

**No. 16-56843**

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

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VIDANGEL, INC.,

*Defendant-Appellant,*

v.

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

*Plaintiffs-Appellees.*

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

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

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## **CIRCUIT RULE 27-3 CERTIFICATE**

Pursuant to Circuit Rule 27-3(a), Defendant-Appellant VidAngel, Inc. submits the following information in support of its Emergency Motion Under Circuit Rule 27-3 for a Stay Pending Appeal of the District Court's Order Granting Plaintiffs' Motion for Preliminary Injunction (ECF No. 144). To avoid irreparable harm, relief is needed immediately (and thus, certainly, in less than 21 days).

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## **2. Facts Showing Existence and Nature of Emergency:**

Defendant VidAngel, Inc. (“VidAngel”) hereby seeks a stay pending appeal of the preliminary injunction order entered by the district court that has forced VidAngel to cease operations immediately. *See* Quinto Decl., ECF No. 167.

VidAngel’s opening brief on the merits will be submitted within two weeks, and full briefing of this expedited appeal will be completed in approximately eight weeks. The requested stay will extend only until this Court has resolved the merits, and can be dissolved at any time. Absent a stay, VidAngel’s business, which has taken years to build, will be irreparably harmed before the merits have been decided.

Just hours ago, VidAngel completely shut down its movie-streaming servers and told its customers that it has sought an emergency stay from this Court. VidAngel accordingly requests a decision on this stay motion within five calendar days.

## **3. Notice and Service of This Motion:**

At approximately 4:15 p.m. PST on December 29, 2016, VidAngel’s counsel notified the Office of the Clerk of Court for the United States Court of Appeals for the Ninth Circuit of VidAngel’s intent to file its Emergency Motion Under Circuit Rule 27-3 for a Stay Pending Appeal.

At 5:15 p.m. PST on December 29, 2016, VidAngel’s counsel emailed to notify Plaintiffs’ counsel of VidAngel’s intent to file its Emergency Motion Under Circuit Rule 27-3 for a Stay Pending Appeal. VidAngel served Plaintiffs with this

motion via this Court's ECF system on December 30, 2016.

**4. Whether Grounds Advanced in Support of the Emergency Motion Were Submitted to the District Court:**

The district court granted Plaintiffs' motion for a preliminary injunction on December 12, 2016, *see* ECF No. 144, and VidAngel filed an expedited motion to stay that Order immediately thereafter, on December 14, 2016, *see* ECF No. 147. All grounds for a stay advanced herein were presented in VidAngel's expedited motion to stay the Order and supplemental declaration in support thereof. *See Ex Parte* Mot., ECF No. 147; Harmon *Ex Parte* Decl., ECF No. 158.

The district court denied VidAngel's expedited motion to stay the Order at 10:31 a.m. PST on December 29, 2016. *See* ECF No. 166. VidAngel immediately—within 24 hours—filed this emergency motion.

Dated: December 30, 2016

Respectfully submitted,

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## INTRODUCTION

Defendant VidAngel, Inc. (“VidAngel”) seeks a stay pending appeal of the district court’s preliminary injunction order. That order has forced VidAngel to shut down its entire business. A.1-3 (Quinto Decl.).<sup>1</sup> The briefing of this expedited appeal will be completed in approximately eight weeks. Without a stay, VidAngel, which has taken years to build, may be destroyed before this appeal is decided.

## STATEMENT OF THE CASE

Plaintiffs are four Hollywood studios (“Studios”) that object to “filtering,” the practice of removing content such as nudity, profanity, and violence from films. But the federal Family Movie Act of 2005 (“FMA”) expressly protects such activity. Defendant VidAngel is a Utah-based startup that serves people who wish to remove mature content from their movies. Pursuant to the FMA, it streams popular movies after filtering them to meet viewer preferences.

VidAngel operates like a used bookstore, but with the added benefit of filtering. VidAngel lawfully purchases *many* copies of various DVDs. *See, e.g.*, A.361 (Am. Countercl.) [REDACTED]

[REDACTED] A.650 (Harmon Decl. ¶ 30)

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<sup>1</sup> For the convenience of the Court, VidAngel has submitted herewith an Appendix containing the relevant docket entries from the proceedings below. VidAngel’s record citations (A.\_\_\_) correspond to the page numbers of the Appendix.

(VidAngel, as of September 2016, already spent \$1.2 million buying DVDs). VidAngel then sells them to customers for \$20, but will buy them back for \$1 less as each day passes. Thus, if a customer sells her DVD back to VidAngel within 20 days, she has paid \$1/day to watch that DVD free of the content she finds objectionable. *See* A.395 (Am. Countercl. ¶ 68).

VidAngel’s \$1/day cost is akin to Redbox and other physical DVD companies. Like those companies, once VidAngel’s physical DVDs of a movie are all taken by other patrons, the movie is unavailable. *See* A.657 (Harmon Decl. ¶ 54(f)) (In August 2016 alone, when the Studios filed their preliminary injunction motion, VidAngel sent nearly 60,000 unique customers over 250,000 “out of stock” notices). Unlike those companies, however, VidAngel provides the ability to watch DVDs via streaming that are *filtered*—i.e., free of content its customers find objectionable. This lawsuit against VidAngel is the latest salvo in the Studios’ campaign against filtering. The Studios lost that fight in Congress. They cannot win it here.

***Early filtering and the FMA.*** Among the first companies to offer filtering was ClearPlay, Inc. (“ClearPlay”) which sold a specialized DVD player that enabled customers to skip objectionable content. *See* H.R. Rep. No. 109-33(1) at 70 (2005). The Directors’ Guild of America and major studio directors sued in 2002 alleging that ClearPlay violated the Copyright and Lanham Acts. *Huntsman v. Soderbergh*, No. 1:02-cv-01662-MJW (D. Colo. Aug. 29, 2002).

In response, Congress passed the FMA as part of the Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, § 167, 119 Stat. 218, 223 (2005). Its express purpose was to enable families to watch filtered content at home. *See, e.g.*, 150 Cong. Rec. H7654-01 (Sept. 28, 2004) (statement of House Rep. Lamar Smith). The FMA amended the Copyright Act to expressly permit “the creation or provision of a computer program or other technology that enables” home filtering. 17 U.S.C. § 110(11). The FMA protects older boxtop-based models, such as ClearPlay’s, as well as more modern streaming services. *Id.* (covering filtered movies “transmitted to that household for private home viewing”). Finally, the FMA provides that companies cannot filter bootlegged content and claim immunity; rather, filtering must come “from an authorized copy.” *Id.*

Hollywood vigorously opposed the FMA, claiming that it deprived them of revenues, hurt “legitimate” companies, and violated their right to control the content of their films. *See Family Movie Act of 2004: Hearing on H.R. 4586 Before the Subcomm. on Courts, the Internet, Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 1-2 (2004), at 68. But the statute passed easily.

The FMA forced Hollywood to capitulate to ClearPlay and its boxtop. H.R. Rep. No. 109-33(1) at 70-72 (2005). The Studios nonetheless continued to fight. Despite the FMA’s express permission for filtered movies delivered via streaming, the Studios argue that they have a veto right over such content. [REDACTED]

(Marquart Decl. Ex. B 83:20-84:21). Further, the Studios have affirmatively required platforms that provide licensed content (such as Google Play) to prohibit the application of filtering technology. *See* A.642-44 & 55-66 (Harmon Decl. ¶¶ 11-16 & 48-50); A.442-504, 624 (Meldal Decl. ¶ 26 & Ex. E). As a result, no commercially viable filtered streaming service emerged until VidAngel.

*VidAngel develops its current model.* Like many, VidAngel founder Neal Harmon does not want his children exposed to nudity, violence, or profanity. A.637 (Harmon Decl. ¶ 2). He attempted to work with the Studios to make filtered streaming a reality. A.387-392 (Am. Countercl. ¶¶387-392). But for artistic and financial reasons, the Studios do not want their movies filtered. Period. The Studios rebuffed Mr. Harmon's efforts. So Mr. Harmon turned to the FMA.

For each title it offers, VidAngel buys multiple, legally authorized copies of the movie on DVD. It extracts and processes the movie file(s) so that they can be tagged for inappropriate content, and uploads them to cloud storage. This entails breaking the movie into tiny segments, and tagging each segment for over 80 categories of content, including nudity, profanity, drug use, sex, and violence. *See* A.382, 387 (Am. Countercl. ¶¶ 24, 39); A.628-29 (Meldal Decl. ¶ 33). The tagged segments are stored, in encrypted form, in the cloud.

To watch a filtered movie, VidAngel customers buy a specific physical DVD from VidAngel. A.387 (Am. Countercl. ¶ 41); A.632 (Meldal Decl. ¶ 37(x)). Each DVD purchased by VidAngel is entered into an inventory database and assigned a unique barcode. A.362 (Am. Countercl.) (photo); A.387 (Am. Countercl. ¶ 38); A.631-32 (Meldal Decl. ¶¶ 37(viii)-(ix)). If VidAngel does not have a physical DVD in stock, it informs the customer that that title is “out of stock” and that the movie is unavailable. A.657 (Harmon Decl. ¶ 54(f)).

When a customer wants to watch her DVD, VidAngel streams only those segments that meet her filtering preferences. *See* A.629-30 (Meldal Decl. ¶¶ 34-36, 37(xi)-(xii), 42). Customers must select at least one filter, in addition to any that filter opening and end credits, and approximately 96 percent of VidAngel customers request multiple filters; typically, language and sex. A.652 (Harmon Decl. ¶¶ 37-38). VidAngel streams the qualifying segments to the customer in sequence, displays each segment, and then discards them. A.632 (Meldal Decl. ¶ 37(xiii)).

VidAngel encourages customers to sell back their DVDs for store credit. The net payment to VidAngel for those who do so is typically about \$1 to \$2/day—comparable to Redbox but without the objectionable content.

***VidAngel informs the Studios of its new business model.*** In July and August 2015, VidAngel wrote to the Studios describing itself in detail. A.645-45 & A.506-08 (Harmon Decl. ¶ 22 & Ex. B). Its letters disclosed that VidAngel had grown from

43 to 4,848 users in under six months, and asked to work with the Studios “to scale its business.” *Id.* VidAngel invited the Studios to access VidAngel, ask questions, and express any concerns. *Id.* No Studio responded substantively. Instead, the Studios began to immediately monitor VidAngel and prepare for litigation.<sup>2</sup>

***The Studios wait over a year to seek an injunction.*** The Studios waited for eleven months to file suit, doing so on June 9, 2016. A.522-53 (Compl.). They waited another two months to move for a preliminary injunction. A.555. After limited discovery and full briefing, the motion was finally heard on November 14, 2016. A.66-189 (Reporter’s Transcript (“Oral Arg. Tr.”)).

On December 12, 2016, the court granted the injunction. A.190-211 (Order Granting Plaintiffs’ Motion for Preliminary Injunction (“Order”)). VidAngel filed its notice of appeal two days later, along with an *ex parte* application for a stay pending appeal. A.36-41, 30-35 (Notice of Appeal, ECF Nos. 148, 149), 42-65 (*Ex Parte* Application to Stay). The next week, the Studios asked the district court to hold VidAngel in contempt. A.9-21. On December 29, 2016, the district court denied VidAngel’s stay application. A.4-8.<sup>3</sup>

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<sup>2</sup> Plaintiff Disney Enterprises, Inc. opened a VidAngel account on August 6, 2015. A.645-46 & A.509 (Harmon Decl. ¶ 22 & Ex. C). That same day, at least 25 studio employees and MPAA lawyers corresponded about VidAngel. A.436-41 (Marquart Decl. Ex. D).

<sup>3</sup> In response to that denial (and with Plaintiffs’ contempt motion pending) VidAngel shut down its movie-streaming servers immediately. A.3 (Quinto

## STANDARD OF REVIEW

This Court must weigh: (1) the likelihood of VidAngel’s success on the merits of this appeal; (2) whether VidAngel will be irreparably injured absent a stay; (3) whether a stay will “substantially injure” other parties; and (4) where the public interest lies. *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011). These factors are weighed on a “continuum, with the relative hardships to the parties providing the critical element in determining” whether a stay is justified. *Id.* at 970.

## ARGUMENT

### **I. VidAngel Is Likely to Succeed in This Appeal and Obtain Dissolution of the District Court’s Injunction.**

VidAngel will likely prevail in this appeal. The district court’s “likelihood of success” holding misreads the Copyright Act on important legal questions of first impression and the district court’s “irreparable harm” holding was clear error.

#### **A. The District Court’s “Likelihood of Success” Holding Was Wrong and Overlooked Serious Legal Questions.**

The Studios assert two Copyright Act claims against VidAngel: infringement under 17 U.S.C. § 106 (the “Infringement Claim”) and anti-circumvention under 17 U.S.C. § 1201 (the “Anti-Circumvention Claim”). The district court held that both claims were likely to succeed. A.190 (Order at 1). Not so.

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Decl.). Less than 24 hours later, with its business shut down, VidAngel now files this emergency motion.



*Infringement Claim (Reproduction).* The Studios first argue that VidAngel violates their reproduction rights under 17 U.S.C. § 106(1) by making a copy of each DVD as part of its filtering process. But VidAngel’s intermediate copies of lawfully purchased DVDs are precisely what the FMA was enacted to authorize.

VidAngel lawfully purchases a movie, processes and slices it up into tiny segments, which are then tagged and reassembled (by filtering customers) without objectionable segments. *Supra* 4-5. That is precisely what the FMA permits: “the making imperceptible \* \* \* of limited portions of audio or video content of a motion picture \* \* \* from an authorized copy of the motion picture.” 17 U.S.C. § 110(11). In response, the Studios argue that VidAngel is streaming from an *unauthorized* “intermediate copy.” A.199 (Order) (adopting the Studios’ argument). But the FMA does not demand “streaming \* \* \* from an authorized copy.” It simply authorizes “the making imperceptible \* \* \* from an authorized copy.” And that, notwithstanding any intermediate steps involved, is precisely what VidAngel does. (To illustrate: holiday cards are best described as “coming from loved ones,” even though the mailman serves as an intermediary.)

The statutory language resolves any doubt. The FMA does not merely authorize “the creation or provision of a computer program,” but also, broadly, “or *other technology* that *enables* such making imperceptible \* \* \* .” 17 U.S.C. § 110(11) (emphasis added). If one begins with an authorized copy, then applies

technology to display the filtered movie to owners of that title, one is clearly *enabling* filtering from (and with respect to) an authorized copy.

That is also the only interpretation consistent with the statute’s history and purpose. The FMA was enacted over the Studios’ vigorous objection that only *they* had the power to authorize filtering. *Supra* 3-4. Congress specifically disagreed, deciding that families should have the power to filter in their homes. *Id.* It makes little sense for Congress, in granting that power to consumers, to have intended that technological solutions cannot use transient, intermediate files without the Studios’ blessing. That would deprive the FMA’s clause “during a performance \* \* \* *transmitted to that household* for private home viewing,” 17 U.S.C. § 110(11) (emphasis added), of any force.

***Infringement Claim (Public Performance).*** The Studios next argue that VidAngel violates their public performance rights under 17 U.S.C. § 106(4). In accepting the Studios’ argument, the district court again erred.

There is no serious dispute that VidAngel streams filtered movies only to customers who own a legitimate DVD copy of that title. *See* A.632, 634 (Meldal Decl. ¶¶ 38, 44), A.389 (Am. Countercl. ¶¶ 45, 47). And a performance of a work is not public when it is directed at someone who owns or possesses the relevant content. *Am. Broad. Cos. v. Aereo*, 134 S. Ct. 2498, 2510-11 (2014) (“We have said that [the term public] does not extend to those who act as owners or possessors of the relevant

content.”). This makes perfect sense. One who already owns the right to view the relevant content can obviously arrange to do so in her home. Nothing about that is “public,” in law or common sense.

Nonetheless, the district court insisted that VidAngel’s customers own only the DVD, not the right to have that content streamed, and that they are therefore members of the public with respect to receiving a stream. A.200 (Order). That analysis both misses the point of *Aereo*’s guidance about who the public is (and is not) and how VidAngel’s service works. VidAngel provides a stream of a filtered movie that (1) is available only to customers who own a DVD copy of—and thus have a right to view—the content, and (2) is available only to a particular DVD owner who has expressed a personalized preference concerning the filtered version she wishes to see. *Supra* 4-5. Owning a DVD means that you can watch it however many times you want, and you can watch whatever parts you want.<sup>4</sup>

***Anti-Circumvention Claim.*** According to the Studios, VidAngel also violates 17 U.S.C. § 1201(a)(1)(A) because it “circumvents” the Studio’s encryption measures when it decrypts DVDs to tag the segments and prepare the movie for filtered streaming. *See* A.201 (Order) (adopting the Studios’ argument). Not true. VidAngel does not “circumvent a technological measure” under 17 U.S.C.

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<sup>4</sup> And when you are finished, you can give *or sell* your DVD to someone else.

§ 1201(a)(1)(A) because decryption is necessary both to view the copyrighted work and for VidAngel to do its tagging, and hence is neither “circumvent[ion]” nor “without the authority of the copyright owner” under the statute. 17 U.S.C. § 1201(a)(3)(A). The FMA simply does not permit the Studios to withhold authority for the application of “other technology that enables such making imperceptible” from an authorized copy for a family to view at home. 17 U.S.C. § 110(11).

Any contrary interpretation of 17 U.S.C. § 1201(a) would give copyright holders like the Studios the ability to block filtered streaming content by encrypting the underlying content and suing anyone who then attempted to filter it. That cannot possibly be reconciled with the FMA, which was revised (before passage) to expressly allow *streaming* of filtered content. *See* Family Movie Act of 2004, H.R. Rep. No. 4586, 108th Cong. § 2 (2004) (containing no transmission language); A.357 (Aho Decl. ¶ 7). To be clear: any filtered stream derived from a movie *lawfully purchased* by the customer will run afoul of the Studios’ cramped reading of 17 U.S.C. § 1201(a). And any filtered stream using a technology that layers on top of a movie *licensed* by the customer can be shut down if the Studios prohibit licensees from granting filtering companies access to their stream. Indeed, that is precisely how the Studios thwarted VidAngel’s initial business model.<sup>5</sup>

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<sup>5</sup> The district court failed to appreciate that reality. It concluded that ClearPlay has developed a permissible streaming method that “offers filtering to Google Play users who access authorized streams from Google Play’s licensed service.” Order at

The Studios' interpretation of 17 U.S.C. § 1201(a) thus renders the FMA both meaningless and superfluous. Particularly since the enactment of the FMA postdated 17 U.S.C. § 1201(a), the earlier statute cannot be read as the district court interpreted it. Statutes must be read in a harmonious manner. *See Watt v. Alaska*, 451 U.S. 259, 267 (1981) (concluding that a court "must read the statutes to give effect to each if [it] can do so while preserving their sense and purpose").<sup>6</sup>

***Fair Use Defense.*** Finally, even if VidAngel's service is found to be in technical violation of the Copyright Act, it will still prevail on its alternative fair use defense. The district court held otherwise, A.202-05 (Order), only by improperly

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20. But the Studios (and other parties) retain a contractual pocket veto over ClearPlay's streaming service—they can grant a license to ClearPlay, or not, and permit (or not permit) Google Play to stream to ClearPlay. VidAngel knows this all too well, because when VidAngel initially attempted a similar service based on filtering with respect to YouTube content, YouTube sent a notice that filtering violated its terms of service. *See* A.639 & A.503-04 (Harmon Decl. ¶ 6 & Ex. A). ClearPlay's current Google-based streaming service is equally vulnerable because ClearPlay does not have the consent of or a license from the Studios, A.357 (Aho Decl. ¶ 10); A.294 (Harmon Supp. Decl. ¶ 6), and Google's terms of service similarly prohibit filtering. A.642-44, 655 (Harmon Decl. ¶¶ 11-16, 48-50); A.624-25 & A.442-502 (Meldal Decl. ¶ 26 & Ex. E).

<sup>6</sup> There is another doctrinal path to the same result. Copyright misuse, including but not limited to antitrust violations, may constitute a valid defense to Section 1201 claims. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 951 (9th Cir. 2010) (leaving open the "interplay between this new anti-circumvention right and antitrust law"). This is precisely that case. *See, e.g.*, A.374 (Am. Countercl.) (Seventeenth Affirmative Defense for copyright misuse); A.399-404 (Am. Countercl.) (First Counterclaim For Relief challenging antitrust violation).

resolving key legal and factual questions against VidAngel. Space precludes full argument addressing the relevant factors. The key points, however, are these:

VidAngel provides a service to American families that the FMA expressly seeks to secure for them: the ability to filter content for private home viewing. The court afforded no weight to that Congressional choice, instead holding that VidAngel's use was not transformative because "[i]t simply omits portions that viewers find objectionable." A.203 (Order). Congress felt otherwise. In passing the FMA, it determined that such conduct *was* significant enough to warrant special protection, notwithstanding the Studios' assertion that only *they* were empowered to make editorial choices. H.R. Rep. No. 109-33(1) at 69.

Compounding its error, the court overly relied upon the fact that VidAngel's service is commercial. A.202 (Order). So are many quintessential fair uses. VidAngel surely profits from its use, but only profits after purchasing a DVD for every customer who will watch it and then empowering families to filter the objectionable aspects of the content they have lawfully acquired—an acquisition (the DVD purchase) from which the Studios have already taken their cut. If anything, VidAngel has *increased* the Studios' market to include customers who would not purchase the movies without filtering. *See* A.204 (Order) (majority of VidAngel's

customers would not view a movie without filtering).<sup>7</sup>

The Studios insist that fair use is never a defense to an anti-circumvention claim, but this Court expressly “le[ft] open the question whether fair use might serve as an affirmative defense to a prima facie violation of § 1201.” *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 950, n.12 (9th Cir. 2010). That is a paradigmatic example of a “serious” question that warrants a stay pending appeal. *See Leiva-Perez*, 640 F.3d at 967 (stay warranted when appeal raises “substantial” or “serious” legal questions).

**B. The District Court’s Finding of Irreparable Harm to the Studios Was a Manifest Abuse of Discretion.**

The preliminary injunction is likely to be reversed on irreparable harm grounds as well. The district court mistakenly presumed irreparable harm, the Studios offered no evidence of any such harm, and their fifteen month delay fundamentally undermines their current litigation position.

***Invalid Presumption.*** In *Flexible Lifeline Systems, Inc. v. Precision Lift, Inc.*, this Court specifically rejected the idea that copyright violations are presumed to lead to irreparable harm: “We conclude that presuming irreparable harm in a

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<sup>7</sup> The district court’s conclusion that at least some viewers are using the technology as a substitute is the precise argument the Supreme Court rejected when it held that commercial home videotapes were nonetheless fair use—again, over the vigorous objection of the Studios. *See Sony Corp. v. Universal City Studios*, 464 U.S. 417, 454 (1984).

copyright infringement case is inconsistent with, and disapproved by, the Supreme Court's Orders in *eBay* and *Winter*.” 654 F.3d 989, 998 (9th Cir. 2011) (citing *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006) and *Winter v. Nat. Res. Dev. Council, Inc.*, 555 U.S. 7 (2008)). Yet here, the district court simply recited a *definition* of copyright infringement and, on that basis, presumed irreparable harm on the ground that VidAngel “interferes with [the Studios’] basic right to control how, when and through which channels consumers can view their copyrighted works.” A.206 (Order). But *Flexible Lifeline* held that such interference was not itself irreparable harm. Instead, demonstrable consequences are required for an injunction. None are present here.

***No Evidence.*** Supposed harm to business relationships (e.g., loss of goodwill) warrants the extraordinary remedy of preliminary injunctive relief only when the movant proves that harm is (1) imminent; (2) caused by the infringing conduct of the defendant, and (3) not remediable by monetary damages.<sup>8</sup> Here the Studios failed

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<sup>8</sup> **Imminence:** *Amylin Pharm., Inc. v. Eli Lilly & Co.*, 456 F. App'x 676, 679 (9th Cir. 2011); *Rent-A-Center v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). **Causation:** *Fox Broad. Co. v. Dish Network, L.L.C.*, 905 F. Supp. 2d 1088, 1110 (C.D. Cal. 2012) (“*Dish Network*”), *aff'd* 747 F.3d 1060 (9th Cir. 2013); *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 982 (9th Cir. 2011); *Garcia v. Google, Inc.*, 786 F.3d 733, 748 (9th Cir. 2015). **Economic:** *Dish Network*, 905 F. Supp. 2d at 1128.



to introduce *any* evidence of these three essential elements. In fact, the record establishes the *opposite*.

1. Rather than introduce evidence of actual or imminent harm to their business relationships with licensees, the Studios conceded its absence:

THE COURT: \* \* \* When you talk about irreparable harm in that vein, you talk about -- and the goodwill, sort of, with licensees. Did -- I just want to make sure I didn't miss the needle in the haystack of paper that's been filed. Have licensees specifically complained? Was there any sort of declarations that talk about, you know, iTunes, Amazon, saying, "Hey, what's going on here? Why am I paying when so-and-so doesn't have to do that?" Is there anything like that? \* \* \*

MR. KLAUS: There is not, Your Honor.

A.128 (Oral Arg. Tr. at 63:14-24).

The Studios' admission at oral argument is consistent with the admissions of Tedd Cittadine, the Senior Vice President of Digital Distribution at 20th Century Fox. [REDACTED]

[REDACTED] A.610-11 (Deposition of Tedd Cittadine ("Cittadine Depo. Tr.") at 227:23-228:12).<sup>9</sup> Yet the district court inexplicably held otherwise, finding that "Tedd Cittadine's sworn declaration" sufficiently established "that unlicensed services like VidAngel's had been specifically referenced as a concern during

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<sup>9</sup> Mr. Cittadine, a Fox employee, necessarily lacks personal knowledge of negotiations between the other Studios and their licensees; accordingly, his testimony offers no support for harm to those plaintiffs.

negotiation meetings with licensees.” A.207 (Order). Mr. Cittadine’s carefully worded declaration indeed shows that licensees worry about competing with unlicensed services that are cheap or free (e.g., Pirate Bay). A.206 (Order) (citing Cittadine Decl. ¶ 19). But the expression of this concern is not proof of imminent harm, much less from a particular competitor (VidAngel) never even mentioned.

2. The Studios have similarly introduced no evidence of causation. The record is clear that “unlicensed services” writ large, and not VidAngel (which pirates nothing and in fact buys tens of thousands of DVDs), constitute the purported harm.<sup>10</sup> Licensees may indeed have much to fear from Pirate Bay, torrents, and other sites in which pirated content is available for free. But those sites are not VidAngel.

3. The Studios also introduced no evidence that monetary damages would be insufficient. Damages to business relationships may sometimes be difficult to quantify, but not here. VidAngel maintains meticulous records of every transaction, A.658 (Harmon Decl. ¶ 62), and the Studios similarly know *exactly* how much its licensees have paid for each of those titles (and hence how much licensing revenue was allegedly foregone). Monetary damages can thus be calculated and paid—to the penny—if liability is ultimately found at trial. Nor is there evidence VidAngel could not satisfy an award; indeed, the company recently raised over \$10 million through

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<sup>10</sup> Tellingly, Mr. Cittadine repeatedly used the term “piracy” in his deposition. *See, e.g.*, A.425, 426, 428 (Cittadine Depo. Tr. at 195:19-23; 196:5-7; 198:17-19).

a stock offering. A.131 (Oral Arg. Tr. at 66:19-23).<sup>11</sup>

**Undue Delay.** Finally, the Studios’ year-plus delay fatally undermines their claims of irreparable harm. This Court has held that “long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.” *Oakland Trib., Inc. v. Chron. Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985).

That is the case here. The Studios have known about VidAngel since at least December of 2014, and about its current business model since at least the summer of 2015. That’s when VidAngel sent them detailed letters and *Disney opened a VidAngel account*. A.641-43 & 509-11 (Harmon Decl. ¶¶ 10-13, 22 & Ex. C). Yet the Studios (1) did not file this lawsuit until June of 2016, eleven months after they received VidAngel’s letters; (2) did not seek injunctive relief for over two months after that; and (3) were content to wait three months for a hearing on that motion.

The Studios argued below that they carefully monitored VidAngel as it grew and promptly filed suit once VidAngel posed a “more significant threat.” *See* A.745-46 (Mot.); A.592-93 (Reply in Support of Mot.); A.100-02 (Oral Arg. Tr. at 35:16-37:22). But they cite no specific evidence of what, precisely, changed things from “let’s wait fifteen months” to “we can’t wait even weeks before irreparable injury.”

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<sup>11</sup> Equitable relief to prevent economic harm is available only in the rare event the *plaintiff* demonstrates a strong likelihood its opponent will be unable to pay. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1217 (2007).

The year-plus delay by the Studios belies their current claim that waiting months for this appeal to be decided on the merits will cause them irreparable harm.

## **II. VidAngel Will Suffer Irreparable Harm Absent a Stay.**

The “relative hardships to the parties” is the “critical element” in determining whether a stay pending review is justified.” *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011). Here, denying a stay will destroy VidAngel and deprive its customers of a valued service that Congress sought to protect for American families. VidAngel has been forced to shut down its entire business as a result of the injunction and the district court’s denial of a temporary stay. *See* A.3 (Quinto Decl.). Unless this Court grants a stay pending appeal, VidAngel will not be able to filter *any* works, and its goodwill, customers, and employees will be lost. *See, e.g.*, A.221-23 (Offering Circular). VidAngel will not be able to recover such losses even if this Court lifts the injunction after full review. *Cf. Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 485 (1st Cir. 2009).

These dire consequences might be irrelevant if VidAngel was an obvious pirate. But, as noted above, it is not. The devastating impact of the preliminary injunction on VidAngel thus strongly warrants a temporary stay.

## **III. A Stay Will Not Substantially Injure the Studios.**

By contrast, there is no evidence of a likely irreparable injury to the Studios, billion-dollar corporations well-equipped to weather this litigation. As explained

above, ordinary money damages can make them whole if they prove their claims. A stay pending appeal, which will last just months, will not harm them substantially.

#### **IV. The Public Interest Favors a Stay.**

VidAngel offers the only non-marginal filtered streaming in the country. VidAngel's is the only filtering service currently available that works with mobile devices, tablets, and SmartTVs, which is how most consumers now view streamed content. A.617, 623 (Meldal Decl., ¶¶ 8, 24); A.656 (Harmon Decl., ¶¶ 52-53). In contrast, ClearPlay streaming (the only other filtering service the Studios have identified) works only on a MAC or PC computer using a Chrome browser, not the modern devices most of the public use to watch movies and television shows. A.621, 436-41 (Meldal Decl., ¶ 16 & Ex. D); A.295-96 (Supp. Harmon Decl., ¶¶ 8-11). As such, enjoining VidAngel's operations undermines an important public interest—the meaningful ability of individuals to filter content they consume in their homes. That is the very interest Congress codified in the FMA.<sup>12</sup> Absent a stay, the public harm to families who rely on VidAngel for content acceptable to them is substantial. *Cf. Winter*, 555 U.S. at 24.

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<sup>12</sup> See 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.4 (2d ed.) (1995) (“The public interest may be declared in the form of a statute.”). Filtering also serves the “repeatedly recognized \* \* \* governmental interest in protecting children from harmful materials.” *Reno v. ACLU*, 521 U.S. 844, 875 (1997).

## CONCLUSION

For the foregoing reasons, VidAngel's emergency motion should be granted.

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Respectfully submitted,

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