A LA CARTE TELEVISION: A SOLUTION TO ONLINE PIRACY?

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I. INTRODUCTION

Television piracy is nothing new. From the first successful television transmission in 1927,[1] to the invention of cable in the 1940s,[2] digital video recorders ("DVR") in the late 1990s,[3] and products that allow users to watch television shows remotely, such as Slingbox,[4] television is a constantly evolving product.[5] Alongside this remarkable evolution an underground market for television piracy has emerged.[6]

Despite decades of growing concern from cable and satellite providers, networks, and content owners, little progress has been made in curbing piracy.[7] Consequently, it is no coincidence that the rise in piracy has paralleled increasing subscription fees.[8] The history of television, whether broadcast,

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[1] *History of Communications - Historical Periods in Television Technology: 1880-1929*, FCC, http://commcns.org/L6uNAm (last visited Apr. 15, 2012).

[2] *Id.*

[3] John Markoff, *Netscape Pioneer to Invest in Smart VCR*, N.Y. TIMES, Nov. 9, 1998, http://commcns.org/LbhJQr.

[4] *About Sling Media*, SLINGBOX, http://commcns.org/JjwR7x (last visited Apr. 15, 2012).

[5] *See Historical Periods in Television Technology*, FCC, http://commcns.org/JTbNc8 (last visited Apr. 15, 2012) (discussing the technology and evolution of television).

[6] Cont'l Cablevision, Inc. v. Poll, 124 F.3d 1044, 1046 (9th Cir. 1997) (discussing the "nationwide black market" of cable piracy).

[7] Michael J. Mellis, *Internet Piracy of Live Sports Telecasts*, 18 MARQ. SPORTS L. REV. 259, 259-60 (2008) (discussing the "worrisome" growth trend in online piracy of sporting events). *See also Matthew Hofmeister, RIAA and Online Piracy: Why Bundling Access to Digital Music with Other Products and Services Would Give the Industry Greater Control Over Downloading*, 30 LOY. L.A. ENT. L. REV. 565, 565 (2010) (discussing the percentage of young adults who have illegally downloaded music).

[8] *See* Mellis, *supra* note 7, at 263 (discussing the correlation between the NFL moving primetime games to the to the subscription-only NFL Network, and a dramatic increase in

cable, or satellite, has shown that users want to watch television shows when and how they wish, and will turn to piracy if convenient and affordable legal alternatives are not available.[9] With digital media ubiquitous and the Internet available as a reliable communications backbone,[10] it is time for the providers to stop ignoring the obvious: piracy is an expression of consumer demand. If content and media providers are unable to step beyond this limbo of high piracy and low customer choice, regulatory reforms need to force this transition.

Estimates put the percentage of people with cable or similar subscription services in this country at eighty-six percent.[11] In fact, the number of cable channels has grown from "just seventy channels in 1990 to 565 channels in 2006."[12] By 2008, the average house in the United States received an average of 118.6 channels.[13] Incredibly, subscribers only watch seventeen of these channels regularly.[14] So why does the consumer have to foot the bill for the extra 101.6 channels? Consumers pay for these channels because, other than piracy, there is not a viable alternative in place for a comparable subscription service.[15] More and more, it seems that rather than pay for these extra channels, many consumers are turning to piracy to get their fix.[16]

This Article examines the current state of television piracy and the viability of a la carte television service as a way to combat the problem. Part II traces the rise of television piracy and examines attempts to combat it. It first discusses the history of television piracy and the different forms of piracy encountered in the pre-Internet era. It then examines the statutes enacted to

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the piracy of these events).

[9] *See* John Paul Titlow, *As Fox Requires Web Viewers to Wait, TV Show Piracy Increases*, READ WRITE WEB (Aug. 22, 2011), http://commcns.org/IY3qbw (describing the nature of viewers who have become accustomed to watching shows online a short time after they originally air).

[10] *See* Jason J. Lunardi, *Guerrilla Video: Potential Copyright Liability for Websites that Index Links to Unauthorized Streaming Content*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1077, 1083-84 (2009) (discussing the correlation between an increase in access to broadband internet and an increase in "illicit" movie downloads).

[11] Jeffrey Eisenach & Adam Thierer, *A La Carte Regulation of Pay TV: Good Intentions vs. Good Economics*, 9 ENGAGE 148, 148 (2008).

[12] *Id.*

[13] David Lazarus, *Let's Pay Only for the TV We Watch*, L.A. TIMES, Nov. 12, 2008, http://commcns.org/KfCjbk.

[14] *Id.*

[15] *Id.* (quoting a cable company executive arguing that the fact that no cable companies offer an a la carte option indicates there is not be a sufficient market for such an option); Catherine DiBenedetto, *Burning Question: Where's My A La Carte TV?*, WIRED MAG. (Jan. 25, 2010), http://commcns.org/JGNyNH (discussing the effect that third parties, such as Xbox and Roku, are having on big cable companies).

[16] *See generally* Vanessa Thorpe, *Young Turn to Piracy to Watch Pay TV for Free*, THE GUARDIAN, Feb. 5, 2011, http://commcns.org/K9bwPz.

combat piracy and how these statutes are interpreted by the courts. Part II further explores digital piracy by examining the emergence of music piracy through file-sharing programs such as Napster.[17] Additionally, Part II evaluates the television networks' attempts to curb piracy by offering free online content,[18] as well as the backlash from consumers that companies have faced when these services are altered or delayed.[19] Finally, Part II addresses the current enforcement efforts[20] and concludes with an examination of the proposed Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 ("PROTECT IP Act").[21]

Part III discusses how legislation alone is not the solution to the problem of digital piracy. Instead, a proper balance of current legislation and enforcement efforts should be supplemented through a la carte television offerings. This Part examines the logistics of implementing a la carte television based on the current regulatory scheme in light of two reports published by the Federal Communications Commission ("FCC" or "Commission"),[22] then evaluates the advantages and disadvantages of three types of a la carte television models. Finally, the Article concludes that the answer to piracy lies not in proposing new legislation and increasing enforcement aimed at eliminating piracy, but in creating and providing a la carte television to consumers.

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[17] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1022 (9th Cir. 2001) (holding that Napster is secondarily liable for direct copyright infringement under the doctrines of vicarious copyright infringement and contributory copyright infringement).

[18] ABIGAIL DE KOSNIK, UNIV. OF CAL. BERKELEY, PIRACY IS THE FUTURE OF TELEVISION, CONVERGENCE CULTURE CONSORTIUM 4 (2010), http://commcns.org/KP5x4J (discussing how websites such as Hulu, Fancast, and MyLifetime.com allow users to watch "fee-free" television shows on their web browsers though streaming).

[19] Tom Krazit, *Netflix Says One Million Customers Expected to Depart After Price Hike*, PAID CONTENT (Sept. 15, 2011), http://commcns.org/K9cs6i. Netflix announced it expected to lose 1 million customers after raising prices for customers who requested access to online and DVD content. Approximately 80 percent of the lost consumers subscribed only to DVDs, but the number of customers who pay to access DVDs and streamed content will remain steady. *Id.* Titlow, *supra* note 9 ("If viewers want to see the most recent episode of *Master Chef*, they're going to see it. As more of them shift to watching TV online, they become conditioned to finding content there. If it's not readily available on legal streaming services, they'll find it elsewhere.").

[20] *See generally Oversight of Intellectual Property Law Enforcement Efforts: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 1 (2011) (statement of Erik Barnett, Assistant Deputy Director of the Department of Homeland Security).

[21] Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property (PROTECT IP) Act of 2011, S. 968, 112th Cong. § 3(b)-(d) (2011). *See generally* Josh Halliday, *Google Boss: Anti-Piracy Laws Would be Disaster for Free Speech*, THE GUARDIAN, May 18, 2011, http://commcns.org/JrfgyS.

[22] *See generally* FCC, REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC (2004) [hereinafter FCC REPORT]; FCC, FURTHER REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC (2006) [hereinafter FCC FURTHER REPORT].

II. HISTORY OF TELEVISION PIRACY

Television piracy occurs when an individual receives television channels or programming for which he or she did not pay.[23] Though the proliferation of the Internet has made the issue of television piracy more prominent, consumers have been stealing cable, satellite feeds, and satellite signals for years.[24] Over that time, the theft of television signals has taken many forms from "passive" piracy, where residents fail to disconnect cable when they move, allowing the new resident to receive free cable,[25] to signal descrambling, by altering a cable box or buying an illegal box specifically designed to intercept cable,[26] to splitting, whereby an existing cable line is cut to create an unpaid feed into a residence.[27]

A. Pre-Internet Days—Cable's Early Days

Cable originated in the early 1950s as a way to extend the reach of television beyond the traditional antenna signals.[28] By the 1980s, cable had expanded beyond its rural routes, becoming a platform for premium sports and movie content.[29] One of the common ways for cable to be transmitted during the 1980s and 1990s was through a converter-decoder, more commonly known as a "black box."[30] Cable companies provided the black box to consumers, enabling them to receive premium content.[31] For movie channels and pay-per-view events, the cable provider would send out "scrambled" signals that the

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[23] Cont'l Cablevision, Inc. v. Poll, 124 F.3d 1044, 1046 (9th Cir. 1997) ("There is a nationwide black market of 'pirate' converter-decoders which descramble cable programming and enable some to receive premium and pay-per-view services without paying the cable operator.").

[24] Thomas Hildebrandt, *Unplugging the Cable Franchise: A Regulatory Framework to Promote the IPTV Cable Alternative*, 42 GA. L. REV. 227, 234-35 (2007) (discussing generally the development of cable television and its regulations from the 1950s to the present day).

[25] Stefanie Olson, *Cable Pirates Splice into Broadband*, ZDNET (Feb. 13, 2012), http://commcns.org/JjyfXE ("Passive cable theft, such as when a family moves into a home where the cable line has not been disconnected.").

[26] *Id.* ("People tampering with a converter box or buying an illegal set-top box.").

[27] *Id.* ("People making an illegal connection to the cable line, which include splitting a cable modem that provides an Internet connection.").

[28] *See* Hildebrandt, *supra* note 24, at 234 (discussing the development of cable television and its regulations from the 1950s to the present day).

[29] Jill Abehouse Stern, *The New Video Marketplace and the Search for a Coherent Regulatory Philosophy*, 32 CATH. U. L. REV. 529, 551 (1983).

[30] Cont'l Cablevision, Inc. v. Poll, 124 F.3d 1044, 1045 (9th Cir. 1997).

[31] *Id.* ("To prevent subscribers from receiving and viewing programming services for which they have not paid, Continental encrypts or 'scrambles' its premium and pay-per-view channels.").

black box would descramble only if the customer paid for the content.[32] However, this technology paved the way for what the Ninth Circuit, described as the "nationwide black market of 'pirate' converter-decoders which descramble cable programming and enable some to receive premium and pay-per-view services without paying the cable operator."[33] The use of these pirate converters led the FCC to issue regulations requiring "any person manufacturing, distributing, or marketing converter-decoders for a cable system have prior FCC approval."[34]

This increase in the "unauthorized access to cable television wires" also compelled Congress to intervene with the Cable Communications Policy Act of 1984.[35] Specifically, the Act states that "[n]o person shall intercept or receive or assist in intercepting or receiving any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law."[36] The Act then describes in detail the criminal and civil penalties for those who violate the statute.[37]

While cable companies are covered under Section 553, the more antiquated Section 605 addresses satellite communications.[38] This provision was actually enacted in 1934, fifty years prior to the Cable Communications Policy Act and well before "[m]odern-day cable systems" existed.[39] Section 605 proclaims that "no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof . . . to any person other than the addressee, his agent, or attorney."[40] Additionally, the section directly addresses technology used to intercept over the air signals, stating that "[a]ny person who manufactures, assembles, modifies, imports, exports, sells, or distributes" devices used for the "unauthorized decryption of satellite cable programming, or direct-to-home

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[32] *Id.*

[33] *Id.* at 1046.

[34] *Id.*

[35] Andrew Russell, *Placeshifting, the Slingbox, and Cable Theft Statutes: Will Slingbox Use Land You in Prison?*, 81 TEMP. L. REV. 1239, 1249 (2008). *See also* Cable Communications Policy Act of 1984, Pub. L. No. 98–549, 98 Stat. 2279 (1984).

[36] 47 U.S.C. § 553(a)(1) (2006). Under this section, the term "assist in intercepting or receiving" includes "the manufacture or distribution of equipment intended by the manufacturer or distributor (as the case may be) for unauthorized reception of any communications service offered over a cable system in violation of subparagraph (1)." *See id.* § 553(a)(2).

[37] *Id.* § 553(b)-(c).

[38] *See* Russell, *supra* note 35, at 1240, 1247.

[39] *Id.* at 1248-49.

[40] 47 U.S.C. § 605(a) (2006).

satellite services" is subject to a fine of up to $500,000 or five years imprisonment (or both) for each violation.[41]

Though Section 605 mainly applies to satellite transmissions, some cable companies have used it in litigation, rather than Section 553, because of the potential to recover larger damages, as well as attorneys' fees that are not mandatory under § 553.[42] Circuits are split as to whether or not cable companies may bring claims under Sections 553 and 605.[43] The conflict between the two statutes was discussed briefly by the District Court for the Southern District of New York in *Cablevision Systems New York City Corp. v. Faschitti*.[44] The case involved the illegal broadcast of boxing pay-per-view event by a tavern owner, who charged patrons $10 per person to watch.[45] The event, which Cablevision owned the broadcast rights to "pursuant to its licensing agreement," was only to be transmitted to "private residences."[46] Cablevision brought the action under both statutes claiming the owner "violated two provisions of the Communications Act, Sections 553(a) and 605(a) . . . [which] allow the aggrieved party to elect between actual and statutory damages, and authorize the court to grant enhanced damages for certain willful violations."[47]

The court awarded damages of $20,000 plus attorneys' fees to Cablevision, reasoning that the award was not too high, but rather "necessary to deter future violations of the communications law."[48] The court went on to say that "[w]hile it is not entirely clear whether section 605 applies to the interception at issue in this case, I need not resolve this question, because I find that $20,000 is the proper amount of damages under either section 553 or section 605."[49]

In addition to the Cable Communications Policy Act of 1984, Congress has enacted two other statutes governing the provision of cable television service. In 1992, the Cable Television Consumer Protection and Competition Act created a number of protections for consumers, including "bann[ing] exclusive franchises and creat[ing] customer service obligations."[50] With regards to

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[41] *Id.* § 605(e)(4).

[42] *See* Russell, *supra* note 35, at 1250.

[43] *Id.* at 1254-56.

[44] Cablevision Sys. N.Y.C. Corp. v. Faschitti, No. 94 Civ. 6830 (DC), 1996 WL 48689, at *2 (S.D.N.Y. Feb. 7, 1996).

[45] *Id.* at *1-2.

[46] *Id.* at *1.

[47] *Id.* at *2 ("Plaintiff Cablevision Systems New York City Corporation ('plaintiff' or 'Cablevision') brings this action under 47 U.S.C. §§ 553 and 605, alleging that tavern owner Peter Faschitti ('defendant' or 'Faschitti') violated the communications laws when, without authorization, he intercepted and displayed a boxing match broadcast by Cablevision.").

[48] *Id.* at *2-3.

[49] *Id.* at *3.

[50] *See* Hildebrandt, *supra* note 24, at 236-37. *See also* Cable Television Consumer

television piracy, the Act "equalized most of the criminal penalties" between Sections 553 and 605, with the only difference being that Section 605(e)(4) "more severely punish[ed] those involved in creating or distributing satellite piracy tools."[51] Second, in 1996, Congress passed the Telecommunications Act, opening the door for "telephone companies to enter the cable business and cable companies to enter the telephone business."[52] This expansion allowed for more competition within the multi-channel video services business.[53]

B. Television Today—Piracy on the High Seas of the World Wide Web

While digital piracy has taken various forms over the years, it has also altered consumption habits. People are no longer as reliant on the daily newspaper or the *TV Guide* as they were in the past—stories in newspapers hit the Web long before they hit people's driveways and many prefer to watch programs either legally on an on-demand basis or illegally on the Internet.[54] As the Internet has grown, so too has digital piracy.[55] Large video files that before took a long time to download can now be downloaded in a fraction of the time.[56] As more and more people gain access to high speed Internet,[57] many have taken advantage by creating various sites and services that promote piracy.[58]

1. The Internet and Piracy

While television and movie studios scramble to find a compromise between

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Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (Oct. 5, 1992).

[51] *See* Russell, *supra* note 35, at 1251-52 .

[52] *See* Hildebrandt, *supra* note 24, 237.

[53] *Id.* at 243. ("The telephone companies, Local Exchange Carriers (LECs), have long sought to compete with cable companies in the multi-channel video services business.").

[54] Titlow, *supra* note 9 ("If viewers want to see the most recent episode of Master Chef, they're going to see it. As more of them shift to watching TV online, they become conditioned to finding content there. If it's not readily available on legal streaming services, they'll find it elsewhere.").

[55] *See* Lunardi, *supra* note 10, at 1084.

[56] *Id.* ("When the music industry began to feel the effects of widespread infringement over the Internet because music files are relatively small and easy to download, Hollywood film studios did not yet see much piracy from the Internet because digital movie files are much larger and would require a substantial time to download.").

[57] *Id.* at 1083-84 ("Additionally, access to broadband Internet was limited, so the threat from illicit movie downloads was minimal. In the past few years, however, the number of people worldwide with access to high-speed Internet connections has multiplied.").

[58] *Id.* ("With this new capacity for data transmission, websites are eager to take advantage of the Internet users' desire to transfer large media files, including video.").

free, immediate content online and subscription services,[59] one thing is clear—they would like to avoid the time and money spent by the Recording Industry Association of America ("RIAA") "attacking online music piracy by filing mass lawsuits against individuals who allegedly transferred music illegally."[60] Though the perception is that most of the illegal downloading that plagued the music industry in the Napster days is a thing of the past, the reality is that, in 2008 an "estimated 96 percent of people between the ages of 18 and 24 have illegally copied music in some form and that youths' MP3 players contain around 800 illegally copied songs on average."[61]

TV piracy today is found mainly in two forms—file sharing and live streaming.[62] Through file sharing, a person can download a television show or movie as a single file by visiting a torrent site, or "torrent directory."[63] This torrent site allows the user to download a file through a specific application, which then downloads the larger file—the movie or television show—to the person's computer through multiple sources.[64] Though this process can be relatively quick or take multiple days depending on the size of the file, once completed, the user will have the entire television episode or movie as one file on his or her computer.[65]

This type of file-sharing is copyright infringement not only by the users of the file sharing service for directly infringing upon the copyright of the studio who owns the copyright of the video,[66] but also by the BitTorrent site itself, which is liable for "inducement of copyright infringement."[67] The Supreme Court has established a two-part test for inducement that requires the plaintiff to prove the defendant "(1) engaged in purposeful conduct that encouraged

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[59] John Paul Titlow, *TV Networks Begin to Rethink Free, Immediate Web Access to Shows*, READ WRITE WEB (Aug. 17, 2011, 10:31 AM), http://commcns.org/IYQPGh.

[60] Hofmeister, *supra* note 7 at 565-66.

[61] *Id.* at 565.

[62] *See* Mellis, *supra* note 7, at 260. *See also* De Kosnik, *supra* note 18, at 6.

[63] *See* De Kosnik, *supra* note 18, at 5 ("A user interested in illegally downloading a TV episode can visit a pirate site, also known as a "torrent directory," and download a BitTorrent [.torrent] file that corresponds to the episode she wishes to acquire.").

[64] *Id.* (The user then uploads the torrent to a BitTorrent client application, and opens the torrent in the client, which signals the client to begin downloading the data associated with the torrent from any active 'seeders,' or uploaders, of the torrent that the client can find on the Internet.").

[65] *Id.* ("The client then assembles a complete video file on the user's computer over a period of time, ranging from a few minutes to several days, or even a week or more for a very large file (such as an entire season of a television program").

[66] Arista Records L.L.C. v. Lime Grp. L.L.C., 784 F. Supp. 2d 398, 410, 423 (S.D.N.Y. May 2, 2011) ("To establish direct infringement, a plaintiff must show that (1) the plaintiff owns the copyright or copyrights at issue; and (2) the third party infringed the copyrights by unauthorized copying or distribution").

[67] *Id.* at 424-26 ("In Grokster, the Supreme Court confirmed that inducement of copyright infringement constitutes a distinct cause of action.").

copyright infringement, with (2) the intent to encourage such infringement."[68]

On the other hand, those who wish to stream live television, often in the form of live sporting events, have at least two options – unicast, and streaming over peer-to-peer networks ("SOP").[69] Unicast streaming occurs when media is sent from a central server directly to a user's computer and displayed in video form.[70] SOP streaming is different in that it is a media signal being sent from user to user, rather than from a central server.[71] Often people will find the particular stream, either unicast or SOP, through visiting an indexing website, which is a site that doesn't actually host videos, but rather has a collection of links to other sites that host particular videos or streams.[72]

2. *Legislative Attempts to Curb Online Piracy*

As technology evolves, so too must the legislation that governs it. The traditional purpose of copyright law in the United States is to encourage the creativity of artists of all types.[73] While there are a number of laws or proposed laws that attempt to curb online piracy, thus far, none have been able to find the proper balance between protecting the interests of copyright holders and allowing for the advancement of free expression.

a. Current Legislation—The Digital Millennium Copyright Act

In 1998, the Digital Millennium Copyright Act ("DMCA") amended already existing copyright legislation "to equip the copyright law to meet the

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[68] *Id.* at 425.

[69] *See* Mellis, *supra* note 7, at 260.

[70] *Id.*

[71] *Id.*

[72] *See* Lunardi, *supra* note 10, at 1080.

> Though some entrepreneurs are willing to pay for a license to avoid potential liability, others are attempting to build businesses around providing access to video content without authorization. Many of these sites exploit the fact that a wealth of unauthorized content can be viewed on video sharing sites like YouTube. While some have already been shut down, such as Peekvid.com and YouTVpc.com, others emerge to take their place, albeit with a modified structure to attempt to stay within the law. An example of such a site is Surfthechannel.com, which is careful to not stress the availability of unauthorized content, and unlike many other sites, does not embed videos within the site. All of these sites share on characteristic: instead of hosting videos on their sites like YouTube, they merely link to videos hosted on other sites. Almost all of these videos are television shows and feature-length movies that have been posted to video sharing sites without the permission of the copyright owners. *Id.*

[73] *Id.* at 1094 ("American copyright law exists for the purpose of promoting the production of artistic goods.").

challenges of online digital exploitation of works of authorship."[74] Specifically, the DMCA addresses circumvention of copyright protection systems, preventing any person from working around "a technological measure that effectively controls access to a work protected under this title."[75] Section 506 addresses the criminal offenses related to copyright infringement, imposing criminal liability on any person who

> willfully infringes a copyright . . . if the infringement was committed for purposes of commercial advantage or private financial gain; by the reproduction or distribution, including by electronic means . . . of 1 or more copyrighted works . . . ; or by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.[76]

Obviously, digital piracy has been high on the agenda of legislators and of copyright holders looking to protect their intellectual property for a number of years.

b. Proposed Legislation—PIPA and SOPA

For the second year in a row, a version of a bill to attempt to stop Internet piracy was introduced in the Senate. The Act was introduced as the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 ("PROTECT IP Act" or "PIPA") of 2011.[77] The bill is a revised version of the Combating Online Infringement and Counterfeits Act, which failed to pass in the previous Congress.[78] The controversial aspects of the bill include provisions that allow the government to ask search engines to remove certain sites from search results, effectively limiting access to these sites by making it incredibly difficult for them to be found.[79] Furthermore, PIPA offers a number of measures to deny access to foreign sites by users in the United States, including court orders for sites to remove links to banned sites, redirection to warning pages, and prohibition on advertising with banned sites.[80] In addition to the restrictive and controversial aspects of the proposed

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[74] Jane C. Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM.-VLA J.L. & ARTS 1, 1 (2000).

[75] 17 U.S.C. § 1201(a)(1)(A) (2006).

[76] *Id.* § 506(a)(1)(A)-(C).

[77] Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property (PROTECT IP) Act of 2011, S. 968, 112th Cong. (2011).

[78] *Americans Face Piracy Website Blocking*, BBC NEWS (May 13, 2011), http://commcns.org/vVxiYO.

[79] *Id.*

[80] Larry Downes, *Five Essential Changes to Protect IP Act*, CNET NEWS (Aug. 17, 2011), http://commcns.org/ua5ell.

> Protect IP authorizes a variety of techniques to cut off access to banned sites. These include court orders forcing search engines and other sites to remove

bill, it would also cost the Department of Justice approximately $47 million to implement according to a Congressional Budget Office Estimate.[81] The cost would come from the hiring of 22 special agents and 26 support staff.[82]

The House also introduced a matching bill in the form of the Stop Online Piracy Act ("SOPA").[83] While in theory the idea behind both PIPA and SOPA is commendable, the actual language of the proposed legislation is incredibly broad and could lead to over-restriction on many levels.[84] For example, SOPA gives the Attorney General the power to receive a court order to block specific sites that are believed to be in violation of the law.[85] These sites are then part of a larger collection of sites that are blacklisted because they are thought to be in violation of intellectual property laws.[86] The Act also places a large burden on search engines by requiring them to make sure that these blacklisted sites do not appear in search results.[87]

These provisions also raise serious Constitutional questions.[88] Critics of SOPA have noted that the Act, regarding the Attorney General's ability to block foreign sites based on mere suspicion of copyright infringement, "has things exactly backwards: the government must prove that material is unlawful *before* restraining it. This aspect of the order is likely constitutionally infirm."[89]

The constitutional questions and implications of the two bills came to a head in early 2012 when various groups and websites organized a 24-hour online blackout in mid-January.[90] The blackout took place on Wednesday, January 18, a few days after the White House chimed in skeptically on the growing

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hyperlinks to banned domains. They also include requiring domain name servers to misdirect clicks on such links to warning pages about possible violation of U.S. law. Ad networks and financial transaction processors would also be prohibited from doing business with the banned sites. *Id.*

[81] CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE ON S. 968 PREVENTING REAL ONLINE THREATS TO ECONOMIC CREATIVITY AND THEFT OF INTELLECTUAL PROPERTY ACT OF 2011 (Aug. 16, 2011), http://commcns.org/LWH92o.

[82] *Id.* at 2.

[83] Stop Online Piracy Act (SOPA), H.R. 3261, 112th Cong. (2011).

[84] Molly McHugh, *Just a Few Ways the E-PARASITE Act Could Disfigure the Internet*, YAHOO NEWS (Nov. 7, 2011), http://commcns.org/LbptC1; Mike Masnick, *PROTECT IP Renamed E-PARASITES Act; Would Create the Great Firewall of America*, TECHDIRT (Oct. 26, 2011), http://commcns.org/JJvl10.

[85] Derek Bambauer, *De-lousing E-PARASITE*, PRAWFSBLAWG (Nov. 5, 2011), http://commcns.org/JjB1fB.

[86] James Allworth, *The Great Firewall of America*, HARV. BUS. REV. (Oct. 28, 2011), http://commcns.org/JgNqY6.

[87] Bambauer, *supra* note 85.

[88] Masnick, *supra* note 84.

[89] Bambauer, *supra* note 85.

[90] *Wikipedia Blackout: 11 Huge Sites Protest SOPA, PIPA on January 18*, THE HUFFINGTON POST (Jan. 18, 2012), http://commcns.org/IYS7kF.

controversy[91] and less than a week before a January 24 vote had been scheduled for PIPA.[92] More than 7,000 websites participated in protesting PIPA and SOPA, although not all went dark.[93] Some of the sites, like Wikipedia, participated fully in the blackout, meaning that the sites regular content and format was not available,[94] while others took another approach. For instance, Google had a black veil over the logo on its homepage.[95] Instead of seeing the familiar Wikipedia homepage, visitors were greeted with a black screen with information on the legislation and how users could contact their local senators and representatives in Washington.[96]

In the wake of the protests and outreach from those opposed to PIPA and SOPA, many key supporters of the two bills began to pull their support.[97] In fact by Friday, January 20, 2012, just two days after the blackout, both Senator Harry Reid (D-NV), the Senate Majority Leader, and Representative Lamar Smith (R-TX), the Chairman of the House Judiciary Committee, announced the indefinite shelving of PIPA and SOPA until something more agreeable to all parties involved could be worked out.[98] Senator Reid's announcement meant the vote that was previously scheduled for January 24, 2012 was now canceled.[99]

Although some considered this a victory, others, like Senator Patrick Leahy (D-VT), saw it not only as a defeat, but also as a win for foreign criminals stating:

> [b]ut the day will come when the Senators who forced this move will look back and realize they made a knee-jerk reaction to a monumental problem. Somewhere in China today, in Russia today, and in many other countries that do not respect American intellectual property, criminals who do nothing but peddle in counterfeit

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[91] Victoria Espinel et. al., *Official White House Response to Stop the E-Parasite Act: Combating Online Piracy While Protecting an Open and Innovative Internet*, WHITEHOUSE.GOV (Jan. 14, 2012), http://commcns.org/Ktl9N5 (stating that "[w]hile we believe that online piracy by foreign websites is a serious problem that requires a serious legislative response, we will not support legislation that reduces freedom of expression, increase cybersecurity risk, or undermines the dynamic, innovative global Internet").

[92] Jasmin Melvin, *Congress Puts Brakes on Anti-Piracy Bills*, REUTERS (Jan. 21, 2012), http://commcns.org/L0JLbF (discussing how Senator Harry Reid decided to postpone a critical vote that had been scheduled for January 24).

[93] *Wikipedia Blackout: 11 Huge Sites Protest SOPA, PIPA on January 18*, *supra* note 90.

[94] *Id.*

[95] Mark Peckham, *Did It Work? 'Day After' Results of the SOPA, PIPA Blackout*, TIME TECHLAND (Jan. 19, 2012), http://commcns.org/JGVUVK (referring to the blackout of Google's logo on the homepage as its "logo shroud").

[96] *Wikipedia Blackout: 11 Huge Sites Protest SOPA, PIPA on January 18*, *supra* note 90.

[97] *See* Peckham, *supra* note 95 (discussing how in the aftermath of the blackout the "political dominoes began to fall," when numerous senators pulled their support for PIPA, including Sen. Marco Rubio, a co-sponsor of the bill).

[98] Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. TIMES, Jan. 20, 2012, http://commcns.org/Kmn8yR.

[99] *Id.*

> products and stolen American content are smugly watching how the United States Senate decided it was not even worth debating how to stop he overseas criminals from draining our economy.[100]

As of April 2012, no further action has been taken regarding either PIPA or SOPA.

However, key opponents of PIPA and SOPA, Senator Ron Wyden (D-OR) and Representative Darrell Issa (R-CA) have introduced alternative bills, The Online Protection and Enforcement of Digital Trade (OPEN) Act in both the Senate and the House of Representatives.[101] According to the OPEN Act's sponsors it is different from PIPA and SOPA in that it targets foreign sites by means of cutting the money supply to the sites.[102] Additionally, they claim that the OPEN Act does not "include controversial provisions that empower rightsholders and the government to upset the architecture of the Internet, upon which cybersecurity infrastructure resides, or to impose a censorship regime."[103] Despite its difference from PIPA and SOPA, the OPEN Act is currently in committee in both the Senate and the House of Representatives.[104] Ultimately, a regulatory scheme that embraces the White House's desire to combat piracy while protecting an open and innovative Internet[105] would be the perfect scheme under which to introduce a true a la carte television option.

III. LEGAL ALTERNATIVES TO PRIVACY

A. Free Streaming, On-Demand, and Subscription Services

One theory on the continued prominence of illegal downloads of music is that the current structure of online music stores, like iTunes and Amazon, is too restrictive for users.[106] Having learned lessons from its handling of music downloading, in recent years, the entertainment industry has made numerous

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[100] Press Release, Sen. Patrick Leahy, Comment of Senator Patrick Leahy on Postponement of the Vote on Closure on the Motion to Proceed to the PROTECT IP Act (Jan. 20, 2012), http://commcns.org/Kmnm9s.

[101] The Online Protection and Enforcement of Digital Trade (OPEN) Act, S. 2029, 112th Cong (2011). *See also* The Online Protection and Enforcement of Digital Trade (OPEN) Act, H.R. 3782, 112th Cong (2011).

[102] Press Release, Wyden, Moran, Cantwell Introduce IP Protection Bill that Will Not Break the Net (Dec. 17, 2011), http://commcns.org/IYTiR9.

[103] *Id.*

[104] Christina DesMarais, *SOPA, PIPA Stalled: Meet the OPEN Act*, PCWORLD (Jan. 21, 2012), http://commcns.org/JJyeim.

[105] Espinel et al., *supra* note 91.

[106] Rose Auslander & Alex Ellerson, *DRM: Dangerously Restrictive Method that Doesn't Really Matter?*, 4 CONVERGENCE 228, 248-49 (2008), *available at* http://commcns.org/KxRzoq.

attempts to offer both free and paid alternatives to television piracy.[107] Broadcast networks, and even some cable networks, are now offering most programs for free shortly after the original airdate.[108] The episodes can be found on either the specific network site of the show or on an alternate host-site, such as Hulu, both of which typically have commercials throughout the stream.[109] Consumers also have the option of finding "what they want, when they want" with on-demand video services offered directly from cable providers.[110] Though originally available only through a cable box or satellite, some companies now offer remote access to the content through a website that requires secure login information.[111] Another option some channels offer is a free streaming feed of certain events. For instance, WatchESPN, formerly known as ESPN 3 and ESPN 360, is a site hosted by ESPN that allows subscribers of certain cable or Internet providers to access their programming through a computer or mobile device at no additional charge.[112]

Up until recently, the standard practice for networks was to make individual television episodes available to viewers the morning after the original broadcast aired.[113] However, Fox now delays availability of its shows by eight days, unless the viewer is a subscriber to either Hulu Plus or Dish Network.[114] According to an informal study conducted by the blog TorrentFreak during the week following Fox's implementation of its new policy, there was an immediate and drastic increase in piracy of the network's shows.[115] The study followed downloads of two Fox shows, *Hell's Kitchen* and *MasterChef,* on BitTorrent.[116] While the study has some flaws, including that TorrentFreak only followed two shows over one platform, BitTorrent, the results are nonetheless something to think about for other networks that are also considering such a delay due to the fact that the online viewing platform has not been as profitable

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[107] *See* Lunardi, *supra* note 10, at 1078-82 (discussing the different alternatives that have emerged including on-demand programming, Youtube, and Hulu).

[108] *See* De Kosnik, *supra* note 18, at 4.

[109] *Id.*

[110] *See* Lunardi, *supra* note 10, at 1078-82 ("As the success of YouTube has shown, people want to view content on demand, and there is a large market for companies who deliver that content. Cable Television providers have already seen success with on-demand content.").

[111] *FiOS TV Online*, VERIZON, http://commcns.org/KmnRAj (last visited Apr. 15, 2012).

[112] *Information About WatchESPN*, ESPN, http://commcns.org/JMI3MR (last visited Apr. 15, 2012).

[113] Titlow, *supra* note 9 (discussing the new policy instituted by Fox in which only subscribers to Hulu Plus or Dish Network have next-day access to new content).

[114] *Id.*

[115] *Fox's 8-Day Delay on Hulu Triggers Piracy Surge*, TORRENTFREAK.COM (Aug. 22, 2011), http://commcns.org/JgP1gD.

[116] *Id.*

for the networks as "traditional content distribution relationships."[117]

Netflix also offers their subscribers streaming movies and television programs.[118] Until recently, subscribers to Netflix's mail-order movie service also received the online streaming content. However, the two services were recently split, and streaming alone was assessed a specific fee.[119] This prompted a hostile response from Netflix subscribers and it was estimated that the company lost approximately one million customers.[120] Netflix intended to call its mail-order DVD department "Qwikster," but after customer backlash at the idea of having to maintain two different accounts for what had once been the same service, the company backtracked and eliminated the idea of the "Qwikster" name. Instead, the company recombined the services, with Netflix CEO Reed Hastings saying, "This means no change: one website, one account, one password . . . in other words, no Qwikster."[121]

A third potentially legal alternative to piracy is placeshifting. Placeshifting allows cable customers to watch their home television remotely through an Internet connection.[122] A widely known placeshifting device is the Slingbox, made by Sling Media.[123] Slingbox is a small box that hooks up to a home television and home Internet connection, enabling a user to receive the video feed in real time from anywhere they are able receive Internet service and on multiple devices, including a computer, laptop, mobile phone, or tablet device.[124] The user is then able to control the content viewed, including on-demand services, through a virtual remote that appears on the screen.[125] While there is no subscription fee for Slingbox, customers must still pay for the home television and Internet service that the Slingbox placeshifts through.[126] Placeshifting does not address the problem of piracy, but rather provides another way of watching an already existing cable account over broadband Internet.[127]

The legality of placeshifting remains unclear – while some entities have

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[117] Titlow, *supra* note 59 ("[T]he revenue seen by content providers from Internet streaming services like Hulu doesn't come close to what they've made from their more traditional content distribution relationships.").

[118] *Company Overview*, NETFLIX, http://commcns.org/JruzHU (last visited Apr. 15, 2012).

[119] Krazit, *supra* note 19.

[120] *Id.*

[121] Reed Hastings, *DVDs Will Be Staying at Netflix.com,* NETFLIX U.S. & CANADA BLOG (Oct. 10, 2011), http://commcns.org/IYULqv.

[122] Jessica L. Talar, *My Place or Yours: Copyright, Place-Shifting, & the Slingbox: A Legislative Proposal*, 17 SETON HALL J. SPORTS & ENT. L 25, 27 (2007).

[123] *See* Russell, *supra* note 35, at 1239.

[124] *Id.* at 1242.

[125] Talar, *supra* note 122, at 28 (citing *How Placeshifting Works*, SLING MEDIA, http://www.slingmedia.com/go/placeshifting-howitworks (last visited Apr. 15, 2012)).

[126] *Id.* at 29.

[127] *Id.* at 39-40.

embraced the technology, others have threatened suit but have yet to follow through.[128] Since the main purpose of placeshifting is to send copyrighted material from one location to another, its use raises questions of legality under copyright law.[129] So far, it remains unclear if doing so through placeshifting violates such copyright law.[130] Much of the focus surrounding the legality of placeshifting centers on whether it is for public or private use.[131] The previously mentioned federal statute 47 U.S.C. § 605 has a private viewing exception that could be used to defend use of placeshifting under certain qualifying circumstances.[132]

In March of 2012, a new subscription service named Aereo launched in New York City.[133] The $12 monthly service, currently available only on iPods and iPads in the New York City area, retransmits broadcast television signals via tiny antennas installed throughout the area, directly to subscribers' devices.[134] The service not only offers live streams of the twenty-seven local broadcast channels, but it also comes with a DVR function that allows subscribers to record and view their favorite programming later.[135] Aereo is already facing multiple suits in which broadcasters claim copyright infringement.[136] In response, Aereo has filed countersuits in each case, arguing that the Second Circuit's ruling in *Cartoon Network v. CSC (Cablevision)*, which allowed Cablevision customers to record programming onto Cablevision hard drives for later viewing over the objection of the copyright holders of such material,[137]

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[128] *See* Russell, *supra* note 35, at 1239-40 (discussing how Sling Media has been perceived by different entities, from partnering with the National Hockey League to having Major League Baseball and Home Box Office, Inc., threaten suit).

[129] Naoya Isoda, *Copyright Infringement Liability of Placeshifting Services in the United States and Japan*, 7 WASH. J.L. TECH. & ARTS 149, 151 (2011) (discussing what placeshifting is used for and that U.S. Copyright law does not specifically cover placeshifting because it did not exist at the time of the legislation's enactment).

[130] *Id.*

[131] *See* Russell, *supra* note 35, at 1256-57 (discussing the private use exception of 47 U.S.C. § 605).

[132] 47 U.S.C. § 605. *See also* Russell, *supra* note 35, at 1256-57 (discussing the definition of private viewing and the previous applications by courts of the private use exception of 47 U.S.C. § 605).

[133] Jonathan Stempel, *Diller-Backed Aereo Countersues Fox, PBS*, REUTERS (Mar. 20, 2012), http://commcns.org/KPhtnh.

[134] Peter Svensson, *Startup Sends Live Local TV to the iPhone*, ASSOCIATED PRESS (Feb. 17, 2012), http://commcns.org/LbvLl4.

[135] Mark Hachman, *Aereo Bets on Personal Use in Response to Broadcaster Suit*, PC MAG. (Mar. 12, 2012), http://commcns.org/IYVKHc (discussing Aereo's offering of a DVR service).

[136] American Broadcasting Cos., et al v. Aereo Inc., No. 12-01540 (S.D.N.Y.); WNET v. Aereo, Inc., No. 12-01543 (S.D.N.Y). *See also* Stempel, *supra* note 133 (discussing the two suits Aereo's counterarguments).

[137] Cartoon Network v. CSC (Cablevision), 536 F.3d 121, 124 (S.D.N.Y. 2008).

should be applied in their case.[138] Aereo also argues that it should be allowed to rebroadcast over the air channels because it is using multiple antennas, rather than just one individual antenna.[139] Aereo's founder and CEO Chet Kanojia is confident that his company is in the right, and with billionaire Barry Diller backing the project, Aereo could be in this fight for the long haul.[140] The nature of Aereo's service, that of a hybrid DVR/placeshifting/retransmission service makes it a unique case in which far ranging copyright decisions could be made that impact various forms of television platforms.

B. Future of Television—Beyond the Piracy Regime

Former *Washington Post* columnist and current radio and television personality Tony Kornheiser recently opined that:

> in the next five or 10 years . . . [t]here's not going to be football on television any more. It's all going to be in your computer...There's no way to make any money any more doing it the old way. . . . People don't want that any more. They're not going to sit around and wait for things.[141]

Mr. Kornheiser may not be an expert on technology, but he sees the on-demand nature of today's society and predicts a movement that many others are as well—that television services as they currently exist will soon become a thing of the past.[142] With that in mind, this Section argues that a la carte television is a viable option for curbing much of the previously mentioned illegal downloading and streaming of television. An a la carte option would allow consumers to pick and choose the television channels they wanted, rather than choosing from packages where the cable company "bundles" channels together.[143]

The FCC has explored the possibility of moving to an a la carte-based television structure and has made statements both for[144] and against[145] the idea. In its initial report in 2004, the Commission stated that "[a]t the heart of these

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[138] Hachman, *supra* note 135 (discussing Aereo's intention on using the personal use and the *Cablevision* decision in defense of its DVR service).

[139] Svensson, *supra* note 134 (discussing Aereo CEO Chet Kanojia's argument that "[e]very one of these little antennas has a person's name on it").

[140] *Id.*

[141] Dan Steinberg, *Tony Kornheiser on ESPN 980's Podcast Policy*, D.C. SPORTS BOG (Oct. 4, 2011), http://commcns.org/IYW8pl.

[142] *Id. See also* Isoda, *supra* note 129, at 149, n.1; Talar, *supra* note 122, at 30.

[143] *See generally* DiBenedetto, *supra* note 15. *See also* Lazarus, *supra* note 13 ("It's time for the $79-billion cable industry to switch to a la carte pricing that would allow customers to pay only for the channels they want to watch.").

[144] FCC FURTHER REPORT, *supra* note 22, at 3.

[145] *See id. See also* FCC REPORT, *supra* note 22, at 6. This report was however found to be based on problematic assumptions and replaced by the subsequent report issued in February 2006.

Congressional requests for the Commission to study a la carte and themed tier services for cable and satellite subscribers is our nation's long-standing public policy goal of making available communications and media technologies to all Americans at affordable rates."[146] The report also noted that "[u]nder the current bundling regime, cable prices have increased by an average of 4.6% per year and in excess of 7% per year for the expanded basic program tier over the past five years, pointing to the "the industry's practice of making most networks available as part of a bundle or tier" as a potential reason for the rise in rates.[147]

The report also points out that certain premium channels, like Home Box Office ("HBO"), have been offered a la carte for more than 30 years and charge relatively high rates—between $10 and $15 a month for services.[148] These services are only available to people who have an existing subscription.[149] Finally, the report noted that pay-per-view options and on-demand services effectively serve as a la carte programming for cable and satellite customers.[150]

The report concluded that "only those consumers who would purchase fewer than 9 program networks may see a reduction in their monthly bills."[151] With the average cable household watching approximately seventeen channels, an a la carte option would not reduce rates for these households. In fact, according to the report these households "would likely face an increase in their monthly bill under a la carte sales of between 14% and 30%,"[152] This conclusion was supported by industry groups such as the National Cable and Telecommunications Association ("NTCA"), which noted that "the bundling of programming in basic and enhanced basic tiers gives today's cable and satellite customers a better value – with more channels, more diversity, higher quality and lower prices – than a government mandated a la carte regime could ever provide."[153]

However, less than two years later the FCC released a second report titled *Further Report On the Packaging and Sale of Video Programming Services to the Public* ("Further Report"). The agency stated that the Further Report was intended "to respond to questions that have arisen regarding the appropriateness of the assumptions relied upon and the conclusions reached in

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[146] *See* FCC REPORT, *supra* note 22, at 3.
[147] *Id.* at 21.
[148] *Id.* at 13.
[149] *Id.*
[150] *Id.* at 14.
[151] *Id.* at 6.
[152] *See* FCC REPORT, *supra* note 22, at 6.
[153] Media Release, Robert Sachs, Nat'l Cable & Telecomms. Ass'n, Statement Regarding the FCC Study on A La Carte Pricing (Nov. 19, 2004), http://commcns.org/KtpDDx.

the First Report."[154] The Further Report explained that the First Report "relied on problematic assumptions and presented incorrect and biased analysis" and concluded "that a la carte could be in consumers' best interests."[155]

This "incorrect and biased analysis" was a study by Booz-Allen Hamilton, which was later discovered to be conducted for "an industry association and based largely on unsupported and unrealistic assumptions."[156] Specifically, the study's assertion that people who purchased more than nine channels a la carte would likely see an increase in their prices was based on a "miscalculation."[157] Instead, the FCC found this number to be closer to twenty networks, rather than nine.[158]

Since the Further Report, much has been discussed regarding the idea of a la carte television and its future. From these discussions, three practical models have emerged regarding the offering of a la carte television in the U.S.: (1) a direct, from the cable provider model,[159] (2) a direct, from the channel model,[160] and (3) a marketplace option through an already existing service like iTunes.[161]

1. Direct from Cable Provider Model

Multiple cable providers have already used this model in Canada, most recently Bell Canada beginning in 2010.[162] Although the option as a whole is not a true a la carte model, in that users cannot simply pick as many or as few channels as they want, there are different a la carte tiers that subscribers can pick and choose from once they have paid for a basic $25 introductory

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[154] *See* FCC FURTHER REPORT, *supra* note 22, at 3.

[155] *Id.*

[156] *Id.*

[157] *Id.* at 4 ("Based on a mistake in its calculations, the study concludes that under a la carte, 'consumers that purchase at least 9 networks would likely face an increase in their monthly bills.'").

[158] *Id.* ("To the contrary, even under the assumptions of the Booz-Allen-Hamilton Study, if there are 6 broadcast stations, consumers could receive as many as 20 channels without seeing an increase in their monthly bills. That is actually 3 more channels than the average cable household watches today.").

[159] *See e.g.*, *Bell Offering A La Carte TV in Quebec*, CBC NEWS (Feb. 12, 2010), http://commcns.org/KmqSjS ("The company on Friday announced new options that will allow television customers to subscribe to individual channels, rather than bundles that include unwanted channels. Customers must first take a basic $25 package that includes standard channels such as Global, CTV, CityTV and CBC, and can then choose 15 channels for $15, 20 for $19 or 30 for $22. Bell is also offering individual channels for $2 each.").

[160] Brad Tuttle, *TV A La Carte: One Man's Dream*, TIME MONEYLAND (Mar. 4, 2010), http://commcns.org/Jw1JrL.

[161] Peter Kafka, *Apple's iTunes Pitch: TV for $30 a Month*, ALL THINGS D (Nov. 2, 2009), http://commcns.org/KPkGTG.

[162] *Bell Offering A La Carte TV in Quebec*, *supra* note 159.

package.[163]

Once the basic package is in place, the subscriber is then able to choose any additional fifteen channels for $15, twenty channels for $19, or thirty channels for $22.[164] Any channels beyond thirty cost $2 each.[165] This a la carte service is only available in certain markets where competition and other a la carte options have already been introduced.[166] As with most cable-related services, there is fine print attached to the a la carte options in Canada, including provisions that "television providers can sell a la carte if they also include all the channels sold in bundle packages" and "51 percent or more of a customer's overall subscription must be comprised of Canadian channels."[167] While this model is clearly not perfect, or even true a la carte, it gives a foundation for what could be a stepping-stone to a more complete version of a la carte television in the United States.

2. *Direct from Channel Model*

This model takes out the intermediary, i.e., the cable, satellite, or telecommunications provider, and sells channels directly to the consumer as an Internet subscription. This streaming of television through a service over the Internet is known as Internet protocol television ("IPTV").[168] One of the major problems facing IPTV, or any other type of direct a la carte television option, is that major content providers are reluctant to adopt such an approach.[169] The reason for their hesitance is that they often own multiple channels and will bundle less popular channels with more popular ones, forcing providers to purchase all of the channels as a package, rather than one by one.[170] One such example is the Walt Disney Company, which owns ABC, as well as all of the ESPN networks.[171]

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[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] DiBenedetto, *supra* note 15.
[169] *Id.*
[170] *Id.*
[171] *Company Overview*, THE WALT DISNEY COMPANY, http://commcns.org/J8mmct (last visited Apr. 15, 2012):

> ESPN, Inc., The Worldwide Leader in Sports, is the leading multinational, multimedia sports entertainment company featuring the broadcast portfolio of multimedia assets with over 50 business entities. Sports media assets include ESPN on ABC, six domestic cable television networks (ESPN, launched in 1979; ESPN2; ESPN2; ESPN Classic; ESPNEWS; ESPN Deportes; ESPNU), ESPN HD and ESPN2 HD (high-definition simulcast services of ESPN and ESPN2, respectively), ESPN Regional Television, ESPN International (31 International

Though this model has a number of hurdles to overcome, a possible way around the issue of bundling channels would simply be for the companies that own the channels to offer each individually, or together at a lower price based on genre directly to the consumer. For example, a company like Disney could set up an a la carte system that would allow sports fans to purchase ESPN and ESPN2 separately for a set price. However, in addition to offering ESPN, ESPN2, etc. for individual set prices, Disney could still offer all of the ESPN channels in a bundle at a price lower than they would be if all purchased separately. A company like Disney, with a variety of networks covering sports and children's programming in addition to offering each channel individually could offer different packages – one including ESPN, ESPN2, ESPN Classic, ESPNEWS, ESPNU and another with Disney Channel, Disney XD, Disney Junior, and ABC Family.[172] This would allow consumers with a specific interest, like sports or children's programming, to buy the channel or channels they want directly from the company in the manner that best meets their economic needs.

3. *Marketplace Model*

The final model that has emerged in recent years charges consumers a subscription fee for specific live or taped content through an already existing service. Thus far, Apple has been one of the biggest proponents of this model.[173] Originally, Apple proposed offering the option for a set fee through iTunes.[174] However, Apple,[175] along with other companies, such as Roku[176] and Boxee,[177] have developed streaming media player technology that allows users

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networks and syndication), ESPN Radio, ESPN.com, ESPN The Magazine, ESPN Enterprises, ESPN Zones (Sports-themed restaurants licensed by ESPN), and other growing new businesses including ESPN360.com (Broadband), ESPN Mobile Properties (wireless), ESPN On Demand, ESPN Interactive and ESPN PPV. Based in Bristol, Ct., ESPN is 80 percent owned by ABC, Inc., which is an indirect subsidiary of the Walt Disney Company. The Hearst Corporation holds a 20 percent interest in ESPN.

[172] *Id.*

[173] Peter Kafka, *supra* note 161 ("Would you pay $30 for iTunes? That's the pitch Apple has been making to TV networks in recent weeks. The company is trying to round up support for a monthly subscription service that would deliver TV programs via its multimedia software.").

[174] *Id.*

[175] *See generally What is Apple TV?*, APPLE, http://commcns.org/KPlqYU (last visited Apr. 19, 2012).

[176] *See generally About Us*, ROKU, http://commcns.org/KmrAOj (last visited Apr. 19, 2012).

[177] *See generally Company Overview*, BOXEE, http://commcns.org/JTlY0m (last visited Apr. 19, 2012).

to access already existing television subscriptions like Netflix,[178] Hulu Plus,[179] and HBO Go[180] directly on their televisions through a small device that is connected to the TV. Apple's device, Apple TV, which can be integrated with its tablet, iPod, and smart phone offerings, allows users to not only access current subscriptions, from services like Netflix and MLB.tv, it also allows users access to their iTunes library of television shows and movies.[181] Although Apple, Boxee, and Roku, as well as gaming consoles such as Playstation 3[182] and Xbox 360,[183] allow users to stream certain on-demand-type services through their television, each lacks sophisticated live programming options. Boxee is the only one of the aforementioned companies in the media player market that offers extensive live television programming through its player.[184] Boxee grasps the inherent value in live programming that all of the on-demand services seemingly lack; unfortunately Boxee's live programming is limited to the local broadcast channels in High Defintion ("HD").[185] The signals for the broadcast channels are received through an HD tuner designed by Boxee specifically for the Boxee unit.[186] Apple, with recent improvements to Apple TV, seems to be moving closer to the possibility of being able to offer live programming through its iTunes market for a specific set fee. With a proposed monthly fee of $30 per month,[187] Apple's option would be less costly than many of the current cable options, but more expensive than monthly rates for comparable services, such as Hulu Plus or Netflix's streaming option, which both cost a mere $7.99 a month.[188] Consequently, if a media player owner has a subscription to multiple services through the media player, the monthly cost could actually be in excess of a monthly cable bill. At this point, it is unclear

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[178] *See generally Company Overview*, NETFLIX, http://commcns.org/JruzHU (last visited Apr. 19, 2012).

[179] *See generally* HULU PLUS, http://commcns.org/LSCCMM (last visited Apr. 19, 2012).

[180] HBO GO, http://commcns.org/KPmhsC (last visited Apr. 19, 2012).

[181] *Apple TV – Airplay*, APPLE, http://commcns.org/JH5pEd (last visited Apr. 19, 2012). *See also What's on Apple TV*, APPLE, http://commcns.org/JTmsnr (last visited Apr. 19, 2012) (discussing the various content available for streaming on Apple TV).

[182] *Playstation Network Overview*, SONY, http://commcns.org/IYcWLS (last visited Apr. 19, 2012).

[183] *Xbox Live Overview*, MICROSOFT, http://commcns.org/L6P1dg (last visited Apr. 19, 2012).

[184] *Boxee Live TV*, BOXEE, http://commcns.org/KPn5Ok (last visited Apr. 19, 2012).

[185] *Id.* (discussing the advantages to watching live television rather than on-demand streaming, including the rising cost of cable bills and that there is no substitute for live TV).

[186] *Id.* (explaining that "Boxee Live TV works with signals from HDTV antennas (using ATSC) or an unencrypted cable connection (using ClearQAM). The package includes a portable ATSC digital terrestrial antenna, which can be used within 10 miles of an ATSC transmitter.").

[187] Kafka, *supra* note 161.

[188] HULU PLUS, *supra* note 179; NETFLIX, http://commcns.org/Ky4rer (last visited Apr. 15, 2012).

whether the media player market will continue to grow as a one-stop-shop for on-demand services, or evolve into the actual streaming of television channels in an a la carte fashion.[189]

There are several hurdles to this model. Networks have been reluctant to disrupt their existing relationships with cable providers, especially considering the lucrative subscription fees they receive.[190] Additionally, programmers are concerned with the effect of Apple's proposal on advertising revenue, as such a service could lead to diminished ratings.[191] The final hurdle—one that all three models may face—is that a number of television networks are actually owned by cable companies.[192] For instance, after Comcast's merger with NBC Universal, it now owns numerous networks, including E!, Golf Channel, and Style.[193] Moreover, many cable companies wholly own or own a portion of regional sports networks, which they could make available only through cable subscription.[194]

IV. CONCLUSION

The above arguments have shown the best way to combat television piracy is on three fronts – (1) a package of on-demand entertainment,[195] in the form of reasonably priced a la carte television,[196] (2) continued enforcement of current laws,[197] and (3) the passing of regulations that combat piracy while continuing to promote innovation.[198] Internet piracy is very similar to the problem facing regulation of performance enhancing drugs in the sports world – users are

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[189] Adam Satariano, *Apple Effort to Develop TV Is Said to Be Led by iTunes Creator Jeff Robin*, BLOOMBERG (Oct. 25, 2011), http://commcns.org/JMV21a.

[190] Kafka, *supra* note 161.

[191] *Id.*

[192] Tuttle, *supra* note 160.

[193] Ian Paul, *NBC-Universal-Comcast Merger: What We Do and Don't Know*, PCWORLD (Dec. 3, 2009), http://commcns.org/L6Q8cP.

[194] Gautham Nagesh, *Comcast, Dish Network Spar over Philly Sports Channel*, THE HILL (Aug. 2, 2010), http://commcns.org/L0PePz.

[195] *See* Lunardi, *supra* note 10, at 1078-82 ("As the success of YouTube has shown, people want to view content on demand, and there is a large market for companies who deliver that content. Cable Television providers have already seen success with on-demand content.").

[196] Lazarus, *supra* note 13 ("It's time for the $79-billion cable industry to switch to a la carte pricing that would allow customers to pay only for the channels they want to watch.").

[197] *Oversight of Intellectual Prop. Law Enforcement Efforts: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Erik Barnett, Assistant Deputy Director of the Department of Homeland Security) (referencing the launch of "Operation In Our Sites," stating specifically that "Last year, the IPR Center launched Operation In Our Sites, a new Initiative targeting websites being used to sell counterfeit goods and distribute pirated merchandise and copyrighted digital materials.").

[198] Espinel et. al., *supra* note 91.

almost always going to be one step ahead of the testers.[199] When it comes to digital piracy, the enforcers are constantly finding themselves one step behind the pirates.

The advantage of a la carte television, as demonstrated above, is that it would allow customers to receive everything in one place. The plethora of options is almost as overwhelming as cable and satellite prices. Currently if someone wants to watch a specific show, they may have to go to a network's website to watch, while another show may only be available through a paid subscription service, like Netflix.[200] That same person might have a desire to then watch a live sporting event, strictly available on a channel that is only accessible through an active subscription. All of this could be done through a central a la carte system that afforded the subscriber, at a reasonable price, what used to take numerous steps.

[199] *Steroids*, N.Y. TIMES, July 30, 2009, http://commcns.org/JMWoZJ ("[M]ost sports have banned steroid use. But committed underground suppliers and users of steroids have often stayed a step ahead of even the most stringent testing programs.").

[200] *See generally*, *Company Overview*, NETFLIX, *supra* note 118.