

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, DC

In the Matter of)
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)
Study on Ancillary Copyright Protections) Docket No. 2021-5
For Publishers)
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COMMENT OF THE COPIA INSTITUTE
OPPOSING
THE CREATION OF AN ANCILLARY RIGHT FOR PUBLISHERS

I. Preliminary Statement

As a smaller, independent journalistic entity that the creation of an ancillary "right" is ostensibly intended to help, the Copia Institute submits this comment to say that it would be a disaster for us, and for everyone else. It is a scheme based upon questionable assumptions, that has failed in the non-US jurisdictions where it has already been tried, that offends the Constitution and the goals and purpose of copyright law, and that, in practice, conflicts with the actual interests of media ventures, including the Copia Institute's. It is an idea that should be abandoned, lest it damage the very interests it purports to advance.

II. About the Copia Institute

The Copia Institute is the think tank arm of Floor64, Inc., the privately-held small business behind Techdirt.com ("Techdirt"), an online publication that has chronicled technology law and policy for nearly 25 years. In this time Techdirt has published more than 70,000 articles regarding subjects such as freedom of expression, platform liability, copyright, trademark, patents, privacy, innovation policy and more. The site regularly receives more than a million page views per month, and its articles have also attracted more

than a million reader comments. As a think tank the Copia Institute also produces evidence-driven white papers examining the evidence underpinning tech policy, and, armed with this insight, it regularly files regulatory comments, amicus briefs, and other advocacy instruments on these subjects to help educate lawmakers, courts, and other regulators – as well as innovators, entrepreneurs, and the public – with the goal of influencing good policy that promotes and sustains innovation and expression.

The Copia Institute submits this comment wearing two hats: as a longtime commenter on the issues raised by the proposed ancillary right, and as a media outlet whose fortunes would be directly impacted by its creation.

III. Argument

As a journalistic entity whose articles are often shared online, it would seem at first glance that the proposed ancillary "right" should help the Copia Institute's media business. In reality, however, it would only hurt it. Because it isn't just a "right" being manufactured but a tax on platforms that dare help readers find expression others publish. And that tax threatens distort the entire online ecosystem, to the detriment of entities like the Copia Institute, who depend on Internet platforms for their own expression to reach audiences.

As with any media outlet, the Copia Institute writes articles it wants people to read. Naturally this expression is a key part of its business, and something it would like to derive revenue from, both traditionally, through advertisements and subscriptions, and via innovative forms of monetization designed to underwrite the company's many expressive activities generally. But no revenue will accrue at all, traditionally or otherwise, if no one can read what the Copia Institute writes.

This proposed "right" threatens to create a world where there are now barriers to people reading the Copia Institute's writing. The Copia Institute counts on platforms¹ being

¹ And not just the large ones, like Google or Facebook, but smaller platforms and search engines, including Duck Duck Go, Twitter and Reddit, and even smaller, independently run forums, online comments sections, and any other site where people share links to things they've discovered online, all of which would be affected by this new "right."

available to host links to its articles, and benefits when they can be shared widely by readers to other readers. But the whole premise of this ancillary right cuts against this availability by essentially punishing platforms for offering this service by taxing them with a financial penalty if they do. Not only does this scheme raise First Amendment issues by interfering with the editorial discretion of platforms to choose to let users share even just links to other articles by making it an expressive decision they need to pay for the privilege to make. But more than that, it defies the point of copyright law itself by building tolls that limit access to that knowledge. Copyright is not supposed to be about creating obstacles to keep the public away from ideas and information; the purpose of copyright law is to make sure they can be united, but this scheme does the exact opposite by design.

And even if some platforms agree to pay into the scheme,² the Copia Institute won't see any of that financial upside. While it punches above its weight, it does not currently have the footprint or coffers of the New York Times or Washington Post. Any deals the platforms do will be done with large incumbents like them. Any royalties collected will go to them, whereas publishers like the Copia Institute in the long tail of small media outlets will see only pennies, if even that much, especially once transaction costs are taken into account. We know this limited revenue potential is likely from the experience with statutory licenses for webcasters.³ Large, commercially successful artists attract the bulk

² While it appears to be presumed that large platforms like Facebook and Google would have the cash to spare complying with the tax this ancillary "right" would demand, not every platform would. Publishers like the Copia Institute need the services of all of them, of every size and shape, yet this "right" could chill many into withdrawing their service by making it unaffordable to offer it.

³ Undersigned counsel spent a decade litigating on behalf of an organization of non-commercial educational webcasters who were forced to comply with the statutory license in order to play music via webcast, including music by smaller artists dependent on those plays for the exposure they needed to have in order to have any sort of commercially viable career. The value that these webcasters could provide to these independent artists through these plays was far greater than any revenue the artists could possibly earn from the plays via the license. Yet these outlets were nevertheless encumbered by the enormous costs of litigating the statutory rates and terms and then having to comply with the sometimes onerous requirements the licenses imposed, even though everyone – licensor and licensee – would have been much better off if the outlets could have been able to simply just focus on the business of playing music, without such encumbrances. In other words, the statutory license for webcasters stands as a cautionary tale for what *not* to do to support creative expression, yet this proposed ancillary "right" threatens to adopt the worst of it this regulatory structure to hobble yet another form of expression.

of revenue collected, while small, independent artists are left to fight over the scraps in a world where there are also now fewer facilitators to help them get their works heard at all, thanks to the costs of complying with these new regulations these facilitators need to face.

Far from providing any sort of windfall to small creative entities, policies like these are destructive to them, and stand to be no less so to small publishers like the Copia Institute in how they scar the overall landscape, making platforms less available to help get publishers' expression to audiences, even when it would be better for publishers if more such platforms were available. While some publishers, even smaller independent ones, might perhaps welcome any revenue such a scheme might offer them, those who see it as a financially losing proposition, given how it reshapes the entire online ecosystem by making the platforms they depend on less available,⁴ will nevertheless be forced to live with it too,⁵ and not be able to compete on terms they might actually prefer.⁶ And we know from previous experience in the non-US jurisdictions that already tried to introduce such a "right" that the effects will be devastating to those very same smaller publishers that this scheme claims to help.⁷

⁴ Spain's attempt to create a similar ancillary "right" illustrates the risk of imposing such "rights" on the previously symbiotic relationship between platforms and publications, where the former benefited from sending audiences to articles and publications benefited from having audiences for their articles. Because it drove Google News to cease providing any referral services to any publications trying to have their stories easily found and shared by readers in Spain, regardless of how much they would have benefited from, or even outright needed, that service sending them readership. See Mike Masnick, *Google Pulls Out The Nuclear Option: Shuts Down Google News In Spain Over Ridiculous Copyright Law*, TECHDIRT (Dec. 11, 2014), <https://www.techdirt.com/articles/20141210/20074829386/google-pulls-out-nuclear-option-shuts-down-google-news-spain-over-ridiculous-copyright-law.shtml>.

⁵ This is particularly the case in instances when the ancillary right is deemed "inalienable," as was the case until recently in Spain. See Mike Masnick, *Spain Likely To Pass 'Google Tax'; Makes Paying For News Snippets An 'Inalienable Right' And A New Bureaucracy To Collect It*, TECHDIRT (Jul. 28, 2014), <https://www.techdirt.com/articles/20140728/06561628035/spain-likely-to-pass-google-tax-makes-paying-news-snippets-inalienable-right-new-bureaucracy-to-collect-it.shtml>.

⁶ See Glyn Moody, *Spain's Ill-Conceived 'Google Tax' Law Likely To Cause Immense Damage To Digital Commons And Open Access*, TECHDIRT (Aug. 12, 2014), <https://www.techdirt.com/articles/20140811/05564728172/spains-ill-conceived-google-tax-law-likely-to-cause-immense-damage-to-digital-commons-open-access.shtml>.

⁷ See Mike Masnick, *Study Of Spain's 'Google Tax' On News Shows How Much Damage It Has Done*, Techdirt (Jul. 29, 2015), <https://www.techdirt.com/articles/20150725/14510131761/study-spains-google-tax-news-shows-how-much-damage-it-has-done.shtml>.

Far from helping media publications, such a scheme would only hurt them. And while the journalism business may indeed be under strain, especially in its lack of smaller media entities, schemes like these don't alleviate that strain because it was not the absence of this sort of ancillary right that caused any of the underlying problems in the first place—and so adding one won't provide the cure. More likely culprits ruining the news business are things such as media consolidation, corporate governance models that emphasize quick profits over good journalism, poor site designs that don't retain readers' attention, and even paywalls that deliberately repel readership. It would make a lot more sense to correct these issues, or at least leave everyone free to innovate better monetization models, including better advertising models that aren't so offensive to reader privacy, which is another problem plaguing the online news business. But instead of making any of these sorts of meaningful changes a scheme like this just papers over the actual problems while making it all the more difficult to find real solutions so that outlets can find the audiences needed to be the economically sustainable entities we all want them to be.

IV. Conclusion

No amount of good intentions can redeem this scheme. For the forgoing reasons, it should be abandoned.

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Respectfully submitted,

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