No. 13-1339

IN THE
Supreme Court of the United States

SPOKEO, INC.,
Petitioner,
v.
THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* TIME INC. AND SEVEN MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions, Statutes, Regulations, and Rules

Agency Materials

Legislative History

Miscellaneous

INTEREST OF *AMICI CURIAE*[1]

Amici include a publishing trade association and a group of companies that provide content in many forms – written, oral, textual, visual, photographic, and audiovisual – in print, radio, television, and online publications.

The Association of Magazine Media ("MPA") is a non-profit trade association that acts as the primary advocate and voice for the magazine media industry, driving thought leadership and game-changing strategies to promote the medium's vitality. The California Newspaper Publishers Association (CNPA) is a nonprofit trade association representing the daily and weekly newspapers of California.

Time Inc., A&E Television Networks, LLC, Advance Publications, Inc., Meredith Corporation, National Public Radio, Inc., and Rodale, Inc., are for-profit and non-profit media and entertainment companies engaged in the business of distributing news and content, and delivering a host of related products and services to consumers (collectively, with the MPA and CNPA, the "Media Amici").[2]

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[1] All parties have consented to this *amicus curiae* brief and letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus* represents that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] The Media Amici's interest in this case is limited to the Article III standing question; they express no view on the merits of the statutory violations alleged by Respondent.

The interest of the Media Amici in this case is in highlighting the extraordinary reach of the Ninth Circuit's decision to abandon the Court's long-standing and Constitutionally-based requirement that a plaintiff allege an injury-in-fact rather than a mere statutory violation, and in particular the potentially devastating impact of this decision on media companies and the related effect on speech.

SUMMARY OF ARGUMENT

Any line that may once have existed distinguishing media and content companies from technology companies has been blurred in recent years. Companies that began as distributors of software, online services or other technical solutions now publish content to wide audiences. Companies once devoted primarily to reporting news and generating other content, such as *amici curiae*, now use technological solutions in every aspect of their business. Indeed, media companies have, by necessity, become technology companies: a transition required in order to thrive in a digital era in which content must be distributed to consumers across multiple platforms, devices and media. Digital distribution, in turn, necessitates the support of an assortment of interactive tools that serve consumers' strong interest in sharing, commenting on, and otherwise connecting with that content.

This explosion of substantive interactions between consumers and media companies is enabled by an even larger number of technical, information-exchanging transactions, some of which may implicate privacy and other concerns. Class action plaintiffs, often using statutes designed in the analog era, have leveraged alleged technical violations of federal and state privacy acts and the availability of statutory damages to coerce huge settlements under the threat of enormous potential statutory awards. Media companies have been the targets of a surprisingly large number of such suits by uninjured plaintiffs, under an array of statutes. The fear of large civil damages awards, and the mere cost of waging a defense against numerous specious claims, inhibits the

development of content by media companies, and thus indirectly chills speech. This is especially true in the case of statutes such as the Video Privacy Protection Act, where the delivery of content itself (digital video) may trigger a claim.

The Ninth Circuit's approval of standing founded on a "bare" statutory violation, with no accompanying allegation of injury-in-fact, endorses the presentation to the federal courts of generalized grievances by large classes of plaintiffs that can and should be addressed by the political branches. These grievances are fundamentally different from the types of particularized, concrete injuries that underpin other statutory schemes important to media companies, such as the Copyright Act and Lanham Act. Although statutory damages are available under those regimes when economic damages are difficult to prove, the invasion of long-recognized individual property rights present in infringement cases is precisely the kind of injury-in-fact that is absent in the instant case.

In light of their firsthand experience with the chilling effects of unbridled class actions brought – or even threatened – by uninjured plaintiffs, *amici curiae* urge that this Court follow its own precedent and hold that a plaintiff must allege an actual injury in order to have standing.

ARGUMENT

I. MODERN TECHNOLOGIES FACILITATING AN INTERCONNECTED WORLD INCREASE THE MEDIA AMICI'S EXPOSURE TO CLASS ACTION LAWSUITS THAT SEEK TO EXTORT LARGE SETTLEMENTS

A. The Intersection of Media and Technology Has Engendered an Explosion of Interactions Between Media Companies and Consumers

In 2006, the Pew Research Center hosted a roundtable event at which industry experts discussed the future of the newspaper industry and changes needed to adapt to an online world. Pew Research Center, *Challenges to the Newspaper Industry* (2006), *available at* http://www.journalism.org/2006/07/24/challenges-to-the-newspaper-industry/ (last visited July 1, 2015). At that time, the questions were whether mainstream media organizations would "survive and thrive in the transition to the Internet" and whether newspapers "printed on paper" were "on a path to extinction." *Id.* Yet, as with many apocalyptic predictions, the Internet has not caused the death of all traditional media. Far from it. The printed word survives, even if it faces strong competition from other forms of media, and many media companies now prosper in the new digital environment. Similarly, broadcast and cable television have shifted content online to "streaming video," as a younger generation cuts the cable cord and opts for online video.[3]

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[3] *See*, Statement of Chairman Wheeler, *Promoting Innovation and Competition in the Provision of Multichannel Video Pro-*

Recent reports and orders from the Federal Communications Commission ("FCC") highlight the rapid transition, propelled by a convergence of consumer demand, the availability of digital technology, ubiquitous connectivity, and advanced devices. *See*, *e.g.*, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, As Amended by the Broadband Data Improvement Act*, 30 FCC Rcd. 1375, 2015 WL 477864 (rel. Feb. 4, 2015) ("*FCC Advanced Telecommunications Inquiry*"). Consumers access their news and entertainment from desktop computers, tablets and mobile phones. *In the Matter of 2014 Quadrennial Regulatory Review – Review of the Commission's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 29 FCC Rcd. 4371, 4372, 2014 WL 1466887, *1-2 (rel. April 15, 2014). Many of these consumers reside in households that "use one or more broadband services, from multiple devices, simultaneously" and admit they never "unplug" from these devices. *FCC Advanced Telecommunications Inquiry* at 1395-1400, 2015 WL 477864, *16 (rel. Feb. 4, 2015). As a result, the entire media industry is moving more content online than ever before. *Id*. at ¶ 32, 2015 WL 477864, *14

Today, media companies' websites brim with content found in traditional print and broadcast media, but the online world also supports streaming

gramming Distribution Services, MB Docket No. 14-261, *available at* https://www.fcc.gov/article/fcc-14-210a2 (last visited July 7, 2015).

video that accounts for 67 percent of downstream Internet traffic during peak hours. *Id.* at ¶ 30, 2015 WL 477864, *14. In March of 2014, it was estimated that more than one third of all U.S. adults watched online news videos. Pew Research Center, News Video on the Web: A Growing, if Uncertain, Part of News (2014), *available at* http://www.journalism.org/2014/03/26/news-video-on-the-web/ (last visited July 1, 2015). Consumers also want to "share" their experiences, utilizing social media to "favorite" and "pin" and "tweet" media content. 30 FCC Rcd. at ¶ 35, 2015 WL 477864, *15. ("Social networking was once dominated by young adults, but today approximately '73% of online adults now use a social networking site of some kind'"). Indeed, it is estimated that over 40% of Americans access news on social media sites, such as Facebook and Twitter. American Press Institute, *How Americans Get Their News* (2014), *available at h*ttp://www.americanpressinstitute.org/publications/reports/survey-research/how-americans-get-news/(last visited July 1, 2015).

As a result of this rapid and far-reaching move to an online/mobile/social environment, a myriad of technical information-exchanging interactions between consumers and the media companies now occur on a continuous basis. Consumers submit comments, feedback, and requests to media company websites and forums. They forward and share articles, images and video, embed them in blog posts and on their own personal websites, and express interest by "liking" them on Facebook and other social media networks. Media companies post content, not just on their own sites, but on third-party sites such as YouTube, and in digested or clipped form on Twitter

and other news feed services. Consumers access content online, enter contests, and submit email addresses and other information in order to be alerted about topical interests, breaking news, or promotions. Some sites permit consumers to post their own content, including user-generated videos.

To support this constant information exchange, media companies often need to incorporate technology into their delivery platforms to enable the integrated use of social media, to deliver advertising, and to track the usage of their content for a variety of purposes, including analytics, research, personalization, and the delivery of interest-based advertising – all of which supports the distribution of mostly free content over the Internet that consumers have come to expect. This technology provides the touchpoints that launch the sharing of content and information between media companies and millions of individuals on a daily basis, and a wide exchange of data and ideas.

In short, almost all media companies have become "tech" companies. Although this transition has opened new markets and offers opportunities to reach consumers in diverse ways, it also exposes media companies to a new danger: class action lawsuits seeking to take advantage of the millions of information transactions between media companies and consumers, and to use those transactions as a multiplier for damages awards under statutes that provide private rights of action. The Media Amici do not dispute that the class action device serves a function in our judicial system, but believe strongly that the counterpoised peril of unchecked expansion of class actions presents a grave threat to their ability to ef-

fectively deliver news and content to the public. The doctrine of standing under Article III and the requirement of an injury-in-fact help preserve that balance, and act as an important check on unwarranted expansion of class action lawsuits.

B. The Extension of Analog-Based Statutes to Digital Technology in Wide Use by the Media Industry Is Often Used to Extort Large Settlements When No Injury-In-Fact Exists

Prior to the advent of the Internet, a number of federal statutes were enacted to protect consumer privacy, including the Fair Credit Reporting Act ("FCRA"), at issue in this case. *See Standards for Privacy of Individually Identifiable Health Information*, U.S. Dep't of Health and Human Services, 65 Fed. Reg. 82,462, 82,469 (Dec. 28, 2000) ("In the 1970s, individual privacy was paramount in the passage of the Fair Credit Reporting Act (1970), the Privacy Act (1974), the Family Educational Rights and Privacy Act (1974), and the Right to Financial Privacy Act (1978)"). Other federal statutes enacted in the same era include the Video Privacy Protection Act ("VPPA"), 18 U.S.C. § 2710; the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227; the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. § 2721; the Cable Communications Privacy Act, 47 U.S.C. § 551; the Wiretap Act (as amended by the Electronic Communications Privacy Act of 1986), 18 U.S.C. §§ 2510 – 2522; and the Stored Communications Act, 18 U.S.C. §§ 2701 – 2712. Each of these laws combines a private right of action with the potential availability of statutory damages, in lieu of actual damages. Today, these laws have been ex-

tended to online activities and used as the basis for numerous class action suits, often turning statutes drafted in an analog world into something of a digital media quagmire. Many of these lawsuits have targeted the media industry, including certain of the Media Amici. In a number of cases, the lower courts have allowed the case to move forward without allegation of injury-in-fact, as the Ninth Circuit has allowed here.

1. The Video Privacy Protection Act

The VPPA was enacted in 1988 to protect consumer privacy after a reporter published a list of movies rented by Judge Robert H. Bork, and threatened to do the same for several prominent legislators. Michael Dolan, *The Bork Tapes*, The Washington City Paper, Sept. 25 – Oct. 1, 1987, at 1, *reproduction available at* http://www.theamericanporch.com/bork5.htm (last visited July 1, 2015). Although the VPPA was drafted to protect the privacy of consumers who purchased or rented video materials from brick-and-mortar stores, courts have extended the VPPA's protections to consumers who access digital media – movies, television shows and other video programming – online. Today, the sheer volume of video materials that a single consumer can download and watch in a matter of hours can implicate thousands of dollars of statutory damages for an individual, and hundreds of millions for a class of consumers.

The potential for large monetary awards and settlements has led to many lawsuits being filed against media companies that have added videos to their websites. *See*, *e.g.*, *In re Hulu Privacy Litig.*, No. 11-03764, 2015 WL 1503506 (N.D. Ca. Mar. 31,

2015), *appeal docketed sub nom. Garvey v. Hulu LLC*, No. 15-15774 (9th Cir. Apr. 17, 2015); *In re Nickelodeon Consumer Privacy Litig.*, MDL 2443, 2015 WL 248334 (D. N.J. Jan. 20, 2015), *appeal docketed,* No. 15-1441 (3d Cir. Feb. 23, 2015); *Yershov v. Gannett Satellite Info. Network, Inc.*, No. 90-345, 2015 WL 2340752 (D. Mass. May 15, 2015), *appeal docketed*, No. 15-1719 (1st Cir. June 17, 2015); *Ellis v. The Cartoon Network, Inc.*, No. 14-484, 2014 WL 5023535 (N.D. Ga. Oct. 8, 2014), *appeal docketed*, No. 14-15046 (11th Cir. Nov. 6, 2014); *Locklear v. Dow Jones & Co., Inc.*, No. 14-00744, 2015 WL 1730068 (N.D. Ga. Jan. 23, 2015), *appeal docketed*, No. 15-10698 (11th Cir. Feb. 18, 2015); *Perry v. Cable News Network*, *Inc.*, No. 14-1194, 2014 WL 4214873 (N.D. Ill. Aug. 25, 2014) (transfer order), *transferred*, 14-2926 (N.D. Ga. Sept. 12, 2014); *Robinson v. Disney Online d/b/a Disney Interactive*, No. 14-4146 (S.D.N.Y. filed June 9, 2014); *Eichenberger v. ESPN, Inc.*, No. 14-463 (W.D. Wash. May 7, 2015), *appeal docketed*, No. 15-35449 (9th Cir. June 9, 2015); *Austin-Spearman v. AMC Network Entm't, LLC*, No. 14-6840, 2015 WL 1539052 (S.D.N.Y. Apr. 7, 2015). In each case, plaintiffs alleged that defendants impermissibly disclosed information about consumers' viewing selections to third parties, including social networks, analytics and research companies, and advertising companies. In each case, plaintiffs failed to allege any harm other than a bare violation of the statute. Two of the district courts that have addressed the harm issue in VPPA cases both determined that no showing of actual injury is required, only a wrongful disclosure. *See In re Hulu Privacy Litigation*, No. C 11-03764LB, 2013 WL 6773794, at *4 (N.D. Cal. Dec. 20, 2013); *In re Nickelodeon Con-*

sumer Privacy Litig., MDL No. 2443, 2014 WL 3012873, at *4-5 (D.N.J. Jul. 2, 2014).

In *Hulu*, the court framed the legal issue as "whether the VPPA requires Plaintiffs to show actual injury that is separate from a statutory violation to recover actual or liquidated damages." *Hulu*, 2013 WL 6773794, at *4. The court stated that its "analysis begins with the plain language of the statute, and it ends there if the text is unambiguous," *id.* (*citing Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010)), and thus did not look beyond the VPPA's language that "a video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided in subsection (d)."[4] *Id.* at *5; 18 U.S.C. § 2710(b)(1). Although Hulu argued that inclusion of the word "aggrieved" required plaintiffs demonstrate an injury in fact, the court concluded that "the practical import of the statute is that the words 'aggrieved person' in subsection (c) mean the same thing they do in subsection (b)(1): a consumer whose personally identifiable is disclosed by the video provider in violation of the statute." *Hulu*, 2013 WL 6773794, at *5. The "practical import" of this decision and the others that follow it, however, is that any technical violation of the statute, regardless of whether a plaintiff suffers an injury-in-fact, becomes a strict liability for a website owner, resulting in the

[4] Both the *Hulu* court and the Seventh Circuit have acknowledged that 18 U.S.C. § 2710(b)(1) contains a typographical error and refers to subsection (d) instead of (c); *Hulu*, 2013 WL 6773794 at *5 n. 3; *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 539 (7th Cir. 2012).

threat of punitive statutory damages and a windfall for plaintiffs' class action attorneys.[5]

2. The Telephone Consumer Protection Act

The TCPA was enacted in 1991 to protect consumers from intrusive telemarketing activities, at a time when telemarketing was synonymous with calls to a landline phone, usually around dinner time. Pub. L. No. 102-243, § 2(11), 105 Stat. 2394 (1991). The FCC has promulgated a series of rules implementing the TCPA and applying the decades-old statute to new technologies, including calls to cellular phones and text messages. *See* 47 C.F.R. § 64.100 *et seq*. If it is alleged that an unsolicited call or text violates the TCPA or the FCC's implementing rules, without any allegation of actual harm to the consumers as a result of the call or text, the TCPA prescribes penalties of $500 in damages for each call (and for each deficient opt-out notice), or $1,500 if the defendant "willfully or knowingly" violated the statute. 47 U.S.C. § 227(b)(3). This strict liability application of the TCPA to new technology has resulted in multi-million dollar settlements. *See In re Capital One Tel. Consumer Prot. Act Litig.*, No. 11 C 5886, 2015 WL 605203, at *2-3 (N.D. Ill. Feb. 12, 2015) (approving $75,455,099 settlement of action alleging that Capital One "called class members' cell phones using an automatic telephone dialing system or an artificial or prerecorded voice in connection with an

[5] Many of the VPPA lawsuits referenced herein were filed by the same law firm after obtaining a $9 million settlement from Netflix, of which $2.25 million went to class counsel. *In re Netflix Privacy Litig.*, No. 05:11-cv-00379-EJD, 2013 WL 1120801 (N.D. Cal. Mar. 18, 2013).

attempt to collect on a credit card debt" without prior express consent); Uncontested Motion & Memorandum in Support of Final Approval of Class Settlement, Approval of Attorney's Fees, and Incentive Award, *Lozano v. Twentieth Century Fox Film Co.*, No. 1:09-cv-06344 (N.D. Ill. filed April 1, 2011), *final judgment and order of dismissal with prejudice* (N.D. Ill. entered April 15, 2011) (approving $16 million settlement of action alleging that defendant sent unsolicited texts advertising a DVD release to consumer cell phones).

At its most recent Open Meeting, the FCC adopted a Declaratory Ruling and Order that resolved multiple petitions filed by businesses seeking relief from an upsurge in big-dollar class action litigation under the TCPA and existing FCC implementing rules. *See* Press Release, FCC, *FCC Strengthens Consumer Protections Against Unwanted Calls and Texts* (June 18, 2015), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0619/DOC-333993A1.pdf (last visited July 1, 2015). As Commissioner O'Reilly said, the petitions arose from a "current state of affairs, where companies must choose between potentially crushing damages … or cease providing valuable communications specifically requested by consumers." Oral Statement of Commissioner Michael O'Reilly, Dissenting in Part and Approving in Part, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135 (June 18, 2015) ("FCC TCPA Ruling"), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0619/DOC-333993A6.pdf (last visited July 1, 2015). The anticipated result of the FCC's impend-

ing order, however, is that essentially all calls made by dialing equipment other than a rotary phone will be subject to the TCPA, further incentivizing plaintiffs to file class action lawsuits that can result in large settlements. *Id.* ("I am beyond incredibly disappointed in the outcome today. It will lead to more litigation and burdens on legitimate businesses without actually protecting consumers from abusive robocalls made by bad actors"); Dissenting Oral Statement of Commissioner Ajit Pai, FCC TCPA Ruling ("This *Order* will make abuse of the TCPA much, much easier. And the primary beneficiaries will be trial lawyers, not the American public"), *available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0619/DOC-333993A5.pdf* (last visited July 1, 2015). *See also Marek v. Lane*, 134 S. Ct. 8, 8-9 (2013) (Roberts, C. J., statement respecting denial of certiorari) (Facebook settled privacy class action by paying *nothing* to unnamed class members, but "paying plaintiffs' counsel and the named plaintiffs some $3 million and spending $6.5 million to set up a foundation in which [Facebook] would play a major role.")

The Media Amici are not disputing the fact that telemarketing calls can be intrusive, the validity of the TCPA and its objectives, or standing under the statute when there is actual economic or some other concrete harm, but rather that plaintiffs can be completely relieved from having to prove any injury in fact – ever. When this requirement is removed, it leads to alarming results that can be seen in the context of a pending TCPA case against Lifetime Entertainment Services, LLC. *Leyse v. Lifetime Entertainment Services, LLC*, No. 13-cv-5794 (AKH) (S.D.N.Y. filed Aug. 16, 2013). In *Leyse*, the plaintiff

has brought a putative class action – four years after the purported violation – claiming statutory damages for an alleged violation of the TCPA where defendant left a single answering machine message informing Time Warner customers that the television show *Project Runway* was now being shown on a different network in their channel lineup. Not only are there serious concerns over the statute's limitation of speech in this context, *see* Section II.B below, but plaintiff has not made any allegation of harm, instead relying solely on the bare statutory violation and the availability of statutory damages.

With the willingness to expand application of the TCPA to new communication technologies and no requirement to allege, much less prove, injury-in-fact, TCPA cases will continue to proliferate and settlement amounts will continue to rise. When media companies have the ability to send news updates to large numbers of consumers who have visited their websites and provided mobile numbers, or need to contact subscribers regarding subscription information or even debt collection, a single misstep can result in draconian penalties.[6]

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[6] In addition to the VPPA and TCPA, certain Media Amici have been sued under other federal laws containing statutory damages, in seeming attempts to find technical violations of statutes that resulted in big payouts. For example, in 2009, a claim was filed against one of the Media Amici affiliates, Oregonian Publishing Co., on the ground that plaintiffs' personal information was obtained in violation of the DPPA, which was enacted in 1994 to protect the privacy of motor vehicle records. *Howard v. Criminal Information Services, Inc. et al.*, 09-cv-01477-MO (D. Or. filed Dec. 17, 2009). The Oregonian had obtained the information for use in news stories about the safety and operation of motor vehicles. Plaintiffs did not allege any

C. Plaintiffs Also Have Used State Statutes to Target Media Activities, Seeking Statutory Damages in the Absence of Actual Harm

In addition to the various federal statutes plaintiffs rely upon to threaten large monetary judgments in the absence of actual injury, plaintiffs use various state laws to the same effect – sometimes in state courts, but often in federal courts as an attempted end-run around limitations by states that restrict class actions seeking statutory damages.[7]

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particularized harm, but rather a technical violation: that the DPPA forbids bulk purchasing of drivers' personal information for future use, because obtaining the information for future use is not itself a permitted purpose. The court ultimately dismissed plaintiff's claim because the statute did not *preclude* purchasing bulk data, and did not reach the standing issue, but not before significant expenses were incurred by the Oregonian in defending the matter.

[7] Some states restrict class claims to recover statutory damages in state court, ostensibly to prevent excessive awards in the absence of actual damages. *See, e.g.,* MCR 3.501(A)(5) ("An action for a penalty or minimum amount of recovery without regard to actual damages imposed or authorized by statute may not be maintained as a class action unless the statute specifically authorizes its recovery in a class action"); N.Y.C.P.L.R. 901(b) ("Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action"); *see also* Iowa R. Civ. P. 1.274(2) ("Damages fixed by a minimum measure of recovery provided by any statute may not be recovered in a class action"); N.D. R. Civ. P. 23(o)(2) (same). Plaintiffs argue these state restrictions should not apply to plaintiffs who file class action lawsuits in federal courts pursuant to the Federal Rules of Civil Procedure. *See Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 559 U.S. 393, 298-99 (2010) (holding that N.Y.C.P.L.R.

Some of the Media Amici have themselves been targets of these suits, including class actions alleging violations of the Michigan Video Rental Privacy Act ("MI VRPA"), M.C.L. § 445.1712, and the California Shine the Light Act, CA Civil Code § 1798.83 ("CA STL").

Similar to the VPPA, the MI VRPA seeks to protect consumer privacy by restricting unauthorized disclosure of customers' video rentals, but goes further and restricts disclosure of customers' purchase, rental or loan of "books or other written materials." In a group of consolidated cases, the Eastern District of Michigan found that "a close reading of the VRPA reveals that it contains absolutely no language to require that a claimant suffer an actual injury apart from a violation of the statute, and plaintiffs have not alleged any specific injury apart from the statutory violation." *Halaburda v. Bauer Publishing*, Nos. 12–CV–12831, 12–CV–14221, 12–CV–14390, 2013 WL 4012827, at *4 (E.D. Mich. Aug. 6, 2013); *see Kinder v. Meredith Corporation*, No. 14-CV-11284, 2014 WL 4209575, at *2 (E.D. Mich. Aug. 26, 2014) (holding that Michigan legislature can create new legal rights by virtue of enacting a statute.); *see also Deacon v. Pandora Media, Inc.*, 901 F. Supp. 2d 1166 (N.D. Cal. Sept. 28, 2012) (holding that disclosure of information sufficient to constitute injury for purposes of Article III standing).

901(b) could not bar a class action in federal court that satisfied the requirements of Fed. R. Civ. P. 23); *Am. Copper & Brass, Inc. v. Lake City Indus. Products*, Inc., 757 F.3d 540, 545-46 (6th Cir. 2014) (holding that MCR 3.501(A)(5) does not bar TCPA class actions that satisfy the requirements of Fed. R. Civ. P. 23).

In juxtaposition to the Michigan cases and the instant case, the Ninth Circuit – relying on state court interpretations of that statute – recently dismissed several cases brought by plaintiffs under the CA STL law, holding that a violation of the statute, in and of itself, was not enough. *Baxter v. Rodale, Inc.* 555 F. App'x 728, 730 (9th Cir. 2014); *Miller v. Hearst Comms.*, 554 F. App'x 657, 659 (9th Cir. 2014); and *King v. Conde Nast Publ'ns*, 554 F. App'x 545, 547 (9th Cir. 2014) (*citing Boorstein v. CBS Interactive, Inc.*, 165 Cal. Rptr. 3d 669, 675 (Cal. Ct. App. 2013) (collectively, the "CA STL cases"). Without the state interpretation, however, it is likely the Ninth Circuit would have permitted the case to move forward, as it did in the case at issue here. The CA STL cases are becoming more of an anomaly as plaintiffs move to forums and causes of action that will support awards of statutory damages for violations of the statute alone. Without the backstop of the Article III injury-in-fact requirement to limit class definition in these state statute cases, potential exposure could make the risk of an adverse decision on the merits untenable, forcing settlements rather than efficiently resolving actual controversies.

II. REQUIRING PLAINTIFFS TO ALLEGE A PARTICULARIZED INJURY IS NECESSARY TO LIMIT THE USE OF CLASS ACTIONS TO COERCE SETTLEMENTS AND CHILL SPEECH

A. Article III Standing Requirements Have Particular Importance in Class Actions, Where the Availability of Statutory Damages May Lead to Coercive Attempts to Extract Large Settlements

Under appropriate circumstances, class actions may promote the efficient resolution of litigation by providing "a convenient and economical means for disposing of similar lawsuits." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980); *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974) (stating that a principal purpose of class actions is "the efficiency and economy of litigation"). They are, however, "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). Unfortunately, this exception intended to promote efficient resolution of actual controversies can be abused by enterprising plaintiffs and counsel, as the Media Amici have witnessed firsthand.

The class procedure allows for the aggregation of claims in a manner that can create coercive pressure for defendants to settle claims that have little or no merit simply to avoid ruinous financial consequences, and the likelihood of this occurring is particularly high when a claim is asserted under a statute that provides for statutory damages, attorneys fees and costs. *Coopers & Lybrand v. Livesay*, 437

U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense"); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"); *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008) (noting the risks "when the number of claims aggregated in the class action is so great that an adverse verdict would push the defendant into bankruptcy, for then the defendant will be under great pressure to settle even if the merits of the case are slight"); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 506 (1985) ("Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat").

At least one recent study has found that (1) the number of companies facing class actions continues to increase, with over half of major companies engaged in class action litigation; (2) class actions are becoming more frequent, with more than a third of companies managing multiple class actions on a regular basis; (3) the potential financial exposure can be severe, even in routine class actions; (4) data privacy class actions are increasing; and (5) "more class actions are high-risk or bet-the-company matters" resulting in a high settlement rate. *The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* (2015), *available at*

http://classactionsurvey.com/pdf/2015-class-action-survey.pdf (last visited July 1, 2015). As the Media Amici continue to increase their use of technology for the digital distribution of content, all of the Carlton Fields Survey's results ring true, and the Media Amici find themselves facing increased data privacy class action litigation in which plaintiffs allege violations of statutes with no allegations of actual harm, but instead rely on the availability of statutory damages in an attempt to coerce the Media Amici into large settlements.

This court has previously explained the *in terrorem* character of class actions in recognizing the pressure to settle. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. at 1752, *citing Kohen v. Pacific Inv. Management Co. LLC*, 571 F.3d 672, 677–678 (7th Cir. 2009) (where potential liability is high, defendants "will be under pressure to settle rather than to bet the company, even if the betting odds are good.").

Article III constitutes one vital check on this nearly-unbridled expansion of class action lawsuits. Article III's standing requirement fundamentally is rooted in the separation of powers doctrine. *Allen v. Wright*, 468 U.S. 737, 750-52 (1984). By limiting the judiciary's jurisdiction to actual cases or controversies brought by persons who have suffered a "distinct and palpable" injury, *see Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (*quoting Warth v. Seldin*, 422 U.S. 490, 501 (1975)), "generalized grievances" are left to be addressed by the political branches. *Allen*, 468 U.S. at 751. Cases such as the instant case and other class action cases alleging bare violations of statutes with no allegation of injury, while superficially appearing to involve the adju-

dication of an individual plaintiff's rights, are more properly ascribed to the category of "generalized grievance." This is because they represent not an individualized, concrete harm to the ostensible class plaintiff, but rather an attempt by Congress to create an injury from observations about market practices generally. In the analog world, this often was not apparent, but the scale of purported violations in the digital age and the often virtually unlimited size of the classes highlight the generalized nature of those violations.

Indeed, it is no coincidence that in contrast to the consumer privacy laws enacted prior to the advent of the Internet, comparable laws enacted more recently typically do not contain similar private rights of action. For example, the Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C. §§ 6501–6506, enacted in 1998, governs the collection, use and disclosure of information about children under the age of 13 on certain websites and does not include a private right of action. Instead, COPPA is enforced primarily by the Federal Trade Commission (FTC) pursuant to its Section 5 authority under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, and state attorneys general.[8]

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[8] Similarly, in 2003, Congress enacted the Controlling the Assault of Non-Solicited Pornography And Marketing Act of 2003 ("CAN-SPAM"), 15 U.S.C. §§ 7701–7713, which was designed to reduce the amount of unsolicited and deceptive email advertising. CAN-SPAM is also primarily enforced by the FTC, and state attorneys general, but "Internet Service Providers" may also bring actions for violations of the statute, but only where they experience significant harms from unlawful emails. 15 U.S.C. §§ 7706(g)(1). While the statute includes the availability of statutory damages for each email sent or received in violation

Continued fidelity to the requirement of an injury-in-fact should create a backstop against some abuses of the class action device. The requirement that plaintiffs who invoke the judiciary's jurisdiction have a "personal stake" in a dispute, alleging "an invasion of a legally protected interest which is . . . concrete and particularized," *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992), must be strictly enforced, *Raines v. Byrd*, 521 U.S. 811, 819 (1997), to ensure that there is a real need for the exercise of judicial power within its constitutional limits. *Summers v. Earth Island Institute*, 555 U.S. 488, 492-493 (2009). The requirement that a plaintiff sufficiently allege an "injury in fact" to invoke federal court jurisdiction is, therefore, "a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 555 U.S. at 497. This "hard floor" applies with equal, if not greater, force in the context of class actions. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints . . ."); *Arizona Christian School Tuition Org. v. Winn,* 131 S. Ct. 1436, 1449 (2011) ("In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so."). Particularly in the case of the Media

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of the Act, those statutory damages are generally capped, except in certain egregious instances. *Id.* Even the Telemarketing and Consumer Fraud and Abuse Prevention Act, which as administered by the Federal Trade Commission covers much of the same ground as the earlier-enacted TCPA, *see* 15 U.S.C. § 6101 *et seq.*, provides a private right of action only where the amount in controversy exceeds $50,000 in actual damages for each person adversely affected by violations. *See id.* § 6104.

Amici, this "hard floor" also serves the important purpose of dampening the indirect effects of abusive class action lawsuits on protected speech.

B. The Threat Of Class Actions Unrestrained By An Injury-In-Fact Requirement Will Have A Chilling Effect On Speech

The threat of class action litigation by uninjured consumers seeking millions or billions of dollars in statutory damages opened up by the Ninth Circuit's decision will have an acutely chilling effect on speech, including for companies such as the Media Amici.

The Court recognized in *New York Times Co. v. Sullivan*, 376 U.S. 254, 278-279 (1964), that concern about damage awards could be more inhibiting than potential criminal liability. In the libel context, "[f]ear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, [will] inevitably cause publishers to 'steer ... wider of the unlawful zone'... and thus 'create the danger that the legitimate utterance will be penalized.'" *Time Inc. v. Hill*, 385 U.S. 374, 389 (1967) (*citing*, *inter alia*, *New York Times Co.,* 376 U.S. at, 279). The Court acknowledged that high civil awards could render First Amendment rights impotent through a process of "self-censorship." *New York Times*, 376 U.S. at 279. The Court has not restricted the rationale of *New York Times* to the law on defamation, but has adapted the reasoning to other torts. *See*, *e.g.*, *Hustler v. Falwell*, 485 U.S. 46 (1988) (intentional infliction of emotional distress).

Self-censorship is of particular concern in actions involving statutes such as the VPPA, where distribution of content such as online videos can trigger class action claims. Although in these cases the threat of large civil liability does not arise directly from the speech itself, but rather from the use of associated metadata and other information, the threat of class actions arising from the distribution of content has significant potential to alter the Media Amici's business practices and thus chill speech.

The Ninth Circuit's ruling poses a broad-based threat to Media Amici because it risks opening the floodgates to a variety of specious lawsuits, not only under FCRA, but under all federal and state statutes that include similar statutory damage provisions. This may force the Media Amici to face suits on multiple fronts, far-removed from their core business concerns, and at the very least to expend significant resources defending those litigations. As the Court has recognized, "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution [of a lawsuit], unaffected by the prospects of its success or failure." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). That is because "the defense costs prior to trial can be extraordinarily high." *Judge and Jury in the Law of Defamation; Putting the Horse Behind the Cart,* 35 Am. U. L. Rev. 3, 91 (1985). Given these costs, publishers of expressive works "will tend to become self-censors" unless they "are assured freedom from the harassment of lawsuits[.]" *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966); *see also Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 670-71 (2000). Again, although the lawsuits may not directly target expressive content, as the Media Amici are faced

with actual class action litigation and forced to settle numerous unmeritorious claims to avoid significant potential liability, or defend class actions that are ultimately dismissed, resources are diverted away from the creation of content, and speech is inevitably chilled. *The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* (2015), *available at* http://classactionsurvey.com/pdf/2015-class-action-survey.pdf (last visited July 1, 2015).

For instance, the threat of TCPA litigation and the uncertainty of how it will be applied (*e.g.*, whether the communication will be deemed "informational" in nature or "advertising," or whether the distribution mechanism will be deemed an "automatic telephone dialing system") has already led media companies to alter the way in which they communicate with consumers, with some deciding to forego any communications with consumers through texting platforms. Similarly, the rising threat of VPPA class action litigation may cause media companies to re-evaluate the distribution of content through video – despite the fact that growing numbers of Americans rely on the Internet to get their news and entertainment.

In *Hulu*, where transmission of data associated with viewers' interactions with online videos was at issue, the VPPA provided an exception to the prohibition on disclosure of personally identifiable information ("PII") where such disclosures were "incident to the ordinary course of business." 18 U.S.C. § 2710(b)(2)(E). The court found that any disclosure of PII in the transmission of data through Internet browser "cookies" for research and website analytics

purposes would *not* be incident to Hulu's ordinary course of business. *In re Hulu Privacy Litig.*, No. 11-cv-03764, 2014 WL 17243444, at *5 (N.D. Cal. Apr. 28, 2014) (13 PVLR 795, 5/5/14). This type of activity is necessary to support the distribution of online content. In the event courts expand the definition of PII under the VPPA, the holding would potentially subject companies such as the Media Amici to astronomical claims for statutory damages, even where this routine and essential business practice is not alleged to cause any harm.

"Freedoms of expression require 'breathing space'" to survive. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986) (*quoting New York Times*, 376 U.S. at 272). The Article III injury-in-fact requirement provides the needed level of protection for First Amendment rights by requiring allegations of actual, particularized harm to the plaintiff caused by the challenged business practice, thereby helping mitigate the chilling effects of costly litigation. While the Court has employed a host of mechanisms to protect speech activity, in the case at hand it need rely only upon existing constitutional jurisprudence and require that plaintiffs demonstrate an injury-in-fact, in order to protect Media Amici's speech.

C. Requiring an Injury-In-Fact for Article III Standing Does Not Threaten Other Important Statutory Regimes

The necessity of alleging an injury-in-fact as a basis for Article III standing is not inconsistent with the premise that Congress can create statutory rights, or its power to establish statutory damages. For instance, when it enacted the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), Congress creat-

ed "a private cause of action for the benefit of persons who have requested certain records from a public agency and whose request has been denied." *United States v. Richardson*, 418 U.S. 166, 204 (1974). The injury-in-fact under FOIA occurs when a person actually files a proper request, and is denied the access afforded by the statutory right. *McDonnell v. United States*, 4 F.3d 1227, 1238 (3d Cir. 1993) ("The filing of a request, and its denial, is the factor that distinguishes the harm suffered by the plaintiff in an FOIA case from the harm incurred by the general public arising from deprivation of the potential benefits accruing from the information sought.")

Nor is the requirement of an injury-in-fact in contraposition to the legal concept of defamation, a common-law tort that recognizes an actual injury to an individual's reputation, *see*, 2 KENT, COMMENTARIES ON AMERICAN LAW 21 (1827), and which the Media Amici may find themselves defending, from time-to-time. Petitioner's alleged misrepresentations that Respondent was married, had more education, and better financial wherewithal than he had in actuality do not present the type of injury that defamation claims are designed to redress which must "expose [the plaintiff] to public hatred, contempt, and ridicule" *Id.*, at 13. Such statements certainly do not meet the higher presumption of injury required for defamation *per se*.

Additionally, several statutes of importance to the Media Amici contain statutory damages provisions, including the Copyright and Lanham Acts. Under the Copyright Act, a plaintiff that demonstrates infringement may elect "elect, at any time before final judgment is rendered, to recover, instead of

actual damages and profits, an award of statutory damages for all infringements involved in the action." 17 U.S.C. § 504(c)(1).[9] The Lanham Act, while limiting statutory damages to infringement cases involving counterfeit trademarks and cybersquatting, permits a plaintiff to "elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits . . . an award of statutory damages. . . ." 15 U.S.C. § 1117(c), (d). That a plaintiff may elect statutory damages in lieu of actual damages or infringing profits does not mean there is no underlying injury.

In his Opposition to the Petition for a Writ of Certiorari, Respondent attempted to twist this framework, claiming that the Copyright Act "has provided for over one hundred years that infringement of copyright is itself a violation that gives rise to a claim for statutory damages without proof of other injury." Opp. Mem., at 14 (*citing Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347-352 (1998)).[10] Respondent's argument suffers two fa-

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[9] Statutory damages are also under the Digital Millennium Copyright Act. 17 U.S.C. § 1203.

[10] Respondent also cites *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952) for the notion that "[e]ven for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy." On the facts of that case, under the Copyright Act of 1909, the term "uninjurious" should not be read to mean no injury-in-fact; indeed, in that case the plaintiff proved not only that the defendant had profited economically from the infringement but also that there was economic loss by plaintiff, just in an unproven amount. *Woolworth*, and other cases under the 1909 Act addressing the courts' discretion to award statutory damages, are not standing cases, and address only the absence of economic

tal flaws. First, the Copyright Act does not dispense with the need for a plaintiff to show actual injury, only with the need to prove a quantum of economic harm. Second, to the extent that Respondent means that violation of a copyright is a bare violation of statute, this too fundamentally misunderstands the nature of intellectual property rights.

The primary purpose of statutory damages under both the Copyright and Lanham Acts is not to provide an award for a mere technical violation of the statute, but to compensate the plaintiff for invasion of a property right where actual damages or infringing profits are difficult to prove; statutory damages serve as a proxy for other forms of damages. Statutory damage provisions for copyright infringement, which as Respondent has noted have a long history, were enacted to serve this compensatory purpose. *See Millar v. Taylor*, 4 Burrows 2303, 2350, 98 Eng. Rep. 201,227 (K.B. 1769) (interpreting Statute of Anne); *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935) (1909 Copyright Act); *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 502 (1st Cir. 2011) (under current Act, "Section 504's text reflects Congress's intent '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'") (quoting *Douglas*, 294 U.S. at 209); *see also see Feltner*, 523 U.S. at 349 (citations omitted) (tracing history of statutory damages for copyright infringement). Similarly, legislative history accompanying the addition

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damage, not the absence of injury-in-fact. *See Nimmer on Copyright* § 14.04[F][1][a] (describing 1909 Act cases where no economic damages proved, but fact of injury was demonstrated and courts awarded statutory damages).

of a statutory damage provision to the Lanham Act for counterfeiting indicates that the remedy is necessary because in the face of "sophisticated, large-scale counterfeiter[s]", the task of "proving actual damages in these cases [is] extremely difficult if not impossible." S. REP. 104-177, S. Rep. No. 177, Sec. 7, 104th Cong., 1st Sess. 1995, 1995 WL 709282, at *10 (Leg.Hist.). *See Sara Lee Corp. v. Bags of New York, Inc.*, 36 F.Supp.2d 161 (S.D.N.Y. 1999).[11]

A plaintiff in an intellectual property case, however, cannot be compensated – whether by a quantum of damages proven at trial or by statutory damages – unless injured in the first instance. The injury in such cases is the misappropriation of a proprietary interest through, *inter alia*, a use of that property that deprives plaintiff of his or her own right to exploit it; damages plaintiff's goodwill or reputation; creates market confusion; impedes First Amendment freedoms (including the freedom not to speak); or causes financial harm. *See Malibu Media, LLC v. John Does*, 12-cv-01953-WYD-MEH, 2013 WL 3753435 *3 (D. Col. July 15, 2013) (authors and exclusive licensees have "standing to bring suit for cop-

[11] Similarly, the legislative history accompanying the Anticybersquatting Consumer Protection Act of 1999 states that the Act "allows trademark owners to recover statutory damages in cybersquatting cases, both to deter wrongful conduct and to provide adequate remedies for trademark owners who seek to enforce their rights in court." S. REP. 106-140, S. Rep. No. 140, 106th Cong., 1st Sess. 1999, 1999 WL 594571, *8 (Leg.Hist.). Reference to a deterrent purpose is also found in copyright cases, especially where an award at the higher end of the statutory range is appropriate. *See Chi-Boy Music v. Charlie Club, Inc.*, 930 F.2d 1224, 1229-30 (7th Cir. 1991) ("[W]hen the infringement is willful, the statutory damages award may be designed to penalize the infringer and to deter future violations").

yright infringement because each suffers injury-in-fact upon said infringement"); *Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, No. c-12-4601-EMC, 2014 WL 1724478 *4 (N.D. Cal. April 29, 2014) (misappropriation of copyright without license would constitute injury-in-fact under Article III); *cf. Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010) (discussing types of irreparable harm in copyright cases); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985) ("Courts and commentators have recognized that copyright, and the right of first publication in particular, serve this countervailing First Amendment value [of the right not to speak]"); *Pappan Enterprises, Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 805 (3d Cir. 1998) (grounds for irreparable injury arising from trademark infringement include "loss of control of reputation, loss of trade, and loss of goodwill [and] the possibility of confusion"); *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (damage to business reputation provides standing under Article III to pursue Lanham Act false advertising claim).

The principle of copyright as a property right predates the United States Constitution. As this Court has noted:

> By the middle of the 17th century, the common law recognized an author's right to prevent the unauthorized publication of his manuscript. . . . This protection derived from the principle that the manuscript was the product of intellectual labor and was as much the author's property as the material on which it was written.

Feltner, 523 U.S. at 349 (1998) (citations omitted). Invasion of a proprietary right, moreover, is quintessentially the type of concrete and particularized injury that may confer Article III standing. *See* James Leonard and 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 (2001) ("Such harms [to proprietary rights] include not only individual property rights protected by the maligned 'private rights model' but also economic rights conferred by government. People tend to lose money or property in unique ways and afterwards suffer unique consequences."). That this is true of intellectual property rights is readily apparent: By definition, works that can be copyrighted must be original to the author and are therefore unique, and source identifiers also must be sufficiently distinguished from other indicia held by third parties in order to be protectable.

Finally, the Copyright Act does not actually create specific copyright interests by statute, but rather creates a legal framework pursuant to which an individual or entity may claim legal protections for a product of the human imagination. In other words, individuals or entities create an intangible "work," and the Copyright Act recognizes works thus created as protectable, assuming they meet certain standards such as originality. Those delineated pieces of intangible property can then be sold, leased or otherwise transferred to other parties. In principle, this is little different than laws that allow ownership of real or personal property. When a third party then misappropriates another's copyrighted work, that third party is invading a particularized interest possessed by the copyright holder, not merely a statuto-

ry provision. This is precisely the type of concrete, particularized injury required by Article III.[12]

[12] Trademarks are similarly in the nature of a property right, *see Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 413 (1916), and the Lanham Act also creates a framework whereby persons can use specific words, phrases, and other source indicia to create a particularized property right.

CONCLUSION

For the foregoing reasons, the Media Amici respectfully request that the decision of the Court of Appeals for the Ninth Circuit be reversed as to standing under Article III of the Constitution, and that the Court reaffirm that a plaintiff must allege an actual injury in order to demonstrate standing under Article III.

Respectfully submitted.

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APPENDIX A

Advance Publications, Inc., directly and through its subsidiaries, publishes print and digital magazines with nationwide circulation, local news in print and online in 10 states, and weekly business journals in over 40 cities throughout the United States. It also owns numerous digital video channels and internet sites and has interests in cable systems serving 2.1 million subscribers.

A&E Television Networks, LLC is an award-winning, global media content company organized under the laws of the State of Delaware with its principal place of business in New York. AETN offers consumers a diverse communications environment ranging from television networks to websites, to consumer products and educational software. AETN is comprised of A&E®, Lifetime®, History®, Lifetime Movie Network®, fyi,™, H2®, History en Espaňol™, Crime & Investigation™, Military History™, Lifetime Real Women®, LMN™, A&E IndieFilms®, A+E Networks International®, A+E Networks Consumer Products® and A+E Networks Digital®. AETN channels and branded programming reach more than 330 million households in over 160 countries.

The **California Newspaper Publishers Association** is a non-profit trade association representing more than 800 daily, weekly and student newspapers in California. For well over a century, CNPA has defended the First Amendment rights of publishers to gather and disseminate – and the public to receive – news and information.

MPA – the Association of Magazine Media is a national trade association including in its present membership more than 175 domestic magazine publishers that publish over 900 titles sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment.

Meredith Corporation is a leading media and marketing company. It creates content across media platforms in key consumer interest areas such as food, home, parenthood and health through such well-known brands as Better Homes and Gardens, Parents and Allrecipes, reaching an audience of over 200 million monthly, including 100 million unduplicated women and 60 percent of American millennial women. Meredith Corporation also owns or operates 17 television stations in fast-growing markets that reach more than 10 percent of U.S. television households.

National Public Radio, Inc. is a producer and distributor of noncommercial news, information and cultural programming. A privately supported, not-for-profit membership organization, NPR serves an audience of more than 26 million listeners each week by providing noncommercial programming through over 1,000 public radio stations nationwide. NPR also distributes noncommercial pro-

gramming through its website, applications and other digital platforms and technologies. In addition to broadcasting and streaming award-winning NPR programming, including *All Things Considered*® and *Morning Edition*®, NPR's Member stations are themselves significant producers of noncommercial news, information and cultural programming.

Rodale, Inc. is a healthy lifestyle media company. In addition to being one of the largest independent book publishers in the U.S., Rodale publishes some of the most well-known health and wellness lifestyle magazines, such as Prevention, Men's Health and Women's Health.

Time Inc. is the largest magazine publisher in the United States. It publishes over 90 titles, including Time, Fortune, Sports Illustrated, People, Entertainment Weekly, InStyle and Real Simple. Time Inc. publications reach over 100 million adults and its web sites, which attract more visitors each month than any other publisher, serve close to two billion page views each month.

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