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14 UNITED STATES DISTRICT COURT
 15 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

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

20 Plaintiffs,

21 v.

22 THE REGENTS OF THE
 UNIVERSITY OF CALIFORNIA, a
 California corporation; MARK G.
 23 YUDOF, an individual; DR. GENE
 BLOCK, CHANCELLOR OF THE
 UNIVERSITY OF CALIFORNIA,
 24 LOS ANGELES, an individual; DR.
 SHARON FARB, an individual;
 25 LARRY LOEHER, an individual;
 PATRICIA O'DONNELL, an
 26 individual; and John Does 1-50,

27 Defendants.

Case No. 10-cv-09378 CBM (MANx)

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

Date: May 2, 2011
 Time: 11:00 a.m.
 Dept: Courtroom 2
 Judge: Hon. Consuelo B. Marshall

Date Comp. Filed: December 7, 2010

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs filed their initial complaint on December 7, 2010, and alleged six
4 causes of action. *See* Doc. 1. Plaintiffs seek to impose liability for the streaming
5 of lawfully purchased video content in The University of California, Los Angeles’s
6 (“UCLA”) instructional development media lab and in its physical and virtual
7 classrooms. Plaintiffs brought this suit even though such use is directly related to
8 the pedagogical purposes of specific classes, is at the direction of the instructor of
9 record, is restricted to only those students enrolled in the specific class for which
10 the video was assigned, and is accessible only during the term of the class.

11 Plaintiffs’ initial complaint was fatally flawed for a number of independent
12 reasons. Among other problems, the original complaint asserted claims barred by
13 the Eleventh Amendment to the U.S. Constitution, failed to specify which plaintiff
14 brought which claims, alleged claims for which neither plaintiff had standing, sued
15 individual defendants who did not participate in any way in the events alleged, and
16 sought to assert rights under state law that are preempted by the Copyright Act.
17 Defendants therefore moved to dismiss the action. *See* Doc. 16.

18 Plaintiffs did not oppose Defendants’ motion, and instead filed an amended
19 complaint on February 14, 2011. *See* Doc. 19. But rather than cure the
20 deficiencies pointed out by Defendants’ motion, Plaintiffs have doubled down.
21 They now allege more claims, sue more individual defendants unconnected to the
22 underlying facts, and assert more preempted state-law causes of action. Rather
23 than drop the claims barred by the Eleventh Amendment, Plaintiffs instead attach
24 hundreds of pages of irrelevant exhibits that Plaintiffs claim reflect Defendants’
25 implied waiver of sovereign immunity, despite the fact that the Supreme Court has
26 rejected similar claims of implied waiver. Further, while Plaintiffs now recognize
27 that there is no such thing as associational standing in copyright infringement suits,
28 rather than drop the claim, Plaintiffs attempt to repackage the same infringement

1 claim as a claim under the Declaratory Judgment Act. These amendments not only
2 fail to save Plaintiffs' claims, they create new problems that require dismissal.

3 Plaintiffs' Amended Complaint alleges nine causes of action against The
4 Regents of the University of California ("The Regents")¹; Mark G. Yudof
5 ("President Yudof"), Dr. Gene Block ("Dr. Block"), Dr. Sharon Farb, Larry
6 Loehner, and Patricia O'Donnell. Yudof is the President of the University of
7 California, and the other individual defendants are all current or former officials at
8 UCLA. The causes of action alleged are breach of contract, anticipatory breach of
9 contract, copyright infringement, declaratory relief, violation of the Digital
10 Millennium Copyright Act's ("DMCA") anti-circumvention provisions, breach of
11 the implied covenant of good faith and fair dealing, unjust enrichment, and tortious
12 interference with contract and prospective business relations.²

13 All claims must be dismissed. First, both The Regents and the individual
14 defendants in their official capacities are protected by the Eleventh Amendment.
15 Moreover, because the Complaint fails to allege a violation of clearly established
16 law, the individual defendants are protected by qualified immunity and cannot be
17 held personally liable for violations of federal law. Similarly, California exempts
18 public employees from personal liability under state law where the conduct

19
20 ¹ As the Amended Complaint's caption reflects, The Regents of the University of
21 California is a California corporation. *See also Armstrong v. Meyers*, 964 F.2d
22 948, 949-50 (9th Cir. 1991) (noting that the Board of Regents is "a corporation
23 created by the California constitution"). Nevertheless, the Complaint elsewhere
24 purports to sue The Regents "in their individual capacities as members of the
25 Board of Regents." Am. Compl. ¶ 1. These individuals have not been served, and
26 the Complaint does not allege that any particular member was involved in any of
27 the events alleged in the Complaint, nor does it name these individuals in the
28 caption. Indeed, it is hard to imagine how some board members—such as newly
elected Governor Jerry Brown—could plausibly have been involved. Accordingly,
the Complaint fails to allege any facts stating a plausible claim for relief as to any
particular member of the Board. This Motion therefore treats The Regents solely
as an official arm of the state. This Motion is filed only on behalf of those
defendants who have been served.

² The Association for Information Media and Equipment ("AIME") is the sole
plaintiff for the declaratory relief claim, and Ambrose Video Publishing, Inc.
("Ambrose"), is the sole plaintiff for the remaining claims.

1 challenged was a matter of discretion. Therefore, every claim against the
2 individual defendants in their individual capacities must also be dismissed.

3 Even if Defendants were not immune from suit, the Association for
4 Information Media and Equipment (“AIME”) lacks standing under Article III to
5 bring its claim for declaratory relief. And even if it had such constitutional
6 standing, its suit for declaratory relief is merely a suit for copyright infringement
7 repackaged in different terms. As Defendants pointed out in their first motion to
8 dismiss, AIME has no statutory standing to sue for infringement.

9 And while Ambrose may have *standing* to sue for copyright infringement, it
10 does not state a claim for copyright infringement. The attachments to its complaint
11 reflect that Defendants have the right to publicly perform the works in question.
12 Ambrose fails to adequately allege infringement of any other protected right, and
13 regardless, any such incidental infringement would be a non-infringing fair use.
14 Thus, Ambrose’s copyright claims fail for this independent reason.

15 The Complaint also fails to allege a plausible claim for violation of the
16 DMCA’s anti-circumvention provisions. Ambrose does not allege any facts
17 demonstrating that Defendants bypassed its access controls. To the contrary, the
18 Complaint alleges that UCLA had a *license* to access the content. Whether or not
19 that content was subsequently copied is irrelevant to a claim that an access control
20 was circumvented. Moreover, while Plaintiffs allege in a conclusory manner that
21 UCLA “trafficked” in forbidden anti-circumvention devices, the facts alleged do
22 not support such a conclusion. The DMCA claims must therefore be dismissed.

23 Additionally, Plaintiffs’ state-law causes of action are preempted by the
24 Copyright Act. These claims seek damages for conduct that is regulated
25 exclusively by the Copyright Act, and state law can neither expand nor diminish
26 those rights. Moreover, Ambrose’s factual allegations are insufficient to support
27 liability under state law. First, under California law, a party cannot be sued for
28 anticipatory breach of contract when the contract in question is unilateral. Second,

1 the individual defendants are all immune from liability pursuant to California
2 Government Code § 820.2. Claims against the individual defendants under state
3 law must be dismissed.

4 For all these reasons, the Amended Complaint must be dismissed. Because
5 Plaintiffs have already had the opportunity to cure the deficiencies of their
6 complaint and have failed to do so, dismissal should be with prejudice.

7 II. FACTUAL ALLEGATIONS

8 While Plaintiffs' complaint is lengthy, their theory of liability is simple:
9 Plaintiffs allege that UCLA has purchased a number of DVDs, and has been
10 improperly "streaming"³ the contents of these DVDs to faculty and students at
11 UCLA without Plaintiffs' permission. *See* Amended Complaint ("Am. Compl.")
12 ¶¶ 3-6, 41-45.⁴

13 Plaintiffs attached to the Amended Complaint a copy of the Ambrose video
14 catalogue, which they contend applies to UCLA's purchases. *Id.*, ex. 8. The
15 catalogue contains the following notice in bold print: "**All purchases by schools
16 and libraries include public performance rights.**" *Id.* (at p. 71 of Doc. 19-2).
17 Similarly, Exhibit 7 indicates that the listed purchase prices for Ambrose DVDs
18 "include public performance rights." *Id.*, ex. 7 at 4. Despite this unambiguous
19 license, the instant complaint alleges that UCLA's streaming infringes Ambrose's
20 exclusive public performance right. *See id.* ¶ 93.

21
22 ³ "Streaming" is defined in the Amended Complaint as a process whereby video
23 content is "distributed in compressed form over the Internet." Am. Compl. ¶ 42.
24 With streaming video, "the user does not have to wait to download an entire
25 program to begin viewing; rather, the compressed data is decompressed and
transmitted from a temporary file to a video display as a continuous 'stream' of
video files." *Id.*

26 ⁴ As they must for purposes of this motion, Defendants assume the truth of all
27 properly pleaded factual allegations in the Amended Complaint. *See Cahill v.*
28 *Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, where an
exhibit attached to a complaint contradicts the assertions in the complaint, "the
exhibit trumps the allegations." *Thompson v. Ill. Dept. of Prof. Regulation*, 300
F.3d 750, 754 (7th Cir. 2002) (quotation marks and citation omitted).

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III. ARGUMENT

A. Defendants Are Immune From Suit.

1. Claims for damages against The Regents and the individual defendants in their official capacities must be dismissed.

“[A]n unconsenting State is immune from suits brought in federal courts.” *Employees of Dep’t of Pub. Health & Welfare v. Mo. Pub. Health Dep’t*, 411 U.S. 279, 280, 93 S. Ct. 1614, 36 L. Ed. 2d 251 (1973). “The Eleventh Amendment bars a suit against state officials when the state is the real, substantial party in interest.” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (quotation marks omitted). “Thus, the general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.” *Id.* For this reason, “[s]tate sovereign immunity extends to government officials that are sued for damages in their official capacity.” *Marketing Info. Masters, Inc. v. Bd. of Trustees of the Cal. State Univ. Sys.*, 552 F. Supp. 2d 1088, 1095 (S.D. Cal. 2008).

Eleventh Amendment immunity applies unless the state consents to be sued or Congress validly overrides the state’s immunity.⁵ *See Green v. Mansour*, 474 U.S. 64, 68, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985). Neither California nor The Regents has consented to be sued, nor has Congress validly overridden California’s immunity. Therefore, immunity applies.

a. A state’s waiver of sovereign immunity must be express and unambiguous, and cannot be implied.

Plaintiffs’ Amended Complaint includes new allegations and voluminous exhibits purporting to reflect The Regents’ waiver of sovereign immunity. *See* Am. Compl. ¶¶ 19-23, exs. 3-7. The “test for determining whether a State has

⁵ The Regents is an “arm of the state,” and therefore entitled to the protections of the Eleventh Amendment. *See Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th 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 waived its immunity from federal-court jurisdiction is a stringent one.”
2 *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241, 105 S. Ct. 3142, 87 L. Ed.
3 2d 171 (1985) (superseded by statute on other grounds). “Generally, we will find a
4 waiver either if the State voluntarily invokes our jurisdiction, or else if the State
5 makes a *clear declaration* that it intends to submit itself to our jurisdiction.”
6 *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S.
7 666, 675-76, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999) (quotation marks omitted;
8 emphasis added).

9 The Supreme Court has repeatedly declined to find such a “clear
10 declaration” absent unambiguous, unqualified, and explicit language. For
11 example, the Supreme Court has rejected a finding of waiver even where a state
12 has specifically authorized suits against it “in any court of competent jurisdiction.”
13 *See Kennecott Copper Corp. v. State Tax Comm’n*, 327 U.S. 573, 577-79, 66 S. Ct.
14 745, 90 L. Ed. 2d 862 (1946). Because the waiver did not specifically waive
15 immunity in *federal* court, it was ineffective. *Id.* at 580. Similarly, a state does not
16 consent to suit in federal court merely by stating its intention to “sue and be sued.”
17 *Fla. Dept. of Health & Rehab. Servs. v. Fla. Nursing Home Ass’n*, 450 U.S. 147,
18 149, 101 S. Ct. 1032, 67 L. Ed. 2d 132 (1981) (per curiam). This is so even where
19 the state entity “agreed explicitly to obey federal law” *Id.* at 150. More
20 recently, the Supreme Court clarified that state sovereign immunity cannot be
21 impliedly waived. *See College Sav. Bank*, 527 U.S. at 682 (noting that a waiver of
22 *federal* sovereign immunity must in all circumstances be express, and holding that
23 there is “no reason why the rule should be different with respect to state sovereign
24 immunity”).

25 Plaintiffs allege that the exhibits attached to the complaint reflect “an
26 express waiver of any claim to sovereign immunity with respect to Plaintiffs’
27 claims herein.” *Id.* ¶ 22. This is absurd. Neither the allegations in the complaint
28 nor the documents attached thereto mention federal court, let alone waive

1 sovereign immunity. Plaintiffs point to the University of California’s commitment
2 to “uphold[ing] copyright law,” Am. Compl. ¶ 19, and various provisions of the
3 University’s Electronic Communications Policy that detail that commitment. But
4 the Supreme Court has already found that a promise to obey federal law does not
5 constitute a waiver of Eleventh Amendment immunity. *See Fla. Dept. of Health,*
6 *450 U.S. at 150.* Indeed, the Supreme Court found that such a promise, even when
7 coupled with the express consent to “sue and be sued,” did not waive immunity.
8 *Id.* at 149. Therefore, it cannot be that a bare commitment to uphold federal law,
9 without any reference to consent to be sued, amounts to such a waiver.

10 Plaintiffs also point to terms of the alleged license agreements and suggest
11 that these licenses “expressly waived any claim to sovereign immunity or qualified
12 immunity.” Am. Compl. ¶ 23. Nothing in the licenses suggests any waiver,
13 implicit or explicit. Both licenses, as alleged in the Amended Complaint, provide
14 that “[n]othing herein shall derogate from any rights of Ambrose . . . under the
15 United States Copyright Law.” That is not an express waiver of anything. The
16 Amended Complaint fails to explain how this could constitute an express waiver of
17 sovereign immunity. The language merely suggests that no other contractual term
18 in the agreement undermines Ambrose’s rights under Copyright Law. This has
19 nothing at all to do with a state’s consent to be sued in federal court.

20 Under *College Savings Bank, Florida Department of Health, Atascadero,*
21 *and Kennecott,* the Amended Complaint fails to allege facts indicating that
22 California has waived its sovereign immunity.

23 **b. Congress’s attempt to abrogate state sovereign immunity**
24 **for claims of copyright infringement is invalid.**

25 If a state has not waived its immunity, it is subject to suit only if Congress
26 has validly abrogated its immunity. In order to determine whether Congress has
27 done so, a court must look to two factors: “(1) whether Congress expressed a clear
28 intent to override the state’s immunity and (2) whether Congress acted pursuant to

1 a constitutional grant of authority.” *Marketing Info.*, 552 F. Supp. 2d at 1092.

2 Congress has not attempted to abrogate California’s immunity as to the state
3 law claims. Moreover, as several courts have found, Congress’s attempt to
4 abrogate immunity as to claims brought under the Copyright Act, *see* 17 U.S.C.
5 § 511, is invalid. *See Chavez v. Arte Publico Press*, 204 F.3d 601, 604 (5th Cir.
6 2000); *Nat’l Assoc. of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*,
7 No. 08-13417, 2011 WL 649951, at *12-19 (11th Cir. Feb. 24, 2011); *Marketing*
8 *Info.*, 552 F. Supp. 2d at 1095.

9 Congress has no authority to abrogate sovereign immunity pursuant to its
10 Article I powers. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73, 116 S.
11 Ct. 1114, 134 L. Ed. 2d 252 (1996). Section 511, then, is constitutional only if
12 enacted pursuant to Congress’s enforcement powers under section 5 of the
13 Fourteenth Amendment. *See id.* at 59. Congress’s enforcement powers under the
14 Fourteenth Amendment, however, are limited to remedial measures. *City of*
15 *Boerne v. Flores*, 521 U.S. 507, 515-17, 117 S. Ct. 2157, 138 L. Ed. 2d 624
16 (1997). The Supreme Court has held that two analogous attempts to abrogate the
17 states’ immunity—for claims of patent and trademark infringement—were void as
18 outside the scope of Congress’s enforcement powers. *See Fla. Prepaid*
19 *Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 119 S. Ct.
20 2199, 144 L. Ed. 2d 575 (1999) (holding invalid Congress’s attempt to abrogate
21 Eleventh Amendment immunity for patent infringement); *College Sav. Bank*, 527
22 U.S. 666 (same as to trademark infringement). For example, Congress’s attempt to
23 abrogate the Eleventh Amendment for patent claims was invalid because it did not
24 “respond to a history of ‘widespread and persisting deprivation of constitutional
25 rights’ of the sort Congress has faced in enacting proper prophylactic § 5
26 legislation.” *Fla. Prepaid*, 527 U.S. at 645 (quoting *City of Boerne*, 521 U.S. at
27 526).

28 In contrast to the legislative history for the Patent Remedy Act, which

1 demonstrated Congress’s intent to rely on its Enforcement Clause powers,
2 Congress did not even attempt to invoke its Enforcement Clause powers in
3 enacting § 511. *See Chavez v. Arte Publico Press*, 204 F.3d 601, 604 (5th Cir.
4 2000). Moreover, far from suggesting a widespread practice of copyright
5 infringement by the states, the legislative history for § 511 suggests that copyright
6 infringement by the states is a relatively infrequent problem. *See id.* at 605-06.
7 Not surprisingly, then, every court to confront the issue has concluded that § 511
8 did not validly abrogate the Eleventh Amendment. *See id.* at 607; *Nat’l Assoc. of*
9 *Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 08-13417, 2011
10 WL 649951, at *12-19 (11th Cir. Feb. 24, 2011); *Marketing Info.*, 552 F. Supp. 2d
11 at 1095.

12 Therefore, the claims against The Regents and against the individual
13 defendants in their official capacities are impermissible suits against the State of
14 California.

15 **2. Claims for injunctive relief as to President Yudof and Dr. Block**
16 **must be dismissed because the Complaint fails to allege any facts**
as to their involvement in the events alleged.

17 The only exception to Eleventh Amendment immunity was first recognized
18 by *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Under *Ex*
19 *parte Young* and its progeny, the Eleventh Amendment does not bar a suit against a
20 state official that seeks only prospective injunctive relief for that official’s
21 violation of federal law.⁶ *See Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39
22 L. Ed. 2d 662 (1974). However, a plaintiff cannot maintain a suit under *Ex parte*
23 *Young* simply by naming any official tangentially involved in an alleged violation
24 of federal law. The named official must be more than simply a supervisory

25 _____
26 ⁶ The Supreme Court has held that *Ex parte Young* applies only to violations of
27 federal law, not state law. *See Pennhurst*, 465 U.S. at 106 (“We conclude that
28 *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 official. *See Pennington Seed, Inc. v. Produce Exchange No. 299*, 457 F.3d 1334,
2 1342 (Fed. Cir. 2006).

3 Plaintiffs’ requests for injunctive relief under the Copyright Act against
4 President Yudof and Dr. Block cannot be justified under *Ex parte Young*.⁷ “In
5 making an officer of the state a party defendant in a suit to enjoin the enforcement
6 of an act alleged to be unconstitutional, it is plain that such officer must have some
7 connection with the enforcement of the act, or else it is merely making him a party
8 as a representative of the state, and thereby attempting to make the state a party.”
9 *Ex parte Young*, 209 U.S. at 157. “When a violation of federal law is alleged . . .
10 the state official whose actions violate that law is the rightful party to the suit and
11 prospective injunctive relief can only be had against him.” *Pennington Seed*, 457
12 F.3d at 1342.

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

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

26
27 ⁷ To the extent the Amended Complaint properly names other officials subject to
28 an *Ex parte Young* claim, the claims fail for the substantive reasons discussed
below. *See infra* Parts III.C-III.E.

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

2 Here, the Complaint does not allege that President Yudof or Dr. Block had
3 anything to do with the challenged streaming. They did not select which videos to
4 stream, determine the process by which they would be streamed, stream the videos,
5 or do anything to set up that streaming. Merely alleging that they are in some way
6 “in charge” is not sufficient to invoke *Ex parte Young*.⁸ See *Los Angeles Cnty. Bar*
7 *Ass’n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992) (“This connection [between
8 defendant and act] must be fairly direct; a generalized duty to enforce state law or
9 general supervisory power over the persons responsible for enforcing the
10 challenged provision will not subject an official to suit.”).

11 Because President Yudof and Dr. Block merely are alleged to have “general
12 supervisory power over the persons responsible for enforcing the challenged
13 provision,” Plaintiffs have failed to allege that they are proper parties under *Ex*
14 *parte Young*.

15 **B. Defendants Are Entitled to Qualified Immunity as to Copyright Claims**
16 **Asserted Against Them in Their Individual Capacities.**

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

26 ⁸ For the same reason, the claims asserted against President Yudof and Dr. Block
27 in their individual capacities must be dismissed. Because the Amended Complaint
28 fails to allege any facts as to their participation, it fails to allege any cause of
action.

1 individual defendants are all entitled to qualified immunity, the claims against
2 them in their individual capacities must also be dismissed.

3 Qualified immunity can only be overcome if a reasonable official would
4 have known that the alleged conduct violated a clearly established right. *See*
5 *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001),
6 receded from on other grounds by *Pearson*, 129 S. Ct. 808. To meet this burden,
7 “clearly established” law must give a public official “fair notice that her conduct
8 was unlawful.” *Brosseau v. Hagan*, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed.
9 2d 583 (2004). This standard “gives ample room for mistaken judgments by
10 protecting all but the plainly incompetent or those who knowingly violate the law.”
11 *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991)
12 (quotation marks omitted).

13 On the facts alleged, a “reasonable official” would not have believed the
14 alleged conduct to be actionable infringement. Indeed, as the exhibits to Plaintiffs’
15 complaint make plain, a reasonable official had good cause to believe the alleged
16 conduct to be authorized. Plaintiffs attach as Exhibit 8 to the Amended Complaint
17 Ambrose’s DVD Catalogue, which contains the following language in bold-faced
18 type: “**All purchases by schools and libraries include public performance**
19 **rights.**” Am. Compl., ex. 8 (at p. 71 of Doc. 19-2). Another exhibit indicates that
20 the prices of the Ambrose DVDs “include public performance rights.” *Id.*, ex. 7, at
21 4. These are the very same rights at the heart of Ambrose’s claim for infringement.
22 *See* Am. Compl. ¶¶ 90-98. Given Ambrose’s own marketing material, a
23 reasonable official had good cause to believe public performances of the Ambrose
24 DVDs were explicitly authorized.

25 Even without this explicit right to publicly perform, Defendants’ conduct
26 qualifies as a fair use. Therefore, Defendants did not violate any right at all, let
27 alone a “clearly established” one. Section 107 of the Copyright Act provides that a
28 “fair use” of copyrighted materials is not infringement. It dictates that fair use,

1 “including such use by reproduction in copies . . . *for purposes such as . . .*
2 *teaching* (including multiple copies for classroom use) . . . is not an infringement
3 of copyright.” 17 U.S.C. § 107 (emphasis added).

4 While § 107 codifies a special solicitude for uses in the educational context,
5 it does not list with precision which uses are, and which are not, “fair.” Instead,
6 § 107 requires the balancing of four factors:

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

9 (2) the nature of the copyrighted work;

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

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

14 17 U.S.C. § 107 (emphasis added).

15 Courts are required to balance these factors and apply an equitable rule of
16 reason to determine fair use. “[S]ince the doctrine is an equitable rule of reason,
17 no generally applicable definition is possible, and each case raising the question
18 must be decided on its own facts.” H.R. Rep. No. 94-1476, at 65-66 (1976); *see*
19 *also Harper & Row v. Nation Enters.*, 471 U.S. 539, 560, 105 S. Ct. 2218, 85 L.
20 Ed. 2d 588 (1985) (noting that fair use is “an equitable rule of reason”).

21 Application of the fair use factors and consideration of the equities supports
22 a finding of fair use. As to the first factor, it is undeniable that UCLA’s use had a
23 nonprofit educational purpose. As the Complaint itself alleges, the streams were
24 “linked to course web pages and remotely accessed by students and faculty.” Am.
25 Compl. ¶ 6. The Ninth Circuit has held that the second factor, the nature of the
26 copyrighted work, “typically has not been terribly significant in the overall fair use
27 balancing.” *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d
28 1394, 1402 (9th Cir. 1997).

1 While the third factor typically weighs against a party that copies an entire
2 work, the Supreme Court has concluded in the context of television broadcasts that
3 the recording of a motion picture so that it might be performed again at a different
4 time—so-called “time shifting”—constitutes fair use. *See Sony Corp. of Am. v.*
5 *Universal City Studios, Inc.*, 464 U.S. 417, 448, 104 S. Ct. 774, 78 L. Ed. 2d 574
6 (1984) (in the television context, “timeshifting merely enables a viewer to see such
7 a work which he had been invited to witness in its entirety free of charge, [so] the
8 fact that the entire work is reproduced does not have its ordinary effect of
9 militating against a finding of fair use.” (citation omitted)). Similarly here,
10 UCLA’s streaming simply allows students who are authorized to view the DVDs
11 in class to “time shift” when and how they view the videos.

12 Finally, as to the last factor, the alleged use also had no effect on “the
13 potential market for or value of” the Ambrose DVDs. UCLA lawfully acquired the
14 DVDs in question, which gave instructors the right to perform the contents of those
15 DVDs in the classroom. Had streaming never been offered by UCLA, there is no
16 reason to conclude that Plaintiffs ever would have sold any more DVDs to UCLA,
17 or that UCLA would have purchased Ambrose’s own streaming service.
18 Additionally, the Complaint does not—and indeed cannot—allege that Plaintiffs
19 offered video streaming of the relevant content when UCLA acquired the Ambrose
20 DVDs.

21 Plaintiffs’ Complaint contains a legal argument that UCLA’s streaming is
22 not a fair use. Am. Compl. ¶¶ 72-76. No published opinion, however, adopts their
23 interpretation of § 107 as applied to video streaming in the educational context.
24 More importantly, even if Plaintiffs were correct on the law, the question of
25 qualified immunity turns on a different and more forgiving analysis. The
26 individual defendants are protected so long as a reasonable official would not have
27 known, at the time of the events alleged, that such streaming was clearly
28 established infringement.

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

9 Therefore, the infringement claims brought against the individual defendants
10 in their individual capacities must be dismissed.

11 **C. AIME Has No Standing to Sue Under the Declaratory Judgment Act.**

12 Article III of the U.S. Constitution imposes minimum requirements for a
13 party to have standing to bring a lawsuit. AIME erroneously asserts that it has
14 standing both because it has “associational” standing on behalf of its members and
15 because it has standing in its own right. Am. Comp. ¶¶ 15-16. Both theories fail.

16 **1. AIME cannot establish associational standing.**

17 In *Hunt v. Washington State Apple Advertising Commission*, the Supreme
18 Court identified three requirements for an association to bring suit on behalf of its
19 members:

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

25 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977).

26 AIME fails the first and third requirements. Although the Complaint alleges
27 that AIME’s “members . . . have standing to sue on their own for infringement of
28 copyrights,” Am. Compl. ¶ 15, there are no factual allegations to support this legal

1 conclusion. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951, 173 L. Ed. 2d 868 (2009)
2 (conclusory allegations are “not entitled to be assumed true”). Indeed, only three
3 paragraphs of the Amended Complaint are devoted to AIME’s declaratory relief
4 claim, and those paragraphs consist of nothing more than conclusory assertions.
5 *See* Am. Compl. ¶¶ 99-101.

6 To establish that its members have standing to sue for infringement requires
7 allegations that AIME’s individual members own the necessary copyrights to the
8 works used by UCLA, and proof that those copyrights have been registered. This
9 necessarily requires participation of the individual AIME members, which means
10 that AIME cannot satisfy the third requirement for associational standing. The
11 declaratory judgment count requires an individualized inquiry into what copyrights
12 each AIME member owns that UCLA allegedly infringed, whether those
13 copyrights are valid, and the nature of any rights conveyed by those members to
14 UCLA when UCLA acquired copies of their works.

15 This analysis is not altered by the fact that AIME proceeds under the
16 Declaratory Judgment Act rather than the Copyright Act itself. Associational
17 standing is prohibited under the Copyright Act because “only copyright owners
18 and exclusive licensees of copyright may enforce a copyright or a license.”
19 *Sybersound Records, Inc. v. UAC Corp.*, 517 F.3d 1137, 1144 (9th Cir. 2008); *see*
20 *also* 6 Patry on Copyright § 21:28 (2010) (“[A]ssociational standing is not
21 permitted under the Copyright Act, which expressly limits standing to legal or
22 beneficial owners of exclusive rights.”). AIME seeks to plead its way around
23 Congress’s explicit limitation of standing by suing instead for declaratory relief.
24 Such artful pleading, however, should not be permitted to override Congress’s
25 express limitation of standing.

26 Moreover, AIME seeks not just a declaration of rights, but a permanent
27 injunction. The Declaratory Judgment Act does not provide independent
28 substantive authority for injunctive relief, and a plaintiff seeking injunctive relief

1 must satisfy the standing requirements of the Copyright Act. *See B. Braun*
2 *Medical, Inc. v. Abbott Labs.*, 124 F. 3d 1419, 1428 (Fed. Cir. 1997) (Declaratory
3 Judgment Act “was not designed . . . to allow a declaratory judgment plaintiff to
4 avoid the requirements imposed by the substantive law as a predicate to obtaining
5 . . . relief”). Because AIME lacks standing to sue under the Copyright Act, its
6 claim for injunctive relief under the Declaratory Judgment Act must be dismissed.

7 Finally, a district court has “discretion in deciding whether to entertain an
8 action under [the] Declaratory Judgment Act.” *Kerby v. Parsons Corp.*, No. C06-
9 687, 2007 WL 2570248, at *3 (W.D. Wash. Aug. 31, 2007). The Ninth Circuit has
10 found a number of factors to be relevant to the exercise of this discretion, including
11 concerns of judicial administration, fairness and convenience to the litigants, and
12 the “availability and relative convenience of other remedies.” *Principal Life Ins.*
13 *Co. v. Robinson*, 394 F.3d 665, 672 (9th Cir. 2005). All these factors counsel in
14 favor of rejecting AIME’s claim.

15 First, the claim is nothing more than an attempted end run around
16 Congress’s limitation of standing under the Copyright Act, and would permit any
17 injured party to bring a *de facto* infringement action under the guise of declaratory
18 relief. This would undermine Congress’s intention for the regulation of copyrights.
19 *See* 17 U.S.C. § 501(b) (granting standing only to “[t]he legal or beneficial owner
20 of an exclusive right under a copyright”). Second, allowing such a camouflaged
21 infringement claim to proceed would impose needless procedural entanglements on
22 the Court and on Defendants, as any such suit would require extensive
23 participation of the non-party copyright owners themselves. Finally, an
24 independent and adequate remedy is available: if the copyright owners wish to file
25 suit, they can do so themselves. These factors all militate against this Court
26 exercising discretion to permit a declaratory judgment claim.

27 **2. AIME has not suffered an injury in fact.**

28 AIME also alleges that it “has a personal stake in the outcome of this

1 litigation, suffering injury in fact.” Am. Compl. ¶ 16. The Amended Complaint
2 identifies only one injury in fact: AIME claims to have “suffered from the
3 diversion of its resources to deal with the Defendants’ infringements of
4 [Ambrose’s] copyrighted works,” and “has been forced to spend much of its
5 limited resources directly addressing the problem created by the Defendants for the
6 educational video publishers.” *Id.* In other words, AIME claims that the costs of
7 this litigation constitute an injury in fact that grants it standing to sue.

8 It is well established, however, that expenses of litigation are not injuries in
9 fact for standing purposes. *See Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27
10 (D.C. Cir. 1990) (“An organization cannot, of course, manufacture the injury
11 necessary to maintain a suit from its expenditure of resources on that very suit.
12 Were the rule otherwise, any litigant could create injury in fact by bringing a case,
13 and Article III would present no real limitation.”); *see also Walker v. City of*
14 *Lakewood*, 272 F.3d 1114, 1124 n.3 (9th Cir. 2001) (agreeing with *Spann*). AIME
15 simply has no standing to sue on its own behalf and its suit must be dismissed.

16 **D. Ambrose Cannot State a Claim for Copyright Infringement.**

17 Ambrose contends that UCLA’s practice of streaming the Ambrose DVDs
18 constitutes copyright infringement because Ambrose owns the exclusive right to
19 publicly perform these DVDs. Am. Compl. ¶¶ 57, 94. But Ambrose granted to
20 Defendants the *explicit right* to publicly perform the DVDs. *See* Am. Compl., ex.
21 8 (“All purchases by schools and libraries include public performance rights.”).
22 “The existence of a license creates an affirmative defense to a claim of copyright
23 infringement.” *Worldwide Church of God v. Philadelphia Church of God, Inc.*,
24 227 F.3d 1110, 1114 (9th Cir. 2000). Therefore, Defendants cannot infringe the
25 public performance right.

26 Ambrose’s claims of infringement of other exclusive rights are similarly
27 unavailing. First, Ambrose alleges that UCLA’s streaming infringes its public
28 display right under § 106. But the Copyright Act defines “display” of a motion

1 picture narrowly, as the “show[ing] of individual images *nonsequentially*.” 17
2 U.S.C. § 101 (emphasis added). The Amended Complaint does not allege any
3 nonsequential display. Therefore, no claim for infringement of display rights can
4 stand. Next, Ambrose alleges that UCLA has infringed the right to distribute
5 copies of the work. The distribution right for a motion picture concerns only the
6 distribution of “copies” of the work. 17 U.S.C. § 106(3). The Copyright Act’s
7 definition of “copies” is limited to “material objects” in which a copy is “fixed.”
8 17 U.S.C. § 101. Section 101 further clarifies that for a copy to be “fixed,” it must
9 be “sufficiently permanent or stable to permit it to be perceived, reproduced, or
10 otherwise communicated for a period of *more than a transitory duration*.” *Id.*
11 (emphasis added). Nowhere in the Complaint is there any allegation that UCLA
12 has distributed infringing “material objects” to its students. While the videos may
13 be streamed using material objects, the only thing that is distributed is a secured
14 link that provides access to digital bits that can only be viewed for a transitory
15 period, and thus cannot infringe the distribution right. *Cf. Agee v. Paramount*
16 *Comm’n*, 59 F.3d 317, 325 (2d Cir. 1995) (“[D]istribution is generally thought to
17 require transmission of a ‘material object’ in which the sound recording is fixed
18 . . .”). No claim for infringement of distribution rights can survive.

19 Finally, as to the allegation that unauthorized copies were made in the
20 streaming process, any such copy was a fair use. Because UCLA had the right to
21 publicly perform the Ambrose DVDs, Ninth Circuit law indicates that incidental
22 exercises of other exclusive rights are non-infringing fair uses. *See Perfect 10, Inc.*
23 *v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (finding the creation of short-
24 term copy to be a fair use); *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir.
25 1993) (finding copying to be fair use because it furthered protected conduct).
26 Similarly here, given Defendants’ right to perform the Ambrose DVDs, incidental
27 copies made to permit more efficient use of such performance rights is not
28 infringement.

1 In sum, because UCLA had authority to publicly perform the Ambrose
2 DVDs, it and its employees cannot be liable for infringement. Therefore, even if
3 Defendants were not immune to suit as discussed above, Ambrose has failed to
4 allege a cognizable claim for infringement.

5 **E. Ambrose Fails to State a Cause of Action Under the DMCA.**

6 The fifth cause of action alleges a violation of the anti-circumvention
7 provisions of 17 U.S.C. § 1201. Again, Plaintiffs have failed to cure the fatal
8 deficiencies identified in Defendants’ first motion to dismiss.

9 First, Ambrose contends that Defendants have violated § 1201(a)(1)(A) by
10 “circumvent[ing] . . . technological measures that effectively control access to” its
11 DVDs. Am. Compl. ¶ 103. But the Amended Complaint is devoid of factual
12 allegations that such a measure was in fact circumvented. Indeed, according to the
13 Complaint itself, UCLA *had a right* to access the DVDs. Ambrose’s real
14 contention is that UCLA, after accessing the DVDs, unlawfully copied and
15 streamed their contents. But regardless of whether there was something wrongful
16 about what was done *after* the DVDs were lawfully accessed, such conduct does
17 not concern the unauthorized circumvention of a measure controlling “access.”
18 *See Nimmer on Copyright § 12A.03[D][3]* (“[A] person who engages in prohibited
19 *usage* of a copyrighted work to which he has lawful access does not fall afoul of
20 any provision of Section 1201.”).

21 Second, the Complaint similarly fails to allege facts supporting the inference
22 that Defendants have trafficked in devices that circumvent access controls in
23 violation of § 1201(a)(2), or devices that circumvent copy controls in violation of
24 § 1201(b). Am. Compl. ¶¶ 104-05. The only factual basis for Ambrose’s
25 trafficking claim is that UCLA allegedly “worked in close coordination” with the
26 company that makes Video Furnace, the product UCLA uses to prepare digital
27 copies of DVDs that can then be streamed digitally. *Id.* ¶ 60. According to
28 Ambrose, this “coordination” and UCLA’s “willingness to lend [its] name and

1 reputation to the marketing effort of” Video Furnace amounts to “trafficking” in
2 violation of § 1201(a)(2) and § 1201(b).⁹

3 Ambrose alleges no facts regarding the substance of UCLA’s supposed
4 assistance with the development of Video Furnace, and its leap from the alleged
5 fact of involvement in development to the legal conclusion of trafficking in the
6 finished device is unsupported. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
7 (2007) (“a formulaic recitation of the elements of a cause of action will not do”).
8 The statutory language provides that, in order to be liable for trafficking, a person
9 must “manufacture, import, offer to the public, provide, or otherwise traffic in any
10 technology.” 17 U.S.C. § 1201(a)(2). The statute does not impose liability for the
11 use of a name in marketing, and no reasonable definition of “otherwise traffic” can
12 be stretched to encompass Defendants’ conduct.

13 Therefore, even if Defendants were not immune as discussed above,
14 Ambrose’s DMCA claim fails to state a claim and must therefore be dismissed.

15 **F. Ambrose’s Claims Under California State Law are Preempted by the**
16 **Copyright Act or are Otherwise Barred.**¹⁰

17 “The Copyright Act specifically preempts ‘all legal or equitable rights that
18 are equivalent to any of the exclusive rights within the general scope of
19 copyright.’” *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1089 (9th Cir.
20 2005) (quoting 17 U.S.C. § 301(a)). A state-law claim is preempted “if: (1) the
21 work involved falls within the general subject matter of the Copyright Act as
22 specified by sections 102 and 103; and (2) the rights that the plaintiff asserts under
23 state law are equivalent to those protected by the Act in section 106.” *Zito v.*
24 *Steeplechase Films, Inc.*, 267 F. Supp. 2d 1022, 1027 (N.D. Cal. 2003). In

25 ⁹ Plaintiffs have been informed that UCLA did not, in fact, participate in any way
26 in the development of Video Furnace.

27 ¹⁰ Even if the claims were not preempted, there can be no individual liability under
28 state law for the conduct alleged. *See* Cal. Gov’t Code § 820.2 (“[A] public
employee is not liable for an injury resulting from his act . . . where the act . . . was
the result of the exercise of the discretion vested in him, whether or not such
discretion be abused.”).

1 addition to the various grounds for dismissal discussed above, Ambrose’s state-law
2 claims must be dismissed because they are preempted by the Copyright Act.

3 **1. Ambrose’s unjust enrichment and tortious interference claims are**
4 **preempted.**

5 “[C]laims for unjust enrichment are . . . generally preempted” by the
6 Copyright Act. *Zito v. Steeplechase Films, Inc.*, 267 F. Supp. 2d 1022, 1027 (N.D.
7 Cal. 2003). In *Zito*, the court explained that “where the unjust enrichment arises
8 from defendants’ unauthorized use of a copyrighted work,” there is no “extra
9 element” to bring the claim out from beneath the preemptive scope of the
10 Copyright Act. *Id.* Ambrose’s claim for unjust enrichment relies solely on
11 Defendants’ allegedly unauthorized use of the Ambrose DVDs. *See* Am. Compl.
12 ¶¶ 113-15. Therefore, it is preempted.

13 Similarly, claims for tortious interference are preempted where they
14 “involve[] the essential elements of [a] Plaintiff’s Copyright Act claim.” *Oldcastle*
15 *Precast, Inc. v. Granite Precasting & Concrete, Inc.*, No. C10-322, 2010 WL
16 2217910, at *3 (W.D. Wash. June 1, 2010). Even though tortious interference
17 claims require proof of elements not necessary to a claim for copyright
18 infringement, such extra elements “do[] not make the rights qualitatively
19 different,” as required to avoid preemption. *Id.*; *see also Falcon Enters., Inc. v.*
20 *Nobel Developments, Inc.*, CV06-1404, 2007 WL 737347, at *3 (W.D. Wash. Mar.
21 5, 2007) (holding that where “the act of unauthorized publication . . . causes the
22 violation[,] . . . tortious interference claims are preempted.” (internal quotation
23 marks and citation omitted)).

24 Ambrose alleges that Defendants’ streaming of the works in question
25 constitutes both tortious interference with contract and tortious interference with
26 prospective business advantage. Both claims, however, “involve[] the essential
27 elements of [Ambrose’s] Copyright Act claim.” *Oldcastle*, 2010 WL 2217910, at
28 *3. For example, at paragraph 124, Ambrose alleges that by “streaming [Ambrose]

1 Shakespeare DVDs to faculty and students, . . . UCLA is depriving Plaintiffs of’
2 potential customers. Am. Compl. ¶ 124. The same conduct underlies Ambrose’s
3 claim for copyright infringement. *See id.* ¶ 94 (“Defendants’ copying and
4 streaming . . . constitute violations of Plaintiff [Ambrose’s] exclusive rights” under
5 the Copyright Act). Ambrose’s tortious interference claims are therefore
6 preempted.

7 **2. Ambrose’s breach of contract claims are preempted because they**
8 **seek recovery based on the exclusive rights protected by the**
9 **Copyright Act.¹¹**

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

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

25 ¹¹ Ambrose alleges that a contract limits UCLA’s rights, but discovery will show
26 that UCLA purchased the DVDs without restriction. And as explained below,
27 even if such a contract did exist, its enforcement is preempted.

28 ¹² Ambrose’s claim for anticipatory breach is barred for an independent reason.
Because Ambrose has discharged its duties under the contract, the contract is now
“unilateral.” Under California law, a party may not bring an anticipatory breach
claim where the contract at issue has become unilateral. *See Minor v. Minor*, 184
Cal. App. 2d 118, 123 (1960).

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

2 Although the Ninth Circuit has not squarely considered the issue, it has
3 endorsed the distinction between contracts that control “use” of a copyrighted
4 work, which are not preempted, and contracts that control rights equivalent to the
5 exclusive rights under copyright law, which are preempted. *See Altera Corp.*, 424
6 F.3d at 1089 (distinguishing between a contract that controls the use of a work and
7 a contract that controls reproduction); *cf. Montz v. Pilgrim Films & Tel., Inc.*, 606
8 F.3d 1153, 1158 (9th Cir. 2010) (finding a claim for breach of implied contract to
9 be “part and parcel of a copyright claim,” and therefore preempted by the
10 Copyright Act). Other circuits have endorsed the same distinction. *See, e.g., Nat’l*
11 *Car Rental*, 991 F.2d at 432 (8th Circuit).

12 Ambrose’s contract claim seeks to control rights equivalent to those under
13 copyright law.¹³ Its entire claim is premised on allegations that UCLA copied,
14 performed, and distributed the Ambrose DVDs. The rights to copy, perform, and
15 distribute copyrighted works are core rights under the Copyright Act, and therefore
16 cannot be remedied via contract law. *See, e.g., Jacobsen v. Katzer*, 609 F. Supp.
17 2d 925, 933 (N.D. Cal. 2009). Plaintiffs’ claims for breach of contract and
18 anticipatory breach of contract must therefore be dismissed.

19 IV. CONCLUSION

20 Plaintiffs have failed to allege any viable cause of action. Plaintiffs
21 improperly ask this Court to issue a judgment against an agency of a sovereign
22 state in contravention of the Eleventh Amendment. The Amended Complaint also
23 improperly seeks civil damages from government officials despite their entitlement
24 to qualified immunity and protection under California Government Code § 820.2.

25 ¹³ Because Plaintiffs’ claim for breach of the implied covenant of good faith and
26 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.
Careau & Co. v. Sec. Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1394-95
(1990).

1 Not only are Defendants immune, but AIME has no standing to bring its
2 claim. In addition, Ambrose purports to bring a claim for infringement even
3 though its own complaint reflects that UCLA has a license to publicly perform the
4 works in question. Perhaps recognizing the futility of this claim, Ambrose also
5 seeks to enforce those same rights by means of state law. Such an effort must fail,
6 as those state law claims are preempted by the Copyright Act. Finally, the
7 Complaint fails to allege facts supporting any cause of action under the DMCA.

8 As all claims are barred, Defendants' motion to dismiss should be granted.
9 And because Plaintiffs have already had the opportunity to amend their complaint,
10 dismissal should be with prejudice.

11 Dated: March 14, 2011

KEKER & VAN NEST LLP

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13
14 By: /s/ R. James Slaughter
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