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The Fight to Filter: Navigating Copyrights to Legally Edit Films

*Matthew Hodgson**

ABSTRACT

Over the past two decades, a number of companies tried and failed to create a business model built upon editing (or filtering) movies for at-home viewers. Repeatedly, these entities encountered fatal obstacles—legal, business-related, or otherwise—in their endeavors to do so. Copyright protections proved to be the most difficult obstacle for these companies, and many filtering businesses infringed upon rights of reproduction, distribution, digital tampering, or first sale. These conflicts led to numerous litigations and legislative actions, culminating in the recent *Disney Enterprises, Inc. v. VidAngel, Inc.*, a case that still has its effects playing out in courts and Congress. This article examines the copyright violations of past filtering endeavors and looks to find viable solutions that avoid the mistakes of the past, fit within copyright statutes, and offer a sustainable business model. Only by accomplishing all three of these tasks can any filtering service hope to survive in the future of the filtering market.

* B.A. in Political Science, Brigham Young University, 2017. J.D. Candidate, University of Missouri School of Law, 2020. Associate Member, *Business, Entrepreneurship & Tax Law Review*, 2018–2019. Special thanks to Professor Gary Myers for his guidance and feedback.

I. INTRODUCTION

December of 1939 proved to be historic for the motion picture industry.¹ The instant classic *Gone with the Wind* arrived in theaters, grossing almost \$200 million domestically.² In addition to its massive box office success, the film had another impact on the film industry: the Motion Picture Production Code (which dictated what content was allowed in film) was altered to allow inclusion of Rhett Butler's famous line, "Frankly, my dear, I don't give a damn."³ The change created some controversy at the time,⁴ but the debate that it began continues to this day.⁵

Decades later, once at-home viewing was more prevalent for movies, viewers again raised concerns over particular films' content.⁶ With this new controversy, however, film audiences took matters into their own hands.⁷ Various businesses began editing out the vulgar, violent, and sexual content of these films.⁸ This new practice brought the wrath of Hollywood down upon these business owners as litigation mounted and filtering companies were subsequently run out of business.⁹ Most of these filtering businesses failed due to copyright violations, usually regarding distribution rights and creations of derivative works.¹⁰ What followed was nearly two decades of trial, error, and failure on the part of hopeful filtering companies.¹¹ It seems that despite the best efforts of these entrepreneurs, no one has managed to create a business model that is both effective and legal.¹²

In spite of these setbacks, filtering services continue to fight for their customers' right to watch films without content that viewers deem inappropriate.¹³ These businesses continue to persist, in part because they believe in a moral right to viewers' choice, and in part because there is a profitable market for their ser-

1. Tim Dirks, *Timeline of Greatest Film Milestones and Turning Points in Film History: The Year 1939*, AMC FILMSITE, <http://www.filmsite.org/1939-filmhistory.html> (last visited Sept. 24, 2018).

2. *Id.*; see also *Domestic Grosses Adjusted for Ticket Price Inflation*, BOX OFF. MOJO, <https://www.boxofficemojo.com/alltime/adjusted.htm> (last visited Mar. 12, 2019) (adjusted for inflation, *Gone with the Wind* grossed nearly \$1.873 billion domestically).

3. GONE WITH THE WIND (Selznick International Pictures 1939); Brian Cronin, *Did Gone With the Wind Use the Word "Damn" in Violation of the Motion Picture Association Production Code?*, ENT. URB. LEGENDS REVEALED (Jan. 13, 2013, 4:18 AM), <http://legendsrevealed.com/entertainment/2013/01/13/did-gone-with-the-wind-use-the-word-damn-in-violation-of-the-motion-picture-association-production-code/> ("[I]n November of 1939 . . . the Code was actually *changed!*" The words "hell" and "damn" were allowed if they were "essential and required for portrayal, in proper historical context . . . or a quotation from a literary work.").

4. *Id.*

5. Jon Cohen, *Mixed Reviews for 'Sanitized' Movies*, ABC NEWS (Jan. 30, 2005), <https://abcnews.go.com/images/Politics/974a1EditingHollywood.pdf>.

6. John Hughes, *Moviemakers Versus the Clean-flicks Revolt*, CHRISTIAN SCI. MONITOR (Aug. 28, 2002), <https://www.csmonitor.com/2002/0828/p09s02-cojh.html>.

7. *Id.*

8. *Id.*

9. See *infra* Parts II and III.

10. See 17 U.S.C. § 106 (2002).

11. See *infra* Part III.

12. See *infra* Part III.

13. Braley Dodson, *VidAngel CEO Vows to Take Case to Supreme Court*, DAILY HERALD (Jan. 6, 2017), https://www.heraldextra.com/news/local/crime-and-courts/vidangel-ceo-vows-to-take-case-to-supreme-court/article_c82ea477-10c5-5ce4-9e3b-01cd94153126.html.

vices.¹⁴ A poll by ABC News shows that nearly 40% of respondents would be likely to participate in a filtering service; more than half of those affirmative respondents indicated themselves as “very likely” to participate.¹⁵ Accordingly, the consumer market, in addition to the moral imperative seen by filtering proponents, drives businesses to continue trying (and failing) to create a service that avoids copyright violations.¹⁶

This article investigates the failures of past models and the potential future of movie filtering. Particularly, as the world enters an age of digital streaming, there is more opportunity to create filtering software—legal or otherwise.¹⁷ The aim of this work is to explain the law and analyze failed business models in an effort to show future enterprises how to succeed in a filtering business. Parts II and III examine failed filtering businesses, specifically emphasizing where each went wrong. In Part IV, special attention is given to the most recent and prominent filtering dispute: the continuing battle between the parties in *Disney v. VidAngel*.¹⁸ Finally, Part V proposes possible solutions to the filtering issue. There are ways in which a filtering company could operate within existing law; some of which may be achieved by existing companies, and some of which may require a new entrepreneurial effort. By examining mistakes made in the past, the road to a filtered future is illuminated.

II. BRIEF HISTORY OF FILTERING

Filtering has existed in one iteration or another almost since movies became available for home viewing.¹⁹ Only in the past few decades has editing really taken off, but it has existed in some form since the 1950s.²⁰ A general understanding of filtering’s history is instructive when considering the current disputes.

A. Early Filtering

In some ways, movie filtering has always been very simple and very legal. With the creation of the Video Cassette Recorder (“VCR”) in 1956, parents and families have had the ability to perform two powerful editing functions: fast-forwarding and muting.²¹ Despite the efficiency of these features, the practical reality is that such edits are only as effective as the remote-wielder is adept. More discouraging yet, that remote-wielder is only as adept as he or she is familiar with the film currently in the VCR. This first form of filtering, while simple, was insufficient for the needs of consumers.

14. *About VidAngel*, VIDANGEL, <https://www.vidangel.com/about> [hereinafter *About VidAngel*] (last visited Sept. 24, 2018); Cohen, *supra* note 5.

15. Cohen, *supra* note 5.

16. Christine McCarroll, *Morals, Movies, and the Law: Can Today’s Copyright Protect a Director’s Masterpiece from Bowdlerization?*, 5 J. HIGH TECH. L. 331, 354–55 (2005).

17. *Id.* at 341.

18. *Disney Enters. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017).

19. *See infra* Part II.

20. *See infra* Part II.

21. Sylvie Castonguay, *50 Years of the Video Cassette Recorder*, WIPO MAG. (Nov. 2006), http://www.wipo.int/wipo_magazine/en/2006/06/article_0003.html.

Formal filtering services first became attractive in the late 1990s.²² As near as can be determined, the first filtering service primarily dealt in editing VHS copies of James Cameron's *Titanic*.²³ This early business consisted of a Utah "mom-and-pop video store," called Sunset Video, which spent its time altering pre-bought VHS tapes.²⁴ Reportedly, this company only provided the service; clients would purchase their own copy of *Titanic* and bring it to the video shop, which would then snip out the offending frames (Kate Winslet's brief nudity) from the tape and return it to the client.²⁵ It began as a small, local service, but soon grew rapidly.²⁶ Some reports indicated that the shop edited over 10,000 copies of the film.²⁷ The service did not last long, but it made the public aware of a consumer preference that was thus far untapped.²⁸ More expansive editing operations began to emerge within the next few years.²⁹

B. Airplanes and Television

It is worth noting that edited, derivative copies of films already exist in multiple mediums.³⁰ For years, some television stations, and more notably, airlines, have shown edited versions of film and television productions.³¹ There is often a public sentiment that these edits are too sensitive and leave too much out, sometimes sacrificing a cohesive plot.³² However, this particular practice plays no role in the current discussion. Edited films shown on airplanes and television are specially contracted versions, created by the studio and film distributors themselves.³³ In accordance with specific agreements, these film studios create finished, edited versions and distribute them exclusively to their contractual partners.³⁴ Copies of

22. Hughes, *supra* note 6.

23. *Id.*

24. *Id.*; Michael P. Glasser, Note, "To Clean or Not to Clean": An Analysis of the Copyright and Trademark Issues Surrounding the Legal Battle Between Third Party Film Editors and the Film Industry, 22 CARDOZO ARTS & ENT. L.J. 129, 133 n.23 (2004).

25. *Id.*

26. *Id.*

27. Dan Kadison, *H'wood: Don't Cut – Lawsuit Could Kill Companies Selling Cleaned-up Films*, N.Y. POST (Sept. 23, 2002, 4:00 AM), <https://nypost.com/2002/09/23/hwood-dont-cut-lawsuit-could-kill-companies-selling-cleaned-up-films/>.

28. Glasser, *supra* note 24, at 134–35.

29. *Id.* at 135.

30. See William Hughes, *Sony to Release "Clean" Versions of its Movies for Digital Download*, AV NEWS (June 6, 2017, 6:24 PM), <https://news.avclub.com/sony-to-release-clean-versions-of-its-movies-for-digi-1798262649>.

31. Anthony Grant, [Bleep!] *How Airlines Censor In-Flight Entertainment*, POINTS GUY (Aug. 19, 2018), <https://thepointsguy.com/news/bleep-how-airlines-censor-in-flight-entertainment/>.

32. Dave Roos, *What Gets Left In, Out on In-Flight Movies Nowadays?*, HOWSTUFFWORKS (Oct. 6, 2017), <https://entertainment.howstuffworks.com/what-gets-left-in-out-on-in-flight-movies-nowadays.htm>; see Jake Rossen, *When Monty Python Took American Television to Court*, MENTAL FLOSS (June 6, 2017), <http://mentalfloss.com/article/501461/when-monty-python-took-american-television-court> (television network ABC aired six episodes of *Monty Python's Flying Circus*, but edited the episodes for its audiences. The resulting edits were 22 minutes shorter than the original episodes, and the debacle ended in a lawsuit); see also *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14 (2d Cir. 1976).

33. Grant, *supra* note 31.

34. *Id.*; see also *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1238 (Colo. D. Ct. 2006).

these studio edits are unavailable elsewhere in the market, though this may change to some degree in the future.³⁵

III. PROBLEMS OF THE PAST: WHY FILTERING'S HISTORY IS FILLED WITH FAILURE

There is an adage that extolls the virtue of learning from watching others make mistakes: "Fools pretend that you can only gain experience at your own expense, but I always managed to learn at the expense of others."³⁶ Any effort to create a legal and effective business model for filtering will surely be futile without a consultation of the mistakes past companies made. There are many useful examples to demonstrate what models do not work and what actions violate copyright laws.³⁷

A. CleanFlicks

One of the earliest businesses to make an attempt at profitable filtering was CleanFlicks.³⁸ Even though studios produced edited copies of their films,³⁹ these edits were not available to the consumer market at large.⁴⁰ CleanFlicks's founder, Ray Lines, decided to extend clean films to the everyday consumer when he saw the opportunity.⁴¹

Lines initially began by simply performing an editing service for himself and his friends.⁴² Using his own editing gear, he would alter or make imperceptible bits of video or audio that he deemed inappropriate.⁴³ His practice gained more attention from friends, and he soon branched out by making use of the internet to create a nationwide rental and editing service.⁴⁴ In addition to copying, renting, and selling edited DVDs, CleanFlicks also functioned as an editor for discs already owned by viewers; customers could mail their own copy to CleanFlicks to be edited and returned.⁴⁵

The process of editing DVDs is more complex than the simple snipping procedure Sunset Video performed on VHS tapes.⁴⁶ The editors must first upload the entirety of the film into a digital format, a process which requires circumventing protective technologies embedded in the disc.⁴⁷ Once the film is on the computer,

35. Hughes, *supra* note 30.

36. BISMARCK INTIME: THE IRON CHANCELLOR IN PRIVATE LIFE 180 (Henry Hayward trans., D. Appleton & Co. 1890).

37. See *infra* Parts III and IV.

38. Glasser, *supra* note 24, at 130 n.11 (listing a number of other early services contemporary to CleanFlicks).

39. Roos, *supra* note 32.

40. Clean Flicks of Colo., LLC v. Soderbergh, 433 F. Supp. 2d 1236, 1238 (Colo. D. Ct. 2006).

41. Glasser, *supra* note 24, at 134.

42. *Id.*

43. *Id.*

44. *Id.* at 134–35 (CleanFlicks anticipated nearly \$2 million in revenue for the 2002 fiscal year).

45. *Id.* at 135 (this early business model was similar to the one Netflix used in its early business years).

46. See Clean Flicks of Colo., LLC v. Soderbergh, 433 F. Supp. 2d 1236, 1238 (Colo. D. Ct. 2006).

47. *Id.* (the District Court of Colorado described these protections as "a digital content scrambling protection system . . . designed to prevent copying.")

editors use standard editing software to omit visual or audio selections.⁴⁸ When this entire editing process is complete, the film is exported as a single file which is then used to burn multiple discs for rental or sale.⁴⁹

Shortly after CleanFlicks (and other companies like it) began to garner a profitable business, the Director's Guild of America ("DGA") and a number of other parties threatened to bring suit to bar these editing businesses.⁵⁰ CleanFlicks joined with its associate companies and preemptively initiated an action seeking a declaratory judgment vindicating their activity and pronouncing them free of copyright violation.⁵¹ The DGA and its allies brought a counterclaim against the filtering companies alleging copyright violations and asserting rights of reproduction, distribution, and creation of derivative works.⁵² These are the very first three rights guaranteed exclusively to copyright holders.⁵³ The sections below examine the DGA's claim against CleanFlicks with respect to each right in turn.

The first exclusive right the studios sought to protect was the right of reproduction.⁵⁴ U.S. copyright law is very clear in its language: "the owner of copyright under this title has the exclusive rights to . . . reproduce the copyrighted work in copies or phonorecords."⁵⁵ A "copy" under copyright law is any "material object[.] . . . in which a work is fixed by any method now known or later developed."⁵⁶ The DGA's rights were clear, and CleanFlicks was in violation of those rights, as the very nature of its business was to create and copy edited versions of feature films.⁵⁷ The court granted summary judgment on this first count to the DGA.⁵⁸

The second claim asserted that CleanFlicks's edits were derivative works, which are prohibited by copyright protections.⁵⁹ Derivative works are a very broad category of works that essentially include any form in which a work may be "recast, transformed, or adapted."⁶⁰ The court's decision in this case hinged on the meaning of the word "transformative."⁶¹ The Supreme Court has provided guidance for this definition; in 1994, a work was deemed transformative if it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."⁶² With this standard in mind, the District Court of Colorado concluded that the CleanFlicks edits did not add anything new by way of content or message.⁶³ Because CleanFlicks's work was not transformative, summary judgment on count two was denied to the DGA.⁶⁴

48. *Id.*

49. *Id.*

50. Glasser, *supra* note 24, at 139.

51. *Id.*

52. *Id.* at 141; *Clean Flicks*, 433 F. Supp. 2d at 1239.

53. 17 U.S.C. § 106(1)-(3) (2002).

54. *Clean Flicks*, 433 F. Supp. 2d at 1239.

55. 17 U.S.C. § 106(1).

56. 17 U.S.C. § 101 (2010).

57. *Clean Flicks*, 433 F. Supp. 2d at 1239.

58. *Id.* at 1243.

59. 17 U.S.C. § 106(2).

60. 17 U.S.C. § 101 (the statute sets forth a lengthy list of possible formats of derivative works, which includes the following: "translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.").

61. *Clean Flicks*, 433 F. Supp. 2d at 1241.

62. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

63. *Clean Flicks*, 433 F. Supp. 2d at 1241.

64. *Id.* at 1243.

Third, the studios claimed that CleanFlicks violated its exclusive rights to distribution.⁶⁵ The fact that the filtering businesses sold and rented edited copies of films is undisputed.⁶⁶ Here, CleanFlicks asserted a defense by way of the first sale doctrine.⁶⁷ The first sale doctrine effectively says that purchasers of an authorized copy of a work have the right to do with it what they please; in other words, it immunizes consumers from liability for resale (which would otherwise violate the right of distribution).⁶⁸ However, this doctrine does not extend so far as to overcome the exclusive right to reproduction.⁶⁹ Had CleanFlicks altered their original, authorized copies, the first sale doctrine might have protected them, but by making multiple of their own copies, they were then distributing unauthorized works.⁷⁰ Summary judgment on this third count was granted in favor of the DGA.⁷¹

In summation, CleanFlicks was held to not violate the exclusive right to create derivative works.⁷² However, as it interfered with rights to reproduction and distribution, it was held to be in violation of existing copyright law.⁷³ The District Court of Colorado ordered a permanent injunction, barring CleanFlicks and its associates from continuing their business endeavors.⁷⁴

B. ClearPlay

The next notable attempt at filtering was the ClearPlay DVD player.⁷⁵ This new startup actually sold entire DVD players, not just the DVDs.⁷⁶ These players came with a FilterStick (essentially a glorified USB with the ClearPlay logo), which plugged into a computer to download filters from the ClearPlay website.⁷⁷ Once those filters were downloaded, the FilterStick went into the DVD player along with any authorized DVD purchased or rented from an authorized dealer.⁷⁸ With everything in place, the player then edited the authorized copy of the movie as it played, cutting audio or omitting segments with inappropriate content.⁷⁹

65. See 17 U.S.C. § 106(3) (2002).

66. *Clean Flicks*, 433 F. Supp. 2d at 1239.

67. *Id.* at 1242.

68. 17 U.S.C. § 109(a) (2008).

69. *Clean Flicks*, 433 F. Supp. 2d at 1242; Glasser, *supra* note 24, at 147.

70. Glasser, *supra* note 24, at 146. (it should be noted, however, that 17 U.S.C. § 109(b)(1)(A) may have still rendered CleanFlicks's business unlawful. Under this statute, otherwise lawful distribution is unlawful if it is "for the purposes of direct or indirect commercial advantage . . . by rental, lease, or lending.")

71. *Clean Flicks*, 433 F. Supp. 2d at 1243.

72. *Id.*

73. *Id.*

74. *Id.* at 1243–44.

75. Sean Portnoy, *Self-Censoring Upconverting DVD Player Filters Inappropriate Content*, ZDNET (Nov. 30, 2009, 10:35 PM), <https://www.zdnet.com/article/self-censoring-upconverting-dvd-player-filters-inappropriate-content/>.

76. *Id.*

77. *Id.*; see *ClearPlay Blu-ray and DVD Player*, CLEARPLAY, <https://try.clearplay.com/blu-ray-player/> (last visited Feb. 17, 2019) (the newer DVD players are equipped with Blu-ray capability and come with Wi-Fi that eliminates the need for FilterSticks.).

78. McCarroll, *supra* note 16, at 347.

79. *Id.*

There were some questions regarding ClearPlay's legality, and it was even included in the initial litigation against CleanFlicks.⁸⁰ The studios prepared to bring the same claims against ClearPlay with particular emphasis on the derivative works claim.⁸¹ However, concerted legislative and lobbying efforts led to an intermediary result that changed the course of the pending lawsuit.⁸²

C. Enter: The Family Movie Act of 2005

In 2005, Congress intervened, cutting some of the filtering litigation short and resolving a number of questions before they were fully vetted by the courts.⁸³ The Family Movie Act of 2005 ("FMA") adjusted copyright law to allow limited exceptions in which some filtering companies could exist.⁸⁴ After becoming law on April 27, 2005, this act was codified in 17 U.S.C. § 110 as an exemption from the copyright holder's exclusive rights.⁸⁵

Specifically, the FMA created a narrow exemption for technology designed to help edit authorized copies of films:

[T]he following [is] not infringement[] of copyright . . . the making imperceptible . . . of limited portions of audio or video content of a motion picture . . . or the creation or provision of a computer program or other technology that enables such making imperceptible . . . if no fixed copy of the altered version of the motion picture is created by such computer program or other technology.⁸⁶

In other words, the FMA made it legal for a company (like ClearPlay, but not CleanFlicks) to provide technology or software to edit movies on behalf of private home viewers.⁸⁷ It did not, however, allow for fixed or permanent copies of the edit to be made, much less reproduced and distributed.⁸⁸

Once the FMA passed, ClearPlay, CleanFlicks, and the remaining filtering businesses were once again examined by the courts.⁸⁹ ClearPlay and another company, Family Shield, were severed from the action, but all accompanying claims were dismissed for want of jurisdiction.⁹⁰ The court held that "Congress has made a policy decision that those who provide the technology to enable viewers to edit

80. *Huntsman v. Soderbergh*, No. A02CV01662RPMJW, 2005 WL 1993421, at *1 (Colo. D. Ct. Aug. 17, 2005).

81. McCarroll, *supra* note 16, at 352–53 (interestingly, this derivative works claim was the one that failed against CleanFlicks. There may be a possibility that ClearPlay would have been excluded from the permanent injunction pronounced upon the other filtering businesses.).

82. *Huntsman*, 2005 WL 1993421, at *1.

83. Family Entertainment and Copyright Act of 2005, S. 167, 109th Cong. (2005) (enacted); *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1240 (Colo. D. Ct. 2006).

84. Family Movie Act of 2005, S. 167, 109th Cong. tit. 2 (2005) (enacted).

85. Family Movie Act of 2005, 17 U.S.C. § 110(11) (2005).

86. *Id.*

87. *Id.*

88. *Clean Flicks of Colo.*, 433 F. Supp. 2d at 1240 ("[T]he amendment was not intended to exempt actions resulting in fixed copies of altered works.").

89. *Huntsman v. Soderbergh*, No. A02CV01662RPMJW, 2005 WL 1993421, at *1 (Colo. D. Ct. Aug. 17, 2005).

90. *Id.* ("The technology provided by Family Shield and ClearPlay is consistent with the statutory definition.").

films for their private viewing should not be liable to the copyright owners for infringing their copyright protections . . . and that removes this court's jurisdiction over any further controversy."⁹¹ CleanFlicks and its associates, however, were not so lucky.⁹² The remaining filtering companies continued their litigation, proceeding with the case described above.⁹³

ClearPlay's vindication has been thorough and powerful.⁹⁴ Because ClearPlay's DVD players allow customers to use authorized copies of films, the business is not making fixed copies, nor is it reproducing or distributing existing copies.⁹⁵ In fact, in subsequent legal battles over filtering, ClearPlay has been lauded as a viable, legal option for providing an effective service.⁹⁶

Despite ClearPlay's legal vindication, the company has floundered by some reports.⁹⁷ As the world transitioned from physical discs to streaming, ClearPlay made a somewhat slow and ineffective conversion.⁹⁸ Aside from its Blu-ray/DVD players (which some argue are quickly becoming obsolete technologies),⁹⁹ ClearPlay only managed to make the jump to compatibility with a single streaming service: Google Play.¹⁰⁰ Even this service has recently encountered trouble keeping up with the advances in streaming software.¹⁰¹ In September 2016, Google altered some of its coding, which interfered with ClearPlay's ability to filter new releases after that time.¹⁰² Some advocates of filtering even had suspicions that this code alteration was intentionally aimed at blocking ClearPlay's service.¹⁰³ Despite the legality of ClearPlay's filtering services, it has failed to develop a successful, long-term business model.

IV. CURRENT DISPUTES

Clearplay's failure to provide a reliable filtering option left consumers searching for a solution.¹⁰⁴ Recently, however, another determined and public effort has

91. *Id.* at *2.

92. *Clean Flicks of Colo.*, 433 F. Supp. 2d at 1240 (“[T]he appropriate branch of government had the opportunity to make the policy choice now urged and rejected it.”).

93. *Id.*; see also *supra* Part III.A.

94. *Disney Enters. v. VidAngel, Inc.*, 224 F. Supp. 3d 957, 978 (C.D. Cal. 2016).

95. *Id.*

96. *Id.* (“An injunction in this case would not prevent . . . a filtering service similar to ClearPlay's, and thus wouldn't negatively impact the public interest in watching filtered content in private.”).

97. Appellant's Reply Brief at 5, *Disney Enters. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017) (No. 16-56843), 2017 WL 774224.

98. Brief of Amicus Curiae Clearplay, Inc. Supporting Plaintiffs/Appellees at 14, *Disney Enters.*, 869 F.3d 848 (No. 16-56843), 2017 WL 696293 [hereinafter Clearplay Amicus Brief].

99. Jess Bolluyt, *Are Blu-Ray and DVD Players Already Obsolete?*, CHEATSHEET (Dec. 2, 2016), <https://www.cheatsheet.com/gear-style/blu-ray-dvd-players-already-obsolete.html/>.

100. Clearplay Amicus Brief, *supra* note 98, at *14.

101. Gene Maddaus, *ClearPlay is No Longer Offering Filtered Movies to Stream*, VARIETY (Feb. 7, 2017, 3:02 PM), <https://variety.com/2017/biz/news/clearplay-streaming-new-releases-google-shutdown-1201980650/>.

102. Michael Cieply, *ClarPlay Confirms it Can No Longer Stream New Filtered Movies through Google, as Competing VidAngel Fights Injunction*, DEADLINE (Feb. 7, 2017, 1:49 PM), <https://deadline.com/2017/02/clearplay-confirms-cant-stream-new-filtered-films-through-google-1201904160/>.

103. *Id.*; see also Jeffrey Harmon, *ClearPlay Streaming Has Secretly Been Shut Down Since September*, VIDANGEL (Feb. 7, 2017), <https://blog.vidangel.com/2017/02/07/breaking-clearplay-streaming-has-secretly-been-shut-down-since-september/>.

104. See Cohen, *supra* note 5.

been made to secure rights to filter movies.¹⁰⁵ Perhaps there has been no effort so concerted as VidAngel to provide a lasting and legal filtering service, particularly for the streaming platform.¹⁰⁶

A. The Rise of VidAngel

Initially, VidAngel attempted two unsuccessful business models for filtering.¹⁰⁷ After these failed efforts, the company settled on its primary business model (which became the model disputed in VidAngel's legal proceedings).¹⁰⁸ This new and inventive model allowed VidAngel to filter and stream movies and television shows to users on a great number of devices.¹⁰⁹ However, the process was also complex and onerous.

For every movie that VidAngel wished to stream, the company first purchased "multiple" copies of DVD and Blu-ray discs for the respective title.¹¹⁰ To keep track of each disc in supply, VidAngel assigned each a unique barcode.¹¹¹ The majority of the discs were stored in a central vault for safekeeping, but one DVD copy and one Blu-ray copy were ripped and uploaded to a server as the "master files."¹¹² The creation of this master file required that VidAngel bypass digital encryptions and security measures encoded into the disc, which are commonly referred to as Technological Protection Measures ("TPMs").¹¹³ Once this ripped master file was safely on VidAngel's server, the film was marked in segments and tagged for various types of inappropriate content.¹¹⁴ These markers formed the basis of the filtering service.

The home viewer would select a film from VidAngel's library, which they then purchased for \$20.¹¹⁵ VidAngel's business model asserted that when a customer paid this \$20, they purchased one of the uniquely coded discs in the VidAngel vault.¹¹⁶ After purchasing a disc, the customer identified which content they did not wish to see, and VidAngel removed segments with those corresponding markers before streaming the remaining film to the viewer's device.¹¹⁷ The

105. See *Disney Enters. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017).

106. *Id.* at 852.

107. Appellant's Opening Brief at 10–11, *Disney Enters.*, 869 F.3d 848 (No. 16-56843), 2017 WL 412299 [hereinafter Appellant's Opening Brief] (the first of these models worked through Google's Chromecast. The second was a free service through YouTube. Both needed studio permission to continue, and the studios withheld consent on both accounts).

108. *Id.* at *11.

109. *Disney Enters.*, 869 F.3d at 854 (supported devices included "Roku, Apple TV, Smart TV, Amazon Fire TV, Android, Chromecast, iPad/iPhone and desktop or laptop computers.").

110. Appellant's Opening Brief, *supra* note 107, at *11–12; Appellees' Answering Brief at 7, *Disney Enters.*, 869 F.3d 848 (No. 16-56843) 2017 WL 658694 [hereinafter Appellees' Answering Brief]; *Disney Enters.*, 869 F.3d at 853 (no official number is placed on the supply of discs VidAngel acquired. All three sources cited use the word "multiple," and VidAngel—the appellant—later uses the word "many." VidAngel also specifies in its opening brief that it spends almost a third of its capital on discs, which totaled in over \$1.2 million of disc purchases by late 2016. In reality, the supply of each title likely varied based on projected demand.)

111. Appellant's Opening Brief, *supra* note 107, at *12.

112. *Disney Enters.*, 869 F.3d at 853.

113. *Id.*

114. *Id.*

115. *Id.*

116. Appellant's Opening Brief, *supra* note 107, at *12.

117. *Id.* (noting that no fixed copy of the edited film is created or saved in VidAngel's model).

court points out, and it is worth noting, that the stream from VidAngel originated from the original master file and not the actual disc “purchased” by the customer.¹¹⁸

After viewing the edited film, the VidAngel customer had the option (and was indeed encouraged) to sell back the “disc” they purchased for its purchase price less \$1 for each day the customer had the disc “in their possession.”¹¹⁹ This sell-back model effectively amounted to a \$1 per day rental service.¹²⁰ In fact, the court aptly pointed out that VidAngel advertised itself as such a rental service.¹²¹ In this process, the disc that has technically changed ownership multiple times had, in actuality, remained safely in VidAngel’s vault for the duration of the transactions.¹²²

After implementing this new filtering system, VidAngel grew quickly.¹²³ The accessibility of the service on multiple devices, combined with an aggressive marketing campaign, led to a large influx of customers.¹²⁴ Soon, VidAngel boasted over 100,000 monthly users.¹²⁵ Unfortunately for VidAngel, however, its quick success would only last so long.

B. A Fallen VidAngel

In June of 2016, a number of film studios brought an action seeking to enjoin VidAngel’s streaming and filtering service.¹²⁶ In their complaints, the studios raised a number of exclusive rights violations, citing many of the same offenses CleanFlicks had committed a decade or so earlier.¹²⁷ Additionally, Disney and its associates asserted a claim for redress based on VidAngel’s circumvention of TPMs.¹²⁸

That December, a district court in California held that Disney was likely to succeed on its claims and it imposed a preliminary injunction against VidAngel.¹²⁹ VidAngel’s filtering and streaming service was prohibited from engaging in the essential activities of its business and was therefore effectively brought to a screeching halt in its quest to filter movies for viewers.¹³⁰

Seeking redress from this initial injunction, VidAngel appealed to the Ninth Circuit.¹³¹ In August 2017, eight months after the initial injunction, VidAngel was

118. *Disney Enters.*, 869 F.3d at 854.

119. *Id.* (i.e., if a customer sold a film back to VidAngel immediately after purchasing and viewing it, the sellback price would be \$19. If the customer waited until the next day, they would receive \$18.).

120. *Id.* (VidAngel’s rate increases to \$2 per day for high-definition titles.).

121. *Id.*

122. *Id.* at 853.

123. *Id.* at 855.

124. Appellees’ Answering Brief, *supra* note 110, at *10.

125. *Disney Enters.*, 869 F.3d at 855.

126. *Disney Enters. v. VidAngel, Inc.*, 224 F. Supp. 3d 957, 965 (C.D. Cal. 2016) (listing as plaintiffs a number of notable movie-making parties, including Disney, Lucasfilm, Twentieth Century Fox, and Warner Bros).

127. *Id.* at 969–71; *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1237 (Colo. D. Ct. 2006); *see also* 17 U.S.C. § 106 (2002).

128. *Disney Enters.*, 224 F. Supp. 3d at 967; *see also* 17 U.S.C. § 1201 (1999).

129. *Disney Enters.*, 224 F. Supp. 3d at 974.

130. *Id.* at 979.

131. *Disney Enters. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017).

dealt another blow as the Ninth Circuit affirmed the district court's ruling.¹³² With the injunction still in place, the case returned to the district court, where in March of 2019, summary judgment was granted for the studios.¹³³ In June of 2019, the case will be heard before a jury that will make a decision on the damages VidAngel owes.¹³⁴

C. What Went Wrong?

In its affirmation of the injunction against VidAngel, the Ninth Circuit spent much of its time discussing its standard of review and VidAngel's defenses,¹³⁵ but its opinion (and the opinion of the Central District of California) indicated that there were five main issues.¹³⁶ To adequately conceive of a legal model for filtering, each of these issues is addressed and analyzed below.

i. Illegal Circumvention of TPMs

In order for VidAngel to rip the content off of its purchased discs and onto its server, it necessarily had to overcome a series of TPMs that the studios and distributors placed on the discs to protect the works contained therein.¹³⁷ VidAngel readily admitted to this circumvention, referring to it in a more ameliorative light as "decrypting" and asserting that, as the rightful owner of the disc, VidAngel had the right to do so under the fair use doctrine.¹³⁸ The assertion that VidAngel circumvented TPMs was a serious accusation, and it played a large part in CleanFlicks's loss in court.¹³⁹

The Digital Millennium Copyright Act of 1998 ("DMCA") provides copyright holders with a number of specific provisions that protect their works in the increasingly technological world.¹⁴⁰ In a very literal way, the DMCA brought copyright law into the twenty-first century. Among the protections enacted are a number of "criminal penalties for circumvention of copyright protection systems"¹⁴¹ such as the TPMs involved in the discs that store these films.¹⁴² However, VidAngel continued to lean on its fair use defense to combat these allegations under the DMCA.¹⁴³

The court held that VidAngel's fair use defense was unsupported by facts or law.¹⁴⁴ The fair use doctrine codified in the copyright statute exempts certain ac-

132. *Id.* at 867.

133. *Disney Enters. v. VidAngel, Inc.*, No. CV 16-04109 AB (PLAx), slip op. (C.D. Cal. Mar. 6, 2019), <https://www.documentcloud.org/documents/5762185-VidAngel.html>.

134. Neal Harmon, *VidAngel CEO Neal Harmon: Copyright Infringement Ruling, and Where We Go from Here*, VIDANGEL (Mar. 8, 2019), <http://blog.vidangel.com/2019/03/08/vidangel-ceo-neal-harmon-copyright-infringement-ruling-and-where-we-go-from-here/>.

135. *Disney Enters.*, 869 F.3d 848.

136. See discussion *infra* Part IV.C.

137. *Disney Enters.*, 869 F.3d at 853.

138. Appellant's Opening Brief, *supra* note 107, at *20, 32; see also 17 U.S.C. § 107 (1992).

139. *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1240 (2006).

140. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

141. Yushan Luo, *Intellectual Property Crimes*, 55 AM. CRIM. L. REV. 1399, 1426 (2018).

142. 17 U.S.C. § 1201 (1999).

143. Appellant's Opening Brief, *supra* note 107, at *20, 32.

144. *Disney Enters. v. VidAngel, Inc.*, 869 F.3d 848, 862 (9th Cir. 2017).

tivities from copyright violation, including reproduction and other protections for particular purposes.¹⁴⁵ Fair use protects such exemptions “for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research.”¹⁴⁶ In the statute, courts are instructed to consider factors such as the nature and purpose of the fair use, the amount of the original work used, and the effect of the use on the source material.¹⁴⁷ VidAngel argued that its actions were exempted as a simple “space-shift” (or transition between formats).¹⁴⁸ This strategy proved futile, as there is established precedent holding that space-shifting is only fair use when it is for the owner of the work alone and not the general public.¹⁴⁹ Because VidAngel distributed its space-shifted copies, the fair use doctrine did not protect its business practice.¹⁵⁰

After the fair use defense failed, there was little to protect VidAngel under the DMCA. Circumventing a TPM is a clear violation of copyright law.¹⁵¹ Because VidAngel was decrypting discs for use in a commercial business, its practice of overcoming TPMs was unjustified under the DMCA’s copyright protections.

ii. Unauthorized Reproduction and Distribution of Copyrighted Works

The most obvious violation by VidAngel was the outright infringement of two of the primary rights protected by copyright statutes.¹⁵² The law clearly states that “the owner of copyright . . . has the exclusive rights . . . to reproduce the copyrighted work . . . [and] to distribute copies . . . of the copyrighted work. . . .”¹⁵³ VidAngel is without valid defense for these offenses.

VidAngel admitted that one of its business practices was to copy the contents of the disc to the company’s server, a practice with precedential illegality established over 25 years.¹⁵⁴ By using its computers to store and edit films, VidAngel violated the studios’ first-listed exclusive right under current copyright law.¹⁵⁵

The court spent little time discussing the studios’ exclusive right to distribution.¹⁵⁶ The very purpose of VidAngel’s business was to distribute and provide access to filtered movies.¹⁵⁷ Because of the clear copyright issues in this regard, the courts had little need to belabor the point.

145. 17 U.S.C. § 107 (1992).

146. *Id.*

147. *Id.*

148. Appellant’s Opening Brief, *supra* note 107, at *16.

149. *A&M Records, Inc., v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001).

150. *Disney Enters. v. VidAngel, Inc.*, 869 F.3d 848, 862 (9th Cir. 2017).

151. 17 U.S.C. § 1201(a)(1)(A) (1999) (“No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”).

152. 17 U.S.C. § 106 (2002).

153. *Id.*

154. *Disney Enters.*, 869 F.3d at 853; *see also* *MAI Sys. Corp., v. Peak Comput., Inc.*, 991 F.2d 511, 518 (9th Cir. 1993).

155. *Disney Enters.*, 869 F.3d at 853; *see also* 17 U.S.C. § 106(1).

156. *See* *Disney Enters. v. VidAngel, Inc.*, 224 F. Supp. 3d 957 (C.D. Cal. 2016).

157. Appellant’s Opening Brief, *supra* note 107, at *1.

iii. Abuse of the First Sale Doctrine

What little discussion the court gave regarding distribution centered on deprivation of profits and financial harm to the studios.¹⁵⁸ Part of this discussion of harm particularly emphasized the profits VidAngel was claiming in a manner adverse to the studios.¹⁵⁹ Streaming, as it turns out, is a large source of income that the studios rely on.¹⁶⁰ By illegally laying claim to a significant corner of the streaming market, VidAngel encroached on profits that, under proper licensing, rightfully belonged to the studios.¹⁶¹

Simple arithmetic characterizes the degree to which VidAngel's efforts usurped business from the studios. On average, any one of VidAngel's discs was "rented"—bought and resold—16 times in the first month of streaming through the platform, all the while remaining safely locked in the VidAngel vault.¹⁶² This means that, for every copy of the disc VidAngel purchased, the studios lost many times over the revenue it would have generated had each of those sales been through a licensed seller. This statistic only accounts for the first four weeks as well; sales likely continued to amass even after the end of this measurement. If VidAngel spent millions of dollars buying discs,¹⁶³ that means that the studios lost millions more as a result—\$15 million or more in the first month alone for every million VidAngel spent.¹⁶⁴ Furthermore, the court noted that almost half of users would view the same titles even without filtering.¹⁶⁵ This fact demonstrates that, contrary to VidAngel's assertions, its service does not benefit the studios by "expand[ing] their market."¹⁶⁶

In defending this point, VidAngel cited other rental companies, both old (Blockbuster) and new (Redbox).¹⁶⁷ VidAngel argued that it had a right to engage in the rental business just as those other companies did.¹⁶⁸ In return, the studios argued that VidAngel's own behavior differentiated itself from these lawful rental companies, which relied on the first sale doctrine.¹⁶⁹ VidAngel's mistake in this analogy was twofold: (1) the first sale doctrine does not apply to works that are

158. *Disney Enters.*, 224 F. Supp. 3d at 974–77; *Disney Enters.*, 869 F.3d at 865–66.

159. *Disney Enters.*, 869 F.3d at 853.

160. *Id.*

161. *Disney Enters.*, 224 F. Supp. 3d at 976.

162. Appellees' Answering Brief, *supra* note 110, at *8.

163. Appellant's Opening Brief, *supra* note 107, at *17.

164. A loss of "\$15 million or more" is calculated using a simple multiplier of the first-month average sales. For example, assume that the average DVD price is \$20 (though the math is the same for any value). $\$1,000,000 \div \$20 \text{ per copy} = 50,000 \text{ copies}$; $50,000 \text{ copies} \times 16 \text{ uses in the first month} = 800,000 \text{ copies}$ the studio might have sold; $800,000 \times \$20 \text{ per copy} = \$16,000,000$ the studios will never see. Subtract the \$1 million VidAngel initially invested to see that the studio loss is estimated at \$15 million. Note, too, that this value estimates the loss attributed to the studios. At \$1 per rental, VidAngel only makes \$800,000 for every \$15 million it causes the studios to lose.

165. *Disney Enters.*, 869 F.3d at 861; Appellees' Answering Brief, *supra* note 110, at *46.

166. Appellant's Opening Brief, *supra* note 107, at *2–3 (note, too, that even if VidAngel's service expanded the studios' market, the profits of that expansion fill the bank account of VidAngel, not the studios.).

167. *Id.* at *19.

168. *Id.* at *18.

169. Appellees' Answering Brief, *supra* note 110, at *23–24.

unlawfully made or reproduced,¹⁷⁰ and (2) copyright laws do not protect rental companies under the fair use doctrine unless authorized by the owners of the copyright.¹⁷¹ VidAngel was not authorized to rent films, nor was it distributing lawfully made copies of the works in question.¹⁷² VidAngel's own business model, in resorting to its buy/sell-back system, evinces that even its own administrators doubted the legality of their business practices.¹⁷³ Otherwise, they would have had little reason to resort to such a technical and nuanced "rental" plan.¹⁷⁴

iv. Preemptive Release in Restricted Format/Interruption of Windowing Strategy

The court's discussion of harm inflicted by VidAngel's business continued on to a new practice known to the studios as "windowing."¹⁷⁵ Windowing is the strategy by which studios "strategically release their content across different distribution channels and to different licensees over time."¹⁷⁶ Typically, a windowing strategy will gradually move from an initial release in disc or digital format to a wider viewing availability over streaming or broadcast networks.¹⁷⁷

VidAngel's business interrupted this windowing practice by making works available for streaming during times of exclusive licensing or disc release.¹⁷⁸ The court identified a couple of examples: *Star Wars: The Force Awakens* was available for streaming on VidAngel before licensed streaming began, and *The Martian* could be streamed during an exclusive license the studios had granted to HBO.¹⁷⁹ These interferences by VidAngel constituted unlawful distribution of films in restricted formats at a time when such formats were legally unavailable.¹⁸⁰ In this light, VidAngel's business resembles piracy, something to which the Ninth Circuit softly alluded.¹⁸¹

v. Failure to Filter Authorized Copies

VidAngel's strongest defense against these copyright claims was that its business was protected by the FMA.¹⁸² Unfortunately, neither the courts nor the

170. Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 655 (S.D.N.Y. 2013); *see also* 17 U.S.C. § 109(a) (2008) (granting fair use exemptions to "the owner of a particular copy or phonorecord lawfully made under this title" (emphasis added)).

171. 17 U.S.C. § 109(b)(1)(A).

172. *Disney Enters. v. VidAngel, Inc.*, 869 F.3d 848, 862 (9th Cir. 2017).

173. *See* Appellees' Answering Brief, *supra* note 110, at *9 (VidAngel's CEO "called buy-sell back the most creative way VidAngel could come up with to offer an on-demand streaming service while trying to stay buttoned up legally In less euphemistic terms, buy-sellback is a lawyer-created construct that VidAngel uses to stream performances while feigning its customers own Discs." (internal quotations omitted)).

174. *Id.* at *8, 11 (the studios declared this model a "sham," and quoted both customers and VidAngel's own marketing campaign, both of which described the service as a rental platform.).

175. *Disney Enters. v. VidAngel, Inc.*, 224 F. Supp. 3d 957, 964 (C.D. Cal. 2016).

176. *Id.*

177. *Disney Enters.*, 869 F.3d at 853.

178. *Id.* at 866.

179. *Id.*

180. *Id.*

181. *Id.* at 859.

182. Appellant's Opening Brief, *supra* note 107, at *19.

authors of the FMA agreed.¹⁸³ Senator Orrin Hatch, the sponsor of the FMA, stated that he intended the FMA to be construed narrowly.¹⁸⁴ He set out to protect a very specific filtering model, and, unfortunately for VidAngel, that model belonged to ClearPlay.¹⁸⁵ ClearPlay, in fact, roundly condemned VidAngel's model as contravening the purpose of the FMA.¹⁸⁶

The FMA exempted from copyright the elimination of audio or video content for in-home viewing (or technology that accomplished this end), so long as the processes created no fixed version of the altered film.¹⁸⁷ VidAngel purported to comply with all of these conditions,¹⁸⁸ but even if it did, nothing in the FMA allowed filtering companies exemptions from other exclusive rights belonging to the copyright holders.¹⁸⁹

The simplest explanation of the court's decision is that the FMA allows for filtering of authorized copies of a film, and VidAngel's copies were unauthorized.¹⁹⁰ Starting with an authorized copy did not necessarily mean that VidAngel actually streamed an authorized copy.¹⁹¹ Because it was streaming an unauthorized copy, VidAngel's act of "making imperceptible" portions of films was not protected by the FMA.

V. THE FUTURE OF FILTERING

The future of movie filtering is now anyone's game. The playing field is set, but no single business has truly laid claim to the market yet. Naturally, any filtering hopefuls will need to fit within the copyright laws already discussed, but there are a number of viable options for future filtering companies.

A. VidAngel's New System: Will it be Enough?

While litigation was still pending in the Ninth Circuit, VidAngel began implementing a survival strategy as it continued its attempts to find a legal model for filtering.¹⁹² In preparation for the worst, VidAngel filed for Chapter 11 bankruptcy protection, even as it launched its new filtering system.¹⁹³ With that legal safety

183. *Disney Enters.*, 869 F.3d at 860.

184. *Id.* at 859.

185. *Id.* at 860.

186. Clearplay Amicus Brief, *supra* note 98, at *5.

187. 17 U.S.C. § 110(11) (2005).

188. Appellant's Opening Brief, *supra* note 107, at *19.

189. 17 U.S.C. § 110 (stating that "[n]othing in paragraph (11) shall be construed to imply further rights under section 106 of this title"); *see also* *Disney Enters. v. VidAngel, Inc.*, 224 F. Supp. 3d 957, 968 (C.D. Cal. 2016) ("[T]he FMA does not provide any exemption from the anti-circumvention provisions of [§] 1201 of title 17." Recall that § 1201 prohibited circumvention of TPMs under the DMCA. (internal quotations omitted)).

190. *Disney Enters.*, 869 F.3d at 860.

191. *See supra* Parts IV.A, C.

192. Gene Maddaus, *VidAngel Changes Course with New Netflix and Amazon Filtering Service*, VARIETY (June 13, 2017, 6:31 PM), <https://variety.com/2017/biz/news/vidangel-netflix-amazon-filtering-launch-1202464295/>.

193. Gene Maddaus, *VidAngel Declares Bankruptcy to Put Copyright Fight on Hold*, VARIETY (Oct. 18, 2017, 3:14 PM), <https://variety.com/2017/digital/news/vidangel-bankruptcy-1202593659/>.

net in place, VidAngel felt confident as it rolled out what it hoped would be the future of its business.¹⁹⁴

The new VidAngel model looks very different from the one the courts banned.¹⁹⁵ As it restructured its service, VidAngel attempted to solve each problem the studios and the courts found with its initial model.¹⁹⁶ Now, it seeks validation that its new structure is legal.¹⁹⁷

With this new system, users pay a monthly fee of \$9.99 to subscribe to the VidAngel service.¹⁹⁸ After that, users must also sign into a separately owned account for either Amazon or Netflix streaming services.¹⁹⁹ With both subscriptions in place, the user can select any title available over either platform.²⁰⁰ To do so, viewers use the VidAngel app, which then communicates with the outside streaming services.²⁰¹ At that point, VidAngel serves as a middleman, intercepting the stream from the valid account and removing the undesired content for the viewer at home.²⁰² By applying the filter over the top of a licensed stream, VidAngel hopes that this new service will be deemed valid.²⁰³

As of early 2019, courts have declined to take official action in regards to the new model.²⁰⁴ VidAngel petitioned the California District Court in September 2017 to clarify that the new service was not included in the injunction.²⁰⁵ The court denied the motion for clarification, saying only that the injunction was to stop engaging in practices which interfere with the studio's copyrights.²⁰⁶ However, in nearly two years since the launch of VidAngel's new service, neither the court nor the studios have taken any action against VidAngel.²⁰⁷ This tolerance stands in marked contrast to the court's swift reaction to VidAngel's continued service after the original injunction.²⁰⁸ Two weeks after implementing the injunction, VidAngel was held in contempt and fined \$10,000 for failing to cease operations of its original service.²⁰⁹

Notable also in the continuing VidAngel saga is a proposed amendment to the FMA, which was introduced to the House of Representatives on September 13,

194. *Id.*

195. Maddaus, *supra* note 192.

196. *Facts Concerning VidAngel's New Filtering Technology*, VIDANGEL 2 (June 2017), <http://blog.vidangel.com/wp-content/uploads/2017/06/Fact-Sheet-VidAngels-New-Technology.pdf> [hereinafter VIDANGEL] (pointing out the decryption, the buy-sell-back model, the windowing concerns, and the exclusivity of other licenses).

197. *Id.*

198. Maddaus, *supra* note 192.

199. *Id.*

200. VIDANGEL, *supra* note 196, at 2.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Disney Enters. v. VidAngel, Inc.*, No. CV 16-04109-AB (PLAx), 2017 WL 6820015, at *1 (C.D. Cal. Sept. 13, 2017).

205. *Id.*

206. *Id.* at *2.

207. Ashley Cullins, *VidAngel Asks Court to Revisit Pause on its Service*, HOLLYWOOD REP. (Jan. 14, 2019, 12:34 PM), <https://www.hollywoodreporter.com/thr-esq/vidangel-asks-court-revisit-pause-service-1175880> (mentioning that the studios have threatened to seek contempt, which means they have not done so).

208. Maddaus, *supra* note 192.

209. *Id.*

2018.²¹⁰ The proposed amendment makes little substantive change to existing copyright law, but VidAngel's legislative advocates hope it will clarify existing law and protect its business.²¹¹ Notable portions read as follows:

[Adding to the list of exemptions:] the making imperceptible by or at the direction of an individual, acting in a personal capacity, of limited portions of audio or video content of a motion picture, during a performance transmitted to that individual for private viewing, directly or indirectly from an authorized copy or digital transmission of the motion picture, or the provision of a service that enables such . . . [Then, clarifying that new paragraph:] (A) no person asserting the rights of a motion picture copyright owner may prevent or impede by contract the provision of a service as described . . . (B) no person providing an authorized digital transmission of a motion picture for any individual may modify technical aspects of its transmission service for the purpose of preventing such individual from receiving a transmission. . . .²¹²

Essentially, this new amendment would create three notable additions to copyright law: (1) it specifically states that a company could lawfully provide a service to omit portions of films within homes, (2) it prohibits copyright holders from taking any action to impede such companies, and (3) it prohibits authorized streaming services from interfering with such companies by altering technical specifications.²¹³

While these amendments and additions seem facially cosmetic, VidAngel hopes that they will be enough to clarify the validity of movie filtering in the national statute.²¹⁴ This new bill would not protect VidAngel's old system or help to overturn the injunction,²¹⁵ but it may insulate the new model from further litigation. Notable, too, is the prohibition of licensed distributors from altering code or other technical aspects in order to block filtering companies.²¹⁶ This inclusion is likely to prevent software filtering barriers such as the ones encountered by ClearPlay.²¹⁷

In the end, VidAngel may not even survive long enough for a final determination concerning this new technology. By filing for Chapter 11 bankruptcy protection, it has indicated that there is at least a possibility that the fight for filtering may not go well.²¹⁸ And, thus far, it has not; VidAngel's bankruptcy protection

210. Family Movie Act Clarification Act of 2018, H.R. 6816, 115th Cong. (2018) (note that this iteration of the FMA Clarification Act failed to pass). See *infra* Part V.B.

211. See Neal Harmon, *We Have a Bill! (H.R. 6816)*, VIDANGEL (Sept. 27, 2018), <http://blog.vidangel.com/2018/09/27/bill-h-r-6816/>.

212. H.R. 6816.

213. *Id.*

214. *Tell Your Member to Co-Sponsor H.R. 6816*, VIDANGEL, <http://savefiltering.vidangel.com/> (last visited Feb. 28, 2019).

215. *Disney Enters. v. VidAngel, Inc.*, No. CV 16-04109 AB (PLAx), slip op. (C.D. Cal. Mar. 6, 2019), <https://www.documentcloud.org/documents/5762185-VidAngel.html>.

216. H.R. 6816 § 2(a)(5)(B).

217. See *supra* notes 98–102.

218. *VidAngel Uses Bankruptcy Strategy to Fend Off Studios*, FORBES (Oct. 18, 2017, 8:52 PM), <https://www.forbes.com/sites/legalentertainment/2017/10/18/vidangel-uses-bankruptcy-strategy-to-fend-off-studios/#6678f4da4cee>.

was not enough to halt the pending litigation against it.²¹⁹ Without that protection, VidAngel was found liable for copyright violation, and will face a jury trial in the summer of 2019 to determine damages.²²⁰ Regardless of the impending outcome, however, VidAngel has at least shed considerable light on some of the rights and wrongs of movie filtering, and maybe helped pioneer a legal path along its way.

B. Is There a Possible Solution?

Considering the legal battles of the past and present and the continued conflict of the last two decades, there are clearly a number of improper and unlawful ways to edit films. The questions remaining are whether there is a legal way to do so and, if there is, what that method looks like. Moving forward, there are four possible solutions for home viewers interested in filtering movies.

The first—and possibly most obvious—solution is both simple and efficient: companies could simply stop trying to filter movies. This option, for whatever level of confrontation it avoids, is probably the least likely to occur. The public demonstrated that they have some level of interest in filtering services, and companies like VidAngel are dedicated to offering that service.²²¹ With the obvious out of the way, there remain three more likely possibilities.

Studios do have the option of releasing the edited films they make for airlines and television stations.²²² These copies already exist and are studio produced, so there would be no copyright issues with the existing statutes.²²³ The only barrier for this possibility is that the onus is entirely on the studios to come forward and release these copies for sale. Sony already began this sort of practice, though only with 24 films.²²⁴ Another drawback with this option is that, because the edits are already made, there is no flexibility as to what sort of content is removed. Modern filtering companies like ClearPlay and VidAngel allow users to select content to filter—a feature that would be unavailable with studio-produced edits.

A third and increasingly plausible possibility is for the courts or Congress to vindicate VidAngel's new service, and for it to increase in prevalence to the point of widespread use. There are still some hurdles that remain for VidAngel to survive, but it continues to fight, and even in the course of researching and drafting this article, the possibility of a future VidAngel service has increased.²²⁵ The two biggest hurdles remaining are business contracts and legal authentication. It may be that VidAngel winds up facing the same barriers that ClearPlay encountered: technological hindrance through code alterations.²²⁶ While Netflix and Amazon

219. *In re VidAngel, Inc.*, 593 B.R. 340, 353 (Bankr. D. Utah 2018) (lifting the stay on legal proceedings to allow the studios' litigation to proceed).

220. See Harmon, *supra* note 134.

221. See *About VidAngel*, *supra* note 14; see also Dodson, *supra* note 13.

222. See *supra* Part II.B.

223. See Hughes, *supra* note 30; see also 17 U.S.C. § 106 (2002).

224. Hughes, *supra* note 30.

225. See Kayla Root, *Why VidAngel May Still Win the Battle for Clean, Family-Friendly Filtering*, CBN NEWS (Sept. 24, 2018), <https://www1.cbn.com/cbnnews/entertainment/2018/september/why-vidangel-may-still-win-the-battle-for-clean-family-friendly-filtering>; see also Neal Harmon, *Happy New Year from VidAngel! Overview of 2018*, VIDANGEL (Jan. 5, 2019), <http://blog.vidangel.com/2019/01/05/happy-new-year-vidangel-overview-2018> (summarizing a number of projects and gains VidAngel is making and providing a positive outlook for future business).

226. See *supra* notes 98–102.

have not outright hindered or opposed VidAngel's use of their platforms for its service, neither company has endorsed nor openly supported VidAngel.²²⁷ It is entirely possible that either or both companies could take actions to block VidAngel's efforts. This business aspect and the legal concerns may be helped by the proposed amendments to the FMA.²²⁸ However, because this bill was introduced so late in the legislative season, it was far from passage by the time the session changed and the 116th Congress was sworn into office. Additionally, the bill's sponsor, Mia Love, lost a tight race for re-election that may have stopped the bill in its tracks.²²⁹ Time alone will tell whether a new sponsor will pick up the FMA amendments after this transition.

The fourth and final option is the most comprehensive, and possibly the most difficult to bring about. If a new business were to arise that implemented this fourth method, it would likely face no legal harm. VidAngel's five primary offenses were: (1) illegal circumvention of TPMs, (2) unauthorized reproduction and distribution of copyrighted works, (3) exceeding the scope of the first sale doctrine, (4) preemptive release in restricted format/interruption of windowing strategy, and (5) failure to filter authorized copies.²³⁰ If a new, technologically-integrated filtering service were created, it could resolve all five of these concerns.

Consider how a browser extension operates on an internet browser.²³¹ It is not a separate application, nor is it entirely its own program.²³² It is an additional feature that becomes integrated into a browser.²³³ In like manner, if a filtering service were to operate on a smart television or a background application (whether desktop or mobile), it could remove the current need for a separate app like VidAngel currently uses. The interface would be the pure, currently available streaming services with an editing option that overlays once a title is selected. As undesired content arises, the extension (likely through some combination of filtering data and artificial intelligence programming) would simply work as an automated remote—muting or skipping any frames the user chooses to omit.

Such a service would rectify all five of VidAngel's mistakes. Because it would operate over other streaming services, there would be no need to decrypt or circumvent digital protections such as TPMs. In this extension-type form, the filtering service would have no need to either reproduce or distribute the copyrighted works. Any questions of first sale or fair use would be moot, as the service would not require any sort of purchase or rental of the copyrighted work. Whereas VidAngel preemptively provided content in as-of-yet prohibited formats, this extension would only stream from the authorized platforms, therefore not interfer-

227. Maddaus, *supra* note 192.

228. See Family Movie Act Clarification Act of 2018, H.R. 6816, 115th Cong. (2018).

229. Benjamin Wood, *Ben McAdams Holds a 1,229-Vote Lead Over Rep. Mia Love After Salt Lake and Utah County Election Updates*, SALT LAKE LAKE TRIB., <https://www.sltrib.com/news/politics/2018/11/13/latest-utah-county-vote/> (last updated Nov. 14, 2018).

230. See *supra* Part IV.C.

231. Chris Hoffman, *Beginner Geek: Everything You Need to Know About Browser Extensions*, HOW-TO GEEK (Aug. 1, 2013, 6:40 AM), <https://www.howtogeek.com/169080/beginner-geek-everything-you-need-to-know-about-browser-extensions/>.

232. *Id.*

233. *Id.*

ing with any windowing strategy the studios may have. Finally, any works edited by such an extension would be from authorized, licensed copies.²³⁴

Additionally, programmers could tailor such a service to be applicable across more platforms because it is an extension rather than an application. Whereas VidAngel is now restricted to Amazon and Netflix, and ClearPlay is exclusively on Google Play Movies, an extension could have functionality over multiple streaming services.²³⁵ Users would have no need to acquire or obtain any specific services; they could use the same platforms they already have and use every day.

Admittedly, this fourth option for the future of filtering may be difficult to create. It would require an advanced level of programming and technological expertise. The artificial intelligence in question would need the ability to know exactly when questionable content will arise within a stream. With that foreknowledge, it could, regardless of which streaming platform is used, smoothly skip from the last frame before the questionable content to the first frame after it. That level of expertise is difficult to come by. However, despite this difficulty, it seems that such a model would fit most cleanly within the parameters of the FMA (amended or current) while also providing a simple, accessible, and sustainable business model—the step ClearPlay struggled to do.²³⁶

One pattern discernable among the history of filtering is that the closer the filtering service is to the actual filtering, the more problems there tend to be. CleanFlicks edited and burned its discs directly.²³⁷ ClearPlay and VidAngel both tried to place the actual filtering function within the home.²³⁸ The next logical step is to place the filtering technology directly in the home while removing the filtering company from the picture. Ideally, this means that this extension should be a product rather than a service. The less involved the company is, the more the filtering is taking place in the hands and at the desires of the viewer. The FMA as currently enacted allows for “the creation or provision of a computer program or other technology that enables” filtering.²³⁹ It seems that an actual program (or extension) fits more cleanly within the statute than would a company like VidAngel. The ideal filtering system should be a “program or other technology” rather than a service.²⁴⁰

VI. CONCLUSION

After two decades of trial, error, and downright failure, movie filtering companies are getting closer to finding the perfect mesh of business model and legal propriety. CleanFlicks failed on both accounts; ClearPlay was legal, but ineffec-

234. *Cf.* VIDANGEL, *supra* note 196, at 2 (claiming that VidAngel’s new service streams from licensed copies. Legally, an extension like the one proposed would run similarly, but would have greater versatility than VidAngel’s current platform restrictions.).

235. *Cf.* David Geron, *This Service Combines All of Your Streaming Services in One Place. Here’s How it Works*, CNBC (July 22, 2017, 2:00 PM), <https://www.cnbc.com/2017/07/21/reelgood-combines-all-of-your-streaming-services-heres-how-it-works.html> (demonstrating that services already exist that can function over multiple streaming services. Simply repurposing this type of programming would be a great start to developing the proper software.).

236. 17 U.S.C. § 110(11) (2005).

237. *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236, 1238 (2006).

238. *McCarroll, supra* note 16, at 347; *Disney Enters. v. VidAngel, Inc.*, 869 F.3d 848, 860 (2017).

239. 17 U.S.C. § 110(11).

240. *Id.*

tive as a business; VidAngel violated copyright, and its future is uncertain. Of the existing models, VidAngel's new service is closest to success, and time will tell if it is refined enough, but the ideal filtering company has yet to lay claim to this corner of the market. The future may see an already-existing company filling this need, or it may see a new player altogether, but one thing is certain: there is still work to do. There is a way to protect both the copyrights of the studios and the preferences of the viewer, and as businesses get closer to striking that balance, they continue chipping away at the unanswered questions in the fight for filtering.