ORIGINAL EX PARTE OR LATE FILED

EX PARTE OR LATE FILED

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

May 10, 2000

00-30

The Honorable Robert Pitofsky
Chairman, Federal Trade Commission
600 Pennsylvania Avenue, NW, #444
Washington, D.C. 20580

RECEIVED
JUL 17 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The Honorable William Kennard
Chairman, Federal Communications Commission
445 - 12th Street, SW
Room 8B 201
Washington, D.C. 20554

Dear Chairman Pitofsky and Chairman Kennard:

As Chairman and Ranking Member of the Antitrust Subcommittee, with a mandate to promote competition, we are writing to bring to your attention a matter we have recently been discussing with both America Online and Time Warner. It involves "routing" and "caching" technology that Internet service providers ("ISPs") can use to enable faster and more updated access to some web sites than others. This technology has pro-competitive benefits, to be sure, but also can be employed to unfairly discriminate against the "content" of rivals and, as a matter of principle, we believe an ISP should not give preferential treatment to content owned by its affiliates solely on the basis of such a relationship. Because the possible misuse of this technology has potentially disturbing implications for Internet and media – and, most importantly, for consumers – we urge you to examine this matter, not only in the context of the AOL/Time Warner merger but also as it affects the industry as a whole.

In evaluating AOL/Time Warner and, indeed, Internet and media competition generally, one of our primary concerns has been ensuring that content is delivered on a non-discriminatory basis in order to promote the greatest possible diversity of expression and competition in the marketplace of ideas. In this context, we understand that Cisco Systems makes "routers" that allow cable broadband providers to control access speeds to Internet sites. While we recognize that there are clearly valid uses for this technology – such as ensuring quick access to popular web sites and not dedicating too much broadband capacity to sites that are rarely used – it also raises some concerns because it permits ISPs to give preferential treatment to sites with which the ISP is affiliated. Indeed, a Cisco Systems "White Paper" entitled "Controlling Your Network – A Must for Cable Operators" notes that by using its devices cable operators "could promote and offer your own or partner's services with full-speed features to encourage adoption of your services, while increasing network efficiency." Using this technology it appears that it would be possible, for example, for the combined AOL/Time Warner to slow down traffic to the ESPN web site while speeding it up to its own competing CNN/Sports Illustrated site or for the MSN ISP to slow down traffic to the Fox News site while speeding up traffic to its own affiliated MSNBC site.

No. of Copies rec'd 0+1
List ABCDE

Such behavior would be especially troubling because, as with the subliminal advertising which the FTC has in the past prohibited on television broadcasts, consumers would likely change their behavior without actually being aware that access to various web sites was being affected in this manner. Similar issues of discrimination arise with respect to the use of "caching" techniques to enable quicker access to affiliated web sites. Appropriate use of this technology can be of great benefit to companies and consumers; the inappropriate use of these technologies, however, raises questions that might be addressed under the FTC's authority to prevent "unfair methods of competition," 15 U.S.C. § 45(a)(1), or the FCC's "public interest" standard.

On March 6, 2000, we wrote to both AOL and Time Warner expressing our concerns in this regard. In response, the CEOs of both companies made important commitments, pledging to "prohibit[] discrimination in the handling of ISP traffic based on affiliation with AOL/Time Warner . . . including all content provided by the ISP regardless of ownership of the content." Moreover, opening up the broadband "pipe" to competition, as AOL and Time Warner have now pledged to do in their Memorandum of Understanding, is a step towards ensuring nondiscrimination.

Nevertheless, we are writing to you now, and enclosing our correspondence, to ensure that you are aware of this important issue. We believe that you should consider it both in your examination of the competitive effects of the AOL/Time Warner merger and, more importantly, in a broader context as well. With respect to the latter, we believe your agencies should consider investigating the uses to which ISPs are employing routing and caching technology and whether further action is necessary to prevent ISPs from using this technology to discriminate with respect to content based relationships with the content provider. This issue may arise with traditional narrowband ISPs as well as in the broadband context. While we are firmly opposed to increased regulation of this developing industry, we also urge your agencies to carefully examine the uses to which this technology can be applied and its consequences for competition and consumers.

Thank you for your attention to this matter. We have enclosed a copy of the correspondence with AOL and Time Warner discussed above, as well as a document from Cisco Systems describing the technology at issue.

Sincerely,

Mike DeWine

MIKE DeWINE
Chairman, Subcommittee on
Antitrust, Business Rights, and
Competition

Herb Kohl

HERB KOHL
Ranking Member, Subcommittee on
Antitrust, Business Rights, and
Competition

Enclosures

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

March 6, 2000

Mr. Steve Case
Chief Executive Officer
America Online, Inc.
22000 AOL Way
Dulles, VA 20166

Mr. Jerry Levin
Chief Executive Officer
Time Warner, Inc.
75 Rockefeller Plaza
New York, New York 10019

Dear Mr. Case and Mr. Levin:

Thank you for your testimony last week at the Judiciary Committee hearing on the AOL Time Warner merger. Your views are very valuable as we consider the competitive implications of your merger, and we very much appreciate your willingness to testify before the Committee. We also followed closely the announcement of the Memorandum of Understanding (MOU) regarding open access business practices. Although the MOU is not binding, we are pleased with it as a first step toward open access for cable broadband delivery of the Internet. We urge now that you expand on this commitment to ensure that content is delivered on a non-discriminatory basis throughout your systems.

Specifically, we hope you both will agree to include an additional term in the MOU. We understand that Cisco Systems makes "routers" that allow cable broadband providers to control access speeds to Internet sites. There are clearly some valid uses for this—but this technology also raises some troubling implications by giving your company the ability to give preferential treatment to its own Internet sites. For example, your combined company could slow down traffic to the ESPN/Disney site while speeding it up to your own CNN/Sports Illustrated site. This technology also could be utilized to make downloading of music quicker and easier over a Time Warner/EMI web site than over a competitor's site.

We are concerned that, by using this technology to give preferential treatment to Internet web sites owned by, or affiliated with, AOL Time Warner, your combined company would have the potential to injure competition by making it much more difficult for consumers to access your competitors' Internet sites. We note your comment in an interview last year, Mr. Case, that "[a]s the Internet becomes more and more important to people's daily lives, we think it's important that the core foundations it is built on be open and nondiscriminatory." Accordingly, we ask that you commit, as an extension of the MOU, that your two companies will not, in providing cable broadband access to the Internet, grant preferential treatment to web sites owned by, or affiliated with, your company.

We recognize that other Internet access providers also can make use of this technology, and that any such commitment to non-preferential treatment of content on the Internet should be undertaken on an industry-wide basis. However, we believe that your agreement to such a commitment as an extension of the MOU would be an important first step in ensuring that our shared goal of open and nondiscriminatory access to all Internet web sites becomes the standard for the industry.

Thank you for your consideration of this matter. We look forward to hearing your response at your earliest possible convenience.

Very respectfully yours,

Mike DeWine

MIKE DeWINE
Chairman
Subcommittee on Antitrust,
Business Rights and
Competition

Herb Kohl

HERB KOHL
Ranking Member
Subcommittee on Antitrust,
Business Rights and
Competition

AMERICA Online

TIME WARNER

April 27, 2000

The Honorable Mike DeWine
Chairman
Subcommittee on Antitrust, Business Rights and Competition
Senate Committee on the Judiciary
161 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Herb Kohl
Subcommittee on Antitrust, Business Rights and Competition
Senate Committee on the Judiciary
815 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators DeWine and Kohl:

Thank you for your letter of March 6, 2000. We appreciated the opportunity to discuss the consumer and competitive benefits of our merger with the Committee at its February 29th hearing, including our Memorandum of Understanding on Open Access ("MOU") which we believe will bring increased choice to cable Internet consumers. We have been pleased by the positive reaction to the MOU by you and your colleagues on the Committee and implementation is one of our highest priorities as we move towards final consummation of the merger.

As you are aware, both America Online and Time Warner have long operated in highly competitive businesses both online and off and we share your strong interest in ensuring the continuation of competition and choice as we move into this Internet Century. Indeed, the intense – and intensifying – competitive struggle to provide consumers with the best the Internet world has to offer has empowered consumers as never before.

Both AOL and Time Warner recognize that businesses that don't give consumers what they want will not survive. That understanding was at the heart of our decision to provide consumers with a choice of multiple ISPs and it will be at the heart of the business strategy which will guide AOL Time Warner. It is a commitment that is a continuation of the business practices both companies employ today.

Consistent with that, let us be clear with respect to the concern expressed in your letter regarding how AOL Time Warner will treat content offered by third parties, and how AOL Time Warner will treat content produced by our competitors: AOL and Time Warner are strongly committed to offering consumers a broad choice of the best content available, regardless of who is producing it, and to distributing our own content as widely as possible on a variety of platforms. This is the strategy which guides each of our businesses today, because it gives customers what they want – and it will be the strategy of the merged company as well.

On the specific question you posed relating to the possible use of certain technology to give preferential treatment to affiliated content on our combined systems: we believe that full implementation of our MOU addresses the issue head-on by prohibiting discrimination in the handling of ISP traffic based on affiliation with AOL Time Warner. We will thereby ensure our cable customers are offered a range of ISPs who will, in turn, provide access to the full diversity of content that the Internet can offer. By ISP traffic we mean to include, of course, all of the exchanges between an ISP and its customer, including all content provided by the ISP regardless of ownership of the content. With our active involvement and encouragement, technology associated with the faster online delivery of content is evolving rapidly. We look forward to using that technology to benefit consumers and to deliver to them the speed of access and choice of content they desire. Again, this commitment reflects the long-standing business practices of our companies. And for good reason, we want to ensure that our customers are thoroughly happy with the quality of content they receive over our systems.

Thus, we hope this letter has answered the concerns raised in your letter and illustrates further our commitment to making AOL Time Warner the best and most respected company in the world. We look forward to a continuing dialogue with you and your colleagues.

Very respectfully yours,

Steve Case
Chairman and CEO
America Online

Gerald M. Levin
Chairman and CEO
Time Warner Inc