

# TACD

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## MERGER OF AMERICA ONLINE AND TIME WARNER AND PRIVACY PROTECTION

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### 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."<sup>1</sup> 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."<sup>2</sup> 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."<sup>3</sup>

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

<sup>2</sup> *Id.*

<sup>3</sup> "AOL Time Warner could get personal," USA Today, Jan. 12, 2000.