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July 11, 2000

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

RE: FCC CS Docket No.: 00-30
Ex Parte Filing

Dear Ms. Salas:

Preston Padden, Executive Vice President of Government Relations for The Walt Disney Company ("Disney"), Mitch Rose, Vice President of Government Relations for Disney and Larry Sidman of Verner, Liipfert, Bernhard, McPherson & Hand, Chtd., counsel to Disney, met with staff from both the Cable Services Bureau and Office of General Counsel on July 7, 2000 to discuss concerns posed by the proposed merger of AOL and Time Warner. FCC officials present were Deborah Lathen, Chief of the Cable Services Bureau, William Johnson, Deputy Chief of the Cable Services Bureau, Royce Dickens, Anne Levine, Ben Golant, Carl Kandutsch, Peter Friedman, Darryl Cooper, James Bird, Senior Counsel of the Office of General Counsel, and Pieter van Leeuwen.

During the meeting, the Disney representatives described both the ability and the economic incentive for the merged entity to engage in anticompetitive and discriminatory behavior against unaffiliated content providers. This discussion tracked closely the observations and arguments contained in the Reply Comments filed by Disney in this proceeding. In addition, Disney advanced for the FCC's consideration the idea of conditioning any approval of the AOL/Time Warner merger upon separation of ownership of bottleneck distribution facilities and content. Disney cited the FCC's former Financial Interest and Syndication Rights Rules, as well as the antitrust consent decree barring common ownership of studios and theaters, affirmed by the United States Supreme Court in United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), as precedents for such an approach.

Disney also distributed to FCC officials the attached correspondence between Disney and Time Warner, as well as the attached article by Lawrence Lessig regarding the critical importance of maintaining a neutral system architecture in broadband platforms.

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

Sincerely,

Lawrence R. Sidman

Lawrence R. Sidman

CC: Deborah Lathen
William Johnson
Royce Dickens
Anne Levine
Ben Golant
Carl Kandutsch
Peter Friedman
Darryl Cooper
James Bird
Pieter van Leeuwen

Disney Channel

Anne M. Sweeney
President

February 18, 2000

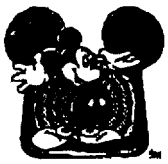
Mr. Joseph Collins
Chairman & CEO
Time Warner Cable
290 Harbor Drive
Stamford, CT 06702

Dear Joe:

I must say that following our conversation of yesterday, I am even less optimistic that we will be able to bridge the material differences between us. This is particularly true with regard to our desire to bring Time Warner in line with the majority of the cable industry in offering The Disney Channel to consumers as part of a basic service (rather than an expensive premium service). Nonetheless, as I committed to do, I will consult with my colleagues and get back in touch.

In the meantime, I would like to highlight the importance of certain basic non-discrimination assurances that we believe should be a part of our agreement irrespective of where we end up on the business points. Specifically, such assurances should cover non-discrimination against Disney/ABC owned content, as compared to Time Warner (or, after your merger, AOL) owned content, with respect to:

1) channel position;
2) page placement;
3) navigation;
4) menu placement;
5) return path functionality;
6) customer interface;
7) caching; and
8) overall consumer availability and prominence.



As you know, both Congress and antitrust regulators have grown increasingly concerned about "screen bias" as a means of steering consumers to affiliated service and content providers and away from unaffiliated providers. Indeed Congress included provisions in both the 1996 Telecommunications Act and the Satellite Home Viewer Improvement Act which, while not specifically applicable to cable, prohibited discrimination in presentation of content to consumers. Time Warner's own 1997 consent order with the FTC in connection with the Turner merger manifests similar concerns on the part of the regulators. The importance of this anti-discrimination issue increases exponentially as cable converts to digital and the Internet continues to expand as a distribution medium. Accordingly, we are looking to secure such non-discrimination assurances with respect to all of your non-broadcast distribution platforms including, without limitation, narrowband internet, broadband internet and cable.

The issue of assuring consumer access to our content on a non-discriminatory basis has always been a priority for us. Even more so in our dealings with Time Warner given our difficult negotiating history (particularly as compared with other cable companies) and Time Warner's enhanced market power to engage in discriminatory conduct should its planned merger with AOL be approved. In this regard, our point of view has been informed by AOL's strong advocacy of open access and the need to assure that ownership of distribution platforms is not permitted to skew competition in content.

In addition we will be seeking your assurance that in retransmitting our digital broadcast signals you will not block consumer access to any "bits" that a consumer could receive for free over the air.

I would be very grateful if you would provide me by early next week with definitive proposed language to provide these non-discrimination and non-blocking assurances.

Best regards,

Anne Sweeney

The Walt Disney Company

Robert A. Iger
President and Chief Operating Officer

Dear Dick,

As discussed, below is a list of the various "access/non-discrimination" categories we would like to address with you.

As we discovered during our negotiation, our interests converge on many of these issues, as we seek to distribute our respective content over myriad platforms. We believe we will mutually benefit from a rigorous level of "content protection," and copyright enforcement, as new technologies prey upon our content without regard to value or ownership.

Although our two companies have been at odds on numerous issues, I believe it is also time for us to consider opportunities to work together, particularly in the area of interactive television. The access you provide will create a fertile ground for us both to develop a rich array of enhanced and interactive television features, which will ultimately offer your cable business countless new marketing opportunities.

In essence, we have 7 core concerns, and are primarily seeking a level of distribution comparable to what your company will afford its own program services and content. Many of these issues were raised during our negotiation, as well as during our meeting with Michael and Jerry.

I realize these are broad categories, and therefore believe we should discuss these in person as soon as possible:

Downstream program and data pass through:
AOL/TW channels and content will not receive preferential bandwidth or data rate treatment, and TW cable systems will not block consumer reception of services and features we provide, that are also passed through on a comparable basis in AOL/Time Warner program services.

Return Path Functionality:
AOL/TW will provide Disney/ABC with the same access to return path functionality as it provides its own program services, (or to third parties) for the purposes of interacting with our consumers.

Menus, Guides, Navigation and Channel Placement:
AOL/TW Channels and content (and third party content) will not be featured more prominently than Disney/ABC channels and content. This would include channel positioning, featured placement on electronic program guides, and home page or front screen positioning.

Caching:
AOL/TW will cache, or provide Disney/ABC the opportunity to cache content equal to the level and manner of caching provided to AOL/TW owned content, resulting in a comparable consumer experience.

Enhanced/Interactive television:
Disney/ABC services will be provided comparable "point and click" functionality to AOL/TW program services, for the purposes of providing its customers with enhanced television services, or interactive television.

Video Image Size and Quality
Without Disney/ABC's permission, AOL/TW will not reduce the image size from full-screen or the quality of the audio and video signal as originated by the Disney/ABC services.

License Agreement:
AOL/Time Warner acknowledges and agrees that it must negotiate licenses with Disney/ABC for interacting with our content, or for authorizing and or enabling such interactivity by others.

I look forward to discussing these issues, and any ideas you have about ways that they might be meaningfully addressed in the context of an ongoing negotiation.

Sincerely,

5/31/00

Mr. Richard Parsons
President
Time Warner Inc.
75 Rockefeller Plaza
29th. Floor
New York, New York 10019

cc. Michael D. Eisner

TIME WARNER

Richard D. Parsons
President

June 15, 2000

Mr. Robert Iger
President & Chief Operating Officer
The Walt Disney Company
500 South Buena Vista Street
Burbank, CA 91521

Dear Bob:

Thanks for your letter of May 31st. Like you, I believe that despite our healthy rivalry as competitors—and any occasional flare-ups that may result—we're on the same wavelength when it comes to some fundamental issues of public policy. In fact, if there's a silver lining to our recent contretemps, I'm hopeful it's in our shared willingness to engage in a wide-ranging discussion of the digital transformation that is redefining the competitive environment for all of us.

Obviously the questions involved are complex and reaching commercial arrangements in the broad categories you set out won't happen overnight. This is further complicated by the regulatory review we are presently undergoing with regard to our pending merger with America Online. Yet, while it would be unwise to prejudice our position by seeking a private agreement with a single competitor, I believe that a more workable alternative is available to us.

As I see it, we have the opportunity to make clear that, along with our long-term desire to resolve specific business differences, we are in agreement on matters of basic importance to the consumers we serve and the talent we employ. If we do it right, a public statement on the principles we hold in common could go a long way toward focusing attention on concerns vital to the future of our companies as well as the entire industry.

Such a statement should address the two issues you raise—i.e., "a rigorous level of 'content protection' and copyright enforcement," and a commitment to providing consumers with the broadest possible selection of content. (I know that Michael has been active on these issues, and so has Jerry. The common ground they share is real, not contrived.) Without implying any definitive language, I think a joint statement might read something like this:

> The digital future has arrived. The explosive proliferation of the Internet and the convergence of media into an instantly available, universally accessible interactive framework are already transforming our society and our economy. The long-term implications for expanding individual freedom, enhancing community empowerment and strengthening human solidarity are profound.
>
> In order for these immensely exciting opportunities to be fully

realized, the creative and economic momentum driving the digital revolution must be sustained. Governments must refrain from imposing artificial constraints that impede private-sector investment and raise barriers to innovation. The private sector must actively promote the powerfully democratic nature of the digital marketplace, while at the same time insisting on copyright protection, which is the lifeblood of intellectual and creative labor.

For our part, we enthusiastically embrace the competitive challenge of the Internet.

We pledge ourselves to helping ensure that consumers have a broad range of choices from as diverse an ensemble of content providers as technology makes possible. The criteria we use for offering these choices—and the only ones that consumers will settle for—must always be quality and originality, not corporate ownership.

Integral to the creation of content is copyright protection. Without this basic legal protection, artists and intellectuals can be denied the rewards of their work, and deprived of the means and motive to continue. Today the threats to copyright protection are greater than ever before. Unless adequate safeguards are instituted and enforced, the creative community will be stripped of any incentive to invest its time, talent and genius in producing material that is routinely subject to infringement and outright theft.

We believe the Internet is the greatest tool in human history for enhancing creativity and advancing artistic diversity. We pledge ourselves to seeking the necessary levels of copyright protection for all those whose work is the soul and inspiration of this new medium.

I hope you'll agree that a statement like this could help put forward priorities that are vital to each of us. We'd work closely, of course, in shaping language to which Michael and Jerry can be equally comfortable attaching their names.

Sincerely,

Dick/cp

cc: G.M. Levin

2ND STORY of Level 4 printed in FULL format.

Time

June 19, 2000

SECTION: VISIONS 21/OUR TECHNOLOGY; Pg. 106

LENGTH: 1177 words

HEADLINE: Will AOL Own Everything?; America Online could do in the early 21st century what Microsoft did at the end of the 20th: control the flow of key technologies

BYLINE: Lawrence Lessig

BODY:

America Online is America's largest Internet service provider. Twenty-two million members get to the Internet through AOL. If it were a state, AOL would rank second in the nation in population, behind California. The company has a market capitalization of $ 125 billion--a bit less than the GDP of Denmark. And with its proposed purchase of one of the largest and most powerful media giants, Time Warner, many are beginning to ask, Should we worry about AOL the way the government worries about Microsoft?

Maybe. But to see why, we've got to look at something politicians don't talk about much--architecture.

At the core of the Internet is a principle of design described by network architects Jerome Saltzer, David P. Reed and David Clark as "end-to-end." The principle of e2e says, Keep the network simple, and build intelligence in the applications ("ends"). Simple networks, smart applications--this was the design choice of the Internet's founders.

The reason was innovation. Simple networks can't discriminate; they are inherently neutral among network uses. Innovators thus don't need to negotiate with every network owner before a new technology is available to all. The burden on innovation is kept small; innovation is, in turn, large.

AOL has benefited from this neutrality. Because regulators breaking up AT&T forced the telephone company to respect e2e neutrality, consumers of telephone service have always had the right to choose the Internet service provider they want, not the ISP the telephone company is pushing. This built an architecture of extraordinary competition among ISPs. AOL, by delivering what consumers want, has prevailed in this competition.

All this may change, however, as Internet access moves from narrowband (telephones) to broadband (predominantly cable). Cable companies are not required to respect e2e; they are allowed to

discriminate. Unlike telephone companies, they get to choose which "new ideas" will run on cable's network. They get to block services they don't like. Already many limit the streaming of video to computers (while charging a premium for streaming video to televisions). And this is only the beginning. The list of blocked uses is large and growing.

This trend worries many. AOL fought restrictions when AT&T (after buying a gaggle of cable monopolies) proposed them. But now AOL, by buying Time Warner, is buying its own cable monopolies. And many are worried that AOL will forget its roots. Will the temptation to build its broadband network to protect itself against unallied content and new innovation be too great? Will AOL, like every other large-scale network that has controlled content and conduit, pick a closed rather than an open architecture? Will AOL become what it eats?

Compromising on the principle of e2e would weaken the Internet. It would increase the costs of innovation. If to deploy a new technology or the next killer application--like the World Wide Web was in the early 1990s or gadgets to link the home to the Net may someday become--you first have to negotiate with every cable interest or with every AOL, then fewer innovations will be made. The Internet will calcify to support present-day uses--which is great for the monopolies of today but terrible for the future that the Internet could be.

An analogous issue is at stake in the government's case against Microsoft. Microsoft argues that it has furthered innovation by providing a platform upon which many application developers have been able to write code. No doubt it has--generally. But the government attacked cases where Microsoft used its power over the platform to stifle technologies that threatened Microsoft's monopoly. The charge was that Microsoft's strategic behavior undermined innovation that was inconsistent with Microsoft's business.

The Microsoft case was about the platform of the 1990s--Windows. The risk that AOL presents is to the platform of the 21st century--the Internet. In both cases, the question is whether a strategic actor can chill innovation. With the Internet, that answer depends upon the principles built into the Net.

AOL promises it will behave. It has been a strong defender of "open access" in the past. But its promises are not binding, its slowness in allowing other instant-messaging services onto its platform is troubling, and last month's squabble over access to ABC on Time Warner's network is positively chilling. These are not signs that the principle that built the Internet thrives.

The test will be whether AOL sticks to the principle of e2e, and if it doesn't, whether the government will understand enough to defend the principle in response. If AOL respects e2e in broadband, if it keeps the platform of the network neutral among new uses, if it builds a guarantee into its architecture that innovation will be allowed and encouraged, then we should not worry so much about what AOL owns. Only when it tries to own (through architecture) the right to innovate should we worry.

Sustaining a neutral platform for innovation will be the challenge of the next quarter-century. The danger is the view--common among politicians—that this neutrality takes care of itself. But we have never seen the owners of a large-scale network voluntarily choose to keep it open and free; we should not expect such altruism now. The Internet has taught us the value of such a network. But the government should not be shy to make sure we don't forget it.

Lessig, who served as an adviser to Judge Jackson in the Microsoft case, is a Harvard law professor, a fellow at Berlin's Wissenschaftskolleg and author of Code and Other Laws of Cyberspace