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 15 and Dr. Gene Block

16 UNITED STATES DISTRICT COURT
 17 CENTRAL DISTRICT OF CALIFORNIA
 18 WESTERN DIVISION

19 ASSOCIATION FOR INFORMATION
 MEDIA AND EQUIPMENT, an
 20 Illinois nonprofit membership
 organization; and AMBROSE VIDEO
 21 PUBLISHING, INC., a New York
 corporation,

22 Plaintiffs,

23 v.

24 THE REGENTS OF THE
 UNIVERSITY OF CALIFORNIA, a
 California corporation; DR. GENE
 25 BLOCK, CHANCELLOR OF THE
 UNIVERSITY OF CALIFORNIA,
 26 LOS ANGELES, an individual,

27 Defendants.

Case No. CV10-09378 CBM (MANx)

**NOTICE OF MOTION AND
 MOTION TO DISMISS
 COMPLAINT FOR LACK OF
 SUBJECT MATTER
 JURISDICTION AND FAILURE TO
 STATE A CLAIM;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT
 THEREOF**

Date: March 14, 2011
 Time: 11:00 a.m.
 Dept: Courtroom 2
 Judge: Hon. Consuelo B. Marshall
 Date Comp. Filed: December 7, 2010

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NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on March 14, 2011, at 11:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 2 of the United States District Court, 312 North Spring St., Los Angeles, California 90012, Defendants The Regents of the University of California and Dr. Gene Block, will and hereby do move this Court to dismiss Plaintiffs' Complaint because of a lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). This Motion is based on the Notice of Motion, the Memorandum of Points and Authorities in Support Thereof, the Proposed Order, all pleadings and papers filed herein, the oral argument of counsel, and any other matter that may be submitted at the hearing.

This motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on January 19, 2011.

Dated: January 24, 2011

KEKER & VAN NEST LLP

By: /s/ R. James Slaughter
ROBERT A. VAN NEST
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Attorneys for Defendants
The Regents of the University of
California and Dr. Gene Block

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs seek to impose liability for the streaming of lawfully acquired
4 video content in The University of California, Los Angeles’s (“UCLA”)
5 instructional development media lab and in its physical and virtual classrooms.
6 Plaintiffs have initiated this suit even though such use is directly related to the
7 pedagogical purposes of specific classes, is at the direction of the instructor of
8 record, and is restricted to only those students enrolled in the specific class for
9 which the video was assigned. Under Section 107 of the Copyright Act, a non-
10 profit, public institution of higher education like UCLA has the right to engage in
11 such a fair use of copyrighted content without permission from the copyright
12 owner.

13 Nevertheless, Plaintiffs Association for Information Media and Equipment
14 (“AIME”) and Ambrose Video Publishing, Inc. (“Ambrose”) have filed a
15 Complaint alleging six causes of action against The Regents of the University of
16 California (“The Regents”) and Dr. Gene Block (“Dr. Block”), the Chancellor of
17 UCLA: breach of contract, copyright infringement, violation of the Digital
18 Millennium Copyright Act’s (“DMCA”) anti-circumvention provisions, breach of
19 the implied covenant of good faith and fair dealing, unjust enrichment, and tortious
20 interference with business relationships.¹

21 Plaintiffs’ claims must be dismissed for a multitude of reasons. First, both
22 The Regents and Dr. Block are shielded by the Eleventh Amendment. Hence, this
23 Court lacks subject matter jurisdiction to adjudicate the alleged causes of action.
24 Moreover, because the Complaint fails to name any individual personally involved
25

26 ¹ Although the prayer seeks relief for “Plaintiffs” on all counts, the operative
27 allegations of counts I (breach of contract), IV (good faith and fair dealing), and VI
28 (tortious interference) plead only that Defendants are “liable to Plaintiff
[Ambrose].” See Compl. ¶¶ 67, 87, 96. AIME is thus a plaintiff only for counts II
(copyright infringement), III (DMCA violation), and V (unjust enrichment).

1 with the events alleged, it fails to state a claim for injunctive relief under *Ex parte*
2 *Young*. Similarly, because Dr. Block is not alleged to have participated in the
3 events alleged, he cannot be held personally liable. Even had he participated,
4 because the Complaint fails to allege a violation of clearly established law, he is
5 protected by qualified immunity. For these reasons, every claim alleged in the
6 Complaint must be dismissed.

7 Even if The Regents and Dr. Block were not immune under the Eleventh
8 Amendment, neither plaintiff has standing to bring certain causes of action alleged.
9 AIME, a trade association that does not own a single copyright at issue in this case,
10 has no standing under the Constitution to bring this action. And even if it had such
11 constitutional standing, it has no statutory standing under the Copyright Act to
12 bring suit for infringement. It is not the beneficial owner of *any* copyright at issue,
13 and is therefore precluded from bringing a claim for infringement. All three of
14 AIME’s claims—for infringement, violation of the DMCA, and unjust
15 enrichment—must therefore be dismissed.

16 Ambrose similarly lacks standing to sue for infringement. It claims to be the
17 “exclusive distributor” of the copyrighted content, but there are no facts sufficient
18 to support this conclusion, and more importantly, that exclusive right does not
19 grant standing to bring an action for unlawful copying, public performance, or
20 public display. The Copyright Act grants the owner of an exclusive right standing
21 to sue only for infringement of that right. An exclusive distributor, therefore, can
22 only sue for unauthorized distribution. The Complaint, however, does not—and
23 cannot—allege facts demonstrating that any distribution of the works in question
24 occurred. Ambrose’s claim for infringement must be dismissed.

25 Additionally, the state law causes of action are preempted by the Copyright
26 Act. These claims seek damages for conduct that is regulated exclusively by the
27 Copyright Act, and state law can neither expand nor diminish the rights established
28 by that Act. Because the conduct alleged consists of nothing more than the alleged

1 infringement of an exclusive right under the Copyright Act, state law cannot
2 impose liability.

3 The Complaint also fails to allege a plausible claim for violation of the
4 DMCA's anti-circumvention provisions. Plaintiffs don't allege any facts
5 demonstrating that Defendants bypassed Plaintiffs' access controls. To the
6 contrary, the Complaint alleges that UCLA had a license to access the content.
7 Whether or not that content was subsequently copied is irrelevant to a claim that an
8 access control was circumvented. Moreover, while Plaintiffs allege in a
9 conclusory manner that UCLA "trafficked" in forbidden anti-circumvention
10 devices, there are no facts alleged to support such a conclusion. The DMCA
11 claims must be dismissed for this additional reason.

12 As all claims are barred, the Complaint must be dismissed in its entirety.

13 II. FACTUAL ALLEGATIONS

14 Ambrose claims to be a corporation "whose principal business is the creation
15 and distribution of high quality video content for the educational marketplace."
16 Compl. ¶ 12.² AIME is not a producer or distributor at all, and is instead a "non-
17 profit membership organization offering copyright information and support"
18 *Id.* ¶ 13. Its mission is "to promote fair and appropriate use of the media and
19 equipment delivering information in a rapidly changing world," and the Complaint
20 specifically alleges that AIME has "standing to sue in this proceeding as an
21 associational Plaintiff on behalf of its members." *Id.* The Complaint does not
22 identify any particular member of AIME, nor any particular copyright owned by
23 any member of AIME. Instead, it alleges vaguely that AIME "estimates" that ten
24 AIME members own the rights to works that are at issue in this case. *Id.* ¶ 61 &
25 Ex. 13.

26
27 ² As they must for purposes of this motion, The Regents and Dr. Block
28 assume the truth of all properly pleaded factual allegations in the Complaint. See
Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996).

1 Plaintiffs allege that that UCLA has purchased a number of DVDs, and has
2 been improperly “streaming” the contents of these DVDs to faculty and students at
3 UCLA without their permission. *Id.* ¶ 33. “Streaming” is defined in the Complaint
4 as a process whereby video content is copied and “sent in compressed form over
5 the Internet.” *Id.* ¶ 26. “With streaming video, a viewer does not have to wait for
6 an entire program to download; rather, the data is displayed as a continuous
7 ‘stream’ of video as it arrives.” *Id.*

8 Plaintiffs filed the instant complaint on December 7, 2010.

9 III. LEGAL ARGUMENT

10 A. Both The Regents and Dr. Block are immune from suit under the 11 Eleventh Amendment to the U.S. Constitution.

12 1. The claims against The Regents and Dr. Block in his official 13 capacity must be dismissed.

14 “[A]n unconsenting State is immune from suits brought in federal
15 courts” *Employees of Dep’t of Pub. Health & Welfare v. Mo. Pub. Health*
16 *Dep’t*, 411 U.S. 279, 280, 93 S. Ct. 1614, 36 L. Ed. 2d 251 (1973). Moreover,
17 “[t]he Eleventh Amendment bars a suit against state officials when the state is the
18 real, substantial party in interest.” *Pennhurst State Sch. & Hosp. v. Halderman*,
19 465 U.S. 89, 101, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (quotation marks
20 omitted). “Thus, the general rule is that relief sought nominally against an officer
21 is in fact against the sovereign if the decree would operate against the latter.” *Id.*
22 A decree “operate[s] against” the sovereign if “the judgment sought would expend
23 itself on the public treasury or domain, or interfere with the public administration,
24 or if the effect of the judgment would be to restrain the Government from acting,
25 or to compel it to act.” *Id.* at 102 n.11. For this reason, “[s]tate sovereign
26 immunity extends to government officials that are sued for damages in their
27 official capacity.” *Marketing Info. Masters, Inc. v. Bd. of Trustees of the Cal. State*
28 *Univ. Sys.*, 552 F. Supp. 2d 1088, 1095 (S.D. Cal. 2008)

Eleventh Amendment immunity applies unless the state consents to be sued

1 or Congress validly overrides the state’s immunity.³ *See Green v. Mansour*, 474
2 U.S. 64, 68, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985). Here, California has not
3 consented to suit, so it is immune from suit unless Congress has validly abrogated
4 its immunity. In order to determine whether Congress has abrogated a state’s
5 immunity, a court must look to two factors: “(1) whether Congress expressed a
6 clear intent to override the state’s immunity and (2) whether Congress acted
7 pursuant to a constitutional grant of authority.” *Marketing Info.*, 552 F. Supp. 2d at
8 1092.

9 Congress has not attempted to abrogate California’s immunity as to the state
10 law claims. Moreover, as several courts have found, Congress’s attempt to
11 abrogate immunity as to claims brought under the Copyright Act, *see* 17 U.S.C.
12 § 511, is invalid. Congress has no authority to abrogate sovereign immunity
13 pursuant to its Article I powers. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44,
14 72-73, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). Section 511, then, is
15 constitutional only if enacted pursuant to Congress’s enforcement powers under
16 section 5 of the Fourteenth Amendment. *See id.* at 59.

17 Congress’s enforcement powers under the Fourteenth Amendment, however,
18 are limited to remedial measures. *City of Boerne v. Flores*, 521 U.S. 507, 515-17,
19 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). The Supreme Court has held that two
20 analogous attempts to abrogate the states’ immunity—for claims of patent and
21 trademark infringement—were void as outside the scope of Congress’s
22 enforcement powers. *See Fla. Prepaid Postsecondary Educ. Expense Bd. v.*
23 *College Savings Bank*, 527 U.S. 627, 119 S. Ct. 2199, 144 L. Ed. 2d 575 (1999)
24 (holding invalid Congress’s attempt to abrogate Eleventh Amendment immunity
25

26 ³ The Regents is an “arm of the state,” and therefore entitled to the protections
27 of the Eleventh Amendment. *See Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th
28 Cir. 1982) (“[T]he University of California and the Board of Regents are
considered to be instrumentalities of the state for purposes of the Eleventh
Amendment.”).

1 for patent infringement); *College Savings Bank v. Fla. Prepaid Postsecondary*
2 *Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999) (same
3 as to trademark infringement).⁴ For example, Congress’s attempt to abrogate the
4 Eleventh Amendment for patent claims was invalid because it did not “respond to a
5 history of ‘widespread and persisting deprivation of constitutional rights’ of the
6 sort Congress has faced in enacting proper prophylactic § 5 legislation.” *Fla.*
7 *Prepaid*, 527 U.S. at 645 (quoting *City of Boerne*, 521 U.S. at 526).

8 In contrast to the legislative history for the Patent Remedy Act, which
9 demonstrated Congress’s intent to rely on its Enforcement Clause powers,
10 Congress did not even attempt to invoke its Enforcement Clause powers in
11 enacting § 511. *See Chavez v. Arte Publico Press*, 204 F.3d 601, 604 (5th Cir.
12 2000). Moreover, far from suggesting a widespread practice of copyright
13 infringement by the states, the legislative history for § 511 suggests that copyright
14 infringement by the states is a relatively infrequent problem. *See id.* at 605-06.
15 Not surprisingly, then, every court to confront the issue has concluded that § 511
16 did not validly abrogate the Eleventh Amendment. *See id.* at 607; *Marketing Info.*,
17 552 F. Supp. 2d at 1095; *Nat’l Assoc. of Bds. of Pharmacy v. Bd. of Regents of the*
18 *Univ. Sys. of Ga.*, No 3:07-cv-084, 2008 WL 1805439 (M.D. Ga. Apr. 18, 2008).

19 Therefore, the claims against The Regents and against Dr. Block in his
20 official capacity are impermissible suits against the State of California.

21
22
23
24 ⁴ The statutes invalidated in *Florida Prepaid* and *College Savings Bank* were
25 passed within two years of the statute at issue in this case, and the three statutes are
26 substantively identical. *Compare* Trademark Remedy Clarification Act, § 3, Pub.
27 L. No. 102-542, 106 Stat. 3568, 15 U.S.C. § 1114 (1992), *and* Patent and Plant
28 Variety Protection Remedy Clarification Act, § 2, Pub. L. No. 102-560, 106 Stat.
4230, 35 U.S.C. § 271(h) (1992), *with* Copyright Remedy Clarification Act, § 2,
Pub. L. 101-553, 104 Stat. 2749, 17 U.S.C. § 511 (1990). The three laws amended
the relevant sections of the U.S. Code using almost identical language.

1 **2. Claims for injunctive relief as to Dr. Block must be dismissed**
2 **because the Complaint fails to allege any facts as to his**
3 **involvement in the events alleged.⁵**

4 The only exception to Eleventh Amendment immunity was first recognized
5 by *Ex parte Young*. 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Under *Ex*
6 *parte Young* and its progeny, the Eleventh Amendment does not bar a suit against a
7 state official that seeks only prospective injunctive relief for that official's
8 violation of federal law.⁶ See *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39
9 L. Ed. 2d 662 (1974). However, a plaintiff cannot maintain a suit under *Ex parte*
10 *Young* simply by naming any official tangentially involved in an alleged violation
11 of federal law. The named official must be more than simply a supervisory
12 official. See *Pennington Seed, Inc. v. Produce Exchange No. 299*, 457 F.3d 1334,
13 1342 (Fed. Cir. 2006).

14 Plaintiffs' requests for injunctive relief under the Copyright Act cannot be
15 justified under *Ex parte Young*:

16 In making an officer of the state a party defendant in a suit to enjoin
17 the enforcement of an act alleged to be unconstitutional, it is plain that
18 such officer must have some connection with the enforcement of the

19 ⁵ As the Complaint's caption reflects, The Regents of the University of
20 California is a California corporation. See also *Armstrong v. Meyers*, 964 F.2d
21 948, 949-50 (9th Cir. 1991) (noting that the Board of Regents is "a corporation
22 created by the California constitution"). Nevertheless, the Complaint elsewhere
23 purports to sue The Regents "in their individual capacities as members of the
24 Board of Regents." Compl. ¶ 1. But the Complaint does not identify any
25 particular member of the board, nor does it allege that any particular member was
26 involved in any way in the events alleged in the Complaint. Accordingly, the
27 Complaint fails to allege any facts stating a plausible claim for relief as to any
28 particular member of the Board. This Motion therefore treats The Regents solely
as an official arm of the state. In any event, even were such a member properly
named in his or her individual capacity, the below analysis as to Dr. Block would
be equally applicable.

⁶ The Supreme Court has held that *Ex parte Young* applies only to violations
of federal law, not state law. See *Pennhurst*, 465 U.S. at 106 ("We conclude that
Young . . . [is] inapplicable in a suit against state officials on the basis of state
law."). Therefore, Plaintiffs cannot seek prospective relief under *Ex parte Young*
for the state law claims.

1 act, or else it is merely making him a party as a representative of the
2 state, and thereby attempting to make the state a party.

3 *Ex parte Young*, 209 U.S. at 157. “When a violation of federal law is alleged . . .
4 the state official whose actions violate that law is the rightful party to the suit and
5 prospective injunctive relief can only be had against him.” *Pennington Seed*, 457
6 F.3d at 1342.

7 In the educational context, this forbids a suit against a university official
8 who has a general duty to supervise activities at the university. In *Pennington*
9 *Seed*, the Federal Circuit held that such a supervisor is not a proper defendant
10 under *Ex parte Young*:

11 Allegations that a state official directs a University’s patent policy are
12 insufficient to causally connect that state official to a violation of
13 federal patent law-i.e., patent infringement. A nexus between the
14 violation of federal law and the individual accused of violating that
15 law requires more than simply a broad general obligation to prevent a
16 violation; it requires an actual violation of federal law by that
17 individual. The fact that a University Official has a general, state-law
18 obligation to oversee a University’s patent policy does not give rise to
19 a violation of federal patent law.

20 *Id.* at 1342-43 (citations omitted).

21 Here, the Complaint only alleges that AIME’s counsel wrote Dr. Block a
22 letter long after this dispute began to which he never responded, and that he “is the
23 individual in charge of all university policies and their implementation.” Compl.
24 ¶ 15. There is no suggestion that Dr. Block chose what material should be used.
25 He did not stream the videos, or do anything to set up that streaming. Merely
26 alleging that Dr. Block is “in charge” is not sufficient to invoke *Ex parte Young*.
27 See *Los Angeles Cnty. Bar Ass’n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992) (“This
28 connection [between defendant and act] must be fairly direct; a generalized duty to

1 enforce state law or general supervisory power over the persons responsible for
2 enforcing the challenged provision will not subject an official to suit.”).

3 Because Dr. Block merely is alleged to have “general supervisory power
4 over the persons responsible for enforcing the challenged provision,” he is not a
5 proper party under *Ex parte Young* for Plaintiffs’ federal claims for injunctive
6 relief.

7 **3. The claims against Dr. Block in his individual capacity must also**
8 **be dismissed for failure to state a claim and because Dr. Block is**
9 **entitled to qualified immunity.**

10 Just as the Complaint’s failure to allege facts connecting Dr. Block to the
11 allegedly improper acts precludes Plaintiffs’ suit under *Ex parte Young* for acts in
12 his official capacity, it similarly precludes Plaintiffs’ attempt to hold Dr. Block
13 personally liable. *See Marketing Info.*, 552 F. Supp. 2d at 1095-96 (requiring that
14 the named defendant be “personally engaged in the infringing behavior” to
15 establish personal liability). As noted above, the Complaint is devoid of factual
16 allegations that Dr. Block “personally engaged in the infringing behavior.”
17 Without such allegations, he cannot be held personally liable.

18 Moreover, at a bare minimum, Dr. Block is entitled to qualified immunity.
19 “[G]overnment officials performing discretionary functions generally are shielded
20 from liability for civil damages insofar as their conduct does not violate clearly
21 established statutory or constitutional rights of which a reasonable person would
22 have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed.
23 2d 396 (1982). The Supreme Court has repeatedly “stressed the importance of
24 resolving immunity questions at the earliest possible stage in litigation.” *Pearson*
25 *v. Callahan*, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009) (internal quotation
26 marks and citation omitted).

27 Qualified immunity can only be overcome if: (1) the right the officials are
28 accused of violating was clearly established, and (2) a reasonable official would
have known that the conduct alleged had violated that right. *See Saucier v. Katz*,

1 533 U.S. 194, 199, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), *receded from on*
2 *other grounds by Pearson*, 129 S. Ct. 808. “‘Clearly established law’ is law that is
3 sufficiently defined so as to provide public officials with ‘fair notice’ that the
4 conduct alleged is prohibited.” *Nat’l Ass’n of Bds. of Pharmacy*, 2008 WL
5 1805439, at *22 (internal quotation marks and citation omitted). This standard
6 “gives ample room for mistaken judgments by protecting all but the plainly
7 incompetent or those who knowingly violate the law.” *Hunter v. Bryant*, 502 U.S.
8 224, 229, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (quotation marks omitted).

9 The rights Plaintiffs seek to enforce here are by no means clearly
10 established, and a reasonable official would not have known that the facts alleged
11 constitute infringement.⁷ To the contrary, Defendants’ conduct qualifies as a fair
12 use, and is therefore not infringement.⁸ Section 107 of the Copyright Act provides
13 that “fair use[s]” of copyrighted materials are not infringements. It dictates that
14 fair use, “including such use by reproduction in copies . . . *for purposes such as . . .*
15 *teaching* (including multiple copies for classroom use) . . . is not an infringement
16 of copyright.” 17 U.S.C. § 107 (emphasis added). Further, the courts have
17 recognized that the purpose of copyright law is “[t]o promote the Progress of
18 Science and useful Arts,” U.S. Const. art. I, § 8, cl. 8, and to serve ‘the welfare of
19 the public.’” *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 720 (9th Cir.
20 2007), *quoting Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417,
21 429 n.10 (1984).

22 While § 107 codifies a special solicitude for uses in the educational context,
23 it does not list with precision which uses are, and which are not, “fair.” Instead,
24

25 ⁷ This fair use argument is not a post hoc rationalization. Exhibit 7 to the
26 Complaint contains a letter from UCLA’s counsel to Ambrose’s counsel
explaining UCLA’s reasoning as to why its streaming constituted a fair use.

27 ⁸ UCLA’s video-streaming practices are also independently authorized both
28 by 17 U.S.C. § 110(1)—the face-to-face exemption—and 17 U.S.C. § 110(2)—the
TEACH Act.

1 § 107 sets forth a four-factor test. The factors are:

2 (1) the purpose and character of the use, including whether such use is
3 of a commercial nature *or is for nonprofit educational purposes*;

4 (2) the nature of the copyrighted work;

5 (3) the amount and substantiality of the portion used in relation to the
6 copyrighted work as a whole; and

7 (4) the effect of the use upon the potential market for or value of the
8 copyrighted work.

9 17 U.S.C. § 107 (emphasis added).

10 Courts are required to balance *all four* of these factors and apply an equitable
11 rule of reason to determine fair use. As stated by the relevant House Report:

12 Although the courts have considered and ruled upon the fair use
13 doctrine over and over again, no real definition of the concept has
14 ever emerged. Indeed, since the doctrine is an equitable rule of
15 reason, no generally applicable definition is possible, and each case
16 raising the question must be decided on its own facts Beyond a
17 very broad statutory explanation of what fair use is and some of the
18 criteria applicable to it, the courts must be free to adapt the doctrine to
19 particular situations on a case-by-case basis.

20 H.R. Rep. No. 94-1476, at 65-66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5680; *see*
21 *also Harper & Row v. Nation Enters.*, 471 U.S. 539, 560, 105 S. Ct. 2218, 85 L.
22 Ed. 2d 588 (1985) (noting that fair use is “an equitable rule of reason,” and quoting
23 H.R. Rep. No. 94-1476). Therefore, while case law might establish that a
24 particular use is or is not a fair use on a case-by-case basis, precedent does not
25 offer clear guidance for the use of new technology, particularly when that
26 technology is employed in protected context like education.

27 Application of the four fair use factors supports a finding of fair use.

28 Importantly, as to the first factor, it is undeniable that UCLA’s use had a nonprofit

1 educational purpose. As the Complaint itself alleges, “[t]he DVD streams were
2 linked to course web pages and accessible remotely by students and faculty,
3 enrolled in or teaching the course.” Compl. ¶ 5.

4 The alleged use also had no effect on “the potential market for or value of
5 the copyrighted work.” UCLA lawfully acquired the DVDs in question, which
6 gave instructors the right to display the contents of those DVDs in the classroom.
7 *See* 17 U.S.C. § 110(1). Had streaming never been offered, there is no reason to
8 conclude that Plaintiffs ever would have sold any more DVDs, or that Ambrose’s
9 own streaming offerings would have been more popular. *See* Compl. ¶ 22.

10 Additionally, the Complaint does not—and indeed cannot—allege that Plaintiffs
11 offered video streaming of the relevant content when UCLA acquired the DVDs.

12 Moreover, while the third factor typically weighs against a party that copies
13 an entire work, the Supreme Court has concluded in the context of television
14 broadcasts that the recording of a motion picture so that it might be performed
15 again at a different time—so called “timeshifting”—constitutes fair use. *See Sony*
16 *Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448, 104 S. Ct. 774, 78
17 L. Ed. 2d 574 (1984) (in the television context, “timeshifting merely enables a
18 viewer to see such a work which he had been invited to witness in its entirety free
19 of charge, [so] the fact that the entire work is reproduced does not have its ordinary
20 effect of militating against a finding of fair use.” (citation omitted)). As for the
21 second factor, the “nature of the copyrighted work,” the Ninth Circuit has held that
22 “this factor typically has not been terribly significant in the overall fair use
23 balancing.” *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d
24 1394, 1402 (9th Cir. 1997).

25 Plaintiffs’ Complaint contains a legal argument that UCLA’s streaming is
26 not a fair use. *See* Compl. ¶¶ 50-59. No published opinion, however, adopts their
27 interpretation of § 107 as applied to video streaming in this context. More
28 importantly, even if Plaintiffs were correct on the law, the question of qualified

1 immunity turns on a different and more forgiving analysis. Dr. Block is protected
2 so long as a reasonable official would not have known, at the time of the events
3 alleged, that such streaming was clearly established infringement.

4 Given the fact that there is “no generally applicable definition” of fair use,
5 and the fair use analysis above, Dr. Block at a minimum—and all that need be
6 shown for purposes of qualified immunity—did not have “fair notice” that the use
7 constituted copyright infringement. Hence, he is entitled to qualified immunity as
8 a matter of law. *Harlow*, 457 U.S. at 818; *cf. Chavez v. Arte Publico Press*, 59
9 F.3d 539, 547-48 (5th Cir. 1995) (dismissing individual capacity copyright claim
10 on a motion to dismiss), *remanded in part by Univ. of Houston v. Chavez*, 517 U.S.
11 1184, 116 S. Ct. 1667, 134 L. Ed. 2d 772 (1996) (remanding on the issue of
12 sovereign immunity but leaving dismissal of individual capacity claim
13 undisturbed).

14 **B. AIME lacks constitutional standing.**

15 Article III of the U.S. Constitution imposes minimum requirements for a
16 party to have standing to bring a lawsuit.⁹ AIME asserts that it is entitled to bring
17 this action under Article III because it has “associational” standing. Compl. ¶ 13.
18 In *Hunt v. Washington State Apple Advertising Commission*, the Supreme Court
19 identified three requirements for an association to bring suit on behalf of its
20 members:

- 21 (a) its members would otherwise have standing to sue in their own
22 right; (b) the interests it seeks to protect are germane to the
23 organization’s purpose; and (c) neither the claim asserted nor the
24 relief requested requires the participation of individual members in the

25 _____
26 ⁹ As noted above, AIME is alleged to be a plaintiff only as to counts II
27 (copyright infringement), III (DMCA violation), and V (unjust enrichment). As to
28 Count II, AIME seeks only injunctive relief. Compl. ¶ 77. As to Count III, AIME
requests both injunctive and monetary relief, *id.* ¶ 83, and in Count V, AIME seeks
only damages, *id.* ¶ 90.

1 lawsuit.
2 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)
3 AIME fails the first and third requirements. Although the Complaint alleges
4 that AIME’s “members have standing to sue on their own for infringement of
5 copyrights,” there are no factual allegations to support this legal conclusion. *See*
6 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951, 173 L. Ed. 2d 868 (2009) (conclusory
7 allegations are “not entitled to be assumed true”). To establish that its members
8 have standing—the first requirement for associational standing—requires proof
9 that AIME’s individual members own the necessary copyrights to the works used
10 by UCLA. This necessarily requires participation of the individual AIME
11 members, which means that AIME cannot satisfy the third requirement for
12 associational standing. The copyright infringement count requires an
13 individualized inquiry into what copyrights each AIME member owns that UCLA
14 allegedly infringed, whether those copyrights are valid, and the nature of any rights
15 conveyed by those members to UCLA when UCLA acquired copies of their
16 works.¹⁰ Similarly, the anti-circumvention count requires analysis of the particular
17 access controls that allegedly were circumvented for each work. And the unjust
18 enrichment count also refers to “license agreements” for the allegedly infringed
19 works, Compl. ¶ 90, the analysis of which would vary from DVD to DVD.
20 Finally, at least for counts III (DMCA violation) and V (unjust enrichment), AIME
21 appears to be seeking damages, which also would require participation of
22 individual AIME members. *See Warth v. Seldin*, 422 U.S. 490, 515-16, 95 S. Ct.
23 2197, 45 L. Ed. 2d. 343 (1974) (“Thus, to obtain relief in damages, each member .

24 _____
25 ¹⁰ To be sure, there are situations in which injunctive relief would not require
26 individualized participation, because the injunctive relief sought is based on facts
27 not specific to any particular person, with an injunction that is equally generalized.
28 *See, e.g., Olagues v. Russoniello*, 770 F.2d 791, 799 (9th Cir. 1985) (injunctive
relief under the Voting Rights Act). Here, the injunction sought would relate to
specific copyrighted works, and the factual predicate necessary for the injunction
would require specific proof for each work at issue.

1 . . . who claims injury as a result of respondents’ practices must be a party to the suit
2”).

3 AIME cannot serve as an associational plaintiff, and all three of its claims
4 must be dismissed.

5 **C. Neither Ambrose nor AIME has statutory standing to bring copyright
6 infringement claims.**

7 Even where a plaintiff has constitutional standing, Congress can further limit
8 the class of individuals who are authorized to bring suit under its statutes. *See*
9 *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004). Congress has
10 imposed such a limitation for claims of copyright infringement: only “[t]he legal or
11 beneficial owner of an exclusive right under a copyright” can sue for copyright
12 infringement. 17 U.S.C. § 501(b); *see also Sybersound Records, Inc. v. UAV*
13 *Corp.*, 517 F.3d 1137, 1145 (9th Cir. 2008) (“Under copyright law, only copyright
14 owners and exclusive licensees of copyright may enforce a copyright or a
15 license.”).

16 **1. AIME cannot sue for copyright infringement.**

17 AIME, by its own admission, does not own any of the copyrights it seeks to
18 enforce. Instead, it seeks to enforce the rights of its members. *See* Compl. ¶ 13
19 (asserting only associational standing). But “associational standing is not
20 permitted under the Copyright Act, which expressly limits standing to legal or
21 beneficial owners of exclusive rights.” 6 Patry on Copyright § 21:28 (2010).
22 AIME’s claim for copyright infringement must therefore be dismissed.

23 **2. Ambrose has no standing to sue for copyright infringement.**

24 “Under copyright law, only copyright owners and exclusive licensees of
25 copyright may enforce a copyright or a license.” *Sybersound*, 517 F.3d at 1144.
26 The Complaint attaches only one copyright registration, for a “motion picture”
27 production of *Hamlet*. *See* Compl., Ex. 12. That registration lists the BBC and
28 Time-Warner as the owners of the copyright, not Ambrose. *See id.* Ambrose

1 alleges only that it is the exclusive distributor for the “A[mbose] DVDs”
2 embodying the BBC and Time-Warner productions. *See id.* ¶ 70. This does not
3 preclude the possibility that the BBC and/or Time-Warner have retained the right
4 to distribute these works in other formats, or even on DVDs other than the
5 Ambrose DVDs. As such, the Complaint alleges no more than that Ambrose is a
6 distributor of the “motion pictures” at issue. An allegation that a party is simply a
7 distributor, without more, is not sufficient to confer standing under the Copyright
8 Act. *See Comptoir De L’Industrie Textile De France v. Fiorucci, Inc.*, No. 78 Civ.
9 3923, 1979 WL 1062 (S.D.N.Y. Apr. 10, 1979). Because Ambrose is not the
10 copyright owner, and has not adequately alleged that it is the exclusive licensee of
11 the distribution right, it has not established standing for its copyright infringement
12 claims.

13 Moreover, even if Ambrose were the exclusive distributor of the BBC/Time-
14 Warner works for which registration has been alleged, the distribution right for a
15 motion picture is limited to distribution of “copies” of the work. 17 U.S.C.
16 § 106(3).¹¹ The Copyright Act only grants standing for an exclusive licensee to
17 sue for infringement of “that particular right.” *See* 17 U.S.C. § 501(b); *see also*
18 Nimmer on Copyright § 12:02[B] (“Of course, an exclusive licensee may not sue
19 for infringement of rights as to which he is not licensed, even if the subject matter
20 of the infringement is the work as to which he is a licensee.”). Ambrose, then, if it
21 is the exclusive distributor, can only sue for infringement of the right to distribute
22 copies.

23 The Copyright Act’s definition of “copies” is limited to “material objects.”
24 17 U.S.C. § 101. Nowhere in the Complaint is there any allegation that UCLA has
25 distributed infringing *material objects* by sending DVDs to its students or
26

27 ¹¹ The statute also refers to distribution of “phonorecords,” 17 U.S.C. § 106(3),
28 but the Copyright Act’s definition of phonorecords excludes motion pictures and
audiovisual works, *id.* § 101.

1 otherwise. While the videos may be streamed *using* material objects, the only
2 thing that is *distributed* is a secured link that provides access to digital bits that can
3 only be viewed—not downloaded or copied—and thus cannot infringe the
4 distribution right. *Cf. Agee v. Paramount Comm’n*, 59 F.3d 317, 325 (2d Cir.
5 1995) (“[D]istribution is generally thought to require transmission of a ‘material
6 object’ in which the sound recording is fixed . . .”). Therefore, there is no factual
7 basis for a claim of infringement of the right of distribution.

8 Instead, the Complaint purports to assert rights related to copying, public
9 performance, and public display. Compl. ¶ 72. But nowhere in the Complaint
10 does Ambrose allege it is the exclusive licensee of any of these rights, and so it has
11 no standing to assert them. Any such claim must therefore be dismissed.

12 **D. Plaintiffs’ claims under California state law are preempted by the**
13 **Copyright Act.**

14 “The Copyright Act specifically preempts ‘all legal or equitable rights that
15 are equivalent to any of the exclusive rights within the general scope of
16 copyright.’” *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1089 (9th Cir.
17 2005) (quoting 17 U.S.C. § 301(a)). Because the state law claims brought against
18 The Regents and Dr. Block “are equivalent to . . . the exclusive rights within the
19 general scope of copyright,” they are preempted.

20 **1. Claims for unjust enrichment are preempted by the Copyright**
21 **Act.**

22 Unjust enrichment claims that seek recovery based solely on a defendant’s
23 copying of a copyrighted work—such as the claim asserted here—are preempted.
24 As explained in *Del Madera Properties v. Rhodes & Gardner, Inc.*, a “promise not
25 to use or copy materials within the subject matter of copyright is equivalent to the
26 protection provided by section 106 of the Copyright Act.” 820 F.2d 973, 977 (9th
27 Cir. 1987), *overruled on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517,
28 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994) (reversing judgment denying attorneys’
fees, but otherwise affirming). It is therefore preempted. *Id.* Because the instant

1 claim for unjust enrichment relies on the act of copying content, which is an
2 explicit protection under section 106, *see* 17 U.S.C. § 106(1), the claim is
3 preempted.

4 **2. Claims for breach of contract and tortious interference are**
5 **preempted when they seek recovery based on the exclusive rights**
6 **protected by the Copyright Act.**

7 The Copyright Act preempts claims for breach of contract where the contract
8 rights at issue are equivalent to rights regulated by the Copyright Act.¹² The
9 preemption analysis depends on whether “the right in question is ‘infringed by the
10 mere act of reproduction, performance, distribution or display.’” *Selby v. New*
11 *Line Cinema Corp.*, 96 F. Supp. 2d 1053, 1061 (S.D. Cal. 2000) (quoting *Nat’l Car*
12 *Rental v. Computer Assoc.*, 991 F.2d 426, 432-33 (8th Cir. 1993)). Prof. Nimmer
13 supports this approach:

14 [A]t times a breach of contract cause of action can serve as a
15 subterfuge to control nothing other than the reproduction, adaptation,
16 public distribution, etc. of works within the subject matter of
17 copyright. . . . To the extent such a contract is determined to be
18 binding under state law, then that law may be attempting to vindicate
19 rights indistinguishable from those accorded by the Copyright Act.
20 Under that scenario, the subject contract cause of action should be
21 deemed pre-empted.

22 Nimmer on Copyright § 1.01[B][1][a].

23 Although the Ninth Circuit has not squarely considered the issue, it has
24 endorsed the distinction between contracts that control “use” of a copyrighted
25 work, which are not preempted, and contracts that control rights equivalent to the

26 ¹² Claims for breach of contract and for tortious interference with contract turn
27 on the same analysis. *Compare Altera Corp.*, 424 F.3d at 1089 (analyzing tortious
28 interference claim), *and Nat’l Car Rental v. Computer Assoc.*, 991 F.2d 426, 432-
33 (8th Cir. 1993) (analyzing breach of contract claim). Therefore, this preemption
analysis applies to Plaintiffs’ claims for breach of contract and tortious interference
with contract.

1 exclusive rights under copyright law, which are preempted. *See Altera Corp.*, 424
2 F.3d at 1089 (distinguishing between a contract that controls the use of a work and
3 a contract that controls reproduction); *see also MDY Indus. v. Blizzard*
4 *Entertainment*, Nos. 09-15932, 09-16044, 2010 WL 5141269, at *21 (9th Cir. Dec.
5 14, 2010) (“We conclude that since Blizzard seeks to enforce contractual rights
6 that are *not equivalent* to any of its exclusive rights of copyright, the Copyright Act
7 does not preempt its tortious interference claim.” (emphasis added)). Other circuits
8 have endorsed the same distinction. *See, e.g., Nat’l Car Rental*, 991 F.2d at 432
9 (8th Circuit).

10 The alleged contract at issue here contains limitations on both UCLA’s right
11 to use and its right to copy and publicly perform the content in question, but only
12 the latter limitation is alleged to have been breached.¹³ As alleged in the
13 Complaint, the contract states that UCLA has the right “to use the Content . . . in
14 an educational OR home video setting.” Compl. ¶ 24. This restriction on use is
15 not alleged to have been breached, since the Complaint does not dispute that the
16 use in question took place in an educational setting.

17 However, the alleged contract goes on to limit UCLA’s right to “duplicate[],
18 broadcast, transmit . . . , or display[]” the content. *Id.* The Complaint alleges that
19 this term was breached, and it is this term that seeks to control conduct that is
20 equivalent to exclusive rights under copyright law. *See* 17 U.S.C. §§ 106(1)
21 (protecting the right to copy), 106(4) (protecting the right to perform a motion
22 picture). The alleged contractual obligation is therefore preempted under *Altera*
23 and *Blizzard*. *See also Jacobsen v. Katzer*, 609 F. Supp. 2d 925, 933 (N.D. Cal.
24 2009) (holding a breach of contract claim to be preempted because it “alleges

25 ¹³ Because Plaintiffs’ claim for breach of the implied covenant of good faith
26 and fair dealing challenges the identical conduct, it too is preempted. In any event,
27 where a claim for breach of the implied covenant of good faith relies on the same
28 allegations as a claim for breach of contract, the good faith claim must fail.
Celestial Mechanix, Inc. v. Susquehanna Radio Corp., No. CV 03-5834, 2005 WL
4715213 at *9 (C.D. Cal. Apr. 28, 2005).

1 violations of the exact same exclusive federal rights protected by Section 106 of
2 the Copyright Act”). Plaintiffs’ claims for breach of contract and tortious
3 interference with contract must therefore be dismissed.

4 **E. Plaintiffs fail to state a cause of action under the DMCA.**

5 The third cause of action in the Complaint alleges a violation of the
6 anticircumvention provisions of 17 U.S.C. § 1201. First, Plaintiffs purport to bring
7 a claim under § 1201(b) alleging that “Defendants are liable . . . for UCLA’s
8 circumventing AVP’s technological measures that effectively control . . . *copying*
9 of its programs.” Compl. ¶ 44 (emphasis added). Section 1201(b), however, does
10 not prohibit the circumvention of a copy-control technology. Rather, its
11 protections reach only the *trafficking* in devices that circumvent copy-control
12 technologies. By prohibiting only trafficking in devices that circumvent copy-
13 controls, and not the circumvention itself, § 1201(b) differs from § 1201(a), which
14 prohibits both the circumvention of access controls *and* the trafficking in devices
15 that circumvent such controls. *See Blizzard*, 2010 WL 5141269, at *10-13
16 (explaining the asymmetry between § 1201(a)(1) and § 1201(b)). Plaintiffs’ claim
17 for violation of Section 1201(b) based on the circumvention of copy-control
18 technology must therefore be dismissed.

19 Second, the Complaint fails to allege that any technological measure
20 controlling access to a work was circumvented in violation of Section 1201(a)(1).
21 According to the Complaint itself, UCLA had a right to access the DVDs. *See*
22 Compl. ¶¶ 24 (“AVP grants to the Licensee a . . . license to use the Content”);
23 32. Therefore, there was nothing unlawful about the access itself. Instead, the
24 claim is that UCLA unlawfully made use of the material in violation of the
25 copyright owners’ exclusive rights, which does not state a claim under section
26 1201(a)(1). Regardless of whether there was something wrongful about what was
27 done after the DVDs were lawfully accessed—namely, the process of converting
28 the contents into a format capable of being streamed over UCLA’s password-

1 protected, secured intranet—such conduct does not concern the unauthorized
2 circumvention of a measure controlling “access.” *See* Nimmer on Copyright §
3 12A.03[D][3].

4 Third, the Complaint fails to allege facts supporting an inference that
5 Defendants have trafficked in devices that circumvent access-controls in violation
6 of § 1201(a)(2), or devices that circumvent copy-controls in violation of § 1201(b).
7 Compl. ¶¶ 80, 81. The only factual basis for Plaintiffs’ trafficking assertion is that
8 UCLA allegedly “worked in close coordination” with the company that makes
9 Video Furnace, the product UCLA uses to prepare digital copies of DVDs that can
10 then be streamed digitally. *Id.* ¶ 45. Even assuming the truth of this allegation,
11 working with a company is not the same as trafficking in its products. “Threadbare
12 recitals of the elements of a cause of action, supported by mere conclusory
13 statements, do not suffice.” *Iqbal*, 129 S. Ct. at 1949-50.

14 Plaintiffs also allege that UCLA “assisted” in the development Video
15 Furnace, that it “acted in concert” in that development, and that this constitutes
16 “trafficking.” *See* Compl. ¶¶ 46-49. Plaintiffs, however, allege no facts beyond
17 UCLA’s supposed assistance with the development of Video Furnace. The leap
18 from the alleged fact of involvement in development to the legal conclusion of
19 trafficking in the finished device is unsupported. *See Bell Atl. Corp. v. Twombly*,
20 550 U.S. 544, 555 (2007) (“a formulaic recitation of the elements of a cause of
21 action will not do”). In order to state a claim, the factual allegations in a
22 Complaint “must be enough to raise a right to relief above the speculative level.”
23 *Id.* Because the claim does not “contain sufficient factual matter, accepted as true,
24 to state a claim to relief that is plausible on its face,” it must be dismissed. *Iqbal*,
25 129 S. Ct. at 1949 (quotation marks and citation omitted).

26 IV. CONCLUSION

27 Plaintiffs have failed to allege any viable cause of action. Most importantly,
28 despite a constitutional amendment and more than two hundred years of precedent

1 to the contrary, Plaintiffs ask this Court to issue a judgment against an agency of a
2 sovereign state. The Eleventh Amendment strips this Court of jurisdiction to hear
3 such a case, and it must therefore be dismissed. The Complaint also improperly
4 sues an individual who is not alleged to have participated in the supposedly
5 wrongful conduct, and who is in any event protected by qualified immunity.

6 Moreover, even if there were no Eleventh Amendment or other immunity,
7 Plaintiffs do not have standing to bring the claims at the core of this case. AIME,
8 which owns no copyright at issue in this case, has no standing as a matter of both
9 constitutional and statutory law. Ambrose similarly owns no relevant copyright,
10 and fails to allege facts suggesting that it otherwise has statutory standing to bring
11 an action for copyright infringement. Perhaps recognizing the futility of their
12 copyright claims, Plaintiffs also seek to enforce those same rights by means of
13 claims under state law. Such an effort must fail, as those state law claims are
14 preempted by the Copyright Act. Finally, the Complaint fails to allege facts
15 supporting any cause of action under the DMCA.

16 As all claims are barred, The Regents and Dr. Block's motion to dismiss
17 should be granted and Plaintiffs' complaint dismissed in its entirety without leave
18 to amend.

19
20 Dated: January 24, 2011

KEKER & VAN NEST LLP

21
22
23 By: /s/ R. James Slaughter
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