Memorandum: Legal Deficiencies in the California Journalism Preservation Act (Assembly Bill 886)

(Legislative analysis prepared for CCIA by a leading U.S. law firm)

The California Journalism Preservation Act (AB 886) ("CJPA") proposes to "establish a journalism usage fee that will be paid [by certain online platforms] to journalism providers to compensate [them] for use of their work product." Assembly Committee on Privacy and Consumer Protection, AB 886 Analysis at 2 (April 25, 2023 Hearing). The CJPA has several deficiencies that run afoul of existing laws as well as the U.S. and California Constitutions.

This memorandum discusses the legal flaws inherent in three of the bill's elements:

> **(1) Fee:** The CJPA requires "covered platforms" ("Platforms") to pay a fee to "eligible digital journalism providers" ("EDJPs"), including for Platforms' fair use of the EDJPs' copyrightable content;
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> **(2) Anti-Retaliation:** The CJPA bars Platforms from "retaliat[ing] against" providers "for asserting [their] rights" under the law "by refusing to index content or changing the ranking, identification, modification, branding, or placement of the [provider's] content"; and
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> **(3) Arbitration:** The CJPA creates a compulsory and binding arbitration procedure to determine the amount of that fee.

These three mechanisms are subject to several legal challenges, as detailed herein. First, the charging of fees would conflict with existing federal law that preempts state copyright law and provides for fair use of copyrighted works. Second, the anti-retaliation clause likely violates Platforms' freedom of speech. Third, the highly restrictive arbitration clause likely violates Platforms' right to due process and right to petition.

1. Copyright

A. Federal Copyright Law Preempts the CJPA.

The CJPA creates a framework that allows EDJPs to compel Platforms to pay a "journalism usage fee" for hyperlinking to, displaying, or presenting EDJPs' copyrightable works. *See* CJPA, AB-886 (requiring "a covered platform . . . to remit a journalism usage fee payment to each eligible digital journalism provider"). As explained below, because the CJPA establishes a compensation mechanism for the distribution, public display, or performance of EDJPs' copyrightable works, federal copyright law preempts the CJPA.

Federal copyright law explicitly preempts "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright." 17 U.S.C. § 301(a). Long-standing precedent clarifies that Section 301(a) preempts any claim under state law if two elements are satisfied: (1) "the work at issue [] come[s] within the subject matter of copyright"; and (2) "the state law rights [are] equivalent to the exclusive rights of copyright."

Meridian Project Sys., Inc. v. Hardin Const. Co., LLC, 426 F. Supp. 2d 1101, 1107-08 (E.D. Cal. 2006) (citing *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 968 (9th Cir. 2004)).

Here, both preemption elements are satisfied. First, EDJPs' news stories fall "within the ambit of copyright protection" because they are "original works of authorship fixed in a[] tangible medium of expression." 17 U.S.C. § 102. Second, the CJPA's compensation mechanism creates an "equivalent to the exclusive rights of copyright." *See* 17 U.S.C. § 106(3) (granting right "to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending"). Courts have found that federal copyright law preempts state laws that similarly attempt to create compensation schemes for protected works. *See Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1071-72 (9th Cir. 2018) (finding that California law "fundamentally reshape[d] the contours of federal copyright law's existing distribution right" and was thus "expressly preempted by § 301(a)").

While it is possible for a state law to overcome federal preemption, the CJPA likely fails to do so. To survive preemption, any claim under the state law "must include an 'extra element' that makes the right asserted qualitatively different from those protected by the copyright act." *Meridian*, 426 F. Supp. 2d at 1108; *see also Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1089 (9th Cir. 2005) (citing *Summit Mach. Tool Mfg. v. Victor CNC Sys.*, 7 F.3d 1434, 1439-40 (9th Cir. 1993)). The CJPA does not include such an element that would make a claim "qualitative[ly] different from those protected by the copyright act." Rather, the CJPA simply imposes a "link tax" that allows copyright holders (*i.e.*, EDJPs) an additional revenue stream related to their original work. *See* CJPA, AB-886, Secs. 3273.60 (defining "eligible digital journalism providers" and "allocation share") and 3273.64 (determining "[t]he percentage of the [Platform]'s advertising revenue [to be] remitted to [EDJPs] . . . pursuant to this section"); Mike Masnick, *TechDirt*, "California Legislature Bribes Big Media Journalists with Big Tech Money to Support Link Tax Bill," https://www.techdirt.com/2023/05/31/california-legislature-bribes-big-media-journalists-with-big-tech-money-to-support-link-tax-bill/ (May 31, 2023, 9:24 am).

As both elements of the preemption test are satisfied and the CJPA does not contain an "extra" element to overcome federal preemption, this provision of the CJPA would not stand up to judicial scrutiny.

Moreover, federal copyright laws, like other laws of the United States enacted pursuant to constitutional authority, are the supreme law of the land. When state law touches upon the area of these federal statutes, it is "familiar doctrine" that the federal policy "may not be set at naught, or its benefits denied" by the state law. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964) (*quoting Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 172, 173, 176 (1942)); *see also Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141, 168 (1989). As the Third Circuit has recognized, even apart from Section 301 preemption, "the general proposition pertains in copyright law, as elsewhere, that a state law is invalid that 'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'" *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1028 (3d Cir. 2008) (citing 1 NIMMER ON COPYRIGHT § 1.01[B][3][a] (2008)). Here, the CJPA would be attempting to make something proprietary that Congress had

expressly made unencumbered – an overreach that would interfere with federal policy goals, and thus would be preempted.

B. The CJPA Likely Runs Afoul of the Fair Use Doctrine.

As described above, the right to control the distribution of protected works is a fundamental purpose of copyright law. However, this exclusive right over certain speech is in tension with the First Amendment's protection of speech. The fair use doctrine reconciles this tension by placing certain limitations on a copyright holder's exclusive rights. Accordingly, Congress codified the fair use doctrine in the Copyright Act of 1976. *See* 17 U.S.C. § 107.

Specifically, fair use permits use of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching[], scholarship, or research." *Id.* Courts have recognized that Platforms have fair use rights related to thumbnail images or snippets "based on the transformative nature of a search engine and its benefit to the public." *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1164 (9th Cir. 2007); *see also Authors Guild, Inc., et al. v. Google Inc.*, 804 F.3d 202 (2nd Cir. 2015) (finding that the creation of a digital, word-searchable copy of a protected work and displaying snippets from that work was transformative). The Supreme Court has held that even copying thousands of lines of code needed for programmers to access an API Application Programming Interface (better known as an "API") constitutes fair use under copyright law. *See Google LLC v. Oracle America Inc.*, 141 S.Ct. 1183 (2021). Given that certain of the uses subject to the CJPA would likely constitute fair use under Section 107, the CJPA stands to violate this doctrine in circumscribing Platforms' right to engage in uses that would otherwise qualify as fair use.

2. Free Speech

The CJPA prohibits a Platform from "refusing to index content or changing the ranking, identification, modification, branding, or placement of the content of the [EDJP]." CJPA, AB-886, Sec. 3273.65. Thus, by effectively creating "must-carry" provisions for certain content, the CJPA violates free-speech protections under the U.S. and California Constitutions by compelling Platforms to carry and subsidize EDJPs' content while also eliminating their right to exercise editorial discretion and content moderation on their own platforms.

Private actors have First Amendment protections, and these rights extend to online platforms. *See Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019) (holding that private actors are protected by the First Amendment); *see also Brown v. Entm't. Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)) ("[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears."); *Kasky v. Nike, Inc.*, 45 P.3d 243, 310 (Cal. 2002) ("The state Constitution's free speech provision is 'at least as broad' as . . . and in some ways is broader than . . . the comparable provision of the federal Constitution's First Amendment.").

When "a private entity provides a forum for speech," it may "exercise editorial discretion over the speech and speakers in the forum." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019).[1] Such editorial discretion itself qualifies as speech – similar to newspapers, other publishers, and other distributors of speech, Platforms exercise their speech rights by, for example, manually and algorithmically selecting what content will be shown to users (and how that content will be shown). U.S. courts, including the Supreme Court, have widely recognized Platforms' right to choose what content to disseminate, moderate, promote, and demote, holding that Platforms "are not engaged in indiscriminate, neutral transmission of any and all users' speech." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 742 (D.C. Cir. 2016); *see also NetChoice, LLC v. Attorney General, Florida*, 34 F.4th 1196, 1203 (11th Cir. 2022) (holding that Platforms' "'content-moderation' decisions constitute protected exercises of editorial judgment"); *Halleck*, 139 S. Ct. at 1932 (recognizing that "certain private entities[] have rights to exercise editorial control over speech and speakers on their properties or platforms"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (explaining that editorial control and judgment include "[t]he choice of material," "the decisions made as to limitations on the size and content," and the "treatment of public issues and public officials—whether fair or unfair"). These affirmative editorial choices reflect Platforms' constitutionally protected discretion regarding what information they wish to display. By prohibiting this discretion, the CJPA – even with a narrow carveout to permit a Platform to enforce its terms of service – substantially prevents Platforms from fully exercising editorial rights and thus violates the First Amendment. *See* CJPA, AB-886, Sec. 3273.65(c) ("This section does not prohibit a [Platform] from, and does not impose liability on a [Platform] for, enforcing its terms of service against an [EDJP]."). As such, this bill would be unlikely to survive judicial scrutiny.

Separately, the CJPA's requirement that Platforms remit a "journalism usage fee payment" to each EDJP raises its own material constitutional concerns by forcing Platforms to subsidize EDJPs' speech. *See* CJPA, AB-886 ("This bill . . . would require . . . a covered platform . . . to remit a journalism usage fee payment to each [EDJP]."). The Supreme Court has ruled that "[j]ust as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government . . . from compelling certain individuals to pay subsidies for speech to which they object." *U.S. v. United Foods, Inc.*, 121 S.Ct. 2334, 2338 (2001). The Supreme Court recently affirmed this principle in a case in which, because "[f]undamental free speech rights [we]re at stake," it held that a public employee could not be forced by law to join and thus "subsidize a union" with whom the employee disagreed. *Janus v. AFSCME*, 138 S.Ct. 2448, 2459-60 (2018).

[1] While a scarcity rationale may justify intrusions on First Amendment rights in some cases, this rationale would not apply to the internet, which has "relatively unlimited" space. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 870 (1997) ("[T]he internet can hardly be considered a 'scarce' expressive commodity" justifying intrusions on First Amendment rights). In fact, the Supreme Court held in *Reno* that a "scarcity" rationale had no place in evaluating speech publication on the internet where a user remains free to communicate on different platforms and through different services. *See id.* at 868 (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637-38 (1994)); *id.* at 868-69 ("[S]pecial justifications for regulation of the broadcast media [] are not applicable to other speakers," like "forums of the internet[.]").

Similar concerns are present in the CJPA. By requiring Platforms to pay "journalism usage fees" to EDJPs – and prohibiting Platforms from "index[ing] content or changing the ranking, identification, modification, branding, or placement of the content" on the Platform – the CJPA forces Platforms to subsidize EDJPs in violation of the First Amendment. CJPA, AB-886, Sec. 3273.65(a).

3. Due Process and the Right to Petition

The CJPA mandates binding arbitration between a Platform and EDJP to determine the percentage of the Platform's advertising revenue to be paid to the EDJP. *See* CJPA, AB-886, Sec. 3273.64; *see also* Sec. 3273.64(h)(D) (providing that the arbitrators shall "[i]ssue a binding, reasoned determination of the percentage of the [Platform]'s advertising revenue remitted to notifying [EDJPs]"). This requirement likely violates Platforms' right to due process and right to petition.

A. The CJPA's Mandatory Arbitration Provisions are Unconstitutional Infringements on the Platforms' Right to Due Process.

The Fourteenth Amendment of the Constitution declares that no state shall "deprive any person of life, liberty, or property, without due process of law." *See* U.S. Const. amend. XIV, § 1. The California Constitution affords a similar right. *See* Cal. Const. Art. I, § 7 ("A person may not be deprived of life, liberty, or property without due process of law.").

Courts have explained that "[a] litigant receives adequate due process where, in the context of the circumstances at issue, sufficient procedures provide the individual an opportunity to be heard before he is deprived of life, liberty, or property." *See Bradford v. Union Pacific R. Co.*, 767 F.3d 865, 870 (9th Cir. 2014) (citing *Edelman v. W. Airlines, Inc.*, 892 F.2d 839, 847 (9th Cir. 1989)). There are three factors that "a court should consider in determining whether there was adequate due process: 1. [T]he private interest that will be affected by the official action; 2. [T]he risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and 3. [T]he Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Bradford*, 767 F.3d at 870 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)).

A statutory mandate to arbitrate must not be "unreasonable or arbitrary, and the procedure it adopts [must] satisf[y] the constitutional requirements of reasonable notice and opportunity to be heard." *Hardware Dealers' Mut. Fire Ins. Co. of Wis. v. Glidden Co.*, 284 U.S. 151 (1931). Further, a mandatory binding arbitration procedure has been found to be unconstitutional if it arises without express or implied consent, and without an avenue for substantive judicial review. *See Hess Collection Winery v. Agric. Lab. Rels. Bd.*, 140 Cal.App. 4th 1584, 1601-02 (2006) ("It ought to be clear, as the *Bayscene* court concluded, that a legislative body cannot compel a private party to submit to final, binding arbitration without any right of judicial review for errors of fact or law.") (citing *Bayscene Resident Negotiators v. Bayscene Mobilehome Park*, 15 Cal.App.4th 119 (1993)).

The CJPA seems poised to fail under both the *Mathews* test and the *Hardware Dealers* factors. For example, the bill proposes that the percentage of a Platform's advertising revenue remitted to notifying eligible digital journalism providers must be determined by an arbitration panel, the decision from which may be appealed to a second arbitration panel only "on the grounds of procedural irregularity." *See* CJPA, AB-886, Secs. 3273.64(a)-(b) and 3273.64(h)(3). Applying the three factors enumerated in *Mathews*: (1) the Platforms' interests in protecting their businesses and revenues will be substantially impacted by a refusal to allow them access to courts; (2) the procedures mandated by the CJPA, especially the limitation of appeals to a second arbitration panel only for procedural irregularities, present a meaningful risk of erroneous deprivation of the Platforms' interests (*e.g.*, the bill expressly prohibits arbitrators from considering important factors such as how much value publishers receive from Platforms' distribution of content), and legal challenges in court would help prevent such issues; and (3) the legislature's stated interest in the CJPA would still be served, without notable burdens to the judicial system, if Platforms were properly afforded their right to address the relevant issues in court. The CJPA has substantial constitutional and other legal infirmities, but the current collective negotiation approach makes it highly unlikely that providing Platforms a reasonable ability to petition and appeal would significantly burden the courts.

The CJPA is also unreasonable under the *Hardware Dealers* factors and, again, likely fails to protect Platforms' constitutional due process rights. Applying these factors: (1) forcing arbitration rather than permitting litigation appears arbitrary and unreasonable absent compelling justifications, particularly where the Platform is not a party to a contract and did not consent in any form to arbitration; and (2) the bill's limited appeal procedures do not provide reasonable opportunity to be heard. Indeed, the CJPA does not provide for any meaningful judicial review, let alone substantive *de novo* review, of that determination.

In addition, the CJPA's mandatory arbitration provisions do not align with the American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures ("Arbitration Rules"), to which the CJPA itself refers. *See* CJPA, AB-886, Sec. 3273.64(b) ("[EDJPs] may initiate, pursuant to Rule R-4 of the American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures, a final offer arbitration against the [Platform]."). These rules do not envision a scenario in which a state law is mandating arbitration. Instead, they focus on two scenarios: (a) arbitration under an arbitration provision in a contract; and (b) arbitration pursuant to a court order. *See* Arbitration Rules, Rule R-4(a)-(b). The CJPA's legislatively mandated arbitration provisions do not align with either scenario.

Further, the Arbitration Rules describe arbitration as "the *voluntary* submission of a dispute to an impartial person or persons for final and binding determination." *See* Arbitration Rules, Introduction (emphasis added). Critically, the arbitration imposed by the CJPA is not voluntary, and Platforms do not have the ability to opt out.

Based on the foregoing, the CJPA's mandatory arbitration provisions are likely an unconstitutional violation of the Platforms' due process rights.

B. The CJPA Could Also Violate the Platforms' Right to Petition.

The First Amendment states that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. Courts have said that this right to petition includes a right of access to the courts. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (citing *Johnson v. Avery*, 393 U.S. 483, 485 (1969)). Further, "[i]t is well established that filing a lawsuit is an exercise of a party's constitutional right to petition." *Chavez v. Mendoza*, 94 Cal.App.4th 1083, 1087 (2001) (citing *Ludwig v. Superior Court*, 37 Cal.App.4th 8, 19 (1995)).

As mentioned above, the CJPA provides no such option to litigate in court, and it proposes that an arbitration panel determine the percentage of the Platforms' advertising revenue that is remitted to notifying EDJPs, with appeals being directed to another arbitration panel "on the grounds of procedural irregularity." *See* CJPA, AB-886, Secs. 3273.64(a)-(b) and 3273.64(h)(3). The law could violate the Platforms' right to petition by not affording them the ability to litigate or challenge the revenue remittance amount in court, initially or on appeal.

4. Conclusion

The CJPA suffers from several, severe deficiencies under the U.S. and California Constitutions and other laws, making the bill subject to litigation and risking judicial invalidation.