

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

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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

January 3, 2017

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

*Counsel for Defendant-Appellant VidAngel, Inc.*  
(Additional counsel on signature page)

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
ARGUMENT .....	1
I.    VidAngel Is A Legitimate Business That Pays The Studios Millions .....	1
II.   The Studios’ Extreme Arguments On The Merits Will Not Prevail .....	2
III.  The Balance Of Equities Strongly Favors A Stay .....	7
A.   The Studios Will Not Suffer Irreparable Harm .....	8
B.   VidAngel Will Be Destroyed If A Stay Is Not Granted .....	9
C.   Granting A Stay Is In The Public Interest .....	10
CONCLUSION .....	11

## TABLE OF AUTHORITIES

### Cases

<i>Lopez v. Heckler</i> , 713 F.2d 1432 (9th Cir. 1983) .....	3
<i>MDY Indus., LLC v. Blizzard Entm't, Inc.</i> , 629 F.3d 928 (9th Cir. 2010) .....	8
<i>RIAA v. Diamond Multimedia</i> , 180 F.3d 1072 (9th Cir. 1999) .....	5, 8
<i>Sony Corp. v. Universal City Studios</i> , 464 U.S. 417 (1984) .....	5

### Statutes

Copyright Act of 1976, 17 U.S.C. § 101 <i>et seq.</i> .....	3, 5, 6
Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 1201 <i>et seq.</i> .....	3, 6, 7
17 U.S.C. § 1201(a) .....	6
17 U.S.C. § 1201(a)(3)(A) .....	6
Family Home Movie Act of 2005 (FMA), 17 U.S.C. § 110(11) .....	<i>passim</i>

### Other Authorities

H.R. Rep. No. 108-670, at 7 (2004) .....	7
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## INTRODUCTION

The Studios' strategy in this matter has been to defame VidAngel as a "pirate," misapprehend the law, and shamelessly claim they will be irreparably harmed unless a small Utah start-up is shuttered before this Court can consider the serious questions of first impression raised on appeal. Their latest opposition follows this playbook. VidAngel submits this short reply to clarify the following:

- VidAngel's legitimate business model pays the Studios millions;
- VidAngel's filtering is protected by the Family Movie Act ("FMA"), and is also protected fair use;
- VidAngel's conduct violates neither the Copyright Act nor the provisions of the DMCA therein; and
- VidAngel should not be destroyed in the interim on the pretense that it threatens the most powerful media conglomerates in the world.

## ARGUMENT

### **I. VidAngel Is A Legitimate Business That Pays The Studios Millions.**

The Studios smear VidAngel as a "sham" and "pirate" and the families it serves as cheats who want to watch movies "without the credits." *See, e.g.,* Opp. at 2, 12-13. That is offensive nonsense.

VidAngel is like a corner video store but with filtered streaming. It serves families who do not wish to watch mature content, many of whom are people of

faith. VidAngel pays the Studios millions for authorized copies of their DVDs, which it then sells and streams to its customers without the content each customer individually finds objectionable. Around 96 percent of users choose multiple filters, and VidAngel does not allow users to filter out only the credits. Mot. at 4-5.

Congress specifically contemplated this business model in enacting the FMA. And as the Studios well know, [REDACTED] [REDACTED] See A.601-602 (Marquart Decl. Ex. B 83:20-84:21). For the millions of Americans who want to watch filtered movies over the Internet, VidAngel is the only meaningful option.

## **II. The Studios' Extreme Arguments On The Merits Will Not Prevail.**

When one party will be destroyed by a preliminary injunction, the relevant inquiry is whether the merits dispute raises “serious legal questions.” *Lopez v. Heckler*, 713 F.2d 1432, 1433-36 (9th Cir. 1983). Here, the Studios advance extraordinary interpretations of the Copyright Act, the DMCA, the FMA, and the fair use doctrine. This appeal raises multiple issues of first impression regarding these serious legal questions. That alone warrants a stay.

*The Studios' arguments conflict with the FMA.* The Studios' interpretation of the Copyright Act and DMCA conflict with the FMA and would render it meaningless. VidAngel does precisely what the FMA permits: it filters content from legitimate physical DVDs and streams it over the Internet to individual consumers.

*See* 17 U.S.C. § 110(11) (permitting filtering “*transmitted* to that household for private home viewing \* \* \* from an authorized copy”) (emphasis added). The Studios’ arguments against this practice all impermissibly ignore the text of this statute or render it a nullity.

The FMA was passed to allow filtering (including filtering over the Internet) without permission of the Studios—permission they have *never* granted. As the Studios have it, online filtering—whether by VidAngel or others—is subject to their veto. They can invoke either (1) their contractual rights to prevent licensed streaming, or (2) the DMCA to prevent unlicensed streaming, even from authorized copies. *See* Mot. at 3-4. But that is not the law, nor should it be. It would render the FMA a dead letter. It is also inconsistent with the Copyright Act. *Infra* 4-6.

***VidAngel has a serious fair use defense.*** The Studios concede that fair use has long been both a common law and statutory defense to copyright claims, but incorrectly deny that filtering is transformative and assert that it has an adverse effect on the demand for their products. Opp. at 13-15.

The district court found that the majority of VidAngel customers would not purchase or view unfiltered titles. A.204 (Order). VidAngel’s fair use thus broadens the Studios’ market rather than shrinks it. And the Studios make millions on VidAngel’s DVD purchases too.

The Studios’ other contention is equally meritless. Omissions can obviously

transform a work: Romeo and Juliet without the final act, or the Bible without the resurrection of Jesus, are fundamentally different works. Congress passed the FMA precisely to allow Americans to transform movies into content suitable for their families. And the Studios have consistently opposed filtering on the grounds that it transforms works by replacing the director's vision and message.

Like the time-shifting held to be fair use in *Sony Corporation of America v. Universal City Studios*, 464 U.S. 417 (1984), this Court has already held that space-shifting is a "paradigmatic" example of fair use. *RIAA v. Diamond Multimedia*, 180 F.3d 1072, 1079 (9th Cir. 1999). VidAngel offers a space-shifting service that is far more transformative than even the "paradigmatic" fair use in *RIAA*. Moreover, VidAngel's transformative service enriches the Studios while making their content available to new markets. Its use is eminently fair, and at a minimum, should not be destroyed without a hearing on the merits of this appeal.

***The Studios are wrong on the merits of their copyright claims.*** Even leaving aside fair use, the Studios are unlikely to prevail on the merits of their Copyright Act claims.

Their argument that VidAngel violates the Act by conducting a "public performance" when it streams filtered movies because VidAngel does not stream from an authorized copy and ownership is a "sham," Opp. at 11-13, is wrong on all counts. First, VidAngel does not conduct a public performance by transmitting

filtered movies directly to their owners at their specific request; moreover, this is exactly what the FMA allows. *See* 17 U.S.C. § 110(11) (expressly permitting filtering done “at the direction of a member of a private household \* \* \* during a performance [that is] transmitted to that household for private home viewing \* \* \* from an authorized copy”). Second, VidAngel streams from an authorized copy of a legitimate DVD that it validly purchased. The Studios *conceded below* that it is irrelevant that VidAngel streams from a master copy. A.94-95 (Oral Arg. Tr. at 29:19-30:6). Finally, not only did the Studios not credibly argue below that VidAngel was a “sham,” but that assertion is also meritless. VidAngel’s sellback model—like Redbox’s and Blockbuster’s—is not a “gimmick” but rather legitimately ensures there is a DVD for every customer; moreover, it is the *only* lawful way for DVD owners to watch streamed filtered content.

The Studios alternately argue that VidAngel violates the Act because it creates intermediate copies to enable filtering. *Opp.* at 10-11. They cite no support for that proposition because there is none. The opposite is true: Congress carefully crafted the FMA to ensure that it would not depend on how any given technology works, including whether doing so entails making intermediate copies. The FMA thus expressly and broadly authorizes the use of “other technology” to enable filtering as long as one begins with an authorized copy and creates no fixed copy of the filtered



version.<sup>1</sup> VidAngel does precisely that.

***The Studios are wrong on the merits of their DMCA claim.*** Similar flaws doom the Studios' claim that VidAngel violates the DMCA portions of the Act.

First, VidAngel does not decrypt “without authorization” in violation of 17 U.S.C. § 1201(a) because, like any other lawful purchaser, VidAngel and its customers are entitled to—and indeed, must—decrypt the DVD for viewing. Moreover, the Studios are not empowered to “withhold authorization,” 17 U.S.C. § 1201(a)(3)(A), because VidAngel’s access is both necessary and incidental to its filtering technology and is independently a fair use. *Cf. Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1151-53 (9th Cir. 2016) (fair use “authorized” and must be considered under DMCA take-down provision). And in passing the FMA, Congress expressly allowed the application of such technology to an authorized copy without the Studios’ consent. H.R. Rep. No. 108-670, at 7 (2004).

Second, the Studios’ argument again proves too much. If the Studios were right, then encrypting a DVD would prevent filtering, fair use, or anything else—even those things expressly permitted by law—without their consent. The FMA was

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<sup>1</sup> The Studios’ assertion that this argument is new is belied by the record. *See, e.g.*, A.681 (VidAngel arguing that “The FMA *expressly provides* that a third party may *filter* and *transmit* content as specified by a lawful owner of a copy so long as a fixed copy of the altered content is not created.”); A.682 (arguing that the FMA does not require further authorization apart from starting with authorized rather than bootlegged copies); A.684 (arguing that intermediate copies permissible).

passed to enable the transmission of filtered content over the Studios' objections. It makes no sense to interpret the legislation to mean that streaming filtering services require Studio permission.<sup>2</sup> It also conflicts with copyright law, which seeks to promote societally beneficial uses of creative works. The idea that the DMCA granted creators through the back door unbridled authority to control digital works runs counter to the entire history of copyright law and to its constitutional mandate.<sup>3</sup>

### **III. The Balance Of Equities Strongly Favors A Stay.**

The balance of equities and the relative hardships here are stark, and strongly favor issuance of a stay. The Studios offered *no evidence* of irreparable harm during the short months it will take for a decision on the merits. Conversely, the injunction has forced VidAngel to shut down. Nor is VidAngel the only victim. Millions of Americans who want to see filtered movies now cannot do so.

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<sup>2</sup> The legislative history cited by the Studios is not to the contrary. It reflects only that *pirates*—those who steal DVDs or other programs without permission (e.g., bootleg copies or theft via torrent sites)—are not immunized. There is no such claim here because VidAngel purchases legitimate DVDs. And in any event, Congress passes, and the president signs, statutory text, not statements in the Congressional Record. *RIAA v. Diamond Multimedia*, 180 F.3d 1072, 1076-77 (9th Cir. 1999).

<sup>3</sup> That is, in part, why this Court has expressly left open the question of whether fair use constitutes a DMCA defense, and has also held that antitrust violations as alleged here may constitute a valid DMCA defense. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 950-51(9th Cir. 2010). These two questions are serious and squarely presented by this case, and their presence again strongly supports issuance of a stay.

**A. The Studios Will Not Suffer Irreparable Harm.**

The idea that a tiny Utah start-up could threaten the behemoth Studios with significant harm in the months it will take to resolve this appeal is fantastical. The only evidence of alleged irreparable harm during this period consists of a generic declaration by a Studio employee, Tedd Cittadine, that copyrights are valuable and that the Studios have much to fear from pirates. Consider:

Assertion by Tedd Cittadine	Related Evidence in Record
Plaintiffs’ copyrights “are critical to providing Plaintiffs the opportunity to earn a return on their substantial investments.” S.A.0941-0942 (Cittadine Decl. ¶¶ 7-8).	No evidence that VidAngel’s conduct has resulted in <i>any</i> reduction in the Studios’ “return” on their movies, let alone one that justifies shutting down VidAngel.
VidAngel’s existence interferes with Plaintiffs’ exercise of their exclusive rights and frustrates Plaintiffs’ ability to negotiate for similar rights in the future. S.A.0945, S.A.0951 (Cittadine Decl. ¶¶ 17, 36).	No evidence that VidAngel “interference” <i>actually</i> led to fewer people watching the Studios’ (unfiltered) movies, or that even a single counterparty used VidAngel as a way to drive a harder licensing bargain with the Studios.
As a Fox employee, Cittadine does not have personal knowledge of how VidAngel allegedly affected Disney or Lucasfilm. S.A.0941 (Cittadine Decl. ¶ 5).	No competent evidence introduced by Disney or Lucasfilm regarding alleged harm VidAngel was causing them.

Nothing the Studios have said about this alleged harm is specific to VidAngel or supported by the detail that would exist if the Studios actually faced it; instead,

the Studios parrot generic concerns in declarations ghostwritten by their lawyers.<sup>4</sup> On the record the Studios created, it is not even clear that the Studios have been damaged at all, let alone subjected to irreparable injury.

**B. VidAngel Will Be Destroyed If A Stay Is Not Granted.**

To comply with the Order, VidAngel was forced to shut down its servers. A.3 (Quinto Decl. ¶ 2). VidAngel now has no incoming revenue. The Studios' response that VidAngel took an overly dramatic step, Opp. at 18-19, is baseless.

Most of VidAngel's DVDs are from the Studios. VidAngel initially hoped to make only the Studios' titles unavailable, leaving it crippled but still online.<sup>5</sup> But despite working feverishly, VidAngel was unable to do so. A.3 (Quinto Decl. ¶ 2). The only way to comply was to shut down its movie-servers completely.

The Studios insist that VidAngel might have kept streaming. Opp. at 18-19. They would have this Court believe that (1) they know more about VidAngel's configuration than it does, and that (2) VidAngel chose to shut down its business unnecessarily. That is insane. And contrary to the Studios' insinuations, VidAngel's

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<sup>4</sup> As for the Studios' concerns over "windows," they almost never sell DVDs during their desired exclusive streaming window, so there is no way for VidAngel to meaningfully interfere.

<sup>5</sup> To be clear, even that best-case scenario would have been a catastrophe. With the most popular titles unavailable, customers would have left in droves. So even if VidAngel could have done what the Studios speculate, the harm in the interim would still be staggering and irreparable.

public vows to survive do not mean it has suffered no damage; they mean only that VidAngel has faith that someday justice will be served.

**C. Granting A Stay Is In The Public Interest.**

Finally, there is a substantial public interest in a stay. The public has a legitimate interest in filtered movies, an interest reaffirmed by the FMA. The Studios argue that ClearPlay meets that need. But the Studios *admit* that ClearPlay (1) works only via Google Play; (2) requires a separate desktop computer; (3) doesn't work on tablets or smartphones (which is what consumers now use to watch movies); and (4) doesn't work on high-definition or Blu-ray content (which is what consumers now watch). The Studios also concede that they or Google Play can shut ClearPlay down at any time because ClearPlay has no license from the Studios and its streaming service violates Google's terms of service. Mot. at 20; A.579 & n.2.

If ClearPlay worked, VidAngel would not exist. But ClearPlay does not work. That is why VidAngel has hundreds of thousands of customers, families who do not or cannot use ClearPlay, and who will be left in the dark absent a stay. A.27 (Harmon *Ex Parte* Decl. ¶ 11). Indeed, 84.3 percent of VidAngel's sales are through apps—a modern media platform that ClearPlay does not support. A.24 (*id.* ¶ 3).

Families should be able to watch filtered content during the short time it will take for this Court to resolve the significant issues raised by this appeal. A stay should be granted to effectuate this public interest.

## CONCLUSION

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

Dated: January 3, 2017

Brendan S. Maher  
brendan.maher@strismaher.com  
Daniel L. Geysler  
daniel.geysler@strismaher.com  
Douglas D. Geysler  
douglas.geysler@strismaher.com  
STRIS & MAHER LLP  
6688 N. Central Expressway, Suite 1650  
Dallas, TX 75206  
Tel: (214) 396-6630  
Fax: (210) 978-5430

David W. Quinto  
dquinto@vidangel.com  
VIDANGEL, INC.  
3007 Franklin Canyon Drive  
Beverly Hills, CA 90210  
Tel: (213) 604-1777  
Fax: (213) 604-1777

Shaun P. Martin  
smartin@sandiego.edu  
UNIVERSITY OF SAN DIEGO  
SCHOOL OF LAW  
5998 Alcalá Park  
San Diego, CA 92110  
Tel: (619) 260-2347  
Fax: (619) 260-7933

Respectfully submitted,

s/ Peter K. Stris  
Peter K. Stris  
peter.stris@strismaher.com  
Elizabeth Rogers Brannen  
elizabeth.brannen@strismaher.com  
Dana Berkowitz  
dana.berkowitz@strismaher.com  
Victor O'Connell  
victor.oconnell@strismaher.com  
STRIS & MAHER LLP  
725 South Figueroa Street, Suite 1830  
Los Angeles, CA 90017  
Tel: (213) 995-6800  
Fax: (213) 261-0299

Ryan Geoffrey Baker  
rbaker@bakermarquart.com  
Jaime Wayne Marquart  
jmarquart@bakermarquart.com  
Scott M. Malzahn  
smalzahn@bakermarquart.com  
BAKER MARQUART LLP  
2029 Century Park East, 16th Floor  
Los Angeles, CA 90067  
Tel: (424) 652-7800  
Fax: (424) 652-7850

*Counsel for Defendant-Appellant*  
VidAngel, Inc.