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13 Attorneys for Defendants

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

Date: February 6, 2012
 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 February 6, 2012, 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 will and hereby do move this Court to dismiss Plaintiffs’ Second Amended 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 November 2, 2011.

Dated: November 23, 2011

KEKER & VAN NEST LLP

By: /s/ R. James Slaughter
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THE REGENTS OF THE
UNIVERSITY OF CALIFORNIA, a
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LOS ANGELES, an individual; DR.
SHARON FARB, an individual;
LARRY LOEHER, an individual;
PATRICIA O’DONNELL, an
individual.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs’ Second Amended Complaint (“SAC”) is longer and more
4 confusing than their First Amended Complaint (“FAC”), but adds nothing of
5 substance, and certainly does not cure the deficiencies the Court identified in its
6 October 3, 2011 Order Granting Defendant’s Motion to Dismiss (“Order”). The
7 Court should dismiss Plaintiffs’ SAC for the same reasons set forth in that Order,
8 this time with prejudice.

9 In its Order, the Court dismissed—with prejudice—all claims against the
10 Regents of the University of California (“Regents”), along with all claims seeking
11 damages from any individual defendants in their official capacity, based on
12 principles of sovereign immunity. *See* Order (Doc. 34) at 4:9-6:3, 13:10-12. The
13 Court dismissed the declaratory relief claim filed by plaintiff Association for
14 Information Media and Equipment (“AIME”) because AIME failed to allege injury
15 in fact as necessary to demonstrate standing. *See id.* at 6:4-7:27, 13:12-13. The
16 Court dismissed all claims for injunctive relief against defendants Mark G. Yudof,
17 the President of the University of California, and Dr. Gene Block, the Chancellor
18 of the University of California, Los Angeles (“UCLA”), because these defendants
19 also are entitled to sovereign immunity. The Court dismissed the claims for
20 copyright infringement and purported violations of the Digital Millennium
21 Copyright Act (“DMCA”) asserted by plaintiff Ambrose Video Publishing, Inc.
22 (“Ambrose” or “AVP”), for failure to state a claim. *See id.* at 8:18-11:17, 13:15-
23 17. And the Court dismissed Ambrose’s state-law claims as preempted by the
24 Copyright Act. *See id.* at 11:18-13:7, 13:17-18.

25 The SAC fails to correct any of the failings the Court identified in its Order.
26 Indeed, Plaintiffs improperly re-allege **even those claims the Court dismissed**
27 **with prejudice**. As for the claims the Court granted Plaintiffs leave to replead,
28 Plaintiffs fail to allege any new facts to support them, proving that these claims

1 also should be dismissed with prejudice. Plaintiffs also add a new claim for
2 deprivation of property without due process, but that claim simply restates an
3 erroneous legal argument that this Court rightly rejected in its Order.

4 Rejecting a similar effort to “repackage” insufficient allegations, the Seventh
5 Circuit aptly observed that “[a]dding more warts to the hog still does not make it a
6 dragon.” *J.D. Marshall Int’l, Inc. v. Redstart, Inc.*, 935 F.2d 815, 821 (7th Cir.
7 1991) (quotation marks omitted). Plaintiffs now have had three opportunities to
8 state a claim, but the result has been the same every time: more warts; same hog.
9 For the reasons the Court already identified in its prior Order, and others discussed
10 below, the Court should dismiss Plaintiffs’ claims with prejudice.

11 II. PLAINTIFFS’ SECOND AMENDED COMPLAINT

12 Putting aside the allegations Plaintiffs already asserted in the FAC, and the
13 Court already rejected in its Order,¹ Plaintiffs’ “new” allegations are clustered in
14 paragraphs 49 to 57 of the SAC, and relate to the properties of the “Video
15 Furnace” software sold by Hai Vision Systems, Inc. (“HVS”). *See* SAC ¶¶ 49-57.
16 In particular, Plaintiffs allege that Video Furnace includes editing capabilities,
17 which, if used, allegedly might infringe the right to create derivative works. *See*
18 *id.* ¶¶ 49-50, 52. ***But Plaintiffs nowhere allege that Defendants actually used any***
19 ***of that functionality to create any derivative works.*** *See id.* Ambrose also asserts
20 a new claim for deprivation of property without due process, but this simply
21 restates an erroneous legal argument that this Court rejected when Ambrose
22 presented it in opposition to Defendants’ previous motion to dismiss. *See* SAC
23 ¶¶ 113-19; *cf.* Doc. 29 at 4:5-7:15; Order at 5:14-6:3. To the extent there is

24 _____
25 ¹ For example, Plaintiffs reiterate that AIME has expended resources on this
26 litigation, but allege no facts to show that AIME suffered any injury in fact for
27 standing purposes. *Compare* SAC ¶¶ 18-20 *with* FAC ¶¶ 15-16; *see also* Order at
28 6:4-7:27. Plaintiffs also allege that “UCLA’s streaming activities exceeded the
scope of the AVP Licenses.” SAC ¶ 55. But they made the same conclusory
allegation in the FAC, and this Court rightly rejected it as insufficient to state a
claim. *See* FAC ¶ 74; Order at 9:9-11.

1 **anything** new in the SAC, it is plainly insufficient to state a claim, as further
2 demonstrated below.

3 III. ARGUMENT

4 **A. Plaintiffs’ repleading of claims that were dismissed with prejudice is 5 improper, and those claims should and will be disregarded.**

6 In its order dismissing the FAC, the Court first dismissed *with prejudice* all
7 claims against the Regents and any claims seeking damages against individual
8 defendants in their official capacity because sovereign immunity bars those claims,
9 Congress did not validly abrogate that immunity, and Defendants did not waive
10 that immunity. Order at 4:9-6:3, 13:10-12. Nevertheless, Plaintiffs have repleaded
11 those claims, ignoring the rule that “once a claim has been dismissed with
12 prejudice, plaintiff cannot reassert the same claim in an amended complaint.”
13 *Connors v. Home Loan Corp.*, CIV 08CV1134-L, 2009 WL 1615989, at *5 (S.D.
14 Cal. June 9, 2009). Because these claims were dismissed *with prejudice* by this
15 Court already, Defendants need not and will not reiterate the reasons for dismissing
16 these claims with prejudice. *See* SAC at 2 n.1.²

17 **B. Plaintiffs have not alleged any new facts to alter this Court’s conclusion 18 that AIME lacks standing.**

19 This Court held that AIME lacks standing, both as an association and on its
20 own. *See* Order at 6:5-7:27. There is nothing in the SAC to change the Court’s
21 conclusion that AIME lacks standing. Thus, the Court should dismiss AIME’s
22 claims again—this time, with prejudice.

23 *First*, the Court held that AIME cannot satisfy the elements required for
24 associational standing—that “(1) its members would have standing to sue on their

25 ² Like the FAC, the SAC purports to sue the Regents “in their individual
26 capacities as members of the Board of Regents.” SAC ¶ 1; *see also* FAC ¶ 1. As
27 before, these individuals have not been served, and Plaintiffs do not allege that any
28 particular member was involved in any of the events alleged in the Complaint, nor
does it name these individuals in the caption. This motion therefore, like its
predecessor, treats the Regents solely as an official arm of the state, and is filed
only on behalf of those defendants who have been served.

1 own, (2) the interests it seeks to protect are germane to the organization’s purpose,
2 and (3) the case does not require the participation of individual members in the
3 lawsuit.” Order at 6:12-16 (citing *Hunt v. Wash. State Apple Adver. Comm’n*, 432
4 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)). In particular, AIME
5 cannot establish the third element “because having the rights over a copyright is
6 essential to establishing a copyright infringement claim,” and the scope of the
7 declaratory relief Plaintiffs seek “would be limited by the rights that members have
8 over the copyrights.” *Id.* at 7:4-9. The SAC does not cure this fatal defect—nor
9 could it, because AIME lacks associational standing “as a matter of law.” *Id.* at
10 7:10.

11 **Second**, the Court held that AIME lacks standing to sue on its own because
12 it has not alleged any injury in fact “as a result of UCLA’s use of the DVDs at
13 issue”—as opposed to purported injuries from this litigation itself, which “do not
14 constitute an injury in fact for purposes of standing.” Order at 7:17-24 (citing
15 *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (Ginsburg, J.)). The
16 Court gave AIME leave to attempt to allege injury in fact, but AIME has failed to
17 do so—instead, the *only* new allegations regarding AIME’s alleged standing
18 merely expand on how it has been “consumed with these legal issues” and has
19 allegedly lost opportunities “as a direct result of this matter.” SAC ¶ 20. As
20 before, however, these purported injuries are “only a byproduct of the suit itself,”
21 and thus not injury in fact for standing purposes. *Diamond v. Charles*, 476 U.S.
22 54, 70-71, 106 S. Ct. 1697, 90 L. Ed. 2d. 48 (1986). “Were the rule otherwise, any
23 litigant could create injury in fact by bringing a case, and Article III would present
24 no real limitation.” *Spann*, 899 F.2d at 27; *see also Walker v. City of Lakewood*,
25 272 F.3d 1114, 1124 (9th Cir. 2001) (“a plaintiff cannot establish standing simply
26 by filing its own lawsuit”).

27 Accordingly, the Court should dismiss AIME’s claims with prejudice.
28

1 **C. The claims against the individual defendants should be dismissed with**
2 **prejudice based on principles of sovereign and qualified immunity.**

3 **1. Plaintiffs have not alleged any new facts to alter this Court’s**
4 **ruling that President Yudof and Dr. Block are entitled to**
5 **sovereign immunity.**

6 In its Order, the Court held that sovereign immunity bars Plaintiffs’ claims
7 for prospective injunctive relief against defendants Yudof and Block because
8 Plaintiffs have not alleged a “causal connection between the officer and the alleged
9 violation of federal law,” as necessary to invoke the narrow exception to immunity
10 established by *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).
11 Order at 8:2-17 (citing *Ex Parte Young*, 209 U.S. at 157, and *Pennington Seed, Inc.*
12 *v. Produce Exchange No. 229*, 457 F.3d 1334, 1342 (Fed. Cir. 2006)). The SAC
13 does not cure this fatal defect. On the contrary, it contains no substantially
14 different allegations with regard to President Yudof, and the few new allegations
15 regarding Dr. Block are plainly insufficient under *Ex Parte Young* and *Pennington*.

16 Plaintiffs allege on information and belief that Dr. Block received a set of
17 principles on the use of streaming from UCLA’s Information Technology Planning
18 Board, and conclude that “Dr. Block in his official and individual capacities
19 contributed to the infringement of the AVP DVDs by authorizing use of HVS’
20 Video Furnace System” SAC ¶¶ 67, 69. Similarly, in *Pennington*, the
21 plaintiffs alleged “that the University and all four of the University Officials ‘are
22 actively growing, marketing, offering for sale, promoting and selling [infringing]
23 product’” and “infringed and continue to infringe” the patent. 457 F.3d at 1338.
24 The court rejected such conclusory pleading because it fails “to sufficiently allege
25 how [the officials] were causally connected to the infringement.” *Id.* at 1342; *see*
26 *also Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1951, 173 L. Ed. 2d 868
27 (2009) (conclusory allegations are “not entitled to be assumed true”).

28 Moreover, Plaintiffs cannot invoke the *Ex parte Young* doctrine based on
allegations that Yudof and Block “supervised intellectual property activity.”

1 *Pennington*, 457 F.3d at 1342; *cf.*, *e.g.*, SAC ¶ 69. “A nexus between the violation
2 of federal law and the individual accused of violating that law requires more than
3 simply a broad general obligation to prevent a violation; it requires an actual
4 violation of federal law **by that individual.**” *Pennington*, 457 F.3d at 1342-43
5 (emphasis added). This requirement follows directly from the *Ex parte Young* case
6 itself, which held that because a state cannot validly instruct its officers to act in an
7 illegal way, an officer who does so is “stripped of his official or representative
8 character and is subjected in his person to the consequences of his individual
9 conduct.” *Ex parte Young*, 209 U.S. at 160. But if there is no such **individual**
10 conduct to enjoin, the plaintiff is “merely making [the official] a party as a
11 representative of the state, and thereby attempting to make the state a party.” *Id.* at
12 157; *see also, e.g., Okpalobi v. Foster*, 244 F.3d 405, 421 (5th Cir. 2001) (“Indeed,
13 if there is no act, or potential act, of the state official to enjoin, an injunction would
14 be utterly meaningless.”).³

15 Plaintiffs have had three chances to allege facts showing “an actual violation
16 of federal law” by President Yudof or Dr. Block as individuals, as opposed to “a
17 broad general obligation to prevent a violation.” *Pennington*, 457 F.3d at 1343.
18 Plaintiffs have failed, yet continue to subject Yudof and Block to this suit based on
19 conclusory allegations, contrary to the “real interests served by the Eleventh
20 Amendment.” *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 270, 117 S.
21 Ct. 2028, 138 L. Ed. 2d 438 (1997). This Court should dismiss the claims against
22 President Yudof and Dr. Block with prejudice.

23 _____
24 ³ The claims asserted against President Yudof and Dr. Block in their
25 individual capacities fail for essentially the same reason: the SAC fails to allege
26 that either of these defendants personally engaged in infringing conduct. *See Mktg.*
27 *Info. Masters, Inc. v. Bd. of Trustees of the Cal. State Univ. Sys.*, 552 F. Supp. 2d
28 1088, 1095-96 (S.D. Cal. 2008) (requiring that a named defendant sued in his or
her individual capacity for copyright infringement be “personally engaged in the
infringing behavior”). The individual capacity claims against President Yudof and
Chancellor Block are also barred by qualified immunity and failure to state a
claim. *See infra*.

1 **2. All of the individual defendants are entitled to qualified immunity**
2 **and, therefore, dismissal with prejudice.**

3 Ambrose’s damages claims against the individual defendants also should be
4 dismissed, because qualified immunity shields government officials “from liability
5 for civil damages insofar as their conduct does not violate clearly established
6 statutory or constitutional rights of which a reasonable person would have known.”
7 *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).
8 An official may only be held liable where “clearly established” law gave her “fair
9 notice that her conduct was unlawful.” *Brosseau v. Hagan*, 543 U.S. 194, 198, 125
10 S. Ct. 596, 160 L. Ed. 2d 583 (2004). This standard “gives ample room for
11 mistaken judgments by protecting all but the plainly incompetent or those who
12 knowingly violate the law.” *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 534,
13 116 L. Ed. 2d 589 (1991) (quotation marks omitted).

14 The Court did not reach the issue of qualified immunity in its Order
15 dismissing the FAC, but did hold that Defendants’ use of Ambrose’s copyrighted
16 material was either covered by the licensing agreements or “fair use.” *See* Order at
17 8-10. Even if the Court were to revisit this issue, qualified immunity applies
18 because it certainly was not “clearly established” that Defendants’ use was neither
19 licensed nor a fair use. *Brosseau*, 543 U.S. at 198; *Harlow*, 457 U.S. at 818.
20 Because it cannot be said that “all but the plainly incompetent” would know that
21 the conduct at issue was prohibited by law, the individual defendants are, at a
22 minimum, qualifiedly immune, and the damages claims against them must be
23 dismissed. *Hunter*, 502 U.S. at 229.

24 Indeed, as this Court correctly noted in its prior ruling, the use was permitted
25 by license and/or fair use (Order at 9:12-10:15), and thus a “reasonable official”
26 would not have believed the alleged conduct to be actionable infringement.
27 Plaintiffs attach as Exhibit 9 to the SAC Ambrose’s DVD Catalogue, which
28 contains an order form that states, in bold-faced type: “**All purchases by schools**

1 **and libraries include public performance rights.”** SAC, ex. 9 (at p. 150 of
2 Doc. 38-2). Another exhibit indicates that the prices of the Ambrose DVDs
3 “include public performance rights.” *Id.*, ex. 8, at 4. Given Ambrose’s own
4 marketing material, a reasonable official had good cause to believe public
5 performances of the Ambrose DVDs were explicitly authorized.

6 Defendants’ conduct also qualifies as a fair use. Section 107 of the
7 Copyright Act provides that a “fair use” of copyrighted materials is not
8 infringement. It dictates that fair use, “including such use by reproduction in
9 copies . . . *for purposes such as . . . teaching* (including multiple copies for
10 classroom use) . . . is not an infringement of copyright.” 17 U.S.C. § 107
11 (emphasis added).

12 While § 107 codifies a special solicitude for uses in the educational context,
13 it does not list with precision which uses are, and which are not, “fair.” Instead,
14 § 107 requires the balancing of four factors:

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

22 17 U.S.C. § 107 (emphasis added).

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

1 Application of the fair use factors and consideration of the equities supports
2 a finding of fair use. As to the first factor, it is undeniable that UCLA’s use had a
3 nonprofit educational purpose. The Ninth Circuit has held that the second factor,
4 the nature of the copyrighted work, “typically has not been terribly significant in
5 the overall fair use balancing.” *Dr. Seuss Enters., L.P. v. Penguin Books USA,*
6 *Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997).

7 While the third factor typically weighs against a party that copies an entire
8 work, the Supreme Court has concluded in the context of television broadcasts that
9 the recording of a motion picture so that it might be performed again at a different
10 time—so-called “time shifting”—constitutes fair use. *See Sony Corp. of Am. v.*
11 *Universal City Studios, Inc.*, 464 U.S. 417, 449-50, 104 S. Ct. 774, 78 L. Ed. 2d
12 574 (1984) (in the television context, “timeshifting merely enables a viewer to see
13 such a work which he had been invited to witness in its entirety free of charge, [so]
14 the fact that the entire work is reproduced does not have its ordinary effect of
15 militating against a finding of fair use.” (citation omitted)). Similarly here,
16 UCLA’s streaming simply allows students who are authorized to view the DVDs
17 in class to “time shift” when and how they view the videos.

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

27 Plaintiffs have argued, unsuccessfully, that UCLA’s streaming is not a fair
28 use. The Court has already rejected that argument, and *no* published opinion has

1 adopted their interpretation of § 107 as applied to video streaming in the
2 educational context. Even if Plaintiffs were nonetheless correct on the law, the
3 question of qualified immunity turns on a different and more forgiving analysis.
4 The individual defendants are protected so long as a reasonable official would not
5 have known, at the time of the events alleged, that such streaming was clearly
6 established infringement.

7 Since there is “no generally applicable definition” of fair use, and in light of
8 the fair use analysis above and the Court’s Order, the individual defendants did not
9 have “fair notice” that the use in question constituted copyright infringement.
10 Hence, they are entitled to qualified immunity as a matter of law. *Harlow*, 457
11 U.S. at 818; *cf. Chavez v. Arte Publico Press*, 59 F.3d 539, 547-48 (5th Cir. 1995)
12 (dismissing individual capacity copyright claim on a motion to dismiss), *remanded*
13 *in part by Univ. of Houston v. Chavez*, 517 U.S. 1184, 116 S. Ct. 1667, 134 L. Ed.
14 2d 772 (1996).

15 Therefore, the infringement claims brought against the individual defendants
16 in their individual capacities must be dismissed. *See Hunter*, 502 U.S. at 229 (“we
17 repeatedly have stressed the importance of resolving immunity questions at the
18 earliest possible stage in litigation”); *accord Pearson v. Callahan*, 555 U.S. 223,
19 231-32, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). Because Plaintiffs have now
20 had multiple unsuccessful attempts to replead, the dismissal should be with
21 prejudice.

22 **D. Ambrose has not alleged any new facts to alter this Court’s conclusion**
23 **that Ambrose failed to state a claim for copyright infringement.**

24 In its prior Order, the Court held that Ambrose admittedly granted
25 Defendants the right to “publicly perform” the DVDs, and that this includes the
26 right to “stream” the DVD content for educational purposes, notwithstanding
27 Plaintiffs’ allegations that the “license was limited and did not provide for
28 streaming.” Order at 9:9-26. The Court also noted that Ambrose failed to address,

1 much less refute, Defendants’ arguments that “streaming” does not constitute
2 “public display” or “distribution” as a matter of copyright law. *See id.* at 10:1-5.
3 And the Court held that any “copying” of the DVDs for purposes of streaming
4 their content was “incidental fair use.” *Id.* at 10:6-15. This ruling is determinative
5 here.

6 Although the SAC introduces further allegations about the functions of the
7 Video Furnace software, none of those allegations provides any basis for the Court
8 to alter its prior conclusions. *See* SAC ¶¶ 49-57. For example, Ambrose alleges,
9 “upon information and belief,” that “in order to upload an AVP DVD into Video
10 Furnace, the web administrator must create a copy of the DVD,” allegedly
11 violating the “copyright owner’s exclusive right to reproduce the work.” *Id.* ¶ 51.
12 But this simply expands upon Ambrose’s previous allegation that the DVD content
13 is copied in order to “produce the stream,” which its counsel reiterated at oral
14 argument. *See* FAC ¶ 43; May 2, 2011 Tr. at 6:9-7:9. The Court correctly rejected
15 those allegations because any such copying is “incidental fair use.” *See* Order at
16 10:6-15. Ambrose cannot state a claim by simply enlarging the same allegations
17 this Court previously held to be insufficient; bigger warts don’t make the hog
18 breathe fire. *See J.D. Marshall*, 935 F.2d at 821.

19 Likewise, Ambrose asserts that Defendants “exceeded the scope of the AVP
20 Licenses.” SAC ¶ 55. But Ambrose made the same allegation in the FAC and at
21 oral argument. *See* FAC ¶ 74; May 2, 2011 Tr. at 10:14-23. The Court rightly
22 concluded that this allegation is insufficient to overcome Ambrose’s admission that
23 it licensed Defendants to “publicly perform” the DVDs in educational contexts.
24 *See* Order at 9:9-11; May 2, 2011 Tr. at 8:19-23. Ambrose contends that the
25 streaming at issue here *might* not be limited to such contexts because an
26 administrator *might* use Video Furnace’s “Guest Permissions” feature to allow
27 non-students to view the DVDs. SAC ¶ 56. But Ambrose does not and cannot
28 allege that Defendants did any such thing. *See id.* This Court expressly

1 admonished Ambrose not to engage in such speculation. *See* May 2, 2011 Tr. at
2 33:4-8; *Johnson v. Lucent Techs. Inc.*, 653 F.3d 1000, 1010 (9th Cir. 2011)
3 (“Conclusory allegations and unwarranted inferences, however, are insufficient to
4 defeat a motion to dismiss.”).

5 Ambrose also repeats its prior allegation that streaming involves distributing
6 copies to end users. *See* SAC ¶ 53; FAC ¶¶ 42-44. These allegations still fail
7 because “distribution” within the meaning of the Copyright Act does not include
8 the transmission of ephemeral data; the items “distributed” must be “material
9 objects” in which a copy is “fixed.” 17 U.S.C. § 101. Section 101 clarifies that for
10 a copy to be “fixed,” it must be “sufficiently permanent or stable to permit it to be
11 perceived, reproduced, or otherwise communicated for a period of *more than a*
12 *transitory duration.*” *Id.* (emphasis added). Ambrose has alleged that the
13 streaming process makes use of a fixed, digital copy, and that the end-users who
14 view the streams have digital copies that remain on their computers for the
15 duration of the stream. SAC ¶¶ 51, 53. Even if true, any such copy is not
16 *distributed*. No material object is moved from one place to another.

17 Instead, the only thing that is transmitted is digital information—
18 “compressed data” that is “distributed” over the Internet. *Id.* ¶ 47. “[M]erely
19 transmitting a sound recording to the public on the airwaves does not constitute a
20 ‘distribution’; . . . distribution is generally thought to require transmission of a
21 ‘material object’ in which the sound recording is fixed” *Agee v. Paramount*
22 *Comm’n*, 59 F.3d 317, 325 (2d Cir. 1995). Similarly, the mere transmission of bits
23 over the Internet is not a “distribution” within the meaning of the Copyright Act.
24 Moreover, even if the digital transmission could be termed a “distribution,” for the
25 same reasons that any incidental copies are fair uses, so too would an incidental
26 distribution be a fair use. *See* Order at 10:6-15.

27 Plaintiffs also allege, for the first time, that Video Furnace *might* be used to
28 create derivative works. *See* SAC ¶ 52. ***But Plaintiffs do not allege any facts***

1 *whatsoever to show that Defendants actually prepared any such derivative works.*
2 *See id.* There is nothing nefarious about Video Furnace’s editing capabilities,
3 which could be used to edit student-created works, to edit works for which UCLA
4 has rights to create derivative works, or for other lawful purposes. Many tools can
5 be used to infringe—pencils, pens, typewriters and more—but alleging ownership
6 of a tool that *might* be used for unlawful purposes does not state a claim. *See, e.g.,*
7 *Wharton v. Columbia Pictures Indus., Inc.*, 907 F. Supp. 144, 147 (D. Md. 1995)
8 (dismissing claim where plaintiff did not allege that defendant actually prepared
9 derivative work).

10 Finally, Ambrose has conceded that the Copyright Act defines “display” of a
11 motion picture to mean showing “individual images nonsequentially.” 17 U.S.C.
12 § 101; *see* SAC ¶ 54. But Ambrose now alleges that “the Video Furnace
13 technology permits faculty to edit and store videos so that images in videos
14 displayed on student computers can be displayed non-sequentially.” SAC ¶ 54. As
15 with its new “derivative works” allegations, however, Ambrose does not allege that
16 Defendants actually showed any of the copyrighted images nonsequentially. *See*
17 *id.* A complaint cannot survive a motion to dismiss based on speculative,
18 conclusory allegations. *See Iqbal*, 129 S. Ct. at 1951. *A fortiori*, it cannot survive
19 where, as here, even the conclusion is left unstated. *See id.*

20 The SAC—like its two predecessors—fails to state a claim for copyright
21 infringement. The Court should dismiss the copyright claim with prejudice.

22 **E. Ambrose has not alleged any new facts to alter this Court’s conclusion**
23 **that Ambrose failed to state a claim under the DMCA.**

24 This Court dismissed Ambrose’s prior effort to state a claim under the
25 DMCA because (1) Defendants’ *use* of DVDs they were licensed to use does not
26 constitute *circumvention* prohibited by the DMCA; and (2) Defendants’ alleged
27 *collaboration* with Video Furnace does not constitute *trafficking* in circumvention
28 technology. *See* Order at 10:16-11:17. The SAC provides no basis for the Court to

1 reach any different conclusion here.

2 First, Ambrose has again failed to allege a violation of the DMCA’s
3 prohibition against “circumvent[ing] . . . a technological measure that effectively
4 control access to” its DVDs. 17 U.S.C. § 1201(a)(1)(A). As Defendants argued in
5 the motion to dismiss the FAC, UCLA *had the right* to access the DVDs.
6 Ambrose’s real contention is that UCLA, after accessing the DVDs, unlawfully
7 copied and streamed their contents—entirely different claims not arising from the
8 DMCA anti-circumvention law. Ambrose does allege that UCLA was not
9 authorized to access the DVDs “for the purposes of use in connection with HVS’
10 Video Furnace.” SAC ¶ 72. Ambrose alleges that “[s]uch use” is prohibited by the
11 alleged licenses. *Id.* But engaging in a prohibited *use* is not an unauthorized
12 *circumvention* of a measure controlling “access.” *See* Nimmer on Copyright
13 § 12A.03[D][3] (“[A] person who engages in prohibited *usage* of a copyrighted
14 work to which he has lawful access does not fall afoul of any provision of Section
15 1201.”); *see also* Order at 10:22-25 (citing Nimmer). Plaintiffs simply have not
16 alleged a claim for anti-circumvention under the DMCA. *See* 17 U.S.C.
17 § 1201(a)(1).

18 Second, the SAC similarly fails to allege facts supporting the inference that
19 Defendants have trafficked in devices that circumvent access controls in violation
20 of § 1201(a)(2), or devices that circumvent copy controls in violation of § 1201(b).
21 In order to be liable for trafficking, a person must “manufacture, import, offer to
22 the public, provide, or otherwise traffic in any technology.” 17 U.S.C.
23 § 1201(a)(2), (b)(1). As was the case with the FAC, in the SAC Ambrose alleges
24 only that UCLA worked in “collaboration” with the maker of the Video Furnace to
25 *develop* the product, and lent its “name and reputation” to *marketing* efforts. SAC
26 ¶¶ 74-75.

27
28

1 Although these facts are false,⁴ *developing* a product, or even *marketing* it,
2 in any event is not the “manufacture, import, offer to the public, [or] provi[sion]”
3 of a technology and is therefore cannot constitute unlawful “trafficking.” Ambrose
4 alleges that this is trafficking, but merely stating a legal conclusion does not make
5 it so. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.
6 Ed. 2d 929 (2007) (“a formulaic recitation of the elements of a cause of action will
7 not do”). The statute does not impose liability for the use of a name in marketing,
8 and no reasonable definition of “otherwise traffic” can be stretched to encompass
9 Defendants’ alleged conduct.

10 Moreover, certain of the new allegations in the SAC *disprove* Ambrose’s
11 trafficking claim. The DMCA does not prohibit trafficking in a device unless it
12 has no more than “limited commercially significant” purposes other than
13 circumvention of technological protection measures. 17 U.S.C. § 1201(a)(2)(B),
14 (b)(1)(B). The excerpts from the Video Furnace Administration Guide that
15 Ambrose has attached to the SAC demonstrate that Video Furnace can be used
16 with a variety of video sources, including sources that need not even include
17 technological protection measures. *See* SAC, Ex. 12 at 65 (discussing using Video
18 Furnace to watch standard television channels). Moreover, Ambrose now alleges
19 that “Video Furnace includes sophisticated editing capabilities” SAC ¶ 4; *see*
20 *also id.* ¶¶ 49, 52. Nothing suggests that these editing capabilities can only be used
21 with video sources that were subject to technological protection measures. Video
22 Furnace’s television and editing features are commercially significant purposes
23 other than circumvention of technological measures. The DMCA claim thus fails
24 for this additional reason, along with those identified by the Court in its prior
25 Order. *See* Order at 10:16-11:17.

26 For these reasons, the Court should dismiss Ambrose’s DMCA claim with
27

28 ⁴ Of course the Court must accept the facts as true for purposes of this motion.

1 prejudice.

2 **F. Ambrose has not alleged any new facts to alter this Court’s conclusion**
3 **that Ambrose failed to state any non-preempted claims under state law.**

4 As the Court previously held, Ambrose’s state-law claims are preempted
5 unless it can allege that Defendants violated rights that are qualitatively different
6 from those protected by the Copyright Act. *See* Order at 11:18-13:7 (citing, *inter*
7 *alia*, 17 U.S.C. § 301(a)). Ambrose purported to identify three such rights: “(1) the
8 guarantee that each program be exhibited ‘only in its entirety’ with ‘complete
9 copyright notices and credits’; (2) the promise in the 2008-2011 License that
10 UCLA would pay ‘a higher price for streaming rights’; and (3) the 2008-2011
11 License’s covenant ‘prohibiting use of Plaintiff AVP’s trademarks.’” *Id.* at 12:22-
12 26. But the Court held that the FAC lacked factual allegations to support the
13 contention that Defendants violated those purported rights. *See id.* at 13:3-7.

14 The same is true of the SAC. It contains no new factual allegations
15 whatsoever regarding the second and third of the purported rights. *See generally*
16 SAC.⁵ With respect to the first, Ambrose now alleges that Video Furnace allows
17 instructors to link to clips of films. *See id.* ¶ 57. But Ambrose also alleges that the
18 same hypothetical conduct would violate its rights under the Copyright Act to
19 publicly perform and display the works, and to make derivative works. *See id.*
20 ¶¶ 49, 52, 54-55, 105. In other words, Ambrose admits that its allegation that
21 Video Furnace might be used to make and link to video clips is subsumed within
22 its copyright claim. *See id.* And even if it had not made this fatal concession,
23 Ambrose still fails to allege any facts showing that Defendants actually showed
24 such clips, or omitted copyright notices and credits. *See id.* ¶ 57.

25 Ambrose’s state-law claims are also precluded for several independent
26 reasons the Court did not reach in its prior Order. *First*, the state-law claims are

27 ⁵ Moreover, the only DVDs allegedly subject to the 2008-2011 AVP License
28 are the “Long Search” series. *See* SAC ¶ 43. The SAC is devoid of any
allegations that these DVDs have ever been streamed.

1 barred because “a public employee is not liable for an injury resulting from his act
2 . . . where the act . . . was the result of the exercise of the discretion vested in him,
3 whether or not such discretion be abused.” Cal. Gov’t Code § 820.2. **Second**,
4 Ambrose cannot state a claim for anticipatory breach because it has discharged its
5 duties under the contract, making the contract unilateral, and thus not the proper
6 subject of an anticipatory-breach claim. *See Minor v. Minor*, 184 Cal. App. 2d
7 118, 123 (1960). **Third**, Ambrose’s claim for breach of the implied covenant fails
8 because it relies on the same allegations as Ambrose’s contract claim. *See Careau*
9 *& Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1394-95 (1990).
10 **Fourth**, none of the contract-based claims (for breach of contract, anticipatory
11 breach, and breach of the implied covenant) can be maintained against any of the
12 individual defendants, because the individuals are not parties to the alleged license
13 agreements.

14 In any event, the Court need not decide anything beyond what it has already
15 held because Ambrose has failed, once more, to allege any facts to support state-
16 law claims that are not preempted. The Court should dismiss these claims with
17 prejudice.

18 **G. Ambrose’s new claim for deprivation of property without due process**
19 **has no merit—indeed, the Court already rejected it when Ambrose**
20 **presented it in opposition to Defendants’ previous motion to dismiss.**

21 The Court should dismiss Ambrose’s new claim for deprivation of property
22 without due process for the same reason the Court rejected it before. In its
23 opposition to Defendants’ motion to dismiss the FAC, Ambrose argued the same
24 thing it now asserts as a separate claim for relief: that it has been deprived of
25 property without due process as a result of Defendants’ sovereign immunity. *See*
26 *Doc. 29 at 4:5-7:15*. The Court rejected that argument because Ambrose is “not
27 being denied all access to a remedy for [Defendants’] alleged violations of
28 copyright law.” *Order at 6:2-3*. Ambrose’s reassertion of this erroneous argument
in the form of an independent claim for relief does not make it any less erroneous.

1 See SAC ¶¶ 113-19.

2 Furthermore, the court in *Pennington* rejected the same kind of due-process
3 claim because “it is the Congress, not this court, that can abrogate Eleventh
4 Amendment sovereign immunity . . . if there is a showing that state remedies were
5 insufficient and violated due process.” *Pennington*, 457 F.3d at 1340 (citing *Fla.*
6 *Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 642-
7 43, 119 S. Ct. 2199, 144 L. Ed. 2d 575 (1999)). As this Court already held,
8 Ambrose has not shown that available state remedies are so insufficient that they
9 violate the Fourteenth Amendment. See Order at 5:17-6:3. *A fortiori*, Ambrose
10 has not alleged, and cannot allege, that “**Congress** made the specific finding that
11 these state procedures are so inadequate that *it* abrogated state sovereign
12 immunity.” *Pennington*, 457 F.3d at 1340 (emphases added).

13 Thus, Ambrose’s new claim for deprivation of property without due process
14 fails as a matter of law. The Court should dismiss it with prejudice.

15 IV. CONCLUSION

16 Plaintiffs’ SAC contains no allegations that merit any deviation from the
17 conclusions this Court reached in its Order dismissing the FAC. For the reasons
18 set forth in that Order, and others discussed above, the Court should dismiss the
19 SAC with prejudice.

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21 Dated: November 23, 2011

KEKER & VAN NEST LLP

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Attorneys for Defendants
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