ORIGINAL

EX PARTE OR LATE FILED

Tribal Voice
600 17th Street, Suite 2500 South
Denver, CO 80202

RECEIVED
JUL 21 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 21, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Ex Parte Presentation
America Online, Inc. and Time Warner, Inc. Applications for Transfer of Control

CS Docket No. 00-30

Dear Ms. Salas:

Pursuant to section 1.1206(b)(1) of the Commission's rules, I am attaching two copies of a White Paper on instant messaging, responding to the June 26, 2000, filing by AOL and Time Warner in the above-captioned docket, that is being provided today today to the Commission personnel listed below. Commission personnel are also being served with a copy of this letter.

A copy of the letter and the attachment is also being provided to the International Transcription Service, as required by Public Notice DA 00-689.

Sincerely,

Ross Bagully

Ross Bagully
President and CEO

cc: Hon. William E. Kennard
Hon. Susan Ness
Hon. Michael Powell
Hon. Harold Furchtgott-Roth
Hon. Gloria Tristani
Ms. Deborah Lathen, CSB
Ms. Royce Dickens, CSB
Ms. Linda Senecal, CSB
Mr. James Bird, OGC

No. of Copies rec'd 0+2
List A B C D E

PressRelease

Contact:
Adrienne Woodward
202-326-1709
adriennew@ms.edelman.com

Leading IM providers release white paper on AOL submissions to Internet standards body and FCC

Washington, DC (July 21, 2000)- Today, leading members of the IM industry released a white paper that analyzes recent submissions by AOL to the Internet Engineering Task Force (IETF) and the Federal Communications Commission (FCC). The purpose of the paper was to clarify a number of issues related to the current public debate over whether AOL, which controls 90% of the Instant Messaging market, can continue to block consumers who use competitive systems from communicating with their members.

In its submissions, AOL justified its continuing blocking primarily on two grounds: first, such blocking is necessary to protect the privacy and security of its members; and second, it is working in good faith to "fast-track" interoperability. The white paper examined both of these claims and finds AOL's arguments to be completely unsupported.

The white paper reviewed the privacy and security argument and finds that AOL has inappropriately used security and privacy concerns as justification for blocking open communication.

- While AOL invoked privacy and security concerns, nowhere in its submissions does it demonstrate how interoperability contributes to the problem.
- As the competitors who AOL has blocked used AOL's own protocols, the competitors' systems were at least as private and secure as AOL's own services.
- In fact, competitors to AOL had achieved more private and secure IM systems. However, consumers had no choice to use these more secure programs if they want to communicate with AOL' s members.
- AOL's invocation of the technical difficulties of addressing the privacy and security issues was in marked contrast to its position on the technical difficulties inherent in other policy arguments. For example, in the cable access debate AOL CEO Steve Case said the technical issues could be solved "quickly and inexpensively." Here, AOL officials keep saying it's a difficult problem to solve, even though a number of companies have already demonstrated that interoperability can work.

-more-

The white paper concluded on this issue "there is not, and there need not be, any trade-off between IM interoperability on the one hand and privacy and security on the other hand."

The white paper also reviewed AOL's argument that it is working in good faith to work toward interoperability and again found the facts indicate the opposite.

- In July of 1999, AOL promised to "fast-track" its effort with the IETF to reach an open standard. In the subsequent year, the number of submissions by AOL officials to the IETF was zero.
- In June of 2000, after government officials began to express concern about AOL's blocking of competitors' access, AOL filed a submission to the IETF. But rather than provide protocols that would enable interoperability, the AOL submission merely restates the questions that need to be addressed to achieve interoperability.
- The AOL submission to the IETF did not include any timetable in terms of reaching an open standard and interoperability.

The paper concluded that it is critical for continued growth and innovation in instant messaging that open standards and interoperability be achieved as quickly as possible.

Companies signing the white paper were: Alibiris, Activate, CarParts.com Excite@Home, iCAST, MSN, MyWay.com, Odigo, OneCore, Qualcomm, Red Gorilla, Talk City, Tribal Voice, Vicinity, Wynd Communications and yesmail.com.

###

Final-July 21, 2000

INDUSTRY WHITE PAPER ON AOL'S SUBMISSIONS TO THE IETF AND THE FCC

Recently, AOL made submissions to the Internet Engineering Task Force (IETF)[1] and to the Federal Communications Commission (FCC)[2] regarding AOL's position on a number of issues related to instant messaging ("IM").

The signatories to this white paper are pleased that AOL agrees in principle that there ought to be interoperability between all IM systems. Further, we are pleased that AOL, contrary to some of its public comments, now appears to concede that interoperability ought to be based on open standards, rather than a system in which one licensor controls the IM market. We believe that interoperability and open standards ought to be achieved sooner, rather than later, and wish to see AOL take more active steps toward this goal.

Unfortunately, however, AOL's submissions do not conclude the debate over interoperability in IM. To the contrary, neither AOL's IETF submission nor its FCC submission demonstrate that AOL is committed to achieving these goals of interoperability or open standards in an expeditious manner. Rather than advancing the debate in pursuit of these goals, providing answers to existing issues, or proposing specific protocols to solve the problems at hand, the submissions only reiterate known issues and appear to be primarily focused on slowing down current interoperability efforts.

The purpose of this white paper is to review AOL's recent submissions in more detail so as to better inform the debate over how best to accelerate the establishment of open standards and interoperability among all IM providers.

EXECUTIVE SUMMARY

IM will shape the future of all communications. Already one of the fastest growing services on the Internet, IM has tremendous potential to grow and to stimulate growth throughout the Internet and the economy.

---

[1] E. Aoki, A. Wick, "The IMX Architecture, Interoperability with America Online's IM Services," June 15, 2000, www.ietf.org/internet-drafts/draft-aol-imx-00.txt ("AOL IETF Submission").

[2] Letter of AOL/Time Warner, dated June 26, 2000 to Royce Dickens, Deputy Chief, Policy and Rules Division, Cable Services Bureau, Federal Communications Commission providing a response to June 9, 2000 Request for Further Information, In the Matter of Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control, CS Docket No. 00-30.

But for IM to achieve its true potential, there must be interoperability between providers. With a commanding 90% share of the IM market, AOL is effectively controlling the technology's future. If AOL resists interoperability, the growth potential of IM will be severely hurt.

A year ago, when government officials first expressed concerns about AOL's behavior, AOL promised to "fast track" its efforts toward interoperability. After more recent public scrutiny, AOL has come forward with submissions to the IETF and the FCC on the technical feasibility of interoperability and other issues.

In these submissions, AOL offers two major defenses for the fact that it continues to block consumers who use competing IM systems: that blocking is necessary to protect their users' privacy and security and that they are actively pursuing an interoperability solution. Upon examination, both defenses fail.

Contrary to AOL's position, there is not, and there need not be, any trade-off between IM interoperability on the one hand and privacy and security on the other. IM interoperability has already been achieved without jeopardizing subscriber security and privacy. IM providers already offer substantial security and privacy safeguards by utilizing encryption, masking of subscriber Internet addresses, and ongoing monitoring and oversight to protect security and privacy.

There is no evidence that AOL users are at risk. AOL has not demonstrated how interoperability, already accomplished by a number of companies until blocked by AOL, has in any manner threatened the privacy and security of its members.

AOL's indictment of the security of other service providers is in fact a condemnation of its own system. Companies which have attempted to interoperate with AOL, have used the protocol AOL published on its own website. AOL effectively endorsed and sanctioned this protocol as a safe and acceptable means by which other IM client applications could communicate with AOL's Instant Messenger ("AIM") users. A service that interoperates with AIM in this manner does not create any additional security risks. Moreover, competing IM systems offer security and privacy equal to or better than AOL's AIM service.

The real benefits to consumers will flow from interoperability, not from blocking communications. Interoperability allows consumers to choose their applications and provides a fair market in which competition and innovation thrives. Only interoperability will allow IM to achieve its full potential as the next "killer app" of the Internet.

As to the efforts AOL cites as evidence of its desire for interoperability, in its submission to the IETF, AOL does not respond to the standard body's request for ideas on the identification, adoption and implementation of protocols that will enable IM users to communicate across platforms. Instead, AOL merely provides a basic architectural outline of how disparate IM services could interoperate at the network level.

In addition, AOL's submission lacks a concrete timeframe to achieve interoperability. Not only does the company not move the standards process forward by limiting its comments to generalized architectural suggestions instead of offering an actual protocol, there is a significant danger that the process will continue to be characterized by delay without a concrete commitment by AOL to a timetable.

IM interoperability will yield enormous benefits for consumers and spur a new leg of innovation and growth. Experience in the marketplace demonstrates that IM interoperability can be achieved without any denigration of customer privacy and security. But the objective of IM interoperability across multiple platforms via a common set of protocols will not be achieved unless all market participants, especially the largest IM provider, work in a meaningful, committed and expeditious manner toward the achievement of that goal.

1. Background on the Instant Messaging Market

A. IM is Emerging as Both a Popular Service and a Critical Catalyst for Innovation

No one should doubt the emerging importance of the IM market. At the recent Morgan Stanley Dean Witter conference entitled "Digital Media Conference: The Impact of the Internet on the Media Industry"[3], Time Warner Chairman Gerry Levin was asked what would be the most valuable asset of a merged AOL/TW. Mr. Levin answered that the number one asset of a merged AOL/TW would be IM. He proceeded to describe IM as being in an embryonic state, with features such as status detection promising tremendous future value. Mr. Levin said that IM would go well beyond the capabilities it has today.

IM can be considered, in its most basic form, as "fast email." Unlike email, which is sent to the recipient's in-box, an instant message pops up in a small box on the recipient's screen, superimposed on top of whatever else the user is doing. The recipient then can type a response, send it and return to her underlying work.

One of the most powerful and distinguishing features of IM is its ability to allow users to let friends or others know when they are online and available. Upon logging onto an IM system, a user's computer automatically alerts other pre-selected users that she is online and is available for this "buddy group" to conduct private online chats in real time. If desired, numerous parties can participate in these online conversations at the same time, creating real-time personal conversations that are akin to teleconferencing. This ability to know when somebody is online and available to communicate in groups instantly makes communication much more powerful, especially as more companies and people communicate globally and as more people access the Internet from wireless devices.

[3] Held June 26, 2000 at the Hilton Hotel in New York, NY. The statement was made during a "Fireside Chat" hosted by Mary Meeker.

IM today is a powerful example of consumer demand for new communications technologies. While IM technology has been widely available only since 1996, it is one of the fastest growing markets on the Internet. More than 3 million users are signing up for IM every month and its growth rate is faster than the growth rate of email or browsing technology. In the US, 30-million individuals use IM at least once a month[4] This represents more than 30% of the US online population.

Used primarily as a 'chat' vehicle in its early stages, IM is rapidly becoming an essential communication medium transcending the convenience of buddy lists and spontaneous online conversation. As the Economist reports "This new form of communication, once considered only a toy for teenagers, is turning out to be much more. Advertisers see it as a pithy, productive medium. Businesses are using it for customer support. And, once connection speeds improve, and voice communication becomes a standard feature, the 'buddy list' will become an immensely valuable telephone directory."[5] With the advent of web-enabled wireless devices, IM also "looks like the 'killer app' of wireless data services."[6]

But to achieve that promise, IM needs interoperability. As Charley Whaley, a Toronto based consultant and market analyst, told Computing Canada on October 1, 1999 "Looking forward, I believe that IM could become the glue that finally makes the Holy Grail of 'unified messaging' possible. The main hurdle will be the resolution of interoperability problems." These interoperability problems have, in the words of PC Magazine, lead to a "balkanization (which) has retarded the growth and value of IM frustrating both users and the companies that provide IM services."[7]

In Europe, the number of web-enabled phone users is twice the number of web-enabled PC users. The US, to date a far more PC-centric Internet market, is gravitating towards web-enabled wireless phones and other devices. The utility of these devices, with their limited display capabilities, will be dramatically enhanced with IM-based features, including alerts and actionable messages. AOL's dominance of today's chat-oriented US IM market is onerous, but only a precursor to its ownership of a far broader array of IM-derived communications services. Active IM users are expected to grow from an estimated 50-million today to 175-million in just eighteen months, with growth driven by adoption in the wireless market.[8] Companies, such as Go2 Systems, of Irvine, CA, already provide IM (including location awareness capability) to WAP phone subscribers. Phone.com, a provider of IM technologies to the wireless market, reports a significant demand for IM interoperability from among its wireless Carrier clients. Wireless carriers and other providers want to ensure that their new wireless IM users will be able to communicate effectively with users of existing IM communities. Moreover, IM is also expected to play a critical role in fostering other developments, such as interactive TV and broadband.

---

[4] Forrester, Nov 29, 1999.
[5] The Economist, "Trying to Connect to You," June 24, 2000, page 69.
[6] Id.
[7] PC Magazine, "IM Growing Pains" by Jim Lynch, 8/01/00
[8] Wireless Week, June 19, 2000 "Growth Spurt Predicted for Fledgling IM".

B. IM Interoperability is Readily Achievable and Numerous IM Providers Already Interoperate Seamlessly

It is not a difficult technical task to enable basic client-to-client interoperability between different messaging clients. The touchstone of interoperability in the IM context is the ability of multiple IM providers to exchange client messages and applications across different network platforms using a common set of protocols. AT&T, Microsoft, Tribal Voice, iCast, Odigo, Prodigy, Yahoo and other companies have achieved interoperability -- occasionally with AIM -- using published protocols. Providers simply need to understand the basic protocols used to communicate within a system and then implement that protocol across systems and within IM client software. This is how existing IM applications take place today across different systems. For example, Tribal Voice's PowWow technology is used by AT&T and iCAST so that their IM clients can interoperate with the MSN Messenger Service; the Odigo Messenger is interoperable with Yahoo! Messenger. This is also how Microsoft, AT&T, Yahoo, Tribal Voice, iCAST, Odigo and others have enabled communication with AOL in the past. And, ironically, it is how AOL intended different companies to interoperate with its AIM service when it published the TOC protocol on its Web site last year (which it subsequently took down).

These IM competitors, as well as Lotus and Fujitsu, have achieved interoperability with clients that were all written independently using a basic protocol. Their achievement demonstrates that interoperability among IM systems is no more difficult than interoperability in e-mail, modems, cable TV signals or fax machines. However, interoperability requires participation and agreement from the largest participants to be worthwhile. Clearly it is possible to find technical solutions to interoperability. The biggest hurdle is simply a matter of gaining AOL's cooperation.

C. Interoperability Across all Platforms is Essential if the Public is to Realize the Promise and Benefits of IM

As noted above, IM is already an important tool for Internet communications. Over one billion instant messages are sent a day, more than the total daily volume of the U.S. Postal Service. IM services will continue to grow in significance as online businesses use it for collaboration and customer service, and as IM becomes a platform for wireless and voice communications. For IM to realize its full potential, however, competing systems must interoperate as seamlessly as our telephone and email systems do.

In its submission with the FCC, AOL suggests that the IM industry is a dynamic and rapidly growing arena with more than 40 different IM and chat programs available to the public. We agree that the IM industry holds great promise. But those companies, and their current and potential innovations, will never reach their full potential if the IM market does not achieve interoperability sooner, rather than later. As AOL has noted in

other contexts[9], interoperability is critical to the functioning and dynamic quality of the Internet. Without interoperability, the growth and innovation that the Internet has experienced would likely cease or slow dramatically. AOL's recitation of the numerous IM companies misses the point: no matter how many companies are in a market, if a company with 90% of the market blocks interoperability, the market will not grow. Further, over time, innovations will diminish because companies will have a diminished incentive to invest in innovations if one company has the power to prevent new features and applications from reaching the vast majority of the potential marketplace.

The IM industry has witnessed several exciting innovations in the last year alone, including voice communications, group browsing, improved security and privacy, and the addition of real-time alerts and updates concerning data and content of importance to subscribers.[10] These innovations and advancements were not created by AOL, but were developed by other IM providers.[11] Interoperability can spur even more innovation that can benefit all IM users, including AOL's. For example, companies with wireless experience and wireless carrier clients need to be able to develop IM technologies in parallel with their PC-centric counterparts, and at the same time enable these wireless users to communicate with members of these PC-based communities. Neither AOL nor any other company, especially one without significant wireless experience, should be able to dictate innovation in this area, especially when such development lies far outside its PC-centric core competencies.

AOL's resistance to interoperability forces consumers to choose between enjoying improved functionality and innovative features versus remaining connected to the vast majority of IM users. The achievement of interoperability can spur a new level of growth and innovation in the IM market that will benefit all users, including AOL's.

2. AOL's Submission to the FCC

AOL's submission to the FCC also contains certain critical flaws, particularly its inappropriate effort to invoke security and privacy as justification for its continued

---

[9] See e.g., In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, Comments of America Online, Inc. (Sept. 14, 1998) at 6 ("competitive market has thrived because the telecommunications infrastructure underlying the Internet is one open to all comers"); In the Matter of Joint Applications of AT&T Corporation and Tele-Communications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations Held by TCI and Its Affiliates or Subsidiaries, CS Docket No. 98-178, Comments of America Online, Inc. (Oct. 29, 1998) at vi ("the opennes of the infrastructure on which the Internet rests is integral to the competitiveness and innovation that drives its extraordinatry success"); In the Matter of Transfer of Control of FCC Licenses of MediaOne Group, Inc. to AT&T Corporation, CS Docket No. 99-251, Comments of America Online, Inc. (Aug. 23, 1999) at 15 ("open platforms policy" is "central to . . . overarching competition agenda").

[10] See In the Matter of Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control, CS Docket No. 00-30, Comments of Tribal Voice, April 25, 2000.

[11] For example, as noted in the current edition of Smart Business from ZD Wire, "AOL Instant Messenger is popular, but it's missing a key feature: off line messaging." The article goes on to note that this feature is available on Yahoo. ZD Wire, "Making the Most of Instant Messaging," by Dave Johnson, 8/01/00

blocking of competitors whose users wish to communicate with users of AOL's IM system.

A. Contrary to AOL's Position, IM Interoperability Can Be Readily Achieved without any Diminution of Customer Privacy and Security

i. AOL has inappropriately sought to construct a false choice between interoperability and customer privacy and security

We are all committed to protecting the privacy and security of our customers and our networks. Privacy and security are important, ongoing issues for all companies offering Internet-related services, including IM providers, and these issues must be discussed in a serious fashion. One thing is clear, however: ***there is not, and there need not be, any trade-off between IM interoperability on the one hand and privacy and security on the other hand.***

AOL has attempted to construct a false choice between interoperability and privacy and security. The fact is that IM interoperability can be, and is being achieved -- albeit without AOL's help -- without any diminution in subscriber privacy and security. IM providers already offer substantial security and privacy safeguards by utilizing encryption, masking of subscriber Internet addresses, and ongoing monitoring and oversight to protect security and privacy. Indeed, AOL simply cannot demonstrate how the IM interoperability already achieved would somehow result in a lower level of privacy and security for its members. AOL's invocation of privacy and security in its FCC submission is nothing more than effort to exploit public concern about these issues to justify their delays on IM interoperability.

As AOL should well understand, it is not uncommon for new Internet-related developments or practices to meet resistance from some quarters based on allegations of concerns about privacy and security. AOL itself has been accused of slighting privacy and security in the past, including most recently in a lawsuit that was filed several weeks ago.[12] We do not express any opinion on the merits of that suit or on earlier attacks on AOL's privacy practices.[13] The point is simply that privacy and security concerns should not be casually invoked to resist changes in the status quo. Any invocation of harm to these interests must be supported factually and empirically. As demonstrated below, AOL does not meet this burden.

---

[12] The Industry Standard, "Lawsuit Says You Can't Escape Netscape: The latest lawsuit accuses AOL subsidiary of illegally tracking Web surfers," by Keith Perine. July 6, 2000; Newsbytes, "AOL Accused of Privacy Violations," July 16, 2000; .

[13] Interactive Week, "AOL May Track User Clicks," August 8, 1997 (noting "company's intention to track members' mouse clicks in order to compile mailing lists for third parties" and quoting privacy rights advocate's view that " 'this is a far more serious privacy violation than the sale of phone numbers' "); CNET, "AOL to give out phone numbers," July 22, 1997 ("The company already has taken heat from privacy experts and members alike for selling its members' names and addresses, along with personal profiles they obtain from other databases"); CNET, "Report blasts companies on privacy," June 9, 1997 ("some companies, such as online service giant America Online are collecting their own information about customers, such as their household incomes, from outside databases and then aggressively selling that information to marketers").

ii. While AOL invokes privacy and security concerns, it has not demonstrated how interoperability contributes to the problem

Throughout the past ten months, AOL has blocked numerous providers who have attempted to interoperate with AIM. AOL has repeatedly claimed that it took the blocking action to protect the security and privacy of its members. Some examples:

- In response to a recent attempt by Odigo to interoperate, AOL spokesperson Tricia Primrose justified blocking the effort by saying, "Our policy is to block unauthorized access to our servers...We will continue to block Odigo's efforts to access our servers to ensure the privacy and security of our members." (CNET, June 13, 2000)

- AOL President of Interactive Services, Barry Schuler in an interview with Reuters (June 14, 2000) went so far as to say that AOL was protecting its members from pornographers and pedophiles because "pornography in the IM world is not just dirty pictures, it's about pedophiles propositioning kids in real-time."

AOL continues to reflexively invoke privacy and security concerns issue in its submission to the FCC, citing such concerns at least a dozen times in the course of a five page discussion of IM.

It is therefore striking that AOL never demonstrates how the interoperability, which has already been accomplished by a number of companies (until blocked by AOL), has in anyway threatened the privacy and security of its members. While there have been several instances where interoperability has been achieved, on none of these occasions was there any evidence that the privacy and security concerns of members, including AOL members, were in anyway compromised. Moreover, the sanctioned interoperability of Odigo with Yahoo! and Tribal Voice with MSN are clear examples that solutions can be readily provided with unwavering commitment to the privacy and security of the individual messenger users.

The only specific example AOL provides of how interoperability might sometime in the future cause a problem is based on a faulty premise. AOL claims that in order to achieve interoperability with AIM, competing IM client software requires users to type-in certain AIM account information, thereby compromising the security of the AIM user. AOL suggests that by entering such information into an alternative client application, the competing service provider would have access to AIM customer data that it can use in an abusive manner. This is simply not true. The information is never revealed to the competing system or any third party - only to AOL upon logging into its AIM service. This is exactly the same procedure that a user would follow to login to the AIM service using AOL's AIM client. All of the login, authentication and messaging activity for IM AIM 'buddies' still occurs using the AIM servers, exactly as it would if you were using the AIM IM client software. Thus, AOL's claim that its members' security and privacy are undermined with interoperability of IM services is false.

The most ironic and significant contradiction in AOL's argument regarding privacy and security is that AOL published a protocol (the TOC protocol) allowing other services to communicate with its users over a year ago. By publishing this protocol, it effectively endorsed and sanctioned the TOC protocol as a safe and acceptable means by which other IM client applications could communicate with AIM users. Consequently, a service that interoperates with AIM in this manner does not create any additional security risks. In effect, AOL's indictment of the security of other service providers using the TOC protocol is an indictment of AOL's own system.

Several companies, including Tribal Voice, iCast, Odigo, Prodigy and Yahoo, all attempted to interoperate with AOL using the TOC protocol that was published on AOL's web site. Moreover, in order for a competing client application to work with the AOL servers used to support its IM systems, the competing user must first obtain a valid account from AOL. Thus, the competing client provides the same degree of privacy and security as AOL's client does. Competing systems are simply providing the existing AIM users with an alternative client application.

Nonetheless, in each case, AOL attempted to shut each of these services down citing privacy and security. Each of these services were as private and secure as AOL's own services which use the TOC protocol.

This is similar to any private individual choosing to buy a telephone from Circuit City for use in their home rather than using the device supplied by AT&T when telephone service was first installed. So long as the telephone equipment meets certain standards, it can be used to replace the circuit-provider's equipment at the user's discretion. In this case, as the Tribal Voice IM system is based on the same protocols as the AOL IM system, there is no difference to the consumer in terms of the protection of the individual's privacy and security.

Moreover, the facts demonstrate that not only is interoperability unlikely to increase the privacy and security risks of its users, interoperability motivates competitors to compete to provide additional privacy and security functionalities. For example, with AIM, a party unknown to the AIM user can make the AIM user a buddy without the AIM's users knowledge. The AIM user only finds out about the relationship when the other party sends a message. Other systems, such as Yahoo and MSN, have developed superior methods to protect users' privacy by alerting the user as soon as another user tries to make the first user a buddy. Another example is MSN Messenger, which uses a stronger level of encryption and a greater level of security for its messages than used by AIM.

AOL also alleges that IM interoperability would increase incidents of "Spam," which is considered unwanted communication from strangers, This allegation ignores a few major facts. First, introducing interoperability in no way creates new ways to Spam that don't already exist on AOL's service. Further, IM offers users better protection from unsolicited communication from strangers than e-mail. IM users can deny (and delete) any message from any known or unknown source, thereby preventing the delivery of

Spam, whereas most email software does not provide this feature. IM users also can delete any sender permanently from a buddy list. In this way, IM is more secure against Spam than e-mail. Finally, as noted above, many IM service providers offer superior default privacy/anti-Spam controls than AIM offers. One of the most noticeable features missing from AOL and available on many other services is the ability to be alerted when somebody has added a user's name to a buddy list.

Further, even to the extent that one foresees Spam as a problem in the IM environment, interoperability does not affect the problem. If Spam is occurring in AOL's base of 120 million users, the problem is likely the result of the activities of ill-intentioned "name harvesters." Allowing the remaining 10% of the market to communicate with AOL's 120 million users does nothing to affect the overall population of bad actors. There is no reason to assume that the bad actors stay out of AOL's massive wall garden and instead populate the services of others.

iii. AOL's claim that it is protecting against "unauthorized" uses mischaracterizes how users of other systems are able to interoperate with AOL's systems

Another justification offered by AOL for blocking users of competitors' systems is that the efforts by such users to send AIM users Instant Messages is unauthorized. As noted above, interoperability has been achieved by using AOL's publicly published protocols and by requiring users to obtain a valid AIM account.

Ironically, in its FCC submission, AOL cites the Internet email system as a model for how communication services could interoperate. But one critical distinction is that no one operating an email system has the power to declare any email from a competing system to be unauthorized.

iv. AOL's invocation of the technical difficulties of addressing the privacy and security issues is in marked contrast to its position on the technical difficulties inherent in other policy arguments

In explaining why AOL continues to block others, AOL spokespersons have raised the purported difficulty of solving interoperability problems: "From a technical point of view...it's a very difficult thing to do." (Barry Schuler, President, America Online Interactive Services, June 14, 2000, Reuters). Notwithstanding the fact that numerous IM providers already have achieved interoperability among each other -- and, in some instances, with AOL -- without any serious technical impediments or reductions in subscriber privacy and security, AOL's FCC submission repeats the baseless argument that it is difficult to solve privacy and security problems supposedly raised by interoperability.

Ironically, AOL takes a very different point of view when assessing the difficulty of interoperability in other areas and when access favors its business. For example, when asked about the technical problems in providing unlimited ISP access to cable networks,

AOL Chairman and CEO Steve Case said such problems could be solved "quickly and inexpensively."[14]

Addressing FCC Chairman William Kennard, Case went on to say that if the FCC were to pursue cable access "you would be startled how quickly they could come back with a simple solution as opposed to a complicated solution. My own view is they do believe that it will be open, but they are just trying to postpone that as long as possible."[15]

AOL provided, albeit unintentionally, some insight into its claim of technical difficulty in its efforts in the cable access debate. There, AOL argued that "open access to the cable modem platform is technically feasible. The issue is, and has been, one of the business model of each company." [16] This appears to be an accurate description of the issue here for AOL.

B. AOL's Participation in the IETF Process Has Been Negligible

In its submission to the FCC, AOL claims that it has participated in industry discussions through the IETF about how to best achieve the goal of an open and interoperable standard.

In fact, AOL has made little effort to participate in this process.[17] As noted by USA Today, AOL "hasn't exactly been prodding an engineering task force along toward development of an open standard. By many accounts, in fact, it has been a passive participant."[18] One trade press report noted that until very recently, "AOL has been conspicuous in its absence from the IETF unit, which has been laboring on an open standard for more than a year," and that the "online giant's change of heart has coincided with the federal government's increased interest in AOL's proposed acquisition of New York-based Time Warner."[19]

AOL's lack of participation is reflected in the record of the IETF proceeding. The IETF discussion is predominantly held over the Internet and the log of the discussion is a matter of public record. From the time AOL pledged to "fast-track" its efforts to the day of the IETF submission, the number of e-mails in the IETF logs from AOL officials is zero.[20]

---

[14] Forum on Technology and Innovation: High-speed communications access: Who Will Control the last mile? May 19, 1999

[15] Id.

[16] Letter from Steven N. Teplitz, Senior Counsel, Law and Public Policy for AOL to the Information Technology Agency of the City of Los Angeles, April 23, 1999 (emphasis added).

[17] See also infra at Section 3.B.

[18] USA Today, "AOL's self-interest blocks communication on Web," June 1, 2000, p. 25A.

[19] eWeek, "AOL yields little on IM," June 19, 2000, p. 11. See also Network World, "Expect instant messages everywhere; Buddies may enter your cell phone and pager, while industry seeks interoperability without AOL's help," May 29, 2000.

[20] The IETF working group addressing IM interoperability issues is the IM and Presence Protocol (IMPP) working group. See www.imppwg.org, to find the log of industry commentary on the IETF/IMPP's standards initiative.

C. AOL Citation of Its Royalty-Free Licensing Agreement Ignores the Significant Controls that AOL Retains over Its IM Licensees

In its submission to the FCC AOL notes that it has entered into more than a dozen royalty free license agreements with other ISPs "to distribute AIM, including co-branded versions." While AOL does not describe the terms of these license agreements, it is difficult to see how the distribution of the AIM software and use of the AOL brand by potential alternative providers of IM services offers consumers any meaningful choice or promotes innovation and competition.

Indeed, AOL's licensing agreements can be used to reinforce its current dominance of the IM marketplace. One problem can readily be seen in the language of the license that AOL requires its end users to sign. For example, the ICQ license states that "By accepting the terms of this license agreement you agree that ICQ Inc. is permitted to limit, deny, create different priorities to different users, or cancel some or all of the functionality of this Software at any time, without prior notice." (http://www.icq.com/legal/end-user-license.html.) The AIM license has similar language.

Under these terms, AOL could force users to migrate to a different platform at any point, start charging for the IM service, or devote their resources to developing the AOL subscribers-only system, thus forcing consumers to become AOL subscribers to be able to get the full benefit of this platform. These terms also would allow AOL to effectively force IM users to take AOL/TW content, instead of enabling the user to determine the content he or she wishes to receive via an IM application. For example, if a provider sought to furnish an IM sports content service relating to a particular baseball team, AOL could leverage its broad discretion under the license in order to dictate the data source of any content or updates transmitted by that service.

This is not a hypothetical consideration. There is nothing to prevent AOL from changing the terms of the license to reflect the kind of terms they are demanding from those who want access to AOLTV. As Reuters reported this week, programmers who want to be on AOLTV must abide by AOL 's "design guideline templates and co-branding requirements and **cannot provide ads, promotions or links from competitors to AOL on AOLTV."**[21]

AOL's one-sided licensing arrangements, and the potential they carry for anti-consumer behavior, underscore a fundamental point: an AOL-driven licensing scheme is no substitute for standardized interoperability. It is apparent, however, that AOL's preference and objective is to rely on licensing in lieu of interoperability, as evidenced by CEO Steve Case's stated vision of a market environment in which "everyone who wants to communicate with AOL members would use software 'licensed or approved by us.'"[22] AOL should have no more ability to control the terms, conditions, technical parameters,

[21] Reuters, "AOL answers FCC queries about content, distribution," July 18,2000 (emphasis added).
[22] Washington Post, "Foes of AOL Merger Take to Capitol Hill; Assurances Sought in Low-Profile Effort," March 24, 2000 at E3.

branding and marketing of IM platform interoperability than it has to control the terms and conditions of conventional e-mail interoperability across different ISP platforms.

D. AOL's Claim that Users of Other IM Systems Can Communicate with AOL Users Ignores AOL's Own Arguments About Why Such Communications Are Flawed.

In its response to the FCC, AOL claims that "an Internet user, can exchange instant messages with virtually any other Internet user, simply by downloading and installing the IM software used by the intended recipient." This is an incomplete -- if not disingenuous -- iteration of the prerequisites for achieving seamlessly transparent IM communications and applications across multiple platforms.

Indeed, earlier in the response, AOL admits that "a consumer who is using one IM service is not able to exchange messages with a consumer who is using another IM service." Further, AOL also admitted that any system requiring users to manage multiple passwords is "seriously flawed."[23] In fact, AOL's submission to the IETF acknowledges on of the chief shortcomings associated with the lack of common protocol interoperability:

> As the number of IM providers has grown, there is increased interest in enabling IM users to exchange presence and messaging information not only with users on their systems, but with those on other systems as well. System vendors have responded by creating "multi-headed clients," clients which can simultaneously communicate with servers on disparate IM systems. Such clients achieve interoperability at a high price, however. Since each service has its own feature set, clients may advertise features that do not work across systems.[24]

Clearly, it is better for consumers and for the progress of the industry to allow simple communication between all clients. The argument that users simply have to download the different programs used by the different people they want to communicate with -- particularly where other IM providers have proved that such complexity is unnecessary -- is like saying that since one could simultaneously hold two telephone handsets and two conversations, one's situation would not be improved by the ability to "conference together" the two people you're talking to.

E. The Claimed Benefits to AOL's Users Are Far Outweighed by the Public Benefits of Interoperability Sooner, Rather than Later.

In its recent response to the FCC's inquiry, AOL suggests that its users benefit when it blocks others from communicating because the privacy and security of the AOL users will be protected in both the short run and the long run. As noted above, there is no

[23] Wall Street Journal, "AOL, Time Warner Tell FCC a Merger would Aid Services" by Jill Carroll and Julia Angwin. June 28, 2000.
[24] AOL IETF Submission, supra n. 1, at § 1.

evidence that AOL users are at increased risk nor is it logical to believe that they are in fact at increased risk caused by interoperability.

The real benefits to the consumers will follow from interoperability, not blocking. As noted above, AOL cites the Internet email system as a model for how communication services could interoperate. We agree with this analogy, but it supports the opposite conclusion from the one drawn by AOL. The Internet email system relies on open protocols between client application and servers, as well as between the systems themselves. This allows consumers to choose their email applications and supports a open market in which competition and innovation thrives. As is the case with email, having open, secure IM protocols fosters consumer choice and product innovation.

3. AOL's IETF Submission

On July 31, 1999, under scrutiny because it was blocking competitors from interoperating with its IM system, AOL publicly promised that it would "fast-track" its efforts to achieve interoperability through the IETF process.[25] Notwithstanding that public commitment nearly one year ago to help "fast-track" interoperability via the IETF process, AOL has made virtually no effort to meaningfully participate in the process of establishing protocols that will facilitate interoperability across multiple IM platforms.[26]

After public reports circulated about governmental concerns about AOL's lock on the IM market[27], AOL did provide a submission to the IETF on June 15, 2000. This submission, however, also raises serious doubts regarding AOL's commitment to "fast-track" IM interoperability efforts. Submissions to the IETF were supposed to recommend solutions and define specific protocols to achieve interoperability. AOL's was inadequate because it merely reiterated many known issues but lacked any specifics about the protocols it would use to achieve interoperability.[28] It also failed to provide a timetable by which interoperability could be achieved.

A. The AOL Response Did Not Set Forth the Technical Protocols Necessary to Achieve Interoperability

The critical question raised by the IETF proposal concerns the identification, adoption and implementation of protocols by IM service providers that will enable IM users to communicate across platforms and use any client application they prefer.

AOL does not answer that question. Rather, it merely provides a basic architectural outline of how disparate IM services could interoperate at the network level.

---

[25] Barry Schuler, President, America Online Interactive Services, July 29, 1999 letter the Co-Chair of the IETF's IMPP Working Group.

[26] See supra at Section 2.B.

[27] Wall Street Journal, "Antitrust Concerns Spur FTC to Look into AOL's IM", June 14, 2000, p. B1; Reuters, "FCC seeks more information on AOL-Time Warner deal," by Jeremy Pelofsky, June 12, 2000.

[28] The Standard, "AOL Lobs Proposal, Lobbies Stockholders," June 16, 2000 ("AOL's document was not a technical spec, the Journal explained, but a broad outline of security and privacy goals for an open system").

The proposal does not include any specific recommendations for what these protocols should actually be and how one would potentially interoperate with the AOL service.. Indeed, AOL's submission to the IETF expressly acknowledges that it **"does not specify the details of the protocol between Servers (the IMX protocol)."**[29] For example:

- AOL's proposal suggests a "server to server" network architecture whereby communication between IM users is made possible through gateways that would translate different protocols from different IM services. The proposal fails to provide a protocol definition, which is the key component necessary for communication between different IM systems, whether it be a "server to server" or "client to server" architecture. Specifically, in its IMX architecture proposal, AOL recognizes that additional information on a protocol is required. (Page 17, section 8: Additional Documents.) Without a common and open protocol it is impossible for two different IM services to communicate with one another.

- By contrast, other industry participants have demonstrated a commitment to achieving interoperability among IM services by submission submissions with the detail necessary to move closer to achieving this goal. For example, Dynamicsoft submitted a detailed proposal that includes actual protocols, the data model, and data format for representing entities on the network, and the security model for subscription information. (http://www.imppwg.org/proposals/index.html#SIP).

B. AOL's Submission Lacks a Concrete Timeframe to Achieve Interoperability

By limiting its comments to generalized architectural suggestions instead of offering an actual protocol, AOL does not move the IETF process forward. Notably, AOL also does not provide a timetable for moving from the architecture stage to the protocol stage to the interoperability stage. Without a concrete commitment to a timetable, there is a significant danger that the process will continue to be characterized by delay.

CONCLUSION

There is much at stake here.

The promise of IM is great. The benefits of interoperability to accelerating IM's growth are undeniable. It allows consumers to choose their applications and provides a fair market in which competition and innovation thrives. With interoperability, the IM market will achieve greater growth and the benefits to consumers become increasingly valuable as the size of the IM network increases.

Moreover, interoperability stimulates far more innovation than a market that is subject to one dominate player blocking all others. Innovation incentives are strongly diminished if one company can prevent or control the degree to which new features and

[29] AOL IETF Submission, supra n. 1, at § 4.4.

services are offered to the vast majority of the marketplace. An open standard gives developers the comfort they need to create new services.

Unfortunately, AOL appears to be intentionally fragmenting and decreasing the size of this communication network and closing it off to innovation. In its effort to continue to push the market in that direction, AOL's submissions to the IETF and FCC mislead federal policymakers and consumers on critical issues, such as security and privacy. The submissions ignore relevant facts, contradict AOL's positions in other proceedings and rely on conclusory statements instead of reasoned analysis and facts.

Alibiris	**Activate**
CarParts.com	**Excite@Home**
ICAST	**MSN**
MyWay.com	**Odigo**
OneCore	**Qualcomm**
Red Gorilla	**Talk City**
Tribal Voice	**Vicinity**
Wynd Communications	**yesmail.com**