

Ninth Circuit Case No. 19-56174

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DISNEY ENTERPRISES, INC.; et al.,

Plaintiffs-Appellees,

v.

VIDANGEL, INC.,

Defendant-Appellant.

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

APPELLANT'S BRIEF

Mark L. Eisenhut
Samuel G. Brooks
CALL & JENSEN
A Professional Corporation

610 Newport Center Drive, Suite 700
Newport Beach, CA 92660
Tel: (949) 717-3000
Fax: (949) 717-3100
meisenhut@calljensen.com
sbrooks@calljensen.com

Attorneys for VidAngel, Inc.

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, VidAngel, Inc. discloses that it has no parent corporation, and that no publicly held company has a share of ten percent (10%) or more of its stock.

TABLE OF CONTENTS

	<u>Page</u>
I. JURISDICTIONAL STATEMENT	1
II. ISSUES PRESENTED ON APPEAL	2
III. STATEMENT OF THE CASE	2
IV. SUMMARY OF THE ARGUMENT	12
V. STANDARD OF REVIEW	13
VI. ARGUMENT	14
A. The Motion for a Permanent Injunction Should Have Been Denied as Moot	14
B. Plaintiffs Did Not Establish the Necessary Elements for a Permanent Injunction	21
1. Plaintiffs did not prove irreparable harm	23
2. Plaintiffs did not prove legal remedies were inadequate.....	33
3. Plaintiffs did not prove the balance of hardships favored an injunction	34
4. Plaintiffs did not prove a permanent injunction was	

in the public interest.....	38
C. The Permanent Injunction is Vague and Overbroad.....	41
1. The definition of “Copyrighted Work” is overly broad and vague	43
2. The prohibition on circumventing “technological measures protecting Copyrighted Works” is overly broad and vague	46
3. The prohibition on “copying” is overly broad and vague.....	48
4. The prohibition on “streaming [and] transmitting” is overly broad and vague	49
5. The prohibition on “facilitating” conduct is overly broad and vague	50
6. The prohibition on “any other activity” constitutes an overbroad order to obey the law	51
VII. CONCLUSION.....	54
VIII. STATEMENT OF RELATED CASES.....	55

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Abend v. MCA, Inc.,

863 F.2d 1465 (9th Cir. 1988) 39

Apple Inc. v. Psystar Corp.,

673 F. Supp. 2d 943 (N.D. Cal. 2009)..... 53, 54

Ariz. Dream Act Coal. v. Brewer,

855 F.3d 957 (9th Cir. 2017) 13

Califano v. Yamasaki,

442 U.S. 682 (1979) 41

Campbell v. Acuff-Rose Music, Inc.,

510 U.S. 569 (1994) 22, 39

E. & J. Gallo Winery v. Gallo Cattle Co.,

967 F.2d 1280 (9th Cir. 1992) 41, 42

eBay v. MercExchange L.L.C.,

547 U.S. 388 (2006) 22, 23, 39, 40

Erickson Prods., Inc. v. Kast,

921 F.3d 822 (9th Cir. 2019)	19
<i>F.W. Woolworth Co. v. Contemporary Arts,</i>	
344 U.S. 228 (1952)	34
<i>Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.,</i>	
654 F.3d 989 (9th Cir. 2011)	24
<i>Fonovisa v. Napster, Inc.,</i>	
No. 3:01-CV-02669, 2002 WL 398676 (N.D. Cal. Jan. 28, 2002).....	37
<i>Graves v. Arpaio,</i>	
623 F.3d 1043 (9th Cir. 2010)	14
<i>Hallett v. Morgan,</i>	
296 F.3d 732 (9th Cir. 2002)	14
<i>Hughey v. JMS Dev. Corp.,</i>	
78 F.3d 1523 (11th Cir. 1996)	52
<i>Int’l Rectifier Corp. v. IXYS Corp.,</i>	
383 F.3d 1312 (Fed. Cir. 2004)	52
<i>Lamb-Weston, Inc. v. McCain Foods, Ltd.,</i>	
941 F.2d 970 (9th Cir. 1991)	41

<i>Lineback v. Spurlino Mats., LLC,</i>	
546 F.3d 493 (7th Cir. 2008)	52
<i>Louis W. Epstein Family Partnership v. Kmart Corp.,</i>	
13 F.3d 762 (3d Cir. 1994).....	52
<i>Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.,</i>	
518 F. Supp. 2d 1197 (C.D. Cal. 2007)	24, 36, 37, 46
<i>Monsanto Co. v. Geertson Seed Farms,</i>	
561 U.S. 139 (2010)	22
<i>N.L.R.B. v. Express Pub. Co.,</i>	
312 U.S. 426 (1941)	52
<i>New York Times Co. v. Tasini,</i>	
533 U.S. 483 (2001)	22
<i>Norman-Bloodsaw v. Lawrence Berkely,</i>	
Lab., 135 F.3d 1260 (9th Cir. 1998).....	14
<i>Perfect 10, Inc. v. Amazon.com, Inc.,</i>	
508 F.3d 1146 (9th Cir. 2007)	50
<i>Range Road Music, Inc. v. E. Coast Foods, Inc.,</i>	

668 F.3d 1148 (9th Cir. 2012)	48
<i>Thomas v. County of Los Angeles,</i>	
978 F.2d 504 (9th Cir. 1992)	53
<i>Ting v. AT&T,</i>	
319 F.3d 1126 (9th Cir. 2003)	14
<i>U.S. v. Oakland Cannabis Buyers' Coop.,</i>	
190 F.3d 1109 (9th Cir. 1999)	37, 41
<i>Weinberger v. Romero-Barcelo,</i>	
456 U.S. 305 (1982)	22
<i>Winter v. Nat. Res. Def. Council, Inc.,</i>	
555 U.S. 7 (2008)	14
<i>Zepeda v. U.S.I.N.S.,</i>	
753 F.2d 719 (9th Cir. 1983)	45

FEDERAL STATUTES

17 U.S.C. § 101	43
17 U.S.C. § 102	44
17 U.S.C. § 106	43, 51

17 U.S.C. § 106(1).....	48
17 U.S.C. § 110(11).....	39
17 U.S.C. §§ 107 through 122	48
17 U.S.C. § 501(b).....	1
17 U.S.C. § 1201(a)(1)(A)	43, 51
28 U.S.C. § 1292(a)(1)	1
28 U.S.C. § 1331	1
28 U.S.C. § 1338	1
28 U.S.C. § 2107(a).....	1
Pub. L. No. 109-9, 119 Stat. 218	2

FEDERAL RULES

Fed.R.Civ.P. 65(c)	8
Fed.R.Civ.P. 65(d)	53
Fed.R.Civ.P. 65(d)(1)(C)	46
Fed.R.Evid. 401(a)	32
Federal Rule of Appellate Procedure 4(a)(1)	1
Federal Rule of Appellate Procedure 26.1.....	1

Federal Rule of Appellate Procedure 28(a)(4) 1

OTHER AUTHORITIES

H.R. Rep. No. 109-33..... 3

I. JURISDICTIONAL STATEMENT

Pursuant to Rule 28(a)(4) of the Federal Rules of Appellate Procedure and Circuit Rule 28-2.2, Defendant-Appellant VidAngel, Inc. (“VidAngel” or “Appellant”) submits the following statement of jurisdiction:

a. The United States District Court for the Central District of California (the “District Court”) had subject matter jurisdiction over this action pursuant to 17 U.S.C. § 501(b) and 28 U.S.C. §§ 1331 and 1338.

b. The District Court’s orders granting a permanent injunction [Excerpts of Record “ER” ER000001-6 (Dkts 519, 520)] are appealable, and this Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

c. The appealable orders were issued on September 5, 2019. The Notice of Appeal was filed on October 4, 2019, and is timely pursuant to 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1).

II. ISSUES PRESENTED ON APPEAL

1. Did the District Court err in granting a permanent injunction?

2. Is the permanent injunction impermissibly overbroad and/or vague?

III. STATEMENT OF THE CASE

In 2005, Congress passed the Family Movie Act (“FMA”) as part of the Family Entertainment and Copyright Act of 2005. Pub. L. No. 109-9, 119 Stat. 218 (Apr. 27, 2005). The House Judiciary Committee believed “copyright and trademark law should not be used to limit a parent’s right to control what their children watch in the privacy of their own home,” and described the goal of the legislation as “giv[ing] the viewer the ability to make imperceptible limited portions of work that he or she chooses not to see for themselves or their family.” H.R. Rep. No. 109-33, pt. 1, at 5-6 (2005).

Hollywood¹ opposed the FMA, *see id.* at 69, and complained the Act would vindicate filtering technology developed by a company which had been sued by studios and directors for copyright and trademark infringement. *Id.* at 69-72.

Adoption of the FMA did not lessen Hollywood's antipathy to private home filtering of motion pictures, nor did it immediately prompt an expansion of the filtering market. Years later, Neal Harmon and his brothers founded VidAngel to fulfill the promise of the FMA by providing consumers with a technology to filter content in movies and television shows streamed to their homes for private viewing. [ER000238-39 (Dkt 513; TT 512:7-513:2)]. The idea first emerged in 2012 when Harmon began writing program codes to automatically skip or mute portions of content rented or purchased from Google Play and watched on a YouTube Player in the Google Chrome web browser. [ER000162-63 (Dkt 41-3 ¶¶ 5-7)]. In 2013, the

¹ Specifically, the Directors Guild of America and the Motion Picture Association of America.

brothers created VidAngel and developed an application for Google's then-new Chromecast device, which would permit filtering on home television sets. [ER000163-64, 293-94 (Dkt 41-3 ¶¶ 8-9; Dkt 513, TT 632:19-633:16)]. However, Google rendered that app useless by making changes preventing it from functioning with paid content. [ER000164-66, 294-95 (Dkt 41-3 ¶¶ 10-13; Dkt 513, TT 633:17-634:2)]. VidAngel later discovered that licensed streaming services were contractually prohibited from permitting any kind of filtering on their platforms. [ER000165-66, 178-79 (Dkt 41-3 ¶¶ 11-12, 48-50)].

To overcome these roadblocks, VidAngel needed a technology that could function without studio permission (whose fundamental opposition to filtering was unlikely to change) while complying with copyright law, including the limitations on copyright owners' rights provided by the FMA. [ER000167 (Dkt 41-3 ¶ 16)].² VidAngel, therefore, developed what came to be known as the "Disc-based

² VidAngel would have preferred to provide filtering of streamed content via streaming licenses, but could not find any major studio who would consider it. [See ER000179-81 (Dkt 41-3 ¶¶ 54-59)].

Service.” [ER000167-68 (Dkt 41-3 ¶¶ 17-21)]. Briefly, this system worked as follows:

- VidAngel purchased DVD/Blu-Ray discs—often thousands of copies of each title³—at retail prices for the purpose of resale to VidAngel customers, assigned each disc a unique bar code, and stored them in its vault.
- Using third-party software, VidAngel decrypted one disc to create a “master file” of video and audio content divided into tiny clips.
- Employees tagged material in the movie for potential filtering.
- Customers purchased discs from VidAngel, becoming the owners of particular bar-coded copies. VidAngel removed sold copies from its available inventory.
- Customers selected filters to be applied during the

³ The number of copies of a particular work VidAngel would purchase depended on availability and anticipated demand. [ER000251-52 (Dkt 513, TT 525:10-526:17)].

performance of the movie.

- VidAngel streamed a unique performance of the motion picture to the customer's household, making imperceptible the specific portions of video/audio content the customer selected for filtering.
- VidAngel offered to repurchase the disc from the customer. Customers who kept the disc could have VidAngel maintain it in its vault (and could stream additional filtered performances without additional charge), or could have it shipped.
- VidAngel returned repurchased discs to its available inventory.

[ER000155-58, 134-38, 200 (Dkt 81-1 ¶¶ 34-37; Dkt 256 ¶¶ 10-42; Dkt 511, TT 191:2-191:9)].

Prior to launching the Disc-based Service, VidAngel sought legal advice from David Quinto, an experienced intellectual property lawyer, to ensure VidAngel could operate the Disc-based Service in

compliance with copyright laws, including the FMA. [ER000245-46 (Dkt 513, TT 519:12-520:6)]. VidAngel made full disclosure of the facts, and Mr. Quinto provided advice. [ER000246, 310-13 (Dkt 513, TT 520:7-520:17; Dkt 504, TT 718:7-721:19)]. VidAngel followed Mr. Quinto's recommended course of conduct. [ER000312-13 (Dkt 504, TT 721:20-721:25)].

VidAngel also had Mr. Quinto send letters to major motion picture studios thoroughly informing them of its Disc-based Service, and soliciting their input. [ER000168-71 (Dkt 41-3 ¶¶ 22-24)]. No studio asserted objections. [ER000168-70 (Dkt 41-3 ¶¶ 22-23)]. However, Disney launched a secret investigation and began coordinating an effort to take down VidAngel. [ER00168-69, 171-72 (Dkt 41-3 ¶¶ 22, 28-29)].

A year after receiving VidAngel's notice, and without asserting any objection during that period, Disney, Lucasfilm, Fox, and Warner Brothers abruptly filed this lawsuit. [ER000350 (Dkt 1)]. In August 2016 they moved for a preliminary injunction, [ER000352 (Dkt 27)],

which the District Court granted on December 12. [ER000364 (Dkt 144)]. On December 14, VidAngel filed both an emergency motion to stay enforcement of the preliminary injunction, [ER000365 (Dkt 147)], and a notice of appeal. [ER000365 (Dkt 148)]. The injunction took effect the following day after Plaintiffs gave security. *See* Fed.R.Civ.P. 65(c), [ER000365 (Dkt 151)].

As evidenced by its appeal, VidAngel disagreed with the District Court's findings and conclusions, and continued to believe in good faith, based on the advice of its counsel, that the Disc-based Service was lawful. In the meantime, VidAngel sought to comply with the preliminary injunction by searching for a way to remove only Plaintiffs' works from its Disc-based Service while continuing to make works not subject to the injunction available to customers. [ER000144-46 (Dkt 164-3, ¶¶ 2-9)]. VidAngel's attorneys advised that it would not be held in contempt if it continued to operate so long as it made reasonable and prompt efforts to comply. [ER000188-89 (Dkt 444, at 19:20-20:22)].

Finally, on December 29 the District Court denied VidAngel's emergency stay motion. [ER000367 (Dkt 166)]. Having not yet found a viable way to remove only Plaintiffs' works, VidAngel immediately shut down all operations—including as to works *not* subject to the injunction—and notified the Court. [ER000139-41 (Dkt 167)]. Thus, VidAngel's business was shut down entirely within 14 days after the injunction took effect. The District Court nevertheless set a hearing on an order to show cause re: contempt. [ER000367 (Dkt 168)]. Then, on January 6, 2017 held VidAngel in contempt, purportedly for not having shut down immediately. [ER000368 (Dkt 175)].

This Court affirmed the preliminary injunction in an opinion filed August 24, 2017. Thereafter, Plaintiffs MVL Film Finance, New Line Productions, and Turner Entertainment joined the action, [ER000374 (Dkt 228)], and VidAngel petitioned for bankruptcy protection. [ER000374 (Dkt 229)].

In the meantime, having abandoned the Disc-based Service, VidAngel developed and launched in June 2017 what it has referred

to as the “Stream-based Service.” [ER000017 (Dkt 508, ¶ 9)]. Under that service, VidAngel’s customers can stream (1) performances of original content owned or distributed under license by VidAngel, and (2) filtered performances of content the customer has access to via Netflix, Amazon Instant Video, Amazon HBO Channel, and Movies Anywhere Through Amazon. [ER000017 (Dkt 508 ¶ 9)]. Customers link their Netflix and/or Amazon account with their VidAngel account, which enables VidAngel to initiate a stream of the selected motion picture on Netflix or Amazon. [ER000017 (Dkt 508 ¶ 9)]. VidAngel separately streams the motion picture to the customer with the customer’s selected filters enabled. [ER000017 (Dkt 508 ¶ 9)]. Thus, Netflix and/or Amazon are fully paid for performances using the Stream-Based Service. [ER000017 (Dkt 508 ¶ 9)].

While the Stream-Based Service—like the Disc-based Service— involves the creation of “master files” for tagging and streaming purposes, it fully resolves concerns raised by Plaintiffs regarding the Disc-based Service, and any “copying” constitutes lawful fair use.

[ER000018 (Dkt 508 ¶ 11)]. Indeed, the Stream-Based Service cannot possibly have anything other than a positive effect on copyright owners' market for authorized copies and licensed performances. No copyright owner has challenged the lawfulness of the Stream-based Service in any court, and VidAngel does not offer any of Plaintiffs' works on that service. [ER000018 (Dkt 508 ¶ 11)]. As such, neither the District Court nor any other court has considered its legality.

In November 2018, the Bankruptcy Court granted relief from the automatic stay, [ER000375 (Dkt 246)], and in December 2018 Plaintiffs moved for partial summary judgment. [ER000375 (Dkt 248)]. The District Court granted the motion on March 6, 2019, [ER000383 (Dkt 323)], then conducted a not-so-fair trial to determine statutory damages for violation of the DMCA and copyright infringement with respect to 819 motion pictures. [ER000397-99 (Dkt 468, 473, 477, 479, 483, 484)].

The jury returned its verdict on June 17, 2019, finding willful copyright infringement, and awarding \$61,425,000 and \$1,023,750 for

copyright infringement and violation of the DMCA, respectively. [ER (Dkt 494)]. The combined awards amounted to more than 296 times the most generous estimate of Plaintiffs' actual damages of \$211,000. [ER000024-27 (Dkt 513, TT 614:20-624:18)]. And while VidAngel earned no profit from the Disc-based Service, the verdict was more than 20 times the *gross* revenues VidAngel ever received from its filtering of Plaintiffs' works (about three million dollars). [ER000274-75 (Dkt 513, TT 613:1-614:6)].

On September 5, 2019, the District Court granted Plaintiffs' motion for a permanent injunction, [ER000005-6 (Dkt 519)], and on September 23, entered the judgment. [ER000402 (Dkt 525)]. VidAngel timely moved for a new trial and to amend the judgment, [ER000403 (Dkt 533, 534)], which the District Court denied on March 31, 2020. [ER000405 (Dkt 552)].

IV. SUMMARY OF THE ARGUMENT

The District Court abused its discretion by granting a permanent injunction. Because VidAngel had unequivocally

abandoned the Disc-based Service, any prior need for injunctive relief was moot. Moreover, Plaintiffs failed to prove that a permanent injunction was necessary to redress or prevent irreparable harm, that legal remedies were inadequate, that the balance of hardships tipped in their favor, and that an injunction was in the public interest. While VidAngel maintains that it acted lawfully, at the time of this filing nearly four years have passed since it abandoned the Disc-based Service, and it is absolutely clear that VidAngel will not revert to it.

Even if the District Court could have been justified in entering a permanent injunction to prohibit VidAngel from reverting to the Disc-based Service, it abused its discretion by fashioning an order that is astoundingly vague and overbroad. The injunction does not only prevent VidAngel from engaging in the conduct the District Court found to be unlawful, but also restrains lawful conduct.

V. STANDARD OF REVIEW

The District Court's decision to grant a permanent injunction is reviewed for abuse of discretion. *Ariz. Dream Act Coal. v. Brewer*, 855

F.3d 957, 965 (9th Cir. 2017). Determinations underlying the grant of an injunction are reviewed “by the standard that applies to that determination.” *Ting v. AT&T*, 319 F.3d 1126, 1134–35 (9th Cir. 2003). Thus, factual findings underlying the grant of the injunction are reviewed for clear error, *see Graves v. Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010), whereas legal conclusions in or underlying the District Court’s order are reviewed *de novo*. *See Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002).

VI. ARGUMENT

A. The Motion for a Permanent Injunction Should Have Been Denied as Moot

An injunction is an “extraordinary remedy never awarded as of right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). A permanent injunction is inappropriate when “(1) subsequent events [have] made it absolutely clear that the allegedly wrongful behavior [cannot] reasonably be expected to recur . . . , and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.” *Norman-Bloodsaw v. Lawrence Berkely Lab.*, 135 F.3d

1260, 1274 (9th Cir. 1998). The District Court rejected VidAngel's contentions that injunctive relief had become moot, but in doing so it mischaracterized the evidence and improperly relied on facts that were not presented in evidence on the motion. Its factual findings were clearly erroneous.

In its order, the District Court characterized the testimony presented by VidAngel as merely saying that "it [VidAngel] has no plans to re-start the disc-based service." [ER 000006 (Dkt 519, at 2)]. But the testimony presented by VidAngel's founder and CEO, Neal Harmon, actually provided: "VidAngel unequivocally commits that it will never revert to [the Disc-Based Service] absent an amendment to the Copyright Act or a decision of an appellate court clearly allowing it." [ER000019 (Dkt 508 ¶ 13)]. Mr. Harmon also explained that while the District Court's preliminary injunction only required VidAngel to cease operating its Disc-based Service with respect to Plaintiffs' copyrighted works, VidAngel chose to cease operating that service across the board. [ER000016 (Dkt 508 ¶ 6)]. Mr. Harmon

described the launch of the Stream-Based Service, which replaced the Disc-based Service entirely, and eliminated every potential injury the District Court had found to be threatened by that system. [ER000017-19 (Dkt 508 ¶¶ 9-12)]. This evidence made it absolutely clear that there could be no reasonable expectation that VidAngel would go back to the Disc-Based Service.

The language of the District Court's order indicates that it either misunderstood or deliberately mischaracterized Mr. Harmon's testimony. He did *not* testify that VidAngel merely "has no plans to re-start the disc-based service," as the District Court's order reports. [ER000006 (Dkt 519 at 2)]. Rather, he testified that VidAngel "has no plans" to offer Plaintiffs' content on its new *Stream-Based Service*, and that if it ever decided in the future to offer Plaintiffs' content using that service it would be willing to work with Plaintiffs to put in place security measures similar or identical to the ones they require for other distributors. [ER000018-19 (Dkt 508 ¶¶ 11-12)]. To the extent the District Court had this testimony in mind when it stated that

VidAngel merely “has no plans to re-start the disc-based service,” it clearly erred.

In addition to VidAngel’s unequivocal commitment, the District Court also had circumstantial guarantees that VidAngel would not “return to its old ways.” Even without an injunction, it would make no economic sense for VidAngel to re-start the Disc-Based Service. Doing so would involve abandoning the Stream-based Service which VidAngel has now used for three years without objection from copyright owners, in favor of a service that was branded unlawful and resulted in devastating liability. Absent an amendment to the Copyright Act or a decisive appellate victory, reverting to the Disc-based service would serve no purpose other than to reignite litigation, with all the accompanying risks and costs. While it maintains the Disc-Based Service was lawful (and has appealed the District Court’s rulings to the contrary), VidAngel would be mad to revert to it while the District Court’s judgment stands.

Furthermore, it appears the District Court based its decision on its own prejudices rather than the evidence. Shrugging off Mr. Harmon's unequivocal testimony, the District Court vaguely referred to "VidAngel's past willful conduct, the liability determination, and the history between the parties" to justify its decision. [ER000006 (Dkt 519, at 2)]. However, it did not explain how any of these items give rise to a reasonable likelihood that VidAngel would revert to the Disc-Based Service.

First, to the extent the reference to "past willful conduct" adopts the jury's finding of willful copyright infringement, that finding was itself against the clear weight of the evidence. As explained in detail in its motion for new trial, [ER000403 (Dkt 534)], the verdict of willful infringement resulted from the combination of prejudicial errors at trial, including most notably the erroneous exclusion of unrefuted evidence that VidAngel at all times followed counsel's advice, the admission of highly prejudicial and irrelevant evidence of the District Court's views, and serious errors in the jury

instructions. The clear weight of the evidence presented to the District Court was that VidAngel *always* followed counsel's advice. [See ER000214-15, 239-40, 244-47, 254-56, 311-13, 188-90 (Dkt 503, TT 430:5-431:18; Dkt 513, 513:8-514:21, 518:14-518:24, 519:6-521:1, 528:5-530:14; Dkt 504, 719:19-720:1, 720:12-721:25; Dkt 444, 19:20-21:25)]. Plaintiffs argued that it was unreasonable for VidAngel to rely on its attorney's opinion, but they offered nothing to contradict evidence that Vidangel did so in good faith. And if VidAngel believed in good faith based on counsel's advice that its conduct was not infringing, it could not have simultaneously had the opposite state of mind—i.e., knowledge that its conduct actually was infringing. *See Erickson Prods., Inc. v. Kast*, 921 F.3d 822, 833 (9th Cir. 2019). Furthermore, obtaining and following counsel's advice is the antithesis of reckless disregard or willful blindness. *See id.* As courts in this Circuit have long recognized, good faith reliance on advice of counsel is inconsistent with unlawful intent. Ninth Cir. Man. of Model Crim. Jury Instr. 5.10 (2010 ed., last updated Dec. 2019).

Nevertheless, even if the verdict of willfulness had been supported by substantial evidence, a finding that VidAngel knew its Disc-based Service infringed Plaintiffs' copyrights does not make it more likely that VidAngel would revert to that service. Even if VidAngel somehow thought it could blatantly and openly infringe Plaintiffs' copyrights without consequences before this lawsuit (it didn't), the jury's verdict and accompanying statutory damages are certainly sufficient to disabuse it of that notion. Even if VidAngel was previously inclined to knowingly violate the law, its interest in self-preservation would obviously counsel against reverting to the Disc-based Service absent a clear victory either in Congress or on appeal.

Likewise, the "liability determination" does not in any way contradict VidAngel's unequivocal abandonment of the Disc-based Service, or make it more likely that VidAngel will revert to that system. If anything the liability determination makes such conduct *less* likely. It would make no sense for VidAngel to abandon the Stream-based Service—which it has operated without objection for

three years—in order to revert to a system that resulted in potentially devastating liability.

Finally, VidAngel has no idea what the District Court means by its reference to “the history between the parties,” but to the extent it rejected Mr. Harmon’s sworn testimony based on a hunch that VidAngel would revert to the Disc-Based Service out of sheer spite, it clearly erred. There was no evidence of any “history” supporting a reasonable expectation that VidAngel would restart its Disc-Based Service.

In short, the evidence presented to the District Court made it absolutely clear VidAngel would not revert to the Disc-Based Service. In light of this evidence, Plaintiffs’ request for a permanent injunction was moot, and the District Court abused its discretion in granting the motion.

B. Plaintiffs Did Not Establish the Necessary Elements for a Permanent Injunction

Plaintiffs were not automatically entitled to a permanent injunction simply because they prevailed on their claims. “An

injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (“An injunction should issue only where the intervention of a court of equity is essential in order effectually to protect property rights against injuries otherwise irreparable.” (internal quotation marks omitted)). The Supreme Court “has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.” *eBay v. MercExchange L.L.C.*, 547 U.S. 388, 392-93 (2006). And “speculation about future harms is no basis for [any] Court to shrink” rights provided by Congress. *New York Times Co. v. Tasini*, 533 U.S. 483 at 505-06 (2001). 533 U.S. 483, 505 (2001).

In the realm of copyright, the over-application of injunctive relief may discourage conduct the Copyright Act actually promotes. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994)

("[T]he goals of the copyright law, 'to stimulate the creation and publication of edifying matter,' . . . are not always best served by automatically granting injunctive relief."). In short, a permanent injunction is an extraordinary remedy, and district courts must examine the evidence critically and refrain from granting injunctive relief when it is not actually necessary.

Before granting an injunction, the District Court had to find that Plaintiffs had proved each element of the traditional four-factor test. In particular, "(1) that [they] suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, [were] inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay*, 547 U.S. at 391.

1. Plaintiffs did not prove irreparable harm

In every case, "the plaintiff must demonstrate a likelihood of irreparable harm as a prerequisite for injunctive relief, *whether*

preliminary or permanent.” *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 998 (9th Cir. 2011) (emphasis added); *see also Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1211 (C.D. Cal. 2007) (irreparable harm cannot be presumed, but must be affirmatively proved). In other words, Plaintiffs had the burden to prove not only that irreparable harm was likely at the time they requested a *preliminary* injunction, but also that irreparable harm would occur in the absence of the entry of a *permanent* injunction.

The District Court’s order does not cite any evidence to support its finding of irreparable harm. Instead, it states only that “irreparable injury . . . favor[s] a permanent injunction for the reasons stated before [at the preliminary injunction stage] and expanded upon in Plaintiffs’ papers, which the Court will not repeat in full here.” [ER000005 (Dkt 519, at 1)]. But none of the reasons or evidence offered at the preliminary injunction stage or in Plaintiffs’ papers supported a finding that they actually suffered irreparable harm, or

that they were likely to suffer such harm *after* the verdict and judgment in the absence of a permanent injunction.

Control of public performances. The District Court's order granting a preliminary injunction found a likelihood of irreparable harm based on evidence that VidAngel's Disc-based Service allowed VidAngel customers to stream filtered performances of certain movies at times when those movies were not available for streaming on other licensed platforms. [ER000149 (Dkt 144 at 17)]. Plaintiffs had presented evidence that "the price for [a license to stream a title during an exclusive time window] is based, in part, on the promise and scope of exclusivity," and that the promise of exclusivity during such a window permits Plaintiffs to "often negotiate higher licensing fees." [ER000149 (Dkt 144 at 17)]. Plaintiffs offered no evidence at that time that they had actually lost any licenses they might otherwise have obtained, or that VidAngel's conduct had actually affected the price of any such licenses. Instead, they argued only that, absent an

injunction, VidAngel's Disc-based Service might frustrate their ability to negotiate such licenses in the future. [ER000149 (Dkt 144 at 17)].

Regardless of whether such evidence could have established a likelihood of irreparable harm justifying a *preliminary* injunction, it did not establish that Plaintiffs actually suffered irreparable harm, or that they were likely to suffer such harm in the absence of a *permanent* injunction. As set forth above, circumstances changed drastically between the preliminary injunction and the verdict: in particular VidAngel went beyond the requirements of the preliminary injunction, abandoning the Disc-based Service entirely, and replacing it with the Stream-based Service. That service was never on trial, but it does not (and cannot) interfere with copyright owners' windowing strategies, since it requires customers to have access to motion pictures through either Amazon or Netflix. [ER000017 (Dkt 508 ¶ 9)]. Plaintiffs presented no evidence or even argument that copyright owners whose motion pictures have been made available through the Stream-based Service lost licensing

opportunities because of VidAngel, or that Plaintiffs would suffer harm unless an injunction prohibits VidAngel from operating that service.

Relationships and goodwill. At the preliminary injunction stage, Plaintiffs speculated—and the District Court accepted—that they might suffer loss of goodwill or negotiating leverage unless VidAngel’s Disc-based Service was enjoined. [ER000149-50 (Dkt 144, at 17-18)]. Even though VidAngel had been operating its Disc-based Service for more than a year by the time Plaintiffs moved for a preliminary injunction, they identified no instances of actual loss of goodwill or bargaining power attributable to VidAngel. Rather, they offered only a studio executive’s statement that licensees had expressed in meetings *general* concerns about unlicensed streaming services. [ER000149-50 (Dkt 144, at 17-18)]. This evidence did not indicate that any of the clients who had “complain[ed] to [Fox] in partnership meetings” even knew about VidAngel, or if they did that

they categorized VidAngel's filtering service with traditional copyright piracy operations. [See ER000185-86 (Dkt 28 ¶ 19)].

Plaintiffs also failed to offer any evidence of damage to their relationships at trial. A Disney executive testified that one licensee, Vudu, had asked about VidAngel, [ER000230-33 (Dkt 503, TT 475:21-478:9)], but that testimony did not evidence any loss of goodwill or harm to the relationship. The executive did not take the position that Vudu had used VidAngel's existence as leverage to seek concessions in negotiation, or blame Disney for competition from VidAngel. Even assuming the Disc-based Service threatened some *potential* harm to Plaintiffs' relationships, there was no evidence that they or any other copyright owner *actually* suffered any such harm.

Moreover, since VidAngel has abandoned its Disc-based Service, there is no threat of future harm. While VidAngel has no plans to add their works to its current Stream-based Service, Plaintiffs offered no evidence that doing so would potentially interfere with their relationships with licensed streaming services.

For example, they offered no evidence that Amazon or Netflix—the two licensed streaming services with which VidAngel’s Stream-based Service works—had ever complained about VidAngel to anyone, or that they had attempted to use VidAngel as leverage to demand concessions from copyright owners. VidAngel’s current business does not threaten Plaintiffs’ relationships in any way, and the District Court clearly erred in finding Plaintiffs had suffered or would likely suffer irreparable harm in the absence of a permanent injunction.

Security Controls. Plaintiffs argued that an injunction was necessary to prevent harm due to the loss of control over security measures, which Plaintiffs speculated could result in a higher risk of third-party piracy. [ER000012 (Dkt 509, at 5)]. The District Court did not cite this concern either in its preliminary or permanent injunction orders, and Plaintiffs offered no evidence of actual third-party piracy from either VidAngel’s defunct Disc-based Service or its active Stream-based Service. While Plaintiffs elicited opinion testimony at trial that VidAngel’s security protocols were not as robust as those

required of licensed streaming services, they offered no evidence that VidAngel's security was ineffective. Moreover, VidAngel presented evidence that it would gladly adopt the same security protocols required of licensed streaming services if that were a legitimate concern. [ER000018-19 (Dkt 508 ¶ 12)].

Consumer Confusion. Finally, Plaintiffs argued that VidAngel's conduct threatened harm in the form of confusion among end-consumers as to the legality of VidAngel's conduct. But they offered no evidence that such confusion actually exists, or if it does that it would constitute irreparable harm. The legality of VidAngel's abandoned Disc-based Service is still subject to a good faith dispute. And the legality of its active Stream-based Service has never even been challenged. It would be one thing if Plaintiffs had requested nothing more than an order prohibiting VidAngel from reverting to the Disc-based Service, but the injunction they requested—and which the District Court granted—extends to the Stream-based Service. The proposition that an order is necessary to prevent confusion as to the

legality of the Stream-based Service when that question has not even been presented to any court for decision makes no sense at all.

Jury's Verdict. In addition to importing wholesale its reasons for granting a preliminary injunction, the District Court stated that its findings of irreparable harm and inadequacy of legal remedies were also based on (1) the high amount of statutory damages, and (2) its assessment “[t]hat VidAngel will probably not be able to pay the award.” [ER000005-6 (Dkt 519 at 1-2)]. This part of the District Court’s reasoning is wholly illogical, and strongly suggests its decision was based on prejudice—not facts.

Contrary to the District Court’s statement, the verdict provides no information regarding the existence or nonexistence of harm—reparable or otherwise—or the adequacy of legal remedies. The jury was not asked to find whether Plaintiffs had suffered any actual harm, whether such harm (if any) was reparable or irreparable, what amount of money (if any) would be sufficient to compensate Plaintiffs, or whether an award of damages would adequately

remedy Plaintiffs' harm (if any). [See ER000024-27 (Dkt 494)]. On the contrary, the jury was instructed that statutory damages should "penalize the infringer and deter future violations of the copyright laws," that "a plaintiff can recover statutory damages whether or not there is evidence of the actual damage suffered," and that "[t]here is no required nexus between the amount of statutory damages awarded and any damages suffered by a plaintiff." [ER000048, 50 (Dkt 485, at 21, 23)]. In other words, because the jury made no findings on the issues of harm or adequacy of remedies, as a matter of evidence their verdict could not have had "any tendency to make [the] fact[s] [of irreparable harm or inadequacy of legal remedies] more or less probable than [they] would be without the evidence." Fed.R.Evid. 401(a).

Likewise, whether VidAngel had the ability or inability to pay a statutory damages award has no bearing on whether Plaintiffs suffered any harm, whether that harm was irreparable, or whether legal remedies are inadequate.

2. Plaintiffs did not prove legal remedies were inadequate

The District Court's preliminary injunction order made no finding as to whether legal remedies would be inadequate to cure Plaintiffs' harm. And its permanent injunction order cites nothing more than the District Court's illogical reasoning regarding the amount of the jury's verdict and VidAngel's perceived inability to pay. [ER000006 (Dkt 519, at 2)]. Contrary to the District Court's statements, the evidence at trial established that Plaintiffs either suffered no actual damages (but in fact benefited from VidAngel's Disc-based Service), or that actual damages were modest, if not *de minimis*. [ER000275-85 (Dkt 513, TT 614:20-624:18)].

Plaintiffs argued that legal remedies would be inadequate unless VidAngel pays the full amount of the statutory damages awards. But they could not deny that whatever actual damage they may have suffered was at most a tiny fraction of that amount. Obviously, legal remedies would be *adequate* to compensate Plaintiffs for their harm so long as VidAngel can pay the *portion* of the

statutory damages awards that would provide just compensation for their actual damages. Any amount of statutory damages beyond that portion is not necessary to remedy harm, but instead represents a windfall to Plaintiffs imposed against VidAngel for “punitive purposes.” Ninth Cir. Man. Model Civ. Jury Instr. 17.35, Comment; *see also F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 233 (1952) (court may, if it deems it just, award statutory damages to discourage infringement).

There is no doubt whatsoever that the payment of even a fraction of the legal remedies imposed against VidAngel would be sufficient to compensate Plaintiffs for any actual damage they may have suffered. And there was no evidence to support a finding that Plaintiffs will suffer any future harm absent a permanent injunction. In short, there is no evidence to support the District Court’s finding that legal remedies were inadequate.

3. Plaintiffs did not prove the balance of hardships favored an injunction

In its preliminary injunction order, the District Court reasoned

that the balance of hardships tipped in Plaintiffs' favor because, in its view, the only hardship VidAngel could identify was "lost profits from an activity which has been shown likely to be infringing" — namely, operating the Disc-based Service. [ER000152 (Dkt 144, at 20)]. While VidAngel maintains it did not infringe, it has nevertheless moved on from the Disc-based Service and has unequivocally committed not to revert to it. [ER000019 (Dkt 508 ¶ 13)]. Thus, if a permanent injunction did no more than prohibit VidAngel from reverting to the Disc-based Service absent an amendment to the Copyright Act or a decision of an appellate court clearly allowing it, VidAngel would not claim hardship. By the same token, in light of VidAngel's commitment not to revert to the Disc-based Service, Plaintiffs would likewise suffer no hardship in the absence of a properly tailored injunction. If anything, the balance of hardships for a properly tailored *narrow* injunction would stand in equipoise.

But the District Court's order does far more than prohibit VidAngel from reverting to the Disc-based Service. It vaguely

prohibits a wide range of behavior that is not infringing—including any fair use that involves the copying or transmission of any portion of any copyrighted work owned by Plaintiffs or any of their parents, subsidiaries or affiliates. In particular, the injunction prohibits VidAngel from making filtered performances of Plaintiffs’ works available through its Stream-based Service even though VidAngel has operated that system for three years without any objection or legal challenge from copyright owners.⁴

The District Court’s decision to restrain VidAngel from engaging in conduct that has not been found to be infringing—and which, though not yet tested in court, is likely non-infringing—was manifestly improper. In deciding whether to issue an injunction, a district court should be “guided generally by the principle that it should only restrain or prohibit actions that violate the law.” *Grokster*,

⁴ As VidAngel testified in the District Court, it has no plans to add Plaintiffs’ works to its Stream-based Service. [ER000018 (Dkt 508 ¶ 11)]. However, that does not mean the District Court was justified in issuing a permanent injunction prohibiting VidAngel from engaging in lawful conduct.

518 F. Supp. 2d at 1230. And “injunctive relief should avoid prohibiting legitimate conduct.” *Id.* at 1231 (quoting *Fonovisa v. Napster, Inc.*, No. 3:01-CV-02669, 2002 WL 398676, at *9 (N.D. Cal. Jan. 28, 2002)). This principle applies even if the legality of the contemplated conduct is unsettled. *See U.S. v. Oakland Cannabis Buyers’ Coop.*, 190 F.3d 1109, 1114 (9th Cir. 1999), *rev’d on other grounds*, 532 U.S. 483 (2001) (injunctions must be “narrow enough to exclude conduct that *likely* would be legally privileged or justified” (emphasis added)).

The question whether VidAngel is infringing copyrights by operation of its Stream-based Service has not been presented to any court. However, the fact that none of the many copyright owners whose motion pictures are available for private filtered performances through that service have objected to it in three years strongly suggests VidAngel’s conduct is legally justified. Even if it could be argued that the balance of hardships favored a permanent injunction prohibiting VidAngel from reverting to the Disc-based Service, this

factor does not favor the District Court's overbroad injunction prohibiting other acts.

4. Plaintiffs did not prove a permanent injunction was in the public interest

The District Court offered no analysis of the public interest in its order, but to the extent it intended to adopt wholesale Plaintiffs' arguments on this matter it clearly erred. Plaintiffs offered no evidence that a permanent injunction would serve the public interest in this case, but instead merely cited cases for the general proposition that the public interest favors enforcement of the copyright laws. Their argument, however, begs the question: it assumes an injunction is necessary to ensure the copyright laws are enforced. Plaintiffs' position, if accepted, would rob the public interest factor of all meaning. The question before the District Court was not whether laws should be enforced—something everyone agrees on—but rather whether the public *benefit* of an injunction outweighs the public *cost*.

While enforcement of copyright laws benefits the public, over-enforcement can harm it. The public has interests in both the

protection of copyrights and in fair access to and use of copyrighted works. An injunction that restricts fair use may hinder the copyright law's goal "to stimulate the creation and publication of edifying matter." See *Campbell*, 510 U.S. at 578 n.10 (1994) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1134 (1990); see also Leval, *supra* at 1132 (public may have a strong interest in publication of fair use materials); *Abend v. MCA, Inc.*, 863 F.2d 1465, 1479 (9th Cir. 1988) (noting potential for "public injury" if injunction prohibited continued exploitation of infringing movie). Likewise, an injunction that unduly restricts the ability to use technology to enjoy filtered private home performances of motion pictures would hinder the public's interest in rights recognized by Congress. See 17 U.S.C. § 110(11).

In addition, the public has no interest in an injunction that, along with "the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses." *eBay*, 547 U.S. at 396

(Kennedy, J., concurring). On the contrary, “[w]hen . . . the threat of an injunction is employed simply for undue leverage in negotiations, . . . an injunction may not serve the public interest.” *Id.*

Moreover, the public has no interest in an injunction that has no practical value. A properly tailored injunction that merely prohibited VidAngel from reverting to the Disc-based Service would require the District Court to maintain a supervisory role at public expense for years to come, even though VidAngel unequivocally abandoned that service. The only practical purpose of the vague, overly broad injunction ordered by the District Court is to give Plaintiffs the ability to threaten VidAngel with contempt proceedings if it engages in any conduct involving any portion of their copyrighted works—including lawful fair uses.⁵ The injunction does not serve the public interest.

⁵ Indeed, at the hearing on its motion Plaintiffs’ counsel argued against adding “some language that exempts fair use or use authorized by the Family Movie Act,” as follows:

If they’ve got an argument that what they are doing is fair use, . . . then the burden is on them to come in and prove it and to show that that’s a defense to a finding of

C. The Permanent Injunction is Vague and Overbroad

When fashioning an injunction, district courts “must insure that [the injunction] is tailored to eliminate only the specific harm alleged.” *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir. 1992); *see also Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) (“Injunctive relief . . . must be tailored to remedy the specific harm alleged.”); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (“[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”). Injunctions should in every case be fashioned to avoid restraining conduct that may well turn out to be “legally privileged or justified.” *Oakland Cannabis Buyers’ Coop*, 190 F.3d at 1114. And an injunction that is overbroad—i.e., that is more burdensome than

infringement.

If they think they’ve got an argument under the Family Movie Act, . . . if they want to put their proverbial money where their mouth is, they could do that in defending a contempt proceeding. And that’s the way that it should be dealt with.

[ER000346-47 (Dkt 545, at 9:10-10:9)].

necessary to provide relief—is an abuse of discretion. *E. & J. Gallo Winery*, 967 F.2d at 1297. The District Court, however, ignored these principles, and issued an overbroad, impermissibly vague injunction restraining lawful conduct, and vaguely ordering VidAngel generally to obey the law.⁶ As such, the order granting the permanent injunction must be vacated.

Several elements of the permanent injunction render it vague and overbroad, including: (1) the definition of “Copyrighted Work,” (2) the prohibition on circumventing technological measures “protecting” Copyrighted Works, (3) the prohibition of all “copying,” (4) the prohibition of all “streaming [and] transmitting” of Copyrighted Works by means of “any device or process,” (5) the

⁶ The District Court did not deny the injunction would extend to VidAngel’s Stream-Based Service, or that such conduct may well be lawful. Instead, it suggested VidAngel could violate the injunction and then challenge its enforceability. [ER000006 (Dkt 519, at 2)]. This reasoning turns on its head the principle that injunctions must be narrowly tailored to eliminate only the specific harm proved. VidAngel should not have to risk a contempt citation in order to engage in lawful conduct.

prohibition on “facilitating any third party in streaming or transmitting Copyrighted Works,” and (6) the prohibition on “engaging in any other activity that violates, directly or indirectly, Plaintiffs’ anti-circumvention right, 17 U.S.C. § 1201(a)(1)(A), or that infringes by any means, directly or indirectly, any Plaintiff’s exclusive rights in any Copyrighted Work under Section 106 of the Copyright Act, 17 U.S.C. § 106.”

1. The definition of “Copyrighted Work” is overly broad and vague

First, the Permanent Injunction defines “Copyrighted Work” to mean

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

[ER000002 (Dkt 520, at 2)]. This definition is breathtakingly overbroad. VidAngel was accused of infringing a specific kind of copyrighted work (motion pictures), but this definition sweeps into

its scope every kind of work, including literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works. *See* 17 U.S.C. § 102. And the injunction purports to expose VidAngel and all of its officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with any of them to potential contempt sanctions if they copy or transmit even a portion of any such work in any way. For example, Plaintiffs could initiate contempt proceedings against a VidAngel employee merely for posting a Baby Yoda meme on the @vidangelnews Instagram account,⁷ or for writing a short “fan fiction” story about the adventures of Woody and Bo Peep, even though such conduct would have nothing to do with filtered performances of movies, and would likely qualify as fair use.

⁷ Many of the posts on that Instagram account consist of screenshots, short clips, and memes from popular movies and TV shows. *See* <https://www.instagram.com/vidangelnews/>

In addition to expanding the definition of “Copyrighted Work” to include works other than motion pictures, the definition also sweeps in works belonging to unnamed, and unknown persons. It purports to require VidAngel and anyone associated with it to research and identify every parent, subsidiary, and affiliate of any Plaintiff, and all copyrights owned by such unnamed persons. As this Court has explained, “[a] federal court may issue an injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over the claim; it may not attempt to determine the rights of persons not before the court.” *Zepeda v. U.S.I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983). In *Zepeda*, an injunction that purported to apply to a putative class prior to certification was struck down as overbroad because the unnamed class members were not parties. *Id.* Likewise, Plaintiffs’ parents, subsidiaries, and affiliates—if they have any—were not joined in the case, and the District Court lacked jurisdiction to adjudicate their rights. Even if it had jurisdiction, the injunction clearly violates the rule that every injunction must “describe in

reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.” Fed. R. Civ. P. 65(d)(1)(C); *see also Grokster*, 518 F. Supp. 2d at 1228 n.24 (an injunction should be drafted so that any “ordinary person reading the order” can “ascertain from the document itself exactly what conduct is proscribed”).

The definition of “Copyrighted Work” improperly requires VidAngel and others bound by the injunction to look far beyond the four corners of the order to ascertain which copyrighted works—or portions thereof—are subject to its protections. Even if the granting of some form of a permanent injunction was within the District Court’s discretion, that order should not have applied to any works beyond motion pictures owned by the Plaintiffs.

2. The prohibition on circumventing “technological measures protecting Copyrighted Works” is overly broad and vague

The injunction also fails to describe in reasonable detail what acts are prohibited with respect to the DMCA. VidAngel was held

liable for circumventing technological measures “that effectively control[] access” to motion pictures because it used two software programs (AnyDVD and AnyDVD HD) to decrypt DVD and Blu-Ray discs for the purpose of making fair use “master files” of the content of those discs. [ER000117-19 (Dkt 323, at 6-8)]. In the event this Court affirms the District Court’s summary judgment that VidAngel violated the DMCA notwithstanding its claim for fair use, an injunction that merely prohibited that conduct would be sufficient to address the alleged violation of the DMCA.

The injunction, however, goes much further. It prohibits the circumvention of “technological measures protecting Copyrighted Works on DVDs, Blu-ray Discs, or any other medium.” [ER000002 (Dkt 520, at 2)]. The injunction does not explain what technologies fall under this vague rubric. Nor is it clear how the injunction would relate to “any other medium” beyond DVDs and Blu-ray discs. [See ER000002 (Dkt 520, at 2)]. VidAngel does not know what, if any, conduct the injunction restrains beyond what it was accused of. To

the extent any injunction could have been properly ordered, it should have been narrowly tailored.

3. The prohibition on “copying” is overly broad and vague

The restriction on “copying Copyrighted Works,” [ER000002, (Dkt 520, at 2)], is also vague. That term might be interpreted to prohibit only the reproduction of copyrighted works in copies. *See* 17 U.S.C. § 106(1). But “copying” is often used as “shorthand for the infringing of any of the copyright owner’s [six] exclusive rights.” *Range Road Music, Inc. v. E. Coast Foods, Inc.*, 668 F.3d 1148 (9th Cir. 2012) (internal quotation marks omitted). To the extent this term is used to mean anything beyond the making of copies it fails to describe in reasonable detail what acts are restrained. And to the extent it is interpreted to refer only to reproduction, it impermissibly fails to provide that the order is subject to limitations on that right, particularly fair use. *See* 17 U.S.C. §§ 107 through 122.

If any injunction was warranted, it should have been narrowly tailored to merely prohibit VidAngel from operating the Disc-based

Service. It should not have been fashioned in such an overbroad and vague manner as to prohibit all “copying,” including “copying” that would otherwise be legal.

4. The prohibition on “streaming [and] transmitting” is overly broad and vague

The injunction prohibits the “streaming” or “transmitting” of any Copyrighted Work—including, according to the definition, any portion of a work—by means of any “device or process.” [ER000003 (Dkt 520, at 3)]. The language of the order ignores the possibility that a person subject to the injunction could stream or transmit a non-public performance of a Copyrighted Work, which would not implicate any of Plaintiffs’ exclusive rights. It also ignores the possibility that a person could stream or transmit a non-infringing public performance of a Copyrighted Work. For example, by its terms the injunction would literally prohibit a VidAngel employee from emailing a Disney-themed meme to a friend, or from posting a fair use parody video on YouTube. The District Court could have easily avoided the overbreadth of this order by simply issuing an injunction

that prohibits VidAngel from reverting to the Disc-based Service.

5. The prohibition on “facilitating” conduct is overly broad and vague

The prohibition on “facilitating” conduct, [ER000003 (Dkt 520, at 3)], is also impermissibly vague and overbroad. VidAngel has no idea what would constitute a “facilitation” of a third party’s conduct. Moreover, VidAngel is unaware of any law that prohibits “facilitation.”

Copyright law provides for secondary liability under the doctrines of vicarious or contributory infringement. *See, e.g., Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170-1175 (9th Cir. 2007). But the prohibition on “facilitation” does not appear to be tethered to either of these doctrines. In fact, Plaintiffs have already indicated they would interpret this prohibition to “bar[] VidAngel from transferring [its intellectual property] assets to third parties,” because any such transferee would necessarily “use those assets to infringe Plaintiffs’ copyrights and circumvent the protections on DVDs and Blu-ray discs.” [ER000013 (Dkt 509, Reply at 11:2-4)]. But Plaintiffs offered no

evidence to support their assertions, or even to establish what assets would be restricted from transfer. Plaintiffs' goal in demanding this portion of the injunction was apparently not to prevent infringement of their copyrights, but rather to destroy the value of VidAngel's intellectual property without due process.

No court has considered the legitimate, non-infringing capabilities of VidAngel's technology, nor decided whether sharing that technology would necessarily give rise to secondary liability for copyright infringement. Such questions cannot be pre-judged by issuance of an overbroad, vague injunction.

6. The prohibition on "any other activity" constitutes an overbroad order to obey the law

Finally, the injunction also impermissibly restrains VidAngel from "engaging in any other activity that violates, directly or indirectly, Plaintiffs' anti-circumvention right, 17 U.S.C. § 1201(a)(1)(A), or that infringes by any means, directly or indirectly, any Plaintiff's exclusive rights in any Copyrighted Work under Section 106 of the Copyright Act, 17 U.S.C. § 106." [ER000003 (Dct

520)]. As the Supreme Court has declared,

the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.

N.L.R.B. v. Express Pub. Co., 312 U.S. 426, 435 (1941); *see also, e.g., Lineback v. Spurlino Mats., LLC*, 546 F.3d 493, 504 (7th Cir. 2008) (“Injunctions that ‘merely instruct the enjoined party not to violate a statute’ generally are overbroad, increasing ‘the likelihood of unwarranted contempt proceedings for acts unlike or unrelated to those originally judged unlawful.’” (quoting *Int’l Rectifier Corp. v. IXYS Corp.*, 383 F.3d 1312, 1316 (Fed. Cir. 2004)); *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1531-32 (11th Cir. 1996) (injunction prohibiting developer from discharging stormwater runoff in violation of the Clean Water Act was an unenforceable “obey the law” injunction); *Louis W. Epstein Family Partnership v. Kmart Corp.*, 13 F.3d 762 (3d Cir. 1994) (“Broad, non-specific language that merely enjoins a party to obey the law . . . does not give the restrained party fair notice of what

conduct will risk contempt.”); *Thomas v. County of Los Angeles*, 978 F.2d 504 (9th Cir. 1992) (injunction directing compliance, “under penalty of contempt, with all department policies and guidelines” failed to “specify the act or acts sought to be restrained as required by Fed.R.Civ.P. 65(d)”).

Here, VidAngel was accused of violating the anti-circumvention provision of the DMCA and infringing Plaintiffs’ reproduction and public performance rights based on specific conduct. Even if an injunction was warranted to restrain such conduct (notwithstanding VidAngel’s unequivocal abandonment of the Disc-based Service), there was no basis whatsoever for an order broadly ordering VidAngel to obey the law.

In granting the overbroad injunction, the District Court relied on the Northern District of California’s decision in *Apple Inc. v. Psystar Corp.*, 673 F. Supp. 2d 943, 954 (N.D. Cal. 2009). [See ER000006 (Dkt 519, at 2)]. However, that case is clearly distinguishable. In *Apple*, the defendant demanded an express carve-out from an

injunction with respect to (1) infringement of future copyrighted works belonging to Apple, and (2) the sale of a product developed by the defendant that was then being litigated in another forum. 673 F. Supp. 2d at 951-52. Unlike the defendant in *Apple*, VidAngel did not argue that an injunction must not extend to future copyrighted works belonging to the Plaintiffs.⁸ Nor did it demand an express carve-out for its Stream-Based Service. Instead VidAngel requested only that the injunction be properly tailored to restrain only the conduct the District Court had actually determined to be unlawful. [See ER000021 (Dkt 507, Opp. at 16)].

VII. CONCLUSION

The permanent injunction issued by the District Court is vague, overbroad, and unnecessary. VidAngel respectfully requests this Court vacate the order in its entirety. In the event this Court is

⁸ VidAngel argued only that it would be improper to extend the injunction to works belonging to unidentified parents, subsidiaries, and affiliates of the Plaintiffs, and to works other than motion pictures. [See ER000022-23 (Dkt 507, at 17-18)].

inclined to affirm the District Court's decision that a permanent injunction was warranted, it must at least be narrowly tailored and clear.

VIII. STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, VidAngel states that Ninth Circuit Case Number 20-55352 is related to this case in that it arises out of the same case in the District Court and involves the same transactions or events.

Dated: July 10, 2020

Respectfully submitted,

By: *s/ Samuel G. Brooks*

Mark L. Eisenhut

Samuel G. Brooks

CALL & JENSEN, APC

Attorneys for VidAngel, Inc.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 8. Certificate of Compliance for Briefs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form08instructions.pdf>

9th Cir. Case Number(s) 19-56174

I am the attorney or self-represented party.

This brief contains 9,006 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

[X] complies with the word limit of Cir. R. 32-1.

[] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[] complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):

[] it is a joint brief submitted by separately represented parties;

[] a party or parties are filing a single brief in response to multiple briefs; or

[] a party or parties are filing a single brief in response to a longer joint brief.

[] complies with the length limit designated by court order dated _____.

[] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/Samuel G. Brooks **Date** 7/10/2020
(use "s/[typed name]" to sign electronically-filed documents)