

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

**iii. VidAngel's "Fair Use" Defense**

VidAngel asserts that they are making "fair use" of the copyrighted works as provided in 17 U.S.C. § 107 of the Copyright Act. The pertinent language of that section reads as follows:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of a copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

**1. Purpose and Character of the Use.**

The "purpose and character of use" factor in the fair use inquiry asks "to what extent the new work is transformative" and does not simply "supplant" the original work and whether the work's purpose was for or not-for-profit. *Mattel Inc. v. Walking Mt. Prods.*, 353

F.3d 792, (9th Cir. 2003) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994)). VidAngel does not dispute that they profit from the use of Plaintiffs' works. Commercial use of copyrighted material is "presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."

*Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 545 (9th Cir. 2008) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984)).

VidAngel argues that their filtering service is transformative in that it alters the content of the works as seen by different viewers in different ways. (Oppo. at 20.) The Supreme Court has said that a use is transformative if it "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message." *Campbell*, 510 U.S. at 579, 114 S.Ct. 1164. VidAngel's service does not add anything to Plaintiff's works. It simply omits portions that viewers find objectionable. The court in \*973 *Clean Flicks of Colo. v. LLC v. Soderbergh*, 433 F.Supp.2d 1236 (D. Colo. 2006), rejected a fair use defense from defendants that provided a service which is similar to that of VidAngel. In *Clean Flicks*, the court ruled that defendants' editing of objectionable content was not transformative because it added nothing to the copyrighted works, and only removed "a small percentage of most of the films." *Id.* at 1241. Furthermore, the Ninth Circuit has held that works are transformative when "the works use copy-righted material for purposes distinct from the purpose of the original material." *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622,

629 (9th Cir. 2003). Notwithstanding the edits made by users, VidAngel's use of plaintiff's works serves the "same intrinsic entertainment value that is protected by Plaintiffs' copyrights", and is thus not transformative. *Id.* VidAngel's commercial use of the copyrighted works, coupled with non-transformative nature of the edited copies weigh heavily in favor of the Plaintiffs under the first statutory factor in the fair use analysis.

## 2. Nature of the Copyrighted Work

"The second statutory factor, 'the nature of the copyrighted work,' § 107(2), draws on Justice Story's expression, the 'value of the materials used.'" *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994) (citing *Folsom v. Marsh*, 9 F.Cas. 342, 348 (C.C.D. Mass. 1841)) "This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied." *Campbell*, 510 U.S. at 586, 114 S.Ct. 1164. For example, the Ninth Circuit has held that "works such as original songs, motion pictures, and photographs taken for aesthetic purposes, are creative in nature and thus fit squarely within the core of copyright protection." *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003) (citing *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984)). This factor also weighs in favor of the Plaintiffs.

## 3. Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

The third factor in the fair use analysis evaluates both the quantity of the work taken and the quality and importance of the portion taken. *Campbell*, 510 U.S. at 586, 114 S.Ct. 1164. "This factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too." *Id.* at 577, 114 S.Ct. 1164. The evidence in this case shows that VidAngel copies Plaintiff's works in their entirety. (Ehler Decl. Ex. EE at Tr. 112:19–113:2.) The Supreme Court in *Campbell* advised that the verbatim copying of "a substantial portion of the infringing work" is a relevant inquiry in the fair use analysis. *Id.* at 588, 114 S.Ct. 1164. VidAngel does not dispute that they copy a substantial portion of the Plaintiff's copyrighted works. Instead VidAngel simply states that their viewers never watch exact copies of the original films, due to the requirement that each user must apply at least one filter. Defendants also assert that the filtered versions of the movies are not substitutes for the Plaintiff's works. However, the Supreme Court in *Campbell* held that "a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original. *Id.* The heart of a copyrighted work is the portion that is the "most likely to be newsworthy and important in licensing serialization." *Campbell*, 510 U.S. at 586, 114 S.Ct. 1164. Despite the fact that VidAngel's service omits portions \*974 of each work, the essential storyline, cinematography, and acting portrayals remain unchanged. These elements are the heart of the movie. Courts consistently find that the performance of the "heart" of a copyrighted work weighs against a fair use

determination. *See Campbell*, 510 U.S. at 586, 114 S.Ct. 1164; *Elvis Presley Enters.*, 349 F.3d at 630; *L.A. News Serv. v. Tullo*, 973 F.2d 791, 798 (9th Cir. 1992). *Arista Records LLC v. Myxer Inc.*, 2011 U.S. Dist. LEXIS 109668, 2011 WL 11660773 (C.D. Cal. Apr. 1, 2011).

Accordingly, the Court finds that this factor weighs in favor of the Plaintiffs.

#### **4. Effect of the Use Upon the Potential Market For or Value of the Copyrighted Work**

The fourth factor in the fair use analysis considers current market harm and “whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market’ for the original.” *Campbell*, 510 U.S. at 590, 114 S.Ct. 1164 (citations omitted). As discussed above, Plaintiff’s use of Plaintiff’s copyrighted works is commercial and non-transformative. The Ninth Circuit has held that when “the intended use is for commercial gain,” the likelihood of market harm “may be presumed.” *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 531 (9th Cir. Cal. 2008).

VidAngel argues that their service does not harm the market for Plaintiff’s copyrighted works because filtered movies are not a substitute for Plaintiff’s unfiltered movies. (Oppo. at 21.) VidAngel also asserts that their filtering service actually increases the market for Disney’s works. (*Id.*) VidAngel attempts to support their arguments by offering customer survey results that indicate that over 51% of VidAngel customers would not watch their offerings without filtering. The survey results are ultimately detrimental to VidAngel’s

arguments. The fact that 49% of VidAngel’s customers would view movies without filters shows that VidAngel’s service does serve as an effective substitute for Plaintiff’s unfiltered works, for approximately half of VidAngels users. Furthermore, the fact that VidAngel’s streams are “composed primarily” of Plaintiff’s works, including the heart of the work, “with little added or changed” makes the streams “more likely to be a merely superseding use, fulfilling demand for the original.” *Campbell*, 510 U.S. at 586, 114 S.Ct. 1164. Therefore, the Court finds that this factor also weighs in favor of the Plaintiffs.

At trial, the defendant in an infringement action bears the burden of proving fair use. *See Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 590, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994). “Because ‘the burdens at the preliminary injunction stage track the burdens at trial,’ once the moving party has carried its burden of showing a likelihood of success on the merits, the burden shifts to the nonmoving party to show a likelihood that its affirmative defense will succeed.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007) (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006)). Plaintiffs have shown a likelihood of success on their DMCA and Copyright Infringement claims, therefore VidAngel bears the burden of showing that they are making fair use of the Plaintiffs Copyrighted works. Based on the analysis of the aforementioned factors, the Court finds that VidAngel has not met this burden.