

No. 16-56843

United States Court Of Appeals
FOR THE NINTH CIRCUIT

DISNEY ENTERPRISES, INC., ET. AL.,
PLAINTIFFS/APPELLEES,
v.
VIDANGEL, INC.,
DEFENDANT/APPELLANT.

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

**BRIEF OF *AMICUS CURIAE* CLEARPLAY, INC.
SUPPORTING PLAINTIFFS/APPELLEES**

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February 15, 2017

**DISCLOSURE OF CORPORATE AFFILIATIONS AND
OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN
LITIGATION**

Amicus Curiae ClearPlay, Inc. (“ClearPlay”) does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST

ClearPlay, Inc. is a video filtering pioneer. Since 2000, it has been providing video filtering to allow parents to moderate their children's video experience.

ClearPlay accomplishes this by muting or skipping specific language or scenes parents deem inappropriate for their home. Accordingly, ClearPlay has specialized knowledge of video filtering technologies, the video filtering industry, and the federal act that governs video filtering, which was enacted in part at its initiative.

In 2004, because of questions raised about its technology, ClearPlay asked Congress to clarify through appropriate legislation that muting and skipping over copyrighted content, without making an unauthorized copy did not violate the Copyright Act (the "Act").¹ The FMA, enacted as part of the Family Entertainment and Copyright Act of 2005, Public Law 109-9, resulted. Among other things, it permits filtering technology in accordance with its terms.

ClearPlay believes its technology, industry and legislative insights may be helpful to the Court, particularly because VidAngel, Inc. has made statements in its brief that ClearPlay believes misrepresent the industry and ClearPlay specifically.

¹ 17 U.S.C. §101 et seq.

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief.²

² No party's counsel authored this brief in whole or in part. Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

A. Neither Circumventing Access Controls Nor Making or Streaming from Unlawful Copies Is Necessary To Filter Videos.

Since 2000, ClearPlay has produced and marketed family-friendly filtering controls, which neither circumvent access controls nor make copies of copyrighted material nor make an unlawful public performance. Thus, these three steps, at issue in this case, may not be credibly claimed as essential for video filtering.

VidAngel's brief in this court claims that VidAngel's particular distribution methodology for streaming video should be excused from violating the Copyright Act because that methodology is essential for video filtering.³ That claim is inaccurate. ClearPlay's technology fully handles video filtering. ClearPlay's service works with multiple media—both physical media (DVD and Blu-ray discs) and legitimate streaming services.

Essentially ClearPlay provides its customers with a technologically assisted fast-forwarding device, which uses video time codes and knowledge of the location of material in the video to forward over the specific scenes or mute specific audio. Because time codes are necessarily integrated between the encrypted content and the device licensed to decrypt and play or stream the video, ClearPlay can

³ “VidAngel thus had no choice but to resort to its disc-based model, which limits it to streaming filtered content based upon the availability of a disc to purchase and resell.” Opening Brief for Defendant--Appellant at 25-26

effectively filter the video without circumventing or making unlawful copies or public performances.

In contrast, to provide its unlicensed streaming service, VidAngel circumvents the encryption in commercial video discs. It makes a full unauthorized copy of the copyrighted material on the disc and stores the copy on its server for more than a transitory period of time.⁴ VidAngel admits it never streams from the original disc; but streams from the same unauthorized decrypted server copy to each customer paying a dollar to watch the DVD.⁵ When VidAngel customers view video content, that content comes from the unauthorized decrypted copy, not the disc that the VidAngel customer had “purchased.”

ClearPlay and VidAngel, in short, both provide video filtering for customers, but VidAngel provides customers with streams from unlawfully obtained video copies made on VidAngel’s servers. ClearPlay filters without circumventing encryption or making unauthorized copies or public performances; VidAngel takes these three steps. Whatever the legality of VidAngel’s process, it cannot be based on VidAngel’s unauthorized conduct being essential for video filtering.

⁴ As the District Court found: “Assuming *arguendo* that VidAngel’s buy/sellback service creates a valid ownership interest in a DVD, this ownership would only apply to the physical DVD, not the digital content that VidAngel streams to paying subscribers. Subscribers view a stream from a master copy stored on a server, not a DVD temporarily ‘owned’ by the user.” *Disney Enterprises, Inc. et al. v. VidAngel, Inc.*, ER 11 (*Disney*).

⁵ SER 1040-41.

B. The Family Movie Act of 2005 by its Language and by its Legislative History Does Not Exempt Violations of Other Copyright Act Provisions

VidAngel’s interpretation of the Family Movie Act of 2005 (“FMA”), contravenes both its clear meaning and its legislative history.

The FMA, which ClearPlay sought, focused on ClearPlay’s technology, and ultimately validated that technology. It did so without overriding the anti-circumvention provisions of section 1201 or the copyright owner’s exclusive rights in section 106 to reproduce or publicly perform its work in copies.

As background, in 2002, some motion picture directors and studios (“motion picture parties”) sued multiple filtering companies, including ClearPlay, alleging that their processes infringed motion picture copyrights.⁶ This case brought to the forefront the technical difference between “editing” and “filtering.” There were accused companies that made and distributed unauthorized edited copies of the original movies, and as to them the suit focused on those unauthorized copies. ClearPlay, however, deployed a filtering technology and made no copies of the movies. As to ClearPlay, the plaintiffs claimed they had copyright rights in the time codes that ClearPlay used, or, alternatively, that the filtered movie that the viewer saw through ClearPlay’s filter was an infringing derivative work. ClearPlay noted, however, that automatic mechanically generated time codes cannot meet the

⁶ *Huntsman v. Soderbergh, et al.*, 2005 WL 1993421 at 1. (*Huntsman*)

minimal creativity required for copyright, and that the filtered movie seen by the viewer was not fixed in a tangible medium for “more than a transitory duration” as required for infringement. Although ClearPlay was confident in its legal position, ClearPlay brought its concerns to Congress and obtained clarification of the non-infringing nature of ClearPlay filtering.⁷

The legislative amendment ClearPlay sought, and that which it ultimately obtained, was framed as a limitation on the exclusive rights of the copyright owner. The FMA was ultimately codified in section 110 of the Copyright Act, which already had contained 10 previous such limitations. The FMA limitation, as ultimately enacted, essentially held that a performance of a movie, within a household, at the direction of a member of the household, could omit (“mak[e] imperceptible”) certain portions of the video. 17 U.S.C. § 110(11). This validated ClearPlay’s filtering process, which lets parents decide what parts of a video will be omitted when it is played in their house, and does so without making unauthorized copies or public performances.

ClearPlay’s technology model was front and center during the hearings leading up to FMA enactment. ClearPlay’s Chief Executive Officer, Bill Aho, testified before, and was questioned extensively by, the House Judiciary

⁷ The FMA “... clarifies the legal status of certain services and technologies that enable individuals to skip and mute content on certain works in the privacy of their own home;” H.R.Rep. No. 109-33(I) at 2 (2005), reprinted in 2005 U.S.C.C.A.N. at 220-221.

Subcommittee on Courts, the Internet, and Intellectual Property. He made clear the limitation he was requesting. In his initial oral statement Mr. Aho told the Subcommittee:

I would like to emphasize the important difference between ClearPlay and most of the other companies involved in this sector.

Most of these companies make copies of DVDs that they resell as edited versions. Now, in contrast, ClearPlay neither copies nor edits DVDs. ClearPlay's technology is more like an automated fast-forward or mute button on your remote control or the technological equivalent of covering your eyes during disturbing scenes, except that we do it in a seamless, consumer-friendly manner.⁸

ClearPlay thus presented a simple case for clarification of the Copyright Act, because its filtering process could be ratified and approved without any effect on the crucial copyright provisions against unauthorized reproduction or public performance (section 106(1), (4)) or circumvention of access controls (section 1201). That, indeed, is the step Congress took. It permitted filtering without making any changes to the copyright owner's exclusive right to control reproduction or public performance, or to the access-control protection afforded by the Digital Millennium Copyright Act ("DMCA").

The FMA's actual language plainly reflects an attempt to approve filtering technology like ClearPlay's:

⁸ *Derivative Rights, Moral Rights, and Movie Filtering Technology: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. 122 (2004) (oral testimony of ClearPlay CEO Bill Aho) at 23.

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.⁹

Because the FMA clearly approved ClearPlay's process, shortly after passage of the FMA, the motion picture parties in the *Huntsman* litigation asked the court to dismiss their claims against ClearPlay, which the court did based on the FMA. *Huntsman*, 2005 WL 1993421 at 1 ("The technology provided by Family Shield and ClearPlay is consistent with the statutory definition.").

VidAngel incorrectly claims the FMA grants it the right to make unauthorized copies and public performances, and to circumvent an effective access control technology. The FMA did none of these things. First, the FMA clearly limited the approved filtered performance to one viewed "from an authorized copy of the motion picture." Even assuming *arguendo* the VidAngel

⁹ 17 U.S.C. §110 (emphasis supplied).

server copies (made by VidAngel and not the “owner” of the disc) were non-infringing, the copyright holders never “authorized” those copies, so transmission from the same copy to multiple customers is clearly not covered by the FMA.¹⁰ Second, the final proviso of the FMA clearly states that no further rights under the Copyright Act are granted by Section 110(11), the section added by the FMA.

Senate legislative history is no more helpful to VidAngel. The bill’s sponsor specifically stated that the FMA did not preempt the anti-circumvention provisions of the Copyright Act. As the District Court noted in the decision: “Senator Orrin Hatch, who introduced the FMA, ... stated that the FMA ‘does not provide any exemption from the anticircumvention provisions of section 1201 of title 17.’”¹¹ Accordingly, the District Court’s conclusion is irrefutable: “Neither the plain language nor the legislative history of the FMA support VidAngel’s position.”¹²

In its Brief, VidAngel asserts that an exchange between Mr. Aho, the ClearPlay CEO, and one Subcommittee member, stemming from a theoretical

¹⁰ Notably, in the then pending motion picture parties litigation, the court ultimately granted summary judgment against the editing companies that made unauthorized copies. *Clean Flicks of Colorado, LLC v. Soderbergh*, 433 F.Supp.2d 1236 (D.Colo. 2006) at 1238 (*Soderbergh*). Once a copyright holder has authorized transmission (e.g., from a licensed online service), then the FMA clarifies the right to filter that transmission.

¹¹ *Disney* at 8. The District Court order also quotes Senator Hatch saying: “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 section 110(11).”

¹² *Id.*

technical question from that member, indicated approval of circumvention. The exchange indicated nothing of the sort:

Ms. Lofgren. So you don't have to defeat the encryption that is protecting these DVDs, for example, although I guess theoretically the movie industry could go to the next phase of encryption, which would then require you to defeat that scheme.

Mr. Aho. We have not ever nor ever contemplated any decryption measures. That's not part of our business practice.

...

Ms. Lofgren. ... But I really think there's a broader issue here, which is artists are free to create and express, but consumers who lawfully purchase or rent are not required to look at all of it.¹³

This exchange, involving a theoretical construct about whether decryption sometime might have to be examined, has no significance for the current situation, because circumvention (decryption) is *not* necessary for filtering. Indeed, while changes can and have been made to the content protection systems, even the “next stage of encryption,” for Ultra-High Definition Blu-ray format, does not require circumvention to use time codes for filtering,¹⁴ nor are we aware of any technical protection measure that prevents access to the time codes. And given the mechanical function of time codes, it is highly unlikely they could be encrypted and the movie would still play. Finally, even if it were relevant to the current

¹³ *Id.* at 73.

¹⁴ See *AACS2 for Ultra HD Blu-ray™ is now available for Licensing*, <http://www.aacsla.com/license/> last accessed February 9, 2017.

situation, which it is not, a theoretical question by one member does not make legislative history, particularly when nothing in the FMA supports any exemption from the circumvention provisions of the DMCA.

In short, the FMA, in ratifying ClearPlay's filtering technology, did not approve the quite different content distribution methods of VidAngel and other companies, which involved either the making of unauthorized copies, or the circumvention of access controls, or (as with VidAngel) both.

C. Allowing VidAngel to Circumvent and to Make Unlawfully Copies and Public Performances Videos Disadvantages Lawfully Operating Competitors Like ClearPlay

ClearPlay has distributed filtering products beginning in 2000, always playing by the rules. Its services give parents video filtering, without any circumvention of access control technology, and without making any unauthorized copies or public performances of copyrighted content. Essentially, ClearPlay's filtering tools act like automatic remote controls—muting language and skipping over scenes. ClearPlay's filtering tools work with authorized copies (DVD and Blu-ray Discs or streaming video). Many thousands of users have used ClearPlay's filtering tools.

The idea of filtering movies came to ClearPlay's founder, Matt Jarman, prior to the year 2000. While working as a movie editor, he conceived of ways for families to control the entertainment in their homes. Ultimately Matt and his

brother Lee started ClearPlay, as a company focused on the belief that “families can enjoy the show together” in their own home.

ClearPlay founders saw filtering as a way to protect the interests of the consumers, directors, and studios. They recognized the distinction between editing, which requires making a fixed copy of a work (and hence creates infringement issues), and filtering, which does not create a fixed copy. Because ClearPlay’s technology focuses on filtering during performances, not creating new edited versions of movies, it is flexible and works across different platforms. In this way, it could be compared to the audio equalizer common on consumer playback devices used to enhance the sound quality. Audio equalizers work to customize the sound quality, at the direction of the user, to suit each user’s desires, without making a copy.¹⁵ Like ClearPlay filtering, audio equalizers work on a wide range of devices and media.

Because ClearPlay’s technology filters during performances, and does not create new edited works, it avoided the copyright problems intrinsic in the editing model. For example, one former competitor, Cleanflicks, would edit movies by first circumventing access controls on a DVD disc (colloquially referred to as “ripping”), copying the “ripped” movie onto a computer hard drive, editing the movie, burning a copy of the movie onto a DVD writable disc, and then

¹⁵ See, Wikipedia, *Equalization_(audio)*, [https://en.wikipedia.org/wiki/Equalization_\(audio\)](https://en.wikipedia.org/wiki/Equalization_(audio)), last accessed February 8, 2017.

distributing the edited disc. This model has been found to violate copyright laws and the restrictions of movie licenses.¹⁶ While the Cleanflicks model provided simplicity for the end-user, it came at the expense of copyright infringement.

The Plaintiff movie studios have acknowledged that contractual restrictions that prohibit the creation of a new edited fixed work do not translate into restrictions against ClearPlay’s filtering: “Nothing in these provisions prohibit the studios from entering into distribution agreements that allow secondary editing or filtering. ... The DGA [Directors Guild of America] Basic Agreement simply does not speak to filtering, much less prohibit it.”¹⁷ Accordingly, copyright owners and other key industry players do not have agreements that prevent households from filtering content in their own homes, or prevent ClearPlay from providing filtering services in accordance with the Family Movie Act.¹⁸

VidAngel attempts to disparage ClearPlay by claiming that ClearPlay’s filters are not yet available on certain streaming technologies. (VidAngel Opening Brief at 58.) But the initial—and likely not permanent—incompatibility of ClearPlay with one particular mode of movie viewing through one particular vendor does not refute the fact that ClearPlay provides a viable way for families to

¹⁶ *Soderbergh* at 1236.

¹⁷ Plaintiffs’ Motion to Dismiss VidAngel’s First Amended Counterclaims, District Court Docket Number 103, at 8:22-27 (Oct. 14, 2016).

¹⁸ Transcript of Proceedings at 4-8, Case No. 2:16-CV-04109-AB (December 19, 2016).

watch filtered movies. For every movie that ClearPlay has developed filters, families can readily use ClearPlay's filtering technology. The ClearPlay technology works with studio-produced DVDs and Blu-rays, it works with a catalog of Google Play streaming movies, and it can work with other streaming technologies as well. The cause of filtering is not helped by VidAngel's unlawful behavior, especially coupled with its incessant undermining statements towards those that *are* lawfully and legally filtering content.

ClearPlay, in short, picked a technology—filtering—that served the need for family-friendly viewing of movies, without circumventing access controls or violating the section 106 rights of the copyright owner. This kind of innovation, meeting a social need in a manner that is legal, is exactly what our free enterprise system encourages.

CONCLUSION

As ClearPlay has demonstrated over 17 years, it is not necessary to circumvent an access control measure, or make unauthorized copies or public performances in order to provide families with effective filtering technology. VidAngel's misinterpretation of the FMA is simply unsupportable either by the plain language or the legislative history, and acceptance of VidAngel's infringing technology would undercut those that have worked within the law to develop compliant technologies.

For all these reasons ClearPlay urges the Court to reject VidAngel's arguments and affirm the District Court's Preliminary Injunction.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE
REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(A)(7)(C)**

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of Amici Curiae ClearPlay Supporting Plaintiffs/Appellees complies with the type-volume limitation, because this brief contains 3,065 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: February 15, 2017

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 15, 2017.

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Dated: February 15, 2017

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