Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

EN BANC HEARING ON AMERICA ONLINE, INC. AND TIME WARNER, INC. APPLICATIONS FOR TRANSFER OF CONTROL

CS DOCKET NO. 00-30

Comments of James Love
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July 27, 2000

Dear Members of the Commission

Thank you for the opportunity to speak today about the proposed merger between AOL and Time-Warner. The Consumer Project on Technology (CPT) is a non-profit organization that was created by Ralph Nader in 1995. We are funded by charitable contributions, and receive no financial support from AOL, Time-Warner or any of their competitors or rivals. However, I should note that an affiliated group, Essential Information, has received funding from the Turner Foundation, for work on environmental issues, and my Father-in law is a former reporter for Time Magazine. CPT's work on electronic commerce and telecommunications issues is documented on our web page at http://www.cptech.org.

CPT opposes the merger between AOL and Time-Warner. This is the second time that CPT has opposed a merger involving AOL. The first involved AOL's acquisition of Netscape. (See Appendix I).

1. Summary of CPT's opposition to the AOL/Time-Warner Merger.

CPT opposes the merger of AOL/Time-Warner. Our opposition is based upon several considerations that I will briefly outline here.

First, the merger will further concentrate the US media industry. AOL has an important role in providing Internet content and Internet navigation. Time-Warner is a giant content company. Both companies have announced that they will use various opportunities to cross promote each others' products, if the merger goes through. We are generally unhappy with the concentration of publishing and distribution of various content industries, and we regret that the current US antitrust guidelines do not provide an adequate framework for evaluating the negative consequences on society of concentrations of control of media outlets, or the importance of joint ventures and industry collaborations on competition and diversity.

Second, and more central to our opposition to this merger is our concern that the merger will lessen competition in the market for broadband Internet services. AOL's primary and core business is providing residential Internet connectivity and navigation. For the most part, AOL currently delivers this service over analogue telephone lines -- a technology that will be replaced by higher bandwidth services in the not too distant future. The cable platform technology is now the most common platform for higher bandwidth residential Internet services, followed by DSL services provided largely over telephone wires.

Prior to the merger, AOL was faced with the prospect of competing against cable systems that offer ISP services over a much faster connection. Time-Warner was the second most important cable operator in the United States, and a direct competitor to AOL for the higher bandwidth Internet services. In the absence of the merger, AOL's could not realistically survive as a US ISP without finding a way to offer a higher bandwidth service. AOL could build its own network, lease lines for DSL connections from the phone companies, or get the cable operators to open up their platforms to AOL. AOL was the most aggressive national force for open access to the cable platform, and approached my group and many others seeking coalitions to advocate in favor of open access to cable systems.

Before AOL announced that it would merge with Time-Warner, there had been a series of comments from FCC Chairman William Kennard, expressing opposition to F.C.C. regulation of the cable Internet platform, and AOL had witnessed firsthand the difficulty of fighting open access battles at the local government franchise level. In our opinion, the proposed merger is a consequence of the failure of policy makers to protect the Internet from last mile monopolies.

Finally, CPT asks the Commission to consider the impact of the proposed merger on privacy, and to ensure the merger will not lead to a loss of privacy by consumers. On this topic we will defer to Appendix II, which is resolution Ecom 17-00 by the Trans Atlantic Consumer Dialogue (TACD, http://www.tacd.org), a group representing 64 consumer organizations in the United States and Europe.

2. The Open Access Issue.

For residential consumers, the next generation of Internet will be different from what we have today. It will be faster, with higher bandwidth connections that will make it possible to download files faster, and receive higher quality multimedia services. But there will also likely be important innovations in the network architecture that could lead to profound changes in the character of the Internet itself. AT&T, Time-Warner and other companies are building new differentiated levels of service for Internet content, and mechanisms to control and manage Internet data.

The cable companies are buying technology from firms like Cisco Systems. In its 1999 White paper, "Controlling Your Network - A Must for Cable Operators," (http://www.cptech.org/ecom/openaccess/cisco1.html) Cisco tells cable operators to build a "New World network," to replace "the Internet" as it exists today.

The ability to prioritize and control traffic levels is a distinguishing factor and critical difference between New World networks employing Internet Technologies, and "the Internet."

Part of the "New World" architecture is Cisco's Quality of Service "QoS" model. According to Cisco:

> . . . traffic-type identification allows you to isolate different traffic types in your IP network. Through Cisco QoS, you can identify each traffic type - Web, e-mail, voice, video. Tools such as type-of-service (ToS) bits identification allow you to isolate network traffic by the type of application, <u>even down to specific brands, by the interface used, by the user type and individual user identification, or by the site address.</u>
>
> Admission control and policing is the way you develop and enforce traffic policies. These controls allow you to limit the amount of traffic coming into the network with policy-based decisions on whether the network can support the requirements of an incoming application. Additionally, you are able to police or monitor each admitted application to ensure that it honors its allocated bandwidth reservation.
>
> Preferential queuing gives you the ability to specify packet types - Web, e-mail, voice, video - and create policies for the way they are prioritized and handled. For example, although voice and video traffic are intolerant of delays and drops, you still might want to ensure that lower-priority residential Web browsing is allocated enough bandwidth to deliver an acceptable level of service during peak usage.

Among other things, Cisco points out that:

> QoS can also propel you forward by giving you the information you need to offer advanced differentiated services at a profit. For example, time-and usage-based billing via NetFlow measurements provide you with a means of encouraging (or shifting) demand during periods of light network loading by offering off-peak discount pricing.

And, with the new levels of service:

> [cable companies] can optimize service profits by marketing "express" services to premium customers ready to pay for superior network performance.

To appreciate the significance of this new approach to Internet traffic, consider the Cisco discussion of its Committed access rate (CAR) technology, and its use to enhance or diminish the performance of content services:

Committed access rate (CAR) is an edge-focused QoS mechanism provided by selected Cisco IOS-based network devices. The controlled-access rate capabilities of CAR allow you to specify the user access speed of any given packet by allocating the bandwidth it receives, depending on its IP address, application, precedence, port, or even Media Access Control (MAC) address.

For example, if a "push" information service that delivers frequent broadcasts to its subscribers is seen as causing a high amount of undesirable network traffic, you can direct CAR to limit subscriber-access speed to this service. You could restrict the incoming push broadcasts as well as subscribers' outgoing access to the push information site to discourage its use. At the same time, you could promote and offer your own or partner's services with full-speed features to encourage adoption of your services, while increasing network efficiency.

. . .

Further, you could specify that video coming form internal servers receives precedence and broader bandwidth over video sourced from external servers.

With CAR, the choice is yours, and it's easy to make constant revisions and adjustments as traffic patterns shift.

With a plethora of new tools and mechanisms to identify, control and discriminate the levels of quality for Internet content, cable companies can do to Internet data traffic what they have done for years to video content -- pick winners and losers, charge different content providers different rates for access and exclude rivals.

There have been repeated attempts to get the F.C.C. interested in these issues. For example, in an April 1996 filing in an F.C.C. proceeding on Inside Wiring for Cable Systems (CS Docket No. 95-184), CPT described US West efforts in Omaha to withhold important interoperability video dialtone information and services from unaffiliated content providers. With respect to Internet services delivered over cable, CPT told the Commission:

> In our discussions with the cable industry we have been told of various plans for the deployment of cable modems. Some schemes would have the cable companies require the consumers to use proprietary software to use the cable Internet service.. One company told us that they did not want consumers to have the ability to offer their own home pages from their home servers, and that this would be a special service offered by the cable company. There are also various proposals by the cable operators to create special high speed servers for information service providers, that offer superior performance to that offered by ordinary Internet connections. We have not seen the details of these schemes, but we are concerned that the cable companies may attempt to limit the functionality of cable modems in order to favor services offered by affiliated providers.

If the F.C.C. fails to act now on the policy issues of open and non-discriminatory access to different levels of services, the cable companies will later claim to have invested billions of dollars with the expectation of bottleneck controls, and the telephone companies will continue to press for de-regulatory parity for DSL services (another area where the FCC has failed to curb anticompetitive conduct) -- leading to a potential duopoly run by giant cable and telephone phone companies who will have the power to decide which Internet traffic gets on the fast pipe, and which Internet traffic moves at a crawl.

3. The FCC needs to protect the Internet.

There is ample evidence that the cable industry has the economic incentive and the culture to impose highly discriminatory access to next generation platforms for Internet content. What is unclear is what if anything the Commission will do to protect the public. This is a case where policy should lead. Engineers at Cisco or its competitors can design networks that do many things. The Commission should do its job and make sure that the "New World" Internet of the future is as open as "the Internet" that we know today.

Thank you for the opportunity to appear today.

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APPENDIX I
CPT's opposition to AOL/Netscape Merger

In 1998, CPT opposed AOL's acquisition of Netscape. CPT's opposition to the AOL acquisition in 1998 concerned the importance of the Netscape browser to the competitive Internet Service Provider (ISP) community. AOL and Microsoft (MSN) both offer online services that include Internet connectivity, but also feature proprietary content and services, including services that use proprietary software. The most important competition for AOL is from ISPs that offer generic connectivity to the Internet over standard open protocols. At the present there are two primary software programs, Netscape and Microsoft's Internet Explorer (MSIE), that are used to browse the Web. These are not the only software programs that can browse the web, but they are the most popular and have the most features. Once AOL purchased Netscape, the two firms that offered proprietary network services (AOL and Microsoft) would control the primary software used by the customers of the generic ISPs. CPT expressed concern that AOL and Microsoft would have an incentive to migrate network intelligence to their own proprietary platforms, noting that in the past, AOL had entered into agreements with Microsoft that limited competition, when AOL's own interests were served. For example, AOL earlier had switched from Netscape to MSIE, in return for favorable placement of an AOL icon on the Windows desktop.

In the discussions on the AOL/Netscape merger, CPT met with AOL, and asked for a commitment to continue, for 5 years, the Netscape level of financial support for the Mozilla project. The Mozilla project was created by Netscape to support the creation of an open source browser. There were complex and controversial issues in the Mozilla project regarding the licensing of the original Netscape code, and the new code developed by Mozilla, but in general, the Mozilla project was considered an important safety valve for the openness of the Internet. AOL gave numerous public interviews expressing support for the Mozilla project, but specifically refused to make any binding legal commitments. AOL told us, "why would we want to make such a commitment?"

To its credit, AOL has continued to support the Mozilla project, although it is unclear how the project will be managed over time. There were key resignations from the Mozilla team, such as Jamie Zawinski, which raised some eyebrows in the open source community, and it is unclear how the next commercial version of Netscape be licensed, and to what degree Netscape will be engineered as a portal to AOL's content. Already it is the case that the new version of Netscape for Windows is designed so that its mail program opens up with an advertisement for the Netscape portal, for example.

Appendix 2
TACD Resolution Ecom 17-00
Merger of America Online and Time Warner and Privacy Protection

Background:

In January 2000, America Online (AOL) and Time Warner announced their intent to merge and form a combined multimedia company offering a wide array of services over the Internet. Both companies are already dominant in their market sectors both in Europe and in the United States. AOL is the world's largest Internet service provider with more than 20 million subscribers. Time Warner has a customer base of more than 65 million households, and is one of the world's largest providers of entertainment products such as music, magazines, and movies.

The combined databases of the two firms would likely produce the most detailed records on consumers ever assembled, from favorite television programs, to book purchases, to associations with religious organizations, and even political preferences. According to the Wall Street Journal, "AOL already has the names, addresses, and credit card numbers of its 22 million members. It also has tons of tidbits on ages, interests, and musical tastes of the people who fill out member profile pages or register with AOL's ICQ chat or its Spinner online radio divisions."[1] The Wall Street Journal also reports that "Time Warner has the names, addresses and information on the reading and listening habits of the 65 million households who receive its magazines, CDs and books."[2] And USA Today notes that "Time Warner has access to information about its 13 million cable subscribers and from its other businesses, such as Time, Sports Illustrated and People magazines."[3]

Industry analysts predict that "AOL Time Warner will be able to track which television show a person is watching on Time Warner's cable system, as well as the web sites they surf on AOL. A person watching a health program on a Time Warner cable channel who then visits a site, such as the drkoop.com Inc. page on AOL, could be tagged as someone concerned about health issues - a prime target for ads from pharmaceuticals companies."

Both companies have mixed records for compliance with privacy laws. Time Warner is currently defending a case in a US federal district court. The complaint in the case alleges that the company failed to comply with privacy subscriber provisions of the Cable Act of 1984. The complaint specifies that the company "violated the Cable Act's substantive privacy provisions by collecting and distributing personally identifiable information about [their subscribers] and also violated its notice provision by failing to adequately inform them of these provisions." The judge has denied a motion to dismiss and the case is going forward.

AOL has been the subject of numerous privacy complaints. At one point, AOL sold member profile information to tele-marketers until this practice was disclosed to the public. Following protest, AOL discontinued the practice. The most high profile incident concerned records that were disclosed about a naval investigator without court authority that led to the improper dismissal of a naval officer. Recently, AOL also took the somewhat extraordinary step of informing its subscribers that it would "expire their privacy preferences," effectively requiring

AOL customers who tried to exercise various privacy options to renew them on an annual basis. And while AOL has had some success addressing consumer concerns about SPAM, it is noteworthy that AOL has done so under a trespass doctrine that essentially gives AOL, not its subscribers, the ability to control the information that is sent over the AOL network.

Assessment:

Market forces alone do not provide privacy protection. Indeed, the early history of e-commerce indicates that it is the unbridled market that is the primary threat to privacy protection. For this reason, it is the general view of consumer organizations around the world that privacy should be protected by means of a legal framework that ensures the observance and enforcement of Fair Information Practices.

In the absence of effective means to enforce privacy protection in the merged AOL-Time Warner entity, particularly the right of data subjects to access and inspect all personal information collected from them, consumers will face an unprecedented threat to personal privacy. Matters of religion, politics, health, and personal finance will be accumulated and used for marketing purposes. Moreover, companies other than AOL-Time Warner who seek to operate under a higher privacy standard will be at a competitive disadvantage as they will be unable to compete against a larger entity that is able to make unrestricted use of the personal information it obtains.

For the above reasons, the Transatlantic Consumer Dialogue expresses its opposition to the proposed merger until adequate privacy protections are put in place.

Recommendations:

Given the risk to consumer privacy that the AOL-Time Warner merger presents, the other mergers between multimedia companies that will likely follow, and the absence of effective measures to safeguard consumer interests, the TACD will:

1. Urge US officials to condition approval of the proposed merger on the adoption of enforceable Fair Information Practices that would guarantee consumer privacy safeguards at least equal to those that would be provided under the EU Data Directive.

2. Urge US officials to pursue adoption of a comprehensive privacy law, comparable to the EU Data Directive, as opposed to the sector specific laws that do not correspond to the range of activities pursued by combined entities such as the proposed AOL-Time Warner corporation.

3. Urge the Safe Harbor Agreement negotiators to consider how the protection of personal information needs to be safeguarded in light of such mergers.

4. There are many media and e-commerce mergers that will undermine consumer privacy, by giving firms much greater access to personal information. TACD asks the US and the EU to consider the impact of mergers on privacy, as one factor in the review to determine if a merger is in the public interest. We further ask that the EU and the US create legal

mechanisms to address privacy concerns of mergers, such as mechanisms to place conditions on mergers that would protect consumer privacy.

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1 "Database of a merged AOL brings cheers and chills," Wall Street Journal, Jan. 14, 2000.

2 *Id.*

3 "AOL Time Warner could get personal," USA Today, Jan. 12, 2000.