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# ***STUDENT ARTICLES***

## **À La Carte v. Channel Bundling: The Debate Over Video Programming Distribution**

By Christopher T. Buckley\*

### **I. Introduction**

Cable rates have risen significantly since deregulation of the cable industry in 1996.<sup>1</sup> Cable companies point to increases in quality and in the number of channels offered as an explanation for the increase in rates and claim that there has actually been a reduction in the quality-adjusted price of cable service.<sup>2</sup> Consumer groups counter that this approach is flawed because it values all the new channels the same, ignoring the fact that subscribers are not watching all the added channels.<sup>3</sup> According to a Nielsen Media Research

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<sup>1</sup> See FEDERAL COMMUNICATIONS COMMISSION, MB DOCKET NO. 03-172, TENTH ANNUAL REPORT: IN THE MATTER OF ANNUAL ASSESSMENT OF THE STATUS OF COMPETITION IN THE MARKET FOR THE DELIVERY OF VIDEO PROGRAMMING) ¶ 10, at 7 (Jan. 28, 2004) [hereinafter TENTH ANNUAL REPORT] (“According to the Bureau of Labor Statistics, between year-end 1993 and the end of June 2003, the Consumer Price Index (“CPI”), which measures general price changes, increased approximately 25.5%, while cable prices, also measured as a subcategory of the CPI, rose approximately 53.1%”).

<sup>2</sup> Stephen S. Wildman, Assessing Quality-Adjusted Changes in the Real Price of Basic Cable Service 1-2 (Sep. 2003), [http://i.ncta.com/ncta\\_com/PDFs/wildmanstudy.pdf](http://i.ncta.com/ncta_com/PDFs/wildmanstudy.pdf); Jeffrey A. Eisenach & Douglas A. Trueheart, Rising Cable TV Rates: Are Programming Costs The Villain? 16-17 (Oct. 2003), [http://www.capanalysis.com/docs/risingcableratesoct\\_2004.pdf](http://www.capanalysis.com/docs/risingcableratesoct_2004.pdf).

<sup>3</sup> Consumer Federation of America, *The Continuing Abuse of Market Power*

report, the average home received 104.2 channels in 2006, but only tuned in to 15.7 channels for at least 10 minutes per week.<sup>4</sup> One proposed solution to exorbitant cable bills is to allow cable subscribers to eliminate the 90 channels they do not watch by adopting an à la carte system, which would allow customers to pick, and pay for, only the channels they want.

In many ways consumer choice has increased in recent years. A few years ago, consumers had no choice in telephone companies—they had to go to Ma Bell. Now they have a choice of phone companies for home phone service, not to mention countless cell phone companies. Not too long ago, if consumers wanted a song they had to go to the store and buy the entire album. Now they can download a single song from iTunes. In this environment, it is only natural that consumers expect to be able to pick and choose which cable channels they pay for and receive. Instead, under the current large tier system, multichannel video programming distributors (“MVPDs”)<sup>5</sup> control the programming that subscribers receive.

Although consumer choice may seem to be on the rise, many goods and services are still sold in packages, without the option to purchase individual parts à la carte. If a reader wants only the sports section, she usually has to buy the whole newspaper. If a prospective law school student wants in-class instruction from a test-prep company only for the logic games portion of the LSAT, she usually must enroll in a course that covers the entire test. And if a student wants to take a property course at a law school, she usually must pay for a minimum number of credit hours. At the same time, even when a consumer can choose what parts she wants, she may have to pay for

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*By the Cable Industry: Rising Prices, Denial of Consumer Choice, and Discriminatory Access to Content 2* (Feb. 2004) [hereinafter *Continuing Abuse of Market Power*] (quoting TENTH ANNUAL REPORT, *supra* note 1, ¶ 139, at 83-84), available at <http://www.consumerfed.org/pdfs/mpcableindustry.pdf>.

<sup>4</sup> Nielsen Media Research, Average U.S. Home Now Receives A Record 104.2 TV Channels, According to Nielsen (Mar. 19, 2007), <http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a062a0/?vgnnextoid=48839bc66a961110VgnVCM100000ac0a260aRCRD>.

As the number of channels available to a household increased, so did the number of channels tuned, although the percentage of available channels actually viewed decreased. In 2006, the average household tuned to 15.7 (or 15.1%) of the 104.2 channels available. This compares to 2000, when the average home viewed 22.1% of the available channels (13.6 channels viewed out of 61.4 available channels).

<sup>5</sup> The term “MVPD” encompasses all cable operators or satellite TV operators that sell multiple channels of video programming.

the ones she does not want—imagine a McDonald’s customer requesting a discount because she wants a Big Mac without lettuce, pickles, or onions. But in all these situations the consumer does have options—she can take her business elsewhere.

Cable companies, on the other hand, face very little competition.<sup>6</sup> Even if consumers have a choice of which television channels they get, an individual channel is a “package” itself.<sup>7</sup> Each channel broadcasts a group of programs and consumers do not usually get to choose which specific programs they get. So even under an à la carte system, consumers who want to watch one program on a cable channel will usually have to subscribe to the whole channel.<sup>8</sup> Because even an à la carte channel choice will present the consumer with options between packages of programming to some extent, the question becomes which packaging model is best for the consumer.

Where should the line be drawn? Should consumers only pay for the part of the newspaper or text book they read, program they watch, or time of day they watch? The current bundling system,<sup>9</sup> where the average household gets over 100 channels and actually watches less than 16 of them, may not be the best place to draw the line from the consumer’s perspective. A pure à la carte system,<sup>10</sup>

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<sup>6</sup> See Andrew Zimbalist, *Economic Perspectives on Market Power in the Telecasting of US Team Sports*, THE ECONOMICS OF SPORT AND THE MEDIA 160, 164-65 (Claude Jeanrenaud & Stefan Késenne ed., 2006) (“Of the 10,157 cable systems in the United States, fewer than 100 of them have competition from another system (either another cable company or a telephone company delivering cable signals) in their area.”); U.S. GEN. ACCT. OFF. GAO-04-8, ISSUES RELATED TO COMPETITION AND SUBSCRIBER RATES IN THE CABLE TELEVISION INDUSTRY, at 9 (Oct. 2003), available at <http://www.gao.gov/new.items/d048.pdf> (finding that cable subscribers in only 2% of markets have “the opportunity to choose between two or more wire-based video operators.” But, “where competition is present, cable rates are significantly lower.”).

<sup>7</sup> Even television programs themselves could be considered a package of segments, because they could be logically broken up into smaller parts.

<sup>8</sup> Increasingly consumers have options other than purchasing a channel if they want to watch a particular program. For example, many popular TV shows are available for purchase on DVD or are available for download on the Internet—some downloads are free, others can be purchased.

<sup>9</sup> This pricing method, where customers can only purchase a fixed-price bundle, is referred to as “pure bundling.” See DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 324 (4th ed. 2005).

<sup>10</sup> This pricing method, where customers can order each item separately, is referred to as “individual pricing.” *Id.*

where consumers have a channel-by-channel selection but can only purchase channels individually, also may not give consumers the best choice of channels.<sup>11</sup> There are, however, options other than the two extremes.<sup>12</sup> But finding a workable compromise, either through the application of existing antitrust law or the creation of new legislation, will be difficult without definitive data on the potential impact of a change in the cable and satellite distribution system.

## II. The Basic Positions of the Two Sides in the Current À La Carte Debate

The à la carte debate has brought together a wide range of groups on both sides of the issue. Those who oppose the à la carte system include representatives from the NAACP and the Rainbow Push Coalition, along with the CATO Institute; even Jerry Falwell and Pat Robertson join with Planned Parenthood in opposition to an à la carte system.<sup>13</sup> Groups such as Consumers Union, Consumer Federation of America, Parents Television Council, and Concerned Women for America support à la carte.<sup>14</sup>

Interestingly, this issue has divided groups that, at first glance, seem like logical allies. For example, Black Entertainment Television (“BET”) opposes à la carte while the Black Education Network (“BEN”) and the Urban Broadcasting Company (“UBC”) support it, and Christian Television Network supports à la carte while the Christian Broadcasting Network opposes it.<sup>15</sup> This split seems to

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<sup>11</sup> See MEDIA BUREAU, FEDERAL COMMUNICATIONS COMMISSION, FURTHER REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC n.7 at 6 (Feb. 9, 2006), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-263740A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf) [hereinafter FURTHER REPORT].

<sup>12</sup> The simplest and most obvious alternative is “mixed bundling,” where customers can choose between a fixed-price bundle and à la carte. See CARLTON & PERLOFF, *supra* note 9.

<sup>13</sup> For an extensive list of people and organizations who have written letters to Congress and the FCC opposing à la carte pricing, see National Cable & Telecommunications Association, Government Mandated A La Carte: Making You Pay More For Less, Jan. 17, 2007, <http://www.ncta.com/PublicationType/TalkingPoint/ALaCarteIsMoreForLess.aspx>.

<sup>14</sup> See Letter to the House of Representatives (Apr. 28, 2004), [http://www.hearusnow.org/fileadmin/sitecontent/042804\\_HouseLTRCblChoice.pdf](http://www.hearusnow.org/fileadmin/sitecontent/042804_HouseLTRCblChoice.pdf).

<sup>15</sup> National Cable and Telecommunications Association, *supra* note 13. For a list of à la carte supporters, see Consumers Union, Channel Choice: Diverse Voices for Cable Choice, <http://www.hearusnow.org/cablesatellite/5/diversevoices>

be based largely on the way the current system affects the distribution of the networks. BET is a division of Viacom,<sup>16</sup> and is accordingly distributed on most cable and satellite systems.<sup>17</sup> BEN and UBC, on the other hand, are not part of a larger media group and have encountered great difficulty getting distribution on cable systems.<sup>18</sup> The debate over whether an à la carte system is the best option for consumers is not as clear cut as one would think.

### III. The Pro-À La Carte Position

Proponents of an à la carte system argue that the current bundling system has caused soaring cable bills and forces consumers to pay for programming they do not want. They advocate a system where consumers have greater control over the type of content they are paying for and the price they are paying. The consumer groups' perspective is grounded on the idea of a marketplace influenced by consumer preferences, which they believe would lead to greater competition, consumer sovereignty, and consumer freedom.<sup>19</sup> They believe there should be "marketplace implications for programmers when subscribers don't want a channel, whether it is because they find the content to be inappropriate or because they simply aren't interested."<sup>20</sup> The family-oriented perspective of FCC Chairman Kevin Martin and groups such as the Parents Television Council is grounded on the idea that customers should not have to pay for programming they find offensive. They believe the current system forces parents "to buy the channels they do not want their families to

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forcablechoice/ (last visited Apr. 17, 2008).

<sup>16</sup> BET Networks Corporate Fact Sheet, <http://bet.mediaroom.com/index.php?s=45> (last visited Apr. 17, 2008).

<sup>17</sup> See About Viacom, <http://www.viacom.com/aboutviacom/Pages/default.aspx> (last visited Apr. 17, 2008) (BET Networks is delivered to "more than 88 million households").

<sup>18</sup> See Consumers Union, *supra* note 15.

<sup>19</sup> See Gene Kimmelman & Dr. Mark Cooper, Reply Comments of Consumers Union and The Consumer Federation of America, In the Matter of Comment Requested on a La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television And Direct Broadcast Satellite Systems, 32-33 (Aug. 13, 2004), [http://www.hearusnow.org/fileadmin/sitecontent/081304\\_FCC\\_ReplyCMTS\\_Cbl.pdf](http://www.hearusnow.org/fileadmin/sitecontent/081304_FCC_ReplyCMTS_Cbl.pdf).

<sup>20</sup> Kevin Martin, Newton N. Minow, & Dan Lipinski, Op-Ed., For kids' sake, TV must go a la carte: A la carte pricing would give cable subscribers meaningful programming choices, CHI. TRIB., Jul. 20, 2007.

view in order to obtain the family-friendly channels they desire.”<sup>21</sup> In other words, parents who want Nickelodeon should not be forced to subscribe to MTV.

In a July 2007 op-ed piece published in the Chicago Tribune, current FCC chairman Kevin Martin, former FCC Chairman Newton Minow, and United States Representative Dan Lipinski (D-Ill.) argue that consumers “deserve greater control over content and their cable bills.”<sup>22</sup> The authors propose a variety of options to implement à la carte pricing. One would allow consumers “to ‘opt out’ of unwanted channels and not be charged for their cost.”<sup>23</sup> Another option would allow subscribers “to ‘opt in’ to particular cable networks in the same way that premium channels like HBO are offered today.”<sup>24</sup> A third alternative would allow customers “to pick a smaller package of channels, choosing from offers of ‘10 packs’ and ‘20 packs’ of channels.”<sup>25</sup>

À la carte is also a popular idea among cable subscribers. A May 2004 Consumers Union survey shows that two-thirds of cable TV subscribers want to choose the channels they get, and pay only for those channels.<sup>26</sup> Two-thirds also think that picking fewer channels should lower their cable bill.<sup>27</sup> Fifty-nine percent would pick fewer channels than they get in their current package.<sup>28</sup> Only twenty-nine percent, however, would choose fewer channels even if the bill did not decline proportionately.<sup>29</sup> So the majority of consumers seem to want à la carte only if it will lower their monthly cable bill.

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<sup>21</sup> *Open Forum on Decency: Hearing Before the S. Comm. on Commerce, Sci. and Transp.* (Nov. 29, 2005) (statement of Kevin J. Martin, Chairman, Federal Communications Commission), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-262484A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-262484A1.doc) [hereinafter *Statement of Kevin Martin*].

<sup>22</sup> See Martin, Minow, & Lipinski, *supra* note 20.

<sup>23</sup> *Id.*

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

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

<sup>26</sup> Consumers Union Cable TV Issues Survey (May 25, 2004), [http://www.hearusnow.org/fileadmin/sitecontent/052504\\_CUCableChoicePoll.pdf](http://www.hearusnow.org/fileadmin/sitecontent/052504_CUCableChoicePoll.pdf).

<sup>27</sup> *Id.*

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

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

#### IV. The Anti-À La Carte Position

Opponents of à la carte, however, warn that consumers who yearn for a system that allows them to pick channels from a menu, and pay only for those channels that they want, should be careful what they wish for.<sup>30</sup> Opponents argue that an à la carte system would be a consumer disaster—resulting in higher prices and decreased programming diversity.<sup>31</sup> Consumers who choose as few as a dozen channels would end up with higher bills than they currently pay for hundreds of channels under the current system.<sup>32</sup> In addition, consumer choice would decline as diversity of programming would decrease due to the disappearance of smaller cable channels because of a lack of subscribers.<sup>33</sup> As many smaller cable networks only exist because of the support that more popular networks provide through bundling, à la carte opponents contend bundles “are not anticonsumer but proconsumer.”<sup>34</sup>

In a November 2007 New York Times article, borrowing from a research note by Craig Moffett which used ESPN and BET as examples, columnist Joe Nocera illustrates how à la carte would drive the price of individual channels up so high that even consumers who chose only a handful of channels would pay more for cable.<sup>35</sup> If you suppose that, under an à la carte system, twenty-five percent of cable customers would subscribe to ESPN<sup>36</sup>—which currently charges \$3 per subscriber per month (the highest amount of any basic cable network)—the network would have to increase the per-subscriber charge by 400 percent, to \$12 a month to maintain its current revenue.<sup>37</sup> And ESPN is one of the most popular cable networks;<sup>38</sup>

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<sup>30</sup> Joe Nocera, *Bland Menu If Cable Goes A la Carte*, N.Y. TIMES, Nov. 24, 2007, at C1 [hereinafter *Bland Menu*].

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

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Adam Thierer, *Progress Snapshot Release 3.15*, Nov. 2007, <http://www.pff.org/issues-pubs/ps/2007/ps3.15cablecon.pdf>.

<sup>35</sup> *Bland Menu*, *supra* note 30.

<sup>36</sup> The 25% estimate used in this example is in line with a recent study by Deutsche Bank which found that 78% of survey respondents said that they would not pay \$2 per month for ESPN if they were given a choice. See *Continuing Abuse of Market Power*, *supra* note 3, at 22.

<sup>37</sup> *Bland Menu*, *supra* note 30.



less popular networks would have to raise fees even higher to survive. If you, unrealistically, suppose every African-American family in America would subscribe to BET, the network would have to raise its fees by 588 percent.<sup>39</sup> If only half subscribed, “still a wildly optimistic scenario,” the network would have to raise its fees by 1,200 percent.<sup>40</sup> With such high per-channel fees consumers would get fewer channels while paying as much, or even more, for monthly cable bills.

Opponents of à la carte also argue that groups that see à la carte as a good way to clean up TV will be unhappy with the result of such regulation. MTV, F/X, Comedy Central, Spike and other channels that broadcast content that family-oriented groups may find objectionable “subsidize the small religious and family stations.”<sup>41</sup> Without this support some “family-friendly” networks may disappear, while the popular channels with “objectionable” content would likely survive.<sup>42</sup>

## V. The FCC’s Reports on Video Program Packaging

The FCC has released two unofficial reports on à la carte pricing of cable channels, the *Report on the Packaging and Sale of Video Programming Services to the Public* (“First Report”), and the *Further Report On the Packaging and Sale of Video Programming Services To the Public* (“Further Report”). The reports, however, appear to reach contradictory conclusions. Both reports are based on an independent study performed by Booz Allen Hamilton Inc. (“Booz Allen Study”)<sup>43</sup> for the National Cable and Telecommunications

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<sup>38</sup> According to its website, ESPN is currently in more than 96 million households, cable operators consider “ESPN the most important network in their cable system,” and ESPN’s flagship show, SportsCenter, is watched by “[a]s many as 93.7 million people a month.” ESPN Corporate Information, [http://www.espnmediazone.com/corp\\_info/corp\\_fact\\_sheet.html](http://www.espnmediazone.com/corp_info/corp_fact_sheet.html) (last visited Apr. 17, 2008).

<sup>39</sup> *Bland Menu*, *supra* note 30.

<sup>40</sup> *Id.*

<sup>41</sup> Derek Hunter, *Liberals and Conservatives Catch the Regulatory Bug*, TCS DAILY, Apr. 9, 2007, <http://www.tcsdaily.com/printArticle.aspx?ID=040407B>.

<sup>42</sup> Adam Thierer, *Moral and Philosophical Aspects of the Debate over A La Carte Regulation*, *Progress Snapshot Release 1.23*, at 3, Dec. 2005, <http://www.pff.org/issues-pubs/ps1.23alacarte.pdf>.

<sup>43</sup> Booz Allen Hamilton Inc., *The a la Carte Paradox: Higher Consumer Costs*

Association (“NCTA”).<sup>44</sup> Given a lack of comprehensive empirical data, Booz Allen was unable to avoid employing an indirect approach and relying “on a number of potentially challengeable assumptions about how households, cable and satellite operators, and program networks would behave.”<sup>45</sup>

The First Report, released in 2004 in response to Congressional requests, concludes that requiring MVPDs to provide programming on an à la carte basis would likely increase the monthly bills of the average subscriber and may decrease the diversity of available programming.<sup>46</sup> When Kevin Martin took over as FCC chairman, he “had many concerns with this report, including the logic and some of the assumptions used,” and he “asked the Media Bureau as well as [the FCC’s] Chief Economist to take a more thorough look at the issue.”<sup>47</sup> This resulted in the Further Report, which “concludes that the earlier report relied on problematic assumptions and presented incorrect and incomplete analysis,”<sup>48</sup> and that “à la carte could be in consumers’ best interests.”<sup>49</sup>

## VI. The FCC’s First Report

The First Report “concludes that à la carte regulation will likely increase operational expenses for MVPDs in three main areas: (1) equipment and infrastructure;<sup>50</sup> (2) customer service operations;

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and Reduced Programming Diversity (Jul. 2004), <http://www.ncta.com/PublicationType/ExpertStudy/572.aspx>.

<sup>44</sup> Charles B. Goldfarb, The FCC’s “à la Carte” Reports (Mar. 30, 2006), available at [http://assets.opencrs.com/rpts/RL33338\\_20060330.pdf](http://assets.opencrs.com/rpts/RL33338_20060330.pdf) [hereinafter The FCC’s “à la Carte” Reports].

<sup>45</sup> *Id.* at 2.

<sup>46</sup> MEDIA BUREAU, FEDERAL COMMUNICATIONS COMMISSION, REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC 6-7 (Nov. 18, 2004), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-254432A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf) [hereinafter FIRST REPORT].

<sup>47</sup> *Statement of Kevin Martin, supra* note 21.

<sup>48</sup> *Id.*

<sup>49</sup> FURTHER REPORT, *supra* note 11, at 3.

<sup>50</sup> “Set-top box expenses would account for 71% to 80% of the increased costs of cable operators.” First Report, *supra* note 46, at 95. But, the cable industry’s longstanding argument—that customers don’t want, and shouldn’t have to pay for, set top boxes—is rapidly losing much of its significance, as cable companies are currently moving to a set top box requirement. For example, in Chicago, RCN will

and (3) billing and back office support.”<sup>51</sup> These “cost increases would be most detrimental to smaller cable operators,” and may thus “have an adverse impact on competition as smaller cable operators would have a difficult time competing with the industry’s primary competitors.”<sup>52</sup> An à la carte system may also decrease advertising revenues while increasing marketing expenses, as networks would then have to “induce consumers to affirmatively select the network.”<sup>53</sup> As program networks fail—“most likely. . . networks serving small niche interests, such as religious programming, programming aimed at minority interests, arts programming and independently owned networks”—the diversity of programming available to consumers would decrease.<sup>54</sup> The First Report also estimates that consumers that purchase nine or more channels “would likely face an increase in their monthly bills.”<sup>55</sup> The average household “would likely face an increase in their monthly bill. . . of between 14% and 30%.”<sup>56</sup>

The First Report also finds that market competition and technological advances may deliver the competition, choice, and control that à la carte advocates desire.<sup>57</sup> The entry of new over-the-air broadcasters and telephone companies into the MVPD market may bring more competition, and result in new programming models.<sup>58</sup> Technological advances, such as “video-on-demand (“VOD”) and digital video recorders (“DVRs”),” are increasing consumer control.<sup>59</sup> Delivery of video over the internet has the

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soon require each television to have a cable box, *see* Frequently Asked Questions for RCN Digital Cable TV, <http://www.rcn.com/digital/faqs.php> (last visited Apr. 16, 2008), and Comcast currently requires a cable box or cable card for most services, Telephone Interview with Comcast Employee, 1-800-COMCAST (April 18, 2008).

<sup>51</sup> FIRST REPORT, *supra* note 46, at 6.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> FIRST REPORT, *supra* note 46, at 6.

<sup>57</sup> *Id.* at 7.

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

<sup>59</sup> *Id.*

potential to lower distribution costs and “make a la carte a reality.”<sup>60</sup> In addition, blocking technology has the potential to “ensure that the public can block any unwanted programming from entering their homes.”<sup>61</sup>

The First Report also briefly addresses concerns about the wholesale acquisition of programming by MVPDs.<sup>62</sup> The current wholesale system involves tying arrangements. MVPDs acquiring rights to a popular network are sometimes contractually obligated to purchase a less attractive network.<sup>63</sup> The Report concludes “that if this practice is anti-competitive and it is causing consumer harm (both of which are currently far from clear and would benefit from further study), the antitrust authorities are best positioned to remedy the situation.”<sup>64</sup>

## VII. The FCC’s Further Report

On the other hand, the Further Report concludes that “many consumers could be better off under an a la carte model.”<sup>65</sup> Specifically, the Report criticizes the First Report’s reliance on the Booz Allen Study, saying: the Study, conducted on behalf of an industry association, was based on unreasonable and unsupported assumptions, and contained errors.<sup>66</sup> The Further Report concludes that once a mistake in the Booz Allen Study’s calculations—including the broadcast basic networks in the cost per channel calculation—is corrected, “consumers could receive as many as 20 channels without seeing an increase in their monthly bills.”<sup>67</sup> Accordingly, a consumer who purchased eleven cable channels would see “a change in his bill ranging from a 13% decrease to a 4% increase, with a decrease in 3 out of 4 cases,” instead of the 14% to 30% bill increase that the First Report predicted.<sup>68</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> FIRST REPORT, *supra* note 46, at 7.

<sup>62</sup> *Id.* at 66.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 7.

<sup>65</sup> FURTHER REPORT, *supra* note 11, at 5.

<sup>66</sup> *Id.* at 6-7.

<sup>67</sup> *Id.* at 10-11.

<sup>68</sup> *Id.* at 9.

The Further Report also questions the Booz Allen Study's assumption that "a shift to a la carte would cause consumers to watch more than 2 hours less television per day," saying: "[t]here is little reason to believe that, given enhanced choice, consumers would watch. . . less than they do today."<sup>69</sup> Without a drop in viewership, "significant decreases in advertising revenues" are unlikely, and advertising rates may actually increase for many popular networks.<sup>70</sup> So consumers who subscribe to only the most popular channels may see substantial savings in their bills from switching to à la carte.<sup>71</sup>

The Further Report also concludes that current bundling practices may keep some potential customers and networks from entering the market. The high price of bundled service may deter some potential customers from subscribing to service,<sup>72</sup> while an à la carte system would allow customers to control the amount of their monthly cable bill.<sup>73</sup> And new networks may find it easier to enter the market because advertisers and MVPDs would be better able to assess the value of smaller networks, which "could demonstrate their popularity with the public through a la carte sales."<sup>74</sup>

The Further Report states that the First Report ignores potential consumer benefits and overstates the implementation costs of à la carte. The Further Report proposes that implementation costs could be greatly reduced "if a la carte were offered only for digital channels."<sup>75</sup> In addition, an à la carte system could provide "diverse programming responsive to consumer demand," where large bundles may prevent consumers "from getting the programming they want."<sup>76</sup>

The Further Report then goes on to detail some options that would provide increased consumer choice in programming while allowing MVPDs to continue to offer their current pre-established bundles if the bundles best meet the individual subscriber's needs.<sup>77</sup> One option is "mixed bundling," which would allow consumers to

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<sup>69</sup> *Id.* at 23.

<sup>70</sup> FURTHER REPORT, *supra* note 11, at 24-25.

<sup>71</sup> *Id.* at 5.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 27.

<sup>75</sup> FURTHER REPORT, *supra* note 11, at 28-30.

<sup>76</sup> *Id.* at 30.

<sup>77</sup> *Id.* at 36-46.

purchase channels on an à la carte basis or as part of a bundle.<sup>78</sup> Another option is “themed tiers,” which would allow consumers to purchase tiers of related programming, such as children’s or sports tiers.<sup>79</sup> A third option is “subscriber-selected tiers,” which would allow customers to have the choice of purchasing smaller packages of channels than are currently offered for a reduced price, with the customer choosing the channels that go into the bundle.<sup>80</sup>

Given the Booz Allen Study’s indirect approach and reliance on assumptions, “neither the Booz Allen study nor the two FCC reports . . . should be viewed as providing definitive results.”<sup>81</sup> Although the Further Report criticizes the First Report, there is also plenty of criticism of the Further Report, and its conclusions that “cannot be proven one way or the other.”<sup>82</sup> There is no doubt a switch to à la carte could have serious implications—negative and positive—for consumers. The question is how regulators and lawmakers should address the issue.

## VIII. The Antitrust Argument Against Channel Bundling

One way to address the à la carte issue under existing laws is to attack the current bundling arrangement under antitrust laws. On September 20, 2007, cable and satellite customers filed a class action antitrust suit in U.S. District Court seeking to end the cable and satellite providers’ practice of bundling channels.<sup>83</sup> The suit, *Brantley v. NBC Universal, Inc.*—which has the endorsement of FCC Chairman, Kevin Martin<sup>84</sup>—alleges the practice, which forces customers to purchase a bundle of channels if they want to receive

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<sup>78</sup> *Id.* at 37-39.

<sup>79</sup> *Id.* at 39-41.

<sup>80</sup> FURTHER REPORT, *supra* note 11, at 42-44.

<sup>81</sup> The FCC’s “a la Carte” Reports, *supra* note 44, at 2-3.

<sup>82</sup> *Id.* at 3.

<sup>83</sup> Press Release, Yahoo Finance, Blecher & Collins, P.C. Announces Consumers File Antitrust Class Action Challenging Media Industry Refusal to Offer “A La Carte” Programming to Cable and Satellite Subscribers (Sep. 20, 2007), <http://biz.yahoo.com/iw/070920/0305229.html> [hereinafter Blecher & Collins]; *Brantley v. NBC Universal, Inc.*, No. 2:07-CV-06101 (C.D. Cal. 2007).

<sup>84</sup> Ted Hearn, *Martin Backs Cable Antitrust Suit*, MULTICHANNEL NEWS, Sep. 25, 2007, <http://www.multichannel.com/article/CA6482791.html>.

any one channel in the bundle, precludes customer choice, in violation of federal antitrust law.<sup>85</sup> Specifically, the suit alleges that the programmers' practice of tying channels, with knowledge that other programmers operate in the same manner, effectively requires that cable and satellite companies buy channels despite low consumer demand.<sup>86</sup> Cable and satellite companies then offer the channels to subscribers in large bundles, driving up the price and depriving the consumers of choice.<sup>87</sup> Therefore, the suit asserts that programmers' tying practices are in violation of Section 1 of the Sherman Act.<sup>88</sup> The suit seeks damages, "and an injunction to eliminate the 'tying' arrangements in the industry and allow consumers to purchase channels on an 'a la carte' basis."<sup>89</sup>

On its face, video programmers' current tying practices, and the resulting large tier system of cable and satellite distribution to customers, look a lot like the situation at issue in *U.S. v. Loew's*.<sup>90</sup> In *Loew's*, the Supreme Court addressed film distributors' practice of bundling together the licensing of feature films in an effort to pressure television stations to purchase the rights to inferior films (the "tied" product) in order to obtain the rights to desirable films (the "tying" product).<sup>91</sup> To get films such as *The Treasure of the Sierra Madre* and *Casablanca*, a local television station had to buy others, such as *Gorilla Man* and *Tear Gas Squad*.<sup>92</sup> Agreeing with the district court's finding—"conditioning the sale of one or more copyrighted feature films to television stations upon the purchase of one or more other films is illegal"—the Court held that the block

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<sup>85</sup> Blecher & Collins, *supra* note 83; *Brantley*, *supra* note 83.

<sup>86</sup> Blecher & Collins, *supra* note 83.

<sup>87</sup> *Id.*

<sup>88</sup> *Brantley*, *supra* note 83; Sherman Act, 15 U.S.C. § 1 (2008) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

<sup>89</sup> Blecher & Collins, *supra* note 83.

<sup>90</sup> See *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), *abrogated by* *Illinois Tool Works Inc. v. Independent Ink.*, 547 U.S. 28 (2006).

<sup>91</sup> *Loew's*, 371 U.S. at 40. "The Product the buyer wants to buy is called the 'tying' product. The product the purchaser is forced to buy in order to acquire the tying product is the 'tied' product." STEPHEN F. ROSS, *PRINCIPLES OF ANTITRUST LAW* 273 (1993) [hereinafter *PRINCIPLES OF ANTITRUST LAW*].

<sup>92</sup> *Loew's*, 371 U.S. at 41-42.

booking practice was a violation of Section 1 of the Sherman Act.<sup>93</sup> The decision was based on a presumption that the required level of economic power was present “when the tying product is patented or copyrighted.”<sup>94</sup> To determine whether cable programmers are also violating antitrust law, it is useful to briefly examine the general framework of antitrust law and the changes in the Court’s approach to tying cases since 1962, when *Loew’s* was decided.

The purpose of federal antitrust law is to preserve competition in the market place and promote consumer welfare. In 1890, Congress enacted the Sherman Act pursuant to its authority to regulate interstate commerce. Section 1 of the Sherman Act prohibits collective action that unreasonably restrains trade. Specifically, liability under Section 1 of the Sherman Act requires: “(1) the existence of a contract, combination, or conspiracy among two or more separate entities that (2) unreasonably restrains trade and (3) affects interstate or foreign commerce.”<sup>95</sup>

#### A. The Existence of a Combination

In the absence of an express contract, combination, or conspiracy, establishing the first requirement requires an inference of agreement. In *Interstate Circuit, Inc. v. United States*, several movie distributors raised rates and limited distribution after an exhibitor requested the restraints in a letter, which made it clear that each of the other distributors was receiving the same letter.<sup>96</sup> The Court held that a price fixing agreement could be inferred from this parallel action.<sup>97</sup> In subsequent cases, however, the Court has established that an allegation of conscious parallel behavior alone is not enough to prove the existence of a conspiracy when the defendants present evidence that they each made their decision independently, based on their own business judgment.<sup>98</sup> Because cable programmers would

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<sup>93</sup> *Id.* at 52.

<sup>94</sup> *Id.* at 45-46 (citing *Int’l Salt Co. v. United States*, 332 U.S. 392 (1947); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948)).

<sup>95</sup> ABA SECTION OF ANTITRUST LAW, I ANTITRUST LAW DEVELOPMENTS 2 (6th ed. 2007) (citing cases) [hereinafter ANTITRUST LAW DEVELOPMENTS].

<sup>96</sup> *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 216-20 (1939).

<sup>97</sup> *Id.* at 226-27.

<sup>98</sup> *See, e.g., Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-66; *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541-42 (1954).



also likely present evidence that they individually reached the conclusion that tying was in their own best interest, proving agreement would require a showing of additional facts and circumstances that “support an inference of concerted action.”<sup>99</sup>

## B. Unreasonable Restraint of Trade

The second requirement, proving that the agreement “unreasonably restrains trade,” may prove even more difficult to establish. An agreement constitutes an unreasonable restraint if it “raises price, reduces output, diminishes quality, limits choice, or creates, maintains, enhances, or preserves market power.”<sup>100</sup> Tying arrangements may potentially have each of these effects on trade, and also deny consumers the freedom of choice.<sup>101</sup>

Tying arrangements occur when the sale of a tying product is conditioned on the purchase of a tied product.<sup>102</sup> The law governing such arrangements has developed to address both economic and non-economic concerns. Many of the decisions that helped shape the Court’s modern approach to tying were based largely on the non-economic concerns. For example, the holding in *International Salt v. United States*<sup>103</sup> is based on the Court’s belief “that one company should not be disadvantaged because it did not also happen to be selling a desirable second product.”<sup>104</sup> Similarly, in *Northern Pacific Railway Co. v. United States*,<sup>105</sup> “the Court expressly objected to the denial of freedom of choice for consumers.”<sup>106</sup>

The Court’s analytical approach to tying arrangements has evolved over the years. In early cases the Supreme Court expressed the view that such arrangements were, in their very nature, unreasonable restraints—saying tying arrangements “serve hardly

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<sup>99</sup> See ANTITRUST LAW DEVELOPMENTS, *supra* note 95, at 11 (citing cases).

<sup>100</sup> *Id.* at 47 (citing cases).

<sup>101</sup> See PRINCIPLES OF ANTITRUST LAW, *supra* note 91, at 277-84.

<sup>102</sup> *Id.* at 273.

<sup>103</sup> *Int’l Salt Co. v. United States*, 332 U.S. 392 (1947), *abrogated by Ill. Tool Works*, 547 U.S. 28 (2006).

<sup>104</sup> See PRINCIPLES OF ANTITRUST LAW, *supra* note 91, at 278.

<sup>105</sup> *N. Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958).

<sup>106</sup> See PRINCIPLES OF ANTITRUST LAW, *supra* note 91, at 279.

any purpose beyond the suppression of competition.”<sup>107</sup> More recently, in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, which involved a tying arrangement for anesthesiological and surgical services, the Supreme Court said a tying arrangement is per se invalid if the seller exploits “its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.”<sup>108</sup> If a plaintiff is unable to demonstrate that a tying arrangement is a per se violation under this standard, the arrangement may still be unlawful under the rule of reason.

### C. Per Se Violations

Under the per se analysis applied in *Jefferson Parrish*, condemnation may be appropriate, with no actual showing of anticompetitive effects required, if the plaintiff demonstrates the presence of several elements.<sup>109</sup> First, for a tying arrangement to occur, two separate products or services must be involved.<sup>110</sup> In *Jefferson Parish*, the Court rejected the hospital’s argument that anesthesiology and surgical services should be considered one product because they were “a functionally integrated package of services.”<sup>111</sup> The Court noted that a prohibited tying arrangement may be present even when a functionally linked product would be useless without the other.<sup>112</sup> Under the reasoning of *Jefferson Parish*, even if the delivery of cable to consumers is arguably a single service, a court may reasonably find that the sale of programming to MPVDs involves the sale of separate products. The second element, the refusal to sell the product or service separately,<sup>113</sup> is present in both the wholesale and retail cable markets. The presence of the third element, market power sufficient to give the seller the ability to

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<sup>107</sup> *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 305-306 (1949).

<sup>108</sup> *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984), abrogated by *Ill. Tool Works*, 547 U.S. 28).

<sup>109</sup> *Jefferson Parish*, 466 U.S. at 15-16.

<sup>110</sup> *Id.* at 21-22.

<sup>111</sup> *Id.* at 18-19.

<sup>112</sup> *Id.* at 21 n.30 (citing cases).

<sup>113</sup> *Id.* at 11.

force the buyer to buy the tied product,<sup>114</sup> will likely be vigorously contested by programmers.

In *Jefferson Parish*, the Supreme Court said that sufficient market power for per se liability may be present “when the seller’s share of the market is high, or when the seller offers a unique product that competitors are not able to offer.”<sup>115</sup> The Court found that because “[s]eventy percent of the patients residing in Jefferson Parish enter hospitals other than East Jefferson,” the hospital did not have “the kind of market power that justifies [per se] condemnation of tying.”<sup>116</sup> Since *Jefferson Parish* was decided, “no court has inferred the requisite market power from a market share below 30 percent.”<sup>117</sup> As applied to cable programming, if the market for cable programming is national or international, any individual programmer’s market share would likely be insufficient. For example, even Viacom, one of the largest programmers, argues that no individual broadcast network has market power sufficient to coerce acceptance of a tied product.<sup>118</sup> If, however, a plaintiff can successfully prove that the programmers are working together, the collective market share controlled by defendants may be high enough to demonstrate market power sufficient to give the sellers the ability to force the buyers to the tied products.

The importance of the market power element was recently made clear in *Illinois Tool Works v. Independent Ink, Inc.*, where the Court held that proof of the defendant’s market power in the tying product is required “in all cases involving a tying arrangement.”<sup>119</sup> In *Illinois Tool*, the Court noted that Congress’ amendments to the Patent Code since *Jefferson Parish* have made clear that a finding of market power cannot be presumed because of the mere existence of a patent.<sup>120</sup>

Even if no sufficient showing of market share is made, the plaintiff may still demonstrate market power by proving the seller’s

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<sup>114</sup> *Jefferson Parish*, 466 U.S. at 13-14.

<sup>115</sup> *Id.* at 17.

<sup>116</sup> *Id.* at 26-27.

<sup>117</sup> ANTITRUST LAW DEVELOPMENTS, *supra* note 95, at 192 (citing cases).

<sup>118</sup> FIRST REPORT, *supra* note 46, at 72 (citing *Viacom Reply Comments*, at 13).

<sup>119</sup> *Ill. Tool Works*, 547 U.S. at 46.

<sup>120</sup> *See id.* at 41-43.

product is unique.<sup>121</sup> Exactly what constitutes sufficient proof of “uniqueness,” however, has not been established by the Supreme Court and the lower courts are still divided.<sup>122</sup>

However, courts have been increasingly hesitant to find a per se violation in tying cases. For example, the Court of Appeals refused to apply the per se rule against tying to the facts in *U.S. v. Microsoft Corp.*<sup>123</sup>—which may have been a signal of “judicial skepticism about the per se tying rule.”<sup>124</sup> Also, *Illinois Tool* strongly suggests that tying is no longer a per se violation of antitrust law, and such arrangements should be analyzed under the rule of reason.<sup>125</sup>

#### D. Rule of Reason

Although it is questionable whether the cable industry’s tying practices would meet all of the requirements of a per se violation, the arrangement may still be unlawful under the rule of reason. The rule of reason analysis requires an examination of the actual effect of the tying arrangement on the market of the tied product.<sup>126</sup> Theoretically, a tying arrangement may be prohibited under the rule of reason even if the plaintiff cannot show that the defendant has sufficient market power.<sup>127</sup> Most courts, however, require a showing of market power in the tying product market.<sup>128</sup> And a strict reading of the court’s holding in *Illinois Tool*, that “in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product,”<sup>129</sup> indicates that market power is a necessary element, even under the rule of reason. The threshold for

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<sup>121</sup> *Jefferson Parish*, 466 U.S. at 17.

<sup>122</sup> ANTITRUST LAW DEVELOPMENTS, *supra* note 95, at 196-98.

<sup>123</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 89-95 (C.A.D.C., 2001).

<sup>124</sup> A. Douglas Melamed & Daniel L. Rubinfeld, *U.S. v. Microsoft: Lessons Learned and Issues Raised*, in ANTITRUST STORIES 287, 309 (Eleanor M. Fox & Daniel A. Crane ed., 2007).

<sup>125</sup> See Jonathan M. Jacobson, Tying: Antitrust Law and Policy, Mar. 2007, <http://www.wsgr.com/publications/PDFSearch/jacobson0307.pdf>.

<sup>126</sup> *Jefferson Parish*, 466 U.S. at 29.

<sup>127</sup> See, e.g., *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 482-85 (3d Cir. 1992).

<sup>128</sup> See ANTITRUST LAW DEVELOPMENTS, *supra* note 95, at 205 (citing cases).

<sup>129</sup> *Illinois Tool*, 547 U.S. at 46.

market power, however, may not be as high under the rule of reason analysis, and the Court may be willing to consider the cumulative effect of the widespread use of similar practices by other companies in the same market.<sup>130</sup>

If plaintiffs are able to demonstrate sufficient market power for rule of reason analysis, they will still have a substantial burden to overcome. Plaintiffs would then need to show that the tying practice caused actual adverse effects on market competition.<sup>131</sup> In *Microsoft*, to show that a practice was a tying violation, the court directed plaintiffs to demonstrate “that Microsoft’s conduct was, on balance, anticompetitive.”<sup>132</sup> And if Microsoft offered procompetitive justifications, it would be the “plaintiffs’ burden to show that the anticompetitive effect of the conduct outweighs its benefit.”<sup>133</sup> As discussed above, the effects of the cable industry’s bundling practices are disputed. Cable programmers contend that bundling has benefits—keeping prices low, and diversity high. It will be the plaintiffs’ burden to show either that these are not actual benefits of bundling or that they are “outweighed by the harms in the tied product market.”<sup>134</sup>

### E. Affects Commerce

The last requirement, proving that the restraint “affects interstate or foreign commerce,” will be much easier to establish. In the case of cable programming, the impact on interstate commerce is evident because of the inherently commercial and interstate nature of the wholesale of video programming.

### F. Antitrust Conclusions

Because *Illinois Tool* effectively overruled the holding in *Loew’s*—that market power could be presumed—the surface resemblance of cable bundling to the facts in *Loew’s* does not

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<sup>130</sup> See *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394-95 (1953) (in determining the effect of a theatre advertiser’s exclusive dealing contracts the Supreme Court considered the effect of the use of similar practices by three other firms in the same industry).

<sup>131</sup> ANTITRUST LAW DEVELOPMENTS, *supra* note 95, at 204-05.

<sup>132</sup> *Microsoft*, 253 F.3d at 95.

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

<sup>134</sup> See *id.* at 96 (citing *Jefferson Parish*, 466 U.S. at 29).

necessarily mean that cable programmers are in violation of antitrust law.<sup>135</sup> Although proving the required market power would be difficult, plaintiffs in an antitrust suit against cable programmers, such as the *Brantley* case, may be able to demonstrate the elements of a per se violation of the Sherman Act. A court, however, may be hesitant to apply per se analysis to a tying arrangement. If the rule of reason analysis is applied instead, the plaintiffs will have an extremely difficult time proving that the harms of cable bundling outweigh the benefits with the data that is currently available.

## IX. The First Amendment Argument Against À La Carte

Regardless of the particular outcome in the *Brantley* case currently pending in federal court, or any other case against cable programmers, the à la carte debate will likely continue. Even if the current large bundle system does not violate antitrust laws, there is nothing to prevent Congress from passing legislation which changes the way video programming is sold. Or is there? Some have argued that a law which forces programmers or MVPDs to offer channels on an à la carte or themed-tier basis would violate the First Amendment rights of cable operators.

Cable operators and program networks contend that the decision of which channels to bundle together is an exercise of “editorial discretion,” and is thus protected by the First Amendment.<sup>136</sup> In a report commissioned by NCTA, Geoffrey R. Stone and David A. Strauss present the argument that “both the à la carte and themed-tier requirements would violate the First Amendment.”<sup>137</sup> They argue that the proposed à la carte requirement does not survive the applicable “intermediate” level of scrutiny.<sup>138</sup> They further contend that the proposed themed-tier requirement is

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<sup>135</sup> See ANTITRUST LAW DEVELOPMENTS, *supra* note 95, at 191 n.1098.

<sup>136</sup> See FIRST REPORT, *supra* note 46, at 33-36.

<sup>137</sup> Geoffrey R. Stone & David A. Strauss, The First Amendment Implications of Government-Imposed A La Carte and Themed-Tier Requirements on Cable Operators and Program Networks 3 (Nat’l Cable & Telecomm. Ass’n Expert Study, Jul. 1, 2004), <http://www.ncta.com/PublicationType/RegulatoryFiling/2883.aspx?hidenavlink=true&type=lpubtp5> [hereinafter Stone & Strauss].

<sup>138</sup> *Id.* at 3-4.

even more problematic, as it is a content-based restriction and would thus be subject to strict scrutiny.<sup>139</sup>

Cable industry representatives argue that regulation that would require themed tiers would amount to a content-based restriction of cable television.<sup>140</sup> Assuming “the government would play a role in specifying the criteria that determine the definition of such tiers,” Stone and Strauss agree that a themed-tier requirement would indeed be “content-based.”<sup>141</sup> Such content-based speech restrictions—“enacted for the purpose of restraining speech on the basis of its content”<sup>142</sup>—are evaluated using “strict scrutiny.”<sup>143</sup>

Under strict scrutiny analysis the government has the burden of proving that the restriction is necessary to serve a compelling governmental interest.<sup>144</sup> If the governmental interest is to allow consumers to avoid paying for channels they do not want, a less restrictive regulation—one that does not discriminate based on content, such as à la carte—would likely achieve that goal. If the governmental interest is to “enable some subscribers to avoid channels containing content they find distasteful,”<sup>145</sup> the restriction would likely violate the First Amendment because when “the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists.”<sup>146</sup> Rather than rely on government restrictions, cable subscribers would be “expected to protect [their] own sensibilities ‘simply by averting [their] eyes.’”<sup>147</sup>

If, however, the government played no role in determining the content of the themed tiers, the regulation would likely be content-

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<sup>139</sup> *Id.* at 16-17.

<sup>140</sup> FIRST REPORT, *supra* note 46, at 35.

<sup>141</sup> Stone & Strauss, *supra* note 137, at 16.

<sup>142</sup> *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986).

<sup>143</sup> *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (citing *Sable Commc'n of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

<sup>144</sup> *See Sable Commc'ns*, 492 U.S. at 126.

<sup>145</sup> Stone & Strauss, *supra* note 137, at 16.

<sup>146</sup> *Playboy*, 529 U.S. at 813.

<sup>147</sup> *Id.* (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971); *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-211 (1975)).

neutral, and thus not subject to strict scrutiny.<sup>148</sup> Accordingly, such non-government defined tiers would be evaluated using the same analysis as would likely apply to the à la carte requirement.

Applying that analysis, Stone and Strauss contend that cable operators' "decisions about which programs to make available, and how best to package them,"<sup>149</sup> are analogous to "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."<sup>150</sup> Case law supports this analogy. In First Amendment cases involving cable, the Supreme Court has "noted that cable operators exercise 'a significant amount of editorial discretion regarding what their programming will include.'"<sup>151</sup>

In determining whether the regulation of the editorial process required by à la carte regulation would violate the First Amendment, Stone and Strauss draw comparisons to the must-carry provisions previously upheld by a plurality in the *Turner* decisions.<sup>152</sup> In *Turner I*, the Court held that must-carry provisions were content-neutral restrictions and thus should be evaluated using the intermediate level of scrutiny.<sup>153</sup> But the Court remanded the case for a determination of "the extent to which the must-carry provisions in fact interfere with protected speech," so that the Court could determine "whether they suppress 'substantially more speech than . . . necessary' to ensure the viability of broadcast television."<sup>154</sup> In *Turner II*, four Justices reaffirmed the important government interests served by the must-carry provisions: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread

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<sup>148</sup> *Playtime Theatres*, 475 U.S. at 47.

<sup>149</sup> Stone & Strauss, *supra* note 137, at 2 (citing *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974)).

<sup>150</sup> *Miami Herald*, 418 U.S. at 258.

<sup>151</sup> *City of Los Angeles v. Preferred Commc'n, Inc.*, 476 U.S. 488, 494 (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979)).

<sup>152</sup> Stone & Strauss, *supra* note 137, at 4-16; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) [hereinafter *Turner I*]; *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) [hereinafter *Turner II*].

<sup>153</sup> *Turner I*, 512 U.S. at 661-62.

<sup>154</sup> *Id.* at 668 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).



dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.”<sup>155</sup> Although Stone and Strauss address the first two interests—concluding that an à la carte requirement would not further either purpose—they do not address the third because it was the basis for the decision of only four Justices.<sup>156</sup>

With regard to the third interest, the principal opinion in *Turner II* states that “it is undisputed [that] the Government has an interest in ‘eliminating restraints on fair competition . . . , even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment.’”<sup>157</sup> In his concurring opinion, however, Justice Breyer states that his conclusion does not rest “upon the principal opinion’s analysis of the statute’s efforts to ‘promot[e] fair competition.’”<sup>158</sup> The opinions of Justice Breyer along with Justice O’Connor, joined in dissent by Justices Scalia, Thomas, and Ginsburg, do agree that “promoting fair competition is a legitimate and substantial Governmental goal.”<sup>159</sup> These five Justices, however, did not find that the must-carry provisions at issue were narrowly tailored to address anticompetitive behavior.<sup>160</sup>

In light of changes in the Court since the *Turner* decision, and the lack of a majority decision that must-carry provisions were justified by the government’s interest in competition, the outcome of a First Amendment case involving an à la carte regulation is far from clear. The question would likely be whether Congress could reasonably conclude that the practice of bundling networks poses a real threat to market competition. The outcome would depend on the evidence before Congress. As discussed above, the debate is currently ongoing and the reports are inconclusive as to what impact

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<sup>155</sup> *Turner II*, 520 U.S. 180, at 189 (stating that “must-carry was designed to serve ‘three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.’” *Id.* (quoting *Turner I*, 512 U.S. at 662). “We decided then, and now reaffirm, that each of those is an important governmental interest.” *Id.*).

<sup>156</sup> Stone & Strauss, *supra* note 137, at 5-6.

<sup>157</sup> *Turner II*, 520 U.S. at 190 (quoting *Turner I*, 512 U.S. at 664).

<sup>158</sup> *Id.* at 225-26 (Breyer, J., concurring).

<sup>159</sup> *Id.* at 232 (O’Connor, J., dissenting); *id.* at 226 (Breyer, J., concurring).

<sup>160</sup> *Id.* at 229 (Breyer, J., concurring); *id.* at 233 (O’Connor, J., dissenting).

à la carte, or some alternative system, would have on competition in the wholesale and retail cable markets.

## X. Conclusion

The desire to change to an à la carte system for video programming will likely continue so long as subscribers feel they are paying too much and receiving too many channels they do not watch. Neither side in the ongoing debate will be content with the opposite extreme—pure bundling or pure à la carte. Although there are alternatives to the two extremes, nothing has emerged as a viable compromise. Regulators and lawmakers will have difficulty establishing a workable compromise without definitive data on the potential impact of a change in the cable and satellite distribution system on price, diversity and choice. Without more conclusive findings, it is unlikely the antitrust laws will invalidate the current large bundle system. And if lawmakers do decide to mandate a change, the potential First Amendment implications are unclear.

Nevertheless, evolving technology may eventually produce a change. New alternatives to cable and satellite may lead to an increase in competition and a resulting increase in choice and decrease in prices. Additionally, the internet is currently offering an alternative to networks unable to find a place in the current large tier system.<sup>161</sup> If lawmakers do decide to implement a mandated à la carte system, and it survives the inevitable Constitutional challenges, niche networks that do not survive the competition for subscribers and advertising may find a home on the internet.

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<sup>161</sup> See Bobby White, *TV Channels Move to Web, Think Outside the Cable Box*, WALL ST. J., Eastern Ed., Aug. 10, 2007, at B1.