

# No (Financial) Harm, No Foul: A Standing Defense in Copyright

Maddie Zabriskie\*

## *Abstract*

*Copyright law creates a bargain. Limited terms of exclusivity for authors are granted in exchange for public access to creative works. Part of that bargain is a statutory cause of action allowing authors to sue copyright infringers. However, modern copyright law has upset the traditional bargain. Plaintiffs no longer need to show that they have been harmed in order to have standing to seek statutory damages. The Supreme Court's decision in *TransUnion LLC v. Ramirez* makes the status quo vulnerable. *TransUnion* reaffirmed that Congress cannot confer standing to a plaintiff who has not suffered a concrete harm distinct from the violation of the legal right. This holding marked a drastic shift in standing doctrine, even if it accorded with the Court's increasing skepticism of statutory standing. Heightened standing requirements spell trouble for copyright plaintiffs because modern copyright law has expanded liability beyond harm.*

*In *TransUnion*, the Court held that for intangible injuries, a broad category of harms that includes anything other than physical or monetary harms, a plaintiff's injury is only sufficiently concrete if she can show that her harm is akin to one traditionally recognized as a basis for suit in American courts. Traditionally, the harm of copyright infringement was pecuniary in nature. Specifically, copyright law stepped in when a plaintiff had suffered a financial harm substantial enough to chill creative expression, and so copyright holders were required to allege such a harm in order to bring a suit for damages. However, modern copyright law presumes harm, even where none has occurred. In doing so, it allows plaintiffs to vindicate moral harms.*

*This may create a standing defense in copyright. There is no close common law or historical analogue for the modern copyright plaintiff. Just as defamation requires publication, copyright law requires a substantial financial harm. Without that, the modern copyright injury is inadequately concrete.*

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*“Only one thing is impossible for God: to find any sense in any copyright law on the planet.”*

*-Mark Twain<sup>1</sup>*

*“In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression.”*

*-Justice Sandra Day O’Connor<sup>2</sup>*

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<sup>1</sup> MARK TWAIN, THE COMPLETE WORKS OF MARK TWAIN: MARK TWAIN’S NOTEBOOK 381 (Albert Bigelow Paine ed., 1935).

<sup>2</sup> Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

## Introduction

Copyright law purports to provide for the public good. It recognizes that a limited term of exclusivity gives authors the financial incentives necessary to produce creative works, which will later benefit society when they enter the public domain. However, in an effort to protect creators, copyright law has upset this balance by recognizing liability in the absence of harm. In doing so, copyright law has forgotten that the “reward to the owner [is] a secondary consideration.”<sup>3</sup>

Over the last fifty years, federal courts have moved expeditiously to dismiss claims brought by plaintiffs injured in name only. Standing is the courts’ doctrine of choice to do so.<sup>4</sup> However, there remains a group of plaintiffs who have largely been exempted from the requirement to show harm: copyright holders. As a result, copyright law and standing doctrine have diverged.

*TransUnion v. Ramirez* refocused attention on plaintiffs without a concrete harm and provided a new framework with which to assess a plaintiff’s standing. Applying *TransUnion*’s historical analogue test to copyright infringement claims spells trouble for the litigious but uninjured copyright holder because the historical analogue of copyright infringement actions required plaintiffs to show a substantial monetary harm in order to recover damages.

Part I provides a brief overview of copyright’s underlying purpose and the modern copyright law regime. Part II reviews the law of standing with a focus on how *TransUnion* introduced a new historical analogue test for intangible harms. Part III argues that modern copyright law lacks a close historical or common law analogue because it does not require a plaintiff to show harm, meaning that copyright owners who cannot show an economic harm likely lack standing. Part IV discusses the implications of dismissing copyright claims brought by plaintiffs injured in name only.

### I. A Brief Overview of Copyright Law

Copyright is meant “to be the engine of free expression.”<sup>5</sup> Today, copyright law protects “original works of authorship fixed in any tangible medium of expression.”<sup>6</sup> The most recent federal copyright statute, the Copyright Act of 1976, expressly leaves room for new forms of creative expression by protecting works of authorship fixed in any tangible medium “now known or later developed.”<sup>7</sup> As technology continues

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<sup>3</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (quoting *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948)).

<sup>4</sup> See James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers’ Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 4 (2001) (“The Burger and Rehnquist Courts, recognizing its potential to confer standing on vast numbers of potential litigants, retained the rule in form but began a slow process of restrictive interpretations that has transformed injury-in-fact from a tool of inclusion to an exclusionary device.”).

<sup>5</sup> *Harper & Row*, 471 U.S. at 558.

<sup>6</sup> Copyright Act of 1976, 17 U.S.C. § 102(a).

<sup>7</sup> *Id.*

to advance, so too does copyright law, often by expanding the scope of works protected or by providing remedies tailored to new innovations.<sup>8</sup>

That said, copyright has an intentionally narrow scope. It protects creative expression, not the idea behind it. The 1976 Copyright Act does not shield “any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”<sup>9</sup> And so, “copyright is limited to those aspects of the work—termed “expression”—that display the stamp of the author’s originality.”<sup>10</sup>

Copyright law codifies a quid pro quo between an author and the public. Invention and imagination can lead to incredible achievement, but such work is often costly and time consuming. Copyright law protects the creator’s investment by providing the exclusivity of publication necessary to make money.<sup>11</sup> However, perpetual exclusivity would prevent the public from accessing creative works, limiting the overall benefits to society. Copyright bridges these competing priorities with a middle ground: limited terms of exclusivity.<sup>12</sup> The length of a copyright’s term is prescribed by Congress.<sup>13</sup>

#### A. The Historical Origins of Copyright Law

Copyright law developed in response to the printing press.<sup>14</sup> Before printing, the time-consuming process of copying works by hand far outweighed any potential income to be made by either the original author or an infringer.<sup>15</sup> Printing suddenly

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<sup>8</sup> For example, the Copyright Act of 1909 explicitly added protections for the owners of musical copyrights because technical innovations had made it easier to produce and distribute copies of those works. See Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, § 1(e), 35 Stat. 1075, 1076 (repealed 1978). This protection was likely added because the Supreme Court had held just a year earlier that “use of these perforated rolls, in the absence of statutory protection, enables the manufacturers thereof to enjoy the use of musical compositions for which they pay no value. But such considerations properly address themselves to the legislature.” *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908).

<sup>9</sup> 17 U.S.C. § 102(b).

<sup>10</sup> *Harper & Row*, 471 U.S. at 547.

<sup>11</sup> See Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1334–1335 (2015); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

<sup>12</sup> *Stewart v. Abend*, 495 U.S. 207, 228 (1990) (“The copyright term is limited so that the public will not be permanently deprived of the fruits of an artist’s labors.”) (citing *Sony Corp. of Am.*, 464 U.S. at 429).

<sup>13</sup> The 1976 Copyright Act gives copyright owners of works created on or after January 1, 1978 exclusive ownership of their work for a term consisting of the life of the author plus seventy years after the author’s passing. 17 U.S.C. § 302(a). Although parties have challenged Congress’s authority to enact such long lasting copyright terms, arguing that it violates the Constitution’s language regarding limited terms, the Supreme Court has generally shown Congress much deference on this issue. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003) (“[W]e are not at liberty to second-guess congressional determinations and policy judgments.”).

<sup>14</sup> *Sony Corp. of Am.*, 464 U.S. at 430.

<sup>15</sup> See Thomas F. Cotter, *Gutenberg’s Legacy: Copyright, Censorship, and Religious Pluralism*, 91 CALIF. L. REV. 323, 325–26 (2003).

made copying affordable, efficient, and lucrative.<sup>16</sup> Mass production offered a tantalizing financial reward, but there were pitfalls—someone other than the author could just as easily print and sell the author’s work. The same incentive for an author to mass produce copies would be equally tempting for a would-be infringer.

Copyright law arose to appropriately align incentives and prevent unjust enrichment.<sup>17</sup> Creativity would be stifled without the promise of financial reward, and so “[t]he monopoly created by copyright thus rewards the individual author in order to benefit the public.”<sup>18</sup> Government interests played a role as well, and the English government certainly had more than just economic incentives in mind. The King granted the Stationers’ Company, a guild comprising printers, bookbinders, and booksellers, the first exclusive right to print and publish licensed works, in exchange for enforcing censorship laws.<sup>19</sup> Such censorship would also feature in early American copyright law.

The first American printing press arrived in Cambridge, Massachusetts in late 1638, brought by a Puritan minister who was fleeing religious oppression in Europe.<sup>20</sup> Its early usage in America reflected a tension between public patronage—publishing information relevant to the public—and the government’s interest in supervision and suppression.<sup>21</sup> Suppression and control largely prevailed. “Even where printing was not completely banned it was heavily restricted.”<sup>22</sup>

Copyright law began to develop in the background. In 1673, John Usher received the first exclusive grant of printing privileges in the United States.<sup>23</sup> He was worried that his printer, Samuel Green, would surreptitiously make and sell extra copies of Usher’s work.<sup>24</sup> Usher was granted a seven-year term of exclusivity.<sup>25</sup> Foreshadowing a policy judgment that would later be enshrined in the Constitution, the grant of

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<sup>16</sup> *Id.* at 326.

<sup>17</sup> *See infra* Part III.B.

<sup>18</sup> *Sony Corp. of Am.*, 464 U.S. at 477 (Blackmun, J., dissenting) (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

<sup>19</sup> Cotter, *supra* note 15, at 327 (citations omitted).

<sup>20</sup> Oren Bracha, *Early American Printing Privileges. The Ambivalent Origins of Authors’ Copyright in America*, in *PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT* 91 (Ronan Deazley, Martin Kretschmer & Lionel Bently eds., 2010). Following Reverend Glover’s death, the printing press would come to be managed and controlled by Harvard University and the Massachusetts colony authorities. *Id.* at 92.

<sup>21</sup> *Id.* at 92–93.

<sup>22</sup> *Id.* at 94. Perhaps the colonial government had good reason to be fearful of the printing press. About one-hundred fifty years after the printing press first arrived in Massachusetts, Thomas Paine would use the printing press to print hundreds of thousands of copies of his pro-independence pamphlet, *Common Sense*. *Thomas Paine: The Original Publishing Viral Superstar*, NATIONAL CONSTITUTION CENTER (Jan. 10, 2023), <https://constitutioncenter.org/blog/thomas-paine-the-original-publishing-viral-superstar-2>.

<sup>23</sup> Bracha, *supra* note 20, at 96.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 97.

exclusivity was a “limited-duration economic privilege of exclusivity on a publisher in order to reduce his risk and encourage a specific publication.”<sup>26</sup>

Early American copyright law had little to do with an author’s ownership of her work. Colonial grants were “economic encouragements to printers or publishers,” having everything to do with “*publishers’* economic privileges and . . . nothing to do with authorship.”<sup>27</sup> The first exclusive privilege bestowed directly on an author would not be granted until 1772.<sup>28</sup> However, the practice of granting copyrights to authors quickly took hold. During the 1780s, American copyright law shifted its focus away from “ad hoc publishers’ privileges” and became “a general statutory regime of authors’ rights.”<sup>29</sup>

The development of American copyright law had been heavily influenced by English practice. In 1710, Parliament had passed the Statute of Anne, the first English copyright statute.<sup>30</sup> The Statute gave owners of already-published works an exclusive right of publication for twenty-one years and gave owners of yet-to-be-published works a fourteen-year period of exclusivity.<sup>31</sup> Although the 1710 Statute of Anne did not govern copyright in colonial America, it was highly influential in the United States, even after the Revolutionary War.<sup>32</sup>

In the newly independent United States, copyright was not yet subject to federal regulation. The Articles of Confederation left authority over copyright to the several states rather than vesting it in the federal government.<sup>33</sup> That is not to say that the Continental Congress played no role in the development of American copyright law. In fact, although copyright law was left to the individual states, the states enacted their copyright statutes in response to a resolution from the Continental Congress calling upon the states to formally enact such legislation.<sup>34</sup> Many of the states drew inspiration from the 1710 Statute of Anne.<sup>35</sup>

However, differences between the statutes of the various states created a virtually ungovernable patchwork of copyright regimes that threatened to undercut the policy goals of copyright.<sup>36</sup> Moreover, only twelve of the original thirteen states

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 100 (emphasis added).

<sup>28</sup> *Id.* at 101.

<sup>29</sup> *Id.* at 110.

<sup>30</sup> Statute of Anne 1710, 8 Anne, c. 19, § 2 (Eng.).

<sup>31</sup> *Id.*

<sup>32</sup> Bracha, *supra* note 20, at 97 (“The 1710 Statute of Anne that created a general statutory copyright regime in Britain did not apply to the colonies.”); see also David Rabinowitz, *Everything You Ever Wanted to Know About the Copyright Act Before 1909, But Couldn’t Be Bothered to Look Up*, 49 J. COPYRIGHT SOC’Y OF THE U.S.A. 649, 650–51 (2001) (stating, for example, that the idea copyright was acquired by registration is “traceable to the Stationers’ Company Acts of the sixteenth and seventeenth century and adhered to in the 1710 Statute of Anne”).

<sup>33</sup> See generally ARTICLES OF CONFEDERATION of 1781.

<sup>34</sup> Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 648 (1943).

<sup>35</sup> *Id.*

<sup>36</sup> See THE FEDERALIST NO. 43 (James Madison) (“The States cannot separately make effectual

had enacted copyright legislation.<sup>37</sup> The Framers of the Constitution recognized the need for a uniform copyright regime and subsequently granted Congress the power to regulate copyright in the Constitution.<sup>38</sup>

The Copyright-Patent Clause of the Constitution gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>39</sup> As the text makes clear, the ultimate goal of Congress’s copyright authority is to promote the arts and sciences. Congress may secure limited terms of exclusivity to the extent that they promote creative expression and scientific invention. Copyright law must strike a balance between the public good of creative works and economic protection for the creator.<sup>40</sup>

The First Congress passed the original federal copyright statute in 1790.<sup>41</sup> The Copyright Act of 1790 gave the authors of:

any map, chart, book or books already made and composed, and not printed or published, or that shall hereafter be made and composed . . . the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the like term of fourteen years from the time of recording the title thereof in the clerk’s office as aforesaid.<sup>42</sup>

Not only did the statute provide a legal right to one’s work, but it also provided the first federal statutory cause of action and accompanying remedies for copyright infringement: “every such offender and offenders shall also forfeit and pay the sum of fifty cents for every sheet which shall be found in his or their possession, either printed or printing, published, imported or exposed to sale, contrary to the true intent and meaning of this act.”<sup>43</sup> These statutory damages could be recovered through an

provisions for either of the cases.”); *see also* Goldstein v. California, 412 U.S. 546, 556 n.12 (1973) (“Numerous examples may be found in our early history of the difficulties which the creators of items of national import had in securing protection of their creations in all States. For example, Noah Webster, in his effort to obtain protection for his book, A Grammatical Institute of the English Language, brought his claim before the legislatures of at least six States, and perhaps as many as 12.”) (citing B. BUGBEE, *THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* 108–110, 120–124 (1967)). To add to the confusion, only twelve of the thirteen original states enacted a copyright statute. Benjamin W. Rudd, *Notable Dates in American Copyright 1783–1969*, 1971 Q. J. LIBR. CONG. 137, 137 (1971).

<sup>37</sup> Irah Donner, *The Copyright Clause of the U. S. Constitution: Why Did the Framers Include It with Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361, 374 (1992). Because some state copyright laws had provisions saying that they would not come into effect until all states had copyright laws, the number of states with effective copyright laws was less than twelve because Delaware never passed a copyright statute. *Id.*

<sup>38</sup> *See* U.S. CONST. art. I, § 8, cl. 8.

<sup>39</sup> *Id.*

<sup>40</sup> *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

<sup>41</sup> Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124 (repealed 1831).

<sup>42</sup> *Id.* § 1.

<sup>43</sup> *Id.* § 2.

action of debt.<sup>44</sup> One half of the money collected would go to the author or proprietor of the work and the other half would go to the government.<sup>45</sup> The 1790 Copyright Act also authorized a special action on the case to be brought against an infringer who printed or published an author's manuscript without consent.<sup>46</sup> Such a plaintiff could seek "all damages occasioned by such injury."<sup>47</sup>

Authorship alone was insufficient to seek redress under the 1790 Copyright Act. Only an author who had properly registered her copyright with the clerk's office of the district court could bring a copyright infringement claim.<sup>48</sup> Works already published could be protected upon registration, but "in all other cases, unless he shall before publication deposit a printed copy of the title . . . in the clerk's office," an author would be unable to vindicate their rights under the Act.<sup>49</sup> The registration requirement would become a fixture of American copyright law for the next two-hundred years.<sup>50</sup> For decades, aggrieved copyright holders seeking damages were limited to an action in debt for statutory penalties or to a special action on the case if the copyrighted material was an unpublished manuscript.<sup>51</sup> However, an express provision adding injunctions as an available remedy was added by statute in 1819.<sup>52</sup>

#### B. The 1976 Copyright Act

Following nearly two-hundred years of amendments and overhauls, federal copyright law reached its current form in the 1976 Copyright Act.<sup>53</sup> The Act authorizes the modern copyright infringement cause of action. Under the Act, "[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright or right of the author, as the case may be."<sup>54</sup> The Act, like its predecessors, also confers standing to sue: "[t]he legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it."<sup>55</sup>

However, mere authorship without registration is not enough to bring suit; "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* § 6.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* § 3.

<sup>49</sup> *Id.*

<sup>50</sup> KEVIN J. HICKEY, CONG. RSCH. SERV., LSB10202, WHEN CAN COPYRIGHT HOLDERS SUE?: SUPREME COURT TO RESOLVE CIRCUIT SPLIT ON COPYRIGHT REGISTRATION 2 (2019).

<sup>51</sup> WILLIAM S. STRAUSS, STUDY NO. 24, REMEDIES OTHER THAN DAMAGES FOR COPYRIGHT INFRINGEMENT, S. DOC. NO. 59537, at 115 (2d Sess. 1959).

<sup>52</sup> Rabinowitz, *supra* note 32, at 654; WILLIAM S. STRAUSS, STUDY NO. 22, THE DAMAGE PROVISIONS OF THE COPYRIGHT LAW, S. DOC. NO. 59537, at 1–2 (2d Sess. 1956).

<sup>53</sup> Copyright Act of 1976, Pub. L. No. 94-553, § 101-810, 90 Stat. 2541 (1976) (codified at 17 U.S.C.). For a brief history of the statutory evolution of American copyright laws, see Rudd, *supra* note 36.

<sup>54</sup> 17 U.S.C. § 501(a).

<sup>55</sup> § 501(b).



accordance with this title.”<sup>56</sup> The Supreme Court has held that “registration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright.”<sup>57</sup> “Upon registration of the copyright, however, a copyright owner can recover for infringement that occurred both before and after registration.”<sup>58</sup>

If the copyright holder can prove that her work was infringed, she may pursue a variety of remedies in a civil action brought under the 1976 Copyright Act, such as an injunction,<sup>59</sup> impounding and subsequent destruction of copies,<sup>60</sup> damages,<sup>61</sup> or costs and attorney’s fees.<sup>62</sup> For the purposes of this Paper, damages are most relevant.<sup>63</sup> The Act provides a copyright owner with two separate options when it comes to statutory damages: “an infringer of copyright is liable for either—(1) the copyright owner’s actual damages and any additional profits of the infringer . . . or (2) statutory damages, as provided by subsection (c).”<sup>64</sup> The second option reflects the presumed difficulties of determining actual damages. “It is often impossible to determine [actual] damages with any precision because the present and future value of the copyright is itself so uncertain.”<sup>65</sup> To determine the present value of the copyright, one must “estimate . . . its future earnings, which in turn depends upon accurately predicting the future taste of the public.”<sup>66</sup>

As such, it is often far easier for a plaintiff to pursue statutory damages, which “the copyright owner may elect [to do], at any time before final judgment is rendered.”<sup>67</sup> Statutory damages may be awarded “in a sum of not less than \$750 or more than \$30,000 as the court considers just.”<sup>68</sup> Statutory damages are awarded per work infringed, regardless of the number of times the defendant infringed a particular work.<sup>69</sup> If the plaintiff can show that the defendant’s infringement was willful, the court has the discretion to award statutory damages of up to \$150,000 per work.<sup>70</sup>

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<sup>56</sup> § 411(a).

<sup>57</sup> *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 586 U.S. 296, 299 (2019).

<sup>58</sup> *Id.*

<sup>59</sup> 17 U.S.C. § 502(a).

<sup>60</sup> § 503.

<sup>61</sup> § 504.

<sup>62</sup> § 505.

<sup>63</sup> This will be discussed in more detail in Part II, but a plaintiff must have standing for each type of remedy sought, not for the case as a whole. *See, e.g., City of L.A. v. Lyons*, 461 U.S. 95 (1983). This Paper examines whether *TransUnion v. Ramirez* has created a standing defense for copyright defendants sued under the 1976 Copyright in an action for statutory damages.

<sup>64</sup> 17 U.S.C. § 504(a).

<sup>65</sup> HOWARD B. ABRAMS & TYLER T. OCHOA, 2 *THE LAW OF COPYRIGHT* § 17:2: ACTUAL DAMAGES (2023).

<sup>66</sup> *Id.*

<sup>67</sup> 17 U.S.C. § 504(c)(1).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> § 504(c)(2).

Statutory damages can sometimes dwarf actual damages. This is by design. The Supreme Court, interpreting a virtually identical damages provision in the Copyright Act of 1909,<sup>71</sup> noted that statutory damages were “adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits.”<sup>72</sup> Moreover, courts often find that a showing of actual harm cannot be proven and *sua sponte* choose to award statutory damages. “A copyright owner will be deemed to have elected to seek statutory damages where no actual damages are proven.”<sup>73</sup> In other cases, courts choose to award statutory damages where actual damages are alleged but are “virtually impossible” to determine.<sup>74</sup> Perhaps it is no surprise that one study of copyright infringement claims found that approximately 75% of cases were brought for either willful or regular statutory damages.<sup>75</sup>

### C. The Elements of Copyright Infringement Claims

To successfully bring a copyright infringement claim, a plaintiff must prove “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”<sup>76</sup> The first element is easy for the plaintiff to prove—ownership of a valid copyright can be established by proof of registration with the Copyright Office.<sup>77</sup>

Proving the second element is often more difficult, and the 1976 Copyright Act provides no guidance.<sup>78</sup> There are generally two ways a copyright holder can establish the second prong of a copyright infringement claim. A plaintiff may prove copying either with “direct evidence, such as an admission of copying,” or by a showing that the “defendant had the opportunity to copy the original (often called ‘access’) and that the two works are ‘substantially similar,’ thus permitting an inference that the

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<sup>71</sup> Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, § 25(b). 35 Stat. 1075, 1076 (repealed 1978) (stating the infringer shall be liable “[t]o pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits the infringer shall have made from such infringement . . . or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated”).

<sup>72</sup> *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935); *see also* *F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 231 (1952) (quoting the *Douglas* case favorably).

<sup>73</sup> HOWARD B. ABRAMS & TYLER T. OCHOA, 2 *THE LAW OF COPYRIGHT* § 17:16: STATUTORY DAMAGES—THE ELECTION BETWEEN ACTUAL AND STATUTORY DAMAGES (2023) (collecting cases).

<sup>74</sup> *Id.*

<sup>75</sup> Ben Depoorter, *Copyright Enforcement in the Digital Age: When the Remedy is the Wrong*, 66 *UCLA L. REV.* 400, 419 (2019) (examining copyright claims between 2005–2008).

<sup>76</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985)).

<sup>77</sup> 17 U.S.C. § 411(a).

<sup>78</sup> Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 *U.C. DAVIS L. REV.* 719, 722 (1987) (“The failure of Congress to address completely the issue of what constitutes infringement would be less troubling if the case law enunciated an adequate standard. However, as we will see, no such enunciation exists.”).

defendant actually did copy the original.”<sup>79</sup> “Fundamentally, proving the basic tort of infringement simply requires the plaintiff to show that the defendant had an actual opportunity to copy the original . . . and that the two works share enough unique features to give rise to a breach of the duty not to copy another’s work.”<sup>80</sup>

The so-called “substantial similarity” test “remains one of the most elusive in copyright law.”<sup>81</sup> Because the various courts of appeals have adopted their own versions of this test, the absence of a uniform approach makes copyright outcomes less predictable and the inquiry more confusing.<sup>82</sup> Some courts employ an ordinary observer test, others an extrinsic and intrinsic factor test, and still others use a test that first identifies general ideas exempted from copyright protection before filtering out those ideas and then comparing the protected portions of each work side-by-side.<sup>83</sup> The test has been widely panned.<sup>84</sup>

Notably absent from these tests is a requirement to show harm, monetary or otherwise. Courts have read one in, assuming that “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.”<sup>85</sup> However, as long as copyright holders are excused from the general requirement to demonstrate an injury, liability will exceed harm. As will be discussed below, liability without harm may present a standing issue.

## II. Standing after *Transunion v. Ramirez*

Federal courts hold limited, rather than general, jurisdiction,<sup>86</sup> meaning that they can only hear cases that fall within the jurisdiction granted to them by the Constitution.<sup>87</sup> Mindful of their limited authority, federal courts independently ensure that they are only hearing the cases over which the Constitution gives them jurisdiction.<sup>88</sup> One of the doctrines used to do so is standing.<sup>89</sup> Standing is a fact-specific inquiry that courts must address anew in each case. As a further matter, a

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<sup>79</sup> *Peters v. West*, 692 F.3d 629, 633 (7th Cir. 2012); *accord Corbello v. Valli*, 974 F.3d 965, 973–74 (9th Cir. 2020); *Compulife Software Inc. v. Newman*, 959 F.3d 1288, 1301–02 (11th Cir. 2020); *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 701 (2d Cir. 1992).

<sup>80</sup> *Peters*, 692 F.3d at 633–34.

<sup>81</sup> Katherine Lippman, *The Beginning of the End: Preliminary Results of an Empirical Study of Copyright Substantial Similarity Opinions in U.S. Circuit Courts*, 2013 MICH. ST. L. REV. 513, 515 (2013).

<sup>82</sup> *Id.*

<sup>83</sup> *See generally* Daryl Lim, *Substantial Similarity’s Silent Death*, 48 PEPP. L. REV. 717, 726–31 (2021) (providing an overview of the various tests employed in the courts of appeals).

<sup>84</sup> Lippman, *supra* note 81, at 522 (“In light of such fervent criticism and concern that case law is sharply skewed in favor of the defendants, it is rational to wonder whether or not the concept of substantial similarity even [works].”); Cohen, *supra* note 78, at 719.

<sup>85</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

<sup>86</sup> *See, e.g., Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

<sup>87</sup> *See* U.S. CONST. art. III, § 2, cl. 1.

<sup>88</sup> *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 583 (1992).

<sup>89</sup> *Id.*

plaintiff must have standing for each remedy sought rather than for the case itself.<sup>90</sup> An injury giving standing for one remedy may not support standing for another.<sup>91</sup> Plaintiffs seeking injunctive relief, for example, may have standing “to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial.”<sup>92</sup> However, the mere risk of future harm is insufficient to support standing in a claim for retroactive damages—the risk must have already materialized.<sup>93</sup>

Standing requirements prevent courts from venturing outside their constitutional bounds by narrowing the category of litigants authorized to bring suit.<sup>94</sup> Constitutional standing has three components: (1) an injury in fact, meaning the invasion of a legally protected interest that is concrete and particularized, actual or imminent, and not conjectural or hypothetical; (2) causation, meaning that the plaintiff’s injury must be fairly traceable to the defendant’s action at issue; and (3) redressability, meaning that it must be likely that the court can redress the plaintiff’s injury with a favorable decision.<sup>95</sup> The party “invoking federal jurisdiction bears the burden of establishing those elements.”<sup>96</sup>

Standing also serves an important separation of powers function. Courts remain concerned that hearing cases in which the plaintiff lacks a true injury could infringe on the Executive Branch’s duty to “take Care that the Laws be faithfully executed.”<sup>97</sup> Standing requires the plaintiff to answer a simple question—“[w]hat’s it to you?”<sup>98</sup>

In practice, standing has a gatekeeping function. If there is no injury suffered by the plaintiff, caused by the defendant, and redressable by the court, “there is no case or controversy for the federal court to resolve.”<sup>99</sup> However, modern copyright infringement may often be an injury in name only. If copyright law continues to recognize infringement in the absence of harm, there should be no standing.

#### A. Statutory Standing and the Injury in Fact Requirement

Congress may statutorily grant a class of individuals a private right of action. Individuals falling within that class are considered to have statutory standing. However, whether the violation of a legal right provides a justiciable injury in fact is

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<sup>90</sup> See *City of L.A. v. Lyons*, 461 U.S. 95, 109 (1983).

<sup>91</sup> *Id.*

<sup>92</sup> *TransUnion LLC v. Ramirez*, 594 U.S. 413, 435–36 (2021) (citing *Clapper v. Amnesty, Int’l USA*, 568 U.S. 398, 414 n.5 (2013)).

<sup>93</sup> See *id.* at 435–38.

<sup>94</sup> See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471–72 (1982).

<sup>95</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations and quotation marks omitted) (cleaned up).

<sup>96</sup> *Id.* at 561 (citations omitted).

<sup>97</sup> *Id.* at 577 (quoting U.S. CONST. art. II, § 3).

<sup>98</sup> Antonin G. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983).

<sup>99</sup> *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (quoting *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 333 (7th Cir. 2019) (Barrett, J.)).

less certain. A plaintiff invoking statutory standing still needs to meet the requirements of constitutional standing. As legislative causes of action continue to grow, the Supreme Court is increasingly willing to investigate whether a plaintiff has suffered a harm distinct from the violation of the given statute.

The term “injury in fact” first appeared in *Association of Data Processing Service Organizations, Inc. v. Camp*.<sup>100</sup> There, the Court said that “[t]he first question is whether the plaintiff alleges that the challenged action has caused him [an] injury in fact, economic or otherwise.”<sup>101</sup> For many years, it was assumed that the “otherwise” category included injuries designated by Congress—also known as injuries in law.<sup>102</sup> Congress’s power to create legal rights cognizable as a basis for suit was construed broadly for many years.<sup>103</sup> In practice, Congress would confer rights by statute and violations of those legal rights were enough for a plaintiff to plead a sufficient injury in fact, even without an injury specific to the individual suing.<sup>104</sup> The Supreme Court even found standing in situations where it acknowledged that the plaintiff could not allege a harm distinct from the violation of the statute.<sup>105</sup> For a time, courts accepted Congress’s ability to elevate injuries that were previously inadequate in law to “the status of legally cognizable injuries.”<sup>106</sup>

However, the Supreme Court began to reestablish the divide between an injury in fact and an injury in law in *Lujan v. Defenders of Wildlife*. The Court made clear that violations of a statutory right were not independently sufficient to support standing for the general public; there needed to be harm particularized enough that the injury “affect[s] the plaintiff in a personal and individual way” and that the “party seeking review be himself among the injured.”<sup>107</sup> Vague violations of a legal right were no longer enough for an injury in fact.<sup>108</sup> The plaintiff needed to prove something more.

More recently, the Court further drove a wedge between injuries in fact and injuries in law. In doing so, the Supreme Court also more clearly addressed the question of what falls into the “otherwise” category in *Data Processing*. In *Spokeo, Inc. v. Robins*, decided in 2016, the Supreme Court zeroed in on the requirement that

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<sup>100</sup> Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 349 (2022). Although standing would later be said to be rooted in Article III’s case or controversy requirement, the *Data Processing* court seems to have made the injury in fact test “up out of whole cloth.” See *id.*

<sup>101</sup> Ass’n of Data Processing Service Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970).

<sup>102</sup> Sunstein, *supra* note 100, at 360–61.

<sup>103</sup> *Id.* at 363–64.

<sup>104</sup> See *Warth v. Seldin*, 422 U.S. 490, 514 (1975) (“Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.”).

<sup>105</sup> *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982) (finding standing for a “tester” who had no intention of obtaining housing where Congress had conferred a legal right to truthful information about available housing).

<sup>106</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992).

<sup>107</sup> *Id.* at 560 n.1, 563 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972)).

<sup>108</sup> *Id.* at 577–78.

an injury in fact be sufficiently concrete in addition to being particularized.<sup>109</sup> *Spokeo* involved a claim brought against a consumer reporting agency which allegedly had generated consumer profiles containing inaccurate information.<sup>110</sup>

The Fair Credit Reporting Act requires consumer reporting agencies such as Spokeo to “follow reasonable procedures to assure maximum possible accuracy” in their consumer reports.<sup>111</sup> It also created a cause of action against “[a]ny person who willfully fails to comply with any requirement imposed” by the Act.<sup>112</sup> The class action members in *Spokeo* alleged that the incorrect information in their consumer profiles proved that Spokeo had violated its statutory obligations.<sup>113</sup> The issue before the Court was whether the class action members had standing.<sup>114</sup>

The Court did not decide the standing question on the merits. Instead, the Court remanded the case back to the Ninth Circuit because that court had left its standing analysis “incomplete” by “fail[ing] to fully appreciate the distinction between concreteness and particularization.”<sup>115</sup> In reaching its decision to remand, the *Spokeo* court recognized that concrete harms could be tangible or intangible in form.<sup>116</sup> To decide whether an intangible harm is sufficiently concrete, the Court looked to two sources of authority: “In determining whether an intangible harm constitutes [an] injury in fact, both history and the judgment of Congress play important roles.”<sup>117</sup>

History, the Court opined, is “instructive” because standing is rooted in Article III’s case or controversy requirement, and that requirement is itself grounded in historical practice.<sup>118</sup> The history test means that an intangible harm is sufficiently concrete if it shares a close relationship to a harm traditionally recognized as a basis for suit in English or American courts.<sup>119</sup> Nevertheless, congressional judgment should not be ignored. The Court also deemed congressional judgment to be “instructive” “because Congress is well positioned to identify intangible harms that meet minimum Article III requirements.”<sup>120</sup> Despite introducing the history test, the Court’s fidelity to congressional judgment suggests it sought to make only an incremental change.

However, despite proceeding cautiously, the Court tipped its hand in favor of the history test. In a statement that foreshadowed what was to come next, the Court noted that a plaintiff still must show “a concrete injury” even when a “statute grants

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<sup>109</sup> See generally *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016).

<sup>110</sup> *Id.* at 335–36.

<sup>111</sup> *Id.* at 335; 15 U.S.C. § 1681e(b).

<sup>112</sup> 15 U.S.C. § 1681n(a).

<sup>113</sup> *Spokeo*, 578 U.S. at 333–34.

<sup>114</sup> *Id.* at 336–37.

<sup>115</sup> *Id.* at 342–43.

<sup>116</sup> *Id.* at 340.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 340–41.

<sup>119</sup> *Id.* at 341 (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775–77 (2000)).

<sup>120</sup> *Id.*

a person a statutory right and purports to authorize that person to sue to vindicate that right.”<sup>121</sup> Congress’s judgment may be instructive, but that “does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.”<sup>122</sup> The Court may have recognized Congress’s authority to create legally cognizable harms, yet it had also expressly reaffirmed its own authority to decide what truly constitutes a sufficiently concrete injury in fact.<sup>123</sup>

*Spokeo* may have couched itself as a reaffirmation of what “we have explained in our prior opinions,”<sup>124</sup> but it began a doctrinal shift that would fully materialize just a few years later in *TransUnion LLC v. Ramirez*.

### B. *TransUnion v. Ramirez*

*TransUnion* took *Spokeo* a step further. *Spokeo* had endorsed both the use of history and congressional judgment in deciding whether an injury was sufficiently concrete. But five years later in *TransUnion*, the court made clear that “*Spokeo* is not an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts.”<sup>125</sup> Instead, *Spokeo* now stood for the proposition that “with respect to the concrete-harm requirement in particular, . . . courts should assess whether the alleged injury to the plaintiff has a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts.”<sup>126</sup> Congress’s judgment “may be instructive”<sup>127</sup> but only to the extent that Congress gives legal status to a harm that already existed in the real world.<sup>128</sup>

First, however, is some context before discussing the implications of the case. Sergio Ramirez and the other members of his class action sued *TransUnion* for violations of the Fair Credit Reporting Act.<sup>129</sup> Similar to *Spokeo*, the class of 8,185 individuals in *TransUnion* claimed that *TransUnion* had failed to use reasonable procedures to ensure the accuracy of their credit files.<sup>130</sup> *TransUnion* had used third-party software to compare consumers’ first and last names against a list maintained by the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC).<sup>131</sup> The OFAC list in question contained the names of people who are “terrorists, drug traffickers, or other serious criminals” that “threaten America’s national security.”<sup>132</sup>

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Sunstein, *supra* note 100, at 364.

<sup>124</sup> *Spokeo*, 578 U.S. at 334.

<sup>125</sup> *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424–25 (2021).

<sup>126</sup> *Id.* at 424 (citing *Spokeo*, 578 U.S. at 341 (internal quotation marks omitted)).

<sup>127</sup> *Id.* (internal quotation marks omitted) (citing *Spokeo*, 578 U.S. at 341).

<sup>128</sup> *Id.* at 426.

<sup>129</sup> *Id.* at 421.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 419–20.

<sup>132</sup> *Id.*

TransUnion only ran this third-party software check if the entity requesting consumer records opted into the program.<sup>133</sup> If TransUnion found a match between the consumer's name and a name on the OFAC list, it would place an alert on the consumer's credit report indicating that there was a potential match.<sup>134</sup> TransUnion did not perform any additional research beyond the initial matching of the first and last names.<sup>135</sup> Class members were among the "[t]housands of law-abiding Americans [that] happen to share a first and last name with one of the terrorists, drug traffickers, or serious criminals on OFAC's list of specially designated nationals."<sup>136</sup>

The suit began after a Nissan dealership in California refused to sell Ramirez a car, telling him that they would not do so because Ramirez's name was on a "terrorist list."<sup>137</sup> When Ramirez subsequently requested a copy of his credit file from TransUnion, the mailing he received from TransUnion did not mention the OFAC alert, although it did provide him with a summary of his rights.<sup>138</sup> The next day, TransUnion sent another letter that informed Ramirez that his name was considered a potential match to the OFAC list, but it did not include an additional copy of the summary of rights.<sup>139</sup> Ramirez sued under the Fair Credit Reporting Act, alleging that TransUnion's process of matching names failed to follow reasonable procedures to ensure accuracy, that TransUnion failed to provide all of the information in his credit file upon his request, and that TransUnion violated its obligation to provide him with a summary of his rights in each mailing.<sup>140</sup>

Ramirez certified a class that included all people within the United States who received mailings similar to the second letter that Ramirez had received from TransUnion—the one informing Ramirez of the OFAC match but omitting a summary of rights—over a six-month period.<sup>141</sup> Although Ramirez won in large part in the lower courts and was awarded retroactive statutory damages, the Supreme Court granted certiorari to determine whether the class members had standing.<sup>142</sup> Importantly for this case, only 1,853 of the 8,185 class members had credit reports bearing the OFAC alert disseminated to third parties.<sup>143</sup>

In coming to its holding, the Court reviewed the distinction between tangible and intangible harms, noting that the former "most obvious[ly]" includes physical and monetary harms.<sup>144</sup> In addition, the opinion acknowledged that "[v]arious

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 421.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 421–22.

<sup>143</sup> *Id.* at 421.

<sup>144</sup> *Id.* at 425.



intangible harms can also be concrete.”<sup>145</sup> “Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts.”<sup>146</sup> Such traditional harms include, for example, reputational harms, disclosure of private information, intrusion upon seclusion, and harms specified by the Constitution, such as abridgement of free speech or free exercise.<sup>147</sup> Plaintiffs did not need to show “an exact duplicate in American history and tradition,” but instead needed to “identif[y] a close historical or common-law analogue.”<sup>148</sup>

The Court decidedly relegated congressional judgment to a second-tier consideration. Legislative judgment should be “afford[ed] due respect,” but it does not “relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm . . . any more than, for example, Congress’s enactment of a law regulating speech relieves courts of their responsibility to independently decide whether the law violates the First Amendment.”<sup>149</sup> The Court fretted over whether “[a]n uninjured plaintiff . . . is, by definition, not seeking to remedy any harm to herself but instead is merely seeking to ensure a defendant’s compliance with regulatory law (and, of course, to obtain some money via the statutory damages).”<sup>150</sup> The Court concluded that such a scenario would be an affront to the separation of powers.<sup>151</sup> To be succinct, “[t]hose are not grounds for Article III standing.”<sup>152</sup>

Conceding that the “concrete-harm requirement can be difficult to apply in some cases,” the Court then proceeded to determine whether there was standing in the case at hand.<sup>153</sup> It held that only the 1,853 class members whose credit reports bearing the misleading alerts had been sent to third-party businesses had standing.<sup>154</sup> Their harm bore a sufficiently close relationship to “the reputational harm associated with the tort of defamation.”<sup>155</sup> It did not matter that the label was misleading rather than false—despite falsity being an essential element of the tort of defamation<sup>156</sup>—because the distinction between labeling someone a “potential terrorist” rather than a “terrorist” was small.<sup>157</sup> Standing “do[es] not require an exact duplicate,” and “the harm from a

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* (citations omitted).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 426.

<sup>150</sup> *Id.* at 427–28 (internal quotation marks omitted) (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 345 (2016) (Thomas, J., concurring)).

<sup>151</sup> *Id.* at 428–29 (“[I]f the law of Article III did not require plaintiffs to demonstrate a concrete harm, Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law. Such an expansive understanding of Article III would flout constitutional text, history, and precedent.” (internal quotation marks omitted)).

<sup>152</sup> *Id.* at 428.

<sup>153</sup> *Id.* at 429–30.

<sup>154</sup> *Id.* at 431–33.

<sup>155</sup> *Id.* at 432 (citing *Spokeo*, 578 U.S. at 341).

<sup>156</sup> *Defamation*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“Malicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person.”).

<sup>157</sup> *TransUnion*, 594 U.S. at 433.

misleading statement of this kind bears a sufficiently close relationship to the harm from a false and defamatory statement.”<sup>158</sup>

Publication, however, was a non-negotiable element for the Court. The Court consequently held that the remaining 6,332 class members lacked standing because “[p]ublication is essential to liability in a suit for defamation” and there was “no historical or common law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury.”<sup>159</sup> The Court concluded by holding that there was also no standing for any class member other than Ramirez on the two remaining claims because “[w]ithout any evidence of harm caused by the format of the mailings, these are ‘bare procedural violation[s], divorced from any concrete harm.’”<sup>160</sup>

Notable here is that the Court analyzed both the elements of the tort of defamation *and* the harm the tort was meant to address. Looking to both was necessary to understand the historical or common law analogue.

In his dissent, Justice Thomas advocated for a different theory of statutory standing. This approach, which he argued was used at the founding, gave courts “judicial power over an action with no showing of actual damages [if] . . . the plaintiff sought to enforce a right held privately by an individual.”<sup>161</sup> This applied for both “traditional common-law rights . . . [and] also for newly created statutory [rights],” including copyright.<sup>162</sup> Thomas’s originalist approach had been adopted three months prior by the Court in *Uzuegbunam v. Preczewski*.<sup>163</sup> There, the Court held that a request for nominal damages satisfied the redressability requirement for standing under Article III when the plaintiff’s claim was based on a completed violation of a legal right.<sup>164</sup> The Court said that it was “well established” in common law “that a party whose rights are invaded can always recover nominal damages without furnishing any evidence of actual damage.”<sup>165</sup> However, while the *TransUnion* majority did not explicitly say why it charted a different course in this case, it probably did so on factual grounds.

Factually, the cases are distinguishable on two fronts. First, *TransUnion* examines whether the legal harm is sufficiently concrete to satisfy the *injury in fact* requirement. In *Uzuegbunam*, the Court was deciding whether nominal damages could satisfy the *redressability* requirement for a past injury.<sup>166</sup> Second, although both cases involved intangible injuries, the harms themselves were different. *Uzuegbunam* claimed that his First Amendment rights had been violated, which was an intangible

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 434 (citations and internal quotation marks omitted).

<sup>160</sup> *Id.* at 440 (second alteration in original) (quoting *Spokeo*, 578 U.S. at 341).

<sup>161</sup> *Id.* at 446–448 (Thomas, J., dissenting).

<sup>162</sup> *Id.*

<sup>163</sup> 592 U.S. 279 (2021).

<sup>164</sup> *Id.* at 292.

<sup>165</sup> *Id.* at 289.

<sup>166</sup> *Id.* at 285.

harm recognized in the Constitution, whereas in *TransUnion*, the right was only conferred by statute.<sup>167</sup>

“After *TransUnion*, this simple principle—the violation of a private right gives rise to presumed injury—no longer applies to private rights created by Congress.”<sup>168</sup> Congressional judgment and statutory text are at best a starting point. It is the court’s responsibility to decide whether a defendant’s “actions are so insignificant that the Constitution prohibits [the plaintiff] from vindicating their rights in federal court.”<sup>169</sup>

### III. Copyright Law after *TransUnion*

Copyright infringement inflicts intangible harms such as violation of the right to exclusivity in publishing or the right to prepare derivative works.<sup>170</sup> To be sure, copyright infringement can lead to a monetary loss, but intangible harms include a host of monetary-adjacent injuries such as damage to advertising efforts, loss of goodwill, or loss of a competitive market position.<sup>171</sup> If *TransUnion* means that Congress cannot confer standing to plaintiffs seeking statutory damages unless the plaintiff can show a concrete harm resulted from the violation of the statutory right, copyright law is vulnerable. Recognizing liability without harm empowers litigants “to ensure a defendant’s ‘compliance with regulatory law’ (and, of course, to obtain some money via the statutory damages).”<sup>172</sup> Courts and litigants alike openly admit that copyright holders often fail to show that they have been harmed.<sup>173</sup> If owners of a copyright cannot establish harm but are still awarded tens of thousands of dollars in statutory damages, what more are they doing than merely seeking to enforce the law and get a payout along the way?

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<sup>167</sup> *Id.*; *TransUnion LLC v. Ramirez*, 594 U.S. 413, 421 (2021).

<sup>168</sup> Elizabeth E. Beske, *Charting a Course Past Spokeo and TransUnion*, 29 GEO. MASON L. REV. 729, 729 (2022).

<sup>169</sup> *TransUnion*, 594 U.S. at 443 (Thomas, J., dissenting).

<sup>170</sup> See, e.g., *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 544 (4th Cir. 2007) (“Irreparable injury often derives from the nature of copyright violations, which deprive the copyright holder of intangible exclusive rights.”); *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 611 (1st Cir. 1988) (“[C]opyright protects the unique and somewhat intangible interest of creative expression.”); Steven Hetcher, *The Immorality of Strict Liability in Copyright*, 17 MARQ. INTEL. PROP. L. REV. 1, 11–12 n.33 (2013) (“[I]t is not as if one can use dynamite to blow up copyright-protected works, as they are intangible, nor can such works be torn apart by domestically kept wild animals for the same reason.”).

<sup>171</sup> *Country Kids ‘N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1288 (10th Cir. 1996) (finding harm in loss of customer goodwill); *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1264 (10th Cir. 2004) (finding intangible harm in the loss of competitive market position); *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (finding harm in damage to advertising efforts). Consider also the facts of *TransUnion*. The misleading information in Ramirez’s credit report resulted in the car dealership refusing to sell him a car. *TransUnion*, 594 U.S. at 420. The Court said it was an intangible injury nonetheless. *Id.* at 424–26. This is because the subsequent harm is separate from the legal right that credit reporting agencies take reasonable measures to ensure accuracy. *Id.*

<sup>172</sup> *Id.* at 427–28 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 345 (2016) (Thomas, J., concurring)).

<sup>173</sup> See ABRAMS & OCHOA, *supra* note 73.

The burden therefore falls on the copyright holder to show that he or she has suffered a concrete harm through a close historical or common law analogue to a harm traditionally recognized as a basis for suit in American courts. Before assessing whether modern copyright infringement suits flunk the historical analogue test, it is important to explain why the concrete-harm requirement of an injury in fact is the element of standing most likely to pose a threat to modern copyright infringement claims.

The other elements of a justiciable injury in fact can be sufficiently pled by a copyright holder. An injury in fact is the invasion of a legally protected interest that is concrete and particularized, actual or imminent, and not conjectural or hypothetical.<sup>174</sup> The 1976 Copyright Act provides the legally protected interest which is violated by the infringement. Violation of the plaintiff's own copyright makes the harm sufficiently particularized and actual. The ability to show that one's work was copied makes the injury both imminent and not hypothetical. Causation is also straightforward, assuming that the injury is concrete. If the plaintiff's injury is that their copyrighted material was infringed, causation is satisfied by demonstrating that the defendant is responsible for the infringement. Redressability is also unlikely to pose a problem. If someone infringes a copyrighted work, the courts can redress the infringement with an award of actual damages<sup>175</sup> or an injunction,<sup>176</sup> among other remedies.<sup>177</sup>

The issue is then only with the concrete-harm requirement. To determine whether the injury is sufficiently concrete, the court looks to "injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts."<sup>178</sup> Such intangible harms include those specified in the Constitution. Although Article I grants Congress the authority to govern copyright, the relevant clause does not carry the rights-creating language found in other parts of the Constitution, such as the First Amendment.

The Copyright-Patent Clause differs linguistically and stylistically from much of the rights-creating language in the Constitution. The First Amendment uses the phrase "Congress shall make no law," which suggests the existence of a right, or at the very least a limit on Congress's power.<sup>179</sup> The Second Amendment says that the rights enumerated in it "shall not be infringed."<sup>180</sup> The Third Amendment dictates that "[n]o Soldier shall."<sup>181</sup> By contrast, Article I says that "Congress shall have the power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective

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<sup>174</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

<sup>175</sup> 17 U.S.C. § 504(a)(1).

<sup>176</sup> § 502.

<sup>177</sup> §§ 503, 505.

<sup>178</sup> *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021).

<sup>179</sup> U.S. CONST. amend. I.

<sup>180</sup> U.S. CONST. amend. II.

<sup>181</sup> U.S. CONST. amend. III.

Writings and Discoveries.”<sup>182</sup> There is no command, no instruction on what Congress shall or shall not do, and so the text does not explicitly provide a space of protected rights. Upon a literal reading, Congress does not even have to create a copyright regime if it so chooses. It merely has the power to do so. As a result, there probably is not a harm specified in the Constitution that makes a copyright infringement claim sufficiently concrete in the absence of harm.

In the absence of an intangible harm specified in the Constitution, a court will find an intangible injury sufficiently concrete if it has a “close historical or common-law analogue” to a harm traditionally recognized as a basis for suit in American courts.<sup>183</sup> Applying the *TransUnion* framework, the next sections review both the traditional causes of action in copyright law and the harm associated with the tort of infringement.<sup>184</sup> As the discussion below finds, the modern conception of copyright infringement claims has moved away from its traditional origins. In fact, the very reason that modern copyright law has expanded so far beyond its historical roots is because modern claimants are not required to show harm in order to receive damages. The historical causes of action in a copyright infringement suit required some showing of harm caused by the defendant, and the harm associated with an infringement action was always economic.

The following sections address three questions: (1) does the common law or statute provide the correct analogue for an inquiry into the original understanding of copyright law, (2) what was the harm traditionally associated with copyright actions, and (3) did the original causes of action and remedies require a showing of harm in order to bring suit?

### A. Sources of Copyright Law

As a threshold matter, the Supreme Court has not clearly articulated what sources of law and tradition should inform the inquiry of whether there is a close historical or common law analogue to the modern statutory harm. In *TransUnion*, the Court said to compare the intangible harm at issue to a harm traditionally recognized as a basis for suit in American courts.<sup>185</sup> The Court cited *Spokeo* for that proposition; however, in *Spokeo*, the Court said that it was instructive to consider harms traditionally recognized as a basis for suit in English or American courts.<sup>186</sup> For the purposes of this Paper, I presume that both sources of law are instructive given that

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<sup>182</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>183</sup> *TransUnion*, 594 U.S. at 424.

<sup>184</sup> “The plaintiffs contend that this injury bears a ‘close relationship’ to a harm traditionally recognized as providing a basis for a lawsuit in American courts—namely, the reputational harm associated with the tort of defamation. We agree with the plaintiffs.” *Id.* at 432 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) (emphasis added)).

<sup>185</sup> *Id.* at 417.

<sup>186</sup> *Spokeo*, 578 U.S. at 340–41.

the *Transunion* Court cited a treatise on English legal history in its discussion of the elements of defamation.<sup>187</sup>

### 1. *The Sources of English Copyright Law*

The printing press may have created a definitive need for copyright law, but the dividing line between copyright at common law and statutory copyright was subject to far more debate in England. The statutory regime, first created by the 1710 Statute of Anne, would come to govern copyright for published works. However, that conclusion came after nearly seventy years of debate.

The 1710 Statute of Anne was the first major piece of copyright legislation.<sup>188</sup> Prior to its passage, English copyright law was largely governed by royal grants.<sup>189</sup> The major achievement of the Statute was that it gave authors of already published works an exclusive right of publication for twenty-one years and yet-to-be-published works a fourteen-year term of exclusivity.<sup>190</sup>

The Statute's drafting process gives clues about the common law tradition it supplanted. The first iteration of the Statute was titled "An act to *secure* the property of authors,"<sup>191</sup> but the title was later changed in committee to be "An Act for the Encouragement of Learning, by *Vesting* the Copies of printed Books in the Authors, or Purchasers, of such Copies, during the Times therein mentioned."<sup>192</sup> The use of "secure" and "vesting" both suggest that the Statute aimed to establish a right rather than codify an existing one.

The Statute's terms of exclusivity and cause of action against infringers were quickly adopted, suggesting that there was an early understanding that the Statute exclusively governed copyright after publication, rather than the common law. In *Tonson v. Baker*, the first copyright infringement suit brought under the 1710 Statute of Anne, the plaintiff relied on both prior custom and the Statute as the authority for his copyright infringement claim.<sup>193</sup> However, the plaintiff only claimed that he was entitled to exclusivity of printing for fourteen years after the first publication of his work and sought an injunction that would protect him for that period.<sup>194</sup> This suggests that the legal and publishing community at the time accepted that the Statute

<sup>187</sup> *TransUnion*, 594 U.S. at 434 (citing J. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 474 (5th ed. 2019)).

<sup>188</sup> Statute of Anne 1710, 8 Anne, c. 19 (Eng.).

<sup>189</sup> See Cotter, *supra* note 15, at 327.

<sup>190</sup> Statute of Anne 1710, 8 Anne, c. 19, § 1 (Eng.).

<sup>191</sup> HENRY WHEATON, REPORT OF THE COPY-RIGHT CASE OF WHEATON V. PETERS. DECIDED IN THE SUPREME COURT OF THE UNITED STATES. WITH AN APPENDIX, CONTAINING THE ACTS OF CONGRESS RELATING TO COPY-RIGHT 22 (1834) (emphasis in original).

<sup>192</sup> Thomas B. Morris, Jr., *The Origins of the Statute of Anne*, 12 COPYRIGHT L. SYMP. 222, 222 (1961–1962) (emphasis added).

<sup>193</sup> H. Tomás Gómez-Arostegui, *The Untold Story of the First Copyright Suit under the Statute of Anne in 1710*, 25 BERKELEY TECH. L.J. 1247, 1311–12 (2010).

<sup>194</sup> *Id.*

controlled copyright law for published works and that there was no superseding common law protection that lasted in perpetuity.<sup>195</sup>

However, the argument in favor of a common law copyright after publication began anew in the decades after the 1710 Statute of Anne, as the statutory periods of exclusivity that the Statute provided began to expire.<sup>196</sup> Booksellers fiercely lobbied Parliament to extend the length of a copyright term, but they were rebuffed.<sup>197</sup> The fight for a perpetual copyright then moved to the courts, where proponents of indefinite terms claimed the protection of the common law. The first major case was

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<sup>195</sup> This also comports with the original understanding of copyright at common law. Copyright had long been treated as literary property. Literary property possessed similar characteristics to other common forms of property, such as a deed. For example, at common law, the property the author had in their manuscript could be transferred. “An author has, by the common law, a property in his manuscript; and there can be no doubt that the rights of an assignee of such manuscript would be protected by a court of chancery.” *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661 (1834). An author could also divest the copyright if he or she relinquished control over the work. Copyright “protects the captor of the idea . . . by giving him the exclusive property in his acquisition or creation.” *Werckmeister v. Am. Lithographic Co.*, 134 F. 321, 324 (2d Cir. 1904). “To pursue the foregoing analogies, the common-law protection continues *only so long as the captives or creations are kept in confinement or controlled.*” *Id.* (emphasis added).

The common law accordingly recognized three methods of publication: exhibition or performance, limited publication, and general publication. Only general publication divested the author of their common law protections. *See Burke v. Nat’l Broad. Co., Inc.*, 598 F.2d 688, 691 (1st Cir. 1979). Performance or oral dissemination of a work would not constitute publication of that work because the author was not abandoning their rights, even if the author did receive a profit from the performance or recitation. *See Nutt v. Nat’l Inst. Inc. for the Improvement of Memory*, 31 F.2d 236, 238 (2d Cir. 1929). This is because “the author ha[d] not lost the physical ability to control the dissemination and enjoyment of his work.” Melville B. Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185, 196 (1956). Limited publication would also not divest the author of protection under the common law as long as the publication was limited to a definitely selected group, it was given to them for a limited purpose, and the recipient was expressly denied the right to disseminate, copy, or sell the work. *Id.* at 200 (collecting cases).

A general publication, most at interest in this discussion, “can be found where only one copy of the work passes to a member of the general public, as general publication depends on the author making the work available to those interested, and not on the number of people who actually express an interest.” *Burke*, 598 F.2d at 691. The distinguishing factor here is control. When the author or owner fully relinquished her work to the public, she was giving up her right to control publication. This distinction made perfect sense when copying was done by hand and true money was to be made through performances of a work. Copying was an onerous task and very well could have been unprofitable because the effort required to transcribe a book could easily exceed the later selling price. With the invention of the printing press, the rule that general publication divested a copyright became highly inconvenient and a threat to publishers’ financial viability.

<sup>196</sup> The Statute provided a fourteen-year term for works published after passage of the Statute, which could be renewed for another fourteen years if the author was still alive at the end of the first term. Statute of Anne 1710, 8 Anne, c. 19, § 1 (Eng.). As a result, the English publishing community sought a way to extend their copyrights in perpetuity, namely through the recognition of a common law right. Ronan Deazley, *The Myth of Copyright at Common Law*, 62 CAMBRIDGE L. J. 106, 109–10 (2003).

<sup>197</sup> Donner, *supra* note 37, at 367–68.

*Millar v. Taylor*, decided in 1769.<sup>198</sup> Andrew Millar brought an infringement claim against Robert Taylor because Taylor made copies of a book of poems wholly owned by Millar.<sup>199</sup> The court eventually ruled for Millar and held not only that a common law copyright existed after publication but also that the 1710 Statute of Anne merely provided additional remedies during the tenure it specified.<sup>200</sup> Essentially, during the copyright term established by the Statute, a copyright holder could seek relief *either* under the Statute or through a common law cause of action. The common law right was still available after the statutory copyright term ended.

*Millar* was quickly superseded by a later case, *Donaldson v. Beckett*, which was, in effect, the same case.<sup>201</sup> Millar had died during the original litigation and his rights in the contested work were purchased by Thomas Beckett.<sup>202</sup> The work was again infringed, this time by Alexander Donaldson.<sup>203</sup> However, the results were less favorable to copyright owners. The court's holding on whether there was a common law copyright protection after publication is contested,<sup>204</sup> but there is agreement that the court held that the 1710 Statute of Anne had divested any common law copyright that previously existed.<sup>205</sup> Post-publication copyright was now exclusively governed by the Statute.

The 1710 Statute of Anne, *Millar*, and *Donaldson*—all well-known in the American colonies<sup>206</sup>—ultimately established that the common law copyright divested at the time of publication, having been superseded by the Statute. This means that any inquiry into the traditional understanding of copyright in England must look to the common law if the work is unpublished and to the 1710 Statute of Anne if the infringed work had already been published. This same bifurcation appeared in the United States.

## 2. *The Sources of American Copyright Law*

Sources of early American copyright law also depended on whether the work had been published. Unpublished works were protected at common law and copyright for published works was governed by legislation. The Constitution's text gave the

<sup>198</sup> [1769] 98 Eng. Rep. 201.

<sup>199</sup> *Id.* at 202–03.

<sup>200</sup> *Id.* at 252–53; Oren Bracha, *The Statute of Anne: An American Mythology*, 47 HOUS. L. REV. 877, 889 (2010).

<sup>201</sup> [1744] 1 Eng. Rep. 837.

<sup>202</sup> *Id.* at 838.

<sup>203</sup> *Id.*

<sup>204</sup> Scholars have disagreed over whether *Donaldson* was misreported, with some scholars claiming that it was not correctly reported and that the final outcome did not actually support a common law right in copyright after publication. *See, e.g.*, H. Tomás Gómez-Arostegui, *Copyright at Common Law in 1777*, 47 CONN. L. REV. 1 (2014). The U.S. Supreme Court noted that the scope of the common law right “is still Considered in England as a question by no means free from doubt.” *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 595 (1834). However, the outcome of that debate is not determinative for the argument in this Paper, and so I leave that question for another day.

<sup>205</sup> *See generally* *Donaldson v. Beckett* [1744] 1 Eng. Rep. 837 (reviewing the various opinions).

<sup>206</sup> *See* *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 648–49 (1943).



first clues that the sources of American copyright law were to be separated by the line of publication, and later Supreme Court cases make the point quite clearly as well.

Federal authority over copyright law stems from the Constitution. The Copyright-Patent Clause empowers Congress to “secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>207</sup> Explicitly granting Congress the authority to create copyright law, and subsequently to *secure* an author’s rights, presents two options: first, either the Constitution’s framers did not believe that common law copyright protected works post-publication and therefore sought to create such a right by statute,<sup>208</sup> or second, if the Framers did believe such protection existed, they sought to abrogate it as the 1710 Statute of Anne had done so in England. The evidence suggests that the Framers believed that copyright did not vest in published works at common law.

Prior to the passage of the Constitution, the Articles of Confederation did not grant the federal government the power to govern copyright, leaving authority to the several states.<sup>209</sup> However, the states seemed in little hurry to pass copyright legislation. Six years after the Articles of Confederation were adopted, the Continental Congress passed a resolution calling upon the states to enact copyright legislation.<sup>210</sup> If early American leaders believed that copyright was adequately protected by state common law after publication, there would be no need for the Continental Congress’s resolution. Further, the text of the Copyright-Patent Clause itself suggests that the Framers believed common law copyright divested at publication given the meaning of the word “secure.”<sup>211</sup> A dictionary from 1785 defines the verb “to secure” to mean “[t]o make certain; to put out of hazard; to ascertain.”<sup>212</sup> It could also mean “[t]o protect; to make safe” or, simply put, “[t]o insure.”<sup>213</sup>

Conceivably, at the time of the founding, the authors and enactors of the Constitution thought that post-publication copyright protection needed to be made certain, protected, or insured. All of which implies that there was a general consensus that the common law right divested upon general publication.<sup>214</sup> Further, the First Congress quickly passed the 1790 Copyright Act. If the Framers believed that common law copyright was sufficient to protect the rights of a copyright holder, why would they have moved so expeditiously to create a statutory copyright regime? The

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<sup>207</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>208</sup> See Gómez-Arostegui, *supra* note 193.

<sup>209</sup> ARTICLES OF CONFEDERATION of 1781.

<sup>210</sup> See *Fred Fisher Music*, 318 U.S. at 648 (discussing the history of copyright legislation).

<sup>211</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>212</sup> Samuel Johnson, *A Dictionary of the English Language* 590 (6th ed. 1785), available at <https://archive.org/details/dictionaryofengl02johnuoft/page/n589/mode/2up?q=secure>.

<sup>213</sup> *Id.*

<sup>214</sup> A similar argument was made by the Supreme Court in 1834. See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661 (1834).

Constitution and passage of the 1790 Copyright Act both suggest that the Framers intended copyright to be governed by statute for published works.

This understanding also makes sense in light of later Supreme Court cases. The Court directly addressed this question in the decades after the Constitution was enacted. In *Wheaton v. Peters*, decided in 1834, Henry Wheaton, the author of an early Supreme Court reporter, sued Richard Peters, another publisher of Supreme Court reports, for copyright infringement, alleging that Peters copied Wheaton's copyrighted reports.<sup>215</sup> Although the Court would ultimately rule against Wheaton because it believed that no one could copyright the written opinions of the Supreme Court,<sup>216</sup> the opinion extensively discussed whether copyright existed at common law for published works.

According to the Court, the author at common law had a property interest in their unpublished manuscript and could "obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavor[s] to reali[z]e a profit by its publication."<sup>217</sup> However, "this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world."<sup>218</sup> The common law did not "recognize any right to control subsequent publication of a work after a first authorized publication had taken place; this was later addressed by the copyright statutes."<sup>219</sup> In short, publication divested the common law right.

The Court grounded its analysis in congressional intent. It opined that Congress must have presumed that a common law copyright did not exist after publication because the 1790 Copyright Act stated that the author "*shall* have the sole right and liberty of printing."<sup>220</sup> "Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it. This seems to be the clear import of the law, connected with the circumstances under which it was enacted."<sup>221</sup>

The certainty of the Court's holding stands in stark contrast to the confusion surrounding the boundaries of the English common law right.<sup>222</sup> *Millar, Donaldson*, and the 1710 Statute of Anne were all well known to the Court and the litigants arguing before it.<sup>223</sup> The Court prevented any lingering uncertainty in the United

<sup>215</sup> *Id.* at 595.

<sup>216</sup> *Id.* at 668.

<sup>217</sup> *Id.* at 657.

<sup>218</sup> *Id.*

<sup>219</sup> HOWARD B. ABRAMS & TYLER T. OCHOA, 1 THE LAW OF COPYRIGHT § 8:12 (2022).

<sup>220</sup> *Wheaton*, 33 U.S. (8 Pet.) at 661 (emphasis added).

<sup>221</sup> *Id.*

<sup>222</sup> *See id.* at 657 ("From the above authorities, and others which might be referred to if time permitted, the law appears to be well settled in England, that, since the statute of 8 Anne, the literary property of an author in his works can only be asserted under the statute. And that, notwithstanding the opinion of a majority of the judges in the great case of *Miller v. Taylor* was in fav[or] of the common law right before the statute, it is still considered, in England, as a question by no means free from doubt.").

<sup>223</sup> *Id.*

States with its clear directive: there is no perpetual copyright at common law for published works.<sup>224</sup> Justice Woodbury, riding circuit, reiterated the divide between the common law right and statutory copyright law a few years later: “that no copyright, as by common law, existed here to a book.”<sup>225</sup> “But any claims or rights, which did exist before in the manuscript, or in a mark, or for deception and fraud, remain untouched.”<sup>226</sup> It quickly became a feature of blackletter law that, for published works, the “right of action, as well as the copyright itself, is wholly statutory, and the means of securing any right of action . . . are only those prescribed by [C]ongress.”<sup>227</sup>

The clear jurisdictional divide established between common law and statutory copyright continued for nearly two hundred years before being abrogated by the 1976 Copyright Act.<sup>228</sup> The separation had last been recognized in the 1909 Copyright Act, which provided that “nothing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor[e].”<sup>229</sup> The 1976 Copyright Act consolidated the sources of copyright law under one mantle. The text of the Act states that:

[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . , whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.<sup>230</sup>

The explicit renunciation of the common law cause of action is notable for the fact that it reveals Congress’s clear intent to break from prior tradition. Congress knew that it was charting a new course for copyright law.<sup>231</sup> Further, a more recent court decision reemphasized that the new copyright regime no longer recognized a common law right. In *Sony Corporation of America v. Universal City Studios, Inc.*, the Court assessed that “it [is] settled that the protection given to copyrights is wholly statutory.”<sup>232</sup>

Patent law provides even further evidence that the division was integral to American intellectual property jurisprudence for nearly two centuries. Because congressional authority to govern both copyright law and patent law is found in the

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<sup>224</sup> *Id.* at 661.

<sup>225</sup> Taylor v. Carpenter, 23 F. Cas. 744, 748 (C.C.D. Mass. 1846).

<sup>226</sup> *Id.*

<sup>227</sup> Thompson v. Hubbard, 131 U.S. 123, 151 (1889).

<sup>228</sup> 17 U.S.C. § 301(a).

<sup>229</sup> Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, § 2, 35 Stat. 1075, 1076 (repealed 1978).

<sup>230</sup> 17 U.S.C. § 301(a).

<sup>231</sup> See *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 9 F.4th 1167, 1170 (9th Cir. 2021) (“In 1976, Congress started a revolution.”).

<sup>232</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984); see also HOWARD B. ABRAMS & TYLER T. OCHOA, 1 THE LAW OF COPYRIGHT § 1:28: THE LEGISLATIVE HISTORY OF THE 1976 COPYRIGHT ACT (2022).

same clause of the Constitution, the judiciary has long treated them similarly.<sup>233</sup> Early patent cases reflect a shared understanding that publication divested the common law right. In 1850, the Supreme Court said that the patent “monopoly did not exist at common law, and . . . it cannot be regulated by the rules of the common law.”<sup>234</sup> “It is created by the act of Congress; and no rights can be acquired in it unless authorized by statute and in the manner the statute prescribes.”<sup>235</sup> Publication divested the common law patent right.

To conclude, the common law or historical analogue for a modern copyright infringement action depends on whether the author’s work was published at the time it was infringed. According to both the English and American traditions, claims regarding an unpublished manuscript should be compared to the common law cause of action, and infringement actions concerning published works should look to statutory analogues.

### B. The Traditional Harm of Copyright Infringement

Under both statutory tradition and the common law, the harm of copyright infringement was pecuniary. Copyright law was never intended to redress a moral injury. Instead, it was meant to align market incentives with the public good that came from innovation and new creative works. “[N]o man but a blockhead ever wrote, except for money.”<sup>236</sup> For that reason, the traditional harm of copyright infringement was a financial or market harm, often proven through evidence of substantial lost profits.

The entire debate surrounding whether the common law or statute governed copyright for published works makes the point quite clearly. The choice of law had a direct impact on how long publishers or booksellers, and later authors, could profit from their work. The printing press was a boon to publishers and booksellers who could suddenly “turn out a multitude of copies rapidly.”<sup>237</sup> Yet their competitors could do the same, necessitating a need for copyright law to preserve the financial viability of the publishing industry. The 1710 Statute of Anne was a direct result of lobbying by booksellers who were “annoyed by the piracy of unprincipled and irresponsible adventurers.”<sup>238</sup> Once the statutorily prescribed terms of exclusivity began to lapse, publishers and booksellers turned to the courts to recognize a perpetual copyright at

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<sup>233</sup> See, e.g., *Evans v. Eaton*, 16 U.S. (3 Wheat.) 454, 500–01 (1818) (“It is true, a patent or copyright can only be granted to an inventor or author; but the originality of the invention or authorship may be determined by congress itself . . . or by an administrative act, by the decision of some board or executive officer; or, lastly, by a judicial investigation: according as the legislative will may prescribe either of these several modes.”); *Eldred v. Ashcroft*, 537 U.S. 186, 201 (2003) (stating that because “the Clause empowering Congress to confer copyrights also authorizes patents, congressional practice with respect to patents informs our inquiry”).

<sup>234</sup> *Gayler v. Wilder*, 51 U.S. (10 How.) 477, 494 (1850).

<sup>235</sup> *Id.*

<sup>236</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (quoting 3 BOSWELL’S LIFE OF JOHNSON 19 (G. Hill ed. 1934)).

<sup>237</sup> See *Morris, Jr.*, *supra* note 192, at 230.

<sup>238</sup> WHEATON, *supra* note 191, at 22.

common law in lieu of a time-limited term.<sup>239</sup> Why would anyone “have needed . . . such protection if he were not attempting to make an entrepreneurial profit?”<sup>240</sup> Nominal economic harm did not precipitate piracy. Instead, English courts recognized suits where infringement resulted in “much hurt” and the original work substantially “lessened in value.”<sup>241</sup>

Similar economic concerns evidently drove the Framers to grant Congress the authority to govern copyright in the Constitution. The driving force behind the creation of a national copyright power vested in the federal government was a concern that authors were being denied the fruits of their labors. Twelve of the thirteen original states had passed their own copyright legislation, creating a confusing patchwork of copyright protections.<sup>242</sup> Moreover, obtaining a copyright in one state provided little protection because the copyright was limited to that state’s boundaries; there was no promise that copyright in one state would be respected in another.<sup>243</sup> James Madison lamented that “[t]he States cannot separately make effectual provisions for either [copyright or patent].”<sup>244</sup> The situation was untenable and “most of [the states] have anticipated the decision of this point”—a uniform set of laws was required because such scattershot protection would upset the “delicate balancing of public interests with [an author’s] rights.”<sup>245</sup> Without the promise of profits created by exclusivity of publishing, authors would lack a necessary incentive to produce new creative works.<sup>246</sup>

The 1790 Copyright Act reflected this same pecuniary concern. An infringer was only liable for copies he or she printed, published, or otherwise exposed to sale.<sup>247</sup> There was no legally cognizable harm until the infringer affirmatively took a step toward monetizing the copies. Therefore, the harm associated with the tort of infringement was pecuniary and was not designed to offer redress for a moral harm or the affront to dignity an author may experience knowing that another infringed on their work.

The 1710 Statute of Anne, the American Constitution, and the 1790 Copyright Act were walking on well-trodden ground. Copyright at common law had long recognized that the true harm of copyright infringement was pecuniary, often in the form of lost profits. As such, the right of first publication was an integral “element of the common-law protections afforded unpublished works.”<sup>248</sup> The financial value of

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<sup>239</sup> See Deazley, *supra* note 196; see also Donner, *supra* note 37, at 367–68.

<sup>240</sup> See Morris, Jr., *supra* note 192, at 230.

<sup>241</sup> Beckford v. Hood [1798], 101 Eng. Rep. 1164, 1164.

<sup>242</sup> Donner, *supra* note 37, at 369–70.

<sup>243</sup> *Id.* at 376 (discussing statements in support of the Constitution by then-Chief Justice of the Pennsylvania Supreme Court Thomas McKean).

<sup>244</sup> THE FEDERALIST NO. 43 (James Madison).

<sup>245</sup> Lippman, *supra* note 81, at 517.

<sup>246</sup> *Id.*

<sup>247</sup> Copyright Act of 1790, Pub. L. No. 1-15, § 2, 1 Stat. 124, 125 (repealed 1831).

<sup>248</sup> Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 552 (1985).

the right of first publication “lies primarily in exclusivity” because “only one person can be the first publisher.”<sup>249</sup> Publishing another person’s manuscript “effectively arrogates to [the infringer] the right of first publication, an important marketable subsidiary right.”<sup>250</sup> Moreover, the Supreme Court acknowledged that the harm associated with copyright infringement was pecuniary in *Wheaton* when it noted that “[i]f labor and effort in producing what before was not possessed or known will give title, then the literary man has title, perfect and absolute, and should have his reward.”<sup>251</sup> That reward was the profits expected upon first publication. However, the harm needed to be substantial, hence the focus on first publication in the common law.

Justice Story recognized that infringement actions required a substantial pecuniary harm:

Thus, for example, no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to critici[z]e, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.<sup>252</sup>

The harm associated with copyright infringement only gave rise to suit where the infringer sought to supersede or substitute for the original work and unjustly reap the economic benefits.

Not long after, Justice Curtis, riding circuit, held that no true harm had occurred where the defendant infringed only on part of the copyright holder’s book.<sup>253</sup> He commented that:

[I]f I were to hold that the words “a copy of a book” meant only a copy of the entire book in the fourth section, which confers a privilege, and meant not only this but also a copy of any such part of a book as would infringe its copyright, in the sixth section which inflicts a penalty. To construe the act, as the plaintiff claims it should be construed, would be, in effect, to insert in it, after the words “copy of a book,” the very important addition “or any substantial and material part thereof sufficient to infringe its copyright.” This enlargement of a highly penal law so as to extend it to a large class of cases not described in it, is inconsistent with the soundest principles of interpretation.<sup>254</sup>

Interpreting both the 1790 Copyright Act and the Copyright Act of 1831, Justice Curtis was forced to the conclusion that copying part, rather than the whole, of a book did not amount to an infringement of the plaintiff’s copyright.<sup>255</sup> That holding can only make sense in light of Justice Story’s commentary that the harm of infringement only occurred when the infringer sought to supersede the original work. Where there

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<sup>249</sup> *Id.* at 553.

<sup>250</sup> *Id.* at 548–49.

<sup>251</sup> *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 691 (1834).

<sup>252</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 344–45 (C.C.D. Mass. 1841) (Story, J.).

<sup>253</sup> *Rogers v. Jewett*, 20 F. Cas. 1114, 1115 (C.C.D. Mass. 1858).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

was no pecuniary loss in the form of substantial lost profits or a similar market harm, there was no injury.

All of this goes to show that common law and statutory copyright law were designed to protect literary property in such a way that no one could preempt an individual's right of first publication or supersede the original work and thereby unjustly collect the profits rightfully belonging to the author.

Moreover, the harm of infringement was meant to be interpreted in light of the underlying policy goal of copyright. The Constitution gives Congress the authority to regulate copyright “[t]o promote the Progress of Science and useful Arts.”<sup>256</sup> As a result, the pecuniary harm—lost profits—associated with the traditional tort of infringement only materialized when it meaningfully removed the incentive to create in the first place. “[W]ithin the free market system, the creator should be able to earn a living, but not to such an extent that it stifles progress or inhibits creativity.”<sup>257</sup> Put another way, “[w]here market harm, and thus harm to creative incentives, does not exist, copyright law should not curtail behavior.”<sup>258</sup>

To some extent, the traditional harm of infringement, pecuniary injury in the form of lost profits, remains relevant today. The Supreme Court has noted that “copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge . . . . The profit motive is the engine that ensures the progress of science.”<sup>259</sup> However, modern doctrine has put an author's profits before the public good by recognizing a far more expansive conception of harm than was recognized as a basis for suit in early American courts.

The modern harm of copyright infringement has become one of moral injury rather than substantial pecuniary loss. Dilbert comics creator Scott Adams acknowledged that the free publicity created by infringement sometimes outweighs any monetary loss but said that infringement “might not seem like a big deal to you, but it feels that way to the person who lost control of his art.”<sup>260</sup> No one enjoys watching another profit off of their hard work, but copyright was never meant to vindicate such a moral harm. William Patry pointedly commented that “there is no

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<sup>256</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>257</sup> Lippman, *supra* note 81, at 517; *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (“The primary objective of copyright is not to reward the labor of authors, but ‘to promote the Progress of Science and useful Arts.’”) (citation omitted).

<sup>258</sup> Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433, 2444 (2016).

<sup>259</sup> Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003) (quoting *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y.1992), *aff'd*, 60 F.3d 913 (2d Cir. 1994)) (emphasis in original).

<sup>260</sup> Scott Adams, *Is Copyright Violation Stealing?*, DILBERT.BLOG (Apr. 7, 2007), [https://dilbertblog.typepad.com/the\\_dilbert\\_blog/2007/04/is\\_copyright\\_vi.html](https://dilbertblog.typepad.com/the_dilbert_blog/2007/04/is_copyright_vi.html).

reason to keep pretending that the Copyright Wars involve morality or principle—they don't and never have.”<sup>261</sup>

Worse, copyright law is becoming an offensive cause of action that is chilling the very creativity that it was meant to incentivize. So-called “copyright trolls” initiate lawsuits for the sole “purpose of generating revenue rather than deterring future infringement of the work.”<sup>262</sup> Large companies use copyright to preserve purity of brand rather than to recoup pecuniary loss. For example, Disney successfully used the threat of litigation to intimidate a day-care center into removing paintings of Disney characters from its walls.<sup>263</sup> Capitol Records won a \$1.92 million verdict in a peer-to-peer file-sharing case even though its actual damages were approximately \$50.<sup>264</sup>

These lawsuits can only be brought because modern copyright law extends liability well beyond pecuniary harm. Copyright law was meant to allow authors to reclaim lost profits rather than vindicate moral injuries. Further, both early English and American copyright law show that the harm only materialized when it escalated to the level of a market harm through violation of an author's right to first publication or by attempting to supersede the original work. Modern copyright has lost sight of that balance. By extending liability in the absence of pecuniary harm, copyright law has upset the very balance it was meant to create. Liability without harm does nothing but “chill[] speech and discourag[e] innovation.”<sup>265</sup>

### C. Copyright Infringement Causes of Action and Remedies

The sections above make two points: first, that the contours of common law and statutory copyright revolved around the line of publication and, second, that the harm traditionally associated with copyright infringement was pecuniary in nature and resembled what we might today call a market harm. These conclusions affect the historical inquiry required by *TransUnion* in two ways. The first conclusion tells the party seeking standing which tradition, common law or statute, she should look to in order to find the correct historical analogue. The second conclusion shapes the question of what harm was needed to bring a copyright infringement action, the answer being a substantial financial injury caused by the infringement. This section

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<sup>261</sup> Buccafusco & Fagundes, *supra* note 258, at 2446 (quoting WILLIAM PATRY, MORAL PANIC AND THE COPYRIGHT WARS 189 (2009)).

<sup>262</sup> Elif Sonmez, *Copyright Troll or Ugly Rights Holder? The Spread of Troll-Tactics and Solutions to the Abuse of the Courts and Degradation of the Copyright Protection Scheme*, 19 INTELL. PROP. L. BULL. 137, 140 (2015).

<sup>263</sup> Jeffrey Schmalz, *Nastiness Is Not a Fantasy In Movie Theme Park War*, N.Y. TIMES (Aug. 13, 1989), <https://www.nytimes.com/1989/08/13/us/nastiness-is-not-a-fantasy-in-movie-theme-park-war.html>.

<sup>264</sup> Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 442–43 (2009) (discussing *Capitol Records v. Thomas-Rasset*, 579 F. Supp. 2d 1210 (D. Minn. 2008)).

<sup>265</sup> Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 53, 55 (2014).



turns next to the causes of action and remedies used in English and American courts to vindicate the pecuniary harm associated with copyright infringement.

A review of the common law cause of action for unpublished works highlights that a showing of harm was a necessary element of a copyright infringement suit. The same holds true for the statutory causes of action that governed infringement of published works. Proving a substantial pecuniary loss that could ultimately threaten the financial incentives copyright created was a requirement.

### 1. *Common Law Causes of Actions and Remedies*

Modern copyright infringement claims involving unpublished manuscripts now fall under the purview of the 1976 Copyright Act.<sup>266</sup> However, because *TransUnion* does not require an “exact duplicate” in history, this is not itself enough to show that modern copyright law has veered away from its historical roots.<sup>267</sup> The problem instead is that the modern cause of action resembles the traditional tort of trespass to land.<sup>268</sup> The plaintiff need only show a violation of their copyright, rather than that the infringement produced an injury, in order to win damages.<sup>269</sup> As modern scholars have pointed out, that similarity to trespass may not make sense given the inherent differences between trespass on real property and something more intangible, like works of authorship.<sup>270</sup> As I further argue, the resemblance between copyright law and trespass not only fails to grasp the nature of copyright, it actually has no basis in the common law.

The true historical origins of copyright infringement claims lie in actions of trespass *on the case*. As discussed below, a plaintiff could not bring a copyright suit under the common law without a showing of harm. To the extent that modern copyright law recognizes liability in the absence of harm, it legitimizes a harm that would not have been recognized as a basis for suit in English or American courts. The key difference is the form of damages sought.

The historical practice of copyright law in England demonstrates that early infringement claims were brought as actions of trespass on the case rather than simple trespass. Take the influential case of *Darcy v. Allin* from 1601.<sup>271</sup> Queen Elizabeth granted both patent and copyright-like protections to Ralph Bowes, giving him exclusivity in “the making of playing cards within the realm, to have and to hold for twelve years.”<sup>272</sup> The monopoly term was later extended by the Queen.<sup>273</sup> *Darcy* arose

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<sup>266</sup> See 17 U.S.C. § 301(a).

<sup>267</sup> See *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021).

<sup>268</sup> Wendy J. Gordon, *Trespass-Copyright Parallels and the Harm-Benefit Distinction*, 122 HARV. L. REV. F. 62, 62 (2009).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 66–69.

<sup>271</sup> (The Case of Monopolies) [1601] 77 Eng. Rep. 1260.

<sup>272</sup> *Id.* at 1260.

<sup>273</sup> *Id.* at 1261.

after the defendant violated Bowes' exclusively by creating his own playing cards.<sup>274</sup> The cause of action: trespass on the case.<sup>275</sup> The practice of using actions on the case would continue for at least the next hundred and fifty years.

The seminal copyright case of *Millar v. Taylor* was also a "plea of trespass upon the case."<sup>276</sup> The *Millar* court made explicit references to the causes of action available to an injured copyright holder:

It is settled and admitted, and is not now controverted but that literary compositions in their original state, and the incorporeal right of the publication of them are the private and exclusive property of the author, and that they may ever be retained so; and that if they are ravished from him before publication, trover or trespass lies.<sup>277</sup>

The practice of bringing an action on the case in England was so established that American courts even recognized that the 1710 Statute of Anne "did not designate the form of action, yet no doubt was ever expressed that case was the appropriate one."<sup>278</sup> English courts went so far as to declare that "the maxim of law attaches that the law confers no right without a remedy to secure it, which in this instance can only be by an action on the case for damages."<sup>279</sup>

A similar tradition arose in the United States. Courts rebuffed copyright infringement suits brought as actions of trespass because "[i]t is clear that the plaintiff has adopted a form of action at law which cannot be supported."<sup>280</sup> General principles of law dictated that "trespass cannot be brought for an injury merely consequential in its character, unaccompanied by force as against the person or property, or by wrongful intermeddling with the possession of property."<sup>281</sup>

Actions on the case for the infringement of unpublished works were hardly rejected by Congress. Instead, the 1790 Copyright Act explicitly contemplated a "special action on the case founded upon this act" that would allow the author of an unpublished manuscript to recover "all damages occasioned by such injury."<sup>282</sup> The Act preserved the traditional common law cause of action and marked it as the only appropriate action for unpublished works. This mirrored English practice—"the statute having vested that right in the author, the common law gives the remedy by action on the case for the violation of it."<sup>283</sup>

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 1260.

<sup>276</sup> *Millar v. Taylor* [1769] 98 Eng. Rep. 201, 202.

<sup>277</sup> *Id.* at 221. Although the case mentions trover, it does not take away from the argument at hand. Trover, "was in it[]s original an action of trespass upon the case." 3 WILLIAM BLACKSTONE, COMMENTARIES \*151. Trover is a common law cause of action "to recover damages for the conversion of personal property, the damages generally being measured by the property's value." *Trover*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>278</sup> *Atwill v. Ferrett*, 2 F. Cas. 195, 198 (C.C.S.D.N.Y. 1846) (citing *Beckford v. Hood* [1798] 101 Eng. Rep. 1164, 1165).

<sup>279</sup> *Beckford*, 101 Eng. Rep. at 1165.

<sup>280</sup> *Atwill*, 2 F. Cas. at 198.

<sup>281</sup> *Id.*

<sup>282</sup> Copyright Act of 1790, Pub. L. No. 1-15, § 6, 1 Stat. 124, 125-26 (repealed 1831).

<sup>283</sup> *Beckford*, 101 Eng. Rep. at 1167 (opinion of Ch. J. Lord Kenyon).

The use of actions on the case was far from an isolated occurrence. It was also the action used for patent infringement cases.<sup>284</sup> Given that patent and copyright law have developed similarly in the United States, this is only further evidence that intellectual property rights were historically vindicated as actions on the case.

The key distinction between an action of trespass and one on the case is in the type of damages available to the injured party. For trespass:

Every unauthorized entry on the land of another is a trespass, for which an action will lie. The law implies damages to the owner, and in the absence of proof as to the extent to the injury, he is entitled to recover nominal damages. Especially is this the case where the suit is brought for the purpose of settling a question of right.<sup>285</sup>

Trespass explicitly contemplates a moral injury and an injury to the dignity of the property holder. This is also how modern copyright law operates. Trespass and modern copyright law have no requirement to show harm of any kind other than the violation of the legal right, and many copyright holders cannot do so. These suits are in effect brought for the purpose of settling a question of right. Despite the plaintiff's failure to show harm, infringers are on the hook for large statutory damage awards untethered from the actual injury. But an action on the case would not tolerate these suits. In actions on the case, liability matches the harm.

Trespass on the case is, “[a]t common law, a lawsuit to recover damages that are not the immediate result of a wrongful act but rather a later consequence.”<sup>286</sup> Actions on the case work well for the harm of copyright infringement. The wrongful act of copying the author's work does not create a harm recognized by law. It is the subsequent move to publish, sell, or otherwise use the copyrighted materials for financial gain that triggers liability. The copyright owner “can only be violated by another's printing without the author's consent.”<sup>287</sup>

As a result, actions on the case provide consequential, rather than nominal, damages.<sup>288</sup> Consequential damages “represent real losses to plaintiffs; plaintiffs who do not recover their consequential damages are not restored to the position they would have occupied but for the wrong.”<sup>289</sup> In other words, in actions on the case, “the jury [is] left to give such damages as will compensate for the injury *really sustained*.”<sup>290</sup>

<sup>284</sup> See, e.g., *Odiorne v. Amesbury Nail Factory*, 18 F. Cas. 578 (C.C.D. Mass. 1819) (Story, J.); *Smith v. Honey*, 28 U.S. (3 Pet.) 469 (1830); *Stein v. Goddard*, 22 F. Cas 1233, 1233 (C.C.D. Cal. 1856).

<sup>285</sup> *Pfeiffer v. Grossman*, 15 Ill. 53, 54 (Ill. 1853); see also 3 WILLIAM BLACKSTONE, COMMENTARIES \*208, \*210 (“And every such entry or breach of a man's close carries necessarily along with it some damage or other: for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage.”).

<sup>286</sup> *Trespass*, BLACK'S LAW DICTIONARY (11th ed. 2019); see also THOMAS W. WILLIAMS, AN ABRIDGMENT OF CASES ARGUED AND DETERMINED IN THE COURTS OF LAW, DURING THE REIGN OF HIS PRESENT MAJESTY, KING GEORGE THE THIRD 34 (1789).

<sup>287</sup> *Millar v. Taylor* [1769] 98 Eng. Rep. 201, 251.

<sup>288</sup> See RESTATEMENT (THIRD) OF TORTS: REMEDIES § 4 (Am. L. INST. 2022).

<sup>289</sup> *Id.*

<sup>290</sup> *Rogers v. Pitman*, 47 N.C. (2 Jones) 56, 58 (1854) (emphasis added).

The finder of fact must view “all the circumstances of the particular case” to determine the appropriate amount of damages.<sup>291</sup> Damages cannot be separated from harm in an action on the case. If copyright’s traditional harm was pecuniary loss caused by the defendant saturating the market with the original author’s work, consequential damages were allowed to restore the author to her rightful position. Actions on the case did not allow nominal damage awards untethered to harm.

The common law cause of action used in early copyright infringement cases, an action on the case, only allowed the plaintiff to receive consequential damages tied to the specific pecuniary harm alleged in each case. Modern copyright infringement actions involving unpublished works that seek statutory damages without a showing of substantial pecuniary harm lack the analogue required by *TransUnion* to make a modern injury sufficiently concrete.

## 2. *Historical Statutory Causes of Action and Remedies*

For published works, copyright infringement actions had to be authorized by statute to be recognized in court. Like their common law counterparts, statutory copyright laws considered harm to be an integral part of a copyright infringement suit. Both English and American statutes used causes of action that require a showing of harm. To the extent that modern copyright law allows an unharmed plaintiff to proceed in court, it is creating a new form of copyright infringement claim rather than hewing closely to a historical analogue.

Critics of *TransUnion*, such as Justice Thomas, have suggested that the 1790 Copyright Act allowed copyright holders to sue for statutory damages even if they “could not show monetary loss.”<sup>292</sup> However, the history and text of the statutory causes of action in the 1710 Statute of Anne and the 1790 Copyright Act show otherwise. Early English and American courts did not award damages without a showing of harm.

The 1710 Statute of Anne vested copyright in authors and authorized a cause of action in the event of an infringement. Mere copying did not trigger liability. The plaintiff could only sue someone who “shall print, reprint, or import, or cause to be printed, reprinted, or imported” a copyrighted material without consent.<sup>293</sup> An infringer would also be liable if he or she “shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale” copyrighted material without the consent of the copyright holder.<sup>294</sup> The infringer was to forfeit their copies to the copyright owner, “who shall forthwith damask, and make waste paper of them.”<sup>295</sup> The copyright owner was entitled to receive one penny for every sheet “which shall be found in [the infringer’s] custody, either printed or printing, published, or exposed

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<sup>291</sup> Jones v. Allen, 38 Tenn. (1 Head) 626, 635 (1858).

<sup>292</sup> *TransUnion LLC v. Ramirez*, 594 U.S. 413, 447 (2021) (Thomas, J., dissenting) (quoting *Muransky v. Godiva Chocolatier, Inc.*, 878 F.3d 917, 972 (11th Cir. 2020)).

<sup>293</sup> Statute of Anne 1710, 8 Anne, c. 19, § 2 (Eng.).

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

to sale, contrary to the true intent and meaning of this act.”<sup>296</sup> Such damages could be recovered in an action of debt and were to be split evenly between the Crown and the copyright owner.<sup>297</sup>

The 1790 Copyright Act employed similar language. It authorized a cause of action against any infringer who “shall print, reprint, publish, or import, or cause to be printed, reprinted, published, or imported” a copyrighted work without consent.<sup>298</sup> Likewise, it authorized suit against an infringer who “knowing the same to be so printed, reprinted, or imported, shall publish, sell, or expose to sale, or cause to be published, sold or exposed to sale, any copy” of the work at issue.<sup>299</sup> Like its English counterpart, the 1790 Copyright Act mandated that the infringer was to forfeit any copies and return them to the copyright holder, “who shall forthwith destroy the same.”<sup>300</sup> A plaintiff could recover fifty cents “for every sheet which shall be found in [the infringer’s] possession, either printed or printing, published, imported or exposed to sale, contrary to the true intent and meaning of this act.”<sup>301</sup> Damages were to be sought in an action of debt; half of the proceeds belonged to the government.<sup>302</sup>

A showing of monetary harm was integral to both statutory regimes. The 1710 Statute of Anne and the 1790 Copyright Act both specified that suits were to be brought as actions of debt. As stated by Justice Story, actions of “debt lie[] only when, by analogy to the rules of the common law, the duty or penalty lies not in unliquidated damages, but is capable of being reduced to a certainty.”<sup>303</sup> If damages could not be reduced to a certainty, a copyright infringement suit was not “sustainable.”<sup>304</sup> Statutory penalties constituted liquidated damages if they left no uncertainty as to how much the liable party owed.<sup>305</sup>

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<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> Copyright Act of 1790, Pub. L. No. 1-15, § 2, 1 Stat. 124, 125 (repealed 1831).

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Bullard v. Bell*, 4 F. Cas. 624, 640 (C.C.D.N.H. 1817).

<sup>304</sup> *Carrol v. Green*, 92 U.S. 509, 513 (1875).

<sup>305</sup> See *Stockwell v. United States*, 80 U.S. (13 Wall.) 531, 542 (1871) (“The act of 1823 fixes the amount of the liability at double the value of the goods received, concealed, or purchased . . . [T]herefore, . . . whether the liability incurred is to be regarded as a penalty, or as liquidated damages for an injury done . . . it is a debt, and as such it must be recoverable in a civil action.”); *Chappell & Co., Inc. v. Pumpernickel Pub, Inc.*, 79 F.R.D. 528, 530 (D. Conn. 1977) (“The essential characteristic of the remedy sought here is recovery of a certain specified sum, a sum spelled out in the statute. If this action were brought at common law, the appropriate form of action would be a civil action for debt.”). This practice also mirrored the copyright acts passed by the states under the Articles of Confederation, none of which authorized unliquidated statutory damages. Some states awarded “just damages,” others awarded double the monetary value of all the infringed copies, and others awarded a fixed amount for each infringed sheet. STRAUSS, STUDY NO. 22, *supra* note 52, at 1. For the three states that set minimum and maximum amounts of damages, all of them required damages to be recovered by an action of debt. *Rhode Island Copyright Statute, Rhode Island (1783)*,

Applied to the 1710 Statute of Anne and the 1790 Copyright Act, it is clear that no copyright infringement action could proceed without a showing of harm. The damages could be liquidated under the statute, but the burden still fell on the plaintiff to prove the number of pages “found” in the infringer’s possession. In 1849, the Supreme Court ruled that statutory damages could not be awarded where the plaintiff failed to prove that the infringer had any infringed copies in his possession.<sup>306</sup> No harm, no foul.

Further, both the 1710 Statute of Anne and the 1790 Copyright Act created a cause of action only where the infringer had taken affirmative steps toward unjustly enriching themselves by profiting off the plaintiff’s work. Neither legislative regime prohibited the initial act of copying. The only prohibition was on printing, publishing, importing, selling, or otherwise exposing copies to sale. Even the phrase “contrary to the true intent and meaning” of the Statute or Act is telling. If the traditional harm of the tort of infringement was pecuniary loss, it is hardly a surprise that infringement suits were only authorized on a showing that the infringement caused a meaningful pecuniary loss. This narrowly defined cause of action reflects that an infringement occurred and consequently harmed the copyright holder only when the infringer sought to “supersede” the author’s work.<sup>307</sup> Mere copying did not allow a copyright holder to sue because it did not threaten to upset the policy goals of copyright. Copyrighted works were always intended to enter the public domain and enrich public knowledge. Copyright law was not meant to enforce an endless stream of income for the author.

Important too is that both the 1710 Statute of Anne and the 1790 Copyright Act required the offender to forfeit “all and every sheet and sheets” to the author, a phrase that meant “every copy of a book published without the consent of the person having the copyright.”<sup>308</sup> Further, authors were explicitly forbidden from using or reselling the copies reclaimed from the infringer.<sup>309</sup> This can only make sense if the purpose of the statutory remedies was to make the plaintiff whole for their pecuniary injuries rather than to create a financial windfall where no injury had been shown. The plaintiff was made whole by removing the infringed works from the market and reclaiming a well-defined number of statutory damages per page that served as a proxy for lost profits. Nothing more was to be won.

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PRIMARY SOURCES ON COPYRIGHT (1450–1900), [https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record\\_us\\_1783h](https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_us_1783h); *Massachusetts Copyright Statute, Massachusetts (1783)*, PRIMARY SOURCES ON COPYRIGHT (1450–1900), [https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record\\_us\\_1783d](https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_us_1783d); *New Hampshire Copyright Statute, New Hampshire (1783)*, PRIMARY SOURCES ON COPYRIGHT (1450–1900), [https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record\\_us\\_1783g](https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_us_1783g). So even where statutory damages appeared to be free floating, they were still required to be liquidated to a certainty, something modern copyright law does not require.

<sup>306</sup> *Backus v. Gould*, 48 U.S. (7 How.) 798, 811–12 (1849).

<sup>307</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 344–45 (C.C.D. Mass. 1841) (Story, J.).

<sup>308</sup> *Backus*, 48 U.S. (7 How.) at 811–12.

<sup>309</sup> See *supra* notes 293 & 298 and accompanying text.

The requirement to show harm was not a short-lived anomaly. Later iterations of the 1790 Copyright Act in the United States required a showing of harm and awarded statutory damages limited to the demonstrated pecuniary loss. For example, the Copyright Act of 1870 awarded statutory damages for every sheet “found in [the infringer’s] possession”<sup>310</sup> or per performance of a musical composition.<sup>311</sup> Without an affirmative showing that the infringer had caused the plaintiff pecuniary harm, there was no ability to collect damages.

Compare the historical harm requirement to modern copyright law. Early copyright law did not allow suits for damages without a liquidated showing of harm. By contrast, the 1976 Copyright Act expands liability well beyond harm. It grants authors the authority to bring suits for statutory damages even where no harm can be alleged.<sup>312</sup> The Act sets a statutory minimum and maximum award of statutory damages, but it does not require them to be collected through an action of debt. Instead, they are awarded at the discretion of the court or jury.

#### IV. No Analogue, No Standing

To the extent that copyright law extends liability beyond pecuniary harm, it lacks a close historical or common law analogue. In both the common law and statutory traditions, copyright holders have always been required to plausibly allege an actual harm. The harm in question—the pecuniary injury of lost profits—was required to be something more than a *de minimis* injury. Copyright law used to recognize that creators should be able to earn a profit, but that right is not so substantial that it should stifle further creative expression. The accompanying causes of action were tailored to ameliorate a specific economic harm rather than to provide a windfall. In a common law action on the case, the injured party could only be made whole for the harm done to them, such as the profits wrongfully denied to them because the infringer violated their right to first publication. Under historical statutory copyright law, copyright holders were also required to show a harm in order to bring a claim for damages.

However, modern copyright law goes well beyond making the plaintiff whole. It has become a punitive regime. Statutory damages “are not solely intended to approximate actual damages.”<sup>313</sup> “They serve purposes that include deterrence.”<sup>314</sup> Deterring would-be infringers with the threat of punitive damages was not an independent goal associated with copyright infringement actions at the founding.

##### A. Heightened Standing Requirements Are Unlikely Unduly to Reduce Cases or Avenues for Redress

Critics of this standing defense would reasonably argue that it is not always feasible to show a monetary injury and that dismissing their claims for lack of

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<sup>310</sup> Copyright Act of 1870, Pub. L. 41-230, § 100, 16 Stat. 198, 214 (repealed 1909).

<sup>311</sup> § 101.

<sup>312</sup> 17 U.S.C. § 504(c).

<sup>313</sup> *Energy Intel. Grp., Inc. v. Kayne Anderson Cap. Advisors, L.P.*, 948 F.3d 261, 274 (5th Cir. 2020).

<sup>314</sup> *Id.*

standing will deny them the ability to hold infringers accountable.<sup>315</sup> However, as discussed next, previous attempts to raise the pleading requirements for intellectual property plaintiffs have not caused a longstanding reduction in cases filed.

### 1. *A Potential Reduction in Cases*

To be sure, enforcing *TransUnion*'s standing requirements in federal court would eliminate the path to recovery damages for some plaintiffs because copyright infringement claims seeking a remedy created by the 1976 Copyright Act can only be brought in federal court.<sup>316</sup> However, previous attempts by the Supreme Court to heighten the requirements for relief in intellectual property lawsuits did not chill expression or have a long-term effect on the number of cases filed.

In *eBay Inc. v. MercExchange, L.L.C.*, the Supreme Court said that claimants seeking injunctive relief under the Patent Act or the 1976 Copyright Act must still satisfy "traditional equitable considerations," including a showing of irreparable harm.<sup>317</sup> The Court rejected the "rule that an injunction automatically follows a determination that a copyright has been infringed."<sup>318</sup> This was a shift from the longstanding practice of courts "appl[ying] a presumption of irreparable harm as long as a copyright plaintiff established a prima facie case or reasonable likelihood of success."<sup>319</sup> Although copyright case filings fell over the three years following *eBay*, they began to rise drastically in 2012 and reached a new high in 2018.<sup>320</sup> Whether *eBay* was the prevailing cause of the initial decline or whether the declining economic conditions were responsible cannot be adequately discussed in the space available here, but it does suggest that *eBay* did not chill the creation or protection of intellectual property for very long, if it was indeed responsible.

### 2. *Other Avenues of Redress Still Exist*

A robust standing defense against uninjured plaintiffs seeking damages does not deny all forms of relief. Copyright holders still have other forms of redress in federal court. The 1976 Copyright Act allows an injured copyright holder to reclaim actual damages plus any profits that the infringer made from their infringement—an award that is highly cohesive with the original understanding of copyright law.<sup>321</sup> The burden of liquidating the infringer's profits falls mostly on the infringer:

The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the

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<sup>315</sup> See generally *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935) (quoted favorably in *F.W. Woolworth Co. v. Contemp. Arts*, 344 U.S. 228, 224–25 (1952)) (discussing "unsatisfactory" result of "plaintiffs, though proving infringement, [who] were able to recover only nominal damages").

<sup>316</sup> See 28 U.S.C. § 1338(a).

<sup>317</sup> *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391–93 (2006).

<sup>318</sup> *Id.* at 392–93.

<sup>319</sup> *TD Bank N.A. v. Hill*, 928 F.3d 259, 278 (3d Cir. 2019).

<sup>320</sup> *Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark*, U.S. COURTS (Feb. 13, 2020), <https://www.uscourts.gov/news/2020/02/13/just-facts-intellectual-property-cases-patent-copyright-and-trademark>.

<sup>321</sup> 17 U.S.C. § 504(a)(1).



infringement and are not taken into account in computing the actual damages. *In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.*<sup>322</sup>

Not only does the statutory language still allow the plaintiff to be made whole, but it does so by deliberately reclaiming the author's lost profits. This accords with the historical analogue of copyright infringement. A plaintiff traditionally had to make a showing of their harm, which was done by producing the copies found in the infringer's possession. This is in a similar vein. The plaintiff must still plead actual damages, but reclaiming the profits of the infringer and forcing the infringer to account for the elements of profit attributable elsewhere still serves the goal of making the copyright holder whole in terms of their assumed lost profits. This kind of damages award is entirely about reclaiming the proceeds of the infringer's unjust enrichment. Although the original statutes awarded a sum per page infringed, these damages still allow the plaintiff only to recover what was rightfully theirs.

Thus, copyright holders can also receive redress with a federal court order that the infringer destroy or otherwise reasonably dispose of all the infringed copies<sup>323</sup> or from an award of costs and attorney's fees.<sup>324</sup> If plaintiffs can show an imminent irreparable harm, they still have standing to seek an injunction.<sup>325</sup>

Moreover, copyright holders are not limited to the remedies of the 1976 Copyright Act. In 2020, Congress passed the Copyright Alternative in Small-Claims Enforcement Act.<sup>326</sup> This statute created a tribunal, the Copyright Claims Board, which is a "voluntary alternative to federal court" staffed by three officers with extensive copyright experience.<sup>327</sup> Matters before the board are limited to those seeking \$30,000 or less in damages, and the Board's jurisdiction is limited only to enumerated copyright-related claims, including infringement.<sup>328</sup> The main drawback of this system is that it is voluntary and that one party can opt out of these proceedings, requiring the case to go to federal court.<sup>329</sup> However, there are incentives to encourage parties to opt in, such as streamlined procedures designed to be more efficient than federal courts, low filing fees, an appeals process, subject matter expert arbiters, and safeguards against abusive practices.<sup>330</sup> Further, because it is not an Article III court and the parties must consent to jurisdiction, it can use more lenient standards of standing in cases for damages.

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<sup>322</sup> § 504(b) (emphasis added).

<sup>323</sup> § 503(b).

<sup>324</sup> § 505.

<sup>325</sup> See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392–93 (2006).

<sup>326</sup> 17 U.S.C. §§ 1501–1511.

<sup>327</sup> See *About the Copyright Claims Board*, COPYRIGHT CLAIMS BD., <https://ccb.gov/about/> (last visited Dec. 28, 2023).

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

## B. A Standing Defense Would Promote Longstanding Policy Goals

A standing defense in copyright would do more than limit the number of frivolous cases. It has the power to serve longstanding policy goals such as the standardization of outcomes, fairness, and even the separation of powers.

### 1. Reducing the Number of Suits Would Promote Fairness

Even if a *TransUnion* standing defense did limit the number of copyright infringement cases, that itself would serve important policy goals. First, requiring plaintiffs to show harm in a suit for damages in order to have standing would serve not to upset but rather to standardize copyright law. It makes little sense for plaintiffs to be denied injunctive relief without a material risk of harm but to subsequently grant standing to those same plaintiffs when they seek retroactive damages without harm. If a copyright plaintiff needs to show harm in order to receive an injunction, then it only follows that a harm should be required in order to receive damages.

Second, curtailing the availability of large statutory damage awards untethered from any showing of harm may serve normative goals of fairness. “Awards of statutory damages are frequently arbitrary, inconsistent, unprincipled, and sometimes grossly excessive.”<sup>331</sup> The relative ease with which copyright holders can collect damages has turned copyright litigation into a “robust business model.”<sup>332</sup> But copyright law was never intended for such a purpose. “Commencing an action for infringement [was] presumed to be a viable option principally when the harm from such infringement interferes in some way with (or is likely to interfere with) the market for creative works.”<sup>333</sup> Liability without harm makes litigation a viable option even without a perceivable market harm. It rewards moral injuries rather than financial ones. Worse, it allows well-funded litigants to intimidate others into silence with the threat of legal action. By giving unharmed copyright holders standing, modern copyright law chills creative expression more than it encourages it.

Lastly, the Supreme Court has recognized in other situations that grossly excessive or arbitrary punitive damages that violate basic notions of fairness also violate the due process clause.<sup>334</sup> These notions of fairness are particularly important for “defendants subjected to punitive damages in civil cases [who] have not been accorded the protections applicable in a criminal proceeding.”<sup>335</sup> There are of course

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<sup>331</sup> Samuelson & Wheatland, *supra* note 264, at 441–42 (“Consider a few examples. In *UMG Recordings, Inc. v. MP3.com, Inc.*, a trial court held that the defendant had willfully infringed copyrights by developing a database of music ‘ripped’ from CDs the firm had purchased, after which the judge announced his intent to award statutory damages of \$25,000 per infringed CD. Approximately 4,700 CDs were at issue in the case, for a potential total award of over \$118 million—despite the absence of any evidence of actual harm to the plaintiffs or profits to the defendant.” (internal citation omitted)).

<sup>332</sup> Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 733 (2013).

<sup>333</sup> *Id.* at 730.

<sup>334</sup> See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416–17 (2003).

<sup>335</sup> *Id.* at 417.

structural differences between punitive damages and compensatory damages, but “[s]tatutory provisions that only provide a range within which damages can be awarded are not sufficiently different from punitive damage awards subject to a statutory cap which the Supreme Court has held does not abrogate due process review.”<sup>336</sup>

## 2. *Separation of Powers*

The separation of powers was “woven into the document that [the Framers] drafted in Philadelphia in the summer of 1787.”<sup>337</sup> It is a “self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another.”<sup>338</sup>

Article II assigns the Executive Branch the power to “take Care that the Laws be faithfully executed.”<sup>339</sup> This power must be respected. “A regime where Congress could freely authorize *unharméd* plaintiffs to sue defendants who violate federal law . . . would infringe on the Executive Branch’s Article II authority.”<sup>340</sup> Such a regime would place important prosecutorial decisions “within the purview of private plaintiffs (and their attorneys)” rather than the Executive Branch.<sup>341</sup> In copyright infringement suits, allowing plaintiffs to proceed in a case for damages without a showing of harm effectively vests Article II executive power in all copyright holders who, although they may be well intentioned, “are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant’s general compliance with regulatory law.”<sup>342</sup> This is particularly pressing because the 1976 Copyright Act makes infringement a criminal offense.<sup>343</sup> By allowing unharméd plaintiffs to sue, courts are allowing these copyright holders not only to enforce a regulatory scheme but also to directly override the Executive Branch’s broad prosecutorial discretion.

In a similar vein, denying standing to plaintiffs without a concrete harm ensures that federal courts do not overstep their authority and instead limit themselves only to true cases and controversies.<sup>344</sup> Standing is intended to filter out frivolous suits by forcing parties to “identify[] those disputes which are appropriately resolved through the judicial process.”<sup>345</sup> If there is no concrete harm, then “there is no case or controversy for the federal court to resolve.”<sup>346</sup> Thus, federal courts have always

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<sup>336</sup> Blaine Evanson, *Due Process in Statutory Damages*, 3 GEO. J. L. & PUB. POL’Y 601, 601 (2005).

<sup>337</sup> See *INS v. Chadha*, 462 U.S. 919, 946 (1983) (quoting *Buckley v. Valeo*, 424 U.S. 1, 124 (1976)).

<sup>338</sup> *Buckley*, 424 U.S. at 123.

<sup>339</sup> U.S. CONST. art. 2, § 3.

<sup>340</sup> *TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021) (emphasis in original).

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992)).

<sup>343</sup> 17 U.S.C. § 506.

<sup>344</sup> See U.S. CONST. art. 3, § 2, cl. 1.

<sup>345</sup> *Lujan*, 504 U.S. at 560 (1992) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

<sup>346</sup> *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (quoting *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 333 (7th Cir. 2019) (Barrett, J.)).

“rejected” any “vision of [their] role” that would give them authority over the acts of another co-equal branch of government, such as the Executive Branch.<sup>347</sup> Accordingly a standing defense in copyright would not only ensure that Congress did not authorize private parties to infringe on the Executive Branch’s authority, but it would also prevent federal courts from exercising their jurisdiction over cases that present no true case or controversy.

### **Conclusion**

After the Supreme Court’s holding in *TransUnion v. Ramirez*, defendants in a copyright infringement suit have a standing defense if the copyright owner bringing the suit cannot show that they have suffered an economic harm. As such, if the defendant can plausibly argue that the claimant has not suffered a substantial pecuniary injury, the suit should be dismissed for lack of standing.

Enforcing the requirement for a concrete harm in copyright infringement suits seeking statutory damages would not only standardize the harm requirement across other remedies available to copyright holders but also serve normative goals of fairness and the idea that redress should be tied to the harm that gave rise to the claim. Further, copyright holders still have other means by which they can collect damages or another form of remedy. However, until they can allege a concrete harm, there should be no standing.

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<sup>347</sup> *Lujan*, 504 U.S. at 577.