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October 25, 2000

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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* Presentation, 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, entitled "Deployment of Interactive Television Technology and Return Path Discrimination," for filing in the above-referenced proceeding.

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

Sincerely,



Lawrence R. Sidman

CC: Deborah Lathen
Royce Dickens
Linda Senecal
James Bird
Darryl Cooper

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BEFORE THE
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

EX PARTE OR LATE FILED

EX PARTE SUBMISSION OF THE WALT DISNEY COMPANY

DEPLOYMENT OF INTERACTIVE TELEVISION TECHNOLOGY
AND RETURN PATH DISCRIMINATION

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October 25, 2000

INTRODUCTION

In the course of attempting to explain away the anticompetitive threat posed by their proposed merger, America Online, Inc. (“AOL”) and Time Warner Inc. (“Time Warner”) have argued that (1) Interactive Television is merely “a concept;”¹ (2) there is no such thing as a cable return path; (3) cable operators do not have the capability to discriminate on the return path; and (4) AOL/Time Warner are committed to non-discrimination. In this written *ex parte* submission, we provide direct quotations from AOL and Time Warner’s own public documents, and public documents of their partners, that flatly contradict AOL/Time Warner’s current assertions. In fact, these public documents demonstrate that (1) Interactive Television is a reality; (2) AOL/Time Warner know it is real because they are developing interactive applications for their own channels and content; (3) Time Warner has, in fact, ordered and deployed set-top boxes designed to enable the cable return path that AOL/Time Warner claim does not exist; and (4) the technical equipment being deployed by Time Warner in fact permits precisely the kind of discrimination feared by Disney.

Indeed, there is a complete digital disconnect between the burgeoning market for interactive television and AOL/Time Warner’s assertions about that market to the regulatory bodies reviewing the proposed merger. On the one hand, the market for Interactive Television is developing rapidly with AOL/Time Warner creating interactive content and deploying interactive set-up boxes; on the other hand, the parties portray the market as merely a “concept.” Similarly, AOL/Time Warner claim to regulators that they have no incentive to discriminate, but at the same time refuse to

¹ See Ted Hearn, *Case, Levin Make No-Conditions Pitch*, MULTICHANNEL NEWS, Oct. 2, 2000 (quoting Steve Case, AOL Chairman and CEO). See also *Ex parte* letter of George Vradenburg, America Online, Inc. and Timothy Boggs, Time Warner Inc. to Deborah Lathen, Chief, Cable Services Bureau. In the Matter of Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control, CS Docket No. 00-30, 7 (Sept. 29, 2000) (“*Sept. 29 ex parte letter of AOL/Time Warner*”).

negotiate with interactive content providers regarding nondiscrimination. This disingenuous approach is particularly troubling because AOL/Time Warner's iron control over the cable return path will allow it to foreclose competitors and achieve dominance in the Interactive Television market.

DISCUSSION

A. AOL/Time Warner's Adamant Refusal to Provide Assurances Regarding a Return Path

Before examining what the parties are telling regulatory bodies about their lack of discriminatory intent, it is useful to review AOL/Time Warner's continuing refusal to guarantee others fair access to the return path and their clear ability to implement this policy by precluding access on a non-discriminatory basis. Following the AOL/Time Warner merger announcement, Disney sought assurances regarding non-discrimination for return path functionality and other elements of interactive television. AOL/Time Warner have refused to provide any such assurances on several occasions. Disney's early attempts, which were memorialized in a February 18, 2000 letter from Anne Sweeney, President of the Disney Channel to Joe Collins, Chairman of Time Warner Cable,² were met with Time Warner's flat refusal to provide any such assurances. In fact, it insisted on inserting language in its May 24, 2000 Digital and Analog Retransmission Consent Agreements with ABC that specifically provided:

Nothing contained herein shall obligate Operator to provide Broadcaster or any Station with access to any return path provided to subscribers by Operator for any purpose...³

² Letter from A. Sweeney to J. Collins (Feb. 18, 2000) (Attached hereto as Exhibit 1).

³ See Statement of Preston Padden, Executive Vice President of Government Relations of The Walt Disney Company, En Banc Hearing on America Online, Inc. and Time Warner, Inc. for Transfers of Control, CS Docket No. 00-30 (July 27, 2000) at 146.

Disney President, Robert Iger, made another approach to Time Warner on interactive television issues. Mr. Iger sought to negotiate an agreement pursuant to which AOL/Time Warner would treat Disney's content the same as that of AOL/Time Warner,⁴ including equal treatment on the return path. Mr. Parsons responded by refusing to enter into "a private agreement with a single competitor" and by suggesting that Disney and Time Warner issue a joint statement warning against government intervention.⁵ NBC had a similar experience. Even when NBC had its popular Olympic programming as a carrot for cable carriage, Time Warner refused NBC's requests to discuss the provision to NBC of nondiscriminatory access to Time Warner's broadband facilities.⁶

Consistent with this position, in response to an FCC question as to whether AOL/Time Warner would permit unaffiliated ISP's to offer interactive services via the set-top box, the parties made it clear that they had no such intent. Thus, they told the FCC bluntly that their much-vaunted "open access" commitment did not extend to Interactive Television: "Set-top boxes were not contemplated in the MOU."⁷ Finally, if there was any lingering doubt, the recent remarks of Kevin Leddy, Time Warner Cable's Senior Vice President for new products put them to rest:

For the next few years, what you see on the screen will be our partners . . . if a programmer wants to offer its advertisers the ability to have two-way communication with viewers, the cable operator has to be part of that.⁸

⁴ Letter from R. Iger to R. Parsons (May 31, 2000) (Attached hereto as Exhibit 2).

⁵ Letter from R. Parsons to R. Iger (June 15, 2000) (Attached hereto as Exhibit 3).

⁶ *Ex Parte* letter of Diane Zipursky, Vice President, Washington Law and Policy, National Broadcasting Co. to Magalie Roman Salas, Secretary, Federal Communications Commission, Sept. 19, 2000 in CS Docket No. 00-30.

⁷ Responses to Written F.C.C. Questions Dated Aug. 25, 2000 concerning the Feb. 29, 2000 Memorandum of Understanding ("MOU") and Multiple ISP Access, *In re Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control*, CS Docket No. 00-30, at ¶ 12 (filed Sept. 6, 2000).

⁸ Saul Hansell, *AOL-Time Warner Rivals Preparing for Interactive TV Fight*, N.Y. TIMES, Section C, page 1, column 2, Sept. 11, 2000.

One must wonder how one becomes a partner of Time Warner, given Time Warner's refusal to negotiate regarding non-discriminatory access even with companies such as Disney and NBC. And, if AOL/Time Warner were to reverse course now and make commitments to open interactive television, one must wonder what they would be worth, given AOL/Time Warner's cavalier treatment of its original commitment to open access.

If AOL/Time Warner are allowed to use their control over the cable return path to exclude competitive interactive content, as Mr. Leddy intends, the result will be that companies such as Disney and NBC will be less likely to invest in interactive programming, advertising rates will be higher, which will reduce demand and lead to less interactive programming, variety and consumer choice, and there will be less innovation. Further, the decreased availability of interactive content will deter the entry of potential overbuilder rivals to AOL/Time Warner.

B. Dr. Haseltine's Description of How Return Path Discrimination Could Be Implemented

There is no doubt but that AOL/Time Warner has the ability to implement this exclusionary vision. Dr. Haseltine's Supplemental Memorandum described in detail how a cable operator controls every step of the delivery of interactive television services, both upstream and downstream.⁹

Among the methods that a cable operator could employ to discriminate against non-affiliated interactive television content providers are: (1) stripping ATVEF triggers out of downstream video signals either at the head-end or in the set-top box; (2) passing through

⁹ See Ex Parte letter of Marsha J. MacBride, Vice President, Government Relations, The Walt Disney Company to Magalie Roman Salas, Secretary, Federal Communications Commission, September 26, 2000 in CS Docket No. 00- 30, transmitting a Supplemental Memorandum of Dr. Eric Haseltine, Executive Vice President of Walt Disney Imagineering Research and Development, Inc. on Control of the Return Path for Interactive Television (Sept. 25, 2000).

ATVEF A signals (those containing triggers requiring data to be fetched from the Web) but not ATVEF B data (data contained in the video signal and stored in the set-top box), thus requiring users to download interactive content from the Web via an ISP, and thereby slowing data delivery and disrupting synchronization of data with video; (3) passing through the ATVEF data to the set-top box, but programming the box to ignore the data from non-affiliated content providers; (4) using conditional access hardware to block portions of the downstream signal containing interactive content; and (5) using the Cable Modem Terminal System (“CMTS”) in the head-end to delay or completely delete unaffiliated content, either on downstream or upstream transmission. The capability to inflict this last type of discrimination is incorporated in the cable industry’s DOCSIS Specification 1.1, which stipulates that CMTS systems must support different quality of service levels on a user-by-user basis. As Cisco Systems, a leading CMTS supplier puts it:

[Cisco has put] absolute control, down to the packet in your hands...tools such as type-of-service (TOS) bits identification allow you to isolate network traffic by the type of application, even down to specific brands, by interface used, by the user type and individual user identification, or by the site address.¹⁰

C. AOL/Time Warner’s Misleading Attempts to Dismiss Concerns over Return Path Discrimination

While AOL/Time Warner have consistently refused to provide any assurances that competing interactive content providers will have access to their monopoly cable and, in unguarded moments, have made clear they intend, in fact, to discriminate against non-partners, their latest FCC filing on the issue takes a more evasive tack.

The parties concede, as they must, that “industry-wide interest in offering interactive TV is at an all time high now . . .”¹¹ But having been forced to acknowledge the obvious, the parties

¹⁰ CISCO SYSTEMS WHITE PAPER, CONTROLLING YOUR NETWORK-A MUST FOR CABLE OPERATORS 3 (1999).

¹¹ *Sept. 29 Ex parte letter of AOL/Time Warner at 2.*

disingenuously argue that they have no incentive to discriminate and that “[t]he ‘cable return path’ model . . . does not exist . . .”

. . . how the cable operator will provide a “return path” for interactive services is entirely speculative. With respect to Time Warner, for example, Time Warner offers no ITV cable return path today, either to itself or to third parties, and neither the hardware, software nor business model necessary to provide such a return path exists today.¹²

AOL/Time Warner premise much of their argument on the current AOLTV set-top box offering, simply ignoring Time Warner’s cable monopolies. AOL/Time Warner claim also that “AOLTV and other ITV services simply are not dependent on cable in order to provide interactive services to consumers who receive their video service from cable . . .”¹³ This is simply not so; as Dr. Haseltine’s paper explains, a provider of interactive television services is significantly dependent on cable to permit those services to be delivered. More importantly, AOL/Time Warner’s failure to deal in any meaningful way with the anticompetitive potential for Interactive Television inherent in their monopoly cable franchise areas is fatal to the argument that they cannot discriminate. While the AOLTV box could be used by AOL/Time Warner to discriminate in non-Time Warner areas, the focus of this paper is how AOL/Time Warner will misuse their control of monopoly cable pipes in Time Warner areas, in particular by discriminating against non-affiliated Interactive Television content on the return path through Time Warner’s cable systems.¹⁴

AOL/Time Warner venture even further into the realm of fiction with their claim that “how the cable operator will provide a ‘return path’ for interactive services is entirely speculative.”¹⁵ But

¹² *Id.* at 8.

¹³ *Sept. 29 Ex parte letter of AOL/Time Warner* at Part III.

¹⁴ In non-Time Warner areas, AOL/Time Warner could program the AOLTV box to discriminate by, for instance, simply ignoring the ATVEF triggers of non-affiliated content providers or degrading the AOL ISP return path transmission.

¹⁵ *Sept. 29 Ex parte letter of AOL/Time Warner* at 8.

the Open Cable standards and the interactive television content (ATVEF) standards that Time Warner helped develop, spell out exactly how return paths are to be implemented and, as described below, Time Warner has, in fact, deployed large numbers of digital set-top boxes of a type that can support a cable return path.

AOL/Time Warner also argue that where interactive content is embedded in the video signal (the ATVEF B standard), no return path, beyond the path to the set top box, is needed. But without a return path beyond the set top box, interactivity is limited. No transactions, e-commerce, communication or other critical interactive components are possible without a return path to the content provider.

AOL/Time Warner's final argument is that cable modem service is not necessarily a better option for interactive services. The companies offer up as support the present configuration of the AOLTV box, which is configured with a narrowband return path. However, cable is so superior to other options, that the new generation of advanced set-top boxes are not even configured with a narrowband return path. And, if a subscriber stuck with the outmoded model configured with a telephone return, he or she would forfeit the ability to use any interactive service (such as video conferencing) that required more than a narrowband return. This will prove increasingly to be a hindrance as applications arrive to make use of the available capacity. Viewers' growing appetite for "authentic" TV shows (such as Real World, Survivor, Big Brother), suggests, for instance, that live video feeds from the home (e.g., video call-in talk shows, home game contestants, home correspondents and commentators) may become an increasing component of television programming.

D. AOL/Time Warner's Deployment of Interactive Television Technology Facilitating Return Path Discrimination

AOL/Time Warner have told the FCC that a cable return path “does not exist.” This statement is puzzling because, as Dr. Haseltine’s Declaration makes clear, advanced set-top boxes with a cable return path are being deployed by Time Warner today and Time Warner is offering interactive television services such as Wink, pay-per-view and video-on-demand through such a return path in local franchise areas.¹⁶ Dr. Haseltine points out, for example, that Time Warner Cable of New York City offers its customers in southern Manhattan the Wink system, a software upgrade to cable set-top boxes that allows viewers to interact with television shows. Time Warner’s return path transactions for Wink are carried solely over the cable return path.¹⁷ Similarly, in a variety of Time Warner franchises, including franchises in Austin, Texas, Tampa Bay, Florida (Hillsborough County), Nebraska and Columbus, Ohio, Time Warner cable customers’ requests for pay-per-view and video-on-demand (the latter available in Austin and Tampa Bay) are communicated back to Time Warner solely via a cable return path.¹⁸ Moreover, as explained in detail below, in recent years Time Warner has purchased set-top boxes that include cable return path technology, and it continues to do so aggressively. These facts belie the claim that a cable return path “does not exist.”

Below, based on company press releases and other publicly available materials, we detail Time Warner’s purchase of at least two to three million advanced set-top boxes offering cable return path capability, from vendors such as Scientific-Atlanta, Pioneer and Pace. These purchases make it clear that AOL/Time Warner are in the midst of a large-scale deployment of the

¹⁶ Declaration of Eric C. Haseltine, Oct. 24, 2000 (Attached hereto as Exhibit 4)

¹⁷ *Id.*

¹⁸ *Id.*

infrastructure for Interactive Television and that they will be perfectly positioned to permit their own content to flow through the cable return path and not to allow non-affiliated content to do so, if that is its choice.

As long ago as March 6, 1996, Time Warner issued an RFP for its Pegasus Program, specifying “a powerful, flexible, yet efficient set-top with both digital and analog capabilities,” according to Pioneer Digital Technologies, one of the chosen vendors.¹⁹ A Pioneer block diagram of the Pegasus set-top terminal clearly shows Quadrature Phase Shift Keyed (QPSK) data signals for both upstream and downstream communications.²⁰ As the Pioneer paper concludes: “Cable clearly shines in the area of high-speed two way communications, and the Pegasus Program capitalizes on this.”²¹

Time Warner recently agreed to order 350,000 to 500,000 Voyager 1000 digital set-top boxes from Pioneer, which has already shipped more than 400,000 Voyager boxes to Time Warner.²² All of these boxes are equipped with Pioneer’s Passport software, which provides:

a versatile portal for interactive entertainment such as video-on-demand, training/education-on-demand, Web browsing, e-commerce and local information services. . . . Passport software provides a . . . platform for . . . a wide range of applications including interactive program guides, channel banner browsing, pay-per-view and other downloadable interactive applications such as Web-browsing, VOD, email, chat, weather, sports, stocks and news.²³

¹⁹ PIONEER DIGITAL TECHNOLOGIES, THE PEGASUS TERMINAL (visited Oct. 19, 2000) <<http://www.pioneerdigital.com/prod/voyager/voy PD.htm>>.

²⁰ *Id.*

²¹ *Id.*

²² Jeff Baumgartner, “Time Warner Taps Pioneer for Aggressive Box Rollout,” MULTICHANNEL NEWS, Aug. 7, 2000.

²³ Pioneer New Media Technologies Press Release, Pioneer New Media and Time Warner Cable Sign Sales Agreement for up to 500,000 digital set-top Terminals for Calendar Year 2000 (July 31, 2000) <<http://www.pioneerbroadband.com/073100.asp>>.

Time Warner's principal set-top box supplier is Scientific-Atlanta, Inc., one of the two leading U.S. set-top box suppliers (the other is Motorola, which acquired General Instruments). Scientific-Atlanta's main set-top box is now its Explorer 2000 Digital Home Communications Terminal, which it describes as "the ideal terminal to support services such as video-on-demand, e-mail or Internet access, as well as other future applications." In its description of the "Features" of the set-top box, the first one described is the cable-based "Reverse Path Data Transmitter," which "Allows instantaneous, IP-based, 'real-time' two-way communication between the DHCT and the headend" and "Enables MSO's to offer two-way services . . ." ²⁴

Scientific-Atlanta recently reported that, during fiscal year 2000, it "accelerated the rollout of advanced two-way digital cable systems, which are real-time, interactive digital networks capable of advanced services such as video-on-demand, e-mail and Web browsing." Scientific-Atlanta's subscriber product sales rose 51 percent "driven by the continued rapid acceleration in the development of digital interactive systems and strong demand for the Explorer® set-tops." Shipments of Explorer interactive set-top boxes rose from 0.5 million in fiscal year 1999 to more than 1.8 million in fiscal year 2000. Sales of digital set-top boxes were 34 percent of total sales in fiscal 2000 as compared to 15 percent in 1999 and 1 percent in 1998. Sales to Time Warner were 23 percent of total sales in fiscal 2000. ²⁵ Time Warner purchased nearly 400,000 Explorer units in 1999 and agreed to purchase 500,000 more in the first half of 2000. ²⁶ In the quarter ending June 30,

²⁴ SCIENTIFIC-ATLANTA, INC., EXPLORER® 2000 SPECIFICATION SHEET (June 2000) <<http://www.scientificatlanta.com/nav/html/top/tpdframe.htm>>.

²⁵ SCIENTIFIC-ATLANTA, INC., 10K (2000).

²⁶ Scientific-Atlanta, Inc. Press Release, *Scientific-Atlanta Accelerates Shipments of Explorer Digital Set-Tops to Time Warner for Digital TV Services* (Dec. 15, 1999) <<http://www.scientificatlanta.com/content/nws/releases/991215-2.htm>>.

Scientific-Atlanta shipped 835,000 boxes, 450,000 of which went to Time Warner and in its most recent quarter, it shipped over one million Explorer units.²⁷

Scientific-Atlanta also expects its even more advanced interactive set-top box, the Explorer 6000 to be commercially available later this year. The Explorer 6000, which was demonstrated at the National Cable Television Show in New Orleans this Spring, can “turn the TV into the true center of home interactivity. Visitors could step into the living room of the near future to check e-mail, surf the Internet and place VOIP phone calls.”²⁸

The other leading American supplier of set-top boxes, Motorola also produces digital interactive set-top boxes, the DCT-2000 and DCT-5000. It had shipped over 5 million of these boxes by late 1999.²⁹ The DCT-2000 “supports real time reverse path communications providing the user a gateway to interactive services such as VOD, Internet Access, Email, Home Shopping and more All DCT-2000’s come with an integrated STARVUE II real-time RF [cable] return and may be equipped with an optional STARFONE telephone return path modem.”³⁰ In December 1999, General Instruments agreed to integrate Open TV’s Runtime system into the DCT-2000.³¹

²⁷ SCIENTIFIC-ATLANTA, INC. 2000 SUMMARY ANNUAL REPORT P. 15.

²⁸ *Id.*

²⁹ General Instrument Corp. Press Release, Canadian Cable Systems Alliance Selects General Instrument’s National Access Control and Digital Network Systems to Deliver Digital to Canadian Operators (Nov. 1, 1999). <http://www.gi.com/Press/CurrentNews/canadiancable_110199.html>.

³⁰ GENERAL INSTRUMENT CORP., DCT-2000 SPECIFICATION SHEET (visited Oct. 23, 2000) <<http://www.gi.com/BUSAREA/DNS/digintdct.2000.html>>.

³¹ OPEN TV FORM 20-F at 11 (2000).

The more advanced DCT-5000 replaces the telephone return path with an integrated DOCSIS cable modem and other capabilities that:

enable operators to offer additional revenue generating services that require dedicated upstream bandwidth, such as high speed data services, IP telephony, IP video conferencing, on-line shopping, home banking and more.³²

Users can simultaneously watch video and perform high-speed Internet access and IP telephony. Under the heading “Watch, Talk N’ Surf,” the DCT-5000 product literature states “[t]his functionality provides the consumer with a seamless interaction between data services such as Internet access and revenue generating video services.”³³

As described above, Time Warner, as well as other cable operators, is deploying these interactive digital set-top boxes at a rapid pace. In addition to Time Warner’s 750,000 to 900,000 boxes from Pioneer, it has purchased at least 900,000 interactive Explorer boxes from Scientific-Atlanta and late in 1999 ordered 750,000 digital interactive set-top boxes from Pace Micro Technology.³⁴ Thus, these orders alone amount to at least 2.4 million units.

Time Warner’s 2000 Annual Report indicates that it had 430,000 digital cable customers by the end of 1999 and expected the service, which includes an interactive program guide and expanded pay-per-view capability, to reach all of its major operations by the end of 2000.³⁵ Time Warner expanded the use of the cable return path when it launched video-on-demand in Hawaii in 1999 and in the Tampa Bay and Austin, Texas areas this year. More than 100,000 Time Warner subscribers are now using the Scientific-Atlantic Explorer 2000 boxes and Concurrent Computer

³² GENERAL INSTRUMENT CORP., DCT-5000 SPECIFICATION SHEET (visited Oct. 23, 2000) <<http://www.gi.com/BUSAREA/DNS/digint/dct5000.html>>.

³³ *Id.*

³⁴ Pace Micro Technology Press Release, Pace signs with Time Warner for first US digital cable contract (Nov. 18, 1999) <<http://www.pace.co.uk/content.asp?id=227&template=0>>.

³⁵ TIME WARNER 2000 ANNUAL REPORT 35-36.

Corporation and SeaChange International systems for video-on-demand through the cable return path.³⁶

E. AOL/Time Warner Develop Interactive Content While Others Are Discouraged from Doing So

AOL/Time Warner's rapid deployment of advanced set-top boxes capable of discriminating against unaffiliated interactive content and concurrent refusal to provide assurances they will not discriminate on the return path will act to deter the development of interactive programming by unaffiliated content providers, as set forth in prior Disney *ex parte* submissions. Such behavior could result in enhanced multi-level barriers to entry into cable conduit, set-top box and interactive television content. This in turn would protect AOL/Time Warner's cable monopolies and would provide a feedback effect that extends that market power into interactive television content. Interactive television is projected to generate revenues of over \$20 billion by 2005 and over \$32 billion by 2006, with 60 percent of U.S. homes having access to digital cable service and an estimated 16 million video-on-demand subscribers by 2005, so the reward for such anticompetitive activity would be great.³⁷

To steal the march on AOL/Time Warner's interactive television competitors, AOL/Time Warner are rapidly developing interactive content while signaling to the rest of the industry it is futile to do the same. Consider, for example, AOL's and Time Warner's dealings with Open TV

³⁶ Concurrent Computer Corp. Press Release, Time Warner Cable Tampa Bay Division Launches Industry's Largest VOD Service Using Concurrent Computer Corporation Systems (Aug. 17, 2000) <http://www.ccur.com/news/pr/pr_153.html>. Scientific-Atlanta, Inc. 2000 Summary Annual Report p 16. Concurrent's Press Release noted that: "Concurrent is uniquely positioned to meet the pent-up demand for interactive television services – movies-on-demand and e-commerce over the television."

³⁷ MYERS GROUP, INTERACTIVE TELEVISION OUTLOOK 2000 13 (June 2000). See also FORRESTER REPORT, SMARTER TELEVISION (July 2000) (predicting that \$18 billion in traditional advertising revenue will be lost by 2005, but that it will be replaced by \$25 billion in new revenues from consumer interaction).

“the leading worldwide provider of software that enables digital interactive television.”³⁸

According to Open TV’s most recent annual SEC filing, it has entered into agreements with Warner

Brothers and Turner Broadcasting Systems:

to develop and market enhanced interactive television applications. Through this relationship, conventional television programs and television advertising will be enhanced with interactive information and e-commerce services. Initially, the Company and Time Warner will focus on enabling Warner and Turner programs, such as those shown on CNN and Cartoon Network, with interactive features, but will later also market the interactive applications to other programming companies. The Company and Time Warner plan to address a wide range of programming genres and develop at least three interactive applications per year.³⁹

Open TV also has an agreement with AOL “to develop a suite of applications to deliver AOL’s most popular online services to the television, including e-mail, instant messaging and information services such as news, financial information and weather.”⁴⁰

Overall, twenty network operators are already deploying Open TV’s Runtime digital interactive television software. It permits “a fully-functional interactive television experience that can be delivered through a low-cost set-top box and within today’s digital network infrastructure.”⁴¹

Open TV is also encouraging interactive content development through a formal program for application developers, which has more than 300 members. With “its content and e-commerce partners,” Open TV is creating “a core set of turn-key applications These include applications for an interactive weather service, e-commerce, enhanced broadcast programming and e-mail.”⁴²

³⁸ OPEN TV FORM 20-F SEC FILING (June 30, 2000). Both AOL and Time Warner are substantial investors in Open TV; each holds 2.25 million shares of Open TV stock.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 5.

⁴² *Id.* at 6.

Open TV offers a system called Open Streamer, which sits at a “head-end and is used to broadcast interactive content via standard digital broadcast facilities.”

OpenStreamer is capable of updating a data stream in real-time, allowing up-to-the-second transmission of sports scores, stock quotes or other time-sensitive data. For example, viewers watching a sporting event will be able to get updated selected statistics and scores from other games on demand rather than having to wait for the broadcaster to provide these updates.⁴³

Open TV also offers programmers applications programming interfaces that “can be used to create compelling new interactive applications, including interactive advertising, gaming, shopping and information services.”⁴⁴

“Core applications” that Open TV is currently offering include:

- Weather. Allows viewers to instantly access the weather forecast for their local area, for other areas they plan to visit, and for skiing and beach resorts.
- Shopping. Allows viewers to instantaneously purchase goods and services, while accessing relevant and entertaining information about the items.
- Information Services. Supports the provision of information such as sports scores, general news, financial news and stock quotes and allows the viewer to selectively retrieve such information.
- E-mail. Allows viewers to retrieve and review e-mail messages with a remote control and, using an infrared keyboard device, send messages over the Internet.
- Enhanced Television. Allows viewers to control the information on their television by creating graphical overlays that provide information without interrupting programming.
- Enhanced Sports Broadcast. Allows viewers watching a sports event to act as a “couch commander” by selecting among various camera angles to watch at a particular time, to pull up player statistics and scores from other games at will, and to order merchandise related to the event or sport. Multiple camera angles may be used

⁴³ *Id.* at 15.

⁴⁴ *Id.* at 16.

to follow a particular favorite player, to see instant replays or highlights of the game.⁴⁵

Time Warner's principal set-top box supplier, Scientific-Atlanta also is working to create interactive applications. It is helping Liberate Technologies develop "Internet-based enhanced TV services such as web browsing, e-mail and TV-based e-commerce" and is working with a company called ICTV "to integrate high-bandwidth interactive gaming, educational software and web browsing" onto Explorer set-top boxes.⁴⁶ America Online owns 7.48 percent of Liberate Technologies and Barry Schuler, President of AOL's Interactive Services Group, is a member of Liberate's Board of Directors, as is AOL Director James Barksdale.⁴⁷

CONCLUSION

AOL/Time Warner have been remarkably steadfast in their refusal to provide any assurances regarding return path discrimination. No one can doubt their ability to engage in such discrimination. It is inherent in the cable technology and digital interactive set-top boxes that will facilitate such discrimination are being manufactured and installed right now.

Thus, AOL/Time Warner will be able to effectuate their plan: rapid development of interactive content by themselves and their partners while foreclosing the market from their competitors by closing down the return path. Despite the parties' protestations that they have no incentive to discriminate, they can better be judged by their words:

"Nothing . . . shall obligate Operator to provide [ABC] with access to any return path

⁴⁵ Id. at 16-17.

⁴⁶ SCIENTIFIC-ATLANTA, INC. 2000 SUMMARY ANNUAL REPORT 16.

⁴⁷ LIBERATE TECHNOLOGIES, FORM 10-K FOR FISCAL YEAR ENDED MAY 31, 2000.

provided to subscribers . . . ,”⁴⁸

and

“For the next few years what you see on the screen will be our partners”⁴⁹

Respectfully submitted,



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Of Counsel for The Walt Disney Company

October 25, 2000

⁴⁸ See *supra*, n.3

⁴⁹ Kevin Leddy, Time Warner Cable Senior Vice President for new products, *AOL-Time Warner Rivals Preparing for Interactive TV Fight*, *supra*, n.8.

EXHIBIT

1



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.



Mr. Joseph Collins
February 18, 2000
Page 2

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,

EXHIBIT

2



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.



R. Parsons
Pg. 2

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,

A handwritten signature in black ink, appearing to be "R. Parsons", written in a cursive style.

5/31/00

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

cc. Michael D. Eisner

EXHIBIT

3

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,

A handwritten signature in cursive script, appearing to read "Dick/CP".

cc: G.M. Levin

EXHIBIT

4

DECLARATION OF ERIC C. HASELTINE, PH.D.

Pursuant to 28 U.S.C. § 1746, I, Eric C. Haseltine, hereby make the following statement:

1. I am Executive Vice President of Walt Disney Imagineering Research & Development, Inc. and have extensive expertise in the technical aspects of interactive television. I am familiar with AOL/Time Warner's claim in their September 29 ex parte letter to the FCC that the interactive television cable return path model "does not exist." I find their assertion puzzling and contrary to the facts.

2. It is publicly reported that TimeWarner's principal set-top box supplier is Scientific-Atlanta, Inc., one of the two leading U.S. set-top box suppliers (the other one is Motorola which acquired General Instruments). I am familiar with Scientific-Atlanta's current main set-top box, the Explorer 2000 Digital Home Communications Terminal (the "Explorer 2000"). I have reviewed the technical specifications for the Explorer 2000 and it appears to offer a cable return path. Time Warner has purchased the Explorer 2000 from Scientific-Atlanta.

3. Another Time Warner vendor for its set-top boxes is Pioneer Digital Technologies ("Pioneer"). I have reviewed Pioneer's functional diagram for the set-top box it provides to Time Warner and it clearly shows a cable return path.

4. I am also familiar with Motorola's digital interactive set-top boxes, the DCT-2000 and DCT-5000. From speaking with Motorola, it is my understanding that more than 50 percent of Motorola's DCT set-top boxes include cable return paths.

5. The Wink system, an interactive television application by any definition, is a software upgrade to both analog and digital cable set-top boxes that allows viewers to interact with television shows. Users simply click on special screen icons that cause the set-top box to display program-related enhancements, such as added game statistics for sports broadcasts or interactive features for advertisements, which, for example, enable viewers to request coupons,

special offers and product information. In an October 24, 2000 telephone conference with Time Warner Cable in New York City, I learned that Wink interactive television is available through both digital and analog set-top cable boxes in southern Manhattan, and that the return path transactions for Wink are exclusively carried over the cable. In fact, according to Time Warner Cable in New York City, all of their digital cable boxes use a cable return path; none use telephone lines for return path traffic.

6. It is my understanding that Time Warner cable franchises, including at a minimum franchises in Austin, Texas, Tampa Bay, Florida (Hillsborough County), Nebraska and Columbus, Ohio, communicate customer orders for pay-per-view and video-on-demand services (the latter available in Austin and Tampa Bay) back to Time Warner solely via a cable return path. There are many types of interactive television services, among which are pay-per-view, video-on-demand and Wink.

7. Based on all of the above, it is apparent to me that Time Warner is purchasing set-top boxes that are equipped with cable return path technology and is also currently using cable return paths for the provision of interactive television services such as Wink, pay-per-view and video-on-demand.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 24, 2000 by


Eric C. Haseltine, Ph.D.