
IP VIDEO: PUTTING CONTROL IN THE HANDS OF THE CONSUMERS

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I. INTRODUCTION

Imagine a world where the entire television universe is at your fingertips. A world where television programming guides are extinct, recording devices are unnecessary, and location is irrelevant. Anything and everything is available at your command. In this world, you type the name of your favorite show and a bevy of episodes immediately appears on your screen, just as it would using a search-engine on the Internet. Within seconds you can begin playing any of those programs on your television or computer or download them to a portable device to carry with you wherever you go. You can start a movie on the subway, continue it during your lunch break, and finish it in your living room that night. Welcome to the world of Internet Protocol Video (“IP Video”). IP Video is ready for deployment and has the potential to revolutionize the communications industry. The race to deliver IP Video to the home is underway, and the technology could serve as the ultimate battleground between cable companies and traditional telecommunications providers.¹

With technology developing at a rapid pace, home entertainment options for the average consumer have increased exponentially since the 1990s.² Just thirty years ago consumers praised the advent of the video cassette recorder (“VCR”) as an innovative technology that would permanently transform television viewing patterns. However, with the arrival of new technologies such as the DVD,³

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¹ Almar Latour, *Verizon, SBC Saddle up to Compete Head to Head With Cable in TV Service*, WALL ST. J., Nov. 8, 2004, at B1.

² See Anick Jesdanun, *Technology’s Effects: Transforming Lifestyles*, DAILY PRESS (Newport News, Va.), Jan. 3, 2005, at C6.

³ DVD is “a high-density compact disk for storing large amounts of data, especially

TiVo⁴ digital broadcast satellite (“DBS”),⁵ and, “On Demand”⁶ video services on digital cable,⁷ the VCR is on the brink of extinction.⁸ Yet, with IP Video just around the corner,⁹ even these relatively new video products that enable consumers to maintain databases of programming will become obsolete. IP Video will radically change the way video content is sold, advertised, packaged and viewed.¹⁰ IP Video enables individual consumers to select the exact programming they want to watch. Beyond the classic expanded tier of standard channel options provided by most digital cable services today, consumers will have the ability to seek out current and archived programming through the use of a search engine.¹¹

Over the last few decades, options for viewers have increased dramatically.¹² In 1980, the average home had just nineteen television channels.¹³ With the explosion of digital cable and DBS, the number of available channels for many viewers has climbed into the hundreds. IP Video expands this exponentially—to the point that thinking in terms of “channels” will itself be anachronistic.

The arrival of IP Video will create a ripple effect, intruding on important is-

high-resolution audio-visual material.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 558 (4th ed. 2000).

⁴ Established in Alviso, California in 1997, TiVo revolutionized how customers control their televisions; with the ability to freeze and store live programming, TiVo functions like a VCR, and includes features such as rewind and fast-forward. *See, e.g.*, Alex Pham, *TiVo Looks to Devoted Fans to Help Keep It in the Picture*, L.A. TIMES, Feb. 20, 2005, at C1.

⁵ *See, e.g.*, Peter Nichols, *Satellite Services Seen as Threat*, N.Y. TIMES, Feb. 13, 1998, at E32.

⁶ Recently, many cable systems have begun offering video-on-demand services allowing customers to watch many of their favorite programs at their leisure. The services often offer interactive features such as rewinding, fast-forwarding, and saving programs. *See, e.g.*, Linda Moss, *Comcast Unit Readies VOD to Go*, MULTICHANNEL NEWS, Feb. 7, 2005, at 38, available at 2005 WLNR 1812579.

⁷ *See, e.g.*, Cliff Edwards et al., *Interactive TV: What's in the Cards?*, BUSINESSWEEK, Jan. 31, 2005, at 32.

⁸ *See, e.g.*, *From Luxury Purchase to Scrapheap in Just 30 Years*, DERBY EVENING TELEGRAPH (U.K.), Nov. 23, 2004, at 6.

⁹ Companies such as Verizon Communications, Inc. and SBC Communications Inc. plan to begin offering the service in select markets as early as 2005. *See, e.g.*, Edie Herman, *Panelists Debate Regulation of IP-Based Services*, COMM. DAILY, June 3, 2005, at 1.

¹⁰ *See, e.g.*, Yuki Noguchi, *Verizon Betting on a Bundle*, WASH. POST, Oct. 22, 2004, at E1.

¹¹ Agam Shah, *Google Launches TV Search Engine*, PC WORLD, Jan. 25, 2005, <http://www.pcworld.com/news/article/0,aid,119421,00.asp>. Google has announced plans to offer a video search engine that would allow consumers to type in the program they are looking for and download it immediately. This would be the next step in the burgeoning trend of content providers offering selections “on demand.” *See, e.g.*, Rachel Leibrock, *Summer Reruns Running Out*, CINCINNATI POST, Aug. 11, 2005, at B3.

¹² Valerie Block, *Cable Loses Connection With New Viewers*, CRAIN'S N.Y. BUS., Sept. 25, 2000, at 47.

¹³ *Id.*

sues concerning the regulation of video content. IP Video presents a number of challenges for the Federal Communications Commission (“FCC” or “Commission”), particularly as it relates to the classification of this new service.¹⁴ A Commission decision on a related service, Voice over Internet Protocol (“VoIP”), indicated that IP Video would be regulated as an “information service”¹⁵ subject only to federal jurisdiction.¹⁶ The Commission stated that “even video” was covered under this holding.¹⁷ Indeed, it is a stark contrast to cable television’s local franchising regulations.¹⁸

IP Video enters the communications landscape during a time of great change in the industry. Because of the dynamic nature of the technology, it will provide definitive answers to two pressing issues facing the Commission: the à la carte and indecency debates. The question as to whether the Commission should force cable systems to offer channels on an à la carte basis was one of the most hotly contested issues in 2004.¹⁹ A November 2004 report from the FCC’s Media Bureau suggested that an à la carte mandate was undesirable.²⁰ However, pressure remains on the Commission to answer the concerns of many consumer groups and prominent politicians.²¹ There has been an outcry from those who want more control over their cable television options and bills.²² IP Video might provide the solution to this problem through an un-

¹⁴ See generally *In re* IP-Enabled Services, *Notice of Proposed Rulemaking*, 19 F.C.C.R. 4863 (Mar. 12, 2004).

¹⁵ 47 U.S.C. § 153(20) (2000) (“[T]he offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service.”).

¹⁶ Ted Hearn, *IPTV’s in Vonage Order*, MULTICHANNEL NEWS, Nov. 22, 2004, at 48, available at 2004 WLNR 12590656.

¹⁷ *In re* Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, *Memorandum Opinion and Order*, 19 F.C.C.R. 22,404 (Nov. 9, 2004) [hereinafter *Vonage Opinion*]. The FCC determined that Vonage, a VoIP service, is an “information service,” thereby prohibiting states from regulating it. *Id.* ¶ 14. Federal preemption of VoIP sets the stage for IP Video providers to seek a similar ruling for their services. *Id.*

¹⁸ 47 U.S.C. § 541.

¹⁹ The debate centered on whether Congress should force cable systems to offer each station on an à la carte basis, giving consumers more choices in how much money they spend and which channels they receive. Comment Requested on à la Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems, *Public Notice*, 19 F.C.C.R. 9291 (May 25, 2004) [hereinafter *Public Notice*].

²⁰ MEDIA BUREAU, FCC, REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC (2004) [hereinafter MEDIA BUREAU REPORT], http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf.

²¹ See, e.g., Ted Hearn, *PTC, McCain Slam FCC on ‘Carte’ Report*, MULTICHANNEL NEWS, Nov. 22, 2004, at 48, available at 2004 WLNR 12790499 [hereinafter PTC].

²² *Id.*

precedented level of consumer-control over the types of programming purchased and received.

Another constant source of debate within the FCC is the battle against indecency over the airwaves. The FCC has generated unprecedented awareness of its enforcement activities in the aftermath of the Janet Jackson incident at the 2004 Super Bowl.²³ Senator John McCain, the Parents Television Council (“PTC”), and others have tied indecency arguments to the à la carte debate—suggesting that consumers be provided with additional options to keep undesirable programming out of their homes.²⁴ The PTC, Consumers Union, and other special interest groups devoted a considerable amount of time and effort to fighting the à la carte and indecency battles throughout the early 2000s.²⁵ Debates surrounding these issues involved multiple congressional hearings and dozens of lobbying sessions at the FCC and on Capitol Hill.²⁶ Ironically, the time spent attempting to solve these problems will be for naught with the arrival of a technology that dramatically shifts the ground on which they stand. The liberal deployment of IP Video will create a significant shift in the television broadcasting and FCC regulatory landscape.

A number of questions related to IP Video face those seeking to deploy this nascent technology, particularly given the uncertainty of the regulatory framework of this service. Yet, while IP Video has prompted a number of questions, answers to pressing issues are already surfacing. By prying control of video content out of the hands of programmers, IP Video will significantly alter the mindset of regulators, content producers, and consumers alike. IP Video presents the communications industry with a neutral solution to some of its most complex problems. One of its most significant effects will be rendering the à la carte cable and indecency debates moot.

This Comment explains why IP Video will definitively answer pressing questions within the industry. First, this Comment will explore what IP Video is and how it should fit within the current regulatory framework—the Telecommunications Act of 1996 (“1996 Act” or “Act”). This Comment discusses why IP Video will eliminate the need for Congress to mandate cable systems to offer à la carte pricing schemes. Next, this Comment explains why IP Video

²³ The Commission received 542,000 complaints and issued a \$550,000 fine to CBS affiliates following Janet Jackson’s “wardrobe malfunction” during the live Super Bowl halftime special. Ann Oldenburg, *A New Battle over Indecency?*, USA TODAY, Nov. 14, 2004, at 3D.

²⁴ See, e.g., Bob Thompson, *Fighting Indecency, One Bleep at a Time*, WASH. POST, Dec. 9, 2004, at C1.

²⁵ See Frank Ahrens, *Sorry—No à la Carte Cable*, WASH. POST, March 26, 2004, at E1.

²⁶ See, e.g., *Escalating Cable Rates: Causes and Solutions: Hearing Before the S. Comm. on Commerce, Science and Transportation*, 108th Cong. (2004), <http://commerce.senate.gov/hearings/witnesslist.cfm?id=1127>.

will bring a definitive end to the tireless debate over broadcast indecency. Finally, this Comment raises some issues that will threaten the viability of IP Video as a nascent technology and describe how those challenges will be overcome.

II. IP VIDEO'S LEGAL FRAMEWORK

A. What Is IP Video?

The FCC has grappled with how to proactively address the challenges posed by IP Video because of the difficulty in precisely defining the technology.²⁷ Historically, the method of content delivery has determined how the content is regulated.²⁸ Verizon Communications, Inc. (“Verizon”), SBC, and BellSouth Communications Inc. (“BellSouth”) are among the corporations that have committed billions of dollars to building high-speed fiber-optic networks²⁹ in major markets nationwide.³⁰ However, these companies will distribute their video content via different technologies.³¹ Irrespective of the delivery system, all these competitors will offer an unprecedented amount of control to consumers. For example, IP Video subscribers can search for content by name or by actor, and have on-demand access to the programming listed in the search results immediately.³²

In June 2004, SBC announced its \$4 billion–\$6 billion effort, “Project Pronto,” and began efforts to launch trials of its fiber-to-the-node technology (“FTTN”)³³ in select markets throughout the United States.³⁴ SBC Chairman Ed

²⁷ See, e.g., Barbara Esbin, Associate Bureau Chief, Federal Communications Commission, Video Programming Distributed Over IP Networks: Regulatory Issues, Address at Federal Communications Bar Association Brown Bag Luncheon (Jan. 25, 2005) [hereinafter Esbin Luncheon] (presentation materials on file with author).

²⁸ See, e.g., Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.). Under this Act, services are regulated based on how they are delivered to consumers. For example, Title II regulates all content delivered over copper wires, whereas Title VI regulates all content delivered over coaxial cable.

²⁹ The bandwidth provided by high-speed fiber-optic networks is needed for delivery of IP Video content. See Doug Mohny, *The Second Age of IP Video*, VON MAG., Oct. 6, 2005, http://www.vonmag.com/webexclusives/2005/10/6_The_Second_Age_of_IP_Video.htm (“Most certainly the enabling factor of IP video is bandwidth. Without bandwidth, consumers can’t get reasonable video and producers can’t get the audiences/eyeballs they need to deliver and monetize their work.”).

³⁰ Latour, *supra* note 1.

³¹ *Id.*

³² Rudy Ruitenbergh, *Microsoft in Internet TV Venture*, SEATTLE TIMES, Feb. 23, 2005, at C2.

³³ Kathleen Richards, *SBC Communications’ Triple Play*, LIGHTWAVE, Nov. 2004, http://lw.pennnet.com/articles/article_display.cfm?Section=ARCHI&C=Aplic&ARTICLE_ID=216478&KEYWORDS=SBC%20Communications%27%20triple%20play&p=13.

Whitacre stated that his corporation is replacing its copper-wire network with fiber-optic networks.³⁵ In addition, SBC's undertaking with Microsoft Corp. ("Microsoft"), named Project Lightspeed, has the Chairman boasting that the new system will perform at speeds greater than current offerings.³⁶ The company reached a \$400 million, ten-year agreement to use Microsoft's "IPTV Edition" software that enables SBC to deliver video-on-demand and high-definition television to IP-enabled televisions, personal computers, portable devices, and Microsoft's Xbox gaming console.³⁷ SBC's choice of a FTTN rollout stems from its desire to commence its IP Video initiative with existing customers, while simultaneously laying the groundwork to serve new customers in the future.³⁸ FTTN technology will enable SBC to bring fiber to existing neighborhood "cabinets,"³⁹ located within 3000–5000 feet of residences and small businesses.⁴⁰ Each cabinet serves approximately 300–500 homes.⁴¹ Once SBC has completed trials with the Microsoft IP Video platform, it can then shift to "Fiber to the Premises" ("FTTP")⁴² technology, which will increase the company's subscriber base.⁴³ SBC contends that while FTTP would normally be employed for new network build-outs, "the cost, deployment time and customer inconvenience for FTTP deployment in existing neighborhoods makes widespread deployment impractical for SBC companies and potentially unde-

Unlike "Fiber to the Home" technology, "Fiber to the Node" delivers the fiber to neighborhood "nodes," requiring an existing copper network to connect each home.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See *SBC, Microsoft in \$400 million FTTH IPTV Deal*, GLOBAL EXECUTIVE F., <http://www.globalexecutiveforum.net/Markets/More%20Recovery%20Watch.htm> (last visited Oct. 15, 2005) ("The initial phase of the plan to replace copper cables with fibre is slated to cost [\$4] billion and make IP-based TV and speedier internet access available to 18 million of SBC's customers by the end of 2007."); see also Ben Charny, *SBC Plans Billions on High-Speed Fiber*, CNET NEWS.COM, June 22, 2004, http://news.com.com/SBC+plans+billions+on+high-speed+fiber/2100-1037_3-5243514.html.

³⁷ Richards, *supra* note 33.

³⁸ Charny, *supra* note 36.

³⁹ Richards, *supra* note 33 ("The neighborhood cabinet serves as the demarcation point between the feeder and distribution plant. Each neighborhood cabinet will serve a distribution area of about 300–500 homes.").

⁴⁰ *Id.*

⁴¹ Press Release, SBC Communications, Inc., SBC Communications Announces Advances in Initiative to Develop IP-Based Residential Network for Integrated Video, Internet VoIP Services (June 22, 2004) [hereinafter SBC Press Release], <http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21207>.

⁴² FTTP, or "Fiber to the Premises" is a technology that brings fiber directly to a customer's home or business. See Katie Grasso, *Fiber Optics Set for 7 Towns*, COURIER POST (N.J.), Sept. 26, 2005, at B10.

⁴³ SBC Press Release, *supra* note 41.

sirable for some customers.”⁴⁴

Perhaps in an attempt to win the race against SBC to secure new IP Video customers, Verizon has taken a decidedly less conservative approach in the initial deployment of its FiOS TV service.⁴⁵ As part of its \$2.8 billion foray into the video business, Verizon has decided to forego delivering video over Internet Protocol, instead using a radio frequency (“RF”) signal.⁴⁶ Consequently, not only is Verizon faced with implementing FTTP,⁴⁷ which SBC has postponed, but it must also acquire local cable franchises in every community that it serves.⁴⁸ Skyline Marketing Group⁴⁹ President John Celantano said Verizon is investing \$1200 per subscribing household to build the network, assuming 90% penetration.⁵⁰ “They are making a huge investment, and I’m worried,” Celantano said.⁵¹

Both SBC and Verizon plan to deliver a full array of television programming over the Internet, enabling each company to provide the “triple play” of phone, Internet, and video content.⁵² As a result, consumers no longer have to pay three to four separate monthly bills for telecommunications and entertainment services. Companies such as Verizon and SBC could consolidate the industry if they are successful in delivering a wide variety of video programming to consumers, similar to the digital cable or satellite providers of today. Not wanting to lag behind SBC and BellSouth in the battle for quality programming, Verizon followed suit in late January 2005, striking a similar deal with Microsoft to supply its content.⁵³

What will distinguish IP Video from traditional cable and satellite is the sig-

⁴⁴ *Id.*

⁴⁵ Verizon’s “FiOS TV” service will deliver high-definition television, digital video recording and on-demand programming on the Microsoft TV platform. Press Release, Verizon Communications, Inc., Verizon Selects Microsoft TV as Platform for FiOS TV Service (Jan. 28, 2005), <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=89058>.

⁴⁶ Carol Wilson, *Verizon Advances on Video*, TELEPHONY (Dec. 13, 2004), http://telephonyonline.com/mag/telecom_verizon_advances_video/. An “RF Signal” is one carried over a radio frequency. *See, e.g.*, Stephen Jacobs, *X-Arcade Puts the Joy in Joystick*, ROCHESTER DEMOCRAT & CHRON. (N.Y.), June 18, 2004, at I16.

⁴⁷ *See, e.g.*, Lance Ulanoff, *FTTP Changes Everything*, PC MAGAZINE (June 15, 2005), <http://www.pcmag.com/article2/0,1895,1828112,00.asp>.

⁴⁸ Wilson, *supra* note 46.

⁴⁹ The Skyline Marketing Group is a telecommunications research and analysis firm specializing in network equipment markets. *See* Skyline Marketing Group, <http://www.skylinemarketing.com> (last visited Sept. 25, 2005).

⁵⁰ *Id.*

⁵¹ Verizon’s investment in a “cost heavy FTTP infrastructure” is a “significant risk.” *Id.*

⁵² *See, e.g.*, Jeff Richgels, *Phone Internet Cable TV*, CAPITAL TIMES (Wis.), May 12, 2005, at 8E.

⁵³ Bruce Meyerson, *Verizon Teams with Microsoft on TV Service*, SAN JOSE MERCURY NEWS, Jan. 29, 2005, at C3.

nificant number of consumer-friendly options accompanying the service.⁵⁴ IP Video will provide consumers with features familiar to users of services like TiVo—end users may fast forward, rewind, view picture-in-picture, pause live events and more—while allowing customers to maintain portable databases of programming.⁵⁵

B. The à la Carte Debate

Throughout the summer of 2004, one of the most intense debates raging within the FCC and Congress was whether the government should require cable and satellite systems to offer programming on an “à la carte” basis.⁵⁶ An à la carte system would allow consumers to purchase unbundled programming.⁵⁷ Consumers could choose to subscribe to any number of channels they desire, rather than having to pay for dozens of stations they never watch. The argument for an à la carte mandate was sparked by a letter from Senator John McCain, then Chairman of the Senate Committee on Commerce, Science, and Transportation,⁵⁸ to former FCC Chairman Michael Powell.⁵⁹ McCain cited the fact that Canada’s cable systems operate on an à la carte basis and asked why, with the availability of digital technology, more choices are not being offered to consumers.⁶⁰ Senator McCain asked Chairman Powell to use the FCC’s

⁵⁴ See, e.g., SBC Press Release, *supra* note 41.

⁵⁵ See, e.g., Elizabeth Guider, *Mart on a Tech Trek*, DAILY VARIETY, Oct. 17, 2005, at 1.

⁵⁶ Marilyn Geewax, *FCC Begins Study of ‘à la Carte’ Cable Service Offerings*, PALM BEACH POST, July 30, 2004, at 8C.

⁵⁷ *Id.*

⁵⁸ The Senate Committee on Commerce, Science, and Transportation oversees the FCC. See Jurisdiction of U.S. Senate Committee on Commerce, Science, & Transportation, <http://commerce.senate.gov/about/jurisdiction.html> (last visited Oct. 15, 2005).

⁵⁹ Letter from Senator John McCain, Former Chairman, Senate Committee on Commerce, Science, and Transportation, to Michael K. Powell, Former Chairman, Federal Communications Commission (May 19, 2004) [hereinafter McCain Letter], http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf. McCain’s letter began with the following:

As you know, the Senate Committee on Commerce, Science, and Transportation has closely examined the issue of escalating cable rates in recent hearings. Cable rates have increased more than 50% since 1996—almost three times the rate of inflation. These hearings have reinforced my concern that consumers lack options that would help them control the rising cost of cable and satellite television. When it comes to purchasing cable channels beyond the basic tier today, consumers have virtually no choice but to pay for a large package of expanded basic channels even if they watch only a couple of the channels. I am writing to ask you to explore all available options within your authority to promote à la carte cable and satellite offerings as soon as possible where such offerings would benefit consumers.

Id.

⁶⁰ *Id.*

statutory authority to control cable prices⁶¹ and provide consumers with choices over the programming they receive. McCain's letter urged Chairman Powell to use any "existing authority . . . [Powell had] to promote, or to create incentives to promote, an à la carte option, in conjunction with whatever tiers cable and satellite companies already offer."

The FCC responded to Senator McCain's request by launching an à la carte proceeding,⁶² seeking comments from the industry and all interested parties about what an à la carte universe would look like.⁶³ The Commission posed dozens of questions for industry reaction, including the technical details involved in offering à la carte, the economic implications, the benefits to be gained by the public, and the major drawbacks to implementing such a mandate.⁶⁴

Initial comments from the public regarding the prospect of à la carte cable were positive and optimistic.⁶⁵ The proposal was quickly accepted because, on the surface, it was difficult to argue in the alternative from a consumer's perspective. Paying less money for cable television is a proposition that is inherently attractive to all subscribers. Likewise, most cable subscribers do not actually watch every station on their cable package or even a majority of the stations they receive.⁶⁶ A study conducted by the Government Accountability Office provided plenty of fuel for this debate.⁶⁷ The study indicated that the average U.S. household watches only twelve to seventeen channels on a regular basis.⁶⁸

As further comments were filed at the FCC, however, a more clear picture began to emerge regarding the economic implications of à la carte regulation. Renowned economists Erik Brynjolfsson, Gregory Crawford, David Waterman, and Steven Wildman universally panned à la carte.⁶⁹ An additional study

⁶¹ 47 U.S.C. § 543 (2000).

⁶² *Public Notice*, *supra* note 19.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *In re Inquiry Concerning à la Carte, Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems, Comments of Consumers Union and Consumer Federation of America*, MB Docket No. 04-207 (July 15, 2004) [hereinafter *Consumers Union Comments*] (accessible via FCC Electronic Comment Filing System).

⁶⁶ GOV'T ACCOUNTABILITY OFFICE, TELECOMMUNICATIONS: ISSUES RELATED TO COMPETITION AND SUBSCRIBER RATES IN THE CABLE TELEVISION INDUSTRY 30, 35 (2003) [hereinafter GAO REPORT], <http://www.gao.gov/new.items/d048.pdf>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *See, e.g.*, MEDIA BUREAU REPORT, *supra* note 20, app. D. Brynjolfsson, Crawford, Waterman, and Wildman were invited by the FCC Media Bureau to participate in a symposium held at the FCC on July 29, 2004 to discuss the à la carte proposal. The four experts agreed that the à la carte proposal would actually harm consumers, rather than help them.

by the consulting firm Booz Allen Hamilton (“Booz Allen”)⁷⁰ indicated that consumers would be disadvantaged more under an à la carte system than they are today, even amidst rapidly escalating cable rates.⁷¹ In order for consumers to reduce their monthly cable bills below current levels, the study concluded, they would need to select approximately six cable networks.⁷² Juxtaposed with this glaring statistic was another finding indicating that simply offering à la carte as an *option* would hurt every single cable subscriber, regardless of their preference.⁷³ Booz Allen concluded that, because of the significant costs involved in implementing an à la carte option for cable systems, the price of expanded basic tiers would rise 7%–15% across the board.⁷⁴ Proponents of à la carte have attempted to refute the arguments forwarded by Booz Allen and other à la carte critics⁷⁵ but the overwhelming weight of the comments suggest that à la carte is simply unsound policy.⁷⁶ As a result, the FCC Media Bureau’s report to Congress struck a negative tone about whether plans to implement à la carte should move forward.⁷⁷

Senator John McCain was not pleased with the FCC’s response to his concerns, stating, “[I]t appears that the industry has been successful once again in distracting policymakers with a ‘parade of horrors’ that they allege would result from a mandatory à la carte offering.”⁷⁸ Senator McCain was not alone in his disappointment at the FCC’s stance on à la carte. Supporters of the proposal such as the PTC and the American Cable Association⁷⁹ vowed to keep

⁷⁰ This study was commissioned by the National Cable and Telecommunications Association (“NCTA”) for inclusion in the à la carte docket accompanied by NCTA’s official reply comment in the proceeding. BOOZ ALLEN HAMILTON, *The a la Carte Paradox: Higher Consumer Costs and Reduced Programming Diversity* (2004) [hereinafter BOOZ ALLEN REPORT], http://www.ncta.com/pdf_files/Booz_Allen_a_la_Carte_Report.pdf.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Eliminating the existing structure of bundled programming would inevitably lead to a decrease in the advertising rates each individual channel could demand, which would subsequently affect the rates that customers must pay, regardless of their preferences. *Id.*

⁷⁴ *Id.*

⁷⁵ See, e.g., *In re Inquiry Concerning à la Carte, Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems, Reply Comments of Consumers Union and Consumer Federation of America*, MB Docket No. 04-207 (Aug. 13, 2004) [hereinafter *Consumers Union Reply Comments*] (accessible via FCC Electronic Comment Filing System).

⁷⁶ See, e.g., *In re Inquiry Concerning à la Carte, Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems, Reply Comments of National Cable & Telecommunications Association*, MB Docket No. 04-207, at 3 (Aug. 13, 2004) [hereinafter *NCTA Reply Comments*] (accessible via FCC Electronic Comment Filing System).

⁷⁷ Ted Hearn, *FCC Prefers a Full Buffet*, MULTICHANNEL NEWS, Nov. 18, 2004, at 1, available at 2004 WLNR 12590542.

⁷⁸ PTC, *supra* note 21, at 48.

⁷⁹ The American Cable Association is a trade association representing the interests of

pushing for *voluntary* à la carte, maintaining that the FCC's report narrowly focused on *mandatory* à la carte, which was only one option.⁸⁰ The à la carte debate has been relatively quiet following the Media Bureau's Report, but it is likely to become hotly contested again with the arrival of IP Video.

C. Sports Networks Are the Crux of the Problem

IP Video will help solve one of the most hotly-contested issues in the cable industry: the price of sports programming.⁸¹ As the primary method of television content delivery shifts to Internet Protocol, consumer advocacy groups will heighten their complaints about the demands sports networks have placed on the average multichannel video program distributor ("MVPD") subscriber. Sports networks and their fans are typically the first scapegoats when the issue of cable and satellite television programming costs arises.⁸² As consumer groups fight for more control over their viewing options, they often blame the exorbitant prices local cable franchises pay for sports programming that drive up expanded basic cable rates for customers.⁸³ Senator John McCain has frequently mentioned sports networks as one of the main forces behind the unfair pricing structure of the industry.⁸⁴ All-sports networks, like ESPN and Fox SportsNet, are among the most expensive stations for a cable operator to carry.⁸⁵ Consumers with no interest in sports are obligated to subsidize sports enthusiasts who escalate the prices of the expanded basic tier. According to some cable operators, Disney, owner of ESPN, compounds the problem by forcing operators to carry additional Disney-owned networks such as ESPN2, ESPN Classic, Toon Disney and ABC Family in order to receive ESPN.⁸⁶ Throughout the à la carte proceeding, ESPN and Disney representatives vehe-

small cable operators. See American Cable Association, <http://www.americancable.org> (last visited Oct. 31, 2005).

⁸⁰ Molly M. Peterson, *Cable à la Carte Could Be on Congress' Menu Next Year*, CONGRESS DAILY, Nov. 29, 2004, at 48.

⁸¹ See, e.g., Bruce Mohl, *As Cable Players Clash, A Clearer Picture Emerges*, BOSTON GLOBE, Dec. 7, 2003, at G1.

⁸² See, e.g., Peter Grant, *It's Yankees 1, Cablevision 0, In TV-Fee Fight*, WALL ST. J., Mar. 25, 2004, at B1.

⁸³ Terry Lane & Anne Veigle, *Cable Rate Increases No Surprise, But Consumer Groups Angry*, COMM. DAILY, Dec. 17, 2004, at 3.

⁸⁴ *Id.*

⁸⁵ Grant, *supra* note 82. According to Kagan World Media and industry estimates, ESPN, the nation's top sports network, charges cable operators more than \$2 per customer, while popular kids network Nickelodeon costs programmers just thirty-four cents per unit.

⁸⁶ *In re Inquiry Concerning à la Carte, Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems, Comments of American Cable Association*, MB Docket No. 04-207 tbl.3 (July 12, 2004) [hereinafter *American Cable Association Comments*] (accessible via FCC Electronic Comment Filing System).

mently denied that they engage in such practices, claiming there is a stand-alone price for ESPN.⁸⁷

Regardless of whether sports networks are boot-strapping secondary channels in an attempt to handcuff cable operators, sports programming often drives changes in the industry. Look no further than the success story of Digital Broadcast Satellite⁸⁸ (“DBS”) systems like DirecTV, which are fueled in part by the passion of sports fans who cannot get enough programming to satisfy their needs on cable television.⁸⁹ Over the past ten years, DBS providers have earned substantial revenue by catering to niche audiences, bringing them comprehensive coverage of professional and college athletics.⁹⁰ DBS companies realized that despite the widespread popularity of sports across North America, many fans simply were not receiving sufficient coverage of the teams they support.⁹¹ Major League Baseball (“MLB”) recognized this, and as a result, is a pioneer in the delivery of its programming content to fans using cutting-edge technology.⁹² MLB’s decision to offer its games on the Internet stemmed from research indicating that 55% of baseball fans root for teams outside their market.⁹³ Until the introduction of premium packages like “MLB Extra Innings,” “NFL Sunday Ticket,” “NBA Full Court Press” and “NHL Center Ice,” which offered dozens of out-of-market games each week, fans were forced to watch their teams in sports bars or catch snippets of game highlights on national sports programs.⁹⁴

DBS providers like DirecTV found that catering to sports fans is lucrative in

⁸⁷ *In re Inquiry Concerning à la Carte, Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems, Reply Comments of the Walt Disney Company*, MB Docket No. 04-207, at 2 (Aug. 13, 2004) (accessible via FCC Electronic Comment Filing System). When pressured at hearings to reveal the stand-alone price, ESPN refused to disclose the rate.

⁸⁸ Aimee Deeken, *Inside Media: TVB: Wired Cable Lost 1.1 Mil. Users*, MEDIAWEEK, Mar. 14, 2005, at 30. Digital Broadcast Satellite (“DBS”) has provided cable systems with significant competition in recent years.

⁸⁹ R. Thomas Umstead, *TV’s Sports Utility Vehicle*, MULTICHANNEL NEWS, June 28, 2004, at 50, available at 2004 WLNR 12589175.

⁹⁰ *See, e.g.*, Press Release, CNW Group, Rogers Super Sports Pak Scores 32% Increase in Subscriptions (Dec. 2004), <http://www.newswire.ca/en/releases/archive/December2004/21/c7635.html>.

⁹¹ Sam Walker, *On Sports: The Long-Distance Fan*, WALL ST. J., July 18, 2003, at W1.

⁹² Unlike most professional sports organizations, Major League Baseball offers its entire slate of games online. *See* Major League Baseball, MLB.TV, http://mlb.mlb.com/NASApp/mlb/mlb/video/mlb_tv.jsp (last visited June 27, 2005). ESPN has followed suit, putting its “GamePlan” package of college football games (broadcast on its ABC and ESPN properties) available for live streaming on its site. *See* ESPN, <http://sports.espn.go.com/ncf/index> (last visited Sept. 22, 2005).

⁹³ *Id.*

⁹⁴ *See id.*

another venue: pay-per-view sales.⁹⁵ Events like professional boxing, wrestling, and mixed martial arts, which often cost \$29.95–\$49.95 per show, draw 30%–40% of their audience from DirecTV subscribers, “despite DirecTV representing just one-fifth of the pay-per-view universe.”⁹⁶ With digital cable and IP Video moving forward, DirecTV has done everything it can to fend off challengers to its domination of the sports-fan market. DirecTV secured its future with its exclusive renewal of the “NFL Sunday Ticket” package at \$3.5 billion over five years—a 75% increase from its previous arrangement.⁹⁷ The agreement ensured that the most devoted football fans in the United States would be tuned to DirecTV for the duration of the contract. A failure to renew the deal would have opened the door to competitors, and would have been a financial disaster for DirecTV.

While DirecTV has an exclusive contract with the NFL, there is little doubt that IP Video providers will move quickly to provide extensive coverage of other professional sports.⁹⁸ The advantages of IP Video over cable and DBS might be most profound when it comes to satisfying sports fans. Enthusiasts will be able to watch their favorite teams play live anywhere they go—at home, in the office, on the subway, or anywhere in between. While previous generations often share childhood memories of staying up late at night and picking up fuzzy game broadcasts on AM radio, future generations will reminisce about tuning in to the high-definition television broadcasts of any game they desire.

Most importantly, through IP Video, sports fans and non-sports fans alike will not be disadvantaged by the preferences of others. Consumers will have more flexibility to build their viewing options around their interests. Rather than subsidizing sports fans by paying higher prices for expanded basic service, consumers with less mainstream interests will be able to seek out niche programming that better serves their needs. By transferring control of the television viewing experience into the hands of the consumers, IP Video will provide an answer to some of the most poignant concerns suffered by consumers. IP Video is a dynamic technology in its ability to also meet the needs of enthusiasts of certain programming, while simultaneously accommodating basic subscribers who have no desire to subsidize additional content that meets other viewers’ interests.

⁹⁵ Umstead, *supra* note 89, at 50.

⁹⁶ *Id.*

⁹⁷ John C. Cotey, *NFL Feast for DirecTV*, ST. PETERSBURG TIMES, Nov. 12, 2004, at C3.

⁹⁸ See, e.g., Claire Atkinson, *Cable vs. Satellite in Prize Fight for Viewers*, ADVERTISING AGE, Nov. 22, 2004, at 19, available at 2004 WLNR 12194000.

D. The Fight Against Indecency

The impact of IP Video extends far beyond the flexibility it affords consumers in selecting programs appropriate for their economic and entertainment needs. It also allows consumers to prevent objectionable programming from entering their homes. Supporters of à la carte, such as Senator McCain, Consumers Union, and the PTC, have related the ongoing debate over indecent programming to the debate over à la carte cable.⁹⁹ When making the point that customers should not have to pay for channels they do not want, consumer advocates argue that many people pay for content that they find objectionable.¹⁰⁰ Consumers Union contends that the FCC could make headway in its public battle against indecent programming by giving consumers the power to select only those stations they want brought into their home.¹⁰¹

The counter argument to the use of à la carte programming to combat indecency is obvious. For years the cable industry has diligently attempted to comply with the Telecommunications Act through the development of customer-controlled devices blocking unwanted channels.¹⁰² The Media Bureau's Report on à la carte detailed the primary methods cable companies employ to provide blocking capability to customers.¹⁰³ The Act requires cable operators to provide "lockboxes" for sale or lease,¹⁰⁴ and to scramble or block programming to which a household does not subscribe, or at the request of a subscriber free of charge.¹⁰⁵

Furthermore, most Americans have the capability to block any stations they want through the use of the "V-Chip"¹⁰⁶ embedded in most televisions.¹⁰⁷ Cable operators have been proactive with attempts to educate customers about using the blocking tools at their disposal, as mandated by the Act.¹⁰⁸ Those efforts,

⁹⁹ See, e.g., *In re Inquiry Concerning à la Carte, Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems, Comments of Parents Television Council to the Public Notice*, MB Docket No. 04-207, at 1 (July 15, 2004) (accessible via FCC Electronic Comment Filing System).

¹⁰⁰ *Id.*

¹⁰¹ *Consumers Union Comments, supra* note 65, at 4.

¹⁰² See, e.g., NAT'L CABLE & TELECOMM. ASS'N, CABLE INDUSTRY EFFORTS TO EMPOWER TELEVISION VIEWERS: CHOICE, CONTROL AND EDUCATION 1-2 (2004), http://www.ncta.com/pdf_files/whitepapers/TVControl.pdf.

¹⁰³ MEDIA BUREAU REPORT, *supra* note 20, at 24.

¹⁰⁴ 47 U.S.C. § 544(d)(2) (2000).

¹⁰⁵ *Id.* § 560.

¹⁰⁶ The "V-Chip" is technology that enables customers to block objectionable programming based upon its rating. The FCC requires that all televisions with picture screens of 13 inches or larger include the technology. See Federal Communications Commission, V-Chip: Viewing Television Responsibly, <http://www.fcc.gov/vchip/> (last visited Sept. 23, 2005).

¹⁰⁷ Michele Grepi & Melissa Grego, *Nets Turn to V-Chip as Savior*, TELEVISION WK., Apr. 5, 2004, at 1.

¹⁰⁸ See, e.g., Press Release, National Cable and Telecommunications Association, Cable

however, have not been particularly successful. Indecency complaints are being filed at a record rate,¹⁰⁹ while blocking technology remains largely unused.¹¹⁰ À la carte supporters dismiss the argument that mandated à la carte is unnecessary because of the existence of blocking technology.¹¹¹ Some customers do not appreciate that they are being forced to pay for objectionable programming.¹¹² Consumers Union and others believe that the government's solution to the rise of indecent and violent programming is to put choices in the hands of consumers, allowing them to pay only for stations they do not find objectionable.¹¹³

E. IP Video Should Be Regulated With a Light Touch

While major players like SBC and Verizon can afford to gamble billions of dollars on IP Video,¹¹⁴ it remains to be seen how quickly companies with more modest resources will invest in the technology. Until there is regulatory certainty, it is unlikely that the start-up companies, a huge part of similar telecommunications developments, will be able to receive the necessary financing to become involved.¹¹⁵

How IP Video will be regulated is a source of great debate. It is a perfect example of why the Act has been regarded as a failure and is being considered for a rewrite by Congress.¹¹⁶ The Commission began exploring how to handle the infusion of IP-Enabled Services with a 2004 decision focusing on the regulation of VoIP.¹¹⁷ Determining that Vonage Holdings Corporation's VoIP service¹¹⁸ should be classified as an "information service"¹¹⁹ and not a "telecom-

Puts You in Control: Cable Industry Launches Consumer Education Initiative (Mar. 2, 2004), <http://www.ncta.com/press/press.cfm?PRid=448&showArticles=ok>.

¹⁰⁹ While there have been a record number of indecency complaints, the majority have been cookie-cutter complaints derived from the PTC and its supporters. *See, e.g.,* Vikas Bajaj, *Bush Elevates Longtime Supporter to FCC Chief*, DALLAS MORNING NEWS, Mar. 17, 2004, at F4.

¹¹⁰ Grepi & Grego, *supra* note 107, at 1.

¹¹¹ *Consumers Union Comments*, *supra* note 65, at 4.

¹¹² *Id.*

¹¹³ *Id.* at 2.

¹¹⁴ *See* Skyline Marketing Group, *supra* note 49.

¹¹⁵ Sanford Nowlin, *SBC Likely to Come up Short with Legislature*, SAN ANTONIO EXPRESS-NEWS, at E1.

¹¹⁶ *See, e.g.,* Press Release, Telecom Policy Report, All Sides Gear Up for Re-Write Fight (Nov. 24, 2004) [hereinafter Telecom Policy Report], http://www.findarticles.com/p/articles/mi_m0PJR/is_45_2/ai_n7180436/print.

¹¹⁷ *In re* IP-Enabled Services, *supra* note 14, at 1.

¹¹⁸ Vonage, founded in 2001, is a New Jersey-based corporation that has developed into the industry's leader in VoIP services. Vonage, <http://www.vonage.com> (last visited Sept. 3, 2005).

¹¹⁹ 47 U.S.C. § 153(20) (2000) ("The term 'information service' means the offering of a

munications service,¹²⁰ the Commission hinted that IP Video should be classified the same way.¹²¹ In the Vonage Opinion, the Commission maintained that “even video” is covered by its decision to preempt state regulation and subject the service only to federal jurisdiction.¹²²

The Vonage Opinion, however, did not expound on the passing mention of video, and particularly, with the departure of FCC Chairman Michael Powell in March 2005, there is uncertainty about the regulation of IP Video.¹²³ Without resolution of the regulatory structure of IP Video, potential investors may shy away from entering the market. If IP Video is treated with the same light regulatory touch as its voice counterpart, VoIP, more industry players will become involved.¹²⁴

Barbara Esbin, the Associate Bureau Chief of the FCC’s Media Bureau, addressed the Commission’s challenge regarding the regulation of IP Video on January 25, 2005.¹²⁵ Although the Commission has not launched a proceeding to determine IP Video’s regulatory classification, Esbin acknowledged that the FCC is considering the issue. She asserted that until there is more certainty about IP Video products, analyzing the jurisdictional question is largely speculative.¹²⁶

Esbin stated that the “only certain thing under the Act today” is that the regulatory status of any given service will depend on three things: (1) what functionality is being provided to end users; (2) who is providing it; and (3)

capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”).

¹²⁰ *Id.* § 153(46) (“The term ‘telecommunications service’ means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”).

¹²¹ *See Vonage Opinion*, *supra* note 17, ¶ 32.

¹²² *Id.*

¹²³ *See* Ted Hearn, *Sununu: New Bill to Address IP Video*, MULTICHANNEL NEWS, Dec. 16, 2004, 2004 WL 86216049. The current FCC Chairman, Kevin Martin, served as a Commissioner during Powell’s tenure as Chairman. There is no reason to believe Chairman Martin will recommend overturning the FCC’s decision. Nevertheless, until IP Video is affirmatively granted the same regulatory status as VoIP, there will be uncertainty. *Id.*

¹²⁴ A consistent trend in telecommunications is that where regulatory certainty is provided by the FCC, more companies are willing to invest. *See, e.g.*, Nowlin, *supra* note 115.

¹²⁵ *See* Esbin Luncheon, *supra* note 27. Esbin was the guest speaker at a heavily attended Federal Communications Bar Association luncheon at Willkie Farr & Gallagher LLP in Washington, D.C. *Id.*

¹²⁶ While companies like SBC, Verizon, and BellSouth have revealed their plans for IP Video deployment, there remains uncertainty as to what the finished products will look like. Verizon’s product will soon be debuted in select markets nationwide. *See, e.g.*, Linda Haugsted, *Verizon Eyes Five More in ‘05*, MULTICHANNEL NEWS, Sept. 26, 2005, at 5, 2005 WLNR 15281388.

what facilities are being used to provide it.¹²⁷ The biggest hurdle in avoiding state regulation for Vonage was the fact it could be considered a “telecommunications service.”¹²⁸ The challenge for Verizon, SBC and others hoping for a widespread deployment of IP Video is avoiding classification as a “cable service.”¹²⁹ If IP Video is deemed a “cable service,” it will be subject to regulation under Title VI of the 1996 Act. This would cause serious harm to the development of the new technology and force IP Video providers to comply with must carry rules, retransmission agreements, and a myriad of other cable-specific regulations.¹³⁰

The Commission and Congress are challenged by the fact that the 1996 Act is not flexible enough to adapt to emerging technologies like IP-Enabled Services.¹³¹ Trying to regulate IP Video with the 1996 Act is like attempting to fit a square peg into a round hole. Until there is a rewrite of the Act, the Commission will struggle in its attempt to regulate IP Video and other innovative technologies that are unforeseen. Furthermore, the Commission must use its delegated authority to preempt state regulation of IP Video if this service is to truly thrive.

III. TRANSITIONING TO CONSUMER CONTROL

A. As Television Programming Evolves, So Do Consumer Options

Throughout the history of television, from the invention of black and white sets in 1939 to the explosion of cable television in the 1990s, consumers have had very little say in their viewing options.¹³² From the days of three broadcast channels picked up with rabbit ear antennas to today’s abundant digital content, power has remained in the hands of the cable and satellite providers.¹³³ The cable industry contends it is doing everything it can to maximize the consumers’ ability to choose their viewing options with the proliferation of huge

¹²⁷ *Id.*

¹²⁸ *Vonage Opinion*, *supra* note 17, ¶¶ 11–12.

¹²⁹ “Cable service” is statutorily defined as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.” 47 U.S.C. § 522(6) (2000).

¹³⁰ Treating IP Video as a cable service would likely quash investment in the technology because of the costs involved in complying with Title VI of the Communications Act. *See, e.g.*, Robert S. Metzger & Benjamin P. Broderick, *Communications Convergence*, 18 *COMPUTER & INTERNET LAW*, 1, 1 n.42 (2001).

¹³¹ *See, e.g.*, Telecom Policy Report, *supra* note 116, at 1.

¹³² *See Consumers Union Comments*, *supra* note 65, at 1.

¹³³ *See id.*

“expanded basic” tiers.¹³⁴ The arrival of digital cable television has afforded consumers options like never before, with the availability of dozens, if not hundreds of channels on the expanded basic tier.¹³⁵ The channels offer consumers more variety than they could have dreamed of ten or twenty years ago—making available dozens of networks catering to niche interests.¹³⁶

B. Consumer Groups and Cable Programmers Square Off

Consumers Union,¹³⁷ the nation’s highest-profile consumer advocacy organization, strongly opposes the cable industry’s contention that consumers are better off with cable programmers dictating what choices are available.¹³⁸ The organization points to Bureau of Labor statistics indicating that cable rates have risen at nearly three times the rate of inflation.¹³⁹

What Consumers Union and other consumer advocates lobby for is a system allowing consumers to pay only for the programming they watch¹⁴⁰—a mirror image of Senator McCain’s suggestion.¹⁴¹ As discussed above, the vast majority of economic analysis surrounding the à la carte debate suggested that Consumers Union’s hope is unrealistic.¹⁴² Consumers Union’s ideas, however, might not be as far-fetched as cable supporters and à la carte detractors have suggested.

A survey of other entertainment outlets—like music and movies—indicates a pronounced shift towards consumer control.¹⁴³ New technologies have devel-

¹³⁴ See, e.g., *NCTA Reply Comments*, *supra* note 76, at 1.

¹³⁵ See, e.g., *In re à la Carte, Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems, Comments of Comcast Corporation*, MB Docket No. 04-207, at 8 (July 15, 2004) (accessible via FCC Electronic Comment Filing System).

¹³⁶ *Id.*

¹³⁷ Consumers Union, an independent, nonprofit testing and information organization serving only consumers since 1936, is the publisher of *Consumer Reports*, the leading consumer publication in the United States. See *Consumer Reports*, <http://www.consumersunion.org/aboutcu/about.html> (last visited Sept. 3, 2005).

¹³⁸ See *Consumers Union Comments*, *supra* note 65, at 2–3.

¹³⁹ See *id.*; see also Bureau of Labor Statistics, *Consumer Price Index* (May 2004), http://www.bls.gov/news.release/archives/cpi_06152004.pdf. According to the Bureau of Labor Statistics, cable rates rose 58% from January 1996 to March 2004, while inflation increased 21% in that same time period (2.7 times faster than inflation). *Id.*

¹⁴⁰ See *Consumers Union Comments*, *supra* note 65, at 9.

¹⁴¹ See McCain Letter, *supra* note 59.

¹⁴² The majority of the economists surveyed within comments in the à la carte docket found that such a system would actually harm consumers, by forcing them to pay more money for much less diverse programming. See, e.g., BOOZ ALLEN REPORT, *supra* note 70, at 1–2.

¹⁴³ See, e.g., Matt Marshall, *Plugging Into Your Home: A Look at Where Silicon Valley’s Venture Capitalists Are Investing*, SAN JOSE MERCURY NEWS, Feb. 11, 2005, at B1.

oped that place an unprecedented amount of control in consumers' hands. The early success of TiVo has prompted cable companies to scramble to build similar systems. This has enabled millions of consumers to watch television with features at their disposal, including: (1) pausing live programming; (2) storing favorite programs; and (3) rewinding and fast-forwarding through programming.¹⁴⁴

The future of video content and delivery appears even more focused on giving consumers freedom to watch what they want, when they want.¹⁴⁵ Products such as "TiVo to Go," a partnership between TiVo and Microsoft, will allow consumers to transfer their recorded television programs to portable devices, such as mobile phones and Pocket PCs running Windows software.¹⁴⁶ Until recent years, the strict schedules of television networks have imposed a burden on consumers as to the particular times they could watch their favorite shows. Even with a VCR, a program had to be recorded at the precise time it was scheduled for that week or viewers were out of luck.¹⁴⁷ However, the burdens that network schedules place on viewers are ameliorated with devices like TiVo which have transformed the mentality of those in the video content business to focus more on giving consumers unprecedented variety in programming options.¹⁴⁸

C. Parallels in the Music Industry

The evolution of consumer control extends well beyond the production and delivery of video content. Recent years have seen music consumers experiencing more control over content than ever before and emerging technologies indicate this trend will continue.¹⁴⁹ Like television, radio follows a tradition whereby the songs and artists receiving airplay are dictated by the station's program directors.¹⁵⁰ Radio station airplay has traditionally been a crucial element in the success of any recording act to sell concert tickets and build overall

¹⁴⁴ See, e.g., Franklin Paul, *TiVo's Success Breeds New Competition and Products*, REUTERS (Feb. 19, 2005), <http://www.expressindia.com/fullstory.php?newsid=42180>.

¹⁴⁵ See, e.g., Marshall, *supra* note 143, at B1.

¹⁴⁶ See Todd Bishop, *In Surprise, Gates Announces a Deal with TiVo on Television*, SEATTLE POST-INTELLIGENCER, Jan. 6, 2005, at E1.

¹⁴⁷ See H. Michael Drumm, Note, *Life After Napster: Will Its Successors Share Its Fate?*, 5 TEX. REV. ENT. & SPORTS. L. 157, 159 (2003).

¹⁴⁸ See, e.g., Paul, *supra* note 144.

¹⁴⁹ See, e.g., Mike Himowitz, *Tuning Up for Online Music Wars' Next Battle*, BALTIMORE SUN, Sept. 2, 2004, at D1.

¹⁵⁰ Lauren J. Katunich, Note, *Time to Quit Paying the Payola Piper: Why Music Industry Abuse Demands a Complete System Overhaul*, 22 LOY. L.A. ENT. L. REV. 643, 644-46 (2002).

fan awareness.¹⁵¹ The primary method consumers learn about new artists is through the airwaves, placing consumers at the mercy of program directors.¹⁵²

Recently, the traditional business model of radio programming, where program directors exercise firm control of what is broadcast, has shifted radically. With the explosion of the Internet in the 1990s, and the arrival of technologies like Apple's iPod¹⁵³ and satellite radio services like XM and Sirius,¹⁵⁴ the music industry has undergone dramatic change. Fans eager for alternatives to over-the-air, corporate-driven FM radio music selections have expanded their choices by downloading songs with possibly less radio play from the Internet.¹⁵⁵ Free music downloads are so prevalent that they threaten the economic future of the music industry itself.¹⁵⁶ This has prompted drastic action by entities such as the Recording Industry Association of America ("RIAA").¹⁵⁷

The music industry was blindsided by the explosion of the Internet, but it is learning how to embrace the dramatic shift in its economic model. Initially, the music industry faced off against consumers in an all-out war against downloaders.¹⁵⁸ This left a bad taste in the mouths of many consumers, however, and music executives are currently handling the situation with less hostility towards consumers.¹⁵⁹ The music industry realized that any attempt to maintain a stranglehold on consumers in the consumption and distribution of music is an

¹⁵¹ See Revella Cook, *The Impact of Digital Distribution on the Duration of Recording Contracts*, 6 VAND. J. ENT. L. & PRAC. 40, 46 (2003).

¹⁵² Furthermore, recent highly-publicized instances of "payola" call into question the integrity of program directors who decide which artists receive airplay. Katunich, *supra* note 150, at 644. "Payola," or pay-for-play, remains a major problem and the focus of considerable FCC attention in recent years. *Id.* at 645.

¹⁵³ Apple's iPod is the leading digital music player in the market. See, e.g., Leslie Walker, *Yahoo Music Challenges Napster*, WASH. POST, May 19, 2005, at F7. It allows consumers to download MP3s or transfer digital music onto a portable device. This handheld hardware is light enough for users to workout with or carry on the train. One Australian publication labeled the iPod as arguably "the most desired object of its type on the planet." Greg Thom, *Pod of Gold*, HERALD SUN (Melbourne), June 30, 2004, at C3.

¹⁵⁴ XM and Sirius are the two satellite radio broadcasters in the United States, both of which offer more than 120 channels of diverse music and talk radio. The services cost about \$12.95 a month and have gained widespread popularity since their inception. See, e.g., Leon Lazaroff, *Satellite Radio Sending Out Strong Signal*, CHI. TRIBUNE, Oct. 2, 2005 at C8.

¹⁵⁵ See Richard Swope, Comment, *Peer-to-Peer File Sharing and Copyright Infringement: Danger Ahead for Individuals Sharing Files on the Internet*, 44 SANTA CLARA L. REV. 861, 862-66 (2004).

¹⁵⁶ See, e.g., Stephen Kiehl et al., *Is Ruling End of File-Sharing?*, BALT. SUN, June 29, 2005, at A1.

¹⁵⁷ *Id.* The RIAA has engaged itself in well-publicized lawsuits against free online download services such as the original "Napster" and "Kazaa," as well as individual citizens who have shared content online with other users. See, e.g., Andrea Weigl, *Music Battle Escalates*, NEWS & OBSERVER (Raleigh), Apr. 18, 2005, at A1.

¹⁵⁸ *Id.*

¹⁵⁹ See, e.g., Sean Daly, *10 Million iPods, Previewing the CD's End*, WASH. POST, Feb. 13, 2005, at A1.

impossible task.¹⁶⁰ No matter how hard the RIAA and others try to police the Internet trafficking of music, the momentum built over the last decade is too much to overcome.¹⁶¹

As a result, the music industry is in the process of revamping its entire business model.¹⁶² Throughout recent history, the collection of music has been about acquiring physical objects—from vinyl records, to the 8-track, to cassette tapes, compact discs and so on.¹⁶³ Companies such as Napster,¹⁶⁴ RealNetworks, MusicNow, and MusicNet are launching services that challenge the traditional economic models of the music industry.¹⁶⁵ These companies have attempted to wrest control from the hands of Apple, who sprinted to the head of the pack with the invention of the iPod and iTunes.¹⁶⁶ For example, “Napster To Go” offers unlimited song downloads for just \$14.95 a month,¹⁶⁷ deliberately attempting to counter the iPod pricing scheme of 99 cents per song.¹⁶⁸ Unlike iTunes, however, Napster does not allow consumers to keep the songs indefinitely.¹⁶⁹ Consumers rent access to Napster’s database of more than 1,000,000 songs; these songs are only available in a copy-restricted format and can be played on a limited number of digital music players.¹⁷⁰ When a consumer’s subscription expires, the songs are no longer available to the consumer.¹⁷¹

Napster’s business model attempts to transform the mindset of the consumer—moving them from perpetual unlimited access of a physical product to restricted access.¹⁷² Questions remain as to the success of this strategy, but it

¹⁶⁰ See Jonathan Kim, *Tech Firms Aim to Change Copyright Act*, WASH. POST Jan. 6, 2005, E01 (“The Recording Industry Association of America has so far sued 7,700 file swappers in hopes of scaring away others, a strategy that has angered many music fans.”).

¹⁶¹ Lawsuits initiated against individual file-swappers have been called the “sue-Oliver remedy,” in reference to Oliver Twist. 108 Cong. Rec. 1791 (daily ed. June 22, 2004) (statement of Sen. Hatch) (describing these litigious efforts as a “debacle”).

¹⁶² Kim, *supra* note 160.

¹⁶³ See *id.*

¹⁶⁴ Although the name “Napster” at one time was synonymous with “illegal downloads,” the company has since re-invented itself as a legitimate online music service. See Paul Wenske, *Services Offer Unlimited Music Rentals for a Monthly Fee*, KAN. CITY STAR, Feb. 4, 2005, at C3.

¹⁶⁵ See *id.*

¹⁶⁶ Apple’s “iTunes” service allows customers to purchase individual songs online and download them to the portable “iPod” device at a cost of just 99 cents per song. See, e.g., Thom, *supra* note 153.

¹⁶⁷ Napster, Napster to Go, available at <http://www.napster.com/ntg.html> (last visited Apr. 7, 2005).

¹⁶⁸ See Apple iTunes, <http://www.apple.com/itunes/music> (last visited Oct. 17, 2005).

¹⁶⁹ Napster, *supra* note 167.

¹⁷⁰ *Id.*

¹⁷¹ Rob Pegoraro, *Math Is Done: Napster To Go Doesn’t Add Up*, WASH. POST, Feb. 13, 2005, at F7.

¹⁷² *Id.*

has certainly caught the industry's attention.¹⁷³ If innovative services such as Napster can change consumer thinking, the music business's future may be in providing access to massive databases of content, leaving behind the idea of individual ownership of physical objects representing the work of particular artists.¹⁷⁴

As the television industry looks ahead to the arrival of IP Video, it should examine the proliferation of new products and methods of distribution within the music industry as a precursor of things to come. In music, the RIAA was forced to concede that, like it or not, consumers were in control of the industry.¹⁷⁵ Likewise, IP Video might force the hand of television content providers and executives. The grip on content control, once held by cable programmers and network executives,¹⁷⁶ will soon be pried from their hands as consumers voice their desires. IP Video is the technology that will give consumers this power.

IV. IP VIDEO WILL PROVIDE THE ANSWER TO CRITICAL QUESTIONS WITHIN THE COMMUNICATIONS INDUSTRY

Issues that have been the subject of spirited debates for years will be answered when IP Video puts consumers in control of content delivery. The à la carte debate is perhaps the most obvious one.¹⁷⁷ The fact that IP Video was looming in the background undoubtedly played a role in how the FCC treated the issue when examining it in 2004.¹⁷⁸ As IP Video providers begin to compete with cable companies, the idea that huge bundles of channels must be broken up to benefit consumers will become moot.

IP Video's arrival should also significantly alter the FCC's most high-profile mission—the regulation of indecency. When consumers are granted full control over their viewing options, the rationale behind policing indecency will disappear. By affirmatively inviting indecent material into the home, consumers cannot be deemed a captive audience blindsided by objectionable content, as is the case with over-the-air television.¹⁷⁹ Part of the unique nature of com-

¹⁷³ Daly, *supra* note 159.

¹⁷⁴ *See id.*

¹⁷⁵ *See supra* text accompanying notes 160–63.

¹⁷⁶ *See supra* text accompanying notes 134–35.

¹⁷⁷ *See Public Notice, supra* note 19.

¹⁷⁸ *See MEDIA BUREAU REPORT, supra* note 20, at 7, 64.

¹⁷⁹ The Supreme Court's traditional rationale behind treating broadcasting differently than other media (such as magazines) is that broadcasting can be received by unsupervised children, without warning, in the home. The Court reasoned that the public interest is served by preventing unintended indecent broadcasts from reaching young children or adults who would be offended by such material. *See FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978).

munications law is the ability of technology to answer dilemmas within the industry. As IP Video evolves, it will become a major asset not only to consumers and providers, but to regulators as well. IP Video will provide a neutral solution to some of the most challenging and sensitive regulatory problems.

A. IP Video Is the Answer to the à la Carte Dilemma

1. *IP Video and à la Carte*

In November 2004, the FCC's Media Bureau revealed its opinion about à la carte¹⁸⁰ to the disdain of Senator McCain and à la carte supporters.¹⁸¹ What might have contributed significantly to its opinion, however, was mentioned only briefly in the Media Bureau's report.¹⁸² The Media Bureau acknowledged the importance of IP Video in its analysis of the à la carte debate.¹⁸³ In the report, the Media Bureau recognized its responsibility to "pursue [its] traditional public interest goals of enhancing consumer choice, fostering MVPD competition and programming diversity, and providing our citizens with the tools to prevent objectionable programming from entering their homes."¹⁸⁴ One of the FCC's recommendations to achieve those policy goals is for regulators to continue to aggressively pursue policies for broadband deployment.¹⁸⁵ The Commission then stated, "[V]ideo over internet protocol is in its infancy, yet is bringing à la carte choices over the Internet to many Americans."¹⁸⁶ The report cited Major League Baseball's successful MLB.TV launch as an example of how the Internet can be used to "lower distribution costs to make à la carte a reality."¹⁸⁷ Major League Baseball offers more than 97% of its games on a live Internet stream, and keeps every game archived for the convenience of its fans.¹⁸⁸ Customers can purchase the entire season of programming for only \$79.95, or individual games for just \$3.95 (either live or archived).¹⁸⁹

Later in the report, the Media Bureau stated that with IP Video's lower distribution costs (compared with cable or satellite), the technology may "ultimately supplant existing non-Internet based platforms for the distribution of

¹⁸⁰ See Public Notice, *supra* note 19.

¹⁸¹ See McCain Letter, *supra* note 59.

¹⁸² MEDIA BUREAU REPORT, *supra* note 20, at 7, 64.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 7.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See Major League Baseball, MLB.TV, *supra* note 92.

¹⁸⁹ *Id.*

certain types of video content.”¹⁹⁰ The report predicted that as digital technology advances, IP Video “and other distribution alternatives will become more competitive.”¹⁹¹ The Media Bureau’s vision for IP Video is certainly not unique. Many experts within the communications industry predict exactly what the FCC visualizes.¹⁹² This idea is furthered by the fact that companies like Verizon and SBC would not have mortgaged their future by spending billions of dollars on a product that has a significant chance of failure.

2. *Bringing the Benefits of Technology to the Consumer*

Because of rapid technological developments over the last decade, consumers have gained more control over their entertainment options than ever before.¹⁹³ IP Video has the potential to push that trend toward consumer choice even further. Because video programming is being delivered over the Internet, a seemingly endless number of features can be added to programs, satisfying short attention spans. The arrival of IP Video marks the continuation of a trend in which the delivery of entertainment services has changed dramatically.¹⁹⁴ The explosive growth of the Internet, coupled with the arrival of digital cable has multiplied the options for consumers to phenomenal levels.¹⁹⁵ Cable companies are regularly offering more luxury services to customers, from on-demand programs to high definition television and interactive features that give consumers more control over their viewing experience.¹⁹⁶

Even with cable television’s dramatic improvements throughout the last five to ten years, IP Video offers so many benefits to consumers that it can out-compete both the cable and satellite industries.¹⁹⁷ The nature of cable’s delivery to the home versus the advantages offered by IP Video places cable programmers at a distinct disadvantage.¹⁹⁸ Cable companies deliver every channel they offer in a continuous stream to a home, scrambling the premium channels for which a customer has not paid.¹⁹⁹ IP Video, however, requires far less band-

¹⁹⁰ MEDIA BUREAU REPORT, *supra* note 20, at 64.

¹⁹¹ *Id.* at 64–65.

¹⁹² *See, e.g.*, Mike Langberg, *Forget à la Carte Cable Idea; The Future Is in Internet TV*, SAN JOSE MERCURY NEWS, July 23, 2004, at 1E.

¹⁹³ Ellen Sheng, *Advertisers Sharpen Their Targeting*, WALL ST. J., Oct. 27, 2004, at 1.

¹⁹⁴ Leon Lazaroff, *Consumers Get New Choices, More Control*, CHI. TRIB., Jan. 1, 2005, at C1.

¹⁹⁵ *Id.*

¹⁹⁶ Catherine Yang, Tom Lowry & Roger Crockett, *Cable vs. Fiber*, BUSINESSWEEK, Nov. 1, 2004, at 36.

¹⁹⁷ *See, e.g.*, Drew Clark, *Buddy, Can You Spare a Franchise Fee?*, <http://www.drewclark.com/wiredinwashington/20041206.htm> (last visited June 25, 2005).

¹⁹⁸ *Id.*

¹⁹⁹ Meyerson, *supra* note 53.

width because only the station that the customer requests is transmitted to the home.²⁰⁰ This will allow IP Video providers to offer a seemingly endless number of viewing options,²⁰¹ unlike cable which is handcuffed by limited space availability.²⁰² This often leads to the exclusion of niche networks that do not appeal to enough people in any given geographic location.²⁰³ This additional bandwidth will give IP Video providers the option of delivering high-speed data, interactive features, and, perhaps most importantly, high definition television all on one platform.²⁰⁴

B. Retransmission Agreements Could Present a Significant Roadblock to the Deployment of IP Video

IP Video will accomplish exactly what à la carte supporters wish for—placing consumers in control of their television-viewing experience.²⁰⁵ Consumers Union has been particularly vocal about the fact that cable programmers force consumers to buy an overpriced extended basic tier of channels, many of which are unwanted, before *any* choices are offered to the consumers.²⁰⁶ IP Video will give consumers options from the very beginning, as viewers will have a level of customization never before offered in the delivery of video content.²⁰⁷

While the capability exists to give customers seemingly unlimited choices, there remains a number of hurdles that will challenge regulators and IP Video content providers. In hearings before the Senate and the House of Representatives regarding à la carte (as well as a July 29, 2004 FCC symposium), the veil of secrecy surrounding contractual agreements between networks and programmers was lifted.²⁰⁸ When prodded by members of Congress to disclose the

²⁰⁰ Like cable television, the consumer will have the option to change channels instantaneously. But instead of wasting bandwidth by streaming every single channel into the home at once, IP technology is advanced to the point that it requires just one channel to be streamed at a time. *Id.*

²⁰¹ *Id.*

²⁰² See 47 U.S.C. § 522(17) (2000) (defining service tier as a “category of cable service or other services provided by a cable operator and for which a separate rate is charged by the cable operator”).

²⁰³ *American Cable Association Comments*, *supra* note 86, at 3.

²⁰⁴ Meyerson, *supra* note 53.

²⁰⁵ *Consumers Union Comments*, *supra* note 65, at 14.

²⁰⁶ *Id.* at 3.

²⁰⁷ Langberg, *supra* note 192.

²⁰⁸ *Competition and Consumer Choice in the MVPD Marketplace, Including an Examination of Proposals to Expand Consumer Choice, Such as a la Carte and Themed-Tiered Offerings: Hearing Before the H.R. Comm. on Energy and Commerce, 108th Cong. 116–22 (2004)* [hereinafter *À la Carte Hearing*] (statement of Mr. Ben W. Hooks, Chief Executive Officer, Buford Media Group), <http://www.access.gpo.gov/congress/house/pdf/108hr/95453.pdf>.

details regarding retransmission agreements and the contractual prices for particular programming, network executives and cable programmers refused to talk, citing confidentiality clauses in their contracts.²⁰⁹ At a July 14 hearing in the U.S. House of Representatives, Congressman Nathan Deal lambasted Ben Pyne, a Disney/ESPN representative, regarding his refusal to disclose any details surrounding these contracts.²¹⁰ Congressman Deal threatened to explore the imposition of antitrust restrictions on the cable networks if their practices continued.²¹¹ Stating that the committee had contacted the FCC about investigating their contents, Deal said:

It is obvious that this whole process is surrounded in secrecy. This committee has written a letter to the FCC asking them to investigate it. I want to guarantee the members of this committee the FCC is going to come back and tell us, “We can’t get the information, because the big guys have sealed the lips of the people they do business with, and they won’t tell us either.”²¹²

C. The FCC Should Press Forward Swiftly in Mandating Disclosure of Contracts Between Networks and Programmers

Congressman Deal’s prediction that the FCC would not be able to force disclosure of the contracts was accurate—there has been no further information emanating from the Commission. However, when IP Video is fully deployed, the presence of retransmission agreements and contractual tie-ins will become a major issue for content providers. The FCC, working in conjunction with Congress, should intervene immediately and demand disclosure of the retransmission agreement details. If not, the Commission will face significant problems when IP Video providers attempt to offer programming in an à la carte fashion.²¹³

With the elimination of “tiers”²¹⁴ customers will have a seemingly unlimited number of programming choices. However, the contractual tie-ins between networks and programmers will also have to be amended for the transition to IP Video. It is likely that, upon demanding disclosure of the contracts’ details, more problematic issues than the à la carte debate will surface. As Congressman Deal mentioned, Congress is prepared to implement antitrust legislation should certain claims from providers prove true.

What promises to be particularly troublesome are the contracts between

²⁰⁹ See, e.g., *id.* at 177 (comments of Mr. Alfred Liggins, Chairman, TV One).

²¹⁰ See *id.* at 170 (comments of Mr. Ben Pyne, Executive Vice President, Disney and ESPN Affiliates, Sales and Marketing).

²¹¹ *Id.* at 227.

²¹² *Id.* at 170.

²¹³ See, e.g., Tom Jicha, *Ready to Pay to Watch CBS?*, SUN-SENTINEL (Fort Lauderdale), June 25, 2005, at D1.

²¹⁴ See *supra* note 202 (defining “service tier”).

networks²¹⁵ and cable programmers involving niche networks seeking carriage.²¹⁶ On Capitol Hill, the Committee asked why networks like Oxygen! and TV One have surrendered significant ownership stakes to Comcast.²¹⁷ Small cable programmers and consumer groups alleged that Comcast has demanded equity in particular networks in exchange for carriage, which is impermissible under the Commission's rules.²¹⁸ While refusing to disclose specific details of their contracts, Comcast vehemently denied engaging in such practices.²¹⁹

The time has come for the FCC and Congress to strengthen their stance and demand disclosure of these agreements. If IP Video is going to transform into a substitute for cable and satellite television, affording consumers all of its competitive benefits, the uncertainty regarding these agreements and contracts must be cleared up immediately.

D. IP Video and à la Carte Create a Potential Nightmare for Advertising Executives

Another significant hurdle IP Video providers will face is backlash from networks over the challenges the technology creates for the traditional advertising-based business model. IP Video could theoretically spell disaster for advertising on television programs because it combines two of the biggest threats facing advertisers today. First, it would put control exclusively in the hands of consumers, thereby eliminating the power that networks once had over a captive, national audience. Second, the user-friendly nature of the technology will enable consumers to easily skip over commercials,²²⁰ much like ReplayTV.²²¹

The networks collect the majority of their revenues from advertising dollars.²²² Advertisers pay premium dollars to networks on the most widely-

²¹⁵ The "networks" referred to here are stations designed exclusively for niche audiences on cable and satellite television such as Oxygen!, the Food Network, and the Weather Channel. *See, e.g.*, the Weather Channel, <http://www.weather.com> (last visited Sept. 4, 2005).

²¹⁶ *See, e.g.*, *À la Carte Hearing*, *supra* note 208.

²¹⁷ *See, e.g., id.*

²¹⁸ This practice is specifically forbidden by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.). *See, e.g.*, *Consumers Union Comments*, *supra* note 65, at 5.

²¹⁹ *In re Inquiry Concerning à la Carte, Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, *Reply Comments of Comcast Corporation*, MB Docket No. 04-207, at 2 (Aug. 13, 2004) (accessible via FCC Electronic Comment Filing System).

²²⁰ Michael Hastings, *One Click Away: TV Via the Web*, NEWSWEEK INT'L, Jan. 24, 2005, at 50.

²²¹ *Newmark v. Turner Broad. Network*, 226 F. Supp. 2d 1215 (C.D. Cal. 2002).

²²² GAO REPORT, *supra* note 66, at 35.

distributed tiers to reach the largest possible universe of subscribers.²²³ One of the biggest arguments against à la carte is that it would destroy this economic model.²²⁴ As a result, cable networks would be forced to pass along these losses to the consumers, driving up their license fee revenues to compensate for the decreased advertising.²²⁵ This same problem will arise with the introduction of IP Video. By shifting control to the consumers and allowing them to pick and choose specific programming, advertisers will no longer have the luxury of reaching a broad segment of television viewers.

Likewise, IP Video will magnify a significant problem that has plagued the advertising industry over the last few years. Because of the interactive nature of user-friendly technology like TiVo and ReplayTV, consumers have the option of skipping directly past commercials.²²⁶ While TiVo was the pioneer of this technology, cable programmers have also begun offering similar products out of necessity.²²⁷ IP Video services will also contain features enabling consumers to skip over commercials. Unlike TiVo, consumers will not have to purchase a separate set-top box to receive these features, and the price will be included in the monthly access charge.

There is little doubt that the networks will cry foul as their advertising numbers continue to drop with the proliferation of IP Video services.²²⁸ The FCC and Congress, however, should ignore these complaints. The public interest would certainly not be served by the government thwarting revolutionary technology to benefit advertisers who have reaped the benefits of controlling the economics of the business for decades. Instead, the advertising community should be encouraged to become creative, looking outside the parameters of how the industry currently operates in order to discover new ways of generating revenue, much as the music industry has done.²²⁹ This theory was championed by Consumers Union throughout the à la carte proceeding. The organization argued that, in an à la carte universe, advertising dollars can be earned through non-conventional means.²³⁰ Consumers Union argued that advertisers who claim they cannot make money without access to broad segments of the television viewing audience are not seeing the whole picture:

In the rational actor assumption that underlies economic theory, advertisers pay for those who watch their advertisements—viewers, not all subscribers. If advertisers were paying

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Sheng, *supra* note 193.

²²⁷ Pham, *supra* note 4.

²²⁸ Broadcast networks are already suffering significantly from the presence of recording devices which enable viewers to skip commercials. *See, e.g.,* Joanne Ostrow, 'Catfight' is a Hissy Fit in Battle of Two Networks, SUN-SENTINEL (Fort Lauderdale), June 15, 2005, at E4.

²²⁹ *See supra* text accompanying notes 164–76.

²³⁰ *See, e.g., Consumers Union Reply Comments, supra* note 75, at 21.

for blank TV screens, they would not be serving as rational actors; paying to air ads when nobody is watching makes no sense. In a mixed bundled world, what advertisers lose in reach (the number of subscribers with access to a network), they make-up in effectiveness (the greater probability that someone is watching).²³¹

Consumers Union's argument is right on the mark. The way to make new communications technology best serve the public interest is to adjust and adapt to the technology, not attempt to fit it into the existing mold.²³² IP Video presents a tremendous challenge for advertisers, but it is one that can be overcome with some creativity.

V. IP VIDEO WILL PROVIDE A SOLUTION TO THE INDECENCY BATTLE

A. Entering a World of Controversy

Because of the nature of broadcast television's delivery into the home, the government is forced to serve as a watchdog, policing indecency on the airwaves.²³³ The FCC delineates between over-the-air and cable television in an attempt to protect the public interest against indecent content.²³⁴

With the arrival of IP Video, indecency regulation should be significantly revamped. The need to seriously regulate indecent content has changed dramatically since the landmark case of *FCC v. Pacifica Foundation*,²³⁵ which is the foundation of modern indecency regulation.²³⁶ In *Pacifica*, the Supreme Court held that because of the "uniquely pervasive" nature of broadcast media, the government has sufficient justification to regulate its content.²³⁷ Prior to the case reaching the Supreme Court, the U.S. Court of Appeals for the District of

²³¹ *Id.*

²³² Advertising executives should closely study what advertisers in other nations have experimented with in their attempts to lure customers. In Iran, for example, advertisers have been successful introducing new forms of advertising, capturing audience interest by targeting ads to specific niche audiences, and "serializing" them to keep them coming back for more each week. *See, e.g.*, Press Release, Asatsu-DK, Asatsu-DK and Tokyu Agency Announce Joint Projects in Digital Media and Research and Development (Nov. 8, 2002), <http://www.adk.jp/english/news/news/021108.html>. The answer to the advertisers' dilemma is to simply make the ads more interesting. This is far more reasonable than to expect the FCC and Congress to impede the development of innovative technology while affording advertisers a free pass. Advertisers can make money by becoming more creative.

²³³ *See, e.g.*, Treasa Chidester, Note, *What the #\$\$%& is Happening on Television? Indecency in Broadcasting*, 13 *COMMLAW CONCEPTUS* 135, 155 (2005).

²³⁴ *Id.*; *see also* *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 744 (1996).

²³⁵ *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

²³⁶ Brett Ferencsak, *Regulating Indecent Broadcasting: Setting Sail From Safe Harbors or Sunk by the V-Chip?*, 30 *U. RICH. L. REV.* 831, 838 (1996).

²³⁷ *Pacifica Found.*, 438 U.S. at 727.

Columbia Circuit lent considerable insight into how the FCC formulated its policy on indecency:

The underlying rationale . . . can be traced to the Commission's view of broadcasting vis-à-vis other modes of communication and expression. According to the Commission, the broadcasting medium carries with it certain unique characteristics which distinguish it from other modes of communication and expression. In the Commission's view the most important characteristic of the broadcast medium is its intrusive nature. Unlike other modes of expression, the television or radio broadcast comes directly into the home without any significant affirmative activity on the part of the listener.²³⁸

One could argue that the rationale employed by the Commission nearly three decades ago no longer applies today in the cable and DBS universe because of the widespread availability of blocking technology.²³⁹ In the IP Video arena, however, regulating indecency under a *Pacifica*-based rationale is even more suspect. *Pacifica*'s holding is based on a broadcaster's uniquely pervasive presence in a consumer's home, allowing consumers no way to ban indecent content absent the lack of a television or radio in the home.²⁴⁰ IP Video reverses this concept entirely. The consumer is choosing precisely and discretely the programming that is streamed into the home.²⁴¹ Descriptions of programming will be available in enough detail for parents to have plenty of information regarding any individual show.²⁴² While program ratings appear every hour at the top of the screen on cable television,²⁴³ IP Video ratings can be placed immediately next to their links on the Internet. Furthermore, providers can screen questionable content for the benefit of parents through the use of blocking mechanisms, prohibiting the transmission of programming in particular categories. With consumers gaining control over the programming entering their homes, the FCC's role in policing indecent content should be considerably reduced, if not eliminated altogether.

IP Video is being introduced at a time when all eyes are on broadcast programmers' responses to strict FCC indecency regulations.²⁴⁴ In the aftermath of the 2004 Super Bowl publicity stunt, where Janet Jackson's breast was exposed on live national television, awareness of indecency regulation has reached a fever pitch.²⁴⁵ The FCC received more than 1,000,000 complaints in

²³⁸ *Pacifica Found. v. FCC*, 556 F.2d 9, 11 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

²³⁹ See *supra* text accompanying notes 105–10.

²⁴⁰ *Pacifica Found.*, 438 U.S. at 727.

²⁴¹ See, e.g., Langberg, *supra* note 192.

²⁴² See, e.g., Steve Donohue, 'I-Guide' Starts to Roll Out, MULTICHANNEL NEWS, Sept. 20, 2004, at 6, available at 2004 WLNR 12550268.

²⁴³ For example, programs designed for mature audiences only are labeled "TV-MA." See, e.g., Paul Davidson, *Broadcasters Get Word Out How to Block Racy Shows*, USA TODAY, June 3, 2005, at 2B.

²⁴⁴ Frank Ahrens, *FCC Aims to Speed Evaluation of Indecency Complaints*, WASH. POST, Feb. 9, 2005, at E1.

²⁴⁵ See, e.g., Gail Pennington, *A Year Later, Jackson Incident Still Provokes Censors*,

2004, up from just 111 in 2000.²⁴⁶ The battle between the Commission and world-famous radio host Howard Stern transformed former FCC Chairman Michael Powell into a national celebrity and brought unprecedented public awareness to the FCC's regulation of indecency.²⁴⁷

The extent to which the FCC should regulate indecency, particularly on cable television, is a very controversial subject.²⁴⁸ The traditional argument against the regulation of indecency on cable has been one based on control. In order for cable programs to reach viewers, they must be affirmatively invited into the home by the consumer.²⁴⁹ The FCC has regulated over-the-air broadcasting differently due to the belief that a consumer has less control over what enters their homes over the public airwaves.²⁵⁰

In *United States v. Playboy Entertainment Group*, the Supreme Court held that regulation of content on cable television is subject to strict scrutiny.²⁵¹ To satisfy this standard, regulations must be "narrowly tailored to promote a compelling Government interest, and if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."²⁵² One of the facts the Supreme Court gave significant importance to was that cable operators are required under § 504 of the Act to block any unwanted channels from coming into a viewer's home upon request.²⁵³

Furthermore, the 1996 Act fully addressed the concerns of parents who wanted an increased ability to screen undesirable programming. The Act mandated that televisions be manufactured with a blocking tool labeled the "V-Chip."²⁵⁴ Although the V-Chip mandate has been in place for nearly a decade,²⁵⁵ awareness of the technology and how to use it is staggeringly low.²⁵⁶ The cable industry spends a considerable amount of resources attempting to educate the general public, even offering to visit consumers' homes at no cost in

CENTRE DAILY TIMES (Pa.), Feb. 8, 2005, at C.

²⁴⁶ Ahrens, *supra* note 244.

²⁴⁷ Brooks Boliek, *Powell Leaves Mixed FCC Legacy*, HOLLYWOOD REP., Jan. 24, 2005, http://www.hollywoodreporter.com/thr/article_display.jsp?vnu_content_id=1000769923.

²⁴⁸ See, e.g., *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803 (2000).

²⁴⁹ *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) ("If an individual voluntarily opens his door and allows a pig into his parlor, he is in less of a position to squeal.").

²⁵⁰ See, e.g., Chidester, *supra* note 233, at 250.

²⁵¹ 529 U.S. at 804.

²⁵² *Id.*

²⁵³ 47 U.S.C. § 560 (2000); see *Playboy*, 529 U.S. at 810, 811.

²⁵⁴ See, e.g., 47 U.S.C. § 303 (introducing a Congressional mandate to which all television manufacturers and cable operators had to adjust as the ability to block unwanted channels became mandated).

²⁵⁵ *An Old, New Indecency Solution*, CHI. TRIBUNE, Mar. 31, 2002, at 22 ("Since 2000, every new television set more than 13 inches wide has been forced to comply with the V-Chip standard.").

²⁵⁶ *Id.*

some cases.²⁵⁷ But its efforts have not made a difference. A significant majority of the American public is unaware of the existence of the blocking technology at its fingertips.²⁵⁸

B. The Future of Indecency Regulation in an IP Video World

Adam Thierer, a leading thinker on communications law issues, described his view on the direction communications regulation is heading in February 2005.²⁵⁹ He said the best way to view the future of telecommunications regulation was through the eyes of a fifteen year-old.²⁶⁰ A fifteen year-old child does not know anything about traditional wireline regulation, the history of the Bell System and its divestiture, or the effect that the wireless industry and the Internet had on communications over the last decade.²⁶¹ Likewise, when a teenager turns on his television set, he does not think about the difference between “over-the-air” and “cable television.”²⁶² The vast majority of the American public now subscribes to cable television or satellite,²⁶³ and in the eyes of a fifteen year-old child, television is television—just one giant tier of channels.²⁶⁴

Thierer’s point is that as the FCC and Congress contemplate rewriting the 1996 Act,²⁶⁵ it is essential to think creatively about how to regulate in an ever-changing technological marketplace. One failure of the Act is that as technology evolves, the rules become harder to apply.²⁶⁶ Because of the rate at which technology is changing, the FCC has been forced to try and quickly adapt to

²⁵⁷ Steve Donohue, *Cox Effort Helps Parents ‘Take Charge’*, MULTICHANNEL NEWS, Aug. 30, 2004, at 10, available at 2004 WLNR 12569794.

²⁵⁸ *Id.*

²⁵⁹ Adam Thierer, Former Senior Fellow and Director, Center for Digital Media Freedom, The Progress & Freedom Found., Panel Discussion at the Rayburn Building on Capitol Hill: “The Telecom Act Nine Years Later: Why Reform Can’t Wait” (Feb. 7, 2005) (presentation materials on file with author).

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Tenth Annual Report*, 19 F.C.C.R. 1606 (Jan. 28, 2004).

²⁶⁴ Thierer, *supra* note 259.

²⁶⁵ *See, e.g.*, Telecom Policy Report, *supra* note 116.

²⁶⁶ A classic example of this was the monumental fight between Pulver.com to be classified as an “information service” instead of a “telecommunications service” as defined in the Act. *See* Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, *Memorandum Opinion and Order*, 19 F.C.C.R. 3307 (Feb. 12, 2004) [hereinafter Pulver.com Petition]. Adam Thierer cites the irony of Jeff Pulver fighting tooth and nail to essentially argue that a phone call was not a phone call, in order to avoiding being regulated by fifty different state jurisdictions. *See* Thierer, *supra* note 259. Pulver.com was successful in avoiding state regulation, but in the absence of a new Telecommunications Act, it is becoming more difficult to classify new technologies into traditional categories. *See, e.g.*, Pulver.com Petition, *supra*.

products that Congress never contemplated. Recent years have seen the FCC and Congress merely reacting to changes in the industry rather than anticipating them and handling them proactively.²⁶⁷

Until IP Video is deployed across the country, the need for indecency regulation will remain. Broadcasters repeatedly sink to the lowest common denominator in an attempt to gain mass audiences.²⁶⁸ However, as IP Video enters the market, and places control of programming in consumers' hands, there is no fear of people becoming the unwitting victims of indecent programming. The significant amount of time and resources the FCC expends on dealing with indecency can, and will be, better spent elsewhere.

C. Implementing a Mandatory Television Ratings System

With the number of options for consumers increasing exponentially, the job of a concerned parent protecting children from indecent programming has become significantly more difficult.²⁶⁹ In this day and age, it is unrealistic to expect parents to monitor all of the programming their children view. The presence of IP Video could add one more avenue for children to access objectionable programming. Many parents are already at a loss as to how to protect children from viewing indecent material.²⁷⁰ One recent study indicates that nearly two-thirds of parents want tighter controls on sex and violence on television, while more than half said they would like federal indecency regulations to apply to cable television as well.²⁷¹

Studies show that current efforts to give parents tools to block indecent programming have failed.²⁷² A more efficient ratings system must be developed that parents can actually understand and easily implement. This is particularly important in the age of IP Video. If the appropriate steps are not taken by parents and if regulators do not empower parents to take such steps, IP Video will make it even easier for children to access indecent programming.

The current, ineffective system consists of voluntary ratings guidelines im-

²⁶⁷ This has occurred despite the Commission being fully aware of the problem and attempting to solve it. The problem is not in the FCC's failure to recognize the problem, but in the ineffectiveness of the Telecommunications Act of 1996 itself. See, e.g., *Powell Pledges Structural Review of FCC*, COMM. DAILY, Feb. 23, 2001, at 1.

²⁶⁸ Ed Friendly, *Nets' Desperate Measures*, DAILY VARIETY, Oct. 5, 2004, <http://www.variety.com/article/VR1117911530?categoryid=9&cs=1>.

²⁶⁹ See Julie Salamon, *The Rating Says PG, But Is That Guidance Enough?*, N.Y. TIMES, Jan. 7, 2005, at E1.

²⁷⁰ See, e.g., Jennifer C. Kerr, *Parents: Control TV Sex, Violence*, COLUMBIAN (Wash.), Sept. 24, 2004, at A3.

²⁷¹ *Id.*

²⁷² Alan Bjerga, *Brownback Leads Drive Against TV Indecency*, WICHITA EAGLE, Sept. 28, 2004, at A1.

plemented by some, but not all networks.²⁷³ The guidelines were introduced by the FCC on March 13, 1998.²⁷⁴ They are designed to inform parents of programs containing inappropriate sexual content, violence, or language and are displayed in the form of one of six categories, ranging from TV-Y (appropriate for all children) to TV-MA (program is unsuitable for children under 17).²⁷⁵ However, the ratings are voluntary and are displayed only at the start of a program. A parent must deliberately seek out a program's rating, or they are not likely to see it. Ratings are often also listed in television channel guides or in the description of shows in on-screen television listings, but only if a parent is willing to seek out this information.

The V-Chip makes the ratings system valuable. Rules were adopted requiring every television measuring thirteen inches or greater to be equipped with V-Chip technology.²⁷⁶ Parents can set their options so that any programming in a particular ratings category is automatically blocked.²⁷⁷ However, the number of parents actually employing the technology is shockingly low.²⁷⁸

IP Video technology will make parents more cognizant of the options available to screen programs. By listing all of the programs online, programmers can enlist a number of techniques to make consumers aware of each program's content and rating. Users can set options so that no programs in a particular category can be viewed. Information regarding each program's content can be posted conspicuously and consistently, making it simple for parents to check each program's content while easily blocking questionable programming.

For IP Video to truly make a difference in tackling indecency, however, the voluntary ratings system should become mandatory. Unless the system is comprehensive, with every program evaluated, parents will still have a hard time screening indecency. By maintaining a voluntary ratings system, the FCC is encouraging providers of indecent programming to abstain from the program. Because a network's revenue is based largely on advertising dollars, which are based on ratings, stations have no incentive to alert consumers to the fact that their programming may contain some indecent content.²⁷⁹ By revealing this, the network is essentially cutting off a portion of its potential audience.

The public interest would be served by mandatory ratings, particularly fol-

²⁷³ Salamon, *supra* note 269.

²⁷⁴ *In re* Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings, *Report and Order*, 13 FCCR 11,248 (Mar. 13, 1998) [hereinafter *Program Ratings Order*].

²⁷⁵ See, e.g., Lynn Smith, *Indecency Feud Could Bring V Back to TVs*, L.A. TIMES, Mar. 22, 2004, at A1.

²⁷⁶ *Program Ratings Order*, *supra* note 274, at 1.

²⁷⁷ See *Program Ratings Order*, *supra* note 274, ¶ 17.

²⁷⁸ According to one study, only 15% of all parents have used the V-Chip. Kerr, *supra* note 270.

²⁷⁹ See, e.g., *Business Digest*, N.Y. TIMES, May 30, 2005, at C2.

lowing the Janet Jackson incident and the influx of violence on television.²⁸⁰ The FCC should place the responsibility for issuing program ratings in an independent body in order to prevent any allegations of favoritism or fraud. The standards for each ratings category should be defined with clarity in an attempt to prevent any confusion or subjective program evaluations. When developing such a system, the FCC should pay close attention to the successes and fall-backs of the movie industry's ratings scheme, administered by the Motion Pictures Association of America.²⁸¹ If a reliable ratings system is in place, IP Video technology will answer one of the industry's biggest concerns. IP Video puts control in the hands of the consumers, and as a result, each individual or family can make a decision about what types of programming may enter their home, independent of what the government feels is appropriate. This would afford Americans the freedom of watching anything they want, when they want to watch it, while retaining the ability to protect their children from indecency.

VI. CONCLUSION

A system of video programming allowing consumers to call the shots is hard to conceive for consumers and regulators. Until now, programmers and networks have had exclusive control over the availability of options for consumers. The arrival of IP Video is poised to change all of that. By shifting the power of choice into consumer hands, controversial debates that have faced the communications industry for years will be resolved. There will certainly be new concerns that the FCC and Congress will need to address when IP Video is fully deployed, but two of the most prominent debates currently facing the Commission will disappear. IP Video is not only the technology of the future, but it will bring the à la carte debate and indecency debates to a definitive end.

²⁸⁰ The FCC issued a Report and Order responding to escalating complaints about violence on television in November 2004. *In re Children's Television Obligations of Digital Television Broadcasters, Report and Order and Further Notice of Proposed Rulemaking*, 19 F.C.C.R. 22,943 (Sept. 9, 2004).

²⁸¹ The movie industry's ratings system has been extremely successful since its inception in 1968, but there have always been complaints about inconsistencies and flaws within the system. By paying attention to the history and trends within the MPAA's ratings scheme, the FCC gain ideas on how to structure its efforts. *See, e.g.,* Steve Persall, *Hollywood's Real Dark Side*, St. Petersburg Times, May 13, 2005, at E1.