The Fight to Filter: Navigating Copyrights to Legally Edit Films

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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.


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I. INTRODUCTION

December of 1939 proved to be historic for the motion picture industry. The instant classic *Gone with the Wind* arrived in theaters, grossing almost $200 million domestically. 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.” The change created some controversy at the time, but the debate that it began continues to this day.

Decades later, once at-home viewing was more prevalent for movies, viewers again raised concerns over particular films’ content. With this new controversy, however, film audiences took matters into their own hands. Various businesses began editing out the vulgar, violent, and sexual content of these films. 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. Most of these filtering businesses failed due to copyright violations, usually regarding distribution rights and creations of derivative works. What followed was nearly two decades of trial, error, and failure on the part of hopeful filtering companies. 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.

In spite of these setbacks, filtering services continue to fight for their customers’ right to watch films without content that viewers deem inappropriate. 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-

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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.
7. Id.
8. Id.
9. See infra Parts II and III.
11. See infra Part III.
12. See infra Part III.
vices. 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. 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.

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. 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. 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. Only in the past few decades has editing really taken off, but it has existed in some form since the 1950s. 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. 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.

15. Cohen, supra note 5.
17. Id. at 341.
19. See infra Part II.
20. See infra Part II.
Formal filtering services first became attractive in the late 1990s. As near as can be determined, the first filtering service primarily dealt in editing VHS copies of James Cameron’s *Titanic*. This early business consisted of a Utah “mom-and-pop video store,” called Sunset Video, which spent its time altering pre-bought VHS tapes. 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. It began as a small, local service, but soon grew rapidly. Some reports indicated that the shop edited over 10,000 copies of the film. The service did not last long, but it made the public aware of a consumer preference that was thus far untapped. More expansive editing operations began to emerge within the next few years.

**B. Airplanes and Television**

It is worth noting that edited, derivative copies of films already exist in multiple mediums. For years, some television stations, and more notably, airlines, have shown edited versions of film and television productions. There is often a public sentiment that these edits are too sensitive and leave too much out, sometimes sacrificing a cohesive plot. 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. In accordance with specific agreements, these film studios create finished, edited versions and distribute them exclusively to their contractual partners. Copies of

22. Hughes, supra note 6.
23. Id.
25. Id.
26. Id.
29. Id. at 135.
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.
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).
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{52} These are the very first three rights guaranteed exclusively to copyright holders.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{55} A “copy” under copyright law is any “material object[] . . . in which a work is fixed by any method now known or later developed.”\textsuperscript{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.\textsuperscript{57} The court granted summary judgment on this first count to the DGA.\textsuperscript{58}

The second claim asserted that CleanFlicks’s edits were derivative works, which are prohibited by copyright protections.\textsuperscript{59} Derivative works are a very broad category of works that essentially include any form in which a work may be “re-cast, transformed, or adapted.”\textsuperscript{60} The court’s decision in this case hinged on the meaning of the word “transformative.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{63} Because CleanFlicks’s work was not transformative, summary judgment on count two was denied to the DGA.\textsuperscript{64}

\begin{thebibliography}{9}
\bibitem{id} Id.
\bibitem{id} Id.
\bibitem{glasser} Glasser, \textit{supra} note 24, at 139.
\bibitem{id} Id.
\bibitem{cleanflicks1} \textit{Id.} at 141; \textit{Clean Flicks}, 433 F. Supp. 2d at 1239.
\bibitem{uscode1} 17 U.S.C. § 106(1)-(3) (2002).
\bibitem{cleanflicks2} \textit{Clean Flicks}, 433 F. Supp. 2d at 1239.
\bibitem{uscode2} 17 U.S.C. § 106(1).
\bibitem{uscode3} 17 U.S.C. § 101 (2010).
\bibitem{cleanflicks3} \textit{Clean Flicks}, 433 F. Supp. 2d at 1239.
\bibitem{uscode4} \textit{Id.} at 1243.
\bibitem{uscode5} 17 U.S.C. § 106(2).
\bibitem{uscode6} 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.”).
\bibitem{cleanflicks4} \textit{Clean Flicks}, 433 F. Supp. 2d at 1241.
\bibitem{cleanflicks5} \textit{Clean Flicks}, 433 F. Supp. 2d at 1241.
\bibitem{id} \textit{Id.} at 1243.
\end{thebibliography}
Third, the studios claimed that CleanFlicks violated its exclusive rights to distribution. The fact that the filtering businesses sold and rented edited copies of films is undisputed. Here, CleanFlicks asserted a defense by way of the first sale doctrine. 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). However, this doctrine does not extend so far as to overcome the exclusive right to reproduction. 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. Summary judgment on this third count was granted in favor of the DGA.

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

B. ClearPlay

The next notable attempt at filtering was the ClearPlay DVD player. This new startup actually sold entire DVD players, not just the DVDs. 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. Once those filters were downloaded, the FilterStick went into the DVD player along with any authorized DVD purchased or rented from an authorized dealer. 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.

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67. Id. at 1242.
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.
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. The studios prepared to bring the same claims against ClearPlay with particular emphasis on the derivative works claim. However, concerted legislative and lobbying efforts led to an intermediary result that changed the course of the pending lawsuit.

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. The Family Movie Act of 2005 (“FMA”) adjusted copyright law to allow limited exceptions in which some filtering companies could exist. 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.

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.

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. It did not, however, allow for fixed or permanent copies of the edit to be made, much less reproduced and distributed.

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

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.
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.”).
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
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
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 sellback 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.
125. Disney Enters., 869 F.3d at 855.
130. Id. at 979.
dealt another blow as the Ninth Circuit affirmed the district court’s ruling. 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. In June of 2019, the case will be heard before a jury that will make a decision on the damages VidAngel owes.

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, but its opinion (and the opinion of the Central District of California) indicated that there were five main issues. 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. 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. The assertion that VidAngel circumvented TPMs was a serious accusation, and it played a large part in CleanFlicks’s loss in court.

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. 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” such as the TPMs involved in the discs that store these films. However, VidAngel continued to lean on its fair use defense to combat these allegations under the DMCA.

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

132. Id. at 867.
135. Disney Enters., 869 F.3d 848.
136. See discussion infra Part IV.C.
137. Disney Enters., 869 F.3d at 853.
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).
activities from copyright violation, including reproduction and other protections for particular purposes. Fair use protects such exemptions “for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research.” 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. VidAngel argued that its actions were exempted as a simple “space-shift” (or transition between formats). 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. Because VidAngel distributed its space-shifted copies, the fair use doctrine did not protect its business practice.

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. 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. 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. . . .” 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. By using its computers to store and edit films, VidAngel violated the studios’ first-listed exclusive right under current copyright law.

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

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146. Id.
147. Id.
148. Appellant’s Opening Brief, supra note 107, at *16.
150. Disney Enters. v. VidAngel, Inc., 869 F.3d 848, 862 (9th Cir. 2017).
153. Id.
154. Id.
155. Disney Enters., 869 F.3d at 853; see also MAI Sys. Corp., v. Peak Comput., Inc., 991 F.2d 511, 518 (9th Cir. 1993).
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. Part of this discussion of harm particularly emphasized the profits VidAngel was claiming in a manner adverse to the studios. Streaming, as it turns out, is a large source of income that the studios rely on. 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.

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. 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, 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. Furthermore, the court noted that almost half of users would view the same titles even without filtering. This fact demonstrates that, contrary to VidAngel’s assertions, its service does not benefit the studios by “expand[ing] their market.”

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

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159. Disney Enters., 869 F.3d at 853.
160. Id.
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 ÷ $20 per copy = 50,000 copies; 50,000 copies × 16 uses in the first month = 800,000 copies the studio might have sold; 800,000 × $20 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
authors of the FMA agreed.\textsuperscript{183} Senator Orrin Hatch, the sponsor of the FMA, stated that he intended the FMA to be construed narrowly.\textsuperscript{184} He set out to protect a very specific filtering model, and, unfortunately for VidAngel, that model belonged to ClearPlay.\textsuperscript{185} ClearPlay, in fact, roundly condemned VidAngel’s model as contravening the purpose of the FMA.\textsuperscript{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.\textsuperscript{187} VidAngel purported to comply with all of these conditions,\textsuperscript{188} but even if it did, nothing in the FMA allowed filtering companies exemptions from other exclusive rights belonging to the copyright holders.\textsuperscript{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.\textsuperscript{190} Starting with an authorized copy did not necessarily mean that VidAngel actually streamed an authorized copy.\textsuperscript{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.

\textbf{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.\textsuperscript{192} In preparation for the worst, VidAngel filed for Chapter 11 bankruptcy protection, even as it launched its new filtering system.\textsuperscript{193} With that legal safety
net in place, VidAngel felt confident as it rolled out what it hoped would be the future of its business.\footnote{194}{Id.}

The new VidAngel model looks very different from the one the courts banned.\footnote{195}{Maddaus, supra note 192.} As it restructured its service, VidAngel attempted to solve each problem the studios and the courts found with its initial model.\footnote{196}{Facts Concerning VidAngel’s New Filtering Technology, \textit{VidAngel} 2 (June 2017), http://blog.vidangel.com/wp-content/uploads/2017/06/Fact-Sheet-VidAngels-New-Technology.pdf [hereinafter \textit{VidAngel}] (pointing out the decryption, the buy-sell-back model, the windowing concerns, and the exclusivity of other licenses).} Now, it seeks validation that its new structure is legal.\footnote{197}{Id.}

With this new system, users pay a monthly fee of $9.99 to subscribe to the VidAngel service.\footnote{198}{Maddaus, supra note 192.} After that, users must also sign into a separately owned account for either Amazon or Netflix streaming services.\footnote{199}{Id.} With both subscriptions in place, the user can select any title available over either platform.\footnote{200}{\textit{VidAngel}, supra note 196, at 2.} To do so, viewers use the VidAngel app, which then communicates with the outside streaming services.\footnote{201}{Id.} 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.\footnote{202}{Id.} By applying the filter over the top of a licensed stream, VidAngel hopes that this new service will be deemed valid.\footnote{203}{Id.}

As of early 2019, courts have declined to take official action in regards to the new model.\footnote{204}{Disney Enters. v. VidAngel, Inc., No. CV 16-04109-AB (PLAx), 2017 WL 6820015, at *1 (C.D. Cal. Sept. 13, 2017).} VidAngel petitioned the California District Court in September 2017 to clarify that the new service was not included in the injunction.\footnote{205}{Id.} 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.\footnote{206}{Id. at *2.} 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.\footnote{207}{Ashley Cullins, \textit{VidAngel Asks Court to Revisit Pause on its Service}, \textit{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).} This tolerance stands in marked contrast to the court’s swift reaction to VidAngel’s continued service after the original injunction.\footnote{208}{Maddaus, supra note 192.} Two weeks after implementing the injunction, VidAngel was held in contempt and fined $10,000 for failing to cease operations of its original service.\footnote{209}{Id.}

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,
2018. 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. 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. . . .

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. 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. This new bill would not protect VidAngel’s old system or help to overturn the injunction, 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. This inclusion is likely to prevent software filtering barriers such as the ones encountered by ClearPlay.

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. And, thus far, it has not; VidAngel’s bankruptcy protection

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212. H.R. 6816.
213. Id.
217. See supra notes 98–102.
was not enough to halt the pending litigation against it.\textsuperscript{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.\textsuperscript{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.

\subsection*{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.\textsuperscript{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.\textsuperscript{222} These copies already exist and are studio produced, so there would be no copyright issues with the existing statutes.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{226} While Netflix and Amazon

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\item[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).
\item[220.] See Harmon, supra note 134.
\item[221.] See About VidAngel, supra note 14; see also Dodson, supra note 13.
\item[222.] See supra Part II.B.
\item[223.] See Hughes, supra note 30; see also 17 U.S.C. § 106 (2002).
\item[224.] Hughes, supra note 30.
\item[226.] See supra notes 98–102.
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have not outright hindered or opposed VidAngel’s use of their platforms for its service, neither company has endorsed nor openly supported VidAngel. 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. 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. 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. 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. It is not a separate application, nor is it entirely its own program. It is an additional feature that becomes integrated into a browser. 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-

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227. Maddaus, supra note 192.
230. See supra Part IV.C.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{237} ClearPlay and VidAngel both tried to place the actual filtering function within the home.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-

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\bibitem{234} Cf. \textit{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 versatilily than VidAngel’s current platform restrictions.).

\bibitem{235} Cf. David Gernon, \textit{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.).


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

\bibitem{239} 17 U.S.C. § 110(11).

\bibitem{240} Id.
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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.