

# Cablefax Daily™

Thursday — November 14, 2019

What the Industry Reads First

Volume 30 / No. 220

## High Court: SCOTUS Hears Arguments on *Byron Allen v. Comcast*

Cable had its time in court Wednesday as the **US Supreme Court** heard oral arguments in **Entertainment Studios Networks [ESN]** founder *Byron Allen*'s racial discrimination suit against **Comcast**. The court's decision, however, could have effects that stretch far beyond carriage agreements by establishing standards for future racial discrimination cases. Allen was present in the room as the justices weighed the legal threshold a plaintiff must meet in order to bring a racial discrimination case to trial. At the heart of the morning's proceedings was Section 1981 of the Civil Rights Act of 1866, which grants all individuals the same rights and benefits "as enjoyed by white citizens" when negotiating contracts. Comcast petitioned SCOTUS to take a look after the Ninth Circuit Court of Appeals found that racial discrimination only needed to be a motivating factor, rather than the determining factor, in Comcast's decision not to carry Entertainment Studios' networks for a claim to proceed from the pleading stage to a trial. Comcast's team fought for the "but-for" test, which would establish that but for racial animus, the operator would have signed a deal with Allen's company, putting the onus on ESN to show discrimination before the case proceeded. Justice *Sonia Sotomayor* questioned *Morgan Ratner*, a representative from the Trump Administration arguing for Comcast's case, on why a but-for test should be instituted before a trial based on the language in the statute. "What I see is a statute that says all citizens must have the same right... and we've also said the civil rights law was designed to eliminate all race discrimination," Sotomayor said. "I'm not sure how we can square those two things with a but-for." Justice *Stephen Breyer* asked why it mattered what test was used at the time of pleading. "They have some evidence, and the evidence is, on information and belief, we think that the defendant here used race improperly to deny us the contract... And who cares whether they say it was a motivating factor or whether they say it was a but-for?" Breyer said. Allen counsel *Erwin Chemerinsky*, Justice *Neil Gorsuch* and Justice *Elena Kagan* battled over the effects of SCOTUS standing by the motivating factor standard. Chemerinsky argued that a party could plead under the motivating factor standard, but would ultimately need to provide enough proof to pass the but-for test to succeed at trial. If they accepted Chemerinsky's argument, the justices said they would still need to overturn the Ninth Circuit because the lower court found that motivating factor would be enough for a party to ultimately win during a trial rather than move to trial. Gorsuch pushed Chemerinsky to give a yes or no answer on whether the Ninth Circuit would need to be over-

**CONNECTED WORLD,  
CONNECTED SERVICE  
TECHNICIANS**



**LEARN MORE**



**CSG FIELD SERVICE MANAGEMENT**

Cablefax Daily (ISSN 1069-6644) is published daily by Access Intelligence, LLC ● www.cablefax.com ● 301.354.2101 ● Editorial Director: Amy Maclean, 301.354.1760, amaclean@accessintel.com ● Publisher: Michael Grebb, 323.380.6263, mgrebb@accessintel.com ● Senior Editor: Sara Winegardner, 301.354.1701, swinegardner@accessintel.com ● Associate Editor: Mollie Cahillane, 212.621.4951, mcahillane@accessintel.com ● Acct. Exec: Olivia Murray, 301.354.2010, omurray@accessintel.com ● Director of Marketing: Kate Schaeffer, kschaeffer@accessintel.com ● Prod. Mgr: Joann Fato, jfato@accessintel.com ● Kerry Smith, Divisional President, Marketing & Media Group, ksmith@accessintel.com ● Group Subs or Subscription Questions, Client Services: 301.354.2101, clientservices@accessintel.com ● Annual subscription price: \$1,749.00/year ● Access Intelligence, LLC, 9211 Corporate Blvd., 4th Floor, Rockville, MD 20850

turned, but Allen’s counsel talked around the point. “I’ve got it. We’re not going to get an answer,” Gorsuch said, ending the exchange. The action wasn’t all happening inside the courtroom. **WUSA9 reported** protesters that were part of the #Keep-Starz campaign were rallying outside the high court to call out the operator for dropping minority programming, including plans to remove **Starz** from packages next month. Rallies were also held outside of Comcast’s offices in Philadelphia and Chicago. According to Allen, SCOTUS’s decision will mark the way forward for his allegations against Comcast as well as similar claims he’s raised against **Charter**. Charter also has filed a petition for SCOTUS to review the Ninth Circuit ruling. Allen was optimistic about the chances that SCOTUS would side with him and expects an opinion to come any time between December and April. “We did extremely well and I think we’re going to prevail,” Allen told **CFX**. “This is history.” Comcast was similarly optimistic the high court would rule in its favor and bring the case to an end. “As today’s Supreme Court hearing demonstrated, this case centers on a narrow, technical point of law that will not in any way lessen the nation’s civil rights laws,” a spokesperson said, adding that the company has a strong civil rights and diversity record. “Comcast believes that the civil rights laws are an essential tool for protecting the rights of African Americans and other diverse communities —and this case will not change those protections. Our advocacy was limited to urging that section 1981 in our case be interpreted the same way it has been interpreted for decades across the country.”

**STELAR Moving Ahead in Commerce: Senate Commerce** postponed Wednesday a markup of legislation to extend the Satellite TV Extension and Localism Act Reauthorization (STELAR) for another five years, with chmn *Roger Wicker* (R-MS) saying he’s heard from a “large number” of committee members who are interested in addressing additional video reforms as part of the legislation. As such, he’s postponing consideration of his STAR Act, a clean, five-year reauthorization, for another date in the coming weeks. **House Commerce** is ready to tackle STELAR Thursday, with **Communications** subcmte chmn *Mike Doyle* (D-PA) introducing a bill that would address some video reform in addition to extending the satellite distant signal license and retrans good faith provision for another five years. The legislation would require TV stations to negotiate with buying groups for smaller MVPDs, such as **NCTC**. It also would force MVPDs, ISPs and phone providers (wireless and fixed) to include all charges in the prices they advertise and bill for services. **Consumer Reports** has been pushing for more transparency in billing for years. On the Senate side, it was expected that Sen *Ed Markey* (D-MA) would have offered an amendment modeled after his TRUE Fees Act had the committee proceeded with its STELAR markup. Markey’s planned amendment would have gone a step further by allowing consumers to cancel their contracts without early termination fees if the provider increases company-imposed fees. It is slated to be a jam-packed House Commerce markup that includes bills on broadband mapping and spectrum.

**TELL US WHAT ELSE WE SHOULD KNOW ABOUT YOUR WORK CULTURE.**

Cablefax is seeking nominations for The 2020 Work Culture List.

This recognition program pulls back the curtain to give a glimpse at the culture behind the company names, shining a light on the magic that happens when work enhances your life.

**WE LOOK FORWARD TO YOUR SUBMISSION!**

Free to Nominate

Deadline: December 13, 2019

[www.CFXWorkCulture.com](http://www.CFXWorkCulture.com)



**Broadcasters Respond to Judiciary on STELAR:** Meanwhile, the Big 4 got back to **Senate Judiciary** chmn *Lindsey Graham* (R-SC) this week on their plans should STELAR expire at year-end. With broadcasters pushing for the bill to sunset, it's no surprise they were all on board with easing the transition. "The satellite legislation set to expire on Dec 31 is a relic of a bygone era when satellite dishes consumed entire backyards and technological limitations prevented carriage of local broadcast signals in all 210 television markets. Fortunately, video delivery technology has advanced far beyond where most could have imagined in 1988, eliminating the need for this law's continuation," wrote *Daniel O'Brien*, **Fox** evp & head of govt relations. Graham had asked the broadcasters if they were willing to provide a one-year license to satellite providers for their shows to ensure viewers don't lose programming. They all committed to finding a solution to provide network programming during an interim period while DirecTV takes the steps needed to provide locals in all 210 DMAs (DISH already offers locals in the markets; DirecTV doesn't in 12 markets). They also committed to finding a solution to address markets that aren't currently served by a network affiliate, with **CBS** noting that Zanesville, OH, is the only market that currently doesn't have a local CBS broadcast affiliate. **NBC** described the number of markets without an NBC local affil as "very small." **ABC** had the briefest response, ultimately concluding: "ABC's answer to each of the questions posed in your letter is 'yes.'"

**Disney+ Draws Over 10mln Sign-Ups:** Despite some technical glitches during Tuesday's launch, **Disney** announced its new streaming service **Disney+** has achieved more than 10mln sign-ups since launch. Shares closed up more than 7% Wednesday. The company described the sign-ups as "extraordinary consumer demand," but that doesn't necessarily mean it has 10mln paying subs, given that it's offering a 7-day free trial and 12-months free through **Verizon**. Regardless, the streamer is well on its way to its projected 60-90mln subs by 2024, and research firm **Apptopia** estimates the Disney+ app has been downloaded 3.2mln times on iOS and Android. Don't expect another streaming or subscriber update anytime soon, however. "Moving forward, there are no plans to release Disney+ subscriber data outside of The Walt Disney Company's quarterly earnings calls," Disney said.

**Pay-TV Providers Report High 3Q19 Losses:** Pay-TV providers lost 1.74mln net video subscribers in 3Q of this year, compared to a net loss of about 975K subscribers in 3Q18. **DirecTV** had record net losses for the sixth consecutive quarter (1.073mln) while **DISH** had fewer net losses (66K) than in any quarter since 3Q14 (it actually had a gain when **Sling** subs are accounted for), according to **Leichtman Research Group**. The top seven cable companies lost about 410K video subs, compared to about 245K a year ago. **AT&T** had a net loss of about 1.37mln subscribers across DirecTV, **AT&T U-verse** and **AT&T Now**, up from its loss of 295K subs in 3Q18. **Comcast** lost 238K subs, followed by **Charter** with 75K. **Atlantic Broadband** was the only traditional MVPD to report a gain, adding 5,294 subs. Speaking of Atlantic Broadband, the company just opened a new office in King William County, VA, and will now provide about 2.7K homes and businesses with access to 1Gig internet, video, and advanced phone services for the first time.

**CuriosityStream Expanding Globally:** **CuriosityStream** is expanding its international reach with distribution partnerships in Africa, New Zealand and the Bahamas. **MultiChoice** launches CuriosityStream on its DStv platform in Africa on Nov 21, **Sky TV NZ** on its streaming platform **Neon** and on on-demand service on Sky TV Dec 1, and **Cable Bahamas** already debuted it on Nov 11.

**Pluto Launches Three CBS Channels:** **Pluto TV** and **CBS Interactive** teamed up to launch three additional channels on the free streaming service, beginning Wednesday. **ET Live** and local news streams **CBSN New York** and **CBSN Los Angeles** join the already existing CBS channels on Pluto: **CBSN** and **CNET**.

**Ratings:** **UPtv** has seen over 7mln viewers this holiday season with its Christmas movies. "Christmas with a Prince: Becoming Royal" is now the net's No 1 premiere movie title among W25-54 2019, and saw over 1mln premiere night viewers on Nov 3. -- Tuesday's series premiere of **History's** "Kings of Pain" saw 924K total viewers and was the net's second best non-fiction series premiere of 2019 among A25-54 (461K) and A18-49 (344K).

**Programming:** **Netflix** and **Nickelodeon** teamed up for a multi-year output deal to produce original animated films and TV series based on Nick characters and new IP. -- **The Weather Channel** will premiere "Meltdown," a one-hour special on the rapid meltdown of glaciers on Nov 17, 10pm. -- **BET** picked up "Games People Play" for Season 2. The series first premiered in April. -- **Showtime Networks** and **A24 Films** entered an exclusive output agreement where films released theatrically by A24 through Nov 1, 2022 will air across Showtime, **The Movie Channel** and **Flix**, as well as on Showtime multiplex channels and streaming services.

**People:** **Bleacher Report** named *Rachel Brill* svp/gm of **B/R Studio**. She is exiting her current role as svp, head of original unscripted programming for **EPIX**.

# Think about that for a minute...

## Occam's Razor

Commentary by Steve Effros

There's a tendency in this column to dive down into the "weeds," as it were, to try to explain complex issues of telecommunications law, policy and technology. There's a simple reason for that; if you don't understand the often simple details, you sure won't understand the hyperbolic lobbying and inadequate consumer press explanations!



There are times, however, when it's just as important to take a look at things from "30,000 feet." Step back and look at the whole scene and see if there are some things that make more sense that way. I'd suggest that such an approach is needed when thinking about the press generated by a new book by NYU economist Thomas Philippon, "The Great Reversal: How America Gave Up on Free Markets." According to the reviews, Philippon's basic premise is that the huge new companies that dominate many markets (think FAANG) don't need to invest as much, can siphon off excess profits for shareholders, and display general indifference to their customers because of a lack of competition.

One example cited; European Internet access prices, he reportedly notes, average about \$35 per month. The typical American price is close to double that. This goes along with the general observation that US prices are on average about 7 to 8 percent higher than in Europe. (An aside; try buying a beer in Stockholm and you'll have a very different perception of that reality!) Anyway, the theory here is that consolidation has resulted in a lack of competition that in turn leads to all sorts of other bad stuff like lower wages, lower investment, lower productivity, etc.

The significance of this "high level" debate, which results in folks like Philippon suggesting that part of the problem is allowing consolidation through lax enforcement of the antitrust laws, is that the business we are in is going to be ground zero for figuring out new potential "fixes." Break up

Amazon and Google? Disallow the merger of T-Mobile and Sprint? Enforce new regulations on Facebook and Twitter because of their overwhelming network effect? All "remedies" now being talked about, and some are likely to be tried.

I have long argued that simplistic characterizations of the problems lead to bad conclusions. Comparing, for instance, the "speed" of the internet in South Korea to the average speed offered in the US is a false analysis. The same is true of capital expenditures when you consider the land-mass and population density distribution of the US to build broadband versus Europe. As to "competition," we have a fundamental problem; competition of what? Are you going to analyze Comcast as a "cable" company, a "broadband" company, a "media" company? In each it has different levels of competition. The antitrust laws were never designed to deal with this complexity.

If there are problems that need to be addressed, and I think there are many, I would suggest that there are multiple problems on multiple levels. Our existing laws can't address all those problems because they cross all sorts of current legal boundaries as to "relevant markets" and competition among businesses versus claims of damage to consumers, for instance.

Rather, I'd suggest an "Occam's Razor" approach; the simplest answer is often the best. Maybe we should start out simply looking at size. Amazon could buy Whole Foods because it has so much money. Size. Apple is sitting on billions of dollars and can buy just about anything. Size. Google? They're already buying just about everything! We need not get into the weeds. Let's consider limiting size.

T:202-630-2099  
steve@effros.com

*(Steve Effros was President of CATA for 23 years and is now an advisor and consultant to the cable industry. His views do not necessarily reflect the views of Cablefax.)*

**Cablefax**  
MOST POWERFUL WOMEN *Awards Luncheon*

**Thursday, December 5 | 11am - 2pm | 583 PARK Avenue**

Join us as we salute the women who have made their mark on the industry with their leadership and innovation.

**Register Your Team at [www.CablefaxWomen.com](http://www.CablefaxWomen.com)**