U.S., Eh? Contrasting the Feasibility of À La Carte Television in Canada and the United States

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I. Introduction - The Issue - The Audience Is (Not) Listening

The increase in competition from subscription video on demand (SVOD) outlets such as Netflix and Hulu, when combined with consistently higher cable bills, has left the current television system antiquated. Consumers continue to fragment the television market by choosing to view content on second screens,[1] including smartphones, tablets and Internet streaming sites.[2] As consumers find substitutes to view content, the consequences for advertisers, who account for nearly half of network revenues, are far-reaching.[3] Although advertising expenses, or adspend, over conventional television is still expected to increase in the next five years, online television revenues are projected to grow at significantly greater levels.[4] In 2012, television advertising grew 4.3%,[5] totaling 57.6%

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1. *See Action Figures: How Second Screens Are Transforming Television Viewing.* NIELSEN NEWSWIRE (June 17, 2013), http://www.nielsen.com/us/en/insights/news/2013/action-figures--how-second-screens-are-transforming-tv-viewing.html.

2. *Id.*

3. *See Global Media and Entertainment Outlook 2015-2019: Television Subscriptions and License Fees*, PWC GLOBAL, http://www.pwc.com/gx/en/global-entertainment-media-outlook/segment-insights/tv-subs-license-fees.jhtml (last visited Nov. 22, 2015).

4. *See Global Media and Entertainment Outlook 2015-2019: Television Advertising*, PWC GLOBAL, http://www.pwc.com/gx/en/global-entertainment-media-outlook/segment-insights/tv-advertising.jhtml (last visited Nov. 22, 2015) [hereinafter *PWC Advertising Outlook*].

5. *See The Small Screen Captured Big Ad Revenue in 2012*, NIELSEN NEWSWIRE (Apr. 18, 2013), http://www.nielsen.com/us/en/newswire/2013/the-small-screen-captured-big-ad-revenue-in-2012.html [hereinafter *Nielson - Small Screen Captured*].

of all adspend;[6] however, online advertising increased by 9.9%,[7] which represents the largest categorical increase amongst all media. The majority of the increase in television adspend can be attributed to the traditional, major, free-to-air terrestrial networks,[8] many of which are classified within a basic tier that cable providers require consumers to purchase in order to gain access to more niche specialty channels.[9]

Although ratings across multiple platforms were harmonized in September 2014 to better reflect how content is being received,[10] the issue facing broadcasters is clear: while consumers may not be cutting the cord, they are no longer watching television programs on a set schedule. Statistics prove that consumers of entertainment content have changed their viewing preferences and are slowly trickling away from conventional television, as every demographic has experienced a decrease in television viewing over the past four years.[11] Yet at the same time, television consumption has remained relatively stable.[12] With viewers choosing to interact with content through second screens and SVOD services,[13] cable providers must better incentivize viewers to tune in over the airwaves through lower cost options and increased choice. A potential solution lies in a hybrid à la carte television system, which would be comprised of a basic tier subscription alongside the option to purchase additional individual channels.

This essay will first address the current landscape of à la carte television and argue that unbundling is necessary for the television market. Next, the paper will address the hybrid à la carte model in Canada, which

6. *See* Kristin Brzoznowski, *Nielsen: Television Maintains Dominance as Ad Medium in Q2 2013*, WORLDSCREEN (Oct. 22, 2013), http://www.worldscreen.com/articles/display/2013-10-22-nielsen-globaladviewpulse.

7. *Id.*

8. *See PWC Advertising Outlook, supra* note 4.

9. *See Consumer Options for Selecting Cable Channels and the Tier-Buy-Through Prohibition*, F.C.C. GUIDE (Aug. 15, 2013), http://www.fcc.gov/guides/consumer-options-selecting-cable-channels-and-tier-buy-through-prohibition.

10. *See* Todd Spangler, *Nielsen to Add Mobile Device Viewing to TV Ratings in Fall 2014*, VARIETY (Sept. 19, 2013, 12:42 PM), http://variety.com/2013/television/news/nielsen-to-add-mobile-device-viewing-to-television-ratings-in-fall-2014-1200649185/.

11. *See* Marketing Charts, *Are Young People Watching Less TV?*, MARKETING CHARTS (Sept. 29, 2015), http://www.marketingcharts.com/television/are-young-people-watching-less-tv-24817.

12. *See* Mediabug, *SVoD Services Not Eroding Pay-TV*, ADVANCED TELEVISION (Oct. 17, 2013), http://advanced-television.com/2013/10/17/svod-services-not-eroding-pay-tv/.

13. *See* Tai Nichols, *Mobile Viewership Trends Revealed in Ericsson Consumer Lab's Report*, VIA SATELLITE (Aug. 20, 2013), http://www.satellitetoday.com/publications/2013/08/30/mobile-viewership-trends-revealed-in-ericsson-consumerlabs-report.

was initially brought on by the Canadian Radio Television and Telecommunications Commission (CRTC)-Bell Media decision in 2012. This paper will then critique diverging stakeholder groups' (viewers, associations, networks, distributors) stances on à la carte and examine the issues with the current American system, including prospective (the 2013 Television Consumer Freedom Act) and existing, outdated legislation (1992 Cable Act).

Part I - The Current Landscape of À La Carte Television

À la carte television is defined as video programming for wholesale or retail purchase on an individual, per-channel basis rather than as part of a package or tier of video programming.[14] The general policy behind à la carte is to provide consumers with more choice and flexibility alongside the opportunity to pay only for the services that consumers want to watch.[15] Currently, only premium channels (HBO, Cinemax) as well as Pay-Per-View programming are available to American consumers à la carte.[16] Beyond these offerings, American cable television operators are not required to sell any channels individually and are given considerable deference in deciding how programming is packaged to consumers.[17]

1. Packaging and the Case For Unbundling

Under the current American packaging model, cable and satellite distributors ensure their profitability by passing on fees to consumers that are initially imposed by content providers.[18] By doing so, the cable provider is then able to capture a significant surplus over what consumers would be willing to pay under a more competitive à la carte system. A consumer is required to purchase a large and unwieldy bundle of channels in order to view a particular network.[19] Ultimately, forced bundling combined with the higher costs of programming is not a model consumers

14. *See* Television Consumer Freedom Act of 2013, S. 912, 113th Cong. (2013), http://beta.congress.gov/113/bills/s912/BILLS-113s912is.pdf.

15. *See ARCHIVED – Transcript, Hearing 22 March 2012*, CANADIAN RADIO-TELEVISION & TELECOMMS. COMM'N, http://www.crtc.gc.ca/eng/transcripts/2012/tb0322.html (last visited Nov. 21, 2015) [hereinafter *CRTC Transcript*].

16. *See* F.C.C., CONSUMER GUIDE: CHOOSING CABLE CHANNELS (Nov. 3, 2015), http://transition.fcc.gov/cgb/consumerfacts/cablechannels.pdf.

17. *Id.* at 1.

18. *See* Ken Belson, *F.C.C. Sees Cable Savings in À la carte*, N.Y. TIMES (Feb. 10, 2006), http://www.nytimes.com/2006/02/10/business/media/10cable.html?_r=0.

19. *See* Warren Grimes, *The Distribution of Pay Television in the United States: Let An Unshackled Marketplace Decide*, 5 J. INT'L MEDIA & ENT. LAW 1, 6 (2013).

can continue to support.[20] As a result, the American television market is not priced or marketed efficiently.[21]

Consumer loyalty to a specific channel suggests a willingness to pay a higher price if that channel were offered à la carte while enjoying an opportunity to save by choosing fewer channels.[22] Similarly, there is evidence that unbundling an entertainment service would create value for customers in the form of more choice while still ensuring profitability for distributors. The iTunes approach, where users can buy individual sound recordings or albums, not only reflects a free market, but also has made Apple the largest music retailer in the United States.[23]

Without à la carte options, consumers are overcharged for excess channels they do not watch.[24] On average, consumers are charged for over 100 channels but watch an average of just 17.[25] Furthermore, with cable prices increasing by 6% annually from 1995-2011,[26] consumers are increasingly choosing to supplement their subscriptions with SVOD services rather than pay for bundles.[27] As these SVOD platforms have become more prevalent, consumers in turn place a lower perceived value on traditional television packages.[28]

Cable providers are forced to purchase unpopular networks in order to gain the right to carry more popular ones.[29] Therefore, bundling practices

20. *Id.* at 9; *see also* Joe Flint, *Legal Battle between Cablevision and Viacom Could Rattle TV Business*, L.A. TIMES (Feb. 27, 2013), http://articles.latimes.com/2013/feb/27/business/la-fi-ct-cable-lawsuit-20130227 (Cablevision's suit accuses Viacom of anti-competitive behavior that forces cable companies to pay for low-rated networks in return for access to its popular channels, costs which are transferred to consumers).

21. *See* Flint, *supra* note 20.

22. *See* Grimes, *supra* note 19, at 7.

23. *See* Alex Pham, *iTunes Crosses 25 Billion Songs Sold, Now Sells 21 Million Songs a Day*, BILLBOARD, (Feb. 6, 2013, 7:47 PM), http://www.billboard.com/biz/articles/news/1538108/itunes-crosses-25-billion-songs-sold-now-sells-21-million-songs-a-day.

24. *See* Grimes, supra note 19, at 8.

25. *See* David Lazarus, *Let's Pay Only For the TV We Watch,* L.A. TIMES (Nov. 12, 2008), http://articles.latimes.com/2008/nov/12/business/fi-lazarus12.

26. *See* Karl Bode, *FCC Study Shocker: Cable Rates Keep Rising Much Faster Than Consumer Price Index (CPI), Inflation*, DSLREPORTS (Aug. 15, 2012, 8:43 AM), http://www.dslreports.com/shownews/FCC-Study-Shocker-Cable-Rates-Keep-Rising-120772.

27. *See* PWC, CONSUMER INTELLIGENCE SERIES - VIDEO CONTENT CONSUMPTION 14 (2013), http://www.pwc.com/us/en/industry/entertainment-media/publications/consumer-intelligence-series/assets/pwc-consumer-intelligence-series-product-services-innovation.pdf [hereinafter *PWC Consumer Report*].

28. *Id.*

29. *See* Alex Sherman, *Bundled Cable TV Withstands Consumer Opposition,* BLOOMBERGBUS., (Nov. 14, 2013), http://www.businessweek.com/articles/2013-11-14/2014-outlook-cable-bundling-and-higher-bills-wont-stop-soon [hereinafter *Sherman 2014 Outlook*].

hurt both consumers and cable providers, as content providers hold considerable leverage over packages. Under an à la carte model, one FCC study predicts that consumers could save as much as 13% on their cable bills,[30] though other sources suggest that these savings may be considerably higher.[31] Specifically, Grimes notes that by using Canadian rates as a benchmark, American consumers are overcharged by $342 per year per viewer, giving cable providers and networks $34 billion dollars in excess revenue by virtue of forced bundling practices.[32]

i. Bundles and Tying - Potential American Antitrust Violations

Bundling practices where a supplier agrees to sell a buyer a product on the condition that a buyer purchase a different product is commonly referred to as tying.[33] Bundled selling, which is a form of tying, allows a cable provider to capture consumer surplus,[34] or the difference between the actual price charged and hypothetical prices under competitive conditions.[35] Bundling beyond the basic tier under a hybrid à la carte system fails to protect the consumer because consumers are forced to purchase multiple channels in order to gain access to the one or ones they desire.[36] Overall, tying popular programming with less popular options allows programmers to leverage channel position as a condition for carriage.[37]

In *Brantley v. NBC Universal*,[38] a class of cable and satellite subscribers unsuccessfully filed suit to compel programmers to sell channels à la carte.[39] While the court ruled for the defendants on summary judgment, [40] the plaintiffs argued that networks are unfairly exploiting its market power vis-à-vis cable providers in forcing them to purchase all channels owned by a particular broadcaster.[41] Still, the Ninth Circuit held

30. *See* Belson, *supra* note 18.

31. *See* Grimes, *supra* note 19, at 16-17.

32. *Id.* at 16.

33. Brantley v. NBC Universal, Inc., 675 F. 3d 1192, 1199 (9th Cir. 2012).

34. *See* Grimes, *supra* note 19, at 7.

35. *Id.* at 7.

36. *See* Edward F. Gehringer, *US v. Microsoft: Antitrust - What's the Big Deal?*, ETHICS IN COMPUTING, at ¶ 1, http://ethics.csc.ncsu.edu/commerce/anticompetitive/dominance/microsoft/study.php (last visited Nov. 23, 2015).

37. *See* Ira Teinowitz, *MPAA Comes Out Against Cable À la carte on Wholesale Level*, TVWEEK (Sept. 10, 2008), http://www.tvweek.com/news/2008/09/mpaa_comes_out_against_cable_a.php.

38. *See Brantley*, 675 F. 3d at 1192.

39. *Id.* at 1195.

40. *Id.*

41. *Id.*

that bundling is permissible under antitrust law, despite being inefficient for consumers as Internet content providers increase its reach.[42] The legality of bundling and antitrust issues was litigated in *Cablevision v. Viacom* in the Southern District of New York starting in 2012,[43] eventually reaching an out-of-court settlement prior to its resolution in late 2015.[44]

Overall, the leverage that vertically integrated cable providers and networks have over consumers has led to an inefficient marketplace, one that can be remedied through à la carte offerings of specialty channels. While the United States continues to debate à la carte legislation, Canada has been a worldwide leader in adopting a hybrid à la carte system, starting with the CRTC-Bell Media decision in 2012.[45] The Canadian television market, when compared to its American counterpart, seems to better integrate concerns from each of the various stakeholder groups (consumers, associations, networks and cable providers) in implementing a hybrid à la carte system and has enjoyed a brief, but sustainable success.

II. THE CANADIAN MODEL

1. The Canadian Television Market - Consumers and Networks

The pervasive influence of television in Canada is well documented, as the medium currently has a higher reach than newspapers, radio, magazines or the Internet, with 83% of Canadians viewing some form of programming daily.[46] Many of the top programs on Canadian airwaves are American shows, so the two markets have many similarities.[47]

42. *Id.* at 1201.

43. *See* Jonathan Stempel, *Viacom Loses Bid to Dismiss Cablevision Bundling Lawsuit*, REUTERS (June 20, 2014), http://www.reuters.com/article/2014/06/20/us-viacom-cablevision-idUSKBN0EV2FR20140620.

44. *See* Kristin Brzoznowski, *Cablevision & Viacom Settle Channel-Bundling Lawsuit*, WORLDSCREEN (Oct. 19, 2015), http://worldscreen.com/articles/display/53172.

45. *See* CANADIAN RADIO-TELEVISION & TELECOMMS. COMM'N (CRTC), BROADCASTING DECISION CRTC 2012-208, Request for Dispute Resolution by the Canadian Independent Distributors Group Relating to the Distribution of Specialty Television Services Controlled by Bell Media Inc. (Apr. 5, 2012), http://www.crtc.gc.ca/eng/archive/2012/2012-208.htm [hereinafter *CRTC 2012-208*].

46. *See Bell Offering À la Carte Television in Quebec*, CBC NEWS: TECH. & SCI. (Feb. 12, 2010), http://www.cbc.ca/news/technology/bell-offering-à-la-carte-television-in-quebec-1.887385.

47. *Id.* By age 11, Canadian children spend more time watching American shows than in school.

There are approximately 14.5 million households[48] in the Canadian market[49] watching 28.2 hours of programming on average each week[50] and paying $53.56/month for cable or satellite television services.[51] Additionally, as of 2013, 1 in every 3 Canadians viewed some form of Internet television,[52] with users watching 2.8 hours of content per week online via streaming or digital download.[53] Comparatively, as of 2011, every American demographic above the age of 34 watched in excess of 30 hours of television each week,[54] with the younger demographics slightly below the Canadian national average.

Under an à la carte system, a profitable network will have to increase per channel subscriber revenues to offset a potential decline in consumers.[55] So long as specialty networks can increase or maintain their subscriber base, the much larger American market, with ten times the number of households[56] and higher cable spending per capita at approximately $200/month,[57] has the potential to be lucrative for a number of specialty channels. As proof, there are less than nine million Canadian households subscribing to some form of both basic cable and specialty stations,[58] but since hybrid à la carte was adopted in Canada, cable companies have

48. "Households" refers to the number of homes in Canada who engage in some form of television viewership.

49. *See* TELEVISION BUREAU CANADA, TV BASICS 2012-2013, at 13, http://www.tvb.ca/page_files/pdf/InfoCentre/TVBasics2012-2013.pdf (last visited Nov. 23, 2015) [hereinafter *TV Basics 2012-2013*].

50. *See CRTC Issues Annual Report on the State of the Canadian Communication System*, CANADIAN RADIO-TELEVISION & TELECOMMS. COMM'N (CRTC) (Sept. 26, 2013), http://www.crtc.gc.ca/eng/com100/2013/r130926.htm.

51. *See* Pete Evans, *CRTC Report Shows Cost of Cable, Telecom Services Increasing*, CBC NEWS: BUS. (Oct. 16, 2014), http://www.cbc.ca/news/business/crtc-report-shows-cost-of-cable-telecom-services-increasing-1.2800960.

52. *Id.*; *see also* CANADIAN RADIO-TELEVISION & TELECOMMS. COMM'N (CRTC), COMMUNICATIONS MONITORING REPORT: SEPTEMBER 2012, UPDATE TO CRTC COMMUNICATION MONITORING REPORT (Sept. 5, 2012), http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2012/cmr.htm.

53. *See id.* at iv.

54. *See The Cross Platform Report Q1 2011: Table 1. A Week In The Life - Weekly Time Spent in Hours: Minutes - By Age Demographic*, NIELSEN: CROSS-PLATFORM REP. 5 (2011), http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2011-Reports/Nielsen-cross-platform-report-Q1-2011-reissued.pdf.

55. *See* Grimes, *supra* note 19, at 13, 15.

56. *See TV Basics 2012-2013*, *supra* note 49, at 13.

57. *Id.*

58. *See CRTC – Financial Summary – Broadcast Distribution (All Services)*, CANADIAN RADIO-TELEVISION & TELECOMMS. COMM'N (CRTC) (Apr. 9, 2013). http://www.crtc.gc.ca/eng/publications/reports/BrAnalysis/dist2012/bdu01.htm.

reported a modest growth in revenues and subscribers.[59] Given the similarities in viewing patterns between the two countries,[60] American content providers as well as distributors should be able to survive and thrive in the same or similar manner to their Canadian counterparts.

2. The Canadian Cable Distributors

The Canadian cable and satellite distribution market is dominated by a small number of service providers: Rogers Communications, Bell Media/BCE, Shaw, Cogeco, and Quebecor Media/Vidéotron. In 2011, these five companies accounted for 83% of all revenues in the communications industry,[61] including an 89% market share of all subscribers.[62] Each of these providers have, to varying degrees,[63] embraced the idea of à la carte distribution by offering individual channels to customers. For example, Shaw Communications Chief Executive Officer, Brad Shaw, has noted that an à la carte system will give Canadians increased choice, while providing producers, broadcasters and distributors more freedom and flexibility to innovate.[64]

By embracing à la carte in its business model, cable providers are recognizing the need to innovate in a market where fewer Canadians are paying for television.[65] This consumer-centric strategy may hurt profit margins and industry in the short term as customers become more selective in what channels they purchase, however CRTC Chair Jean-Pierre Blais has remarked that although there may be services that don't survive as well as job losses, that good companies will still find a way to compete, thrive and be successful.[66] In the meantime, Canadian distributors have ensured their

59. *See CRTC Releases 2012 Financial Results for Canadian Cable and Satellite Companies*, CANADIAN RADIO-TELEVISION & TELECOMMS. COMM'N (CRTC) (Apr. 9, 2013), http://www.crtc.gc.ca/eng/com100/2013/r130409.htm#.UplFe-B1L_c.

60. *See TV Basics 2012-2013*, *supra* note 49, at 34. Five of the top ten highest rated programs in Canada were American-produced series (*Survivor* [2 seasons], *Big Bang Theory, Grey's Anatomy*, and *Glee*).

61. *Id.*; *see* COMMUNICATIONS MONITORING REPORT, *supra* note 52, at ii; *see also id.* at 35 (*Figure 4.1.1: Broadcasting Revenues for the Top 5 Group of Companies*).

62. *See* COMMUNICATIONS MONITORING REPORT, *supra* note 52, at iv; *see also id.* at 36 (Figure 4.1.4: *2011 BDU Revenues by Operator*).

63. *See, e.g.*, *Want Choice with Bell TV? Move to Quebec*, FAGSTEIN (Feb. 15, 2010), http://blog.fagstein.com/2010/02/15/bell-a-la-carte-in-quebec/.

64. David Lazarus, *Canada Sets Example For À la carte Pay-TV Pricing*, L.A. TIMES, (Mar. 26, 2015), http://www.latimes.com/business/la-fi-lazarus-20150327-column.html.

65. *See* Linda B. Baker & Alastair Sharp, *Canadian Cable Television's 'À la carte' Menu Begins To Take Hold*, REUTERS (Sept. 19, 2013), http://www.reuters.com/article/2013/09/19/us-northamerica-television-analysis-idUSBRE98I0T020130919#CW5T45pEEtrcVXsF.97.

66. *See* Lazarus, *supra* note 64.

profitability through packaging à la carte television offerings alongside higher margin services such as broadband Internet.[67]

i. Avoiding À La Carte Unbundling - Receiving a Mandatory Distribution Order on The Basic Tier

Local broadcast networks, as well as CRTC-approved stations, are classified within a basic tier, which is mandatory to purchase in order to gain access to à la carte specialty channels. To obtain a mandatory distribution order from the CRTC, resulting in a networks' placement on a basic tier for all distributors nationwide, channels must not only be affordable[68] and contribute to original, first-run Canadian programming,[69] but also adhere to Section 9(1)(h) of the Broadcasting Act by contributing in an exceptional manner to Canadian expression and reflect artistic creativity that would otherwise not be seen on television.[70]

Mandatory distribution has a direct impact on consumers' bills and guarantees millions in subscriber revenue for channels classified within the basic tier, as anyone with a cable subscription is paying for it.[71] As a result, the CRTC has recently held networks applying for a mandatory distribution order to an extremely high standard, granting new applications for just three networks[72] and eight of twenty-two in total.[73] Therefore, a nexus exists between attaining basic tier status and keeping consumer costs low, as each of the accepted channels charge a distribution fee of less than $0.25 per subscriber per month.[74] Without receiving a basic tier classification, overly niche specialty networks in a hybrid la carte market risk survival if they fail to attract a sufficient subscriber base.

ii. Beyond the Basic Tier - Successful Results for Distributors

67. *See* Baker & Sharp, *supra* note 65.

68. *See* CANADIAN RADIO-TELEVISION & TELECOMMS. COMM'N (CRTC), BROADCASTING REGULATORY POLICY CRTC 2013-372, APPLICATIONS FOR MANDATORY DISTRIBUTION ON CABLE AND SATELLITE UNDER SECTION 9(1)(H) OF THE BROADCASTING ACT, at ¶ 9 (Aug. 8, 2013), http://www.crtc.gc.ca/eng/archive/2013/2013-372.htm.

69. *See CRTC Grants Mandatory Distribution to Three New Television Services*, CANADIAN RADIO-TELEVISION & TELECOMMS. COMM'N (CRTC) (Aug. 8, 2013), http://www.crtc.gc.ca/eng/com100/2013/r130808.htm#.Uk0Z_uB1L_c.

70. *Id.*

71. *See* Michael Geist, *CRTC Should Put Consumers First and Drop the 'Must Carry' Requirements*, MICHAEL GEIST (Jan. 29, 2013), http://www.michaelgeist.ca/content/view/6769/135.

72. *See* BROADCASTING REGULATORY POLICY CRTC 2013-372, at ¶ 181.

73. *Id.*

74. *See* BROADCASTING REGULATORY POLICY CRTC 2013-372, at ¶ 3.

Unbundling Specialty Channels

Overall, Canadian distribution entities have embraced the idea of à la carte, and have appeased consumers with reasonable prices for individual channels beyond the mandatory basic tier.[75] For example, on top of the basic tier, cable provider Telus’ Optik television allows consumers the option to add up to 50 individual channels for $4 per month each.[76] The results are clear. By pursing a hybrid strategy of aggressively marketing à la carte options alongside a basic tier and standard packages, Optik television has doubled its customer base in two years, helping it gain valuable market share.[77]

Similarly, Rogers has priced à la carte stations at $2.80 per channel per month,[78] and has been able to maintain a subscriber base in excess of 2 million households.[79] Meanwhile, Bell has pursued a limited strategy by rolling out à la carte pricing in Quebec at a cost of $2 per channel in an attempt to gain market share from Cogeco,[80] as well as Quebecor Media’s Vidéotron.[81] With each of the major distributors employing some form of à la carte pricing, as well as an increasing number of specialty stations entering the marketplace, the Canadian hybrid system has proven both feasible and lucrative to both vertically integrated and independently run distributors thus far.

3. Protecting Producers and Programming - CANCON

While many of the top viewed shows in Canada are produced in the United States,[82] Canada imposes strict content and employment requirements on both broadcasters and consumers to protect the domestic market.

75. *See* Baker & Sharp, *supra* note 65.

76. *Id.*; *see also Optik Television Channel Selection Guide*, TELUS, http://www.telus.com/content/tv/common/pdf/Optik_channel_selection.pdf (Note that packages are still available to the consumer in addition to à la carte specialty options.) (last visited Nov. 23, 2015).

77. *Id.*

78. *Id.*

79. *Id.*

80. *See CRTC Transcript*, *supra* note 15, ¶ 342.

81. *See* CBC NEWS, *supra* note 46.

82. *See TV Basics 2012-2013*, *supra* note 49, at 34.

i. Employment Requirements

With respect to broadcasters, all television licensees must broadcast a certain percentage of Canadian content, otherwise known as CANCON.[83] To be classified as CANCON, productions must fulfill three requirements.[84] First, a Canadian must fulfill any producer functions.[85] Second, productions must employ a certain percentage of local labor, which is determined through a point system.[86] This system specifies that the director or screenwriter, as well as one of the two lead actors must be Canadian, in addition to other key crew.[87] Third, production expenditures paid to Canadians must be at least 75% of production costs,[88] including salaries for producers and above the line creative personnel, post-production expenses, and film supplies.[89] A network that fulfills these criteria is then entitled to recoup a certain percentage of its labor expenditures through government-funded tax credits, the amounts of which vary by province.

ii. Content Requirements

In addition to having employment requirements in order to get government funding, networks must then ensure a certain percentage of their airtime is filled with Canadian-based programs.[90] Networks previously adhered to the point system by fulfilling its content quota with low-cost daytime programming and the news in prime time, saving money to acquire distribution rights to higher-rated American shows.[91] As a result, the CRTC recently enacted changes requiring each company to spend 30% of

83. *See Canadian Program Certification*, CANADIAN RADIO-TELEVISION & TELECOMMS. COMM'N (CRTC) (Sept. 13, 2013), http://www.crtc.gc.ca/eng/info_sht/tv11.htm [hereinafter *Canadian Program Certification*].

84. *Id.*

85. *See* CANADIAN RADIO-TELEVISION & TELECOMMS. COMM'N (CRTC), BROADCASTING REGULATORY POLICY CRTC 2010-905, REVISION OF THE DEFINITION OF A CANADIAN PROGRAM TO INCLUDE CANADIAN PROGRAMS THAT HAVE BEEN DUBBED IN CANADA AND OUTSIDE CANADA, at B (Dec. 3, 2010), http://www.crtc.gc.ca/eng/archive/2010/2010-905.htm. Series are responsible for maintaining an average of six points per episode. Directors and Screenwriters count for 2 points each, with lead performers, production designers, directors of photography, music composers, and picture editors counting for one point each.

86. *Id.*

87. *Id.*

88. *Id* at C (Expenditures).

89. *Id.*

90. *Id.*

91. *See The National: CRTC Relaxes CanCon Requirements For Private Stations* (television broadcast June 11, 1999), http://www.cbc.ca/archives/entry/crtc-relaxes-cancon-requirements-for-private-stations. (Note: This reflects the policy as of 1999).

its revenues on CANCON,[92] and exempting news from CANCON altogether,[93] likely in an effort to spur the development of original domestic programming.[94]

With these requirements in place, the Canadian government has managed to protect domestic production and jobs with content requirements and employment provisions while incentivizing foreign co-productions. Under an à la carte market, protectionist policies are essential to domestic production and jobs, and ensure Canadian identity and culture over the airwaves as required by the Broadcasting Act.[95] As a result, unbundled specialty channels are better protected from foreign competition because the CRTC can regulate, to some degree, every broadcaster using Canadian airwaves.[96]

iii. Content Spending and Signal Substitution

Content-wise, Canadian broadcasters still spend more on acquiring foreign programming ($726 million) than domestic ($661 million), though the gap between these figures is shrinking.[97] Moreover, Canada consumes lots of foreign content, with 81% of English and 70% of French drama and comedy programs being produced abroad.[98] If not for CANCON requirements, these viewing preferences under a pure à la carte market could reduce the profitability of domestic programming, as consumers could choose not to subscribe to Canadian-owned networks.

However, the CRTC has a long-standing policy of protecting broadcasters from foreign revenue erosion through signal substitution provisions, where the distributor replaces the signal of a foreign channel with that of a Canadian one.[99] The original reasoning behind signal substitution was the proximity of a majority of Canadians to the American

92. *See Cancon Spending Minimums Set By CRTC*, CBC NEWS: ARTS & ENT. (July 27, 2011), http://www.cbc.ca/news/arts/story/2011/07/27/crtc-renews-licences.html.

93. *Id.*

94. *See Canadian Program Certification*, *supra* note 83 (Exempt or Ineligible Programming).

95. *See* Broadcasting Act, S.C. 1991, c 11, § 3(1)(d)(ii) (Can.).

96. *See About Us*, CANADIAN RADIO-TELEVISION & TELECOMM. COMM'N, http://www.crtc.gc.ca/eng/acrtc/acrtc.htm (last modified Sept. 2, 2014).

97. *See* Etan Vlessing, *Canada's Private Broadcasters Spending Big on U.S. TV Shows: Report*, HOLLYWOOD REP. (Jun. 14, 2013, 10:59 AM), http://www.hollywoodreporter.com/news/canadas-private-broadcasters-spending-big-569196.

98. *See* COMMUNICATIONS MONITORING REPORT, *supra* note 52, at iii (Television Viewership Statistics Are Strong).

99. *See Seeing Canadian Commercials on American Channels*, CANADIAN RADIO-TELEVISION & TELECOMMS. COMM'N (Jan. 18, 2010), http://www.crtc.gc.ca/Eng/INFO_SHT/Bdt10.htm (last modified Nov. 5, 2015).

border, who could view American stations to the detriment of local broadcasters.[100] As a result, broadcasters faced losing domestic ad revenues to the American market.[101] Continued signal substitution under an à la carte system ensures ratings for Canadian-based distributors and enables stations showing the same program at the same time to earn a significant portion of their prime time dollars from local advertisers.

4. The CRTC-Bell Media Decision - Hybrid À La Carte Formally Recommended

In 2012, the CRTC, the government agency responsible for overseeing broadcasting and communications,[102] reached a decision in an arbitration ruling in favor of regulatory unbundling, giving cable and satellite providers the option to offer consumers à la carte rates for specialty stations.[103] In ruling for unbundling, the CRTC interpreted the policy provisions of Section 3(1) of the Broadcasting Act[104] to require that distributors provide reasonable terms for carriage, packaging and retailing of programming services.[105]

At the hearing, the CRTC considered the major needs facing independent distributors, including flexibility regarding distribution and packaging, commercial reasonableness of carriage terms, and access to linear and non-linear program distribution rights.[106] Notably, the CRTC mandated that vertically integrated entities, encompassing broadcast networks and cable/satellite distributors, must offer more choice and flexibility to customers, including a pick and pay, hybrid à la carte model.[107] Moreover, these vertically integrated entities are responsible for contracting with independent networks on commercially reasonable terms, including pricing at fair market rates, not setting minimum subscription guarantees, and making programming accessible on a stand-alone basis as opposed to requiring the acquisition of bundled programs or services.[108] The CRTC

100. *See* Pip Wedge, *Simultaneous Substitution on Cable Television and Satellite*, CANADIAN COMMC'NS FOUND. (Feb. 2006), http://www.broadcasting-history.ca/index3.html?url=http%3A//www.broadcasting-history.ca/networks/networks_Simultaneous_Substitution_on_TV.html.

101. *Id.*

102. *About Us*, *supra* note 96.

103. *CRTC 2012-208*, *supra* note 45, ¶¶ 22-25.

104. *Id.* ¶ 10.

105. *See id.* ¶ 10; *see also* Broadcasting Act § 3(1)(t)(iii).

106. *CRTC 2012-208*, *supra* note 45, ¶ 2.

107. *See id.* ¶ 11.

108. *See id.* ¶ 13.

decision attempts to achieve balance between providing programmers with predictable and stable monthly revenue[109] and adheres to the CRTC's policy of giving subscribers more flexibility and control over what content they watch.[110]

Bell Media, the major proponent of unbundling, noted the decision provided increased packaging flexibility, and that satellite and cable companies could better produce and procure high quality content.[111] Although a proponent for unbundling, Bell Media contended that its main concern with à la carte was the risk of specialty channels experiencing a serious penetration decline that would decrease revenues necessary to continue operations.[112] As a vertically integrated cable provider, Bell also has an ownership interest in some of these specialty networks.[113] Therefore, any changes to their subscriber base under à la carte would require review of its current business model.

Bell Media also claimed that undermining revenue protection for specialty channels, currently made possible through packaging, could lead to lower quality programming, less variety and less choice for consumers, as some customers in an à la carte market may choose to forego subscriptions to Bell-owned specialty channels.[114] To date, this concern appears unsubstantiated. Of the eight developed countries that are monitored by the CRTC, Canada has the largest penetration of pay television services.[115] In addition, Canadian television watching remains on average in excess of four hours per person each day.[116] Furthermore, the number of domestic pay and specialty channels has increased each year, reaching 190 in 2012.[117] These 190 channels have collectively accounted for just one third of all television viewing in Canada in each of the last five years, yet many of these niche networks remain profitable.[118]

Finally, adequate revenue protection does not seem to be a major issue for Canadian operated specialty stations, as only 26 channels reach in

109. *Id.* ¶ 22.

110. *Id.* ¶ 20.

111. *See* BNN Video, *Video: Consumers To Have More Control Over Cable Television Costs,* Globe & Mail (July 20, 2012, 2:47 PM), http://www.theglobeandmail.com/report-on-business/video/video-consumers-to-have-more-control-over-cable-tv-costs/article4430740/.

112. *See CRTC Transcript, supra* note 15, ¶ 302.

113. *See CRTC 2012-208, supra* note 45, ¶ 2.

114. *See CRTC Transcript*, *supra* note 15, ¶ 318.

115. *Id*. ¶ 323; *see also* COMMUNICATIONS MONITORING REPORT, *supra* note 52, at 186.

116. *CRTC Transcript*, *supra* note 16, at ¶ 324.

117. *See TV Basics 2012-2013*, *supra* note 49, at 28.

118. *Id.* at 33.

excess of one million households.[119] Under an à la carte hybrid system made possible by the CRTC decision, vertically integrated cable providers can remain profitable without having to reach millions of subscribers.

5. Canadian Hybrid À La Carte Summary

In summary, the Canadian market combines strict protectionist policies alongside a viewer-first policy framework in making hybrid à la carte television available to consumers. Furthermore, the government's protective stance on not forcing Canadians to pay for channels that they do not watch ensures that the Canadian broadcasting system can better compete with foreign networks.[120] The CRTC has found a balance by protecting networks through CANCON requirements and signal substitution rules, as well as providing Canadian consumers choice and lower cost options. In addition, distributors have enjoyed stable profits and a steady subscriber base under a hybrid à la carte system. Although the CRTC's decision serves as a recommendation rather than a binding decision, the Canadian government has recently introduced legislation to make à la carte offerings mandatory, recognizing that à la carte distribution will evolve over time.[121] By December 2016, all Canadian distributors must offer a "skinny basic" service costing no more than twenty-five dollars, and allow subscribers to augment that through pick-and-pay or smaller, reasonably priced packages.[122]

Notably, vertically integrated distributors competing with one another have already started to acquire exclusive rights to hockey games across all platforms in an effort to persuade customers to switch cable providers,[123] and to incentivize consumers to purchase individual specialty channels.[124]

119. *Id.* at 41-42.

120. *See Conservatives Signal Consumer-Friendly Throne Speech*, CBC NEWS (Oct. 13, 2013, 11:01 AM), http://www.cbc.ca/news/politics/conservatives-signal-consumer-friendly-throne-speech-1.2021739.

121. *See* Terry Pedwell, *Tories to Force TV Providers to Let Consumers 'Pick and Choose' Individual Channels*, NAT'L POST (Oct. 13, 2013, 1:05 PM), http://news.nationalpost.com/news/canada/cable-and-satellite-tv-services-must-offer-more-consumer-choice-industry-minister-james-moore.

122. Amy Minsky, *Canada to Require À la Carte Television Service by December 2016*, GLOBAL NEWS (Mar. 19, 2013, 3:03 PM), http://globalnews.ca/news/1892474/canada-to-require-a-la-carte-television-service-by-december-2016/.

123. *See* Sean Fitzgerald, *What the NHL Deal With Rogers Means to the CBC, Don Cherry, and the Quebec Nordiques*, NAT'L POST (Nov. 26, 2013, 6:25 PM), http://sports.nationalpost.com/2013/11/26/what-the-nhl-deal-with-rogers-means-to-the-cbc-don-cherry-and-the-quebec-nordiques.

124. *Id.*

Rogers' landmark hockey deal, which began in 2014 and is the largest rights agreement in Canadian history,[125] has major implications for the Canadian à la carte television market because of the number of specialty channels Rogers owns. This 12-year, $5.2 billion dollar NHL deal[126] gives Rogers control over sublicensing content to other broadcasters such as the CBC, which has provided coverage of the NHL for over sixty years.[127]

CRTC chair Jean-Pierre Blais has created a healthy model for broadcasting, one that appears built to withstand increased competition from cheaper online streaming options such as Netflix, Hulu Plus, and Amazon Prime.[128] The impact of these SVOD services on cable subscriptions under an à la carte system is that consumers will be less inclined to cancel their cable going forward if they are allowed to purchase only the channels they want. The aforementioned evidence of the success of the Canadian model should be replicated in the United States. Yet, major impediments remain to achieving buy-in, which makes the most prescient issue in the United States resolving the heavily divided perceptions of à la carte amongst networks, cable providers, associations and consumers.

III. DIVERGING VIEWPOINTS: STAKEHOLDER POSITIONS ON À LA CARTE - CONSUMERS, NETWORKS, DISTRIBUTORS AND ASSOCIATIONS

1. Consumer Behavior

Consumers stand to gain from the regulatory unbundling of television channels through lower monthly cable bills and freedom of selection. Without à la carte options, consumers are increasingly turning to alternative media, with 66% of all American consumers accessing some content online through either streaming or subscriptions.[129]

125. *See* Maury Brown, *NHL and Rogers Reach Lucrative 12-Year, $5.232 Billion Media Rights Deal*, FORBES (Nov. 26, 2013, 12:57 PM), http://www.forbes.com/sites/maurybrown/2013/11/26/nhl-and-rogers-communications-reach-lucrative-12-year-5-232-billion-media-rights-deal/.

126. *See* Dan Rosen, *Rogers Communications Announce 12-Year, $5.2 Billion TV, Multimedia Deal*, NHL (Nov. 26, 2013, 3:48 PM), http://www.nhl.com/ice/news.htm?id=693152.

127. *See* William Wolfe-Wylie, *What the New Rogers-NHL Deal Means For the CBC: Broadcaster to Earn No Revenue from Hockey*, CANADA (Nov. 26, 2013), http://o.canada.com/business/what-the-new-rogers-nhl-deal-means-for-the-cbc/.

128. *See* Carson S. Walker, Comment, *À la carte Television: A Solution to Online Piracy?*, 20 COMMLAW CONSPECTUS 471, 492 (2012).

129. *PWC Consumer Report*, *supra* note 27, at 13.

Moreover, American consumers already spend an average of nearly 3 hours a week streaming movies and television shows through consoles,[130] including 70% of the teen demographic.[131] Console technology allows viewers to interact in real time with the content they are consuming.[132]

Furthermore, this younger demographic, called cord-nevers,[133] is unlikely to subscribe to a cable provider later in life because they have become accustomed to "freemium" content. Freemium content describes a business model in which a product is given away for free, with premium options to purchase thereafter.[134] Both Hulu Plus and Netflix employ forms of this model, with the latter recently overtaking HBO in the number of American subscribers with 31.1 million.[135] However, the majority of consumers have kept their subscriptions with a cable provider, considering a traditional subscription to be the foundation of the television viewing experience.[136] Non-traditional video services, including SVOD services such as *Netflix*, are considered complementary forums for discovering new and original content as opposed to a pure market substitute to a cable subscription.[137] *HBO* has recognized this shift in consumer behavior and began offering stand-alone à la carte streaming starting in 2015.[138] With TV subscriptions down in 11 of the past 12 quarters dating back to the middle of 2012,[139] and *Netflix* subscriptions increasing by 73% over the

130. PWC, CONSUMER INTELLIGENCE SERIES – THE EVOLUTION OF VIDEO GAMING AND CONTENT CONSUMPTION 2 (2013), http://www.pwc.com/us/en/industry/entertainment-media/publications/assets/pwc-video-gaming-and-content-consumption.pdf [hereinafter *PWC Content Report*].

131. *See PWC Content Report*, at 21.

132. *See* Marcello Ballve, *Why This TV Season Will Confirm Mobile's Unstoppable Rise As a Complementary Second Screen*, BUS. INSIDER – TECH., (Sept. 20, 2013), http://www.businessinsider.com/the-second-screen-as-an-audience-builder-2013-9.

133. *See PWC Consumer Report*, *supra* note 27, at 5.

134. *See* FREEMIUM 101: A BRIEF INTRODUCTION TO THE FREEMIUM BUSINESS MODEL, FREEMIUM 1, http://ebookbook.blogspot.com/2015/08/freemium-101.html (last visited Nov. 23, 2015).

135. Ben Popper, *Netflix Now Officially Bigger Than HBO, Adds 1.3 Million New US Subscribers in Q3*, VERGE (Oct. 21, 2013), http://www.theverge.com/2013/10/21/4862966/netflix-q3-2013-earnings.

136. *See PWC Consumer Report*, *supra* note 27, at 3.

137. *See id.* at 5-6.

138. Daniel Frankel, *It's Really Happening: HBO Sets À la carte Streaming for 2015*, FIERCECABLE (Oct. 14, 2014), http://www.fiercecable.com/story/its-really-happening-hbo-sets-la-carte-streaming-plans-2015/2014-10-15.

139. *See Get Data: Netflix vs. Cable*, SAMUEL W. BENNETT, http://www.samuelwbennett.com/netflix-vs-cable (last visited Nov. 23, 2015).

same period,[140] it may be too late once the major cable distributors put measures in place to protect themselves from increased competition.

Surprisingly, the threat of cord cutting, which may be the greatest leverage consumers possess vis-à-vis cable providers, has not yet had a major effect on the market. In 2011, only 1.5 million households cancelled their cable service, with just 1.8 million following suit since 2012,[141] comprising a minute percentage of the roughly one hundred million American television homes with paid cable subscriptions.[142] A mass cord cut by tens of millions of consumers would serve to incentivize these providers to alter its stance on à la carte to ensure consumer retention. Until such a movement happens, customers will continue to be collectively overcharged by billions of dollars each year for channels they neither want nor watch.[143]

i. Consumer Preferences Under "Pure" À La Carte

According to a consumer survey, consumers prefer à la carte to alternatives, such as creating their own pay-television packages, forced bundling, or smaller packages at lower rates,[144] expecting to save money without having to resort to cord cutting.[145] Notably, the majority of customers in a pure, or complete à la carte market would purchase upwards of 10 channels, with 26% willing to pay between four and eight dollars per channel per month.[146] Under pure à la carte, basic cable offerings are considered a staple of television viewing, with 69% likely to purchase these networks.[147] In summary, customers recognize tangible benefits in à la carte and perceive it to be an effective way of controlling their pay television choices and costs.

140. *Id.*

141. *See Cross Platform Report Q1 2011*, *supra* note 54.

142. *See* Robin Flynn, *SNL Kagan Special Report: U.S. Multichannel Subscriber Update and Programming Cost Analysis*, SNL KAGAN 1 (June 2013), http://go.snl.com/rs/snlfinancialllc/images/SNL-Kagan-US-Multichannel-Subscriber-Update-Programming-Cost-Analysis.pdf.

143. *See* Grimes, *supra* note 19, at 3-5.

144. *See PWC Consumer Report*, *supra* note 27, at 8.

145. *Id.*

146. *See id.* at 9-10.

147. *See id.* at 9.

2. Distributor-Network Opposition

i. Cable Channels

Cable channels, given their history of receiving high subscriber revenues,[148] are resistant to change and are against an à la carte system. For example, FOX has taken a hard-line stance, referring to à la carte as a fantasy, and unnecessary for networks to consider in the short-term given the lack of cord cutting.[149] FOX President Chase Carey expressed his confidence in the current model's viability, stating that people will give up food and a roof over their head before they give up television.[150] Additionally, FX CEO John Landgraf has remarked that half the jobs in Hollywood would disappear under à la carte, leading to a major recession in the industry.[151] Disney's CEO Robert Iger is also against à la carte on economic grounds, stating that consumers are getting a good deal on television packages given the rising cost of programming.[152]

One of the networks most affected by à la carte would be ESPN, for which lucrative programming deals began in 2014.[153] ESPN already demands in excess of $5.00 per subscriber,[154] which would likely increase to offset losing subscribers, because the survey data shows only 59% of customers are likely to purchase sports à la carte.[155] Under these conditions, it has been speculated that the price may be driven up to $30/month;[156] however, ESPN has only raised rates in the past at an annual average rate of

148. *See* Paul Bond, *Television Subscriber and License Revenue to Grow 5.4 Percent Annually Through 2016 (Report),* HOLLYWOOD REP. (Jun. 11, 2012), http://www.hollywoodreporter.com/news/television-subscriber-growth-pricewaterhousecoopers-336114.

149. *See* Jeff Bercovici, *21st Century Fox's Chase Carey: À la Carte is a Fantasy,* FORBES (Aug. 8, 2013), http://www.forbes.com/sites/jeffbercovici/2013/08/08/21st-century-foxs-chase-carey-a-la-carte-is-a-fantasy.

150. *Id.*

151. *See* Tim Kenneally, *The Grill: FX's John Landgraf on À la carte Cable's Threat to Hollywood's Creativity, "Breaking Bad" Regrets,* WRAP (Sept. 23, 2013), http://www.thewrap.com/thegrill-fx-boss-john-landgraf-a-la-carte-cable-breaking-bad-regrets.

152. *See* Georg Szalai, *Disney CEO Talks Netflix, Cord Cutting, ESPN's Outlook*, HOLLYWOOD REP. (Sept. 24, 2013), http://www.hollywoodreporter.com/news/disney-ceo-talks-netflix-cord-635397.

153. *Id.*

154. *See* Trefis, *Can ESPN Maintain Its Fee Per Subscriber Growth?* NASDAQ (Mar. 21, 2013), http://www.nasdaq.com/article/can-espn-sustain-its-fee-per-subscriber-growth-cm229538 [hereinafter *Nasdaq ESPN Fees*].

155. *See PWC Consumer Report*, *supra* note 27, at 9. *But see* Grimes, *supra* note 19, at 7. Grimes contends that only 15-20% of customers regularly watch sports channels currently.

156. *See Bundle Busting: Is À la Carte Cable Television Better For Consumers?,* CBC NEWS (Oct.17, 2013), http://www.cbc.ca/news/canada/bundle-busting-is-à-la-carte-cable-television-better-for-consumers-1.2054603 [hereinafter *CBC Bundle Busting*].

38 cents per subscriber.[157] ESPN constitutes 40% of Disney's value,[158] so unbundling will affect the network's ability to meet its existing broadcast rights deals without raising its fees. It should also be noted that ESPN has lost approximately three million subscribers between 2014-2015 because of subscription cancellations.[159] Under an à la carte regime, it is logical that at least some of those customers would return.

ii. Cable and Satellite Distributors

As consumers continue to view and interact more with content through second screens, cable distributors face the challenge of offering programming exclusively through traditional television or delaying its online release.[160] Time Warner Cable (TWC) has been an outspoken proponent of à la carte, likely in an effort to restore the distributor's image having faced a consumer backlash from their retransmission consent battle with CBS in 2013. Additionally, CBS President Les Moonves has remarked that the days of the 500 channel universe are over,[161] and that people are going to be slicing and dicing their television packages in different ways.[162] Former TWC CEO Glenn Britt, who has said that a hybrid à la carte market allows customers to decide how much value they ascribe to programming, further supports this argument.[163]

This customer-first approach is also supported by Cablevision and Dish.[164] However, other distributors such as Comcast are either in opposition, or ambivalent such as a Charter Communications, which doubts the proposed Television Consumer Freedom Act of 2013 that would allow distributors to offer channels à la carte,[165] will ever pass.[166] AT&T has

157. *See Nasdaq ESPN Fees*, *supra* note 154.

158. *Id.*

159. *See* John Koblin, *Unwrapping the Cable TV Bundle*, N.Y. TIMES (Oct. 3, 2015). http://www.nytimes.com/2015/10/05/business/media/unwrapping-the-cable-tv-bundle.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0.

160. *See PWC Consumer Report*, *supra* note 27, at 13, 15.

161. *See* Koblin, *supra* note 159.

162. *Id.*

163. *See* Alex Sherman, *CBS's Moonves Attacks Time Warner Cable Plan in Blackout*, BLOOMBERG BUS. (Aug. 6, 2013, 1:30 PM), http://www.bloomberg.com/news/articles/2013-08-06/cbs-calls-time-warner-cable-ceo-s-a-la-carte-proposal-a-sham-.

164. *See* Alex Ben Block, *Broadcasters, MPAA Line Up Against Proposed À la Carte Bill*, HOLLYWOOD REP. (Aug. 2, 2013, 5:00 AM), http://www.hollywoodreporter.com/thr-esq/broadcasters-mpaa-line-up-a-598054.

165. *See* Television Consumer Freedom Act of 2013, S. 912, 113th Cong. (2013); *Summary: S.912 - 113th Congress (2013-2014)*, CONGRESS, https://www.congress.gov/bill/113th-congress/senate-bill/912.

taken a stance supporting unbundling, but like many of the networks, it likens à la carte's necessity as a reactive measure to cord cutting activity.[167] With a flat subscriber outlook, distributors' most lucrative short-term position may be its current model.

iii. Broadcasters - Specialty Channels

Specialty channels view hybrid à la carte from an unsettling business paradigm. In the past, guaranteed subscription revenue, made possible through bundling, has been vital to the networks' viability. Moreover, unbundling and reaching fewer subscribers runs the risk of further losing advertising dollars content that providers rely on for profitability.[168] With the majority of new shows failing, specialty channels à la carte would solely rely on a few hit programs to sustain their entire programming slate,[169] as networks receive zero ad revenue until a channel reaches at least 25 million homes.[170] Overall, the major risk of à la carte unbundling to specialty networks is a decrease in subscribers, which could deter advertisers from spending with these networks, thus threatening these networks' survival.

iv. Broadcasters - Premium Channels

Although distributors are not required to offer channels on an individual basis, the FCC has allowed distributors the right to unbundle any channel not on the basic tier.[171] For example, HBO is already available to consumers à la carte once a consumer purchases the basic tier with a cable provider. Now, HBO has bypassed these requirements through an Internet platform and taken à la carte one step further in the process. Recognizing that its premium content is a target for piracy, HBO has partnered with Google Play to offer individual programs à la carte, at a cost of $1.99 or

166. *See* David Lieberman, *Liberty Media CEO Endorses Changes In Pay TV and Broadband Pricing*, DEADLINE HOLLYWOOD (Sep. 25, 2013, 9:29 AM), http://deadline.com/2013/09/liberty-media-ceo-endorses-changes-in-pay-tv-and-broadband-pricing-596090/.

167. *See* Jeff Baumgartner, *AT&T's Jeff Weber: No Cord-Cutting Going on Here*, MULTICHANNEL NEWS (May 29, 2013, 1:35 PM), http://www.multichannel.com/news/content/att-s-jeff-weber-no-cord-cutting-going-here/358469.

168. *Id.*

169. *See* Jeff Bercovici, *Unraveling The Cable Industry's Spin On Unbundling*, FORBES (Aug. 8, 2013, 2:28 PM), http://www.forbes.com/sites/jeffbercovici/2013/08/08/unraveling-the-cable-industrys-spin-on-unbundling/.

170. *See CBC Bundle Busting*, *supra* note 156*; see also* Laura Martin & Dan Medina, *Needham Insights - The Future of Television*, NEEDHAM, at 20(4) (July 11, 2013), http://archive.desertsun.com/assets/pdf/J1209360730.PDF [hereinafter "The Future of TV"].

171. *See* CONSUMER GUIDE, *supra* note 16.

$2.99 per episode, or $14.99-$34.99 for the entire season.[172] HBO's strategy in offering this "iTunes approach" is to protect its exclusivity by encouraging subscriptions[173] and compete squarely against Amazon Prime, Hulu and Netflix, all of whom have recently produced original content.[174] HBO bypasses what most economists perceive as the biggest threat to unbundling, in that the channel relies completely on consumer subscriptions rather than advertising.[175] By planning to offer content à la carte in 2015, HBO Chairman and CEO Richard Plepler remarked that it is time to remove all barriers to those who want HBO.[176]

Despite the inherent advantage online outlets have over HBO in delivering low-cost programming without necessitating a cable subscription, HBO's foray into online à la carte may foreshadow the next step in unbundling beyond the hybrid system in both America and Canada: a per episode, season and series approach over cable. This strategy may become a widely adopted distributor response if alternative media outlets continue to grow at pay televisions expense.[177] Ultimately, if the goal an à la carte system sets out to achieve is to increase consumer flexibility and choice while reducing their cable bills, a strategy similar to that of HBO may be the optimal outcome for every network facing a potential decline in subscription revenue under a hybrid system.

3. Associations Divided on À La Carte

The American National Cable and Telecommunications Association (NCTA), which acts as a unified voice for cable networks, has commented that an à la carte system is a lose-lose proposition, as it unnecessarily forces

172. *See* Charles Ripley, *Google Play Adds HBO's Game of Thrones and 6 Other Shows*, BRANDPOST, http://www.pcworld.com/article/2052814/google-play-adds-hbo-s-game-of-thrones-and-6-other-shows.html (last visited Nov. 23, 2015).

173. *See* Dave Thier, *You Can Finally Buy "Game Of Thrones" À la Carte: HBO Comes To Google Play*, FORBES (Oct. 8, 2013, 11:06 AM), http://www.forbes.com/sites/davidthier/2013/10/08/you-can-finally-buy-game-of-thrones-a-la-carte-hbo-comes-to-google-play.

174. *See* Mike Hale, *Taking Killers and Thrillers to the Web*, N.Y. TIMES (Oct. 14, 2013), http://www.nytimes.com/2013/10/15/arts/television/crackle-a-netflix-competitor-offers-new-programming.html.

175. *See The Future of TV*, *supra* note 170, at 17, 20(2).

176. *See* Frankel, *supra* note 138, at ¶4.

177. *See* Kristin Brzoznowski, *Netflix Pledges to Double Investment in Originals in 2014*, WORLDSCREEN (Oct. 22, 2013), http://www.worldscreen.com/articles/display/41770. Netflix added 1.3 domestic subscribers in Q3 2013 for a total of 31.09M and estimate another 2.01M subscribers in Q4.

a retail model on private providers.[178] Also, the NCTA argues that à la carte would deprive consumers of the ability to easily explore new programming and networks because a per channel subscription would force viewers to lock in their programming choices in advance.[179] Reducing programming diversity is a potential caveat of an à la carte system, but the NCTA's outright refusal to allow government intervention stands in stark contrast to the American Cable Association's (ACA) stance on à la carte. The ACA, which represents smaller, independent networks,[180] embraces à la carte on the grounds that networks use their market power to impose tying and bundling requirements on distributors, which is subsequently offered to frustrated consumers.[181] While the ACA does not recognize pure à la carte to be the solution, they agree that large television packages should not be the sole option, as bundles could still be offered.[182]

In summary, most justifications for and against à la carte can be grouped as either economic (lower prices for customers versus higher per subscriber costs) or social (removing unwanted programming versus less choice altogether). The current model is broken, but persists despite inefficient regulations.

IV. THE AMERICAN REGULATORY ENVIRONMENT - CABLE ACT AND TELEVISION CONSUMER FREEDOM ACT

1. The Current Governing Policy - The 1992 Cable Act

Currently, cable distribution in the United States is regulated by the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act).[183] Originally, the Cable Act was enacted in response to near monopolistic power by cable providers.[184] The aim of the Cable Act is to

178. *See NCTA Statement Regarding the Television Consumer Freedom Act*, NCTA (May 9, 2013), https://www.ncta.com/news-and-events/media-room/article/2638.

179. *See Keeping it Affordable*, NCTA, https://www.ncta.com/node/63 (last visited Nov. 23, 2015).

180. *See ACA Membership*, AM. CABLE ASS'N, http://www.americancable.org/about_us/aca_membership_0 (last visited Nov. 23, 2015).

181. *See American Cable Association Statement On McCain À la carte Bill*, Am. Cable Ass'n, http://www.americancable.org/node/4172 (last visited Nov. 23, 2015).

182. *Id.*

183. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C. § 521 (2012)), http://transition.fcc.gov/Bureaus/OSEC/library/legislative_histories/1439.pdf [hereinafter *Cable Act*].

184. *See Another Video Smackdown*, WALL ST. J. (Sept. 2, 2009, 12:49 PM), http://www.wsj.com/articles/SB10001424052970204731804574387120029467020.

provide consumers with expanded choices at lower rates,[185] yet over the past ten years the average cable bill has more than doubled to over $90/month.[186]

Moreover, there is a fundamental disconnect between policy provisions embodied in the Cable Act and current market realities. For example, Section 2(b)(5) of the Cable Act sets out to ensure that cable operators do not have undue market power vis-à-vis video programmers and consumers.[187] However, cable subscription costs have increased by 33% over the last 8 years, whereas the consumer price index during the same period has risen by just 15%.[188] These concerns reflect a growingly archaic Cable Act, which was enacted when the United States had significantly fewer cable subscribers and no Internet platforms to view television content.[189] The growth in both television subscriptions and networks over the past twenty years reflect a changing marketplace in need of reform.

i. Networks and Cable Providers Can Set Overly High Rates Under the Cable Act

With respect to setting rates, the Cable Act only mandates the FCC to ensure that rates for the basic service tier are reasonable.[190] Ironically, the same clause prohibits any federal or state agency from further regulating the rates for the provision of cable services.[191] As a result, The FCC only has the limited power to act as an intermediary between cable providers and networks if they are unable to reach a consensus on carriage fees.[192] With the FCC unable to intervene, the Cable Act gives cable providers considerable leverage over customers, who have no recourse other than choosing to cut the cord altogether.

185. *See The Cable Act at 20: Hearing Before the S. Comm. on Commerce, Science and* Transportation, 112th Cong. 1 (2012), http://www.gpo.gov/fdsys/pkg/CHRG-112shrg86916/pdf/CHRG-112shrg86916.pdf.

186. *See* Lauren A.E. Schuker, *Customers Say to Cable Firms, 'Let's Make a Deal'*, WALL ST. J., (Dec. 29, 2011), http://www.wsj.com/articles/SB100014240529702034791045 77124494272500550.

187. *See* § 2, 106 Stat. at 1463.

188. *See* Jeffrey M. McCall, *FLASHPOINT: Time to Stop Paying for TV You Don't Watch*, TRIBUNE STAR (July 7, 2013, 5:00 AM), http://www.tribstar.com/opinion/flashpoint/flashpoint-time-to-stop-paying-for-tv-you-don-t/article_2167174f-1be8-5e82-8062-15ecfc4af511.html.

189. *See* § 2, 106 Stat. at 1460. In 1992, when the Cable Act was passed, the United States had 60 million television household subscriptions, whereas the market currently has over 100 million.

190. *See id.* § 3, 106 Stat. at 1464.

191. *See id.*

192. *Id.*

Furthermore, Section 3(8)(C)(2) of the Cable Act lists a number of factors to help the FCC determine if the rates set by distributors are unreasonable.[193] These factors include the revenues received by a cable operator via advertising from programming that is carried as part of the service for which a rate is being established.[194] Specifically, advertising revenue accounts for just under half of a network's cash inflows,[195] and this revenue stream has nearly tripled over the past decade.[196] Vertically integrated distributors are able to capture the entire surplus of rates in a specialty channel package while still being perceived under the Cable Act as having set reasonable prices.[197] This surplus can be attributed to inter-product price discrimination, where networks are able to bundle channels to take advantage of consumer's willingness to pay higher prices.[198] As a result, cable providers leverage bundles to increase both their subscriber fees and advertising revenues than what would be possible under à la carte.

ii. Must Carry Provisions in the Cable Act Ensure a Mandatory Basic Tier

Similar to the Canadian market, a required basic tier, referred to as must carry, would still be required for consumers to purchase and distributors to offer in order to gain access to à la carte specialty stations. Specifically, the Cable Act confirms that each cable operator shall provide subscribers with a separately available basic service tier to which subscription is required for access to any other tier of service.[199] This condition imposed on cable providers that they must carry a basic tier protects public, educational, and governmental programming through small but guaranteed subscriber revenues.[200]

193. § 3, 106 Stat. at 1468-69. Other factors include rates for similarly situated cable systems in offering comparable services, rates subject to effective competition, historical rates and their relationship to general consumer prices, and capital and operating costs of the cable system.

194. § 3, 106 Stat. at 1469.

195. *See PWC Advertising Outlook*, *supra* note 4. Note: Global advertising revenues totaled $162.1 billion USD in 2012, whereas worldwide subscription revenue totaled $172 billion USD.

196. *See Industry Data: Cable Advertising Revenue*, NCTA, https://www.ncta.com/industry-data/item/310 (indicating that SNL Kagan reported that US Advertising Revenues in 2011 totaled $30,477 million dollars, the overwhelming majority of which flowed to cable networks) (last visited Nov. 23, 2015).

197. *See* Grimes, *supra* note 19, at 6.

198. *Id.* at 7.

199. § 3, 106 Stat. at 1467.

200. *Id*. Public service broadcasting has a positive effect on commercial broadcasting, promoting a race to the top and improving industry standards.

Absent these must carry requirements, the Cable Act reflects the concern that a substantial likelihood that citizens will be deprived of access to these services, as consumers could choose not to purchase these networks à la carte.[201] However, many of the most watched cable networks are classified under the basic tier, accounting for 66% of cable viewership and just 34% of programming costs.[202] Additionally, consumers selecting channels under a pure an à la carte system are likely to purchase networks listed in the basic tier.[203] Overall, the must carry provision, which was deemed constitutional,[204] serves to create competitive balance for networks while protecting access to millions of homes without specialty cable subscriptions.[205]

iii. The Tier-Buy Through Provision Protects Against Price Discrimination

Although a pure à la carte system in which consumers could purchase any channel individually would run contrary to the Cable Act, distributors would be prevented from engaging in predatory pricing beyond the basic tier. The tier-buy through provision,[206] which prevents cable operators from requiring a subscription to any tier other than the basic service tier as a condition of access to programming,[207] ensures that cable operators cannot charge different rates between subscribers of the basic tier and subscribers to programming offered on a per channel or per program basis.[208] In an à la carte market, cable companies would not be able to discriminate against consumers purchasing fewer channels by increasing its monthly per channel subscription costs.[209]

Overall, the major economic implication of the tier buy through provision under à la carte is that consumers would be protected from unfair

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201. § 3, 106 Stat. at 1467; *see also* Alex Sherman, *Bundled Cable TV Withstands Consumer Opposition*, BLOOMBERG BUS. (Nov. 23, 2015), http://www.bloomberg.com/bw/ articles/ 2013-11-14/2014-outlook-cable-bundling-and-higher-bills-wont-stop-soon (noting that many specialty channels currently available to consumers receive less than one dollar per month per household subscription).

202. Sherman, *supra* note 201.

203. *See PWC Consumer Report*, *supra* note 27, at 9.

204. *See* Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994).

205. *Id.* at 635, 669.

206. Cable Act § 3, Pub. L. No. 102-385, 106 Stat. 1460, 1468 (1992).

207. *Id.*

208. *Id.*

209. *Guide: Consumer Options for Selecting Cable Channels and the Tier Buy-Through Prohibition*, FCC (Aug. 15, 2013), http://www.fcc.gov/guides/consumer-options-selecting-cable-channels-and-tier-buy-through-prohibition.

rates if they choose to subscribe to individual specialty channels.[210] Similarly, must carry provisions ensure a guaranteed subscription revenue for a number of smaller, local networks, which air on the basic tier. Both of these provisions provide necessary protections for networks and cable providers because it assures a more consistent monthly revenue stream. Therefore, these provisions would complement proposed legislation mandating à la carte offerings.

2. The 2013 Television Consumer Freedom Act

The proposed Television Consumer Freedom Act (TCFA),[211] sponsored by Sen. John McCain and Sen. Richard Blumenthal, was introduced in 2013 in response to disgruntled subscribers becoming increasingly frustrated with their higher monthly cable bills.[212] Referring to the business practices of cable providers as an injustice being inflicted on the American people,[213] the proposed legislation is aimed at permitting multichannel video programming distributors to provide channels to subscribers on an à la carte basis.[214] The McCain and Blumenthal legislation helps shift the television landscape to benefit consumers, giving them significantly more control over their cable bills.[215] Without this legislation, only distributors can buy individual channels from programmers, and consumers must continue purchasing inefficient bundling packages.[216] Provided that distributors could compete with one another, smaller bundles or à la carte offerings could emerge from this legislation.

Even though any channel may be provided à la carte under this legislation, the TCFA acknowledges must carry requirements, keeping the mandatory basic tier subscription intact.[217] This provision is consistent with the current Canadian system in that à la carte offerings exist only with respect to specialty channels. Packaging is not omitted either, as distributors can now offer channels as part of a package so long as the cable provider

210. *Id.*

211. *See* Television Consumer Freedom Act of 2013, S. 912, 113th Cong. (2013), http://beta.congress.gov/113/bills/s912/BILLS-113s912is.pdf.

212. *See* Joe Flint, *John McCain Introduces Television Consumer Freedom Act of 2013*, L.A. TIMES (May 9, 2013), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-mccain-cable-20130509-story.html.

213. *Id.*

214. S. 912 § 3(A).

215. *See* Flint, *supra* note 212.

216. *Id.*

217. S. 912 § 3(C).

also offer such channel on an à la carte basis.[218] This practice of giving consumers a choice between buying a bundle and buying goods separately is commonly referred to as mixed bundling.[219]

Additional provisions of the TCFA serve to incentivize distributors, which may experience a loss in revenue if consumers purchase fewer specialty channels à la carte. For example, the TCFA relaxes retransmission license fees for distributors who fail to carry local commercial stations,[220] and ensures the FCC can intervene if cable providers and networks fail to agree on rates for individual specialty networks.[221] Overall, the legislation, if enacted, will unquestionably benefit consumers and increase protection for cable distributors as well.

If passed, the TCFA will complement rather than supersede the Cable Act, as nothing prohibits any state from enacting any consumer protection law.[222] However, the legislation has so far been stalled in committee without any guarantee that it will receive a Senate vote.[223] Despite there being little chance of passage at this time, the TCFA marks the first attempt the United States government has made to legislate à la carte options for consumers.

CONCLUSION

More consumer choice and lower cost options should be the primary goal of reforming the American broadcasting system. One way to accomplish this goal is to make hybrid à la carte options available to consumers. However, stakeholders are divided on the merits of any à la carte system, as the status quo has ensured ample profitability for content providers and distributors. Still, a number of cable providers are recognizing that à la carte can be a lucrative business model, as it keeps customers happy while alleviating some of the leverage networks possess in programming carriage fees, which in turn improves upon distributors' poor reputation.[224]

218. S. 912 § 3(B)(3).

219. *See* William James Adams & Janet L. Yellen, *Commodity Bundling and the Burden of Monopoly*, 90 Q. J. ECON. 475, 475 (1976).

220. S. 912 § 3(B)(1).

221. S. 912 § 3(D).

222. Cable Act § 8, Pub. L. No. 102-385, 106 Stat. 1460, 1484 (1992).

223. Civic Impulse, LLC., GOVTRACK, *S. 912 (113th): Television Consumer Freedom Act of 2013*, https://www.govtrack.us/congress/bills/113/s912.

224. *See* Lance Whitney, *Cable Providers, ISPs Rank Dead Last For Customer Service*, CNET, (Aug. 21, 2013), http://news.cnet.com/8301-1023_3-57599488-93/cable-providers-isps-rank-dead-

In contrast, while the Canadian model has not yet been mandated by legislation, it is already providing Canadian viewers with meaningful, lower cost options. These benefits have been attained through a group of cooperative cable providers and the leadership of the responsible Canadian broadcast regulator alongside a government strongly in favor of enacting à la carte as law.[225]

last-for-customer-service (noting that under the 2013 Temkin Customer Service Ratings, Charter Communications, TWC, Cox and Cablevision rank last out of 235 companies, respectively).

225. *See* Stephen Chase, *Conservatives Take First Step on Unbundling Cable Channels*, GLOBE & MAIL (Nov. 14, 2013), http://www.theglobeandmail.com/report-on-business/conservatives-take-first-step-on-unbundling-cable-channels/article15437551.

In October 2015, the Liberal Party led by Prime Minister Justin Trudeau was elected to a majority government, replacing the Conservative Party after nearly a decade in power. The Liberal Government also supports à la carte television, as evidenced by the rollout of $25/month skinny basic packages on March 1, 2016, by every major Canadian cable provider.