

1 Gregory P. Goonan (Cal. Bar #119821)
 2 **The Affinity Law Group APC**
 3 600 West Broadway, Suite 400
 4 San Diego, CA 92101
 5 Tel: 619-702-4335
 6 Fax: 619-243-0088

7
 8
 9 Attorneys for Plaintiff
 10 Marketing Information Masters, Inc.

11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

12 Marketing Information Masters, Inc., a
 13 California corporation,

14 Plaintiff,

15 vs.

16 The Board of Trustees of the California State
 17 University System, a public entity acting
 18 through its subdivision San Diego State
 19 University; and Robert A. Rauch, an
 20 individual,

21 Defendants.

Case No. 06 CV 1682 JAH (JMA)

**PLAINTIFF'S MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 OPPOSITION TO DEFENDANTS'
 MOTION TO DISMISS FIRST AMENDED
 COMPLAINT**

Date: January 18, 2007

Time: 3:00 p.m.

Court: 11 (Hon. John A. Houston)

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Table of Authorities 4

I. PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT 6

II. FACTUAL AND PROCEDURAL BACKGROUND 9

III. ARGUMENT 12

 A. This Motion Should Be Denied Because SDSU Is Not Immune
 From Being Sued For Copyright Infringement In This Court 12

 1. Overview 13

 2. The Applicable Analytical Framework 14

 3. Congress Expressed in “Unmistakably Clear”
 Language that the CRCA Abrogated State Immunity
 Under the Eleventh Amendment for Copyright
 Infringement Lawsuits 16

 4. The CRCA is a Constitutional Exercise of
 Congress’ Authority Pursuant to the Enforcement
 Clause of the Fourteenth Amendment 17

 a. The CRCA was enacted in response
 to substantial evidence of copyright
 infringement by the States and
 their instrumentalities19

 b. Congress determined there were no
 available state remedies for copyright
 infringement20

 c. Congress tailored the remedy to be
 provided by the CRCA to the magnitude
 of the harm to be prevented 21

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

5. The Supreme Court Decision in *Florida Prepaid*
Does Not Support a Finding that the CRCA
is Unconstitutional_ 21

- B. Rauch Is Not Entitled To Any Relief By This Motion 22
 - 1. The Declarations Submitted By Rauch Cannot Be
Considered In Connection With This Motion And Should
Be Stricken From The Record 23
 - 2. Rauch Does Not Enjoy Any Immunity From Suit 23
 - 3. MIMI’s State Law Claims Against Rauch Are Not Preempted 25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Cases:

American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907) 18

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 15

Briarpatch Ltd. v. Phoenix Pictures, Inc., 373 F.3d 296 (2d Cir. 2004) 25

Chavez v. Arte Publico Press, 204 F.3d 601 (5th Cir. 2000) 14

City of Boerne v. Flores, 521 U.S. 507 (1997) 14,18

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 14, 22

Florida Prepaid Postsecondary Educational Expense Bd. v. College Savings Bank,
527 U.S. 627 (1999) 21

Katzenbach v. Morgan, 384 U.S. 641 (1966) 17, 22

Kentucky v. Graham, 473 U.S. 159 (1985) 24

Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) 19

Lambert v. City of Kenner, 1993 WL 99188 (E.D. La. 1993) 14

New Kids on the Block v. News America Publishing, Inc.,
971 F.2d 302 (9th Cir. 1992) 18

Pareto v. FDIC, 139 F.3d 696 (9th Cir. 1998) 10, 22

Parks School of Business, Inc. v. Symington, 51 F.3d 1480 (9th Cir. 1995) 22

Richard Anderson Photography v. Brown, 852 F.2d 114 (4th Cir. 1988) 24

Roth v. Pritikin, 710 F.2d 934 (2d Cir. 1983) 18

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1995) *passim*

Unix System Laboratories, Inc. v. Berkeley Software Design, Inc.,
832 F. Supp. 790 (D.N.J. 1993) 14

1 Constitution, Statutes and Rules:

2 U.S. CONST. amend. XIV *passim*

3 U.S. CONST. amend. XIV, § 5 *passim*

4 17 U.S.C. § 301(a) 25

5 17 U.S.C. § 501(a) *passim*

6 17 U.S.C. § 511(a) *passim*

7 28 U.S.C. § 1338(a) 20

8 Fed.R.Civ.P. 12(b)(6) *passim*

9

10

11 Other Authorities:

12 5B Wright & Miller, *Federal Practice and Procedure*, § 1337 23

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 Defendants Board of Trustees of the California State University System, acting through
2 and representing its subdivision San Diego State University (hereinafter “SDSU”) and Robert A.
3 Rauch (“Rauch”) collectively have filed a motion to dismiss the first amended complaint (the
4 “Complaint”) of plaintiff Marketing Information Masters, Inc. (“MIMI”) pursuant to Rules
5 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. MIMI hereby respectfully submits
6 this memorandum of points and authorities in opposition to Defendants’ motion to dismiss.
7

8
9 **I. PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT**

10 As the Court undoubtedly is aware from its own personal knowledge and experience, the
11 use of materials protected by the intellectual property laws of the United States permeates the life
12 of literally every American. Nowhere is this more true than in the academic environment. Indeed,
13 it cannot be seriously disputed that academic institutions like SDSU are major users of materials
14 protected by the US intellectual property laws – and especially the copyright laws.

15 Literally every day, academic institutions like defendant SDSU use myriad materials
16 protected by copyright in their teaching, research, administrative and business activities. The most
17 obvious example is the use by academic institutions of textbooks, journal articles, and other
18 written and tangible materials as teaching materials in the classroom setting. But the use of
19 copyrighted materials by academic institutions like SDSU goes far beyond just books and other
20 written classroom materials. In this digital age, academic institutions now regularly use
21 multimedia materials, computer materials, music, art and graphics in connection with the teaching,
22 entertainment and recreation of their students. And the academic institutions also use myriad
23 computer programs (such as operating systems, e-mail programs, spreadsheet and accounting
24 programs, databases, etc.) to perform their day-to-day administrative functions.

25 Imagine a world (and a legal system) where certain academic institutions (like defendant
26 SDSU here) could evade the limitations, protections and liability of the copyright laws that apply
27 to every other business and entity in the United States (including the federal government and its
28

1 instrumentalities) simply because of the fortuity that such institutions happen to be state-run
2 institutions. Under such a scenario, state-run academic institutions would be free to operate what
3 are commonly-known as textbook “mills” whereby only one copy of a textbook and/or other
4 written materials would be purchased and then photocopied for all students without the approval
5 or compensation of the copyright owner. Or an institution could purchase one (or a few) copies of
6 a needed computer program (for example, Microsoft Windows, Word, Excel, etc.) and then copy
7 the program onto the computers of as many users as wanted to have access to the programs
8 without obtaining the necessary number of licenses for such use of the computer programs. Or an
9 institution could make unlimited and unrestricted use of artwork, music, sports logos, graphical
10 materials and the like without regard for the copyright protection attached to such materials.

11 While on first reading the Court may perceive that the scenarios outlined above may be
12 far-fetched, such scenarios describe exactly the danger and harm that would result if the immunity
13 argument made by Defendants as their principal argument in support of the present motion were
14 correct.¹ Under Defendants’ view of the world, the states (and therefore their instrumentalities
15 like defendant SDSU) are absolutely immune from liability or suit under the Copyright Act no
16 matter how egregiously or outrageously SDSU might infringe another’s copyright rights.²

17 Fortunately for plaintiff MIMI and other copyright owners, the United States Congress
18 identified the specific problems that would result if states were provided with blanket immunity
19 from copyright infringement liability and lawsuits, and enacted express and specific legislation to
20 make crystal clear that the states and their instrumentalities are subject to copyright infringement
21 liability just like any other person or entity who infringes a copyright. Acting pursuant to its
22 authority under the Fourteenth Amendment to the United States Constitution – which authorizes

23 ¹ As this Court knows, the federal courts have exclusive jurisdiction over copyright infringement
24 suits so any and all such suits must be brought in federal court. So, in raising its claim of
25 supposed sovereign immunity, SDSU essentially takes the position that it can engage in copyright
26 infringement with impunity, yet never be sued for such infringement because it allegedly enjoys
27 sovereign immunity.

28 ² Defendants’ immunity argument is especially egregious and hard to swallow when it is
considered (as will be shown through the discovery in this case) that SDSU has not hesitated to
file suit to protect its own intellectual property rights when SDSU believed infringement or
misappropriation had occurred.

1 Congress to abrogate state immunity when necessary to prevent the taking of property without due
2 process of law (such as occurs in the case of a copyright infringement by a state) – Congress in
3 1990 enacted the “Copyright Remedy Clarification Act (the “CRCA”).

4 Critically for purposes of the present motion, the CRCA modified and amended the
5 language of Section 501(a) of the Copyright Act (17 U.S.C. § 501(a)), the statute that creates a
6 federal cause of action for copyright infringement, to make express and absolutely clear that the
7 states and their instrumentalities were subject to federal court copyright infringement lawsuits just
8 like all other persons and entities in the United States. Likewise, the CRCA added Section 511 to
9 the Copyright Act, which plainly and unambiguously provides that the States and their
10 instrumentalities are not immune from suit for copyright infringement under the Eleventh
11 Amendment.

12 The language of Sections 501(a) and 511 of the Copyright Act subjecting the states and
13 their instrumentalities like SDSU to copyright infringement lawsuits in federal court remains a
14 part of the statutory language of the Copyright Act as of the filing of this opposition. Critically,
15 the amendments to the Copyright Act that resulted from enactment of the CRCA were expressly
16 approved by the United States Copyright Office and also were universally sought and approved by
17 myriad persons and entities engaged in businesses involving copyrighted materials.³

18 Nevertheless, by the present motion, SDSU asks this Court to take the extraordinary step
19 of overriding the will and legislative authority of the United States Congress and declaring
20 unconstitutional the relevant portions of Sections 501(a) and 511 of the Copyright Act. But as will
21 be discussed below, there is no basis for this Court to override the considered judgment of the
22 legislative branch and declare the CRCA unconstitutional. On the contrary, in enacting the

23 ³ For example, the following businesses and entities – literally running the gamut of the creative
24 endeavors in the United States -- were among the many persons and entities who expressed
25 concern to the Congress about damage to their copyright rights by the states, so they presented
26 evidence and testimony to Congress and sought the legislation that ultimately became the CRCA:
27 Association of American University Presses, Inc.; Association of American Publishers, Inc.;
28 Software Publishers Association; Broadcast Music, Inc. (BMI); American Journal of Nursing;
Motion Picture Association of America (MPAA); Harcourt Brace Jovanovich, Inc.; Information
Handling Services; Music Publishers Association of the United States; Songwriter’s Guild of
America; and the American Society of Composers, Authors and Publishers (ASCAP).

1 CRCA, Congress complied in full with the requirements for the abrogation of the States’
2 immunity under the Eleventh Amendment as explained in the well-settled Supreme Court
3 precedents preceding the CRCA.

4 Because passage of the CRCA was a valid and lawful exercise of Congress’ legislative
5 authority, SDSU does not have any sovereign immunity from the present suit since such
6 immunity, to the extent it ever existed at all, has been plainly and expressly abrogated by Sections
7 501(a) and 511 of the Copyright Act. SDSU’s request for dismissal pursuant to FRCP 12(b)(6) on
8 the grounds of sovereign immunity consequently must be denied.

9 Defendant Rauch also seeks dismissal by this motion on the ground that he was an
10 employee of SDSU and thus allegedly is immune to the same extent as SDSU. MIMI has sued
11 Rauch both in his individual capacity (making this lawsuit a so-called “personal capacity suit”
12 against Rauch) as well as in his potential role as a SDSU employee. Because this is a 12(b)
13 motion, MIMI’s allegations must be accepted as true and Rauch cannot introduce extrinsic
14 evidence in support of the motion. Consequently, the two declarations submitted by Rauch in
15 support of this motion cannot be considered by the Court and should be stricken from the record.

16 As will be shown below, even if SDSU enjoys sovereign immunity which precludes this
17 suit, such immunity does not shield Rauch from liability for committing copyright infringement
18 himself or for inducing and aiding and abetting SDSU to commit copyright infringement.⁴
19 Likewise, as further discussed below, the state law claims asserted by MIMI against Rauch are not
20 preempted by the Copyright Act because such claims seek to vindicate rights different than rights
21 that can and are protected by copyright. Consequently, Rauch is not entitled to any relief by this
22 motion.

23 **II. FACTUAL AND PROCEDURAL BACKGROUND**

24 Because the present motion has been brought pursuant to FRCP 12(b)(6), the Court must
25 accept as true all material allegations in MIMI’s Complaint, as well as all reasonable inferences

26 ⁴ Of course, even if SDSU is immune (which it is not), that does not mean SDSU did not infringe
27 MIMI’s copyright. All it means is that SDSU cannot be sued in federal court for such
28 infringement.

1 therefrom. [*Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).] The allegations of MIMI’s
2 Complaint establish the following facts:

3 This is an action for copyright infringement, conversion, misappropriation and unfair
4 business practices under federal and California law. As alleged in MIMI’s Complaint, for a
5 number of years MIMI and its owner Michael Casinelli performed economic impact studies for the
6 San Diego Holiday Bowl committee and provided the Holiday Bowl with written reports setting
7 forth and discussing MIMI’s analysis and conclusions about the Holiday Bowl’s economic impact
8 on the San Diego region. [Complaint ¶¶ 2-4; 25-26.]

9 The written report at issue in this case is MIMI’s 2003 economic impact report (the “2003
10 Report”), which is a work registered under and protected by the copyright laws of the United
11 States. [Complaint ¶ 29.] As alleged in MIMI’s Complaint, as least for the 2004 Holiday Bowl
12 (and possibly for subsequent games), the Holiday Bowl committee retained the Center for
13 Hospitality and Tourism Research at SDSU (the “SDSU Center for Hospitality and Tourism
14 Research”) to conduct the study of the economic impact of the 2004 game. Defendant Rauch was
15 the individual with primary responsibility for the project. [Complaint ¶¶ 7-9; 30-33.]

16 Unfortunately, Rauch and SDSU did not develop their own methodology, practices or
17 analysis framework to conduct the 2004 study, analyze the data obtained therefrom, or reach
18 conclusions from such data as they were required to do under the applicable laws. Instead, as
19 explained in MIMI’s complaint, Rauch and SDSU obtained a copy of the 2003 Report and then
20 simply (and illegally) misappropriated MIMI’s ideas, methodologies, practices and analytical
21 framework to conduct the 2004 study. To further compound their wrongdoing, Rauch and SDSU
22 blatantly and intentionally copied and plagiarized the copyrighted 2003 Report to generate a
23 written report for the Holiday Bowl regarding the 2004 study. [Complaint ¶¶ 10-11; 34-39.]

24 The actions of Rauch and SDSU were intentional copyright infringement in the extreme,
25 and also constituted the conversion and misappropriation of MIMI’s property not covered by the
26 copyright on the 2003 Report.⁵ Indeed, as alleged in MIMI’s Complaint, MIMI is informed and

27 _____
28 ⁵ To make the wrongdoing of Rauch and SDSU even worse, the data and statistics presented by

1 believes that SDSU conducted an internal investigation about this matter and itself concluded that
2 Rauch was guilty of plagiarism and copyright infringement.

3 After obtaining federal registration of the copyright in the 2003 Report and complying with
4 the requirements of the California statutes regarding claims against governmental entities like
5 SDSU, MIMI filed its original complaint in this matter on August 18, 2006. [Complaint ¶ 16.]
6 Defendant SDSU responded by a motion to dismiss pursuant to FRCP 12(b). Rauch “joined” in
7 such motion.

8 As the Court will recall, one of the principal arguments made by SDSU and Rauch in
9 connection with their first motion to dismiss was that MIMI’s complaint should be dismissed for
10 lack of subject matter jurisdiction because MIMI had not yet obtained the formal registration
11 certificate for the 2003 Report at the time it filed its original complaint. For the reasons explained
12 in MIMI’s opposition to Defendants’ earlier motion to dismiss, such argument by Defendants was
13 frivolous and bogus. Nevertheless, in order to resolve any questions about the Court’s subject
14 matter jurisdiction, MIMI filed its first amended complaint (the “Complaint”) to provide the
15 details of MIMI’s copyright registration (which had been issued as of the date of MIMI’s
16 opposition to the earlier motion to dismiss).

17 Following the filing of MIMI’s first amended complaint, the Court issued an order denying
18 as moot the earlier motion to dismiss because of the filing of the first amended complaint. MIMI
19 neither expected nor intended such result – it filed the first amended complaint for the sole
20 purposes of eliminating the subject matter jurisdiction argument and dismissing the pendant state
21 law claims against SDSU.

22 Defendants ultimately responded to the first amended complaint by filing the present

23 _____
24 Rauch and the SDSU Center for Hospitality and Tourism Research to the Holiday Bowl were
25 false, distorted and over-inflated, and did not accurately reflect the true economic impact of the
26 2004 Holiday Bowl on the San Diego community. [Complaint ¶ 11.] Such falsification and
27 distortion of the economic data was caused in large part by the fact that Rauch and the SDSU
Center for Hospitality and Tourism Research simply copied MIMI’s 2003 Economic Impact
Report rather than independently performing a legitimate economic impact study and then
independently writing a report about such study. [Id.]

1 motion to dismiss, which is nothing but a rehash of the arguments made in the earlier motion to
2 dismiss (with the exception of the subject matter jurisdiction argument). Unfortunately, however,
3 in rehashing their old arguments, Defendants choose to level accusations at MIMI that are, with
4 due respect, ridiculous.

5 Right from the outset of their memorandum, Defendants opine that the timing of MIMI's
6 first amended complaint "should raise some eyebrows" and accuse MIMI of "pure
7 gamesmanship." Such accusations are as baseless as they are insulting. Defendants do not make
8 any attempt to explain why the filing of the first amended complaint was "pure gamesmanship" or
9 should "raise some eyebrows." The reason why Defendants have not offered any factual support
10 for their unseemly rhetoric is plain and obvious: As noted, the first amended complaint was filed
11 solely to eliminate the subject matter jurisdiction argument and to benefit SDSU by dismissing the
12 pendant state claims against it. Had Defendants not made their bogus subject matter jurisdiction
13 argument in the first place, the filing of a first amended complaint would not have been necessary
14 at all. Certainly, Defendants should not now be complaining about the filing of a pleading that
15 was filed in response to Defendants' own frivolous argument.

16 In any event, the present motion now presents for decision the immunity and preemption
17 arguments that Defendants previously raised by their earlier motion to dismiss. As discussed
18 below, neither the immunity argument nor the preemption argument has any merit, so this motion
19 should be denied in its entirety.

20 **III. ARGUMENT**

21 A. This Motion Should Be Denied Because SDSU Is Not Immune From Being Sued
22 For Copyright Infringement In This Court

23 SDSU seeks dismissal pursuant to FRCP 12(b)(6) on the grounds that it is immune
24 pursuant to the Eleventh Amendment from being sued for copyright infringement in federal courts
25 like this one. As the Court might expect, the question of state sovereign immunity against
26 copyright infringement claims is a complicated issue of constitutional law to which MIMI easily
27 could devote 50 pages to brief.

28 Given the page limitations for briefs under the Court's local rules, MIMI will explain to
*PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS FIRST AMENDED COMPLAINT*

1 the Court as concisely as possible why SDSU in fact does not enjoy the immunity it asserts.

2 In further support of its opposition to Defendants’ motion, MIMI also submits herewith
3 various legislative and administrative materials as Exhibits A through C, which materials provide
4 further detail and analysis why Defendants’ immunity argument must fail. The documents
5 submitted as Exhibit A are excerpts from the testimony and evidence submitted to the United
6 States Senate in connection with the Senate’s investigation and consideration of the CRCA. The
7 documents submitted as Exhibit B similarly are excerpts from the testimony and evidence
8 submitted to the United States House of Representatives in connection with the House’s
9 consideration of the CRCA. Finally, the documents submitted as Exhibit C are excerpts of the
10 Comments submitted to the United States Copyright Office in connection with the Copyright
11 Office’s work with the Congress in connection with the CRCA.

12 If the Court believes that it requires more detailed briefing, MIMI stands ready upon notice
13 from the Court to submit briefing and/or evidence that more extensively deals with the issue of
14 state immunity from copyright infringement lawsuits.

15 1. Overview

16 Defendants urge in their moving papers that MIMI’s Complaint supposedly “calls on this
17 Court to ignore established authority and adopt a rule of law that permits [MIMI] to sue the State
18 for infringement.” Such a statement is inaccurate and turns the applicable analytical framework
19 on its head. The Court does not need to “adopt a rule of law that permits [MIMI] to sue
20 [Defendants] for infringement.” In enacting the CRCA, Congress already has enacted and adopted
21 such a rule. As a result of Congress’ actions in enacting the CRCA, the plain and unambiguous
22 language of Sections 501(a) and 511 of the Copyright Act expressly authorize MIMI’s suit against
23 Defendants.

24 To be sure, the issue of whether a state can be sued for copyright infringement is a matter
25 of ongoing controversy in the federal courts. Neither the United States Supreme Court nor the
26 Ninth Circuit has ever addressed such issue. Certainly, neither the Supreme Court nor the Ninth
27 Circuit has ever declared the CRCA unconstitutional as Defendants now ask this Court to do.

28 As Defendants correctly note at pages 11-12 of its memorandum, the Fifth Circuit and a
*PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS’
MOTION TO DISMISS FIRST AMENDED COMPLAINT*

1 few federal trial courts have found the CRCA unconstitutional. No other federal appellate court
2 other than the Fifth Circuit has invalidated the CRCA. Equally important, other district courts that
3 have addressed the viability of the CRCA have upheld the constitutionality of Congress'
4 abrogation of state immunity by the CRCA. [*See Unix System Laboratories, Inc. v. Berkeley*
5 *Software Design, Inc.*, 832 F. Supp. 790, 799 (D. N.J. 1993); *Lambert v. City of Kenner*, 1993 WL
6 99188 (E.D. La. 1993).]

7 The *Unix System* case decided by the District of New Jersey dealt with the issue of whether
8 the plaintiff could proceed with copyright infringement claims against the Regents of the
9 University of California. There is no legitimate distinction between the defendant in the *Unix*
10 *System* case and SDSU here – both the UC system and SDSU are educational institutions operated
11 by the State of California. Critically, the district court in the *Unix System* case found that the
12 CRCA was a valid and constitutional exercise of Congress' power to abrogate state immunity
13 under the Eleventh Amendment for copyright infringement claims, and accordingly allowed the
14 plaintiff to proceed with copyright claims against the University of California that arose after the
15 enactment of the CRCA.

16 For the reasons discussed below, the cases cited by Defendants in support of this motion
17 were wrongly decided and should not be followed by this Court. Instead, just as the district court
18 did in the *Unix System* case, this Court should reject SDSU's assertion of immunity under the
19 Eleventh Amendment.

20 2. The Applicable Analytical Framework

21 There can be no dispute that, as a general proposition of law, states and their
22 instrumentalities are immune from suit in federal courts unless there has been consent to suit. But
23 such immunity is not absolute. On the contrary, the law is well-settled that Congress has the
24 authority to abrogate state sovereign immunity by passing appropriate legislation so long as
25 Congress satisfies two requirements. First, Congress must express in "unmistakably clear"
26 language in the legislation itself its intention to abrogate the state's immunity. In addition,
27 Congress must act pursuant to a constitutional grant of power authorizing it to enact the abrogating
28 statute. [*See, e.g. Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *City of Boerne v. Flores*, 521 U.S.

1 507, 519-20 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1995).]

2 In 1985, the Supreme Court issued its decision in *Atascadero State Hospital v. Scanlon*,
3 473 U.S. 234 (1985), by which the Supreme Court appeared to expand the situations where states
4 could be found immune from suit in federal court. In the 100 years before the *Atascadero*
5 decision, there were only four published federal decisions in copyright infringement cases
6 involving Eleventh Amendment immunity. However, in the three years following *Atascadero*, six
7 such suits arose and were all dismissed by the district courts on Eleventh Amendment grounds. In
8 all such cases, the defendant state asserted complete immunity from damages under the federal
9 copyright law, leaving the copyright holders without any remedy for the states' infringement given
10 exclusive federal jurisdiction for copyright infringement cases. [*See* Copyright Remedy
11 Clarification Act and Copyright Office Report on Copyright Liability of States: Hearings on H.R.
12 1131 Before the Subcommittee on Courts, Intellectual Property and the Administration of Justice
13 of the Committee on the Judiciary (the "House Hearings"), 101st Congress 51 (1989) (Exhibit B
14 hereto).]

15 Given this untenable situation, Congress decided that remedial legislation was needed to
16 make crystal clear that the states were in fact subject to copyright infringement lawsuits in federal
17 courts and were not immune from such suits under the Eleventh Amendment. [*See* The Copyright
18 Clarification Act: Hearing on S. 497 Before the Subcommittee on Patents, Copyrights and
19 Trademarks of the Committee on the Judiciary (the "Senate Hearing"), 101st Congress 1, 10, 52,
20 54, 61 (Exhibit A hereto).] The result was the passage in 1990 of the Copyright Remedy
21 Clarification Act (the "CRCA"), P.L. 101-553, 104 Stat.2749.

22 Critically for purposes of the present motion, the CRCA modified and amended the
23 language of Section 501(a) of the Copyright Act (17 U.S.C. § 501(a)), the statute that creates a
24 federal cause of action for copyright infringement, to make express and absolutely clear that the
25 States and their instrumentalities were subject to federal court copyright infringement lawsuits just
26 like all other persons and entities in the United States. Likewise, the CRCA added Section 511 to
27 the Copyright Act, which plainly and unambiguously provides that the States and their
28 instrumentalities are not immune from suit for copyright infringement under the Eleventh

1 Amendment.

2 The language of Sections 501(a) and 511 of the Copyright Act subjecting the States and
3 their instrumentalities like SDSU to copyright infringement lawsuits in federal court remains a
4 part of the statutory language of the Copyright Act as of the filing of this opposition. So, in order
5 to prevail on its FRCP 12(b)(6) motion, SDSU must convince this Court to override the will and
6 legislative authority of the United States Congress and declare unconstitutional the relevant
7 portions of Sections 501(a) and 511 of the Copyright Act.

8 As discussed herein, there is no basis for this Court to override the considered judgment of
9 the legislative branch and declare the CRCA unconstitutional. On the contrary, in enacting the
10 CRCA, Congress complied in full with the requirements for the abrogation of the States’
11 immunity under the Eleventh Amendment as explained in the well-settled Supreme Court
12 precedents preceding the CRCA. Congress clearly and expressly abrogated whatever immunity
13 may have existed in favor of the States for copyright infringement lawsuits in federal court.
14 Congress also validly acted pursuant to its power under the Enforcement Clause of the Fourteenth
15 Amendment in enacting the CRCA.

16 Because passage of the CRCA was a valid and lawful exercise of Congress’ legislative
17 authority, SDSU does not have any sovereign immunity from the present suit since such
18 immunity, to the extent it ever existed at all, has been plainly and expressly abrogated by Sections
19 501(a) and 511 of the Copyright Act. SDSU’s request for dismissal pursuant to FRCP 12(b)(6) on
20 the grounds of sovereign immunity consequently must be denied

21 3. Congress Expressed in “Unmistakably Clear” Language that the CRCA
22 Abrogated State Immunity Under the Eleventh Amendment for Copyright
23 Infringement Lawsuits.

24 As discussed above, the first step in the inquiry whether legislation passed by Congress
25 abrogating state immunity is a constitutional exercise of Congressional power is whether Congress
26 expressed in “unmistakably clear” language in the legislation itself its intention to abrogate the
27 state’s immunity. Here, there cannot be any question or legitimate dispute that the CRCA satisfies
28 this prong of the constitutional inquiry. Section 501(a) of the Copyright Act has long provided

1 that “[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer
2 of the copyright . . .” Section 501(b) provides the aggrieved copyright owner may commence a
3 copyright infringement lawsuit against such copyright infringer.

4 In enacting the CRCA, Congress amended Section 501(a) of the Copyright Act to
5 expressly provide that the term “anyone” in Section 501(a) includes any state and any
6 instrumentality of the state, to the same extent as any nongovernmental entity. Likewise, in
7 enacting the CRCA, Congress added Section 511 to the Copyright Act. To the extent that there
8 may have been any doubt whether Congress’ amendment of Section 501(a) abrogated state
9 immunity, Section 511(a) expressly provides that the states and the instrumentalities of the state
10 “shall not be immune, under the Eleventh Amendment of the Constitution of the United States or
11 under any other doctrine of sovereign immunity” from a copyright infringement lawsuit in federal
12 court.

13 Given the foregoing, the key inquiry in the analysis of the constitutionality of the CRCA is
14 whether Congress acted pursuant to a constitutional grant of power authorizing it to enact the
15 CRCA. As discussed below, Congress most certainly did so.

16 4. The CRCA is a Constitutional Exercise of Congress’ Authority Pursuant to
17 the Enforcement Clause of the Fourteenth Amendment

18 As SDSU correctly explains in its moving papers, the Supreme Court held in *Seminole*
19 *Tribe of Florida v. Florida*, 517 U.S. 44 (1995) that Congress does not have the power pursuant to
20 Article I of the Constitution to abrogate state immunity. But such argument completely misses the
21 point, because the CRCA survives constitutional scrutiny as a valid exercise of Congress’ power
22 under the Enforcement Clause of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 5.

23 It has long been settled that Congress has the power under the Enforcement Clause to
24 abrogate state immunity. [*See, e.g. City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997)
25 (Congress has “wide latitude” under Enforcement Clause to enact appropriate legislation to protect
26 Fourteenth Amendment rights); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (Enforcement
27 Clause authorizes Congress to “exercise its discretion in determining whether and what legislation
28 is needed to secure the guarantees of the Fourteenth Amendment”).]

1 Among the guarantees of the Fourteenth Amendment are that no State shall deprive any of
2 its citizens of life, liberty or property without due process of law. The exclusive rights created by
3 and protected under the Copyright Act are “property” rights. [*See American Tobacco Co. v.*
4 *Werckmeister*, 207 U.S. 284, 291 (1907); *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983); *New*
5 *Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302, 306 (9th Cir. 1992).]⁶
6 Consequently, Congress was empowered under the Enforcement Clause to enact the CRCA to
7 protect copyright owners against the taking of their property, i.e., copyright infringement, by the
8 States.

9 The Supreme Court decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997) is the critical
10 case to the Court’s analysis of whether the CRCA was a valid exercise of Congressional power
11 under the Enforcement Clause. As the court explained in *Boerne*, Congress’ power under the
12 Enforcement Clause is “remedial” in nature, and Congress does not have the power under the
13 Enforcement Clause to create new rights. [521 U.S. at 519.] But the court also recognized that
14 “the line between measures that remedy . . . and measures that make a substantive change in the
15 governing law is not easy to discern [so] Congress must be given wide latitude [under the
16 Enforcement Clause].” [*Id.* at 519-20 (emphasis added).]

17 The *Boerne* decision sets forth the analytical framework that federal courts must employ to
18 determine if a statute is sustainable under the Enforcement Clause. As the Supreme Court
19 explained in *Boerne*, “there must be a congruence and proportionality between the injury to be
20 prevented or remedied and the means adopted to that end.” [*Id.*] To apply this somewhat
21 amorphous principle, the Supreme Court explained that for Congress to invoke the Enforcement
22 Clause, it must identify conduct transgressing the Fourteenth Amendment’s protections, and must
23 tailor its legislative scheme to remedying or preventing such conduct. [*Id.*]

24 The Enforcement Clause analysis required under *Boerne* focuses on three particular issues:
25 (1) the nature of the injury to be remedied; (2) whether there are adequate state remedies to

26 _____
27 ⁶ Defendants do not dispute in their moving papers that a copyright is “property” for purposes of
28 the Fourteenth Amendment analysis.

1 address the injury; and (3) the coverage of the legislation. [*See Kimel v. Florida Board of*
2 *Regents*, 528 U.S. 62 (2000).] As discussed below, the CRCA passes muster under all three of
3 these factors so the CRCA was a valid exercise of Congress’ power under the Enforcement
4 Clause.

5 a. The CRCA was enacted in response to substantial evidence of
6 copyright infringement by the States and their instrumentalities

7 As the Court might expect, Congress held substantial hearings regarding the need for and
8 scope of the CRCA before its passage. The evidence presented to Congress during such hearings
9 unfortunately showed a widespread and growing trend of copyright infringement by the States and
10 their instrumentalities (like colleges and universities). For example, one witness testified that
11 problems “are clearly widespread and they are clearly increasing.” [Senate Hearings at pp. 106,
12 109.] A number of witnesses testified about the problems they had enforcing their copyrights
13 against state universities. [Senate Hearings at pp. 82, 90-91 (addressing illegal copying of
14 copyrighted materials by universities and losses caused thereby); p. 109 (discussing devices
15 created by universities to override copy protections on computer products); House Hearings at p.
16 146 (discussing curious situation where universities typically do not buy multiple copies of
17 computer software as required by copyright law); Senate Hearing at p. 82; House Hearings at pp.
18 104, 106, 148 (discussing illegal university photocopying of copyrighted course books); Senate
19 Hearing at pp. 95, 102.).]

20 Witnesses also testified that copyright infringement problems by the states only increased
21 as the well-publicized budget problems of various states became more severe. [See House
22 Hearings at p. 92.] Congress also heard how state agencies increasingly were refusing to license
23 copyrighted works like software and performance works because of the States’ perceived Eleventh
24 Amendment immunity. [See Senate Hearing at pp. 69-70, 77; p. 152; pp. 95, 102.] Even state
25 university representatives themselves admitted that the widespread evidence of state copyright
26 infringement and invalid assertions of Eleventh Amendment immunity as such circumstances
27 existed at the time of the hearings about the CRCA could justify abrogation. [See Senate Hearing
28 at p. 131; House Hearings at p 179.]

1 In connection with its consideration of and deliberations about the CRCA, Congress also
2 commissioned the Copyright Office to obtain information and comments about Eleventh
3 Amendment immunity issues in the copyright field. The Copyright Office in turn issued a request
4 for information to the copyright community to discuss state immunity and the problems that might
5 be caused thereby. Excerpts of some of the comments and information submitted to the Copyright
6 Office in response to its request are submitted herewith as Exhibit C. Such comments and
7 information provide additional insightful and highly probative evidence of the need for the
8 abrogation of state immunity for copyright claims that ultimately was brought about by the
9 enactment of the CRCA.

10 Simply put, Congress had more than ample evidence of widespread and increasing
11 copyright infringement and improper assertions of Eleventh Amendment immunity by the states
12 that Congress believed needed to be remedied by the enactment of the CRCA. Congress
13 accordingly more than amply satisfied the first *Boerne* factor in enacting the CRCA.

14 b. Congress determined there were no available state remedies for
15 copyright infringement

16 Congress also carefully considered the availability of state remedies for copyright
17 infringement as part of its deliberations about the CRCA. Congress concluded that there was not a
18 single state that had any remedy for copyright infringement. This is no surprising giving the fact
19 that the federal courts have exclusive jurisdiction over copyright infringement lawsuits pursuant to
20 28 U.S.C. 1338(a). [See Senate Hearing at pp. 7, 66; House Hearings at p. 79.] Moreover, as
21 previously discussed, following the Supreme Court’s decision in *Atascadero Hospital*, there was
22 an explosion of copyright litigation whereby states had infringed copyrights but attempted to avoid
23 liability on the basis of alleged Eleventh Amendment immunity.

24 As can be seen, at the time it enacted the CRCA, Congress was faced with a situation
25 where there was no remedy available whatsoever to copyright owners whose copyrights had been
26 infringed by states or their instrumentalities. Congress consequently reasonably exercised its
27 power under the Enforcement Clause to abrogate state immunity in order to create a remedy
28 against states who deprive their citizens of their property without due process by engaging in

1 copyright infringement.

2 c. Congress tailored the remedy to be provided by the CRCA to the
3 magnitude of the harm to be prevented

4 In enacting the CRCA, Congress did nothing more than extend the remedies already
5 available under the Copyright Act against private and non-governmental parties to the states and
6 their instrumentalities. In enacting the CRCA, Congress did not create any type of new or
7 enhanced right against the states or rights against the states that were different or greater than the
8 rights against private parties. Moreover, because of the nature of copyright infringement, i.e., the
9 unlawful use of copyrighted materials, Congress did not create any remedy that was esoteric or
10 difficult to understand.

11 In summary, Congress, in the exercise of the discretion and wide latitude granted to it to
12 enforce the protections of the Fourteenth Amendment, found that making damages remedies
13 available against the States was necessary to remedy state copyright infringement. [See H. Rep.
14 No. 101-282(I) at pp. 8-9.] Such exercise of its discretion was amply and fully supported by fact
15 and the evidence adduced by Congress during its hearings on the CRCA, and is eminently
16 constitutional.

17 5. The Supreme Court Decision in *Florida Prepaid Does Not Require a*
18 Finding that the CRCA is Unconstitutional

19 In *Florida Prepaid Postsecondary Educational Expense Bd. v. College Savings Bank*, 527
20 U.S. 627 (1999), the Supreme Court found that an amendment to the Patent and Plant Variety Act
21 called the “Patent Remedy Act” that was enacted by Congress to abrogate state immunity under
22 such statute was not a valid exercise of Congress’ authority under the Fourteenth Amendment.
23 Such decision does not mandate that the Court likewise invalidate the CRCA and grant SDSU’s
24 motion to dismiss.

25 This is so because, as discussed in detail above, in passing the CRCA Congress did
26 everything that the *Florida Prepaid* court found lacking when it invalidated the Patent Remedy
27 Act. As discussed herein, unlike the situation with the Patent Remedy Act, Congress identified a
28 widespread and increasing pattern of state copyright infringement. Congress considered the

1 availability of recourse under state law (which, as discussed was totally non-existent), and it
2 tailored the CRCA to remedy the specific problem of state copyright infringement it identified.

3 Simply put, in enacting the CRCA, Congress acted at least as prudently and carefully – if
4 not more prudently and carefully – as it has in the past in enacting legislation ultimately found by
5 the Supreme Court to be valid exercises of Congress’ power under the Enforcement Clause. [*See*,
6 *e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).]
7 Thus, the decision in *Florida Prepaid* does not provide any basis or reason for this Court to
8 invalidate the CRCA.⁷

9 B. Rauch Is Not Entitled To Any Relief By This Motion

10 Rauch’s motion to dismiss is made pursuant to FRCP 12(b)(6). Because this is a FRCP
11 12(b) motion, the Court must accept as true all material allegations in MIMI’s Complaint, as well
12 as all reasonable inferences therefrom. [*Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).] The
13 Complaint must be construed in the light most favorable to MIMI, and dismissal may not be
14 granted unless it appears “beyond doubt” that MIMI can prove no set of facts in support of its
15 claims. [*See Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).]

16 Defendant Rauch seeks dismissal of the claims against him on two grounds: (1) that he
17 allegedly also enjoys immunity from suit under the Eleventh Amendment because he supposedly
18 was an employee of SDSU; and (2) MIMI’s state law claims against Rauch supposedly are
19 preempted by the Copyright Act. As discussed below, neither of Rauch’s arguments has any
20 merit. Even if SDSU is immune under the Eleventh Amendment, such immunity does not extend
21 to acts of copyright infringement done by Rauch individually. Moreover, because MIMI’s state
22 law claims seek to vindicate rights that are not within the scope of the Copyright Act, such claims
23 are not preempted. Rauch’s motion for dismissal accordingly should be denied in its entirety.

24
25 _____
26 ⁷ Indeed, in his dissent in *Florida Prepaid*, Justice Stevens specifically commented that the
27 CRCA was different that the Patent Remedy Act at issue in *Florida Prepaid* because of the
28 evidence adduced by Congress during its deliberations about the CRCA, and consequently
concluded that the CRCA was appropriate legislation under the Enforcement Clause. [*See Florida
Prepaid*, 527 U.S at 659 n.9 (Stevens, J., dissenting).]

1 1. The Declarations Submitted By Rauch Cannot Be Considered In
2 Connection With This Motion And Should Be Stricken From The Record

3 An important aspect of practice under FRCP 12(b)(6) is that a court cannot rely upon
4 extrinsic evidence (other than matters subject to judicial notice and matters of public record) in
5 considering a FRCP 12(b)(6) motion. [See 5B Wright & Miller, *Federal Practice and Procedure*,
6 at section 1337.] In direct violation of this fundamental rule of FRCP 12(b)(6) practice, Rauch has
7 submitted two declarations in support of this motion, in what appears to be a blatant and improper
8 attempt to circumvent the allegations of MIMI’s Complaint and convert this motion into a thinly-
9 disguised motion for summary adjudication.

10 Such tactic cannot and should not be countenanced. Because the declarations filed by
11 Rauch constitute extrinsic evidence that attempts to contradict the allegations of MIMI’s
12 Complaint, such declarations cannot be considered by the Court in connection with this motion
13 and should be stricken from the record.

14 2. Rauch Does Not Enjoy Any Immunity Here

15 MIMI has sued Rauch both in his individual capacity (making this lawsuit a so-called
16 “personal capacity suit”) as well as in his potential role as a SDSU employee. [Complaint ¶ 21.]
17 Because this is a 12(b)(6) motion, MIMI’s allegations must be accepted as true and Rauch cannot
18 introduce extrinsic evidence in support of the motion. In other words, MIMI’s allegations that
19 Rauch acted in his individual capacity in infringing, and aiding and abetting and inducing the
20 infringement of, MIMI’s copyright must be accepted as true.

21 Even if SDSU enjoys sovereign immunity which precludes this suit against it (which it
22 does not), such immunity does not shield Rauch from personal liability for committing copyright
23 infringement himself or for inducing and aiding and abetting SDSU to commit copyright
24 infringement.⁸

25 Personal capacity lawsuits like the present one against Rauch “seek to impose personal
26

27 ⁸ For the reasons discussed herein, SDSU is not immune from this suit. Rauch consequently
28 likewise enjoys no immunity for acts taken in his official capacity (if any) for the same reasons.

1 liability upon a governmental official for actions he takes under color of state law.” [*Kentucky v.*
2 *Graham*, 473 U.S. 159, 165 (1985).] Such suits do not violate the Eleventh Amendment. [*Id.*]
3 Simply put, the possible award of monetary damages for copyright infringement against Rauch –
4 which there is no reason to assume he could not pay – does not implicate any Eleventh
5 Amendment concerns that may apply to the claims against SDSU. [*Richard Anderson*
6 *Photography v. Brown*, 852 F.2d 114 (4th Cir. 1988).]

7 The Fourth Circuit decision in *Richard Anderson Photography* is squarely on point in
8 demonstrating that Rauch does not enjoy any Eleventh Amendment immunity regardless of
9 whether SDSU has such immunity (which it does not).

10 In *Richard Anderson Photography*, the plaintiff sued Radford University, an educational
11 instrumentality of the Commonwealth of Virginia, and Deborah Brown, Radford’s director of
12 public information and relations, for copyright infringement for making unauthorized use of the
13 plaintiff’s copyrighted photographs. Given that the lawsuit was filed before passage of the CRCA,
14 the court found that Radford was entitled to immunity from such suit.

15 The claims against Brown were against her in her official capacity as well as in her
16 individual capacity. The court found that Brown was not entitled to any immunity for acts of
17 copyright infringement taken in her individual capacity, even if such copyright infringement was
18 done in the course and scope of Brown’s employment. [*See* 852 F.2d at 122.] In so holding, the
19 Fourth Circuit explained, in language squarely on point here, that “the mere fact that [Brown’s]
20 conduct was undertaken in the course of her state employment does not of course relieve her of
21 individual liability, even if her employer could not be sued for it [because of immunity]. A state
22 may no more than an individual principal give its agent authority to commit torts without civil
23 recourse . . . Brown is therefore amenable to suit in her individual capacity for the claimed
24 copyright violation.” [*Id.* (emphasis added).]

25 Just as was true in *Richard Anderson Photography*, Rauch cannot claim and is not entitled
26 to any immunity for acts of copyright infringement taken in his individual capacity, even if such
27 acts of copyright infringement were done in the course of Rauch’s employment by SDSU.
28 MIMI’s Complaint specifically and expressly alleges claims against Rauch against Rauch in his

1 individual capacity. [Complaint ¶ 21.] Consequently, just as was done in *Richard Anderson*
2 *Photography*, this Court should reject any claim of immunity by Rauch.

3 2. MIMI's State Law Claims Against Rauch Are Not Preempted.

4 The preemption argument made by Rauch is based on a fundamental misinterpretation of
5 the nature and basis of MIMI's state law claims.⁹ Preemption exists only as state law claims based
6 upon rights that are the equivalent to the exclusive copyright rights protected under the Copyright
7 Act. [17 U.S.C. § 301(a).] Section 301(a) preempts a state law claim only when (1) the particular
8 materials or work addressed by the state law claim fall within the type of works protected by the
9 Copyright Act under Sections 102 and 103 of the Copyright Act (the so-called "subject matter"
10 requirement); and (2) the state law claim seeks to vindicate legal or equitable rights that are
11 equivalent to rights already protected by copyright law under Section 106 of the Copyright Act
12 (the so-called "general scope" requirement). [*See, e.g., Briarpatch Ltd. V. Phoenix Pictures, Inc.*,
13 373 F.3d 296, 305 (2d Cir. 2004).] The foregoing test is known as the "extra element" test – a
14 state law claim will not be preempted if it deals with subject matter not within the scope of the
15 Copyright Act or if it otherwise includes any "extra elements" that make it qualitatively different
16 from a copyright claim. [*See id.*]

17 Here, MIMI's state law claims against Rauch are based on the misappropriation and
18 conversion by Rauch of things such as MIMI's methodologies for evaluating the economic impact
19 of sporting events, questionnaires developed by MIMI to evaluate the impact of the Holiday Bowl,
20 work papers generated by MIMI when it did economic impact studies for the Holiday Bowl, and
21 other intangible property and ideas. [Complaint ¶¶ 58-60, 64-68, 74-79.]

22 So, reduced to their essence, MIMI's allegations are that Rauch stole two separate and
23 distinct types of property from MIMI. First, Rauch pirated and misappropriated MIMI's

24 _____
25 ⁹ It appears that SDSU also is seeking dismissal of MIMI's state law claims. However, as MIMI
26 indicated in its opposition to the earlier motion to dismiss, MIMI agrees that the state law claims
27 against SDSU (but only against SDSU) can be dismissed, so long as such dismissal is without
28 prejudice. MIMI believes it already effected the dismissal of its state law claims against SDSU
when it filed the first amended complaint. But if such dismissal is not clear, MIMI will agree to
file a further amended complaint to better clarify that SDSU is not a named defendant on the state
law claims.

1 copyrighted 2003 Report to create the infringing 2004 economic impact study. Such wrongful
2 conduct clearly falls within the exclusive jurisdiction of the Copyright Act and Is not addressed by
3 MIMI's state law claims.

4 But as alleged in MIMI's Complaint, Rauch also stole and misappropriated MIMI's
5 methodologies for evaluating the economic impact of sporting events, questionnaires developed
6 by MIMI to evaluate the impact of the Holiday Bowl, work papers generated by MIMI when it did
7 economic impact studies for the Holiday Bowl, and other intangible property and ideas. None of
8 this property is the subject of copyright protection. Indeed, unlike the situation in the *Berge* case
9 cited in SDSU's motion, the property stolen and misappropriated by Rauch that is not covered by
10 copyright is not simply the "ideas" embodied in the copyrighted work, but actually property that is
11 separate and distinct from the copyrighted content in the 2003 Report.

12 Simply put, because the property that is the subject of MIMI's state law claims against
13 Rauch is not property that is the "equivalent" of rights protected under the Copyright Act, there is
14 no preemption.

15 It also must be remembered that Rauch is raising his preemption defense in the context
16 of a FRCP 12(b)(6) motion. Obviously, the identity and nature of the property that is the subject
17 of MIMI's state law claims will be the subject of substantial discovery and proof by evidence. At
18 this stage of this case, the Court must accept as true MIMI's characterization of the property that is
19 addressed by MIMI's state law claims. If, after discovery, Rauch still believes preemption exists,
20 he can bring a summary judgment motion. But for now, accepting the allegations of MIMI's
21 Complaint as true and drawing all favorable inferences from such allegations in favor of MIMI as
22 the Court must in the context of a FRCP 12(b)(6) motion, Rauch's preemption argument must be
23 rejected.

24
25
26
27
28

