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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

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

Plaintiffs,

vs.

VIDANGEL, INC.,
Defendant.

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

**VIDANGEL'S NOTICE OF
MOTION AND MOTION TO
CLARIFY OR CONSTRUCT
PRELIMINARY INJUNCTION
ORDER (DKT. 144)**

The Hon. André Birotte Jr.

Date: July 17, 2017
Time: 10:00 a.m.
Courtroom: 7B

Trial Date: None Set

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VIDANGEL, INC.,
Counterclaimant,
vs.
DISNEY ENTERPRISES, INC.;
LUCASFILM LTD. LLC;
TWENTIETH CENTURY FOX FILM
CORPORATION; WARNER BROS.
ENTERTAINMENT, INC., AND
DOES 1-100,
Counterclaim-Defendants.

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1 **TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on July 17, 2017, at 10:00 a.m., or as soon
3 thereafter as the matter may be heard before the Honorable André Birotte Jr., in
4 Courtroom 7B of the United States District Courthouse, 350 West First Street, Los
5 Angeles, California 90012, Defendant and Counterclaimant VidAngel, Inc.
6 (“VidAngel”) will and hereby does respectfully move for an order: (1) clarifying or
7 constructing the Court’s December 12, 2016 order granting a preliminary injunction
8 (the “Order”), and (2) declaring that VidAngel’s proposed course of conduct will not
9 violate the preliminary injunction.

10 This motion is based on the accompanying Memorandum of Points and
11 Authorities, the Declaration of David Quinto dated June 19, 2017, the exhibits
12 thereto, the proposed order submitted concurrently herewith, and any other evidence
13 and argument as may be presented in reply or at oral argument.

14
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17 DATED: June 19, 2017

Respectfully submitted,

18
19 Bv: /s/ Jaime W. Marquart
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Counterclaimant VidAngel, Inc.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. Preliminary Statement

VidAngel’s mission is to offer families a viable way to filter unwanted content out of popular television shows and movies in the digital streaming age, just as Congress intended when it enacted the Family Movie Act. VidAngel maintains that Plaintiffs are diametrically opposed to that mission and that this lawsuit is a ruse to defeat a legitimate filtering service. Plaintiffs contend they do not oppose filtering, but that VidAngel’s service threatens them with economic and irreparable harm. Specifically, Plaintiffs allege they are harmed because VidAngel: (i) streams content to consumers without paying for a streaming license¹; (ii) occasionally offers filtered content for streaming before the unfiltered content is released for streaming by licensed streaming services; and (iii) relies on the ownership of thousands of DVD and Blu-ray discs to stream filtered content less expensively than authorized streaming services can stream unfiltered content. This motion, and the new technology upon which it is based, eliminates all of these purported harms and puts to rest Plaintiffs’ stated opposition to VidAngel’s service. Any opposition to VidAngel’s new service is purely and simply an opposition to filtering alone.

On December 12, 2016, the Court entered a preliminary injunction prohibiting VidAngel from decrypting, copying, and transmitting Plaintiffs’ copyrighted motion pictures (the “Preliminary Injunction”).² To give immediate effect to the Preliminary Injunction, VidAngel was required to cease offering its titles altogether. During its business hiatus, VidAngel developed a version of its filtering technology to address Plaintiffs’ stated concerns, and to prevent any conceivable economic or other harm to

¹ VidAngel is willing to negotiate streaming licenses, but Plaintiffs have flatly refused to sell one to VidAngel or any other filtering service.

² On June 8, 2017, the Ninth Circuit heard oral argument concerning VidAngel’s contentions that its service does not violate the DMCA and is immune from copyright infringement claims pursuant to the Family Movie Act of 2005 (“FMA”), codified in principal part at 17 U.S.C. § 110(11).

1 them. VidAngel has begun using its new technology to provide filtering services for
2 motion pictures that are not subject to the Preliminary Injunction. (Declaration of
3 David W. Quinto dated June 19, 2017 (“Quinto Dec.”) ¶ 2.) VidAngel now seeks
4 confirmation that it will not violate the Preliminary Injunction if it applies this new
5 method to filter and stream motion pictures owned by Plaintiffs.

6 VidAngel has already disclosed its new technology to Plaintiffs and requested
7 their agreement that it does not violate the Preliminary Injunction. (Quinto Dec. ¶ 3,
8 Exh. A.) Even though VidAngel’s new technology satisfies the requirements
9 identified by Plaintiffs’ counsel at the hearing on their motion for a preliminary
10 injunction—namely, that the filtering service work in conjunction with an authorized
11 streaming service—Plaintiffs nevertheless declined to provide a substantive response
12 to VidAngel’s request. (Quinto Dec. ¶ 4, Exh. B.) Instead, Plaintiffs’ counsel stated
13 only that they “have no complaint against services that provide filtering in a manner
14 that is consistent with the law.” (*Id.*) Because Plaintiffs refuse to confirm that
15 VidAngel’s new service will comply with the terms of the Preliminary Injunction,
16 VidAngel must seek clarification from the Court.

17 Unlike its earlier technology, predicated on the ownership of a physical copy
18 of a motion picture in the form of a DVD or Blu-ray disc, VidAngel’s new
19 technology does not require decryption.³ Also, under its new service, VidAngel
20 customers cannot obtain filtered content at a lower cost than unfiltered content. Nor
21 can customers use VidAngel to obtain access to streamed content before it is released
22 for streaming by licensed streaming services. VidAngel’s new service will increase
23 Plaintiffs’ and their licensed clients’ already highly profitable streaming revenues.⁴

24 To use VidAngel’s new technology, customers will be required to purchase
25

26 ³ As a result, Plaintiffs’ asserted claim arising under the Digital Millennium
27 Copyright Act (“DMCA”) is not applicable.

28 ⁴ As noted above in note 1, VidAngel would gladly obtain such streaming licenses if
Plaintiffs would sell them to VidAngel.

1 streamed content from their preferred licensed streaming (or electronic sell-through)
2 service⁵ (hereinafter, “LSS”). However, rather than receive streamed content directly
3 from the LSS on their viewing device, customers will authorize VidAngel to receive
4 the video stream from the LSS, and VidAngel will simultaneously stream the
5 purchased motion picture to the customer’s device while applying the customer’s
6 selected filters in real time.

7 VidAngel’s new service will enhance Plaintiffs’ profits by expanding their
8 market to customers who would otherwise refrain from purchasing or renting motion
9 pictures whose content they find objectionable. It will also enable families to access
10 technology for filtering content during the performance of a motion picture
11 transmitted to their household, as intended by the Family Movie Act.

12 **II. Statement of Facts**

13 **A. The Preliminary Injunction**

14 On December 12, 2016, the Court entered an order granting Plaintiffs’ motion
15 for a preliminary injunction. The Preliminary Injunction prohibits VidAngel from
16 engaging in the following four categories of conduct:

- 17 (1) circumventing technological measures protecting Plaintiffs’ copyrighted
18 works on DVDs, Blu-ray discs, or any other medium;
- 19 (2) copying Plaintiffs’ copyrighted works, including but not limited to
20 copying the works onto computers or servers;
- 21 (3) streaming, transmitting or otherwise publicly performing or displaying
22 any of Plaintiffs’ copyrighted works over the Internet (through such
23 websites as VidAngel.com), via web applications (available through
24 platforms such as the Windows App Store, Apple’s App Store, the
25 Amazon App Store, Facebook or Google Play), via portable devices
26

27 ⁵ Licensed streaming service providers include Amazon Channels, Amazon Instant
28 Video Rentals/Purchases, Amazon Prime Instant Video streamed video on demand,
Google Play, HBO Now, Netflix, and Vudu electronic sell-through.

1 (such as through applications on devices such as iPhones, iPads,
2 Android devices, smart phones or tablets), via media streaming devices
3 (such as Roku, Chromecast or Apple TV), or by means of any other
4 device or process; or

- 5 (4) engaging in any other activity that violates, directly or indirectly,
6 Plaintiffs’ anti-circumvention right under § 1201 of the Copyright Act,
7 17 U.S.C. §1201(a), or infringing by any means, directly or indirectly,
8 Plaintiffs’ exclusive rights under § 106 of the Copyright Act, 17 U.S.C.
9 § 106.

10 (Dkt. 144 (Order at 22).)

11 **B. VidAngel’s New Technology**

12 VidAngel’s new technology works in conjunction with the transmission of a
13 movie from an LSS. (Quinto Dec. ¶ 5.) While the movie streams from the LSS to a
14 device operated by VidAngel, VidAngel simultaneously streams the movie to a
15 device operated by its customer, applying the customer’s selected filters as the movie
16 streams. (*Id.*) To accomplish this task, VidAngel’s new filtering technology requires
17 two sets of operations: (1) the creation of available filters, and (2) the streaming of
18 the movie. (*Id.*)

19 The first operation is accomplished as follows:

- 20 1. VidAngel purchases a digital transmission of a motion picture from an
21 LSS (e.g., Amazon Instant Video).
22 2. A VidAngel “tagger” (a person responsible for marking or “tagging”
23 content a customer might find objectionable) then initiates a stream of a
24 particular motion picture to be played using the LSS’s web-based video
25 streaming software.⁶

26 _____
27 ⁶ In the ordinary course of its business, the LSS makes a copy of each motion picture
28 it is authorized to stream and sends the copies to a cloud browser, e.g., a virtual copy
of Google Chrome hosted in the cloud through the LSS’s own Web-based app.

- 1 3. As the streamed motion picture is processed by the LSS's video player
2 app, the tagger generates a framebuffer version of the movie data.⁷
3 Although the audio data does not run through the framebuffer, it does run
4 through the operating system's audio bus, allowing VidAngel to capture
5 it as the movie plays using the system's soundcard hardware.
- 6 4. The VidAngel tagger then saves the created copy of the motion picture to
7 a cloud storage location.
- 8 5. Working from the copy, the VidAngel tagger then generates eight
9 versions of the movie, each at different bitrates.⁸ Each bitrate version is
10 then cut into eight-second segments,⁹ and the segmented pieces of the
11 motion picture are then encrypted and uploaded to an S3 cloud storage
12 bucket.¹⁰
- 13 6. At this point, the VidAngel tagger initiates a tagging session by making a

14 _____
15 Because an LSS uses its own player to manage digital rights (including any potential
16 encrypting and decrypting of video segments), the VidAngel tagger can access the
17 stream through the cloud browser via the LSS's player software. VidAngel *does not*
18 decrypt the motion picture. Rather, the VidAngel tagger consumes the stream post-
19 decryption—exactly as intended for viewing by the motion picture copyright owners.

20 ⁷ A “framebuffer” is a portion of random access memory (“RAM”) containing a
21 bitmap image file format used to store and refresh a video display from a memory
22 buffer containing a complete frame of data. In other words, the framebuffer version
23 is essentially a digital copy of the video created from the video stream.

24 ⁸ The term “bitrate” refers to the number of bits per second that can be transmitted
25 along a digital network. When a video is streamed over a network, the bitrate is
26 limited by the network speed. Videos streamed at a higher bitrate can be of higher
27 quality, but they also require greater network bandwidth than videos streamed at a
28 lower bitrate.

29 ⁹ Cutting the video into eight-second segments enables VidAngel to offer its
30 customers the highest quality streams of filtered works, while adjusting to ordinary
31 fluctuations in the customer's network speed as the video plays. For example, a
32 customer with a high speed Internet connection may initiate a video stream at the
33 highest available bitrate. If the customer's Internet speed drops while the video is
34 streaming (for example, because another household member initiates a separate video
35 stream on another device), VidAngel's streaming application will automatically
36 begin delivering the lower bitrate segments without interruption to the customer's
37 playback experience.

38 ¹⁰ An S3 (Amazon Simple Storage Service) cloud storage bucket is object storage
with a simple web storage service interface to store and retrieve data from anywhere
on the Web with very high durability.

1 temporary copy of the lowest bitrate segments, and placing that
2 temporary copy in a separate bucket.¹¹ The tagger then downloads the
3 temporary copy to the tagger’s browser.

4 7. During the tagging session, the tagger creates video tags identifying
5 potentially filterable content. As each tag is created, the segment
6 corresponding to the time where that filterable content is located is
7 fleetingly copied to a “keyframe generator.”¹²

8 8. The keyframe generator marks the location of each tag boundary in the
9 stream (i.e., the beginning and end time) and copies each segment back
10 to the working bucket, in the process overwriting (and thus destroying)
11 the existing segment.

12 9. When the motion picture’s tagging is completed, the tagger uses the tags
13 to create a “published” version of the master segments in a location that
14 the Web and mobile apps can access them. Those segments are then
15 encrypted and the segments in the working bucket are destroyed.

16 10. VidAngel next uploads the encrypted segments to a content delivery
17 network (“CDN”) edge server.¹³

18 (Quinto Dec. ¶ 6.)

19 With the first operation complete, VidAngel is ready to provide its filtering
20 service to consumers. That second operation works as follows:

21 1. To watch filtered, streamed content, a consumer must open an account

22 ¹¹ Placing the temporary copy in a separate bucket prevents any corruption of the
23 master segments.

24 ¹² In compressed video, a “key frame” is a full information frame that serves as a
25 marker point for subsequent frames; frames coming after a key frame only store
26 information that has changes from the key frame. By annotating each potential tag
with a key frame, the system can generate dynamic clips based on tag boundaries
without losing pieces of video.

27 ¹³ A content delivery network is a group of servers, geographically distributed, that
28 improves the speed of content delivery by allowing customers to get the requested
files from a server closer to them. It is common practice in the video industry to
deliver video files through a CDN.

- 1 with an LSS (e.g., Amazon Instant Video, Google Play, etc.).
- 2 2. The consumer must then link his or her LSS account credentials with
- 3 his or her VidAngel account.¹⁴
- 4 3. The consumer may browse VidAngel’s content library to select a
- 5 motion picture for which VidAngel offers filtering services.
- 6 4. Upon selection of a motion picture, VidAngel either accesses the
- 7 consumer’s subscription video-on-demand (“SVOD”) with his or her
- 8 LSS, or accesses a stream the consumer has already purchased from the
- 9 LSS. For the consumer’s convenience, VidAngel may with the
- 10 consumer’s authorization purchase a stream of the requested motion
- 11 picture on the consumer’s behalf.
- 12 5. When the consumer initiates the stream using VidAngel’s player,
- 13 VidAngel simultaneously initiates the stream from the LSS. Rather
- 14 than streaming the motion picture to the consumer’s device, the LSS
- 15 delivers the video stream to VidAngel.¹⁵
- 16 6. While the LSS is streaming the motion picture to VidAngel, VidAngel
- 17 simultaneously streams the copy of the motion picture stored on its
- 18 CDN server to the consumer using the appropriate bitrate segments.
- 19 7. To the extent any segments of the motion picture do not correspond to a
- 20

21 ¹⁴ VidAngel does not store customers’ account credentials on its servers. Customers
22 must provide their LSS account credentials each time they use VidAngel’s services.

23 ¹⁵ VidAngel receives the actual stream paid for by the user to ensure that the LSS
24 treats it as a valid stream, thus preventing consumers from receiving more than they
25 have paid for by, for example, watching a motion picture filtered on VidAngel using
26 one device and simultaneously playing it unfiltered on a different device. Because
27 VidAngel receives an authorized stream from the LSS, if a consumer tries to watch it
28 simultaneously on a second device using the LSS’s app, the LSS is alerted to the
existence of multiple streams and can enforce any requirements or limitations
concerning the use of a second device. VidAngel continuously monitors the stream
so that if the LSS cuts off or stops providing its stream for any reason, VidAngel will
also terminate its stream. A consumer therefore never has any greater ability to watch
content using VidAngel’s service than if he or she had purchased that content
directly from the LSS.

1 filter chosen by the consumer, those segments are streamed directly to
2 the consumer's device.

3 8. To the extent segments do correspond to selected filters, requests for
4 those segments are sent to a "clip generator,"¹⁶ which downloads the
5 segments from the S3 cloud storage bucket, decrypts the encryption
6 supplied by VidAngel, and filters the audio and/or video content
7 according to the customer's filter selections. The filtered bits are then
8 re-encrypted and transmitted to the consumer's player and are
9 simultaneously deleted from the clip generator.

10 (Quinto Dec. ¶ 7.) At no point in this process does VidAngel create a fixed copy of
11 an altered version of the motion picture. (*Id.* ¶ 8.)

12 **C. Plaintiffs Have Acknowledged That Lawful Filtering of Streaming**
13 **Content Is Permitted**

14 VidAngel argued during the November 14, 2016 hearing on Plaintiffs'
15 preliminary injunction application that if its service was not legally enabled by the
16 FMA, then nothing was. In response, Plaintiffs' counsel contended that a filtering
17 service would be protected by the FMA if it worked in conjunction with an
18 authorized streaming service:

19 THE COURT: What's your response to the notion that—to Mr.
20 Quinto's point that you can't filter without ripping?

21 MR. KLAUS: That is wrong. We pointed out that *there is*
22 *another service, one of their competitors, ClearPlay, the same*
23 *company that made the DVDs. They offer a service that—they offer*
24 *a service that works in conjunction with authorized streams from*
25 *Google Play.*

26 _____
27 ¹⁶ A "clip generator" is a VidAngel computer program that performs filtering by
28 generating new clips in real time while omitting content the user has chosen to filter.
The "clip generation" process uses only RAM—it does not result in the creation of a
permanent copy of the filtered work.

1 (Quinto Dec. ¶ 9, Exh. C, November 14, 2016 Hearing Tr. at 30:7 to 30:14.
2 (emphasis added).) Plaintiffs’ counsel admitted that he did not “know all of the in’s
3 and out’s” of how ClearPlay’s technology worked, but the thrust of his argument
4 was that so long as the viewer paid an LSS a fee that “has built into it the acquisition
5 cost of having to stream a copy,” Plaintiffs have no objection to another company
6 providing a filtering service. (See *id.*, Hearing Tr. at 30:7 to 31:7.)

7 Notwithstanding its apparent admission that a filtering streaming service
8 would be legitimate so long as the filter “works in conjunction with authorized
9 streams,” and that VidAngel’s new technology would do just that, Plaintiffs’ counsel
10 refused to acknowledge that the new technology complies with copyright law.
11 (Quinto Dec. ¶ 4, Exh. B.)

12 **D. VidAngel’s New Technology Is Similar to Existing Streaming Proxy**
13 **Services**

14 Streaming proxy services have operated for many years. One, known as
15 PlayOn, serves far more customers than VidAngel and has operated openly for at
16 least nine years. (Quinto Dec. ¶ 10.) Another significant streaming proxy service,
17 Boxee, operated for a time before it was purchased by Samsung and later phased
18 out.¹⁷ (*Id.*) VidAngel’s new technology operates in a manner that is similar to
19 PlayOn and Boxee. (*Id.*)

20 Briefly, PlayOn allows users to either stream content from a variety of
21 providers, or record that content for later viewing without an internet connection on
22 the customer’s preferred device. (Quinto Dec. Exhs. D, E.) The recording feature
23 serves a function similar to the digital video recorder (“DVR”) technology used by
24 many consumers in connection with cable or satellite television subscriptions.
25 (Quinto Dec. Exh. E.) PlayOn describes itself on the home page of its website as: “A
26 _____

27 ¹⁷ Boxee is not currently in operation, as Samsung decided to abandon the market at
28 some point after its purchase. However, the service operated openly for at least 3
years without any objection from Plaintiffs.

1 Fully Featured Streaming DVR” and advertises: “Record Streaming Videos. Watch
2 Offline. Watch streaming shows and movies, ad-free, anywhere, anytime.” (Quinto
3 Dec. Exh. F.) It advertises the PlayOn Desktop as a PC app “that turns your PC into
4 a streaming video recorder and media server. Record, cast, and stream your favorite
5 online shows and movies from Netflix, Hulu, Amazon, HBO and 100 other popular
6 streaming sites.” (*Id.*)

7 PlayOn’s services are well known in the industry. PlayOn has a Facebook
8 page and a Twitter feed, and it has been featured in several published articles.
9 (Quinto Dec. Exhs. G, J, K, L, M.) PlayOn’s applications are available for personal
10 computers, as well as iOS (e.g., iPhone and iPad) and Android devices. (Quinto Dec.
11 Exs. H, I.)

12 In addition to PlayOn, a proxy service known as Boxee openly operated for
13 several years until its owner, Samsung, decided to abandon the market for business
14 reasons. According to Wikipedia, Boxee was a “cross-platform freeware HTPC
15 (Home Theater PC) software application . . . that enables its users to view, rate and
16 recommend content to their friends through many social network services and
17 interactive media related features.” (Quinto Dec. Exh. N.) An alpha version of
18 Boxee was made available to the public on June 16, 2008, and a public beta version
19 was released in January 2010. (*Id.*) Boxee gave its users the convenience of viewing
20 content from a variety of providers using a single application. (*Id.*) Boxee’s promise
21 was significant enough that it was acquired by Samsung in or around 2013. (*Id.*)
22 And it also received media attention. (Quinto Dec. Exhs. O, P.) Although Boxee is
23 now defunct as a consequence of a business decision made by its owner, Samsung,
24 it—like PlayOn—openly recorded and re-transmitted content owned or distributed
25 by Plaintiffs and their affiliates, who never acted to block its copying and re-
26 transmission of their paid content.

27 VidAngel’s new technology operates in a manner similar to the technologies
28 used by PlayOn and Boxee. PlayOn and Boxee were designed to give consumers

1 flexibility in accessing authorized copyrighted content that they legitimately
2 purchased. Likewise, VidAngel’s new technology will simply give consumers the
3 ability to filter undesirable content during the streamed performance of motion
4 pictures that they have purchased from an LSS.

5 **III. Argument**

6 **A. The Court May Clarify or Construct the Scope of the Preliminary**
7 **Injunction While the Appeal Is Pending.**

8 Although the merits of the Preliminary Injunction are the subject of an appeal
9 pending before the Ninth Circuit, this Court retains jurisdiction to decide whether
10 specific, proposed conduct would comply with or violate the injunction’s terms.
11 *Lara v. Sec’y of Interior*, 820 F.2d 1535, 1543(9th Cir. 1987) (“The district court
12 may issue orders pending appeal to enforce its judgment.”); *Hoffman v. Beer Drivers*
13 *& Salesmen’s Local No. 888*, 536 F.2d 1268 (9th Cir. 1976)(“Where the court
14 supervises a continuing course of conduct . . . an appeal from the supervisory order
15 does not divest the district court of jurisdiction to continue its supervision, even
16 though in the course of that supervision the court acts upon or modifies the order
17 from which the appeal is taken.”).

18 The Supreme Court teaches that if a party is unsure whether particular conduct
19 would violate an injunction, it may seek clarification or construction rather than risk
20 disobedience and contempt. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192
21 (1949) (“Yet if there were extenuating circumstances or if the decree was too
22 burdensome in operation, there was a method of relief . . . Respondents could have
23 petitioned the District Court for a modification, clarification or construction of the
24 order.”); *see also Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 15 (1945) (“If defendants
25 enter upon transactions which raise doubts as to the applicability of the injunction,
26 they may petition the court granting it for a modification or construction of the
27 order.”); *Regents of the Univ. of Cal. v. Aisen*, No. 15-CV-1766-BEN (BLM), 2016
28 WL 4681177, at *1 (S.D. Cal. Sept. 7, 2016).

1 A person subject to an injunction may ask the issuing court whether the
2 injunction applies to proposed conduct. Even if it amounts to an “advisory opinion,”
3 it is one the court should grant to prevent unwitting contempt. *See Matter of*
4 *Hendrix*, 986 F.2d 195, 200 (7th Cir. 1993) (citing *Regal Knitwear Co. v. NLRB*, 324
5 U.S. 9, 15 (1945)); *see also Daniels Health Scis., LLC. v. Vascular Health Scis.,*
6 *LLC*, 710 F.3d 579, 586 (5th Cir. 2013).

7 Accordingly, VidAngel seeks an order clarifying whether its use of its new
8 technology to filter and stream motion pictures whose copyrights are owned by
9 Plaintiffs would or would not violate the Preliminary Injunction while its appeal of
10 that injunction awaits decision by the Ninth Circuit.

11 **B. VidAngel’s New Technology Complies with the DMCA.**

12 This Court’s order determined that Plaintiffs are likely to prevail on the merits
13 of their claim for violation of the Digital Millennium Copyright Act (“DMCA”)
14 because VidAngel’s earlier method for providing its filtering services involved the
15 decryption of DVD and Blu-ray discs. (Dkt. 144, Order at 6-8.) As explained above,
16 VidAngel’s new technology does not require VidAngel to circumvent any encryption
17 technology. (Quinto Dec. ¶ 6(B) n.1.) Therefore, the DMCA is not implicated by
18 VidAngel’s proposed course of conduct.

19 **C. Although VidAngel’s New Technology Does Involve Some Copying,**
20 **That Copying Is Fair Use.**

21 As explained above, VidAngel’s new technology involves some incidental
22 copying of copyrighted works. Copies of each motion picture available for filtering
23 from VidAngel will be stored in the cloud. The creation of these copies is essential
24 to VidAngel’s tagging process. VidAngel will also create temporary “clips” of
25 segments in which limited portions of the audio or video have been made
26 imperceptible as a necessary step in providing its filtering service. However, all of
27 this conduct constitutes a fair use, and therefore is *not* prohibited by the Copyright
28 Act.

1 The Fair Use Doctrine permits a party to engage in the “reproduction in
2 copies” of a copyrighted work to a certain extent without the copyright owner’s
3 consent. *See* 17 U.S.C. § 107. In granting the preliminary injunction, the Court
4 rejected VidAngel’s argument that the conduct then at issue was protected as a fair
5 use. (Dkt. 144, Order at 13-16.) However, the Court’s order was heavily influenced
6 by its preliminary finding that Plaintiffs were likely to prove that VidAngel’s
7 technology interfered with their ability to maximize profits from streamed content,
8 including by providing earlier access to streaming than licensed services would
9 provide, and at a lower cost. (*Id.* at 17.) Although VidAngel disagrees with those
10 conclusions, its new technology eliminates all doubt as to whether the use is fair. Its
11 new technology is conceptually identical to third-party “time shifting” services that
12 capture streams and re-transmit them later for private family viewing.

13 **1. Purpose**

14 The Copyright Act identifies several purposes for which unauthorized copying
15 can be lawful, including “criticism, comment, news reporting, teaching (including
16 multiple copies for classroom use), scholarship, or research.” 17 U.S.C. § 107.
17 However, this list is not exclusive. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S.
18 569, 577-78 (1994) (“The text employs the terms ‘including’ and ‘such as’ in the
19 preamble paragraph to indicate the ‘illustrative and not limitative’ function of the
20 examples given, . . . which thus provide only general guidance about the sorts of
21 copying that courts and Congress most commonly had found to be fair uses.”
22 (internal citations omitted)). Other legitimate purposes include, but are not limited
23 to, parody, *see Campbell*, 510 U.S. 569, and “time shifting” (i.e., the unauthorized
24 in-home recording of a broadcast performance of a motion picture for later viewing).
25 *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447-456 (1984).

26 Here, the purpose of VidAngel’s limited copying is to enable consumers to
27 enjoy the benefits conferred by Congress in the FMA. Because VidAngel’s purpose
28 serves the public interest, the purpose factor weighs in favor of a finding of fair use.

1 VidAngel’s new technology involves the creation of both temporary and
2 permanent copies. (Quinto Dec. ¶¶ 6-7.) The creation of temporary “working”
3 copies is necessary to permit VidAngel to generate the “tags” that enable customers
4 to select filters, and enable VidAngel to apply those filters. (Quinto Dec. ¶ 6.) The
5 working copies are made only to avoid the risk of corrupting the master files during
6 the tagging process. The “marked up” working copies are not offered for sale.
7 Indeed, they are destroyed the moment the tagging process is complete.

8 VidAngel’s new technology also creates temporary copies of “clips” that have
9 been modified to render objectionable content imperceptible based on a particular
10 customer’s selected filters. The only purpose for creating such copies is to execute
11 the customer’s direction to “mak[e] imperceptible . . . limited portions of audio or
12 video content of a motion picture, during a performance in or transmitted to that
13 household for private home viewing.” 17 U.S.C. § 110(11). VidAngel’s new
14 technology simply replaces the original segment with a segment in which the
15 objectionable content has been made imperceptible. The “clips” are created only
16 when needed, and are destroyed afterwards. The creation of temporary copies is
17 necessary to permit VidAngel to deliver its service to the customer.

18 Finally, VidAngel will create eight permanent copies of each motion picture it
19 offers—each at a different bitrate. The creation of those copies is necessary to
20 ensure that each customer receives a smooth transmission of the content he or she
21 purchased from an LSS. VidAngel will not receive revenue from distributing or
22 performing its copies of the copyrighted works.¹⁸ Rather, any payments to VidAngel
23 will be for the provision of an additional service—namely, filtering. This service
24 was expressly authorized by Congress in the FMA. Therefore, VidAngel’s purpose

25 ¹⁸ Currently, VidAngel customers must pay an existing LSS for the right to receive a
26 video stream. Of course, were Plaintiffs or other copyright owners willing to
27 negotiate an agreement for VidAngel to become a licensed streaming service,
28 customers could both purchase or rent motion pictures from VidAngel, and also
receive VidAngel’s filtering services. VidAngel would, in turn, pay the copyright
owners directly for each license.

1 in creating the very few limited copies that its new technology requires is wholly
2 proper.

3 Plaintiffs may argue that the “purpose” factor of the fair use inquiry weighs
4 against a finding of fair use because VidAngel’s conduct is commercial in nature.
5 However, the commercial nature of VidAngel’s enterprise does not automatically
6 weigh against fair use. Indeed, companies that offer “time shifting” services, such as
7 digital video recorders (DVRs) and streaming proxy services have engaged in fair
8 use copying for profit for years without challenge from copyright owners. PlayOn,
9 for instance, enables customers to record streamed content to an electronic device so
10 it can be viewed later without an internet connection. It is a commercial service that
11 copies movies in their entirety for the express purpose of enabling its consumers to
12 engage in the fair use activity of time shifting. In the eight years of its existence,
13 Plaintiffs have never challenged the legality of PlayOn’s services.

14 Like PlayOn, VidAngel simply wishes to provide a legitimate service to its
15 customers. Whereas PlayOn assists consumers in time shifting, VidAngel helps
16 them enjoy in-home filtering during the performance of movies. The purpose of any
17 copying required by VidAngel’s new technology is only to provide customers with
18 this legitimate service. Most importantly, both the plain language of the FMA and its
19 extensive legislative history clearly evidence an intent to allow third party services to
20 offer filtering technologies to families for a profit. Accordingly, the purpose factors
21 weighs heavily in favor of fair use.

22 **2. Nature of the copyrighted work**

23 The second factor in the fair use analysis is the “nature of the copyrighted
24 work.” VidAngel acknowledges that motion pictures are within “the core of
25 copyright protection.” *See Elvis Presley Enters. v. Passport Video*, 349 F.3d 622,
26 629 (9th Cir. 2003). However, this fact does not tip the balance in favor of Plaintiffs;
27 it simply means that the other relevant factors must be given particularly careful
28 consideration.

1 Similarly, if this case involved a copyrighted work at the margins of copyright
2 protection, that would not itself weigh in favor of permitting copying. Rather, the
3 marginally expressive nature of the work would simply give a court greater leeway
4 when considering, for example, the purpose of copying, or the impact on the market
5 for the copyrighted work. For example, if the copyrighted work at issue were, say,
6 merely a useful object with some copyrightable features (such as a lamp), courts
7 would tolerate a more significant impact on the market by a competing product than
8 if the copyrighted work at issue were, say, a novel or a motion picture.

9 In short, although motion pictures are at the core of copyright protection, the
10 relevant factors—that is, the purpose and effect of the copying implicated by
11 VidAngel’s new technology—weigh heavily in favor of fair use.

12 3. Amount and substantiality of copying

13 The Copyright Act directs courts deciding whether a particular use is fair to
14 consider “the amount and substantiality of the portion used in relation to the
15 copyrighted work as a whole.” 17 U.S.C. § 107(3). This factor is of great importance
16 when the party making use of the copyrighted work claims that the alleged
17 infringement is transformative (such as for purposes of criticism, comment, news
18 reporting, scholarship and parody). *See Campbell*, 510 U.S. at 579-80.

19 Here, however, the “amount and substantiality” factor is irrelevant given the
20 Court’s conclusion—based on Plaintiffs’ argument—that VidAngel’s use is non-
21 transformative.¹⁹ When a proposed fair use involves a non-transformative use of the
22 copyrighted work for a legitimate purpose (such as teaching, research, or time-
23 shifting), it is generally assumed that the use will involve the copying of the entirety
24 of the work. Therefore, the fact that the copying is “substantial” does not weigh
25 against a finding of fair use.

26 _____
27 ¹⁹ Although VidAngel disagrees strongly with the Court’s conclusion that the process
28 of filtering out objectionable content is not transformative, this motion assumes the
Court is correct.

1 For example, a high school teacher may make multiple copies of the entirety
2 of a copyrighted poem or short story for classroom teaching. This conduct would
3 involve the non-transformative copying of an entire copyrighted work. Or, a law
4 student conducting research for a paper might save copies of multiple law review
5 articles on her laptop computer so she can refer to them later without having to
6 repeatedly access an online database. Or, a sports fan whose meeting schedule
7 conflicts with the big game may record the entire broadcast of the event to watch
8 later.

9 While the foregoing examples involve the wholesale copying of copyrighted
10 works which are at the core of copyright protection, they are clearly eligible for fair
11 use treatment. Both teaching and research are expressly approved in the statute as
12 fair uses, and “time shifting” is well-recognized by courts as fair use notwithstanding
13 the assumption that all of these uses will ordinarily involve the reproduction in
14 copies of substantially the entire work. Thus, it would be illogical to weigh either the
15 “nature of the work” or the “amount and substantiality” factors against fair use in
16 these situations. Rather, when the use is not transformative and inherently requires
17 substantial copying, the relevant factors to consider are the purpose of the copying
18 and “the effect of the use upon the potential market for or value of the copyrighted
19 work,” 17 U.S.C. § 107(4). Thus, if the purpose of a non-transformative use is
20 proper and the copying of an entire work does not unfairly impact the market for it,
21 the copying will qualify as fair use. Indeed, unauthorized time shifting was approved
22 largely because copyright owners “failed to demonstrate that [it] would cause any
23 likelihood of nonminimal harm to the potential market for, or the value of, their
24 copyrighted works.” *Sony Corp. of Am.*, 464 U.S. at 456.

25 **4. Market Effect**

26 As one court put it, the question in considering the fourth fair use factor is
27 whether the copying is likely to usurp the market for the original work. *See Blanch*
28 *v. Koons*, 467 F.3d 244, 258 (2d Cir. 2006); *NXIVM Corp. v. Ross Inst.*, 364 F.3d

1 471, 481-82 (2d Cir. 2004). Again, assuming that VidAngel's anticipated copying is
2 not transformative, the most significant factor is whether VidAngel's proposed
3 course of action will usurp the market for Plaintiffs' copyrighted works. That is not
4 the case here. To the contrary, VidAngel's new technology will *increase* Plaintiffs'
5 market without harming its preexisting streaming sales.

6 Plaintiffs' main complaint with VidAngel's previous business model was that
7 it undermined their market for streamed content, which is purportedly more lucrative
8 than the market for DVD and Blu-ray discs. This Court weighed the market effect
9 factor in Plaintiffs' favor, finding that VidAngel's business was likely to fill demand
10 for the original. (Dkt. 144, Order at 15-16.) However, VidAngel's new approach
11 reverses the weight of this factor so that it weighs completely in favor of fair use.

12 Under VidAngel's proposed new method, customers are required to purchase
13 streamed content from an LSS. VidAngel's new service thus *expands* Plaintiffs'
14 market by attracting consumers who would not have otherwise purchased or rented
15 their movies. The Court has already received evidence that 51% of VidAngel
16 customers would not watch the films offered by VidAngel without filtering. (Dkt.
17 43, Declaration of Neal Harmon in support of VidAngel's Opposition to Motion for
18 Preliminary Injunction, ¶¶ 39-40.) But for Plaintiffs' opposition to filtering,
19 VidAngel would have long since purchased streaming licenses from Plaintiffs similar
20 to those enjoyed by Amazon, Google, Netflix and others.

21 In short, the copying required by VidAngel's new technology is a fair use, and
22 will have no deleterious effect on the market for Plaintiffs' motion pictures. Instead,
23 it will significantly increase their market.

24 **D. VidAngel's New Technology Does Not Infringe Performance Rights.**

25 In issuing the Preliminary Injunction, this Court concluded that by streaming
26 content to its customers, VidAngel violated Plaintiffs' right to publicly perform their
27 copyrighted works. (Dkt. 144, Order at 10-11.) Although VidAngel is seeking
28 appellate review of this part of the Court's Order, the proposed new course of

1 conduct will not violate Plaintiffs’ performance right even under the Court’s view of
2 that right.

3 As explained above, VidAngel’s customers will be required to purchase the
4 right to watch streamed content from an LSS. By paying an LSS to rent or purchase
5 a motion picture, VidAngel’s customers obtain the right to receive that content by
6 streaming over the internet. In other words, if the right to receive a video by
7 streaming over the internet is the “relevant product,” then VidAngel customers
8 become the “owners or possessors of the relevant product” by purchasing or renting
9 it from an LSS. *See Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2510 (2014).
10 Any payments received by VidAngel will be for the provision of a filtering service—
11 not for the performance of the video. *Cf. id.* at 2511 (“[W]e have not considered
12 whether the public performance right is infringed when the user of a service pays
13 primarily for something other than the transmission of copyrighted works, such as
14 the remote storage of content.”). Furthermore, VidAngel will not transmit the videos
15 it streams “to a substantial number of people outside of a family and its social
16 circle.” *Id.* Pursuant to the FMA, VidAngel’s services will be explicitly restricted to
17 private viewing.

18 In short, VidAngel’s proposed course of conduct is in complete harmony with
19 this Court’s stated views regarding the public performance right. VidAngel simply
20 seeks to provide its customers with a valuable service—namely, the ability to filter
21 limited portions of audio or video which the customer has the right to stream over the
22 internet.

23 **E. VidAngel’s New Technology Complies with the FMA.**

24 Finally, the Court held that because VidAngel previously streamed videos
25 from copies made from decrypted discs, its services did not satisfy the requirements
26 of the FMA. (Dkt. 144, Order at 12.) While VidAngel disagrees with the Court’s
27 conclusion, its new technology obviates the Court’s concerns. There is no question
28 that VidAngel customers will have purchased or rented authorized copies of the work

1 from an LSS. Moreover, as explained above, VidAngel will not decrypt any discs or
2 otherwise circumvent any technology to create fair-use copies. Because VidAngel's
3 copies are lawfully made pursuant to the fair use doctrine, they are also "authorized"
4 within the meaning of the FMA. The customer's selected filters will be applied to
5 the motion picture during streaming by replacing the unmodified segment containing
6 the objectionable content with a modified "clip" in which that content has been made
7 imperceptible. (Quinto Dec. ¶ 7(H).) These modified clips are created as the video
8 streams, and they are destroyed thereafter. (*Id.*) Therefore, VidAngel's technology
9 will not result in the creation of any fixed copy of an altered version of the motion
10 picture.

11 VidAngel's technology will simply enable members of a private household to
12 choose limited portions of audio or video content of a motion picture they do not
13 wish to hear or view, and to make those limited portions imperceptible during the
14 transmission to that household of an authorized copy of the motion picture. *See* 17
15 U.S.C. § 110(11). It is clearly within the protections of the FMA.

16 **F. VidAngel's New Technology Complies with the Purpose of the**
17 **Preliminary Injunction.**

18 VidAngel's new approach does not violate the first element of the Preliminary
19 Injunction. As explained above, VidAngel's new technology will not require it to
20 decrypt any DVD or Blu-ray disc, nor will it require the circumvention of any
21 technological measures applicable to "any other medium." (Quinto Dec. ¶ 6(B) n.1.)

22 With respect to the second element, VidAngel's proposed service will require
23 it to make permanent copies of Plaintiffs' copyrighted works to be stored in the
24 cloud. (Quinto Dec. ¶ 6(I).) Read literally, the second element of the Preliminary
25 Injunction would prohibit VidAngel from making even lawful copies of Plaintiffs'
26 works. However, the Preliminary Injunction presumably forbids only the **unlawful**
27 copying of those works. As explained above, the copying contemplated by
28 VidAngel constitutes a fair use, and therefore such copying is **not unlawful**.

1 Therefore, VidAngel seeks clarification that VidAngel’s proposed fair use copying of
2 such works is not subject to the Preliminary Injunction. Any copying performed by
3 VidAngel is necessary to carry out a legitimate purpose—i.e., to enable individuals
4 to apply selected filters to motion pictures that they have already purchased or rented
5 *for streaming*—and the copying in question will have no deleterious effect on the
6 market for, or value of, the copyrighted works. No VidAngel customer will receive a
7 stream of a copyrighted motion picture unless that customer is lawfully entitled to
8 receive a stream of it from an LSS.

9 The third element of the Order prohibits VidAngel from “streaming,
10 transmitting or otherwise publicly performing or displaying any of Plaintiff’s
11 copyrighted works” by any means. If interpreted broadly, this element could prohibit
12 a VidAngel employee from purchasing a video from Amazon and using the Amazon
13 app to stream the video over the Internet to her own company laptop. By doing so,
14 the VidAngel employee would literally be “streaming . . . [one] of Plaintiff’s
15 copyrighted works over the Internet . . . , via [a] web application[] . . . , via [a]
16 portable device[].” Again, prohibiting such activity cannot be the intent of the
17 Preliminary Injunction. Indeed, this Court’s Order identified ClearPlay as a party
18 that provides filtering services for streamed content, and stated that the Preliminary
19 Injunction “would not prevent VidAngel or any other company from providing a
20 filtering service similar to ClearPlay’s.” (Dkt. 144 (Order at 20).)

21 VidAngel assumes that the Court meant what it said, and that the Preliminary
22 Injunction does not preclude VidAngel from participating in lawful activity simply
23 because that activity involves streaming. As explained above, VidAngel’s new
24 technology will work “in conjunction with authorized streams from [a licensed
25 streaming service].” (See Quinto Dec. Exh. C, November 14, 2016 Hearing Tr. at
26 30:7 to 31:7.) Furthermore, it will stream only to the “owners or possessors of the
27 relevant product.” *See Aereo, Inc.*, 134 S. Ct. at 2510.

28 Because VidAngel must necessarily participate in the streaming process to

1 provide filtering services, its anticipated approach could be deemed to violate the
2 letter of the Preliminary Injunction even though it clearly does not violate the intent.
3 The intent of the Preliminary Injunction cannot be to prohibit conduct that is
4 unmistakably lawful. Therefore, VidAngel asks that the Court clarify that
5 VidAngel’s new service is in compliance with the Preliminary Injunction.

6 The fourth element of the Preliminary Injunction is a catch-all that essentially
7 orders VidAngel to “obey the law.” It is well settled that “blanket injunctions to
8 obey the law are disfavored.” *Mulcahy v. Cheetah Learning, LLC*, 386 F.3d 849,
9 852 n.1 (8th Cir. 2004); *see also Swift & Co. v. United States*, 196 U.S. 375, 396
10 (1905) (“We cannot issue a general injunction against all possible breaches of the
11 law.”); *Jake’s, Ltd. v. City of Coates*, 356 F.3d 896, 904 (8th Cir. 2004) (court’s
12 order to comply with wide-ranging zoning ordinances was overbroad “command to
13 obey the law”); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F.Supp.2d
14 1197, 1226 (C.D. Cal. 2007) (denying permanent injunction that would prohibit
15 activities “that are far beyond the bounds of this lawsuit.”). Because Plaintiffs will
16 not confirm that VidAngel’s proposed course does not infringe their rights, VidAngel
17 wishes to obtain clarification from the Court before engaging in the contemplated
18 activity.

19 Plaintiffs have conceded—as they must—that filtering does not itself violate
20 any provision of the Copyright Act. Indeed, the FMA expressly permits filtering
21 whether the performance of the motion picture occurs entirely within a private
22 household or by transmission from a third party. *See* 17 U.S.C. § 110(11). As
23 explained above, the end result of VidAngel’s proposed course of conduct will be
24 that private households will have the ability to filter limited portions of audio or
25 video content during the transmission of a motion picture they paid for. Plaintiffs
26 will receive payment for the streaming rights because those rights will be obtained
27 from an LSS—not VidAngel. VidAngel will not circumvent decryption measures,
28 and it will not create a fixed copy of an altered version of any motion picture.

1 Although VidAngel must make incidental copies to provide its filtering service, that
2 copying will be lawful as a fair use. The proposed plan will not infringe any of
3 Plaintiffs' rights.

4 Accordingly, VidAngel requests that the Court clarify the injunction and
5 confirm that VidAngel's new approach is in compliance with it.

6 **G. The Requested Clarification Will Benefit the Parties.**

7 Approving VidAngel to resume business operations will provide significant
8 practical benefits to both sides. If VidAngel is permitted to provide filtering services
9 without fear of contempt, it will be able to fully resume its business. Plaintiffs'
10 damages exposure to VidAngel should the Ninth Circuit find that the Preliminary
11 Injunction was improvidently granted would be partially mitigated and Plaintiffs'
12 exposure for such damages would be reduced.

13 **IV. Conclusion**

14 For the foregoing reasons, VidAngel respectfully requests that the Court issue
15 the [Proposed] Order clarifying the Preliminary Injunction issued herein and
16 confirming that VidAngel's use of its new technology in connection with Plaintiffs'
17 motion pictures will not violate the Preliminary Injunction.

18

19 DATED: June 19, 2017

Respectfully submitted.

20

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