

REDACTED

Case No. 16-56843

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DISNEY ENTERPRISES, INC., ET AL.,

Plaintiffs-Appellees,

v.

VIDANGEL, INC.

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Case No. 16-cv-04109-AB (PLAx)
The Honorable André Birotte Jr., Presiding

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure:

Appellees Disney Enterprises, Inc. and Lucasfilm Ltd. LLC certify they are wholly owned subsidiaries of The Walt Disney Company, a publicly held company.

Appellee Twentieth Century Fox Film Corporation certifies it is an indirect, wholly-owned subsidiary of Twenty-First Century Fox, Inc., a publicly held company.

Appellee Warner Bros. Entertainment Inc. certifies it is an indirect, wholly-owned subsidiary of Time Warner Inc., a publicly held company.

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INTRODUCTION

VidAngel blatantly violates Plaintiffs’ rights under the copyright laws, and the district court’s preliminary injunction appropriately ordered VidAngel to cease its unlawful conduct. The court correctly held that Plaintiffs have “a strong likelihood of success” on all of their substantive claims: (1) VidAngel circumvents the technological protection measures on DVDs and Blu-ray discs (“Discs”) containing Plaintiffs’ copyrighted movies and television shows—i.e., VidAngel “rips” Plaintiffs’ Discs—and violates the anti-circumvention prohibition in the Digital Millennium Copyright Act (“DMCA”), § 1201(a)(1)(A).¹ (2) VidAngel makes new, master copies of the content it has ripped, infringing Plaintiffs’ exclusive reproduction right, § 106(1). (3) VidAngel then uses these master copies to stream performances of the works to thousands of paying customers, infringing Plaintiffs’ exclusive public performance right, § 106(4). ER 6-11.

Because settled law and the undisputed facts are against it, VidAngel tries to change the subject. VidAngel argues this case is about “Hollywood” trying to quash home-viewer filtering. That is not true. Plaintiffs’ claims have nothing to do with filtering. The Family Movie Act, § 110(11) (“FMA”), does not excuse VidAngel’s illegal conduct. The FMA makes certain limited conduct non-

¹ All statutory citations are to the relevant section of 17 U.S.C. unless otherwise noted.

infringing under § 106—namely, the act of “making imperceptible” limited portions of audio or video content in accordance with other statutory requirements, or making or providing technology that enables “such making imperceptible.” § 110(11).

The FMA’s text—confirmed by on-point legislative history—makes clear that the statute does not excuse circumvention violations under any circumstances. Nor does it provide any defense for VidAngel’s infringing copying and streaming. Even as a threshold matter, for the FMA to apply, the exempted acts of “making imperceptible” must occur in connection with a lawful performance made “from an *authorized* copy of” the work. § 110(11) (emphasis added). VidAngel streams unlawfully from the *unauthorized* copy it made by violating the DMCA and infringing Plaintiffs’ reproduction right.

The logic of VidAngel’s misreading of the FMA leads to absurd results Congress could not have intended. Under VidAngel’s theory, practically any streaming service could seek to avoid liability for the unauthorized use of copyrighted works merely by adopting VidAngel’s model and allowing customers to filter out any snippet of content—including the filtering of just the movie’s opening or closing credits (a feature VidAngel provided pre-litigation and VidAngel has promised to restore). Congress intended the FMA to create a limited

exception to copyright infringement. Congress did not create the massive loophole in DMCA and copyright protection that VidAngel purports to find there.

The district court properly found that VidAngel caused Plaintiffs ongoing, expanding and irreparable harm; and that requiring VidAngel to comply with the law would not cause cognizable harm to VidAngel or to the public interest.

VidAngel based its business on violating Plaintiffs' rights; scaled up its offerings to more than 100,000 monthly active users (and a half-million monthly streams) by aggressively marketing itself as a \$1-a-day alternative to licensed streaming services, such as iTunes, Hulu, Amazon, and Netflix; and continued to add new titles as Plaintiffs released them on Discs, even after the preliminary injunction issued.

The preliminary injunction should be affirmed.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). Subject matter jurisdiction is based on 28 U.S.C. §§ 1331, 1338(a) and 17 U.S.C. §§ 501(b), 1203(a).

ISSUE PRESENTED

Did the district court appropriately exercise its discretion in preliminarily enjoining VidAngel from circumventing the technological protection measures on

Discs containing Plaintiffs' works and from infringing Plaintiffs' rights to reproduce and publicly perform those works?

STATEMENT OF THE CASE

A. Plaintiffs And Their Copyrighted Works

Plaintiffs or their affiliates produce or distribute some of the most popular motion pictures and television shows in the world. ER 619. VidAngel systematically violates the DMCA and infringes Plaintiffs' copyrights in more than a thousand titles, including (to name just a few) *Frozen* (Disney), *Star Wars: The Force Awakens* (Lucasfilm), *Avatar* (Fox), and *Harry Potter and the Sorcerer's Stone* (Warner Bros.). ER 84 ¶ 9 (VidAngel offers over 2,500 titles, more than half being Plaintiffs'); *see also* ER 324, 620.

Plaintiffs license their works for public dissemination through numerous channels. An increasingly important channel for producers and consumers is internet streaming. ER 2, 558 ¶ 10. Plaintiffs (and other copyright owners) license to a wide array of online streaming services, including iTunes, Amazon Video, Google Play, Netflix, and Hulu. ER 2, 557 ¶ 9. Some services (e.g., Netflix, Hulu) enable consumers to stream desired movies to internet-connected devices "on-demand" in return for subscription fees. ER 557 ¶ 9. Others (e.g., iTunes, Google Play) offer digital downloads for on-demand viewing on an individual license or "rental" basis. *Id.*

Each Plaintiff utilizes “windowing” to release works through different distribution channels and licensees at different times. ER 2, 559 ¶ 15. For example, Lucasfilm released *Star Wars: The Force Awakens* to Disc and for digital download (e.g., iTunes) before releasing it to any on-demand streaming services (e.g., Netflix). ER 560 ¶ 16. A Plaintiff also will grant exclusive rights for certain movies for certain times. For example, when Plaintiffs filed their preliminary injunction motion, Fox’s *The Martian* and *Brooklyn* were available exclusively on HBO, including on-demand through HBO Go online. ER 564-65 ¶ 32. Distribution rights are highly valuable and heavily negotiated. See ER 560 ¶¶ 14-15.

Distributing content digitally (whether online or on Disc) provides tremendous benefits for producers and consumers. Given the ease with which digital copies can be made and widely distributed, however, Plaintiffs utilize numerous measures to protect their content from unauthorized access and copying. Among the most important is Plaintiffs’ use of technological protection measures (“TPMs”) that control access to and copying of content distributed on Discs. SER 1215 ¶ 20, 1217 ¶ 27.

The encryption-based TPMs that Plaintiffs use on Discs may be lawfully decrypted only for playback (not copying) and only by devices manufactured under license from the licensing organization responsible for authorizing the use of

decryption keys for the relevant TPM. SER 1215-19 ¶¶ 20-34; *see Realnetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913, 918-924 (N.D. Cal. 2009) (background of CSS licensing organization and framework of CSS license agreement).

B. VidAngel's Pivot To An Unlicensed Streaming Service

VidAngel claims it was forced to develop its infringing model based on Plaintiffs' interference with its former business model, first launched in 2013, that offered filters for authorized digital streams its users obtained through Google Play and accessed through the YouTube player. ER 523; *see* Br. 10-11. That allegation is false, and no evidence supports it. The record shows Plaintiffs first learned of VidAngel in July 2015, several months *after* VidAngel began beta testing its current model. ER 529 ¶ 22. The record also shows VidAngel switched to its infringing model not because of interference from Plaintiffs, but because VidAngel encountered difficulties with Google and decided it could make more money by streaming movies itself.

In December 2013, YouTube told VidAngel its "implementation [was taking] away from the YouTube experience" by, among other actions, "modifying the YouTube player, specifically the play button." ER 528 ¶ 17, 546. Likewise, VidAngel learned that, among customers who had stopped using VidAngel, 47%

“didn’t want to pay for rentals on YouTube/Google Play,” suggesting that filtering alone was an insufficient draw for users. SER 1329.

In late 2014, VidAngel decided to cut out the middleman and stream movies itself. VidAngel knew it would ultimately need licenses to run a legitimate streaming business. SER 1465. However, VidAngel decided to wait to seek licenses—believing it would be better able to pressure Plaintiffs and others into offering favorable terms once it had a substantial user base, and operating without licenses in the meantime. ER 682; SER 1359, 1465.

C. VidAngel’s Unlicensed Streaming Service

VidAngel’s enjoined service utilizes the following uncontroverted steps:

First, after deciding which titles to offer (based in part on the title’s popularity), VidAngel purchases multiple Discs containing that title. ER 292-93. Using just one such Disc (and [REDACTED]), VidAngel, in its own words, will [REDACTED]. SER 1286. VidAngel uses illegal software² to “remove”—i.e., to circumvent—the TPMs that control access to the files on that Disc. ER 6. The unused Discs then

² VidAngel uses AnyDVD HD, notorious circumvention software sold by RedFox, a Belize-based company. SER 1281 ¶¶ 38-39. Such software is generally recognized to be illegal for U.S. distribution. SER 1229 ¶ 11-12, 1230 ¶ 15. RedFox is run by former developers from the company SlySoft, which was shut down due to “regulatory requirements” and whose owner was convicted in a foreign jurisdiction of trafficking in circumvention tools. SER 1281 ¶¶ 38-39.

go into a “vault,” where they serve as window dressing for VidAngel’s argument that it “sells” Discs to its users. ER 292, 294.

Second, VidAngel makes digital master copies of the ripped movie to VidAngel’s computers and servers. ER 9. VidAngel tries to minimize its copying by calling these “intermediate” copies, which are broken “into tiny segments.” Br. 11, 27. As the district court found, these are still copies; and regardless of VidAngel’s “break[ing]” the files into pieces, VidAngel makes and maintains a complete copy of each movie. ER 9-10.

Third, VidAngel streams performances of the movie to its customers—often streaming performances of the same title to hundreds or thousands of different customers. ER 329 ¶ 77; SER 1510-11. VidAngel streams from the unauthorized master copies it creates after ripping Discs. The multitudes of Discs that VidAngel claims to “sell” to its customers remain unused in VidAngel’s vault. ER 292, 294.

VidAngel relies heavily on “buy-sellback” to justify the legality of its service. “Buy-sellback” is a sham. VidAngel does *not* purchase a Disc for every customer who streams a work. VidAngel recycles the Disc’s purported “ownership” over-and-over as different customers select the same movie to stream. *See* Br. 17-18. As of the preliminary injunction, VidAngel said the average Disc was “resold” an average of 16 times in the first four weeks after VidAngel started streaming the underlying movie. ER 329 ¶ 77.

VidAngel markets itself as—and its customers understand and treat it as—a streaming service that offers short-term, on-demand access to movies, similar to iTunes. VidAngel’s marketing touts its \$1-a-day price for movies (for standard definition; \$2-a-day for high definition). SER 1119-44.³ For the overwhelming majority of all transactions—99.6% classified as “short-term”—customers “sell-back” in an average of five hours after allegedly “buying.” SER 1024.⁴

Before this lawsuit, VidAngel’s CEO admitted that “VidAngel is NOT a disc service.” SER 1336. He called “buy-[sell]back” “the most creative way [VidAngel] could come up with” to offer an on-demand streaming service while trying to “stay[] buttoned up legally.” SER 1465. In less euphemistic terms, “buy-sellback” is a lawyer-created construct that VidAngel uses to stream performances while feigning its customers “own” Discs.

³ VidAngel uses a “popup” at the movie’s end to encourage immediate “sell back.” Until this lawsuit, VidAngel’s settings allowed users to select “auto-sellback”—i.e., the movie was automatically returned after viewing. SER 1438-39.

⁴ VidAngel claims that it will send the Disc to any requesting customer. The record shows that, out of millions of alleged “sales,” VidAngel has only delivered four Discs to requesting customers. SER 1510:16-1511:5, 1513:12. VidAngel also claims that “20% of VidAngel’s discs are *never sold back*” (but also not sent to the customers). Br. 18. VidAngel introduced no evidence supporting this point. Even if the assertion is true, given that 99.6% of VidAngel’s transactions are short-term transactions, the Discs VidAngel is talking about would account for at most 0.4% of all transactions. SER 1024.

D. VidAngel's Letters To Plaintiffs, And Its Rapid Growth

In July 2015, VidAngel, through litigation counsel, sent letters announcing its new service to the general counsels of Plaintiffs' parent companies. ER 548-50. The letters described a nascent service of fewer than 5,000 users that was in "limited beta" testing. ER 549. The letters said nothing about VidAngel circumventing TPMs on Plaintiffs' Discs or copying their works.

VidAngel thereafter launched an aggressive marketing campaign, touting the advantages flowing from its unlicensed exploitation of Plaintiffs' works.

VidAngel emphasized it could stream popular new releases like *Star Wars: The Force Awakens* at times other licensed services could not. SER 1090; *see id.* 1092-93, 1101-16 (promoting titles available on VidAngel but "Not on Netflix").

VidAngel emphasized its low prices relative to streams of the same movies on other services (which, of course, pay for the right to stream that content). SER 1136 ("How VidAngel \$1 Movies Work in 15 Seconds"); *see generally* SER 1119-44. And, until it was sued, VidAngel allowed customers to filter only opening or closing credits—offering, in essence, streams of entire movies without alteration. SER 1172-75. VidAngel also offered a Jar Jar Binks filter that its customers could select as their single required filter even on non-*Star Wars* movies, again enabling on-demand streaming without filtering. ER 535 ¶ 34.

The public responded to VidAngel's marketing cues:

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

SER 1146; *see also id.* at 1149 (“We bought Star Wars and sold it back for a total of \$1 when it was like \$5 to rent on Amazon. So even if you don't need content cleaned, it's a great video service.”). Unsurprisingly, VidAngel's customer survey shows that 49% of those who watched a movie on VidAngel would have watched the same title without filters. SER 1059-60.

E. Procedural History

Plaintiffs started investigating how VidAngel operated shortly after receiving VidAngel's letters. ER 565-66 ¶ 35. Many fledgling services that infringe content are short lived or do not grow to be a threat. VidAngel, however, started gaining notoriety in the media. SER 1087-1116, 1119-68, 1299-1313.⁵ Its user base (just 5,000 as of July 2015) expanded to more than 100,000 monthly active users by June 2016. ER 549; SER 989. In response to VidAngel's continuing operation and increasing visibility, Plaintiffs filed suit on June 9, 2016. ER 613.

⁵ As Plaintiffs learned after filing suit, VidAngel's founders profited handsomely from its marketing. For the six months ending June 30, 2016, VidAngel spent more than \$2 million on sales and marketing—money that went largely to Harmon Brothers LLC, which is owned by Neal Harmon and his brothers (also VidAngel principals). SER 1015, 1063, 1245-46, 1408 (showing Harmon Brothers' role in marketing).

The parties stipulated to expedited discovery and a schedule for Plaintiffs' preliminary injunction motion. ER 568. The parties filed briefs and a record of more than 2,000 pages. The district court conducted a half-day hearing on November 14.⁶ ER 94-217 (transcript). On December 12, the district court entered its order. The court considered all of VidAngel's many arguments against the requested injunction, but found Plaintiffs had a "strong likelihood of success" on all three of their claims, and that all equitable factors favored an injunction. ER 8, 11. The court enjoined VidAngel from circumventing Discs containing Plaintiffs' works, and from copying and publicly performing those works. ER 22.

The injunction was effective immediately, but VidAngel did not comply with it until the court denied its motion for a stay on December 29. ER 29. In the intervening time, VidAngel not only continued to stream Plaintiffs' works, but added more of Plaintiffs' works to its offering as Plaintiffs released new titles on Discs. SER 930-42. Although VidAngel told the court (after Plaintiffs raised the non-compliance) that it had technical difficulties complying with the injunction, ER 86, VidAngel told its customers it would not comply unless its stay motions were denied. SER 951-53. Based on VidAngel's tactical and legally unsupported decision "to wait until after the [court's] decision on the stay [application]" to

⁶ Plaintiffs noticed their motion for hearing on October 24, a date continued because of a request from VidAngel's counsel and the court's trial schedule.

comply with the injunction, SER 909:18-19, the district court held VidAngel in civil contempt. ER 23.

SUMMARY OF ARGUMENT

The preliminary injunction was a wholly appropriate exercise of the district court's discretion. The court considered all four factors for injunctive relief, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), and VidAngel fails to show that the court erred (much less abused its discretion) in any of its conclusions.

First, the court correctly held that Plaintiffs have a “strong likelihood of success” on all of their substantive claims. ER 8, 11. Plaintiffs established VidAngel's prima facie liability on each claim. Section I. And VidAngel failed to show that the affirmative defenses it relied on—the FMA and fair use—likely would defeat liability. Section II.

Second, the court correctly found that Plaintiffs face irreparable harm to relationships with licensees and goodwill from VidAngel's expanding illegal conduct. Section III.

Third, the court correctly held that the harm to Plaintiffs sharply outweighed VidAngel's self-inflicted injuries from operating illegally. Section IV.

Fourth, the court was correct that the injunction is in the public interest. Section V.

STANDARD OF REVIEW

This Court reviews the preliminary injunction for abuse of discretion. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1157 (9th Cir. 2007). This is “much more limited than review of an order involving a permanent injunction where all conclusions of law are freely reviewable.” *Sports Form, Inc. v. United Press Int’l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982). The Court “will reverse only when ‘the [district] court’s application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.’” *Gilman v. Schwarzenegger*, 638 F.3d 1101, 1105-06 (9th Cir. 2011) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)). This Court will not reverse even if, applying the same standard, it “would have arrived at a different result.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING PLAINTIFFS HAVE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS OF ALL THEIR CLAIMS

A. VidAngel Circumvents In Violation Of § 1201(a)(1)(A)

1. VidAngel’s Violation Of § 1201 Is Clear

Section 1201(a)(1)(A) “prohibits the circumvention of any technological measure that effectively controls access to a protected work and grants copyright owners the right to enforce that prohibition.” *MDY Indus., LLC v. Blizzard Entm’t*,

Inc., 629 F.3d 928, 944 (9th Cir. 2010). VidAngel’s liability under § 1201(a)(1)(A) is clear.

First, it is undisputed that the TPMs Plaintiffs use on their Discs “effectively control[] access to” copyrighted works. § 1201(a)(1)(A). A TPM “effectively controls access to a work” if, “in the ordinary course of its operation,” the TPM “requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.” § 1201(a)(3)(B). The TPMs at issue here—CSS (for DVDs) and AACS and BD+ (for Blu-ray discs)—use encryption, authentication, and other measures that, in the ordinary course, ensure that the Disc’s content can be accessed only for playback on an authorized Disc player. SER 1215-19 ¶¶ 20-34; *see Realnetworks*, 641 F. Supp. 2d at 932 (CSS effectively controls access); *Universal Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 317-18 (S.D.N.Y. 2000) (same), *aff’d Universal Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

Second, VidAngel circumvents the TPMs. “[T]o ‘circumvent a technological measure’ means to descramble a scrambled work, to decrypt an encrypted work, or otherwise avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.” § 1201(a)(3)(A). VidAngel does not access the Disc’s content using an authorized Disc player. Instead, VidAngel uses illicit ripping software to decrypt Plaintiffs’

Discs without Plaintiffs' authorization. *See* ER 339 ¶ 120(b); SER 1219-20 ¶¶ 37-38, 1315. VidAngel illegally circumvents. *See Corley*, 273 F.3d at 444 (removing CSS protection from a DVD violates § 1201(a)).

2. VidAngel's Argument Against Liability Ignores The DMCA's Plain Language And Precedent

Faced with undisputed evidence of its illegal circumvention, VidAngel seeks to avoid liability with a convoluted argument that is against the text of the statute and contrary to precedent from this Court and others.

VidAngel draws a hardline distinction between § 1201(a) and § 1201(b). Section 1201(a) addresses “access”-control TPMs, that is TPMs that control access to copyrighted works. It prohibits both the act of circumventing access-control TPMs and trafficking in devices that circumvent. Section 1201(b) addresses “use”-control TPMs, that is TPMs that control the exercise of the copyright owner's § 106 rights in their copyrighted works (e.g., copying and publicly performing). Section 1201(b) prohibits trafficking in devices that circumvent use-control TPMs, but does not itself prohibit the act of unauthorized use; the remedy for unauthorized use is an infringement claim under § 106. According to VidAngel, whether a defendant is subject to the restrictions of § 1201(a) or § 1201(b) turns on whether the defendant is circumventing the TPM (i) to view the protected work (which VidAngel says is subject to § 1201(a)) or (ii) to exercise one or more of the § 106 rights in the work, e.g., to copy it. If the defendant

circumvents for the latter purpose, VidAngel argues, then the defendant is subject to § 1201(b) if the defendant traffics in the device used to circumvent, or § 106 if the defendant copies or otherwise exercises one of the exclusive rights of copyright with respect to the copyrighted work. The defendant would not, however, be liable under § 1201(a)(1)(A) for circumventing the TPM, even if the TPM controls access to the copyrighted work.

Reasoning from this proposed dichotomy, VidAngel argues it does not circumvent access controls (and therefore does not violate § 1201(a)(1)(A)) because any Disc purchaser “*unquestionably ha[s] authority to decrypt and view each movie.*” Br. 32. VidAngel says that Plaintiffs’ real complaint is that VidAngel is circumventing in order to copy and publicly perform the copyrighted works, and thus Plaintiffs may sue VidAngel only under § 106 but not under § 1201(a)(1)(A). *Id.* at 35-38.

VidAngel did not make this access-use control argument in the district court and therefore waived it. *See Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011) (“Absent exceptional circumstances, [the Court] generally will not consider arguments raised for the first time on appeal . . . [and] will not reframe an appeal to review what would be in effect a different case than the one decided by the district

court.”) (citations omitted).⁷ Even if the Court considers it, VidAngel’s argument is meritless because its underlying premises are wrong.

(a) VidAngel Is Not Authorized To Remove The TPMs That Control Access To Plaintiffs’ Works

The first premise of VidAngel’s § 1201 argument is that when it buys a Disc, it obtains the copyright owner’s authority to bypass the TPM (i.e., to decrypt the encrypted content). From this premise, VidAngel argues that Plaintiffs’ complaint is with VidAngel’s use of the copyrighted works—not VidAngel’s access to those works—and therefore their only remedy is an infringement claim under § 106. Br. 33-38.

VidAngel defies the statute’s text and ignores precedent. Section 1201(a)(3)(A) defines circumvention as decrypting the TPM “without the authority of the copyright owner.” VidAngel suggests it has this authority—and therefore is not subject to § 1201(a)(1)(A)—because it obtained the right to access the movie when it bought the Disc. Br. 35. As this Court made clear in *MDY*, however, the relevant question under § 1201(a)(3)(A) is whether the defendant has authority “to circumvent an access control measure,” *not* whether (as VidAngel argues) it has authority “to access the work.” *MDY*, 629 F.3d at 953 n.16.

⁷ VidAngel also raises new arguments with respect to its public performance claim and FMA defense. *See* Sections I.C.3, II.A.2, *infra*. Those arguments are also waived.

When it purchases a Disc, VidAngel has the right to watch the movie using an authorized playback device, but it does not have authority to circumvent the access-control TPMs on the Disc. The manufacturer of the Disc-playback device (e.g., Panasonic) has the right, pursuant to a license from the relevant licensing body that controls the decryption keys associated with the relevant TPM, to make devices that are authorized to decrypt the content on Discs during playback.⁸ But, as courts have consistently held, the Disc purchaser does not have the right to circumvent TPMs on that Disc. *See, e.g., Corley*, 273 F.3d at 444 (§ 1201(a) “exempts from liability those who would ‘decrypt’ an encrypted DVD with the authority of a copyright owner, not those who would ‘view’ a DVD with the authority of a copyright owner”); *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1096 (N.D. Cal. 2004) (“[T]he purchase of a DVD does not give to the purchaser the authority of the copyright holder to decrypt CSS.”). VidAngel analogizes itself to someone given a key to a locked room and then punished for its use of the key rather than its use of the room’s contents. Br. 37. The analogy crumbles because the licensing authorities give the licensed

⁸ To exercise that right, the manufacturer must abide by the requirements of the TPM license, which authorizes the making of devices that decrypt encrypted content only for purposes of playback, not copying. *See Realnetworks*, 641 F. Supp. 2d at 933-35, 946-52.

manufacturers (e.g., Panasonic) the keys to decrypt content. No one has given VidAngel those keys.

(b) VidAngel’s Argument Is Based On A False Dichotomy

The second premise of VidAngel’s argument is that a claim under § 1201(a)(1)(A) “would frustrate the comprehensive scheme Congress enacted for use-controls” where a consumer has the authority to view a Disc. Br. 33. This argument is wrong because it presupposes Congress intended for copyright owners only to have remedies under § 1201(a) *or* § 1201(b) (supplemented by § 106), but not both. Under VidAngel’s proposed interpretation, if a defendant is able to gain access to view a protected work—such as by watching a movie on Disc using a licensed playback device—then the defendant cannot be liable under § 1201(a)(1)(A) if the defendant also copies or performs (or exercises any other § 106 right with respect to) the copyrighted work. This argument is baseless.

First, VidAngel’s argument is contrary to the DMCA’s text and structure, and precedent construing the statute. As this Court stated quite directly in *MDY*, “if a copyright owner puts in place an effective measure that both (1) controls access and (2) protects against copyright infringement, a defendant who traffics in a device that circumvents that measure could be liable under *both* § 1201(a) and (b).” *MDY*, 629 F.3d at 946 (emphasis added)). Sections 1201(a) and 1201(b) are not mutually exclusive. A defendant’s unlawful conduct with respect to a TPM

that controls both access and use may give rise to claims under either or both sections. *See Realnetworks*, 641 F. Supp. 2d at 935-936 (enjoining defendants' distribution of DVD-ripping and copying-device found to likely violate § 1201(a)(2) and § 1201(b)(1)); *321 Studios*, 307 F. Supp. 2d at 1095 (defendants violated both § 1201(a)(2) and § 1201(b)(1)).

Here, the TPMs that Plaintiffs use both control access to the underlying works and protect against copying (and other infringing uses) of those works. A defendant that traffics in devices that circumvent these TPMs is liable under the anti-trafficking provisions in each of § 1201(a) and § 1201(b). *See MDY*, 629 F.3d at 946; *Realnetworks*, 641 F. Supp. 2d at 935-936; *321 Studios*, 307 F. Supp. 2d at 1095.

A defendant like VidAngel that circumvents the TPMs to gain unauthorized access to copyrighted works is liable under § 1201(a)(1)(A). *See Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 300 (3d Cir. 2011) (“if a movie studio encrypts a DVD so that it cannot be copied without special software or hardware, and an individual uses his own software to ‘crack’ the encryption . . . the studio may pursue the copier . . . for his circumvention of the encryption”). The same defendant may also be liable for infringement based on its subsequent violation of the copyright owner’s rights under § 106. Here, for example, VidAngel is liable

for its unauthorized copying and publicly performing of Plaintiffs' works, both of which occur after VidAngel circumvents.

Second, VidAngel's interpretation of § 1201(a)(1)(A) to not cover circumvention when the party is circumventing to infringe (i.e., "use") the copyrighted content would render other important parts of the statute superfluous. Section 1201(a)(1)(B) directs the Librarian of Congress to conduct Triennial Rulemaking Proceedings to exempt from liability under § 1201(a)(1)(A) "users of a copyrighted work which is in a particular class of works" who, during the relevant period, otherwise may be "adversely affected . . . in their ability to make noninfringing uses of that particular class of works." It would make no sense for Congress to direct the Librarian to undertake these Proceedings if, as VidAngel argues, § 1201(a)(1)(A) were inapplicable whenever the user of the work in the exempted categories had already lawfully acquired the content, and would therefore be "authorized to view" it.⁹ Under VidAngel's interpretation, almost all

⁹ VidAngel's reliance on the Librarian's statement from the first Triennial Rulemaking Proceeding (in 2000), Br. 37-38, is misplaced. The Librarian noted there that § 1201's drafters may have been aware of CSS (which was in development when the DMCA was drafted), and that CSS operated as both an access- and copy-control TPM. 65 Fed. Reg. 64568 n.14 (Oct. 27, 2000). The Librarian said it was "quite possible" that the drafters "anticipated that CSS would be a 'technological measure that effectively controls access to a work.'" *Id.* The Librarian said it was "unclear how a court might address" a case where the same TPM controlled both access and copying. *Id.* at 64568. This Court and others

users of the works in the exempted categories would not face a circumvention claim at all—in other words, the Triennial Rulemaking Proceeding would be unnecessary. That is an untenable reading of the statute.

In sum, when unpackaged, VidAngel’s argument resisting the application of § 1201(a)(1)(A) is completely without merit. VidAngel’s liability for violating § 1201(a)(1)(A) is clear.

B. VidAngel Copies Plaintiffs’ Works In Violation Of § 106(1)

VidAngel admits that after removing the TPMs it “copies . . . the movie file(s) from one disc” onto computers and servers to create a master file. Br. 11, 21. The district court correctly concluded this copying violates Plaintiffs’ exclusive reproduction right. ER 9 (citing *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (“‘copying’ for purposes of copyright law occurs when a [copyrighted work] is transferred from a permanent storage device to a computer[.]”)).

VidAngel essentially concedes Plaintiffs’ prima facie case on copying, and instead argues its affirmative defenses excuse this infringement. *See* Section II, *infra*. VidAngel does try to compare itself to Redbox, but the comparison is totally inapt. *See* Br. 18-19. Redbox relies on the first sale doctrine to sell or rent Discs

have since made clear that the same TPM used to control access to and use of the same work may be the basis for a claim under both sections. *See MDY*, 629 F.3d at 946; *Realnetworks*, 641 F. Supp. 2d at 935-936.

to its customers for home viewing. Under that doctrine, the owner of a specific lawful physical copy of a work (e.g., a particular Disc) has the right to dispose of that physical copy, notwithstanding the copyright owner's exclusive public distribution right. § 109. The first sale doctrine does not give the owner of the particular copy the right to do what VidAngel does, i.e., exercise other § 106 rights, such as the reproduction or public performance rights. *See Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013).

C. VidAngel Publicly Performs Plaintiffs' Works In Violation Of § 106(4)

1. VidAngel's Streaming Violates The Public Performance Right

To “perform” a motion picture means “to show its images in any sequence or to make the sounds accompanying it audible.” § 101. To perform such a work publicly means, inter alia, “to transmit or otherwise communicate a performance . . . of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.” *Id.* (the “Transmit Clause”). To “transmit” a performance means “to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.” *Id.*

Well-established precedent supports the court’s conclusion that VidAngel violates the Transmit Clause by streaming performances of the same works to multiple customers. In *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984), the Third Circuit held that a remote video rental service—wherein patrons selected videos from a store, which transmitted performances from the videos to in-store booths—violated the public performance right. The store “show[ed] each copy [of a movie] repeatedly to different members of the public,” and the service was “essentially the same as a movie theatre, with the additional feature of privacy.” *Id.* at 159.

Following *Redd Horne*, *On Command Video Corporation v. Columbia Pictures Industries*, 777 F. Supp. 787, 789 (N.D. Cal. 1991), held that a hotel’s “electronic rental” system—in which the hotel rented movies to guests and transmitted performances from the main office to individual rooms—infringed the public performance right. Likewise, *Warner Bros. Entertainment Inc. v. WTV Systems, Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011) (“*Zediva*”), held that a service’s remote streaming from individual DVDs in playback devices to individual home users—alleged to have rented the DVD and the player—was a public performance. *Id.* at 1006-07, 1010.

The Supreme Court in *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014), found a public performance in the defendant’s

streaming of broadcast programs to its commercial subscribers. Aereo created its service based on a lawyer-designed gimmick to avoid the public performance right. Specifically, Aereo used arrays of individual antennas to make numerous individual copies of the same broadcast, used those individual copies to make separate internet transmissions, and then argued that each stream of the same work was a “private” performance not subject to § 106. The Court rejected Aereo’s arguments because its “behind-the-scenes” machinations meant “nothing to the subscriber” and “nothing to the broadcaster,” and did nothing to change Aereo’s “commercial objective.” *Id.* at 2507-08. The Court held that Aereo’s conduct was covered by the Transmit Clause. *Id.*; see *Fox Television Stations, Inc. v. FilmOn X LLC*, 150 F. Supp. 3d 1, 31 (D.D.C. 2015) (time-delayed retransmissions “originat[ing] from individual copies and [] streamed to individual users do[] not render the transmission[s] ‘private,’” but rather in violation of the public performance right).

Like the streaming services in *Aereo*, *FilmOn*, and *Zediva*; the video store in *Redd Horne*; and the hotel operator in *On Command*, VidAngel transmits performances of copyrighted works to a commercial, public audience. That audience consists of the thousands of paying customers to whom VidAngel streams the same movies. VidAngel performs Plaintiffs’ works publicly.

2. “Buy-Sellback” Does Not Make VidAngel’s Performances Private

Like Aereo and others before it, VidAngel argues each stream it makes of the same copyrighted work is private and not subject to § 106. VidAngel’s spin is that it streams performances to users who supposedly own Discs containing the same title. The district court correctly held that “buy-sellback” is irrelevant to the public performance right: “Assuming *arguendo* that VidAngel’s buy/sellback service creates a valid ownership interest in a DVD,” the customer’s “ownership would only apply to the physical DVD, not the digital content that VidAngel streams to paying subscribers.” ER 11. Neither the user nor VidAngel acquires any rights in the underlying work, including the right to publicly perform that work or transmit that work in a different media, simply by purchasing a Disc. *See New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 495-96 (2001) (each § 106 right is “discrete”); § 202 (“Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.”).

VidAngel argues against this result by mischaracterizing dicta in *Aereo*. The dicta involved a possible basis for distinguishing a hypothetical future case involving a remote-storage digital video recorder or cloud storage service from Aereo’s service. The Court said its holding as to Aereo did not resolve whether the public performance right would be infringed where users “receive performances in

their capacities as owners or possessors of the underlying works.” *Aereo*, 134 S. Ct. at 2510. The Court analogized to the distinction between a valet service, which returns cars to their owners, and a car dealership, which sells new cars to customers who then become owners: “we would not say that the [valet] provides cars ‘to the public’ . . . [w]e would say that a car dealership . . . provide[s] cars to the public, for it sells cars to individuals who lack a pre-existing relationship to the cars.”¹⁰ *Id.*

This analogy provides no cover to VidAngel. Unlike either a valet or car dealer (both of which provide access to the same product, namely, a car), VidAngel does not provide access to the product purportedly “sold” to the customer, i.e., the Disc. VidAngel instead offers its customers access to an on-demand service in direct competition with other streaming services like iTunes or Hulu. VidAngel’s advertising and FAQs make clear that VidAngel and its customers recognize “buy-sellback” as nothing more than a stratagem to enable \$1-a-day streaming. SER 1119-44, 1179; *see* 1024 (more than 99% of transactions

¹⁰ The Court said that, even if it were to draw such a line, *Aereo* would be on the wrong side of it. *Aereo* was more like a car dealership because it “transmits to large numbers of paying subscribers who lack any prior relationship to the works.” *Id.* The same is true of VidAngel, whose users have no “prior relationship” with the works they watch, but instead receive access by paying the equivalent of a rental fee. “Buy-sellback” does not convey anything resembling the type of ownership *Aereo* contemplated, even of copies.

result in “sell-back” within an average of five hours). VidAngel purports to create an “ownership” interest in the Disc, but solely to evade copyright requirements that apply to its service. VidAngel does not even stream from the Disc the customer purportedly “owns,” but from an unauthorized master copy. “Buy-sellback” does not “render [VidAngel’s] commercial objective any different” from an authorized streaming service or “alter” its customers’ viewing experience. *Aereo*, 134 S. Ct. at 2508.

Aereo is clear that a court must look to the substance of what a defendant is doing rather than the legal artifice it constructs to characterize its commercial performances as private. *Id.* (“the behind-the-scenes way in which Aereo delivers television programming to its viewers’ screens” did not change that Aereo was publicly performing); *cf. A & M Records, Inc. v. A.L.W., Ltd.*, 855 F.2d 368, 370 (7th Cir. 1988) (rejecting buyback scheme under Record Rental Amendment of 1984); *Central 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). Like the streaming services with which it competes, and like Aereo before it, VidAngel publicly performs Plaintiffs’ works.

3. VidAngel Performs Plaintiffs' Works

VidAngel argues in a footnote that its customers—and not VidAngel—“do” the performing because each customer selects particular filters and thus may view a slightly different version of the movie than the version other customers view. Br. 23 n.30. VidAngel did not make this argument to the district court and so waived it. The argument in any event is meritless.

The Transmit Clause covers a performance “of the work.” § 101. As *Aereo* and the other cases discussed make clear, when VidAngel streams *Star Wars: The Force Awakens* to thousands of customers, VidAngel performs the same “work” regardless of which snippets different customers ask VidAngel to filter. The district court’s ruling is also fully consistent with *Perfect 10, Inc. v. Giganews, Inc.*, ___ F.3d ___, No. 15-55500, 2017 WL 279504 (9th Cir. Jan. 23, 2017).¹¹

¹¹ *Giganews* did not involve public performance rights at all and thus did not present the question whether a volitional conduct requirement applies to a violation of this right. No other circuit has held that a plaintiff must prove “volitional conduct” to establish a violation of the public performance right. The only circuit to consider the question directly declined to apply such a requirement, even though that court applied the volitional conduct requirement to the reproduction right. *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 134 (2d Cir. 2008) (declining to apply volitional conduct requirement to public performance right because “[t]he definitions that delineate the contours of the reproduction and public performance rights vary in significant ways”). This Court should not endorse any such requirement here because (i) doing so would be error given the statutory provisions that define the public performance right and (ii) there is no need to address the issue because VidAngel plainly caused the performance as *Giganews* understood the term.

Giganeews distinguished a service that is “merely a passive host” of the images displayed from a service that “initiates and controls the storage and communication” of the same images. *Id.* at *6-7 (quoting *Amazon.com*, 508 F.3d at 1160 n.6).

VidAngel is the opposite of a “passive host.” VidAngel selects the movies it adds to its service; VidAngel rips Discs containing those movies and makes new copies; VidAngel curates, advertises, and offers the movies for streaming; and VidAngel streams the movies from servers it controls. VidAngel performs Plaintiffs’ copyrighted works.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT VIDANGEL WAS UNLIKELY TO SUCCEED ON ITS AFFIRMATIVE DEFENSES

Because Plaintiffs showed they likely would prevail on the merits of their claims, VidAngel had to show it likely would prevail on its defenses.

Amazon.com, 508 F.3d at 1158. The district court did not abuse its discretion in concluding VidAngel was unlikely to succeed on its FMA and fair use defenses.

A. The FMA Does Not Excuse VidAngel’s Circumvention Violation Or Copyright Infringement

The FMA provides:

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

* * *

(11) the making imperceptible, by or at the direction of a member of a private household, of limited portions of audio or video content of a motion picture, during a performance in or transmitted to that household for private home viewing, from an authorized copy of the motion picture, or the creation or provision of 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. . . .

Nothing in paragraph (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.

§ 110(11).

This text (1) provides no defense to a circumvention violation, (2) does not excuse VidAngel’s making of and streaming from unauthorized copies, and (3) cannot be construed as VidAngel argues without leading to absurd results. The impact of the FMA is not a mystery: when it applies, it allows individuals and technology to mute and skip content when privately viewing movies; it does not authorize an unlicensed streaming service.

1. The FMA Provides No Defense To A Circumvention Violation

(a) The Unambiguous Text Of The FMA Does Not Apply to DMCA Violations

“[I]n interpreting a statute, a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume

that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

The FMA’s text could not be clearer that, where it applies, it applies only to an infringement claim. It does not shield a defendant from anything else, including circumvention claims.

The preamble to the FMA states that, “[n]otwithstanding the provisions of *section 106*, the following are not *infringements of copyright*.” §110 (first sentence) (emphasis added). The final paragraph clarifies that nothing in the FMA “shall be construed . . . *to have any effect on defenses or limitations on rights granted under any other section of this title*.” § 110 (last sentence) (emphasis added). A circumvention violation—which arises under § 1201, not § 106—is separate and distinct from a claim for copyright infringement. *MDY*, 629 F.3d at 950.

Where, as here, “the words of a statute are unambiguous . . . th[e] first canon is also the last: judicial inquiry is complete.” *Connecticut Nat’l Bank*, 503 U.S. at 254 (internal quotation and citation omitted). The FMA does not excuse violations of the DMCA, including VidAngel’s circumvention violation.

(b) The Legislative History Confirms The FMA Does Not Excuse A Circumvention Violation

The FMA’s legislative history confirms what the statute makes clear. The *only* item from the legislative history that either party has cited directly addressing the issue here states unequivocally that:

- The FMA “does not provide any exemption from the anti-circumvention provisions of section 1201;” and
- “It would not be a defense to a claim of violation of section 1201 that the circumvention is for the purpose of engaging in the conduct covered by this new exemption in [the FMA].”

151 Cong. Rec. S450, S502 (daily ed. Jan. 25, 2005) (Sen. Hatch); *see* Hearing on H.R. 4586, Serial No. 94 (2004) at 89 (letter from Register of Copyrights stating it was unnecessary for FMA to state it did not apply to circumvention because “it should be clear that [the FMA and other exemptions in § 110] do not” apply).

VidAngel’s counterarguments are meritless.

First, VidAngel argues that it is authorized to remove the TPMs from Plaintiffs’ Discs. Br. 41. As shown in Section I.A.2.a, *supra*, that argument is baseless.

Second, VidAngel points to an exchange between Congresswoman Lofgren and ClearPlay’s then-CEO that purportedly made clear the Congresswoman “shared VidAngel’s understanding of 1201(a).” Br. 41-42. Remarks such as these

from a committee hearing “are entitled to little weight” in construing statutes. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 n.24 (1976). Moreover, Congresswoman Lofgren stated at the hearing that the issues “at play here are not about encryption and defeat of technology in the DMCA.” Derivative Rights, Moral Rights, and Movie Filtering Technology: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Comm. on the Judiciary, 108th Cong., Serial No. 93 (2004) at 21.

Third, VidAngel argues that, unless it can circumvent the encryption on Discs, “adding the transmission language to the FMA accomplished *literally nothing*.” Br. 40-41. As VidAngel’s own prior example of filtering authorized streams shows, a service does not have to circumvent to filter streamed content. Statement of the Case, Section B, *supra*. VidAngel simply decided to use the expedient of circumvention rather than seeking licenses. *Id.*

2. The FMA Does Not Excuse VidAngel’s Copyright Infringement

The FMA provides no defense to VidAngel’s violations of the reproduction and public performance rights.

First, the FMA does not give VidAngel the right to copy or to publicly perform Plaintiffs’ works. The FMA provides a limited defense to infringement. To the extent its conditions are met, the FMA provides only that a defendant does not infringe by “making imperceptible” limited portions of content at a private

user's direction or "creat[ing] or provi[ding] a computer program or other technology that enables such making imperceptible." § 110(11). The acts of publicly performing and copying works are fundamental rights of copyright ownership; they are not covered by the FMA. § 106.

Congress could have said—but did not say—that copying and publicly performing works are exempt when done by a service that filters. The FMA says simply that the act of "making imperceptible" is not an infringement when done "during a performance in or transmitted to [a home]" and in accordance with the FMA's other requirements. § 110(11). If Congress intended to exempt the performance itself from copyright obligations (or the making of copies in connection with the performance), it would have said so expressly. The legislative history again confirms the statute's plain language: "an infringing transmission of a performance to a household is 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." 150 Cong. Rec. S.11852-01, S11853 (daily ed. Nov. 24, 2004) (Sen. Hatch).

Second, VidAngel does not even satisfy the threshold requirements of the FMA. Specifically, VidAngel does not make or stream "from an authorized copy" of any of Plaintiffs' works. VidAngel rips Discs and makes new, unauthorized

master copies of the underlying movies, and then streams from those illegal master copies. ER 11-12.

VidAngel argues that it streams “from an authorized copy” because it “*begins* its filtering process with an authorized copy of the title, i.e., a disc.” Br. 21. That argument is meritless.

Even if VidAngel starts with an “authorized copy” when it buys a Disc, the FMA immunizes only the act of “making imperceptible,” not VidAngel’s unlawful copying and public performance. And, the FMA does not say that the filtering must *begin* with an authorized copy; it says that the “performance in,” or “transmitted to,” the home must be made “*from* an authorized copy.” § 110(11) (emphasis added). Where the performance is made in the home by a user applying filters to media containing a copyrighted work, that media must contain an authorized copy. Where the performance is transmitted to the home, the transmission itself must be lawful *and* must be made “from an authorized copy.” There is no other logical way to read the “authorized copy” requirement.

VidAngel insists that the streams it provides come “from an authorized copy” in the same way holiday cards delivered by a mailman come “from loved ones,” not “from the mailman.” Br. 21-22. The analogy is totally inapt. The mailman delivers the same cards the “loved ones” sent. VidAngel transmits from new copies it has made.

VidAngel also argues—again for the first time on appeal—that making and streaming from unauthorized copies is excused as “*other technology that enables*” filtering. Br. 22. That argument is contrary to the FMA’s text. It is not an infringement of copyright to “creat[e] or provid[e] a computer program or other technology that enables *such making imperceptible.*” § 110(11) (emphasis added). “Such making imperceptible” refers back to the making imperceptible that complies with the statute’s requirements, including that any transmission to a home must itself be lawful and also made “from an authorized copy.” *Id.* VidAngel’s interpretation of the “other technology” clause would make superfluous all of the other statutory conditions for the FMA and would effectively eviscerate the rights of copyright so long as some content is filtered. That reading is untenable. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”) (citation omitted).

3. VidAngel’s Interpretation Of The FMA Would Lead To Absurd Results

Even if the text were ambiguous—which it is not—VidAngel’s reading of the FMA must be rejected for leading to absurd results. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (“interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available”).

VidAngel emphasizes that “[f]iltering” may be used to remove “mature content.” Br. 1. But that is not the only type of filtering eligible for the FMA defense. To avoid creating distinctions based on the type of content filtered—and thus First Amendment issues—Congress made the FMA neutral as to the content that may be filtered. H.R. Rep. No. 109-33(1) at 6 (2005).

If VidAngel were right that the FMA completely exempts its unauthorized conduct, then any streaming service could claim an exemption from all infringement and circumvention liability merely by buying and ripping Discs and allowing its customers to choose to filter out a snippet of content, like the opening or closing credits (as VidAngel did before this lawsuit). For example, Netflix would not have needed to negotiate licenses for public performance rights to launch its streaming business; it could simply have piggybacked off its Disc rental business. Of course, Netflix recognized (as even VidAngel did in internal documents, *see* SER 1465) that streaming rights must be negotiated. In enacting a limited exemption, Congress could not have intended to create such a massive loophole from the rest of Title 17.

B. VidAngel Fails To Show Its Fair Use Defense Will Excuse Its Violations

1. Fair Use Does Not Excuse A Circumvention Violation

VidAngel argues that the fair use doctrine excuses its violation of Plaintiffs’ anti-circumvention rights. Br. 43. But courts have repeatedly refused to create a

non-statutory fair use defense to the requirements of Section 1201(a). *See, e.g., Corley*, 273 F.3d at 433-44, 458-59; *United States v. Crippen*, No. CR 09-703 PSG, 2010 WL 7198205, at *2 (C.D. Cal. Nov. 23, 2010); *321 Studios*, 307 F. Supp. 2d at 1101-03; *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1134-35 (N.D. Cal. 2002).

First, by its terms, the fair use defense, like the FMA, applies “[n]otwithstanding the provisions of sections 106 and 106A.” § 107. It applies to copyright infringement, and not circumvention. VidAngel has not cited any case that has ever upheld a fair use defense to a circumvention claim.

Second, the DMCA itself allows for circumvention in certain circumstances, but does not authorize circumvention for the purpose of fair use. Congress placed a number of limitations on the circumvention prohibition, but it did not include a broad fair use defense. Most significantly, Congress provided for the Triennial Rulemaking Proceedings, which require the Librarian to determine “whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make non-infringing uses under [Title 17] of a particular class of copyrighted works.” § 1201(a)(1)(C). The Librarian can then exempt persons from liability for circumventing access controls in order to make such non-infringing uses of works in those classes. *Id.* § 1201(a)(1)(D). The

DMCA also has specific exemptions for particular uses that, in the context of an infringement claim, might be eligible for the fair use defense, including, inter alia, exemptions for certain uses by “nonprofit library, archives, or educational institution[s].” § 1201(d), (f), (g). None of these exemptions—or indeed the Triennial Rulemaking Proceedings—would be necessary if § 1201(a) already included a broader fair use defense. *See Corley*, 273 F.3d at 443 n.13 (“It would be strange for Congress to open small, carefully limited windows for circumvention to permit fair use in subsection 1201(d) if it then meant to exempt . . . any circumvention necessary for fair use.”); *see Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013) (“[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”) (quotation omitted).¹²

Third, VidAngel is wrong that § 1201(c)(1) supports a fair use defense to a DMCA violation. Br. 45. As *Corley* explained, that subsection “simply clarifies

¹² The Electronic Frontier Foundation argues that the prohibitions in § 1201 and the Triennial Rulemaking Proceedings are content-based speech restrictions that cannot survive First Amendment scrutiny unless a fair use defense is added to § 1201. VidAngel did not make this argument in its opening brief or in the district court and therefore may not rely on it. *Artichoke Joe’s California Grand Casino v. Norton*, 353 F.3d 712, 719 n.10 (9th Cir. 2003) (“In the absence of exceptional circumstances, which are not present here, we do not address issues raised only in an amicus brief.”). In any event, the argument is meritless for the reasons set forth in *Corley*, 273 F.3d at 458-59.

that the DMCA targets the *circumvention* of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the *use* of those materials after circumvention has occurred.” 273 F.3d at 443; *cf.* *MDY*, 629 F.3d at 950 (any “perceived tension” between § 1201(c)(1) and § 1201(a)’s ban on circumvention “is relieved by our recognition that § 1201(a) creates a new anti-circumvention right distinct from the traditional exclusive rights of a copyright owner. It follows that § 1201(a) does not limit the traditional framework of exclusive rights created by § 106, or defenses to those rights such as fair use”).

Fourth, VidAngel is wrong that “[a]bsent a fair use defense, content creators could prevent anyone anywhere from using their content for any reason.” Br. 44. To take VidAngel’s own examples, although an individual could not rip a Disc to create a parody or circulate the theoretical “election rigging” movie, *id.* at 45, she could still “comment[] on the [] [Disc’s] content, quot[e] excerpts . . . , and even record[] portions of the video images and sounds on film or tape by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie.” *Corley*, 273 F.3d at 459. Those options may not be as desirable to VidAngel as ripping a Disc, but there is “no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original.” *Id.*

2. VidAngel's Copying And Streaming Of Plaintiffs' Works Is Not Fair Use

The district court correctly identified the four fair use factors and applied them to the facts of this case. The court therefore did not abuse its discretion—to the contrary, it was correct—in finding that VidAngel was unlikely to prevail on its fair use defense to the copyright infringement claims. ER 13-16; *see Amazon.com*, 508 F.3d at 1158 (defendant has the burden of proving its affirmative defenses at the preliminary injunction stage).

“The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” This factor asks whether VidAngel's use is commercial and transformative. *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 529-30 (9th Cir. 2008). VidAngel does not dispute that its use is commercial, and that this weighs against fair use. *Id.*; Br. 28. VidAngel argues only that “omissions can transform a work.” Br. 29. VidAngel, however, copies Plaintiffs' works in their entirety, omitting nothing. That copying is not transformative. *See Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1117 (9th Cir. 2000).

Nor are VidAngel's public performances transformative. A transformative use “adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). VidAngel's use does not *add* anything; it merely

omits limited portions of content. Those omissions are not transformative because VidAngel merely “rebroadcast[s] for entertainment purposes [works] that Plaintiffs rightfully own.” *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003), *overruled on other grounds as recognized in Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013). The district court found as a fact that VidAngel is simply transmitting works for their intrinsic entertainment purpose. ER 14. *See Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1174 (9th Cir. 2012) (“minor cropping” does not transform copyrighted photographs); *Worldwide Church of God*, 227 F.3d at 1117 (“where the use is for the same intrinsic purpose as the copyright holder’s, such use seriously weakens a claimed fair use”) (alterations and quotation omitted); *Clean Flicks of Colorado, LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1241 (D. Colo. 2006) (where “[i]t is undisputed that the edits are a small percentage of most of the films copied and the use is clearly for commercial gain[,] [t]here is nothing transformative about the edited copies”).¹³

¹³ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2002), on which VidAngel extensively relies, is inapposite. *See* Br. 28 n.34, 29 n.35. The defendant was a search engine that displayed copyrighted images in “thumbnail” size when returning search results. The court held this use was transformative because the thumbnails “were much smaller, lower-resolution images that served an entirely different function than [the plaintiff’s] original images.” *Kelly*, 336 F.3d at 818. Here, VidAngel’s performances serve the same intrinsic function as Plaintiffs’ movies. When VidAngel streams *Frozen* with some snippets rendered imperceptible, VidAngel is still streaming *Frozen*.

“The nature of the copyrighted work.” VidAngel does not dispute that, because Plaintiffs’ works are highly creative, this factor favors Plaintiffs. *See Elvis Presley Enters.*, 349 F.3d at 629 (motion pictures “fit squarely within the core of copyright protection”).

“The amount and substantiality of the portion used in relation to the copyrighted work as a whole.” VidAngel similarly does not dispute that the third factor also favors Plaintiffs: VidAngel copies Plaintiffs’ works in their entirety and publicly performs the “heart” of Plaintiffs’ works. *See Campbell*, 510 U.S. at 587; *Elvis Presley Enters.*, 349 F.3d at 630.

“The effect of the use upon the potential market for or value of the copyrighted work.” This factor asks “whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.” *Campbell*, 510 U.S. at 590 (citations omitted). In the case of a commercial, non-transformative use (such as VidAngel’s), the likelihood of market harm “may be presumed.” *Leadsinger*, 512 F.3d at 531 (citation omitted); *see also Monge*, 688 F.3d at 1181-83 (“a presumption of market harm ‘makes common sense[] when a commercial use amounts to mere duplication of the entirety of an original’”) (quoting *Campbell*, 510 U.S. at 591).

VidAngel argues that there is no market harm because VidAngel buys Discs, and many of its users supposedly would not watch Plaintiffs' movies absent filtering. Br. 30. The district court made a factual finding that VidAngel's service acts as a substitute for licensed streaming services and therefore harms the market for those works. ER 15. That finding was correct, and certainly was not clearly erroneous: VidAngel's own evidence demonstrated that almost half of its users would have viewed the *same* title they watched on VidAngel without filters, ER 15; SER 1059 (survey question), and there was ample evidence that VidAngel markets itself as a cheaper alternative to licensed on-demand streaming services. SER 1087-1116, 1299-1313.

Nor does the fact that VidAngel purchases Discs—a point it stresses repeatedly—support its fair use defense. “Any allegedly positive impact of defendant's activities on plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs copyrighted works.” *Napster*, 239 F.3d at 1017 (quotation omitted).¹⁴

¹⁴ VidAngel does not purchase a Disc for every customer who streams a particular movie. VidAngel only claims to have a Disc in the vault corresponding to each customer who streams a movie at any particular time. Br. 11-12.

Because none of the fair use factors favor VidAngel, the district court did not abuse its discretion in finding that VidAngel was unlikely to prevail on this defense.

3. VidAngel's Other Claims Of Fair Use Are Meritless

Independent of applying the fair use factors, VidAngel also makes overbroad analogies to other cases and circumstances, insisting that its use of Plaintiffs' works is similarly fair. *See* Br. 27. VidAngel's analogies do not hold.

First, VidAngel argues that its unauthorized copying is fair use because VidAngel is simply “[m]aking intermediate copies.” *Id.* There is nothing “intermediate” about the copies VidAngel makes. They are permanent master copies from which VidAngel streams over and over again. And, contrary to VidAngel's broad claim, the circumstances in which courts have found that “intermediate copying” may be a fair use have been very limited and have no application to VidAngel's copying. *Sega Enterprises Ltd. v. Accolade Inc.*, 977 F.2d 1510 (9th Cir. 1992), held merely that “[w]here there is good reason for studying or examining the unprotected aspects of a copyrighted computer program,” in those cases, “disassembly for purposes of such study or examination constitutes a fair use.” *Id.* at 1520; *see also Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 599 (9th Cir. 2000) (same).

VidAngel also claims it is merely “space-shifting” works that users own. Citing *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999)—which stated in dicta that copying digital files from a computer to a portable device was “paradigmatic noncommercial personal use”—VidAngel insists it is making a fair use of Plaintiffs’ works. Br. 27. But *Diamond* did *not* hold that “space-shifting” is fair use under § 107. That case involved only a claim under the Audio Home Recording Act (“AHRA”); it did not involve an infringement claim or a § 107 fair use defense. The Court’s statement about “space-shifting” was both dicta and inapposite.¹⁵ VidAngel cites no case that holds space-shifting establishes a fair use defense under § 107, and the cases construing § 107 do not adopt such a sweeping interpretation. *See Napster*, 239 F.3d at 1019 (rejecting Napster’s argument that its “space-shifting” was fair use because “shifting” is fair use only if it “[does] not also simultaneously involve distribution of the copyrighted material to the general

¹⁵ The question in *Diamond* was whether the Rio portable music player qualified as a “digital audio recording device” under the AHRA. If the Rio was such a device, the manufacturer would have had to make royalty payments for the benefit of sound recording copyright owners. The Court held the Rio was not covered under the AHRA. It noted that the AHRA’s purpose was to protect consumers’ ability to make certain “*private, noncommercial use[s]*” of copyrighted music. 180 F.3d at 1079 (quoting S. Rep. 102-294 at 86 (1992)). The “space-shifting” language that VidAngel cites merely observed that the Rio facilitated the type of use the AHRA was intended to protect. *Id.*

public”); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (rejecting space-shifting of MP3 files as “simply another way of saying that the unauthorized copies are being retransmitted in another medium—an insufficient basis for any legitimate claim of transformation”).¹⁶

In all events, “personal” and “noncommercial” do not describe VidAngel’s conduct. VidAngel rips Discs, systematically copies the underlying movies to computer servers, and then streams performances to thousands of paying customers. That is commercial and non-personal.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT VIDANGEL CAUSES PLAINTIFFS IRREPARABLE HARM

The district court was well within its discretion in concluding, based on uncontroverted evidence, that VidAngel’s unauthorized streaming service was likely to “undermine Plaintiffs[’] negotiating position” and “damage[] [Plaintiffs’] goodwill with licensees,” and that this harm “will likely only increase absent an injunction.” ER 18-19, 32.

¹⁶ In declining to adopt an exemption to the DMCA for “space-shifting,” the Copyright Register explained “the law of fair use, as it stands today, does not sanction broad-based space-shifting or format-shifting.” 80 Fed. Reg. 65944-01 at 65960 (Oct. 28, 2015).

A. The District Court Found A Likelihood Of Irreparable Harm, It Did Not Presume Harm

Interference with negotiations with licensees, damage to goodwill, and harm to the on-demand streaming market are exactly the sorts of irreparable harms that courts have enjoined. *See WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 286 (2d Cir. 2012) (unrestrained unauthorized retransmissions of broadcast programming “would encourage” other services to follow suit, diminish plaintiffs’ negotiating position, adversely affect “quantity and quality of efforts put into creating” new works, and “drastically change the industry, to plaintiffs’ detriment”); *Zediva*, 824 F. Supp. 2d at 1012 (because infringing service interfered with “negotiated exclusivity periods[,] . . . [it] interfere[d] with Plaintiffs’ grants of exclusivity to their licensees, Plaintiffs’ ability to negotiate similar agreements in the future (because potential licensees will not be willing to pay a premium for a non-exclusive period), [and] Plaintiffs’ relationships, including the goodwill developed with their licensees”); *Fox Television Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30, 50 (D.D.C. 2013) (“harm to [plaintiffs’] ability to negotiate with advertisers; damage to their contractual relationships and ability to negotiate with authorized retransmitters; interference with their proprietary and licensed online distribution avenues, such as their own websites, Hulu.com, and Apple’s iTunes; and the loss of control over the distribution and quality of their copyrighted programs” all are harm with “far-reaching consequences”). In line with these streaming service cases, the district

court here correctly found that VidAngel's unlicensed streaming service adversely affected Plaintiffs' negotiations and goodwill with its licensees. ER 18-19.

VidAngel nevertheless argues that Plaintiffs did not "prove that VidAngel's continued operation would cause irreparable harm." Br. 48, 50-51. The standard, however, is whether Plaintiffs demonstrated a *likelihood* of irreparable harm.

"[W]hile 'likely' is a higher threshold than 'possible,' the [plaintiff] need not prove that irreparable harm is certain or even nearly certain." *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1191 (9th Cir. 2011). Plaintiffs more than met their burden.

Specifically, the declaration from Tedd Cittadine, Senior Vice President of Digital Distribution at 20th Century Fox Home Entertainment, explains in detail why VidAngel harms Plaintiffs: "Plaintiffs' exclusive rights under copyright are critical to providing Plaintiffs the opportunity to earn a return on their substantial investments." ER 17-18, 556-57 ¶¶ 7-8. Plaintiffs license their exclusive rights to authorized distributors and often "negotiate higher licensing fees in exchange for granting a licensee the exclusive right to perform a movie or television show during a particular time period." ER 17, 559 ¶ 15. The record also reflects the undisputed fact that "VidAngel operates without any license and performs Plaintiffs' works during negotiated exclusivity periods." ER 17 & n.6, 560, 566

¶¶ 17, 36. The district court did not rely on a “forbidden presumption” of harm, as VidAngel argues. Br. 48. The court relied on the uncontroverted record evidence.

VidAngel also argues that the court presumed harm because no licensee named VidAngel specifically. Br. 50-51. Mr. Cittadine stated that, while no licensee had identified VidAngel by name, “licensees have complained in partnership meetings, and especially in negotiations, that it is difficult to compete with” unlicensed services. ER 17, 560-61 ¶ 19. Plaintiffs also submitted evidence of VidAngel’s direct interference with Plaintiffs’ exclusivity periods: VidAngel (1) offered *Star Wars: The Force Awakens* before that title was available on any authorized streaming service; and (2) offered (at the time Mr. Cittadine submitted his declaration) “(at least) two of Plaintiffs’ works—*The Martian* and *Brooklyn*—during periods these works [were] exclusive to an authorized licensee, HBO.” ER 17 & n.6, 560, 564-65 ¶¶ 16, 32. Further, VidAngel’s own marketing trumpets that it provides on-demand streaming at prices that undercut licensed services and during windows when licensed services cannot yet offer the same titles. SER 1119-44 (promoting \$1-a-day movies), 1091-93, 1101-16 (promoting titles “Not on Netflix”).

The district court was correct that money damages cannot fully compensate Plaintiffs for their harm.¹⁷ Br. 52. Damages cannot adequately compensate Plaintiffs for the “harm to [their] negotiating position and/or goodwill with licensees.” ER 18 (citing, inter alia, *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (“intangible injuries . . . qualify as irreparable harm”)). In *ActiveVideo Networks, Inc. v. Verizon Commc’ns, Inc.*, 694 F.3d 1312, 1340 (Fed. Cir. 2012), which VidAngel cites, Br. 52, the infringement did not interfere with negotiations or goodwill. In any event, Plaintiffs’ licensing relationships involve more than just payment; they include important non-monetary terms such as compliance with security and quality protocols. ER 558 (discussing general terms of Fox’s licenses).

The record included ample evidence that absent an injunction, irreparable harm was likely. The district court did not abuse its discretion in finding that Plaintiffs met their burden.

¹⁷ Based on the magnitude of VidAngel’s liability, which would only grow absent a preliminary injunction, VidAngel is unlikely to have the resources to satisfy a damages award. *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1147 (C.D. Cal. 2012) (finding irreparable harm when “start-up” “would [not] be likely to be able to satisfy the damages award”); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1217 (C.D. Cal. 2007) (same).

B. The District Court Correctly Found That Plaintiffs Face Ongoing And Worsening Harm

VidAngel’s argument that Plaintiffs cannot obtain preliminary relief now because they should have sued VidAngel sooner ignores controlling Ninth Circuit authority. Br. 52-53. “[C]ourts are ‘loath to withhold relief solely on [] ground[s]’” of delay, and alleged “tardiness is not particularly probative in the context of ongoing, worsening injuries.” *Arc of Cal. v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014) (citations omitted). VidAngel admitted that, unless enjoined, it would “continue to stream Plaintiff’s works and add other future releases.” ER 19. VidAngel even continued to add new works after the preliminary injunction issued, leading the district court to hold it in contempt. ER 23; SER 930-42. Plaintiffs’ injuries are therefore both “ongoing” and “worsening”—and would only continue to worsen absent an injunction. ER 19.

Further, the district court found as a fact that Plaintiffs acted reasonably under the circumstances in suing when they did rather than when VidAngel first announced itself to Plaintiffs. *Id.* VidAngel engaged in a deliberate strategy to approach Plaintiffs when it was in “‘limited beta’ [and] ha[d] fewer than 5,000 users.” ER 549, 565-66 ¶ 35. Plaintiffs “monitored VidAngel and investigated their claims,” filing suit “once VidAngel started marketing itself more aggressively, expanded its content offering, and posed a more significant threat of

harm.”¹⁸ ER 19. The district court’s finding that Plaintiffs sued at a reasonable time is correct and not clearly erroneous.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY CONCLUDING THE BALANCE OF HARDSHIPS WEIGHS IN FAVOR OF PLAINTIFFS

The district court considered VidAngel’s claims of harm to its business not once, but *twice*, and both times the court correctly determined that the balance of hardships tips sharply for Plaintiffs. ER 20 (granting preliminary injunction); 31-32 (denying stay motion). “The assignment of weight to particular harms is a matter for district courts to decide.” *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010). The district court did not abuse its discretion in finding that the ongoing and increasing threat of harm to Plaintiffs outweighed any supposed harm to VidAngel from having to stop its infringement and circumvention.

VidAngel argues the court erred in reasoning that VidAngel “cannot complain of the harm that will befall it when properly forced to desist from its infringing activities” because the district court relied on cases that predate *Winter*. Br. 55; *see* ER 20. *Winter* held that a court must give more than “ cursory”

¹⁸ VidAngel suggests it detrimentally relied on the fact that Plaintiffs did not sue it in late 2015. Br. 13. But VidAngel’s CEO admitted the company would not have changed its behavior had Plaintiffs objected or sued VidAngel earlier. SER 1253. VidAngel was not lulled into complacency but was actively preparing for litigation. SER 1388 (VidAngel stating it hired “NO CONFLICT” counsel in fall 2015 so it could present the “most relevant defense available in the industry”).

consideration to the balance of equities and public interest factors. 555 U.S. at 26. It did not undermine this Court’s common sense recognition that the harm an infringer faces from having to stop illegal activity merits little weight. That reasoning is still persuasive and has been applied post-*Winter*. See, e.g., *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1147 (C.D. Cal. 2012) (“Defendants ‘cannot complain of the harm that will befall [them] when properly forced to desist from [their] infringing activities[,]’” and “[w]here the only hardship that the defendant will suffer is lost profits from an activity which has been shown likely to be infringing, such an argument in defense ‘merits little equitable consideration’”) (quoting *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995)).

The district court properly discounted VidAngel’s claim of “irreparable harm,” which was entirely of VidAngel’s “own making [in] attempting, as it did, to ‘game the system.’” *Fresenius Med. Care Holdings, Inc. v. Baxter Int’l, Inc.*, No. C 03-1431 SBA, 2007 WL 1655625, at *6 (N.D. Cal. June 7, 2007).

Moreover, VidAngel’s cries of harm are disingenuous. VidAngel says it “had no choice but to completely close its streaming business to comply with the preliminary injunction” because compliance with respect to Plaintiffs’ works while “still streaming other content . . . was not technologically feasible.” Br. 53-54. But VidAngel told the district court in sworn declarations that it could modify its

applications to allow it to stream non-Plaintiffs' movies by January 5, for Apple, and January 25, for Roku. ER 86. It has not done so, not for technological reasons, but because VidAngel fears it will be sued for willful infringement by other content owners. ER 63-64. That is a business decision, not a hardship from the preliminary injunction.

Likewise, VidAngel says it had to "close its streaming business," Br. 53, but VidAngel is by no means shuttered. According to its own press release, "one day after [the Court's] decision, VidAngel hosted a launch party in Provo, Utah where CEO Neal Harmon outlined an exciting path forward for the company in front of hundreds of fans, investors, employees, and the media," announcing "the launch of VidAngel Studios" to produce original content for streaming on VidAngel. SER 948-49. In a video linked in the press release, Mr. Harmon explains that VidAngel has \$10 million to fund this litigation, will start producing original content in "early 2017," and has already licensed three films that it would stream in December. SER 946 ¶ 10, 951 (video *available at* <https://www.youtube.com/watch?v=9bFBchSChaY>) (last visited Feb. 8, 2017).

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY CONCLUDING THAT A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

The district court properly analyzed the evidence before it and rejected VidAngel's argument that an injunction would "severely undercut" individuals'

right to watch filtered content in private. ER 20; *see also* ER 32. As the court found, “the presence of market alternatives” belies VidAngel’s “claim that an injunction would effectively ‘end the public’s ability to watch filtered movies.’” ER 32.

VidAngel argues that the district court was wrong to cite ClearPlay, which offers filters for Discs played on ClearPlay-Disc players and for licensed streams from GooglePlay. ER 20; SER 1052-57. VidAngel argues that ClearPlay “is no substitute” for VidAngel’s supposedly superior service and that an injunction will affect users who would prefer to use VidAngel instead.¹⁹ Br. 58. VidAngel did not support these claims of consumer preference with evidence of that preference, and in any event, they do not change the balance. Weighed against the strong public interest in “upholding copyright protections and correspondingly, preventing the misappropriation of skills, creative energies, and resources which are invested in the protected work,” the district court correctly concluded that “a preliminary injunction is in the public interest.” ER 21 (citing *Zediva*, 824 F.

¹⁹ On February 7, VidAngel notified Plaintiffs’ counsel that it believes ClearPlay has encountered a technical issue with GooglePlay whereby its filters do not work on streams of movies released after September 2016. VidAngel does not dispute that ClearPlay’s filters work on GooglePlay streams of movies released before September 2016 (the bulk of its online library) or on Discs using the ClearPlay-Disc player. Hence, even if evidence to support VidAngel’s new facts were in the record, it would not change the outcome.

Supp. 2d at 1015 (citing *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1255 (3rd Cir. 1983)).

CONCLUSION

Plaintiffs respectfully submit the district court's order should be affirmed.

DATED: February 8, 2017

MUNGER, TOLLES & OLSON LLP

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Attorney for Appellees

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 16-56843

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Signature of Attorney or
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STATEMENT OF RELATED CASES

There are no known related cases pending in this Court.

CERTIFICATION OF SERVICE

I hereby certify that I electronically filed the foregoing **Plaintiffs-Appellees'** **Answering Brief** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 8, 2017.

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DATED: February 8, 2017

s/ Donald B. Verrilli, Jr.
DONALD B. VERRILLI, JR.