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18 **UNITED STATES DISTRICT COURT**
 19 **CENTRAL DISTRICT OF CALIFORNIA**

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

26 v.

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

Case No.: CV 10-09378 CBM (MANx)

**PLAINTIFFS' MEMORANDUM
 OF POINTS AND
 AUTHORITIES IN
 OPPOSITION TO
 DEFENDANTS' NOTICE AND
 MOTION TO DISMISS
 SECOND AMENDED
 COMPLAINT**

Date: February 6, 2012

Time: 11:00 a.m.

Dept. Courtroom 2

Judge: Hon. Consuelo B. Marshall

Date. Comp. Filed: Dec. 7, 2010

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN
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1 Association for Information Media and Equipment (“AIME”) and Ambrose Video
2 Publishing, Inc. (“AVP” or “Ambrose”) (collectively, the “Plaintiffs”) respectively submit
3 this Opposition to the Motion to Dismiss the Second Amended Complaint (“Motion”) by
4 Defendants (collectively, the “Defendants”).

5 I. INTRODUCTION

6 Defendants have chosen to ignore or dismiss with the barest of argument the material
7 new facts alleged by Plaintiffs in the Second Amended Complaint (“SAC”) (Doc. 38).
8 Those new facts, which address deficiencies in the First Amended Complaint (“FAC”)
9 identified in the Court’s Order Granting Defendant’s Motion to Dismiss of October 3, 2011
10 (“Order”) (Doc. 34), relate to the following:

- 11 1. A detailed explanation of the specific injuries AIME has suffered which entitle it to
12 standing in its own right.
- 13 2. Additional facts establishing a direct connection between Mr. Yudof and Dr. Block
14 and the infringements alleged by Plaintiffs.
- 15 3. A detailed explanation of how Defendants’ use of the Video Furnace system resulted
16 in violation not only of AVP’s public performance rights and of the Digital
17 Millennium Copyright Act (“DMCA”) 17 U.S.C. §1201 et seq., but also of its
18 exclusive rights to copy the works, publicly distribute the works, publicly display the
19 works and create derivative works.
20

21 For many reasons Defendants’ arguments fail, and the Motion should be denied as to
22 those matters not dismissed with prejudice in the Order.¹

23
24 ¹ Defendants also chose to ignore footnote 1 on page 2 of the SAC, where Plaintiffs
25 explicitly state that they included in the SAC those claims the Court dismissed with
26 prejudice **solely for the purposes of preserving a complete record for appeal to the**
27 **Ninth Circuit**. For purposes of this Memorandum, except as otherwise noted herein,
28 Plaintiffs will not readdress Defendants’ arguments opposed in Plaintiffs’ Memorandum of
Points and Authorities in Opposition to Defendants’ Motion to Dismiss (“First

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II. ARGUMENT

A. Plaintiffs have alleged facts sufficient to support AIME's Standing¹

1. *AIME is entitled to associational standing.*

The Order states that AIME has failed to meet the third prong of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977) (the case does not require the participation of individual members in the lawsuit) and, therefore, lacks associational standing.² Order 7:10-11. However, Plaintiffs believe that just like the association of professional photographers in *Olan Mills Inc. v. Linn Photo Co.*, 795 F. Supp. 1423, 1428-29 (N. D. Iowa 1991), *rev'd on other grounds*, 23 F.3d 1345 (8th Cir. 1994), AIME has associational standing to bring suit on behalf of its members.³ Here, the SAC alleges that Defendants have digitized and streamed the copyrighted works of seven AIME members. SAC ¶ 18-19, ex. 3. Further, the requested relief—a narrowly

Opposition”) (Doc. 29). The First Opposition is incorporated herein by reference. Further, as Defendants note, Plaintiffs’ claim of deprivation of property without due process of law was raised in the context of the First Opposition; therefore, it has likewise been included in the SAC in the interests of a complete record and is responsive to the Court’s suggestion during oral argument which invited this amendment. Reporter’s Transcript of Proceedings Motion to Dismiss Hearing, May 2, 2011 (“Tr.”) at 33: 4-6.

² The third prong of *Hunt*, which is not a constitutional requirement but rather a judicially-created one “best seen as focusing on matters of administrative convenience and efficiency,” *United Food & Commer. Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 555-57, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996), arguably does not apply to this situation. The issue of whether Congress has allowed for associational standing under the Copyright Act has not been settled in the Ninth Circuit, and Plaintiffs submit it is inappropriate for resolution on a motion to dismiss.

³ *Olan Mills* provides support for finding that AIME has associational standing. In that case, the court found that the association had standing for purposes of a motion for judgment on the pleadings where the complaints alleged that the association members were the copyright owners, the named individual plaintiff had registered the photographs involved in the lawsuit, and a reasonable inference could be drawn that other members had registered their copyrights. *Olan Mills*, 795 F. Supp. at 1428-29.

1 tailored declaration that Defendants’ DVD streaming practices violate copyright law and an
2 injunction to prevent them from engaging in future infringements (SAC ¶ 121) — would
3 apply broadly and uniformly. No individualized proof is needed for such relief.⁴ *See Warth*
4 *v. Seldin*, 422 U.S. 490, 515, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) (“[i]f in a proper case
5 the association seeks a declaration, injunction, or some other form of prospective relief, it
6 can reasonably be supposed that the remedy, if granted, will inure to the benefit of those
7 members of the association actually injured”).

8 2. ***AIME has standing in its own right.***

9 The Order states that AIME did not allege in the FAC “which activities have been
10 diverted as a result of UCLA’s use of the DVDs at issue.” Order at 7:22-24. The SAC
11 remedies this insufficiency by setting forth the following facts concerning the injury
12 suffered by AIME:

- 13 1. AIME has been forced to cut back on its traditional mission of providing copyright
14 advice and information to its members in order to focus its limited staff resources on
15 the streaming issue. This has been the case since it learned of the UCLA streaming
16 activities in 2009, *well prior to filing this lawsuit*. SAC ¶ 20.
- 17 2. AIME has lost members because it has been unable to provide the copyright
18 resources they expect. SAC ¶ 20.
- 19 3. AIME lost a major opportunity to attract new members when, due to the AIME-
20 UCLA dispute and *prior to AIME’s instituting this lawsuit*, a national media
21

22
23 ⁴ *Contrast Nat’l Fed’n of the Blind of Neb., Inc. v. Outlook Neb., Inc.*, 8:10CV418, 2011
24 U.S. Dist. LEXIS 117587, at *32-33 (D. Neb. 2011) (finding that plaintiff did not have
25 associational standing because the requested relief would have required “individualized
26 proof that a particular employee experienced one or more of the varieties of employment
27 discrimination alleged in the complaint” but that plaintiff had not “argued—much less
28 established—that it can bring forth this proof without the participation of any individual
employee”).

1 conference canceled a cooperative meeting on copyright in the fall of 2009 that
2 would have allowed AIME to market itself to a particularly appropriate target
3 audience. SAC ¶ 20.

4 Plaintiffs believe that these facts detail the activities diverted by UCLA's streaming
5 practices and clearly support a claim of actual injury far beyond the costs of the litigation.

6 *Diamond v. Charles*, 476 U.S. 54, 70-71, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986),
7 relied on by Defendants, (Motion at 4), does not support their position. The injury that the
8 Supreme Court called a "byproduct of the suit" in *Diamond* was a physician's liability for
9 attorney's fees, i.e. express litigation expenses, which, although a consequence of his
10 decision to intervene, was insufficient to confer standing since it could not be traced to the
11 abortion statute being challenged. Unlike in *Diamond*, in the instant case, AIME is not
12 alleging the cost of legal fees; rather, it is alleging substantive injury experienced by AIME,
13 much of which predates its decision to participate in the lawsuit. Nevertheless, these
14 injuries are a direct consequence of UCLA's decision to initiate streaming activities that
15 broadly implicate the business purposes and activities of AIME.

16
17 **B. Plaintiffs have alleged facts sufficient to support their claim for injunctive relief**
18 **against Mr. Yudof and Dr. Block, as well as Defendants' Loehner, Farb and O'Donnell.**

19 The Order states that there is no allegation in the FAC "that a particular policy
20 enforced by Yudof violates the law" and further that "the FAC alleges that Defendant Block
21 instructed his legal counsel and other UCLA staff to correspond with AVP and AIME...but
22 it does not contain any allegation that the correspondence constituted copyright
23 infringement." Order at 8:11-15. The SAC responds to both of these findings with specific
24 allegations.

25 Defendants speciously suggest that Plaintiffs have still not alleged the requisite causal
26 connection to invoke *Ex Parte Young* as to Mr. Yudof and Dr. Block. 209 U.S. 123, 28 S.
27 Ct. 441, 52 L. Ed. 714 (1908). This argument demonstrates their utter failure to recognize
28 that the contributory infringing conduct of these specific defendants may be established by

1 reasonable inferences from facts alleged. Plaintiffs have alleged the following central facts
2 *based on Defendants' own documents and the statements of UCLA counsel:*

- 3 1. Mr. Yudof and Dr. Block are charged with supervising intellectual property matters at
4 UCLA. SAC ¶¶ 22-23, 29.
- 5 2. Dr. Block was personally placed on notice that UCLA's streaming practices violated
6 copyright law by letter of June 18, 2009. SAC ¶ 63. That notice set forth AVP's
7 particular concerns with UCLA's streaming practices and was responded to by the
8 Senior Campus Counsel in Dr. Block's office. SAC ¶ 63, ex. 17.
- 9 3. Following further correspondence between the parties, temporary suspension of
10 streaming by UCLA and a meeting of the parties which did not resolve the dispute,
11 UCLA's Information Technology Planning Board ("ITPB") met on February 11,
12 2010 to develop suggested principles on the use of streaming, videos in connection
13 with discussion of this lawsuit. SAC ¶¶ 64-67. These principles which authorized
14 on-going streaming are not self-executing, but required administrative approval.
- 15 4. On February 16, 2010 the ITPB and Academic Senate presented directly to Dr. Block
16 and Executive Vice Chancellor and Provost Scott Waugh a set of suggested principles
17 on the use of streaming videos and other educational content. SAC ¶ 67, ex. 21.
18 These principles state, *inter alia*, that the Office of Instructional Development
19 ("OID") streaming service should be restored as soon as possible.
- 20 5. On March 2, 2010 Amy Blum, Senior Campus Counsel, advised Arnold Lutzker,
21 counsel for AVP and AIME, that UCLA made the decision to reinstitute streaming
22 after review by "the highest levels of both academic and administrative leadership."
23 SAC ¶ 69, ex. 22. "The highest levels of ... administrative leadership" is a direct and
24 explicit reference to both Mr. Yudof and Dr. Block. Also, on March 2, 2010, UCLA
25 issued a press release stating that it would resume streaming DVDs from its libraries.
26 SAC ¶ 68, ex. 22.
- 27
28

1 Thus, because they are charged by the University of California with controlling
2 intellectual property policy and practices at UCLA, and because UCLA's own attorney
3 admitted that the decision to stream programming was made at the university's highest
4 administrative level, there is little doubt that Mr. Yudof and Dr. Block considered,
5 authorized and enforced the decision to stream DVDs within UCLA's possession, including
6 those of AVP and other AIME members.

7 Significantly, the announced decision following study by the ITPB and Academic
8 Senate directly contravenes UCLA's own copyright policies and regulations, which
9 mandate that if a copy of a motion picture requires a change in format, then **permission**
10 **from the copyright owner must be secured.** SAC ¶ 25, ex. 6. This policy applies to all
11 UCLA staff and, as discussed below, renders it impossible for any UCLA employee,
12 including Defendants Patricia O'Donnell, Larry Loehner and Dr. Sharon Farb, as well as Dr.
13 Block, to claim ignorance that streaming of AVP's DVDs without consent is prohibited. In
14 other words, Dr. Block and Mr. Yudof personally contributed to the infringement of AVP's
15 and AIME members' copyrights by sanctioning the streaming practices of UCLA. Their
16 contributions, without which the streaming activities would not have been authorized,
17 establish the requisite causal connection to the infringement (SAC ¶ 67, ex. 21) and are
18 qualitatively different from the general supervisory responsibility over intellectual property
19 activity and broad obligation to prevent violations that was found insufficient in
20 *Pennington Seed, Inc. v. Produce Exchange No. 229*. 457 F.3d 1334, 1342-43 (Fed. Cir.
21 2006). In short, in this case there is individual conduct to be enjoined, and not an attempt to
22 make the state a party as Defendants suggest. Motion at 6.

24 Liability for copyright infringement can be based on contributory, as well as direct,
25 infringement, and "one who, with knowledge of the infringing activity, induces, causes or
26 materially contributes to the infringing conduct of another, may be held liable as a
27 'contributory' infringer." *Gershwin Publishing Corp. v. Columbia Artists Management,*
28 *Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); *see also* 3-12 Nimmer on Copyright §12.04,

1 (citing and quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 437,
2 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984)) (“The Supreme Court has described a contributory
3 infringer as one who ‘was in a position to control the use of copyrighted works by others
4 and had authorized the use without permission from the copyright owner’”). **Therefore, it is**
5 **not necessary for Plaintiffs to allege that Mr. Yudof or Dr. Block themselves streamed**
6 **the AVP DVDs, but only that they authorized or participated in the decision to**
7 **authorize the streaming. Plaintiffs have done this with specificity.** Short of producing
8 additional evidence to be obtained through discovery, what more can be expected of
9 Plaintiffs at this stage? Plaintiffs submit that it would be unjust, given these allegations and
10 supporting documents and the reasonable inferences to be drawn therefrom, to dismiss their
11 *Ex Parte Young* claim.

12 *Ex Parte Young* also fully applies to Defendants O’Donnell, Loehner and Farb. The
13 SAC states that these three key UCLA employees also have personal responsibility for
14 UCLA’s past infringing practices, and thus prospectively. SAC ¶¶10, 30-32, 62 and 66. As
15 additional evidence, Exhibit 24 to the SAC includes copies of the actual orders placed by
16 Defendant O’Donnell. These documents dispute Defendants’ representation to the Court in
17 pleadings and at oral argument that the Court should look to the marketing material, not
18 AVP-UCLA licenses for the definition of rights UCLA acquired. Motion at 7-8; Tr. 22:9-
19 12. Plaintiffs submit these exhibits, which were in Defendants’ possession should have
20 been addressed directly in prior filings. Under any circumstances, Plaintiffs submit that at
21 the very least, in light of the SAC, these individual Defendants, who have been personally
22 involved with the streaming practices of UCLA, should be subject to injunctive prospective
23 relief under *Ex Parte Young*.

24
25 **C. Defendants claim to qualified immunity distorts actual facts and is untenable.**

26 As Defendants recognize, the Court did not address the issue of qualified immunity in
27 the Order (Motion at 7), and dismissed claims against the individual defendants in their
28

1 individual capacities on other grounds .⁵ However, for the record, Plaintiffs will respond
2 briefly to Defendants' arguments on this issue.

3 The SAC alleges sufficient facts to show that the individual defendants could not
4 have reasonably believed that their use of AVP's copyrighted material was legal (i.e. that it
5 was either covered by licensing agreements or constituted fair use.) First, the individual
6 defendants were charged with either supervising (Mr. Yudof and Dr. Block) or
7 administering (Defendants O'Donnell, Farb, Loehner and John Does 1-50) the University's
8 compliance with copyright law, so they can hardly plead ignorance as to such matters. SAC
9 ¶¶ 6, 22, 23, 29-34. Second, they had studied the issue. SAC ¶ 67, ex. 21, 22. Third, they
10 were repeatedly put on notice by AVP and AIME that their conduct was in violation of the
11 license agreement and copyright law. SAC ¶¶ 9, 62-67. Fourth, *they violated UCLA's own*
12 *rules* requiring permission of the publisher when audiovisual materials are copied in a
13 different format. SAC ¶ 25, ex. 6. Fifth, they were aware that Plaintiff Ambrose offered a
14 streaming service for a separate fee. SAC ¶ 10.

15
16 The suggestion that "[g]iven Ambrose's own *marketing material*, a reasonable
17 official had good cause to believe public performances of the Ambrose DVDs were
18 explicitly authorized," (Motion at 8) (emphasis supplied), is a distortion of the facts of this
19 dispute. The question is not whether some abstract person might give a particular
20 interpretation to AVP's marketing brochure, but whether these named Defendants were
21 guided by the marketing brochure instead of the licensing agreement. There is no doubt that
22 Defendant O'Donnell knew about AVP's streaming option. SAC ¶ 10. Moreover, as the
23 person who ordered the DVDs, she is defined in the order as the "Customer" (and, thus, the
24 "Party" to the AVP Licenses). SAC, ex. 24. The AVP Licenses explicitly provide that
25

26 _____
27 ⁵ The discussion, *supra*, of the personal involvement of Mr. Yudof, Dr. Block, Ms.
28 O'Donnell, Mr. Loehner and Ms. Farb also supports Plaintiffs' claims against these
Defendants in their individual capacities.

1 programs “may not be duplicated, broadcast, transmitted by cable or otherwise, on any
2 multi-receiver open or internet system, or displayed before the public, whether or not
3 admission is charged.” *Id.* At the very minimum, this language should have (and did) set
4 off loud warning bells as to whether creating *hundreds of copies of a single DVD* was really
5 authorized by the license agreement. Defendants try to hide behind the unsubstantiated
6 suggestion of an abstraction – a “reasonable official” who believed the AVP marketing
7 material authorized the streaming practice. This is done to avoid conceding the truth of the
8 Plaintiffs’ allegations that individual Defendants like those who worked within the library
9 had actual knowledge of the AVP’s DVD licenses agreements. The Defendants promoted
10 this suggestion in their briefs and at oral argument, enabling them to withhold incriminating
11 documents that show this assertion to be actually untenable. *See SAC, ex. 24.*

12 Equally significant, it is legally indefensible to throw out Plaintiffs’ complaint at this
13 stage given the facts within the SAC. Where, as in the instant case, “the proper disposition
14 of the case requires some factual development by the parties,” it is inappropriate to deal
15 with immunity issues on a 12(b) motion. *Sutton v. U.S.*, 819 F.2d 1289, 1299 (5th Cir.
16 1987). “Permitting limited discovery for the purpose of providing the court with sufficient
17 information to answer the threshold question of governmental immunity is consistent with
18 both the spirit and holding of *Harlow*.”⁶ *Id.*; *see also Black v. Coughlin*, 76 F.3d 72, 75 (2d
19 Cir. 1996) (overturning district court’s dismissal of claim against corrections officer on
20 grounds of qualified immunity because “qualified immunity is an affirmative defense that
21 the defendants have the burden of raising in their answer and establishing at trial or on a
22 motion for summary judgment”, and a plaintiff “need not plead facts showing the absence
23 of such a defense” in order to state a claim of constitutional violation). Yet, if the
24 Defendants had their way, they would be able to sustain a qualified immunity defense
25

26
27 ⁶ Defendants cite *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d
28 396 (1982) to support their qualified immunity argument. Motion at 7, 10.

1 without ever filing an answer in this case. That flies in the face of established legal
2 precedent and should be rejected by this Court.

3 **D. AVP has sufficiently alleged facts to support its claim for copyright**
4 **infringement.**

5 When considering a motion to dismiss for failure to state a claim pursuant to Rule
6 12(b)(6), the complaint must be viewed in the light most favorable to the non-moving party.
7 *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). Motions to dismiss under Rule
8 12(b)(6) are generally disfavored, and complaints are to be construed liberally to set forth
9 some basis for relief so long as they put the defendants on notice of the charges against
10 them. *In re Rigel Pharm., Inc. Sec. Litig.*, No. C 09-00546 JSW, 2009 WL 5125344, at *5
11 (N.D. Cal. Dec. 21, 2009). In *Bell Atlantic Corp. v. Twombly*, the Supreme Court stated that
12 “a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
13 allegations” and that a complaint’s factual allegations must merely “be enough to raise a
14 right to relief above the speculative level.” 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed.
15 2d 929 (2007). Under this standard, “[s]pecific facts are not necessary,” *Erickson v.*
16 *Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007), and the plaintiff must
17 merely put forth enough evidence “to raise a reasonable expectation that discovery will
18 reveal evidence of illegality.” *Twombly*, 550 U.S. at 556. See *Interserve, Inc. v. Fusion*
19 *Garage Pte. Ltd.* 2010 U.S. Dist. LEXIS 60598, at *22 n.7 (N.D. Cal. 2010) (finding that
20 the allegations in the complaint were adequately alleged for pleading purposes
21 notwithstanding that “the precise identity of the parties” at issue required further factual
22 development.)
23

24 Where, as is the case here, the facts supporting a finding of liability are peculiarly
25 within the possession and knowledge of the defendant, courts are generally less inclined to
26 dismiss a claim under the Rule 12(b)(6) standard articulated in *Twombly*. See *Boykin v.*
27 *Keycorp*, 521 F.3d 202, 215 (2d Cir. 2008) (Sotomayor, J.). Respectfully, Plaintiffs believe
28 that this Court should ask Defendants pointedly why they did not disclose the existence of

1 Exhibit 24 and deal with those documents as facts, rather than creating the artificial
2 suggestion that Defendants should be allowed to rely on the AVP marketing brochure for
3 their claim of public performance rights.

4 Even in the context of copyright infringement, courts in this circuit have recognized
5 that where information is uniquely within the purview of a defendant or a third party,
6 plaintiffs must be permitted to make reasonable inferences in order to establish a plausible
7 claim of infringement. *See Miller v. Facebook, Inc.*, 2010 U.S. Dist. LEXIS 61715, at *14-
8 15 (N.D. Cal. May 28, 2010) (finding that the details behind most of the technical questions
9 at issue were best known by the defendant and that, as a result, the plaintiff should not be
10 expected to know “every last detail” for purposes of the pleading stage).

11 Here, based on (1) the capabilities of the Video Furnace System, (2) the current
12 UCLA streaming policy (which encourages illegal uses of Video Furnace streaming
13 technology), (3) the documents in Exhibit 24, and (4) the fact that much of the other specific
14 evidence beyond what is needed to make a plausible claim is in the possession of the
15 Defendants, it may be reasonably inferred that discovery will reveal evidence of illegality.
16 While such a reasonable inference is all that is needed to withstand a 12(b)(6) motion, as
17 discussed below, the SAC contains very specific allegations that Defendants violated not
18 only Plaintiff AVP’s public performance rights, but also its exclusive rights to copy,
19 publicly distribute, publicly display and create derivative works from the DVDs. SAC ¶¶
20 50-55, 70. These allegations, which provide Defendants with notice beyond what is
21 required under *Twombly*, are supported by specific facts and are not, as Defendants would
22 have it, “[c]onclusory allegations and unwarranted inferences...”⁷ Motion at 12.
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27 ⁷ *Johnson v. Lucent Techs., Inc.*, 653 F.3d 1000, 1010 (9th Cir. 2011), cited by Defendants,
28 is not on point as that court dismissed the plaintiff’s claim *because the record itself belied
the inferences to which the plaintiff would otherwise have been entitled.*

1 Accordingly, the Motion begs the question: what further notice do the Defendants require
2 regarding Plaintiffs' claim of copyright infringement and the grounds upon which it rests?⁸

3 **1. Breach of the exclusive right to publicly perform the work:** The Order states
4 that "...the licensing agreement allows Defendants to put the DVD on the UCLA internet
5 network as part of the provision of the agreement that Defendants could 'publicly perform'
6 the DVD content." Order at 9:22-24. This conclusion was based on the Court's finding that
7 "[t]he type of access that students and/or faculty may have, whether overseas or at a coffee
8 shop, does not take the viewing of the DVD out of the educational context." Order at 9:19-
9 21. However, there are several serious problems with this incomplete analysis.

10 First, rather than relying on the incomplete general reference in the AVP marketing
11 brochure (SAC, ex. 9, which the Court cites as FAC, ex. 8), the Court should read the
12 Order, Invoice and Sales forms actually completed by and sent to UCLA. SAC, ex. 24.
13 These forms include TERMS AND CONDITIONS which explicitly limit the nature of the
14 educational public performance rights that Plaintiff Ambrose granted to Defendants.
15 Defendants have no grounds whatsoever to deny that the license terms and conditions are
16 applicable, and Plaintiffs respectfully submit that this Court cannot base its ruling to dismiss
17 Plaintiffs' claims on Defendants' specious and unsupportable allegation that a line in the
18 AVP brochure justifies an enormous expansion of the use of these DVDs.

19 What is evident from Exhibit 24 is that AVP granted certain *limited* public
20 performance rights— in essence the right to show a DVD in a classroom. However, the
21 public performance license is strictly circumscribed by the express language of the
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23

24 ⁸ At this early stage in the litigation the Court should not interpret the AVP License
25 Agreements. See *Carlsson v. The McGraw-Hill Co.*, No. C 10-0323 RS, 2010 U.S. Dist.
26 LEXIS 77453, at *12 (N.D. Cal. 2010) (language in a royalty contract providing that
27 plaintiffs would receive royalties only on the current edition of their work and not on
28 "revisions or future editions" was ambiguous and therefore the court denied defendant's
motion to dismiss since, at that stage of the proceedings, "the Court cannot conclusively
interpret the contract").

1 controlling license agreement, which (i) prohibited transmission on any multi-receiver open
2 or Internet system; (ii) limited exhibition to non-paying private audiences; and (iii)
3 prohibited cuts, alterations or edits. SAC ¶ 55. Therefore, using the order forms from the
4 Ambrose educational catalog as support for the statement that “AVP concedes that it
5 licensed Defendants to ‘publicly perform’ the DVD” (Order at 9:13-14)⁹ ignores the fact
6 that the parties had a detailed agreement which spelled out the necessary conditions
7 applicable to the UCLA license.¹⁰ As noted, the Defendants should have been candid in
8 disclosing this highly pertinent evidence.

9 Further, the Order states that “Plaintiff’s basic argument is that streaming is not
10 included in a public performance because it can be accessed outside of a classroom, and as
11 remotely as overseas.” Order at 9:16-18. Respectfully, that is not Plaintiffs’ basic
12 argument. Plaintiffs claim that the license agreement itself expressly prohibits streaming.
13 *See* Tr. at 10:20-23. The concept of access to a stream only comes into the analysis because
14 of UCLA’s incredibly expansive—and totally novel—view of a “virtual classroom.” This
15 creative but wholly unsupportable concept challenges the express Section 110(1) statutory
16 (“face-to-face”) formulation, which, for more than a generation, has been well-understood
17 between educational video publisher and educational institution as the proper venue for
18 viewing by students and faculty. Indeed, it has been so well understood that when Congress
19 adopted the 1976 Copyright Act, it did not see a need to further define it:

21 There appears to be no need for a statutory definition of “face-to-face” teaching
22 activities to clarify the scope of the provision. “Face-to-face teaching

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24 ⁹ Exhibit 8 to the FAC contained the order form for the 2009-2010 catalog. Since the
25 Defendants separately argued that the 2008-2011 AVP License Agreement provision
26 acceding to federal jurisdiction should be ignored when it came to Defendants’ waiver of
27 sovereign immunity, why is it that the 2009-2010 catalog should be cited to support their
28 claim of public performance regarding their 2006-2007 DVD acquisitions? Defendants
cannot have it both ways.

¹⁰ At the hearing counsel for Defendants also referenced AVP’s marketing material,
ignoring the existence of this agreement. Tr. at 22:9-12; FAC, ex. 8.

1 activities” under clause (1) embrace instructional performances and displays
2 that are not “transmitted.” The concept does not require that the teacher and
3 students be able to see each other, although it does require their simultaneous
4 presence in the same general place. Use of the phrase “in the course of face-to-
5 face teaching activities” is intended to exclude broadcasting or other
6 transmissions from an outside location into classrooms, whether radio or
7 television and whether open or closed circuit. However, as long as the
8 instructor and pupils are in the same building or general area, the exemption
9 would extend to the use of devices for amplifying or reproducing sound and for
10 projecting visual images. H.R. Rep. No. 94-1796, at 81 (1976).

11 In order to allow UCLA to make the videos freely accessible to students outside the
12 classroom, in a different place from the teacher, in the course of a transmission and non-
13 simultaneous basis, this Court must reject decades of accepted industry practice and the
14 express understanding of Congress. Moreover, it must buy into Defendants’ digital
15 distortion of the established understanding of “face-to-face,” and then permit UCLA to take
16 DVDS, change their format (without consent of the copyright owner), copy them and then
17 publicly distribute untold numbers of digital versions of the DVD. Plaintiffs respectfully
18 submit that to go down this path is folly and would destroy the educational video
19 marketplace as we now know it. It invites wholesale degradation of copyright law and
20 principles. Given that AVP already offers a viable streaming option to all its customers for
21 a fair and decent price, there is no cognizable public benefit from Defendants’ wholesale
22 assault on the well-established business principles underlying licensing of DVDs to
23 educational institutions.

24
25 Moreover, as a principal in the educational content industry for more than two
26 decades, AVP can affirm that it is understood by producers and users alike that digital
27 streaming *requires* separate and detailed licensing, because the practice does *not* come
28 solely within the definition of “public performance.” Plaintiffs respectfully submit that the

1 Defendants' radical definition of "public performance" constitutes a complete departure
2 from the common understandings that have long been the practice of the educational video
3 marketplace. It is not an exaggeration to state that never before in the history of educational
4 film distribution has it been suggested that the rights conveyed through a limited
5 educational public performance rights conveyed to UCLA or any other school allow the
6 program to be performed other than in the context of a face-to-face teaching environment.¹¹
7 As Congress explained, this embraces performances that are not transmitted¹² with faculty
8 and students in the same place. Otherwise, what would prevent a professor from
9 duplicating a video acquired under a license for public performance and lending multiple
10 copies for a semester to students enrolled in a class?

11 Defendants essentially contend that merely indicating in a promotional brochure that
12 school purchases "include public performance rights" eliminates all conditions set forth in a
13 DVD license. Their position converts the "order form" in a marketing brochure into a
14 complete license agreement. As previously noted, it voids the order, sales and invoice
15 forms and terms and conditions actually appended to UCLA's acquisition of the DVDs.

16 If Defendants' redefinition of "unrestricted public performance rights" is upheld,
17 Plaintiffs submit it will result in upheaval within the industry. Respectfully, no educational
18 or theatrical production company will offer public performance rights without basing its
19 fees on charges for broadcast, streaming and multi-copy/duplication. Public libraries,
20 schools and universities wishing only to publicly perform a work in the format in which
21 they acquired the program would be penalized and charged for rights that have traditionally
22 had nothing to do with public performance. Companies selling products under the
23

24
25 ¹¹ Defendants expressly do not rely on Section 110(1) to justify the streaming. Tr. at 23:19-
26 21. This is appropriate because neither 17 U.S.C. § 110(1), nor §110(2) covers all the
27 activities engaged in by Defendants.

28 ¹² Note well that streaming is transmission over the Internet.

1 traditional definition of public performance, which would lose money from their existing
2 catalogs under the expanded definition, would most certainly not be willing to make future
3 investments in format conversions. Educational streaming distributors that paid educational
4 producers to acquire streaming rights would find themselves holding a worthless license.

5 The Order further states:

6 However, Plaintiff does not dispute that in order to access the DVDs, a person
7 must have access to the UCLA network and specifically to the DVD. The type
8 of access that students and/or faculty may have, whether overseas or at a coffee
9 shop, does not take the viewing of the DVD out of the educational context.”

10 Order at 9:18-21.

11 Plaintiffs **do** dispute this claim. With Video Furnace, the students and faculty do not
12 access the DVD – they access a stream, which originates from an illegally created and
13 reformatted file of the original DVD.

14 Moreover, Plaintiffs have learned, and the SAC specifically states, that because of the
15 Video Furnace’s “Guests Permissions” feature, access is NOT limited to persons with
16 “access to the UCLA network and specifically to the DVD.” SAC ¶ 56. The viewer does
17 not have to be an enrolled student because, through this Video Furnace feature an
18 administrator may choose to allow *any* individual – student or non-student – to view the
19 DVDs without a user name or password. SAC ¶ 56, ex. 2. In addition to undercutting
20 Defendants’ argument¹³ and a particular premise on which the Court’s holding is based, this
21 fact contradicts UCLA’s representation that it “provides extensive protections to ensure that
22 only the users already permitted to view the content (students in a specific class) ever have
23 access to the streamed content.” SAC ex. 22.

24 Defendants contend that the SAC does not claim that this feature has actually been
25 used. This is true because not all relevant facts in this case are known to Plaintiffs.
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¹³ See Tr. at 26:16-17.

1 Significantly, Defendants do not maintain that the guest invitation feature has never been
2 used. Indeed, given the respect that institutions of higher education like UCLA have for the
3 academic freedom of faculty, it is highly plausible that, if a professor wished to invite a
4 guest to view a stream of the AVP Shakespeare program, this could be done without notice
5 to the UCLA administration. Plaintiffs submit that their burden is to present the facts
6 known to them in the complaint and, for purposes of a motion to dismiss, the Court makes
7 reasonable inferences from the facts. For present purposes, Plaintiffs submit there are more
8 than enough facts and reasonable inferences to conclude that Plaintiffs have satisfied their
9 pleading burden, and they should be allowed to proceed to discovery. *See Boykin v.*
10 *Keycorp*, 521 F.3d at 215.

11 **2. Breach of the exclusive right to copy the work:** The Order states that “[b]ecause
12 placing the DVD on the UCLA network is part of the right that Plaintiff licensed to
13 Defendants, the copying was incidental fair use.” Order at 10:14-15. Plaintiffs believe that,
14 because fair use is an affirmative defense, any fair use analysis—let alone a determination
15 which is made on a wholesale basis—is inappropriate for purposes of a 12(b)(6) motion. *See*
16 *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136, 1148 (S.D. Cal. 2005) (citing
17 *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997)).¹⁴
18 However, even assuming that such a determination is deemed proper¹⁵, the detailed
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21 ¹⁴ *See also M. Shanken Communs., Inc. v. Cigar500.com*, 07 Civ. 7371 (JGK), 2008 U.S.
22 Dist. LEXIS 51997, at *28 (S.D.N.Y. July 7, 2008) (“due to the ‘fact-driven nature of the
23 fair use determination,’ courts should be cautious in finding fair use as a matter of law *even*
24 *on a motion for summary judgment...*”) (emphasis added) (citations omitted); *Matteo v.*
25 *Rubin*, No. 07 C 2536, 2007 U.S. Dist. LEXIS 88394, at *9 (N.D. Ill. Dec. 3, 2007)
26 (concluding that the defense of fair use to justify use of plaintiff photographer’s image on
client website was “better suited to be analyzed at a later stage of litigation”).

27 ¹⁵ The handful of cases in which district courts in the Ninth Circuit have granted a motion to
28 dismiss on fair use grounds involved either transformative, parodic uses of the copyrighted
work or use of a single copyrighted work for purposes of political criticism, situations
patently different from the instant case of wholesale copying. *See, e.g., Sedgwick Claims*

1 allegations as to the technology of the Video Furnace system set forth in the SAC (SAC 49-
2 57) weigh strongly against finding fair use here.

3 The SAC alleges the following with respect to copying: (i) in order to upload a DVD
4 into Video Furnace, the administrator must create a copy of the DVD;¹⁶ (ii) the reformatted
5 copy remains fixed on the Video Furnace system until deleted by the administrator or until a
6 specified end date is reached (“i.e., for more than a transitory duration”), while, at the same
7 time, the original DVD is back on the library shelf available for further distribution (in
8 essence one copy becomes two or more copies); (iii) additional copies can be made and
9 stored by each faculty member who uses Video Furnace to individualize content for his or
10 her class; and (iv) copies of the video delivered to users remain on their computers as long
11 as an InStream viewing session is open. SAC ¶ 51, ex. 12. Thus, the SAC makes it more
12 clear to the Court (whose fair use analysis did not consider the newly alleged features of the
13 Video Furnace) that the copyright owner’s exclusive right to make copies of the work is
14 violated at the point of uploading and distributing the video, when it is stored on course web
15 pages *and* when it is received by the user. While Defendants attempt to denigrate these
16 facts as repetitive of what was set forth in the FAC (arguing the SAC merely “enlarged”
17 allegations this Court found insufficient in the FAC, *see* Motion at 11), the SAC is
18 quantitatively and qualitatively very different from the FAC. Simply stated, the Order did
19 not deal with all these copying activities, because they were not specifically alleged in the
20 FAC. For Defendants to prevail on the rationale in the Order, they must show that every
21 one of these copying activities occasioned by video streaming is transitory or incidental and
22 fair use, which Video Furnace system information establishes is not the case. SAC ¶ 51, ex.
23 11-13. *None* of these copying activities is transitory or incidental, and *none* is covered by
24 fair use. Indeed, to hold that a copy which is stored *for months at a time* is merely an
25

26 *Mgmt. Serv. v. Delsman*, No: C 09-1468 SBA, 2009 U.S. Dist. LEXIS 61825 , at *20 (N.D.
27 Cal. July 17, 2009).

28 ¹⁶ The SAC also alleges that the reformatting violates UCLA’s policy if consent of a
copyright owner has not been secured. SAC ¶¶ 25, 51; *see infra*.

1 “incidental,” fair use would be a novel decision, which is inappropriate at this stage of the
2 litigation.

3 Plaintiffs do not believe that *Perfect 10, Inc. v. Amazon.com, Inc.* requires a finding
4 of fair use with respect to Defendants’ copying activities because the copying held to be
5 incidental in that case (the making of automatic “cache” copies of full-size images by the
6 computers of users who linked to infringing websites) was a short-term, transformative use
7 “designed to enhance an individual’s computer use, not to supersede the copyright holders’
8 exploitation of their works.” 508 F.3d 1146, 1169 (9th Cir. 2007). By contrast here, (1) the
9 copying punctuates the streaming process at both ends, (2) the uses are by no means
10 transitory (since copies remain in the Video Furnace system until deleted by the
11 administrator or at a fixed end date and copies can be stored on course web pages and
12 remain on users’ computers while the InStream session is open), (3) there is no
13 transformative element, and (4) Plaintiffs have specifically alleged the harm to their market
14 that it causes.¹⁷ The features of the Video Furnace system that allow faculty members to
15 make and store copies to individualize class content (SAC ¶ 51) and to create “clips” (SAC
16 ex. 14) further distinguishes this case from the “automatic” copying in *Perfect 10*.¹⁸

17
18 Moreover, Defendants’ continued reliance on *Sony Corp. of America v. Universal*
19 *City Studios, Inc.* to support their fair use argument is very much misplaced. 464 U.S. 417,
20 104 S. Ct. 774, 78 L. Ed, 2d 574 (1984). First, in *Sony* all the private viewers had lawful
21 direct access to the copyrighted works, publicly televised TV shows. Here, we have DVDs
22

23 ¹⁷By analogy, see the Ninth Circuit’s rejection of the “essential step” defense in the context
24 of a software license: “...the essential step defense does not apply where the copyright
25 owner grants the user a license and significantly restricts the user’s ability to transfer the
26 software.” *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1110 (9th Cir. 2010) (citing *Wall Data,*
Inc. v. Los Angeles County Sheriff’s Dep’t, 447 F.3d 769, 784-85 (9th Cir 2006)).

27 ¹⁸ Finally, as before, Plaintiffs point to the “good faith and fair dealing underpinnings of the
28 fair use doctrine,” see *Perfect 10*, 508 F.3d at 1164, n. 8, especially since Defendants
temporarily ceased their streaming activities upon being advised of their illegality by
Plaintiff’s counsel, then resumed them with a public pronouncement and a new justification.

1 that are licensed to an educational institution for classroom viewing on a face-to-face basis.
2 By the nature of the license and the media, the AVP Licenses allow one professor or one
3 student at a time to use a DVD. It is a physical impossibility for that DVD to be played in
4 multiple locations at the same time, as in *Sony*, so streaming necessarily creates a *new* use
5 whereby many copies can be shown simultaneously. That is essentially different from the
6 use that was licensed to Defendants and does not reflect industry practice.

7 Second, the holding in *Sony* addressed the limited situation where publicly broadcast
8 programs are televised at a predetermined time and individual users with lawful access wish
9 to view that programming at another time (hence, fair use for purposes of “time shifting”).
10 But the Defendants’ use of Plaintiffs’ licensed DVDs raises a different set of issues. The
11 programs are not publicly broadcast for all to see, and the students do not have an
12 independent right of access other than through the enrolled course. Moreover, the DVDs
13 are licensed to the schools for face-to-face viewing only (i.e. during classroom time, or on a
14 one-at-a-time basis in a library viewing room), and most AVP Shakespeare DVDs run two
15 to three hours and could not be seen in their entirety in typical one hour class session. In
16 short, students do not have open access to the program as they would with TV shows and
17 Plaintiffs submit that here there is no broadcast time to be shifted.

18 Finally and most materially from AVP’s perspective, *Sony* found that the recording
19 by viewers did not cause any market harm to the copyright owners. That is most definitely
20 not the case here. AVP has alleged that it has been deprived of its ability to sell its
21 separately priced streaming license. SAC ¶ 90. AVP has also alleged that its market for
22 sales to institutions¹⁹, professors and students has been harmed. SAC ¶¶ 146-47. In fact,
23 Defendant O’Donnell has explicitly told AVP that rather than paying for Ambrose’s
24

25
26 ¹⁹ While institutions have traditionally purchased multiple copies of Plaintiffs’ DVDs to
27 satisfy demand, Defendant UCLA’s streaming practices enables it to purchase a single copy
28 of those DVDs.

1 streaming license, it would continue to use the “lesser quality” but “no fee” Video Furnace
2 versions. SAC ¶ 10.

3 **3. Breach of the exclusive right to publicly distribute the work:** The Order states
4 that “Plaintiffs do not specifically counter Defendants’ arguments that ‘streaming’ is not
5 distribution or that the Complaint lacks allegations of ‘public display.’” Order at 10:2-4. In
6 the SAC, Plaintiffs take this point on directly, alleging as follows: “...upon information and
7 belief, the Video Furnace system administrator retains an original copy of the AVP DVD
8 while **distributing copies to end users**, which copies remain on the end user’s computer as
9 long as the Video Furnace InStream player remains open.” SAC ¶ 53 (emphasis supplied.)
10 Exhibit 12 to the SAC contains HVS’ Administration Guide, which describes the Video
11 Furnace System as a “simple-to-deploy system for encoding and **distributing**” video. SAC,
12 ex. 12 (emphasis supplied.)

13 Defendants’ argument that there is no ‘material object’ to distribute and therefore
14 there can be no infringement of the distribution right (Motion at 12) is flat out false. First,
15 the Supreme Court has held that copies may be distributed electronically. *New York Times*
16 *Co. v. Tasini*, 533 U.S. 483, 498, 121 S. Ct. 2381, 150 L. Ed. 2d 500 (2001). Second,
17 Defendants overlook the distinctions articulated in the *Perfect 10* case. In that case, the
18 court’s holding that Google did not distribute copies of the images in question rested on its
19 finding that Google did not own a collection of Perfect 10’s full-size images and therefore
20 only indexed the images and communicated instructions to a user’s browser as to where to
21 find them. Rather it was “the website publisher’s computer that distributes copies of the
22 images by transmitting the photographic image electronically to the user’s computer.” 508
23 F.3d at 1162. *Here, UCLA is in the shoes of the website publisher because it is transmitting*
24 *exact digital images over the Internet.* Finally, no court has held that “incidental
25 distribution” is fair use. Defendants would have the Court make new law in that regard on
26 the Motion and without the development of any factual record. That is unfair and
27 procedurally indefensible.
28

1 **4. Breach of the exclusive right to publicly display the work:** The Court
2 accepted the Defendants’ argument that the FAC lacked allegations of “public display.”
3 Order at 10:2-4. The Order also states that the Court found that the FAC “does not allege
4 any nonsequential display.” Order at 9 n.1. However, now, the SAC provides that, upon
5 information and belief, “the Video Furnace technology permits faculty to edit and store
6 videos so that images in videos displayed on student computers can be displayed non-
7 sequentially.” SAC ¶ 54, ex. 13 and 14 (Exhibit 13 contains excerpts from the HVS
8 Administration Guide describing editing and managing assets, and Exhibit 14, UCLA’s
9 Request to Link Instructional Material, identifies showing clips as sample explanations to
10 support instructors’ requests to have films linked to their course web pages.)

11 **5. Breach of the exclusive right to create derivative works:** Although the Order
12 did not specifically address the creation of derivative works, the SAC alleges specific facts
13 not previously known to Plaintiffs relating to the editing capabilities of Video
14 Furnace.²⁰ These critical facts include allegations that, upon information and belief,
15 derivative works are created in the following ways: (i) Video Furnace allows the web
16 administrator to create new versions of the DVDs by trimming content, merging content
17 from multiple DVDs, and adding text/metadata to the streamed content and bookmarking
18 data; and (ii) UCLA instructors can request to have videos encoded and linked to their
19 course webpage via the Video Furnace system, and once they have been linked, instructors
20 can prepare a derivative work, which can be separately stored, thereby creating multiple
21

22 _____
23 ²⁰ Although *Wharton v. Columbia Pictures Indust., Inc.*, 907 F. Supp. 144, 147 (D. Md.
24 1995), cited by Defendants (Motion at 13), was a case in which the plaintiff claimed that the
25 defendants had infringed a copyrighted work (a screenplay) by creating a derivative work (a
26 movie), the court’s dismissal of the claim as to one of the defendants had nothing to do with
27 the elements of a claim for creation of an infringing derivative work. Rather, that
28 defendant, who managed a theater where the movie was shown, had no connection to the
case at all. Thus *Wharton* did not, as Defendants imply, involve the question of whether a
derivative work had actually been created, but who had created the derivative work that was
at issue.

1 infringing copies. SAC ¶ 52, ex. 14. These new and various versions of the AVP programs
2 cannot be deemed “incidental” copies. Plaintiffs should be allowed a searching inquiry
3 about how the Defendants create and exploit these works.

4 **E. AVP has sufficiently alleged facts to support its claim under the DMCA.**

5 In dismissing Plaintiffs’ anti-circumvention claim under Section 1201(a)(1), the
6 Court appears to have accepted the Defendants’ contention that Plaintiffs’ allegations
7 pertain to Defendants’ use of the DVDs, and not to Defendants’ access to the DVDs. Order
8 at 10:19-22. With respect to Plaintiffs’ claim under Section 1201(a)(2), the Order states that
9 the FAC “does not allege how the Defendants worked with Video Furnace, or what actions
10 Defendants took that constitute the ‘manufacture, import, offer to the public, prov[ision], or
11 otherwise traffic[king]’ of the DVDs.” Order at 11:10-13. The SAC addresses both of
12 these insufficiencies, and, with details about the Video Furnace system, Plaintiffs show how
13 UCLA unlawfully accesses DVDs to reformat in preparation for streaming. SAC ¶¶ 25, 72,
14 74-76, ex. 6. Further, SAC makes clear that UCLA “offers” to its faculty and students and
15 “provides” the entire Video Furnace technology, which has as its basic premise the
16 circumvention of AVP’s content scrambling technology that limits access and prevents
17 duplication. SAC ¶¶ 49-55, 68, 77-78, ex. 11-14. The offering to the public and provision
18 of that technology to all on the UCLA campus are the express violations of the DMCA.

19 **F. AVP has sufficiently alleged facts to support its state law claims.²¹**

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21
22 ²¹ The Motion argues that AVP’s state law claims are precluded for other reasons not
23 addressed in the Order. Motion at 16. With the exception of the fourth such reason, which
24 was not included in Defendants’ original Motion to Dismiss, Plaintiffs adequately addressed
25 these arguments in their First Opposition. Defendants fail to provide any case support for
26 their new fourth reason (“none of the contract-based claims...can be maintained against any
27 of the individual defendants, because the individuals are not parties to the alleged license
28 agreements”). Motion at 17. However, Plaintiffs dispute the claim that individual
defendants must be parties to the agreements involved in order to be liable for their breach.
**Nevertheless, one specific Defendant, Ms. O’Donnell, is in fact a party to the AVP
Licenses. See Exhibit 24.**

1 As stated above with respect to Plaintiffs' copyright infringement claims, at this stage
2 of the litigation, the Court should not interpret the terms of the AVP Licenses. *See*
3 *Carlsson*, 2010 U.S. Dist. LEXIS, at *12.

4 In the FAC, Plaintiffs alleged breach of three provisions of the AVP Licenses that it
5 believes are not preempted by the Copyright Act: (1) the guarantee that each program be
6 exhibited 'only in its entirety;' (2) the promise in the 2008-2011 License that UCLA would
7 pay a higher price for streaming rights; and (3) the covenant in the 2008-2011 License
8 prohibiting use of AVP's trademarks. The Order states that the FAC "lacks the factual
9 allegations to establish the basis for the breach of the three provisions that AVP claims are
10 not preempted by the Copyright Act" and that all the factual allegations in the FAC "relate
11 to AVP's purported copyright infringement claim, and therefore the corresponding state law
12 claims are preempted." Order at 13:4-7.

13
14 Plaintiffs contend that the FAC and SAC states sufficient facts to establish a breach
15 of the promise in the 2008-2011 License that UCLA would "pay a higher price for
16 streaming rights." With respect to this claim, Plaintiffs did not supplement the FAC with
17 additional facts because it is simply impossible to allege their claim with greater specificity.
18 In the FAC, Plaintiffs stated in no uncertain terms that: (1) Ms. O'Donnell was "aware of
19 Ambrose 2.0;" (2) Ms. O' Donnell "declined to acquire the AVP streaming license" at a
20 higher fee; and (3) Ms. O'Donnell continued to rely on the lesser quality AVP streaming
21 license, notwithstanding that she was aware such "a practice was in flagrant violation of the
22 AVP DVD License." FAC ¶ 8; SAC ¶ 10.

23 Notwithstanding the above, in connection with its highly detailed exposition of how
24 the Video Furnace system actually works, the SAC also contains additional facts to support
25 the contention that Defendants violated the covenants articulated in the AVP Licenses. For
26 example, respecting the promise requiring Defendants to show each program "only in its
27 entirety," the SAC alleges not only that the Video Furnace provided Defendants with a
28 means of creating and uploading clips of films, (SAC ¶ 57), but also that *UCLA counsels*

1 *teachers to specifically upload clips* without showing films in their entirety, *see* SAC, *ex.*
2 *14* (quoting, *inter alia*, as guidance “[t]o illustrate points through our class discussions, it is
3 essential for me to show clips...”) Thus, contrary to Defendants’ assertions that the
4 Plaintiffs’ arguments are merely hypothetical, Plaintiffs have pleaded very specific facts,
5 which are sufficient to meet their burden under *Twombly* and its progeny. Surely the
6 defendants have alleged enough facts to “raise a right to relief above the speculative level.”
7 *Twombly*, 550 U.S. at 556.

8
9 **III. CONCLUSION**

10 In conclusion, Plaintiffs ask the Court to consider the consequences of granting the
11 Motion. For all the foregoing reasons the Motion should be denied in its entirety.

12 DATED: December 21, 2011

13 Respectfully Submitted,

14
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1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF ORANGE

3 I am employed in the County of Orange, State of California. I am over the age of 18 and not
4 a party to the within action; my business address 4 Park Plaza, Suite 1230, Irvine, CA 92614.

5 On **December 21, 2011**, I served document(s) described as **PLAINTIFFS'**
6 **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS'**
7 **NOTICE AND MOTION TO DISMISS SECOND AMENDED COMPLAINT** on the following
8 person at the addresses and/or facsimile number below:

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1 [] VIA FACSIMILE – Based on an agreement by the parties to accept service by fax
2 transmission, I faxed the documents from a fax machine in Irvine, California, with the
3 number 949-252-0090, to the parties and/or attorney for the parties at the facsimile
4 transmission number(s) shown herein. The facsimile transmission was reported as complete
5 without error by a transmission report, issued by the facsimile transmission upon which the
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7 [X] BY ELECTRONIC SERVICE – Based on a court order or agreement of the parties to accept
8 service by electronic transmission, I caused the documents to be sent to the persons at the
9 electronic notification addresses listed herein on the above referenced date. I did not receive,
10 within a reasonable time after the transmission, any electronic message or other indication
11 that the transmission was unsuccessful.

12 [X] BY MAIL - I am "readily familiar" with the firm's practice of collection and processing
13 correspondence for mailing. Under that practice it would be deposited with the U.S. postal
14 service on that same day, with postage thereon fully prepaid, at Irvine, California in the
15 ordinary course of business. I am aware that on motion of the party served, service is
16 presumed invalid if postal cancellation date or postage meter date is more than one day after
17 date of deposit for mailing in affidavit.

18 [] BY CERTIFIED MAIL - I am "readily familiar" with the firm's practice of collection and
19 processing correspondence for mailing. Under that practice it would be deposited with the
20 U.S. postal service on that same day, with postage thereon fully prepaid, at Irvine, California
21 in the ordinary course of business. I am aware that on motion of the party served, service is
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23 date of deposit for mailing in affidavit.

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26 with Federal Express on that same day in the ordinary course of business for overnight
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filed separately.

I declare under penalty of perjury under the laws of the State of California and the United
States of America that the above is true and correct.

Executed on **December 21, 2011** at Irvine, California.

By: 
Cathy Castellano