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Congress and the FCC Turn Up the Heat

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By John M. Higgins and P.J. Bednarski -- Broadcasting & Cable, 12/5/2005

In a single stroke, FCC Chairman Kevin Martin may have turned the world of cable operators and programmers on its head.

Under the glare of TV lights at a Senate indecency hearing last week, Martin reversed course on the agency's pivotal 2004 decision that shot down a new way to sell cable TV to subscribers, essentially allowing customers to choose precisely which channels they could buy.

Martin said that this method, known as à la carte, would not push consumers' cable bills higher. His predecessor, former FCC Chairman Michael Powell, had made "mistakes in its basic calculations," according to Martin. And by Martin's analysis, à la carte is an ideal antidote to TV's rising indecency. Television today "contains some of the coarsest programming ever aired," he said, adding that the move will offer consumers a real choice at no cost to cable companies.

Cable companies are howling at the FCC chairman's new agenda. They see à la carte as the regulatory equivalent of a dirty bomb, rendering both systems and basic networks economically uninhabitable. The more expensive channels, such as TNT or sports channel ESPN, could end up as costly standalone choices. How many people would pay the \$15 per month one analyst estimates that ESPN might charge in an à la carte world? Smaller networks without much marketing money would struggle in the clutter.

Cable operators fear lower revenues if customers buy fewer channels and, at least near term, marketing chaos as the industry rips up the model for selling their core product. Perhaps most challenging will be defining, as Congress seems to want them to, what exactly "family programming" is.

Already, one cable pioneer and iconoclast has broken from the pack, agreeing with senators that à la carte is entirely feasible—and weakening any argument otherwise. Chuck Dolan, chairman and founder of Cablevision Systems, declared in a statement, "We do not believe in the long term that selling programming à la carte will be detrimental to either programmers or cable operators ... Consumers should not be obliged directly or indirectly to buy services they do not want."

DBS rival EchoStar and telco AT&T also endorse à la carte.

Consumer advocates have for years pushed à la carte as a way of letting subscribers reduce their bills, allowing customers to choose individual channels in a package from the current offering of 100 channels or so. Subscribers would select basic channels the same way they can take or leave movie networks like HBO or Showtime.

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“THEY HAVE THEIR EYES ON US”

The approach has gained steam among critics of TV indecency. Parents with conservative tastes can already block out raunchy FX or MTV shows that offend them through the V-chip, a little-used parental-control technology in TVs that can block offensive programming (see sidebar, below). But critics resent that they nevertheless have to pay for these channels as part of the basic tier. À la carte would let them cherry-pick only the channels they want to receive.

Peter Tolan, creator of the edgy *Rescue Me* on FX, thinks the indecency police “have their eyes on us and *Nip/Tuck* and *The Shield*,” two other FX shows that push the envelope.

The drive for indecency legislation is continuing to build. Four such bills are working their way through Congress. Another indecency hearing is scheduled for Dec. 12, and in January powerful Senate Commerce Committee Chairman—and indecency critic—Ted Stevens (R-Alaska) plans another hearing at which the committee will start marking up legislation.

“A VERY DANGEROUS IDEA”

Cable operators say they see a couple of paths to a compromise but privately acknowledge that they risk the à la carte debate spinning beyond their control.

Mandating à la carte would be legally tricky. National Cable & Telecommunications Association (NCTA) President Kyle McSillarow called using à la carte to control content “a very dangerous idea” at the hearing and proclaimed that the industry would fight it in court as a violation of the First Amendment.

“The point was not to be antagonistic. It was to be very clear where we stand,” McSillarow said in an interview. The cable industry is trying to blunt the attacks by promoting tools that parents already have to control what their kids can watch on TV, and they are trying to develop new ones.

“The best outcome, everyone basically agrees with me, is that everyone should have the ability to protect their children,” McSillarow said.

Proper parenting seemed to be the universal ideal, but those skills are lacking these days, testified Joe Pantoliano, best known as violent mobster Ralphie on HBO’s *The Sopranos*. He said he is stunned that parents allow their kids to watch the series. “I’m always flabbergasted on the many occasions parents approach me with their children and encourage their children to tell me how much they love *The Sopranos*,” said Pantoliano, co-president of Creative Coalition, a Hollywood lobbying group. “On these occasions, I can’t help but think, why would they let their children watch a show like this?”

Martin signaled that he wants to reopen the à la carte debate at the Senate Commerce Committee’s Open Forum on Decency last Tuesday. With 23 witnesses—including media executives, conservative Christian groups and religious broadcasters—limited to five-minute presentations, the hearing was expected to be routine.

But it wasn’t until Martin’s office made a courtesy call late Monday that NCTA officials knew he would press the issue at the hearing.

Cable executives thought they had largely defanged the à la carte question. In 2004, the FCC Media Bureau issued a report concluding that consumers’ bills would probably increase in an à la carte world. That echoed a similar analysis by the Government Accountability Office.

Martin slammed the FCC report guided by Michael Powell and ex-Media Bureau

Chief Ken Ferree as based on “incorrect and biased analysis.” A new report to be issued by commission staff soon shows that à la carte “could be economically feasible and in consumers’ best interest.”

À la carte is only one solution. Martin outlined other options to regulate content, including holding basic networks to the same indecency rules that govern broadcast channels, or mandating tiers of family-friendly programming. At the least, Martin was clearly sharpening up à la carte as a weapon to force the cable industry to clean up its content.

“We used to receive indecency complaints by the hundreds, and now they come in by the hundreds of thousands,” he said. “The industry needs to do more to address parents’ legitimate concerns.”

Programmers say à la carte could crush their dual revenue stream—the license fees from cable operators and the rates they could charge for advertising—since fewer people would be watching.

Networks bundled into the basic cable tier reach around 95% of a cable system’s subscribers. No network is likely to secure that penetration in an à la carte world. (HBO, for example, manages to snag around 30% of cable and DBS homes; Showtime gets just 10%).

Ad sales would be suffer from the loss of viewers who happen to graze through a network. How many occasional viewers of HGTV or TLC’s home-improvement shows would balk at paying for those networks every month?

In a 2004 report, Bear Stearns media analyst Ray Katz estimated that, if ESPN’s penetration fell to 50%, it would have to charge consumers \$7.79 monthly to offset financial losses. MTV and Fox News would have to charge \$1.06 monthly. If penetration dropped to 25%, ESPN would have to charge \$15.82; MTV \$2.32 and Fox News \$2.17.

And it doesn’t count the \$14 or so that operators would charge to even order the first à la carte channel.

Both programmers and operators would then confront the kind of monstrous marketing challenge faced by pay movie networks, which turn over 50% of their subscribers each year. How much would low-rated networks like Bravo or E! have to spend to persuade subscribers to buy? Operators say they face backoffice and billing havoc juggling subscribers’ choices.

Jonathan Rodgers, president of TV One, a startup network aimed at black viewers, says he has had an à la carte-themed nightmare that “had me knocking on every door in Biloxi [Miss.], telling them to buy TV One.”

“RISK OF BEING SQUEEZED OUT”

“Less-watched channels would be at risk of being squeezed out, as they would no longer receive affiliate fees across such a broad subscriber base,” says UBS Warburg analyst Aryeh Bourkoff. “Many smaller/less-watched cable networks would find it economically unfeasible to provide service to such a small audience, with little ability to raise affiliate fees.”

One possible compromise would be to subject basic-cable networks to the same indecency standards faced by broadcasters.

Disney touts that one, largely because it would pinch its competitors without materially affecting its own cable networks, including ABC Family and The Disney Channel. (Moreover, Disney is against offering ESPN à la carte.)

Cable operators would accept that compromise in an instant. "If it were up to cable operators, this wouldn't be a debate," says the president of one major operator.

But the owners of racier networks News Corp. (FX) and Viacom (MTV, Comedy Central, Spike) oppose the idea and may have the First Amendment on their side.

A more palatable alternative would be the creation of a "family tier," filled only with unobjectionable programming, much as operators relegate porn to pay-per-view channels.

Such a tier might be the preferred route to get Capitol Hill off cable's back, says a prominent communications attorney who has represented broadcasters and cable networks.

Andrew Jay Schwartzman, president of the public-advocacy group Media Access Project, agrees that Congress and the FCC want an easy solution so "this whole thing goes away." He adds, "My guess is that the family tier would be phenomenally unsuccessful. I suspect actual viewing habits, as compared to what viewers write their senators about, are different."

A family tier also presents one immense problem. "Who's going to decide what a family network is?" asks TV One's Rodgers.

For example, it is unclear how MTV, which targets teens but is criticized for broadcasting obscenities and sexual situations, would be classified.

The TV industry's best hope is make it incredibly simple for parents to control TV in their homes, filtering out rough programming even when they're not around. That might be through a bigger push of the V-chip, or more-sophisticated filters in cable set-tops.

One buzz phrase that is catching on is "uniform ratings system." Media critics bemoan the cacophony of various ratings for TV, movies and videogames. Lobbyists say that Stevens seems receptive to the idea of one simplified grading system for all media content.

Sen. Stevens issued a stark warning to television executives in the hearing room: "Everybody at this table ought to realize, if we don't reach an agreement of some sort during this period before January, we're going to see a bill that many of you won't like to live under, and we'll be in litigation for years to come."

Additional reporting by Michael Grebb and Ben Grossman

V-Chip: Why Don't Parents Use It?

When the FCC required that all TV sets with screens 13 inches or larger contain V-chip technology by January 2000, it seemed like the panacea for parents concerned about inappropriate content.

Nearly six years later, however, the FCC is once again looking into the issue of indecency, despite the fact that V-chips are not only in TVs but also in cable and DBS set-top boxes—even in TV-tuner cards for personal computers.

So why hasn't the technology caught on?

"The V-chip is a cautionary tale of what happens when you mandate technologies," says Michael Petricone, Consumer Electronics Association VP, technology policy, government and legal affairs. "If it was a voluntary technology

and a product feature, it could be used to differentiate products and become a selling point. But when it's mandated, there is no incentive to market it. No automaker markets four wheels as a feature."

The V-chip works by reading a small information bit that resides in the program stream and tells the TV what kind of content the program contains. If the V-chip sees the flag for violence and the parents want no violent content shown, then the program is blacked out.

Accessing the V-chip menu onscreen through a new TV set's remote control is typically a three- or four-step process. Parents can choose from a menu of ratings that can be watched or blocked, such as TV-MA. "The ratings system is quite complex," says Petricone. "And part of a government-driven process is to make something as usable as possible."

At last week's Senate hearing, television executives on the panel seemed headed toward some consensus that the codes be simplified. They also pushed for a more coordinated campaign to let viewers know the blocking devices exist and urge them to use it.

CBS Executive VP Marty Franks is optimistic that the V-chip can be the answer. "If the broadcast networks, the NCTA and DirecTV can combine our weight and have a similar message, we could move the needle [on V-chip awareness]," he says.

Since testifying, he says, he has had conversations with others, such as former Motion Picture Association of America chief Jack Valenti, about doing just that.
—*Ken Kerschbaumer*

The Indecent Four

Four bills dealing with television indecency are under consideration by lawmakers:

HR 310—Broadcast Decency Enforcement Act of 2005

Sponsored by Rep. Fred Upton (R-Mich.), it has already passed the House and is currently held up in the Senate Commerce Committee. The bill would set fines as high as \$500,000 for any broadcast licensee determined by the FCC to have broadcast obscene, indecent or profane material. The current maximum fine is \$32,500 per violation. The bill doesn't cover cable.

S 193—Broadcast Decency Enforcement Act of 2005

Sponsored by Sen. Sam Brownback (R-Kan.), it would increase fines for broadcast licensees to \$325,000 per day per indecency violation. Fines could reach up to \$3 million for each specific incident.

S 616—Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005

Sponsored by Sen. John Rockefeller (D-W.Va.), it would direct the FCC to study whether current TV ratings and blocking systems are adequate safeguards for parents and, if they're not, prohibit licensees from broadcasting such programming during children's viewing hours or require them to come up with new protections.

S 946—Kid-Friendly TV Programming Act of 2005

S 946, sponsored by Sen. Ben Nighthorse (D-Colo.), it would require cable and

S 940, sponsored by Sen. Ron Wyden (D-Ore.), it would require cable and satellite operators to offer a child-friendly programming tier of at least 15 channels, as well as include channel-blocking instructions as part of the monthly bill.

—Compiled by Michael Grebb

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