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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
Illinois nonprofit membership
18 organization; and AMBROSE VIDEO
PUBLISHING, INC., a New York
19 corporation,

20 Plaintiffs,

21 v.

22 THE REGENTS OF THE
UNIVERSITY OF CALIFORNIA, a
California corporation; MARK G.
YUDOF, an individual; DR. GENE
23 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.
28

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

**REPLY IN SUPPORT OF MOTION
TO DISMISS SECOND AMENDED
COMPLAINT FOR LACK OF
SUBJECT MATTER
JURISDICTION AND FAILURE TO
STATE A CLAIM**

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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I. INTRODUCTION

At the hearing on Defendants’ motion to dismiss the First Amended Complaint, the Court advised Plaintiffs that it would allow them leave to amend, but counseled them to “keep in mind Rule 11. You have to have a basis. You don’t get to just allege thinking that it might be the case and then conduct some discovery and hope that you figure it out.”¹ But that is precisely what Plaintiffs have done, as their Opposition makes clear. For example, they speculate that it is “plausible” that a professor might allow non-students to view one of their films and ask that they “be allowed to proceed to discovery.” Plaintiffs’ Opposition to Defendants’ Motion to Dismiss (“Opp’n”) (Doc. 44) at 17:3-9. Elsewhere they concede that it is “simply impossible to allege their [contract] claim with greater specificity” (Opp’n at 24:-17) than what this Court already rejected, yet continue to assert it. The fact is, the SAC does not add any factual allegations that materially change the Court’s analysis as reflected in its Order on Defendants’ motion to dismiss the First Amended Complaint. This is Plaintiffs’ third attempt to plead these claims. It is time they be dismissed with prejudice.²

II. ARGUMENT

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

As this Court rightly held, AIME lacks associational standing because the participation of individual copyright owners is necessary here. *See* Order Granting Defendants’ Motion to Dismiss (“Order”) (Doc. 34) at 6:5-7:11; *see also* *Hunt v. Wash. State Apply Adver. Comm’n*, 432 U.S. 333, 343 (association cannot assert standing where, *inter alia*, the case requires the participation of individual members). AIME’s only counterargument rests on dictum from *Olan Mills Inc. v.*

¹ May 2, 2011 Hearing Transcript at 33:5-8.

² Plaintiffs concede that they cannot now revive the claims that the Court previously dismissed with prejudice. *See* Opp’n at 1-2 n.1. They further concede that this limitation also applies to their newly pled due process claim. *Id.*

1 *Linn Photo Co.*, 795 F. Supp. 1423 (N.D. Iowa 1991), which the district court itself
2 described as rumination on a “moot point,” *id.* at 1428, and which the plaintiffs
3 apparently abandoned on appeal, *see* 23 F.3d 1345 (8th Cir. 1994). The district
4 court’s dictum in *Olan Mills*, speculating that associational standing might be
5 proper in a copyright case, contradicts the Copyright Act itself, which expressly
6 limits standing to the “legal or beneficial owner of an exclusive right under a
7 copyright.” 17 U.S.C. § 501(b); *see also* 6 Patry on Copyright § 21:28 (2010)
8 (“[A]ssociational standing is not permitted under the Copyright Act, which
9 expressly limits standing to legal or beneficial owners of exclusive rights.”). The
10 Copyright Act simply “does not permit copyright holders to choose third parties to
11 bring suits on their behalf.” *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881,
12 890 (9th Cir. 2005) (citation and quotation marks omitted).

13 Likewise, AIME lacks standing to sue in its own right. AIME argues,
14 incorrectly, that its new allegations in the SAC establish injury in fact. But even if
15 this were correct—which it is not, as shown below—it would not matter, because
16 AIME’s allegations of injury do not and cannot change the fact that Congress has
17 expressly limited standing to the legal or beneficial owners of the copyrights in
18 question. *See* 17 U.S.C. § 501(b). As the Supreme Court held in *Warth v. Seldin*,
19 422 U.S. 490 (1975), even where a plaintiff has adequately alleged an Article III
20 injury, its claims must fail where, as here, they violate the “prudential standing rule
21 that normally bars litigants from asserting the rights or legal interests of others in
22 order to obtain relief from injury to themselves.” *Id.* at 509. Congress may
23 override this rule and expand federal jurisdiction by expressly granting a right of
24 action to third-party plaintiffs. *Id.* But “Congress also has the power to contract
25 federal jurisdiction” by providing that plaintiffs “must raise only their rights and
26 not the rights of others. That would constitute a legislative direction to the courts
27 that the third party standing doctrine, in its strictest form, must be applied.” *Am.*
28 *Immigration Lawyers Ass’n v. Reno*, 199 F.3d 1352, 1364 (D.C. Cir. 2000). And

1 that is precisely what Congress did by providing that “only owners of an exclusive
2 right in a copyright may sue.” *Silvers*, 402 F.3d at 887; *see* 17 U.S.C. § 501(b).³

3 In any event, like the first two complaints, the SAC does not allege any
4 cognizable injury to AIME. AIME argues that it has been injured because it has
5 been forced to focus on “the AIME-UCLA dispute” and has consequently lost
6 some members, and an opportunity to attract new ones when a conference in either
7 2010 (as alleged in the SAC) or 2009 (as argued, without explanation, in the
8 Opposition) was cancelled. None of these supposed injuries are actionable under
9 the Copyright Act. *See* 17 U.S.C. §§ 106, 501. And, aside from that fatal
10 disconnect,⁴ AIME cannot manufacture standing either by means of this litigation
11 itself or, as it now suggests, its members’ dissatisfaction with its pre-litigation
12 campaign of letters to UCLA. *See N.A.A.C.P. v. City of Kyle, Tex.*, 626 F.3d 233,
13 238 (5th Cir. 2010) (unsuccessful “prelitigation” efforts to get defendant to “back
14 down” did not constitute injury in fact).

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

16 **B. The claims against the individual defendants should be dismissed with
17 prejudice based on principles of sovereign and qualified immunity.**

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

21 This Court rightly dismissed Plaintiffs’ claims for prospective injunctive
22 relief against defendants Yudof and Block because Plaintiffs have not alleged a

23 ³ AIME misses the Court’s point in *Warth*, citing it as purported support for
24 the notion that AIME may seek injunctive relief that will, somehow, be both
25 “narrowly tailored” and apply “broadly and uniformly.” *Opp’n* at 2:13-3:7. But
26 *Warth* made clear that a plaintiff must have standing, regardless of the relief it
27 seeks; although a plaintiff may plead itself out of court by seeking the wrong relief,
28 it cannot manufacture standing simply by limiting its prayer to injunctive or
29 declaratory relief. *See Warth*, 422 U.S. at 511-18.

30 ⁴ For purposes of standing, the only relevant injury is one that is likely to be
31 redressed by a judgment in the plaintiff’s favor. *Lujan v. Defenders of Wildlife*,
32 504 U.S. 555, 560-61 (1992). Any connection between a favorable decision for
33 AIME and its supposed membership woes is attenuated and speculative. *See*
34 *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976).

1 “causal connection between the officer and the alleged violation of federal law,” as
2 necessary to invoke the narrow exception to sovereign immunity established by *Ex*
3 *parte Young*, 209 U.S. 123 (1908). Order at 8:2-17 (citing *Ex Parte Young*, 209
4 U.S. at 157, and *Pennington Seed, Inc. v. Produce Exchange No. 229*, 457 F.3d
5 1334, 1342 (Fed. Cir. 2006)).

6 In their Opposition, Plaintiffs argue that they have cured this fatal defect by
7 alleging that “Mr. Yudof and Dr. Block are charged with supervising intellectual
8 property matters at UCLA.” They then offer baseless speculation that, because of
9 these supervisory duties and the alleged presentation of a set of “faculty principles”
10 to Dr. Block⁵ “there is little doubt that Mr. Yudof and Dr. Block considered,
11 authorized and enforced the decision to stream DVDs.” Opp’n at 5:3-6:6.
12 Contrary to Plaintiffs’ contentions, however, these allegations are not
13 “qualitatively different,” *id.* at 6:19, from those rejected in *Pennington*. The
14 *Pennington* court held that the *Ex Parte Young* doctrine requires more of a “nexus
15 between the violation of federal law and the individual accused of violating that
16 law” than allegations that those individuals “supervised intellectual property
17 activity” yet failed to “prevent a violation; it requires an actual violation of federal
18 law by that individual.” *Pennington*, 457 F.3d at 1342-43. Plaintiffs here still fail
19 to allege, and cannot allege, any “actual violation of federal law” by Dr. Block,
20 who, at most, merely received a set of “faculty principles” about streaming, or Mr.
21 Yudof, who is not alleged even to have received those “principles,” much less to
22 have formulated them, and still less to have done anything that could be
23 characterized as an actual violation of federal law by any stretch of the
24 imagination.

25 _____
26 ⁵ See SAC Ex. 21. These “faculty principles” show on their face that Dr.
27 Block had nothing to do with formulating or administering them, and were not
28 even presented to President Yudof. Further, while Plaintiffs contend that Mr.
Yudof and Dr. Block were charged with “supervising ... the University’s
compliance with copyright law,” Plaintiffs concede that Yudof and Block did not
“administer[]” those policies. See Opp’n at 8:7-8.

1 Plaintiffs argue that their allegations regarding Yudof's and Block's
2 supervisory duties suffices as an allegation of contributory infringement, and thus a
3 violation of federal law sufficient to invoke *Ex Parte Young*. See Opp'n at 6:24-
4 7:12. But that misstates the nature of contributory infringement even in actions
5 against private individuals and corporations,⁶ and if it applied to public officials, it
6 would eviscerate the rule in *Pennington*. Under Plaintiffs' overbroad conception
7 of contributory infringement, *Ex Parte Young* would have applied in *Pennington* as
8 well because the infringement there also occurred under the officials' supervision.
9 See *Pennington*, 457 F.3d at 1342-43. But the court held the opposite: *Ex Parte*
10 *Young* did not apply. See *id.* "To hold otherwise would not only violate the
11 principles of federalism and a state's sovereign immunity, but it would also be akin
12 to a suit against the state itself." *Id.* at 1343.

13 Further, Plaintiffs' insistence that the streaming at issue "directly
14 contravenes UCLA's own copyright policies and regulations," Opp'n at 6:8,
15 underscores that Plaintiffs are asking this Court to enjoin Yudof and Block from
16 allegedly neglecting their job duties as established by University policy and,
17 ultimately, state law. As the court held in *Pennington*, however, a state university
18 official's alleged failure to uphold a university or state-law policy of compliance
19 with federal intellectual-property laws is not itself a violation of federal law, and
20 cannot justify the abrogation of sovereign immunity under the *Ex Parte Young*
21 doctrine. *Pennington*, 457 F.3d at 1343. On the contrary, "the entire basis" for the
22

23 ⁶ Contributory infringement, as distinct from vicarious liability, applies where
24 a defendant knowingly induces, causes, or materially contributes to another's
25 direct infringement by, for example, "providing the site and facilities for known
26 infringing activity." *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, —
27 F.3d —, 2011 WL 6357788, at *18 (9th Cir. Dec. 20, 2011) (citation and quotation
28 marks excluded). Plaintiffs allege no such thing here. Contributory infringement
is sometimes conflated with vicarious liability, as in *Gershwin Pub. Corp. v.*
Columbia Artists Mgmt., Inc., 443 F.2d 1159 (2d Cir. 1971), on which Plaintiffs
rely. But to plead liability on that basis, Plaintiffs must allege that Yudof and
Block "derived substantial financial benefit from the actions of the primary
infringers." *Id.* at 1163. Plaintiffs do not and cannot allege anything of the kind.

1 *Ex Parte Young* doctrine “disappears” in such a case:

2 A federal court’s grant of relief against state officials on the basis of
3 state law, whether prospective or retroactive, does not vindicate the
4 supreme authority of federal law. On the contrary, it is difficult to
5 think of a greater intrusion on state sovereignty than when a federal
6 court instructs state officials on how to conform their conduct to state
7 law. Such a result conflicts directly with the principles of federalism
8 that underlie the Eleventh Amendment.

6 *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); *accord*

7 *Pennington*, 457 F.3d at 1343.

8 Thus, the Court should dismiss the claims against President Yudof and Dr.
9 Block with prejudice.

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

12 As demonstrated in Defendants’ opening brief, the Court also should dismiss
13 the damages claims against each of the individual defendants based on qualified
14 immunity, which shields government officials “from liability for civil damages
15 insofar as their conduct does not violate clearly established statutory or
16 constitutional rights of which a reasonable person would have known.” *Harlow v.*
17 *Fitzgerald*, 457 U.S. 800, 818 (1982).

18 Plaintiffs argue, without basis or citation, that the “question is not whether
19 some abstract person might give a particular interpretation to AVP’s marketing
20 brochure, but whether these individual defendants were guided by the marketing
21 brochure instead of the licensing agreement,” deriding the former as an
22 “unsubstantiated suggestion of an abstraction – a ‘reasonable official.’” Opp’n at
23 8:19-9:7. But “objective legal reasonableness” is “the touchstone of *Harlow*,” and
24 of qualified immunity generally. *Anderson v. Creighton*, 483 U.S. 635, 639
25 (1987). Contrary to Plaintiffs’ suggestions, Defendants’ “subjective beliefs” about
26 the licenses and marketing materials “are irrelevant.” *Id.* at 641.

27 Plaintiffs do not dispute that their own marketing material expressly and
28 prominently states: “**All purchases by schools and libraries include public**

1 **performance rights.”** SAC Ex. 9 (emphasis in original), *accord* Ex. 8 at 4. To
2 deflect attention from these unambiguous promises, Plaintiffs resort to baseless
3 invective, arguing that Defendants’ reliance on them somehow constitutes a
4 “distortion of the facts,” and repeatedly contend that Defendants “withheld
5 incriminating documents”—specifically, Exhibit 24 to the SAC. *See* Opp’n at
6 9:10-11, 10:27-11:3, 13:7-8. But Exhibit 24 is merely a demand letter from
7 Plaintiffs’ attorney, which adds nothing new to the allegations and documents
8 Plaintiffs introduced in their first two failed attempts to state a claim. *Compare*
9 SAC Ex. 24 *with* FAC ¶¶ 37-38, 74, Ex. 6.

10 Moreover, a reasonable official is not obliged to believe the partisan claims
11 of a hired gun. Indeed, the Court was apprised by Plaintiffs of the alleged terms
12 and conditions of the AVP licenses (FAC ¶¶ 37-38, Ex. 6), and Plaintiffs’ claims
13 that “UCLA acquired the AVP Shakespeare DVDs pursuant to the 2006-2007 AVP
14 License that expressly grants only a limited license to exhibit the videos to non-
15 paying audiences, while prohibiting duplication and transmission ‘on any multi-
16 receiver open or internet system.’” *Id.* ¶ 74. The Court noted those allegations—in
17 particular, that Defendants allegedly “knew that their license was limited and did
18 not provide for streaming (and therefore incidental uses of the streaming practices
19 such as copying) of the DVDs”—but nonetheless rejected Plaintiffs’ claims. Order
20 at 9:9-11. Plaintiffs offer no reason why a reasonable official should have reached
21 the different conclusion that the conduct at issue was “clearly” unlawful.

22 On the contrary, after repeating their stale allegations that the purported
23 license agreements prohibit streaming, Plaintiffs now seemingly *suggest that those*
24 *same licenses are ambiguous.* *See* Opp’n at 12 n.8 (arguing that the Court should
25 not interpret the licenses on the present motion, citing *Carlsson v. McGraw-Hill*
26 *Companies, Inc.*, C 10-0323 RS, 2010 WL 3036487 (N.D. Cal. July 30, 2010)).
27 The *Carlsson* case cited by Plaintiffs simply has no relevance to the present motion
28 unless the licenses are, in fact, at least ambiguous—that is, if they at least could

1 reasonably be interpreted to include streaming rights. If the licenses are
2 ambiguous, then the clarity of the promises in the marketing materials that “[a]ll
3 **purchases by schools and libraries include public performance rights**” is all
4 the more relevant. *See* SAC Ex. 9. On these facts, it cannot be said that “all but
5 the plainly incompetent” would know that streaming was “clearly” both unlicensed
6 and unfair. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991); *Harlow*, 457 U.S. at 818.
7 Any such suggestion is particularly untenable given that this Court has already
8 held that Defendants’ use of Ambrose’s copyrighted material was either covered
9 by the licensing agreements or “fair use.” *See* Order at 8-10.

10 Plaintiffs do not confront these issues directly, contending instead, based on
11 decades-old and inapposite decisions from the Fifth and Second Circuits, that “it is
12 inappropriate to deal with immunity issues on a 12(b) motion.” Opp’n at 9:12-
13 10:2. But the Supreme Court refuted that very contention in *Ashcroft v. Iqbal*, 556
14 U.S. 662 (2009), which held that the Second Circuit erred by not **requiring** the
15 district court to dismiss the complaint on a Rule 12(b)(6) motion based on qualified
16 immunity. “The basic thrust of the qualified-immunity doctrine is to free officials
17 from the concerns of litigation, including ‘avoidance of disruptive discovery.’” *Id.*
18 at 1953 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J.,
19 concurring)). Likewise, the Ninth Circuit has long recognized that “unless the
20 plaintiff’s allegations state a claim of violation of clearly established law, a
21 defendant pleading qualified immunity is entitled to dismissal before the
22 commencement of discovery.” *Doe By & Through Doe v. Petaluma City Sch.*
23 *Dist.*, 54 F.3d 1447, 1449-50 (9th Cir. 1995) (citation, quotation marks and
24 brackets omitted).

25 For the same reason, a district court’s refusal to dismiss a complaint based
26 on qualified immunity is immediately appealable. “This is so because qualified
27 immunity—which shields Government officials ‘from liability for civil damages
28 insofar as their conduct does not violate clearly established statutory or

1 constitutional rights,’—is both a defense to liability and a limited ‘entitlement not
2 to stand trial or face the other burdens of litigation.’” *Iqbal*, 129 S. Ct. at 1945-46
3 (citations omitted) (quoting *Harlow*, 457 U.S. at 818, and *Mitchell v. Forsyth*, 472
4 U.S. 511, 526 (1985)); *see also, e.g., Crawford-El v. Britton*, 523 U.S. 574, 598 &
5 n.19 (1998) (court should decide immunity issue “before permitting discovery,”
6 and denial of motion to dismiss on immunity grounds is appealable). Thus,
7 Plaintiffs’ argument that this Court should ignore Defendants’ qualified immunity
8 and subject them to discovery is not only wrong, it is an invitation to immediately
9 appealable error.

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

12 This Court previously held that Ambrose admittedly granted Defendants the
13 right to “publicly perform” the DVDs, and that this includes the right to “stream”
14 the DVD content for educational purposes, notwithstanding Plaintiffs’ allegations
15 that the “license was limited and did not provide for streaming.” Order at 9:9-26.
16 The Court further held that copying and other uses incidental to streaming were
17 fair uses. *See id.* at 10:7-15 (“Here, Plaintiff AVP alleges that Defendants copied
18 the DVD in order to be able to put it on the UCLA internet network. Because
19 placing the DVD on the UCLA network is part of the right that Plaintiff licensed to
20 Defendants, the copying was incidental fair use.”); *citing Perfect 10, Inc. v.*
21 *Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007). These rulings were, and remain,
22 correct, mandating dismissal of the SAC for the same reasons.

23 Plaintiffs recycle, as if it were new, an argument this Court already rejected:
24 that the license was limited and did not allow streaming. Opp’n at 12-13. They do
25 not identify any material new allegations in support of this rehashed argument.
26 Plaintiffs cannot avoid the fact that their own marketing material expressly and
27 prominently states that purchases by schools include public performance rights.
28 SAC Ex. 9, *accord* Ex. 8 at 4. They further again concede, as they must, that even

1 under their interpretation of the licenses, UCLA had “the right to show a DVD in a
2 classroom.” Opp’n at 12:21. Nor can Plaintiffs’ reliance on Exhibit 24 to the
3 SAC, a demand letter from Plaintiffs’ counsel, to support a change from the
4 Court’s prior ruling. As already noted, Exhibit 24 adds no few facts beyond those
5 the Court previously considered. *Compare* SAC Ex. 24 with FAC ¶¶ 37-38, 74,
6 Ex. 6. The Court’s conclusion that Plaintiffs have a license to publicly perform the
7 DVDs was correct before, and remains correct now.

8 Plaintiffs also argue that the Court’s determination that any uses pertaining
9 to rights other than the public display rights that were incidental to UCLA’s
10 streaming were fair uses was procedurally improper because “any fair use
11 analysis” is “inappropriate for purposes of a 12(b)(6) motion.” Opp’n at 17:14-16.
12 Again, this merely reargues a *legal* point, rather than offering new *factual*
13 *allegations* from the SAC. The Court granted leave to amend, not leave to move
14 for reconsideration. Regardless, the “Court may conduct a fair use analysis, as a
15 matter of law, where the facts are presumed or admitted” because “judgments
16 pertaining to fair use ‘are legal in nature’ and are to be made by the court.”
17 *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 967 (C.D. Cal.
18 2007) (citing *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539,
19 560 (1985), and quoting *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986)); *see*
20 *also Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 530 (9th Cir. 2008)
21 (“[T]he district court’s resolution of the fair use issue at the motion to dismiss
22 stage was proper.”). In *Burnett*, for example, Judge Pregerson of this District
23 dismissed a copyright claim with prejudice based on fair use. *See Burnett*, 491 F.
24 Supp. 2d at 972. Numerous other courts have done likewise. *See, e.g., Sedgwick*
25 *Claims Mgmt. Services, Inc. v. Delsman*, C 09-1468 SBA, 2009 WL 2157573, at
26 *4 (N.D. Cal. July 17, 2009) (granting motion to dismiss with prejudice, rejecting
27 plaintiff’s argument “that the issue of fair use cannot be decided on a motion to
28 dismiss, and that it should be allowed to conduct ‘further discovery’”); *Brownmark*

1 *Films, LLC v. Comedy Partners*, 800 F. Supp. 2d 991, 999 (E.D. Wis. 2011) (same,
2 concluding that “this dispute simply does not warrant putting the defendants
3 through the expense of discovery”) (citation, quotation marks and brackets
4 omitted); *Savage v. Council on Am.-Islamic Relations, Inc.*, C 07-6076 SI, 2008
5 WL 2951281, at *9 (N.D. Cal. July 25, 2008) (granting motion for judgment on the
6 pleadings based on fair use).⁷

7 Having no new facts to rely upon, Plaintiffs contend that Section 110 of the
8 Copyright Act (the “face-to-face” exception and the TEACH Act) do not permit
9 streaming. But, as Defendants have previously noted, this motion to dismiss is not
10 based on Section 110. Regardless, Plaintiffs’ argument is precisely backwards.
11 Section 110 places limitations on *copyright owners’ exclusive rights*—it does not
12 limit the scope of *fair use*. See 17 U.S.C. § 110 (titled “Limitations on exclusive
13 rights: Exemption of certain performances and displays”). Had Congress intended
14 to limit the reach of fair use, it presumably would have referenced Section 107—
15 fair use—in the text of Section 110. It did not. Instead, it stated that
16 “[n]otwithstanding the provisions of section 106” (i.e. copyright owners’ exclusive
17 rights), the acts described in Section 110 “are not infringements of copyright.” 17
18 U.S.C. § 110. Indeed, when enacting the current version of another subsection of
19 Section 110, both the House Judiciary Committee and the Register of Copyrights
20 recognized that “[f]air use is a critical part of the distance education landscape,”
21 and “could apply as well to instructional transmissions not covered by the changes
22 to section 110(2). . . .” H.R. Rep. 107-687 at 15-16 (Sept. 25, 2002). Section 110 in
23 no way precludes Defendants’ fair use argument.

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26 ⁷ Plaintiffs suggest that “transformative, parodic uses,” are entitled to greater
27 solicitude in the 12(b)(6) context than educational uses. See Opp’n at 17 n.15. But
28 this baseless contention is contrary to Section 107, which never mentions parody,
but expressly refers to “teaching (including multiple copies for classroom use),”
“scholarship,” and “nonprofit educational purposes” as paradigmatic “fair uses.”
17 U.S.C. § 107.

1 Plaintiffs further attempt to avoid the application of the fair use doctrine
2 based on their speculation that Video Furnace *might* be used to allow non-students
3 to access the content at issue. Opp’n at 16-17. As Defendants pointed out in their
4 opening brief, however, Plaintiffs have not alleged that UCLA has ever done so.
5 *See* Mot. at 11:24-12:4. In their Opposition, Plaintiffs concede that this “is true”
6 because they have no basis other than speculation for making the allegation. *See*
7 Opp’n at 16:25-17:10. Nonetheless, Plaintiffs contend that they should be allowed
8 discovery to attempt to substantiate their speculation—nowhere alleged in the
9 SAC—that some hypothetical professor might conceivably have, at some unknown
10 point in time, invited “a guest to view a stream of the AVP Shakespeare program.”
11 *Id.* at 17:3-5. Such “unsupported assertions of counsel” cannot state a claim for
12 relief. *Pennington*, 457 F.3d at 1342 n.4. And even if Plaintiffs had included their
13 speculation in the SAC, Rule 8 requires allegations “plausibly suggesting (not
14 merely consistent with)” unlawful conduct. *Bell Atl. Corp. v. Twombly*, 127 S. Ct.
15 1955, 1966 (2007). But as set forth in Exhibit 17 to the SAC, “[a]ccess to the
16 Video Furnace links is restricted to password protected course web sites only.”
17 SAC, Ex. 17 at 2.⁸ The ID used to log in is “checked against the Registrar’s
18 records, ensuring that the ID is registered in that class.” *Id.* Plaintiffs’ unpleaded
19 speculation thus stops well shy even of offering “more than a sheer possibility that
20 a defendant has acted unlawfully,” and at a minimum “stops short of the line
21 between possibility and plausibility of entitlement to relief.” *Iqbal*, 129 S. Ct. at
22 1949, 1950 (citations and quotation marks omitted).⁹

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24 ⁸ Each of the pages subsequent to the first page of this exhibit are labeled
“Page 2.” This cite refers to the actual second page of the document.

25 ⁹ The case Plaintiff cites for the proposition that it should be allowed to
26 proceed with discovery based on its unalleged speculation, *Boykin v. KeyCorp*, 521
27 F.3d 202 (2d Cir. 2008), did not so hold and, in any event, not only preceded the
28 Supreme Court’s decision in *Iqbal*, but expressly relied on the Second Circuit
decision the *Iqbal* Court overturned. *See id.* at 213; *Iqbal*, 129 S. Ct. at 1950
 (“Rule 8 marks a notable and generous departure from the hyper-technical, code-
pleading regime of a prior era, but it does not unlock the doors of discovery for a
plaintiff armed with nothing more than conclusions.”).

1 The same failing dooms Plaintiffs’ arguments that they have alleged breach
2 of their alleged rights to publicly display the works and to create derivative works.
3 See Opp’n at 22:1-23:3. Plaintiffs have alleged nothing more than the possibility
4 that faculty *might* publicly display videos nonsequentially, and *might* create
5 derivative works. Because these allegations “do not permit the court to infer more
6 than the mere possibility of misconduct, the complaint has alleged—but it has not
7 ‘show[n]’—‘that the pleader is entitled to relief.’” *Iqbal*, 129 S. Ct. at 1950
8 (quoting Fed. R. Civ. P. 8(a)(2)).

9 Plaintiffs also contend that they have pleaded additional allegations in the
10 SAC about copies Video Furnace allegedly makes in the streaming process. See
11 Opp’n at 18:3-19:2. These allegations are not, as Plaintiffs contend, “qualitatively
12 very different,” *id.* at 18:18, from those Plaintiffs presented in the FAC and at oral
13 argument, to no avail. See FAC ¶ 43; May 2, 2011 Tr. at 6:9-7:9; Order at 10:7-15
14 (citing *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007)). In
15 any event, Plaintiffs’ supposedly new allegations change nothing.

16 **First**, Plaintiffs contend that copying occurs “at both ends” of the streaming
17 process. Opp’n at 19:9-10. But the same was true of the “cache” copies held to be
18 fair use in *Perfect 10*. See 508 F.3d at 1156 n.3 (“There are two types of caches at
19 issue in this case,” Google’s and the user’s).

20 **Second**, Plaintiffs contend that the copies are not “transitory” because a
21 copy allegedly remains on the Video Furnace system until deleted. That, however,
22 does not mean the videos are not transitory. The videos, in fact, “are available
23 only for the duration of the academic quarter in which the course is offered.” SAC,
24 Ex. 17 at 3¹⁰; see *Field v. Google*, 412 F. Supp. 2d 1106, 1123, 1124 (D. Nev.

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28 ¹⁰ This cite refers to the actual third page of the exhibit, which is mislabeled
“Page 2.”

1 2006) (finding fair use where copies were retained for 14-20 days).¹¹

2 Moreover, given that UCLA has the right to stream the copy, Plaintiffs do
3 not and cannot explain why it is unfair to keep a copy that is incidental to that right
4 for its duration. The issue of fair use cannot turn on such technical points. Indeed,
5 in finding fair use in *Sony v. Connectix*, 203 F.3d 596 (9th Cir. 2000), the Ninth
6 Circuit declined to “supervise the engineering solutions of software in minute
7 detail.” *Id.* at 605. The Ninth Circuit particularly took issue with any suggestion
8 that fair use law would “require that a software engineer, faced with two
9 engineering solutions that each require intermediate copying of protected and
10 unprotected material, ... follow the *least efficient solution.*” *Id.* (emphasis in
11 original). Here, requiring UCLA to transcode a DVD every time a student
12 requested a stream would be the least efficient solution. Copyright law does not
13 require such wasted efforts. *Id.*; *see also A.V. ex rel. Vanderhye v. iParadigms,*
14 *LLC*, 562 F.3d 630, 635, 645 (4th Cir. 2009) (affirming finding of fair use,
15 notwithstanding that the plaintiffs’ works were archived indefinitely in the
16 defendants’ system, where they were used to evaluate potential plagiarism).

17 **Third**, Plaintiffs contend that the copies are not “transformative.” But
18 whether a use is “transformative” is merely another way of framing the first fair
19 use factor. *Perfect 10*, 508 at 1164 (“The central purpose” of the first factor
20 inquiry “is to determine whether and to what extent” the use is “transformative”).
21 Here, UCLA’s use of the DVDs is for nonprofit educational purposes, which is the
22 prototypical transformative use set forth in the statutory text of the first fair use
23 factor. *See* 17 U.S.C. § 107(1) (directing consideration of “the purpose and
24 character of the use, including whether such use is of a commercial nature or is for
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26 ¹¹ Notably, the *Field* court did not rely on the 14-20 day period in deciding the
27 issue of fair use. *See id.* at 1117-23. The court’s discussion of the 14-20 period is
28 part of its analysis of whether Google was entitled to safe harbor protection under
17 U.S.C. § 512(b), which applies to certain “temporary” storages of material. *See*
id. at 1124; 17 U.S.C. § 512(b).

1 nonprofit educational purposes”).

2 In any event, the key point is that fair use favors copying that is incidental to
3 other lawful uses. *See Sega Enterprises Ltd.*, 977 F.2d 1510, 1513-14, 1521 (9th
4 Cir. 1992) (copies made during reverse engineering for a legitimate use were a fair
5 use); *Sony v. Connectix*, 203 F.3d at 602 (same). In *Perfect 10*, the Ninth Circuit
6 held that the “copying function performed automatically by a user’s computer” was
7 a fair use because it was done to “assist in accessing the Internet,” which is a
8 transformative use. 508 F.3d at 1169. That is, it was incidental to a transformative
9 (and legitimate) use. Here, the transcoding of DVDs performed by Video Furnace
10 assists UCLA’s nonprofit and educational use, and thus is transformative. *See* 17
11 U.S.C. § 107(1). Moreover, it is incidental to the exercise of UCLA’s right to
12 publicly display the DVDs, which itself is a legitimate use.

13 **Fourth**, Plaintiffs argue that they have “specifically alleged the harm to their
14 market” caused by the alleged copying. Opp’n at 19:14-15. But they cite no such
15 allegation in the SAC, *see id.*, which simply repeats the same insufficient
16 allegations as the FAC, which focus on purported harm from *streaming*, not from
17 incidental *copies* made in the course of streaming. *See* SAC ¶ 14; FAC ¶ 11.
18 UCLA is exercising its lawful right to publicly perform the DVDs. Any copying
19 incidental to that exercise cannot be a cognizable harm under the fourth fair use
20 factor, because Ambrose has already granted UCLA the right to publicly perform
21 the DVDs. Nothing in the SAC supports any conclusion other than the one the
22 Ninth Circuit reached in *Perfect 10*: that such incidental copying “has no more than
23 a minimal effect” on Plaintiffs’ alleged rights. 508 F.3d at 1169.

24 Finally, Plaintiffs offer no response to Defendants’ arguments that, under 17
25 U.S.C. § 101, items “distributed” must be “material objects” in which a copy is
26 “fixed”—*i.e.*, “sufficiently permanent or stable to permit it to be perceived,
27 reproduced, or otherwise communicated for a period of more than a transitory
28 duration.” *Id.* Nor do Plaintiffs address *Agee v. Paramount Comm’n*, 59 F.3d 317

1 (2d Cir. 1995), where the court explained that “merely transmitting a sound
2 recording to the public on the airwaves does not constitute a ‘distribution,’” which
3 “is generally thought to require transmission of a ‘material object’ in which the
4 sound recording is fixed....” *Id.* at 325. Instead, Plaintiffs rely *New York Times*
5 *Co. v. Tasini*, 533 U.S. 483, 121 S. Ct. 2381, 150 L. Ed. 2d 500 (2001), but the
6 Court there simply observed in passing that selling CD-ROMs and articles stored
7 in a database is distribution. *See id.* at 498. The case had nothing to do with
8 streaming, which is by definition an operation of “transitory duration,” and
9 certainly did not suggest that streaming is “distribution.” *See id.* In any case, if
10 Plaintiffs are correct that streaming is distribution, then distribution must be
11 permitted by either the license or the doctrine of fair use, or both, given that
12 streaming is permitted. Nothing in the logic Ninth Circuit’s incidental use cases
13 limits fair use to incidental copies, as opposed to other uses incidental to legitimate
14 purposes.

15 Accordingly, the Court should dismiss the copyright claim with prejudice.

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

18 Plaintiffs present only two arguments in support of their DMCA claim: that
19 UCLA “unlawfully accesses DVDs to reformat in preparation for streaming,” and
20 that UCLA “offers” and “provides” faculty and students the “entire Video Furnace
21 technology, which has as its basic premise the circumvention of AVP’s content
22 scrambling technology.” Opp’n at 23:11-19.

23 Plaintiffs’ first argument fails to address the fact that Defendants had the
24 undisputed *right* to access the DVDs because every purchase of every DVD by
25 definition includes the right to *access* what is on the DVD – otherwise no one
26 could play a DVD in any machine. The DMCA’s anti-circumvention provisions,
27 therefore, simply do not apply. *See Nimmer on Copyright § 12A.03[D][3]*.

28 Plaintiffs’ second argument fails because offering a technology to faculty

1 and students is not offering it “to the public.” 17 U.S.C. § 1201(a)(2), (b)(1).
2 Moreover, UCLA does not offer Video Furnace to the faculty and students
3 generally. Instead, it limits use of these services to “the Instructor of record or
4 Teaching Assistant” for a course, who must be using a video for “criticism,
5 comments, teaching or research.” SAC, Ex. 17 at 2.¹²

6 Moreover, as Defendants argued in their opening brief, Plaintiffs own
7 allegations make clear that circumvention is *not* the “basic premise” of Video
8 Furnace. *See* Mot. at 15:10-25. Plaintiffs allege that “Video Furnace includes
9 sophisticated editing capabilities....” (SAC ¶ 4; *see also id.* ¶¶ 49, 52) but do not
10 allege that any such editing actually occurred. And Plaintiffs’ exhibits demonstrate
11 that Video Furnace can be used with a variety of video sources, including sources
12 that need not even include technological protection measures. *See* SAC Ex. 12 at
13 65 (discussing using Video Furnace to watch standard television channels). The
14 DMCA, therefore, does not apply by its own terms because Video Furnace
15 admittedly has more than “limited commercially significant” purposes aside from
16 circumvention of technological protection measures. 17 U.S.C. § 1201(a)(2)(B),
17 (b)(1)(B). Plaintiffs fail to even address this argument and, therefore, concede it.

18 The Court should dismiss Ambrose’s DMCA claim with prejudice.

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

21 The Court rightly held that Ambrose’s state-law claims are preempted unless
22 it can allege that Defendants violated rights that are qualitatively different from
23 those protected by the Copyright Act. *See* Order at 11:18-13:7. As Ambrose
24 concedes, it has only identified three possibilities: “(1) the guarantee that each
25 program be exhibited ‘only in its entirety;’ (2) the promise that the 2008-2011

26 _____
27 ¹² As previously noted, each of the pages subsequent to the first page of this
28 exhibit are labeled “Page 2.” This cite refers to the actual second page of the
exhibit.

1 License that UCLA would pay a higher price for streaming rights; and (3) the
2 covenant in the 2008-2011 license prohibiting use of AVP's trademarks." Opp'n
3 at 24:5-8.

4 As to the first alleged promise, Plaintiffs alleged that Video Furnace allows
5 instructors to link to clips of films. See SAC ¶ 57. As Defendants pointed out,
6 however, Ambrose alleges that the same conduct is subsumed within its copyright
7 claim. See *id.* ¶¶ 49, 52, 54-55, 105. This claim, therefore, is preempted, as
8 Plaintiffs concede by not arguing otherwise. See Opp'n at 24:23-25:7. Further,
9 Plaintiffs have not alleged that Defendants actually showed any such clips. See
10 SAC ¶ 57. In their Opposition, Plaintiffs argue that Exhibit 14 shows that UCLA
11 counsels teachers to upload clips, but nothing there suggests, and Plaintiffs do not
12 allege, that clips were shown of any Ambrose DVDs in violation of the purported
13 covenant to show only entire programs. See SAC Ex. 14.

14 With regard to the second purported promise, Ambrose admits that it has not
15 alleged and cannot allege any additional facts to support it. See Opp'n at 24:14-22.
16 Moreover, as discussed above, Plaintiffs' allegations make clear that there was no
17 offer, much less an acceptance, for a streaming license *per se*. Rather, Ambrose
18 sought to sell Defendants a streaming service, but Defendants declined, as they had
19 every right to do. See SAC ¶¶ 10, 40, Ex. 10.

20 Finally, Plaintiffs do not even contend that they have pleaded any facts to
21 support the third purported covenant regarding trademarks. See Opp'n at 24:4-
22 25:7.

23 Accordingly, the Court should dismiss the state-law claims with prejudice.
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III. CONCLUSION

For the reasons set forth in this Court's prior Order, and others discussed in Defendants opening brief and above, the Court should dismiss the SAC with prejudice.

Dated: January 17, 2012

KEKER & VAN NEST LLP

By: /s/ R. James Slaughter
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