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901 - 15TH STREET, N.W.  
WASHINGTON, D.C. 20005-2301  
(202) 371-6000  
FAX: (202) 371-6279

December 6, 2000

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

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

EX PARTE OR LATE FILED

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 6.0 software for filing in 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  
Linda Senecal  
James Bird  
Darryl Cooper

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WASHINGTON, D.C. 20005-2301  
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December 6, 2000

Ms. Deborah Lathen  
Chief, Cable Services Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Re: In the Matter of Applications of America Online, Inc. and Time Warner,  
Inc. for Transfers of Control (CS Docket No. 00-30)

Dear Ms. Lathen:

In an *ex parte* letter dated November 21, 2000, America Online, Inc. ("AOL") maintains there was "no truth" to concerns raised by The Walt Disney Company ("TWDC") that AOL's new "AOL 6.0" software undermines consumer choice. Despite AOL's vigorous denials, there are, indeed, aspects of AOL 6.0 that confuse consumers and make it make more difficult for them to exercise freely their choices of Internet services. AOL's *ad hominem* attack on TWDC's October 30, 2000 filing does not alter the fundamental reality that AOL 6.0 is simply the most recent example of AOL's "walled garden" strategy to diminish consumer choice.

In its *ex parte*, AOL attempts to justify the exclusion, in AOL 6.0, of the familiar, house-shaped icon from the AOL toolbar, an icon consumers use to quickly (i.e., with "one-click") access a default home page. AOL claims that consumers "did not know what the house-shaped icon was for" and "rarely used it to set up a favorite place." This explanation strains credibility. If AOL truly wanted to make it easier for consumers independently to create home pages, AOL could have explained the use of the house-shaped icon to consumers. Instead, AOL chose, in releasing AOL 6.0, to eliminate the recognizable default home page feature altogether, and, as discussed below, provide consumers with neither notification of this change, nor readily accessible instructions on setting up an alternative feature.

Until AOL's November 21 *ex parte*, the public had been given little, if any, direction about how to have "one click" access, through AOL 6.0, to Web sites and services provided by companies other than AOL. AOL's decision to substitute for the familiar, house-shaped icon, without warning or explanation, a new "customization process" suggests that AOL hardly had consumer choice or simplicity in mind. Indeed, consumers searching for an alternative means by which to avoid using AOL's proprietary site for searching the Web are given little direct guidance on how to do so using AOL 6.0. Only after clicking sequentially on the "HELP" icon, the "WHAT'S NEW IN AOL 6.0" button, the "SIMPLIFY YOUR LIFE" button, the "EASY TO USE" button, a secondary "LEARN HOW" button, the "GETTING AROUND AOL" button, and finally the "CUSTOMIZING THE TOOLBAR" button would the most sophisticated and

persistent of consumers discover that there even exists a way to set up one-click access to a selected Web site from the main AOL toolbar. As AOL explains in its *ex parte*, this involves navigating to the desired site, dragging a “heart” icon to the AOL tool bar, and filling out a dialog box – a process that is far from intuitive. By comparison, the average AOL consumer, who is technically unsophisticated,<sup>1</sup> will assume that the ability to have one-click access to Web content of their choice has simply been removed with the house-shaped icon. AOL knows that these consumers are destined to choose the path of least resistance, and that most will surrender to following the primrose path AOL has created for its own proprietary services rather than spend the time and effort to figure out on their own how to avoid AOL’s “walled garden” experience.

AOL’s *ex parte* also tries to confuse “one-click” access to assorted Web pages with the ability of consumers to select the critically important *first* page they view when they explore the Web through a browser. For consumers, the ability to select the first screen home page of their choice is fundamental to exploring the Internet on their own terms. AOL 6.0 has a new “AOL Anywhere” start page that is automatically called up whenever a consumer clicks on the “Internet” button located on the main AOL 6.0 toolbar. Earlier versions of AOL’s software permitted consumers to freely reset this selection, as virtually all browsers do – again, allowing the consumer to decide which Internet site would serve as their first-screen “homepage.” AOL 6.0 eliminates this feature, thus forcing all AOL consumers who access the Internet using the “Internet” icon (likely the vast majority) to enter AOL’s proprietary site before accessing any other.<sup>2</sup> The removal of this functionality, so ubiquitous in all other browsers, gives AOL yet another advantage in the market at the expense of real consumer choice.

Lastly, AOL’s *ex parte* does not even address another troubling aspect about AOL 6.0 described in the November 9, 2000 *ex parte* submission filed in CS Docket No. 00-30 by Kenneth F. Yates, Esq. and Douglas Brooks, Esq. on behalf of non-AOL Internet service providers. The Yates/Brooks *ex parte* states that a test revealed AOL 6.0 automatically overrides any preexisting consumer selection of a “default” or preferred ISP upon installation. When installed, AOL 6.0 behaves like a computer hacker, surreptitiously changing the dial-up settings a consumer has installed in the computer’s connection box from their preferred ISP or browser to settings establishing AOL as the primary service. Thus, AOL 6.0 does not further consumer choice; it ignores consumer choice by automatically switching the consumer’s chosen “default” or preferred ISP to AOL without the consumer’s consent. AOL’s manipulation and suppression of consumer choice through these aspects of AOL 6.0 is clear and inexcusable.

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<sup>1</sup> See, *Simplicity, Crucial Acquisitions Keep AOL on Top*, WASHINGTON TIMES, December 4, 2000, at D12. Quoting an AOL Senior Vice President responding to claims that AOL users lack technical sophistication: “[AOL users] are like motorists with automatic transmissions who don’t later have to change to manual gear shifting.”)

<sup>2</sup> In fact, AOL’s so-called “help” is extremely misleading when it comes to instructing consumers who seek to change the default home page of their AOL Internet browser. After leading a consumer through a series of steps (from the AOL toolbar: Setting/Preferences/Internet Properties/General) the consumer is brought to a dialog box similar to those in many browsers that appears to enable the consumer to change the default home page. In fact, these instructions actually permit the consumer only to change the default home page of an *external browser* (i.e., that which may have come bundled with their operating system), not the AOL browser. While some consumers may be technically savvy enough to know how to use such an external browser when connected to AOL, the vast majority of AOL users are not. In this manner, AOL is ensuring preferential treatment of its proprietary content.

TWDC again urges the Commission to protect consumer choice by ensuring that AOL 6.0's discriminatory features do not become models for additional discriminatory behavior used by AOL/Time Warner to thwart consumer choice in the market.

Respectfully submitted,

*Lawrence R. Sidman*

Lawrence R. Sidman

Lawrence Duncan, III

Sara W. Morris

VERNER, LIIPFERT, BERNHARD,

MCPHERSON AND HAND, CHARTERED

901 15<sup>TH</sup> Street, N.W., Suite 700

Washington, D.C. 20005

(202) 371-6206

Counsel for The Walt Disney Company

Dated: December 6, 2000

cc: Royce Dickens, Deputy Chief, Policy and Rules Division, Cable Services Bureau  
Linda Senecal, Cable Services Bureau  
James Bird, Assistant General Counsel, Office of the General Counsel  
Darryl Cooper, Cable Services Bureau