

No. 16-56843

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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VIDANGEL, INC.,

*Defendant-Appellant,*

v.

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

*Plaintiffs-Appellees.*

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On Appeal from the United States District Court  
for the Central District of California

Hon. André Birotte Jr.

No. 2:16-cv-04109-AB-PLA

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**APPELLANT'S REPLY BRIEF**

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## INTRODUCTION

VidAngel provides filtered streams of movies to customers who buy (or, according to the Studios, rent) a specific physical disc.<sup>1</sup> That service entails decrypting, copying, and streaming discs. It is neither unfair nor illegal.

The Studios insist that VidAngel unfairly operates “a \$1-a-day alternative to licensed streaming services, such as iTunes, Hulu, Amazon, and Netflix.” Ans. Br. 3. True, VidAngel does not license content. But licenses are only one way that streaming services can legitimately pay for content. Physical disc purchases are another, and VidAngel pays the Studios millions for their discs. Br. 11-12 (citing ER292, 674-87).

In many ways, VidAngel resembles Redbox, the successful disc-rental business. Like Redbox, VidAngel waits for the Studios to sell discs to the public, spends significant capital lawfully purchasing discs at prices determined by the Studios, and effectively charges customers \$1-\$2 per day to watch each movie. That model is neither good nor evil: it is determined by market forces.

Make no mistake: the Studios detest the \$1-\$2 per day movie rental business of Redbox. They hate *all* legitimate movie-rental businesses, and have long attempted to litigate and lobby them out of existence. Br. 5. The reason is simple:

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<sup>1</sup> Because it is legally irrelevant here, VidAngel will accept (for the sake of argument) the Studios’ incorrect characterization of its business as a rental service.

they want to make additional profits by requiring any post-sale rental to occur only with their permission. But the Studios lost that battle long ago.

Having chosen to sell discs on a given date for a given price, the Studios cannot prevent the subsequent rental of those same physical discs. That is not unfair to the Studios because they are free to adjust their initial pricing and release dates to capture as much revenue from the later rental business as possible. Br. 5-6 (describing VHS distribution strategy).

This case arises because VidAngel differs from Redbox and other post-sale disc rental businesses in one respect: it provides filtered streaming. For technological reasons, it must process, filter, and stream from one physical copy of each title, rather than the many identical discs it buys and warehouses. ER486-88. That is necessary for filtered streaming without the Studios' consent—and the Studios have never consented. Br. 8-10 (citing ER711-12).

The Studios' legal claims rest entirely on a false premise: that the Studios have the exclusive right to stream content. Every time the Studios deride “unlicensed streaming,” they implicitly characterize streaming as an exclusive right under the Copyright Act. It is not. VidAngel has not violated any of the Studios' *actual* rights under the Act. The Studios are not entitled to monopolize the post-disc sale streaming market any more than they are entitled to monopolize post-sale rentals.



## ARGUMENT

### **I. The Studios' Narrative Is Misleading.**

The Studios presentation of the record is misleading. It unfairly demonizes VidAngel, and obscures the relevant legal questions at issue in this appeal.

#### **A. VidAngel's Business Is Fair.**

VidAngel cares about filtering. VidAngel does not use filtering as some cynical disguise for an unlicensed streaming service that, by charging only \$1-\$2 per day, rips off the Studios and unfairly competes with “legitimate” streaming services.

VidAngel was founded, and has always been run, to enable filtering. ER523-25. And millions of Americans desperately want filtering—as evidenced by the overwhelming support VidAngel has received from communities of faith. ER411-40 (dozens of declarations supporting VidAngel); ER241 (SaveFiltering.com petition, which has received over 125,000 signatures).

The Studios are also wrong to insist that VidAngel's pricing “unfairly” undercuts licensed streaming companies. True, VidAngel's typical per-movie cost is lower than that of services like iTunes. But that comparison is incomplete. VidAngel charges *exactly* what Redbox charges to rent discs. Given that VidAngel uses a disc-based model (with all its inherent risks and limitations), it unsurprisingly follows a similar price structure. The fairness of VidAngel's business (and pricing) should turn on whether its service is lawful—not on whether it is cheaper than

streaming companies with fundamentally different business models. The Studios' repeated comparison of VidAngel to Netflix, Hulu, and Amazon is even less fitting. Those services charge fixed monthly fees of \$8-\$9 for unlimited streaming access to entire libraries of movies.<sup>2</sup>

**B. The Studios Are Claiming A Filtering Veto.**

If the Studios are correct, filtered streaming of their works cannot occur without their permission. Br. 39-40. The Studios are careful *not* to deny this. Instead, they point to one allegedly "legitimate" filtered streaming company (ClearPlay on Google) as contrary evidence. ER123-24. That alternative is illusory.

That the Studios might temporarily permit ClearPlay to operate on Google hardly establishes they will continue to do so. At any point, the Studios (under pressure from the Directors Guild of America) may enforce terms of use prohibiting any filtering software plug-in or application. That is what happened when VidAngel first attempted a nearly identical approach. Br. 10-11.<sup>3</sup>

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<sup>2</sup> Netflix, *Membership Plans*, [www.netflix.com/getstarted/](http://www.netflix.com/getstarted/); Hulu, *Pick Your Plan*, [www.hulu.com/start](http://www.hulu.com/start); Amazon.com, *About the Amazon Prime Membership Charge*, [www.amazon.com/gp/help/customer/display.html?nodeId=200966690](http://www.amazon.com/gp/help/customer/display.html?nodeId=200966690).

<sup>3</sup> The Studios dismiss this as a false allegation unsupported by evidence. Ans. Br. 6. But VidAngel *did* introduce evidence that the Google technology supporting its original service was changed to make filtering impossible specifically at the Studios' request. ER528.

The proof is in the pudding. In the 12 years since passage of the FMA, the Studios admit they have *never* granted *any* license to a filtering company. ER711-12. And the ClearPlay filtering streaming service touted as a “legitimate” alternative by the Studios *has been disabled for all new movies* as of September 2016. Gene Maddaus, *ClearPlay Is No Longer Offering Filtered Movies to Stream*, Variety (Feb. 7, 2017), [www.variety.com/2017/biz/news/clearplay-streaming-new-releases-google-shutdown-1201980650](http://www.variety.com/2017/biz/news/clearplay-streaming-new-releases-google-shutdown-1201980650).

Even ClearPlay admits that it cannot currently offer streamed filtering for any new movie releases. ClearPlay Br. 13. It attributes that fact, not to Studio intervention, but to unspecified technical difficulties. *Id.* Those “technical difficulties” have been unsolved for five months and counting, but ClearPlay maintains they are “likely not permanent.” *Id.* How reassuring.

Streamed filtering by ClearPlay is currently unavailable for any new movies; the Studios could shut down ClearPlay at any time; and no other streaming filtering company exists in the United States today.

## **II. The Studios Cannot Show Likely Success On Their Copyright Claims.**

VidAngel infringes no copyrights. The Studios make two counterarguments. First, they argue that VidAngel violates § 106(4) by publicly performing the filtered works it streams to each customer for private viewing. Ans. Br. 24-31. Second, they argue that VidAngel violates § 106(1) by making intermediate, unfiltered copies of

lawfully purchased discs to facilitate filtering. Ans. Br. 23-24. The copies disqualify VidAngel's service from FMA immunity, per the Studios, because they are not "authorized." Ans. Br. 36-38.

The Studios' first argument misconstrues the meaning of "public performance." VidAngel's transmissions are neither performances nor public. And the Studios' second argument misconstrues the plain meaning of the FMA's requirement that filtering must be "from an authorized copy \* \* \* ." 17 U.S.C. § 110(11).

**A. VidAngel's Transmissions Are Not Public Performances.**

**1. VidAngel Does Not Perform.**

VidAngel's transmissions are not "performances" by VidAngel under the Act. Br. 23 & n.30. The Studios' three responses are unsatisfactory.

First, the Studios argue that a volitional conduct requirement does not apply to public performance claims. Ans. Br. 30 n.11. But "a user's involvement in the operation of the provider's equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act." *Aereo*, 134 S. Ct. at 2507.

Second, the Studios contend that VidAngel is too involved to not be performing. Ans. Br. 30. But involvement *prior* to causing transmission is irrelevant.

VidAngel makes choices available, but its customers select which movies to acquire and instruct VidAngel what to filter. They exercise the volition.

Finally, the Studios say VidAngel has waived this argument. Ans. Br. 30. But “it is *claims* that are deemed waived or forfeited, not *arguments*.” *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) (emphases added).<sup>4</sup> In any event, only *after* VidAngel’s opening brief did this Court hold that volitional conduct is an element of direct infringement, and remains so after *Aereo. Perfect 10, Inc. v. Giganews, Inc.*, No. 15-55500, 2017 WL 279504, at \*4-6 (9th Cir. 2017).

## **2. Any Performance By VidAngel Is Private.**

The Supreme Court recently addressed the meaning of the phrase “to the public” in the Transmit Clause. *Aereo*, 134 S. Ct. at 2500-01. Several major broadcasters (including two plaintiffs here) had sued Aereo, a “commercial retransmission service that ‘enable[d] its subscribers to watch broadcast television programs over the internet for a monthly fee.’” Brief for Petitioners at \*7, *Aereo*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 768315 (citation omitted).

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<sup>4</sup> The Studios assert that that VidAngel “waived” two other arguments by, in their view, failing to articulate the identical points below. Ans. Br. 17, 38. Not so. VidAngel made those arguments below. And, in any event, pure questions of law, even if not raised below, may be considered on appeal. *See United States v. Berger*, 473 F.3d 1080, 1101 n.5 (9th Cir. 2007).

As the Studios correctly informed the Court, Aereo had built its business “without \* \* \* paying anyone a penny.” *Compare id.* at \*21 (emphasis added) with ER292 (“VidAngel spends one third of all capital raised to lawfully purchase thousands of DVD and Blu-ray discs \* \* \* .”) and ER683 (average disc purchase price paid by VidAngel for each new-release constitutes 78% of all revenues collected by VidAngel over the life of that disc).

In finding that Aereo’s transmissions were “to the public,” the Supreme Court emphasized the following:

Neither the record nor Aereo suggest that Aereo’s subscribers receive performances in their capacities as owners or possessors of the underlying works. This is relevant because when an entity performs to a set of people, whether they constitute “the public” often depends upon their relationship to the underlying work. \* \* \* [A]n entity that transmits a performance to individuals in their capacities as owners or possessors does not perform to “the public.”

*Aereo*, 134 S. Ct. at 2510. The relevant distinction is simple: transmission to those who have lawfully acquired the right to view a work is private.

Both the United States and the Studios endorsed this distinction. Brief of the United States as *Amicus Curiae* Supporting Petitioners at \*32, *Aereo*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 828079; Brief for Petitioners at \*46, *Aereo*,

134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 768315. It is fatal to the Studios' position here.<sup>5</sup>

Unlike *Aereo*, VidAngel streams to customers who have lawfully acquired the right to possess, and therefore to view, copyrighted works. The Studios admit:

1. VidAngel pays the Studios millions to buy thousands of discs, numbers each one, and stores them in a warehouse. Br. 11-12 (citing ER292; ER674-87).
2. Any time a VidAngel customer wishes to watch a movie, he pays for a unique, numbered disc. Br. 12 (citing ER489).
3. Any time a VidAngel customer wishes to watch a stream of a disc he owns, he must select the filters he wants to be applied to the stream. Br. 12 (citing ER532-33).
4. No two customers can own (and thus stream) the same numbered disc at the same time. If there is no unique disc available, neither existing nor prospective customers can view a filtered stream of that title. Br. 12 (citing ER489, ER541).

The conclusion is inescapable. Every VidAngel customer has obtained the legal right to view a movie by buying or renting a unique, physical disc. Choosing to have VidAngel filter and stream it does not make the performance public.

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<sup>5</sup> Unable to escape the opinion, its own brief, and the government's brief in *Aereo*, the Studios instead assert that "[w]ell-established precedent supports the court's conclusion that VidAngel violates the Transmit Clause." Ans. Br. 25. They proceed to cite only an inapposite Third Circuit case that predates *Aereo* by 30 years, and two wrongly decided pre-*Aereo* district court cases. *Id.*

The Studios respond by disparaging VidAngel’s “buy-sellback” model as a “sham.” Ans. Br. 27-29. But whether VidAngel’s customers own or rent the discs is irrelevant. Renters lawfully possess. The Supreme Court was clear in *Aereo* that one who transmits a performance of a work “to individuals in their capacities as owners *or possessors* does not perform to ‘the public.’” 134 S. Ct. at 2510 (emphasis added).

Nor is VidAngel a sham. VidAngel’s inventory of discs is limited; only customers who pay for a specific, physical disc can watch, ER541; and at any time, VidAngel’s streaming is constrained by the number of unique discs for which it has paid the Studios, ER541. VidAngel’s customers have a right to watch the content on a specific, numbered disc. *That* distinguishes them from the public.<sup>6</sup>

Finally, when Congress amended the Transmit Clause in 1976, it added a compulsory license provision to ensure that all broadcast retransmitters, no matter how small, would be able to participate. *See Aereo*, 134 S. Ct. at 2506. That

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<sup>6</sup> The Studio’s two “*cf.*” citations, *see* Ans. Br. 29, merely illustrate that their “buyback scheme” argument is baseless. Those cases both arose under 17 U.S.C. § 109(b), a section added to the Copyright Act in 1984 (for phono-records) and 1990 (for computer software) specifically. As its legislative history confirms, § 109(b) imposes special sell/buyback prohibitions for phono-records and computer software that do not apply to other kinds of works. *Brilliance Audio, Inc. v. Hights Cross Commc’ns, Inc.*, 474 F.3d 365, 372-73 (6th Cir. 2007) (phono-records); *Central Point Software, Inc. v. Global Software & Accessories, Inc.*, 880 F. Supp. 957, 963-64 (E.D.N.Y. Mar. 28, 1995), *as amended* Apr. 21, 1995 (computer software). § 109(b) is the exception that proves the rule as to the Studios’ works: post-sale rental does not render a performance public. *See Columbia Pictures Indus., Inc. v. Prof’l Real Estate Inv’rs, Inc.*, 866 F.2d 278, 281 (9th Cir. 1989).



compulsory license provision protects against the same de facto veto rights the Studios seek to impose on filtered streaming. In *Aereo*, the Supreme Court made clear that new fact situations not involving broadcast retransmissions would need to be examined closely in light of the Act’s purposes. *Id.* at 2707. This is such a case.

**B. The FMA Permits VidAngel’s Intermediate Unfiltered Copies.**

VidAngel’s filtering technology makes intermediate copies of lawfully purchased discs. Br. 11; ER487-88, ER508-10. The FMA expressly immunizes those copies from liability under § 106(1).<sup>7</sup> The Studios’ three arguments otherwise are mistaken.

First, the Studios argue that the FMA, *even if its conditions are met*, does not immunize any violation of § 106(1) (and, for that matter, § 106(4)). Ans. Br. 35-36. In the words of the Studios: “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.” Ans. Br. 36.

Congress *did* say so expressly. The FMA provides that “*Notwithstanding the provisions of section 106*, the following are not infringements of copyright \* \* \* .”

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<sup>7</sup> For similar reasons, the FMA also expressly immunizes VidAngel’s transmissions from liability under § 106(4). And the definition of a public transmission in the FMA is either coterminous or *narrower* than that of the Transmit Clause. The Studios offer no reason why VidAngel would not meet the FMA’s private transmission definition.

17 U.S.C. §110(11) (emphasis added). Of course, both § 106(1) and § 106(4) are “provisions of section 106.”

Like generals fighting the last war, the Studios read the FMA to immunize only “fast-forwarding” filtering (which the Studios had argued, pre-FMA, would infringe upon their derivative work rights under § 106(2)). But that cramped interpretation cannot be squared with the FMA’s plain text. If Congress intended the Studios’ meaning, it would have written: “Notwithstanding the provisions of section 106(2), the following are not infringements of copyright \* \* \* .” And it knew how to restrict exemptions to § 106 in such a manner.<sup>8</sup>

Second, the Studios argue that “VidAngel falls outside the FMA,” because it does not “make or stream ‘from an authorized copy’ of any of Plaintiffs’ works.” Ans. Br. 36. Again, the Studios are wrong. This requirement was included to prevent filtering from bootleg copies, not to prevent filtering from lawfully purchased discs. *See* 151 Cong. Rec. S501 (daily ed. Jan. 25, 2005) (“The making imperceptible must be ‘from an authorized copy of a motion picture.’ Thus, skipping and muting from an unauthorized or ‘bootleg’ copy of a motion picture would not be exempt.”).

VidAngel creates every filtered stream from a lawfully purchased disc. As such, VidAngel’s technology “make[s] imperceptible” *from* an authorized copy.

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<sup>8</sup> *See, e.g.*, § 109(a) (“Notwithstanding the provisions of section 106(3) \* \* \* .”); § 109(c) (same for § 106(5)); § 109(e) (same for §§ 106(4) and 106(5)).

That is the common sense meaning of “from.” The word “enable” further clarifies that legitimate intermediate steps are not disqualifying. Indeed, the FMA prohibits the making of a “fixed copy of *the altered version* of the motion picture.” 17 U.S.C. § 110(11). If Congress meant what the Studios say, it would have prohibited the making of “*any* copy of the motion picture.”

The Studios’ reading of the FMA also undermines its purpose. Br. 21-23. Tellingly, the Studios offer no conceivable reason why Congress would authorize filtering only so long as it could be accomplished without intermediate copying. As legislators who voted to pass the FMA have expressly told this Court: “In 2005, Congress clearly contemplated that a decryption/filtering/streaming method, like VidAngel’s, could be developed in the future and would be lawful under the FMA and the DMCA.” U.S. Reps. Br. 17.

Finally, the Studios argue that VidAngel’s reading of the FMA would lead to absurd results. Ans. Br. 38-39. Not so. The private performance requirement prevents anyone from buying only one disc and streaming unlimited copies of it to the public writ large. And if other companies wanted to adopt the cumbersome business model that VidAngel adopted in light of the Studios’ refusal to deal, they could do so without violating the Studios’ *public performance* rights. But they could

not create intermediate copies to stream within the FMA safe harbor unless they were also to filter in compliance with the FMA.<sup>9</sup>

### **III. The Studios Have Not Shown Likely Success On Their DMCA Claim.**

The Studios are also wrong about the DMCA. Finding otherwise would force this Circuit to deepen unnecessarily a controversial split with the Federal Circuit.

#### **A. The Studios’ § 1201(a) Arguments Are Wrong.**

When a copyright holder conditions an authorization to circumvent a technological protection measure (“TPM”) on use, i.e., one can decrypt to view but not decrypt to copy, the TPM is a use control under the DMCA. That matters because the DMCA does not prohibit the circumvention of use controls. Br. 33-35.<sup>10</sup>

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<sup>9</sup> The Studios worry that VidAngel’s view of the FMA would allow companies to filter out meaningless snippets. Ans. Br. 2-3, 38-39. Congress was aware of that possibility, and accepted it as a cost of enacting a statute consistent with the First Amendment. *See generally Derivative Rights, Moral Rights, and Movie Filtering Technology, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 93 (2d Sess. 2004). Indeed, several legislators pointed out that the FMA would allow pornographic companies to use filtering to their advantage. H.R. Rep. No. 108-700, at 116-17 (2004) (“In conclusion, section 12 \* \* \* would lead to socially undesirable editing and actually permit the distribution of technology that makes pornography *even more* pornographic.”). Congress acted anyway—because it adjudged the possibility of abuse outweighed by the certainty of legitimate filtering.

<sup>10</sup> § 1201(a) involves technological protection measures intended to prevent access. The policy justification is that *viewing* a disc without permission does not violate § 106. *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 945 (9th Cir. 2010) (“*Blizzard*”). In contrast, § 1201(b) governs technological protection measures designed to protect the *use rights* of the copyright owner, i.e., its rights

The Studios disparage VidAngel’s access/use control distinction as “convoluted” and a “false dichotomy.” Ans. Br. 16, 20. But the dichotomy is in the statute itself. Br. 33-35. And the Studios’ response, Ans. Br. 18-20, begs the relevant question. Obviously VidAngel had “authority” to decrypt discs it purchased using approved methods, such as playback in a DVD player, that permit viewing but not copying. Lacking authority to decrypt using an unapproved method, i.e., a method that permits copying, only matters *if* the “TPM” is treated as an access control. But where decryption is authorized, conditional access controls should be treated as use controls—for which circumvention absent authority does not trigger liability.

The legislative history makes this perfectly clear:

[Section 1201](a)(1) does not apply to the subsequent actions of a person once he or she has obtained authorized access to a copy of a work protected under Title 17, even if such actions involve circumvention of additional forms of technological protection measures. In a fact situation where the access is authorized, the traditional defenses to copyright infringement, including fair use, would be fully applicable. So, an individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully.

H.R. Rep. No. 105-551, pt. 1 at 18 (1998).

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under § 106. *Id.* at 944-45. There is no need for a strict anti-circumvention rule as to § 1201(b), because, absent trafficking, § 106 does the relevant work. *Id.* at 945.

Precisely that happened here. VidAngel had “authorized access” to the work, i.e., the right to decrypt and view discs via playback. VidAngel was therefore permitted to “circumvent additional forms of technological protection measures” as long as the subsequent use did not violate § 106. *Id.*; *see also* S. Rep. No. 105-190 at 29 (1998) (confirming that § 1201(a) applies only to “*initial* access to a copyrighted work”) (emphasis added).

According to the Studios, this Court held that “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 the measure could be liable under both 1201(a) and (b).” *Blizzard*, 629 F.3d at 946 (emphasis added). But that does not help the Studios, because section 1201(b) provides that the prohibited act in connection with use-control circumvention is *trafficking*. If one creates a program that circumvents both access and use controls and then distributes it, one is liable under both sections. In fact, *Blizzard* supports VidAngel because it suggests the converse: absent trafficking, circumventing a use control does not run afoul of § 1201(a).<sup>11</sup>

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<sup>11</sup> Both *Realnetworks, Inc. v. DVD Copy Control Ass’n*, 641 F. Supp. 2d 913, 917 (N.D. Cal. Aug. 11, 2009), and *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1094 (N.D. Cal. Feb. 19, 2004), involved the *trafficking* of circumvention software. Distinguishing between access-controls and use-controls was unnecessary, because trafficking is illegal in either instance. Those decisions therefore lack persuasive value. As for the passing remark from *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295 (3d Cir. 2011), that *dictum* disregards the

Lastly, the Studios claim that VidAngel’s interpretation would render the Librarian’s exemption authority superfluous. Ans. Br. 22-23. Not so. The Library is empowered to protect those without authorized *access* who should nonetheless be allowed to engage in fair use: students, academics, and artists. 17 U.S.C. §§ 1201(a)(1)(C)-(D); *see also infra* 19 (rulemaking preferable to litigation).

**B. The Studios’ Expansive Interpretation Would Unnecessarily Deepen A Circuit Split On An Important Question.**

How this Court should view “mixed” access/use controls under the DMCA is an issue of first impression. Treating mixed measures as what they really are—use controls—would avoid granting the Studios absolute power to prevent non-infringing uses, which Congress did not intend and which is constitutionally suspect. EFF Br. 8-12. It also avoids unnecessarily deepening a controversial split with the Federal Circuit:

In 2010, this Court expressly split with the Federal Circuit on whether § 1201(a) requires a nexus to infringing conduct. This Court ruled that it does not. *Blizzard*, 629 F.3d at 952. In *Chamberlain Group v. Skylink Technologies, Inc.*, the Federal Circuit had ruled that it does. 381 F.3d 1178, 1204 (Fed. Cir. 2004). The

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statutory structure, legislative history of the DMCA, and natural implications of this Court’s decisions.

Federal Circuit was profoundly concerned about the societal consequences of imposing liability absent infringement. *Chamberlain*, 381 F.3d at 1200.<sup>12</sup>

While this Court parted with the Federal Circuit on “pure” access controls, the Federal Circuit’s reasoning applies with even more force here, where an access control is being deployed to control use. Treating a conditional access control like a pure access control would *unnecessarily* deepen the divide. In essence, the Studios are asking this Court to become the first and only circuit to apply a strict § 1201(a) regime to “mixed” access and use controls. It should decline.

#### **IV. VidAngel Is Likely To Prevail On Its Fair Use Defense.**

In the alternative, VidAngel engages in fair use. The district court erred in concluding otherwise.

##### **A. Fair Use Is A Defense To *Both* Copyright And DMCA Claims.**

The Studios deny that fair use is a defense to DMCA claims. Ans. Br. 39-42. Yet § 1201(c)(1) expressly authorizes a fair use defense to claims made “under this title,” which includes the DMCA. Br. 45-46. Every academic commentator, including Jane Ginsburg, agrees that the text of § 1201(c) applies fair use to DMCA claims. Br. 46. The Studios offer no response.

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<sup>12</sup> *Chamberlain* was the only relevant Circuit authority on this point when the FMA was passed. That is why it is not surprising that Congress saw no need to add an *express* DMCA exemption in the FMA.



The Studios also misrepresent the relevant case law. They cite district court cases but fail to mention *this* Court expressly left open this precise issue. *Blizzard*, 629 F.3d at 958. The Studios then assert that the Second Circuit has held that DMCA claims are not subject to a fair use defense, Ans. Br. 39-40, but this is what that court *actually* said:

We need not explore the extent to which fair use might have constitutional protection \* \* \* because whatever validity a constitutional claim might have as to an application of the DMCA that impairs fair use of copyrighted materials, such matters are far beyond the scope of this lawsuit \* \* \* [T]he Appellants do not claim to be making fair use of any copyrighted materials, and nothing in the injunction prohibits them from making such fair use.

*Universal City Studios v. Corley*, 273 F.3d 429, 458-59 (2d Cir. 2001). Nor do the Studios refute that eliminating fair use would offend both the Copyright Clause and First Amendment. Br. 46-47.

The Studios finally say that a fair use defense is unnecessary because the Librarian of Congress may grant categorical exemptions triennially. Ans. Br. 40-41. Statutes often have express safe harbors precisely to make *clear* the propriety of certain acts. That Congress included an avenue to protect legitimate fair uses amenable to rulemaking through a process other than protracted litigation against billion-dollar corporations merely underscores that the DMCA is subject to fair use.

Fair use—perhaps the most decorated, longstanding, and important doctrine in copyright law—is a common law creation notwithstanding the original Act’s

express prohibitions. That Congress would strike it *sub silentio* is unlikely at best. Such a sea change would and should require explicit congressional instruction.

**B. The District Court Clearly Misapplied The Four Fair Use Factors.**

Determining whether a use is fair entails considering each unique case and balancing four guiding factors. The parties agree that the central factors here are (1) the nature of the use and (2) its market effects. *See also Campbell v. Acuff-Rose Music*, 510 U.S. 569, 570 (1994). Both favor VidAngel.

As for the nature of the use, the district court held that omissions categorically cannot be transformative. Ans. Br. 43-44. That holding, critical to the district court's findings and defended by the Studios here, was clear error.

Omissions can unquestionably be transformative. This was a key premise of the Directors Guild of America and the Studios in opposing the FMA. Br. 9 n.23. The reason they so fiercely oppose filtering is *because* omissions transform works in ways they find artistically unacceptable.

Consider these two versions of *Sir John Chardin*, a painting displayed in the

National Portrait Gallery:



Omissions can entirely transform the emotional and social content of a work.<sup>13</sup>

The omissions VidAngel facilitates transform works into content that families are willing and able to watch together. Indeed, it is undisputed that the omission of “mature” content is the only reason most VidAngel customers are even *willing* to watch the Studios’ movies. ER15. The Studios ignore this. The Court should not.

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<sup>13</sup> That does not mean they always do. But the “minor cropping” of photographs in *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012), is not comparable to removing content that people find contrary to their fundamental values. The Studios’ remaining cases are even less relevant. See *Elvis Presley Enterprises, Inc. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003) (long Elvis clips used without transformation); *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000) (“verbatim” copying).

Ultimately, the Studios wrongly ask this Court to deny that people’s values matter when consuming entertainment. VidAngel’s filtering service provides personalized transformations of works so that people can view them without religious, moral, or parenting discomfort. The district court’s conclusion that filtering, i.e., omission, can *never* be transformative was mistaken. VidAngel’s service is highly transformative. This factor weighs strongly in favor of fair use.

The court below compounded that error by making another equally serious one. It improperly evaluated the market effects evidence before it. Based on the undisputed evidence—which the district court expressly credited—VidAngel *enhances* the economic value of the Studios’ works.

The district court concluded that 51% of VidAngel’s audience would not watch the Studios’ movies without filtering. ER15. For those customers, VidAngel indisputably expands both the Studios’ revenues and market.<sup>14</sup> That the other 49% might watch unfiltered works does not diminish this. Some unspecified percentage of them would not watch the Studios’ movies with their children. ER537. For that subset, VidAngel again increased the Studios’ audience.

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<sup>14</sup> That customers pay VidAngel rather than the Studios directly does not undermine this conclusion. First, VidAngel buys more copies of the Studios’ discs than otherwise would have been sold. Second, VidAngel introduces a new population to the Studios’ works.

Even assuming, *arguendo*, that the entire 49% would otherwise have watched an unfiltered version and was attracted to VidAngel not only because they preferred (but did not require) filtering, but also due to its pricing, the district court erred in finding market harm to the Studios. People who are price-motivated rather than (exclusively) filtering-motivated could have watched the same movie by paying \$1 per day to Redbox. There is no substantial reason to believe the alleged negative effects outweigh the unquestionably positive effect of the majority of VidAngel customers who never would have watched the Studios' movies at all.

The Studios respond only by repeatedly citing *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), which they (correctly) note was not fair use. Ans. Br. 46-49. But Napster bought *one* CD and *simultaneously* streamed it to *tens of thousands* of customers. That would have an adverse market effect. If Redbox (or VidAngel) bought only one disc, copied it, and then put all those copies for rent in a red box (or streamed them), Napster would be a good analogy. But that is not this case.

VidAngel, like Redbox, instead buys a disc for each one-at-a-time customer. The profits that the Studios obtain from these two businesses are *materially indistinguishable*. Unlike VidAngel, Napster (like other pirate sites) never ran out of stock. Napster did not put millions into the Studios' coffers by buying their discs, let alone copies that customers would not pay to watch without its service.

The Studios argue that VidAngel is Napster-like because after it buys numerous copies, it stores most discs in a vault and streams from only one of them. That objection is misplaced. The *market effects* on the Studios arise from the money made when VidAngel buys their discs. As long as VidAngel buys *one unique disc per customer*, which it does, the Studios get paid. VidAngel is not Napster.

Taking a disc one owns or has rented—i.e., for which the Studios have already been paid—and streaming it to a particular screen for private home viewing is space-shifting. This Court (and every academic commentator) has accurately described space-shifting as “paradigmatic fair use.” All the Studios say in response is that this Court’s express statement to that effect in *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072 (9th Cir. 1999), was technically *dictum*. Even so, it was entirely true.

On both the transformative nature of the work (which the court below valued at *zero*, ER13-14) and on the market effects (which the court below misunderstood, ER14-15), the court committed clear error. And because fair use is an equitable rule of reason that requires a *balancing* among various factors, this Court should reverse. *See Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (protecting time-shifting using the then-new VCR).

**V. The Studios Have Not Shown Likely Irreparable Harm.**

VidAngel argued that the Studios showed no harm, let alone irreparable harm. Br. 48-52. In response, the Studios point to the deposition of Tedd Cittadine, who noted that partners like exclusivity and are concerned about pirates. Ans. Br. 51-52.

General concerns are not harm. No less favorable deal terms were struck. No potential partners walked. That a small company offering filtered streams *after* discs are already available to buy and rent somehow moved the needle in the Studios' negotiations with Netflix or HBO is specious. No Studio partner ever mentioned VidAngel in negotiations, let alone actually drove a harder bargain. Br. 51.

Indeed, the absence of such evidence further suggests that "traditional" streaming services know full well that "filtered" streams appeal largely to an audience they disregard. Nor was there *any* indication in the record that, to the extent the Studios' unfounded speculations of harm translated into any actual lost revenue, VidAngel would be unable to pay damages. Br. 52. Nothing about the supposed harm was concrete, imminent, or not remediable by damages.

The Studios' delay in acting is further evidence that their cries of irreparable harm are insincere. One does not wait eleven months to address irreparable harm. Br. 52-53. Nor, if a harm is truly irreparable, will months of evidence-gathering fail to unearth even a single particularized reference to the specific harm (or estimated amount thereof) a plaintiff is supposedly suffering. Br. 51.

## **VI. The Balance Of Hardships Requires Reversal.**

In stark contrast, the harm to VidAngel and its customers was devastating. VidAngel shut down its streaming business. Br. 53-54 (citing ER28, 56-57).

The Studios say harm to infringers does not count. Ans. Br. 55-56. But as VidAngel pointed out, that cannot be, because likelihood of success and consideration of hardship are *separate* prongs in the analysis. That means hardship to the defendant necessarily matters *even if* the plaintiff is likely to succeed—and it matters even more in close cases. Br. 54-56. Any other approach would tolerate the destruction of a defendant’s business *before* final judgment. That is the opposite of how an equitable doctrine should function.

The Studios also say VidAngel’s “cries of harm are disingenuous,” Ans. Br. 56, because VidAngel *could* have modified its technology to permit only the streaming of movies other than Plaintiffs’ works, but instead chose not to. *Id.* at 57.

This suggestion—that VidAngel stopped streaming unnecessarily—ignores the record. First, the Studios’ movies comprise 56% of its titles. Even if the injunction prevented streaming only of that large share, VidAngel was significantly harmed as a matter of both math and customer psychology. ER84. Second, in the abrupt time permitted for compliance, VidAngel originally hoped it could, and desperately tried to, come up with a technological solution that would affect only the Studios’ titles, *but it failed*. ER28. In fact, VidAngel incurred the wrath of the district



court for complying too slowly with its order and was not permitted adequate time to explore a technological solution. ER23. And, contrary to the Studios' implication, Ans. Br. 57, nothing about VidAngel's defiant public conduct or insistence that it would fight the Studios to the end suggests that VidAngel was not seriously harmed. Under that reasoning, Pearl Harbor was not a serious blow.

## **VII. The Injunction Harms The Public Interest.**

Although the public interest in filtering is strong and Congressionally sanctioned, Br. 56-57, the injunction robbed the public of any viable means to filter. VidAngel is shut down; ClearPlay no longer functions for new releases; and the Studios have scared everyone else away.

According to the Studios, the relevant public interest is in "upholding copyright protections." Ans. Br. 58. The Studios have confused themselves with the public. The actual public has no interest in seeing America's only commercially and technologically viable filtering company destroyed through an unnecessary *preliminary* injunction. The legal questions in this case are as complex and novel as they are important. If the Studios prevail, they will be entitled to damages. If VidAngel prevails, they will not. In either case, there will be a final judgment that "upholds copyright protections."

## CONCLUSION

For the foregoing reasons, the injunction should be dissolved.

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## CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Court Rule 32-1 because it contains 6,296 words, excluding the parts of the brief exempted by the Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Undersigned counsel certifies that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced 14-point Times New Roman typeface using Microsoft Word 2013.

Dated: February 22, 2017

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## CERTIFICATE OF SERVICE

I hereby certify that, on February 22, 2017, 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. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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