

UPDATED

Disney et al v. VidAngel, currently before the Central District Court of California, is a case to watch. VidAngel has expressed an intention to fight this matter to the U.S. Supreme Court, if possible, to push the courts and legislature to bring clarity to the jurisprudence around the film industry created in the last 100 years. Modern technology, such as streaming, home servers, and cloud storage, creates challenges to apply decades old case law to modern distribution and ownership of video content.

The court granted a preliminary injunction against VidAngel, ordering VidAngel to cease distributing the Plaintiff's copyrighted material via the VidAngel website and technology. VidAngel largely relies on the Home Movie Act of 2005 and argues that the Act must create an exemption to the DMCA and to public performance jurisprudence, else it must be read to be meaningless.

Streaming under the DMCA Disney Enter., Inc. et al. v. VidAngel, Inc.

Monday, December 12, 2016, U.S. District Judge Andre Birotte Jr. released an order granting a preliminary injunction against VidAngel of Provo, UT in favor of film studios owned by Disney, Warner Bros., and 20th Century Fox (collectively "the Studios"). The preliminary injunction was granted based on several considerations.

The case is of interest because VidAngel is the most recent video service in the line of video cases. While previous cases addressed issues such as "time-shifting" of tape-recorded (and later, DVR'd) copyrighted material (Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984)) and streaming of time-shifted and live copyrighted material over the internet (American Broadcasting Companies v. Aereo, 573 U.S. ___ (2014)), VidAngel provides, via the internet, remote access to the content of a singular, physical copy of a DVD. VidAngel describes this as "space-shifting" of the DVD.

The customer purchases a physical copy of the DVD from VidAngel, and VidAngel provides on-demand access to viewership of the DVD from their facility via the internet. The customer

retains an ability to resell the DVD back to VidAngel for a difference of \$1.00 per DVD. Upon accessing the content of the DVD, VidAngel offers services to “filter” the content of the DVD for a variety of subject matter that may be undesirable to the customer, such as language, violence, nudity, etc. As the customer has exclusive access to a physical DVD and filters the content themselves, VidAngel argues, therefore, that they are merely selling a DVD with an offer to repurchase the DVD and no more.

However, Judge Birotte disagreed with this assessment, granting a preliminary injunction to the Studios. Judge Birotte stated that the studios have demonstrated a likelihood of prevailing on their claims as well as shown the prospect of irreparable harm. The judge also found that a preliminary injunction would also serve the public interest. In coming to his conclusions, Judge Birotte analyzed the provision of the Digital Millennium Copyright Act (DMCA) that prohibits circumvention of access-control along with VidAngel’s acknowledgement of using software to remove restrictions on DVDs and Blu-Rays. It is important to note that the licensing of streaming of video content and the sale of physical copies of the video content are considered distinct rights within the copyright “bundle of sticks”. For example, many Disney films are available for purchase, but are not or have not ever been licensed for streaming. Another example is the Warner Bros. film “Suicide Squad”, which was unavailable on any streaming service, but available for purchase on disc at the time. VidAngel’s offer of remote access to a physical disc of “Suicide Squad” via the internet (before Warner Bros. authorized any streaming) therefore, provides a functionally similar service to the consumer and Judge Birotte found no support to the argument that all VidAngel is doing is “space-shifting” or “format-shifting” in a fair use way.

Judge Birotte also declined to agree with VidAngel that they are only selling and repurchasing a physical DVD and that their customers are merely watching a purchased disc in their own home. “Assuming arguendo that VidAngel’s buy/sellback service creates a valid ownership interest in a DVD, this ownership would only apply to the physical DVD, not the digital content that VidAngel streams to paying subscribers. Subscribers view a stream from a master copy stored on a server, not a DVD temporarily ‘owned’ by the user. Furthermore,

lawful ownership of a DVD only conveys authorization to view the DVD, not to decrypt it for the purpose of viewing it on an alternative platform. Therefore, VidAngel's customers are not lawful 'owners or possessors' of the digital content that is streamed via VidAngel's service. Finally, VidAngel's argument that Aereo holds that the public performance right is not infringed when the user pays for something other than the transmission of copyrighted works, is unsupported."

Finally, regarding the actual filtering of the content, Judge Birotte points to a requirement in the Family Home Movie Act of 2005 that permits altering of video content. Judge Birotte notes that for the provisions of the FHMA to apply, "a performance or transmission of filtered content must come from an 'authorized copy' of the motion picture." While the FHMA allows filtering of the authorized copy, VidAngel must now prove during trial that the content provided to their customers amounts to an authorized copy.

The full content of the order is available for viewing or download here:

<https://www.documentcloud.org/documents/3237153-VidAngel-Order.html>