

George Hofmann (10005)
Jeffrey Trousdale (14814)
Cohne Kinghorn, P.C.
111 East Broadway, 11th Floor
Salt Lake City, Utah 84111
Telephone: (801) 363-4300

Attorneys for George Hofmann,
Chapter 11 Trustee

**IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

In re: VIDANGEL, INC., Debtor.	Bankruptcy No. 17-29073 (KRA) Chapter 11
--	---

**TRUSTEE’S MOTION FOR ORDER AUTHORIZING USE OF PROPERTY OUTSIDE
OF THE ORDINARY COURSE OF THE DEBTOR’S BUSINESS**

George Hofmann, in his capacity as Chapter 11 Trustee (the “Trustee”) of VidAngel, Inc. (the “Debtor”), hereby moves the Court (the “Motion”) for entry of an order pursuant to Bankruptcy Code §§ 105(a), 363(b), and 1106 authorizing the Trustee to make material changes to the Debtor’s “filtering” based lines of business, or in the alternative, authorizing the Trustee to abandon the Debtor’s “filtering” based line of business. In support of this Motion, the Trustee states as follows:

GENERAL BACKGROUND

1. The Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) on October 18, 2017 (the “Petition Date”).

2. On August 28, 2019, the Court entered its Order appointing the Trustee, and the Trustee was appointed as the Debtor’s Chapter 11 Trustee on that same date.

3. Prior to the Trustee’s appointment, the Debtor operated its business as a debtor-in-possession under Bankruptcy Code §§ 1107 and 1108.

BACKGROUND SPECIFIC TO THE MOTION

4. The Debtor was created to allow its customers to watch movies and television shows without being subjected to visual or audio content the customer finds objectionable, such as violence, obscenity, or nudity.

5. From late 2015 through late December 2016, the Debtor used a disc-ownership model to provide video to its customers (the “Disc Ownership Model”). Under the Disc Ownership Model, the Debtor purchased DVDs and Blu-ray discs and sold them to its customers. After a customer purchased a disc from the Debtor, the Debtor would stream the video to the customer, filtered as each customer individually requested. Once purchased, a customer could opt to sell the video disc back to the Debtor, or keep the actual physical disc, which the Debtor would ship to purchasers, on request, or store for the customer in a secure vault.

6. The Debtor’s Disc Ownership Model was popular and growing, with more than 1 million viewers as of December 2016. However, in June 2016, certain movie studios (including Disney Enterprises, Inc., Lucasfilm Ltd. LLC, Twentieth Century Fox

Film Corporation, and Warner Bros. Entertainment Inc.) (collectively, the “Studios”) sued the Debtor in the United States District Court for the Central District of California (the “District Court”), Case No. 2:16-cv-04109-AB-PLA, for copyright infringement of certain of the Studios’ copyrighted works (the “California Litigation”).

7. In the California Litigation, the Studios alleged that the Debtor decrypted their works in violation of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 1201(a), and that the Debtor’s filtering and streaming violated the Studios’ exclusive rights to make copies of and publicly perform their works in violation of 17 U.S.C. § 106. On December 12, 2016, the Studios obtained a preliminary injunction (the “Preliminary Injunction”) in the California Litigation, and the Debtor stopped using the Disc Ownership Model.

8. Six months after the District Court issued the Preliminary Injunction, the Debtor launched a new streaming-based filtering service for motion pictures and television shows (the “Stream-Based Model”). The Debtor’s customers that wish to view videos that can be filtered through the Stream-Based Model must purchase the right to view the video through a licensed streaming service (“LSS”), such as Amazon or Netflix. Under the Stream-Based Model, the Debtor causes the content the customer has indicated is objectionable to be filtered from the streamed video.

9. The Debtor is presently operating under the Stream-Based Model and has been using this model for the more than two years since the filing of the Debtor’s bankruptcy petition. Because of the Preliminary Injunction, the Debtor has not been filtering any content produced by the Studios. On September 5, 2019, the District Court issued its Order Granting Plaintiffs’ Motion for Permanent Injunction (the “Permanent

Injunction”), a copy of which is attached as Exhibit A. Since entry of the Permanent Injunction, the Debtor has also ceased filtering any content produced by any “affiliate” of the Studios. The other companies whose films are being used in the Stream-Based Model have not expressed any objection to the use of their films by the Debtor.

10. In order to mitigate the risk of potential claims and litigation, in light of prior concerns raised by the Studios that may impact issues raised by other copyright owners, the Debtor, at the Trustee’s direction, has been developing and preparing to implement a new version of its service that allows its customers to use their personal computer as a digital video recorder (“DVR”) to make their own copy from each customer’s LSS stream and apply the Debtor’s filtering technology to that DVR copy during viewing (the “DVR Model”).¹

11. As part of the DVR Model, a customer must download the Debtor’s software to the customer’s computer. The software will provide three key functionalities. First, the software acts as a DVR, allowing a customer to direct the software to record videos the customer streams through the customer’s LSS account. The DVR recording created will be a recording of the exact LSS stream the customer receives, stored on the customer’s computer. Second, the software allows the customer to mark potentially objectionable content, using his or her recording as a basis for determining potential content time codes to be filtered out for customers viewing their own DVR copy of that video. The customer’s marks then can be shared with others to use as well, benefiting all who want to filter. Finally, the software has the ability to filter out objectionable content

¹ The following description of the New Model is based on the current anticipated specifications. Because the New Model is still under final development, these specifications are subject to change based on technological realities.

as the customer plays his or her recording of the video. The software determines the content to filter based on the time codes associated with the objectionable content. If a customer has the necessary applications installed on his or her cellphone, the computer software can direct the filtered video to be played on additional devices.²

12. The DVR Model will provide customers with new features and an improved customer experience. The DVR Model affords customers the ability to use a wider array of devices to view the filtered content. Further, some customers in rural areas have complained about the viewing quality associated with the Stream-Based Model. Because the DVR Model plays content from the customer's desktop DVR, the Debtor anticipates that customers will enjoy a higher quality and smoother playback experience.

13. For the foregoing reasons, the Trustee has determined that it is in the best interests of the Debtor and its creditors to develop and implement the DVR Model as a replacement for the Stream-Based Model. The DVR Model not only decreases the Debtor's potential legal risk but also provides customers with increased functionality and a better viewing experience.

14. To be clear, although the Trustee believes that applying the DVR Model to the Studios' copyrighted materials would not infringe on the Studios' exclusive rights as copyright owners and would not violate the DMCA, and the Trustee reserves the right to

² Although the New Model may be rolled out in phases, the New Model will eventually support both a desktop-based option, where the software and DVR reside on the customer's physical computer, and a cloud-based option, where the software and DVR reside on a cloud-based, virtual computer that is rented by the customer. This will allow the Debtor to serve its customers who do not have a home computer, but only have mobile devices.

do so, the Trustee will continue to direct the Debtor not to apply the DVR Model to any copyrighted works of the Studios, their parents, subsidiaries, and affiliates.

15. Accordingly, the Trustee requests an order from the Court authorizing the Debtor to continue to operate the Stream-Based Model while it develops and implements the DVR Model. However, if the Court denies the Trustee's request to implement the DVR Model, the Trustee seeks authority to abandon all of the Debtor's video-filtering based lines of business.

RELIEF REQUESTED

16. By this Motion, the Trustee seeks Court approval to (i) allow the Debtor to develop and implement the DVR Model, while continuing to use the Stream-Based Model in the brief interim period; or (ii) in the alternative, authorizing the Trustee to cease all "video filtering" services by the Debtor.

DISCUSSION

17. Bankruptcy Code § 363 provides that the Trustee, "after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b). To approve the use, sale or lease of property outside of the ordinary course of business, the Trustee must show four requirements: "(1) that a sound business reason exists for the [use]; (2) there has been adequate and reasonable notice to interested parties, including full disclosure of the ... terms [of use] ... ; (3) that the sale price is fair and reasonable; and (4) that the proposed buyer is proceeding in good faith." In re Medical Software Solutions, 286 B.R. 431 (Bankr. D. Utah 2002); accord Committee of Equity Security Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983) (identifying the "sound business purpose" test); In re Abbotts

Dairies of Penn., Inc., 788 F.2d 143, 145-47 (3d Cir. 1986) (implicitly adopting the articulated business justification test of Lionel, and adding the “good faith” requirement).

18. In general, bankruptcy courts often defer to a trustee’s business judgment regarding the use of estate assets, unless such decision is arbitrary and capricious. See In re Curlew Valley Assocs., 14 B.R. 506, 511-13 (Bankr. D. Utah 1981). Courts generally will not second-guess a trustee’s business decisions when those decisions involve “a business judgment made in good faith, upon a reasonable basis, and within the scope of his authority under the Code.” Curlew Valley, 14 B.R., at 513-14 (footnotes omitted).

19. A chapter 11 trustee “is charged with the duty of acting as the chief executive officer of a corporate debtor.” In re Lowry Graphics, Inc., 86 B.R. 74, 76 (Bankr. S.D. Tex. 1988). A trustee “has considerable scope within which to exercise his business judgment in running the business, without prior notice to creditors or leave of court.” Id. Of course, a trustee is also charged with duties of care and diligence and is obligated to be accountable for all property received. See e.g., 11 U.S.C. § 704; Bennett v. Williams, 892 F.2d 822, 823 (9th Cir. 1989).

20. When making a decision of significant consequence in a case, “best practice” is to “obtain court approval and give notice to the debtor of a proposed action” and to ensure that “[t]he trustee’s disclosure to the court [is] candid.” Bennett v. Williams, 892 F.2d at 823.

21. The Trustee believes the DVR Model may allow the Debtor to continue its business operations in the future with a lower risk of further litigation. But the Debtor’s management estimates that it will take approximately two months to develop and

implement the DVR Model. The Trustee therefore asks the Court's permission to allow the continued use of the Stream-Based Model only for a short and limited time pending implementation of the DVR Model.

22. The Debtor has been operating under the Stream-Based Model for more than two years since its bankruptcy filing. During the time that it takes to roll-out the DVR Model, it would be very difficult for the Debtor to continue its operations without the income produced by the Stream-Based Model. Furthermore, if the Debtor stopped using the Stream-Based Model, then undoubtedly many of the Debtor's current subscription customers would be lost forever and the estate would in turn likely suffer irreparable harm.

23. The Trustee believes that the development and implementation of the DVR Model greatly increases the Debtor's chance to successfully reorganize. The DVR Model allows the Debtor to continue providing the same (or similar) service to its customers, while decreasing any potential legal risk.

24. In any event, it is clear that (i) ceasing the operation of the Stream-Based Model and/or (ii) implementing the DVR Model are transactions "outside of the ordinary course" of the Debtor's business. Accordingly, the Trustee seeks Court approval of his decisions to implement the DVR Model, continue the Stream-Based Model during the interim period, and then discontinue the Stream-Based Model once the DVR Model is fully developed and implemented.

25. In the alternative, the Trustee requests Court approval to cease all the Debtor's "filtering" based lines of business. The Trustee understands that stopping these lines of business—which represent the Debtor's largest source of revenue—will

present a significant hurdle to the Debtor's ability to reorganize. However, if the Court rejects the Trustee's request to implement the DVR Model, then the Trustee believes he has no choice but to abandon the "filtering" based aspects of the Debtor's business.

26. Finally, the Trustee submits that is in the best economic interests of creditors for the Debtor to continue its business of supplying filtered video content to its subscription customers. The bulk of the Debtor's revenue derives from this business, and continuing the business substantially enhances its value and increases the prospects for a successful reorganization.

WHEREFORE, the Trustee respectfully requests that this Court enter an order (i) authorizing the Debtor to continue using the Steam-Based Model until the DVR Model is developed and ready to be implemented; (ii) authorizing the Debtor to develop and implement the DVR Model; and (iii) in the alternative, approving the Trustee's determination to cease and abandon all "filtering" based lines of the Debtor's business.

Dated: November 8, 2019

COHNE KINGHORN P.C.

/s/ Jeffrey Trousdale

GEORGE HOFMANN

JEFFREY TROUSDALE

Attorneys for the Chapter 11 Trustee

Exhibit “A”

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

DISNEY ENTERPRISES, INC.;
LUCASFILM LTD. LLC;
TWENTIETH CENTURY FOX FILM
CORPORATION; WARNER BROS.
ENTERTAINMENT INC.; MVL FILM
FINANCE LLC; NEW LINE
PRODUCTIONS, INC.; and TURNER
ENTERTAINMENT CO.,

Plaintiffs,

vs.

VIDANGEL, INC.,

Defendant.

Case No. 2:16-cv-04109-AB (PLAx)
**[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION FOR
PERMANENT INJUNCTION**

Judge: Hon. André Birotte Jr.

1 Upon reviewing the legal argument and evidence presented by Plaintiffs
2 Disney Enterprises, Inc., Lucasfilm Ltd. LLC, Twentieth Century Fox Film
3 Corporation, Warner Bros. Entertainment Inc., MVL Film Finance LLC, New Line
4 Productions, Inc., and Turner Entertainment Co. (collectively, “Plaintiffs”) in
5 support of their Motion for Permanent Injunction (“Motion”); and having reviewed
6 the opposition legal argument and evidence presented by Defendant VidAngel, Inc.
7 (“VidAngel”); and having considered (i) the irreparable injuries that Plaintiffs have
8 suffered as the result of VidAngel’s infringement of the works in which Plaintiffs
9 own or control the copyrights and VidAngel’s circumvention of technological
10 protection measures (“TPMs”) that control access to the Copyrighted Works; (ii) the
11 inadequacy of remedies available at law to compensate Plaintiffs for their injuries;
12 (iii) the balance of hardships; and (iv) the public interest, the Court HEREBY
13 FINDS AND ORDERS as follows:

14 “Copyrighted Work” shall mean any work, or portions thereof, whether in
15 existence as of the date hereof or later created, in which any Plaintiff (or parent,
16 subsidiary or affiliate of any Plaintiff) owns or controls an exclusive right under the
17 Copyright Act, 17 U.S.C. §§ 101 et seq., including, but not limited to, the 819
18 Copyrighted Works that were at issue in the statutory damages trial held before this
19 Court from June 11, 2019, to June 17, 2019.

20 VidAngel and all of its officers, agents, servants, employees, attorneys, and
21 all other persons in active concert or participation with any of them that receive
22 notice of the Permanent Injunction, ARE PERMANENTLY RESTRAINED AND
23 ENJOINED from:

24 (1) circumventing technological measures protecting Copyrighted Works on
25 DVDs, Blu-ray discs, or any other medium;

26 (2) copying Copyrighted Works, including but not limited to copying the
27 Copyrighted Works onto computers or servers;

28

1 (3) streaming, transmitting, or otherwise publicly performing or, facilitating
2 any third party in streaming, transmitting, or otherwise publicly performing, any
3 Copyrighted Works over the Internet (including without limitation through the
4 VidAngel.com website or any other website owned or controlled by VidAngel or
5 with which VidAngel or any person restrained by this Permanent Injunction acts in
6 concert); via web applications (including without limitation through platforms such
7 as the Windows App Store, Apple’s App Store, the Amazon App Store, Facebook,
8 or Google Play); via portable devices (including without limitation through
9 applications on devices such as iPhones, iPads, Android devices, smart phones or
10 tablets); via media streaming devices (including without limitation the Roku,
11 Chromecast, or Apple TV devices); or by means of any other device or process; or

12 (4) engaging in any other activity that violates, directly or indirectly,
13 Plaintiffs’ anti-circumvention right, 17 U.S.C. § 1201(a)(1)(A), or that infringes by
14 any means, directly or indirectly, any Plaintiff’s exclusive rights in any Copyrighted
15 Work under Section 106 of the Copyright Act, 17 U.S.C. § 106.

16 This Permanent Injunction shall not apply to Defendant’s use of a
17 Copyrighted Work as to which Defendant has obtained the relevant Plaintiff’s (or
18 relevant parent’s, subsidiary’s, or affiliate’s) express written authorization for such
19 use, during the period in which such authorization is valid.

20 The Permanent Injunction is effective immediately.

21 The Permanent Injunction replaces the Preliminary Injunction (Dkt. 144).
22 The Clerk of this Court shall return the Preliminary Injunction Bond (Dkt. 163) to
23 Plaintiffs forthwith.

24 Defendant shall forthwith give notice of this Judgment and Permanent
25 Injunction to each of its officers, agents, servants, employees, attorneys, assigns,
26 partners, owners, affiliates, representatives, successors, licensees, and all those
27 acting in concert or participation with each or any of them.

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

This Court shall retain exclusive and continuing jurisdiction over the Parties for purposes of interpreting or enforcing the Permanent Injunction.

IT IS SO ORDERED

DATED: September 5, 2019



The Honorable André Birotte Jr.
United States District Judge

CC: Fiscal