

No. 16-56843

**United States Court of Appeals
for the Ninth Circuit**

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

Plaintiffs-Counter-Defendants-Appellees,

– v. –

VIDANGEL, INC.,

Defendant-Counter-Claimant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CENTRAL CALIFORNIA, LOS ANGELES
CASE NO. 2:16-CV-04109-AB-PLA, ANDRE BIROTTE, DISTRICT JUDGE

**BRIEF OF *AMICUS CURIAE* THE COPYRIGHT
ALLIANCE IN SUPPORT OF APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the Copyright Alliance states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of *amicus*'s stock.

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Pursuant to Federal Rule of Appellate Procedure 29(a), *amicus curiae* the Copyright Alliance respectfully submits this brief in support of appellees Disney Enterprises, Inc.; LucasFilm Ltd., LLC; Twentieth Century Fox Film Corporation; and Warner Bros. Entertainment, Inc. (collectively, “Appellees”). This brief is submitted with consent by the parties.¹

INTEREST OF AMICUS CURIAE

The Copyright Alliance is a nonprofit, nonpartisan 501(c)(4) membership organization dedicated to promoting and protecting the ability of creative professionals to earn a living from their creativity. It represents the interests of individual authors from a diverse range of creative industries – including, for example, writers, musical composers and recording artists, journalists, documentarians and filmmakers, graphic and visual artists, photographers and software developers – and the small businesses that are affected by the unauthorized use of their works. The Copyright Alliance’s membership encompasses these individual creators and innovators, creative union workers, and small businesses in the creative industry, as well as the

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. Only *amicus curiae* made such a monetary contribution. Some Copyright Alliance members are, or are affiliates of, Appellees in this matter. Additionally, some Copyright Alliance members may join other *amicus* briefs in support of Appellees.

organizations and corporations that support and invest in them. Moreover, members of *amicus* are among the even larger and even more diverse array of citizens and companies that owe their livelihoods to the Copyright Act.

The appellant in this case attempts to make this appeal only about big studios, and the suggestion that the appellant knows better than the studios do about how their works should be commercialized. But this case is not just about big film studios: it is about creators of all types, and those affected by the reach of copyright law extend far beyond the names of the parties involved in the present appeal. Creators and contributors to copyright-protected works come in all sizes and varieties, and this case has implications for all of them.

The concept of innovation is of fundamental importance to the Copyright Alliance. The copyright laws spur the development and distribution of new creative works and innovations for the benefit of public consumption by ensuring that those who contribute to these works and innovations are entitled to determine how their efforts will be used and modified. Accordingly, the Copyright Alliance encourages partnerships between creators and technology companies to develop and take advantage of new technologies that create new audiences in new and legal ways,

regardless of whether those new ways might “disrupt” traditional business models.

However, regardless of the ways in which new technologies and businesses models evolve, a stated aspiration to create “family friendly” copies of copyrighted works does not merit judicial legislation to permit a new, and heretofore illegal, enterprise. Nor is one necessary to accomplish certain activities envisaged and permitted by existing legislation. The Copyright Alliance submits this brief to help the Court understand the broad-reaching legal and practical consequences that reversal would have on creators and owners of copyrighted works – not just motion pictures, but any sort of work. The Copyright Alliance also submits this brief to help the Court understand the policy reasons that support the propriety of Judge Birotte’s reading of the Family Movie Act (“FMA”), and to underscore that this Court should reject any attempts to use this case to legislate new exceptions to technological protections for copyrighted works.

SUMMARY OF THE ARGUMENT

Defendant-appellant VidAngel, Inc. (“VidAngel”) advocates for what it calls “common sense,” but there is nothing sensible about disregarding the law or legal precedent. And creating broad exceptions to broad rights conferred by Congress and the Constitution does not appeal to our better

angels. Indeed, courts have repeatedly, and correctly, rejected prior efforts to find lawyer-created loopholes in these broad rights. No basis exists for VidAngel to meet a different outcome.

VidAngel reproduces copyrighted works and publicly performs them, purportedly in the interest of allowing children with diligent parents to see movies that contain “filter-worthy” content. Assuming this is in fact VidAngel’s objective, it can be met – and indeed, is being met – using methods other than one that relies on violations of several exclusive rights granted to copyright owners under Section 106 of the Copyright Act.

This self-described “tiny start-up” – in reality, a for-profit company that “spends millions of dollars” making thousands of copies of the entire content of thousands of copyrighted works, which VidAngel retransmits to the public – threatens to have an expansive impact on copyright law. The arguments it makes would unleash broad consequences for creators and copyright owners of all stripes. It would turn a narrow exception into an open door for commercial actors to exploit others’ hard work and financial investments, without seeking permission or contributing to the creative effort. Moreover, a dozen years ago Congress carefully considered the same policy arguments that VidAngel purports to rely upon, and the FMA was

written accordingly. It is for Congress, not the courts, to consider arguments that the FMA should be re-written.

Nor is this the place to legislate new exceptions to the law against circumvention of technological protection measures for creative works. Technological protection measures defend all sorts of copyrighted works, and VidAngel's position would create an exception that runs directly counter to the core reasons for the enactment of Section 1201 of the Digital Millennium Copyright Act in the first place; it would also incentivize others to engage in hacking of all sorts of technological protection measures that are designed to prevent piracy of creative works. The district court's ruling was sound, legally and practically, and should be affirmed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY SAW THROUGH VIDANGEL'S ATTEMPT TO CREATE AN UNWARRANTED LOOPHOLE IN COPYRIGHT LAW

A. VidAngel Violates Fundamental Exclusive Rights of Copyright Owners.

VidAngel claims to be under attack for providing filtered versions of movies. That is false. The complaint in this case shows that the plaintiffs sued VidAngel not for filtering movies, but for running an unlicensed video-on-demand service that makes unauthorized reproductions and public performances in violation of 17 U.S.C. §§ 106(1) & (4). *See* Compl. ¶56

(VidAngel infringes plaintiffs’ exclusive rights to copy and make public performances of copyrighted works, in violation of 17 U.S.C. § 106(1) & (4)). Hiding behind the argument that its commercial business creates a benefit to which copyright owners’ interests should be subordinate, VidAngel at its core copies and publicly performs copyright owners’ works, without the permission of or payment to the owners. This is indefensible.

A proper application of the law holds that copying is copying unless there is an exception. Congress deliberately constructed the Copyright Act to work in such a way: the “approach of the bill is to set forth the copyright owner’s exclusive rights in broad terms in section 106[.]” H.R. Rep. No. 94-1476, at 61 (1976). The breadth of the Act is important, because it is how creators and copyright owners realize a return on their investments of artistry, time, and money. When an exception is created, it is done carefully and with all stakeholder interests taken into account.

The thrust of VidAngel’s argument appears to be that because it has purchased a copy of a work, it can do whatever it wants with that work. Yet despite that VidAngel’s argument, just under its surface, is a mutant form of the first sale doctrine in Section 109 of the Copyright Act, VidAngel itself does not cite the doctrine. This is a tacit admission that despite its forced analogies to the disposition of physical copies, VidAngel is engaged in much

more than that. Its “distribution” is defensible only where it makes no copies and does not perform: the text of the first sale defense confirms as much. 17 U.S.C. § 109(a) (noting applicability only to the distribution right (Section 106(3))). There is nothing about the possession of an authorized copy that allows a party to make copies or engage in public performances (the rights that the district court found VidAngel likely violated) as part of the sale or disposal of a copy of a work.

Others who have attempted to make similar “I bought it, so I can do whatever I want with my copy” arguments have found no blessing from the courts: making copies is a separate infringing activity that must be authorized by the copyright owner under Section 106. *See Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 646, 655-56 (S.D.N.Y. 2013) (copying music file from user’s computer to cloud locker for purposes of selling song “necessarily involves copying”); *see also Peker v. Masters Collection*, 96 F. Supp. 2d 216, 221 (E.D.N.Y. 2000) (“It is no defense that [defendant] used a lawfully acquired object to achieve its unlawful goal of copying.”); *Design Options, Inc. v. BellePointe, Inc.*, 940 F. Supp. 86, 91 (S.D.N.Y. 1996) (right to resell sweaters bearing designs did not give right to sell sweaters with new versions of designs). Administrative agencies have held similarly. *See* U.S. Dep’t of Commerce Internet Policy Task

Force, White Paper on Remixes, First Sale, and Statutory Damages, at 35 (Jan. 28, 2016), *available at* https://www.ntia.doc.gov/files/ntia/publications/white_paper_remixes-first_sale-statutory_damages_jan_2016.pdf (copying for purposes of distributing new versions of works is infringement); U.S. Copyright Office, DMCA Section 104 Report, at 79-80, 97-98 (August 2001), *available at* <https://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf> (finding no defense in the creation of digital copies for purposes of “re-selling” previously purchased digital files).

VidAngel’s references to “intermediate” copying does not make those copies any less infringing. Making copies for some other purpose – unless a specific exception or defense applies – is copying nonetheless. *See Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1519 (9th Cir. 1992) (following *Walker v. Univ. Books*, 602 F.2d 859, 864 (9th Cir. 1979) (“[T]he fact that an allegedly infringing copy of a protected work may itself be only an inchoate representation of some final product to be marketed commercially does not in itself negate the possibility of infringement.”); *see also MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (loading copy into RAM may result in the creation of unauthorized copies). This form of copying falls plainly within the statute as well as

within this Court's precedent and, contrary to VidAngel's arguments, following the law makes sense.²

B. VidAngel Relies on Lawyer-Driven Methods That Directly Conflict with the Letter and Spirit of the Law.

When looking at the way VidAngel functions, it is clear that the cry of “filtering” is a red herring that seeks to distract the Court from the fact that VidAngel is violating the plaintiffs’ reproduction and public performance rights, and lacks any viable defense. And VidAngel ignores or downplays features of its system that have nothing to do with omitting aspects of movies that some may prefer not to see. Most egregiously, VidAngel markets itself as a way to remove the end credits of films – the heart of how the many artists and professionals who work on them are acknowledged. VidAngel Br. at 12. While VidAngel unconvincingly maintains that its “credits” filter is offered because some films show potentially offensive “bloopers” during credits, this is merely a pretext, when it has every ability to remove those portions where they appear, leaving the credits in place. *See id.*

² VidAngel spends a lot of ink on the history of the VCR and other products. The Court should not be distracted by those arguments. These products are not only outside of the facts of this case, but VidAngel’s service bears no factual or legal similarity to the exceptions that have been judicially found to fall outside the bounds of copyright liability. Likewise, laws exist that cover what Redbox does; but these laws do not apply to VidAngel, and VidAngel does not put forth an explanation that they do.

Moreover, VidAngel's system is overly complex. There truly is no reason – other than trying to take advantage of some perceived loopholes in copyright law – for VidAngel's convoluted “buy-sellback” system. Indeed, the situation here is essentially analogous to those in a long line of cases where courts have rejected lawyer-driven methods for avoiding copyright law. Seventeen years ago, Judge Rakoff rejected an argument that a service that bought tens of thousands of popular CDs and uploaded them for access by subscribers who could prove they owned the work, was legal, despite the defendant's argument that the service was the “functional equivalent” of a cloud locker that allowed space-shifting. *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349, 350-51 (S.D.N.Y. 2000). Dismissing “consumer demand” arguments that are echoed in VidAngel's brief, the court explained:

Stripped to its essence, defendant's “consumer protection” argument amounts to nothing more than a bald claim that defendant should be able to misappropriate plaintiffs' property simply because there is a consumer demand for it. This hardly appeals to the conscience of equity.

Id. at 352. Courts have continued to see past lawyer-driven business structures that are dressed up as something else but in fact are designed to seek a way around copyright law. In *ReDigi*, the court rejected an attempt to argue that a system for selling “used” digital music files merely “migrates”

the file from one user to another, when it was clear that a copy was made in the process. 934 F. Supp. 2d at 650. Two years earlier, a court shut down an enterprise that involved the purchase of hundreds of DVD players and hundreds of copies of copyrighted works for customers to “rent” for 14 days. *Warner Bros. Entm’t Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1011 (C.D. Cal. 2011).

In *American Broadcasting Companies, Inc. v. Aereo, Inc.*, the Supreme Court saw Aereo’s complicated system of dime-sized antennas for what it was: an attempt to create an end-run around the public performance right. 134 S. Ct. 2498, 2511 (2014). With its ruling, the Court also eliminated the confusing “guideposts” that the Second Circuit was constrained to create in order to avoid widespread consequences of its now-reversed decision that Aereo – itself a “Rube Goldberg-like contrivance” – was not violating the law. *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500, 513 (2d Cir. 2013) (*en banc*) (Chin, J., dissenting) (rejecting concept that rulings “provide ‘guideposts’ on how to avoid compliance with our copyright laws.”).

These courts have all rejected the pretext that has been put forth, finding that MP3.com was not just “music in a different place” or that Aereo was just “television on your phone.” The courts looked at what the party

actually did. Similarly, like in the cases cited above, the law should not favor methods that are designed to take advantage of perceived loopholes in the law. This is not the type of innovation that the framers of Article I, Section 8, Clause 8 had in mind. Nor does a system that floods the market with nearly identical competing works add anything to the progress of science or the useful arts. *Compare Am. Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 404 (S.D.N.Y. 2012), *aff'd sub nom. WNET*, 712 F.3d. 676 (2d Cir. 2013), *rev'd and remanded sub nom. Aereo*, 134 S. Ct. 2498 (2014) (noting the “numerous other methods through which the public can lawfully receive access to [p]laintiffs’ content” – and rejecting the argument that the public has the right to receive programming through Aereo’s *particular* service), *with* VidAngel statement, “watch movies however the BLEEP you want” “VidAngel” Google Search Results Page, Google Search, https://www.google.com/search?q=vidangel+bleep&biw=1440&bih=794&source=lnms&sa=X&ved=0ahUKEwiktoL74o_SAhVhyoMKHbcSC1sQ_AUIBSgA&dpr=1 (last accessed Feb. 15, 2017).

II. JUDGE BIROTTE’S DECISION CORRECTLY CONSTRUED THE FMA

In its opening brief, VidAngel asserts that the FMA, 17 U.S.C. § 110(11), “immunizes it from any liability.” *See* VidAngel Br. at 17. However, the plain meaning of the Copyright Act, as supported by the universally-accepted canons of statutory construction and legislative intent leads to one conclusion: VidAngel’s expansive reading of Section 110(11) is wrong. *See id.*

A. Broad Copyright Rights Are Fundamental to Creators’ Constitutional Bargain with the Public.

The exclusive rights created by Section 106 of the Copyright Act are intentionally broad, because they are fundamental to the Constitutional bargain between creators and the public. *See* H.R. Rep. No. 94-1476, at 61 (1976) (the “approach of the [Act] is to set forth the copyright owner’s exclusive rights in broad terms in section 106[.]”)

The FMA, in contrast, is a very limited provision specifying that certain specific acts do not constitute violations of the Copyright Act. Congress was careful to draft the language of the FMA to be very technical, specialized, focused and precise, like any limitations on the rights of copyright creators and owners. *See, e.g.,* S. Rep. No. 106-42, at 10 (1999)

(compulsory licenses are narrowly drawn by Congress); H.R. Rep. No. 108-660, at 8-9 (2004) (same).

In keeping with this approach, Congress has debated, drafted, and ultimately passed the FMA and other exceptions to copyright with the assumption that courts would follow the traditional tenets of statutory interpretation and construe their terms strictly, giving every word its intended meaning. It is thus of fundamental importance to all creators and members of the creative community, including *amicus*'s members, that this Court carefully apply the tools of statutory construction so as not to extend any exceptions to copyright liability beyond the scope contemplated by Congress.

In contrast to this balanced and traditional view of copyright, in the present appeal, VidAngel invites the court to radically extend the FMA by violating, *inter alia*, the plain meaning rule, the presumption of narrow interpretation of statutory exemptions whenever (unlike here) any ambiguity exists, and the rule against surplusage.

B. The Plain Meaning Rule Shows that the FMA Should Be Directly and Narrowly Applied.

Any inquiry into the proper interpretation of a statute must begin with its text. As a matter of course, courts follow the plain meaning of statutory text, unless such a reading suggests an absurd result or a scrivener's error.

See e.g., Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 474-75 (1992); *United States v. Providence Journal Co.*, 485 U.S. 693, 700-01 (1988).

The rule is easily followed in this appeal because the plain text of the FMA is unambiguous. By its own terms, the FMA is drafted as a narrow and very specific exception to the rights of copyright holders. The 191 words of the relevant text of the statute only exempt two discrete actions from liability: (1) the “making imperceptible” of portions of content, and (2) the “creation or provision” of technology to enable the same. 17 U.S.C. § 110(11) *et seq.* Every other clause in the FMA is a carefully-crafted limitation on those two exemptions: *e.g.*, on who can direct the “making imperceptible” (a member of a private household), how much can be made imperceptible (limited portions), on when the exception applies (during performances or transmissions), and on where performances during which the making imperceptible takes place under the FMA must occur (in or to one household for private viewing). *Id.*

Nowhere in the text of the FMA is there an exemption for copying protected materials. Indeed, the FMA prominently and explicitly requires that a performance or transmittal be from an “authorized copy of the motion picture” and that enabling technology not create a “fixed copy.” *See Clean*

Flicks of Colo., LLC v. Soderbergh, 433 F. Supp. 2d 1236, 1240 (D. Colo. 2006). Despite this lack of authorization, as demonstrated above, *supra* Part I, VidAngel admits that it makes such unauthorized copies and stores them on its servers. VidAngel Br. at 11, 20. Such storage is undeniably a fixation “that can be perceived with the aid of a machine or device.” *See, e.g., Matthew Bender & Co. v. West Publ’g Co.*, 158 F.3d 693, 702 (2d Cir. 1998), *cert. denied*, 526 U.S. 1154 (1999) (citing 17 U.S.C. § 101).

Nor does the FMA contain any language exempting unauthorized public performance of works. Courts have made clear that a service (like VidAngel) that streams copyrighted works over the internet is publicly performing them and thus requires a license. *See Aereo*, 134 S. Ct. at 2498; *WTV Sys., Inc.*, 824 F. Supp. 2d at 1011.

Finally, Section 110 plainly states that “[n]othing in [the FMA] shall be construed . . . to have any effect on defenses or limitations on rights granted under any other section of this title or under any other paragraph of this section.” 17 U.S.C. § 110. Thus, by its terms, the FMA was not intended to enlarge any other limitation on rights such as the first-sale doctrine or fair use. VidAngel, however, contends that the FMA supports its claim that the filmmaker’s rights are limited by both doctrines. *See* VidAngel Br. at 27, 29-30, 32-43.

C. VidAngel's Misinterpretation of the FMA Violates the Canon of Narrow Construction of Statutory Exceptions.

Finding the plain meaning of the FMA a poor fit, VidAngel instead offers a patchwork of semantic tricks in a failed attempt to stretch the statute to its needs. In just two short paragraphs in its brief, VidAngel encourages the court to misinterpret the statute using a remarkable variety of double-speak. Phrases such as “a common sense reading of the statute,” “most naturally described,” “authorizes . . . broadly,” and “most natural construction,” *id.* at 21-22, are all strong indications that VidAngel's argument reaches well past the plain text of the statute.

The various readings of the FMA that VidAngel advances all violate the fundamental canon of construction that presumes that exemptions to statutes should be construed narrowly. *See C.I.R. v. Clark*, 489 U.S. 726, 739 (1989); *see also John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 95-97 (1993) (ERISA); *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 181 (1993) (FOIA); *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 33-35 (1987) (FLSA). This basic principle of interpretation is even more important when, as here, the Constitutionally-protected rights of artists and copyright holders are at issue. *See, e.g., Tasini v. N.Y. Times Co.*, 206 F.3d 161, 168 (2d Cir. 2000), *aff'd*, 533 U.S. 483 (2001); *Fame Publ'g Co. v. Ala.*

Custom Tape, Inc., 507 F.2d 667, 670 (5th Cir. 1975); *Ryan v. CARL Corp.*, 23 F. Supp. 2d 1146, 1150 (N.D. Cal. 1998).

Perhaps the best example of VidAngel's overbroad approach is its attempt to enlarge the scope of the words "from an authorized copy" until the phrase loses all meaning. According to VidAngel, any performance of a copyrighted work is from an authorized copy of that work, as long as a copy of the work was purchased legitimately somewhere along the causal chain, no matter how much unauthorized copying or distribution has occurred between the purchase and performance. *See* VidAngel Br. at 22.

Clearly, this argument proves too much, because most piracy can trace its origin to a copy that was legitimately obtained at some stage. VidAngel's attempt to create a loophole for itself would mean that almost every performance of a copyrighted work comes "from an authorized copy," including the activities of past illicit services like Napster (authorized copies illegally uploaded by users), MP3.com (authorized copies purchased by pirate streaming service), MP3tunes (authorized promotional copies "sideloaded" into cloud lockers), and Aereo (authorized broadcasts retransmitted through the Internet).

A holding by this court that supports VidAngel's interpretation of the FMA would have implications for future business that exploit that statute,

but could also be cited by a wide variety of users outside of the FMA context who might claim that their infringement is also a performance “from an authorized copy” as MP3.com and other services have tried in the past. It is clear that Congress could not have intended such a limited exception in the FMA lead to such an absurd result. The alternate interpretation, that the words “from an authorized copy” in the statute are confined to their literal meaning that a performance or transmission must originate directly and contemporaneously from the authorized copy itself to be authorized by the FMA, is clearly superior.

VidAngel also would have this Court enlarge the FMA’s statutory exemption by adding intermediate copying and storage to the two activities the statute allows: (1) “making imperceptible”; and (2) the creation of technology to “make imperceptible.” VidAngel Br. at 21. However, when Congress has intended to exempt intermediate copying and storage under certain circumstances from infringement liability, it has done so explicitly. *See* 17 U.S.C. § 117(a), 512(b). Congress could have added direct language to the FMA if it had wanted to create an exemption for infringement of a rightsholder’s exclusive reproduction right, but did not.

D. VidAngel’s Argument Violates the Rule Against Surplusage.

Finally, VidAngel’s argument violates the familiar rule against surplusage. “It is a cardinal principle of statutory construction” that the courts should not construe enactments of the legislative branch to cause any clause, sentence, or word to be “superfluous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation omitted); *see also Ratzlaf v. United States*, 510 U.S. 135, 140 (1994); *Kungys v. United States*, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986). VidAngel, however, invites this Court to delete the key “authorized copy” and “fixed copy” requirements from the statute. *See* VidAngel Br. 20-26.

Reversal here would violate the plain meaning rule, the presumption for narrow construction of exemptions, and the rule against surplusage. This court should interpret the FMA as Congress wrote it – not as VidAngel wishes it were written. *See Aereo*, 134 S. Ct. at 2511 (“[T]o the extent commercial actors or other interested entities may be concerned with the relationship between the development and use of [new] technologies and the Copyright Act, they are of course free to seek action from Congress.” (citing Digital Millennium Copyright Act, 17 U.S.C. § 512)).

E. The Legislative History of the FMA Makes Its Limited Application Clear.

Both the Senate and House were careful to note that the FMA was intended to be narrowly applied when the bill was being debated. Yet in several places in its brief, VidAngel argues that Congressional intent in 2005 was to create a broad exception for practically any activity that a company found it advisable or convenient to take in order to implement a filtering system. *See, e.g.* VidAngel Br. at 19 & n.28-20, 22-23.

VidAngel’s arguments boil down to an assertion that Congress intended that the presence of filtering, some types of which the FMA permits, justifies other infringements. This is wrong. Indeed, the Senator who introduced the 2005 FMA, Orrin Hatch, was clear that “infringing transmission[s] [are] not rendered non-infringing by section 110(11) by virtue of the fact that limited portions . . . are made imperceptible.” 150 Cong. Rec. S.11852-01, S11853 (daily ed. Nov. 24, 2004) (Sen. Hatch).³ But according to its own marketing, VidAngel is “not licensed to provide unfiltered content and doing so would be unfair to the companies that make the content.” Brad Rhees, *Why Are Filters Required?*, VidAngel (Jan.

³ Senator Hatch also provided another example of the narrowness of the FMA’s exemption when he assured other legislators and the public that the FMA “does not provide *any exemption* from the anticircumvention provisions of section 1201 of title 17.” *Id.* (emphasis added).

2017), <https://vidangel.zendesk.com/hc/en-us/articles/231972068-Why-Are-Filters-Required->. This admission itself dooms VidAngel’s defense, because it concedes that *only* filtering makes this case different from any other action against an illegal streaming service and that, without filtering, its activities would be both infringing and unfair. *See id.*

The House Committee that was responsible for the FMA was even more specific about the reproduction right, stating that the FMA was not intended to exempt actions resulting in fixed copies of works. *Clean Flicks*, 433 F. Supp. 2d at 1240 (citing H.R. Rep. No. 109-33(I), at 6-7 (2005), reprinted in 2005 U.S.C.C.A.N. 220, 225).⁴

Thus, the legislative history shows that both houses of the appropriate branch of government had the opportunity to make the policy choice now urged by VidAngel and rejected it. *Id.*

⁴ VidAngel’s arguments are echoed by *amici*, former Representatives Hostettler and Bachus. Br. of Reps. Hostettler and Bachus, Dkt. 26, at 16-17. They argue that Congressional intent in 2005 was to create broad enough safe harbor to protect any new technology that had filtering (primarily for violence, as compared to VidAngel’s focus on sex and language) as its goal. However, while Congress may have been interested in encouraging new filtering companies that were not then in operation, the “fixed copy” and “authorized copy” limitations on the FMA’s safe harbor would also apply to those company’s new technological developments. On those issues, too, VidAngel’s admissions settle the matter.

F. The Historical Context of the FMA Makes Its Limited Application Clear.

The FMA was enacted only 12 years ago. The developments that led to its adoption are thus easily ascertained. Indeed, other courts have noted that the FMA was passed in the wake of litigation against two companies that violated copyright law in similar circumstances to VidAngel, Clean Flicks and ClearPlay. However, the FMA did not shield every aspect of either of those companies, just as it does not shield VidAngel's illegal reproduction and public performance of the plaintiffs' works.

The FMA was enacted during the pendency of litigation against CleanFlicks and Family Flix. *Id.* Like VidAngel, those companies had as their goal the commercial exploitation of re-edited Hollywood films with certain content "filtered out." *Id.* at 1238. Like VidAngel, as their "initial step," they purchased a DVD of a film at retail before it created a fixed copy of an "edited" work. *Id.* at 1238-39. And like VidAngel, the presence of these fixed copies took CleanFlicks and Family Flix firmly out of the ambit of the FMA. *Id.* at 1240.

In contrast with these two, a third company, ClearPlay, provided DVD playback equipment that made imperceptible portions of truly "authorized copies" of films that end users purchased themselves. VidAngel Br. at 8-9. ClearPlay did not create a fixed copy of work, and its equipment enabled

“filtered” performances “from authorized copies” under the plain meaning of the word, *i.e.*, DVDs of films that ClearPlay customers bought themselves.

Id.

That the FMA applied to the then-current structure of one of the offerings from the three companies, and not the other two, demonstrates the narrow application of the text of the statute. The FMA means what it says, and is not meant to be “broadly” applied to immunize any infringement that purportedly occurs incident to “filtering.”

III. THIS COURT SHOULD NOT REWRITE THE DMCA TO ACCOMMODATE VIDANGEL’S ILLEGAL BUSINESS MODEL

VidAngel’s brief repeatedly attacks the film studios who sued it as “the richest entertainment companies on Earth,” VidAngel Br. at 1, and as enemies of those Americans who want to view films without adult content. *Id. passim.* Without commenting on the propriety of those accusations, *amicus* merely points out that its membership represents a diverse range of copyright creators and owners, including outside the filmmaking industry. Yet a reversal in this case will affect them as surely as it will the studios because they also depend on copyright protections.

As all forms of expression are increasingly distributed and consumed digitally, *amicus*’s members increasingly rely on the protections of the anti-

circumvention provisions in Section 1201 of the Digital Millennium Copyright Act (“DMCA”). As Congress foresaw, virtually every artist, writer, and member of the creative community, from the largest music labels to the smallest independent video game designer or photographer, has made their works available to the public digitally in the years since the DMCA was passed.

The only thing standing between these works and general, free distribution online are the anti-circumvention provisions of the DMCA. Thus, any judicial narrowing of the protections found in Section 1201 of the DMCA would have profound effects on *amicus* and across the economy. VidAngel’s DMCA and fair use arguments have the potential to embolden others to adopt similar business practices, making use of the same arguments that VidAngel advances.

Specifically, VidAngel further claims that it can prevail on this appeal without the Court reversing its decision in *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F.3d 928, 950 n.12 (9th Cir. 2010), *amended and superseded on denial of reh’g*, No. 09-15932 (9th Cir. Feb. 17, 2011), and holding that a nexus between circumvention and copyright infringement is required for liability under Section 1201(a). However, this is not the case.

VidAngel concedes that it “uses software” to hack the technology that prevents unauthorized access to the plaintiffs’ works. VidAngel Br. at 35. However, it claims to be authorized to do so by those same filmmakers. *Id.* at 35. As an initial matter, the idea that VidAngel’s activities are authorized, while bold, is absurd. VidAngel itself admits that the Studios have declined to grant them licenses to copy and stream (*i.e.*, publicly perform) any content. VidAngel Br. at 25; *supra* at 21-22 (VidAngel webpage). Instead, VidAngel claims to be authorized as a retail purchaser of DVDs. VidAngel Br. at 35. VidAngel would have the Court believe that it is acting under authorization of a copyright license, by claiming that “a lawful purchaser of a digital work is authorized *by the copyright holder* to circumvent encryption.” *Id.* at 38 (emphasis added).

In other words, VidAngel’s entire Section 1201(a) argument rests on the idea that because it has received an implied permission to view the content on a DVD, it has not exceeded its copyright license, and therefore has not committed circumvention of access controls. Such an argument appears to be a form of magical thinking that would eviscerate the protections afforded by the DMCA for encryption mechanisms that control access to a protected work. Indeed, VidAngel asserts, contrary to *Blizzard*,

that liability for circumvention of such controls can only be for the infringement of exclusive rights under Section 106. *Id.* at 32-38.⁵

VidAngel has not received any type of permission to circumvent the technological measures in place. Nor is there any general permission to do so on which VidAngel might rely. Moreover, the ability to view does not translate to the ability for an entity like VidAngel to circumvent access control measures – and particularly not for purposes of copying and streaming that is central to VidAngel’s service.

Finally, it would be contrary to public policy to hold that circumvention of an access control under Section 1201(a) requires a further act of infringement to ground any sort of liability. Raising the bar on liability for a Section 1201(a) violation would frustrate the purposes of the DMCA to protect, not just companies like the plaintiffs here, but a wide variety of creative professionals.⁶ *Amicus*’s members and many other

⁵ Of course, a three-judge panel of this court must follow *Blizzard*, unless “the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority.” *Lair v. Bullock*, 798 F.3d 736, 745 (9th Cir. 2015). There is no such intervening authority here.

⁶ The brief of *amicus* the Electronic Freedom Foundation (“EFF”) also raises issues for which this appeal is not an appropriate vehicle. As an initial matter, the record underlying the preliminary injunction order on appeal is simply not developed enough for a sweeping decision overturning Section 1201 on First Amendment grounds on the facts of the present case. Moreover, while much of the EFF’s brief concerns the dissemination of

members of the creative community depend on the anti-circumvention provisions of the DMCA to protect digital copies of their work. Circumscribing Section 1201 to chain them to remedies that already existed before the DMCA would render the statute superfluous. Indeed, such a move would dramatically increase the availability of unauthorized copies of creative works on the Internet and make it even more difficult for creators to earn the revenues they need to invest in new works.

information outside of copyright, such as automobile repair or potentially “hackable” Internet security vulnerabilities, *see e.g.*, EFF Br. 6, 9, 12-20, 23 n.4, those issues are not pertinent to the case before this Court, which involves pure expressive and copyrightable content.

CONCLUSION

For the reasons set forth above, and for those set forth in Appellees' brief, *amicus curiae* respectfully requests that the decision below be affirmed.

Dated: New York, New York
February 15, 2017

s/ Eleanor M. Lackman

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,046 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as counted by Microsoft® Word 2007, the word processing software used to prepare this brief.

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Dated: February 15, 2017

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 15, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 15, 2017

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