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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

October 30, 2000

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B204
Washington, D.C. 20554

**RE: NOTICE OF WRITTEN *EX PARTE* SUBMISSION,
APPLICATIONS OF AMERICA ONLINE, INC. AND TIME
WARNER, INC. FOR TRANSFERS OF CONTROL,
CS DOCKET NO. 00-30.**

Dear Ms. Salas:

On behalf of The Walt Disney Company, submitted herewith pursuant to Section 1.1206(b)(1) of the Commission's Rules are an original and one copy of the attached written *ex parte* submission, regarding AOL's new 6.0 web browser and its discriminatory effect on unaffiliated companies, for filing in connection with the above-referenced proceeding.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Lawrence R. Sidman

Lawrence R. Sidman

cc: Deborah Lathen
Royce Dickens
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James Bird
Darryl Cooper

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)
)
Application of America Online, inc.) **CS Docket No. 00-30**
And Time Warner Inc. for)
Transfers of Control)
)

***EX PARTE* SUBMISSION OF THE WALT DISNEY COMPANY**

**AOL's 6.0 EVIDENCES A COMMITMENT TO DISCRIMINATE AGAINST
UNAFFILIATED COMPANIES WHILE UNDERMINING CONSUMER CHOICE**

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October 30, 2000

INTRODUCTION

During the course of this proceeding, America Online, Inc. (“AOL”) and Time Warner, Inc. (“Time Warner”) have attempted to dismiss the concern that they will engage in discrimination to steer viewers toward the affiliated content and interactive services of AOL/Time Warner. Repeatedly, AOL and Time Warner have responded to this concern about discriminatory behavior by asserting that: (1) there is no business rationale behind limiting consumer choice, (2) AOL and Time Warner believe in an open, non-discriminatory system, and (3) the Commission should trust AOL/Time Warner to abide by a Memorandum of Understanding that purports to obligate the parties to adhere to non-discrimination. In this written ex parte submission, The Walt Disney Company again reveals that, in fact, the actions of AOL/Time Warner speak louder and more accurately about their intentions than their words. AOL’s new service “AOL 6.0” clearly shows that AOL/Time Warner is intent on skewing consumer choice through its control of a proprietary system that will disfavor market competitors and steer consumers toward AOL/Time Warner content and services. This latest business decision speaks volumes about AOL/Time Warner’s intent to discriminate against unaffiliated companies in several markets, including the interactive television market, and demonstrates AOL/Time Warner’s disregard for the importance of unfettered consumer choice.

DISCUSSION

A. AOL’s Removal of Integral Home Page Elements from AOL’s Internet Browser Undermines Consumer Choice and Discourages Selection of AOL Rivals.

AOL recently introduced AOL 6.0 proclaiming that it “sets the new standard for online convenience, ease of use and value and takes our flagship service into the next generation of the

Internet's development.”¹ This bold prediction omits one glaring and extremely unsettling aspect about AOL 6.0 which is representative of the tactics in which AOL/Time Warner plan to engage if their merger is approved without conditions to ensure non-discrimination. Specifically, AOL 6.0 wages a frontal attack on consumer choice through its elimination of two essential elements of its Internet browser. First, AOL 6.0 eliminates the ability of consumers to determine their own “home page,” to which the browser defaults when that user first establishes a connection to the Internet through AOL. Second, AOL 6.0 eliminates the “home page button” on the AOL toolbar, which on earlier versions had enabled consumers with one click to access instantly to their designated home page. AOL's decision to eliminate the ability of consumers to either set or easily access a home page of their choice strikes a very serious blow to the concept of consumer choice and Internet openness. Instead of allowing consumers to select as a default the site of their choice for a home page (such as AOL competitor Yahoo!), AOL has taken this capability away from consumers by making it extremely difficult – requiring a level of technical sophistication well beyond the abilities of the average consumer using AOL's online service – to choose a home page different from AOL's proprietary screen.

The earlier version of AOL's Web browser, AOL 5.0, had several discriminatory aspects as well, which Disney recounted in a written ex parte filing to the Commission on July 25, 2000.² Those specific concerns remain to be addressed by the federal courts and they evidence a troubling pattern of discriminatory behavior by AOL which have now been exacerbated by AOL 6.0.

¹ AOL Press Release on Launch of AOL 6.0, Statement of Bob Pittman, President and Chief Operating Officer of AOL (October 25, 2000).

² See *Written Ex Parte of The Walt Disney Company*, CS Docket No. 00-30, filed July 25, 2000 at 20 (“According to these class action complaints, installation of AOL 5.0 changes the user's communications configuration and settings to interfere with any non-AOL communications software. After installing AOL 5.0, apparently users have difficulty connecting to other ISPs or to run non-AOL e-mail programs, whether or not they respond “no” when asked during the installation process if they wanted to make AOL their “default provider.”).

In AOL 5.0, when a user logs on to AOL, the first screen the consumer sees is the AOL welcome screen, which is an internal AOL site. In accessing the Internet through AOL 5.0, consumers are able to click on the AOL “home button,” located on a toolbar, which takes them directly to the user’s default Internet browser home page.³ This Internet browser home page can be set up through “AOL/IE” to access any user defined Internet page, such as MSN, Yahoo! or Go.com.

When consumers use AOL 6.0, they similarly encounter an AOL welcome screen before any other information. However, to access the Internet, consumers click on the “Internet” button, whereupon they are sent exclusively to the AOL.com Internet page. Unlike version 5.0, AOL 6.0 does not allow consumers to set up a personalized automatic default home page of their choice or access the page through a “home button” which otherwise would be located on the toolbar in the AOL welcome screen.⁴ AOL’s removal of the “home button” from AOL 6.0 now means that consumers using AOL will likely access the Internet through AOL.com rather than through a rival web site offered by an unaffiliated company. Simply put, under AOL 6.0, a user cannot automatically designate a non-AOL site as their home page. Such sites can only be accessed as secondary bookmarks, a designation that falls well short of the prominence and potential revenue streams associated with home pages. Rather than admit that this is an obvious curtailment of consumer choice, AOL has incredibly suggested that the elimination of these home page elements in AOL 6.0 *benefit* consumers. Jeff Kimball, AOL executive director stated: “What we did was we looked at the toolbar as a whole, and in that redesign, in that streamlining, we moved some things around. And yes, it’s not there.”⁵ AOL’s nonchalant view of this change fails to recognize the real impact that it will have on consumer choice. As Jeff

³ See Attachment 1, showing AOL 5.0 with an AOL “home page button.”

⁴ See Attachment 2, showing AOL 6.0 without an AOL “home page button.”

Chester, executive director of the Center for Media Education aptly stated: “This is an outrageous business tactic that goes to the heart of our concern about how AOL Time Warner will be a digital monopoly. AOL and Time Warner want to become the new gatekeepers of the digital age, and we have to resist that.”⁶

The timing of AOL 6.0’s release and its discriminatory features are particularly troublesome given the representations that AOL and Time Warner have made to the Commission about their commitment to consumer choice and competition in emerging markets such as Interactive Television. Disney has maintained throughout this proceeding that AOL and Time Warner intend to leverage their current dominant market power in several markets and engage a variety of discriminatory tactics so that consumers will remain captive in the closed proprietary system operated and controlled by AOL/Time Warner. AOL and Time Warner have attempted to sidestep this issue by citing their voluntary Memorandum of Understanding which they maintain is sufficient to satisfy any concerns about a potential for discrimination. However, this latest revelation, embodied in the discriminatory aspects of AOL 6.0, shows that AOL/Time Warner cannot and should not be trusted to function in the Interactive Television Market without stringent nondiscrimination safeguards. Quite the contrary, during the course of this proceeding, both Time Warner – through its illegal shut down of ABC broadcasts during May sweeps -- and now AOL – through its release of AOL 6.0 – have demonstrated a callous disregard for the fundamental notion of consumer choice. In addition, there have been a host of other egregious anticompetitive acts by AOL and Time Warner that have irreparably harmed consumers and market competition. These acts, listed below, further demonstrate that the Commission should

⁵ See *New Software Directs Members to AOL Home Page*, CNET News.com (October 26, 2000).

⁶ *Id.*

impose stringent conditions before any approval of the AOL/Time Warner merger to prevent future abuses.

- Time Warner's threats to Disney for offering free satellite dishes.
- Time Warner Cable's stripping of Gemstar's electronic program guide data.
- Time Warner's refusal to carry independent local news channels which compete with Time Warner-owned news channels.
- Time Warner's discrimination in channel placement, favoring its own content over that of unaffiliated cable content providers.
- Time Warner's entering into exclusive arrangements with set top box manufacturers, thereby undermining competition from overbuilders.
- AOL's refusal to make its instant messaging ("IM") system interoperable with unaffiliated IM company services.
- AOL's forcing Disney and others to agree to restrictive contracts that strip out the navigation links to the Internet.

All of these discriminatory acts, taken together, clearly indicate that consumer choice means something very different to AOL/Time Warner than it does to everyone else. Properly understood, consumer choice should mean that consumers have an unfettered ability to choose and select the content and services they wish without regard to its ownership and without encountering technological roadblocks and trickery meant to discourage or steer their selections. By contrast, AOL/Time Warner seems to have adopted the "AOL/Time Warner Know Best" version of consumer choice. Through its actions, AOL/Time Warner believes it is appropriate through outright blockage or through more subtle, but equally offensive, forms of discrimination to steer consumers away from content and services offered by unaffiliated companies and toward the content and services owned by and affiliated with AOL/Time Warner. The Commission should take affirmative steps in this proceeding to ensure that AOL/Time Warner does not

continue to impose its twisted notion of consumer choice on emerging markets such as Interactive Television.

B. AOL's Removal of the "Home Page Button" And The Ability to Choose a Default Home Page Undermine Consumer Choice and Is Precisely the Kind of Discrimination that AOL/Time Warner Intend to Bring to the Interactive Television Market.

The launch of AOL 6.0 provides stark evidence that AOL is willing to fundamentally alter the "open" nature that has governed the Internet since its inception, wherein consumer choice in searching, selecting and organizing is facilitated – but not controlled – by those providing access. Based on AOL's behavior *today*, there is every reason to believe that a combined AOL/Time Warner will seek to replicate such discriminatory behavior in the Interactive Television Market.

The Interactive Television equivalent of the Internet default "home page" will be the "first screen." Using the open architecture of the Internet as an essential model, consumers would be able to tailor their first screen to provide quick and easy access to their own interactive content choices, perhaps so that their favorite sports, movie or children's programming channels are presented either by category or individually. Absent the consumer categorizing and presenting the interactive content according to their desired preferences, the notion of consumer choice and competition dictate that the first screen presenting interactive content do so in a manner that does not unfairly showcase or favor content based on ownership or affiliation. Rather, consumers should encounter a first screen that provides them with an unbiased menu of programming and service options so that they make exercise their choices consistent with their tastes and interests.

A non-discriminatory model for the first screen in the Interactive Television Market is clearly out of sync with AOL's and Time Warner's collective view of the world. Using AOL 6.0 as a model, for instance, consumers would be forced to view a first page that has been designed not according to the consumer's preferences, but to AOL/Time Warner's. A "first screen" under this model – again, the model AOL is embracing *today* for its online customers – could present content based on the amount that content owners paid for placement, placing those who paid a premium (or received a preferential rate) on the initial screen, while leaving those who perhaps could not pay such rates (or get preferential treatment) in the nether regions, removed from immediate view and far more difficult for consumers to access.

The potential for anti-competitive discrimination under such a model is clearly evident. For instance, to ensure preferred placement on a first screen, AOL/Time Warner could require content competitors to turn over portions of their revenues. Likewise, consumers could find themselves trapped in the same "walled garden" that has now become the AOL experience, unable to quickly and easily navigate a first screen tailored to reflect the consumer's – not AOL/Time Warner's – interests, and unable to change the organization of that content.

C. Strong Enforceable Conditions Are Needed to Prevent AOL/Time Warner from Replicating Its Discriminatory Conduct in the Interactive Television Market.

Disney and other commenters, including NBC and several consumer groups, have expressed the need for the Commission to act proactively to ensure consumer choice and competition in light of the AOL/Time Warner merger. Disney reiterates its strong belief that certain provisions of the Communications Act could serve as appropriate models for the Commission to craft the strong, enforceable conditions for non-discriminatory behavior which are clearly needed to ensure that AOL/Time Warner will not attempt to replicate discriminatory

systems such as AOL 6.0 in emerging markets like the Interactive Television Market.⁷ Specifically, Disney urges the Commission to modify the purpose of Section 653 of the Communications Act so that it can serve as an enforceable condition against screen bias and other forms of technological discrimination by AOL/Time Warner. A condition modeled after Section 653 is especially needed to guard against the unprecedented control AOL/Time Warner will have over the distribution of and access to programming and content in the Interactive Television Market, especially through its ability, as demonstrated by AOL 6.0, to manipulate the choices consumers will have over content and services. The Commission should adopt this safeguard to preserve the fundamental open nature of today's narrowband Internet where consumers can freely choose from among different content and service providers. Permitting AOL/Time Warner to use discriminatory systems like AOL 6.0 in emerging markets like the Interactive Television Market will only jeopardize the ability of consumers to make unfettered choices. It also will greatly undermine any semblance of market competition.

CONCLUSION

Each time AOL and Time Warner are questioned about their capability and incentives to engage in discriminatory behavior in emerging markets like the Interactive Television Market, they respond with the same mantra that they are committed to non-discrimination and that their Memorandum of Understanding vitiates any need for enforceable conditional safeguards. The clearly anti-competitive behavior of Time Warner and AOL shown throughout this proceeding, and most recently evidenced by the release of AOL 6.0, should prove beyond any shadow of a doubt that AOL/Time Warner will not adhere voluntarily to any reasonable concept of non-discrimination. Through a strong pattern of conduct, AOL/Time Warner has telegraphed its very obvious intent to push the envelope beyond all reason when it comes to the issues of consumer

⁷ See *Written Ex Parte of The Walt Disney Company*, CS Docket No. 00-30, filed July 25, 2000 at 74-77.

choice and competition. The failure of AOL/Time Warner to even recognize how blatant their acts of discrimination are in the market should give the Commission great pause before granting any approval of the AOL/Time Warner merger without first attaching strong enforceable conditions to prohibit discrimination in the Interactive Television Market.

Respectfully submitted,



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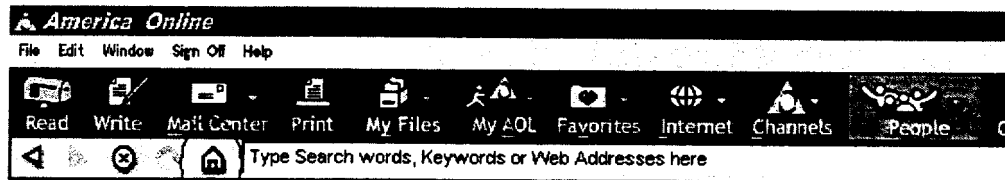
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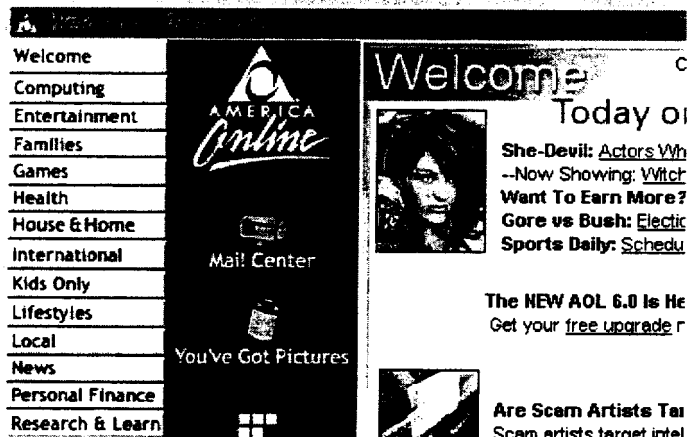
Counsel for The Walt Disney Company

Dated: October 30, 2000

AOL VERSION 5.0 WITH "HOME" BUTTON



AOL HOME BUTTON



AOL VERSION 6.0 WITHOUT HOME BUTTON

