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Watch What You *Bleeping* Want: Interpretation of Statutes Dealing With Advancing Technology in Light of the Ninth Circuit Case of "Disney Enterprises, Inc. v. VidAngel, Inc."

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WATCH WHAT YOU *BLEEPING* WANT: INTERPRETATION OF STATUTES DEALING WITH ADVANCING TECHNOLOGY IN LIGHT OF THE NINTH CIRCUIT CASE OF *DISNEY ENTERPRISES, INC. V. VIDANGEL, INC.*

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I. INTRODUCTION

As has been the recurring trend of the innovative-heavy media consumption age, there has been a shift in the market for media viewership to internet-based streaming. There have been substantial shifts in media-viewing technology leading up to today's streaming movement since the inception of at-home media viewership. From the invention of the VHS, to the advancement of 4K Ultra High Definition televisions, to the ease of streaming popular movies and shows from the internet, the innovation of at-home media viewership has been one of the most rapid and intriguing technological transformations of the current era.

However, the rapid advancement of technology has raised issues on how new types of technology comport with existing statutory regulations. Specifically, this Note considers the preliminary injunction granted against a company, VidAngel, using new technology to offer filtered streams of popular movies and television shows.[1] While VidAngel brought a multitude of defenses against Disney's copyright claim,[2] the Family Movie Act defense and the interpretation of the Act by the court brings an intriguing insight as to how these types of statutes should be considered and interpreted in view of the developing technology they directly implicate.

To illustrate how rapidly the technology revolving around at-home media viewership has changed, consider what is arguably the most iconic service of the streaming media movement: Netflix. Starting up in 1997, Netflix originally began as a service for DVD rental and sale in 1997, eventually becoming a subscription-based service in 1999.[3] When Netflix first started its streaming service in 2007, its service was far from that which it has become today.[4] In fact, when Netflix tried to use price increases to push its customers from mailed DVDs to streaming media, the company suffered harsh economic loss and came close to reaching bankruptcy.[5] Fortunately for the sake of Netflix and technological advancement, Netflix was able to refocus on its customers' needs and now has 117 million subscribers worldwide.[6]

There has since been a clear shift to streaming in today's culture. Multiple companies have entered the market, and there is an increasing prevalence of

[1] Disney Enters., Inc. v. VidAngel, Inc., 869 F.3d 848 (9th Cir. 2017).

[2] *See id.*

[3] *Netflix Timeline: A brief history of the company that revolutionized watching of movies and TV shows*, NETFLIX, https://media.netflix.com/en/about-netflix (last visited Mar. 19, 2018).

[4] *Id.*

[5] Tien Tzuo, *The Year Netflix Almost Died*, ENTREPRENEUR (Oct. 23, 2015), https://www.entrepreneur.com/article/250218.

[6] *Id.*; *About Netflix*, NETFLIX, https://media.netflix.com/en/about-netflix (last visited Mar. 19, 2018).

"stream exclusive" shows created by streaming service providers.[7] Even televisions themselves have integrated internet services to allow for more accessible streaming.[8] More radically, some consumers (a large percentage of them millennials) have begun to completely eliminate cable subscriptions and instead rely solely on internet streaming services for all manners of media entertainment.[9]

In the midst of today's cultural obsession with streaming, VidAngel saw its chance to make an impact and have a hand in the stream-heavy culture. VidAngel was founded on the premise that those who have objectional views to explicit content in movies and television should have the ability to watch and stream popular media and not feel as if they were excluded from the rest of the American population and culture.[10] Prior to its current model, VidAngel attempted to enable filtered streaming through Google-based services but was halted in its tracks by complications with Google and major film entertainment studios.[11] Faced with this dilemma, VidAngel then developed its own unique model to allow for filtered streaming.[12] This model involved VidAngel purchasing multiple DVD and Blu-ray disc copies of different titles, after which VidAngel took the discs and processed the movie file (commonly referred to as "ripping" the file) to break it up into small segments in order to tag each segment for some type of filterable content.[13] Each individual disc purchased by VidAngel was given a unique barcode to keep track of how many customers purchased the film to stream.[14] Since VidAngel only kept a set amount of physical discs of each movie, only an equal set amount of customers could

[7] *See* Robert Channick, *Ditching cable in 2017? What you need to know about streaming TV*, CHI. TRIB. (Dec. 15, 2016), http://www.chicagotribune.com/business/ct-cable-cord-cutting-1216-biz-20161215-story.html.

[8] *See, e.g.*, Ryan Waniata & Brendan Hesse, *Cord-cutting 101: How to quit cable for online streaming video*, DIGITAL TRENDS (Feb. 13, 2018, 9:59 AM), https://www.ditigaltrends.com/home-theater/how-to-quit-cable-for-online-streaming-video/.

[9] Channick, *supra* note 7. One significant point brought up by Channick is the 1.3 million drop in traditional television subscribers in September 2016 and the projected drop from 99.5 million in December 2016 to 93.9 million in 2020. A big factor in this dropping subscription rate is the fact that traditional television providers, like DirecTV and Dish, are providing their own streaming services in addition to traditional cable and satellite television.

[10] Appellant's Opening Brief at 10, Disney Enters., Inc. v. VidAngel, Inc., 869 F.3d 848 (9th Cir. 2017) (Docket No. 16-56843).

[11] *Id.*

[12] *Id.*

[13] *Id.* at 11–12. VidAngel accounts for over eighty different types of filterable content, and a user who chooses to filter out the end credits must also select a second filter that pertains to the actual content of the movie. However, it should be noted that some of the filters may not directly apply to all movies, which brings up an issue as to what is actually being filtered in certain cases.

[14] *Id.* at 12.

purchase the film for streaming at one time.[15] After a customer watched their streamed movie or show, they were encouraged (but not required) to "sell" back the title so that they are refunded all but $1 for each night they kept their purchase.[16]

At the outset of launching this business model, VidAngel notified Disney and other major studios of its intentions and its method for streaming.[17] VidAngel also encouraged any studios which felt that their method of filtered streaming was contrary to copyright laws to contact VidAngel concerning potential issues.[18] Consequently, the major studios filed a suit eleven months after this notice for violations of the Copyright Act in the Central District Court of California, where the court granted a preliminary injunction against VidAngel.[19] This decision was upheld by the Ninth Circuit on August 24, 2017.[20]

After the preliminary injunction was granted, VidAngel launched a new business model for its streaming service. VidAngel, at the time of this Note, currently offers a subscription-based service where subscribers can connect their VidAngel account to any of their other streaming accounts, such as Netflix or Amazon Prime.[21] VidAngel no longer uses decryption of discs as a method to filter but instead uses a "crowd sourced tagging tool" and "some machine learning algorithms for filtering," which allow subscribers to watch filtered media from whatever primary streaming service they subscribe to.[22] This Note will analyze the Ninth Circuit interpretation of the Family Movie Act of 2005 (FMA) and how statutes should be interpreted in the face of advancing technology, using VidAngel's current business model's compatibility with the FMA as an illustration.[23]

Part II of this Note begins with a brief review of a Supreme Court ruling that set the stage for this Note's analysis. It then shifts into the background of the FMA, including relevant legislative history and the single piece of judicial history that concerns the relevant subsection of the FMA. Part II continues with a discussion of the Ninth Circuit ruling in *Disney Enterprises*, specifically concerning its interpretation of the FMA. Then, Part II finishes with the different tools of

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15 *Id.*

16 *Id.* at 12–13.

17 *Id.* at 13.

18 *Id.*

19 Disney Enters., Inc. v. VidAngel, Inc., 224 F. Supp. 3d 957, 963–64 (C.D. Cal. 2016), *aff'd*, 869 F.3d 848 (9th Cir. 2017).

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

21 *How VidAngel's New Service Works*, VIDANGEL, https://vidangel.zendesk.com/hc/en-us/articles/115010522747-How-VidAngel-s-New-Service-Works (last visited Mar. 19, 2018).

22 *Facts Concerning VidAngel's New Filtering Technology*, VIDANGEL, http://blog.vidangel.com/wp-content/uploads/2017/06/Fact-Sheet-VidAngels-New-Technology.pdf (last visited Mar. 19, 2018).

23 17 U.S.C.A. § 110(11) (West, Westlaw through Pub. L. No. 115-61).

interpretation relevant to this Note's analysis. Finally, Part III consists of an analysis of the approach the Ninth Circuit takes and a suggestion that statutes similar to the FMA, which directly impact rapidly changing technology, should be interpreted to accommodate such technological growth.

II. BACKGROUND

A. FACING THE GIANTS: A BRIEF LOOK AT *SONY CORP. OF AMERICA* AND ITS IMPLICATIONS ON TECHNOLOGICAL ADVANCES IN THE MEDIA INDUSTRY

Rapid media-based innovation that has occurred over the past few decades has brought its own difficulties that have caused legal troubles through the years, especially in the world of copyright. These issues can be traced back to an important 1976 case where Universal Studios sought to hold Sony responsible for the illegitimate use, which resulted in copyright infringement, of its Betamax videocassette recorder.[24]

In 1984, a Supreme Court majority set the foundation for the home video business, incidentally aiding Universal in the long run.[25] In *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court held that Sony did not commit contributory infringement by "supplying the 'means' " for copyright infringement since there was an unobjectionably legitimate widespread use of the Betamax.[26] Additionally, the Court declined to expand copyright protections beyond what is statutorily guaranteed, leaving to Congress the task of managing technological advancements.[27] This early decision lends support to the suggestion that certain statutes should be interpreted in ways which allow for technological innovation, not stifle it. Similar to the *Sony* case, the litigation concerning VidAngel calls for an innovation-friendly reading of a statute that would otherwise hamper technological innovation.

[24] Ashlee Kieler, *On This Day In 1984, The Supreme Court Saved The VCR From Certain Death*, CONSUMERIST (Jan. 17, 2014, 3:05 PM), https://consumerist.com/2014/01/17/on-this-day-in-1984-the-supreme-court-saved-the-vcr-from-certain-death/.

[25] *What the 1984 Betamax ruling did for us all*, L.A. TIMES (Jan. 17, 2014, 12:00 AM), http://www.latimes.com/opinion/editorials/la-ed-betamax-ruling-anniversary-20140117-story.html#axzz2qgCGPouK.

[26] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 436, 456 (1984), *superseded by statute*, Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2863.

[27] *Id.* at 431.

B. RULES OF ENGAGEMENT: THE FAMILY MOVIE ACT OF 2005 AND HOW IT SET THE STAGE FOR *DISNEY ENTERPRISES*

1. Legislative History of the Act. The current FMA was first introduced to the Senate on January 1, 2005, by Senator Orrin G. Hatch under Title II of the Family Entertainment and Copyright Act.[28] The FMA was brought up with the explicit purpose to tackle the issue of companies that used filtering technology for family-friendly viewing of movies.[29] One of the initial concerns debated on the first introduction was that litigation surrounding technology which enabled filtering was going to cause a "hampering [of] the development of the technology that families may find helpful in protecting children from potentially objectionable content."[30] The main concern of the FMA revolved around its potential application to "ad-skipping," but Senator Cornyn assured the Senate that the FMA was only applicable to "using a certain kind of technology to modify the viewing experience of a movie to skip over objectionable content."[31] Although it was not a significant issue in 2004 or 2005, it should be noted that when the legislation was proposed there was no definition of what constituted an "authorized use" or authorized copy of a motion picture outside of the fact that any alteration must take place in a private household and at the discretion of the private viewer, but "unauthorized use" was compared to that of a "bootleg" copy of a movie.[32]

After being referred to the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property, the proposed FMA legislation was brought before the House of Representatives on April 12, 2005, through a report by the Committee on the Judiciary.[33] While the majority of the House viewed the proposed FMA legislation favorably, there was a minority view that directly opposed the FMA.[34] The primary concern of the minority view was that the FMA would interfere with pending litigation and that it unfairly favored one side of the case.[35] The minority view also charged the FMA as being unnecessary since those who wish to not view certain types of content and/or protect their children from such content simply have the option of not exposing themselves

[28] 151 CONG. REC. S494-95 (daily ed. Jan. 25, 2005) (statement of Sen. Hatch).

[29] *Id.* at S495.

[30] *Id.* at S499.

[31] *Id.*

[32] 150 CONG. REC. S11,852–53 (daily ed. Nov. 24, 2004) (statement of Sen. Hatch). "Bootleg" refers to some manner of illegally copying a performance (either by recording or other means) and then redistributing the illegal copy. *See, e.g.*, Michael Coblenz, *Intellectual Property Crimes*, 9 ALB. L.J. SCI. & TECH. 235 (1999).

[33] H.R. REP. NO. 109-33, at 5 (2005).

[34] *Id.* at 69.

[35] *Id.* at 69–72 (citing Huntsman v. Soderbergh, No. Civ.A02CV01662RPMMJW, 2005 WL 1993421, at *1 (D. Colo. Aug. 17, 2005).

and/or their children to these types of movies.[36] The minority view additionally noted its concerns over the inconsistency of filtering and the impairment of "artistic freedom and integrity."[37]

On April 19, 2005, a debate over the bill occurred in the House with the primary disagreement concerning whether the FMA was an acceptable provision of the Family Entertainment and Copyright Act.[38] However, advocates for the FMA's inclusion referred to it as applying to "available technology,"[39] and "allow[ing] for technology innovation to flourish without having to face legal challenges."[40] Despite the opposition, the FMA passed with the rest of the proposed legislation through the House and was approved by President George W. Bush on April 27, 2005.[41]

2. Judicial History. Section 110(11) of the FMA has been the subject of virtually no prior litigation leading up to the current *Disney Enterprises* case. In fact, the only case prior to *Disney Enterprises* was the very case the minority view from the House of Representatives hearing on April 12, 2005, was concerned about influencing.[42] As the minority view predicted, passing the FMA led to the dropping of ClearPlay from the initial action, but it left Clean Flicks out to dry and become primarily liable for the copyright lawsuit.[43]

Clean Flicks engaged in a filtering model that involved purchasing a movie, creating a digital copy of the movie on a computer, editing the digital copy, and then copying ("burning") this edited copy onto multiple blank DVDs to sell on the market.[44] Instead of fast-forwarding through objectionable content, Clean Flicks in redacted audio, replaced audio with ambient noise, cropped video, or put a black bar over visual content.[45] This filter-and-burn method seems to have been directly targeted as a type of infringement by the FMA considering the explicit prohibition against any "fixed cop[ies] of the altered version" as well as any form of audio or visual content "in place of existing content in a motion

[36] *Id.* at 72–73. Those who wish to avoid objectionable content, according to the minority view, should use the rating system implemented in the movie industry to avoid any type of content they may find objectionable.

[37] *Id.* at 73–76.

[38] 151 CONG. REC. H2117-20 (daily ed. Apr. 19, 2005).

[39] *Id.* at H2117 (statement of Rep. Sensenbrenner).

[40] *Id.* at H2119 (statement of Rep. Cannon).

[41] 151 CONG. REC. H5598 (daily ed. June 30, 2005).

[42] H.R. REP. NO. 109-33, at 5 (2005) (citing Huntsman v. Soderbergh, No. Civ.A02cv01662RPMMJW, 2005 WL 1993421 (D. Colo. Aug. 17, 2005)).

[43] *Huntsman* 2005 WL 1993421, at *2; Clean Flicks of Colo., LLC v. Soderbergh, 433 F. Supp. 2d 1236 (D. Colo. 2006).

[44] *Clean Flicks*, 433 F. Supp. 2d at 1238.

[45] *Id.*

picture."[46] Unsurprisingly, the court in *Clean Flicks* found that Clean Flicks had violated copyright laws, and Clean Flicks was barred from continuing its business.[47]

Considering the *Huntsman* case, it is equally clear that the FMA was passed at least to allow ClearPlay to avoid being tied up in litigation.[48] At the time of litigation, ClearPlay's model involved downloading software onto a user's computer to play the original DVD.[49] The software was specific to each movie and allowed for filtering through edits and muting of the original DVD.[50] This method of business was directly in line with the language of the FMA since it was from an "authorized copy" and involved "technology that enables such making imperceptible [of the film] . . . at the direction of a member of a private household" without making any type of "fixed copy of the altered version."[51]

C. CATCH ME IF YOU CAN: THE VIDANGEL SAGA

1. The District Court Case. After filing suit against VidAngel, Disney was granted a preliminary injunction by the Central District Court of California.[52] As previously stated, the claims and defense asserted by both sides go far beyond just the FMA.[53] However, the FMA defense and analysis will be the primary focus of this Note. In evaluating the copyright infringement claim against VidAngel, the court took issue with whether VidAngel was streaming from an authorized copy.[54] In rejecting VidAngel's FMA defense, the court reasoned that the language of the statute was unambiguous and that VidAngel clearly did not comply with the FMA, eliminating any chance of asserting it as a defense to copyright infringement.[55]

In addition to primarily relying on the statutory text, the court pointed to legislative history which indicated that the FMA was not meant to provide exemption from anti-circumvention provisions, even to engage in conduct permissible under the FMA.[56] Applying this decision to the FMA defense against copyright infringement, the court found it clear that VidAngel did not operate

46 17 U.S.C.A. § 110 (West, Westlaw through Pub. L. No. 115-140).

47 *Clean Flicks*, 433 F. Supp. 2d at 1243–44.

48 H.R. REP. NO. 109-33, at 69–72 (2005) (minority view).

49 Defendants' Answer and Counterclaims at Huntsman v. Soderbergh, ¶¶ 61–66, No. Civ.A02CV01662RPMMJW, 2005 WL 1993421.

50 *Id.*

51 17 U.S.C.A. § 110 (West, Westlaw through Pub. L. No. 115-140).

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

53 *Id.*

54 *Id.* at 971–72.

55 *Id.* at 972.

56 *Id.* at 968 (citing 150 CONG. REC. S11852-01, S11853 (daily ed. Nov. 24, 2004) (statement of Sen. Hatch)).

from an authorized copy and therefore was prohibited from the FMA defense.[57] Unfortunately, the court did not engage in a detailed interpretation of the statute because it believed VidAngel was in direct violation of the plain text.[58]

2. The Circuit Court Case. The Ninth Circuit engaged in a considerably more detailed analysis of the FMA. Like the district court, the Ninth Circuit analyzed the "authorized use" language of the FMA.[59] However, the Ninth Circuit also spent significant time discussing what it means to be "from" an authorized copy.[60] The court opted for a plain reading, under which the actual transmission must come *directly* "from" an authorized copy, rather than simply *originate* from one, as in VidAngel's model. [61]

The Ninth Circuit then considered the titles under which the FMA currently resides.[62] The court found that the headings of the Family Entertainment and Copyright Act of 2005 and 17 U.S.C. § 110 indicate that the FMA is only a safeguard for actual filtered performances, and not the process to make a performance possible.[63] To backup this context-based interpretation, the court compared the heading of § 110 to another section of Title 17 which prompted the statute as being protective of the actual reproduction.[64] Additionally, the court found VidAngel's business model to be in direct contrast with the purpose of the Family Entertainment and Copyright Act's purpose of "provid[ing] for the protection of intellectual property rights."[65] Further, the court also stated that VidAngel was in direct contrast with the FMA since it would have an effect on the existing copyright scheme.[66]

VidAngel's assertion that it was authorized under the statute to use technology to enable making parts of a film imperceptible was also shot down on a textual basis.[67] The court reasoned that the "such making imperceptible" language, which VidAngel argued gave a broad meaning to the FMA so as to

[57] *Id.* at 972.

[58] *Id.*

[59] Disney Enters., Inc. v. VidAngel, Inc., 869 F.3d 848, 857 (9th Cir. 2017).

[60] *Id.* at 858.

[61] *Id.* (citing Yates v. United States, 135 S. Ct. 1074, 1085 (2015); ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 148–49 (2012)).

[62] *Id.*

[63] *Id.* (citing Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, § 202(a), 119 Stat. 218; 17 U.S.C.A. § 110 (West, Westlaw through Pub. L. No. 115-61)).

[64] *Id.* (comparing 17 U.S.C.A. § 110 and 17 U.S.C.A. § 108 (West, Westlaw through Pub. L. No. 115-61)).

[65] *Id.* at 858–59 (quoting Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 119 Stat. 218).

[66] *Id.* (quoting § 110 ("Nothing in paragraph (11) shall be construed to have . . . any effect on . . . limitations on rights granted under any other section of this title or any other paragraph of this section.")).

[67] *Id.* at 859 (citing § 110(11)).

include any technology which makes certain movie content imperceptible, was a clear reference to the earlier text of § 110(11), which states the making imperceptible must come from an authorized copy.[68] Using its previous analysis of what constitutes being from an authorized copy, the court ruled that VidAngel's service was still not covered by the FMA since it was not operating from an authorized copy when making content imperceptible.[69]

After directly addressing each of VidAngel's individual interpretations of sections of the FMA, the court noted that there could be a significant loophole if it were to accept VidAngel's interpretations.[70] Specifically, the court was concerned that if it lent credence to VidAngel's interpretation, it would open the door to legitimizing various types of piracy since they all likely start "from" an authorized copy.[71] The court's chief concern was the erosion of digital performances' commercial value if unlicensed streamers put up movies while only filtering out something as minor as the credits to the film.[72]

While the majority of the court's interpretation of the FMA was principally textualist, the court also supported its conclusions using legislative history.[73] Specifically, the court relied upon statements from the sponsor of the FMA, Senator Orrin Hatch. First, the court pointed to language from the records stating that the FMA should be construed narrowly in order to prevent any impact on the established doctrines of copyright.[74] Further, the court noted Senator Hatch's statements that infringing performances or transmissions are not rendered non-infringing only because they make certain parts of films imperceptible and that any assertion of violation of copyrights or copy protection in order to further the exercise of viewer choice does not run parallel to the legislative intent or the technological necessity of the FMA.[75]

The second use of the legislative history was to illuminate the fact that there was an accepted and legal business for filtering movies.[76] The court made note of the fact that both the Senate and House of Representatives identified the ClearPlay model as what was intended to be protected under the FMA.[77] The

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[68] *Id.* (quoting § 110(11)).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* (citing 4 WILLIAM F. PATRY, PATRY ON COPYRIGHTS § 14:2 (2017)).

[73] *Id.*

[74] *Id.* (quoting 151 CONG. REC. S450-01, S501 (daily ed. Jan. 25, 2005) (statement by Sen. Hatch)).

[75] *Id.* at 859–60 (quoting 151 CONG. REC. S450-01, S501 (daily ed. Jan. 25, 2005) (statement by Sen. Hatch)).

[76] *Id.*

[77] *Id.* at 860 (citing 151 CONG. REC. S450-01, S501 (daily ed. Jan. 25, 2005) (statement by Sen. Hatch); H.R. REP. NO. 109-33, pt. 1, at 70 (2005) (minority views); *Derivative Rights, Moral Rights, and Movie Filtering Technology: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual*

court concluded by pointing to the fact that ClearPlay had been judicially determined to be in compliance with the FMA, while a company that made digital copies from lawfully purchased discs to filter, similar to VidAngel, was in violation of copyright law and not in compliance with the FMA.[78]

D. A BEAUTIFUL MIND: A BRIEF OVERVIEW OF THE DIFFERENT TOOLS OF INTERPRETATION

When faced with interpreting a statute, the legal field provides a substantial number of different avenues to structure arguments. The Supreme Court has acknowledged that different interpretive canons are useful when a statute presents ambiguity.[79]

While different members of the legal profession certainly have preferences for particular interpretative tools, it is necessary for any individual trying to argue for a certain interpretation to be able to maneuver through the various interpretative tools. Likewise, the analysis in Part III of this Note requires the use of multiple tools to demonstrate why a more expansive interpretation of technology-based statutes is essential.

1. Textualism. While not all members of the legal field rely as heavily on textualism as the late Justice Scalia, there is a general acceptance that the text of a statute controls if it is not ambiguous.[80] Indeed, the Supreme Court has recognized that interpretation should start with the language of the statute and end there if the language is not ambiguous.[81] The problem, however, is that "easy" cases don't come up in court; instead, courts are more often than not faced with statutes containing some manner of ambiguity or question as to their text.[82]

As the name plainly suggests, textualism is centered around using the text of the statute to decipher any ambiguity or confusion in the statute.[83] Textualists

Prop. of the H. Comm. on the Judiciary, 108th Cong. (2004) (statement of Matt Jarman, ClearPlay CEO)).

[78] *Id.* (citing Huntsman v. Soderbergh, No. Civ.A02CV01662RPMMJW, 2005 WL 1993421, at *1 (D. Colo. Aug. 17, 2005); Clean Flicks of Colo., LLC v. Soderbergh, 433 F. Supp. 2d 1236, 1238, 1240 (D. Colo. 2006)).

[79] *See, e.g.*, Corley v. United States, 556 U.S. 303, 325 (2009) (Alito, J., dissenting) ("Canons of interpretation 'are quite often useful' . . . when statutory language is ambiguous." (citing United States v. Monsanto, 491 U.S. 600, 611 (1989))).

[80] *See, e.g.*, BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183 (2004); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

[81] *Id.*; 421 U.S. at 756 (Powell, J., concurring) ("The starting point in every case involving construction of a statute is the language itself.").

[82] Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994).

[83] *See generally* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347 (2005).

utilize a variety of textual "tools" in order to arrive at conclusions.[84] It is not necessary to delve into the nuances of these numerous tools, only that they center around the text of the statute.[85] These tools can include the definitions of words, surrounding words and phrases in the statute, and even the text of other statutes that make up an act.[86] Using these tools, textualists aim to interpret the statute in such a way as to give people subject to the statute reasonable notice as to what the statute means based primarily on the actual text of the statute.[87]

2. Intentionalism. Like textualism, intentionalism also gives power to the legislature's words in interpreting ambiguous statutory provisions. Intentionalists, however, look instead to relevant legislative history of a statute in order to resolve ambiguity.[88] Through the legislative history, intentionalists aim to determine the intent of the legislature which enacted the statute.[89]

While intentionalism and textualism both aim to give the legislature power in resolving ambiguity, intentionalism is typically considered to be the subjective counterpart to textualism's objective approach to looking at the text.[90] In evaluating an ambiguous statute, intentionalists give more weight to different types of history.[91] While there is a general hierarchy of legislative history, there is some divide as to whether this hierarchy is definitive or if there should be consideration as to the underlying factors that give the hierarchy its structure.[92] Despite this discrepancy, there is a general consensus among intentionalists that committee reports are some of the more important pieces of legislative history,[93] which will be of consideration in this Note's analysis.

Indeed, it can be difficult to pinpoint a single, definitive legislative intent. This leads to some intentionalists settling for a "conventional intent" as determined by the legislature generally agreeing or acquiescing to reports or floor statements by sponsors.[94] However, this approach is criticized as being contrary to proper legislative process and based upon flawed assumptions.[95] Another possible method for intentionalism is to allow judges to use "imaginative

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* at 352.

[88] *Id.* at 349.

[89] *Id.*

[90] *Id.* at 348.

[91] *Id.* at 359–60.

[92] *See* HILLEL Y. LEVIN, STATUTORY INTERPRETATION: A PRACTICAL LAWYERING COURSE 409–10 (2d ed. 2016).

[93] Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 4 (1988–1989).

[94] William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 327 (1990).

[95] *Id.*

reconstruction" and reconstruct how the legislature would answer the interpretive question at hand.[96] It should be clear why this is problematic: it potentially allows a judge to mask personal discretion as the reconstructed intent of the legislature.

3. Purposivism. As its name suggests, purposivism considers the purpose of the statute itself and assumes that the legislature is reasonable and will reach a reasonable, purposive result in crafting and passing a statute.[97] Importantly, in some situations purposivism can serve as a direct counterargument to intentionalism and textualism, in that the latter two interpretive methods may be directly at odds with and even violate the actual purpose of the statute.[98]

However, purposivism is clearly more subjective than both intentionalism and textualism, which opens it up to sharp criticism. One pitfall of purposivism is the assumption that the legislature always acts reasonably, which is not the case. Reasonable people do not always come to reasonable conclusions, and some legislation is even passed with the intent of not being reasonable in order to further some other objective.[99] It is also a stretch to say that a statute serves a singular purpose since members of the house and senate may pass legislation with the goal of pleasing a variety of interest groups, which may be contrary to a common public purpose of a statute.[100]

Additionally, purposivism must typically follow the text or the history of a statute in order to derive the purpose, making it difficult to combat a textualist or intentionalist interpretation. Nevertheless, purposivism has its place as a foundation of statutory interpretation and can be a decisive tool in certain cases.[101]

4. Pragmatism. Pragmatists have a much different approach than those that subscribe to any of the aforementioned theories. In simple terms, pragmatism's singular goal is to use practical reasoning in order to come to conclusions that are most beneficial to society.[102] Unlike textualism, intentionalism, and purposivism, pragmatism does not have a clear method for interpreting statutes.

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[96] *Id.* at 329 (citing RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 286 (1985)).

[97] *Id.* at 334. Note that purposivism focuses on the *general* purpose of the statute in resolving a problem and how to best give effect to that purpose, and intentionalism focuses on determining the *specific* intent of the legislature on an issue that falls (or doesn't fall) under a statute's authority.

[98] *Id.* at 333 (citing United Steelworkers v. Weber, 443 U.S. 193, 202 (1979)).

[99] *Id.* at 335.

[100] *Id.* (citing Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227–33 (1986)).

[101] *Id.* at 324–25.

[102] LEVIN, *supra* note 92, at 143–44.

Pragmatists instead focus on each case individually in order to evaluate what is best for society in each situation.[103]

While pragmatism is appealing in theory, it is rarely specifically invoked, and is often not sufficient without reinforcement of another interpretive tool. Although pragmatists assert varying reasons why judges are able to and should interpret statutes this way, there is a certain amount of uneasiness with allowing judges considerable range in interpreting statutes. However, using other interpretive tools and theories to backup an interpretation can result in a successful argument for a pragmatic outcome while still appealing to those who subscribe to the more traditional theories of interpretation.

5. Dynamic Interpretation. Similar to pragmatism, dynamic interpretation involves a less traditional approach to statutory interpretation. Dynamic interpretation calls for statutes to be interpreted more like the common law and the Constitution in order to adapt to society's progression and development.[104] This is generally when the statute has become "old" or "antiquated" and the legal or societal landscape has significantly shifted.[105]

Similar to pragmatism, this approach grants judges a lot of discretion, which creates the concern that judges can further their own personal agendas or beliefs under the mask of being "dynamic." Putting the concern of false dynamic interpretation aside, *true* dynamic interpretation is probably more prominent than judges admit. It is arguable that judges dynamically interpret statutes much like pragmatists, but they do so under the guise of other forms of statutory interpretation. This allows for judges to use true dynamic interpretation without being faced with the criticism of furthering their own personal beliefs. In contrast to pragmatism, however, a dynamic approach is more likely to show why the various interpretive tools fail in application to an old statute that is inconsistent with the present legal and societal landscape.

III. ANALYSIS

Now that a general overview of the relevant background information has been provided, this Note will proceed with an analysis of the Ninth Circuit's interpretation of the FMA, how this court and other courts should instead interpret these statues, and conclude by analyzing how VidAngel's new filtered streaming process should fit in with the FMA.

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[103] *Id.*

[104] William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1481 (1987).

[105] *Id.*

A. ANACONDA: THE NINTH CIRCUIT'S INTERPRETATION OF THE FMA IS TOO CONSTRICTING

The Ninth Circuit's interpretation starts with the text, as it should, since it had not previously interpreted the FMA.[106] While this is the obvious starting point and all interpretations should first consider the text, the Ninth Circuit does little beyond textual analysis. It does incorporate some legislative history, but only to the extent to reaffirm what the court believed to be unambiguous text.[107]

The first part of the text that the court directly considers is what qualifies as being "from an authorized copy."[108] In ordinary circumstances, the word "from" would not cause as much ambiguity as it does in this situation. While the court takes what is the most common use of the word "from" and applies it to the FMA, the court inadvertently constricts future technology. Under the court's interpretation, the permitted filtering of a movie must come *directly* from an authorized copy of a movie.[109] In the context of VidAngel's situation, this means that there must be a hard copy distributed similar to the ClearPlay model.[110]

Now, consider the prevalence of streaming and the fact that hard copies of movies and shows are quickly decreasing in popularity.[111] Because of the shift in technology used to view media, the word "from" is actually more ambiguous than the court gives it credit for. Streamed media does not come "from" a hard copy; instead, it comes from a digital copy stored on a server and distributed to subscribers. Thus, while it appears at first glance that the court made a reasonable interpretation of "from," it fails to acknowledge the ambiguity that surrounds this word in the context of modern technology.

However, that there is ambiguity in the word "from" does not mean VidAngel wins. Instead, there should have been further analysis and consideration of what it means for something to be "from" an authorized copy. This very well could come out in favor of VidAngel, but there is still the issue of what would constitute an "authorized copy" and if the stream is actually from an authorized copy. Given VidAngel's original business structure of creating a

106 Disney Enters., Inc. v. VidAngel, Inc., 869 F.3d 848, 857 (9th Cir. 2017) (citing Hernandez v. Williams, Zinman & Parham PC, 829 F.3d 1068, 1072 (9th Cir. 2016)).

107 *Id.* at 859 (stating that "although we need not rely upon legislative history, it supports our conclusion").

108 *Id.* at 857.

109 *Id.* at 857–58.

110 *Id.* at 859–60.

111 Ryan Faughnder, *Home Video Sales Shrank Again in 2016 as Americans Switched to Streaming*, LA TIMES (Jan. 6, 2017, 12:05 PM), http://www.latimes.com/business/holywood/la-fi-ct-home-video-decline-20170106-story.html.

master copy by ripping movies from a disc,[112] there could very well be an issue that the stream is actually coming from the unauthorized master copy rather than an authorized copy. Considering the court's evaluation of the Digital Millennium Copyright Act (DMCA) claim, VidAngel could still fall short of satisfying the FMA.[113]

However, VidAngel also brought up the fact that there is an exception in the FMA for the technology that is used for making media imperceptible.[114] The court correctly construes this language of the FMA to refer back to the earlier language requiring exemptions to come from an authorized copy.[115] Since the court failed to acknowledge the technology-based ambiguity of the word "from," there is not an adequate consideration of how "from" would comport with this section of the FMA. At the very least, it is arguable that this exception would actually encompass VidAngel's practice of ripping and streaming since it uses this technology in the process of making portions of movies imperceptible for streaming.

As the Ninth Circuit points out, this creates a possible loophole for piracy that simply cannot be ignored.[116] It could be minimized, though, by using another textual tool: specifically, since this section of the FMA is clearly an *exception* to general copyright rules, under the traditional textualist approach it should be construed narrowly. In this way, if the court found that VidAngel was entitled to an FMA exception, it's holding could reasonably be limited to businesses utilizing the same type of sophisticated model. That is, the average "rip-and-stream" pirate of the internet could not be afforded the FMA exemption. While some may say this reads too far into the statute in search of a subjective reading, it is conceivably supported by other non-textualist tools of interpretation.

For one thing, given the ambiguity that arises out of the development of technology, it is necessary to also consider the legislative intent and history of the Act. Although the Ninth Circuit does include some history, it is sparse at best and mostly self-serving: Senator Hatch desired a narrow construction of the FMA.[117] Senator Hatch went on to say that any violation of copyrighted work or a copy protection scheme in order to advance viewer choice was contrary to intent and technological necessity.[118]

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[112] 869 F.3d at 852.

[113] *Id.* at 863–64. In fact, the court found that the VidAngel was not exempt from circumvention liability because they lacked the property authority to circumvent encrypted technology and that the district court was within its discretion to find that Disney was likely to succeed on its DMCA circumvention claim. *Id.*

[114] *Id.* at 859.

[115] *Id.*

[116] *Id.*

[117] *Id.* (citing 151 CONG. REC. S450-01, S501 (daily ed. Jan. 25, 2005)).

[118] *Id.* at 859–60 (quoting 151 CONG. REC. S501)).

While this may appear discouraging to the case for VidAngel's interpretation of the FMA, the court does not elaborate nearly enough on the relevant history. In particular, the purpose of the FMA was to allow filtering technology in order to allow for family-friendly viewing of movies.[119] This clearly conflicts with the court's assertion that the purpose of the *FMA* itself was for the protection of intellectual property rights.[120]

While protection of established copyright law is important, the court neglected to consider the statements promoting the FMA as a way to prevent the hampering of technology and allowing it to flourish.[121]

Further, the legislative history did provide *some* insight as to the type of technology Congress wished to allow and disallow, but not to the extent that would automatically exclude VidAngel. As the Ninth Circuit points out, the FMA was passed specifically with the ClearPlay and Clean Flicks models in mind.[122] In spite of the court's effort to equate the two, Clean Flicks and VidAngel follow two distinct business models that are similar only in the respect that they both used digital technology to filter films.[123] They differ in every other material way.

First, Clean Flicks engaged in mass bootlegging of films, which was explicitly addressed in the legislative history.[124] The Clean Flicks model is clearly in violation of the FMA's ban on creating fixed copies of the altered movies, but the VidAngel model is much less clear. VidAngel does not create a fixed copy of an altered version of a movie and mass-sell it like Clean Flicks does. Instead, VidAngel has a fixed number of movies it can use in its buy/sell model of renting movies that is determined by the number of physical copies of movies that VidAngel actually buys.[125] Further, VidAngel does not create a fixed copy.[126] Instead, it allows each user to personalize his or her viewing experience and have an altered version of the movie for his or her viewing.[127] If the customer follows VidAngel's request to return the movie, the altered version is not retained and is

[119] 151 CONG. REC. S495 (daily ed. Jan. 25, 2005) (statement of Sen. Hatch).

[120] *See* Disney Enters., Inc. v. VidAngel, Inc., 869 F.3d 848, 858 (9th Cir. 2017) (quoting Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 119 Stat. 218)). The purpose of the FMA would fall under the "and for other purposes" language included in the Family Entertainment and Copyright Act.

[121] 151 CONG. REC. S499 (daily ed. Jan. 25, 2005) (statement of Sen. Cornyn); 151 CONG. REC. H2117, H2119 (daily ed. Apr. 19, 2005) (statement of Rep. Cannon).

[122] *Disney Enters.*, 869 F.3d at 860.

[123] *Id.*

[124] *See* 150 CONG. REC. S11853 (daily ed. Nov. 24, 2004) (comparing an unauthorized use of a movie to a bootleg copy of a movie, which would violate the FMA).

[125] *See Disney Enters.*, 869 F.3d at 853–54.

[126] *Id.* at 854.

[127] *See id.*

no longer viewable.[128] The only part of VidAngel's model that could possibly qualify as a fixed copy is its master copy of the film. However, this master copy is clearly not the altered, fixed copy to which the legislature was referring to. The legislature was concerned with fixed copies that could be reproduced and sold in mass, like Clean Flicks.[129] The VidAngel master copy was only used to tag the film and allow for customers to watch their own personalized, altered version which ceases to exist upon return of the movie to VidAngel.[130]

Second, the FMA specifically targeted the Clean Flicks model of adding content in order to make certain parts of movies imperceptible.[131] Quite clearly, VidAngel follows ClearPlay in the method of only fast-forwarding and skipping content instead of the Clean Flicks model of inserting new and different content into the movies.[132] Indeed, the minority view of the House was correctly concerned that the FMA would target Clean Flicks and cause it to lose its case.[133] Since it is clear the legislature intended to target Clean Flicks, the comparison between VidAngel and Clean Flicks is a useful point of comparison in seeing if VidAngel's model conflicts with the intent of the legislature. However, the court failed to engage this comparison aside from the mere conjecture that the two models were both in conflict with the legislature's intentions because they both used digital methods to create altered versions of movies.

As briefly mentioned above, the purpose of the statute can be unveiled through the text and history. It seems clear that the FMA's purpose was to simultaneously allow for family-friendly viewing of movies with not so family-friendly content, while doing so in a manner that would not completely undercut existing copyright law. Although the Ninth Circuit did not directly address this issue, it would be a fair assumption that the court would likely put more emphasis on preserving the existing copyright law. However, it is possible for the *VidAngel* case to fulfill both purposes of the FMA.

Most obviously, ClearPlay fulfills the purpose of providing family-friendly viewing. There is little to no argument that this is satisfied. However, with a narrow decision in the case, an interpretation of the FMA in favor of VidAngel could also preserve established copyright law. As previously mentioned, a strict allowance of the VidAngel model as acceptable under the FMA would prevent a surge in online piracy.

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[128] *Id.* A customer can sell the digital copy back to the company and can no longer view the title. Additionally, all copies are digital and therefore not "fixed" in the physical sense of being fixed on a disc.

[129] *See* 151 CONG. REC. S5494 (daily ed. Jan. 25, 2005) (statement of Sen. Hatch).

[130] *See Disney Enters.*, 869 F.3d at 853–54.

[131] *Id.* at 860.

[132] *Id.*

[133] H.R. REP. NO. 109-33, pt. 1, at 69–72 (2005).

It is clearly the intent of the legislature to disallow any form of mass bootlegging of a single altered version.[134] Any individual or company that tries to engage in this would be in direct violation of the FMA. Additionally, the language does not allow for any fixed copies, so online pirates could not set up a mass stream of a film altered in a particular way (or multiple ways) without being in violation of the FMA. Further, it would also be impossible for an individual or company to provide for a service similar to VidAngel and only alter the credits, since this would be in direct conflict with the purpose of filtering out objectionable content and not just extraneous content.[135] Thus, by interpreting the FMA both in a narrowly and in VidAngel's favor, the purpose of the FMA could be both served and protected.

Approaching the problem from a pragmatic sense, a narrow interpretation in favor of VidAngel is the most sensible. To begin with, it is generally clear that society is positively impacted when technology is allowed to flourish and prosper. Additionally, society is shifting to become more dependent on stream-based content, so it makes sense to interpret the FMA in step with an eye toward what's best serves society. However, society also benefits when creators retain their protection. It is therefore necessary to preserve copyrights and keep creators comfortable and protected. Most importantly, it is necessary to balance these two benefits and determine which would benefit society more: having creators' work more accessible or ensuring that copyright laws are not compromised. Given our society's dependence upon intellectual property law to obtain valuable innovation, it seems clear that the more important issue of the two is ensuring that copyright laws are not compromised. Therefore, it needs to be determined if there is an interpretation that can prevent copyright infringement while also allowing greater access to movies and for technological innovation.

Given the previous discussion on the purpose of the FMA, it should be clear that such an interpretation of the FMA readily exists. By allowing VidAngel to continue its business and for future technologies to fit under the FMA, technology is allowed to continue its rapid development without being hindered through litigation. Additionally, narrowly construing the FMA in favor of VidAngel to only allow comparable models would preserve copyright. Again, it is important to reiterate that this pragmatic take is only in the context of the FMA interpretation and does not necessarily include the surrounding claims that were present in the Ninth Circuit case. These other claims could very well shift the weight to preserving the remaining copyright laws and sacrificing the development of technology in this particular instance.

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134 *See* 151 CONG. REC. S494 (daily ed. Jan. 25, 2005) (statement of Sen. Hatch).

135 It should be noted that a loophole in VidAngel's model allowed for customers to select credits to be filtered out along with any other content, even if the movie did not contain such content. This is clearly at odds with the purpose of the FMA and would not stand up in this analysis.

Finally, a dynamic approach to this issue follows along similar grounds. It is hardly fair to call the FMA, a 2005 statute, "old" in the sense of time. Even so, "old" can be relative. For example, consider the development of Netflix and how rapidly the company grew and changed platforms. Within a decade, Netflix's primary method of media delivery switched to streaming from mail-order DVDs.[136] Technology, especially that of home-viewing media, is always looking for the next big step and is rapidly changing. While it may seem like a stretch to call a 2005 statute old only a little over a decade later, it becomes less of a stretch when considered against the rapid advance of technology.

Indeed, the dynamic approach calls for new interpretations whenever there has been a significant societal shift. In 2005, DVDs and hard copy discs were the prominent technology and the face of at-home media. In today's culture, it is now streaming that is seen as the face of at-home media. It would certainly make sense to adapt the FMA in order to include streaming as a viable option for viewing media in a family-friendly way. It is true that a simple shift in technology may be an insufficient reason to most to interpret the FMA in a manner that broadens what the Act encompasses. However, when considered alongside all of the other issues raised in regard to the FMA, this dynamic approach adds even more weight to the argument in favor of interpreting the FMA to include VidAngel's model.

B. BACK TO THE FUTURE: HOW COURTS SHOULD APPROACH THESE STATUTES MOVING FORWARD

The *Disney Enterprises* case will certainly not be the last time a court is faced with the dilemma of interpreting a statute in the face of rapidly advancing technology. Due to this fact, a balance must be determined that allows for the advancement of technology but still gives respect to Congressional decisions in statutes. Using the suggestion proposed by this note on how to approach the FMA, such a balance can be accomplished.

First and foremost, courts should continue the longstanding tradition of adhering to the text of a statute. Even if a purely textual reading will unquestionably limit technology, unambiguous statutory language should not be thrown to the side by a court. Courts should, however, consider more carefully whether language is ambiguous. As is evident in *Disney Enterprises*, even relatively unambiguous words (like "from") can have ambiguous meanings with changes in technology. Courts should consider how the language comports with the technology in question, assuming there is no language in the statute that expressly limits the statutes reach to a particular technology.

Of course, the most natural response is to say that the duty is with Congress to change the language or pass a new statute that encompasses the new

[136] *Netflix Timeline*, *supra* note 3.

technology. However, the "sit back and wait" approach is inefficient and detrimental to advancing technology. Given the rapid rate at which technology changes, and the inefficient rate at which a majority of legislation is passed, it is obvious that pure reliance on Congress would result in nothing short of inhibiting growth and development in certain areas of technology. Particularly in situations like this, where technological developments at least *arguably* render statutory language ambiguous, courts should be wary of letting life outdistance law by insisting that "textualism" be synonymous with "literalism."

Admittedly it is also important for the courts not to diminish the power of Congress. This can be prevented by placing Congress on notice that statutory language is more likely to be considered ambiguous where it affects rapidly advancing technology. With this notice, Congress can be more conscious of how broad they want the statute to extend in the future and, if they so choose, include language that indicates a statute should only be interpreted to affect particular technology. This would force Congress to consider future implications of statutes and encourage more conscientious and thoughtful legislation, instead of adhering to a methodology in which there is constant uncertainty of new technology's place in older statues.

a statute's language is ambiguous regarding new technology, the court should be willing to consider the legislative intent and history. While not as powerful as unambiguous language, legislative intent is important to also ensure that Congress is not deprived of its power. Particular language might be ambiguous, but there may still be a clear intent of Congress regarding a statute. In the particular context of a statute directly implicating advancing technology, it would be important for a court to consider any acknowledgement that the statute was or was not meant to affect future technology.

As an example, consider the legislative history of the FMA. There was a clear intention, stated numerous times in the presence of advocates and opponents of the FMA, that the FMA was intended to prevent the inhibition of developing technology.[137] Throughout the different hearings and reports, the intent of allowing the development of technology was never questioned. In fact, one of the major issues brought up by the minority was the fact that the FMA was only favoring a specific technology.[138]

Granted, it is not always possible to determine a collective intent of Congress. In the case of the FMA, it was never fully deliberated and discussed how it should apply to future technologies. There was also some legislative history that cut against VidAngel's technology.[139] Since it is often difficult to pinpoint a singular

[137] *See supra* text accompanying notes 119–121.

[138] H.R. REP. NO. 109-33, at 69 (2005).

[139] *See, e.g.*, Disney Enters. Inc. v. VidAngel, Inc., 869 F.3d 848, 859–60 (2017) (discussing statements of Sen. Hatch).

intent, the legislative history will not typically control interpretation statutes implicating advancing technology. However, this does not mean that the history cannot give considerable weight to one interpretation or the other.

After analyzing the language and history of the statute, the court will likely have an idea of what the purpose of the statute is. While this part of the statutory analysis may begin to invite more subjectivity, but it still is primarily based on an objective analysis. The analysis largely becomes a balancing of any conflicting purposes, and an inquiry into whether there is any version of the interpretation that allows for simultaneous fulfillment of the purposes. The court should first focus on preserving the primary purposes of the statute and then engage in an analysis of how to include any secondary purposes without violating the primary purposes.

Even if there is an interpretation that allows for the advancement of technology, a court should consider pragmatic implications. Given the general benefit of technology, pragmatism will typically weigh in favor of interpreting a statute to include advancing technology. However, there may be instances where the technology could jeopardize current statutes and may actually be counterproductive to society. While this is mostly a subjective decision to be made by courts, which is typically not common, it is an important distinction to be considered.

If the only construction of the statute available would cause substantial detriment, then a more constricting interpretation may be necessary. Consider the difference between an online mass piracy website and VidAngel. A narrow interpretation of the FMA for VidAngel benefits society and limits detriment done to surrounding copyright law.[140] However, an interpretation that permits mass bootleg downloading and viewing would undoubtedly be detrimental to both society and the current copyright law.

Finally, considering the statute from a dynamic standpoint can tilt the scales towards one interpretation or another. However, the dynamic aspect is also the most subjective, and therefore questionable, in nature. A court would first need to consider whether the statute is "old" compared to the technology being dealt with. While some technology rapidly changes over the course of a short span of years, other types of technology develop at a significantly slower pace.

As discussed in the above analysis of the Ninth Circuit interpretation, technology used for viewing media has substantially changed since 2005 when the FMA was enacted. In that particular instance, it is desirable to interpret the statute in a way to keep it relevant as opposed to forcing Congress to try and pass legislation at an impossibly fast rate to keep up with technology. Yet, this

[140] It is important to again note that an interpretation of the FMA in favor of VidAngel would not necessarily indicate they should have won their appeal to the Ninth Circuit. There were other claims raised that influenced the decision to uphold the injunction against VidAngel. *See generally Disney Enters.*, 869 F.3d 848.

is not the case for every area of technology. In some instances, technology may have developed slowly so that existing legislation gradually became less and less applicable.

While a pure dynamic approach would likely still be in favor of construing a statute to fit the new technology, the burden should be on Congress to adopt new legislation. Congress still holds the power to legislate in the situation of slowly developing technology, there would be ample time for Congress to address and pass legislation to encompass the new technology. The only time when the court should step in and interpret a statute in a manner which encompasses new technology is when the development of the technology is so rapid that it would be significantly hindered if it has to wait for Congress to pass new legislation.

C. DEEP IMPACT: HOW VIDANGEL'S NEW SYSTEM SHOULD FIT UNDER THIS APPROACH

Since VidAngel has changed its business model, there is a new question as to whether its method of streaming fits within the FMA. While the previous model may have raised some questions as to its legality and was a closer call under the FMA, the new subscription model almost certainly fits under the proposed construction of the FMA.

First, VidAngel's new method eliminates the uncertainty of the "from an authorized copy" language. The above analysis of how the Ninth Circuit should have interpreted "from" still stands relevant, but this new technology also takes care of the concern over VidAngel's ripping movies from discs. While it is not yet abundantly clear what the exact process is, VidAngel asserts that they no longer rip and decrypt content in order to filter, instead relying on crowd tagging and algorithms to provide filters from movies.[141] Moving to the exception in the FMA for technology that allows for the making imperceptible of media, it seems much more likely that VidAngel will prevail with their new technology now that the technology is not directly wrapped up in a DMCA claim. Additionally, this fixes the loophole concern of the Ninth Circuit for online piracy.

Because of the sophistication and subscription-based nature of the new VidAngel model, the rule of narrow exception could easily be applied to these circumstances and allow for models similar to VidAngel's to be granted exception from copyright claims under the FMA. Finally, VidAngel's process is patented with additional patents pending,[142] so it is not the type of technology

[141] *Facts Concerning VidAngel's New Filtering Technology*, VIDANGEL, http://blog.vidangel.com/wp-content/uploads/2017/06/Fact-Sheet-VidAngels-New-Technology.pdf (last visited Nov. 17, 2017).

[142] *Id.*

available to the average internet pirate for use of bootlegging and illegal streaming.

With regard to the legislative history of the FMA, the new business model of VidAngel fits more appropriately than the older business model did. The primary purpose of the FMA to allow for family-friendly viewing of movies is satisfied because there is no alternative use or need for consumers to subscribe to VidAngel.[143]

The new model fulfills this purpose by requiring consumers to purchase a subscription to VidAngel on top of their subscription to another streaming service.[144] Consumers can then watch filtered versions of the movies and shows they would normally have access to.[145] While the old VidAngel model did attract consumers wanting to watch a movie at a cheaper cost than other providers while filtering little to no content, the new model eliminates any consumers looking to abuse the system. Consumers will only use VidAngel's services in order to filter movies with objectionable content, not to gain cheap access to movies they wouldn't otherwise have access to.

Further, this new model is the epitome of the advancing technology which the FMA was intended to encourage. This new model is much more in-tune with the ClearPlay model that the FMA directly allowed; both models are set up in such a way that they will only be used by consumers trying to avoid objectionable content in films, and both models require the consumer to have some manner of prior access to the media before the filtering technology can be used.

Additionally, there is still not a fixed copy created since each consumer customizes their filtering which is not available after the consumer finishes watching their movie or show. Even though VidAngel was distinctly different than Clean Flicks prior to the change in business model, there was still some uncertainty as to how closely it fit with the intended allowance of the FMA. Now that VidAngel has changed its model and significantly resembles ClearPlay, it is much clearer now that the FMA was intended to encompass these types of business models.

Although the previous analysis of the FMA's purpose still largely stands with the new VidAngel model, the new model, unsurprisingly, better fits that purpose. The biggest concern with the previous VidAngel model was its potential to undercut the FMA's purpose of preserving existing copyright laws.[146] While a very narrow exception for VidAngel's old model could have preserved this purpose, a more general exception under the FMA for the new model would also suffice. Instead of carving out a very specific exception for VidAngel's old

143 151 CONG. REC. S450-01, S495 (daily ed. Jan. 25, 2005) (statement of Sen. Hatch).

144 *Facts Concerning VidAngel's New Filtering Technology*, *supra* note 141.

145 *Id.*

146 Disney Enters., Inc. v. VidAngel, Inc., 869 F.3d 848, 858–59 (2017).

model, the new model can easily be an updated version of the ClearPlay model that has already been accepted as appropriate. This allows the court to look less like it is passing legislation, and more like it is adhering to precedent and Congress's decision to allow ClearPlay.

The pragmatic analysis is also swayed more in favor of VidAngel with this new business model. First, the existing body of copyright law is not undercut as it may have possibly been under the old model. The new model also serves established streaming services by bringing in new consumers who would not otherwise have subscribed to them.[147] Since the new VidAngel model requires an existing subscription to other streaming services, it gives consumers who want to avoid objectionable content a viable reason to subscribe to these services in order to view filtered versions of movies and shows. Simultaneously, this allows for exposure to audiences who would likely not get the exposure to the film in another way. This can bolster a creator's reputation and result in other benefits that come along with creators getting higher viewership.

All of these factors combine to encourage a dynamic interpretation of the FMA. As stated above, total consideration of these factors is critical before a court decides to dynamically interpret a statute. Considering the analysis of why the FMA can be considered old when compared to the advancement of technology used for viewing media, it is clear that the FMA should be interpreted to include VidAngel's new service.

While the FMA could have possibly been construed to encompass the old VidAngel model, there were still significant questions and uncertainties surrounding the method of interpretation for the FMA necessary to reach that result. This new VidAngel model serves as a suitable example of how the proposed method of interpretation can soundly be applied to statutes that deal with rapidly advancing technology. While the provided analysis is somewhat generalized, and perhaps not as thorough as might, or should, be performed by a court of law, it should be clear that there is certainly a viable method for including new technology in statutes in order to prevent the hampering of technological advancement.

IV. CONCLUSION

Trying to interpret existing statutes and figuring out how they deal with new technology is certainly not a new issue. It is also an issue that is not going to disappear any time soon. In order to deal with this issue in the future, it is imperative for there to be an established method for dealing with these types of statutes. As appealing as it would be to be able to construe all statutes to encompass new technology, it is just not a feasible goal. Instead, Congress should

[147] *Facts Concerning VidAngel's New Filtering Technology*, *supra* note 141.

have the primary duty of adapting the law over time by passing new statutes to encompass technology over time.

However, there are exceptions to every rule. There are some types of technology that develop and change so rapidly that Congress cannot possibly enact statutes quickly enough to keep up with their development. In these cases, it is important that courts be willing to use their interpretive power to prevent the inhibition of technological development. To avoid this process from becoming overly arbitrary, courts should rebuttably presume that they must interpret statutes to account for the rapid advance of technology.

Once the court has decided to consider how the statute applies to developing technology, the court should engage in interpretation using the traditional tools. As with all statutory interpretation, there must be an established basis for the court's interpretation. First, the court should establish if there is any ambiguity in the statute. During this stage of the analysis, it is important for the court to consider how the changes in technology may have caused ambiguity in words that would otherwise not appear to be ambiguous. However, should the court find the terms unambiguous in the face of the new technology, then the analysis should stop then and there.

Next, the court should consider how the legislative history and intent fit with the advancing technology. Primarily, the court should seek out any history or intent of Congress that suggests that the statute was meant or not meant to apply to future technology. Further, the court should determine what type of technology was considered in the legislative history and how the new technology matches up.

Once the court has considered both the history and text of the statute, the purpose should become more evident. Once a purpose has been established, the court should consider possible interpretations, such as very narrow inclusions or exceptions that can fulfill all the purposes. If such an interpretation does not exist, then the court should use the text and history to determine what the primary purpose was and use an interpretation consistent with the primary purpose. Often, this interpretation will be such that it is meant to preserve the existing body of law surrounding the technology.

Following the purpose, the court should consider the pragmatic implications of the possible interpretations. While the development of technology is typically in the best interest of society, this is not always the case. The court should consider all the potential implications and potential detriments to society from a dynamic interpretation of the statue, such as loopholes, undercutting existing laws, and hurting economic markets.

Once all these different tools have been considered and evaluated, the court should do a final balancing of them all to determine if the statute warrants dynamic interpretation. As indicated in the above analysis, this analysis will not always result in an interpretation in favor of technology. For the older VidAngel model, this interpretation could swing either way. There are a number of

uncertainties and ambiguities that would have to be thoroughly fleshed out, and the detriment could outweigh the benefit. While a very narrow inclusion of the old model could fit under the FMA, it hinges on the borderline of judicial lawmaking. However, the new VidAngel model presents a clear example of when a statute can be interpreted to include new technology with minimal detriment.

There will never be a bright line rule that provides a clear indication of when and when not to interpret statutes to include new technology. This process of interpretation will demand courts to use their sound judgment as to the different factors, assuming there is at least some manner of textual ambiguity. While it is perhaps not the most desirable method to include this type of discretion in the court, it is essential to the furtherance of society and technology. Judges will often not be experts on the nuances of technology, but they are experts in the craft of evaluating various factors and the implications on society. For this reason, this approach to statutory interpretation should be adopted and used in courts when issues come up regarding rapidly developing technology.