EDITOR’S NOTE

ARTICLES

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Matt J. Duffy

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Daniel J. Spitz

Big Tobacco Blows Smoke on Public Health Initiatives: Using Trademark Law to Prevent International Changes to Cigarette Packaging
Caile Morris
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Editor’s Note

This is an exciting time at the Journal of International Media and Entertainment Law. First, our next symposium, entitled Freedom of Information Laws on the Global Stage: Past, Present and Future, is now a firm go for November 4, 2016 at Southwestern Law School in Los Angeles. Timed to commemorate the 250th anniversary of Sweden’s freedom of information law—the world's first—and the 50th anniversary of the U.S. government’s FOIA, this conference will bring a “who’s who” of top international scholars together to present on a diverse range of topics relating to access to government records and sunshine laws around the world. David Kaye, U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, will be our keynote speaker. Conference papers will be published in the Journal and in an associated Southwestern Law School publication, the Journal of International Law. If you would like to speak at the conference without submitting a paper, please contact us at jimel@swlaw.edu. All speakers will receive free registration to the conference and discounted accommodations at the conference hotel. For more details about attending Freedom of Information Laws on the Global Stage, including the receipt of continuing legal education credit, please go to http://www.swlaw.edu/globalFOIconference.

We are also excited about the articles we are publishing in this volume. “Konate v. Burkina Faso: An Analysis of a Landmark Ruling on Criminal Defamation in Africa,” by Matt J. Duffy, assesses the significance of the rare case, in the African Court of Human and People’s Rights, in which the judicial body upheld the rights of journalists over those of public figures. Duffy, a professor at Kennesaw State University, is a prolific scholar of journalism in print and online. “Is There Anybody Out There? Analyzing the Regulation of Children’s Privacy Online in the United States of America and the European Union . . .” by Nachson Goltz, a scholar at Osgoode Hall Law School at York University in Canada, offers a carefully calibrated analysis of regulation of children’s privacy online. Goltz uses Eberlein et al.’s Transnational Business Governance Framework to critique the commodification of personal information collected in the United States of America and the European Union. In “Contrasting the Feasibility of À La Carte Television in Canada and the United States,” author Daniel Spitz examines the growth of subscription video on demand (SVOD) and the
transition to non-linear television viewing in both countries. Spitz, an emerging scholar with a transnational entertainment law practice, concludes that hybrid basic tiers with optional à la carte services may strike the balance between the needs of the cable industry and consumers in an increasingly fragmented marketplace. Rounding out this issue is “Big Tobacco Blows Smoke on Public Health Initiatives: Using Trademark Law to Prevent International Changes to Cigarette Packaging” by Caile Morris. Morris, a Law & Policy Fellow at the Association of Research Libraries, frames the U.S. public health debate about cigarette warning labels in light of global battles over trademark and branding related to cigarette packaging.

Finally, I would like to note that the Journal of International Media and Entertainment Law is entering a new phase. Beginning with this issue, the Journal will be published by the Donald E. Biederman Entertainment and Media Law Institute of Southwestern Law School, in association with the American Bar Association’s Forum on Communications Law and the Forum on Entertainment and Sports Industries. Other than some changes in the Journal’s front-matter, the content of this issue and our mission going forward remain the same. Indeed, I look forward to continuing input and feedback from a broad range of Journal subscribers, including those in both of our constituent ABA Forums.

Michael M. Epstein
Supervising Editor
SOUTHWESTERN LAW SCHOOL
2015–2016

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The African Court of Human and Peoples’ Rights heard its first case regarding press freedom in December 2014: Konaté v. Burkina Faso. Overturning a conviction of criminal defamation against a journalist in Burkina Faso who had reported on corruption, this is a landmark decision because few courts in Africa, or in the developing world at large, rule in favor of journalists against public figures. The ruling held that: 1) a petitioner can approach the regional court before exhausting local legal remedies if the country’s court system is unable, by design, to rule in the petitioner’s favor; 2) the licensing of journalists violates freedom of expression; 3) custodial sentences for defamation are an impediment to free speech; and 4) public figures must tolerate more scrutiny than private individuals. Analyzing regional jurisprudence, this article finds that three main concepts have emerged as “best practices” in international defamation law: civil lawsuits should be used rather than criminal charges; truth must always be allowed as a defense for defamation; and public figures must withstand more scrutiny than private figures. Analyzing the African Court’s ruling, the article finds that the Court rooted its decision in both African and international human rights bodies and instruments.
INTRODUCTION

For the past several decades, freedom of expression advocates have focused on the repressive effects of criminal defamation charges that discourage a climate of open dialogue and healthy criticism. Powerful public figures, critics note, use laws designed to ensure the protection of reputations for nefarious purposes, such as punishing journalists who expose corruption or who offer unvarnished criticisms of policies. Even without convictions, the prospect of going to jail for writing or broadcasting a critical report creates a chilling environment for journalists. Criminal libel and slander laws are most often found in a country’s penal codes—rather than in media laws—and allow police to arrest people if they receive a complaint of defamation. A front-page editorial in a Qatari newspaper broached the subject in a 2011 column:

Here, anybody can simply file a complaint with the police against a reporter and his newspaper. The police then call the reporter and question him in a harassing way, and if they (the police) feel there is merit in the complaint, the journalist is referred to the Public Prosecution for further questioning. Since it is the prosecution’s prerogative to refer a matter to court, many complaints against journalists do not reach the court at all and end up in journalists being harassed and humiliated rather than being put on a fair trial. Many a time prosecution officials call a journalist concerned at 5 am, when he is in the middle of sleep. The entire process is so harrowing and humiliating for a journalist that he chickens out when it comes to writing critically on issues.1

The authors of this editorial courageously detail exactly how the criminal defamation laws in Qatar lead to muted journalism. The same situation can be found around the world in countries that suffer from poor press freedom rankings.

This article analyzes the case of Konaté v. Burkina Faso, a landmark African Court of Human and Peoples’ Rights ruling that should help end the abuse of criminal defamation in many countries in Africa and could have implications beyond the continent. The ruling is important because few courts in Africa, or in the developing world at large, rule in favor of journalists against powerful public figures. The African Court of Human and Peoples’ Rights ruled in December 2014 against the state of Burkina Faso, which had imprisoned a journalist reporting on the corruption of a public prosecutor. The judges decided that the use of criminal defamation

violated free speech rights guaranteed in both the United Nations Charter of Human Rights and the African Charter on Human and Peoples’ Rights. The Court further ruled against the notion of licensing journalists and also agreed to allow an immediate appeal to the African Court because local laws do not protect freedom of expression. The ruling is particularly significant because it should create a precedent against criminal defamation across much of the continent. Twenty-seven countries have agreed to abide by the African Court’s ruling, including many countries that suffer from low press freedom rankings.  

I. BACKGROUND

The African Court of Human and Peoples’ Rights is a regional court for countries in the African Union, an organization founded in 2001 and to which every country in Africa belongs, with the exception of Morocco. The Union claims fourteen objectives, including the promotion of “peace, security, and stability on the continent” and “democratic principles and institutions, popular participation and good governance.” The African Court of Human and Peoples’ Rights was established in 2006 to serve as a court of last resort for countries within the African Union. Only countries that have agreed to the Court’s protocol are officially under its purview. As of 2015, twenty-seven of the fifty-four countries in the African Union have acceded to the Court’s authority.

The African Court was modeled after the Inter-American Court of Human Rights and the European Court of Human Rights. All of these courts use their regional charters— which are modeled in part on the UN Charter for Human Rights—as a basis for deciding cases in which plaintiffs

4. Id.
6. Id.
7. List of Countries, supra note 2. The countries that have acceded to the Court’s authority are Algeria, Burkina Faso, Burundi, Côte d’Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Sahrawi Arab Democratic Republic, Senegal, Tanzania, Togo, Tunisia, and Uganda.
feel local judgments violated the rights guaranteed them under the regional charter. The African Court was established to complement the African Commission on Human and Peoples’ Rights, which was seen as a weak body with no compulsion mechanism. The efficacy of the Court has yet to be determined, although some critics have complained about its progress on some issues. From 2007 to early 2015, the Court decided twenty-five cases. The Konaté case is the first to focus on press freedoms.

Pending approval by fifteen countries, the African Court of Human and Peoples’ Rights will merge with the African Court of Justice, a court more focused on business matters and treaty disputes. The new court will feature two chambers and will be known as the African Court of Justice and Human Rights.

II. FACTS OF THE CASE

Konaté describes his French-language newspaper, L’Ouragan—“the hurricane”—as a “private Weekly with an independent editorial policy focusing mainly on political and social issues.” In his filing to the African Court, Konaté noted that his newspaper had “been the object of various legal proceedings in Burkina Faso due to its style in news reporting.” He has served as editor-in-chief since 1992.

In 2012, L’Ouragan printed two articles that allegedly defamed Burkina Faso’s state prosecutor, Placide Nikiéma. The first articles appeared on August 1: Konaté’s “Counterfeiting and laundering of fake bank notes—the Prosecutor of Faso, 3 Police Officers and a Bank Official—Masterminds of Banditry” and reporter Roland Ouédraogo’s

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15. *Id.*
16. *Id.* ¶ 56.
“The Prosecutor of Faso—a saboteur of Justice.” The editor-in-chief of the weekly newspaper wrote a second article on August 8 entitled: “Miscarriage of Justice—the Prosecutor of Faso: a rogue officer.” The prosecutor filed a complaint against both Konaté and the reporter Ouédraogo for defamation, public insult, and contempt of court. The Ouagadougou High Court ruled quickly. On October 29, Konaté and the reporter were found guilty of all charges and sentenced to twelve months in prison and ordered to pay a fine of about $12,500 (USD). The court also ordered the newspaper, *L’Ouragan*, to shut down for six months. It further ordered that, upon reopening, the newspaper must publish the operative provisions of the Court’s judgment for four months. Finally, the court demanded that the judgment be published in three successive issues of three other Burkina Faso newspapers, *L’Evenement*, *L’Observateur Paalga*, and *Le Pays*.

Konaté appealed the ruling, but on May 10, 2013, the Ouagadougou Court of Appeal upheld the judgment of the Ouagadougou High Court. At that point, Konaté’s lawyers, rather than continue the appeals process in the Burkina Faso courts, appealed to the African Court of Human and Peoples’ Rights. The reporter never appealed the original ruling and thus is not involved in the African Court ruling.

III. ANALYSIS

Analysis shows that the decision had one major component and two minor ones: 1) the incompatibility of criminal defamation with protections for freedom of expression and a functional, free press; 2) the rejection of formal control over journalists through licensing requirements; and 3) the regional court’s acceptance of the case, even though local remedies had not been exhausted, because the plaintiff could not expect to receive a favorable ruling. The latter two decisions were made in the procedural section of the court’s decision, so it’s unclear how widely they will be followed.

Other parts of the ruling deal with several motions for dismissal filed by the state defendants, which proved to be ineffective attempts to have the case thrown out on technical grounds. The “respondent state,” for instance, had noted that the legal filing referred to the formal name of Burkina Faso

17. *Id.* ¶¶ 3-4.
18. *Id.* ¶ 5.
19. *Id.* ¶ 6.
incorrectly. The Court ruled that “a typographical error” cannot be “deemed to constitute a ground for the inadmissibility of the Application.” The judges also dismissed the state’s argument that Konaté’s lawyers “disparaged” the country by referring to it as the “Democratic Republic of Burkina Faso,” words that intentionally call to mind the North Korean dictatorship that also calls itself a Democratic Republic. The Court dismissed these and other objections after brief review.

A. The Licensing of Journalists

One of these dismissals of objections from the state defendants warrants closer examination: the African Court upheld the international norm against the licensing of journalists. Many global courts have struck down attempts to license journalists because of the danger that governments with the ability to withdraw a license could use that power to influence coverage. The Inter-American Court of Human Rights, for instance, ruled in 1984 against a Costa Rican law that mandated that journalists join a professional organization. While the reasoning behind this licensing requirement appears valid—professional organizations should conceivably help strengthen journalism ethics—the court ruled against requiring such membership. The judges reasoned:

General welfare requires the greatest possible amount of information, and it is the full exercise of the right of expression that benefits this general welfare. . . . A system that controls the right of expression in the name of a supposed guarantee of the correctness and truthfulness of the information that society receives can be the source of great abuse and, ultimately, violates the right to information that this same society has.

The Inter-American Court ruled that the potential for abuse outweighed the argument for mandating membership. The revocation of their membership in an association could, in effect, ban journalists from working.

22. Id. ¶ 46.
23. Id. ¶¶ 64–73.
25. Id.
26. The licensing of broadcast media outlets is a well-recognized global norm because audio-visual communication is treated differently. The scarcity of audio-visual spectrum and the pervasiveness of the medium have led many governments to license the airwaves. International courts have stressed that regulation must not unduly infringe upon freedom of expression, particularly about matters of public importance. The European Court of Human Rights specifically
In Konaté v. Burkina Faso, the local state had argued that Konaté’s newspaper was not registered appropriately with the government and that he had not received a “press card” from authorities—effectively, licensing requirements. The government therefore alleged that Konaté was engaged in an “illegal practice.” The African Court dismissed these objections. The issue, it held, was “whether, by not complying with the above administrative formalities, the Applicant cannot claim to be a journalist.”

The Court noted that the issue of whether one can practice journalism without “administrative formalities” is quite important and said it “deems it useful to rule on this issue.” The judges stated that under the current system in Burkina Faso, the authorities “are in charge of legalizing the existence of a newspaper.” The ruling then pointed out that Konaté worked for a newspaper that had been around since 1992, so the idea that he should not be considered a journalist seems odd. The Court ruled that Konaté “has the de facto status of a journalist” even if he had “not complied with some administrative requirements in Burkina Faso.”

The judges also pointed out that Article 9 of the United Nations Declaration of Human Rights and Article 19 of the African Covenant on Human Rights guarantees rights to freedom of expression to all citizens regardless of profession. The Court appears to have gone out of its way in this section of the ruling to repudiate the notion of requiring journalists to receive a license to practice their profession. The government of Burkina Faso, the Court ruled, does not have the authority to decide who can or cannot be considered a journalist. With this ruling, the African Court has aligned itself with the Inter-American Court of Human Rights and many other international jurisdictions where press freedoms are protected. The procedural ruling will probably not lead to major changes throughout Africa, but the Court has provided a robust foundation for a legal case against the practice of licensing journalists.


27. Konaté, No. 004/2013 at ¶ 55.
28. Id. ¶ 50.
29. Id. ¶ 55.
30. Id. ¶¶ 53, 55.
31. Id. ¶ 54.
32. Id. ¶ 56.
33. Id. ¶ 57.
34. Id. ¶ 58.
35. Id. ¶¶ 55-59.
B. Local Remedies

The Court also ruled that Konaté deserved to have his case heard in the regional court even though he had not yet exhausted all legal avenues in Burkina Faso because the country’s highest court, the Supreme Court of Appeals (*Cour de Cassation*), could not possibly have ruled in his favor.36 The state had noted that Rule 40(5) of the African Court’s governing “Rules of Court” provides that no application to the African Court can be made until “exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.”37 Although the *Konaté* ruling does not mention it, Article 50 of the Charter establishing the African Court of Human and Peoples’ Rights also requires that “all local remedies, if they exist, have been exhausted” before the Court may get involved.38 The local remedies rule is well established in the realm of international regional courts. Article 2 of the Optional Protocol of the International Covenant on Civil and Political Rights,39 for instance, requires that the plaintiff have “exhausted all available domestic remedies” before filing a complaint with the United Nations Committee.40 The same approach can be found in Article 35(1) of the European Convention on Human Rights,41 as well as Article 46(1)(a) of the American Convention on Human Rights.42

The African Court made a unique decision in agreeing to hear the *Konaté* case: it acknowledged, but did not follow, these international precedents regarding local remedies. Konaté had lost a local trial and an appeals court ruling, but he still could have appealed to the Supreme Court of Appeals (*Cour de Cassation*), the highest court in the country available

36. Id. ¶¶ 113-14.
37. Id. ¶ 74.
39. Optional Protocol to the International Convention on Civil and Political Rights, art. 2, Mar. 23, 1976, 999 U.N.T.S. 171, 173-74. The ICCPR is an international treaty that creates safeguards for the civil and political rights of individuals, including freedom of religion, freedom of speech, freedom of assembly, the right to life, electoral rights and rights to due process. As of 2014, 74 countries had adopted the treaty.
to Konaté.43 (A higher court, the Constitutional Council, does not hear cases from individuals.) The African Court could have agreed to hear the case on the grounds that the review process would take too long. The judges expressly stated, however, that the plaintiff had not adequately made the case that the courts were moving too slowly.

Instead, the African Court accepted the case in advance of this condition by finding that Konaté could not have expected a ruling in his favor from the highest court in Burkina Faso. The decision is interesting because no part of the African Charter explicitly authorizes such an exception. The Court noted that a prior African Court ruling had found that plaintiffs in Burkina Faso had not exhausted their legal remedies because the Supreme Court of Appeals could have conceivably ruled in their favor. In the Konaté case, however, the Court found that “the issue of its effective application in the present case is a matter that requires closer attention.”44 The judges pointed to an earlier decision from the African Commission on Human and Peoples’ Rights that called for avoiding local remedies if they were not “available (or accessible), effective and sufficient.”45 The Court also noted, without being specific, that other international courts also allowed for exemptions in similar cases. While the European Court of Human Rights does not offer such an exception, the Court of Inter-American Human Rights does provide several exemptions to the local remedies. The American Convention on Human Rights allows for avoiding local remedies in the following three cases:

a) when the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;

b) when the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or

c) when there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.46

Konaté’s situation appears to fit the first reason—that Burkina Faso “does not afford due process of law for the protection of the right.”47

44. Konaté, No. 004/2013, at ¶ 94.
45. Id. ¶ 95.
46. American Convention on Human Rights “Pact of San Jose, Costa Rica” (B-32), supra note 42, art. 46(2) at 155-56.
Examining the issue, the Court noted that the plaintiff essentially wanted the Supreme Court of Appeals to “declare that the Burkinabé Laws on the basis of which he was held criminally and civilly liable are in breach of the right to freedom of expression.” The African Court must rule, therefore, on the issue of whether the Supreme Court of Burkina Faso would itself “rule on such a request and thus ultimately overturn the laws in question.” The African Court noted that the role of Burkina Faso’s Supreme Court is simply to review whether lower courts had acted in accordance with the Burkina Faso law. The Supreme Court does not have the power to overturn a law on any grounds, but instead, its judges are “charged with ensuring the strict observance of the law by other lower domestic courts.” The judges noted that the Constitutional Council is the appropriate organ for determining whether a law should be overturned on human rights grounds. The Constitutional Council, however, is set up in such a way that only institutions may approach this court with grievances. As a private citizen, therefore, Konaté could not possibly approach the Constitutional Council. For these reasons, the Court concluded “that the remedy at appeal was ineffective and insufficient and . . . that the appeal to the Constitutional Council was unavailable.” The justices justified its ruling in Konaté by citing the African Commission’s earlier ruling and, perhaps, knowledge of the Inter-American Charter that provides similar guidance. It is unclear whether this ruling will have a wide impact on other pending cases for the African Court, although the Court did grant a waiver for local remedies in another Burkina Faso ruling from the same year.

C. Criminal Defamation in International Jurisprudence

Laws that prohibit the defamation of reputations serve a public good by ensuring that people who deserve good reputations can protect their image. Most governments ostensibly use criminal defamation laws to create public order and control. Historically, however, many governments have used such laws—particularly in criminal prosecutions—to control and

47. Id.
49. Id.
50. Id. ¶ 110.
51. Id. ¶ 114.
suppress criticism of public officials and other public figures. Indeed, the practical purpose of defamation statutes has often been to protect the powerful and elite. Government officials and public figures with the ability to have residents arrested for criticisms that are deemed libelous or insulting can generate a huge chilling effect on public discourse.\textsuperscript{54} Most human rights observers agree that criminal defamation charges place too much of a burden on the press to perform its role as a watchdog of the powerful.

Framed by a logic of public security, criminal libel prosecutions have often not even hinged on whether the allegedly defamatory material was true. Media law scholar Greg Lisby underscores this point:

The purpose of the prosecution of the crime was to prevent violence—either against public officials and prosecuted as seditious libel, or against private persons and prosecuted as criminal libel. As a result, it made no difference whether the matter was true or false, because the greater the truth the more likely violence would result.\textsuperscript{55}

In recent decades, however, the tide of jurisprudence has turned against criminal defamation. Global norms regarding defamation have coalesced into three main concepts: defamation complaints should be handled by civil lawsuits rather than criminal charges, public figures must withstand more scrutiny than private figures, and truth must always be a defense for libel. The next three sections explore these concepts and the global trends in their favor.

1. Civil vs. Criminal

In 2002, the UN Special Rapporteur on Freedom of Expression, the Organization for Security and Cooperation in Europe’s Representative on Freedom of Expression, and the Organization of American States’ Special Rapporteur jointly suggested the complete elimination of criminal libel: “Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.”\textsuperscript{56} In fact, many


jurisdictions have by now either stopped employing their criminal defamation laws or have actually repealed them altogether.

Although many countries, including the United States, still have criminal defamation statutes, many rarely use them.\(^57\) Less than half of US states still have criminal defamation statutes and some have recently voted to repeal theirs.\(^58\) Bosnia-Herzegovina (2002), Central African Republic (2004), Georgia (2004), Ghana (2001), Sri Lanka (2002), Togo (2004), and Ukraine (2001) have all removed criminal defamation laws from their penal codes.\(^59\) In many jurisdictions, including the United States, statutes that address breaches of the peace, disorderly conduct, or incitement to riot are used instead of criminal libel statutes.\(^60\)

Regional courts have also joined this movement. Two regional courts have overturned criminal defamation convictions in their jurisdictions because imprisonment for publication seemed unduly harsh and an impediment to freedom of expression.

The Inter-American Court of Human Rights has overturned criminal defamation convictions on several occasions.\(^61\) In *Herrera-Ulloa v. Costa Rica* (2004), the Inter-American Court found that “laws on criminal defamation, libel and slander were used to silence criticism of a public official and to censor the publication of articles related to the alleged illicit activities in which a public official engaged while discharging his office.”\(^62\) The case involved a journalist who reported on corruption allegations made against a Costa Rican diplomat. The court ruled that Costa Rica’s criminal defamation laws were incompatible with Article 13 of the Inter-American Convention of Human Rights, which guarantees freedom of thought and expression.

The European Court of Human Rights similarly found that a criminal defamation case in Spain conflicted with guarantees of freedom of expression. In *Castells v. Spain* (1985), the European Court ruled in favor

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57. See Lisby, *supra* note 55. Lisby argues that criminal libel laws should be removed from all state penal codes or ruled unconstitutional by the Supreme Court.


of a journalist who criticized the performance of an elected official. The court did not rule out criminal libel completely, but stressed that it should not be used against speech that involves a public debate. The court stated that the “dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.”

2. Actual Malice and Scrutiny of Public Figures

In New York Times v. Sullivan (1964), the US Supreme Court issued a landmark ruling on civil defamation that created a high bar for public officials to win defamation charges against journalists. The case occurred in the middle of the Civil Rights era in the United States when blacks were fighting for equality, particularly in the racially segregated South. The Birmingham, Alabama police commissioner had sued the New York Times in state court over an advertisement that made derogatory claims about the police department’s conduct. The Alabama courts found in favor of defamation and ordered the newspaper to pay Sullivan a fine of $500,000. The result provided a palpable incentive for media outlets from the North to stop reporting on Southern civil rights violations. Nearly $300 million in libel lawsuits were pending against media outlets covering news in the South when The New York Times appealed to federal courts on constitutional grounds. The Supreme Court unanimously ruled that the state court’s libel ruling had violated the First Amendment by unjustly restricting freedom of the press. The court reasoned that public officials must withstand scrutiny because they decide issues of public importance. Justice William Brennan stated the Supreme Court’s reasoning:

We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

The court ruled that to ensure robust debate, public officials must tolerate small inaccuracies as long as the journalist did not act with “actual


malice.” This term has proven confusing because it does not mean “ill will,” but rather only that the journalist acted with “reckless disregard of the truth” or “knowing falsity.”

Another Supreme Court ruling, Garrison v. Louisiana (1964), applied the actual malice standard to criminal defamation while also discouraging the use of criminal libel on public order grounds. In Curtis Publishing Co. v. Butts (1967), the Supreme Court applied the same standard to public figures (such as politicians, celebrities, or business leaders) since they may discuss matters of public concern.

Some international courts have decided against adopting the “actual malice” concept, while other courts have embraced it in practice, if not in name. As media law scholar Kyu Ho Youm reports, Canada, Australia, England, New Zealand, South Korea, and South Africa have all explicitly rejected the use of the actual malice standard. Courts in Argentina, Bosnia-Herzegovina, Hungary, India, the Philippines, and Taiwan, however, have all followed the concept. Media law researcher Edward Carter surveyed several cases in South America and concluded that the region appeared to be on a “slow march” toward adopting actual malice standards.

Regardless of whether courts are specifically drawing a line at “reckless disregard for the truth,” most courts and human rights observers have agreed that public figures must withstand more scrutiny than private figures. In the regional court cases mentioned in the section above, the courts did not explicitly adopt the actual malice standard (knowing disregard of the truth). Still, they sided with the journalists, agreeing that in order to encourage robust dialogue in a democracy people who are pervasively involved in public affairs cannot expect the same level of protection from defamation as private individuals can, especially in matters of public importance.

3. Truth as a Defense Against Defamation

The final generally accepted international norm related to defamation allegations is the concept that truth must be a defense against an allegation of libel or slander. This concept is deeply rooted in English common law.

70. Carter, supra note 61, at 397.
and was invoked in America as far back as the colonial period, when, in a 1735 case against John Peter Zenger, the publisher of a New York newspaper successfully defended himself against a libel charge from the governor. The jury found him not guilty after he proved during his trial that his critical comments about the governor were true. Truth as a defense for libel ensures that people cannot protect good reputations if they do not deserve them.

Over the years, many courts and human rights observers have agreed that truth should be a defense. The Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples’ Rights in 2002, states that “[n]o one shall be found liable for true statements.” In *Castells v. Spain* (1992), the European Court of Human Rights invalidated a libel conviction in Spain because, in part, the journalist had no opportunity to prove the truth of his reporting.

**D. Konaté v. Burkina Faso and International Jurisprudence**

In *Konaté*, the African Court addressed two of the three “best practices” outlined above regarding defamation. The judges dealt with the issues of criminal charges and greater scrutiny for public figures, but did not consider the issue of truth as a defense for libel.

The Court’s ruling on the issue of criminal defamation is quite exhaustive and draws heavily on past decisions of the African Commission on Human and Peoples’ Rights while taking note of the rulings of the European Court of Human Rights and the Inter-American Court of Human Rights, as well. The Court also addressed Article 66(2)(c) of the Revised Treaty of the Economic Community of West African States (ECOWAS) of July 24, 1993, which holds that member states should try to protect journalists so that they may do their jobs. The Court noted that Article

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73. As a reminder, the African Commission is a body that issues rulings without any enforcement mechanisms, whereas the African Court is a newer court that has jurisdiction over the countries that have opted into the system. The African Court tends to look toward the African Commission’s rulings for guidance.

19(3) of the International Covenant on Civil and Political Rights provides that:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by the law and are necessary:

For respect of the rights or reputation of others,

For the protection of national security or of public order (ordre public) or of public health or morals.\(^75\)

Given that protecting the reputation of others is guaranteed in the charter,\(^76\) the Court had to determine whether the criminal defamation charge against a journalist unduly affects the government’s ability to protect reputations. The Court quoted a 2009 case before the African Commission in which the Court ruled that it must weigh the “balance . . . between the protection of the rights and freedoms of the individual and the interests of the society as a whole.”\(^77\) In the 2009 case, the Commission used five questions to help sort out the government’s actions: “Was there sufficient reasons supporting the action? Was there a less restrictive alternative? Was the decision-making process procedurally fair? Were there any safeguards against abuse? Does the action destroy the very essence of the Charter rights in issue?”\(^78\)

The African Court also referenced the African Commission case *Media Rights Agenda v. Nigeria*, noting that the Commission had determined that government actions should not be disproportionate and unexpected, thereby leading to the dampening of freedom of expression, and that the Commission had considered the closure of specific media outlets to be generally disproportionate.\(^79\) In both cases before the African Commission, this quasi-judicial body had ruled in favor of the speakers. The European Court of Human Rights and the Inter-American Court of Human Rights had

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76. The same language can be found in many international documents including the United Nations Declaration of Human Rights and the International Covenant of Civil and Political Rights.


78. *Zimbabwe Lawyers*, No. 284/03 at ¶ 176. By raising these issues when considering the case, the Commission was therefore of the view that the closing of the Newspaper of the Complainants amounted to a violation of their right to the Freedom of Expression. *Id.* ¶ 178.

79. See *Konaté*, No. 004/2013 at ¶ 150.
ruled in a similar manner on the issue of proportionality, the African Court also noted.

In addition to criminal charges, the African Court’s ruling in Konaté also addressed the issue of the allegedly defamed prosecutor and his position as a public figure, ruling that Burkinabé law was out of step with international norms. The Court observed that the African Commission had previously ruled that public figures must withstand more scrutiny than private figures: “[P]eople who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether.”80 The Court further noted that “there is no doubt that a prosecutor is a ‘public figure’; as such, he is more exposed than an ordinary individual and is subject to many and more severe criticisms.”81 The Court points out that no laws of the states that are party to the African Charter and African Covenant should allow for greater penalties for defaming public figures than for defaming private individuals.82

The laws in Burkina Faso, however, do just that. Articles 109, 110, and 111 of Burkina Faso’s Information Code83 and Article 178 of its Penal Code84 provide extra penalties for defaming members of the judiciary, the army, the “constituted corps,” as well as magistrates, jurors, and “assessors.”85 The Court here ruled that the laws in question aimed to protect the reputations of public servants. While acknowledging that protecting reputations of public servants is a “perfectly legitimate objective” and “consistent with international standards in this area,” the Court also made clear that such legislation conflicts with guarantees of freedom of expression:

81. Konaté, No. 004/2013 at ¶ 156.
82. Id. ¶ 156.
85. See id. ¶ 157:
In the instant case, the Court notes that Article 110 of the Information Code of the Respondent State provides that defamation committed against members of the judiciary, the army and the constituted corps shall be punishable by a prison term of fifteen (15) days to three (3) months and a fine of 100,000 to 500,000 or one of both fines only.” And that Article 178 of its Penal Code provides that “when one or more Magistrates, jurors or Assessors are victims of contempt in words or in writing or in drawings not made public, while exercising their duties, which may tarnish their image and reputation, the culprit will be sentenced to a prison term of from six (6) months to one (1) year and a fine of 150,000 to 1,500,000 CFA francs.
Given that a higher degree of tolerance is expected of him/her, the laws of States Parties to the Charter and the Covenant with respect to dishonoring or tarnishing the reputation of public figures, such as the members of the judiciary, should therefore not provide more severe sanctions than those relating to offenses against the honor or reputation of an ordinary individual.  

The African Court appears to be calling out all of the state parties to the African Commission and the African Charter for their laws that create extra penalties for defaming public officials. Such laws, it held, are out-of-step with the international norms surrounding defamation law.

The Court cited international media law rulings and previous African Commission decisions to discuss when criminal defamation laws are justified. It noted that the European Court of Human Rights held that the “exceptional circumstances justifying a prison term are for example, the case of hate speech or incitement to violence.” It also noted the similar approach taken by the Inter-American Court of Human Rights. The Court concluded that:

Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, color, religion or nationality, the Court is of the view that the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences, without going contrary to the above provisions.

Given these conclusions, the Court decided that the government violated Konaté’s rights by imprisoning him for criminal defamation. It specifically noted that sections 109 and 110 of Burkina Faso’s Information Code and Section 178 of its Penal Code (which call for custodial sentences for defamation) violated his right to freedom of expression as guaranteed by both Article 9 of the African Charter and Article 19 of the International Covenant of Civil and Political Rights. The Court also decided that the government violated the ECOWAS Treaty, in which the signatory states agreed to “respect the rights of journalists.” It ruled that Burkina Faso “also failed in its duty in this regard in that the custodial sentence under the above legislation constitutes a disproportionate interference in the exercise

86. Id. ¶ 156.
87. Id. ¶ 158.
88. Id. ¶ 165.
89. See id. ¶ 164-6.
90. Id. ¶ 164.
of the freedom of expression by journalists in general and especially in the Applicant’s capacity as a journalist.”91 The judges noted that any sanctions against journalists that are excessive are incompatible with guarantees of free speech.92

In its conclusion, the Court issued several declarations and demands93 It ruled that the government violated Konaté’s rights with both the imprisonment and the “excessive fine, damages, interests and costs.” The Court also ruled that Burkina Faso should amend its defamation laws so that they do not conflict with the African Charter and the ECOWAS treaty protecting journalists. The judges urged the Burkina Faso government to repeal custodial sentences for defamation and to change its legislation so that sanctions for defamation meet the tests of necessity and proportionality in agreement with obligations of the African Charter and other international instruments. The Court agreed with the international consensus that criminal defamation should not be employed against journalists and that public figures must withstand greater scrutiny than private figures. The Court did not, however, address the issue of the truth of Konaté’s reporting.

The absence of such a ruling on truth can be interpreted in two ways. First, it may be an opportunity squandered. Many countries in Africa and elsewhere do not hold truth as a standard in many defamation cases. The situation allows public figures to win libel allegations by merely showing that their reputations have been injured with no emphasis on whether the defamatory material was rooted in truth. In these cases, courts are in the habit of protecting good reputations for people who don’t deserve them. The other perspective is that the court did not wish to broach the issue of truth because they have adopted an “actual malice” approach in which small errors will be tolerated in order to satisfy robust public debate. The court may have decided that since the prosecutor was a public figure, determining the truth of the reporting was simply immaterial.

CONCLUSION

The African Court of Human and People’s Rights ruling in the Konaté case appears to have lived up to its billing as a “landmark” ruling.94 The case should change the nature of the debate throughout Africa, a continent that sees an abundance of criminal defamation charges used against...
At least one country has already seen the ruling mentioned in its court system. In Uganda, a journalist made reference to it while asking a judge to throw out his criminal defamation charges. The judge asked him to provide a copy of the ruling.

The African Court clearly aligned itself with the prevailing international norms regarding criminal defamation and the rule of law. The Court upheld the norms of discouraging criminal defamation charges and holding that public figures must expect more scrutiny than public figures.

The Court also weighed in on two other important matters, albeit in the context of procedural law. In their decision, the judges went out of their way to state that requiring journalists to obtain licenses violated their free speech rights. The judges also ruled that a petitioner could avoid exhausting all local remedies in a specific type of situation. The move to the African Court would be allowed if the local courts could not, by design, receive a favorable court ruling.

The full effect of the entire ruling may not be visible for years. The expected outcome, however, is greater freedom of expression and better journalism in Africa. The ruling may even lead to other regions suffering from weak protections for journalists (such as the Middle East and Africa) to make changes in their approach.


Is There Anybody Out There?
Analyzing the Regulation of Children’s Privacy Online in the United States of America and the European Union According to the TBGI Analytical Framework by Eberlein et al.

Nachshon Goltz*

This article analyzes the regulation of children’s privacy online. This analysis is focused on the regulation of personal information collection in the United States of America (USA) and the European Union (EU). The analysis is conducted according to the Transnational Business Governance Interactions analytical framework proposed by Eberlein et al.1 This article reviews the regulatory structure of the field in these two jurisdictions, including global organizations, according to Elberlein et al. components and questions. In the analysis, a map of the regulatory interactions within this global realm will be presented and discussed. Analysis of the influence of each interacting party and the degree of interaction between parties demonstrates that there is a clear dominance of the industry in the regulatory realm of children’s privacy protection online. Therefore, it is suggested to include an analysis of the regulatory interactions (e.g., using the TBGI analytical framework by Eberlein et al.) when discussing new or amended regulatory measures in each one of the levels described in this article. This will allow a better understanding of the overall regulatory

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picture and may prevent bias towards more powerful actors, such as the industry.

“Today what we are experiencing is the absorption of all virtual modes of expression into that of advertising. . . . All current forms of activity tend toward advertising and most exhaust themselves therein.”2

In an October 6, 2015 decision, The Court of Justice of the European Union (CJEU) declared that the Commission’s U.S. Safe Harbour Decision is invalid.3 This decision, launched by an Irish law student, Maximillian Schrems, has struck down the fifteen-year-old Safe Harbour agreement that allowed the free flow of information between the USA and EU. The case was originally sent to the CJEU by the High Court of Ireland, after the Irish data protection authority rejected a complaint by Schrems, who argued that in light of Snowden’s revelations about the NSA, the data he provided to Facebook and transferred from the company’s Irish subsidiary to the U.S. under the Safe Harbour scheme was not, in fact, safely harboured.4

This article was written before the CJEU decision, but the analysis provided herein traces the roots of the regulatory “misconduct” leading to the “Safe Harbour” arrangement that was “born in sin” and unsurprisingly struck down fifteen years later. What would be the implications of the CJEU’s decision, whether USA Internet giants like Facebook, Google, and Twitter change their conduct and what would be the new arrangement between the EU and the USA in light of the decision, is yet to be seen. However, in light of the challenging embedded regulatory structure described in this article, a root change is needed in order to make a difference.

I. INTRODUCTION

In the online world, children’s privacy has turned into one of the most valuable commodities. The desire to sell, market, and advertise has overcome all moral values penetrating even the gentle fabric of regulation,

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aimed to place constraints and create boundaries between the corporation and children’s most inner psychological mechanisms of well being and healthy development. As Kline stated: “The consumption ethos has become the vortex of children’s culture.”

An illustration of this intrusive and cynical practice is provided by Steeves and Tallim’s report of a fourteen-year-old girl taking the “Ultimate Personality Test” on the children’s website emode.com. The website told the girl “that she values her image”; therefore, it recommended that she visit the website e-diets.com, one of their advertisers, to “prep her body for success.”

The online world is a challenge to privacy for all users. Children face this challenge in a much more profound way than other users, and their ability to identify the harm and cope with it is inherently limited. There is no dispute that measures to protect their online privacy should be implemented and enforced. However, as this paper will demonstrate, the interacting players in this regulatory field do not always have the benefit of the children as their main target.

In his book Privacy and Freedom, Alan F. Westin defines the meaning of information privacy as “the claim of individuals to determine for themselves when, how, and to what extent information about them is communicated to others.” Privacy is not absolute, as there is an equally strong desire to participate in society. Therefore, individuals are balancing the desire for privacy with the desire to communicate with others.

Privacy is important, as we need it for personal autonomy, emotional release, self-evaluations, and protected communication. In order to achieve privacy offline, several privacy behaviors exist: we lock doors, lower voices, and close curtains. In the online world, personal privacy is

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7. ALAN F. WESTIN, PRIVACY AND FREEDOM (1967).
8. Id. at 7.
important also: next to the aforementioned aspects, we nowadays also need online privacy to foster our own authenticity.\textsuperscript{10}

In order to achieve privacy online, different privacy behaviors exist.\textsuperscript{11} However, in the online world we do not seem to show as many privacy behaviors as compared with the offline world.\textsuperscript{12} Children need protection from the dangers of sharing personally identifiable information online because they are socially immature and naïve.\textsuperscript{13}

The harm to children’s privacy online can stem from several sources. Websites are seeking personal details to be used as a commodity that they can sell to third parties, mainly for advertising purposes. These websites employ automatic collection of the users information (e.g., cookies\textsuperscript{14}), methods in which the children are “contributing” their personal information in order to sign up for a service or participate in a competition, or volunteer

\begin{itemize}
  \item \textsuperscript{13} See Janine S. Hiller, France Belanger, Michael Hsiao, & Jung-Min Park, Pocket Protection, 45 AM. BUS. L.J. 417 (2008).
  \item \textsuperscript{14} Fraction of data implemented by the website in the user’s browser. This mechanism provides the website with the user’s previous activity. See INTERNET ENGINEERING TASK FORCE (IETF), HTTP State Management Mechanism, http://tools.ietf.org/html/rfc6265#section-3 (last visited Nov. 22, 2015), for more information.
\end{itemize}
that information when using social networking sites like Facebook, Twitter, and others.\(^\text{15}\)

As is the case with many adults, children do not read the privacy statements in websites that they use.\(^\text{16}\) These privacy statements are often written in a legal language hard to understand even for adults.\(^\text{17}\) Although the law usually requires parental consent, children’s websites often overlook, “detour,” and try to avoid the need for such consent. When they do require it, they often do it in a way that causes much burden on the children and their parents.\(^\text{18}\)

Moreover, because of children’s lack of understanding of what it means to have their privacy breached (an abstract concept which is hard to explain), they often provide their information with no hesitation, failing to comprehend the implication of such act. As the online world is relatively new and privacy breaches within it are a phenomenon that grows over time, there is a lack of appropriate tools to educate children (and adults) in this respect, a fact that only increases children’s vulnerability and amplifies the problem.

Marketers are employing invasive methods to turn children’s privacy into a commodity. Online monitoring of children’s online use and profiling based on collected information (i.e., creating a consumer profile) are some of these methods. The children are not aware of these methods nor do they

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\(^{18}\) The age threshold according to the federal privacy law in the United States’ Children’s Online Privacy Protection Act (COPPA), which determined the requirement for parental consent, is 13 years old. FTC Children’s Online Privacy Protection Rule, 16 C.F.R. § 312 (2015); see COPPA - CHILDREN’S ONLINE PRIVACY PROTECTION ACT, http://www.coppa.org/coppa.htm. In the European Union, it is required to obtain parental consent as long as minors do not have the capability to fully comprehend the situation and are not able to make an informed choice.
understand their intrusiveness. Consumer groups are concerned about potential “negative impacts on children’s future self image and well-being” due to the use of these techniques.

The protection of children’s privacy online is mainly regulated by two instruments: command and control implemented through legislation at the federal and/or state level, and self regulation driven by the internet industry. Self-regulation has produced industry standards such as the International Chamber of Commerce’s (ICC) Advertising and Marketing Communication Practice, the International Advertising Bureau UK and US codes, the Federation of European Direct and Interactive Marketing (FEDMA) code, and many more.

These regulatory instruments are either general in their application and encompass all marketing practices or have a more narrow scope, applying only to online marketing and covering all users or children in specific.

This article analyzes the regulation of children’s privacy online (see Figure 1) especially in the context of personal information collection as a commodity, in the United States and the European Union according to the Eberlein et al. Framework. The article reviews the regulatory structure of this field in these two jurisdictions including global organizations, according to Elberlein et al. components and questions. In the analysis, a
map of the regulatory interactions within this global realm is presented and discussed. Finally, conclusions are drawn and suggestions are made.

II. TBGI Analytical Framework

The TBGI analytical framework will be used to analyze the regulation of children’s privacy online in the USA and the EU. The article will demonstrate that with the assistance of the TBGI analytical framework, hidden layers of regulation and regulatory interactions are revealed and underscore the regulatory process that is usually invisible.

More specifically, as a result of employing the TBGI analytical framework towards the regulation of children online privacy in the USA and the EU, the problematic nature of the discussions held between these two jurisdictions is exposed. Interestingly, the recent development described in the prologue, directly corresponds with the “problematic” of these discussions and their regulatory outcome.

Transnational business governance (TBG) describes systematic efforts to regulate business activities that encompass a high degree of non-state
authority in the implementation of regulatory capacities internationally.\textsuperscript{22} The Eberlein et al. framework is unique in focusing on the analysis of regulatory interactions and providing a theoretical structural tool to analyze a regulatory field from the perspective of the entities interacting within it.

TBG schemes involve different interacting actors, pursuing varieties of interests, values, and beliefs.\textsuperscript{23} The Eberlein et al. analytical framework include six components:

(i) framing the regulatory agenda and setting objectives;
(ii) formulating rules or norms;
(iii) implementing rules within targets;
(iv) gathering information and monitoring behavior;
(v) responding to non-compliance via sanctions and other forms of enforcement;
(vi) evaluating policy and providing feedback, including review of rules.

For each component, Eberlein et al. identifies six questions that are crucial in analyzing interactions:

(1) who or what is interacting;
(2) what drives and shapes the interactions;
(3) what are the mechanisms and pathways of interaction;
(4) what is the character of the interactions;
(5) what are the effects of interaction;
(6) how do interactions change over time.

The Elberlein et al. framework is flexible, thus allowing (and even recommending) employing some, and not all, of the components and


questions in analyzing a given regulatory field. Therefore, only the relevant components and questions will be included in the following section.

In its strongest form, the Elberlein et al. framework seeks to shift the paradigm of regulatory analysis by focusing on the regulatory interaction rather than on the regulation itself. This is a powerful and influential shift, as the focus on analyzing regulatory interactions enables the actors involved in the regulatory eco-system (e.g., regulators, industry, academics) to identify deviations in the regulatory process. These insights allow pinpointing the cause for the regulatory process derail thus shifting it towards better and more efficient regulation to protect the vulnerable party from the potential deleterious effects of the harm. This point is demonstrated well in Section 3.3 below, regarding the EU-US debate on the regulation of personal data transfer.

In light of Kuhn’s seminal work on paradigm shifts, the framework’s architects and advocates should not be coy in situating it in the right place to gain recognition and influence based on its added value in identifying and even amending cases of impaired regulatory processes leading to unwanted results. The first step would be to omit the words “Transnational,” “Business,” and “Governance” from the framework definition, thus allowing it to be used in the context of the entire regulatory field.

Moreover, the framework creates an opportunity to place law in its natural position, as a field of regulation. This simple and accurate statement will relax the tension artificially created between these allegedly separate fields and restore the important proportions often overlooked by those mistakenly arguing to the contrary, that regulation is a branch of law. The implications of such restorative and correctional measures, among others, on legal and regulatory education and the regulators and regulations of the future, cannot be overstated.

III. CHILDREN’S PRIVACY ONLINE – REGULATORY INTERACTIONS ANALYSIS

The following section reviews the regulatory scheme of children’s online privacy in the USA and the EU (including global organizations) according to the Eberlein et al. TBGI Framework, using relevant components and questions. The general regulatory scheme is shown in Figure 2.

Figure 2 is constructed in three columns: the USA, the United Nations (UN) and the Organization for Economic Cooperation and Development (OECD), and the EU. The legend includes three main regulatory schemes: law, industry, and community, each in its own color. The UN and OECD column is a symbol for global regulation while the USA and EU columns include regulation that is specific to these two jurisdictions. For example, while the Interactive Advertising Bureau (IAB) is a global organization dealing both with the USA and the EU, its background color is white as it is global, and its fill color is red as it belongs to the law scheme.

The Children’s Advertising Review Unit (CARU), being a “Safe Harbor” under the USA’s Children’s Online Privacy Protection Act (COPPA) and an industry organization (as will be detailed in the coming section), is blue for industry and dark blue for federal. It is also tending to the left side (i.e., a USA entity) while the Federation of European Direct and Interactive Marketing (FEDMA), its EU equivalent, is tending to the right. Finally, Figure 2 is illustrative and non-exhaustive, aiming to provide an overview of the regulatory structure of children’s online privacy regulation.

The goal of Figure 2 is twofold. On one hand, it illustrates the structure of the regulatory regime in the jurisdictions at play and the parties operating within this regime. On the other hand, the Figure is an illustration of the complexity and multiplicity of actors and positions involved in this regulatory sphere. These complexity and multiplicity of interests, actors, and factors implies that while the intentions can be positive, the results are bound to be negative. Inherently, this regulatory structure is poorly designed.

![Figure 2: Overview of the structure of children’s online privacy regulation](image)
A. Global Organizations

The regulation of children’s privacy online by global organizations is analyzed according to the first component of TBGI Framework: Framing the regulatory agenda and setting objectives. This component will be addressed using the TBGI Framework’s six questions.

(i) Framing the regulatory agenda and setting objectives

Data protection law’s normative basis rests on human rights treaties. Relevant treaties are the Universal Declaration of Human Rights (UDHR)25 and the International Covenant on Civil and Political Rights (ICCPR).26 The only data protection binding international treaty is the Council of Europe Convention 108.27

Calls for an international convention dealing with data protection and privacy have been made. For example, such a call came at the 27th International Conference of Data Protection and Privacy Commissioners held in 2005. The Conference declared the “Montreux Declaration,” appealing the United Nations “to prepare a legal binding instrument which clearly sets out in detail the rights to data protection and privacy as enforceable human rights.”28 Internet companies also made similar appeals. In 2007 Google called for the creation of “global privacy standards.”29 However, according to Bygrave, as of today “there does not exist a truly global convention or treaty dealing specifically with data privacy.”30

The Convention on the Rights of the Child was adopted by the General Assembly of the UN on 20 November 1989. This convention has been ratified by 193 countries (excluding the USA, Somalia and South Sudan). Article 16 of the convention deals with the child’s right to privacy.

The UN issued its Guidelines concerning Computerized Personal Files in 1990. These guidelines take the form of a non-binding guidance document. The UN General Assembly has requested “governmental, intergovernmental and non-governmental organizations to respect those guidelines in carrying out the activities within their field of competence.”

The OECD is an international organization based in Paris that deals with economic and social policy and currently has 34 member countries, including many EU member states, Canada and the USA. Discussions of privacy related issues began in the OECD in 1970, and culminated in the publication of the OECD Privacy Guidelines in 1980. The Guidelines are a non-binding set of principles that member countries may enact.

While representing the industry, the IAB, a global organization with multinational members from the Forbes 500, holds the international ties so to speak, being the only one except the UN and the OECD to have this capacity and thus influence.

An interview with Senior Director of Policy at the IAB was conducted by the author to help understand its role. During the interview, the Senior Director stated, “IAB does not have a specific policy with regard to children’s privacy online and tends to be active when new regulation is suggested representing its members to provide feedback to the government.

An example would be IAB providing industry feedback on COPPA when being reviewed.\textsuperscript{38}

Within global organization, the interaction is between the organization itself, the members of the organization, and external entities such as other global organizations, industry, and interest groups. As there is a common understanding that children’s privacy protection is a worthwhile cause, the main question is to what extent and using which measures the protection should be facilitated.

The parties to this interaction use formal as well as informal discussion, public pressure, and persuasion to promote their position. The interactions character is one of cooperation but below the surface there is plenty of competition between the competing interests of the parties interacting. The effects of the interaction are twofold: on one hand, the cooperation is promoting harmonization of the regulation on a global scale therefore promoting the regulation effectiveness, but on the other hand, the struggle between competing interests prevent progress in setting a clear agenda, thus weakening the regulatory protection altogether.

It seems that the nature of the interactions does not change over time but the increase in awareness to the harms associated with privacy breaches as well as the industry progress in taking advantage of personal data as a commodity tend to create more understanding and consensus that the protection of children’s online privacy is vital.

B. The United States

The regulation of children’s privacy online in the USA is analyzed according to the following components: framing the regulatory agenda and setting objectives, and formulating rules and norms. As this article deals with the macro federal and global level, states role is beyond its scope.

(i) Framing the regulatory agenda and setting objectives

The U.S. Constitution does not have an express grant of the right to privacy.\textsuperscript{39} Nonetheless, through a long line of cases, the U.S. Supreme Court has established and recognized a number of privacy rights embedded in the Constitution’s First,\textsuperscript{40} Fourth,\textsuperscript{41} Fifth,\textsuperscript{42} and Ninth Amendments,\textsuperscript{43} and

\textsuperscript{38} Interview with Senior Director of Policy, Interactive Advertising Bureau (IAB) (June 2014) (on file with the author).


\textsuperscript{40} “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people}
in the “concept of liberty guaranteed by the first section of the Fourteenth Amendment.”

The Constitution and the U.S. Supreme Court are interacting. As the Constitution is a static factor (almost impossible to be amended), the U.S. Supreme Court through the cases brought before it, drives the interaction and shapes it in its interpretation of the Constitution in the context of privacy. The U.S. Supreme Court is not free of political influence that in turn shapes the said interaction. As the Constitution is mainly static, the mechanisms and pathways of the interaction are limited as well as the character of the interaction.

The interaction affects the regulatory capacity and performance in setting the principles of the scope of the regulation and the means allowed to be used in implementing and enforcing the regulation. The interaction itself does not tend to change over time as the Constitution is mainly static. Nonetheless, different U.S. Supreme Court judges allow different levels of interpretation.

41. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

42. “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

43. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

44. “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV; see also Roe, 410 U.S. at 152.

(ii) Formulating rules and norms

In order to prevent Internet businesses from breaching the privacy rights of children, Congress enacted in 1998 the Children’s Online Privacy and Protection Act (COPPA). The Federal Trade Commission (FTC) is required by COPPA to create specific rules for the regulation of online collection of personal information from children under the age of 13 years old. On April 21, 2000, the FTC’s Final Rule became effective and enforceable.

An Internet operator may be able to satisfy COPPA requirements by following alternative sets of self-regulatory guidelines that have been created by certain industry groups and self-regulatory programs known as “safe harbors.” In order to become safe harbors, interested organizations must submit their self-regulatory guidelines to the FTC. The FTC will then publish the interested organizations suggested guidelines for public comment, and decide if the suggested guidelines meet the FTC’s Rule criteria. The safe harbor’s guidelines must provide “substantially the same or greater protections” that create the same or better protections as the requirements detailed in COPPA.

The safe harbor’s guidelines must also contain effective methods of independently assessing a website’s compliance with the guidelines. The FTC has approved a number of safe harbors, including the Children’s Advertising Review Unit of the Council of Better Business Bureaus (CARU), the Entertainment Software Rating Board (ESRB), and True Ultimate Standards Everywhere (TRUSTe).

While Congress enacted COPPA and the FTC articulated its principles and administers it, other actors are involved in this regulatory interaction, mainly industry organizations like CARU and the ESRB through the “Safe

49. Id.
50. Id. § 312.11(a).
51. Id. § 312.11(b).
52. Id. at § 312.11(b)(2).
53. Id. at § 312.11(b)(1).
54. Id. at § 312.11(b)(3).
Harbor” option, as well as online companies approaching children, parents, and finally the children users.

The interactions in the context of the safe havens between the FTC and the industry organizations is driven by the FTC’s desire to allow self-regulation on one hand and the industries wish to self-regulate itself as a mean of avoiding “top-down” regulation by the FTC. It would be reasonable to assume that the more informal interaction within this regulatory realm (i.e., between the FTC, industry, parents, and children) are driven and shaped by the interests of each actor. Nonetheless, it should be noted that parents and children interests are not necessarily identical as children strive for more engagement even at the price of their privacy, while parents take a more careful approach.

When it comes to the interaction between industry organizations administering the safe havens and the FTC, the mechanisms and pathways are, at least in principle, simple and clear. The safe harbor is supposed to comply with COPPA, and the FTC oversees the safe harbor operators that in turn oversee the online companies’ compliance. With the other actors (i.e., parents and children), the mechanisms and pathways are less clear and can take the form of advocacy groups and other informal dimensions.

The character of the interactions vary. Among the organizations providing safe havens and between these organizations and the FTC there is an element of competition, as they all offer an option to comply with COPPA. However, at least on the surface, the dominant character of the interaction is one of coordination as all the parties manifested goal is to protect children’s privacy. The character of the interaction between parents and children and the rest of the actors, mainly the industry, can be defined as chaos, since forces, not always predictable, are pulling in different directions.

The effects of the interaction on the regulatory capacity and performance of actors in the given regulatory space is twofold. The interaction between the FTC and industry’s safe havens are supposed to enhance regulatory capacity and performance, but may, at the same time, erode the capacity and performance of both interacting actors. This complex nexus may also occur when interacting with parents and children, pushing in opposite directions, thus creating confusion.

C. The European Union

The regulation of children’s privacy online in the EU is analyzed according to the following components: framing the regulatory agenda and setting objectives, and formulating rules and norms. Each component is
addressed using the framework six questions, as mentioned above. As this article deals with the macro federal and global level, member states role is beyond its scope.

(i) Framing the Regulatory Agenda and Setting Objectives

Directive 2005/29 on unfair business-to-consumer commercial practices (The UCP Directive), one of the cornerstones of EU consumer policy, explicitly recognizes that children constitute a group of particularly vulnerable consumers, and as such deserve special protection.56

This special protection is confirmed by Point 28 of Annex I of the UCP Directive which provides that “including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them” is an unfair commercial practice and should therefore be prohibited.

It is only in the absence of more specific rules that UCP Directive applies.57 Specifically, in respect to advertising to children, Point 28 of the Annex explicitly states that it is “without prejudice to Directive 89/552.”

The Television Without Frontiers Directive (The TVWF Directive)58 has now been replaced by the Audiovisual Media Services Directive (The AVMS Directive).59 The TVWF Directive created binding minimum standards for all the member states and contained provisions restricting the amount of advertising to which children were exposed.60

Nevertheless, television advertising to children was not altogether banned and restrictions imposed were unlikely to be effective in curbing significantly their exposure, with the exception of tobacco products and medicines and medical treatments available only by prescription, whose advertising was prohibited. The TVWF Directive suggested that children were perceived as particularly vulnerable, but the provisions relating to advertising to children were insufficient to alleviate the growing concerns associated with the commercialization of childhood.

The EU was given a chance to reassess its legislative framework during the revision process of the TVWF Directive by the AVMS Directive. The reform led to three major changes: the extension of the scope of the TVWF

Directive to new media (i.e., the Internet); the extension of its scope to new marketing techniques (i.e., product placement); and the extension of its scope to new problems (i.e., food marketing).

As the AVMS Directive is a measure of minimum harmonization (as was the TVWF Directive), Member States are entitled to apply stricter requirements for audiovisual media service providers established on their territories.\(^{61}\)

The privacy rights of minors are not mentioned explicitly in the Data Protection Directive\(^{62}\) and the Electronic Communications Directive.\(^{63}\) The Electronic Communications Directive sets privacy rules for the telecommunications industry that implement principles from the Data Protection Directive.\(^{64}\) A reform to the Data Protection Directive rules was suggested by the European Commission in 2012 to increase online privacy rights and enforce Europe’s “digital economy.”\(^{65}\)

While the EU parliament is framing the regulatory agenda and setting objectives, in practice it is interacting with the member states, the EU Court and global organizations mentioned in the next section. The Directives formulation and its interpretation and harmonization are not done in a vacuum and is influenced by these interactions.

These interactions are driven and shaped by the party’s interests, some of which are correlating and some contrasting. For example, The EU parliament’s interest in harmonization can be contested by member states different perceptions of the subject matter.

The mechanisms and pathways of interaction are twofold: before and after the enactment of the Directives. Before the enactment of the Directives, the interacting parties are operating to influence the legislation, and after the enactment, they are operating through interpretation of the legislation and the implementation of it. The interactions character is mainly of cooperation, however, with the different perceptions of the subject matter, competition becomes a dominant character.

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61. Article 4 of the AVMS Directive states that “Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union law.” Council Directive 2010/13, 2010 O.J. (L 95) (E.C.).
The effects of the regulatory interaction on the regulatory capacity and performance of actors depends on the specific interaction and the period in which it occurs. The influence of industry, for example, on the formulation of the Directive is different in its effect than the interpretation of courts and member states after the Directive is affirmed. There is also a difference between member states interpretation and an EU Court ruling, as the former relates to a specific member state while the later relates to all member states.

(ii) Formulating Rules and Norms

Modeled after the OECD principles, a main part of the Data Protection Directive is the strong restrictions on the transfer of EU residents’ data outside of the EU. Under these restrictions, without an agreed solution, the EU-USA trade would be drastically impacted. Therefore, in 1998 negotiations commenced between the U.S. Department of Commerce (DOC) and the EU Commission with respect to the steps that could be taken to avoid USA businesses (which include most of the internet giants) from being cut off from access to EU residents’ data.66

While the parties agreed that improvements in data protection were necessary, they were divided with respect to the best solution. The USA supported a solution suggested by an FTC report finding that given the fluid, evolving nature of the “information economy,” self-regulation by industry is the best method to achieve maximum protection with minimal constraint on future development.67

The EU held the opposite extreme, arguing that anything less than comprehensive data protection legislation was insufficient. During 1998 and into 1999, the DOC submitted multiple proposed self-regulation schemes (referred to as “safe harbors”), all rejected by the EU Working Party on the Protection of Individuals with Regard to the Processing of Personal Data (Working Party), stating that it “deplore[d] that most of the comments made in . . . previous position papers do not seem to be addressed in the latest version of the US documents.”68

66. SOMA ET AL., supra note 62, at 298.
68. Working Party on the Protection of Individuals with Regard to the Processing of Personal Data, Opinion 7/99 on the Level of Data Protection Provided by the “Safe Harbor” Principles as Published Together with the Frequently Asked Questions and Other Related Documents on 15 and 16 November 1999 by the U.S. Department of Commerce, 5146/99/EN/final at 3 (Dec. 3, 1999),
Nonetheless, by the summer of 2000 the DOC had worn down the Commission’s resistance to agree to some form of self-regulation.69 According to Soma,70 “[w]ith extensive behind the scenes lobbying, and despite the strenuous objections of the Working Party, the Commission issued a decision on July 26, 2000 confirming the adequacy of the draft Safe Harbor proposal submitted by the DOC on July 21 of that year.”71

The EU Commissioner and the U.S. Department of Commerce are the primary actors in this interaction. Since all the major internet corporations are based in the USA, the interaction is driven by this American dominance. The Commissioner is driven by interests of stricter regulation while the DOC tends towards an industry based self-regulation, similar to the safe harbors employed by COPPA.

While the formal mechanisms of these interactions are discussions and drafts submitted by the parties, it is clear that informal exchange and communication is an important part of this interaction. From the description of the interaction above, it is clear that the interaction character was one of competition rather than cooperation, as would be expected in this case.

IV. CONCLUSION

Analyzing a regulatory field using the Eberlein et al. analytic framework and focusing on the interactions between the regulatory entities brings to mind Marshal McLuhan’s famous saying in the context of media ecology: “The Medium is the Message.” As it is the form in which the regulation is formulated, resulting from the competing forces driving the interacting parties involves, which sets the tone and at the end of the day determines the regulatory structure, the agenda, the rules, and the compliance.

As illustrated in Figure 3, the web of ties and influences in the regulatory sphere of the regulation of children’s privacy in the EU and USA and beyond are complex. Many actors are involved in the regulation of the field of children’s privacy online but instead of reaching an expected result of highly regulated field that will protect children’s privacy, we end up with too much regulation that provides poor protection.

69. SOMA ET AL., supra note 62, at 299.
70. Id.
Moreover, it can be inferred that this global regulatory framework tends towards the industry being the leading global player, supported by multinational corporations. If we judge the influence of each interacting party by the web of ties and the amount of interactions it has with the other parties involved, there is no doubt that there is a clear dominance of the industry in this regulatory realm of children’s privacy protection online.

As said above, while other parties usually tend towards a stricter protection of children’s privacy online, the industry’s natural tendency would be to oppose strict regulation since a large portion of its revenue is dependent on the use of children’s information as a commodity.

Therefore, it is suggested to include an analysis of the regulatory interactions (e.g., using the Eberlein et al. framework) when discussing new or amended regulatory measures in each one of the levels described in this article. This will allow a better understanding of the overall regulatory picture and may prevent a bias towards more powerful actors, such as the industry.

![The Regulatory Interactions](image)

*Figure 3: The Regulatory Interactions involved in children’s online privacy*

The events described in section 3.3(ii), *supra*, regarding the negotiations between the USA and the EU regarding data transfer outside of the EU echo’s this article’s conclusion. There is no surprise that these events in which the US, led by its powerful internet industry, forced the EU
to adopt soft measures of self-regulation, which had surfaced fifteen years later in the EU high court decision described at the beginning of this article.

These events and their reappearance eventually after so many years underscore the problematic nature of the regulatory structure of interactions and the regulatory interactions itself in this field as was discussed in this article using the analysis of the TBGI analytical framework.

The high court decision overturning the forced and unjust agreement reached between the USA and the EU due to imbalance between their power in the field of data and the Internet, is an illustration of the inevitable end result in a poorly structured regulatory sphere. However, it is still to be seen how the court’s decision will change the regulatory structure in this field.
U.S., Eh? Contrasting the Feasibility of À La Carte Television in Canada and the United States

Daniel J. Spitz*

I. INTRODUCTION - THE ISSUE - THE AUDIENCE IS (NOT) LISTENING

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

* J.D., Southwestern Law School (2014). The author would like to thank Professor Warren Grimes for his thoughtful feedback, as well as Professor Robert Lind for his mentorship and guidance throughout the writing of this article.


2. Id.


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

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

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

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7. Id.

8. See PWC Advertising Outlook, supra note 4.


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

Part I - The Current Landscape of À La Carte Television

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

1. Packaging and the Case For Unbundling

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

17. Id. at 1.
can continue to support. As a result, the American television market is not priced or marketed efficiently.

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

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

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

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


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


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


28. Id.

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

i. Bundles and Tying - Potential American Antitrust Violations

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

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

30. See Belson, supra note 18.
32. Id. at 16.
33. Brantley v. NBC Universal, Inc., 675 F. 3d 1192, 1199 (9th Cir. 2012).
34. See Grimes, supra note 19, at 7.
35. Id. at 7.
38. See Brantley, 675 F. 3d at 1192.
39. Id. at 1195.
40. Id.
41. Id.
that bundling is permissible under antitrust law, despite being inefficient for consumers as Internet content providers increase its reach.\textsuperscript{42} The legality of bundling and antitrust issues was litigated in \textit{Cablevision v. Viacom} in the Southern District of New York starting in 2012,\textsuperscript{43} eventually reaching an out-of-court settlement prior to its resolution in late 2015.\textsuperscript{44}

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

II. The Canadian Model

1. The Canadian Television Market - Consumers and Networks

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

\textsuperscript{42} Id. at 1201.
\textsuperscript{45} See CANADIAN RADIO-TELEVISION & TELECOMMS. COMM’N (CRTC), BROADCASTING DECISION CRTC 2012-208, Request for Dispute Resolution by the Canadian Independent Distributors Group Relating to the Distribution of Specialty Television Services Controlled by Bell Media Inc. (Apr. 5, 2012), http://www.crtc.gc.ca/eng/archive/2012/2012-208.htm [hereinafter CRTC 2012-208].
\textsuperscript{47} Id. By age 11, Canadian children spend more time watching American shows than in school.
There are approximately 14.5 million households\textsuperscript{48} in the Canadian market\textsuperscript{49} watching 28.2 hours of programming on average each week\textsuperscript{50} and paying $53.56/month for cable or satellite television services.\textsuperscript{51} Additionally, as of 2013, 1 in every 3 Canadians viewed some form of Internet television,\textsuperscript{52} with users watching 2.8 hours of content per week online via streaming or digital download.\textsuperscript{53} Comparatively, as of 2011, every American demographic above the age of 34 watched in excess of 30 hours of television each week,\textsuperscript{54} with the younger demographics slightly below the Canadian national average.

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

\textsuperscript{48} “Households” refers to the number of homes in Canada who engage in some form of television viewership.


\textsuperscript{52} Id.; see also CANADIAN RADIO-TELEVISON & TELECOMMS. COMM’N (CRTC), COMMUNICATIONS MONITORING REPORT: SEPTEMBER 2012, UPDATE TO CRTC COMMUNICATIONS MONITORING REPORT (Sept. 5, 2012), http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2012/cmr.htm.

\textsuperscript{53} See id. at iv.


\textsuperscript{55} See Grimes, supra note 19, at 13, 15.

\textsuperscript{56} See TV Basics 2012-2013, supra note 49, at 13.

\textsuperscript{57} Id.

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

2. The Canadian Cable Distributors

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

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

60. See TV Basics 2012-2013, supra note 49, at 34. Five of the top ten highest rated programs in Canada were American-produced series (Survivor [2 seasons], Big Bang Theory, Grey’s Anatomy, and Glee).
61. Id.; see COMMUNICATIONS MONITORING REPORT, supra note 52, at ii; see also id. at 35 (Figure 4.1.1: Broadcasting Revenues for the Top 5 Group of Companies).
62. See COMMUNICATIONS MONITORING REPORT, supra note 52, at iv; see also id. at 36 (Figure 4.1.4: 2011 BDU Revenues by Operator).
66. See Lazarus, supra note 64.
profitability through packaging à la carte television offerings alongside higher margin services such as broadband Internet.\textsuperscript{67}

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

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

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

ii. Beyond the Basic Tier - Successful Results for Distributors

\textsuperscript{67} See Baker & Sharp, supra note 65.
\textsuperscript{69} See CRTC Grants Mandatory Distribution to Three New Television Services, CANADIAN RADIO-TELEVISION & TELECOMMS. COMM’N (CRTC) (Aug. 8, 2013), http://www.crtc.gc.ca/eng/com100/2013/r130808.htm#.Uk0Z_uB1L_c.
\textsuperscript{70} Id.
\textsuperscript{71} See Michael Geist, CRTC Should Put Consumers First and Drop the ‘Must Carry’ Requirements, MICHAEL GEIST (Jan. 29, 2013), http://www.michaelgeist.ca/content/view/6769/135/.
\textsuperscript{72} See BROADCASTING REGULATORY POLICY CRTC 2013-372, at ¶ 181.
\textsuperscript{73} Id.
\textsuperscript{74} See BROADCASTING REGULATORY POLICY CRTC 2013-372, at ¶ 3.
Unbundling Specialty Channels

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

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

3. Protecting Producers and Programming - CANCON

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

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75. See Baker & Sharp, supra note 65.
76. Id.; see also Optik Television Channel Selection Guide, TELUS, http://www.telus.com/content/tv/common/pdf/Optik_channel_selection.pdf (Note that packages are still available to the consumer in addition to à la carte specialty options.) (last visited Nov. 23, 2015).
77. Id.
78. Id.
79. Id.
80. See CRTC Transcript, supra note 15, ¶ 342.
81. See CBC News, supra note 46.
82. See TV Basics 2012-2013, supra note 49, at 34.
i. Employment Requirements

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

ii. Content Requirements

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

84. Id.
85. See CANADIAN RADIO-TELEVISION & TELECOMMS. COMM’N (CRTC), BROADCASTING REGULATORY POLICY CRTC 2010-905, REVISION OF THE DEFINITION OF A CANADIAN PROGRAM TO INCLUDE CANADIAN PROGRAMS THAT HAVE BEEN DUBBED IN CANADA AND OUTSIDE CANADA, at B (Dec. 3, 2010), http://www.crtc.gc.ca/eng/archive/2010/2010-905.htm. Series are responsible for maintaining an average of six points per episode. Directors and Screenwriters count for 2 points each, with lead performers, production designers, directors of photography, music composers, and picture editors counting for one point each.
86. Id.
87. Id.
88. Id at C (Expenditures).
89. Id.
90. Id.
91. See The National: CRTC Relaxes CanCon Requirements For Private Stations (television broadcast June 11, 1999), http://www.cbc.ca/archives/entry/crtc-relaxes-cancon-requirements-for-private-stations. (Note: This reflects the policy as of 1999).
its revenues on CANCON,\textsuperscript{92} and exempting news from CANCON altogether,\textsuperscript{93} likely in an effort to spur the development of original domestic programming.\textsuperscript{94}

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

iii. Content Spending and Signal Substitution

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

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


\textsuperscript{93} Id.

\textsuperscript{94} See Canadian Program Certification, supra note 83 (Exempt or Ineligible Programming).

\textsuperscript{95} See Broadcasting Act, S.C. 1991, c 11, § 3(1)(d)(ii) (Can.).


\textsuperscript{98} See COMMUNICATIONS MONITORING REPORT, supra note 52, at iii (Television Viewership Statistics Are Strong).

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

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

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

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

101. Id.
102. About Us, supra note 96.
103. CRTC 2012-208, supra note 45, ¶¶ 22-25.
104. Id. ¶ 10.
105. See id. ¶ 10; see also Broadcasting Act § 3(1)(t)(i).d.
106. CRTC 2012-208, supra note 45, ¶ 2.
107. See id. ¶ 11.
108. See id. ¶ 13.
decision attempts to achieve balance between providing programmers with predictable and stable monthly revenue\textsuperscript{109} and adheres to the CRTC’s policy of giving subscribers more flexibility and control over what content they watch.\textsuperscript{110}

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

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

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

\textsuperscript{109} Id. ¶ 22.
\textsuperscript{110} Id. ¶ 20.
\textsuperscript{112} See CRTC Transcript, supra note 15, ¶ 302.
\textsuperscript{113} See CRTC 2012-208, supra note 45, ¶ 2.
\textsuperscript{114} See CRTC Transcript, supra note 15, ¶ 318.
\textsuperscript{115} Id. ¶ 323; see also COMMUNICATIONS MONITORING REPORT, supra note 52, at 186.
\textsuperscript{116} CRTC Transcript, supra note 16, at ¶ 324.
\textsuperscript{117} See TV Basics 2012-2013, supra note 49, at 28.
\textsuperscript{118} Id. at 33.
excess of one million households. Under an à la carte hybrid system made possible by the CRTC decision, vertically integrated cable providers can remain profitable without having to reach millions of subscribers.

5. Canadian Hybrid À La Carte Summary

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

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

119. Id. at 41–42.
124. Id.
Rogers’ landmark hockey deal, which began in 2014 and is the largest rights agreement in Canadian history, has major implications for the Canadian à la carte television market because of the number of specialty channels Rogers owns. This 12-year, $5.2 billion dollar NHL deal gives Rogers control over sublicensing content to other broadcasters such as the CBC, which has provided coverage of the NHL for over sixty years.

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

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

1. Consumer Behavior

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


Moreover, American consumers already spend an average of nearly 3 hours a week streaming movies and television shows through consoles, including 70% of the teen demographic. Console technology allows viewers to interact in real time with the content they are consuming. Furthermore, this younger demographic, called cord-nevers, is unlikely to subscribe to a cable provider later in life because they have become accustomed to “freemium” content. Freemium content describes a business model in which a product is given away for free, with premium options to purchase thereafter. Both Hulu Plus and Netflix employ forms of this model, with the latter recently overtaking HBO in the number of American subscribers with 31.1 million. However, the majority of consumers have kept their subscriptions with a cable provider, considering a traditional subscription to be the foundation of the television viewing experience. Non-traditional video services, including SVOD services such as Netflix, are considered complementary forums for discovering new and original content as opposed to a pure market substitute to a cable subscription. HBO has recognized this shift in consumer behavior and began offering stand-alone à la carte streaming starting in 2015. With TV subscriptions down in 11 of the past 12 quarters dating back to the middle of 2012, and Netflix subscriptions increasing by 73% over the


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


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

137. See id. at 5-6.


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

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

i. Consumer Preferences Under “Pure” À La Carte

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

140. Id.
143. See Grimes, supra note 19, at 3-5.
144. See PWC Consumer Report, supra note 27, at 8.
145. Id.
146. See id. at 9-10.
147. See id. at 9.
2. Distributor-Network Opposition

i. Cable Channels

Cable channels, given their history of receiving high subscriber revenues, are resistant to change and are against à la carte system. For example, FOX has taken a hard-line stance, referring to à la carte as a fantasy, and unnecessary for networks to consider in the short-term given the lack of cord cutting. FOX President Chase Carey expressed his confidence in the current model’s viability, stating that people will give up food and a roof over their head before they give up television. Additionally, FX CEO John Landgraf has remarked that half the jobs in Hollywood would disappear under à la carte, leading to a major recession in the industry. Disney’s CEO Robert Iger is also against à la carte on economic grounds, stating that consumers are getting a good deal on television packages given the rising cost of programming. One of the networks most affected by à la carte would be ESPN, for which lucrative programming deals began in 2014. ESPN already demands in excess of $5.00 per subscriber, which would likely increase to offset losing subscribers, because the survey data shows only 59% of customers are likely to purchase sports à la carte. Under these conditions, it has been speculated that the price may be driven up to $30/month; however, ESPN has only raised rates in the past at an annual average rate of

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

ii. Cable and Satellite Distributors

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

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

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157. See Nasdaq ESPN Fees, supra note 154.

158. Id.


161. See Koblin, supra note 159.

162. Id.


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

iii. Broadcasters - Specialty Channels

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

iv. Broadcasters - Premium Channels

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

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168. Id.


171. See CONSUMER GUIDE, supra note 16.
$2.99 per episode, or $14.99-$34.99 for the entire season.\footnote{172}{See Charles Ripley, Google Play Adds \textit{HBO}'s \textit{Game of Thrones} and 6 Other Shows, \textsc{Brandpost}, \url{http://www.pcworld.com/article/2052814/google-play-adds-hbo-s-game-of-thrones-and-6-other-shows.html} (last visited Nov. 23, 2015).} HBO’s strategy in offering this “iTunes approach” is to protect its exclusivity by encouraging subscriptions\footnote{173}{See Dave Thier, \textit{You Can Finally Buy “Game Of Thrones” À la Carte: \textit{HBO} Comes To Google Play}, \textsc{Forbes} (Oct. 8, 2013, 11:06 AM), \url{http://www.forbes.com/sites/davidthier/2013/10/08/you-can-finally-buy-game-of-thrones-a-la-carte-hbo-comes-to-google-play}.} and compete squarely against Amazon Prime, Hulu and Netflix, all of whom have recently produced original content.\footnote{174}{See The Future of TV, supra note 170, at 17, 20(2).} HBO bypasses what most economists perceive as the biggest threat to unbundling, in that the channel relies completely on consumer subscriptions rather than advertising.\footnote{175}{See Frankel, supra note 138, at ¶4.} By planning to offer content à la carte in 2015, HBO Chairman and CEO Richard Plepler remarked that it is time to remove all barriers to those who want HBO.\footnote{176}{See Kristin Brzoznowski, \textit{Netflix Pledges to Double Investment in Originals in 2014}, \textsc{Worldscreen} (Oct. 22, 2013), \url{http://www.worldscreen.com/articles/display/41770}. Netflix added 1.3 domestic subscribers in Q3 2013 for a total of 31.09M and estimate another 2.01M subscribers in Q4.}

Despite the inherent advantage online outlets have over HBO in delivering low-cost programming without necessitating a cable subscription, HBO’s foray into online à la carte may foreshadow the next step in unbundling beyond the hybrid system in both America and Canada: a per episode, season and series approach over cable. This strategy may become a widely adopted distributor response if alternative media outlets continue to grow at pay televisions expense.\footnote{177}{See \textit{Kristin Brzoznowski}, \textit{Netflix Pledges to Double Investment in Originals in 2014}, \textsc{Worldscreen} (Oct. 22, 2013), \url{http://www.worldscreen.com/articles/display/41770}. Netflix added 1.3 domestic subscribers in Q3 2013 for a total of 31.09M and estimate another 2.01M subscribers in Q4.} Ultimately, if the goal an à la carte system sets out to achieve is to increase consumer flexibility and choice while reducing their cable bills, a strategy similar to that of HBO may be the optimal outcome for every network facing a potential decline in subscription revenue under a hybrid system.

3. Associations Divided on À La Carte

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

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

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

1. The Current Governing Policy - The 1992 Cable Act

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

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182. Id.
provide consumers with expanded choices at lower rates.\textsuperscript{185} yet over the past ten years the average cable bill has more than doubled to over $90/month.\textsuperscript{186}

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

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

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


\textsuperscript{187} See § 2, 106 Stat. at 1463.

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

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

\textsuperscript{190} See id. § 3, 106 Stat. at 1464.

\textsuperscript{191} See id.

\textsuperscript{192} Id.
Furthermore, Section 3(8)(C)(2) of the Cable Act lists a number of factors to help the FCC determine if the rates set by distributors are unreasonable. 193 These factors include the revenues received by a cable operator via advertising from programming that is carried as part of the service for which a rate is being established. 194 Specifically, advertising revenue accounts for just under half of a network’s cash inflows,195 and this revenue stream has nearly tripled over the past decade.196 Vertically integrated distributors are able to capture the entire surplus of rates in a specialty channel package while still being perceived under the Cable Act as having set reasonable prices.197 This surplus can be attributed to interproduct price discrimination, where networks are able to bundle channels to take advantage of consumer’s willingness to pay higher prices.198 As a result, cable providers leverage bundles to increase both their subscriber fees and advertising revenues than what would be possible under à la carte.

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

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

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

194. § 3, 106 Stat. at 1469.

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


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

198. Id. at 7.

199. § 3, 106 Stat. at 1467.

200. Id. Public service broadcasting has a positive effect on commercial broadcasting, promoting a race to the top and improving industry standards.
Absent these must carry requirements, the Cable Act reflects the concern that a substantial likelihood that citizens will be deprived of access to these services, as consumers could choose not to purchase these networks à la carte.\textsuperscript{201} However, many of the most watched cable networks are classified under the basic tier, accounting for 66% of cable viewership and just 34% of programming costs.\textsuperscript{202} Additionally, consumers selecting channels under a pure à la carte system are likely to purchase networks listed in the basic tier.\textsuperscript{203} Overall, the must carry provision, which was deemed constitutional,\textsuperscript{204} serves to create competitive balance for networks while protecting access to millions of homes without specialty cable subscriptions.\textsuperscript{205}

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

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

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

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

\textsuperscript{202} Sherman, supra note 201.

\textsuperscript{203} See PWC Consumer Report, supra note 27, at 9.


\textsuperscript{205} Id. at 635, 669.


\textsuperscript{207} Id.

\textsuperscript{208} Id.

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

2. The 2013 Television Consumer Freedom Act

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

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

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

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

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

CONCLUSION

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

218. S. 912 § 3(B)(3).
220. S. 912 § 3(B)(1).
221. S. 912 § 3(D).
In contrast, while the Canadian model has not yet been mandated by legislation, it is already providing Canadian viewers with meaningful, lower cost options. These benefits have been attained through a group of cooperative cable providers and the leadership of the responsible Canadian broadcast regulator alongside a government strongly in favor of enacting à la carte as law.\textsuperscript{225}

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


In October 2015, the Liberal Party led by Prime Minister Justin Trudeau was elected to a majority government, replacing the Conservative Party after nearly a decade in power. The Liberal Government also supports à la carte television, as evidenced by the rollout of $25/month skinny basic packages on March 1, 2016, by every major Canadian cable provider.
Big Tobacco Blows Smoke on Public Health Initiatives: Using Trademark Law to Prevent International Changes to Cigarette Packaging

Caile Morris*

I. INTRODUCTION

In June 2009, President Barack Obama signed the Family Smoking Prevention and Tobacco Control Act. This legislation was a bipartisan effort in both houses of Congress, and was hailed by Obama as allowing “the scientists at the FDA to take . . . common-sense steps to reduce the harmful effects of smoking.” Among other things that this legislation accomplished, it gave the U.S. Food and Drug Administration (“FDA”) authority to regulate the warning labels used by tobacco companies more than ever before. The FDA decided to require nine color graphic warning labels to be attached on a rotating basis to all cigarette packages and advertising. Various aspects of the FDA’s regulations have been challenged in the years since 2009, slowing any effective progress. However, progress globally may lend support for a renewed surge to protect public health, despite challenges by tobacco companies in national and international forums.

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1. Press Release, The White House, Office of the Press Secretary, Remarks by the President at the Signing of the Family Smoking Prevention and Tobacco Control Act (June 22, 2009) (noting that the legislation “will not ban all tobacco products, and it will allow adults to make their own choices. But it will also ban tobacco advertising within a thousand feet of schools and playgrounds. It will curb the ability . . . to market to our children by using appealing flavors,” and will force tobacco companies “to more clearly and publicly acknowledge the harmful and deadly effects of the products they sell.”), https://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-the-signing-of-the-family-smoking-prevention-and-tobacco-control-act.

The United States has been struggling with the tobacco industry for several years over changing the warning labels required on cigarette packages. This fight is indicative of the larger global struggle between countries’ governments and tobacco companies on how to promote public health policies by changing the packaging of cigarettes. A large argument that the industry has been clinging to on an international scale is how its intellectual property, specifically its trademarks and branding, is being harmed due to changes to cigarette packaging. How this fight is regulated and resolved globally may provide guidance for how the policymakers in the United States can resolve the issue at home.

The tobacco industry is using trademark law as a legal weapon for brand protection, rather than to protect the principles of consumer confusion and unfair competition that provide foundation for the law in the United States and elsewhere. Moving forward past the legal challenges to the 2010 FDA’s proposed rules to implement the Family Smoking Prevention and Tobacco Control Act, the FDA should consider the successes and failures of countries around the world to implement similar legislation in order to anticipate and hopefully avoid most future challenges. By examining Australia’s plain packaging laws, case studies of other countries that implement graphic warning legislation, and the United States’ specific litigation troubles, recommendations for how the FDA should act going forward become much clearer.

II. AUSTRALIA AND PLAIN PACKAGING

In 2011, the Australian Parliament passed the Tobacco Plain Packaging Act. The first of its kind, this legislation required that all tobacco packaging sold in Australia needed to conform to plain packaging standards, or packaging without any advertisements, branding, or colors. These standards include, among other requirements, that cartons of cigarettes sold be stripped completely of their branding, save the brand name and variant name (i.e. Marlboro Light), though in a standardized font, size, and color. The cigarette packages are also required to be free of a tobacco company’s logo or picture trademarks. In lieu of the trademarked brands, the packages must have an olive-brown background color, and contain text and picture health warnings about the hazards of cigarettes that take up 82.5% of the total package area.

4. Id. §§ 20(2), 21.
5. Id. §§ 18-21; see also CANADIAN CANCER SOC’Y, CIGARETTE PACKAGE HEALTH WARNINGS: INTERNATIONAL STATUS REPORT 2 (2014).
This landmark legislation provoked strong reactions around the world from those who were for and against its passage.\(^6\) Australia’s plain packaging reform was the first of its kind in the world\(^,\) and as such, there were many differing views to contribute. The main cry of those who were against the implementation of the Act, mostly tobacco companies and their affiliated farmers and distributors, argue that plain packaging is not more likely to prevent adolescents from smoking, persuade current smokers to quit, or promote health warnings more effectively. More effectual alternatives to plain packaging suggested by the industry includes youth smoking prevention programs, tackling the tobacco “black market,” and strengthening minimum-purchasing-age laws. Further, they argue that tobacco companies are more likely to be targeted by counterfeiters due to the lack of branding on cigarette packages, that consumers will be confused as to source of origin of the packs, and that there are additional unnamed damages to the cultivated brand of each tobacco company.\(^8\)

On the other side, many plain packaging advocates scoffed at the arguments of the tobacco companies and pointed to the myriad of benefits that would be conferred. Following the World Health Organization (“WHO”)’s Framework Convention on Tobacco Control in 2003, many member countries were encouraged to adopt plain packaging in order to “increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others.”\(^9\) In addition to the public health policy arguments, proponents of plain packaging also dismissed the tobacco industry’s intellectual property arguments. The proponents said that tobacco manufacturers would still be able to distinguish their products from

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competitors as the brand name may still be used, and that trademark registrations merely confer the right to prevent counterfeiters from copying rather than allowing the positive right to use a mark at all (as this comes just from starting a business and using the mark in the course of trade). They also argued that a government that introduces this measure is not acquiring the intellectual property of tobacco companies, but prohibiting the promotional branding on packaging for public health purposes.

These arguments and debates provide a framework for the challenge in the High Court of Australia of the Tobacco Plain Packaging Act brought by British American Tobacco, Imperial Tobacco Australia Limited, Philip Morris, and Japan Tobacco International [hereinafter “the Tobacco Coalition”]. This lawsuit effectively set the stage for what arguments the tobacco industry at large could bring against plain packaging worldwide.

A. Australian High Court Case

In April 2012, the High Court of Australia heard argument for three days from the Tobacco Coalition and Commonwealth’s solicitor-general on whether or not the 2011 Tobacco Plain Packaging Act violated Australia’s Constitution. The High Court did not release its decision until August 2012, and did not post the reasons for its decision until even later, in October 2012. The oral arguments were packed with lawyers for each side, with members of the public and the media looking on to hear the case that could either jumpstart the promulgation of plain packaging of tobacco products worldwide, or bring it to a screeching halt.

The Tobacco Coalition’s arguments followed along the lines of what anti-plain packaging advocates voiced prior to the case, revolving around the central argument that requiring plain packaging amounted to an acquisition of property. This view of property under the Australian Constitution is a broad one, wherein property includes all forms of intellectual property in relation to the Tobacco Coalition’s packaging.

10. See Bonadio, supra note 6.
11. Id.
The lawyers arguing for the Tobacco Coalition believed that “the IP rights of tobacco companies had been extinguished, or at least severely impaired.” The Coalition also argued that there should be a distinction between graphic health warnings and plain packaging, which was phrased as “excessive regulation,” and believed that tobacco companies should be compensated for putting public health advertisements on their products.

There were many who criticized the arguments of the Tobacco Coalition. One commentator even called the arguments “about acquisition of property . . . synthetic and unreal.” However, there were also those that supported the views of the Tobacco Coalition, and believe that if this decision were to come down against the Coalition that it would set a dangerous precedent for intellectual property owners on a broader scale about what the government could feasibly take.

On the side of the Commonwealth, the Solicitor-General argued that this was no different from any other information standard for products in the course of trade, and that the legislation was directed to reducing the public health harm that is caused by using tobacco products. Plain packaging was meant only to be the next step in the process of regulating tobacco products, and trademarks should be subject to a prohibition on use to prevent harm to the public health. In fact, the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) recognizes that members may need to regulate in certain ways in order to protect public health. Finally, the Solicitor-General argued that it would go “beyond the requirements of any reasonable notion of fairness” to compensate the tobacco companies for the use of the warnings.

15. Id.
16. Id.
18. See Rimmer & Stern, supra note 17, at 58 (“As for intellectual property, software could be taken and argued by the government to be necessary for defence uses, patents for pharmaceuticals could be exploited by the government for the purposes of providing drugs to plague-ridden areas or to soldiers on active duty, designs for the construction of armed vehicles could be used without royalties by the government if the safety of soldiers could be arguably justified.”).
20. Id.
21. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 8, Apr. 15, 1994, 33 ILM 81, http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=305736 (“Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition . . . provided that such measures are consistent with the provisions of this Agreement.”).
22. See Rimmer, supra note 14.
Several months later, the High Court ruled against the Tobacco Coalition.\(^23\) A few months following that ruling, the High Court issued its reasons for the decision. A majority of six to one rejected that the Tobacco Plain Packaging Act constituted an acquisition of the Tobacco Coalition’s property under the Australian Constitution.\(^24\) As one commentator put it, “the majority judges variously described the case of the tobacco companies as ‘delusive’, ‘synthetic’, ‘unreal’, and suffering ‘fatal’ defects in logic and reasoning.”\(^25\) The Justices seemed to break their reasons into three major sources: public health, intellectual property, and constitutional law.

In terms of public policy, one of the majority Justices noted that plain packaging is the latest control measure in a long line of such measures in the tobacco industry, and another Justice recognized that this law gave effect to Australia’s obligations as a party to the WHO Framework Convention on Tobacco Control.\(^26\) In terms of intellectual property law, the majority stressed that this kind of law is meant to serve public policy objectives rather than the private interests of the rights holder. Some of the Justices noted that a trademark conferred is not a pass to use that mark free from restraints of other laws, and that trademark legislation in Australia has manifested an accommodation of both commercial and public interests.\(^27\) Justice Crennan said that the aim of trademark law as used by the Tobacco Coalition, and what they strenuously objected to and considered taking of property, was the “advertising or promotional functions of [the Coalition’s] registered trademarks or product get-up, which functions were prohibited by the Packaging Act.”\(^28\) In terms of constitutional law, the High Court followed its precedents on intellectual property and constitutional law by ruling that the Commonwealth does not acquire any interest in property through the Tobacco Plain Packaging Act. Judge Kiefel pointed out that the point of the Act is to dissuade people from using tobacco products, and that “if that object were to be effective the [Tobacco Coalition’s] businesses


\(^{25}\) Rimmer, supra note 14.


\(^{27}\) Id. at 27, 42 (paraphrasing the opinions of Justices French and Gummow).

\(^{28}\) Id. at 102.
may be harmed, but the Commonwealth does not thereby acquire something in the nature of property itself."\textsuperscript{29}

This ruling has had a long reach in terms of bringing tobacco packaging reform to the forefront of many countries’ public health policy agendas.\textsuperscript{30} It may embolden other countries, like Canada and South Africa, which have had similar stances to Australia on tobacco reform, to move forward with plain packaging as well. It can serve as a roadmap for how a country may successfully pass such an act despite pressure from major international tobacco companies. It also shows that the tobacco industry may not be so successful going forward with arguments on intellectual property takings.

\textbf{B. World Trade Organization Pending Disputes}

The tobacco industry is not the only party to be concerned with Australia’s Tobacco Plain Packaging Act. There are currently five disputes awaiting final reports from the World Trade Organization ("WTO"): one request from Ukraine in March 2012;\textsuperscript{31} one request from Honduras in April 2012,\textsuperscript{32} one request from the Dominican Republic in July 2012,\textsuperscript{33} one request from Cuba in May 2013,\textsuperscript{34} and one request from Indonesia in September 2013.\textsuperscript{35} These requests for consultation all challenge Australia’s Act, and all allege essentially the same thing: that this law is inconsistent with Australia’s obligations under several articles of TRIPS, a few articles of the Technical Barriers to Trade Agreement ("TBT"), and an article of the

\textsuperscript{29} Id. at 132.

\textsuperscript{30} See infra Part II.C.

\textsuperscript{31} Request for Consultations by Ukraine, \textit{Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging}, WTO Doc. WT/DS434/1 (Mar. 15, 2012).

\textsuperscript{32} Request for Consultations by Honduras, \textit{Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging}, WTO Doc. WT/DS435/1 (Apr. 10, 2012).

\textsuperscript{33} Request for Consultations by the Dominican Republic, \textit{Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging}, WTO Doc. WT/DS441/1 (July 23, 2012).

\textsuperscript{34} Request for Consultations by Cuba, \textit{Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging}, WTO Doc. WT/DS448/1 (May 7, 2013).

\textsuperscript{35} Request for Consultations by Indonesia, \textit{Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging}, WTO Doc. WT/DS467/1 (Sept. 25, 2013).
1994 General Agreement on Tariffs and Trade ("GATT 1994")\(^{36}\). Some of the arguments put forward by these countries for challenging Australia’s Act include that it would hurt tobacco farmers in small, vulnerable economies, that counterfeiting of a tobacco company’s brand will be much easier, and that the measure will not actually reduce smoking because plain packaging will cause the prices of cigarettes to drop and even out the market, leading to higher consumption by consumers. There are a large number of countries that have reserved their third-party rights in these disputes, representing developed and developing countries, and countries that primarily grow the products in addition to countries that manufacture and sell the products.\(^{37}\)

These disputes were considered together. A panel was composed on May 5, 2014, and on October 10, 2014, the Chair of the Panel informed the dispute settlement body that it would issue its final reports not before the first half of the year 2016.\(^{38}\) As such, interested parties have no reports, panel, or appellate body proceedings at the WTO to try and determine how the WTO panel will respond to these disputes. However, the outcome of the major challenge to the law in Australia, in addition to the fact that the tobacco industry pressure has not stopped other countries from considering similar laws, is likely to factor into a decision by the WTO Panel. Until then, it can only be speculated what will happen and how much effect it will have on the momentum already created for plain packaging reform in the past three years.

C. International Movements to Plain Packaging

Prior to Australia implementing the Tobacco Plain Packaging Act in 2011, there were some international attempts to instigate plain packaging regulations. In 1989, New Zealand’s Department of Health suggested that

\(^{36}\) See supra notes 31-35. The specific articles claimed to be inconsistent with Australia’s laws are Articles 2.1, 3.1, 16.1, 16.3, 20, 22.2(b), and 24.3 of TRIPS, Articles 2.1 and 2.2 of the TBT, and Article III:4 of the GATT 1994.

\(^{37}\) Countries that have asserted third party rights include: Brazil, Canada, China, the EU, Guatemala, India, Japan, Korea, Malaysia, Mexico, New Zealand, Nicaragua, Norway, Oman, the Philippines, the Russian Federation, Chinese Taipei, Thailand, Turkey, the United States, Uruguay, Zimbabwe, Peru, Singapore, Argentina, Chile, Malawi, and Nigeria. See WORLD TRADE ORG. [WTO], ANNUAL REPORT 2015: DISPUTE SETTLEMENT 96-98, https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep15_chap6_e.pdf (last visited Nov. 22, 2016).

cigarettes be sold in white packs with simple text, and no colors or logos.\textsuperscript{39} In 1994, the Canadian House of Commons Standing Committee on Health suggested plain packaging should be including in legislation once further research was done on the effectiveness of the packaging.\textsuperscript{40} However, both of these recommendations lost steam and were subsequently dropped from the policy agendas.\textsuperscript{41}

Australia opened the floodgate to a host of countries considering plain packaging reform. This consideration can be so little as requesting new studies and evidence on the effectiveness of plain packaging, to so far as actually introducing laws. In February 2014, the European Commission revised the European Union (“EU”) Tobacco Products Directive.\textsuperscript{42} The Directive mandates more stringent regulations for member states regarding how cigarette packages look. At the minimum, the packs will need to have “picture and text health warnings covering 65% of the front and the back of cigarette packs – to be placed at the top edge.”\textsuperscript{43} These are typically referred to as “graphic warnings,” where there are text and picture warnings covering a good portion of the package, but there is room remaining for a tobacco company’s unique brand. While the Directive allows for space to remain available for the tobacco companies to brand their products, it does not stop Member States from going further if they choose:

The new Directive specifically allows Member States to introduce further measures relating to standardisation of packaging – or plain packaging – where they are justified on grounds of public health, are proportionate, and do not lead to hidden barriers to trade between Member States.\textsuperscript{44}

The Directive essentially gives a green light to EU member states to introduce legislation mandating plain packaging of cigarettes, so long as the three conditions quoted above can be justified.

Several EU countries have decided to do just as the Directive allows. In early March 2015, Ireland became the first country in the EU to pass plain packaging legislation.\textsuperscript{45} It instituted very similar regulations to Australia, stripping the package of a company’s branding save a

\begin{itemize}
  \item \textsuperscript{39} Andrew D. Mitchell, \textit{Australia’s Move to the Plain Packaging of Cigarettes and Its WTO Compatibility}, 5 \textit{ASIAN J. WTO & INT’L HEALTH L & POL’Y} 405, 411 (2010).
  \item \textsuperscript{40} Id.
  \item \textsuperscript{41} Id.
  \item \textsuperscript{43} Id.
  \item \textsuperscript{44} Id.
  \item \textsuperscript{45} Henry McDonald, \textit{Ireland Passes Plain Packaging Bill for Cigarettes}, \textit{GUARDIAN} (Mar. 3, 2015, 2:56 PM), http://www.theguardian.com/world/2015/mar/03/ireland-passes-plain-packaging-bill-cigarettes-smoking-tobacco.
\end{itemize}
standardized font brand name and variant name, included standardized colors, and had rotating picture and text health warnings. Only a couple of weeks later, the United Kingdom (“UK”) joined Ireland and Australia in passing legislation. 46 Both the UK and Irish laws are slated take effect in May 2016. 47 In addition, Norway has publicly announced a consultation on plain packaging, and has reached out to Australia for guidance. Initial discussions are also taking place in South Africa, Panama, France, Burkina Faso, New Zealand, and Turkey. 48 It is obvious that many of the world’s developed nations, and even some developing nations, are emboldened by Australia’s success thus far, and not all are persuaded or cowed by the tobacco industry’s furious and heavy-handed response with increased lobbying and lawsuits.

Japan Tobacco International (“JTI”) maintained from a start that there would be a vigorous challenge to the Ireland legislation. 49 It follows that the UK and other countries considering enacting legislation will be up against lawsuits and forceful lobbying efforts from JTI and others heavy hitters in the tobacco industry. Dr. James Reilly, the Irish Minister for Children, stated that even at the EU parliament level that “members . . . complained that the scale of lobbying on this directive was unprecedented,” and that once the arena moved back to Ireland that the legislature was “lobbied on a scale that Irish politics had never seen before.” 50 The Irish law has since been challenged by JTI, and the case is currently pending in the Commercial Court of Ireland on trade obstacle claims, with other substantive intellectual property and freedom of expression claims being reserved by JTI at this time. 51

47. Id.
49. McDonald, supra note 45 (“A spokesperson for JTI said that plain packaging is a disproportionate, unjustified and unlawful measure” and “warned that it will go to court to challenge the new law.”).
50. Miller, supra note 48.
51. Plain Cigarette Packaging Case Adjourned in High Court, IRISH TIMES (Apr. 13, 2015, 2:06 PM) (“JTI contends, because harmonisation of labelling and packaging is a stated objective of the EU directive, a member state cannot adopt national measures which further restrict the free movement of goods on grounds of a high level of protection for human health.”), http://www.irishtimes.com/business/plain-cigarette-packaging-case-adjourned-in-high-court-1.2174026.
This is likely only the beginning of the challenges that will come to both Ireland and the UK, and other countries that follow suit in the coming months. However, such movement may create a domino effect that will both put pressure on countries to update their tobacco regulations and laws as well as give them a safer, more established route to follow in doing so.

III. INTERNATIONAL GRAPHIC PICTORIAL WARNING PACKAGING

While plain packaging is the newest kind of tobacco health warning regulation happening on an international scale, many other countries have been implementing other kinds of warnings on packaging for years. The most effective, up until the advent of plain packaging in Australia, are graphic pictorial warnings. As discussed, these warnings typically take up a percentage of the cigarette pack and include text and picture health warnings, with the pictures usually consisting of a graphic representation of the health hazards of smoking. The percentage of the pack taken up varies country to country, with some of the highest covering 85% of the total package. These warnings rotate messages, much like plain packaging warnings do. The main difference is that the rest of the package is left for the tobacco company to include their branding, which usually consists of the brand name and variant name in a stylized font, sometimes a logo, and company-specific color schemes.

Examining some of the countries in the world that require the strictest graphic warnings, and the challenges they have faced from the tobacco industry, is also illustrative of how tobacco companies protect their brand and their products, and what may work for a country attempting to implement this kind of regulation. A 2014 Canadian study reports that by September 2014, seventy-seven countries and jurisdictions have picture warnings (including Australia’s plain packaging), an increase from the fifty-five countries and jurisdictions with warnings at the end of 2012. Sixty of these countries or jurisdictions require that the warnings cover at least half of the total package area. Several of the countries that have the largest warnings have also encountered the largest resistance from the tobacco industry, and a country wishing to implement any kind of picture warning

52. Supra Section II.B.
53. See CANADIAN CANCER SOC’Y, supra note 5, at 2 (detailing the top countries in terms of warning size percentages for the combined space on the front and the back of a cigarette package, with Thailand requiring 85% of the package to be covered in warnings).
54. Id.
55. Id.
regulation on tobacco products would be wise to see how these countries were successful, and where their efforts need improvement.

A. Thailand

As of September 2014, Thailand requires the largest amount of graphic warning labels on tobacco products in the world. The labels must cover an average of 85% of the package, with 85% of the front and of the back covered.\(^{56}\) Thailand first instituted graphic warnings in 2005, and the size of the warnings has grown in the ten years since as the regulations are updated.\(^{57}\) The largest jump was from the 2010 regulations, which required 55% of the total package be covered, to the current 2014 regulations that require 85%.\(^{58}\) The warnings take up the top portion of the package, leaving the bottom for the branding of tobacco companies. Those involved in public health took notice and applauded Thailand’s Health Ministry, but they were not the only ones who saw the changes. The tobacco industry also took notice, and subsequently challenged the new regulations.\(^{59}\)

The regulations were set to go into effect on October 2, 2013, but were stalled in August of that year due to legal action taken by three of the world’s largest tobacco companies, headed by Philip Morris.\(^{60}\) Philip Morris and the other companies sought an injunction in the Administrative Court, leaving the regulation hanging while both parties argued their cases and waited for a judgment. This was especially shocking, given that many Thai legal scholars and professors said this kind of legal action against the Thai Ministry of Public Health is unprecedented, with this being the first time the Ministry has ever had to defend itself in court for its regulations, and the first case in the history of tobacco control in Thailand at all.\(^{61}\) The tobacco companies argued that the regulations were “not only illegal, but also unnecessary, given that the health risks of smoking are universally known in Thailand.”\(^{62}\) Most of the arguments for illegality are the familiar ones used by the industry: that the Ministry “exceeded its power,” that it “failed to consult thousands of retailers and manufacturers” before implementing the legislation, and, of course, that it “impaired the ability of

\(^{56}\) Id.

\(^{57}\) Id. at 3.

\(^{58}\) Id. at 2.


\(^{60}\) Id.

\(^{61}\) Id.

\(^{62}\) Id.
manufacturers and importers to use their trademarks to differentiate their products.”

The second argument of consultation is especially interesting in the context of relations between the industry and the Thai government, given that the norm for the Ministry of Health is to do just what it did: create regulations, enact them, and expect for the affected industry to comply.

Australia backed the Thai government’s move, and voiced concern that countries around the world needed to stand up to the tobacco companies’ bullying tactics. Jonathan Liberman, an Australian lawyer and expert on anti-tobacco legislation, said:

Countries have to defend these measures against these legal claims and legal threats that are brought by the tobacco industry. It tries to intimidate governments and sue them, rather than just allow them to implement the measures that will reduce death and disease and the enormous social and economic costs. The government[s] can’t be intimidated [—] there’s too much at stake.

Ten months following the preliminary injunction obtained in August 2013, the injunction was overturned. Even as recent as early 2015, the tobacco companies and their supporters cautioned that the restriction on advertising and the placement of the branding on packages in Thailand encroached on the intellectual property rights of the companies.

A draft law was signed on November 24, 2014, by the Thai Ministry of Public Health that is mostly the same as the law passed in 2010, which contains language that says, “the law on intellectual property shall not apply to the display of the Package under this Section.” How this law will be

63. Id.
64. Ron Corben, Thailand’s Health Ministry Battles Big Tobacco Over Graphic Health Warnings, VOICE AM. (Oct. 8, 2013, 9:13 AM), http://www.voanews.com/content/thailands-health-ministry-battles-big-tobacco-over-graphic-health-warnings/1765216.html (quoting Pokpong Srisanit, a Thammasat University law professor who said “[w]hen the Ministry of Public Health announce a new regulation normally the big company and the small tobacco company obey the regulation.”); see also Corben, supra note 59 (“Professor Pokpong] said in the past when new regulations were introduced by the ministry, the tobacco companies, after some debate, ‘but never in court,’ would adopt new measures.”).
65. Corben, supra note 64.
67. See Adcock, supra note 66.
68. Id. (quoting Draft Section 37 of the Thai draft law, the Tobacco Products Control Act).
received is yet to be determined, as it is currently circulating the Ministries of the Thai government for comments.\textsuperscript{69} However, it is likely poised to consider following Australia down the plain packaging route should this language remain in the finalized law.

B. \textit{Uruguay}

Uruguay requires tobacco packages to be 80\% covered with graphic warnings, averaging 80\% on both the front and the back.\textsuperscript{70} Implementation of picture and text warnings began in 2006, but it has been updated six times since then, with the size of the warnings growing until it reached the current size in 2010.\textsuperscript{71} In March 2010, Philip Morris International fought this 30\% increase in warning label size with a multi-billion dollar lawsuit.\textsuperscript{72} This lawsuit differed from those brought in Thailand and Australia because the claim was brought to an international forum, the World Bank’s International Center for Settlement of Investment Disputes, and it claimed violations of a bilateral treaty between Uruguay and Switzerland, where Philip Morris is headquartered.\textsuperscript{73}

Philip Morris complained about two specific measures implemented by these 2010 regulations: the increase of the warnings from 50\% to 80\% of the total pack size and that companies would be forced to sell only one variation of cigarettes per brand, essentially forbidding labeling cigarettes as light or mild, or using colors to designate these labels without actually saying it on the pack.\textsuperscript{74} The treaty that was alleged to be violated is meant to protect investments that Switzerland has made into Uruguay, including with brands, intellectual property, and ongoing business enterprises.\textsuperscript{75} The violation allegedly stems from having to remove seven out of twelve varieties of cigarettes for sale in the country, and because the packages “[leave] virtually no space on the pack for the display of the legally

\textsuperscript{69} \textit{Id.}

\textsuperscript{70} \textit{See Canadian Cancer Soc’y, supra note 5, at 2.}

\textsuperscript{71} \textit{See id. at 3; see also Uruguay, Tobacco Labelling Resource Ctr., http://www.tobaccolabels.ca/countries/Uruguay (last visited April 22, 2015).}


\textsuperscript{73} \textit{Id. (claiming that the Switzerland-Uruguay Bilateral Investment Treaty was violated by Uruguay).}


\textsuperscript{75} \textit{Id.}
protected trademarks.” The trademark concerns reflect many of the others used in other litigation tactics around the world: basically that there is no room for display of the trademarks, and that it does not address and may actually promote black market cigarettes. The difference between these classic trademark arguments and those brought in Australia and Thailand is that they are viewed in the lens of a bilateral trade agreement, where the focus is kept on investments and capital lost as a direct result of these measures.

Another part of what makes this litigation different from what was done in Australia and Thailand is that it is not being brought in a domestic court, and as such the costs of the suit itself are astronomical. The damages being sought are also extremely high, with Philip Morris asking for $25 million US dollars for actual damages caused by the disregard Uruguay allegedly is giving to investors by not “[keeping] the promises it makes.” The idea that a company that makes revenues that almost double the GDP of the country it is taking up litigation against could ask for such a large amount of damages is staggering. However, one commentator speculated that Philip Morris brought this suit as a wider strategy to oppose the plain packaging movement by making “an example of Uruguay, because [Philip Morris] likely believes that [Uruguay] may not have the resources or expertise available to put on the best possible defence, and because Uruguay is an acknowledged world leader in tobacco control.”

Currently, the suit is still pending at the World Bank, but despite this, Uruguay continued to implement these and other tobacco control measures. The Pan American Health Organization and the World Health Organization are strongly supporting Uruguay’s efforts—as is Michael Bloomberg, strangely enough. While it is unclear what the outcome may be here, it is obvious that the tobacco industry is attempting to make an

76. Id.
77. Id.
78. Id.
example out of Uruguay, but it is commendable that the country is not bowing to the pressure despite the financial risk the arbitration poses. This could turn into an avenue of pursuit for the tobacco companies should the World Bank rule that Uruguay violated the bilateral treaty with the Swiss, as many other countries are party to such agreements with Switzerland and the home countries of the other major international tobacco companies.

C. Canada

Canada ties for fourth with Brunei and Nepal for having the fourth-highest total percentage of graphic warnings required on tobacco packages, coming in at 75%.82 Despite not having the largest percentage of graphic warnings, Canada was the first country in the world to implement picture-based health warnings on cigarette packages, which went into effect in 2001.83 The regulations required half of the packages to be covered with rotating pictorial and text graphic warnings, leaving the other half for tobacco branding. This was raised to the current 75% total coverage level in 2011, with implementation in 2012.84

Canada has had discussions of implementing plain packaging before, and remains a leader on conducting research on the implementation and effectiveness of graphic warnings and plain packaging worldwide.85 Like other countries that are recognized world leaders in tobacco control, the laws that have been implemented controlling how tobacco companies can advertise and how cigarette packages can look have been challenged by the industry. The 1997 Tobacco Act banned tobacco sponsorship, restricted the way that cigarettes were advertised, and required large warnings on packages.86 Originally brought to the Quebec Superior Court in 2002 where it was upheld entirely, and reversed in part by the Quebec Court of Appeal in 2005, the law was a sweeping reform at the time.87 The government argued that they were dealing with a tobacco epidemic and that the legislation was weak compared to laws in countries like Australia, which

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82. CANADIAN CANCER SOC’Y, supra note 5, at 2.
84. Id. (noting that Canada also prohibits the terms “light” and “mild” from appearing on packages).
85. See supra Part II.C. Take note that many of the sources of the information and reports used here are from Canadian sources, such as the Canadian Cancer Society Report and the Tobacco Labelling Resource Centre facts.
87. Id.
had banned tobacco advertising completely at the time. The manufacturers were okay with some prohibitions on promotion, such as youth-targeted advertising, but objected strenuously to being restricted from advertising to of-age adult smokers.88

In a unanimous decision by the Supreme Court of Canada, the tobacco companies’ argument that the 1997 law violated their right to freedom of expression was dismissed. It was said that the law and corresponding regulations were a reasonable limit that was justifiable under the Canadian Charter of Rights and Freedoms. The Chief Justice even went so far as to say that the key provisions were “constitutional in their entirety,” and “nothing less than a matter of life or death for millions of people who could be affected.”89

This is not the only challenge that Canada has faced however. In 2010, when the proposal to enlarge the graphic warnings from 50% of the total package to 75% was introduced, it was not long before the tobacco industry’s lobbyists got to work. A Canadian news outlet revealed that tobacco executives were lobbying against revised labeling for years prior to the announcement, arguing that “the warnings didn’t leave them enough room for branding,” and that “the government should fight the sale of contraband cigarettes instead.”90 While the lobbying eventually failed, it is yet another example of the same trademark and constitutional arguments being brought by the tobacco companies. In the case of Canada, these arguments remain unpersuasive.

D. Togo

While the previous exploration of countries with picture warnings has showed a significant losing streak for the tobacco companies, there are plenty of instances where the industry has been successful. As chronicled on John Oliver’s HBO show Last Week Tonight that aired in February 2015,91 Philip Morris (and most likely other large international tobacco companies) have successfully intimidated countries out of imposing harsher regulations on tobacco packaging.
Togo is tied for seventh in the world, with Turkey and Turkmenistan, for having laws in place that require 65% of the total cigarette package be covered in warnings.92 However, unlike Turkey and Turkmenistan, these are not graphic pictorial warnings but instead text warnings in the three most common languages in Togo, implemented in September 2014.93 The government of Togo, recognizing that as one of the world’s poorest countries with a high rate of illiteracy that many of its citizens were likely unable to read the warnings, proposed adding graphic images as Australia does.94 However, Philip Morris sent a letter threatening “an incalculable amount of international trade litigation” against Togo should it go forward with the plan to implement graphic warnings on cigarette packages.95 Philip Morris also used language from the opinion of the lone dissenting judge in the Australian High Court decision as an apparent precedent to scare Togo into thinking that they would automatically lose any such suit.96 According to Oliver’s report, Togo, “justifiably terrified by the threat of billion dollar settlements, backed down from a public health law that many people wanted.”97

While Togo may not have implemented the law due apparently to Philip Morris’ actions, Oliver’s show created a stir of negative activity in the media, forcing a response from the company.98 The company wrote, “[w]hile we recognize the tobacco industry is an easy target for comedians, we take seriously the responsibility that comes with selling a product that is an adult choice and is harmful to health.”99 Philip Morris also noted that it complies with thousands of regulations in countries around the world, and is investing billions of dollars into finding products that have the potential to be less harmful for smokers to switch to.100 Finally, the company asserts that “like any other company with a responsibility to its business partners,

92. CANADIAN CANCER SOC’Y, supra note 5, at 2, 8.
93. See id. at 8; Chuck Idelson, Trade Deals Should Come With Their Own Warnings for Public Health, NATIONAL NURSES UNITED BLOG (Feb. 18, 2015), http://www.nationalnursesunited.org/blog/entry/trade-deals-should-come-with-their-own-warnings-for-public-health.
94. See Idelson, supra note 93.
95. See Last Week Tonight With John Oliver, supra note 91; see also Idelson, supra note 93.
96. See Last Week Tonight With John Oliver, supra note 91.
97. See id.; Idelson, supra note 93 (noting that Philip Morris made $80 billion in annual revenues in 2014, while Togo’s GDP for the same year was $4.3 billion).
99. Id.
100. Id.
shareholders and employees, we ask only that laws protecting investments, including trademarks, be equally applied to us.”

Many commentators are still critical of Philip Morris’s response, especially of the “balanced . . . facts on the many topics raised by the program,” calling it a classic non-response where Philip Morris does not address Oliver’s report point by point, but still claims that the report was misleading. What is apparent from the situation in Togo is that tobacco companies have applied tactics like this before to poor, developing countries, and they will likely continue to do so in the name of protecting their intellectual property and ultimately their profits.

In general, these country case studies show a pattern by the tobacco industry of lobbying, legal threats, and domestic and international suits against countries that attempt to either implement graphic warning label laws, or take regulation a step further to implement plain packaging. They utilize many of the same arguments: threats to trade agreements and investments, violations of permitted and free speech, other constitutional arguments like the “taking” of property, and intellectual property arguments, most prominently centered around trademarks and branding. What is key for a country to remember is that these arguments, while they have not yet been defeated in an international court, have been defeated in numerous domestic courts around the world. It should also be remembered that the tide is moving towards graphic warnings in general.

IV. FDA Battles Big Tobacco

In 2009, the Family Smoking Prevention and Tobacco Control Act (“the Act”) was passed by Congress and signed by President Obama. Congress mandated that the FDA had two years to come up with regulations requiring that tobacco warnings contain color graphics. As such, the FDA put out a Notice of Proposed Rulemaking in 2010 to get public responses to thirty-six proposed warning images and text, along with related

101. Id.
102. Id.
105. See supra Part I.
In 2011, the FDA revealed nine rotating graphic color images that were ultimately selected, which would cover the top half of both the front and the back of the package. These labels were intended to go into effect in September 2012, but the tobacco industry stepped in before regulations were ever implemented.\textsuperscript{107}

The FDA was sued in many places, but two of these suits in particular are important.\textsuperscript{108} The results of these two lawsuits has effectively set up the United States to make a decision on what, if any, kind of labels or packaging will be mandated upon cigarettes sold. The larger questions are what will the FDA choose to try, and if it should consider the larger international landscape on graphic warnings and plain packaging.

A. D.C. Circuit

In \textit{R.J. Reynolds Tobacco Co. v. FDA,}\textsuperscript{109} five tobacco companies obtained a preliminary injunction in the District Court for the District of Columbia and ultimately were granted a motion for summary judgment. The challenge was to the 2009 Act, but it specifically alleged that the nine proposed graphic warnings violated the First Amendment. The FDA appealed this ruling to the Court of Appeals for the District of Columbia Circuit.\textsuperscript{110}

Much of what the tobacco companies argued was that the warnings would be cost-prohibitive and would dominate the packaging and damage the promotion of their brands.\textsuperscript{111} The FDA argued that communicating the health information about cigarettes effectively would help more people to stop smoking.\textsuperscript{112} What was considered “effective,” at least from the standpoint of the FDA, was having graphic picture and text warnings.

\begin{enumerate}
\item[106.] R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1209 (D.C. Cir. 2012); see Chris Morran, \textit{Will the FDA Ever Get Around to New Warning Labels For Cigarettes}, CONSUMERIST (Feb. 18, 2015), http://consumerist.com/2015/02/18/will-the-fda-ever-get-around-to-new-warning-labels-for-cigarettes.
\item[107.] Morran, supra note 106.
\item[108.] Another suit, besides the ones discussed at Part IV.A, B, infra, came up in the Second Circuit where a provision for graphic advertising wherever tobacco products are sold was struck down.
\item[110.] \textit{R.J. Reynolds}, 696 F.3d at 1208.
\item[112.] \textit{Id.}
\end{enumerate}
The Court analyzed, under an “intermediate scrutiny” standard, whether or not the interest that the FDA had in these graphic warnings was substantial, and if the regulation directly advanced that interest, and if the regulation was not more extensive than necessary to serve that interest. The Court determined that the “FDA [had] not provided a shred of evidence – much less the ‘substantial evidence’ required . . . showing that the graphic warnings will ‘directly advance’ its interest in reducing the number of Americans who smoke.” The Court also did not find the argument about why these nine graphic warnings would be more effective convincing either. The majority said:

Both the statute and the Rule offer a barometer for assessing the effectiveness of the graphic warnings – the degree to which they encourage current smokers to quit and dissuade would-be smokers from taking up the habit. As such, the FDA’s interest in “effectively communicating” the health risks of smoking is merely a description of the means by which it plans to accomplish its goal of reducing smoking rates, and not an independent interest capable of sustaining the Rule.

The majority was ultimately not convinced that these nine specific graphic warnings would get current smokers to quit and dissuade those who were thinking about it, or at least it was not convinced enough to take away the tobacco companies’ First Amendment right to commercial speech free of restriction. The Court vacated the graphic warning requirements and remanded to the FDA, also vacating the injunction issued by the District Court to allow the FDA to reformulate regulations.

Judge Rogers in his dissent believed that the majority applied the wrong level of First-Amendment scrutiny to the commercial speech of the tobacco companies, and that even if the intermediate level of scrutiny was correct, that the FDA should still have been able to go forward with this regulation. He believed that the goal of the FDA was to effectively convey the negative health consequences of smoking on cigarette packages

113. R.J. Reynolds, 696 F.3d at 1217-18.
114. Id. at 1219 (italics omitted) (reasoning that the studies provided by the FDA showing that Canadian and Australian youth smokers thought about quitting based on cigarette pack warnings, there was no evidence that such warnings “directly caused a material decrease in smoking rates in any of the countries that now require them.”).
115. Id. at 1221 (citations omitted) (“The government’s attempt to reformulate its interest as purely informational is unconvincing, as an interest in ‘effective’ communication is too vague to stand on its own. Indeed, the government’s chosen buzzwords, which it reiterates through the rulemaking, prompt an obvious question: ‘effective’ in what sense?”).
116. Id. at 1222.
117. Id. at 1222-23 (Rogers, J., dissenting).
and in advertising, and that the majority disregarded that the tobacco companies have a history of deceptive advertising with their products.\textsuperscript{118}

Interestingly enough, the FDA chose not to appeal this ruling with a petition of certiorari to the Supreme Court. Ultimately, this case did not rule that the entire 2009 Act would have to be thrown out, but that the nine warnings specifically chosen by the FDA during its Rulemaking violated the tobacco companies’ commercial free speech. This meant that the FDA could still regulate, but could not use the nine graphic warnings it originally planned to use.

B. 6th Circuit

In \textit{Discount Tobacco City & Lottery, Inc. v. U.S.}, several tobacco companies brought suit to a Kentucky District Court challenging the 2009 Act, seeking a preliminary injunction and a judgment declaring the provisions of the law unconstitutional.\textsuperscript{119} The tobacco companies challenged five provisions of the Act, including that a significant portion of the display would go to the health warnings.\textsuperscript{120} The companies claimed that these provisions “violate[d] their free speech rights under the First Amendment, constitute[d] an unlawful taking under the Fifth Amendment, and [were] an infringement on their Fifth Amendment due process rights.”\textsuperscript{121} Both parties filed motions for summary judgment with the District Court, and the court mostly granted the motion for the

\begin{itemize}
\item \textsuperscript{118} \textit{Id.} (internal quotations, citations, and markings omitted) (“[T]his court has recognized that the government’s interest in preventing consumer fraud/confusion may well take on added importance in the context of a product that can affect the public’s health. Tobacco products necessarily affect the public health, and to a significant degree. Unlike other consumer products, tobacco products are dangerous to health when used in the manner prescribed. . . . Thus, the government’s informational interest takes on added importance, and merits independent consideration.”).
\item \textsuperscript{119} Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512 (W.D. Ky. 2009), \textit{aff’d in part, rev’d in part sub. nom. Discount Tobacco City & Lottery, Inc. v. United States}, 674 F.3d 509, 522 (6th Cir. 2012).
\item \textsuperscript{120} Discount Tobacco, 674 F.3d at 520 (listing the other five challenges to the act, which includes: restrictions on the commercial marketing of modified risk tobacco products, ban on statements that at all convey that tobacco products are approved or safer due to regulation by the FDA, restricting most advertising of tobacco products to black text on white background for most media, and bar on the distribution of free samples of tobacco products in most locations, sponsorship of athletic or social events, branded merchandising of any non-tobacco product, and distributions of free items in consideration of a tobacco purchase).
\item \textsuperscript{121} \textit{Id. at 521.}
\end{itemize}
government.  

Many of the arguments made by each side in front of the Sixth Circuit were similar to the arguments made in front of the D.C. Circuit. The tobacco companies argued that the “scale and intrusiveness” of the warning proposed by the Act would far outweigh any legitimate interest in conveying information to prevent the confusion of consumers, as most consumers “already overestimate these health risks.” They also argued that the warnings are unduly burdensome because the companies’ speech is dominated by the warnings, and that the requirement for graphic images extends beyond mere factual warnings to the point of forcing the companies to market “that tobacco use is socially unacceptable.” In essence, the tobacco companies believe that the new warnings are far beyond necessary to convey facts that the existing warnings already convey and that consumers already know, so they are unconstitutional.

The government counters these arguments that consumers are not universally aware of the dangers of tobacco use, especially adolescents. The point of the warning labels is not to force the industry to market a message that stigmatizes its own product for the government on its own dime, but merely making sure that the consumers see the health risk warnings right away. Finally, the government argued that these warnings would not be burdensome on the speech of the tobacco companies because they still get half of cigarette packs for their own branding.

The court ultimately concludes that, like the D.C. Circuit, strict scrutiny is not the correct analysis here, but that the same intermediate scrutiny standard should be used to judge the regulation of commercial speech. Where the court differs from the D.C. Circuit is that it considers

122. Id. (granting summary judgment to the tobacco companies on the provisions that “the ban on color and graphics in advertising and the ban on statements implying that tobacco products are safer due to FDA regulation violated their First Amendment speech rights.”).
123. Id. at 553-54.
124. See supra Part IV.A-B.
125. Discount Tobacco, 674 F.3d at 524.
126. Id. at 524-25.
127. Id. at 525.
128. Id.
129. Id.
130. Id. (pointing out also that 70% of smokeless tobacco packages and 80% of advertisements remain open for the tobacco companies’ “speech,” or branding and advertising).
131. Commercial speech that is non-misleading and deserves an intermediate level of scrutiny is governed by Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of NY, 447 U.S. 557 (1980), as was used in the D.C. Circuit case, supra Part IV.A.
two kinds of commercial speech: non-misleading commercial speech and commercial speech that is false, deceptive, or misleading. The test that is applied here determines whether a restriction, or disclosure requirement, is unconstitutional, and this test can apply to commercial speech that is inherently or potentially misleading.\(^\text{132}\) In the case of misleading or potentially misleading commercial speech, “an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers and [are] not unjustified or unduly burdensome.”\(^\text{133}\) This test provides a lower burden for the government in terms of regulating commercial speech, and the court is persuaded that the tobacco industry’s history of misleading advertising and messaging allows for this lower-burden test. Ultimately, the court affirmed most of the decision of the District Court, and held that the Act’s requirement that tobacco packaging and advertising include color graphic and some non-graphic warning labels was constitutional under the First Amendment.\(^\text{134}\)

The tobacco companies appealed this ruling up to the Supreme Court. In April 2013, the Supreme Court declined to hear the appeal, letting the Sixth Circuit decision stand.\(^\text{135}\) What this means, in terms of what actions the FDA can and cannot take based on these major two lawsuits, is that the FDA can move forward with developing new graphic cigarette warnings that comply with the 2009 Act and the judicial rulings.\(^\text{136}\) The Sixth Circuit ruling upheld the requirement of the Act for graphic warnings, but the nine specific warnings that were supposed to be enacted were struck down by the D.C. Circuit, meaning that the FDA can go forward with creating new graphic warnings under the existing law.\(^\text{137}\)

\(^{132}\) Discount Tobacco, 674 F.3d at 523-24.

\(^{133}\) Id. at 524 (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651) (quotations omitted).

\(^{134}\) Id. at 531. The conclusion of the case also affirmed all other determinations of the district court, with the exception of the court’s granting of summary judgment for the tobacco companies on the unconstitutionality of tobacco companies’ claiming FDA regulation somehow makes cigarettes safer. Id. at 551.


\(^{136}\) Id.

\(^{137}\) Id.
C. The U.S. Moving Forward – Recommendations

The FDA was clear to create new regulations for graphic warnings based on the 2009 Act and subsequent lawsuit decisions starting in late April 2013. However, three years later there seems to be no movement from the agency in terms of proposing rulemaking or new graphic warnings for the public to examine. In considering the possible options for what the FDA can hope to accomplish, assuming it moves forward anytime soon, it is important to keep the international backdrop in mind of how and what the tobacco industry may challenge and how the FDA may fail or succeed in combating these challenges.

The challenges that can be expected to any new tobacco regulation includes the trademark challenges as discussed, as well as constitutional challenges under the First Amendment and the Takings Clause of the Fifth Amendment. Unlike Australia, the United States does protect commercial speech under the First Amendment more broadly. If a government regulation is curtailing commercial speech, as the FDA would be doing by regulating how much of a tobacco company’s trademarked brand is visible on the package, it must be directly advancing its purpose for the regulation and must do so in a way that is not excessive, with the means reasonably fitting the ends being used to promote that purpose.\(^{138}\) Given how the Supreme Court has expanded protections for commercial speech under the First Amendment, especially in regard to regulations targeting “vices” like alcohol and cigarettes, regulation of percentage of cigarette packages dedicated to branding versus warnings would have to tread very carefully.\(^{139}\) The regulation could not be too broad, and would have to reasonably fit the purpose of promoting public health and awareness of the danger of cigarettes.

Australia’s High Court also considered if plain packaging would constitute a taking under the Constitution. The United States has a similar

\(^{138}\) See generally Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (using a four-part test to analyze regulations of commercial speech, where the court determines (1) whether the expression is protected by the First Amendment, (2) whether the asserted governmental interest is substantial, (3) whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than necessary to serve that interest) (citing Central Hudson Gas & Electric Corp. v. Public Service Commission, 507 U.S. 761, 770-71 (1990). See also Florida Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995) (explaining that in order to determine the fourth prong of the Central Hudson commercial speech test, there must be a reasonable fit between the legislature’s ends and the means chosen to accomplish those ends, or a means narrowly tailored to achieve the desired objective).

clause in its Constitution, which has been interpreted to allow the federal government and the states to use the power of eminent domain to take private property for “public use.” If this is done, the owner must be paid just compensation for what is taken. However, the Supreme Court and other courts in the United States have not seriously tested the application of the takings clause to intellectual property. 140 This is likely because the analysis for tangible property is already uncertain, and becomes infinitely more complicated when considering intangible property like trademarks. 141 The High Court in Australia did not view plain packaging as a taking of property, however it is unclear whether this sort of constitutional challenge by Big Tobacco, apart from any First Amendment challenges, would have merit in an American courtroom. 142 These trademarks owned by the various tobacco companies are longstanding, and are valuable intangible property, but case law is unclear on whether regulation limiting the space for presenting the trademarks would go so far as to constitute a taking.

In terms of general recommendations, it seems advisable that the United States, via the FDA, continues moving forward with graphic warnings rather than going straight to plain packaging. Given that the United States is one of the countries that currently only has text health warnings covering a portion of cigarette packages, it may be a more natural process for the FDA to continue promulgating regulations that require a certain amount of graphic warnings while leaving a portion of the package for a tobacco company’s branding. It is also advisable that the FDA not try and increase the percentage of warnings on the package that was called for the by the Act and upheld by the Sixth Circuit. This way, the tobacco companies would have less of an argument for the general constitutionality of the kind or amount of warnings, nor would they likely be able to bring a successful trademark claim. It would also allow for the United States to have some regulations successfully on the books, should it ever want to follow the world trend for graphic picture warnings taking up a larger percentage of the pack or even plain packaging.

The only challenge with serious merit from tobacco companies, based on the D.C. and Sixth Circuit opinions, would be regarding the content of the warnings themselves. For this, it is instructive to look to how other countries have fared in lawsuits from the tobacco companies, especially those common-law countries with similar legal structures and principles to

140. Id. (explaining that “takings cases present serious interpretive questions,” and noting many prominent cases deal with real or personal property).
142. See supra 7-8, n.29.
the United States. Thailand and Uruguay provide extreme examples of graphic images that have been upheld, but these are considered progressive world leaders on such regulations. It may be helpful for the United States to try and implement images like those used in Canada currently or Australia prior to plain packaging, keeping in mind that the percentage of the package covered by the warnings would be 50% of the total package area.  

One caveat to the ideal recommendations above is the likelihood that this will remain on the back burner at the FDA for the foreseeable future. A commentator from Consumerist contacted the FDA to ask about timelines and plans the agency may have to move forward with graphic warnings following the Supreme Court’s refusal to hear the Sixth Circuit appeal by the tobacco companies. The spokesperson only said, “[T]he agency will undertake research to support a new rulemaking consistent with [the 2009 Act].” The commentator pointed out that the phrase “undertake research” means that no research has begun yet, and also that when spokesperson was pressed for general timelines for additional rulemakings that he “could not provide any additional information.” This does not bode well for expectations that the FDA will act anytime soon. It also is feasible that the tobacco industry is utilizing the full reach of its financial sway to conduct lobbying efforts to put off a rulemaking as long as possible. While lobbying by the industry may have reached new heights for many of the other countries implementing harsher regulations, it is a well-oiled machine in American politics and is likely to attempt to stave off regulation as long as possible.

V. CONCLUSION

It is obvious that the tobacco industry has vast resources and influence, and is unlikely to give up fighting against the constant regulations thrown at it internationally any time soon. As such, the large international tobacco companies hire brilliant legal minds to come up with every possible challenge to these regulations in each country in order to stave off regulation that will hurt their brands and profits. One such challenge that has been a favorite to use against graphic picture warnings and plain

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143. See TOBACCO LABELLING RESOURCE CTR., http://www.tobaccolabels.ca (last visited Apr. 22, 2015) (making available the dates of when different countries implemented picture warnings around the world on tobacco products, as well as pictures of the specific warning labels approved, so to view each country listed above, merely search them from the main page).
144. Morran, supra note 106.
145. Id.
packaging worldwide is using trademark law. However, this use of trademark law is more for brand protection, rather than the consumer confusion and unfair competition principles that provide foundation for the law in the United States and elsewhere.

While it may be some time before the United States tobacco market needs to directly confront graphic warning regulation from the FDA, the FDA can learn lessons from legal struggles around the world for crafting new regulations to comply with the 2009 Family Smoking Prevention and Tobacco Control Act. Trademark arguments of the tobacco companies can come in various forms, but may often be seen as either takings of intellectual property by the government (especially in the plain packaging context), or as being harmful to the trademarks directly by creating incentives for counterfeiting and tobacco “black markets,” as well as consumer confusion. The FDA can avoid these arguments by following the lead of countries like Australia, and putting forth similar arguments to those used by other governments. The FDA should also stick with the warnings prescribed in the 2009 Act in order to avoid further constitutional challenges, and should consider what other countries like Canada have been successful with as far as specific content for the graphic warnings. If the FDA follows these recommendations when it eventually conducts additional research and proposes a new rulemaking, it is much less likely to fail when fighting the inevitable challenges from the tobacco industry.
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