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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 REPLY IN SUPPORT
OF MOTION TO CLARIFY OR
CONSTRUCT PRELIMINARY
INJUNCTION ORDER (DKT. 144)**

[Meldal Decl. and Quinto Supp. Decl.
filed concurrently herewith]

The Hon. André Birotte Jr.

Date: July 24, 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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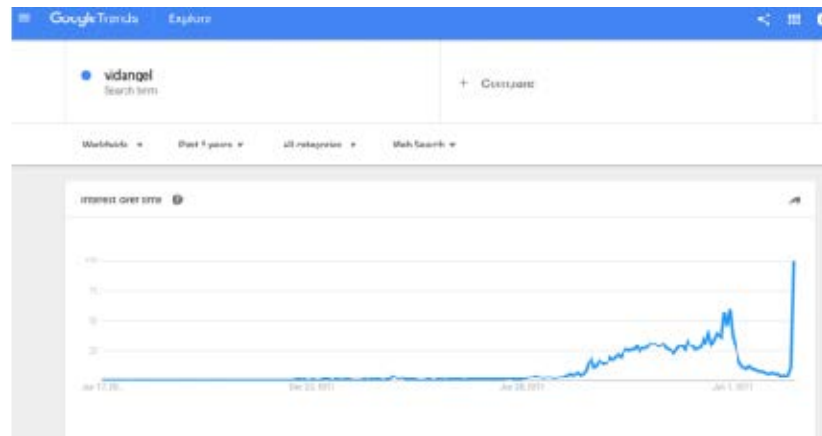
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1 **I. PRELIMINARY STATEMENT**

2 Plaintiffs¹ claim they do not oppose filtering. To prove it, their attorney, Kelly
3 Klaus, filtered Exhibit G to his declaration in opposition to VidAngel’s motion. He
4 attached a purported printout from VidAngel’s Web site explaining that owing to its
5 discovery of a “bug,” VidAngel had extended the free trial period. But in doing so,
6 he removed the Google Trends graphic showing what caused the difficulty²:



14 **DISNEY'S SUBMISSION**

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14 **ORIGINAL BLOG POST**

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26 ¹ “Plaintiffs” refers collectively to Disney Enterprises, Inc., LucasFilm Ltd., LLC, Twentieth Century Fox Film Corporation, and Warner Bros. Entertainment, Inc.

27 ² The Google Trends graphic depicts the public interest in VidAngel. The December
28 2016 peak shows when VidAngel’s legacy service was enjoined while the June 2017
28 peak shows when its new service was announced.

1 Mr. Klaus also refused to accept VidAngel’s offer to allow Plaintiffs’ expert to
2 examine *all* the source code it uses—its own and third-party, legacy and new—and
3 to allow Plaintiffs’ expert to speak directly with VidAngel’s head software developer
4 to get answers to any questions he might have. Plaintiffs refused this offer because,
5 as reflected in the accompanying declaration of Sigurd Meldal, VidAngel offered
6 more than enough information to allow any competent software engineer to answer
7 the “open questions” posed by Plaintiffs’ expert, Robert Schumann. Such willful
8 blindness does not establish a likelihood of injury, irreparable or otherwise.

9 Desperate to tarnish VidAngel, Plaintiffs also devoted two paragraphs of the
10 Klaus declaration to attempting to prove that VidAngel’s new service violates both
11 Netflix’s and Amazon Video’s terms of use, notwithstanding that neither Netflix nor
12 Amazon Video have ever made that contention and Plaintiffs plainly lack standing to
13 raise the issue.

14 Notwithstanding their pious statements concerning filtering, Plaintiffs have
15 now been thoroughly outed that they are trying to kill filtering. VidAngel’s moving
16 papers pointed out that much larger services that have operated much longer than
17 VidAngel—Boxee and PlayOn—have long done everything VidAngel does—other
18 than filter—without objection from Plaintiffs. Because that is undeniable, Plaintiffs’
19 opposition memorandum entirely ignores that unpleasant fact.

20 Plaintiffs also do not dispute that VidAngel’s new service has eliminated
21 decryption and *every* alleged market injury they pointed to in seeking the preliminary
22 injunction. At the same time, though, they ignore that this Court’s finding of
23 likelihood of success at trial assumed that Plaintiffs would prove that VidAngel
24 violated the Digital Millennium Copyright Act (“DMCA”) by decrypting motion
25 pictures (which, *ipso facto*, would be sufficient to enjoin VidAngel’s service) and
26 further assumed that fair use would not provide a defense to the alleged Copyright
27 Act § 106 violations (copying and public performance) owing to Plaintiffs’ alleged
28 irreparable injuries. But the DMCA is now off the table and Plaintiffs have offered

1 no *evidence* of any injury. Instead, Plaintiffs bizarrely speculate that *if* Amazon
2 Prime or Netflix customers who also subscribe to VidAngel have a poor experience,
3 they *might* cease watching streamed movies altogether.

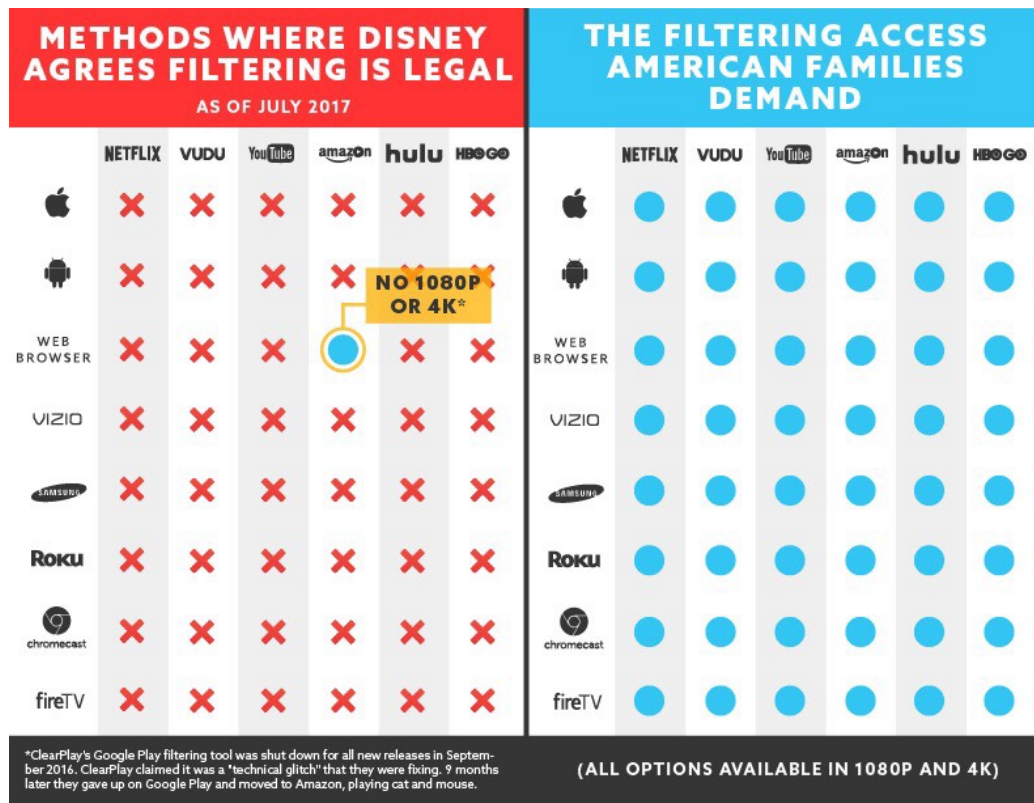
4 Plaintiffs also disingenuously attack the quality of VidAngel’s new service
5 notwithstanding that: (i) as determined by an independent ratings service,
6 VidAngel’s quality is significantly better than the quality of Plaintiffs’ Disney
7 Movies Anywhere and WB Movies All Access services; (ii) VidAngel’s quality is
8 significantly better than ClearPlay’s highly unpopular service that Plaintiffs hold out
9 as the paragon of virtue; and (iii) if Plaintiffs wanted to improve the quality of
10 streamed filtered content, they would issue licenses to filtering services so that they
11 could exercise quality control over their streaming.

12 Let there be no doubt that ClearPlay is unable to offer a service consumers
13 find acceptable. In arguing for the preliminary injunction last November, Mr. Klaus
14 touted ClearPlay’s ability to provide filtered, streamed content by riding on Google
15 Play when, in fact, its ability to do so with respect to new releases had been
16 terminated on September 3. (Ten months later, it is not possible to watch *any* movies
17 filtered by ClearPlay using Google Play.) Having lost its ability to filter content
18 streamed by Google Play, ClearPlay is now relying on a platform that works *only*
19 with Amazon, does not (and never will) permit filtering of high-definition content
20 (“HD”) (today, 1080p or 4k content), offers hundreds fewer possible titles than are
21 available through VidAngel, offers many, many fewer filters than VidAngel enables
22 its customers to select, and briefly freezes the motion picture whenever an image is
23 filtered.

24 But Plaintiffs tout ClearPlay’s service because they are trying to promote the
25 *worst* filtering services for a cynical reason. In the short term, they hope to defeat
26 VidAngel’s ongoing efforts to persuade Congress to clarify the Family Movie Act
27 (“FMA”) by rejecting VidAngel’s proposed amendment to it. But as he did in
28 2003—before his 2004 introduction of legislation resulting in the Family Movie Act

1 (“FMA”)—Senator Orrin Hatch (joined by the rest of Utah’s Congressional
 2 delegation)—has asked content owners, directors, and ClearPlay to work with
 3 VidAngel to reach a business solution.

4 Plaintiffs cynically hope that because some filtering services exist, they can
 5 argue against any legislative fix by pointing to the existence of such
 6 “services.” And, if only poor quality filtering services are allowed to exist, they will
 7 eventually fail commercially and Plaintiffs will have achieved their objective to deny
 8 families the ability to watch filtered content in private. (Plaintiffs’ hopes in this
 9 regard recently suffered a blow when Sony offered to make 24 motion pictures
 10 filtered for airline use available for streaming to families only to have the Directors
 11 Guild of America (“DGA”) object that doing so violated the terms of its collective
 12 bargaining agreement with the studios. As a consequence, Sony was forced to stop
 13 offering those titles.) The following graphic illustrates some of the limitations of
 14 ClearPlay’s technology:



1 Notwithstanding that VidAngel required 45 minutes just to get *Hacksaw Ridge*
2 streamed on a browser from ClearPlay without crashing (without 1080p or 4k which
3 are prohibited by the studios on browsers), when the movie was finally transmitted,
4 problems that detracted from the viewing experience were obvious as the movie
5 often froze briefly before a filter. VidAngel counted approximately 65 instances of
6 freezing during a single performance of the movie. Examples of ClearPlay's poor
7 filtering of *Hacksaw Ridge* may be accessed at: <http://blog.vidangel.com/clearplay>.

8 Hoping to prevent their motion pictures from being filtered notwithstanding
9 their purported non-objection to filtering, Plaintiffs also advance the irrational
10 argument that clarifying or constructing the Preliminary Injunction to determine
11 whether it bars a technology that the Court necessarily could not consider earlier
12 would "alter the status" of the preliminary injunction appeal (and even "divest" the
13 Ninth Circuit Court of Appeals of jurisdiction to decide it). Plaintiffs' poppycock
14 argument ignores that: (i) VidAngel is not asking the Court to alter one word of the
15 Preliminary Injunction; (ii) Plaintiffs still want VidAngel's use of its prior
16 technology enjoined (as reflected in VidAngel's motion for clarification scheduled
17 for hearing on July 31, 2017); and (iii) Plaintiffs would still be entitled to go to trial
18 and seek damages based on VidAngel's past use of the enjoined technology. And,
19 of course, this argument ignores both that this Court has not made any irreparable
20 harm finding with respect to VidAngel's new technology, which causes none, and
21 that the Court was perforce unable to examine VidAngel's new technology through
22 the fair-use prism last November.

23 **II. PLAINTIFF'S BRIEF CONFIRMS THAT PLAINTIFFS OPPOSE**
24 **VIDANGEL'S NEW SERVICE ONLY BECAUSE VIDANGEL**
25 **FILTERS CONTENT**

26 Other than filter content, VidAngel does *nothing* that much larger and longer
27 established proxy streaming services have not also done for years without objection
28 from Plaintiffs. VidAngel's moving papers showed that PlayOn and Boxee both
made or make for retransmission copies of Plaintiffs' copyrighted works to give

1 customers flexibility in accessing authorized copyright content that they have
2 legitimately purchased, as does VidAngel. (VidAngel’s Motion to Clarify (“Mot.”)
3 at 9-12, 15-16; Declaration of David Quinto dated June 19, 2017 (“Quinto Dec.”),
4 Exs. D-P.) The *only* meaningful difference between those streaming proxy services
5 and VidAngel is that VidAngel adds the extra element of filtering.

6 Plaintiffs do not dispute that VidAngel correctly characterized those services
7 in its motion. They make no mention of PlayOn or Boxee in their 23-page brief, 6-
8 page Cittadine Declaration, 7-page Klaus Declaration, or 13-page Schumann
9 Declaration. They also do not dispute that *any* concern they might honestly and
10 legitimately have concerning VidAngel’s service would apply equally to PlayOn’s
11 service. And yet for eight years they have not voiced any objection to PlayOn (and
12 did not object to Boxee before that).

13 Plaintiffs’ studied silence exposes all their purported arguments as excuses, not
14 reasons, for opposing a service that would not cause them a care in the world – but
15 for the fact that it allows the filtering of objectionable content.

16 Plaintiffs might point to a distinction without a difference: VidAngel streams
17 from just eight “master” copies of each title whereas PlayOn streams from thousands
18 of individual copies. That means, of course, that PlayOn creates far more copies of
19 each of Plaintiffs’ motion pictures than VidAngel does. While VidAngel could filter
20 thousands of individual copies, doing so would provide no benefit whatever to
21 Plaintiffs and would needlessly degrade the quality of VidAngel’s filtering while
22 increasing the cost that VidAngel’s customers would have to pay. Requiring
23 VidAngel to filter individual copies would therefore run counter to the public policy
24 expressed by Congress in enacting the FMA – that family friendly filtering should be
25 both affordable and widely accessible. 150 CONG. REC. H7654-01 (Sept. 24, 2004);
26 151 CONG. REC. H2114-01 (Apr. 10, 2005).

1 **III. PLAINTIFFS DO NOT DISPUTE THAT VIDANGEL’S NEW**
2 **TECHNOLOGY HAS ELIMINATED EVERY MARKET CONCERN**
3 **THEY DEMONSTRATED IN SEEKING THE PRELIMINARY**
4 **INJUNCTION**

5 In seeking the Preliminary Injunction, Plaintiffs argued that VidAngel’s 2015-
6 16 business model that relied on the lawful purchase of DVDs might cause them
7 irreparable harm by disrupting established streaming markets. Plaintiffs argued that
8 if consumers chose to watch VidAngel, not because they wanted to watch filtered
9 content but because doing so was less expensive than using a licensed streaming
10 service (“LSS”), Plaintiffs’ ability to negotiate favorable deals with LSSs might be
11 undercut. Plaintiffs also offered evidence for the argument that the same feared
12 phenomenon might undercut their ability to vary their release cycles by offering
13 streamed content for purchase before offering streamed content for rental and might
14 reduce their ability to offer a preferential agreement to an individual LSS to allow it
15 to begin streaming new content before its competitors were authorized to do so. In
16 seeking the preliminary injunction, Plaintiffs did not offer evidence of any other
17 potential injury.

18 Plaintiffs do not dispute that VidAngel has put to rest every one of those
19 concerns. They offer no evidence of any other economic, much less irreparable,
20 harm. By their silence, they concede that VidAngel’s new service does not raise the
21 specter of any irreparable injury.

22 **IV. PLAINTIFFS INSTEAD OFFER RANK AND IRRATIONAL**
23 **SPECULATION CONCERNING AN IMAGINED INJURY**

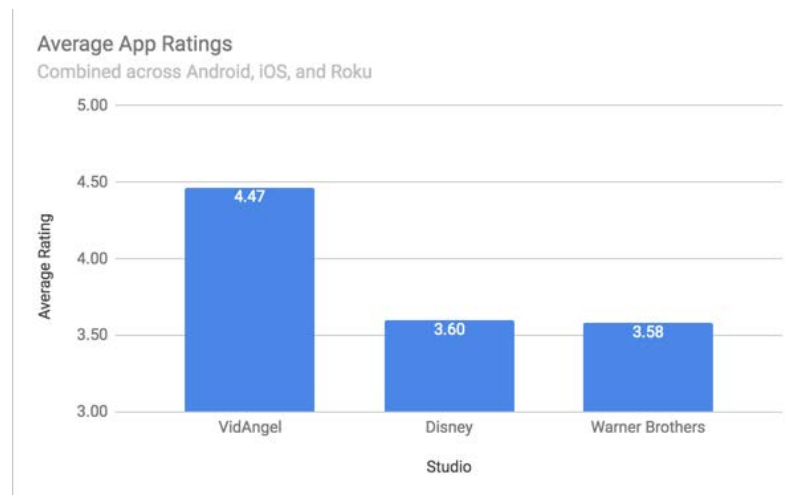
24 Having no logical basis to argue that VidAngel’s new service might cause
25 them to suffer an irreparable injury, Plaintiffs instead speculate that *if* consumers
26 have a terrible experience watching content using VidAngel, they *might* conclude
27 that all streaming services are bad and *might* therefore decide not to watch Plaintiffs’
28 content using an LSS. The absurdity of that argument is stunning. After all, only
consumers *who are already customers of an LSS* may subscribe to VidAngel. Such

1 customers would perforce have used a streaming service whose quality Plaintiffs
2 approved *before* turning to VidAngel.

3 Beyond that, Plaintiffs’ argument assumes that families who choose to watch
4 content using VidAngel have never before watched any other streaming service—
5 *e.g.*, YouTube, broadcast clips shown by online news services, videos posted on
6 Facebook, video links forwarded by e-mail, etc.—and that customers who had *never*
7 before watched any streamed content *would* watch an LSS if VidAngel’s service
8 were unavailable.

9 Still further, Plaintiffs’ contention that they care about the quality of
10 VidAngel’s service ignores at least two critical facts. First, if Plaintiffs truly cared
11 about quality, they would license filtering services to stream because a license brings
12 with it the right to exercise quality control. However, they have never licensed any
13 filtering service—including ClearPlay—to stream. Second, Plaintiffs do not dispute
14 that any service that rides on top of a stream and attempts to filter it in transit will
15 necessarily offer a poorer experience to consumers than a service that operates as
16 VidAngel’s does.

17 The final absurdity of Plaintiffs’ professed quality control concern is that
18 according to an independent ratings service, Disney Movies Anywhere and WB
19 Movies All Access have much lower consumer satisfaction scores than VidAngel
20 enjoys:



1 (Quinto Supp. Decl., ¶ 16.)

2 If Plaintiffs were truly concerned that poor streaming services might dissuade
3 consumers from watching streamed movies, they would improve their own service.

4 **V. PLAINTIFFS IN FACT WANT FILTERING SERVICES TO HAVE
5 POOR QUALITY**

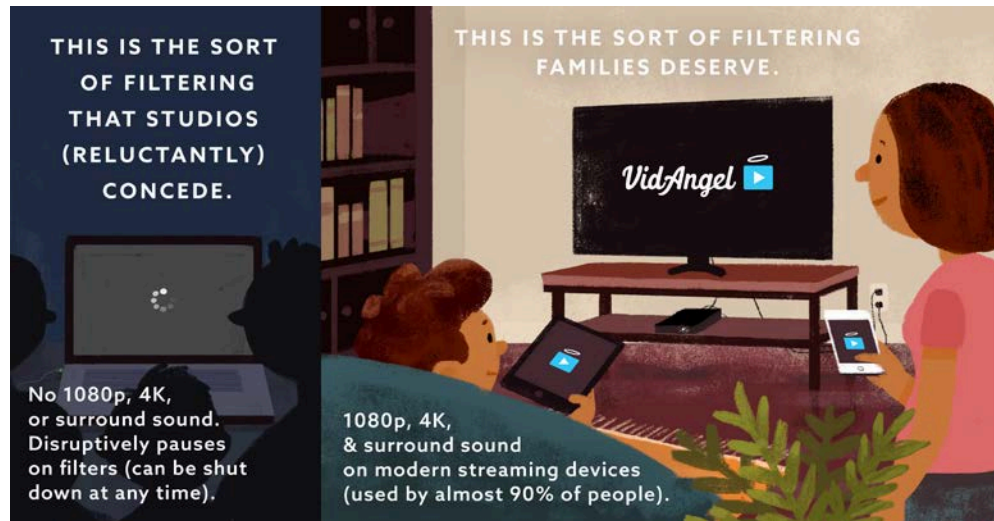
6 One would think that because VidAngel has eliminated decryption, eliminated
7 every alleged harm Plaintiffs offered any evidence at all to support, and based its
8 new system on the purchase of authorized streams from LSSs as Plaintiffs previously
9 told both this Court and the Ninth Circuit it should, Plaintiffs would now approve of
10 VidAngel's new technology. But they do not for an obvious reason: Plaintiffs
11 oppose filtering. Their strategy to defeat filtering is also obvious. If only the poorest
12 quality filtering services are allowed to operate, they will never be successful and
13 will ultimately fail. Until then, Plaintiffs can point to the existence of those filtered
14 streams as evidence that the FMA "works" and that VidAngel's proposed
15 amendment to it is unnecessary. (The amendment VidAngel has proposed to the
16 Copyright Act is attached to the Supplemental Quinto Declaration as Exhibit D.)³

17
18 ³ As Congress did during 2003-04, it is trying to persuade the stakeholders to
19 negotiate an agreement to allow American families to enjoy filtered content in
20 private, specifically by allowing American families to have filtered content streamed
21 to them. The senator who sponsored the FMA in the Senate, Orrin G. Hatch, has
22 again taken the lead. Following months of communications directly with interested
23 parties and indirectly through their lobbyists, Senator Hatch, joined by Senator Mike
24 Lee and Representatives Mia B. Love, Rob Bishop, and Chris Stewart, wrote to,
25 among others, the Motion Picture Association of America ("MPAA"), the Directors
26 Guild of America ("DGA"), the Producers Guild of America, the Internet and
27 Television Association of America, and even VidAngel's competitor ClearPlay.
28 Senator Hatch and the other co-authors of the letter observed that:

24 "At the time the FMA was passed, most home viewing of movies occurred via DVD.
25 That is no longer the case. The advent and increasing popularity of online streaming
26 has transformed the way Americans watch movies. Gone are the days when most
27 people traveled to a video rental store, or purchased a DVD, to watch a movie at
28 home. Nowadays when someone wants to watch a movie, more likely than not he or
she goes on Netflix, Amazon, or other streaming service; selects the movie; and then
streams it directly onto a computer or linked device."

(Quinto Supp. Decl., ¶ 18, Ex. H.)

1 That Plaintiffs support poor quality filtered streaming services while seeking
2 to prevent the best one from operating is illustrated in the following comparison:



12
13 (Quinto Supp. Decl., ¶ 14.)

14 Plaintiffs know that VidAngel’s competitors will never succeed using their
15 technologies. This is reflected by the current number of persons each competitor has
16 listed on its Chrome application: ClearPlay has only 5,514 persons listed, while
17 Cleanstreamit has 151 and UFilter has but 111. (*Id.*, ¶ 15 Exs. E-F.) VidAngel
18 knows from its own experience that the number of actual users those services have is
19 likely to be *much* lower than the number of persons listed on the basis of having
20 expressed interest in using the Chrome extension. (*Id.*)

21 **VI. PLAINTIFFS’ TRUE MOTIVATION TO KILL FILTERING IS ALSO**
22 **REFLECTED IN THEIR LATEST ATTEMPT TO TARNISH**
23 **VIDANGEL**

24 Never mind that VidAngel’s service is deemed vastly superior to Disney’s and
25 Warner Bros.’s own services and never mind that *all* new technologies have bugs
26 that must be corrected, be that new technology a Windows operating system, an
27 Apple iPhone, a new aircraft, or anything else. Plaintiffs insisted that they be
28 allowed to take discovery of all VidAngel’s communications with its customers
including, in particular, customer complaints. (Quinto Supp. Decl., ¶ 9.) Their

1 attorney, Kelly Klaus, attached examples of such complaints—all made during
2 VidAngel’s testing period when its customers were not being charged—to his
3 declaration. Remarkably, Mr. Klaus (who earlier argued to the Court in November
4 that VidAngel could stream movies using the same method as ClearPlay purportedly
5 used notwithstanding that ClearPlay’s ability to stream new movies had been
6 terminated more than two months earlier⁴) filtered an exhibit to his declaration in
7 opposition to this motion. Exhibit E purported to show a screen capture of e-mail
8 messages concerning a bug in VidAngel’s new system but, as shown in Exhibit B to
9 the Supplemental Quinto Declaration, Mr. Klaus filtered out and secretly redacted a
10 Google Trends chart showing there was more public interest in VidAngel after it
11 announced its new service than in December, when the Preliminary Injunction
12 enjoined its legacy disc-based service, despite Plaintiffs’ attempts to promote
13 ClearPlay’s service. (*Id.*, ¶ 10.)

14 **VII. PLAINTIFFS ARE RELYING ON THEIR WILLFUL BLINDNESS TO** 15 **OPPOSE VIDANGEL’S MOTION**

16 As reflected in their recent, unsuccessful *ex parte* application to strike
17 VidAngel’s motion altogether or, at a minimum, forestall any ruling on it for many
18 months, Plaintiffs have made a calculated gamble. When VidAngel wrote to them in
19 mid-January describing its then contemplated service in great detail, Plaintiffs
20 thought about how to respond for 13 days before adopting the ostrich defense and
21 burying their heads in the sand. (Supp. Quinto Decl., ¶ 2.) They did not ask any
22 questions. (*Id.*) They did not express any concerns specific to the proposed

23 ⁴ ClearPlay has never been able to resume filtering and streaming Google Play
24 movies and television shows. Notably, Plaintiffs were unconcerned then that
25 VidAngel had received a violation of terms of service notice from Google several
26 years ago when it offered a service similar to ClearPlay’s current service and are
27 unconcerned now that ClearPlay’s current service also violates those terms of
28 service. As VidAngel explained to this Court in opposing the preliminary injunction
motion, streaming services such as ClearPlay’s rely on the goodwill of LSSs and the
DGA. Coincidentally, even Sony’s recent attempt to offer two dozen family friendly
airline versions of its movies was thwarted by the DGA. (Quinto Supp. Decl., ¶ 11
Ex. C.)

1 technology. (*Id.*) They did not even ask to be kept apprised of the status of
2 VidAngel's development efforts or to be notified when alpha and beta testing began.
3 (*Id.*)

4 Twice more VidAngel reached out to Plaintiffs to raise questions concerning
5 VidAngel's impending resumption of its filtering service using its new technology
6 and still Plaintiffs chose not to ask questions, express specific objections, or request
7 to be kept apprised of VidAngel's progress.

8 On June 13, with great fanfare and a live stream (watched live by over 50,000
9 persons and all told by close to a quarter million persons), VidAngel announced its
10 new technology and the resumption of its service. And still Plaintiffs chose not to
11 ask questions, express specific objections, or request to be kept apprised. (*Id.*, ¶ 13.)

12 On June 19, VidAngel filed its motion asking the Court to clarify or construct
13 the preliminary injunction. (Dkt. 182.) On June 20, Plaintiffs raised questions
14 concerning VidAngel's new service for the first time. (Supp. Quinto Decl., ¶ 4.)
15 The questions they raised were, however, both anticipated by and answered in
16 VidAngel's moving papers. Plaintiffs' request to delay any ruling on VidAngel's
17 motion for five or more months was an obvious artifice. (*Id.*) The Court responded
18 by ordering Plaintiffs to respond to VidAngel's motion now. (Dkt. 186.)

19 Once again, Plaintiffs have claimed they need discovery, though this time it is
20 different discovery than they needed two weeks ago. As before, they claim that
21 because they do not have this discovery, VidAngel's motion should be denied, but
22 they are playing ostrich. Although Plaintiffs say they want to understand how
23 VidAngel's new technology works, they demanded to discover a lot more than that
24 *and refused to accept discovery sufficient to satisfy their purported concern.*

25 Specifically, VidAngel *agreed* to disclose to Plaintiff's expert:

26 The source code for VidAngel's new service. Specifically, the source
27 code for (i) accessing the video and audio output from the LSS; (ii) all
28 copying of video and audio output originating from the LSS;
(iii) streaming files from any server copies to users; and

1 (iv) interactions with the LSS, including “monitoring” the user’s LSS
2 account while VidAngel is streaming to the user. To the extent that
3 VidAngel’s new service uses third party source code, applications or
4 tools in connection with any of the foregoing, Plaintiffs request that
5 VidAngel provide Plaintiffs with the name of, any instructions or
6 operating configurations for, and access to such third-party source
7 code, applications or tools. If feasible (and provided it does not limit
8 Plaintiffs’ ability to inspect the source code), Plaintiffs’ expert will
9 review all source code responsive to this request remotely, with a
10 login and full access to VidAngel’s backend system.

11 (Supp. Quinto Decl., ¶ 6 Ex. A.)

12 VidAngel also offered to disclose the source code related to digital rights
13 management:

14 As you know, much of VidAngel’s source code used in the current
15 technology is borrowed from its legacy system, as to which plaintiffs
16 have already had discovery. That includes, for example, the source
17 code related to DRM/security. Because plaintiffs have previously had
18 discovery of the legacy software, VidAngel’s proposal allows them a
19 second bite at the apple. Put another way, our proposal affords
20 plaintiffs more than we believe they are entitled to.

21 (*Id.*, ¶ 7.)

22 To aid Plaintiffs’ expert in understanding precisely how VidAngel’s new
23 technology operates, VidAngel volunteered to allow Plaintiffs’ expert to speak
24 directly to VidAngel’s chief programmer to ask questions “related to understanding
25 the code and its functionalities.” (*Id.*, ¶ 8.)

26 As Dr. Meldal testifies, VidAngel’s offer to allow Plaintiffs “to review source
27 code and third-party tools for VidAngel’s new technology would have enabled
28 Plaintiffs to fully investigate their alleged concerns about possible circumvention of
29 technological protection measures, quality control issues and content security risk.”
(Declaration of Sigurd Meldal dated July 10, 2017 (“Meldal Decl.”), ¶ 4.) A source
code review would have permitted Plaintiffs to fully investigate whether any of these

1 concerns had any real merit. (*Id.*, ¶¶ 14-15.) In fact, because VidAngel uses a form
2 of agile development for its systems development processes, the source code, third
3 party tools and instructions for their use are “the primary documentation of the
4 system.” (*Id.*, ¶¶ 11-13.) Further, in an important sense, VidAngel *exceeded*
5 Plaintiffs’ requests in those areas by offering to allow its expert to put questions
6 directly to VidAngel’s programming wizard rather than requiring that Plaintiffs’
7 expert speculate concerning how VidAngel’s programs work or why those programs
8 are written as they are. (*See id.*, ¶ 8 (an offer to permit a party’s expert to speak with
9 the actual programmers is “an unusual accommodation to assist in a source code
10 review).)

11 A source code review and inspection of third party tools and instructions
12 would have laid to rest each of Plaintiffs’ alleged concerns related to circumvention,
13 quality control, and content security. Plaintiffs’ expert, Mr. Schumann, has posed
14 several questions he purportedly needs answered before he can render an opinion
15 concerning whether VidAngel’s new technology illegally circumvents technological
16 protection measures. (It does not.) But his questions easily could have been
17 answered by a source code review, had Plaintiffs permitted it. Such a review would
18 have revealed how a VidAngel tagger “access[es]” or “consume[s]” the stream, the
19 specific media player and additional tools used, and other information sought by Mr.
20 Schumann. (*Id.*, ¶¶ 17-23.)

21 Likewise, a source code review would have allowed an ordinarily competent
22 expert to determine the quality of the content delivered by the VidAngel technology.
23 (*Id.*, ¶¶ 24-25.) It would not be necessary for such an expert to review
24 communications between VidAngel and its users concerning their perception of the
25 reliability or quality of VidAngel’s new technology to obtain objective information
26 about the quality of VidAngel’s filtered content. (*Id.*)

27 A source code review also would have provided all the information needed by
28 an ordinarily competent expert to evaluate VidAngel’s digital rights management and

1 other security protections. (*Id.*, ¶ 26.) It would not be necessary for an ordinarily
2 competent expert to review VidAngel’s technical manuals, design documents, or
3 other internal instructions or guidelines. (*Id.*) In fact, those documents could be
4 misleading and inaccurate if they contradicted the source code or third-party software
5 tools or instructions in actual operation. (*Id.*)

6 Knowing that a source code review would prove that VidAngel’s new
7 technology operates as described in the Quinto Declaration and poses no harm
8 whatsoever, Plaintiffs instead conditioned *their acceptance* of VidAngel’s offer of
9 free discovery on other things. They insisted that unless VidAngel *also* gave them
10 discovery irrelevant to deciding this motion and useful only to attempting to unfairly
11 discredit VidAngel in the press and to Congress—including presentations made to
12 investors, Board documents, and customer complaints—they would not accept the
13 discovery VidAngel offered to provide. (*See id.*, Ex. 1.) Schumann himself did not
14 even suggest that investor presentations or Board documents bear any relevance
15 whatsoever to his analysis. Indeed, accepting VidAngel’s offer would have ended
16 Plaintiffs’ ability to suggest that somehow, somewhere, some evil lurks in
17 VidAngel’s new technology and would have rendered the Schumann declaration
18 entirely unnecessary.

19 That those concerns are merely purported, not genuine, is evidenced by the
20 fact that, as set forth in paragraph 6 of the Declaration of David W. Quinto dated
21 June 22, 2017 (filed in opposition to Plaintiffs’ *ex parte* application), the DRM and
22 security-related aspects of VidAngel’s current technology are unchanged from the
23 now enjoined technology—as to which Plaintiffs were allowed to, and did, conduct
24 discovery a year ago. That Plaintiffs’ claimed concerns are makeweight is also
25 reflected in the fact that notwithstanding the tremendous success VidAngel enjoyed
26 prior to the injunction—offering thousands of motion pictures to over 1,000,000
27 viewers—Plaintiffs have never pointed to even one breach of VidAngel’s security or
28 any injury whatever resulting from VidAngel’s use of the security and DRM aspects

1 of its technology. (Quinto Supp. Decl., ¶ 17.)

2 **VIII. PLAINTIFFS’ CONTENTION THAT IRREPARABLE INJURY IS NOT**
3 **AT ISSUE IGNORES THE LAW**

4 Plaintiffs’ argument that the Court need not address (the absence of)
5 irreparable injury ignores that a showing of irreparable injury is the cornerstone of
6 any preliminary injunction. The issuance of a preliminary injunction for a particular
7 course of conduct requires an independent showing that that conduct is likely to
8 cause irreparable injury. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392-3
9 (2006); *Flexible Lifeline Sys. v. Precision Lift, Inc.*, 654 F.3d 989, 995-996 (9th Cir.
10 2011) (requiring an “independent showing” that plaintiff was likely to suffer
11 irreparable harm).

12 Plaintiffs made that showing to the Court’s satisfaction with respect to
13 VidAngel’s prior, disc-based technology. They have not come close to making it
14 with respect to VidAngel’s current technology. Before both this Court and the Ninth
15 Circuit, Plaintiffs argued that filtered streaming services requiring the lawful
16 purchase of an authorized stream from an LSS would satisfy the protections for
17 coverage under the FMA, codified in major part at 17 U.S.C. § 110(11). They also
18 argued in the alternative that VidAngel could not prevail on a fair use defense when
19 it decrypted DVDs to offer a service that might undercut their streaming service
20 pricing (a harm not at issue now).

21 But VidAngel has developed a new technology that overcomes the purported
22 harms caused by its old technology that Plaintiffs argued and this Court
23 found. Plaintiffs devote pages 8-12 of their opposition to proving what VidAngel’s
24 moving papers expressly conceded: VidAngel (like PlayOn and Boxee) makes copies
25 and, as interpreted by this Court, engages in public performances when it streams
26 individually filtered content to specific families for private viewing. But now,
27 however, the analysis of whether VidAngel violates the exclusive rights of copyright
28 in doing so is vastly different because the fair use analysis is vastly

1 different. VidAngel is providing a service that is expressly and unanimously
2 endorsed by Congress, a service Congress has found American families should be
3 able to enjoy. And it is doing so without causing *any* injury to Plaintiffs (or other
4 content owners).

5 At trial, Plaintiffs might (or might not) persuade the jury that VidAngel's new
6 service is not a fair use and therefore infringes but, having failed to show irreparable
7 injury, Plaintiffs are not entitled to that presumption now.

8 **IX. HOPING TO AVOID A MERITS DETERMINATION OF**
9 **VIDANGEL'S MOTION, PLAINTIFFS HAVE ATTACKED A STRAW**
10 **ARGUMENT REGARDING THE COURT'S JURISDICTION**

11 Even while an appeal of a preliminary injunction is pending, the district court
12 retains jurisdiction to clarify or construct the injunction to preserve the *status quo*
13 and supervise ongoing compliance. *Hoffman v. Beer Drivers & Salesmen's Local*
14 *Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976) (holding that the general rule
15 that an appeal deprives the district court of jurisdiction "should not be applied in
16 those cases where the district court, as here, has a continuing duty to maintain a
17 *status quo*"); *Natural Resources Defense Council, Inc. v. SW. Marine Inc.*, 242 F.3d
18 1163, 1166-67 (9th Cir. 2001) (clarifying a preliminary injunction pending appeal to
19 ensure that the underlying purpose of the injunction was effectuated).

20 Moreover, district courts routinely clarify the scope of preliminary injunctions
21 to preserve the *status quo* when new facts raise doubts as to the injunction's
22 applicability. *See Robinson v. Delicious Vinyl Records Inc.*, 2013 WL 12119735, at
23 *2 (C.D. Cal. Sept. 24, 2013) (clarifying the particular ways which defendants were
24 enjoined from using the trademark "Pharcyde"); *Commodores Entm't Corp. v.*
25 *McClary*, 2015 WL 12850563, at *1 (M.D. Fla., Feb. 5, 2015) (clarifying that the
26 injunction was intended to enjoin defendants from infringing certain trademarks both
27 in the U.S. and in foreign territories after defendants had arranged to perform
28 abroad).

1 Here, VidAngel is not seeking a merits determination that its new technology
2 and service are lawful, nor is it seeking to alter this Court’s decision that VidAngel’s
3 legacy disc-based service be enjoined.

4 As shown above, VidAngel is simply seeking a clarification or construction of
5 the Preliminary Injunction that its *new* technology and service are not subject to the
6 Preliminary Injunction. The Preliminary Injunction would otherwise remain
7 unchanged and the *status quo* involving VidAngel’s enjoined technology would be
8 preserved.

9 Plaintiffs have attacked a straw argument by attacking “disguised motions for
10 declaratory relief.” (Plaintiffs’ Opposition to VidAngel’s Motion to Clarify (“Opp.
11 Mem.”) at 7-8.) VidAngel is not seeking a determination that its product would “not
12 constitute an infringement of either of the two mechanical patents in suit,” as in *Velo-*
13 *Bind, Inc. v. Minnesota Mining & Manufacturing Co.*, 647 F.2d 965 (9th Cir. 1981),
14 nor is seeking “to circumvent the [rights holders’] right to a trial of the fact issues by
15 a jury,” as in *Atiyeh v. Filtex Corp.*, 130 F. Supp. 196, 97 (S.D. Cal. 1955). The
16 principal cases Plaintiffs rely on for this misdirection are easily distinguished. In
17 *Pacific Bioscience Laboratories, Inc. v. Home Skinovations, Inc.*, 2017 WL 1179392,
18 at *3 (W.D. Wash. Mar. 30, 2017), Home Skinovations used its motion to clarify as
19 “a maladroit vehicle to drive the issue of non-infringement to resolution” by asking
20 the court to perform an in-depth patent claim construction analysis of its new
21 product. *Id.* The court recognized that the careful evaluation required to compare a
22 completely new product design in a patent infringement case was not possible
23 without a fully developed record. *Id.* Home Skinovations also mooted its motion for
24 clarification by admitting that its new product was already for sale in the United
25 States, thus needing no further clarification to avoid “unwitting
26 contempts.” *Id.* Similarly, in *Cornucopia Products, LLC v. Dyson Inc.*, 2013 WL
27 12098786, at *2 (D. Ariz. June 20, 2013), Cornucopia asked the court to undertake
28 an in-depth analysis of “a two-dimensional rendering of a proposed product that may

1 never come to fruition” to determine whether the proposed product infringed
2 Dyson’s design patent. *Id.* The court refused to do so because the injunction was
3 narrowly tailored to Dyson’s specific design patent such that Cornucopia needed no
4 clarification, and because judicial economy would not be served by doing so. *Id.*

5 In contrast, this is not a patent case, which cases are uniquely discovery-, law-,
6 and fact-intensive. VidAngel has already explained in its Opposition to Plaintiffs’ *Ex*
7 *Parte* Application (Dkt. 184) that its new technology is the same as its legacy
8 technology in most respects; and VidAngel has carefully described the differences to
9 Plaintiffs and this Court. Accordingly, an in-depth analysis akin to patent claim
10 construction is unnecessary to clarify whether VidAngel’s service is subject to the
11 Preliminary Injunction and will cause Plaintiffs irreparable injury. Moreover,
12 VidAngel has already developed its new technology and is now seeking this Court’s
13 guidance before employing it for Plaintiffs’ works. As such, VidAngel’s request for
14 clarification is both ripe and genuine and should be addressed on its merits.

15 **X. PLAINTIFFS HAVE ALSO MISREPRESENTED THAT GRANTING**
16 **VIDANGEL’S MOTION WOULD “ALTER THE STATUS” OF THE**
17 **PRELIMINARY INJUNCTION APPEAL**

18 Plaintiffs have raised another straw argument in contending that an order
19 granting VidAngel’s motion would materially alter the status of the appeal, including
20 the issues of: (a) whether copying for the purpose of promoting filtering is a fair use;
21 (b) whether VidAngel’s streaming is a private or public performance; and (c)
22 whether the FMA provides a defense to unauthorized copying and streaming. (Opp.
23 Mem. at 5:7-18.)

24 What Plaintiffs omit is that the Court actually found that filtering is not a fair
25 use *when such copying threatens copyright owners with irreparable harm.* The
26 Court also did not address whether filtering is fair use when it furthers a
27 Congressionally endorsed service that causes no irreparable, or even economic,
28 injury to anyone. Moreover, the Court need not decide whether VidAngel’s

1 streaming service is a private or public performance *if it concludes that VidAngel's*
2 *new service does not threaten irreparable injury.* Additionally, the Court may view
3 the question of private versus public performance as irrelevant *if VidAngel's new*
4 *service might be protected by fair use.* Finally, the Court need not decide whether
5 the FMA provides a defense to unauthorized copying and streaming *if it concludes*
6 *that VidAngel's new service does not threaten irreparable injury, or it views the*
7 *question as irrelevant because VidAngel's new service might be protected by fair*
8 *use.*

9 Following those critical omissions, Plaintiffs suggest that granting VidAngel's
10 motion will "materially alter the status of the case on appeal," but unsurprisingly fail
11 to explain how that could possibly be so. Granting the motion will not alter that
12 VidAngel used the technology it used during 2015-16, and granting the motion will
13 not affect Plaintiffs' right, if any, to recover damages for VidAngel's past use of its
14 technology. Contrary to Plaintiffs' assertion that VidAngel is attempting to present
15 "new evidence or argument to the trial court" (Opp. Mem. at 4:24-28), VidAngel's
16 motion does not address the enjoined service and technology. It concerns only a new
17 service and technology that the Court necessarily could not consider in issuing its
18 Preliminary Injunction Order.

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1 **XI. CONCLUSION**

2 For the reasons explained above and in VidAngel’s moving papers,
3 VidAngel’s motion should be granted in all respects.

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5 DATED: July 10, 2017

Respectfully submitted.

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Bv: /s/ Jaime W. Marquart

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