

No. 16-56843

**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
Hon. André Birotte Jr.
No. 2:16-cv-04109-AB-PLA

APPELLANT’S APPENDIX

VOLUME 3 OF 3

(Pages 573-749)

Brendan S. Maher
Daniel L. Geysler
Douglas D. Geysler
STRIS & MAHER LLP
6688 N. Central Expy., Suite 1650
Dallas, TX 75206
Telephone: (214) 396-6630
Facsimile: (210) 978-5430

Peter K. Stris
Elizabeth Rogers Brannen
Dana Berkowitz
Victor O’Connell
STRIS & MAHER LLP
725 S. Figueroa St., Suite 1830
Los Angeles, CA 90017
Telephone: (213) 995-6800
Facsimile: (213) 261-0299
peter.stris@strismaher.com

December 30, 2016

Counsel for Defendant-Appellant VidAngel, Inc.

TABLE OF CONTENTS

Date	Description	Page
12/29/16	[ECF No. 167] Declaration of David Quinto	A.1
12/29/16	[ECF No. 166] [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	A.4
12/22/16	[ECF No. 161] Plaintiffs’ Ex Parte Application for an Order to Show Cause Why VidAngel Should Not Be Held in Contempt for Violating the Preliminary Injunction Order	A.9
12/21/16	[ECF No. 158] 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 Circuit on Stay Pending Appeal.....	A.22
12/14/16	[ECF No. 149] VidAngel, Inc.’s Notice of Appeal from Order Granting Motion for Preliminary Injunction; Representation Statement.....	A.30
12/14/16	[ECF No. 148] VidAngel, Inc.’s Notice of Appeal from Order Granting Motion for Preliminary Injunction; Representation Statement.....	A.36
12/14/16	[ECF No. 147] VidAngel, Inc.’s Ex Parte Application to Stay Preliminary Injunction Pending Appeal or, Alternatively, Pending Decision by the Ninth Circuit on Stay Pending Appeal	A.42
12/14/16	[ECF No. 145] Reporter’s Transcript of Proceedings on Monday, November 14, 2016.....	A. 66

12/12/16	[ECF No. 144] Order Granting Plaintiffs’ Motion for Preliminary Injunction.....	A.190
10/27/16	[ECF No. 117-2] Exhibit A to Plaintiffs’ Ex Parte Application to File Supplemental Request for Judicial Notice in Support of Motion for Preliminary Injunction	A.212
10/17/16	[ECF No. 110] Supplemental Declaration of Neal Harmon in Opposition to Motion for Entry of Preliminary Injunction (with exhibits)	A.291
10/17/16	[ECF No. 109] Declaration of William J. Aho in Support of VidAngel, Inc.’s Opposition to Motion for Entry of Preliminary Injunction.....	A.354
9/16/16	[ECF No. 77] Amended Answer and First Amended Counterclaims.....	A.359
9/12/16	[ECF No. 45-1] Excerpts from Videotaped Deposition of Tedd Cittadine.....	A.419
9/12/16	[ECF No. 44-4] Exhibit D to Declaration of Jamie Marquart in Support of VidAngel’s Memorandum of Points and Authorities In Opposition to Preliminary Injunction Motion.....	A.436
9/12/16	[ECF No. 44-5] Exhibit E to Declaration of Jamie Marquart in Support of VidAngel’s Memorandum of Points and Authorities In Opposition to Preliminary Injunction Motion.....	A.442
9/12/16	[ECF No. 43-1] Exhibit A to Declaration of Neal Harmon in Support of VidAngel’s Memorandum of Points and Authorities In Opposition to Preliminary Injunction Motion.....	A.503
9/12/16	[ECF No. 43-2] Exhibit B to Declaration of Neal Harmon in Support of VidAngel’s Memorandum of	

	Points and Authorities In Opposition to Preliminary Injunction Motion.....	A.505
9/12/16	[ECF No. 43-3] Exhibit C to Declaration of Neal Harmon in Support of VidAngel’s Memorandum of Points and Authorities In Opposition to Preliminary Injunction Motion.....	A.509
7/12/16	[ECF No. 11-1] Exhibits A & B to VidAngel, Inc.’s Answer and Affirmative Defenses to Complaint; And Counter-Complaint.....	A.452
6/9/16	[ECF No. 1] Complaint for Copyright Infringement and Violation of Digital Millennium Copyright Act	A. 514

Documents filed under seal (Volume 3):

10/3/16	Plaintiffs’ Reply in Support of Motion for Preliminary Injunction.....	A.573
9/21/16	Excerpts from Videotaped Deposition of Tedd Cittadine.....	A.599
9/21/16	Declaration of Sigurd Meldal in Support of VidAngel’s Memorandum of Points and Authorities in Opposition to Preliminary Injunction Motion.....	A.613
9/21/16	Declaration of Neal Harmon in Support of VidAngel’s Memorandum of Points and Authorities in Opposition to Preliminary Injunction Motion.....	A.636
9/12/16	VidAngel’s Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction.....	A.661
7/22/16	Plaintiffs’ Notice of Motion and Motion for Preliminary Injunction; Memorandum of Points and Authorities in Support Thereof.....	A.705

1 GLENN D. POMERANTZ (SBN 112503)
glenn.pomerantz@mto.com
2 KELLY M. KLAUS (SBN 161091)
kelly.klaus@mto.com
3 ROSE LEDA EHLER (SBN 296523)
rose.ehler@mto.com
4 ALLYSON R. BENNETT (SBN 302090)
allyson.bennett@mto.com
5 MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, Thirty-Fifth Floor
6 Los Angeles, California 90071-1560
Telephone: (213) 683-9100
7 Facsimile: (213) 687-3702

8 Attorneys for Plaintiffs

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 WESTERN DIVISION

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

15 Plaintiffs and Counterclaim
Defendants,

16 vs.

17 VIDANGEL, INC.,

18 Defendant and Counter-
19 Claimant.

Case No. 16-cv-04109-AB (PLAx)

**UNREDACTED VERSION OF
DOCUMENT PROPOSED TO BE
FILED UNDER SEAL**

**PLAINTIFFS' REPLY IN SUPPORT
OF MOTION FOR PRELIMINARY
INJUNCTION**

Judge: Hon. André Birotte Jr.

Date: October 31, 2016

Time: 10:00 a.m.

Crtrm.: 4

Filed concurrently herewith:

- (1) Decl. of Allyson Bennett
- (2) Supp. Decl. of Robert Schumann
- (3) Request for Judicial Notice
- (4) App. to File Under Seal
- (5) Resps. to VidAngel's Objections
- (6) Plts' Evid. Objections

Trial Date: None Set

TABLE OF CONTENTS

		Page
1		
2		
3		
4	INTRODUCTION	1
5	ARGUMENT.....	2
6	I. THE FMA PROVIDES NO DEFENSE FOR VIOLATING THE	
7	DMCA OR PLAINTIFFS’ EXCLUSIVE REPRODUCTION AND	
8	PUBLIC PERFORMANCE RIGHTS.....	2
9	A. VidAngel’s Argument Contradicts The FMA’s Clear Language.....	2
10	B. The FMA’s Legislative History Makes Clear That The Statute	
11	Does Not Immunize VidAngel’s Conduct.....	4
12	C. VidAngel’s Interpretation Of The FMA Leads To Absurd	
13	Results.....	5
14	II. VIDANGEL’S NON-FMA DEFENSES ARE MERITLESS	6
15	A. VidAngel Has No Defense For Its DMCA Violation.....	6
16	B. VidAngel Cannot Defend Its Infringement Of The Reproduction	
17	Right By Calling Its Copies “Intermediate” And “Personal”.....	8
18	C. <i>Aereo</i> Provides No Defense To VidAngel’s Infringement Of	
19	Plaintiffs’ Public Performance Right.....	9
20	D. VidAngel’s Unauthorized Conduct Is Not Fair Use.....	11
21	E. VidAngel’s Antitrust Allegations Provide No Defense.....	14
22	III. PLAINTIFFS FACE AN IMMINENT AND INCREASING RISK OF	
23	IRREPARABLE HARM.....	15
24	A. Plaintiffs Filed Suit And Sought An Injunction When It Was	
25	Clear VidAngel Posed A Viable Threat Of Harm	15
26	B. Plaintiffs’ Harms Are Not Speculative	17
27	C. Money Damages Are Inadequate To Redress Plaintiffs’ Harms.....	18
28	D. VidAngel, Not The FMA, Causes Plaintiffs’ Harm	19
	IV. THE LEGITIMATE HARDSHIPS WEIGH IN PLAINTIFFS’ FAVOR.....	19
	V. THE PUBLIC INTEREST STRONGLY FAVORS AN INJUNCTION.....	20
	VI. MINIMAL SECURITY SHOULD BE REQUIRED.....	20
	CONCLUSION.....	20

TABLE OF AUTHORITIES

		Page(s)
1		
2		
3	FEDERAL CASES	
4	<i>321 Studios v. Metro Goldwyn Mayer Studios, Inc.</i> ,	
5	307 F. Supp. 2d 1085 (N.D. Cal. 2004).....	6, 7
6	<i>A&M Records, Inc. v. Napster, Inc.</i> ,	
7	239 F.3d 1004 (9th Cir. 2001).....	13
8	<i>Advanced Access Content Licensing Adm’r, LLC v. Shen</i> ,	
9	No. 14-CV-1112 (VSB), Dkt. No. 87 (S.D.N.Y. Mar. 16, 2015).....	8
10	<i>Am. Broad. Cos. v. Aereo, Inc.</i>	
11	2012 WL 3854042 (S.D.N.Y. Jul. 11, 2012).....	15, 16
12	<i>Am. Broad. Cos. v. Aereo, Inc.</i> ,	
13	2014 WL 5393867 (S.D.N.Y. Oct. 23, 2014).....	1, 15
14	<i>Am. Broad. Cos. v. Aereo, Inc.</i> ,	
15	134 S. Ct. 2498 (2014).....	9, 10
16	<i>Arc of Cal. v. Douglas</i> ,	
17	757 F.3d 975 (9th Cir. 2014).....	1, 15
18	<i>Campbell v. Acuff-Rose Music, Inc.</i> ,	
19	510 U.S. 569 (1994).....	13
20	<i>Capitol Records, LLC v. ReDigi Inc.</i> ,	
21	934 F. Supp. 2d 640 (S.D.N.Y. 2013).....	4, 8
22	<i>Clean Flicks of Colorado, LLC v. Soderbergh</i> ,	
23	433 F. Supp. 2d 1236 (D. Colo. 2006).....	11, 13, 20
24	<i>Crow Tribe of Indians v. Racicot</i> ,	
25	87 F.3d 1039 (9th Cir. 1996).....	7
26	<i>Elvis Presley Enters., Inc. v. Passport Video</i> ,	
27	349 F.3d 622 (9th Cir. 2003).....	12
28	<i>Fox Broad. Co. v. Dish Network, L.L.C.</i> ,	
	905 F. Supp. 2d 1088 (C.D. Cal. 2012), <i>aff’d</i> , 747 F.3d 1060 (9th Cir. 2013).....	18, 19

TABLE OF AUTHORITIES
(continued)

		Page(s)
1		
2		
3	<i>Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC,</i>	
4	915 F. Supp. 2d 1138 (C.D. Cal. 2012).....	17, 18, 19, 20
5	<i>Fox Television Stations, Inc. v. FilmOn X LLC,</i>	
6	966 F. Supp. 2d 30 (D.D.C. 2013).....	17, 19, 20
7	<i>Griffin v. Oceanic Contractors, Inc.,</i>	
8	458 U.S. 564 (1982)	5
9	<i>Kelly v. Arriba Soft Corp.,</i>	
10	336 F.3d 811 (9th Cir. 2003)	8
11	<i>MDY Indus., LLC v. Blizzard Entm't, Inc.,</i>	
12	629 F.3d 928 (9th Cir. 2010)	7
13	<i>Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.,</i>	
14	518 F. Supp. 2d 1197 (C.D. Cal. 2007).....	18
15	<i>Overstreet v. United Brotherhood of Carpenters and Joiners,</i>	
16	409 F.3d 1199 (9th Cir. 2005)	7
17	<i>Perfect 10, Inc. v. Amazon.com, Inc.,</i>	
18	508 F.3d 1146 (9th Cir. 2007)	11
19	<i>Realnetworks, Inc. v. DVD Copy Control Ass'n,</i>	
20	641 F. Supp. 2d 913 (N.D. Cal. 2009).....	7, 8
21	<i>Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.,</i>	
22	944 F.2d 597 (9th Cir. 1991)	19
23	<i>Sega Enters. Ltd. v. Accolade, Inc.,</i>	
24	977 F.2d 1510 (9th Cir. 1992)	8
25	<i>Sony Computer Entm't, Inc. v. Connectix Corp.,</i>	
26	203 F.3d 596 (9th Cir. 1999)	8
27	<i>UMG Recordings, Inc. v. MP3.com, Inc.,</i>	
28	92 F. Supp. 2d 349 (S.D.N.Y. 2000)	8, 11, 13
	<i>United States v. Elcom Ltd.,</i>	
	203 F. Supp. 2d 1111 (N.D. Cal. 2002).....	9

TABLE OF AUTHORITIES
(continued)

		Page(s)
1		
2		
3	<i>United States v. Gonzales,</i>	
4	520 U.S. 1 (1997)	4
5	<i>Universal City Studios, Inc. v. Corley,</i>	
6	273 F.3d 429 (2d Cir. 2001)	6
7	<i>Warner Bros. Entm't Inc. v. WTV Sys., Inc.,</i>	
8	824 F. Supp. 2d 1003 (C.D. Cal. 2011).....	passim
9	<i>WPIX, Inc. v. ivi, Inc.,</i>	
10	691 F.3d 275 (2d Cir. 2012)	1, 15
11	FEDERAL STATUTES	
12	17 U.S.C. § 106.....	1, 3, 4
13	17 U.S.C. § 110(11).....	passim
14	17 U.S.C. § 504(c)	18
15	17 U.S.C. § 1201(a)(1)(A).....	6, 8
16	17 U.S.C. § 1203(b)(1)	7
17	17 U.S.C. § 1203(c)(3)	18
18	FEDERAL REGULATIONS	
19	80 Fed. Reg. 65944-01 (Oct. 28, 2015).....	7
20	LEGISLATIVE MATERIALS	
21	150 Cong. Rec. S.11852-01	5
22	H.R. 4586, Serial No. 94 (June 17, 2014)	3, 11
23	H.R. Rep. 109-33(1)	3, 6
24		
25		
26		
27		
28		

1 **INTRODUCTION**

2 VidAngel’s overarching defense is that it should be entirely exempt from
3 “liability under any provisions of the Copyright Act” because it filters. Opp. 15.
4 That is absurd. VidAngel’s tortured reading of the Family Movie Act (“FMA”)
5 contradicts the law’s plain language and on-point legislative history, and requires a
6 finding that Congress, in passing a narrow exemption, intended to upend the
7 Copyright Act entirely. If VidAngel were right, then any service could rip, copy
8 and stream content from DVDs and Blu-ray discs (“Discs”) with impunity—simply
9 by offering users the option to filter out mere seconds of that content. Relying on its
10 sweeping interpretation of the FMA, VidAngel argues the Court should allow it to
11 continue to rip Discs, and then copy and stream Plaintiffs’ works to an active user
12 base of nearly [100,000] (and growing).

13 The case for injunctive relief is overwhelming. VidAngel’s violations of
14 §§ 106 and 1201 are clear, and its legal defenses are meritless.¹ All of the equitable
15 factors weigh decisively for an injunction. Courts consistently hold that
16 unauthorized streaming services like VidAngel cause immediate and irreparable
17 harm to copyright owners. *See, e.g., WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 286 (2d
18 Cir. 2012); *Am. Broad. Cos. v. Aereo, Inc.*, 2014 WL 5393867, at *27-28 (S.D.N.Y.
19 Oct. 23, 2014); *Warner Bros. Entm’t Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003,
20 1012-14 (C.D. Cal. 2011) (“Zediva”). VidAngel’s argument that Plaintiffs waited
21 too long to sue for an injunction contradicts Ninth Circuit authority and the facts.
22 *Arc of Cal. v. Douglas*, 757 F.3d 975, 990-91 (9th Cir. 2014).

23 VidAngel’s attempt to portray itself as a victim is belied by VidAngel’s
24 strategy of seeking forgiveness instead of permission. VidAngel ripped and
25 infringed content, in the words of its CEO, Mr. Harmon, to get “a lot bigger” before
26 trying to “get licensing from Hollywood.” Ehler Decl. Ex. DD at 366. In other

27 _____
28 ¹ Unless otherwise noted, all statutory cites are to 17 U.S.C.; all emphases are
added; and quotations and citations within quotations are omitted.

1 words, VidAngel deliberately violated Plaintiffs' rights to have better leverage in
2 negotiating for licenses. Moreover, despite VidAngel's contrary insinuations,
3 VidAngel *did not* ask Plaintiffs to discuss a streaming license until *after* this lawsuit.
4 And even that request was a transparent attempt to create evidence for opposing this
5 motion or supporting VidAngel's baseless antitrust counterclaim. In arguing against
6 an injunction, VidAngel asks the Court to reward its deceitful tactics.

7 Contrary to VidAngel's rhetoric, Plaintiffs are not trying to stop lawful
8 filtering. This case simply is not about filtering. Plaintiffs' claims are aimed at
9 VidAngel's unauthorized and illegal ripping, copying and streaming to the public of
10 Plaintiff's copyrighted works. The legitimate streaming services with which
11 VidAngel claims to compete all have licenses from copyright owners for the works
12 they stream. VidAngel does not, and the fact that it offers filtering in connection
13 with its streaming service does nothing to excuse the need to obtain such licenses.
14 Notably, VidAngel omits to tell the Court that another filtering service, ClearPlay,
15 has continued to operate for more than a decade since the FMA was passed, or that
16 it offers filtering to Google Play users who access authorized streams from Google
17 Play's licensed service.² A company that wants to filter lawfully does not have to
18 violate the DMCA and infringe copyright to do so.

19 ARGUMENT

20 I. THE FMA PROVIDES NO DEFENSE FOR VIOLATING THE DMCA 21 OR PLAINTIFFS' EXCLUSIVE REPRODUCTION AND PUBLIC 22 PERFORMANCE RIGHTS

22 A. VidAngel's Argument Contradicts The FMA's Clear Language

23 The FMA does not authorize a party that filters to circumvent access controls,
24 to copy movies and TV shows, or to stream them. Rather, the FMA exempts only
25 _____

26 ² Bennett Decl. Ex. A (ClearPlay users can apply filters to content streamed on
27 computers or on their televisions, using Google's Chromecast, Apple's Air Play or
28 an HDMI cable). VidAngel distinguishes ClearPlay in part because it offers *only*
standard definition (SD) and not high definition (HD) resolution, but over [REDACTED] of
VidAngel's users choose SD over HD. *See* Ehler Decl. Ex. Z at 296.

1 the act of “making imperceptible . . . limited portions of audio or video content.”
2 § 110(11).³ VidAngel’s argument is impossible to square with the FMA’s text.

3 First, the FMA does not address DMCA violations or create an exemption
4 through silence. The FMA is clear that it provides a defense only to § 106 rights,
5 which are different from § 1201 rights. The latter impose a prohibition on
6 circumvention of access control measures. If Congress intended the FMA to excuse
7 a DMCA violation, it would have said so. In fact, Congress considered explicitly
8 stating that the FMA would not be a defense to an anti-circumvention claim, but the
9 Register of Copyrights told it that doing so was unnecessary since, as a rule,
10 statutory exceptions to § 106 rights do not apply to § 1201. *See* Hearing on H.R.
11 4586, Serial No. 94 at 84, 89 (June 17, 2014) (RJN Ex. E at 236, 241).

12 Second, VidAngel is wrong that the FMA “*expressly provides*” that VidAngel
13 can “*transmit*” performances of movies as long as “a fixed copy of the altered
14 content is not created.”⁴ Opp. 12 (emphasis VidAngel’s). The FMA provides an
15 exemption only for the narrow act of “making imperceptible” portions of an
16 audiovisual work during a performance of such work. Nothing in the language
17 authorizes the performance itself or the copying of those works. The acts of
18 publicly performing (transmitting) and copying copyrighted works are different (and
19 fundamental) rights of a copyright owner. If Congress had intended to limit the
20 reproduction or public performance rights, it would have said expressly that copying

21 _____
22 ³ Congress intended the FMA to resolve disputes in then-pending litigation about
23 whether filtering that did not result in the creation of a fixed copy infringed the
24 exclusive rights to create derivative works and distribute copies. H.R. Rep. 109-
25 33(1) at 6-7, 69-72 (Minority Views) (Apr. 12, 2005) (RJN Ex. K at 483-85, 500-
26 02). This case, in contrast, does not involve either of those rights.

27 ⁴ VidAngel does not comply with the FMA requirement that no altered copy be
28 fixed. As Plaintiffs demonstrated, and VidAngel does not dispute, altered portions
of Plaintiffs’ movies are [fixed—i.e., copied—to servers and stored there for up to
24 hours]. Schumann Decl. ¶¶ 11-12; Mot. 22 n.11. VidAngel argues that it does
not fix “complete” copies, Opp. 15-16, but the FMA forbids the copying of any
“altered version,” which does not have to be the entirety of the work.

1 and transmitting works are exempt when done by a service that filters.

2 VidAngel argues that it streams from “authorized copies” because it uses
3 “authorized (not bootlegged) copies of physical discs” from “the legal market.”
4 Opp. 13. This is irrelevant because VidAngel has no right to stream Plaintiffs’
5 content at all. In any event, VidAngel’s argument is wordplay. The Disc that
6 VidAngel acquires contains an authorized copy. When VidAngel illegally
7 circumvents access-controls and copies content from the Disc to a computer or
8 server, VidAngel creates a new copy. This copying violates the reproduction right.
9 *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 649-50 (S.D.N.Y. 2013)
10 (“the reproduction right is necessarily implicated when a copyrighted work is
11 embodied in a new material object”). And the new copy that VidAngel makes, and
12 “from” which it streams to thousands of users, is *not* authorized.

13 Third, VidAngel’s interpretation of the FMA is foreclosed by the statute’s
14 savings clause, which directs that courts shall not construe the FMA “to imply
15 further rights under section 106 . . . or to have any effect on defenses or limitations
16 on rights granted under any other section” of Title 17. § 110 (last sentence).

17 **B. The FMA’s Legislative History Makes Clear That The Statute**
18 **Does Not Immunize VidAngel’s Conduct**

19 Recognizing that the FMA’s text does not support its argument, VidAngel
20 relies overwhelmingly on selected portions of the FMA’s legislative history that
21 speak generally about filtering. (VidAngel cites to the history 39 times, while citing
22 the text just four times.) There is no reason to resort to legislative history when
23 statutory language is unambiguous. *United States v. Gonzales*, 520 U.S. 1, 6 (1997).
24 The FMA is unambiguous: it exempts filtering, but not circumventing, copying or
25 publicly performing. But even if the Court finds the FMA ambiguous, the history
26 proves VidAngel’s reading of the FMA is wrong.

27 First, the on-point legislative history could not be more direct in addressing
28 the concrete claims at issue and showing the FMA is not a defense here:

1 • **DMCA Violation:** The FMA “does not provide any exemption from the anti-
2 circumvention provisions of section 1201 of title 17.” 150 Cong. Rec.
3 S.11852-01 at S11853 (Sen. Hatch) (RJN Ex. G at 269). VidAngel asserts the
4 history “does not evince a clear intent to prohibit VidAngel from decrypting
5 DVDs for the purpose of accessing a disk to filter.” Opp. 16-17. The history
6 in fact shows VidAngel’s defense to the DMCA violation is meritless: “It
7 would not be a defense to a claim of violation of section 1201 that the
8 circumvention is for the purpose of engaging in the conduct covered by this
9 new exemption in section 110(11).” 150 Cong. Rec. at S11853 (RJN Ex. G at
10 269).

11 • **Public Performance Violation:** “[A]n infringing transmission of a
12 performance to a household [is] not rendered non-infringing by section
13 110(11) by virtue of the fact that limited portions of audio or video content of
14 the motion picture being performed are made imperceptible.” *Id.*

15 Plaintiffs pointed to these and similar quotations from the legislative history. Mot.
16 14-15, 22. VidAngel ignores them. The legislative history that VidAngel quotes
17 simply does not address the issues that actually matter in this case.

18 Second, VidAngel argues that because movie streaming services such as
19 iTunes, Netflix and Hulu did not exist in 2005, Congress must have intended for the
20 FMA to allow filtering services to circumvent DVD protections in order to copy
21 movies to computer servers and make filtered streams to users. Opp. 17. Nothing in
22 the statute or legislative history supports this position. And the history makes clear
23 that FMA does not protect a service that circumvents in order to filter.

24 **C. VidAngel’s Interpretation Of The FMA Leads To Absurd Results**

25 “[I]nterpretations of a statute which would produce absurd results are to be
26 avoided if alternative interpretations consistent with the legislative purpose are
27 available.” *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). If
28 VidAngel were right that the FMA completely exempts a party from liability under

1 Title 17, *see* Opp. 12, practically *any* streaming service could avoid *all* liability for
2 infringement and circumvention merely by following VidAngel’s sham “buy-
3 sellback” model and allowing its customers to choose to filter out a snippet of
4 content. A service need not even filter “sex, violence, [or] profanity” to qualify for
5 the FMA. *See* Opp. 5. The statute is “content-neutral.” H.R. Rep. 109-33(1) at 6
6 (RJN Ex. K at 483). Thus, under VidAngel’s interpretation, a service could filter
7 only a movie’s credits (as VidAngel did pre-litigation, and says it will do again,
8 Mot. 11), or an even smaller portion of content, and circumvent, copy and stream at
9 will. Congress, in creating a limited exemption for making content imperceptible,
10 did not intend to create such a massive loophole in the law.

11 **II. VIDANGEL’S NON-FMA DEFENSES ARE MERITLESS**

12 **A. VidAngel Has No Defense For Its DMCA Violation**

13 VidAngel admits that it bypasses and removes the technological protection
14 measures on Plaintiffs’ Discs. Opp. 16; Meldal Decl. ¶ 40. VidAngel
15 euphemistically calls this “re-formatting.” Opp. 17. The DMCA calls it
16 circumvention, and the statute makes it illegal. § 1201(a)(1)(A) (prohibition),
17 (a)(3)(A) (definition). VidAngel cannot excuse its DMCA violation.

18 First, VidAngel is wrong that the purported purchase of a Disc conveys
19 authority to decrypt the Disc to view it on another platform. Opp. 17. Courts have
20 repeatedly rejected this argument: “[T]he purchase of a DVD does not give the
21 purchaser the authority of the copyright holder to decrypt CSS.” *321 Studios v.*
22 *Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1096 (N.D. Cal. 2004);
23 *see Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 444 (2d Cir. 2001) (same).

24 Second, VidAngel is wrong that it has an exemption from the DMCA because
25 VidAngel enables “space shifting.” Opp. 17. There is no DMCA exemption for
26 space shifting—a point that VidAngel itself admits only six pages earlier. *Id.* at 10-
27 11. VidAngel’s argument is particularly disingenuous because the Librarian of
28

1 Congress and the Copyright Office have repeatedly *declined* to adopt the exemption
2 VidAngel’s seeks. Only last year, the Register again “recommended *against* the
3 adoption of a proposed exemption, on the ground *that the law of fair use, as it*
4 *stands today, does not sanction broad-based space-shifting or format-shifting.*”⁵ 80
5 Fed. Reg. 65944-01 at 65960 (Oct. 28, 2015).

6 Third, VidAngel is wrong that a DMCA injunction “essentially” operates as a
7 prior restraint. Opp. 18. The DMCA authorizes, and courts routinely grant,
8 injunctions to halt circumvention violations. § 1203(b)(1); *MDY Indus., LLC v.*
9 *Blizzard Entm’t, Inc.*, 629 F.3d 928, 953-54 (9th Cir. 2010); *321 Studios*, 307 F.
10 Supp. 2d at 1105. *Overstreet v. United Brotherhood of Carpenters and Joiners*, 409
11 F.3d 1199 (9th Cir. 2005), which VidAngel cites as “*cf.*” authority, Opp. 18, has
12 nothing to do with the DMCA or this case.

13 Fourth, VidAngel’s expert, Sigurd Meldal argues that CSS, AACS and BD+
14 are not effective access-control measures because illegal software—such as the
15 AnyDVD HD software VidAngel uses—to rip Discs is readily available on the
16 Internet. *See* Meldal Decl. ¶ 12. Dr. Meldal is not permitted to make legal
17 arguments, *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996)
18 (“[e]xpert testimony is not proper for issues of law”), and in any event, courts have
19 uniformly rejected this argument, *321 Studios*, 307 F. Supp. 2d at 1095 (“this is
20 equivalent to a claim that, since it is easy to find skeleton keys on the black market,
21 a deadbolt is not an effective lock to a door”); *Realnetworks, Inc. v. DVD Copy*
22 *Control Ass’n*, 641 F. Supp. 2d 913, 932 (N.D. Cal. 2009) (same). CSS, AACS and
23

24 ⁵ VidAngel incorrectly asserts that Don Verrilli told the Supreme Court at the
25 *Grokster* argument that his movie studio *and* record company clients “agreed that
26 space shifting is legal.” Opp. 17. He actually said that “[*t*]he record companies, my
27 clients, have said, for some time now ... that it’s perfectly lawful to take a CD that
28 you’ve purchased, upload it onto your computer, put it onto your iPod.” RJN Ex. B
at 53 (Tr. of *MGM v. Grokster* Oral Argument at 12). CDs are not protected by
technological protection measures; DVDs and Blu-ray discs are, and thus are subject
to the protections of the DMCA’s anti-circumvention prohibition.

1 BD+ all effectively control access “in the ordinary course of [their] operation,”
2 which is all the DMCA requires. § 1201(a)(3)(B); *Realnetworks*, 641 F. Supp. 2d at
3 932 (CSS); *Adv. Access Content Licensing Adm’r, LLC v. Shen*, No. 14-CV-1112
4 (VSB), Dkt. No. 87 at 4-5 (S.D.N.Y. Mar. 16, 2015) (AACS) (RJN Ex. A at 9-10).

5 **B. VidAngel Cannot Defend Its Infringement Of The Reproduction**
6 **Right By Calling Its Copies “Intermediate” And “Personal”**

7 VidAngel does not dispute that it copies Plaintiffs’ movies from Discs to
8 computer servers. Ehler Decl. Ex. EE Tr. 58:1-4; Schumann Decl. ¶¶ 40-42. That
9 violates Plaintiffs’ reproduction right. *ReDigi*, 934 F. Supp. 2d 640, 649-50.

10 VidAngel instead tries to defend its copying by calling it “intermediate,” a
11 concept that has no application here. Opp. 10. VidAngel uses its unauthorized
12 copies to make unauthorized streams. Schumann Decl. ¶¶ 40-42; Supp. Schumann
13 Decl. ¶ 21. There is nothing “intermediate” about VidAngel’s copies. The cases on
14 which it relies are completely inapposite. Two of them hold that a defendant may
15 have a defense of fair use to an infringement claim when it makes copies of another
16 party’s copyrighted computer software for the sole purpose of discovering
17 functional, non-copyrightable elements of that software that are required for the
18 defendant’s product to interoperate with that software.⁶ *Sony Computer Entm’t, Inc.*
19 *v. Connectix Corp.*, 203 F.3d 596, 606 (9th Cir. 1999); *Sega Enters. Ltd. v.*
20 *Accolade, Inc.*, 977 F.2d 1510, 1522 (9th Cir. 1992). *UMG Recordings, Inc. v.*
21 *MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 n.2 (S.D.N.Y. 2000), makes clear that *Sony*
22 and *Sega* provide no defense for making permanent copies of works to servers in
23 order to stream performances to customers. *See also ReDigi*, 934 F. Supp. 2d at 650
24 (rejecting *ReDigi*’s argument that it simply “migrates a file” when it creates new
25 copies of works upon upload and download).

26 VidAngel also insists it makes “personal copies” and says such copies are

27 _____
28 ⁶ The third case VidAngel cites—*Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003)—has nothing to do with such “intermediate” copying.

1 immune from infringement. No case holds that making “personal copies” of movies
2 is fair use or otherwise lawful. And one of the cases that VidAngel cites holds
3 exactly the opposite: “there is as yet no generally recognized right to make a copy
4 of a protected work, regardless of its format, for personal noncommercial use.”
5 *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1135 (N.D. Cal. 2002) (cited
6 Opp. 11). And, there is nothing “personal” about the copies VidAngel makes.
7 VidAngel makes four master copies of files (differing in resolution) from a single
8 Disc, and then streams from those master files to thousands of different paying
9 users. Supp. Schumann Decl. ¶¶ 21, 24-28; Ehler Decl. Ex. EE Tr. 90:18-22.

10 **C. *Aereo* Provides No Defense To VidAngel’s Infringement Of**
11 **Plaintiffs’ Public Performance Right**

12 VidAngel ignores on-point precedent establishing its infringement of the
13 public performance right. *See* Mot. 17-18. VidAngel instead misreads *American*
14 *Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014), to argue that VidAngel
15 makes private performances because its users “purchase[]” Discs. Opp. 11.

16 VidAngel’s *Aereo* defense fails because it is based on gimmickry—calling
17 what obviously is a rental service a “buy-sellback” service—and *Aereo* makes it
18 clear that a service like VidAngel cannot use gimmickry to create loopholes in
19 copyright law. The Supreme Court rejected *Aereo*’s arguments that it transmitted
20 “private” performances because it transmitted broadcast programs from separate
21 copies captured from thousands of individual antennae. The Court held that *Aereo*’s
22 “behind-the-scenes” mechanisms made no difference to “Congress’ regulatory
23 objectives,” “*Aereo*’s commercial objective,” or “the viewing experience.” *See*
24 *Aereo*, 134 S. Ct. at 2508-09.

25 The same substance-over-form analysis compels the conclusion that “buy-
26 sellback” is a sham: the alleged “buyer” does not control the Disc that VidAngel
27 supposedly “sells” him or her; VidAngel does not stream a performance to the user
28 from his or her “copy”; VidAngel actively encourages users to treat the service as a

1 rental; and VidAngel’s users treat it as a rental, with only [four] of out of more than
2 [1.5 million] purported “sales” resulting in the transfer of a Disc. Mot. 7-9, 20. Mr.
3 Harmon himself admitted that “buy-sellback” is just VidAngel’s “creative way” to
4 offer “the value of a Redbox while staying buttoned up legally,” and that
5 [“VidAngel is NOT a disc service”—i.e., it does not sell Discs—but instead “is a
6 streaming service.”] Ehler Decl. Ex. DD at 366; *id.* Ex. W at 234. Tellingly,
7 VidAngel does not respond to *any* of this evidence in its Opposition.

8 VidAngel insists that its service falls within the Court’s dicta stating that the
9 analysis of the public performance right might be different with a different type of
10 service, such as one that allows users to “receive performances in their capacities as
11 owners or possessors of the underlying works,” analogous to a car owner getting its
12 keys back from a valet parker. *Aereo*, 134 S. Ct. at 2510. The Court explained that
13 the valet analogy would not apply to a service, like *Aereo*’s, where the users lacked
14 a “relationship to the work[]” prior to dealing with the service. *Id.* VidAngel
15 likewise falls outside the dicta because its users also have no “prior relationship” to
16 the movies before coming to VidAngel’s service to stream them.

17 VidAngel also argues that *Aereo* holds it is not infringement if “the user of a
18 service pays primarily for something other than the transmission of copyrighted
19 works.” Opp. 11. The Supreme Court actually said that it “ha[d] not considered”
20 that question. *Aereo*, 134 S. Ct. at 2511. And, in any event, VidAngel’s users do
21 not pay “primarily” for something other than streaming Plaintiffs’ works. Without
22 the streamed *content*, VidAngel’s service has no value. *See* Ehler Decl. Exs. A, B.⁷

23 _____
24 ⁷ VidAngel incorrectly accuses Plaintiffs of trying to force users to “be charged
25 twice”—once for the sale of a Disc, a second time for a stream—in order “to watch
26 a movie once.” Opp. 11. Plaintiffs ask for no such thing. VidAngel decided to run
27 its service by buying copies of movies on Discs and then streaming performances
28 from server copies. Reproduction and public performance are two different rights
under the Copyright Act, and copyright owners are entitled to compensation for the
exercise of each right. (That is why, for example, Netflix pays for the DVDs it uses
for its mail-order business, and separately for the right to stream the same movies.)

1 **D. VidAngel’s Unauthorized Conduct Is Not Fair Use**

2 It is settled law, and VidAngel does not dispute, that fair use is not a defense
3 to a DMCA violation. *See* Mot. 15-16. VidAngel does not meet its burden of
4 showing the fair use defense likely will excuse VidAngel’s copying and streaming
5 of Plaintiffs’ works. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th
6 Cir. 2007); *see MP3.com*, 92 F. Supp. 2d at 351 (service’s conduct, not that of its
7 users, must meet burden for fair use defense). Indeed, VidAngel does not show that
8 any fair use factor weighs in its favor.

9 **Factor One: VidAngel’s use is not transformative.** VidAngel argues that,
10 because its users must select at least one filter, VidAngel’s copying and streaming
11 are transformative. Opp. 19-20. Not so. VidAngel uses Plaintiffs’ movies and TV
12 shows for their intrinsic purpose, just like airlines and networks do when they show
13 edited versions of Plaintiffs’ works. VidAngel’s customers recognize they can
14 watch a full work with minimal filtering. *See* Bennett Decl. Ex. C; *id* at 20 (“Even a
15 single word is good enough to then watch the movie. Beats Redbox all day.”).

16 Numerous cases (discussed in Plaintiffs’ Motion) make it clear that VidAngel
17 uses Plaintiffs’ works for their intrinsic purpose, not for transformative use. Mot.
18 23-24. VidAngel ignores all of these except for *Clean Flicks of Colorado, LLC v.*
19 *Soderbergh*, 433 F. Supp. 2d 1236, 1241 (D. Colo. 2006), which rejected a filtering
20 service’s fair use defense where “the edits are a small percentage of most of the
21 films copied and the use is clearly for commercial gain.” VidAngel calls *Clean*
22 *Flicks* “inapposite” because that service had no FMA defense. Opp. 22. That is a

23 _____
24 Customers of legitimate streaming services, however, pay one charge to watch the
25 movie through that service. ClearPlay customers who want to use filters on top of
26 an authorized stream pay only once—to Google Play—to watch the movie; they pay
27 ClearPlay separately for filtering. *See* ClearPlay, “Filtering & Streaming Together”
28 *available at* <https://try.clearplay.com/streaming-sign-up/>. VidAngel is wrong that
Congress did not intend for users to pay to filter: ClearPlay, whose service the
legislative history expressly cited, charged users for its filtering service, while users
paid separately for DVDs they wished to watch. *See* Hearing on H.R. 4586 at 2
(RJN Ex. E at 154).

1 distinction without a difference. The FMA has no effect on the fair use defense, *see*
2 § 110 (last sentence), and in any event VidAngel has no FMA defense either. *Clean*
3 *Flicks* and Plaintiffs’ other authority show factor one weighs for Plaintiffs.

4 ***Factor Two: Plaintiffs’ works are at the core of copyright protection.***

5 VidAngel’s argument that “this factor favors fair use” because Plaintiffs already
6 published their works, Opp. 20, is wrong. The law is clear that motion picture
7 content—whether or not published—is “creative in nature and thus fit[s] squarely
8 within the core of copyright protection.” *Elvis Presley Enters., Inc. v. Passport*
9 *Video*, 349 F.3d 622, 629 (9th Cir. 2003).

10 ***Factor Three: VidAngel copies all, and publicly performs nearly all, of***
11 ***Plaintiffs’ works.*** Even with filters, VidAngel is copying entire works and
12 streaming nearly complete versions—the heart of Plaintiffs’ works by any measure.
13 *Id.* at 630. This factor weighs for Plaintiffs.

14 ***Factor Four: VidAngel directly interferes with the market for Plaintiffs’***
15 ***works.*** VidAngel argues that it does not harm the market for Plaintiffs’ works
16 because “filtered movies are not a substitute” for Plaintiffs’ works. Opp. 21.
17 VidAngel is wrong because the evidence shows its offerings are substituting for
18 authorized streams of Plaintiffs’ works. Ehler Decl. Ex. I; Bennett Decl. Ex. D.
19 VidAngel originally asserted that “[o]ver 92 percent of VidAngel customers would
20 not watch those movies without filtering,” Opp. 21, but later filed an errata dropping
21 that number to 51%. Dkt. 76. Taking VidAngel at its (unexamined) word on this
22 (VidAngel refused Plaintiffs’ repeated requests for the actual survey data),
23 VidAngel admits that nearly *half* of its customers would watch the exact same
24 movie without filters.⁸ Moreover, these numbers only account for VidAngel. The
25 relevant question on factor four is “whether unrestricted and widespread” streaming

26 ⁸ Even VidAngel’s errata is erroneous. The errata states that “[o]ver 51% of its
27 users would not watch unfiltered content under any circumstances.” Dkt. 76 at 1,
28 21. In fact, the survey instrument (like VidAngel’s Opposition) asked whether the
user would have watched the particular movie without filters. Bennett Decl. Ex. E.

1 by other services mimicking VidAngel would “substantially adverse[ly] impact”
2 Plaintiffs’ potential market opportunities. *Campbell v. Acuff-Rose Music, Inc.*, 510
3 U.S. 569, 590 (1994). The answer obviously is yes.

4 VidAngel also is off-base arguing that its unauthorized use “[i]ncreases
5 [Plaintiffs’] [s]ales.” Opp. 21. To be clear, VidAngel does *not* purchase a Disc for
6 every individual customer to whom it streams. VidAngel instead purports to have in
7 its vault a Disc for every user who, at a particular moment, has obtained access to
8 the content. Once a user “sells back” their access (i.e., returns the rental), the Disc
9 becomes “available” again in VidAngel’s system for a different user. On average,
10 for every [16] users to whom VidAngel streams a new release title, VidAngel buys
11 one Disc containing that title.⁹ Harmon Decl. ¶ 61. This means if VidAngel buys
12 100 Discs of new releases, VidAngel will use those 100 Discs to justify streams of
13 the same title to [1,600] different users. Buying one Disc for multiple users helps
14 VidAngel’s bottom line, not Plaintiffs’.

15 More important, VidAngel’s purported “help” to Plaintiffs is entirely
16 irrelevant as a legal matter. Courts have roundly rejected the argument that an
17 infringing use is “fair” because the use allegedly generates incremental income for
18 the copyright owner: ““Any allegedly positive impact of defendant’s activities on
19 plaintiffs’ prior market in no way frees defendant to usurp a further market that
20 directly derives from reproduction of the plaintiffs’ copyrighted works.”” *A&M*
21 *Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001) (quoting
22 *MP3.com*, 92 F. Supp. 2d at 352); *Clean Flicks*, 433 F. Supp. 2d at 1242 (same).

23 VidAngel fails to show it likely will prevail on any fair use factor, much less
24 that its defense likely will succeed. All factors weigh decisively for Plaintiffs.

25
26
27 ⁹ Mr. Harmon’s declaration provides this ratio only for new releases. Based on the
28 limited discovery thus far, a conservative estimate of the ratio for all VidAngel
offerings is, for every Disc, around [19-20 streaming sessions]. Bennett Decl. ¶ 7.

1 **E. VidAngel’s Antitrust Allegations Provide No Defense**

2 VidAngel asserts that Plaintiffs have conspired to put it out of business. Opp.
3 18; Harmon Decl. ¶¶ 14-16, 45-60. This is a smokescreen to divert attention from
4 VidAngel’s unlawful conduct.¹⁰

5 First, VidAngel incorrectly asserts that Plaintiffs (and other motion picture
6 studios) are parties to an agreement with the Directors Guild of America (“DGA”)
7 that prohibits any studio from licensing any service through which users could apply
8 filters. Opp. 7; Harmon Decl. ¶ 48. The DGA Agreement is publicly available, and
9 it does not set forth any such prohibition.

10 Second, VidAngel alleges that Plaintiffs and other “studios” directed Google
11 and other licensees not to do business with VidAngel. Opp. 7; Harmon Decl. ¶ 49.
12 Mr. Harmon, however, admitted at his deposition that VidAngel has *no* evidence
13 that any Plaintiff directed Google or anyone else not to work with VidAngel.
14 Bennett Decl. M Tr. 273:14-277:11, 301:15-20; *see id.* Ex. J at 51 (Google
15 expressing it might [“go it alone”]).

16 Third, VidAngel argues that Plaintiffs refused when asked to license
17 VidAngel. Opp. 7-8; Harmon Decl. ¶ 59. Notably, Mr. Quinto did not make his
18 license “offer” until after Plaintiffs filed this Motion. Quinto Decl. ¶¶ 2-4 Ex. A.
19 Mr. Quinto’s “offer,” moreover, was a transparent attempt to gain litigation
20 advantage. Mr. Quinto invited all Plaintiffs—who are competitors in licensing their
21 works—collectively “to discuss[] a license.” *Id.* Had Plaintiffs accepted the offer,
22 VidAngel presumably would have used that as evidence of joint licensing to support
23 its antitrust counterclaim. Because Plaintiffs refused to engage in joint licensing
24 discussions, VidAngel has cited this as evidence of a purported group boycott.

25
26 _____
27 ¹⁰ Plaintiffs will move to dismiss the antitrust counterclaims before the hearing on
28 this Motion. Plaintiffs moved to dismiss VidAngel’s original counterclaim.
Dkt. 35. VidAngel mooted the first motion to dismiss by amending the
counterclaim the day its opposition was due. Dkt. 77.

1 VidAngel’s Catch 22 litigation tactics provide no basis for denying this Motion.¹¹

2 **III. PLAINTIFFS FACE AN IMMINENT AND INCREASING RISK OF**
3 **IRREPARABLE HARM**

4 VidAngel admits it intends to increase exponentially its unlawful streaming of
5 Plaintiffs’ works. VidAngel currently claims to have more than a [half-million]
6 monthly streams spread across nearly [100,000] monthly active users. Ehler Decl.
7 Ex. EE Tr. 190:2-8; *id.* Ex. AA at 317. Absent an injunction, VidAngel will try to
8 grow that user base to [REDACTED] within a year, and [REDACTED] in two years. *Id.*
9 Ex. Y at 283. The law is clear that such conduct causes immediate and irreparable
10 harm to copyright owners’ exclusive rights to control their works. *ivi*, 691 F.3d at
11 286; *Aereo*, 2014 WL 5393867, at *7; *Zediva*, 824 F. Supp. 2d at 1012-14.

12 **A. Plaintiffs Filed Suit And Sought An Injunction When It Was Clear**
13 **VidAngel Posed A Viable Threat Of Harm**

14 In an effort to avoid an injunction and continue its illegal streaming for profit,
15 VidAngel argues that Plaintiffs waited too long to sue and so forfeited the right to a
16 preliminary injunction. Opp. 22-24. If accepted, VidAngel’s argument would
17 require plaintiffs to “rush to court at the first sign of potential infringement, even if
18 the prospect of harm is remote.” *Am. Broadcasting Cos. v. Aereo Inc.* (“*Aereo I*”),
19 2012 WL 3854042, at *27-28 (S.D.N.Y. Jul. 11, 2012). That is why the law is to
20 the contrary. *Id.*; *Arc of Cal.*, 757 F.3d at 990.

21 VidAngel argues that because Plaintiffs knew about and investigated
22 VidAngel’s service before filing suit, any harm may be reparable. Opp. 21-22.
23 *Aereo I* expressly rejected the same type of argument. There, as here, plaintiffs
24 “were aware of [the service’s] existence for roughly a full year before seeking [an]
25 injunction,” *Aereo I*, 2012 WL 3854042 at *27. Indeed, *Aereo* had received

26 ¹¹ VidAngel also relies on confidential agreements of a non-party (Sony Pictures)
27 that VidAngel admits it obtained trolling WikiLeaks for documents stolen during the
28 massive criminal cyber-attack on Sony. Opp. 7; Harmon Decl. ¶¶ 48-50. Plaintiffs
will not respond in kind by quoting from stolen documents, but simply note that the
materials VidAngel cites do not support its claim.

1 substantial press attention and \$4.5 million in funding a year before plaintiffs filed
2 suit. *Id.* at *28. The court held that plaintiffs “did not unduly sleep on their rights”
3 but brought suit once it was clear that Aereo “posed a substantial and imminent
4 threat of irreparable harm.” *Id.* at *27-28. The same is true here. Plaintiffs learned
5 of VidAngel when it was in “limited beta” and had fewer than 5,000 users—which
6 would not lead legitimate streaming licensees to “notice (let alone complain).”
7 Cittadine Decl. ¶¶ 35-36. Plaintiffs monitored VidAngel and investigated their
8 claims. *Id.* Once VidAngel started marketing itself more aggressively, expanded its
9 content offering, and posed a more significant threat of harm, Plaintiffs filed this
10 action and sought a preliminary injunction.¹² That is not undue delay. *Aereo I*,
11 2012 WL 3854042 at *27.

12 VidAngel asserts that it detrimentally relied on the lack of a response to Mr.
13 Quinto’s letters. Opp. 24. Mr. Harmon admitted under oath, however, that if
14 Plaintiffs had sued VidAngel earlier, the company would have behaved just as it has
15 since June 2016. Bennett Decl. Ex. M Tr. 313:5-20. VidAngel was not lulled into
16 complacency but was actively preparing for litigation. It hired (in its own words)
17 [“NO CONFLICT”] counsel in fall 2015 so it could present the [“most relevant
18 defense available in the industry”]. Ehler Decl. Ex. Y at 286. As Mr. Harmon
19 concedes, if Plaintiffs (or someone else) had objected in response to Mr. Quinto’s
20 letters, VidAngel could have instituted a potentially unnecessary declaratory
21 judgment action. Harmon Decl. ¶ 24. Plaintiffs were entitled to wait until the harm

22 ¹² Contrary to VidAngel’s claim that Plaintiffs waited a “year-and-a-quarter” to
23 seek a preliminary injunction, Opp. 22, Plaintiffs sought a stipulated preliminary
24 injunction from VidAngel on June 10, 2016. Bennett Decl. ¶ 13, Ex. K at 53-54.
25 VidAngel also asserts that Plaintiffs “seemingly learned of VidAngel in December
26 2014,” when, VidAngel says, Plaintiffs “apparently . . . caus[ed] Google to”
27 withdraw support for a *different* VidAngel service. Opp. 23. This is pure conjecture
28 that has no basis in fact. *See* pp. 14-15 *supra*. And VidAngel’s accusation that
Plaintiffs are “hid[ing] evidence” by refusing VidAngel’s demand to conduct a
company-wide email search is not true. Opp. 23. As Plaintiffs explained (and
VidAngel does not dispute) searching the emails of many thousands of employees is
infeasible and unnecessary. Marquart Decl. Ex. E.

1 from VidAngel’s service was imminent before bringing suit.

2 **B. Plaintiffs’ Harms Are Not Speculative**

3 Mr. Cittadine testified, among other things, that VidAngel’s service threatens
4 to undermine content owners’ legitimate digital business and dealings with third
5 parties. Cittadine Decl. ¶¶ 14-34. He specifically explained that as of August 22,
6 VidAngel was directly interfering with the exclusive window Fox had granted HBO
7 for *The Martian* and *Brooklyn*. *Id.* ¶ 32. These and other harms that Mr. Cittadine
8 describes are fact, not speculation. Opp. 26.

9 That harm continues to grow as VidAngel adds more users and encourages
10 them to stream through VidAngel rather than a licensed service. The evidence since
11 Plaintiffs’ filing shows this harm only continues to grow. For example, one
12 VidAngel user posted a review to Facebook on September 7: “Far and away the
13 best video streaming service out there . . . Even if you don’t want to filter much or
14 anything, take out one swear word or even the credits. You’ll live and so will
15 Spielberg, Disney, and the others.” Bennett Decl. Ex. C at 15. *See also id.* Ex. D at
16 28 (Sept. 13: “#CivilWar is already on @VidAngel great job, can’t wait to watch it
17 tonight. I even use VA when I don’t need filtering, cheaper than Amazon.”); *id.* at
18 29 (Sept. 20: “I will never watch a movie at home through another service. Simply
19 amazing in every way.”). VidAngel thus undermines Plaintiffs’ relationships with
20 authorized streaming services—harm that courts have repeatedly held is irreparable.
21 *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d
22 1138, 1147 (C.D. Cal. 2012) (“pressure on [] licensing relationships” is irreparable);
23 *Zediva*, 824 F. Supp. 2d at 1013 (same); *Fox Television Stations, Inc. v. FilmOn X*
24 *LLC*, 966 F. Supp. 2d 30, 50 (D.D.C. 2013) (same).

25 VidAngel’s growth has exacerbated the harm to Plaintiffs’ business and will
26 continue to do so. Cittadine Decl. ¶ 34. VidAngel continues to add Plaintiffs’
27 popular titles as they are released to Disc. Bennett Decl. Ex. F (*Captain America*:
28

1 *Civil War* (2016), posted September 13); Ehler Decl. Ex. EE Tr. 36:19-37:5. The
2 Opposition says VidAngel projects growth to [REDACTED] by April 2018
3 with an annual revenue of [REDACTED], Harmon Decl. ¶ 63; its internal
4 projections predict even more aggressive growth to [REDACTED]
5 [REDACTED], Ehler Decl. Ex. Y at 283.

6 **C. Money Damages Are Inadequate To Redress Plaintiffs' Harms**

7 VidAngel is wrong that money damages are adequate to compensate
8 Plaintiffs' harms. Opp. 28-29. First, VidAngel will not be able to pay a final
9 judgment, making an injunction appropriate. *BarryDriller*, 915 F. Supp. 2d at 1147;
10 *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1217
11 (C.D. Cal. 2007). The statutory damages for each work VidAngel has infringed
12 may be as much as \$150,000, § 504(c); and statutory damages will be as high as
13 \$2,500 for each act of circumvention (i.e., for each of the "thousand[s]" of titles
14 VidAngel has ripped from Discs, Harmon Decl. ¶ 30), § 1203(c)(3). VidAngel
15 pleads financial hardship, Harmon Decl. ¶ 63, and will not be able to pay.

16 Second, infringement like VidAngel's directly undermines Plaintiffs'
17 "exclusive right to decide when, where, to whom, and for how much they will"
18 license their copyrighted works. *Zediva*, 824 F. Supp. 2d at 1012. Money damages
19 cannot compensate this harm. Citing *Fox Broadcasting Co. v. Dish Network*,
20 *L.L.C.*, 905 F. Supp. 2d 1088, 1110 (C.D. Cal. 2012), VidAngel urges that
21 Plaintiffs' licenses can be used to calculate money damages. Opp. 29. But
22 VidAngel's large-scale infringement "eviscerate[s] Plaintiffs' ability to protect and
23 enforce their statutorily-created property rights," which cannot be compensated with
24 payment for lost sales. *Grokster*, 518 F. Supp. 2d at 1218. *Dish* also is inapposite
25 because the court there said it was the skipping of commercials rather than the
26 infringing copying that was the real source of harm. 905 F. Supp. 2d at 1011.
27 Here, VidAngel's circumvention and copyright infringement, if not enjoined, will
28

1 undermine Plaintiffs’ legitimate licensing and goodwill.

2 Third, the law is clear that harm to goodwill and relationships with consumers
3 and licensees is non-quantifiable and thus irreparable. *See Rent-A-Ctr., Inc. v.*
4 *Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991)
5 (“intangible injuries . . . qualify as irreparable harm”).

6 **D. VidAngel, Not The FMA, Causes Plaintiffs’ Harm**

7 VidAngel is wrong that Plaintiffs’ harm flows from the FMA rather than
8 VidAngel’s conduct. Opp. 25-26. This argument rests on VidAngel’s FMA
9 defense, and thus collapses along with that defense.

10 **IV. THE LEGITIMATE HARDSHIPS ALL WEIGH IN PLAINTIFFS’**
11 **FAVOR**

12 VidAngel’s claimed hardships must be disregarded. First, the fact that
13 VidAngel will have to stop violating Plaintiffs’ rights, Opp. 29, is not hardship as a
14 matter of law. Mot. 31-32 (citing cases).

15 Second, VidAngel is wrong that its status as a start-up entitles it to an
16 exemption from the law of injunctive relief. Opp. 29. Courts regularly enjoin
17 infringing startups. *BarryDriller*, 915 F. Supp. 2d at 1147 (enjoining “start-up” in
18 part *because* it would not be able to satisfy damages); *FilmOn X*, 966 F. Supp. 2d at
19 50; *Zediva*, 824 F. Supp. 2d at 1014-15.

20 Third, VidAngel’s appeal to equity ignores the fact that its revenues are
21 primarily enriching VidAngel’s owners. In just the first five months of 2016,
22 VidAngel spent [\$2.2 million] on sales and marketing—where the main services are
23 provided by [Harmon Brothers LLC], which is owned by Neal Harmon and his
24 brothers (who also are VidAngel’s principals). Ehler Decl. Ex. AA at 319; *id.* Ex. Z
25 at 306 ([showing Harmon Brothers’ role in marketing]); Bennett Decl. Ex. M Tr.
26 19:7-20:19, *id.* Ex. G. VidAngel’s owners have no right to profit from illegal
27 activity.
28

1 **V. THE PUBLIC INTEREST STRONGLY FAVORS AN INJUNCTION**

2 The public interest is served by upholding Plaintiffs’ rights. Mot. 32-33
3 (citing cases). VidAngel cites cases involving individuals’ interest in not being
4 *involuntarily* subjected to speech or conduct they do not want to hear. Opp. 31-32.
5 These cases are inapposite because enjoining VidAngel will not force anyone to see
6 or hear anything. VidAngel’s multiple declarations from individuals who say the
7 “public” wants to be able to view filtered content does not change any of this. There
8 are other market alternatives for filtering that do not depend on circumvention or
9 copyright infringement. Bennett Decl. Ex. A, B; *see also Clean Flicks*, 433 F. Supp.
10 2d at 1240 (finding similar declarations “inconsequential to copyright law and []
11 addressed in the wrong forum,” in part because the court’s role was not “to
12 determine the social value of copyrighted works”).

13 **VI. MINIMAL SECURITY SHOULD BE REQUIRED**

14 VidAngel’s request for a \$50 million bond is excessive and unsupported. In
15 analogous cases, the required security has been well below \$1 million. *See, e.g.,*
16 *BarryDriller*, 915 F. Supp. 2d at 1149 (rejecting request for \$15 million bond in
17 favor of \$250,000); *Zediva*, 824 F. Supp. 2d at 1015 (\$50,000); *FilmOn X*, 966 F.
18 Supp. 2d at 50 (\$150,000). VidAngel also argues that a massive bond is necessary
19 so its lawyers will have the incentive to continue litigating its antitrust counterclaim.
20 VidAngel provides no legal or factual support for this perplexing argument.

21 **CONCLUSION**

22 Plaintiffs respectfully request that the Court grant their motion.

23 DATED: October 3, 2016

MUNGER, TOLLES & OLSON LLP

24
25
26 By: /s/ Kelly M. Klaus

KELLY M. KLAUS

27 Attorneys for Plaintiffs

**FILED UNDER SEAL PURSUANT
TO ORDER OF THE COURT
DATED SEPTEMBER 14, 2016
(Dkt. 75)**

EXHIBIT B

HIGHLY CONFIDENTIAL

1 A. Uh-huh.

2 MR. KLAUS: And just -- and so just --
3 just for my purposes, Mr. Marquart, when you're
4 using "filtering" in this depos- -- deposition,
5 unless you say otherwise, that's going to mean
6 "making imperceptible limited portions of audio or
7 video content of a motion picture"?

8 MR. MARQUART: Yes.

9 And I specifically mean to include the
10 examples that the witness gave, which would be
11 bleeping -- he mentioned to filter out or make
12 imperceptible audio -- and removing and cutting,
13 which would be to skip the video.

14 MR. KLAUS: Removing, cutting, skipping
15 video?

16 MR. MARQUART: Yes.

17 MR. KLAUS: Okay.

18 MR. MARQUART: Those were examples of
19 filtering that I also mean to include.

20 BY MR. MARQUART:

21 Q. Have you -- has Fox ever authorized one
22 of its clients to provide filtering of authorized
23 copies of VOD titles?

24 MR. KLAUS: So the -- and just to be
25 clear, is it a -- speaking at a general level

1 without going into any specific agreement, but I
2 think the question is: Are you aware of an
3 agreement that specifically authorizes filtering as
4 Mr. Marquart has described it?

5 THE DEPONENT: Let me think about that.

6 Theoretically, it's possible if we agreed
7 with a client about it.

8 I can't think of a specific agreement
9 offhand. I don't have the agreements with me.

10 That comes to mind is something where the
11 client and -- and Fox have mutually decided to
12 authorize it.

13 BY MR. MARQUART:

14 Q. Okay. So you can't -- you can't, sitting
15 here today, remember any instance in which it has
16 been done?

17 A. Has been agreed upon. I can't -- I can't
18 think of a specific example. Again, I don't know
19 all of the -- I don't have the agreements in front
20 of me, but I can't think of a specific
21 circumstance.

22 Q. Okay. And said, "Theoretically, it's
23 possible." Just clarify that for me.

24 What do you mean?

25 A. So if -- if Fox and the client were to

1 A. -- more specifically.

2 Q. Let's talk about those.

3 A. Okay.

4 Q. What's digital sell-through?

5 A. Digital sell-through is a right that we
6 grant our clients to offer consumers the ability to
7 access content for a very long period of time,
8 whether it's by download or whether it's by stream,
9 to a number of authorized devices.

10 Q. Okay. And the second category you
11 mentioned -- I believe you called -- what was your
12 word?

13 A. Video-on-demand, or --

14 Q. Yes.

15 A. -- you can refer to it as "digital
16 rental" --

17 Q. Okay.

18 A. -- in more of a generic sense.

19 Q. Okay. What does that entail?

20 A. It's a -- a -- a limited time frame where
21 a consumer can download and watch a piece of
22 content, whether that's television or -- or film.

23 Q. Okay.

24 A. More prevalent in the -- the film
25 business than in the television business.

1 Q. Does your business have anything to do
2 with physical disc sales?

3 MR. KLAUS: "Your business" meaning --

4 MR. MARQUART: Sorry.

5 MR. KLAUS: -- what he's involved in

6 or --

7 BY MR. MARQUART:

8 Q. Does the business that you're involved in
9 have anything to do with physical disc sales?

10 A. A very -- very minor aspect of it does.

11 Q. Are you where familiar with the
12 technology called "ultraviolet"?

13 A. I am.

14 Q. What is that technology?

15 A. Ultraviolet is a -- is a consortium of
16 companies -- technology companies, content
17 providers, as well as retailers or our -- our
18 clients, that are working together to create better
19 utility for digital content.

20 It involves the interoperability of
21 rights from one retailer to another, meaning you
22 buy a piece of content at Apple, and if you're an
23 Amazon user, that piece of content would be
24 available in your Amazon ecosystem as well as your
25 Apple ecosystem, so it makes the content more

1 usable, as well as a standard set of -- of rights
2 and utility that a customer can get.

3 So whether they buy from Apple or Amazon
4 or another party, you know, they're guaranteed a --
5 a certain amount -- or baseline of utility with
6 that movie.

7 Q. Okay. And how does that -- how does that
8 technology relate to the actual purchase -- the
9 retail purchase of physical discs?

10 MR. KLAUS: Object to the form of the
11 question.

12 THE DEPONENT: I would say that it
13 doesn't specifically relate to the purchase of
14 physical discs.

15 A number of studios, including Fox, have
16 attached what we call an eCopy or eCopy rights to a
17 physical disc --

18 BY MR. MARQUART:

19 Q. Yeah.

20 A. -- where we have voluntarily granted with
21 some our digital retailers the right for the
22 consumer that buys a physical disc to get a digital
23 or electronic copy of that movie.

24 And there -- they would be able to watch
25 that copy at a retailer of their choice, and that

1 would be a retailer that Fox has authorized to
2 offer that.

3 Q. And -- and when that's offered, that's
4 offered for free?

5 MR. KLAUS: Object to the form of the
6 question.

7 THE DEPONENT: That is currently offered
8 for no additional cost --

9 BY MR. MARQUART:

10 Q. Okay.

11 A. -- to the DVD --

12 Q. No additional cost --

13 A. -- or the Blu-ray.

14 Q. -- other than the cost of the DVD or
15 Blu-ray?

16 A. That's correct.

17 Q. Okay. And are -- does that cover all of
18 Fox's new-release titles for major theatrical
19 motion pictures?

20 A. I believe that -- that covers most --
21 most, if not all.

22 Q. Okay.

23 A. A very large percent.

24 Q. And what about Fox's television
25 programs?

1 A. A much more limited selection of tel- --
2 television programs would be available for an
3 electronic copy. And a much smaller percentage of
4 that -- very, very small number would be
5 ultraviolet enabled.

6 Q. Okay. So -- and is ultraviolet becoming
7 more or less popular, in your estimation?

8 A. That's a good question.

9 I am not an -- an expert on ultraviolet.
10 I can only tell you that, in my opinion,
11 ultraviolet has not changed, you know, noticeably
12 in the last, I would say, two years.

13 We have the same number of retailers that
14 have participated in ultraviolet. And our -- our
15 strategy -- as well from like our -- as well as
16 what I can tell from our competitors -- has not
17 materially changed of putting eCopies on discs,
18 some of which are ultraviolet enabled.

19 Q. Okay. Does -- does Fox allow a member of
20 the public who has purchased a digital copy, to
21 filter content of that copy to themselves for
22 private home viewing?

23 MR. KLAUS: Object to the form of the
24 question.

25 THE DEPONENT: Who has purchased the --

1 how was the purchase made in this case?

2 BY MR. MARQUART:

3 Q. Let us use the example of an ultraviolet
4 purchase.

5 A. Okay.

6 Q. An individual has bought a disc at an
7 authorized retailer.

8 A. Okay.

9 Q. That purchase allows them, for free, to
10 access a digital copy.

11 A. Yes.

12 Q. Does Fox allow that user to view their
13 digital copy in a filtered format to their
14 specifications?

15 MR. KLAUS: Object to the form of the
16 question.

17 If you know, you can answer the question.

18 THE DEPONENT: Yes.

19 To my knowledge, it does not allow them
20 to -- to filter the -- the movie that they've
21 purchased physically and then redeem the digital
22 copy of that.

23 BY MR. MARQUART:

24 Q. Does -- to your knowledge, does any other
25 Plaintiff allow that?

1 MR. KLAUS: If you know.

2 THE DEPONENT: Not -- not to my
3 knowledge, but -- but I don't know for -- for
4 sure.

5 BY MR. MARQUART:

6 Q. And I know the answer to this.

7 But, to your knowledge, does Fox allow
8 any third party to assist that user in filtering
9 out content from their streamed copy?

10 MR. KLAUS: Object to the form of the
11 question, outside the scope, calls for a legal
12 conclusion.

13 If you know of any third-party agreements
14 that specifically authorize that, you can say "Yes"
15 or "No."

16 THE DEPONENT: No.

17 BY MR. MARQUART:

18 Q. Okay. Based on your counsel's
19 clarification, I have another question.

20 Does -- do you believe that Fox has to
21 authorize the filtering of that digital copy before
22 it may legally be filtered by the user?

23 MR. KLAUS: Object to the form of the
24 question, calls for a legal conclusion. It's
25 outside the scope of the deposition topics.

1 If it were illegal, I would object to --

2 to that behavior, yes.

3 BY MR. MARQUART:

4 Q. The -- the second example you mentioned
5 on Harm Number 2 --

6 A. Uh-huh.

7 Q. -- control of revenue and license
8 agreements was -- the second specific example you
9 gave, was that existing VOD users might complain to
10 you.

11 Do you recall that?

12 A. Existing VOD users being existing VOD
13 clients?

14 Q. Yeah. Sorry.

15 A. Yeah.

16 Q. Let me specify that.

17 A. Yeah.

18 Q. So your existing VOD clients might come
19 to you and complain about the unauthorized
20 distributors' activities and say that it's harming
21 their business?

22 A. Yes, they do complain.

23 Q. Do you have any evidence of actual
24 complaints to you or to anyone at Fox about
25 VidAngel?

1 A. Again, I have not received specific
2 complaints about VidAngel, or rarely receive
3 specific complaints about individual pirate or
4 illegal or unauthorized service from clients. Very
5 rarely.

6 But very frequently, we receive
7 push-back. Whether we're trying to negotiate
8 economic terms or counter-protection terms or
9 consumer-use cases that unauthorized or pirate
10 services don't have to play by the same rules, or
11 the rules do not apply to them.

12 I get frequent push-back about that from
13 a -- from a generic sense about unauthorized
14 services, not specific to a single or -- or
15 multiple authorized services.

16 Q. Okay. But so no one -- no one
17 specifically mentioned VidAngel in that context in
18 any of your negotiations; correct?

19 A. That's correct.

20 Q. And you don't normally receive specific
21 complaints? They're normally generic?

22 A. Regarding specific unauthorized services,
23 that's --

24 Q. If you --

25 A. -- that's correct.

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)
bgrace@bakermarquart.com
5 BAKER MARQUART LLP
2029 Century Park East, Sixteenth Floor
6 Los Angeles, California 90067
Telephone: (424) 652-7800
7 Facsimile: (424) 652-7850

8 Peter K. Stris (Bar No. 216226)
peter.stris@strismaher.com
9 Brendan Maher (Bar No. 217043)
brendan.maher@strismaher.com
10 Elizabeth Brannen (Bar No. 226234)
elizabeth.brannen@strismaher.com
11 Daniel Geyser (Bar No. 230405)
daniel.geyser@strismaher.com
12 STRIS & MAHER LLP
725 South Figueroa Street, Suite 1830
13 Los Angeles, California 90017
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 LTD. LLC;
24 TWENTIETH CENTURY FOX FILM
CORPORATION; AND WARNER
25 BROS. ENTERTAINMENT, INC.,

26 Plaintiffs,

27 vs.

28 VIDANGEL, INC.,

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

**FILED UNDER SEAL PURSUANT
TO ORDER OF THE COURT
DATED SEPTEMBER 14, 2016 (Dkt.
75)**

**DECLARATION OF SIGURD
MELDAL IN SUPPORT OF
VIDANGEL'S MEMORANDUM OF
POINTS AND AUTHORITIES IN**

BAKER MARQUART LLP
2029 CENTURY PARK EAST, 16TH FLOOR
LOS ANGELES, CA 90067
Tel: (424) 652-7800 • Fax: (424) 652-7850

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Defendant.

**OPPOSITION TO PRELIMINARY
INJUNCTION MOTION**

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

1 I, Dr. Sigurd Meldal, declare:

2 1. I submit this declaration in support of defendant and counterclaimant
3 VidAngel, Inc.’s (“VidAngel’s”) Memorandum of Points and Authorities in
4 Opposition to Plaintiffs’ Motion for Preliminary Injunction. I have personal
5 knowledge of the facts set forth herein and, if called and sworn as a witness, I could
6 and would testify competently hereto.

7 2. I have been retained by VidAngel as an expert in this case. I am a
8 professor of computer engineering, software engineering and computer science at
9 San Jose State University and a computer scientist for Quandary Peak Research and
10 I have served as a consulting Professor in the Electrical Engineering Department at
11 Stanford University.

12 3. I have received several honors and awards over the course of my
13 career, including the Fulbright-Hayes Fellowship, the Carl-Erik Fröberg Award, a
14 Certificate of Recognition from the California State Assembly, and a Certificate of
15 Special Recognition from the U.S. House of Representatives.

16 **Professional Honors and Experience**

17 4. I have served on many professional committees and organizations. For
18 example, I serve as a Commissioner of the national Engineering Accreditation
19 Commission of the Accreditation Board for Engineering and Technology (ABET.)
20 (The Engineering Accreditation Commission of ABET defines the standards for
21 engineering education and determines whether programs are up to those standards or
22 not.) I am also a member of the Fulbright Association, and a Senior Member of the
23 Institute of Electrical and Electronics Engineers (IEEE) and of the Association for
24 Computing Machinery (ACM).

25
26
27
28

- 1 (vi) The Plaintiffs’ Motion for a Preliminary Injunction (Unredacted) (Dkt.
2 27), declarations of Todd Cittadine (Unredacted) (Dkt. 28) and Robert
3 Schumann (Unredacted) (Dkt. 29) in support of Plaintiffs’ Motion for
4 Preliminary Injunction;
- 5 (v) The Digital Entertainment Group’s DEG Year-End 2006 Home
6 Entertainment Sales Update;
- 7 (vi) The standard terms of service for VOD Google Play, Amazon Video,
8 Vudu, iTunes Store, and Youtube;
- 9 (vii) ClearPlay, Inc.’s website available at <https://www.clearplay.com>.

10 **DVD and Blu-ray Discs Dominated the**
11 **Home Entertainment Market in 2005**

12 8. In the mid to late 1990s, digital versatile discs (“DVDs”) began to
13 replace VHS tapes as the primary media onto which motion pictures were recorded
14 for sale in the home entertainment market. By 2005, the home entertainment market
15 was dominated by DVDs. Attached as Exhibit B is a true and correct copy of a
16 Digital Entertainment Group report dated January 8, 2007, stating that in 2005,
17 approximately 94% of digital home entertainment was consumed using discs. By
18 2006, this percentage increased to well over 99%. But as I will explain later, the
19 home entertainment market is now moving rapidly away from physical discs, to
20 services that stream a title directly to a user’s television or other device.

21 **Discs Were Encrypted by the Late 1990s**

22 9. Encryption of DVDs also dates back to the 1990’s, and was the subject
23 of an appellate opinion in 2001. *Universal City Studios, Inc. v. Corley*, 273 F.3d
24 429 (2d Cir. 2001). In 2005, DVDs and Blu-ray discs bore security features,
25 commonly known as “encryption,” that encoded the content in such a way that the
26 disc’s contents could not be accessed, copied or modified without a decryption key.
27 A disc cannot be used without first decrypting it. Common forms of encryption
28 included Content Scramble System (“CSS”) for DVDs and Advanced Access

1 Content System (“AACs”) for Blu-ray discs. I have read the Declaration of Robert
2 Schumann in Support of Plaintiffs’ Motion for Preliminary Injunction (“Schumann
3 Dec.”) and, for the purposes of my opinion expressed in this declaration, agree with
4 his descriptions of how CSS, AACs and BD+ each function (but disagree with his
5 assessment of their effectiveness, as noted below). (Schumann Dec. ¶¶ 20-34.)
6 CSS, AACs, and to a lesser extent BD+, remain the most common forms of
7 encryption for DVDs and Blu-ray discs today. (Schumann Dec. ¶¶ 20, 27.)

8 10. By definition, it is impossible to access, view, copy or alter in any way
9 a motion picture contained on an encrypted digital disc without first unlocking the
10 encryption. In 2005, all household DVD players were equipped with digital keys
11 that unlocked the encryption on the digital disc prior to sending the video to the
12 user’s television.

13 **The Digital Millennium Copyright Act**

14 11. The DMCA addresses, to some extent, the forms of encryption
15 described above and in Mr. Schumann’s Declaration. It provides that “a
16 technological measure [i.e., encryption] ‘effectively controls access to a work’ if the
17 measure, in the ordinary course of its operation, requires the application of
18 information, or a process or a treatment, with the authority of the copyright owner,
19 to gain access to the work.”

20 12. In the case of the encryption commonly used to access motion pictures
21 on Blu-rays and DVDs, it is undisputed that software capable of removing these
22 measures is ubiquitous and easily accessible, despite the fact that much of that
23 software is no longer readily sold in the United States. In light of the ease with
24 which one may currently decrypt a DVD or Blu-ray disc using readily available
25 software, DVD and Blu-ray encryption does not “effectively control access to a
26 work,” because these measures may be easily removed in the ordinary course of
27 their operation to gain access to the work. Accordingly, Robert Schumann’s opinion
28

1 expressed throughout Paragraphs 20-34 (under the headings, “CSS Is An Effective
2 Access-Control System for DVDs,” and “AACs and BD+ Are Effective Access-
3 Control Systems for Blu-ray Discs”) that CSS, AACs and BD+ are effective access-
4 control systems is incorrect.

5 **The 2005 Family Movie Act Authorized**
6 **Third Parties (Such as VidAngel) to Filter**
7 **Motion Pictures in Either of Two Ways**

8 13. I understand that The Family Home Movie Act of 2005 (“FMA”)
9 provides the legal context for the expert opinions expressed herein. The FMA
10 specifically provides that “it is not a violation of copyright” to:

11 [make] imperceptible, by or at the direction of a member of a private
12 household, of limited portions of audio or video content of a motion
13 picture, during a performance in or transmitted to that household for
14 private home viewing, from an authorized copy of the motion picture,
15 or . . . creat[e] or provi[de]. . . a computer program or other technology
that enables such making imperceptible and that is designed and
marketed to be used, at the direction of a member of a private
household, for such making imperceptible, if no fixed copy of the
altered version of the motion picture is created by such computer
program or other technology.

16 17 U.S.C. § 110(11). As used in the FMA, “motion picture” is defined to include
17 television programs. The “making imperceptible . . . limited portions of audio or
18 video content of a motion picture” referenced in the FMA is commonly referred to
19 as “filtering.”

20 14. The plain language of the FMA quoted above expressly authorizes and
21 exempts from copyright infringement two distinct methods for filtering motion
22 pictures. The first – and today far more important method – is the “transmission” or
23 streaming method. The word “transmission” has broad meaning in the context of
24 the Copyright Act. “To ‘transmit’ a performance or display is to communicate it by
25 any device or process whereby images or sounds are received beyond the place from
26 which they are sent.” 17 U.S.C. § 101. In turn, “device,” “machine,” and “process”
27 are defined to include “one now known or later developed.” *Id.* Accordingly, the
28

1 FMA expressly authorized future processes for privately transmitting filtered
2 versions of motion pictures to members of households at their direction. In the
3 transmission method, a third party, at the direction of a member of the household,
4 makes imperceptible limited portions of an authorized copy of a motion picture's
5 audio or video content in a “transmission” to that household. This first method is
6 the more important today because it works across every type of device and mobile
7 platform for viewing content. This is also the method that VidAngel employs, as
8 described in more detail below.

9 15. The FMA also exempts any computer program or other technology that
10 filters an authorized copy of a motion picture “during a performance in” a private
11 household 17 U.S.C. § 110(11). In 2005, when the FMA was being created, this was
12 the only type of filtering service that existed. It was provided by a company called
13 ClearPlay, which sold specialized hardware to be installed in the user’s home. The
14 ClearPlay hardware unlocked encryption through the use of a built-in DVD/Blu-ray
15 disc drive equipped with a CSS “key” that unlocked the DVD’s CSS encryption. *See*
16 <https://www.clearplay.com/p-450-clearplay-blu-ray-player-cp1126.aspx>, a true and
17 correct copy of which is attached as Exhibit C. All DVD player manufacturers
18 obtained CSS keys through licenses from the DVD Copy Control Association
19 (“DVD CCA”) so that every home DVD player could unlock CSS encryption. Once
20 the home DVD player unlocked the CSS encryption, the ClearPlay set top box
21 provided the filtering. Because no fixed copy of the altered work was ever created
22 by the ClearPlay box, its service was expressly authorized by the FMA. The
23 ClearPlay set top box recently retailed for \$249.99 and required an additional \$7.99
24 per month subscription to ClearPlay for the filters. The ClearPlay method did not
25 allow a user to access filtered content on modern mobile devices. *See*
26 https://www.clearplay.com/t-streaming_support.aspx, a true and correct copy of
27 which is attached as Exhibit D (noting the ClearPlay Streaming Player works only
28

1 on a Mac or PC computer using a Chrome browser, and only when the computer is
2 attached to the TV via HDMI cable or the “tab-cast” feature of the Chromecast in
3 order to work).

4 16. The FMA expressly does not require that the household or the
5 technology provider operating at the direction of the household obtain the consent of
6 the copyright holder prior to filtering a work, provided that no fixed copy of the
7 altered work is created. 17 U.S.C. § 110(11). This lack of a consent requirement for
8 filtering is essential to any functioning market for filtering motion pictures because
9 the major studios that own those works and the directors that create them were
10 vehemently opposed to the enactment of the FMA and to companies that provided
11 filtering technology. In fact, I have reviewed the deposition testimony of Tedd
12 Cittadine, who testified that no studio to his knowledge has ever privately licensed
13 any third party to filter any of its works. Deposition Transcript of Tedd Cittadine
14 attached as Exhibit B to the Declaration of Jaime W. Marquart filed concurrently
15 herewith (“Marquart Dec.”) at Tr. 83:21-84:21.

16 17. Digitally encoded motion pictures to be distributed commercially are
17 usually *encrypted*. The content of the movie is transformed from its viewable format
18 into a representation where the content is no longer distinguishable from random
19 data – *encrypted data*. Without a subsequent *decryption*, the content information is
20 not accessible – it cannot be viewed or manipulated in any meaningful way. Thus
21 before the movie content can be displayed to a viewer, the encrypted data has to be
22 *decrypted*, or *unlocked*, reversing the encryption process to yield the original
23 information content.

24 18. Since the encrypted representation of the content is indistinguishable
25 from random data, the movie content cannot be analyzed for objectionable content
26 subject to filtering, nor can such filtering be applied without the content first
27 becoming viewable again. It is thus impossible to view or filter for viewing a
28

1 motion picture stored in a digitally encrypted format without first unlocking the
2 encryption. This is true in the case of DVD viewing, where a key contained within a
3 DVD player unlocks the encryption, and it also true in the case of streaming, where
4 a viewing application provided by the streaming service unlocks the encryption.
5 The reason for this is that, by definition, encryption prevents accessing, copying or
6 altering the content of the original files.

7 19. In drafting the FMA, Congress obviously considered known
8 technologies. When Congress enacted the FMA, encrypted physical discs were the
9 dominant technology in the market. To *transmit* a filtered version of a motion
10 picture stored on any physical disc sold in the home entertainment market, one must
11 first unlock the encryption of the content and make an intermediate version. The
12 reason for this is that a filter has to modify the movie content to be delivered to the
13 viewer, a process that requires the substitution of original content with the filtered
14 (e.g., muted audio or hidden video) content based on information regarding the time
15 points where the filter is to be invoked, and how. Such manipulation of the original
16 content cannot occur without that content being available, i.e., the encrypted data
17 has to be decrypted before any filtering can occur.

18 20. It is inherent in the decryption process that a local version of the
19 unlocked content be created – be it in memory or other storage.

20 21. Having made the movie content ready for a filtered transmission,
21 further transient versions are created. It is common to create different versions of the
22 content adapted to various presentation formats (e.g., for standard and high
23 definition resolutions) and for different transmission bandwidth environments (e. g.,
24 slower vs. faster connections between the servers and the consumer). Finally, for
25 broadly distributed content, when a customer requests a particular movie (as filtered
26 by filtering technologies such as VidAngel’s), the streaming media is usually moved
27 from the central servers to so-called “edge servers” to place the multimedia data
28

1 repository closer to the consumer to avoid the massive network traffic congestion
2 that would result if all multimedia were transmitted from a single hub. (This is
3 commonly referred to as a “pull cache” technology.)

4 22. The strategy of creating temporary versions of data such as movie
5 content to enable streaming transmissions is referred to as “caching,” and is a
6 standard practice in the computer and networking professions generally, and with
7 respect to streaming media content in particular.

8 23. As is common industry practice for delivering of commercial digital
9 content, VidAngel’s technology ensures the integrity and the protection of such
10 content against illegal access by encrypting the content prior to its delivery across
11 the Internet to the customer (see below for details).

12 **Technological Measures Implemented** 13 **by VOD Providers Impede Filtering**

14 24. Today, physical discs are rapidly being replaced by Video on Demand
15 (“VOD”) distribution. None of the VOD services described in Plaintiffs’ Complaint
16 – Netflix, Hulu, iTunes, Google Play, Amazon Video and VUDU – existed in April
17 2005, when the FMA was enacted. To deliver VOD content to a consumer, standard
18 VOD files are transmitted from the VOD provider’s server to a user’s television,
19 computer or mobile device in an encrypted format. The most popular VOD
20 providers all use a combination of legal and technological means to prevent
21 filtering. First, all the most popular VOD providers provide their own studio-
22 approved form of encryption for the motion picture files they stream to their users.
23 See, e.g., Marquart Dec. Ex A at Tr. 80:13 – 81:16. Second, their VOD distribution
24 systems are “closed systems.” In closed systems, the files are encrypted prior to
25 transmission to the user’s device and then may be opened and viewed only by using
26 a proprietary software application loaded on the user’s device. The use of a closed
27 system is intended to prevent any third party (or the user) from accessing or altering
28

1 any VOD file transmitted to it. In closed systems, access to the VOD provider’s
2 proprietary software is necessary to alter the file, and no user or third party may
3 access, alter or add to that software. Id.

4 25. I have read the declaration and deposition transcript of Plaintiffs’
5 witness, Tedd Cittadine, who testified that the market for VOD titles is divided into
6 two general types of transactions, rental (usually for a small period of time, such as
7 24-48 hours) and what the VOD providers characterize as “sell-through.” This
8 comports with my understanding of the market for VOD titles. In general, “sell-
9 through” is meant to mimic in some, but not other, respects the purchase of a
10 physical disc, and VOD providers generally refer to a sell-through transaction as a
11 “Purchase.” The price for a purchase of a VOD title is commensurate with the price
12 for purchasing a physical disc at retail, though it is usually reduced by a small
13 amount (as much as \$5.00 for a new release), which reflects costs saved by not
14 having to manufacture, package, store, distribute and ship discs. A “sell-through”
15 transaction differs from a traditional purchase of a physical disc, however, in that it
16 is merely a license to view the VOD title within the VOD provider’s viewing
17 software subject to a long list of restrictions contained in terms of service
18 agreements that must be accepted to complete the “purchase.” The same is true of
19 “renting” a VOD title, with the additional term that a customer’s window to watch
20 the title expires within a short time.

21 26. Third, their terms of service agreements prohibit filtering. I have
22 reviewed the standard terms of use for the four VOD providers mentioned in
23 Plaintiffs’ Complaint as marketing major motion pictures on a rental and “sell-
24 through” basis: Vudu, Google Play, iTunes, and Amazon Instant Video. Two other
25 services mentioned in Plaintiffs’ Complaint – Netflix and Hulu – provide VOD titles
26 on a subscription basis. However, I understand that Plaintiffs in this case have
27 compared VidAngel’s service to the non-subscription-based VOD providers. True
28

1 and correct copies of the terms of service agreements for the four non-subscription-
2 based services are attached collectively as Exhibit E. Each of them provides that
3 the user may not modify any digital content purchased through the provider's
4 system. Because these terms of service expressly prohibit modification of
5 audiovisual content in the ways necessary to filter (through automatic skipping and
6 muting), a user may not filter VOD content without violating the VOD provider's
7 terms of service.

8 27. Fourth, in addition to VOD terms of service, which prohibit filtering,
9 several technological issues make it impractical to apply filters accurately to a VOD
10 title after it is opened within the VOD provider's proprietary software on a user's
11 device. Due to varying transfer rates and other technical functionalities unique to
12 each VOD provider's viewing application software, as well as operational
13 differences unique to each user's device, it has not been possible for a third party to
14 create software compatible across multiple devices and applications to filter titles
15 after they have been opened in a particular VOD provider's viewing application.
16 More importantly, such software cannot be written for even a simple application.
17 Closed systems contain security features that prevent the creation of filtering
18 software compatible with that system absent assistance from the VOD provider. To
19 develop filtering software that functions within a VOD provider's closed system, a
20 developer typically must have the consent and participation of the VOD provider to
21 access its software for the purpose of developing software compatible with it. I
22 have been informed, and have confirmed in part through my review of Mr.
23 Cittadine's deposition transcript, that no VOD provider and no Plaintiff has ever
24 consented to allow a third party to create software compatible with a VOD
25 provider's closed system to allow users to apply customized filters to titles viewed
26 within the provider's closed system.

**Google’s Purported YouTube Player “Exception”
Demonstrates That Plaintiffs Have Made It Infeasible to
Provide Filtered VOD Content to Consumers**

1
2
3 28. One exception to the closed VOD delivery systems architecture and
4 terms of service described above is the YouTube Embeddable Player and its
5 application programming interface (“API”). The YouTube Embeddable Player API
6 also did not exist in April 2005, when the FMA was enacted. An API is a set of
7 function and interface definitions, the protocols for their use, and associated
8 programming tools that affords software developers controlled access to the API
9 owner’s software. An API permits the development of other software programs that
10 can interact with the API owner’s software. The additional software is often referred
11 to as a “plug-in” to the API owner’s software. In theory, the YouTube Embeddable
12 Player API allows a software developer to create a plug-in for the YouTube
13 Embeddable Player capable of allowing automatic skipping and muting of undesired
14 content in an encrypted motion picture file after the file is opened for viewing by the
15 YouTube Embeddable Player in a user’s Google Chrome browser. To my
16 knowledge, no other VOD provider’s player contains an API that would allow for
17 the creation of a plug-in capable of allowing automatic skipping and muting of
18 undesired content in an encrypted motion picture file after the file is opened for
19 viewing by the VOD provider’s player.

20 29. Paragraph 47 of Plaintiffs’ Complaint alleges that the YouTube API
21 allows a third party – such as VidAngel – to filter VOD titles purchased from
22 Google. This is inaccurate in a number of ways. To begin, YouTube’s terms of
23 service – attached as Exhibit F – expressly prohibit a user (or anyone directed by the
24 user) from “alter[ing] or modify[ing] any part of” a motion picture viewed on the
25 YouTube Embeddable Player. The user also “agree[s] not to access Content
26 through any technology or means other than the video playback pages of the Service
27 itself, the Embeddable Player, or other explicitly authorized means YouTube may
28 designate.” The YouTube Paid Service Terms of Service – a true and correct copy

BAKER MARQUART LLP
2029 CENTURY PARK EAST, 16TH FLOOR
LOS ANGELES, CA 90067
Tel: (424) 652-7800 • Fax: (424) 652-7850

1 of which is attached as Exhibit G – further prohibits copying the Paid Services or
2 the sublicensing them to any third party. These terms of service also do not allow a
3 user to “circumvent, reverse-engineer, modify, disable, or otherwise tamper with
4 any security technology that YouTube uses to protect the Paid Service or encourage
5 or help anyone else to do so.” All these restrictions expressly make it a violation of
6 YouTube’s Terms of Service to engage in any of the activities necessary to filter a
7 motion picture through YouTube’s Embeddable Player.

8 30. In addition, the YouTube API Services Terms of Service for developers
9 writing software plug-ins that interact with the API – a true and correct copy of
10 which is attached as Exhibit H – also prohibit any technology capable of filtering
11 motion pictures viewed through the YouTube Player API. They provide that
12 developers may not “separate, isolate, or modify the audio or video components of
13 any YouTube audiovisual content made available through the YouTube API.”
14 Thus, any third party that attempts to provide a filtering plug-in for a YouTube
15 Embeddable Player does so in violation of YouTube’s terms of use. I have also read
16 Exhibit A to the Declaration of Neal Harmon, which is a notification from YouTube
17 informing VidAngel that its filtering plug-in for the YouTube Embeddable Player
18 violates the YouTube API Services Terms of Service.

19 31. There are also several technological limits to creating a plug-in
20 compatible with the YouTube Embeddable Player API capable of accurately and
21 seamlessly filtering motion pictures purchased lawfully for viewing on the YouTube
22 Embeddable Player. To begin with, the Embeddable Player plug-in works only with
23 standard-definition content, not with the popular high-definition format typical of
24 DVDs or Blu-ray discs. More importantly, because the plug-in is not officially
25 supported by Google, changes to YouTube can cause the filters to fail. When that
26 happens, filtering is ineffective and users will see content that they did not want to
27 see until the plug-in is updated. Finally, slower computers cannot process both the
28

1 video and the filter at the same time, resulting in missed filters. The end result is
2 that – without Google’s technical support and cooperation – no method of using a
3 YouTube Embeddable Player plug-in provides a consistent filtering experience for
4 the majority of users and no method would provide a high-definition filtering
5 experience for any user. In addition, this method does not work on modern mobile
6 devices.¹

7 32. Furthermore, these approaches to enabling a filtering functionality for
8 the customer suffer from reductions in the quality of the viewer experience such as
9 lower resolution, delays or stops, stuttering, and other impediments to smooth
10 viewing. Consequently, the commercial quality a viewer would expect when
11 enjoying the filtered content would be significantly jeopardized and diminished.

12 **VidAngel Transmits Filtered Versions of Plaintiffs’
13 Motion Pictures to Owners of Authorized Copies of
14 the Motion Pictures Pursuant to the FMA**

15 33. VidAngel is an online video filtering service that operates under the
16 “transmission” filtering method authorized by the FMA. Its service allows
17 customers to stream filtered feature films and television shows via the Internet to a
18 wide range of devices, including desktop computers, laptops, iPads, smart phones,
19 and televisions (through devices like Roku, Google Chromecast, or Apple TV).

20 ¹ I am also aware of certain “digital rights locker services,” such as UltraViolet
21 and Disney Movies Anywhere and disc-to-digital services such as VUDU and
22 Flixter, that claim to allow consumers to convert previously purchased DVDs or
23 Blu-ray discs into high quality digital files. *See* 37 CFR Part 201 (Exemption
24 to Prohibition on Circumvention of Copyright Protection Systems for Access
25 Control Technologies). These services merely provide the same digital right to a
26 user that he or she would obtain if purchasing a “sell-through” license from a VOD
27 provider for the disc the customer owns. The user then must follow the same terms
28 of service attendant to that VOD license, which prevent any third-party filtering in
the same way that other VOD services prevent filtering. Marquart Dec. Ex. B at Tr.
96:11-102:4.

1 VidAngel users can select from more than 80 unique filters when viewing a film or
2 television show. The filters have the effect of skipping audiovisual content or
3 muting audio content in categories created by VidAngel and selected by the user.
4 Example categories include sexual activity, nudity, drug use, obscenity, vulgarity,
5 the “F” word, blasphemy and violence. All users must select at least one filter, and
6 each user has the option to select as many other filters as apply to that content, thus
7 permitting users in most instances to select many thousands of different
8 combinations of filters, thus making a customer’s viewing experience individualized
9 and unique.

10 **VidAngel’s Filtering Technology**

11 34. VidAngel follows the first, “transmission,” method contemplated by
12 the FMA, requiring the purchase of an authorized copy of a physical disc, a filtered
13 version of which is then streamed to the user without making a fixed copy of the
14 filtered work. VidAngel delivers filtered content to users by streaming it over the
15 Internet using a video content delivery protocol called HTTP Live Streaming²
16 (“HLS”). HLS divides the audiovisual content into short segments that are
17 frequently less than 4 seconds and never more than 10 seconds that are delivered
18 separately to a user’s device when viewed. The user’s device downloads each
19 segment individually. At the beginning of an HLS streaming session, the user’s
20 device downloads an index file which provides the device with a list of segment
21 files that the device can then request and play to display the content.³

22 35. VidAngel’s filtering technology divides each feature film or television
23 show into hundreds or sometimes thousands of small segments (ranging from 2

24 _____
25 ² R. Pantos, W. May, “HTTP Live Streaming,” Internet Engineering Task Force,
26 Apr. 4, 2016 (retrieved from [https://tools.ietf.org/html/draft-pantos-http-live-](https://tools.ietf.org/html/draft-pantos-http-live-streaming-19)
27 [streaming-19](https://tools.ietf.org/html/draft-pantos-http-live-streaming-19), Sept. 3, 2016)

28 ³ *Id.*

1 tenths of a second to 10 seconds in length), for which each segment is identified and
2 “tagged” as associating with one or more available categories of filterable content.
3 When a user selects a filter category and streams a feature film or television show,
4 all segments that are tagged for that filter are omitted from the stream.

5 36. If the filter concerns audiovisual content, the user’s device will not
6 download the segments that have been tagged for that filter. If the filter affects only
7 the audio, the user’s device downloads a version of the segment with the voice
8 soundtrack muted while other soundtracks continue to play, but leaves the video
9 portion unchanged.

10 37. Based on my review of the documents that VidAngel has provided to
11 me, it is my understanding that VidAngel’s system is designed and operates as
12 follows:

- 13 (i) VidAngel lawfully purchases DVDs and Blu-ray discs;
- 14 (ii) VidAngel places a DVD or Blu-ray disc into the optical drive of a
15 computer. VidAngel then uses a commercially available software program such as
16 AnyDVD HD to automatically allow read-access for the purpose of mounting the
17 DVD or Blu-ray files for uploading onto a computer, in the process necessarily
18 removing restrictions on DVD or Blu-ray content access;
- 19 (iii) VidAngel uses a software program to extract the subtitle/caption data
20 files and then creates temporary (“locally cached”) Matroska files (erroneously
21 referred to by Plaintiffs’ expert, Robert Schumann, as “Mastroska” files) of the
22 feature films. Matroska files are multimedia files that can hold an unlimited number
23 of video, audio, picture, or subtitle tracks in one file;
- 24 (iv) VidAngel uploads the subtitle/caption data files and Matroska files
25 (collectively known as the “pre-filter files” or “PF” files) onto a secure folder on a
26 third-party Internet service provider’s cloud storage service (“PCSS”) and uploads
27 the subtitle/caption into a separate PCSS folder (“PCSS cache” of these intermediate
28

1 files);
2 (v) VidAngel destroys the locally cached Matroska file;
3 (vi) VidAngel boots an encoding and segmenting server (“ESS”) to run two
4 scripts, including an encoding script and a segmenting script, as follows:
5 a. The encoding script temporarily copies the PF files from the PCSS
6 cache to the ESS, uses ffmpeg to prepare the PF files for tagging and filtering,
7 creates a single mp4 file (640 kilobytes per second bitrate) for tagging (when that is
8 not performed beforehand on YouTube or when corrections need to be made to the
9 tags), copies the mp4 file from the ESS to a secure PCSS location, creates four
10 Transport Stream files (“TS files”) at 640, 1200, 2040 and 4080 bitrates for filtering,
11 copies the TS files to a secure location on the PCSS, and deletes all copies and files
12 on the ESS. This script is run once for each title’s Matroska file.
13 b. The segmenting script temporarily copies the TS files from the PCSS to
14 the ESS, segments the TS files for adaptive bitrate streaming (as per the HLS
15 specification) based on both 9-10 second intervals and the locations of each tag for
16 the title (which could be as short as 2 tenths of a second), creates thumbnail files for
17 player scrubbing preview for each non-filterable segment, saves a comma-separated
18 values (CSV) file containing the results of the segmenting process for each segment,
19 uploads the CSV file for use by the filtering system, encrypts the segments of each
20 bitrate with a new and unique encryption key, copies the unencrypted segments
21 from the ESS to a secure location on the PCSS, copies the encrypted segments from
22 the ESS onto a publicly accessible location on the PCSS (the “TS cache”), copies
23 the encryption keys from the ESS to a secure location on the PCSS, deletes older
24 revision files on the PCSS, and deletes all copies and files on the ESS;
25 (vii) VidAngel lawfully purchases additional DVDs and Blu-ray discs;
26 (viii) VidAngel enters the information concerning the additional discs into an
27 inventory system;
28

- 1 (ix) VidAngel applies bar codes to the disc packages;
- 2 (x) VidAngel sells specific discs to specific customers;
- 3 (xi) VidAngel requires each customer to select one or more filters; and
- 4 (xii) VidAngel streams encrypted content from the discs to each purchaser
- 5 while applying the filters chosen by that customer.

6 (xiii) At the customer's device VidAngel software assembles the segments in
7 sequence, and for each segment decrypts the content, displays it and then discards
8 the segment.

9
10 **VidAngel's Technology Prevents File Sharing and Does
Not Create Any Watchable Copy of Plaintiffs' Works**

11 38. Based on my understanding of VidAngel's system, at no point during
12 this process does VidAngel create a fixed copy of the altered (filtered) movie or
13 television show viewed by any user. In fact, VidAngel's service does not even
14 make a "copy" of the original motion picture in any traditional sense. Rather, the
15 feature film or television show is altered (filtered) as it is divided into hundreds or
16 thousands of small segments and streamed to the user's device using the HLS
17 protocol. A user can view the contents of each segment only after it has been
18 streamed in sequence, decrypted with the correct keys (keys which, themselves, are
19 protected and accessible only by a user who has legally purchased a disc from
20 VidAngel), and rendered with a VidAngel media player. After each unencrypted
21 segment is viewed, it is removed from the device's memory by the player and, for all
22 intents and purposes, is gone.

23 39. I have read the description of VidAngel's service in the Declaration of
24 Robert Schumann (Paragraphs 7 to 19 and 35 to 42), and the service, as he describes
25 it, also creates no fixed copy of the altered movie or television show.

**The Purported Legal Violations Plaintiffs Complain of
Are Necessary to Provide any Filtering/Streaming
Service Authorized by the FMA**

1
2
3 40. The FMA provides that it is not a violation of copyright to “transmit” a
4 filtered motion picture to a consumer who lawfully purchased a copy of the
5 unfiltered work. To *transmit* a filtered version of a movie or television show from a
6 DVD or Blu-ray disc to a household, VidAngel must first unlock the encryption on
7 the DVD or Blu-ray disc. Only after the encryption is unlocked can VidAngel tag
8 audiovisual and audio segments of the movie or television show for filtering. This
9 process of unlocking the encryption contained on the disc is the functional
10 equivalent of what occurs every time a person places the disc in a player to view the
11 contents of the disc.

12 41. As is common practice for Internet content delivery services (and
13 multimedia services in particular), VidAngel employs multiple delivery servers for
14 caching purposes to ensure that its users receive a seamless stream and avoid
15 creating network traffic congestion. VidAngel streams filtered content to users from
16 one of eight or more servers located in different parts of the United States. The
17 content is streamed to the user from whichever server is closest. The closer the user
18 is to the server, the faster the content reaches the user’s device, reducing the need
19 for buffering. Without the use of distributed servers, a viewer would see and hear a
20 motion picture briefly before it froze while the next segment of the motion picture
21 loaded, thereby diminishing the presentation quality of the media content. Rather
22 than see continuous motion, the viewer would experience a maddening start, stop,
23 start, stop viewing of the motion picture.

24 42. Each VidAngel user experiences an individualized stream based on the
25 filters he or she selects. A user can choose from many thousands of different
26 combinations of filters for any movie or television show, creating a private viewing
27 experience. For two people to watch all of the exact same segments of a filtered
28

1 motion picture streamed through VidAngel’s process, they would have to choose the
2 same combination of filter settings and receive each of the segments from the same
3 server.

4 43. Decrypting and streaming a filtered version of a motion picture
5 contained on a DVD or Blu-ray disc that the user has lawfully purchased is the only
6 method a third party such as VidAngel can employ to *transmit* a filtered version of a
7 motion picture to a household absent an express VOD license from the copyright
8 owner. It is my understanding that the studios refuse to license VOD rights to
9 VidAngel (or any other service that filters content). Moreover, the closed systems
10 of the VOD providers prevent the creation of technology that could permit filtering
11 without their consent and participation. Thus, VidAngel’s method is the only
12 known method a third party could use to transmit filtered content to a household
13 without first obtaining the copyright holder’s consent.

14 44. Importantly, VidAngel’s methodology ensures that any decrypted file
15 can be accessed *only by* the legal purchaser of the disc containing the file, and that
16 no filtered version could ever be conveyed to a member of the public by any means.
17 VidAngel’s decryption technology thus does not and cannot harm the market for the
18 work, nor does VidAngel’s decryption process result in injury to copyright owners.

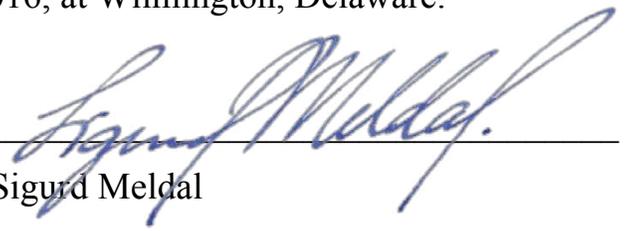
19 45. Tedd Cittadine declares that the following four harms he claims will
20 befall Plaintiffs if VidAngel’s service is not enjoined: (1) the service harms the
21 studios’ “basic right to control how, when and through which channels our content
22 is disseminated for viewing by consumers”; (2) the service causes “harm to the
23 online distribution of our content and to our relationships with authorized
24 distributors”; (3) the service causes “harm to our ability to secure and protect
25 content in an online environment”; and (4) the service causes “harm to the overall
26 development of the on-demand streaming market by the provision of user-viewing
27 experiences without our rigorous quality controls.” To begin with, I have reviewed
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Mr. Cittadine’s declaration and his deposition transcript and have found no direct evidence that VidAngel has actually caused any of these injuries; rather, Mr. Cittadine has merely testified that VidAngel “threatens” serious harm to the studios. More importantly, *any* service that transmits a filtered version of Plaintiffs’ motion pictures pursuant to the FMA would “harm” the studios in each of these ways. By definition, filtering does not allow Plaintiffs to control the manner in which a user filters their works, and the FMA states that filtering shall occur without the studios’ consent. This necessarily means that viewing experiences will occur outside of the studios’ control.

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

Executed on September 11, 2016, at Wilmington, Delaware.



Dr. Sigurd Meldal

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)
bgrace@bakermarquart.com
5 BAKER MARQUART LLP
2029 Century Park East, Sixteenth Floor
6 Los Angeles, California 90067
Telephone: (424) 652-7800
7 Facsimile: (424) 652-7850

8 Peter K. Stris (Bar No. 216226)
peter.stris@strismaher.com
9 Brendan Maher (Bar No. 217043)
brendan.maher@strismaher.com
10 Elizabeth Brannen (Bar No. 226234)
elizabeth.brannen@strismaher.com
11 Daniel Geyser (Bar No. 230405)
daniel.geyser@strismaher.com
12 STRIS & MAHER LLP
725 South Figueroa Street, Suite 1830
13 Los Angeles, California 90017
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.;
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)

**FILED UNDER SEAL PURSUANT
TO ORDER OF THE COURT
DATED SEPTEMBER 14, 2016 (Dkt.
75)**

**DECLARATION OF NEAL
HARMON IN SUPPORT OF
VIDANGEL'S MEMORANDUM OF**

1 VIDANGEL, INC.,
2 Defendant.

**POINTS AND AUTHORITIES IN
OPPOSITION TO PRELIMINARY
INJUNCTION MOTION**

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

12 I, Neal Harmon, declare:

13 1. I am a founder and the Chief Executive Officer of defendant and
14 counterclaimant VidAngel, Inc. (“VidAngel”). I submit this declaration in support
15 of VidAngel’s Memorandum of Points and Authorities in Opposition to Plaintiffs’
16 Motion for Preliminary Injunction. I have personal knowledge of the facts set forth
17 herein and, if called as a witness, I could and would testify competently thereto.

18 **Why My Family Wanted to Watch Filtered Content**

19 2. Throughout my life, I have been a consumer of family-friendly movies
20 and television programs. I was raised in rural Idaho. We did not watch movies with
21 sex or nude scenes or with excessive violence and profanity in our home. For much
22 of my childhood, this meant that my family did not have access to many mainstream
23 movies and television shows, as they often included content at odds with my
24 family’s beliefs and values. At times, we felt left out of popular American culture,
25 as we were unable to watch the most popular movies and shows. Even
26 entertainment offerings with messages and themes compatible with my family’s
27 values and beliefs still included some scenes with content we found objectionable.
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Figure 1 - I was the third of 9 children and our family enjoyed movie experiences together. Here we are with our parents, spouses and young children. We had movie night out on the lawn for our family reunion using VidAngel.

We decided not to watch certain offerings we were interested in, because we could never know when a particular scene in a broad family comedy might include material that made us uncomfortable. For this reason, my family was very excited about the CleanFlicks service that debuted in 2000.

3. CleanFlicks was a business that produced edited versions of films to remove content that was inappropriate for children or that other viewers might find offensive. CleanFlicks removed sexual content, profanity and some references to violence from movies, either by muting audio or cutting entire portions of the track. My family and I used the CleanFlicks service to watch the same movies the rest of the country found enjoyable and moving, without compromising our values. To our regret, a group of Hollywood directors engaged in litigation with CleanFlicks for copyright infringement and in 2006 a federal district court found that CleanFlicks’ filtered movies infringed their copyrights. CleanFlicks’ service was held to infringe because, contrary to the requirements of the Family Movie Act (“FMA”), CleanFlicks did not allow each consumer to decide what to mute or delete. It also created fixed copies of filtered works. When CleanFlicks and similar services were put out of business, my family lost a major source of family-friendly content.

4. The FMA was enacted in 2005, in response to a lawsuit against a number of different filtering companies, including ClearPlay. The FMA promised a

1 clearly legal way to filter out content from popular films and television shows that
2 families like mine found objectionable.

3 5. In 2012, Google announced the debut of Google Play. Google Play is a
4 digital distribution service operated and developed by Google. Among other things,
5 Google Play serves as a digital media store, offering music, magazines, books,
6 movies and television programs. It is similar to services such as Apple iTunes,
7 VUDU and Amazon Video. Google Play allows users to download media to various
8 digital devices, including phones and Google TV. When Google debuted Google
9 Play, I had already been experimenting with the YouTube JavaScript application
10 programming interface (“API”). It allowed me to write program codes that
11 permitted automatic skipping and muting of movies and television shows purchased
12 through Google Play and watched on a YouTube Player in a Google Chrome web
13 browser.

14 6. Around the time Google Play debuted, I realized that the way users
15 consume movies and other visual narratives was undergoing a profound shift away
16 from traditional physical embodiments like DVDs and Blu-ray discs to digital
17 streaming. The popularity of smart phones and tablets along with the development
18 of internet infrastructure and other technologies offered users the potential to stream
19 movies and television shows to many types of devices whenever a user desired.
20 Remembering my family’s struggle to find appropriate film and television content, I
21 realized there was a tremendous opportunity to serve the vast market of households
22 with religious, moral and other objections to the adult content of most mainstream
23 studio offerings in the context of this massive shift to streaming distribution.

24 7. Sometime in 2012, my brothers and I asked ourselves, “Why isn’t there
25 a content filtering service for streaming?” Using my coding knowledge, I coded a
26 filtering tool for the movie “Cinderella Man” on the YouTube Player in the Google
27 Chrome browser. (YouTube is owned by Google.) The tool filtered the film for
28

1 swearing and a couple of especially gruesome punches. While it would play only the
2 standard definition (“SD”) version of the movie on a computer, the tool succeeded
3 in removing the objectionable content. “Cool,” we said, “it seems to work for SD
4 content on the Chrome browser.” At the time, though, we realized that high
5 definition (“HD”) content would become the industry standard for digital movie
6 distribution. Realizing this, my brothers and I started to look for ways to create a
7 filtering tool that would work on HD content streams.

8 **The Development That Led Us to Found VidAngel**

9 8. In 2013, Google announced that it would conduct a private beta test of
10 the Chromecast streaming device. Chromecast is a line of digital media players
11 developed by Google. The players are physically small dongles and play video
12 content on high-definition televisions by streaming it directly to a television set via
13 Wi-Fi from the Internet or a local network. Users select the media to play using
14 mobile and web apps that work with the Google Chromecast technology. The first-
15 generation Chromecast was a video-streaming device that was made available for
16 purchase in July 2013. When Chromecast was announced, there was no company
17 providing a content filtering service pursuant to the FMA that worked with HD
18 video streams. My brothers and I saw a market opportunity to provide families with
19 such a tool.

20 9. “The Chromecast is how we get filtered HD content on the television,”
21 my brothers and I said to each other. “It’s time to build this.” To confirm our
22 intuitions concerning the potential market for such a service, we conducted research
23 and found that about half of American parents would use a filtering service.
24 Although we created VidAngel because we wanted it for our own children, we knew
25 many other families would want to use it as well. We then set about creating the
26 technology, business plan and infrastructure necessary for a filtering service. After
27 many months of hard work, we launched a private beta VidAngel filtering service
28

1 capable of filtering HD content through Chromecast. It was and is my
2 understanding that our beta service fully complied with the provisions of the FMA.
3 We simply provided users with a tool they could use to filter digital content streams
4 from Google Play using the Chromecast's technology.

5 **The Studios' First Attempt to Block VidAngel**

6 10. In January 2014, we raised \$600,000 to launch VidAngel.com. After
7 the private beta launch, we reached out to Google to ask whether we could purchase
8 Chromecast devices at wholesale and then sell them to families who wanted to use
9 VidAngel's filtering service. Google responded that it would consider a bulk
10 purchase agreement only after VidAngel successfully launched a public beta of its
11 Softward Development Kit (SDK) on February 3, 2014. The day of Google's
12 Chromecast API launch, even though we were attending a conference in California,
13 we were so excited to launch that we did not sleep the entire night trying to get the
14 system to work and be the first out the door on the list of Chromecast applications. It
15 never worked.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Figure 2 - I took this photo of my brothers Daniel and Jordan in our Redwood City, CA hotel on Tuesday, Feb 4, 2014 at 8:05am after working through the night trying to understand why our programs no longer worked

11. We discovered that Google removed the technology from their SDK that made the filtering service possible on native Chromecast. Google did not notify us or publicly announce the removal of its technology. Based on conversations I later had with a Google representative, I am informed and believe that Google removed this technology at the request of the movie studios, which claimed that Google would be in violation of its agreement with them if it enabled VidAngel’s filtering.

12. Also, on December 5, 2013, VidAngel received a notification from YouTube that VidAngel’s YouTube Player API programming violated the developers’ API Terms of Service for YouTube. Attached as Exhibit A is a true and correct copy of that notification. Again based on later conversations with a Google representative, I am informed and believe that YouTube sent this notification because the studios told Google that it would be in violation of its agreement with

1 them if it enabled VidAngel’s filtering. As explained in more detail in Paragraphs
2 48-50 below, I later obtained a copy of Google Play’s VOD Distribution Agreement
3 with Sony, which confirmed this belief.

4 13. That the technology enabling filtering had been quietly removed gave
5 me pause about moving forward with the VidAngel service. Even though I
6 understood that our service was legal under the FMA, I was aware of the studios’
7 historical hostility to filtering. In light of that hostility, I was concerned that the
8 studios might again try to shut down our service despite the clear protections of the
9 FMA. VidAngel was a startup company without the deep pockets and litigation
10 budgets of the major studios, and I feared that the studios would wage a legal
11 campaign that would bankrupt VidAngel’s business – before VidAngel could
12 prevail in court under the FMA.

13 **VidAngel’s Attempt to Partner with Google Play**
14 **and the Studios’ Interference with Those Efforts**

15 14. Because we had already raised money, we decided to test different
16 models and ultimately opted for seeing how many customers we could acquire if we
17 gave the filtering away for free -- even if users could watch only on the YouTube
18 Player in the Chrome browser on their computer, and only in SD format.

19 15. While VidAngel was working with counsel to develop a filtering
20 technology compliant with the law, someone from a different division of Google
21 reached out to partner with VidAngel to provide a filtering feature for all of Google
22 Play. VidAngel was thrilled to pursue this option, realizing that with Google’s
23 resources and reach in digital markets, VidAngel would finally be able to serve the
24 vast market of Americans desiring an effective digital streaming filtering tool. The
25 partnership did not materialize because Google’s distribution contracts required
26 them to seek permission from the studios to develop a filtering tool. I was advised
27 by Google that the studios refused Google’s requests to develop such a tool with
28

1 VidAngel.

2 16. After the studios rejected Google’s requests to allow the use of a
3 filtering tool, VidAngel realized that a small startup could not possibly negotiate a
4 filtering license with the studios. With the help of legal counsel, VidAngel then
5 decided to pursue the launch of its current filtering system.

6 **VidAngel’s Current Streaming Technology**

7 17. By mid-2014, it was clear that the VidAngel service, as it was then
8 structured, using the YouTube Player API, could never achieve commercial success.
9 It required users first to create an account on VidAngel and then with Google Play.
10 Users would use their Google Play accounts to rent content viewable on YouTube,
11 but then had to return to the VidAngel site to select the filtering they desired. After
12 those steps, users could watch only an SD version of the content and only on their
13 computer. This multi-step process confused and frustrated customers. In addition,
14 the filters often did not work properly because computer processors struggled with
15 YouTube’s API. Further, the service was not then adapted to modern industry
16 standards for digital content streaming – users demanded HD content and needed to
17 be able to watch the content on their mobile devices and high-definition set-top
18 boxes. By mid-2014, people simply did not watch SD movies exclusively on their
19 desktops computers and no major distributor of digital content limited their
20 distribution in this way.

21 18. In June 2014, the Supreme Court published its decision in American
22 Broadcasting Companies v. Aereo, 573 U.S. ___, 134 S. Ct. 2498. In that decision,
23 the Court noted: “an entity that transmits a performance to individuals in their
24 capacities as owners or possessors does not perform to ‘the public.’” This language
25 prompted me to seek legal advice concerning ways to provide a lawful filtering
26 service to the owners of movies under the FMA.

27 19. I am familiar with some of the litigation involving filtering technology
28

1 and the FMA. I know that in 2005, a federal court in Colorado dismissed a
2 copyright infringement claim against ClearPlay based on the FMA. *Huntsman v.*
3 *Soderbergh*, No. Civ. A02CV01662RPMMJW, 2005 WL 1993421 (D. Colo. 2005).
4 The Court found that the FMA protected ClearPlay’s service from the studios’
5 infringement claims: “the effect of the Family Movie Act is that Congress made a
6 policy decision that those who provide the technology to enable viewers to edit
7 films for their private viewing should not be liable to the copyright owners for
8 infringing their copyright” I am also aware that the FMA protects a technology
9 that filters content “transmitted to [the] household for private home viewing.”
10 Today, VidAngel follows the FMA and transmits filtered content to users’ homes
11 without making a “fixed copy of the altered version of the motion picture.”
12 VidAngel specifically designed its current technology to comply with the FMA and
13 the relevant Court decisions interpreting the FMA and copyright law.

14 20. Under the current service, customers buy an authorized DVD or Blu-
15 ray disc from VidAngel (which buys it at retail after the studios release it) and then
16 choose various filters provided by VidAngel to apply to the movie. VidAngel then
17 streams the filtered movie to the user’s home. VidAngel allows users to sell back
18 their disc to VidAngel if they choose not to own the movie permanently.

19 21. In early 2015, VidAngel began privately testing the new service with
20 customers. Over the course of a few months, the service improved substantially and
21 we were able to expand it to the Google Play app store and Chromecast.

22 **VidAngel Announces Its New Service to the Studios**

23 22. By July of 2015, VidAngel felt confident enough in its service to seek
24 feedback from the major movie studios. To that end, with the help of counsel,
25 VidAngel sent a letter on July 23, 2015, to the major studios and television networks
26 (including all plaintiffs herein) explaining its service and technology. A true and
27 correct copy of that July 23, 2015 letter as sent to Disney is attached as Exhibit B.
28

1 VidAngel’s letter explained that VidAngel operates under the FMA’s filtering
2 exemption, and works as follows: (1) VidAngel “purchases the DVD or Blu-ray disc
3 for the customer and stores it in a physical vault;” (2) it “streams” the contents of the
4 disc to the customer in a filtered format chosen by the customer; and (3) it then “re-
5 purchase[s] the disc at a discount from the sale price. . .based on the length of time
6 the customer has owned the disc.” VidAngel explained that it had grown from 43 to
7 4848 users in just under six months (a 10,000% growth rate) and now wished to buy
8 directly from the studios “to scale its business.” The letter invited the studios to
9 access the service and concluded:

10
11 If you have any questions concerning VidAngel’s technology or
12 business model, please feel free to ask. If you disagree with
13 VidAngel’s belief that its technology fully complies with the Copyright
14 Act or otherwise does not adequately protect the rights of copyright
15 owners, please let us know. VidAngel wants to take the concerns of
16 content owners into consideration and address them to the extent it can.

17 Unbeknownst to VidAngel at the time, Disney almost immediately accessed its
18 service. Attached as Exhibit C is true and correct copy of a printout from a
19 VidAngel user account showing that, on August 6, 2015, a Disney employee signed
20 up for a VidAngel account using a non-descript Gmail account and provided
21 payment information for a Director of Antipiracy Operations at Disney. Even
22 though they were obviously investigating VidAngel, Plaintiffs did not respond to
23 VidAngel’s letter, so it sent a second letter on August 21, 2015. A true and correct
24 copy of the August 21, 2015 letter is attached as Exhibit D. VidAngel had over 750
25 titles available for the new filtering service when it sent its letters to Disney. Prior
26 to filing suit on June 9, 2016, none of the plaintiffs, nor any of the dozen other
27 entities to which VidAngel wrote, ever expressed to VidAngel that they believed its
28 services infringed their copyrights and none ever sent a cease and desist letter to
VidAngel.

23. I understand that two of the plaintiffs confirmed receipt of VidAngel’s

1 letters and called or emailed VidAngel’s counsel. Warner Bros. Entertainment
2 Inc.’s parent, Time Warner, Inc., emailed VidAngel in October. VidAngel promptly
3 returned the email and even scheduled a call to answer his questions. Time Warner
4 later cancelled the call and never rescheduled it. Fox called VidAngel’s counsel in
5 September 2015 and left a message, but in my understanding did not return phone
6 calls placed to it in September and October by VidAngel’s counsel. Thereafter,
7 VidAngel heard nothing from Plaintiffs, through counsel or otherwise, until this
8 lawsuit was filed.

9 **VidAngel Wanted the Studios’ Feedback for Many Reasons**

10 24. The letters were an important part of VidAngel’s strategy of developing
11 new technology. Although VidAngel believed its new filtering system complied
12 with the FMA, as a practical matter we understood that any legal challenge from the
13 studios would have significant financial consequences for VidAngel even if its
14 technology were ultimately vindicated by the Courts. It was important to assess the
15 studios’ attitude toward VidAngel’s new streaming system early on, to provide
16 VidAngel’s investors (and potential investors) with accurate information about the
17 studios’ position with respect to VidAngel’s technology. For that reason, the letters
18 requested feedback from the studios and invited them to examine VidAngel’s
19 technology and ask any questions they might have about it. Because the letters
20 invited a response from the studios and clearly described VidAngel’s technology,
21 VidAngel assumed that, to the extent the studios had a problem with VidAngel’s
22 technology, they would inform VidAngel if any of them disagreed that VidAngel’s
23 service complied with the FMA. Further, as VidAngel’s model involved purchasing
24 DVDs from the studios and was serving a market of customers that would never
25 watch un-filtered studio content, VidAngel was creating new revenue for the
26 studios. VidAngel believed then (and continues to believe) that there are very good
27 business reasons for the studios to support VidAngel’s model. Since VidAngel’s
28

1 service contributes to the studios' bottom line, it was another reason to view the
2 studios' silence in response to VidAngel's letters as tacit approval of its service.
3 Had any studio expressed a complaint to VidAngel in response to the letters,
4 VidAngel would have discussed and considered any proposal to resolve it. In
5 particular, VidAngel could have adapted its technology in some way or, to the
6 extent the studios expressed an opinion that VidAngel's technology was infringing,
7 VidAngel could have filed a declaratory relief suit concerning its technology.

8 25. Having received no feedback or objections to our technology from the
9 studios after sending two very direct letters, VidAngel opened its services to the
10 public in August 2015.

11 26. The version of the system that was publicly launched in August 2015
12 solved the problems of the 2014 design: it simplified the user-interface, required
13 users to register only once with VidAngel, allowed users to watch HD content on
14 their favorite mobile devices and set-top boxes, and improved the filters so that they
15 were more seamless. By bringing VidAngel's technology up to and beyond industry
16 standards and offering the features users expect of any content streaming service,
17 VidAngel found a large market for filtered movie and television content. As a
18 result, its customer base began to shoot up almost immediately.

19 27. In fact, today, VidAngel's apps are rated higher by users than the
20 leading studio distribution platforms. For example, the VidAngel rating on Google
21 Play is 4.8 stars whereas Netflix is 4.4 stars, Hulu is 4.1 stars, and Disney Movies
22 Anywhere is 3.9 stars. For all ratings on the Apple App Store, VidAngel has 5 stars,
23 Netflix has 3.5 stars, Hulu has 2 stars, and Disney Movies Anywhere has 3.5 stars.
24 On Roku, VidAngel has 4.5 stars, Netflix has 3 stars, Hulu has 3.5 stars and Disney
25 Movies Anywhere has 3.5 stars.

26 28. By the end of 2015, VidAngel's monthly disc sales had grown to over
27 100,000. In January 2016, USA Today published an article about VidAngel's
28

1 services and the ability to stream filtered versions of Star Wars prequels for a net
2 cost (after buy and sellback) of as little as \$1. A true and correct copy of this USA
3 Today article is attached as Exhibit E. On January 12, a Disney employee -- using
4 the secret VidAngel account created with payment information from Disney's
5 Director of Antipiracy Operations -- logged on to VidAngel account and purchased
6 Frozen and a Star Wars prequel. (See Exhibit F hereto.) This same employee
7 purchased and sold back 17 total titles over the next four months.

8 29. On March 3, 2016, Disney announced that it would release Star Wars:
9 The Force Awakens on DVD on April 5. The film would be available for digital
10 "purchase" (but not a shorter rental period) on April 1. I am aware that Plaintiffs
11 have used Star Wars: The Force Awakens to show that VidAngel purportedly makes
12 titles available before they become available in other digital markets. This is untrue.
13 In fact, the film was available for digital download purchase four days before
14 VidAngel could buy DVDs. Attached as Exhibit F is a true and correct copy of an
15 article regarding Disney's announcement. While the film was not made available
16 for shorter-term rentals when VidAngel began to make the filtered film available,
17 this is irrelevant because VidAngel does not rent titles. In any event, Star Wars:
18 The Force Awakens is the only major title released in this way, and it was clearly
19 done so at a time when the plaintiffs were planning litigation against VidAngel.
20 Despite VidAngel's growing popularity, the imminent release of Star Wars: The
21 Force Awakens, and the fact that Plaintiffs had been discussing VidAngel with one
22 another and outside counsel for over seven months, Plaintiffs did not send VidAngel
23 a cease and desist letter or seek an injunction. Instead, on April 5, Plaintiffs
24 purchased, streamed and sold back the film. (See Exhibit C.)

25 **VidAngel Invested Millions in Reliance Upon the Studios' Silence**

26 30. During the ten and a half months from VidAngel's first letter to the
27 filing of Plaintiffs' suit, VidAngel openly streamed filtered versions of every one of
28

1 Plaintiffs’ most popular titles as soon as they were available on DVD. During this
2 time, VidAngel continued to purchase DVDs. In total, VidAngel has spent over
3 \$1.2 million purchasing discs at retail. VidAngel has also spent millions of dollars
4 in funding since it wrote to Plaintiffs in July 2015. Attached as Exhibit G is a true
5 and correct copy of an article from October 2015 announcing that VidAngel had
6 raised \$2.5 million in additional funding. VidAngel invested most of that funding to
7 develop its current model prior to Plaintiffs filing suit. Prior to the filing of this
8 lawsuit, VidAngel also had applications approved on every major mobile
9 application store and set-top box (e.g., Roku, Apple App Store, Apple TV, Amazon
10 Fire TV, Android TV and Kindle Fire). Monumental efforts went into each one of
11 these apps. In fact, VidAngel hired scores of tech, support and content employees.
12 VidAngel also hired scores of contractors to support the employees. Also, VidAngel
13 updated all the streaming technology to play more smoothly and built a multi-
14 thousand title content library. After several months passed without objection from
15 the studios, VidAngel concluded that the studios did not object to its service. In
16 response to media inquiries about the legality of its service, I cited VidAngel’s
17 letters and the studios’ lack of objection as a basis for VidAngel believing its service
18 did not infringe. Attached as Exhibit H are news articles containing my quotes
19 about the studios having no objection to VidAngel’s service. Today, over 500,000
20 families have used VidAngel’s filtering service.

21 31. In fact, it was not until VidAngel announced its intention to seek
22 significant financing that Disney finally decided to sue. On May 24, 2016, a couple
23 of weeks before the suit, VidAngel informed its better customers (including Disney,
24 which has purchased 17 titles with its secret VidAngel account) of its intent to raise
25 additional funds through Regulation A+ financing. Then, and only then, did Disney
26 finally decide to sue. I believe this litigation was intentionally timed to cut off
27 VidAngel’s access to cash flow at a critical stage in its development and prevent our
28

1 modern filtering service from growing.

2 **VidAngel Is a Filtering Company**

3 32. Because VidAngel has catered only to people who want to filter the
4 motion pictures they watch in their homes, we did not immediately recognize that
5 others might try to abuse VidAngel’s service or exploit loopholes in our service to
6 watch motion pictures without filtering. At the very early stages of our service, our
7 system allowed one to stream a movie even if no filter was selected. At that time,
8 we trusted that our audience was using our service for filtering.

9 33. In December 2015, we created a #StopJarJar marketing campaign to
10 coincide with Star Wars 7 movie launch, giving away a free \$20 Star Wars movie.
11 We discovered that the campaign was attracting users who were watching Star Wars
12 without filters. We therefore halted the campaign and began requiring filters to
13 watch movies on VidAngel.

14 34. Later on, we discovered that other customers were setting a single
15 global filter (e.g., Jar Jar Binks) and then watching movies on the Roku that didn’t
16 have any tags for the selected filter, resulting in a few unfiltered streams. As soon as
17 we discovered potential loophole, we altered the system again so that it ensured that
18 a filter was set on each streamed movie. It has upset a few customers, but it has
19 allowed us to stay focused on our original target market of FMA-compliant filtering.

20 35. When the studios sued us, they complained that the opening and
21 closing credits were another loophole of sorts. Because we had always tried to
22 prevent improper use of VidAngel, we immediately removed the opening and
23 closing credits tags altogether. VidAngel received a few complaints from those who
24 were abusing the system, but it also got complaints from those who used those
25 filters for legitimate purposes. One reason these filters were created was that credits
26 are often more than mere lists of the people who did certain tasks in creating the
27 film. Some movies save the most offensive content for the credits. The titles and
28

1 credits feature allowed users to avoid such content. We are now updating our apps
2 to allow our customers to use the opening and closing credits filters provided that
3 they also pick at least one additional filter.

4 36. All of the above steps to remove potential loopholes and focus
5 VidAngel’s viewing experience on filtering have been a part of our evolution, as we
6 become known to a larger audience of people. VidAngel is committed to ensuring
7 that people come to VidAngel to view filtered versions of motion pictures.

8 37. Despite there being a few times where the system has been abused, our
9 data shows that 95.93 percent of VidAngel’s purchases came from users who
10 voluntarily chose more than one filter. VidAngel also ran these numbers for July
11 2016, and found that more recently 96.93 percent of VidAngel’s purchases came
12 from users who voluntarily chose more than one filter. This indicates that our users
13 are overwhelmingly using VidAngel for filtering, and that the number of users
14 choosing multiple filters is increasing.

15 38. The studios claim that VidAngel is threatening the “legitimate
16 streaming market” because VidAngel’s sellback model allows a net cost of \$1, but
17 the data prove otherwise. Because almost 96% of VidAngel’s purchasers have
18 selected multiple filters over VidAngel’s entire history, this means the version of the
19 film or television show VidAngel streams to them is of a different character than the
20 version available through other VOD providers like Google Play, Amazon Video,
21 VUDU and iTunes. VidAngel has had a long history of ensuring that it is reaching
22 its target filtering market.

23 39. VidAngel has additional data showing that most of its users would not
24 have watched the movie they chose to see absent filtering:

25 SURVEY QUESTION: Would you have watched "[title]" without a filter?

26 Out of 180,227 movies watched, 92,225 users said they would not have
27 watched the movie at all without filters (as of 8/26/2016). These answers come from
28

1 the account holders (usually parents). The numbers do not fully account for
2 hundreds of comments like these:

3 I would let my 13+ year old children watch without the filter. My younger
4 kids had to wait until Vidangel provided it.

5 My kids love this movie especially at Halloween but I hate it because it
6 needed to be edited. Thank you for editing it and putting it on your site.

7 The filter was great with younger kids watching (13 yr old in my case)

8 The filter was for the kids.

9 I wouldn't have let me kids watch without the filters.

10 My husband and I love the movie "Apollo 13" but we have never watched it
11 with our kids (youngest is age 7.) We muted the language that we feel is
12 inappropriate for our own household and were able to watch it with our
13 children. They loved it :)

14 I would have watched it without a filter with my older kids, but not the
15 youngsters.

16 40. This means that, while over half of all movies would not have been
17 watched by the account holders without filters at all, far more users would not have
18 watched the movie with their family without filters. This filtered-only viewership is
19 entirely additive to the studios' market, and the purchases of those films and shows
20 would not have occurred without VidAngel.

21 VidAngel's Marketing Is About Filtering

22 41. VidAngel is constantly testing advertising messages and the studios
23 have cherry picked a few that never even got traction. While the studios say
24 VidAngel has an "unfair advantage" using its net cost with sellback and filters as a
25 marketing hook, what they fail to acknowledge is that VidAngel is not a direct
26 competitor to their distribution partners because those partners do not offer filtering.

27 42. VidAngel learned in its early market testing that the market for filtered
28 content was far larger if customers did not have to pay an additional fee for filtering.
It seemed that customers felt they should be able to watch the movie however they
wanted after they had purchased the movie. As a company strategy, VidAngel

1 wanted to reach broadest filtering audience possible and adjusted its marketing
2 messages accordingly.

3 43. Historically, those who would like to enjoy filtered content had to pay a
4 premium price for the ability to do so (even purchase expensive hardware and a
5 subscription in addition to the cost of the movie). VidAngel’s messaging helps those
6 who think that filtering is more expensive and more difficult to realize that the
7 opposite is true. An analogy explains why VidAngel’s marketing references other
8 VOD services. People may believe that flying in an airplane is dangerous. Airlines
9 may highlight that the chances of dying in a car are higher than the chances of dying
10 in an airplane to dispel that myth and attract people to purchasing plane tickets.
11 Plane tickets do not directly compete with car sales, but the comparison is useful to
12 customers.

13 44. The number of users voluntarily choosing more than one filter (over 96
14 percent in July) are evidence that the studios have mistakenly concluded that
15 VidAngel’s marketing highlighting net cost gives VidAngel an “unfair advantage,”
16 when the approach is ultimately attracting a filtering audience rather than competing
17 with all the many distributors who do not offer filtering.

18 **The Studios Are Being Disingenuous Concerning the Lawsuit**

19 45. In their Complaint, the studios say they are suing VidAngel because it
20 is allegedly operating an "unlicensed VOD streaming service" even though
21 VidAngel is operating a remote filtering service under the FMA.

22 46. Plaintiffs claim that "The FMA requires that any copy or performance
23 made pursuant to that statute be otherwise 'authorized'— that is, not violating the
24 copyright owner’s other exclusive rights." Complaint (Dkt No. 1), ¶ 44. Under this
25 position, the authority to filter content in the home resides with the studios, not with
26 the family. This position would essentially repeal the FMA, which does not require
27 any consent from the studios to filtering (consent they would definitely not give).
28

1 modifications in the Picture; provided, [Sony] shall comply with any
2 contractual right of first opportunity to make such changes granted to
3 Director.

4 51. Given this language and the studio interpretation of the FMA, this
5 language trickles down through all agreements and ultimately hands the authority to
6 make any changes to the movie back to the director of the movie.

7 52. The legislative history of the FMA reflect that the DGA refused to
8 testify or cooperate with Congress in any way when FMA was being debated in
9 Congress. The DGA and the studios would not seek a business deal with filtering
10 companies in 2004. And these are the same organizations who have not filled the
11 market need for filtering for the last decade, leading a few brothers from Idaho to
12 ask themselves, “Why isn’t there filtering for streaming?”

13 53. If the court were to interpret the law as argued by the studios, then
14 VidAngel will not be able to operate under the “transmitted” language of the FMA
15 because the studios will not sell VidAngel a license that permits filtering. In fact,
16 they are unable to do so without cooperation from the DGA. And lack of
17 cooperation from the DGA is the reason the FMA was passed by Congress in the
18 first place. VidAngel is the only entity that provides a filtering service under the
19 FMA for those viewing title on modern mobile devices such as smartphones, tablets,
20 and SmartTVs.

21 **VidAngel Would Love to Purchase a Filtered Streaming License**

22 54. VidAngel has various business reasons for which it is preferable to
23 purchase a streaming license that allows for filtering. For example:

- 24 a) Discs will increasingly become less available and may eventually be
25 phased out of existence.
26 b) New customers complain about VidAngel’s buy/sellback model and
27 ask why they can’t just rent the movies.
28 c) A streaming license would allow VidAngel to provide both filtered and
unfiltered versions of movies.

1 d) There is a lot of overhead and waste in managing a vault of physical
2 discs.

3 e) Acquiring physical discs through retailers is time consuming and
4 difficult.

5 f) When customer demand exceeds our supply, VidAngel has to send
6 customers out-of-stock notices. VidAngel sent out almost 60,000 unique customers
7 over 250,000 out of stock notices last month alone. This means that VidAngel
8 turned away 250,000 requests for streams that it could have received income for if it
9 had a standard VOD distribution agreement that allows for filtering.

10 g) When VidAngel purchases more discs than it is ultimately able to sell,
11 it ends up with hundreds or thousands of discs that it will never sell.

12 55. VidAngel assumed that it needed to have significant size before the
13 studios would ever consider a filtered licensing deal. Some contacts in Hollywood
14 told me to wait until we had over 1 million users, preferably over 5 million.

15 56. In fact, VidAngel started talking with a local distributor in Utah about a
16 licensing deal in May of 2016, before the lawsuit. This distributor has agreed to
17 licensing its latest film to VidAngel because it has not signed an agreement with the
18 DGA and can permit filtering of content.

19 57. After Plaintiffs filed their lawsuit, VidAngel inquired of some of the
20 plaintiffs whether they were open to a business solution rather than litigation.

21 58. VidAngel also met with Sony, Lionsgate and Paramount about a
22 licensing deal since those studios had not sued them. VidAngel has reached out to
23 many others. These studios have either said, “this is complicated legally,” or
24 “maybe we can solve the problem with the airline cut,” or “you have to get the DGA
25 to agree first.” Multiple studios said they would get back to me after meeting with
26 their legal teams and never did.

27 59. Finally, I am aware that my counsel has emailed counsel for Disney
28

1 and offered to make certain changes to VidAngel’s model and that Plaintiffs’
2 counsel responded: “my clients absolutely will not engage in any joint licensing
3 discussions.” Counsel for VidAngel then offered to abandon its FMA exemption
4 defense (and with it the requirement that consumers must purchase copies of discs)
5 and instead pay a streaming license fee to stream filtered content, noting that this
6 arrangement would resolve Disney’s DMCA and infringement claims. Disney has
7 not responded to this offer.

8 60. It appears that VidAngel is back to 2005 again, with no business
9 solution available to VidAngel.

10 **New Releases on VidAngel Generate**
11 **Revenue Share Similar to Studio Contracts**

12 61. Over its history, much of VidAngel’s revenue comes from the sale and
13 filtered streaming of popular movies within the first four weeks of their release.
14 Each new release DVD or Blu-ray is purchased by VidAngel and is then sold to its
15 customers (after it is bought back by VidAngel) on average 16 times. The average
16 net revenue for each transaction over VidAngel’s history is \$1.20. The average cost
17 for a new release DVD or Blu-ray is \$15.01. This means that VidAngel, on average,
18 contributes \$15.01 in capital for total revenue of \$19.20. In other words, the studios
19 receive approximately 78% of all of the revenue VidAngel receives on a new release
20 title. By comparison, the Google Play and VUDU VOD Distribution Agreements
21 with Sony calls for Sony to receive 70% of the revenue day one, and receive 65%
22 for the four weeks thereafter for all new release rentals.

23 **VidAngel Maintains It Has Robust Records of Every Transaction**
24 **In Its History Related to Each of Plaintiffs’ Titles**

25 62. VidAngel maintains records of every transaction. Those records
26 include the date purchased, date sold back, amounts paid to purchase and sell back,
27 the specific disc purchased and filters used. VidAngel maintains that data for every
28

1 title VidAngel users have ever filtered and streamed.

2 **VidAngel Will Suffer Tremendous Hardship If an Injunction Issues**

3 63. In the event that VidAngel is enjoined on October 24, 2016, the
4 following financial damages (immediate, and future) would be incurred in the
5 estimated 18-month timeframe for the trial to occur:

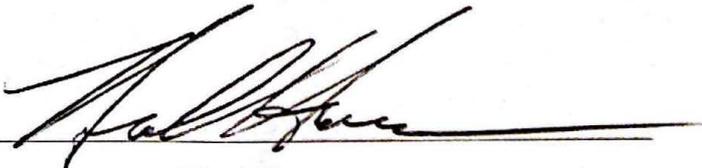
- 6 a. [REDACTED]. VidAngel is
7 currently operating at a [REDACTED], this includes
8 Hosting, Credit Card Fees, and Tagging Costs. [REDACTED].
9 [REDACTED].
- 10 b. VidAngel expects to have a user base of [REDACTED]
11 by April 2018 (18 months from the injunction hearing). With a
12 [REDACTED], and a [REDACTED]
13 [REDACTED], the [REDACTED].
14 If VidAngel were to be enjoined, the total value of the customers
15 lost would be [REDACTED].
- 16 c. In Apr 2018, VidAngel's monthly revenue run rate is projected to
17 be at [REDACTED] per month, or an annual [REDACTED]
18 [REDACTED]. If VidAngel achieves this goal in the timeframe
19 projected, the company would be valued at, or above, [REDACTED]
20 [REDACTED]. All of this potential market value would be lost if
21 VidAngel is enjoined.

22 VidAngel, formed just three years ago, has only 20 full-time employees. To date,
23 VidAngel has been capitalized with over \$3.6 million and has spent over a third of
24 that capital, \$1.2 million, purchasing discs.

1 64. VidAngel developed its filter-and-stream technology just as consumer
2 preferences were beginning to move away from getting physical DVDs/Blu-ray
3 discs to watch on a home television to having content streamed to them to watch on
4 all sorts of devices, which now are only infrequently a television set. Consumers
5 increasingly want to avoid having to obtain discs and want the freedom to watch
6 content on tablet, laptop, and desktop computers, smart telephones, and other
7 devices, and want to be able to watch content wherever they may be, in private. As
8 consumer preferences involving digital technologies always do, the preference for
9 streamed content is happening rapidly and the bulk of the transition will likely be
10 complete in less than three years. VidAngel is the only company currently
11 streaming filtered content to customers. (The only other content filtering service
12 sells devices that consumers may use at home to filter the content of physical DVD
13 and Blu-ray discs being watched on a television set.) As the sole competitor
14 offering to provide filtered streamed content to modern devices, VidAngel
15 obviously has a significant head start over potential competitors in developing its
16 technology and increasing its know-how. Further, VidAngel owes a large portion of
17 its success to the highly capable and competent employees and independent
18 contractors it has attracted, trained, and retained. Were VidAngel to be enjoined
19 during the pendency of this action, it would lose all the advantages described above.

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

22 Executed on September 12, 2016, at Provo, Utah.

23
24
25
26
27
28


Neal Harmon

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)
bgrace@bakermarquart.com
5 BAKER MARQUART LLP
2029 Century Park East, Sixteenth Floor
6 Los Angeles, California 90067
Telephone: (424) 652-7800
7 Facsimile: (424) 652-7850

8 Peter K. Stris (Bar No. 216226)
peter.stris@strismaher.com
9 Brendan Maher (Bar No. 217043)
brendan.maher@strismaher.com
10 Elizabeth Brannen (Bar No. 226234)
elizabeth.brannen@strismaher.com
11 Daniel Geyser (Bar No. 230405)
daniel.geyser@strismaher.com
12 STRIS & MAHER LLP
725 South Figueroa Street, Suite 1830
13 Los Angeles, California 90017
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
18 Facsimile: (732) 377-0388

19 *Attorneys for Defendant and*
Counterclaimant VidAngel, Inc.
20

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)

**FILED UNDER SEAL PURSUANT
TO ORDER OF THE COURT
DATED SEPTEMBER 14, 2016 (Dkt.
75)**

**VIDANGEL'S MEMORANDUM OF
POINTS AND AUTHORITIES IN**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VIDANGEL, INC.,

Defendant.

VIDANGEL, INC.,

Counterclaimant,

vs.

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

Counterclaim Defendants.

**OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION**

Judge: Hon. André Birotte Jr.

Date: October 24, 2016
Time: 10:00 a.m.
Courtroom: 4

Filed concurrently herewith:

Request for Judicial Notice,
Declarations of Neal Harmon, Sigurd
Meldal, Jaime Marquart, David Quinto,
Elizabeth Ellis, Theodore Baehr, David
Barton, Tim Barton, Gary Bauer, David
Bozell III, L. Brent Bozell, Connor
Boyack, Rick Green, Rebecca Hagelin,
Donna Rice Hughes, Harry Jackson,
Matt Kibbe, Andrea Lafferty, Gary
Marz, Bryan and Diane Schwartz, Bob
Waliszewski, Tim Wildmon, and
Timothy F. Winter; Evidentiary
Objections; Application to File Under
Seal with Supporting Declaration of
Jaime Marquart and Proposed Order

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	1
FACTUAL BACKGROUND.....	3
A. Prior to 2005, Disney Used Copyright Litigation to Prevent Customers Who Purchased Movies for Home Viewing from Filtering Objectionable Content.....	3
B. Congress Enacted the FMA to Ensure that Families Could Watch Filtered Content in Private.....	4
C. Congress’s Decision to Authorize For-Profit Companies to Stream Lawfully Purchased Movies for Filtered Home Viewing Was Knowingly Made Over Disney’s Vigorous Opposition.....	5
D. In Furtherance of Its Unlawful Agreements with the DGA, Disney Prohibits Filtering in All Streaming Licenses.....	7
E. Unable to Obtain a License from Disney, VidAngel Has Developed an FMA Authorized Streaming Business Model That Enables Customers Who Purchase Movies for Home Viewing to Filter Objectionable Content.....	8
LEGAL STANDARD.....	9
ARGUMENT.....	9
I. DISNEY IS NOT LIKELY TO PREVAIL.....	9
A. Disney Will Not Succeed on Its Reproduction and Public Performance Copyright Claims.....	10
B. In Any Event, the FMA Shields Companies Like VidAngel From Liability Under any Provision on the Copyright Act.....	12
C. VidAngel’s Service Does Not Violate the Copyright Act’s Anticircumvention Provisions Found in the DMCA.....	16

D.	Even if VidAngel Is in Technical Violation of the Law, Its Service Is a Protected Fair Use.....	19
1.	VidAngel’s Service Is Highly Transformative.....	19
2.	Plaintiffs’ Works Are Especially Amendable to Fair Use.....	20
3.	VidAngel’s Users May Access Plaintiffs’ Works Only for Transformative Purposes.....	20
4.	VidAngel’s Lawful Filtering Service Increases Disney’s Disc Sales.....	21
5.	The <i>Clean Flicks</i> Fair Use Analysis Is Inapposite.....	22
II.	DISNEY CANNOT DEMONSTRATE IRREPARABLE HARM...	22
A.	Disney’s Year and a Quarter Delay Demonstrates That an Injunction Is Unnecessary to Prevent Immediate and Irreparable Harm.....	22
B.	Disney’s Alleged Harms Are Caused by the FMA, Not VidAngel.....	25
C.	Disney’s Alleged Harms Are Speculative.....	26
D.	Disney’s Alleged Harms Are Economic.....	28
III.	THE BALANCE OF HARDSHIPS WEIGHS AGAINST A PRELIMINARY INJUNCTION.....	29
IV.	THE PUBLIC INTEREST STRONGLY FAVORS ALLOWING FAMILIES TO USE VIDANGEL’S FILTERING SERVICE.....	31
A.	The Supreme Court Has Repeatedly Protected the Public from Offensive Content.....	31
B.	VidAngel Serves an Important Public Interest.....	32
V.	ANY INJUNCTION SHOULD BE CONDITIONED ON THE POSTING OF A LARGE BOND.....	33
	CONCLUSION.....	35

TABLE OF AUTHORITIES

Page

CASES

<i>A&M Records, Inc. v. Napster, Inc.</i> , 239 F. 3d 1004 (9th Cir. 2001)	34
<i>Activant Sols., Inc. v. Wrenthead, Inc.</i> , No. C 03-3376 VRW, 2004 WL 1887529 (N.D. Cal. Aug. 23, 2004)	31
<i>All for the Wild Rockies v. Cottrell</i> , 632 F.3d 1127 (9th Cir. 2011)	30
<i>Alvarez v. Tracy</i> , 773 F.3d 1011 (9 th Cir. 2014)	15
<i>American Broadcasting Companies, Inc. v. Aereo, Inc.</i> , 573 U.S. 134 S. Ct. 2498 (2014)	11, 24
<i>Authors Guild v. Google, Inc.</i> , 804 F.3d 202 (2d Cir. 2015), <i>cert. denied sub nom. Authors Guild v.</i> <i>Google, Inc.</i> , 136 S. Ct. 1658 (2016).....	19, 20
<i>Bird-B-Gone, Inc. v. Bird Barrier Am., Inc.</i> , 2013 WL 11730662 (C.D. Cal. Mar. 20, 2013)	25
<i>Buddy Systems, Inc. v. Exer-Genie, Inc.</i> , 545 F. 2d 1164 (9th Cir. 1976)	33
<i>Cabell v. Markham</i> , 148 F.2d 737 (2d Cir. 1945)	12
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	19, 21
<i>Capitol Records v. Redigi</i> , No. 1:12-cv-00095, Order Denying Motion for Preliminary Injunction (S.D.N.Y. February 6, 2012)	29
<i>Citibank N.A. v. Citytrust</i> , 756 F.2d 273 (2d Cir.1985)	23
<i>Clean Flicks of Colo., LLC v. Soderbergh</i> , 433 F. Supp. 2d 1236 (D. Colo. 2006)	22
<i>Columbia Pictures Indus., Inc. v. Miramax Films Corp.</i> , 11 F. Supp. 2d 1179 (C.D. Cal. 1998).....	21

<i>Corley v. United States</i> , 556 U.S. 332 (2009).....	12, 13
<i>Credit Bureau Connection, Inc. v. Pardini</i> , 726 F. Supp. 2d 1107 (E.D. Cal. 2010)	34
<i>Cybermedia, Inc. v. Symantec Corp.</i> , 19 F. Supp. 2d 1070 (N.D. Cal. 1998).....	34
<i>Design Furnishings, Inc. v. Zen Path, LLC</i> , 2010 WL 5418893 (E.D. Cal. Dec. 23, 2010).....	34
<i>eBay, Inc. v. MercExchange, LLC</i> , 547 U.S. 388 (2006).....	24, 26
<i>FCC v. Fox Television Stations, Inc.</i> , 556 U.S. 502 (2009).....	32
<i>FCC v. Pacifica Foundation</i> , 438 U.S. 726 (1978).....	32
<i>Flexible Lifeline Systems, Inc. v. Precision Lift, Inc.</i> , 654 F.3d 989 (9 th Cir. 2011)	26
<i>Fox Broadcasting Co. Inc. v. Dish Network, L.L.C.</i> , 905 F. Supp. 2d 1088 (C.D. Cal. 2012).....	25, 26, 29
<i>Fox Broadcasting Co. v. Dish Network LLC</i> , 747 F.3d 1060 (9 th Cir. 2013)	25, 29
<i>Garcia v. Google, Inc.</i> , 786 F.3d 733 (9 th Cir. 2015)	25
<i>Goldie’s Bookstore, Inc. v. Super. Ct.</i> , 739 F.2d 466 (9 th Cir. 1984)	26
<i>Green v. U.S. Department of Justice</i> ,, No. 1:16-cv-01492-EGS (D.D.C. filed on July 21, 2016).....	18
<i>Hanginout, Inc. v. Google, Inc.</i> , 54 F. Supp.3d 1109 (S.D. Cal. 2014)	23
<i>Harper & Row Publishers v. Nation Enters.</i> , 471 U.S. 539 (1986).....	21
<i>Hibbs v. Winn</i> , 542 U.S. 88 (2004).....	12
<i>Huntsman v. Soderbergh</i> , No. 02-M-1662 (MJW), 200 WL 1993421 (D. Colo. filed Aug. 29, 2002)	14, 15
<i>Hybritech Inc. v. Abbott Labs.</i> , 849 F.2d 1446 (Fed.Cir.1988)	31

<i>Indep. Living Ctr. v. Maxwell–Jolly</i> , 572 F.3d 644 (9th Cir.2009).....	31
<i>Int’l Jensen, Inc. v. Metrosound U.S.A., Inc.</i> , 4 F.3d 819 (9th Cir. 1993).....	30
<i>Kelly v. Arriba Soft</i> , 336 F.3d 811 (9th Cir. 2003).....	10, 20
<i>Lopez v. Brewer</i> , 680 F.3d 1068 (9th Cir. 2012).....	30
<i>LucasArts Entm't Co. v. Humongous Entm’t Co.</i> , 815 F. Supp. 332 (N.D. Cal. 1993).....	30
<i>MacDonald v. Chicago Park Dist.</i> , 132 F.3d 355 (7th Cir. 1997).....	31
<i>MCA, Inc. v. Wilson</i> , 667 F.2d 180 (2d Cir. 1981).....	21
<i>MDY Industries, LLC v. Blizzard Entertainment, Inc.</i> , 629 F.3d 928 (9th Cir. 2010).....	18
<i>Mead Johnson & Co. v. Abbott Labs.</i> , 201 F. 3d 883 (7th Cir. 2000).....	33
<i>Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.</i> , 545 U.S. 913, 125 S. Ct. 2764 (2005).....	17
<i>MGM v. Honda Motor Co.</i> , 900 F. Supp. 1287 (C.D. Cal. 1995).....	34
<i>Oakland Trib., Inc. v. Chron. Pub. Co.</i> , 762 F.2d 1374 (9th Cir. 1985).....	23
<i>OG Int’l, Ltd. v. Ubisoft Entm’t</i> , No. C 11-04980 CRB, 2011 WL 5079552 (N.D. Cal. Oct. 26, 2011).....	30
<i>Ossur Holdings, Inc. v. Bellacure, Inc.</i> , No. C05-1552JLR, 2005 WL 3434440 (W.D. Wash. Dec. 14, 2005).....	30
<i>Overstreet v. United Bros. of Carpenters and Joiners of Am.</i> , 409 F.3d 1199 (9th Cir. 2005).....	18
<i>Perfect 10, Inc. v. Amazon.com, Inc.</i> , 508 F.3d 1146 (9th Cir. 2007).....	20
<i>Perfect 10, Inc. v. Google, Inc.</i> , 653 F.3d 976 (9 th Cir. 2011).....	25

<i>Petrella v. Metro-Goldwyn-Mayer, Inc.</i> , 134 S. Ct. 1962 (2014).....	24
<i>Pyro Spectaculars N., Inc. v. Souza</i> , 861 F. Supp.2d 1079 (E.D. Cal. 2012)	28
<i>Realnetworks, Inc. v. DVD Copy Control Ass'n</i> , 641 F. Supp. 2d 913 (N.D. Cal. 2009).....	11
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997).....	32
<i>Rent-A-Center v. Canyon Television & Appliance Rental, Inc.</i> , 944 F.2d 597 (9 th Cir. 1991)	26, 28
<i>Rowan v. United States Post Office Dept.</i> , 397 U.S. 728 (1970).....	32
<i>Sammartano v. First Judicial Dist. Ct.</i> , 303 F.3d 959 (9th Cir. 2002)	31
<i>Sega Enters. Ltd. v. Accolade Inc.</i> , 997 F.2d 1510 (9th Cir. 1992)	10
<i>Sierra Forest Legacy v. Rey</i> , 577 F.3d 1015 (9 th Cir. 2009)	31
<i>Sony Computer Entm't, Inc. v. Connectix Corp.</i> , 203 F.3d 596 (9th Cir. 1999)	10
<i>Sony Corp. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984).....	9
<i>Stone v. INS</i> , 514 U.S. 386 (1995).....	12
<i>Stormans, Inc. v. Selecky</i> , 586 F.3d 1109 (9th Cir. 2009)	31, 33
<i>The Squaxin Island Tribe v. State of Washington</i> , 781 F. 2d 715 (9th Cir. 1986)	33
<i>Topline Corp. v. 4273371 Canada, Inc.</i> , 2007 WL 2332471 (W.D. Wash. Aug. 13, 2007).....	34
<i>Universal City Studios, Inc. v. Corley</i> , 273 F. 3d 429 (2 nd Cir. 2001).....	11
<i>U.S. c. Elcom Ltd.,</i> 203 F. Supp. 2d 1111 (N.D. Cal. 2002).....	11
<i>Valeo Intell. Prop., Inc. v. Data Depth Corp.</i> , 368 F. Supp. 2d 1121 (W.D. Wash. 2005)	23

<i>Warner Bros. Entertainment Inc. v. WTV Systems, Inc.</i> , 824 F. Supp. 2d 1003 (2011)	22, 23
<i>Weinberger v. Romero-Barcelo</i> , 456 U.S. 305 (1982).....	31, 33
<i>Winter v. Natural Res. Defense Council, Inc.</i> , 555 U.S. 7 (2008).....	1, 9, 24

STATUTES

15 U.S.C. § 1114(3)(A).....	7
17 U.S.C. § 101	13
17 U.S.C. § 106(1), (4).....	9
17 U.S.C. § 110(11)	passim
17 U.S.C. § 1203(b)(1).....	18
17 U.S.C. § 1201(a)(1)(A)	9, 16, 18
F.R.C.P. § 65(c)	33

OTHER AUTHORITIES

150 CONG. REC. H7654-01 (Sept. 24, 2004)	4, 5, 13, 16
150 CONG. REC. s11852-01 (Nov. 24, 2004).....	16, 17
151 CONG. REC. H2114-01 (Apr. 10, 2005)	5
4 Nimmer on Copyright § 14.06[A][3][c]	23
H.R. REP. No. 108-670 (2004).....	4, 12, 13
H.R. REP. No. 109-33(I)	passim
U.S. COPYRIGHT OFFICE, Docket No. 2014-07, EXEMPTION TO PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTIONS SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES (2015).....	11

1 **INTRODUCTION**

2 Disney and three other Hollywood studios (“Disney”) have sued VidAngel, a
3 small Utah-based company that operates an online video streaming service designed
4 to enable lawful owners of movies to filter out objectionable content before viewing
5 those movies at home. According to Disney, VidAngel is a copyright pirate that
6 chooses to steal rather than “negotiate and pay for the rights they use.” *See*
7 *Plaintiffs’ Memorandum of Points and Authorities (“MPAS”)* at 1:22-23. Like
8 many of its movies, however, Disney’s story is pure fantasy.

9 When that story is fully told, three things are clear: (1) VidAngel is no
10 pirate. It spent over a third of its capital contributions to buy DVD and Blu-ray
11 discs sold by the studios and re-sells them to consumers, many of whom would not
12 otherwise watch the movies recorded on them. (2) Disney is no victim. It is a bully
13 that, acting in concert with other powerful companies, has long engaged in an
14 unlawful effort to block *any* online filtering services for the at-home viewing of
15 lawfully purchased movies. And (3) this lawsuit is about *filtering*, not piracy. It is
16 an elegantly disguised attempt by Disney’s lawyers to accomplish what its lobbyists
17 could not: obstruction of the Family Home Movie Act of 2005 (“FMA”).

18 Currently before this court is Disney’s motion for a preliminary injunction
19 seeking to shut down VidAngel’s operations pending resolution of this
20 litigation. That motion must be denied.

21 It is well settled that a party seeking the “extraordinary remedy” of a
22 preliminary injunction must “clearly show” that it is likely to succeed on the merits;
23 that it will suffer irreparable harm without an injunction; that the balance of equities
24 tips in its favor; and that an injunction is in the public interest. *Winter v. Natural*
25 *Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Disney has not met—and cannot
26 meet—its burden on *any* (let alone all four) of those factors.

27 First, Disney cannot establish that any of its claims are likely to
28 succeed. VidAngel’s service is both legal and fair.

1 It is legal because nothing VidAngel does can reasonably be construed as
2 infringement or circumvention under federal law. Any possible confusion on that
3 issue was conclusively resolved by Congress over a decade ago. The FMA
4 authorizes for-profit companies to stream lawfully purchased movies for home
5 viewing with objectionable content filtered out pursuant to each customer's
6 individual choice. Disney vigorously opposed the FMA. They lost, but have
7 continued their war against filtering by refusing to license any company ever to
8 filter lawfully purchased content for home viewing. Without apparent irony, Disney
9 insists that VidAngel's DVD-based business model is illegal, when it is *Disney's*
10 *misconduct* that has effectively made that model the only way in which FMA-
11 authorized filtering can be meaningfully made available to American families.

12 VidAngel's service is also fair. Contrary to Disney's intimations and
13 accusations, every VidAngel customer must actually purchase a Disney movie
14 before it is streamed for their home viewing. If Disney's view of the law were
15 adopted, anyone who wanted to purchase and have a filtered movie streamed for
16 home-viewing would be forced to pay Disney *twice* for that privilege: once for the
17 DVD and once to watch it. That's unfair.

18 Second, Disney cannot show that VidAngel's continued operation pending
19 trial would cause any irreparable harm. After receiving letters from VidAngel in
20 July and August of 2015, Disney (and all five other major studios) discussed
21 VidAngel's service for almost a year before Disney (but not three other major
22 studios) elected to file this action. Less than two weeks after receiving VidAngel's
23 first letter, Disney established a VidAngel account, and the major studios exchanged
24 over 1,300 emails related to VidAngel in the ten-plus months before suit. Disney
25 then waited several more months before seeking to enjoin VidAngel's service. That
26 is not how Big Hollywood responds to pirates, *however small*, and it is not how they
27 react to those who traffic in DMCA circumvention technologies aimed at facilitating
28 piracy. In those cases, the studios have always acted quickly and in concert. Here,

1 in contrast, Disney took a year, not to build a case against a pirate, but to decide how
2 to neutralize an act of Congress. Such extraordinary delay bars injunctive relief.

3 Finally, Disney cannot prove that the balance of hardships tips decisively in
4 its favor or that the public interest supports a preliminary injunction. To the
5 contrary, the balancing of hardships weighs strongly in favor of VidAngel, the only
6 participant in a nascent market being suppressed by Disney. Moreover, as
7 evidenced by the half-million families it has already served, that market serves an
8 important public interest recognized by Congress when it passed the FMA.

9 **FACTUAL BACKGROUND**

10 This case is about *filtering*, not piracy. And Disney is going to lose, because
11 Congress said so. Specifically, the FMA authorizes for-profit companies such as
12 VidAngel to stream lawfully purchased movies for home viewing with objectionable
13 content filtered out pursuant to each customer’s individual choice. Disney and the
14 other major studios vigorously opposed the FMA. They lost, but have continued
15 their war against filtering by refusing to license any company to filter content.
16 Declaration of Jaime Marquart (“Marquart Dec.”), Ex. B at Tr. 83:20-84:21. That
17 *de facto* ban has necessitated VidAngel’s DVD-based business model, which makes
18 the filtering authorized by the FMA meaningfully available to American families.
19 To correct the highly misleading narrative set forth by Disney, we begin with a brief
20 summary of the relevant factual history.

21 A. **Prior to 2005, Disney Used Copyright Litigation to Prevent** 22 **Customers Who Purchased Movies for Home Viewing From** 23 **Filtering Objectionable Content.**

24 Before 2005, the motion picture studios sued every service that tried to
25 provide filtered content to consumers. H.R. REP. No. 109-33(1) at 7 (2005). Like
26 today, Disney and its allies attempted to use scorched-earth litigation tactics to bully
27 smaller players. As the House Judiciary Committee noted with some incredulity,
28 Disney and its allies had sued companies *lawfully* providing filtering services under
the pre-FMA legal regime: “Testimony provided by the Register on June 17, 2004,

1 makes clear that some parties to the suit should not face liability for their current
2 actions.” *Id.* at 5. *See also* H.R. REP. No. 108-670, at 3 (2004) (“The Committee is
3 . . . concerned that one service that has adopted a model that is already legal under
4 existing law is embroiled in litigation.”). The Committee also observed that if
5 Disney and its allies had allowed the “airline and broadcast versions [of movies to] .
6 . . be[] made available for sale to the public,” new legislation (which became the
7 FMA) might not have been needed. H.R. REP. No. 108-670, at 3 (2004).

8 Indeed, it was precisely because Big Hollywood refused to acknowledge the
9 moral rights of American families to filter objectionable content that Congress
10 changed the law by enacting the FMA over 11 years ago.

11 **B. Congress Enacted the FMA to Ensure that Families Could Watch**
12 **Filtered Content in Private**

13 There is no serious doubt concerning the purpose of the FMA. It was enacted
14 to ensure “that existing copyright and trademark law cannot be used to prevent a
15 parent from deciding what their children see in the privacy of their own home”
16 because Congress did “not take kindly to those who would presume to tell parents
17 how they decide what is best for their children.” 150 CONG. REC. H7654-01 (Sept.
18 24, 2004) (statement of Rep. Sensenbrenner). Congress sought to “shield[]
19 companies that make movie-filtering systems from liability for copyrighting
20 infringement,” *id.*, and “ensure” that technology that helps parents “determine what
21 their children see on the screen” would “not face continued legal challenges.” *Id.*
22 (statement of Rep. Smith).

23 Congress wanted to “allow for technology innovation to flourish without
24 having to face continued legal challenges” and without “requir[ing] limits to be
25 placed on content the studios develop.” *Id.* (statement of Rep. Cannon). At the
26 same time, though, Congress wanted to allow other use of “*available* technology to
27 skip over portions of a movie.” 151 CONG. REC. H2114-01 (Apr. 10, 2005)
28 (statement of Rep. Sensenbrenner). It was “time for the rights of parents not to be

1 tied up in the courts any longer.” *Id.*

2 Congress believed strongly that families should be allowed to filter content
3 shown at home. The FMA’s House sponsor succinctly explained that need:

4 Just as the author of a book should not be able to force someone to read
5 that book in any particular manner or order, a studio or director should
6 not be able to force our children to watch a movie in a particular
7 way. No one can argue with a straight face it should be against the law
8 to skip over a few pages or even entire chapters of a book. So, too,
9 it should not be illegal to skip over a few words or scenes in a
10 movie. The Family Movie Act ensures that parents have such rights.

11 150 CONG. REC. H7654-01 (Sept. 28, 2004) (statement of Rep. Lamar
12 Smith). Congressman Cannon observed that the FMA was intended to allow parents
13 “to protect their children from the sex, violence, profanity and other objectionable
14 materials that are found in movies” by “clarifying the exemption in the copyright
15 infringement law allowing people to skip, mute or avoid scenes on DVDs.” *Id.*

16 As explained below, the legislative choices that Congress made in the FMA
17 were *directly* intended to prevent studios or directors from using litigation to block
18 parental filtering they disliked.

19 C. **Congress’s Decision to Authorize For-Profit Companies to Stream**
20 **Lawfully Purchased Movies for Filtered Home Viewing Was**
21 **Knowingly Made Over Disney’s Vigorous Opposition.**

22 Disney and all the major studios—as well as the Motion Picture Association
23 of America (MPAA), and the Directors Guild of America (DGA)—fought *intensely*
24 to prevent the passage of the FMA. *See, e.g.*, H.R. REP 109-33(1) at 70. Their
25 central grievance was the same as here, namely, that *only* Disney and its friends
26 should have the right to make “editorial decisions” about movies. The FMA was
27 problematic because it stopped studios from invoking copyright law to block
28 filtering they did not bless. *Id.*

As Disney’s Capitol Hill allies explained in a minority report reflecting the
reason for Disney’s opposition to the FMA: “The issue in the debate [is] *who should*
make editorial decisions about what movie content children see: parents or a for-
profit company,” H.R. REP. No. 109-33(1) at 69 (emphasis added). The minority

1 report further noted that the FMA “does not require that filtering be done with the
2 permission of the content creator or owner, but rather creates an *exemption from*
3 *copyright and trademark liability for filtering.*” *Id.* at 74 (emphasis added). Indeed,
4 Congresswoman Watson memorably complained that the FMA would “shield[]
5 companies that make movie-filtering systems from liability for copyrighting
6 infringements.” *Id.* Exactly.

7 Then and now, Disney and its allies were and are motivated by the same goal:
8 to prevent *any* parental filtering.¹ For Disney, home-viewing was and is an all or
9 nothing proposition: “[D]on’t let your children watch a movie unless you approve of
10 the content of the entire movie.” H.R. REP. No. 109-33(I) at 72. In Disney’s
11 preferred world, parents’ only recourse should be to rely on its G, PG, PG-13, R,
12 and NC-17 rating system, which according to Disney, “effectively enable[s] parents
13 to steer their children away from movies they consider inappropriate.” *Id.*²

14 In the considered judgment of Congress, that view was an unacceptable insult
15 to the right of parents to control content in their own home in accord with their
16 constitutionally-protected values. At the same time, Congress was acutely sensitive
17

18 ¹ The inability to completely control what is filtered underlies several of Disney’s
19 alleged “irreparable injuries.” *See* Cittadine Dec., ¶¶ 5, 15-17, 21-34. If that were
20 correct, Disney would be irreparably injured every time a movie-watcher closed his
eyes to avoid seeing a scary scene.

21 ² Of course, as the House Judiciary Committee wryly observed, Disney fails to
assert the moral rights of movie directors when such is inconvenient to Disney:

22 The Committee is aware of numerous motion pictures being edited for
23 screen size, content, and time purposes with or without the director’s
24 consent so that a motion picture can be displayed on the 48-3 aspect
25 ratios of standard definition televisions, or an airplane with
objectionable language remove, and on television channels in the
26 traditional 90 or 120-minute time slots. The Committee sees no
difference between the impact upon the moral rights of directors of
such modifications and someone wanting to prevent certain content
from being displayed on their television.

27 H.R. REP. No. 109-33(I) at 7.
28

1 to the prospect that the studios and directors might never license third parties to
2 stream filtered content to consumers. Accordingly, the FMA was drafted to permit
3 third parties to filter *without consent* and without liability for intellectual property
4 claims the studios and directors might assert.

5 To that end, the FMA amended section 110 of the Copyright Act to provide
6 that “the following are *not* infringements of copyright: . . . (11) the making
7 imperceptible, by or at the direction of a member of a private household, of limited
8 portions of audio or video content of a motion picture, during a performance . . .
9 transmitted to that household for private home viewing, from an authorized copy of
10 the motion picture . . . if no fixed copy of the altered version of the motion picture is
11 created” 17 U.S.C. § 110(11) (emphasis added). The Lanham Act was
12 similarly amended. *See* 15 U.S.C. § 1114(3)(A).

13 **D. In Furtherance of Its Unlawful Agreements with the DGA, Disney**
14 **Prohibits Filtering in All Streaming Licenses**

15 Disney and other MPAA member studios have entered into an agreement with
16 the DGA (“DGA Agreement”) that prohibits all but very limited editing or cutting
17 of their major motion pictures and does not allow any form of filtering under the
18 FMA. (Dkt. No. 11). VidAngel has counter-complained against Disney for
19 antitrust violations with respect to the DGA Agreement, alleging that the agreement
20 is part of a concerted effort to prohibit the lawful provision of online filtering
21 services pursuant to the FMA. *Id.*

22 Disney’s witness, Tedd Cittadine, admitted that no plaintiff in this case has
23 ever licensed any VOD provider to filter streamed movies. Marquart Dec., Ex. B at
24 Tr. 83:20-84:21. He further admitted that his company’s standard VOD agreements
25 all have a term similar to the one in the VOD agreement between Sony and Google
26 Play. Marquart Dec., Ex B at Tr. 343:6-21. That agreement prohibits the VOD
27 provider from “mak[ing], or authoriz[ing] any others to make, any modifications,
28 deletions, cuts, alterations or additions” in or to any of Disney’s titles sold by the

1 VOD provider. Harmon Dec., ¶ 48; Quinto Dec., ¶¶ 2-4, Ex. A. The terms of
2 service of VOD providers likewise prevent users from filtering Disney titles they
3 buy from a VOD provider. Meldal Dec., ¶¶ 26, 29, 30, Exs. G & H. To obviate this
4 motion, VidAngel offered to enter into a standard VOD license agreement with
5 Disney that allowed for filtering. Harmon Dec., ¶ 59; Quinto Dec., ¶¶ 2-4. Disney
6 (*i.e.*, each plaintiff in this litigation) refused to consider its offer. *Id.* The reason is
7 simple. Disney does not want the market for filtering its licensed VOD titles to
8 exist.

9 **E. Unable to Obtain a License from Disney, VidAngel Has Developed**
10 **an FMA Authorized Streaming Business Model That Enables**
11 **Customers Who Purchase Movies for Home Viewing to Filter**
12 **Objectionable Content.**

13 The Declarations of VidAngel’s CEO, Neal Harmon, and its technological
14 expert, Dr. Sigurd Meldal, explain in detail how VidAngel lawfully acquires DVDs
15 of Disney’s titles, sells those discs to its users, and then streams filtered versions of
16 those titles to the lawful owners of those discs for private home viewing. Harmon
17 Dec., ¶¶ 20, 26, 61; Meldal Dec., ¶¶ 33-44. The declarations provide much more
18 detail on how the technology works, but the letters VidAngel sent to Disney and
19 other studios *well over a year ago* explained its basic service quite succinctly: (1)
20 VidAngel “purchases [a] disc for the customer and stores it in a physical vault;” (2)
21 using proprietary technology, it “streams” the contents of the disc to the customer
22 in a filtered format chosen by the customer; then (3) it “re-purchase[s] the disc at a
23 discount from the sale price. . .based on the length of time the customer has owned
24 the disc.” Harmon Dec., ¶ 22, Ex. B. VidAngel has spent over a third of its capital
25 contributions to buy digital video discs and Blu-ray discs (collectively, “DVDs”)
26 sold by the studios and re-sells them to consumers, many of whom would not
27 otherwise watch the movies recorded on them. *Id.*, ¶ 63. To date, VidAngel has
28 spent over \$1,200,000 to purchase content sold by the studios. *Id.* No fixed copy of
an altered work is ever created. *Id.* This service complies with the FMA.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

LEGAL STANDARD

A preliminary injunction is an “extraordinary remedy never awarded as of right.” *Winter*, 555 U.S. at 24. Indeed, the remedy is appropriate only if the movant proves “[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Id.* at 20.

When a plaintiff seeks to enjoin a technology, as Disney does here, a court should exercise particularly great restraint. As the Supreme Court observed in the seminal *Sony Betamax* case: “[t]he judiciary’s reluctance to expand the protections afforded by copyright without explicit legislative guidance is a recurring theme,” *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984), and “it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . to give the public appropriate access to their work product.” *Id.* at 429.

ARGUMENT

I. DISNEY IS NOT LIKELY TO PREVAIL.

Disney is not likely to prevail on either its first claim for relief, for Copyright infringement, 17 U.S.C. § 106(1), (4), or its second claim for relief, for violation of the DMCA 17 U.S.C. § 1201(a)(1)(A). Knowing that it cannot demonstrate a likelihood of success on its first and most important cause of action, for copyright infringement, Disney focuses first on its second, DMCA claim, in its moving papers. Not only does that argument put the cart before the horse, it reveals the inherent infirmity in Disney’s logic. This Court’s analysis of the copyright infringement claims should shed light on the larger purpose of the DMCA, which was intended to protect against copyright infringement.

1 A. Disney Will Not Succeed on Its Reproduction and Public
2 Performance Copyright Claims.

3 In contending that VidAngel violates Disney’s exclusive rights to reproduce
4 and publicly perform its copyrighted works, Disney ignores that it gave up certain
5 rights, and the subsequent owners acquired other rights, when physical copies of
6 Disney’s DVDs were lawfully sold in the market.

7 Disney first argues that VidAngel’s intermediate copies violate its
8 reproduction right, citing only case law in which a defendant acted unlawfully by
9 making copies *capable of being viewed by consumers*. But, the case law draws a
10 clear distinction between unlawful copies, which can be viewed by consumers, and
11 lawful “intermediate” copies, which cannot. VidAngel does not make *any* copy that
12 a consumer could watch, even if given access to the relevant files. After decrypting
13 discs it owns, VidAngel creates intermediate files that are not capable of being
14 watched. (Intermediate files can be compared to computer source code, which is
15 unusable until it has been compiled and converted into object code.) VidAngel tags
16 the files for over 80 types of content, breaks them into approximately 1,300
17 fragments that contain no more than 10 seconds of content (and frequently less),
18 encrypts those fragments, and stores them in a secure, access-controlled location in
19 the cloud. Meldal Dec., ¶¶ 33-38. A consumer given access to the content at any
20 point before his or her disc purchase and selection of filters would be unable to
21 watch it. Such intermediate copies are thus not “copies” as defined by the
22 Copyright Act and, as a matter of law, do not give rise to infringement claims. *Sega*
23 *Enters. Ltd. v. Accolade Inc.*, 997 F.2d 1510 (9th Cir. 1992); *Sony Computer Entm’t,*
24 *Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 1999); *Kelly v. Arriba Soft*, 336 F.3d
25 811 (9th Cir. 2003).

26 Moreover, the U.S. Copyright Office’s most recent triennial report to
27 Congress noted that both legislative history and a Central District of California
28 decision militated in favor of the creation of an exemption for making personal
copies of discs one owns (a practice known as “format-shifting”) before concluding

1 that the policy judgments related to it “are complex and thus best left to Congress or
2 the courts.” U.S. COPYRIGHT OFFICE, Docket No. 2014-07, EXEMPTION TO
3 PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTIONS SYSTEMS FOR
4 ACCESS CONTROL TECHNOLOGIES (2015). Various courts have addressed the issue
5 and noted that the owner of a disc may make a personal copy. *Universal City*
6 *Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); *Realnetworks, Inc. v. DVD*
7 *Copy Control Ass’n*, 641 F. Supp. 2d 913, 942-43 (N.D. Cal. 2009); *U.S. v. Elcom*
8 *Ltd.*, 203 F. Supp. 2d 1111, 1125 (N.D. Cal. 2002). And, here, Congress *has* spoken.

9 Nor is the streaming of filtered copies to customers who have purchased
10 DVDs a public performance. The Supreme Court has declared that a transmission
11 of a copyrighted program is not made to “the public” when it is made “to those who
12 act as owners or possessors of the relevant product.” *Am. Broad. Cos. v. Aereo,*
13 *Inc.*, 134 S. Ct. 2498, 2510 (2014). Disney characterized that statement as *dictum*,
14 but the Court took pains to craft a “limited holding” that would not discourage “the
15 emergence or use of different kinds of technologies.” *Id.* It further suggested that
16 the public service right is not be infringed when – as with a filtering service – “the
17 user of a service pays primarily for something other than the transmission of
18 copyrighted works” *Id.* at 2511. Because VidAngel streams filtered versions
19 of motion pictures created at the direction of and owned by its customers, it is
20 simply untrue that VidAngel engages in public performances.

21 Disney’s argument requires the Court to find that Congress intended that
22 consumers be charged twice to watch a movie once. That is not the law. The FMA
23 requires that any consumer watching filtered content must first have lawfully
24 purchased a copy (*i.e.*, a DVD), thus ensuring that the studios receive a royalty
25 payment. Then, says Disney, the consumer must pay a separate streaming fee to
26 watch that copy. But nothing in the FMA suggests that Disney should be paid twice

27
28

1 when consumers watch a filtered movie once.³ Indeed, that suggestion is especially
2 absurd given that Disney does not even provide the filtering service.

3 **B. In Any Event, the FMA Shields Companies Like VidAngel From**
4 **Liability Under any Provision of the Copyright Act.**

5 Even assuming Disney is likely to succeed on the merits of its reproduction
6 and public performance claims, VidAngel has a strong FMA defense. The FMA
7 *expressly provides* that a third party may *filter* and *transmit* content as specified by a
8 lawful owner of a copy so long as a fixed copy of the altered content is not created.
9 VidAngel complies with those requirements. Disney’s argument that VidAngel’s
10 service necessarily violates its public performance right unless Disney chooses to
11 grant a license to VidAngel would improperly give Disney a veto power over the
12 FMA. If accepted by the Court, Disney’s argument would render the first, and now
13 most important, provision of the FMA (allowing a third party to filter and stream the
14 content of a disc owned by a consumer) meaningless. In actuality, Congress made
15 filtering legal without the studios’ consent.

16 The FMA must be read to give it purpose. As Judge Learned Hand observed,
17 “it is one of the surest indexes of a mature and developed jurisprudence . . . to
18 remember that statutes always have some purpose or object to accomplish.” *Cabell*
19 *v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945). *See also Stone v. INS*, 514 U.S. 386,
20 397 (1995) (“When Congress acts to amend a statute, we presume it intends its
21 amendment to have real and substantial effect.”); *Hibbs v. Winn*, 542 U.S. 88, 101
22 (2004) (“A statute should be construed so that effect is given to all its provisions, so
23 that no part will be inoperative or superfluous, void or insignificant . . .”); *Corley v.*

24 ³ Congress intended that the studios would be compensated only through the
25 sale of copies of movies: “the bill would impose a private-sector mandate on
26 copyright owners. [It] would limit the right of copyright owners to collect
27 compensation under copyright law from persons using or manufacturing a
28 technology that enables making limited changes to a motion picture for a private
home viewing.” H.R. REP. NO. 109-33(1) at 22; H.R. REP. NO. 108-670, at 6
(2004).

1 *United States*, 556 U.S. 332 (2009) (same).

2 Here, Congress enacted the FMA to provide a legislative solution to the
3 studios' refusal to cooperate with third parties seeking to satisfy consumer demand
4 for filtered motion pictures. Congress intended that "directors may not control
5 every detail of how their works are displayed, particularly for a legal copy aired in
6 the privacy of a consumer's home." H.R. REP. No. 108-670, at 3 (2004). To ensure
7 that neither the studios nor the directors could deny the public the ability to enjoy
8 filtered content in the privacy of their homes, the FMA "does not require that
9 filtering be done with the permission of the content creator or owner, but rather
10 creates an exemption from copyright and trademark liability for filtering." *Id.* at
11 76. Disney's argument that a filtering service (like VidAngel) needs the identical
12 permissions it would have needed *before* the FMA's enactment would render this
13 provision meaningless.

14 VidAngel streams "authorized" (not bootlegged) copies of physical discs that
15 it obtains on the legal market. Harmon Dec., ¶ 20. It is not required to obtain any
16 further authorization from Disney to engage in its filtering service. *See* 17 U.S.C.
17 110(11); 150 CONG. REC. H7654-01 (Sept. 28, 2004) ("The making imperceptible
18 must be 'from an authorized copy of a motion picture.' Thus, skipping and muting
19 from an unauthorized to 'bootleg' copy of a motion picture would not be exempt.")

20 Disney does not dispute that VidAngel transmits filtered motion pictures for
21 private home viewing at the direction of members of private households. Nor can
22 it. Under the Copyright Act, "[t]o 'transmit' a performance. . . is to communicate it
23 by any device or process whereby images or sounds are received beyond the place
24 from which they are sent." 17 U.S.C §101. "This legislation contemplates that any
25 altered performances of the motion picture would be made either directly by the
26 viewer or at the direction of a viewer where the viewer is exercising substantial
27 choice over the types of content they choose to skip or mute." 150 CONG. REC.
28 H7654-01 (Sept. 28, 2004). That unquestionably occurs here, as VidAngel's

1 customers select the filters that they wish to apply to each motion picture
2 transmitted to them for private viewing in the home. Meldal Dec., ¶¶ 37(b)(xi)-(xii).

3 Tellingly, Disney’s papers ignore entirely the one case actually construing the
4 FMA.⁴ In *Huntsman v. Soderbergh*, No. 02-M-1662 (MJW) (D. Colo. filed Aug.
5 29, 2002), all the major studios counter complained against ClearPlay and 11 other
6 small businesses (“ClearPlay”) that employed a variety of technologies to allow the
7 public to watch filtered motion pictures. Disney alleged that:

8 [ClearPlay had found a] profitable business in providing to certain
9 audiences, bowdlerized versions of other peoples’ movies. Rather than
10 go to the effort . . . of . . . producing . . . their own movies . . . they
11 simply take the Studios’ movies and alter them without authorization
12 by removing the material they think this audience will not want.

11 Motion Picture Studio Def. Answer and Counterclaims, *Huntsman v.*
12 *Soderbergh*, No. 02-M-1662 (MJW), 2005 WL 1993421 (D. Colo. Aug. 17, 2005),
13 2002 WL 1993421, ¶ 23.

14 ClearPlay offered edited versions “of the Hottest Movies.” *Id.* at ¶ 62. Its
15 “editing service and software utilize[d] ‘ClearPlay Filters’ and ‘ClearPlay Guides’
16 that [we]re created for each motion picture title.” *Id.* at ¶ 63. Disney alleged that
17 ClearPlay “created, duplicated, rented, sold, or otherwise publicly distributed
18 unlawfully edited” copies of movies (*id.* at ¶ 86) and that ClearPlay had additionally
19 “created . . . film specific software files which, when used in conjunction with
20 DVDs containing the Studios’ motion pictures, create unlawfully edited or
21 otherwise altered versions of the Studios’ motion pictures.” *Id.* at ¶ 115. Like
22 VidAngel’s technology, ClearPlay’s filtering technology did not create fixed copies
23 of the filtered works.

24 Because the action was still pending when the FMA took effect, the claims

25 _____
26 ⁴ That omission could not have resulted from oversight in that 3 of the 4
27 plaintiffs herein—Disney, Fox, and Warner Bros.—lost.

1 against ClearPlay had to be dismissed. The court explained: “the effect of the
2 Family Movie Act is that Congress has made a policy decision that those who
3 provide the technology to enable viewers to edit films for their private viewing
4 should not be liable to the copyright owners *for infringing their copyright*
5 *protections* or to the directors for the Lanham Act claims, and that removes this
6 court’s jurisdiction over any further controversy. . . .” 2005 WL 1993421, at *2
7 (emphasis added).

8 The upshot is quite simple: if a filtering service complies with the FMA, that
9 service need not satisfy any other provisions of the Copyright Act: “The Committee
10 strongly believes that subject to certain conditions, copyright and trademark law
11 should not be used to limit a parent’s right to control what their children watch in
12 the privacy of their own home.” H.R. REP. No. 109-33(1) at 5.

13 Those “certain conditions” were spelled out in the House Report (as well as in
14 the text of the statute itself): “This new subsection *ensures* that U.S. copyright law
15 does not prohibit . . . the use of *any filtering service or technology* that mutes or
16 skips content, provided the service or technology: 1. ‘is confined to private, in-
17 home use; 2. ‘for the household of the purchasing consumer only; and 3. ‘does not
18 create a fixed copy of the alternate version.” *Id.* at 24 (emphasis added). Further,
19 “*technology* used to filter certain material out of movies for private viewing would
20 not constitute a violation of copyright or trademark law.” *Id.* at 21 (emphasis
21 added). The Report explained what was *not* exempted: “The Act does not create an
22 exemption for actions that result in fixed copies of altered works.” *Id.* at 7.

23 Moreover, Disney’s argument that “VidAngel’s server copy segments are
24 fixed because they are [allegedly] stored for more than a transitory duration” is
25 legally and factually meritless. MPAS at 22, fn. 11. The term “fixed copy” in the
26 FMA clearly is distinguishable from intermediate copies made incident to the
27 filtering process, and it cannot be reasonably construed as prohibiting the creation of
28 such copies. *See* 17 U.S.C. § 110(11); *Alvarez v. Tracy*, 773 F.3d 1011, 1025 (9th

1 Cir. 2014) (Kozinski, J., dissenting) (discussing the doctrine of *expressio unius est*
2 *exclusio alterius*). Congress’ intent was to prohibit third parties from creating and
3 selling a single fixed, altered version of a motion picture to the public at large:

4 There is a basic distinction between a viewer choosing to alter what is
5 visible or audible when viewing a film, the focus of this legislation, and
6 a separate entity choosing to create and distribute a single, altered
7 version to members of the public. The section 110(11) exemption only
8 applies to viewer directed changes to the viewing experience, and not
9 the making or distribution of actual altered copies of the motion
10 picture.

11 150 CONG. REC. S11852-01 (Nov. 24, 2004); *see also* 150 CONG. REC. H7654-01
12 (Sept. 24, 2004).

13 **C. VidAngel’s Service Does Not Violate the Copyright Act’s**
14 **Anticircumvention Provisions Found in the DMCA.**

15 Disney contends that VidAngel circumvents access control measures in
16 violation of § 1201(a)(1)(A) of the Copyright Act. 17 U.S.C. § 1201(a)(1)(A). This
17 statutory provision was added to the Copyright Act as part of the Digital Millennium
18 Copyright Act (“DMCA”). As such, Disney refers to VidAngel’s alleged violation
19 of 17 U.S.C. § 1201(a)(1)(A) as its DMCA claim.

20 The DMCA claim asserted by Disney is specious. To be sure: because
21 Disney encrypts DVDs “to prevent unauthorized access to their content on Discs,”
22 MPAS at 12:8-9, and VidAngel decrypts them, Disney’s argument has superficial
23 appeal. The argument, however, is based on a fundamental misapprehension of both
24 the DMCA’s text and VidAngel’s service.

25 Section 1201(a)(3)(A) of the Copyright Act expressly defines what it means
26 “to circumvent a technological measure” as, *inter alia*, “to decrypt an encrypted
27 work. . . without the authority of the copyright owner.” 17 U.S.C. § 1201(a)(3)(A).
28 But VidAngel buys authorized copies of Disney’s DVDs. Harmon Dec., ¶¶ 20, 61;
Meldal Dec., ¶ 33. And it sells them to its customers, who are able to view (with
filtering) what they have purchased. *Id.* That is not circumvention.

 Contrary to Disney’s contention, the FMA legislative history does not evince

1 a clear intent to prohibit VidAngel from decrypting DVDs for the purpose of
2 accessing a disk to filter audio and visual content. That history merely shows that
3 Congress was aware that “some copy protection technologies rely on matter placed
4 into the audio or video signal” and the FMA “does not allow the skipping of
5 technologies or other copy-protection-related matter *for the purpose of defeating*
6 *copy protection.*” 150 CONG. REC. S11852-01 (Nov. 24, 2004) (emphasis
7 added). On the other hand, “it is expected that skipping and muting of content in the
8 actual motion picture will be skipped or muted at the direction of the viewer based
9 on that viewer’s desire to avoid seeing or hearing the action or sound in the motion
10 picture.” *Id.* Thus, in balancing the legitimate interests of the viewer and the
11 copyright holder, Congress expressed its intention that the FMA’s safe harbor not be
12 misused for the purpose of thwarting “copy protection technologies.” *Id.*

13 At most, what VidAngel does could be considered as decrypting content for
14 the purpose of allowing it to be viewed in another way, a procedure known as re-
15 formatting or “space shifting.” VidAngel does so at the request of disc purchasers
16 who elect to have their DVD content streamed to them rather than receiving the
17 physical discs. As former Solicitor General Don Verrilli assured the Supreme Court
18 in *Grokster* while representing the major record labels and movie studios, his clients
19 agreed that space shifting is legal. Transcript of Oral Argument at 12, *Metro-*
20 *Goldwyn-Mayer Studios, Inc. v. Grokster*, 545 U.S. 913 (2005) (No. 04-480).

21 Moreover, the DMCA should not be construed so broadly as to gut the FMA
22 of its effectiveness. It is undisputed that, when the FMA was enacted in April 2005,
23 the *only* existing technology capable of allowing consumers to receive filtered
24 content streamed to them required that DVDs be decrypted and intermediate copies
25 be made. Marquart Dec., Ex A at Tr. 79:7-80:24, 80:19-82:14; Meldal Dec., ¶¶ 19-
26 23.) While Disney argues this is “irrelevant as a legal matter” (MPAS at 13:7),
27 Congress surely did not intend to enact an impotent statute that would have no
28 practical effect. To the contrary, “[t]he plain meaning of [the FMA] *exempts* from

1 actions brought under U.S. copyright and trademark law the ‘making imperceptible
2 . . . of limited portions of audio or video content provided no fixed copy is created.’
3 H.R. REP 109-33(I) at 6-7 (emphasis added). That exemption is limited only in that
4 “[t]he Act does not create an exemption for actions that result in fixed copies of
5 altered works.” *Id.* The Chair of the House Judiciary Committee explained that,
6 “this legislation, the Family Movie Act, clarifies that existing copyright and
7 trademark law cannot be used to prevent a parent from utilizing available
8 technology to skip over portions of a movie they may find objectionable.” 151
9 CONG. REC. H2114-01 (Apr. 10, 2005) (statement of Rep. Sensenbrenner).

10 Tellingly, Disney defends its DMCA claim based principally on *MDY*
11 *Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F.3d 928, 952-55 (9th Cir.
12 2010) (“*MDY*”). But *MDY* simply did not turn on 17 U.S.C. § 1201(a)(1)(A). And,
13 perhaps more importantly, the *MDY* court noted the tension between antitrust law
14 and the doctrine of copyright misuse; indeed, it expressly cautioned against DMCA
15 application when, as here, antitrust issues are present. *Id.* at 951.⁵

16 In any event, the remedies section of the DMCA portion of the Copyright Act
17 makes clear that to redress violations, courts “may not impose a prior restraint on
18 free speech,” 17 U.S.C. § 1203(b)(1), which is essentially what Disney seeks, and
19 courts should be especially wary of imposing such a restraint at a preliminary stage.
20 *Cf. Overstreet v. United Bros. of Carpenters and Joiners*, 409 F.3d 1199, 1218 (9th
21 Cir. 2005). Even if this provision is ultimately (and incorrectly) found to support an
22 award of damages, the DMCA ought not to serve as the basis for enjoining
23 VidAngel’s service.

24
25 ⁵ The Court should act with restraint for the additional reason that the Electronic
26 Frontier Foundation recently filed suit in the District of Columbia challenging the
27 constitutionality of the precise DMCA provision, 17 U.S.C. § 1201(a)(1)(A), at
28 issue herein. Ex. A to Request for Judicial Notice (“RJN”), *Green v. U.S. Dep’t of*
Justice, Case No. 1:16-cv-01492-EGS, (D.D.C. filed on July 21, 2016).

1 **D. Even if VidAngel Is in Technical Violation of the Law, Its Service**
2 **Is a Protected Fair Use.**

3 If VidAngel’s service is found to be in technical violation of the FMA, it is
4 nonetheless entitled to protection as a “fair use.” As the Supreme Court recently
5 explained, “[t]he ultimate goal of copyright is to expand public knowledge and
6 understanding. . . . [W]hile authors are undoubtedly important intended beneficiaries
7 of copyright, the ultimate, primary intended beneficiary is the public, whose access
8 to knowledge copyright seeks to advance by providing rewards for authorship.”
9 *Authors Guild v. Google, Inc.*, 804 F.3d 202, 212 (2d Cir. 2015), *cert. denied* 136 S.
10 Ct. 1658 (2016); *see also Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 575
11 (1994) (Fair Use furthers “copyright’s very purpose, ‘[t]o promote the Progress of
12 Science and useful Arts.’”). To determine whether a particular use of a work is fair,
13 the factors considered: (1) the purpose and character of the use, including whether it
14 is of a commercial nature⁶ or is for nonprofit educational purposes; (2) the nature of
15 the copyrighted work; (3) the amount and substantiality of the portion used in
16 relation to the copyrighted work as a whole; and (4) the effect of the use upon the
17 potential market for or value of the copyrighted work. *Campbell* at 576-77; 17
18 U.S.C. § 107. The Court should also consider the clear legislative intent to make
19 filtering services such as VidAngel’s service available to the public and the public
20 interest in allowing children to be protected from inappropriate content.

21 **1. VidAngel’s Service Is Highly Transformative.**

22 The central inquiry in evaluating the purpose and character of the use of a
23 copyrighted work is to determine whether and to what extent the new work is
24 “transformative.” *Campbell*, 510 U.S. at 579. A work is “transformative” when it
25 does not “merely supersede the objects of the original creation” but rather serves a

26

27 ⁶ Under the FMA, it is irrelevant that VidAngel is a for-profit business. *See* H.R.
28 REP. NO. 109-33(1) at 69-74; 17 U.S.C. § 110(11).

1 new and different function. *Id.*; *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d
2 1146, 1164 (9th Cir. 2007).

3 VidAngel’s filtering service transforms films that many people find offensive
4 or inappropriate for children into family-friendly content as judged by each viewer.
5 By its very nature, VidAngel’s service is transformative in that it alters the content
6 of the works as seen by different viewers in different ways. Each user is privately
7 streamed a customized version of the work that no longer contains the content the
8 viewer finds objectionable. The vast majority of VidAngel users would not watch
9 the content streamed to them without filters. Harmon Dec., ¶¶ 37-40. VidAngel
10 makes the unwatchable watchable, thus furthering congressional intent to provide
11 families with access to content they otherwise would not consume, and creates a
12 new audience for the filtered works. VidAngel’s highly transformative service
13 weighs heavily in favor of finding fair use.

14 **2. Plaintiffs’ Works Are Especially Amenable to Fair Use**

15 “Published works are more likely to qualify as fair use [than unpublished
16 works] because the first appearance of the artist’s expression has already occurred.”
17 *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003).

18 VidAngel filters exclusively published works. Because the copyright owner’s
19 expression of those works occurs before VidAngel’s use, this factor favors fair use.

20 **3. VidAngel’s Users May Access Plaintiffs’ Works Only for**
21 **Transformative Purposes**

22 In determining whether a use is fair, courts assess the amount and
23 substantiality of the copyrighted work that is “made accessible to the public for
24 which it may serve as a competing substitute.” *Authors Guild*, 804 F.3d at 221-222.
25 VidAngel’s service allows individual users to control how much of a film is made
26 imperceptible. Each user is required to apply at least one (substantive) filter, and
27 VidAngel’s system never allows the public to access any original, unaltered work.
28 VidAngel’s data show that the overwhelming majority of users (96 percent) apply

1 multiple filters. Harmon Dec., ¶ 37. Thus, the amount of Plaintiffs’ works made
2 accessible is determined by each user and is always limited to the amount necessary
3 to create that particular user’s desired filtered work. VidAngel users *never* watch
4 exact copies of the original films. Moreover, VidAngel’s filtered content is not a
5 substitute for Plaintiffs’ original works.

6 **4. VidAngel’s Lawful Filtering Service Increases Disney’s Disc**
7 **Sales.**

8 The “single most important element of fair use” is the impact of the use on the
9 traditional market for the copyrighted work. *Harper & Row Publishers v. Nation*
10 *Enters.*, 471 U.S. 539, 566 (1986). To defeat a claim of fair use, the copyright
11 holder must point to the market harms that result from secondary use substituting for
12 the original work. *See Campbell*, 510 U.S. at 591 (“cognizable market harm” is
13 limited to “market substitution”). This factor “requires the Court to strike a balance
14 between the benefit the public will derive if the use is permitted and the personal
15 gain the copyright owner will receive if the use is denied.” *Columbia Pictures*
16 *Indus., Inc. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179, 1189 (C.D. Cal. 1998)
17 (quoting *MCA, Inc. v. Wilson*, 667 F.2d 180, 183 (2d Cir. 1981)).

18 VidAngel does not harm the market for unfiltered movies because filtered
19 movies are not a substitute for them. As a rule, VidAngel cannot offer filtered
20 movies until *after* the unfiltered originals have been shown in theaters, released on
21 collector’s edition discs, and streamed to audiences. *See* Harmon Dec., ¶¶ 29-30.
22 Because VidAngel does not make fixed copies of filtered works, it cannot compete
23 in the pay or free television market. VidAngel’s filtering service *increases* the
24 market for Disney’s works. Over 51% of VidAngel customers would not watch
25 those movies without filtering. Harmon Dec., ¶¶ 37-40. VidAngel lawfully
26 purchases thousands of discs to resell to these unique customers. In fact, VidAngel
27 has spent over one-third of its capital contributions to purchase discs. *Id.*, ¶ 61.

1 **5. The *Clean Flicks* Fair Use Analysis Is Inapposite**

2 Disney’s reliance on *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp.
3 2d 1236 (D. Colo. 2006) is inapposite because it was not decided under the FMA.
4 Clean Flicks made *fixed* copies of edited films, which is expressly prohibited by the
5 FMA. *Id.* at 1240. The FMA was also inapplicable because CleanFlicks, rather
6 than its customers, decided what to filter. Here, no fixed copy of the filtered work is
7 ever made and each user chooses what to filter. Accordingly, VidAngel’s service is
8 clearly fair use to the extent it is not exempted by the FMA.

9 **II. DISNEY CANNOT DEMONSTRATE IRREPARABLE HARM.**

10 **A. Disney’s Year-and-a-Quarter Delay Demonstrates That an**
11 **Injunction Is Unnecessary to Prevent Immediate and Irreparable**
12 **Harm.**

13 Disney relies heavily on *Warner Bros. Entertainment Inc. v. WTV Systems*,
14 824 F. Supp. 2d 1003 (C.D. Cal. 2011), to support its irreparable harm argument.
15 But in that case, the plaintiffs – who were represented by Disney’s counsel herein,
16 Glenn Pomerantz and Kelly Klaus – brought suit against an online DVD rental
17 service called Zediva within 18 days of Zediva’s launch. Even so, counsel took
18 pains to explain their delay in seeking an injunction.⁷ Significantly, they alleged
19 that because Zediva had 137 titles available for rent, it posed an imminent threat.
20 By comparison, VidAngel had over 750 titles available when it notified 16 studios
21 and networks, including Disney, of its service with not one but *two* letters in July
22 and August of 2015. VidAngel explained that it: (1) “purchases the DVD or Blu-ray
23 disc for the customer and stores it in a physical vault;” (2) “streams” the contents of
24 the disc to the customer in a filtered format chosen by the customer; and (3) then

25 ⁷ In *WTV Systems*, plaintiffs’ counsel submitted a declaration emphasizing the
26 speed with which plaintiffs filed suit. RJN Ex. B. When the parties stipulated to
27 expedited discovery, the stipulation recited that the additional time required for
28 discovery would not evidence any delay. Here, however, the parties stipulated only
that the continuance of the preliminary injunction hearing from October 24 to
October 31, 2016, would not constitute evidence of delay.

1 “re-purchase[s] the disc at a discount from the sale price. . .based on the length of
2 time the customer has owned the disc.” Harmon Dec., ¶ 22, Ex. B. VidAngel added
3 that it had grown from 43 to 4848 users in just under six months (a 10,000% growth
4 rate) and wished to buy directly from studios “to scale its business.” *Id.* The letters
5 invited Disney to access its service, ask questions, and express any objections.
6 Notwithstanding that the harm alleged Disney alleges herein is the same as in *WTV*
7 *Systems*, Disney took almost a year and a quarter longer to seek an injunction.

8 Delay in requesting a preliminary injunction is inconsistent with a claim of
9 irreparable harm. *Oakland Trib., Inc. v. Chron. Pub. Co.*, 762 F.2d 1374, 1377 (9th
10 Cir. 1985) (“long delay before seeking a preliminary injunction implies a lack of
11 urgency and irreparable harm.”); 4 MELVILLE B. NIMMER & DAVID NIMMER,
12 NIMMER ON COPYRIGHT § 14.06[A][3][c] (unreasonable delay can defeat irreparable
13 injury and the delay “need not be great”). Denying an unreasonably delayed request
14 for injunctive relief furthers the purpose of such relief – to maintain the *status quo*.
15 *See, e.g., Citibank N.A. v. Citytrust*, 756 F.2d 273 (2d Cir. 1985) (10-week delay
16 following notice of infringement was unreasonable); *Hanginout, Inc. v. Google,*
17 *Inc.*, 54 F. Supp. 3d 1109, 1132–33 (S.D. Cal. 2014) (seven-month delay in filing
18 suit, and even more before seeking preliminary injunction, was inexcusable); *Valeo*
19 *Intell. Prop., Inc. v. Data Depth Corp.*, 368 F. Supp. 2d 1121, 1128 (W.D. Wash.
20 2005) (three-month delay belied claims of irreparable harm).

21 Disney seemingly learned of VidAngel in December 2014, when it apparently
22 called provisions in its agreements with Google to Google’s attention, thus causing
23 Google to alter the Chromecast technology to render VidAngel’s service
24 unworkable. Harmon Dec., ¶¶ 10-13. Evidently to hide evidence of that, Plaintiffs
25 refused to search for or produce any e-mail communications related to VidAngel
26 sent before late July 2015. Marquart Dec., Ex. E. Disney’s further year-and-a-
27 quarter delay in scheduling a preliminary injunction hearing after receiving
28 VidAngel’s July 2015 letter negates its claims of irreparable harm. After receiving

1 VidAngel’s first letter, Disney opened a VidAngel account on August 6, 2015.
2 Harmon Dec., ¶ 22, Ex. C. Also on August 6, 2015, 18 mostly legal employees of
3 Plaintiffs and other MPAA studios and 7 MPAA lawyers exchanged e-mails and
4 messages about VidAngel. Marquart Dec., Ex. D. On August 20, 2015, Plaintiffs e-
5 mailed renowned litigation counsel, Tom Nolan of Skadden Arps, about VidAngel.
6 *Id.* On August 28, 2015, Plaintiffs e-mailed Kelly Klaus, Glen Pomerantz and
7 Jonathan Blavin of Munger Tolles, about VidAngel. *Id.* In all, 59 employees of
8 Plaintiffs, the MPAA, or other MPAA studios exchanged 124 messages concerning
9 VidAngel in August 2015 alone. *Id.* Plaintiffs’ in-house counsel and outside
10 counsel discussed VidAngel over 1,300 times by e-mail alone before filing suit. *Id.*
11 Yet, Plaintiffs failed to send any cease-and-desist letter or other objection to
12 VidAngel prior to filing. Harmon Dec., ¶ 22. Their delay prejudiced VidAngel and
13 its users. Hundreds of thousands of families now rely on VidAngel’s filtering
14 service, and VidAngel invested millions in its distribution model (and enriched
15 Plaintiffs by doing so), in reliance upon the studios’ silence. Harmon Dec., ¶ 30.

16 The authority Disney cites to justify its delay is inapposite. The primary case
17 Disney quotes to explain its delay – *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S.
18 Ct. 1962 (2014) – did not involve a preliminary injunction and did not address
19 irreparable harm. At issue was whether asserting a laches defense precluded the
20 issuance of a *permanent* injunction. Particularly after *eBay* and *Winter* – which
21 require a showing of imminent actual harm – Plaintiffs’ delay negates any claim of
22 irreparable harm.⁸

23

24 ⁸ Disney will likely rely upon another case in which they were involved,
25 *American Broad. Cos.*, 2012 WL 3854042 (S.D.N.Y. 2012), in which delay of
26 roughly one year was excused, but only because defendant’s business relied on an
27 untested technology perceived as not viable. Further, (1) most of the delay occurred
28 while Aereo operated in “stealth” mode before its public announcement; (2) when it
finally announced itself, the plaintiffs were unsure whether Aereo was viable; (3)
Aereo operated in an invitation only, beta-testing phase for much of the delay; (4)
Aereo loomed large only after it announced the commercial launch of its service in
(footnote continued)

1 **B. Disney’s Alleged Harms Are Caused by the FMA, Not VidAngel.**

2 A plaintiff must also present evidence of actual harm suffered as a direct
3 result of the defendant’s actions. *Fox Broadcasting Co. v. Dish Network, L.L.C.*,
4 905 F. Supp. 2d 1088, 1110 (C.D. Cal. 2012), *aff’d* 747 F.3d 1060 (9th Cir. 2013);
5 *see also Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 982 (9th Cir. 2011) (Perfect
6 10 did not prove a sufficient causal connection between irreparable harm to its
7 business and Google’s search service). If there is not a sufficient causal nexus
8 between the alleged irreparable injury and the alleged wrongdoing, an injunction
9 will not issue. *Garcia v. Google, Inc.*, 786 F.3d 733, 748 (9th Cir. 2015) (citing
10 *Perfect 10*, 653 F.3d at 982); *Bird-B-Gone, Inc. v. Bird Barrier Am., Inc.*, 2013 WL
11 11730662, at *6 (C.D. Cal. Mar. 20, 2013).

12 In *Dish*, Fox alleged that Dish’s “Autohop” service, which allowed
13 subscribers to skip commercials in recorded Fox television shows, infringed. 905 F.
14 Supp. 2d at 1095. To ensure Autohop functioned properly, Dish made “quality
15 assurance” (“QA”) copies of Fox’s shows. *Id.* Fox sought a preliminary injunction,
16 arguing that the QA copies resulted in irreparable harm by causing a “loss of
17 control” of Fox’s copyrights. The court found that Fox did not establish irreparable
18 harm *caused by Dish*. *Id.* at 1110. It held that the alleged harms flowed from the
19 *non-infringing* ad-skipping function the copies facilitated. *Id.* The Ninth Circuit
20 affirmed: “[i]n refusing to enjoin Dish from creating these [QA] copies, the district
21 court correctly concluded that the harms Fox identified—including ‘loss of control
22 over its copyrighted works and loss of advertising revenue’—did not ‘flow from’ the
23 quality assurance copies themselves, but from the entire Autohop program.” *Fox*
24 *Broad. Co. v. Dish Network LLC*, 747 F.3d at 1072. It concluded, “the market harm

25 _____
26 New York City, one month before suit; and (5) Aereo admitted that it would not
27 have changed its business plan if it had received a cease-and-desist letter and was
28 gearing up for litigation. *Id.* at 28. Here, VidAngel was publicly launched in July
2015 and had considerably more subscribers than even Aereo had when ABC sued
it.

1 that Fox and its *amici* allege results from the automatic commercial-skipping, not
2 the recording of programs” *Id.* at 1069.

3 Here, legitimate filtering under the FMA, not infringement by VidAngel,
4 causes the “harms” alleged by Disney. First, Disney alleges harm to its right to
5 control how, when and through which channels consumers view its works. By
6 definition, filtering under the FMA occurs without Disney’s consent, and Disney
7 may not control how others view those works. Second, Disney alleges that
8 VidAngel undermines its ability to license unfiltered content for streaming, but the
9 FMA does not require a license to stream filtered content. Third, Disney claims
10 VidAngel disrupts its ability to secure and protect its content, but the FMA allows
11 the transmission of filtered content. Thus, Disney does not have any right to review
12 and approve VidAngel’s service (which is very secure in any event). Meldal Dec.
13 ¶¶ 34, 38-39. Fourth, Disney argues that VidAngel could prevent the development
14 of the online streaming market through inferior user-viewing experiences. Again,
15 the FMA allows filtered transmissions without Disney’s consent. Moreover,
16 VidAngel’s streaming service is independently rated as superior to Disney’s (and to
17 that of any other third party streaming service). Harmon Dec., ¶ 27.

18 **C. Disney’s Alleged Harms Are Speculative.**

19 Disney’s irreparable injury analysis depends on a premise invalidated by the
20 Supreme Court: that a presumption of irreparable harm applies to copyright
21 infringement claims. *See eBay Inc.*, 547 U.S. at 392-3; *Flexible Lifeline Sys.*, 654
22 F.3d at 995-996 (9th Cir. 2011); *Dish Network*, 905 F. Supp. 2d at 1109 (requiring
23 an “independent showing” that plaintiff was likely to suffer irreparable harm). A
24 threatened loss of prospective customers, goodwill or reputation supports irreparable
25 harm only if it is not speculative. *Rent-A-Center v. Canyon Television & Appliance*
26 *Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991); *Goldie’s Bookstore, Inc. v. Super.*
27 *Ct.*, 739 F.2d 466, 472 (9th Cir. 1984) (rejecting the plaintiff’s claimed lost goodwill
28 and “untold” customers as too speculative).

1 Disney’s “evidence” in support of its four alleged irreparable harms is
2 supplied only by Tedd Cittadine who at his deposition could offer no evidence that
3 VidAngel was actually causing *any* of the hypothetical harms to which he testified.
4 VidAngel has provided its disc-based filtered streaming service since the beginning
5 of 2015 and over 500,000 families have now used it. Harmon Dec., ¶¶ 25, 30.
6 Logic suggests that if any of the speculated harms were real, there would now be
7 evidence of actual injury. Yet, Cittadine had no evidence: (1) of *actual* harm
8 caused by VidAngel to Disney’s “control of its copyrights” (Marquart Dec., Ex. A at
9 Tr. 196:8-13, 197:18-25); (2) that any VOD provider actually complained about
10 VidAngel or that VidAngel ever even came up in negotiations with them (*id.*, Ex. B
11 at Tr. 227:23-228:19); (3) that VidAngel undermined Disney’s ability to secure and
12 protect its content online (*id.*, Ex. A at Tr. 240:14-24); or (4) that VidAngel hindered
13 Disney’s development of the on-demand streaming market through inferior user
14 experiences. *Id.* at 263:11-18.⁹ Cittadine also acknowledged that the four
15 hypothetical “harms” existed when Disney received VidAngel’s July 2015 letter.¹⁰

16 Cittadine’s hypotheticals are based upon a false assumption that VidAngel is
17 a copyright pirate, like the filing-sharing networks shut down by courts. When
18

19 ⁹ Owing to the admission that Plaintiffs have no evidence of inferior viewer
20 experience, Disney cites to the Ehler declaration, Ex. L, for the proposition that
21 VidAngel’s social media pages reflect a few consumer complaints of “poor
22 streaming quality.” Exhibit L reflects just 9 complaints from January 2016 through
23 July 2016. In almost all the screen captures, VidAngel responds to the consumer
24 issue and promises to quickly resolve it, which is not “evidence” of any widespread
25 consumer issue with VidAngel. To the contrary, VidAngel’s service is growing
26 precisely because it provides a quality viewing experience. Harmon Dec., ¶¶ 26-28.

24 ¹⁰ Cittadine admitted that Fox would have had the same concern about
25 VidAngel’s security in July 2015 that it did in June 2016, when it applied for a
26 preliminary injunction. Marquart Dec., Ex. A at Tr. 245:18-246:21. Cittadine
27 admitted that VidAngel offered to allow Fox to look at its security architecture in
28 July of 2015. *Id.* at 244:13-18. Cittadine also admitted that he did not know
whether Fox ever took VidAngel up on that offer (in fact, Fox did not). *Id.* at
244:25-245:7.

1 asked for Disney’s evidence that VidAngel was causing harm to its right to control
2 its intellectual property, Cittadine referenced “piracy that costs our business billions
3 of dollars.” Marquart Dec., Ex. A at Tr. 195:19-23. Cittadine stated that: (1)
4 “piracy obviously encourages people to watch consumer content without paying for
5 it” (*id.* at 198:17-19); (2) “piracy undermines our ability to try and build a legitimate
6 marketplace” (*id.* at 199:9-12); and (3) piracy “challenges us when we’re trying to
7 negotiate business deals with our clients.” *Id.* at 200:16-20.

8 Plaintiffs have now demonstrated that the claimed irreparable injuries are
9 purely pretextual. After Cittadine declared that VidAngel’s “out-of-stock” notices
10 harmed Disney by creating a poor user experience (Cittadine Dec., at ¶¶ 29-30),
11 VidAngel offered to negotiate a reasonable license fee to stream filtered content in
12 lieu of sending out-of-stock notices pending resolution of this action. Quinto Dec.,
13 ¶¶ 2-4 and Ex. A. Plaintiffs’ counsel responded: “my clients absolutely will not
14 engage in any joint licensing discussions.” *Id.*, ¶ 3. Counsel for VidAngel then
15 offered to abandon its FMA exemption defense (and with it the requirement that
16 consumers must purchase copies of discs) and instead pay a license fee to stream
17 filtered content, noting that such arrangement would resolve Disney’s DMCA and
18 infringement claims.¹¹ Plaintiffs never responded to the offer. *Id.*, ¶ 4.

19 **D. Disney’s Alleged Harms Are Economic.**

20 Economic injury alone will not support a finding of irreparable harm because
21 it can generally be remedied by money damages. *Pyro Spectaculars N., Inc. v.*
22 *Souza*, 861 F. Supp.2d 1079, 1092 (E.D. Cal. 2012) (citing *Rent-A-Center*, 944 F.2d
23 at 603). A preliminary injunction is appropriate only if the record establishes that

24
25 ¹¹ VidAngel’s counsel described the many reasons why VidAngel would prefer
26 to license content for streaming from Plaintiffs rather than continue its current
27 physical DVD-based model, including that the studios will someday stop selling
28 DVDs and that movies are usually released for streaming prior to their DVD release,
requiring VidAngel customers to wait for this content. Quinto Dec., Ex. E.

1 the harm is not economic. *Id.* If a defendant in a copyright infringement action
2 maintains accurate records from which damages can be calculated, the harms are not
3 irreparable. *See Capitol Records v. Redigi*, No. 1:12-cv-00095, Order Denying
4 Motion for Preliminary Injunction (S.D.N.Y. Feb. 6, 2012) and transcript of ruling
5 on preliminary injunction. RJN., Ex. C.

6 In *Dish*, 905 F. Supp. 2d at 1110–11, the Central District denied a preliminary
7 injunction because the damages were calculable. Fox accused Dish of copying its
8 programs, which could be purchased from services like iTunes, without paying for
9 them. The fact that “Fox has licensing agreements with other companies shows that
10 the *copies* of Fox Programs have a market value that other companies already pay in
11 exchange for the right to use the copies.” *Id.* So too here. The *same* VOD market is
12 at issue and any damages are both economic and easily calculable. The Ninth
13 Circuit agreed that monetary damages could compensate Fox for the loss of its
14 copies, reasoning that Fox’s existing VOD licenses could “at the very least”
15 constitute a starting point or aid in calculating damages. *Fox Broad. Co.*, 747 F.3d
16 at 1073. It also found that the appropriate market to consider was that for Fox’s
17 VOD licenses (iTunes, Hulu, etc.). *Id.* at 1070, 1073.

18 As in *Dish* and *Redigi*, the value of VidAngel’s sales can be calculated.
19 VidAngel has records of every transaction – including purchase date, sell-back date,
20 amount paid, and filters selected – for every title it has ever filtered and streamed.
21 Harmon Dec., ¶ 62. Thus, any damages caused by VidAngel are easily calculable.

22 **III. THE BALANCE OF HARDSHIPS WEIGHS AGAINST A** 23 **PRELIMINARY INJUNCTION.**

24 If its service is enjoined, VidAngel, whose only business is providing the
25 filtering service at issue, would suffer an unimaginable financial hardship that could
26 impair its ability to defend this action before the merits are decided. Where there are
27 no more than “serious questions going to the merits,” the moving party must show
28 that “the balance of hardships tips sharply in [its] favor.” *All for the Wild Rockies v.*

1 *Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011); *Lopez v. Brewer*, 680 F.3d 1068,
2 1072 (9th Cir. 2012).

3 “In evaluating the balance of hardships a court must consider the impact
4 granting or denying a motion for a preliminary injunction will have on the
5 respective enterprises. Thus the relative size and strength of each enterprise may be
6 pertinent to this inquiry.” *Int’l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819,
7 827 (9th Cir. 1993). When a larger, established corporation seeks a preliminary
8 injunction against a start-up, courts consistently refuse to enjoin the start-up’s
9 business operations. *See, e.g., LucasArts Entm’t Co. v. Humongous Entm’t Co.*, 815
10 F. Supp. 332, 338 (N.D. Cal. 1993) (refusing to enjoin “a start-up company with
11 limited financial resources” because it “depends to a large extent on sales of its
12 products to pay its employees and operating expenses” and its “customers may lose
13 their trust and confidence in the young company’s ability to deliver goods on time”);
14 *OG Int’l, Ltd. v. Ubisoft Entm’t*, No. C 11-04980 CRB, 2011 WL 5079552, at *11
15 (N.D. Cal. Oct. 26, 2011); *Ossur Holdings, Inc. v. Bellacure, Inc.*, No. C05-
16 1552JLR, 2005 WL 3434440, at *9 (W.D. Wash. Dec. 14, 2005).

17 The hardships strongly favor VidAngel, which has but 20 full-time
18 employees. Harmon Dec., ¶ 63. This injunction would prevent it from filtering any
19 motion pictures owned or licensed by Disney, and would cast doubt on the legality
20 of its entire business enterprise. Additionally, VidAngel’s goodwill would be
21 seriously damaged as customers could not reliably depend upon VidAngel to filter
22 many popular motion pictures. In contrast, Disney are four of the world’s largest
23 movie studios and have “presented little evidence regarding the harm [they]
24 allegedly [are] suffering, other than the harm presumptively caused by copyright
25 infringement.”¹² *See Activant Sols., Inc. v. Wrenthead, Inc.*, No. C 03-3376 VRW,

26
27 ¹² Plaintiffs do not attempt to balance the hardships, but dismiss VidAngel’s
28 hardships as legally irrelevant based on the assumption that they have demonstrated
(footnote continued)

1 2004 WL 1887529, at *9 (N.D. Cal. Aug. 23, 2004).

2 **IV. THE PUBLIC INTEREST STRONGLY FAVORS ALLOWING**
3 **FAMILIES TO USE VIDANGEL’S FILTERING SERVICE.**

4 “The public interest analysis for the issuance of a preliminary injunction
5 requires [the court] to consider ‘whether there exists some critical public interest
6 that would be injured by the grant of preliminary relief.’” *Indep. Living Ctr. v.*
7 *Maxwell–Jolly*, 572 F.3d 644, 659 (9th Cir. 2009) (quoting *Hybritech Inc. v. Abbott*
8 *Labs.*, 849 F.2d 1446, 1458 (Fed. Cir. 1988)). “If . . .the impact of an injunction
9 reaches beyond the parties, carrying with it a potential for public consequences, the
10 public interest will be relevant to whether the district court grants the preliminary
11 injunction.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138-39 (9th Cir. 2009)
12 (citing *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 965 (9th Cir. 2002)).
13 *See also Sierra Forest Legacy*, 577 F.3d at 1022 (“When deciding whether to issue a
14 narrowly tailored injunction, district courts must assess the harms pertaining to
15 injunctive relief in the context of that narrow injunction”). Further, when “an
16 injunction is asked which will adversely affect a public interest ... the court may in
17 the public interest withhold relief until a final determination of the rights of the
18 parties, though the postponement may be burdensome to the plaintiff.” *Weinberger*
19 *v. Romero-Barcelo*, 456 U.S. 305, 312–13 (1982).

20 **A. The Supreme Court Has Repeatedly Protected the Public from**
21 **Offensive Content.**

22 The courts and Congress have frequently protected families from offensive
23 content while in the privacy of their homes. The following are but a few
24 examples. In *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970), the

25 _____
26 a likelihood of success. (Mot. at 31-32.) That is not the case. In any event, where,
27 as here, the balance of hardships tips strongly in the defendant’s favor, the plaintiff
28 is required to demonstrate a stronger likelihood of success on the merits.
MacDonald v. Chicago Park Dist., 132 F.3d 355, 357 (7th Cir. 1997).

1 Supreme Court upheld a statute allowing anyone who received material that he or
2 she perceived as erotically arousing or sexually provocative to request that the
3 Postmaster General order the sender not to send further mailings because there is no
4 constitutional right to send unwanted materials into someone’s home. It was
5 irrelevant that the recipient could simply choose to throw the unwanted mail away:
6 “[T]he asserted right of a mailer . . . stops at the outer boundary of every person’s
7 domain.” *Id.* at 738. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the
8 Court noted that “broadcasting is uniquely accessible to children, even those too
9 young to read,” *id.* at 749, and held that the FCC has the power to regulate indecent
10 radio broadcasts. *Id.* at 731, 738. The Supreme Court also upheld the issuance of
11 notices of liability to Fox Television Stations for permitting “fleeting” expletives
12 during nationally broadcast awards shows (although a later decision excused the
13 fines). *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). In *Reno v.*
14 *ACLU*, 521 U.S. 844 (1997), the Supreme Court noted that it has “repeatedly
15 recognized the governmental interest in protecting children from harmful
16 materials.” *Id.* at 875 (citing cases). Of especial significance here, it noted that a
17 less restrictive alternative to banning all indecent speech on the Internet would be to
18 “require[e] that indecent material be ‘tagged’ in a way that facilitates parental
19 control of material coming into their homes.” *Id.* at 879.

20 **B. VidAngel Serves an Important Public Interest.**

21 The public interest in protecting every person’s right to watch filtered content
22 in private would be severely undercut by the issuance of a preliminary injunction.
23 Consumers are rapidly shifting their viewing preferences toward mobile devices,
24 tablets, and SmartTVs. VidAngel is the only entity that provides a filtering service
25 under the FMA for those viewing methods. Meldal Dec., ¶¶ 8, 24, Harmon Dec., ¶¶
26 52-53. An injunction would affect the largest and fastest growing segment of
27 filtered content viewers. As reflected by the overwhelming support of countless
28 families and community leaders, VidAngel serves an important public interest. *See*

1 Declarations of Timothy F. Winter; Donna Rice Hughes; Harry Jackson; Connor
2 Boyack; Matt Kibbe; David Bozell; L Brent Bozell III; David Barton; Gary Bauer;
3 Gary Marx; George E. Roller; Patrick Trueman; Rebecca Hagelin; Rick Green;
4 Andrea Lafferty; Theodore Baehr; Tim Barton; Bryan and Diane Schwartz; Bob
5 Waliszewski; and Tim Wildmon.

6 An injunction would also reach far beyond the parties by destroying the
7 market for filtered films. *See Stormans*, 586 F.3d at 1139 (overturning a preliminary
8 injunction in part because it “clearly reached non-parties and implicated issues of
9 broader public concern that could have public consequences.”). Moreover, due to
10 Disney’s unreasonable delay in bringing its motion, over 500,000 families have used
11 VidAngel’s service to provide family-friendly entertainment options. Harmon Dec.,
12 ¶ 30. The Court should not end the public’s ability to watch filtered movies before a
13 final determination of the parties’ rights. *See Weinberger*, 456 U.S. at 312.

14 **V. ANY INJUNCTION SHOULD BE CONDITIONED ON THE POSTING**
15 **OF A BOND OF NOT LESS THAN \$50 MILLION.**

16 A preliminary injunction may issue “only if the movant gives security in an
17 amount that the court considers proper to pay the costs and damages sustained by
18 any party wrongfully enjoined or restrained.” F.R.C.P. § 65(c); *Squaxin Island*
19 *Tribe v. Washington*, 781 F. 2d 715, 724 (9th Cir. 1986). A party that is wrongfully
20 enjoined may be limited to the amount of the bond as its recovery. *Buddy Sys., Inc.*
21 *v. Exer-Genie, Inc.*, 545 F. 2d 1164, 1168 (9th Cir. 1976). Thus, “[w]hen setting the
22 amount of security, district courts should err on the high side,” because “an error in
23 the other direction produces irreparable injury.” *Mead Johnson & Co. v. Abbott*
24 *Labs.*, 201 F.3d 883, 888 (7th Cir. 2000). In analogous circumstances, courts in this
25 circuit typically require multi-million dollar bonds.¹³

26 ¹³ *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001)
27 (\$5 million); *MGM v. Honda Motor Co.*, 900 F. Supp. 1287, 1290 (C.D. Cal. 1995)
28 (\$6 million); *see also Design Furnishings, Inc. v. Zen Path, LLC*, 2010 WL
(footnote continued)

1 VidAngel occupies a uniquely advantageous market position. It developed its
2 filter-and-stream technology just as consumer preferences were beginning to shift
3 from viewing physical discs on a home television to streaming content on all sorts of
4 devices. Consumers increasingly want the freedom to watch content wherever they
5 may be, on tablet, laptop, smart telephones, and other devices. As consumer
6 preferences involving digital technologies always do, the change in preference for
7 streamed content is happening rapidly and will likely be complete in under three
8 years. VidAngel enjoys a unique market position as the only company currently
9 streaming filtered content to customers. (The only other content filtering service on
10 the market sells devices that consumers may use at home to filter the content of
11 physical DVDs being watched on a television set.) As the sole company offering to
12 provide filtered streaming content, VidAngel enjoys a significant head start over
13 potential competitors in developing its technology, patenting its break-throughs, and
14 increasing its know-how. VidAngel would lose this enormous head start if it were
15 enjoined. Loss of market share, especially during a critical period in a company's
16 growth, is, of course, an irreparable injury. *See Credit Bureau Connection, Inc. v.*
17 *Pardini*, 726 F. Supp. 2d 1107, 1123 (E.D. Cal. 2010). Further, VidAngel owes a
18 large portion of its success to the highly capable and competent employees and
19 independent contractors it has attracted, trained, and retained. Were VidAngel to be
20 enjoined during the pendency of this action, it would lose all the advantages
21 described above.

22 The injunction threatens to put VidAngel out of business before any
23 resolution on the merits and would cause it serious financial loss. To date,

24

25 5418893, at *9 (E.D. Cal. 2010) (\$1 million); *Topline Corp. v. 4273371 Canada,*
26 *Inc.*, 2007 WL 2332471 at *15 (W.D. Wash. Aug. 13, 2007) (\$1 million);
27 *Cybermedia, Inc. v. Symantec Corp.*, 19 F. Supp. 2d 1070, 1081 (N.D. Cal. 1998)
(\$1.6 million).

28

1 VidAngel has been capitalized with over \$3.6 million. Harmon Dec., ¶ 63. In the
2 next 18 months (a cautious estimate of the time it will take to get to trial), VidAngel
3 is expected to earn [REDACTED] and the company's fair market value
4 would be [REDACTED]. Harmon Dec., ¶ 63. But if its entire business is
5 wrongfully enjoined, VidAngel would lose all its value. *Id.*

6 The devastating financial repercussions of an injunction also would severely
7 hamper VidAngel's ability to properly fund the litigation of its antitrust claims
8 against the counterclaim defendants, which are well-funded and established giants in
9 the entertainment industry. Disney, the DGA, and others have entered into written
10 agreements that are clearly designed to prohibit the lawful provision of online
11 filtering services. These agreements unreasonably restrain the market for licensed
12 VOD filtered streaming. An injunction would jeopardize the pursuit of these
13 legitimate claims on behalf of this suppressed market. Thus, VidAngel requests a
14 bond of not less than \$50,000,000.

15 **CONCLUSION**

16 For the reasons explained above, Disney's motion should be denied.

17
18 DATED: September 12, 2016

Respectfully submitted,

19
20 By: /s/ Jaime W. Marquart

Jaime W. Marquart
BAKER MARQUART LLP
2029 Century Park East, Sixteenth Floor
Los Angeles, California 90067
(424) 652-7800
(424) 652-7850 (facsimile)

21
22
23
24 Attorneys for Defendant and
Counterclaimant VidAngel, Inc.

1 GLENN D. POMERANTZ (SBN 112503)
glenn.pomerantz@mto.com
2 KELLY M. KLAUS (SBN 161091)
kelly.klaus@mto.com
3 ROSE LEDA EHLER (SBN 296523)
rose.ehler@mto.com
4 ALLYSON R. BENNETT (SBN 302090)
allyson.bennett@mto.com
5 MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, Thirty-Fifth Floor
6 Los Angeles, California 90071-1560
Telephone: (213) 683-9100
7 Facsimile: (213) 687-3702

8 Attorneys for Plaintiffs

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 WESTERN DIVISION

12 DISNEY ENTERPRISES, INC.;
LUCASFILM LTD. LLC;
13 TWENTIETH CENTURY FOX FILM
CORPORATION and WARNER
14 BROS. ENTERTAINMENT INC.,
15 Plaintiffs and Counterclaim
Defendants,
16 vs.
17 VIDANGEL, INC.,
18 Defendant and Counter-
19 Claimant.

Case No. 16-cv-04109-AB (PLAx)
**UNREDACTED VERSION OF
DOCUMENT PROPOSED TO BE
FILED UNDER SEAL**
**PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR
PRELIMINARY INJUNCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**
Judge: Hon. André Birotte Jr.
Date: October 24, 2016
Time: 10:00 a.m.
Crtrm.: 4
Filed concurrently herewith:
(1) Declaration of Tedd Cittadine
(2) Declaration of Rose Leda Ehler
(3) Declaration of Kelly M. Klaus
(4) Declaration of Robert Schumann
(5) [Proposed] Order
(6) Application to File Under Seal
Trial Date: None Set

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on October 24, 2016, at 10:00 a.m., before the
3 Honorable André Birotte Jr., in Courtroom 4 of the United States District Court for
4 the Central District of California, located at 312 North Spring Street, Los Angeles,
5 California 90012, Plaintiffs Disney Enterprises, Inc., Lucasfilm Ltd. LLC, Twentieth
6 Century Fox Film Corporation, and Warner Bros. Entertainment Inc. (collectively,
7 “Plaintiffs”) will and hereby do move for a Preliminary Injunction restraining
8 Defendant VidAngel, Inc. (“VidAngel”) and all of its officers, agents, servants,
9 employees, and attorneys, and those persons in active concert or participation or
10 privity with any of them, from: [1] violating Plaintiffs’ rights pursuant to § 1201(a) of
11 the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 1201(a), by
12 circumventing technological measures that effectively control access to Plaintiffs’
13 copyrighted works on DVDs and Blu-ray discs; and [2] infringing by any means,
14 directly or indirectly, Plaintiffs’ exclusive rights under § 106 of the Copyright Act,
15 *id.* § 106, including by reproducing or publicly performing Plaintiffs’ copyrighted
16 works.

17 This Motion is made on the following grounds as explained in the
18 accompanying Memorandum of Points and Authorities and supporting papers:

19 1. Plaintiffs are likely to succeed on the merits because the record
20 evidence clearly shows that VidAngel: (a) uses “ripping” software to circumvent
21 technological protection measures on DVDs and Blu-ray discs that effectively
22 control access to Plaintiffs’ copyrighted motion pictures and television shows on
23 those discs, thereby violating § 1201(a); (b) copies the resulting unprotected digital
24 files containing Plaintiffs’ works to a computer system, thereby infringing Plaintiffs’
25 exclusive rights to reproduce their works under § 106(1); and (c) transmits
26 performances from the unauthorized copies that VidAngel makes to the public,
27 thereby infringing Plaintiffs’ exclusive rights to perform their works publicly under
28 § 106(4).

1 2. VidAngel’s defenses to violating Plaintiffs’ rights are meritless.

2 3. Absent a preliminary injunction, Plaintiffs will suffer irreparable harm,
3 including with respect to their ability to exercise their exclusive rights, their
4 relationships and goodwill with authorized licensees, and the development of the
5 market for on-demand streaming. The balance of equities tips decidedly in
6 Plaintiffs’ favor, and an injunction is in the public interest.

7 This Motion is based upon this Notice of Motion and Motion; the attached
8 Memorandum of Points and Authorities; the Declarations of Tedd Cittadine
9 (“Cittadine Decl.”), Rose Leda Ehler (“Ehler Decl.”), Kelly M. Klaus (“Klaus
10 Decl.”) and Robert Schumann (“Schumann Decl.”) and Exhibits thereto; all
11 documents on file in this action; and such further or additional evidence or
12 argument as may be presented before or at the time of the hearing on this Motion.

13
14 DATED: August 22, 2016

MUNGER, TOLLES & OLSON LLP

15
16
17 By: /s/ Kelly M. Klaus

18 KELLY M. KLAUS

19 Attorney for Plaintiffs

1 **TABLE OF CONTENTS**

2 **Page**

3 INTRODUCTION 1

4 FACTUAL BACKGROUND..... 4

5 A. Plaintiffs And Their Copyrighted Works..... 4

6 B. VidAngel Builds Its Business By Exploiting Plaintiffs’ Rights..... 5

7 1. VidAngel’s Decision To Create An Unlicensed Service 5

8 2. How VidAngel Works 7

9 3. VidAngel’s Escalating Marketing And Recent Growth..... 9

10 C. VidAngel’s Letters To Plaintiffs And Other Studios, And This

11 Lawsuit..... 10

12 ARGUMENT..... 11

13 I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF

14 THEIR CLAIMS 11

15 A. Plaintiffs Will Succeed On Their DMCA Claim 11

16 1. VidAngel Circumvents The Technological Protection

17 Measures That Control Access To Plaintiffs’ Works On

18 Discs..... 12

19 2. VidAngel Has No Defense To Its Violation Of § 1201(a)..... 13

20 a. The DMCA Makes No Exception For Businesses

21 That Want To Circumvent To Provide Filters 13

22 b. The FMA Does Not Authorize Circumvention..... 14

23 c. There Is No Fair Use Exemption To § 1201(a)

24 Liability 15

25 B. Plaintiffs Will Succeed On Their Copyright Infringement Claims 16

26 1. Plaintiffs Own Or Control Valid Copyrights In The Works

27 That VidAngel Exploits..... 16

28 2. VidAngel Violates Plaintiffs’ Exclusive Rights To

Reproduce And Publicly Perform Their Copyrighted

Works..... 16

a. VidAngel Violates Plaintiffs’ Exclusive Right To

Reproduce Their Works By Making Copies..... 17

TABLE OF CONTENTS
(continued)

		Page
1		
2		
3	b. VidAngel Violates Plaintiffs’ Exclusive Right To Publicly Perform Their Copyrighted Works	17
4		
5	i. VidAngel Publicly Performs Plaintiffs’ Works	17
6		
7	ii. VidAngel’s “Buy-Sellback” Scheme Does Not Transform VidAngel’s Public Performances Into Private Ones.....	18
8	3. None of VidAngel’s Defenses Excuse Its Infringement	21
9		
10	a. The FMA Does Not Excuse VidAngel’s Infringement	21
11		
12	b. VidAngel’s Affirmative Defense Of Fair Use Does Not Excuse Its Infringement	22
13		
14	i. VidAngel’s Wholesale Copying And Publicly Performing Plaintiffs’ Works Are Commercial And Non-Transformative	23
15		
16	ii. Plaintiffs’ Copyrighted Works Are Highly Creative	24
17		
18	iii. VidAngel Copies The Entirety Of Plaintiffs’ Works And Publicly Performs Substantially The Entirety Of Them	24
19		
20	iv. VidAngel’s Service Undermines Existing And Potential Markets For Plaintiffs’ Works	25
21		
22	c. The First Sale Doctrine Does Not Authorize VidAngel’s Copying or Streaming.....	26
23		
24	II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION	27
25		
26	A. VidAngel’s Unauthorized Service Causes Immediate And Irreparable Harms	27
27		
28	B. Plaintiffs’ Motion Is Timely, And VidAngel’s Assertions of “Delay” Do Not Negate Irreparable Harm	30
29		
30	III. THE BALANCE OF HARDSHIPS TIPS DECISIVELY FOR PLAINTIFFS.....	31
31		
32	IV. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST.....	32
33		
34	V. MINIMAL SECURITY SHOULD BE REQUIRED.....	33

**TABLE OF CONTENTS
(continued)**

Page

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION.....33

TABLE OF AUTHORITIES

		Page(s)
1		
2		
3	FEDERAL CASES	
4	<i>321 Studios v. Metro Goldwyn Mayer Studios, Inc.</i> ,	
5	307 F. Supp. 2d 1085 (N.D. Cal. 2004).....	12
6	<i>A & M Records, Inc. v. A.L.W., Ltd.</i> ,	
7	855 F.2d 368 (7th Cir. 1988).....	20
8	<i>A&M Records, Inc. v. Napster, Inc.</i> ,	
9	239 F.3d 1004 (9th Cir. 2001).....	16
10	<i>American Broadcasting Companies, Inc. v. Aereo, Inc.</i> ,	
11	134 S. Ct. 2498 (2014).....	3, 7, 17, 18, 19
12	<i>Apple Inc. v. Psystar Corp.</i> ,	
13	673 F. Supp. 2d 943 (N.D. Cal. 2009).....	32
14	<i>Arc of Cal. v. Douglas</i> ,	
15	757 F.3d 975 (9th Cir. 2014).....	30, 31
16	<i>Arista Records LLC v. Myxer, Inc.</i> ,	
17	No. CV 08-03935 GAF, 2011 WL 11660773 (C.D. Cal. 2011).....	25
18	<i>Authors Guild v. Google, Inc.</i> ,	
19	804 F.3d 202 (2d Cir. 2015).....	24
20	<i>Cadence Design Sys., Inc. v. Avant! Corp.</i> ,	
21	125 F.3d 824 (9th Cir. 1997).....	31
22	<i>Campbell v. Acuff-Rose Music, Inc.</i> ,	
23	510 U.S. 569 (1994).....	23, 24, 25
24	<i>Capitol Records, LLC v. ReDigi Inc.</i> ,	
25	934 F. Supp. 2d 640 (S.D.N.Y. 2013).....	26
26	<i>Central Point Software, Inc. v. Global Software & Accessories, Inc.</i> ,	
27	880 F. Supp. 957 (E.D.N.Y. 1995).....	20
28	<i>Clean Flicks of Colo. v. LLC v. Soderbergh</i> ,	
	433 F. Supp. 2d 1236 (D. Colo. 2006).....	24

TABLE OF AUTHORITIES
(continued)

		Page(s)
1		
2		
3	<i>Columbia Pictures Industries, Inc. v. Redd Horne, Inc.</i> ,	
4	749 F.2d 154 (3d Cir. 1984)	17, 18, 19
5	<i>Dish Network, L.L.C. v. Vicxon Corp.</i> ,	
6	No. 12-CV-9-L WVG, 2013 WL 3894905 (S.D. Cal. July 26, 2013)	15
7	<i>Dr. Seuss Enters., L.P. v. Penguin Books, USA, Inc.</i> ,	
8	109 F.3d 1394 (9th Cir. 1997)	25
9	<i>Eldred v. Ashcroft</i> ,	
10	537 U.S. 186 (2002)	32
11	<i>Elvis Presley Enters., Inc. v. Passport Video</i> ,	
12	349 F.3d 622 (9th Cir. 2003)	23, 24, 25
13	<i>Harper & Row Publishers, Inc. v. Nation Enters.</i> ,	
14	471 U.S. 539 (1985)	23
15	<i>Hooks v. Kitsap Tenant Support Servs., Inc.</i> ,	
16	816 F.3d 550 (9th Cir. 2016)	14
17	<i>Kelly v. Primco Mgmt., Inc.</i> ,	
18	No. CV-14-07263 BRO, 2015 WL 10990368 (C.D. Cal. Jan. 12,	
19	2015)	32
20	<i>L.A. News Serv. v. Tullo</i> ,	
21	973 F.2d 791 (9th Cir. 1992)	25
22	<i>Leadsinger, Inc. v. BMG Music Publ'g</i> ,	
23	512 F.3d 522 (9th Cir. 2008)	23, 25
24	<i>Lotus Dev. Corp. v. Paperback Software Int'l</i> ,	
25	740 F. Supp. 37 (D. Mass. 1990)	30
26	<i>Lydo Enters., Inc. v. City of Las Vegas</i> ,	
27	745 F.2d 1211 (9th Cir. 1984)	30
28	<i>MAI Sys. Corp. v. Peak Computer, Inc.</i> ,	
	991 F.2d 511 (9th Cir. 1993)	17, 22
	<i>MDY Indus., LLC v. Blizzard Entm't, Inc.</i> ,	
	629 F.3d 928 (9th Cir. 2010)	2, 12, 14

TABLE OF AUTHORITIES
(continued)

		Page(s)
1		
2		
3	<i>Monge v. Maya Magazines, Inc.</i> ,	
4	688 F.3d 1164 (9th Cir. 2012).....	23,24
5	<i>On Command Video Corporation v. Columbia Pictures Industries</i> ,	
6	777 F. Supp. 787 (N.D. Cal. 1991).....	18, 19
7	<i>Peker v. Masters Collection</i> ,	
8	96 F. Supp. 2d 216 (E.D.N.Y. 2000).....	26
9	<i>Perfect 10, Inc. v. Amazon.com, Inc.</i> ,	
10	508 F.3d 1146 (9th Cir. 2007).....	22
11	<i>Petrella v. Metro-Goldwyn-Mayer, Inc.</i> ,	
12	134 S. Ct. 1962 (2014).....	4, 30, 31
13	<i>Realnetworks, Inc. v. DVD Copy Control Ass'n</i> ,	
14	641 F. Supp. 2d 913 (N.D. Cal. 2009).....	12, 32
15	<i>Red Baron-Franklin Park, Inc. v. Taito Corp.</i> ,	
16	883 F.2d 275 (4th Cir. 1989).....	26
17	<i>Salinger v. Colting</i> ,	
18	607 F.3d 68 (2d Cir. 2010).....	27
19	<i>Ticketmaster L.L.C. v. RMG Techs., Inc.</i> ,	
20	507 F. Supp. 2d 1096 (C.D. Cal. 2007).....	28
21	<i>Triad Sys. Corp. v. Se. Express Co.</i> ,	
22	64 F.3d 1330 (9th Cir. 1995).....	31
23	<i>TRW Inc. v. Andrews</i> ,	
24	534 U.S. 19 (2001).....	13
25	<i>UMG Recordings, Inc. v. Escape Media Grp., Inc.</i> ,	
26	No. 11 CIV. 8407, 2014 WL 5089743 (S.D.N.Y. Sept. 29, 2014).....	17
27	<i>United Fabrics Int'l, Inc. v. C&J Wear, Inc.</i> ,	
28	630 F.3d 1255, 1257 (9th Cir. 2011).....	16
	<i>United States v. Crippen</i> ,	
	No. CR 09-703 PSG, 2010 WL 7198205 (C.D. Cal. Nov. 23, 2010).....	15, 16

TABLE OF AUTHORITIES
(continued)

		Page(s)
1		
2		
3	<i>Universal City Studios, Inc. v. Reimerdes,</i>	
4	111 F. Supp. 2d 294 (S.D.N.Y. 2000).....	12, 16
5	<i>Warner Bros. Entertainment Inc. v. WTV Systems, Inc.,</i>	
6	824 F. Supp. 2d 1003 (C.D. Cal. 2011).....	18, 19, 27, 29, 33
7	<i>Winter v. Natural Res. Def. Council, Inc.,</i>	
8	555 U.S. 7 (2008)	11
9	<i>Worldwide Church of God v. Philadelphia Church of God, Inc.,</i>	
10	227 F.3d 1110 (9th Cir. 2000).....	24
11	<i>WPIX, Inc. v. ivi, Inc.,</i>	
12	691 F.3d 275 (2d Cir. 2012)	28
13	FEDERAL STATUTES	
14	17 U.S.C. § 101.....	3, 17, 22
15	17 U.S.C. § 106.....	14, passim
16	17 U.S.C. § 106(1).....	1, 17
17	17 U.S.C. § 106(3).....	26
18	17 U.S.C. § 106(4).....	1, 3, 17
19	17 U.S.C. § 107.....	15, 22
20	17 U.S.C. § 109(a)	26
21	17 U.S.C. § 110.....	14, 15, 21
22	17 U.S.C. § 110(11).....	2, passim
23	17 U.S.C. § 117(c)	31
24	17 U.S.C. § 410(c)	16
25	17 U.S.C. § 1201.....	14, 15
26	17 U.S.C. § 1201(a)	1, passim
27		
28		

TABLE OF AUTHORITIES
(continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

17 U.S.C. § 1201(c) 15

17 U.S.C. § 1201(d)-(j) 13

FEDERAL REGULATIONS

37 CFR pt. 201.40 13

LEGISLATIVE MATERIALS

151 Cong. Rec. S501-S502 (daily ed. Jan. 25, 2005)..... 2, 15, 22

H.R. 4586, Serial No. 94 (June 17, 2004) 15

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Defendant VidAngel operates an online on-demand video streaming service
4 that blatantly violates Plaintiffs’ rights under the DMCA and the Copyright Act:

- 5 • VidAngel starts by circumventing the technological protection
6 measures on DVDs and Blu-ray discs (collectively, “Discs”) that
7 control access to the digital media files of Plaintiffs’ copyrighted
8 movies and television shows—or, as VidAngel’s employees say, they
9 “rip[]” the movies—a violation of § 1201(a) of the DMCA. Schumann
10 Decl. ¶¶ 7, 35-38, 43, Ex. C at 23; Dkt. 11(Counter-Complaint) ¶ 61.
- 11 • VidAngel then copies to computer servers the copyrighted works that
12 VidAngel has ripped—a violation of Plaintiffs’ exclusive rights to
13 reproduce their works under § 106(1) of the Copyright Act. Schumann
14 Decl. ¶¶ 37, 40-42, Ex. C at 23-25; Ehler Decl. Ex. EE at Tr. 58:1-4.¹
- 15 • VidAngel then streams performances of those copyrighted works over
16 and over again to numerous VidAngel customers, i.e., “to the public”—
17 a violation of Plaintiffs’ exclusive rights to publicly perform their
18 works under § 106(4). Schumann Decl. ¶¶ 7-8, Ex. C at 23-25; Ehler
19 Decl. Ex. EE at Tr. 90:18-22.

20 Legitimate on-demand streaming services—e.g., iTunes, Amazon and Google
21 Play—run their businesses without illegally circumventing and with authorization to
22 copy and stream Plaintiffs’ works. These legitimate services negotiate and pay for
23 the rights they use. VidAngel does not, and it thereby acquires an unjust
24 competitive advantage that VidAngel touts in its advertising. *Id.* Ex. A (examples).

25 _____
26 ¹ All transcript references are to the 30(b)(6) deposition of VidAngel’s CEO, Neal
27 Harmon on August 11, 2016, excerpts at Ehler Decl., Ex. EE. The “Tr.” references
28 are to the page and line of the original deposition transcript rather than the page as
consecutively numbered in the Exhibits.

1 VidAngel’s illegal conduct threatens imminent, irreparable harm by depriving
2 Plaintiffs of their rights to control their content, interfering with relationships with
3 licensees, and undercutting the growth of the legitimate on-demand streaming
4 market. Even VidAngel’s followers recognize VidAngel causes harm. *Id.* Ex. C (“I
5 could watch Star Wars 7 on VidAngel (only filtering one small thing) for \$1 before
6 any other video streaming service had it available. If you guys are allowed to rip,
7 stream, and resell DVDs, the other streaming services will want to do it too – it’s
8 only fair.”).

9 VidAngel tries to defend its service with three meritless arguments.

10 First, VidAngel argues that Congress sanctioned all of its unlawful conduct
11 under the Family Movie Act of 2005 (“FMA”), 17 U.S.C. § 110(11), because
12 VidAngel allows its users to select content “filters” that skip or mute content from
13 streamed movies. The claims at issue have nothing to do with the filtering aspects
14 of VidAngel’s service, and the FMA provides VidAngel no shelter on this motion.
15 The FMA says that one does not infringe copyright by making motion picture
16 content “imperceptible” (or providing software that does the same) in the context of
17 private home viewing. *Id.* The FMA does not say that a business that filters thereby
18 has a total exemption from the DMCA or from having to license the right to copy
19 and publicly stream movies. On the contrary, the FMA makes clear that the relevant
20 filtering must be done from an “authorized copy,” which VidAngel does not make
21 and from which it does not stream. *Id.*; see 151 Cong. Rec. S501-S502 (daily ed.
22 Jan. 25, 2005) (Sen. Hatch) (“[A]n infringing transmission of a performance to a
23 household, [is] not rendered non-infringing by section 110(11) by virtue of the fact
24 that limited portions [of the performance] are made imperceptible.”). Filtering does
25 not make an underlying unlicensed service legal. And the FMA provides no defense
26 to circumventing, which is “distinct from infring[ing].” *MDY Indus., LLC v.*
27 *Blizzard Entm’t, Inc.*, 629 F.3d 928, 946, 950 (9th Cir. 2010).

28

1 Second, VidAngel claims it does not violate the public performance right
2 because it makes only “private” performances to users who “purchase” Discs from
3 VidAngel. That is wrong. When it streams movies over the Internet, VidAngel is
4 “transmitting” performances to users. Transmissions infringe § 106(4) where, as
5 here, the defendant makes them “to the public, by means of any device or process,
6 whether the members of the public capable of receiving the performance or display
7 receive it in the same place or in separate places and at the same time or at different
8 times.” 17 U.S.C. § 101 (defining “[t]o perform . . . a work ‘publicly’”). A long
9 line of precedent construing this provision (the “Transmit Clause”)—including in
10 the Supreme Court’s recent decision in *American Broadcasting Companies, Inc. v.*
11 *Aereo, Inc.*, 134 S. Ct. 2498 (2014)—makes it clear that VidAngel’s online, on-
12 demand transmissions are public performances. They do not become “private”
13 performances just because VidAngel purports to “sell” its users the Discs (which
14 VidAngel then immediately offers to buy back for a net access price of \$1 a day).
15 VidAngel’s “buy-sellback” scheme is an artifice—what its CEO called a “creative
16 way” to compete while trying to be “buttoned up legally.” Ehler Decl. Ex. DD at
17 366. This sleight of hand does not cure VidAngel’s infringement. What matters is
18 whether VidAngel is transmitting performances to the public, not the label that
19 VidAngel uses to describe its transactions. *Aereo*, 134 S. Ct. at 2509 (“[W]hen
20 Aereo streams the same television program to multiple subscribers, it ‘transmit[s]
21 . . . a performance’ to all of them”). VidAngel publicly performs without a license.

22 Third, VidAngel argues that Plaintiffs forfeited the right to a preliminary
23 injunction because they did not immediately sue VidAngel when its outside litigator
24 (and recently appointed General Counsel) sent letters describing parts of the service
25 to Plaintiffs and other motion picture studios in July 2015. Dkt. 11, Ex. A. At that
26 point, as noted in those letters, VidAngel had fewer than 5,000 users and described
27 its service as being in a “limited beta.” *Id.* The letters did not say when VidAngel
28 would launch publicly, and Plaintiffs could not have known whether the service

1 would survive, let alone thrive. As the Supreme Court has recognized, “[e]ven if an
2 infringement is harmful, the harm may be too small to justify the cost of litigation.”
3 *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1976 (2014). Copyright
4 owners do not have to immediately sue anyone who infringes, or forever lose the
5 right to seek a preliminary injunction; such a requirement would lead to unnecessary
6 litigation and burdens on the courts. VidAngel started to advertise more
7 aggressively earlier this year and gained traction in the press and online blogs; it
8 now has more than [100,000] active monthly users (and more than [400,000] total)
9 and continues to grow. Ehler Decl. Ex. D; *id.* Ex. AA at 317. Plaintiffs were
10 justified in suing when they did, and they satisfy all the requirements for injunctive
11 relief.

12 **FACTUAL BACKGROUND**

13 **A. Plaintiffs And Their Copyrighted Works**

14 Plaintiffs, directly or through affiliates, invest substantial resources and effort
15 to produce and distribute some of the most popular and critically acclaimed movies
16 and television programs in the world. Their works include, among many others,
17 *Frozen* (2013) (Disney), *Star Wars: The Force Awakens* (2015) (Lucasfilm), *Avatar*
18 (2009) (Fox), and *Harry Potter and the Sorcerer’s Stone* (2001) (Warner Bros.).

19 Copyright protection is critical to Plaintiffs’ ability to obtain a return on their
20 substantial investments in these and other works and to underwrite the production of
21 new creative content, often at great financial risk. Cittadine Decl. ¶ 8. A studio will
22 spend tens or even hundreds of millions of dollars producing, distributing and
23 marketing a major motion picture. *Id.* ¶ 7. Third parties that wish to exercise
24 Plaintiffs’ rights to exploit their works must negotiate to obtain those rights. *Id.*
25 ¶ 14.

26 Plaintiffs employ different strategies to make their content available to meet
27 consumer demand, but each Plaintiff tries to tailor the value and price for each
28 offering—or “distribution channel”—to the willingness of customers (and licensees)

1 to pay for those offerings. *Id.* ¶ 9. Plaintiffs distribute and license their content for
2 home entertainment across a number of channels. These include, among others:
3 (1) physical Discs; (2) digital download through services like iTunes, VUDU or
4 Amazon Video; (3) on-demand streaming for short-term viewing on a per-
5 transaction fee (e.g., iTunes Store or Google Play Store); or (4) subscription on-
6 demand streaming (e.g., Netflix or Hulu). *Id.*

7 Plaintiffs’ strategic process of releasing their content across different
8 distribution channels and to different licensees over time is called “windowing.” *Id.*
9 ¶ 15. A Plaintiff may decide to release specific titles only through certain channels
10 for a prescribed period, e.g., releasing titles for purchase on Discs or digital
11 download before releasing them to on-demand streaming. *Id.* ¶¶ 15, 33. Plaintiffs
12 often negotiate higher licensing fees in exchange for granting a licensee the
13 exclusive right to perform a movie or television show during a particular time
14 period. *Id.* ¶ 15. The online and digital channels have become increasingly
15 important revenue sources. *Id.* ¶ 10.

16 Especially in this digital age, to exercise their exclusive rights under
17 copyright, Plaintiffs must protect their content from piracy and unauthorized use.
18 Technological protection measures that control access (here, “access controls”) are
19 one way in which Plaintiffs ensure that copies of their content stored on Discs
20 cannot be easily copied and disseminated digitally. Schumann Decl. ¶¶ 20, 27. The
21 access controls that encrypt the digital files on Discs can lawfully be unencrypted
22 for playback or copying only by authorized devices. *Id.* ¶¶ 20-34.

23 **B. VidAngel Builds Its Business By Exploiting Plaintiffs’ Rights**

24 **1. VidAngel’s Decision To Create An Unlicensed Service**

25 In the fall of 2013, VidAngel first launched a standalone filtering service
26 through a web browser plug-in. Ehler Decl. Ex. EE at Tr. 135:12-136:7. This
27 technology permitted a user to apply filters to content streamed from YouTube (and
28 if a full-length movie, obtained legitimately through Google Play). *Id.*

1 In the fall of 2014, VidAngel decided to “pivot” its business to its current
2 service, which does not simply provide filtering but offers unauthorized streaming
3 for a daily fee. *Id.* Ex. V at 217; *Id.* Ex. EE at Tr. 136:8-12. VidAngel knew from
4 surveying users who stopped using its prior service that [47% of them “didn’t want
5 to pay for rentals on YouTube/Google Play.”] *Id.* Ex. V at 227. It also had
6 information that only 1% of Americans would actually pay to watch filtered
7 versions of movies if you charged them to use a filter. *Id.* Ex. E at 61. VidAngel
8 decided that, rather than provide filters to run on streams from licensed services, it
9 would rip and copy Discs and charge users for streaming. When investors
10 questioned whether the company was getting into a [declining business (movies on
11 Discs)], Mr. Harmon, the CEO, assured them that [“VidAngel is NOT a disc service.
12 VidAngel is a *streaming* service.”] *Id.* Ex. W at 234 (emphasis added).²

13 From the outset of its “pivot,” VidAngel knew it would need licenses to run a
14 streaming business. VidAngel, however, decided on a strategy of asking for
15 forgiveness, not permission. As Mr. Harmon put it in a fall 2014 email to an
16 investor: [“[i]n the future we plan to negotiate licenses for content directly from
17 Hollywood (as Netflix) did. . . . We need disc[s] right[] [now] on the streaming
18 platform (which is growing at over 20 percent annually), not an upward trend in disc
19 sales.”] *Id.*; *see also id.* Ex. DD at 366 (Feb. 2015: Mr. Harmon saying VidAngel
20 would “have to be a lot bigger” to “get licensing from Hollywood. . . . Until then,
21 we sell DVDs and Blu-Rays to you, vault them in our warehouse, and stream you a
22 filtered movie. The buyback system was the most creative way we could come up
23 with in order to offer you the value of a Redbox while staying buttoned up
24 legally.”); *id.* Ex. X at 257 (Sept. 2015: Mr. Harmon saying VidAngel [“

25 _____
26 ² At deposition, Mr. Harmon claimed this email was discussing a model for users to
27 “trade or share” their own Discs. Ehler Decl. Ex. EE at Tr. 146:8-148:6. But the
28 statement that VidAngel would be a [“streaming service,” “NOT a disc service,”]
was true regardless of the source of Discs. *Id.* Ex. W at 234.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

[REDACTED]

[REDACTED]”]).

2. How VidAngel Works

For every movie or TV show it streams, VidAngel first rips a digital copy of the content from a single Disc. *Id.* Ex. EE at Tr. 127:6-131:7; Schumann Decl. ¶¶ 37-39, 42, Exs. C at 23, D. Using RedFox AnyDVD HD software—popularly known as a “ripping” tool—VidAngel circumvents the technological protections—CSS, AACS, BD+—that Plaintiffs use to control access to their content. Ehler Decl. Ex. S. VidAngel previously used the same software sold by the same developers and staff of SlySoft, a ripping software company whose owner was found guilty of distributing illegal circumvention tools. *Id.* Exs. F, EE at Tr. 68:9-69:16.

After circumventing the access controls, VidAngel copies the underlying digital files (i.e., the movie or television show) onto its computers and then saves additional copies on leased third-party servers. Schumann Decl. ¶ 40-42. VidAngel uses the ripped digital copies stored on those servers to stream content. *Id.*; Ehler Decl. Ex. EE at Tr. 90:18-22.

VidAngel charges customers for its on-demand streaming through a sham “buy-sellback” scheme. VidAngel adopted this scheme as part of the “pivot,” believing that it provided a loophole from public performance liability in light of dicta in the *Aereo* decision. *Id.* Ex. V at 217. As discussed at pp. 18-21, *infra*, VidAngel’s reliance on “buy-sellback” does not change its liability. The facts showing “buy-sellback” to be a fiction, however, speak volumes about VidAngel’s credibility in defending its service.

“Buy-sellback” works like this: Users pay an upfront fee of \$20, purportedly to “purchase” a physical Disc. *Id.* Ex. P at 181, 198 (“like a ‘security deposit’”). VidAngel then associates the user with an individual Disc that VidAngel has bar-coded and stored at its facility (the so-called “vault copy”). *Id.* Ex. EE at Tr. 51:5-20; 184:22-185:9. The user does not control or possess the vault copy; VidAngel

1 does. *Id.* at 124:21-25. VidAngel claims that, upon request, it will transfer
2 possession of the vault copy to the user. *Id.* at 228:21-229:1. To date, however,
3 VidAngel has received only [eight] requests from users to receive the physical Disc
4 and has returned only [four] Discs—out of more than [1.5 million] purported “sales”
5 thus far in 2016 alone. *Id.* at 229:2-12; 189:21-190:8.³

6 Furthermore, VidAngel does not actually stream from the vault copy—the
7 copy that VidAngel claims the customer “owns.” *Id.* at 127:6-20. Rather, VidAngel
8 circumvents the access controls on a Disc, copies the content and then streams from
9 the ripped copy that resides on VidAngel’s leased server. *Id.* at 130:20-131:17.
10 VidAngel then encourages the user to “sell back” the Disc at a “buyback” price that
11 goes down by \$1 or \$2 for each 24-hour period. *Id.* Ex. G at 93-94 (VidAngel
12 promotional clips on YouTube).⁴ The net effect is that the user pays \$1 or \$2 a day
13 for on-demand access to stream the movie or television show—daily prices which
14 VidAngel prominently features in its advertising. *Id.* Ex. G.

15 VidAngel constantly encourages users to treat the service as an online rental
16 service, which they can do by simply clicking to “sellback” the movie for credit.
17 Among other things, VidAngel provides: (1) an icon in the corner of the viewing
18 screen, allowing the user to initiate sellback during the stream; (2) a sellback
19 “popup” box at the end of the movie; (3) a link to sellback in the user dashboard;

20 _____
21 ³ Other inconsistencies expose the fiction that VidAngel is performing the contents
22 of a Disc the user “owns.” For example, the [four] users who actually requested and
23 received physical Discs can still stream the same content via VidAngel—proving
24 the stream comes from a different copy. *Id.* at 235:6-21. And, users who want to
25 watch a television show “purchase” access only to a single episode. *Id.* Ex. H.
26 Discs of Plaintiffs’ television shows contain entire seasons. If a user actually
27 “owned” the Disc, the user could watch the full season.

28 ⁴ “How VidAngel \$1 Movie Works in 15 Seconds” is available on YouTube at
<https://www.youtube.com/watch?v=map6EIP41bY> (last visited Aug. 21, 2016).
“How \$1 Movies Work on VidAngel Sellback” is available at
<https://www.youtube.com/watch?v=wvcF4x1d0xo> (last visited Aug. 21, 2016).

1 (4) an email reminder about the sellback option after 24 hours; and (5) until this
2 lawsuit, an “auto-sellback” default setting, whereby users would automatically set
3 their devices to sellback, and thus be assured the equivalent of a rental transaction.
4 *Id.* Ex. BB at 336-37.

5 3. **VidAngel’s Escalating Marketing And Recent Growth**

6 VidAngel’s strategy has involved rapidly growing its user base. In July 2015,
7 VidAngel had fewer than 4,848 users, but ambitious growth plans. Dkt. 11, Ex. A at
8 3. A November 2015 investor presentation projected that for 2016, VidAngel would
9 reach [REDACTED] customers and [REDACTED] in revenue; for 2017, [REDACTED]
10 customers and [REDACTED] in revenue; and for 2018, [REDACTED] customers and
11 [REDACTED] in revenue—with projected profit margins of [REDACTED]. Ehler
12 Decl. Ex. Y at 283.

13 To achieve these ends, VidAngel this year embarked on an aggressive
14 marketing campaign, explicitly contrasting its \$1-a-day (or \$2 for HD) price
15 (because it foregoes license fees) with the more typical \$4.99 or \$5.99 daily fee
16 charged by licensed services; VidAngel also boasts of its ability to offer movies not
17 available on other services. Ehler Decl. Exs. A, B. VidAngel’s users have
18 responded to VidAngel’s marketing cues:

19 One more thing I love about VidAngel is that I can easily
20 download NEW movies cheaper than anywhere else! I
21 probably won’t edit this one for our family, but I’m so
22 happy I can still just rent it for \$2 a night!

22 *Id.* Ex. I at 98; *see also id.* at 101 (“We bought Star Wars and sold it back for a total
23 of \$1 when it was like \$5 to rent on Amazon. So even if you don’t need content
24 cleaned, it’s a great video service.”).

25 This spring, VidAngel began adding more of Plaintiffs’ works to its service,
26 with a particular focus on marketing movies as soon as they were released on Disc.
27 On April 5, 2016, VidAngel offered *Star Wars: The Force Awakens*. *Id.* Ex. J.
28 April 5 was the same day that *The Force Awakens* was released for purchase on

1 Disc and digital download, but was not yet available to the on-demand streaming
2 market. Cittadine Decl. ¶ 16. VidAngel also released Disney’s *Zootopia*, Warner
3 Bros.’s *Batman v. Superman: Dawn of Justice* and *Keanu*, and Fox’s *DeadPool* and
4 *The Revenant*, among others, within a week of their release on Disc and, for some of
5 these titles, before they were released on any other on-demand streaming service.
6 Ehler Decl. Ex. N.

7 By June 2016, when Plaintiffs filed suit, VidAngel had grown to nearly
8 [500,000] monthly transactions across well over [100,000] monthly active users. *Id.*
9 Ex. AA at 315, 317. VidAngel had also streamed over [1.5 million] movies in the
10 first half of 2016. *Id.* Ex. EE at Tr. 189:21-190:8. VidAngel continues to
11 aggressively market its service using Plaintiffs’ copyrighted content.

12 **C. VidAngel’s Letters To Plaintiffs And Other Studios, And This**
13 **Lawsuit**

14 Late last summer, VidAngel’s then-outside counsel, David Quinto, sent letters
15 to Plaintiffs or their corporate parents, ostensibly expressing interest in purchasing
16 more Discs directly from each company. Dkt. 11, Ex. A. Mr. Quinto sent the letters
17 to General Counsels, not to people in business development. He purported to
18 describe VidAngel’s nascent service, which he said was in “limited beta” testing.
19 *Id.* at 3. Mr. Quinto said nothing about VidAngel circumventing the access-control
20 measures on Discs. He said nothing about VidAngel marketing its service for \$1-a-
21 day on-demand streaming through its “buy-sellback” scheme or offering Plaintiffs’
22 content before that content was available to authorized licensees.

23 Plaintiffs started investigating their potential legal claims against VidAngel
24 almost immediately after receiving Mr. Quinto’s letter. Cittadine Decl. ¶ 35.
25 Starting earlier this year, VidAngel launched a much broader advertising offensive
26 and started to gain traction in the press and on blogs, and its service started to grow
27 to significant user numbers. On June 9, 2016, Plaintiffs filed this suit.
28

1 In response, VidAngel modified certain aspects of its service. Before being
2 sued, VidAngel allowed users to filter for either the opening or closing credits as the
3 single required filter, meaning users could stream essentially the entire movie
4 without filters (users could even set this as the default filter).⁵ Ehler Decl. Ex. EE at
5 Tr. 247:24-248:21. To the chagrin of its users, VidAngel suspended this option in
6 response to this litigation, although users still must only select one filter to use the
7 service.⁶ *Id.* at 246:10-247:22.

8 ARGUMENT

9 Plaintiffs satisfy all the requirements for a preliminary injunction: They
10 likely will succeed on the merits and suffer irreparable harm absent preliminary
11 relief; the balance of equities tip in their favor, and an injunction is in the public
12 interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

13 I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF 14 THEIR CLAIMS

15 A. Plaintiffs Will Succeed On Their DMCA Claim

16 To prevail on their circumvention claim, Plaintiffs must prove that VidAngel
17 “circumvent[s] a technological measure that effectively controls access to a work
18 protected” by copyright. 17 U.S.C. § 1201(a)(1)(A). A violation of the DMCA is
19 “*independent* of traditional copyright infringement,” and no “nexus” to copyright
20

21
22 ⁵ This was a popular option particularly for Disney works. When VidAngel offered
23 this option, customers watched [23.61%] of streams of *Up*, [22.36%] of streams of
24 *Finding Nemo*, [20.91%] of streams of *Monsters, Inc.*, [20.46%] of streams of *Wall-*
25 *E* and [20.36%] of streams of *Big Hero 6* essentially unfiltered by selecting only the
26 credits filter. Ehler Decl. Ex. CC. For Warner Bros.’s *An Innocent Man*, customers
27 viewed [44.90%] of streams using only this filter. *Id.*

28 ⁶ Users were upset that they would have to filter actual movie content (rather than
the credits) to cheaply stream movies: “@VidAngel and you took away censoring
the end credits which was an easy choice if I didn’t really want to censor anything.”
Ehler Decl. Ex. FF; *id.* Ex. K (examples); *see also id.* Ex. O.

1 infringement is required. *See MDY Indus.*, 629 F.3d at 946, 949, 952 (expressly
2 declining to adopt a “infringement nexus requirement”) (emphasis added).

3 **1. VidAngel Circumvents The Technological Protection**
4 **Measures That Control Access To Plaintiffs’ Works On Discs**

5 A technological measure effectively controls access to a copyrighted work if,
6 “in the ordinary course of its operation, [it] requires the application of information,
7 or a process or a treatment, with the authority of the copyright owner, to gain access
8 to the work.” 17 U.S.C. § 1201(a). Plaintiffs use CSS, AACS and BD+ to prevent
9 unauthorized access to their content on Discs. Schumann Decl. ¶¶ 20, 27. All three
10 qualify as DMCA access controls. *See id.* ¶¶ 20-34; *Realnetworks, Inc. v. DVD*
11 *Copy Control Ass’n*, 641 F. Supp. 2d 913, 932 (N.D. Cal. 2009) (“CSS . . .
12 effectively controls access to . . . copyrighted DVD content”); *321 Studios v. Metro*
13 *Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1095 (N.D. Cal. 2004);
14 *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 317-18 (S.D.N.Y.
15 2000).

16 VidAngel circumvents these access controls. To circumvent is “to
17 descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid,
18 bypass, remove, deactivate, or impair a technological measure, without the authority
19 of the copyright owner.” 17 U.S.C. § 1201(a)(3)(A). VidAngel *admits* that it “uses
20 a commercially available software program to automatically allow read-access for
21 the purpose of mounting the DVD [and Blu-ray] files for uploading onto a
22 computer, *in the process removing restrictions on DVD [and Blu-ray] encryption.*”
23 Dkt. 11 ¶ 50(ii) (emphasis added); *see* Ehler Decl. Ex. S (invoice for AnyDvd HD);
24 Schumann Decl. ¶¶ 35-39. In short, VidAngel circumvents technological measures
25 that control access, and is liable under § 1201(a).

1 **2. VidAngel Has No Defense To Its Violation Of § 1201(a)**

2 **a. The DMCA Makes No Exception For Businesses That**
3 **Want To Circumvent To Provide Filters**

4 VidAngel argues that its circumvention is lawful because “the making of a
5 decrypted copy [is] the necessary first step in making a lawfully purchased DVD
6 capable of being filtered.” *See* Dkt. 11 (Counter-Complaint) ¶¶ 61-62. That is not
7 true as a factual matter and is irrelevant as a legal matter. As VidAngel admits,
8 other services provide software that allows consumers to apply filters to Discs they
9 have purchased. *See id.* ¶ 34 (describing ClearPlay’s DVD-filtering service). What
10 VidAngel means is that circumventing is a “necessary first step” for the type of
11 business VidAngel wants to run—one that provides unauthorized on-demand access
12 to content streamed from copies ripped from Discs. Circumvention makes it easier
13 and cheaper for VidAngel to run its business, but that does not make the
14 circumvention lawful.

15 VidAngel’s circumvention does not fit into any enumerated exception to the
16 anti-circumvention right or any additional exception promulgated by the Librarian
17 of Congress.⁷ 17 U.S.C. § 1201(d)-(j). Where, as here, “Congress explicitly
18 enumerates certain exceptions to a general prohibition, additional exceptions are not
19 to be implied, in the absence of evidence of a contrary legislative intent.” *TRW Inc.*
20 *v. Andrews*, 534 U.S. 19, 28 (2001) (quotations omitted).

21
22
23
24
25 ⁷ The DMCA calls for the Librarian of Congress to engage in triennial rulemaking to
26 determine if certain noninfringing uses of a copyrighted work are entitled to an
27 exception. 17 U.S.C. § 1201(a)(1)(B)-(C). The exceptions the Librarian has
28 promulgated are at 37 CFR Part 201.40, and none applies to VidAngel. Indeed, the
Librarian has never even been asked to consider such an exception for filtering.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

b. The FMA Does Not Authorize Circumvention

VidAngel argues that the FMA shows Congress’s intent to exempt VidAngel from § 1201(a) liability. The FMA’s text and legislative history show the opposite is true.

The FMA addresses a narrowly specified type of activity (the making imperceptible of certain audio and video), which, if it falls within the FMA is “not an infringement[] of copyright.” 17 U.S.C. § 110(11). Section 1201, however, provides a separate cause of action that is not a claim of infringement. As the Ninth Circuit explained—in the course of declining to adopt the requirement of a “nexus” between a DMCA violation and infringement—the DMCA “create[d] a *new* anticircumvention right in § 1201(a) *distinct from infringement.*” *See MDY Indus.*, 629 F.3d at 950 (emphasis added). “Infringement” is the violation of one of copyright’s exclusive rights, which are found in § 106. It is not the same as circumvention. The FMA further states that nothing in that exception to infringement (§ 110(11)) “shall be construed to imply further rights under section 106 of this title, *or to have any effect on defenses or limitations on rights granted under any other section of this title* or under any other paragraph of this section.” 17 U.S.C. § 110 (final sentence) (emphasis added). Section 1201(a) embodies rights and defenses relating to circumvention and not infringement. The FMA by its plain language provides VidAngel no defense.

Because “the statutory language is unambiguous and the statutory scheme is coherent and consistent,” there is no need to examine legislative history. *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 562 (9th Cir. 2016). But the legislative history *confirms* that the FMA does not excuse circumvention. The section-by-section analysis by the FMA’s Senate sponsor states that the FMA “does *not* provide any exemption from the anti-circumvention provisions of section 1201,” and that it:

1 would not be a defense to a claim of violation of section
2 1201 that the circumvention is for the purpose of engaging
3 in the conduct covered by this new exemption in section
4 110(11) [the FMA], just as it is not a defense under section
5 1201 that the circumvention is for the purpose of engaging
6 in any other non-infringing conduct.

7 151 Cong. Rec. S502 (daily ed. Jan. 25, 2005); *see id.* (“Any suggestion that support
8 for the exercise of viewer choice . . . requires violation of either the copyright in the
9 work or of the copy protection schemes that provide protection for such work should
10 be rejected.”).⁸ The FMA provides VidAngel no defense to its § 1201(a) violations.

11 **c. There Is No Fair Use Exemption To § 1201(a) Liability**

12 The fair use defense under § 107 does not apply to § 1201(a) violations. *See,*
13 *e.g., Dish Network, L.L.C. v. Vicxon Corp.*, No. 12-CV-9-L WVG, 2013 WL
14 3894905, at *6 (S.D. Cal. July 26, 2013) (“[P]otential lawful or fair use is not a
15 defense to § 1201(a) when its requirements are established.”); *United States v.*
16 *Crippen*, No. CR 09-703 PSG, 2010 WL 7198205, at *2 (C.D. Cal. Nov. 23, 2010)
17 (“A reading of § 1201(c) that adds the fair use arrow to a defendant’s § 1201(a)
18 quiver contradicts the plain meaning of the statute and must be rejected.”).

19 ⁸ When Congress first considered the FMA, in 2004, Representative Goodlatte
20 expressed concern that it might interfere with copyright owners’ rights under
21 § 1201. Hearing on H.R. 4586, Serial No. 94 (June 17, 2004) at 84. He asked about
22 including an explicit provision to make clear that the FMA has no effect on § 1201.
23 *Id.* In a letter, the Register of Copyrights stated that such an explicit provision was
24 unnecessary because “[t]he anticircumvention provisions of section 1201 apply even
25 in cases where circumvention is carried out in order to engage in an act that is not an
26 act of infringement under the copyright statute.” *Id.* at 89. The Register advised
27 against including a specific statement confirming the inapplicability of the FMA to
28 § 1201 claims, noting such a provision could create needless confusion regarding
the other exemptions from infringement in § 110 (where the FMA is codified) and
elsewhere in the Copyright Act: “To include in this new exemption a reference to
section 1201 when none of the other exemptions in section 110 or elsewhere in the
Copyright Act make such reference will imply that those existing exemptions also
apply to liability under the anticircumvention provisions, when it should be clear
that they do not.” *Id.*

1 “[T]he decision not to make fair use a defense to a claim under Section
2 1201(a) was quite deliberate.” *Reimerdes*, 111 F. Supp. 2d at 322. Congress was
3 well aware “that technological controls on access to copyrighted works might erode
4 fair uses by preventing access even for uses that would be deemed ‘fair,’” and
5 “struck a balance among the competing interests.” *Id.* (citing Commerce Com. Rep.
6 25-26). Reading a fair use defense into § 1201(a) would upset that balance and be
7 contrary to the statute. *Crippen*, 2010 WL 7198205, at *5 (§ 1201(a) is a
8 “rebalancing of interests that attempts to deal with special problems created by the
9 so-called digital revolution”; “[t]hat balancing [is] done by the DMCA, not by
10 adding fair use to the circumvention equation”) (citation omitted).

11 **B. Plaintiffs Will Succeed On Their Copyright Infringement Claims**

12 Plaintiffs easily establish prima facie infringement claims because they
13 (1) “show ownership” and (2) demonstrate a violation of “at least one exclusive
14 right” (sections 1 and 2, *infra*). *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004,
15 1013 (9th Cir. 2001). VidAngel’s claimed defenses are meritless (section 3, *infra*).

16 **1. Plaintiffs Own Or Control Valid Copyrights In The Works
17 That VidAngel Exploits**

18 Certificates of registration issued by the Copyright Office for the copyrighted
19 works identified in the Complaint are included with this filing. Klaus Decl. Exs. A-
20 RR. The certificates create a presumption of copyright validity and ownership. 17
21 U.S.C. § 410(c); *United Fabrics Int’l, Inc. v. C&J Wear, Inc.*, 630 F.3d 1255, 1257
22 (9th Cir. 2011). It is undisputed that VidAngel currently offers all the works listed
23 in Exhibit A to the complaint and, unless enjoined, will continue to offer these
24 works and other future releases. Ehler Decl. Ex. EE at Tr. 27:19-29:14; 30:3-20;
25 31:6-37:4.

26 **2. VidAngel Violates Plaintiffs’ Exclusive Rights To Reproduce
27 And Publicly Perform Their Copyrighted Works**

28 VidAngel infringes at least two distinct § 106 rights, each of which is

1 sufficient to render VidAngel liable.

2 **a. VidAngel Violates Plaintiffs’ Exclusive Right To**
3 **Reproduce Their Works By Making Copies**

4 Plaintiffs have the exclusive right “to reproduce” their works “in copies.” 17
5 U.S.C. § 106(1). VidAngel admits to making copies of Plaintiffs’ works onto
6 computer system and third-party servers, thereby violating the reproduction right.
7 Ehler Decl. Ex. EE at Tr. 58:1-4. This is infringement. *MAI Sys. Corp. v. Peak*
8 *Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (transferring digital work “from a
9 permanent storage device to a computer’s RAM [or storage]” infringes the
10 reproduction right); *see UMG Recordings, Inc. v. Escape Media Grp., Inc.*, No. 11
11 CIV. 8407, 2014 WL 5089743, at *20 (S.D.N.Y. Sept. 29, 2014) (“uploaded copies”
12 of works violate reproduction right).

13 **b. VidAngel Violates Plaintiffs’ Exclusive Right To**
14 **Publicly Perform Their Copyrighted Works**

15 *i. VidAngel Publicly Performs Plaintiffs’ Works*

16 Plaintiffs have the exclusive right “to perform the copyrighted work
17 publicly.” 17 U.S.C. § 106(4). VidAngel violates that right under the Transmit
18 Clause. VidAngel “transmits” “performances” “of the work[s].” 17 U.S.C. § 101
19 (definition of public performance and “to transmit”); *Aereo*, 134 S. Ct. at 2508
20 (Internet streams trigger the Transmit Clause). And VidAngel streams “to the
21 public,” i.e., VidAngel’s thousands of users. Under the Transmit Clause, the fact
22 that VidAngel’s users receive those performances “in separate places” and “at
23 different times” does not change the fact that VidAngel is performing “to the
24 public.” 17 U.S.C. § 101; *Aereo*, 134 S. Ct. at 2510.

25 VidAngel’s public performance liability follows from Transmit Clause
26 precedent. *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d
27 Cir. 1984), held that a remote video rental service—wherein patrons selected videos
28 from a store, which transmitted performances from the videos to private in-store

1 booths—violated the public performance right. The court held that the store
2 “show[ed] each copy [of a movie] repeatedly to different members of the public,”
3 and that the service was “essentially the same as a movie theatre, with the additional
4 feature of privacy.” *Id.* at 159.

5 *On Command Video Corporation v. Columbia Pictures Industries*, 777 F.
6 Supp. 787 (N.D. Cal. 1991), held that a hotel’s “electronic rental” system—in which
7 the hotel rented movies to guests and transmitted performances from the main office
8 to individual hotel rooms—infringed the public performance right. The court held
9 that the “relationship between the transmitter of the performance, On Command,
10 and the audience, hotel guests,” was “a commercial, ‘public’ one regardless of
11 where the viewing takes place.” *Id.* at 788.

12 *Warner Bros. Entertainment Inc. v. WTV Systems, Inc.*, 824 F. Supp. 2d 1003
13 (C.D. Cal. 2011) (“*Zediva*”), held that the *Zediva* service—which streamed
14 performances from DVDs and DVD players purportedly assigned to specific
15 users—violated the public performance right. *Id.* at 1006-07, 1010.

16 And *Aereo* held that Internet streaming of content captured from over-the-air
17 broadcast signals by thousands of separate antennae—each of which, *Aereo*
18 claimed, was assigned separately to individual subscribers—infringed. The Court
19 squarely rejected *Aereo*’s claim that its technical design (using an individual
20 antenna to make a separate transmission path to each user) made the performances
21 private. *Aereo*, 134 S. Ct. at 2508-09 (noting subscribers would not “care much”
22 about the service’s technical design).

23 Like its predecessors, VidAngel “transmits” (by streaming) performances “to
24 the public” (its users). VidAngel’s liability is clear.

25 *ii. VidAngel’s “Buy-Sellback” Scheme Does Not*
26 *Transform VidAngel’s Public Performances Into*
Private Ones

27 VidAngel argues that it makes private, not public, performances because it
28 transmits streams of movies that users purportedly “buy” from VidAngel. VidAngel

1 claims support for this argument in dicta from *Aereo*, stating that a different analysis
2 might apply where users “receive performances in their capacities as owners or
3 possessors of the underlying works.” *Aereo*, 134 S. Ct. at 2510. This argument
4 fails.

5 First, the Court’s description of the ownership/possessory relationship that
6 might be relevant is plainly inapplicable to VidAngel. The Court said that the
7 difference between a valet returning cars to their owners and a dealership selling
8 new cars provided a potential analogy to the private/public distinction: “we would
9 not say that the [valet] provides cars ‘to the public’ . . . [w]e would say that a car
10 dealership . . . provide[s] cars to the public, for it sells cars to individuals who lack a
11 pre-existing relationship to the cars.” *Id.* The Court said *Aereo* was more like a car
12 dealership because it “transmits to large numbers of paying subscribers who lack
13 any prior relationship to the works.” *Id.* The same is true of VidAngel, whose users
14 have no “prior relationship” with the works they watch, but instead receive access
15 by paying VidAngel a fee.

16 Second, as *Aereo* and the other cases discussed above make clear, courts must
17 look at the reality of what the defendant is doing rather than the stratagem it
18 employs to characterize its performances as private. The Court rejected *Aereo*’s
19 claim that associating each user with an antenna made its streams private
20 performances. The Court explained that this gimmickry did not “render *Aereo*’s
21 commercial objective any different from that of cable companies,” and did not
22 “significantly alter the viewing experience.” *Id.* at 2508. It is unfathomable that the
23 courts in *Redd Horne*, *On Command*, and *Zediva* would have deemed the
24 performances private if the defendants had said they were “selling” videos to
25 customers and “buying them back” after each performance.

26 The courts’ focus on substance rather than labels is fatal to VidAngel’s
27 “private performance” argument. VidAngel streams the same copyrighted works to
28 multiple users (“the public”) in a manner that is fundamentally the same as other on-

1 demand services. VidAngel’s own internal documents make it clear that
2 [“VidAngel is NOT a disc service. VidAngel is a *streaming* service.”] Ehler Decl.
3 Ex. W at 234 (emphasis added). VidAngel’s labeling the transaction a “sale” does
4 not affect the user’s viewing experience. Given that only [eight] users have ever
5 requested a copy of the Disc they purportedly “bought”—out of [millions] of
6 purported “sales”—it is obvious that VidAngel’s users do not treat the service as
7 selling them Discs. *Id.* Ex. EE at Tr. 189:21-190:8, 229:2-12; *see also id.* Ex. I at
8 120 (“VidAngel – An Honest Review”⁹). VidAngel’s business model depends on
9 consumers treating the “buy-sellback” option just like an on-demand streaming
10 rental service, and it encourages this behavior at every turn by repeatedly reminding
11 users to “sellback,” sending email reminders, and even offering “auto-sellback.” *Id.*
12 at Ex. BB at 336-37. VidAngel’s labeling of the transaction cannot disguise what is
13 really taking place.¹⁰

14 Third, even if VidAngel were right (which it is not) that the Court should look
15 at how VidAngel characterizes its service (at least in its legal papers as opposed to
16 its marketing materials), that would not help VidAngel. VidAngel streams
17 performances to paying subscribers from a master copy stored on a server (not a
18 Disc temporarily assigned to the user) in the same way licensed services do—*except*
19 VidAngel’s master copy is unauthorized and VidAngel has no license to stream.

20
21

22 ⁹ “VidAngel – An Honest Review” is available on YouTube at
23 <https://www.youtube.com/watch?v=KG7xgmDHF40> (last visited Aug. 21, 2016).

24 ¹⁰ In analogous contexts, courts have recognized “rentals” couched as “sales”
25 through a sell-buyback structure as gimmicks and held that it is the substance that
26 matters. *A & M Records, Inc. v. A.L.W., Ltd.*, 855 F.2d 368, 370 (7th Cir. 1988)
27 (rejecting buyback scheme under Record Rental Amendment of 1984); *Central*
28 *Point Software, Inc. v. Global Software & Accessories, Inc.*, 880 F. Supp. 957, 964
(E.D.N.Y. 1995) (rejecting buyback scheme under Computer Software Rental
Amendments Act of 1990).

1 Schumann Decl. ¶¶ 7, 42. In sum, VidAngel’s attempt to characterize its
2 performances as private fails.

3 **3. None of VidAngel’s Defenses Excuse Its Infringement**

4 **a. The FMA Does Not Excuse VidAngel’s Infringement**

5 The statutory text and Congress’s clear intent establish that the FMA is
6 narrow and does not exempt VidAngel’s infringement of Plaintiffs’ rights.

7 First, as a textual matter, the FMA exempts only (1) “the making
8 imperceptible” and (2) “the creation or provision of a computer program or other
9 technology that enables such making imperceptible.” 17 U.S.C. § 110(11). Every
10 other word in the FMA narrows the circumstances in which these two exemptions to
11 § 106 apply. The savings clause, moreover, clarifies the FMA shall not be
12 “construed to imply further rights under” § 106. *Id.* § 110 (final sentence).

13 VidAngel argues that a business that offers filtering software has statutory
14 authorization to publicly perform Plaintiffs’ works because the FMA permits
15 filtering “during a performance . . . transmitted to that household for private home
16 viewing.” Dkt. 11 (Counter-Complaint) ¶ 65 (quoting 17 U.S.C. § 110(11)
17 (omissions in original)). The plain text of the FMA defies this reading. VidAngel’s
18 reading ignores the requirement that the performance be from an “authorized copy.”
19 17 U.S.C. § 110(11). If Congress wanted to grant filtering businesses a total
20 exemption from copyright infringement—a radical notion with no historical
21 support—it would have said that directly. The fact that the transmission must come
22 from an “authorized copy” of the copyrighted work makes clear that Congress did
23 not provide a blanket exemption to the reproduction or public performance right. *Id.*
24 VidAngel’s answer to this is that it purchases authorized copies of Plaintiffs’ movies
25 on Discs. But VidAngel does not stream from those Discs (and even if it did, it
26 would still be publicly performing them without the necessary license, as discussed
27 above). VidAngel does not stream from an “authorized copy;” it streams from a
28

1 ripped digital copy that it obtained by violating § 1201(a) and then by violating
2 Plaintiffs’ reproduction right.¹¹ Schumann Decl. ¶¶ 35-42.

3 The FMA was “targeted narrowly and specifically” at the act of filtering and
4 did not impact other rights and obligations under the Copyright Act. The statute
5 was not intended to be a blanket license for every business that engaged in
6 filtering.¹²

7 **b. VidAngel’s Affirmative Defense Of Fair Use Does Not**
8 **Excuse Its Infringement**

9 VidAngel must show it likely will succeed on its defense that copying and
10 publicly performing Plaintiffs’ works are fair uses. *Perfect 10, Inc. v. Amazon.com,*
11 *Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007). VidAngel cannot meet its burden. All
12 four factors that § 107 directs the Court to consider weigh against VidAngel.

13 _____
14 ¹¹ Even if VidAngel’s reading were correct—which it is not—VidAngel could not
15 rely on the statute because it [REDACTED]
16 [REDACTED]. Schumann Decl. Ex. C at 25; Ehler Decl. Ex. EE at Tr.
17 95:22-96:14. The FMA only applies “if no fixed copy of the altered version of the
18 motion picture is created by such computer program or other technology.” 17
19 U.S.C. § 110(11). VidAngel’s documents make clear that it [REDACTED].

20 Schumann Decl. Ex. C at 25. A copy is fixed if it is “sufficiently permanent or
21 stable to permit it to be perceived, reproduced, or otherwise communicated for a
22 period of more than transitory duration.” *MAI Sys. Corp.*, 991 F.2d at 518 (citing 17
23 U.S.C. § 101). VidAngel’s server copy segments are fixed because they are stored
24 for more than a transitory duration. *Id.* (software loaded to a computer’s RAM is
25 fixed, even if for the sole purpose of viewing the system and running an error log).

26 ¹² Senator Hatch, a sponsor of the bill, explained that the FMA “would not exempt
27 from liability an otherwise infringing performance, or a transmission of a
28 performance, during which limited portions of audio or video content of the motion
picture are made imperceptible” and infringing performances “are not rendered non-
infringing by section 110(11) by virtue of the fact that limited portions of audio or
video content of the motion picture being performed are made imperceptible during
such performance or transmission.” 151 Cong. Rec. S501 (daily ed. Jan. 25, 2005)
(Sen. Hatch) (emphasis added).

1 against VidAngel. *See Campbell*, 510 U.S. at 586; *Elvis Presley Enters.*, 349 F.3d
2 at 630; *L.A. News Serv. v. Tullo*, 973 F.2d 791, 798 (9th Cir. 1992).

3 *iv. VidAngel’s Service Undermines Existing And*
4 *Potential Markets For Plaintiffs’ Works*

5 The fourth factor considers current market harm and “whether unrestricted
6 and widespread conduct of the sort engaged in by the defendant . . . would result in a
7 substantially adverse impact on the potential market’ for the original.” *Campbell*,
8 510 U.S. at 590 (citations omitted). Where, as here, the defendant uses the works
9 “for commercial gain, the likelihood of market harm may be presumed.”

10 *Leadsinger*, 512 F.3d at 531-32 (quotations omitted); *see Campbell*, 510 U.S. at 591
11 (presumption of market harm “makes common sense” in cases involving “copying
12 of the original in its entirety for commercial purposes”) (quotation marks and
13 alterations omitted). To rebut this presumption, VidAngel must “bring forward
14 favorable evidence about relevant markets.” *Arista Records LLC v. Myxer, Inc.*, No.
15 CV 08-03935 GAF, 2011 WL 11660773, at *43 (C.D. Cal. 2011) (quoting *Dr. Seuss*
16 *Enters., L.P. v. Penguin Books, USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997)).

17 This VidAngel cannot do.

18 VidAngel plainly undermines existing and developing markets for Plaintiffs’
19 works. VidAngel’s own marketing materials and strategy compare it to legitimate
20 on-demand streaming services such as iTunes, Google Play, Amazon Video, and
21 Netflix. Ehler Decl. Exs. A, B. Further, as explained by the Senior Vice President,
22 Digital Distribution at Fox, VidAngel undercuts the market for Plaintiffs’ works in a
23 number of ways. Cittadine Decl. ¶¶ 16-22; 26-34. For example when VidAngel
24 released *Star Wars: The Force Awakens* on the same day it was released to Disc and
25 for digital download, VidAngel was “competing directly with these other exclusive
26 viewing options and preempting legitimate on-demand streaming services” which
27 did not yet have rights to stream that title. *Id.* ¶ 16. Likewise, “[b]y offering
28 consumers on-demand streaming at a lower price—which VidAngel can offer only

1 because it misappropriates Fox’s content—VidAngel threatens the business of all of
2 [Fox’s licensees] who have negotiated legal, authorized licenses [with Fox and other
3 Plaintiffs] for those rights.” *Id.* ¶ 20. Many VidAngel customers are using the
4 service because of its price as compared to authorized services—a differential that
5 exists only because VidAngel does not pay for the rights it exploits. Ehler Decl. Ex.
6 I (examples).

7 In sum, fair use is not a defense to VidAngel’s blatant infringement.

8 **c. The First Sale Doctrine Does Not Authorize VidAngel’s**
9 **Copying or Streaming**

10 VidAngel claims that Plaintiffs’ attempt to enforce their reproduction and
11 public performance rights violates the first sale doctrine, *see* 17 U.S.C. § 109(a),¹³
12 because VidAngel buys Discs and resells them via its “buy-sellback” model. Dkt.
13 11 (Counter-Complaint) ¶¶ 53-59. Even if VidAngel were actually selling Discs
14 (which it is not), the argument would be a red herring. The first sale doctrine
15 applies only to Plaintiffs’ right of distribution, which is not at issue here. *See Red*
16 *Baron-Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275, 280-81 (4th Cir. 1989)
17 (“the first sale doctrine has no application to the rights of the owner of a copyright
18 guaranteed by § 106, except the right of distribution”); *Capitol Records, LLC v.*
19 *ReDigi Inc.*, 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013) (“[T]he first sale defense
20 does not apply to ReDigi’s infringement of those [reproduction] rights.”); *Peker v.*
21 *Masters Collection*, 96 F. Supp. 2d 216,221 (E.D.N.Y. 2000) (“no defense that
22 [defendant] used a lawfully acquired object to achieve its unlawful goal of
23 copying”).

24
25 _____
26 ¹³ “Notwithstanding the provisions of section 106(3), the owner of *a particular copy*
27 . . . lawfully made under this title, or any person authorized by such owner, is
28 entitled, without the authority of the copyright owner, to sell or otherwise dispose of
the possession of *that copy*” 17 U.S.C. § 109(a) (emphasis added).

1 **II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT AN**
2 **INJUNCTION**

3 A court may find that a copyright owner’s harm is likely “irreparable” for
4 many reasons, including that a particular loss is “difficult to replace,” “difficult to
5 measure,” or of a kind “that one should not be expected to suffer.” *Salinger v.*
6 *Colting*, 607 F.3d 68, 81 (2d Cir. 2010). VidAngel’s illegal conduct puts Plaintiffs
7 at risk of suffering imminent, irreparable harms; VidAngel’s “delay” defense does
8 not change this fact.

9 **A. VidAngel’s Unauthorized Service Causes Immediate And**
10 **Irreparable Harms**

11 First, VidAngel interferes with Plaintiffs’ basic right to control how, when
12 and through which channels consumers can view their copyrighted works. “As the
13 copyright holders, Plaintiffs have the exclusive right to decide when, where, to
14 whom, and for how much they will authorize transmission of their Copyrighted
15 Works to the public.” *Zediva*, 824 F. Supp. 2d at 1012 (citation omitted). Where
16 defendants operate an “infringing service without the normal licensing restrictions
17 imposed by Plaintiffs, [it] interfere[s] with Plaintiffs’ ability to control the use and
18 transmission of their Copyrighted works, thereby, causing irreparable injury.” *Id.* at
19 1012 (citation omitted). Plaintiffs’ exclusive rights under copyright are critical to
20 providing Plaintiffs the opportunity to earn a return on their substantial
21 investments—often tens of millions of dollars for a major motion picture—in
22 creating content. Cittadine Decl. ¶¶ 7-8. This harm is ongoing and worsening as
23 VidAngel continues to add Plaintiffs’ works and grow its user base. *Id.* ¶ 34.

24 Plaintiffs exercise their rights through agreements with authorized
25 distributors. Some licenses grant the licensee an exclusive time window for
26 performing a title. *Id.* ¶ 15. The price for such a license is based, in part, on the
27 promise and scope of exclusivity. *Id.* VidAngel operates without any license and
28 performs Plaintiffs’ works during negotiated exclusivity periods. As of this filing,

1 VidAngel offers (at least) two of Plaintiffs’ works—*The Martian* and *Brooklyn*—
2 during periods these works are exclusive to an authorized licensee, HBO. *Id.* ¶ 30.
3 As noted, VidAngel offered *Star Wars: The Force Awakens* when no service had
4 rights to distribute it for on-demand streaming. *Id.* ¶ 16; Ehler Decl. Ex. J.
5 VidAngel flaunts its interference with exclusive windows as a competitive
6 advantage over authorized services by expressly promoting titles that are available
7 on VidAngel but “NOT on Netflix.” Ehler Decl. Ex. A at 13-15, 23-38. VidAngel
8 thus interferes with Plaintiffs’ exercise of their exclusive rights and frustrates
9 Plaintiffs’ ability to negotiate for similar rights in the future. Cittadine Decl. ¶¶ 17,
10 36.

11 Second, VidAngel threatens harm to Plaintiffs’ relationships and goodwill
12 with authorized distributors by undermining their ability to provide licensed
13 offerings. *See Ticketmaster L.L.C. v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1115
14 (C.D. Cal. 2007) (irreparable harm includes “damage to goodwill”). VidAngel
15 poses a threat to the businesses of Plaintiffs’ legitimate licensees and, in turn, to
16 Plaintiffs’ relationships with them and the goodwill Plaintiffs have worked to create.
17 Cittadine Decl. ¶¶ 18-22. VidAngel’s users often compare the service to Plaintiffs’
18 licensees, commenting that they prefer VidAngel because it provides inexpensive
19 access to Plaintiffs’ copyrighted works. *See Ehler Decl. Ex. I* (examples).
20 Licensees complain to Plaintiffs that their business suffers from competition with
21 unlicensed services that offer low-cost or free content because they do not obtain
22 licenses. Cittadine Decl. ¶ 19. VidAngel’s unrestrained conduct thus threatens the
23 legitimate online distribution market. *Id.* ¶¶ 19, 22; *see WPIX, Inc. v. ivi, Inc.*, 691
24 F.3d 275, 286 (2d Cir. 2012) (holding that unrestrained unauthorized Internet
25 retransmissions of broadcast programming “would encourage” other services to
26 follow suit, diminish plaintiffs’ negotiating position, adversely affect “quantity and
27 quality of efforts put into creating” new works, and “drastically change the industry,
28 to plaintiffs’ detriment”).

1 Third, VidAngel threatens harm to Plaintiffs’ ability to secure and protect
2 their content in the online environment. Online distribution carries with it a
3 heightened risk of piracy because the Internet facilitates the ability to exploit
4 copyrighted content on a mass scale. Cittadine Decl. ¶ 24. Plaintiffs require
5 licensees to employ specified security measures to prevent piracy. *Id.* ¶ 25. Because
6 VidAngel streams Plaintiffs’ works without negotiating a license, Plaintiffs are
7 deprived of their right to impose those terms on VidAngel. *Id.* VidAngel
8 jeopardizes Plaintiffs’ content and harms Plaintiffs’ relationships with licensees who
9 are required to abide by security requirements to which VidAngel is not bound. *Id.*

10 Fourth, VidAngel threatens harm to the overall development of the on-
11 demand streaming market by the provision of inferior user-viewing experiences.
12 *See Zediva*, 842 F. Supp. 2d at 1014 (*Zediva* “threatens the development of a
13 successful and lawful video on demand market by offering a sub-optimal customer
14 experience and, thus, tarnishing customers’ perception of video on demand as an
15 attractive option for viewing Plaintiffs’ Copyrighted Works.”). Plaintiffs require
16 their licensees to have quality controls, which maintain predictable standards and
17 allow customers to view Plaintiffs’ movies under consistently positive conditions.
18 Cittadine Decl. ¶ 27. VidAngel threatens these efforts and provides an inferior user-
19 viewing experience that tarnishes Plaintiffs’ brands because it is not bound to
20 comply with Plaintiffs’ quality controls. *Id.* This possibility is not merely
21 theoretical: VidAngel’s social media pages contain customer complaints about the
22 service’s poor streaming quality. Ehler Decl. L (attaching numerous examples).

23 VidAngel also threatens the lawful market by confusing consumers that
24 VidAngel is engaged in lawful conduct. *See Zediva*, 824 F. Supp. 2d at 1013
25 (finding that the *Zediva* service threatened “to create incorrect but lasting
26 impressions with consumers about what constitute[d] lawful video on demand
27 exploitation” of copyrighted works). VidAngel publicly justifies its unlicensed
28

1 activities as “legal” under the FMA. Ehler Decl. Ex. M. But VidAngel’s service is
2 not legal, and it creates incorrect expectations about the value of Plaintiffs’ content.

3 **B. Plaintiffs’ Motion Is Timely, And VidAngel’s Assertions of**
4 **“Delay” Do Not Negate Irreparable Harm**

5 VidAngel has asserted that Plaintiffs face no irreparable harm because they
6 did not sue as soon as they learned of VidAngel when they received Mr. Quinto’s
7 letters in July 2015. Plaintiffs are not required to act immediately to sue, or to seek
8 to enjoin, every potential infringer. *See Petrella*, 134 S. Ct. at 1976 (“Even if an
9 infringement is harmful, the harm may be too small to justify the cost of
10 litigation.”). A rule that required a copyright holder to pursue every possible
11 threat—no matter how nascent—would generate a rash of litigation and motion
12 practice, which would not serve the Courts, the parties, or the public interest. *See*
13 *Lotus Dev. Corp. v. Paperback Software Int’l*, 740 F. Supp. 37, 82 (D. Mass. 1990)
14 (“Prudent business judgment, Rule 11, and basic common sense required [the
15 plaintiff] first to ascertain that the threat to its intellectual property interest was
16 serious, and that its legal position was sound, before filing suit.”) (internal
17 quotations omitted). Courts are “loath to withhold relief” solely on the ground that a
18 party delayed seeking an injunction. *Arc of Cal. v. Douglas*, 757 F.3d 975, 990 (9th
19 Cir. 2014) (citing *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1214 (9th
20 Cir. 1984)).

21 Plaintiffs filed this suit when VidAngel’s conduct was sufficiently egregious
22 to require litigation and when it was apparent VidAngel would continue operating.
23 *See Arc of Cal.*, 757 F.3d at 991 (“The significance of such a prudent delay in
24 determining irreparable harm may become so small as to disappear.”). To require
25 Plaintiffs to “sue soon, or forever hold [their] peace” would force Plaintiffs to mount
26 a federal case to stop services that might never get off the ground—which is often
27 the case. *Petrella*, 134 S. Ct. at 1976 (describing “seemingly innocuous
28 infringements”). Plaintiffs filed suit after they had conducted their investigation and

1 analysis, and when it was clear that litigation was necessary to stop VidAngel's
2 illegal conduct.

3 Moreover, each new title that VidAngel offers gives rise to a new
4 infringement claim and inflicts new immediate, irreparable harm.¹⁴ *Id.* at 1969
5 (“[e]ach wrong gives rise to a discrete ‘claim’ that ‘accrue[s]’ at the time the wrong
6 occurs”). VidAngel has added more and more of Plaintiffs’ titles in recent months
7 and promises to continue to do so, especially with Plaintiffs’ most popular releases.
8 Ehler Decl. Exs. N (examples of titles recently added); EE at Tr. 32:9-37:4, R
9 (VidAngel offers new movies that reach more than [\$10 million] in domestic sales).

10 The harm that VidAngel causes is not over and done with, but continuing and
11 growing. The time a party takes initially in seeking judicial protection “is not
12 particularly probative in the context of ongoing, worsening injuries.” *Arc of Cal.*,
13 757 F.3d at 990-91 (citations omitted). VidAngel’s growth, increased marketing
14 and more brazen conduct have increased the immediacy and magnitude of the harm
15 to Plaintiffs, further justifying injunctive relief. *See id.*

16 **III. THE BALANCE OF HARDSHIPS TIPS DECISIVELY FOR**
17 **PLAINTIFFS**

18 The threat of harm to Plaintiffs, as demonstrated above, is substantial. In
19 contrast, VidAngel “cannot complain of the harm that will befall it when properly
20 forced to desist from its infringing activities.” *Triad Sys. Corp. v. Se. Express Co.*,
21 64 F.3d 1330, 1338 (9th Cir. 1995), *superseded on other grounds by* 17 U.S.C.
22 § 117(c); *see Cadence Design Sys., Inc. v. Avant! Corp.*, 125 F.3d 824, 830 (9th Cir.
23 1997) (“Where the only hardship that the defendant will suffer is lost profits from an
24 _____

25 ¹⁴ For example, on July 20, 2016, VidAngel made *Batman v. Superman: Dawn of*
26 *Justice (Ultimate Edition)* available, when that title was not yet available to
27 legitimate on-demand streaming services. *See Ehler Decl. Ex. N* at 155. On August
28 4, VidAngel offered *Keanu*, when that title was not yet available to legitimate on-
demand services. *See id.* at 157.

1 activity which has been shown likely to be infringing, such an argument in defense
2 merits little equitable consideration”) (quotations and citations omitted); *Apple Inc.*
3 *v. Psystar Corp.*, 673 F. Supp. 2d 943, 950 (N.D. Cal. 2009) (“Since [small start-up
4 defendant] does not (and cannot) claim any *legitimate* hardships as a result of being
5 enjoined from committing unlawful activities, and Apple would suffer irreparable
6 and immeasurable harms if an injunction were not issued, this factor weighs
7 strongly in favor of Apple’s motion.”).

8 VidAngel does not suffer a legitimate hardship if it is enjoined because the
9 very core of its business involves circumvention and infringement. The fact that
10 VidAngel’s litigation counsel sent letters to a number of general counsel makes
11 clear that VidAngel knew from the outset it was on thin ice. Nonetheless, VidAngel
12 proceeded at its peril.

13 **IV. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST**

14 Upholding copyright protection is in the public interest. *See Eldred v.*
15 *Ashcroft*, 537 U.S. 186, 212 n.18 (2002) (“[t]he economic philosophy behind the
16 [Copyright] [C]lause . . . is the conviction that encouragement of individual effort by
17 personal gain is the best way to advance public welfare through the talents of
18 authors and inventors”) (citation omitted); *Kelly v. Primco Mgmt., Inc.*, No. CV-14-
19 07263 BRO, 2015 WL 10990368 at *16 (C.D. Cal. Jan. 12, 2015) (“[I]t is virtually
20 axiomatic that the public interest can only be served by upholding copyright
21 protections”); *Realnetworks, Inc.*, 641 F. Supp. 2d at 943 (“By making it a
22 DMCA violation to distribute products that enable consumers to override copyright
23 owner preferences against unauthorized copying, Congress determined that the
24 public interest is best served by outlawing such products.”).

25 VidAngel’s circumvention violations and infringements undermine
26 Congress’s purposes in the DMCA and Copyright Act. Congress believed that
27 content owners must have exclusive rights, as set forth in § 106, and also the ability
28 to safeguard access to their works, in order to be able to earn returns on their (often

1 substantial) investments. VidAngel’s violation of Plaintiffs’ rights flouts Congress’s
2 goals and harms Plaintiffs. An injunction serves the public interest in upholding the
3 law.

4 **V. MINIMAL SECURITY SHOULD BE REQUIRED**

5 The required security need not be substantial. *See Zediva*, 824 F. Supp. 2d at
6 1015 (requiring \$50,000 bond). Any hardship VidAngel faces results from its
7 voluntary decision to build a business around violating Plaintiffs’ rights. Plaintiffs
8 respectfully submit that security in the amount of \$50,000 is appropriate.

9 **CONCLUSION**

10 The Court should grant Plaintiffs’ motion for a preliminary injunction.

11
12 DATED: August 22, 2016

MUNGER, TOLLES & OLSON LLP

13
14
15 By: /s/ Kelly M. Klaus

16 KELLY M. KLAUS

17 Attorneys for Plaintiffs
18
19
20
21
22
23
24
25
26
27
28

