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Before the
Federal Communications Commission
Washington, D.C. 20554

2000 OCT 17 A 10: 23

In the Matter of)
)
Applications of America Online, Inc.)
and Time Warner, Inc. for Transfers of Control)

CS Docket No. 00-30,

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ORDER

Adopted: October 10, 2000

Released: October 10, 2000

By the Chief, Cable Services Bureau:

1. On April 7, 2000, the Bureau entered a Protective Order in this proceeding to ensure that any confidential or proprietary documents submitted by America Online, Inc. (AOL) and Time Warner, Inc. (Time Warner) are afforded adequate protection.¹ The Protective Order requires reporting of violations of the order to the Commission "immediately," and that the party take "all necessary steps to remedy the improper disclosure." It also provides that "the Commission retains its full authority to fashion appropriate sanctions for violations of this order."²

2. The Walt Disney Company (Disney), a reply commenter in this proceeding, sought and obtained access pursuant to the Protective Order to confidential and proprietary information submitted in this proceeding. On September 27, 2000, counsel for Disney notified the Commission, AOL, and Time Warner that a breach of the Protective Order had occurred.³

3. According to Disney, on September 22, 2000, an associate attorney in the firm representing Disney sent an e-mail containing a description of "a number of confidential documents subject to the protective order" to two in-house counsels in the Government Relations Group of Disney's Washington, DC, office "under a mistaken belief that the in-house counsels had executed the required acknowledgments of confidentiality."⁴ Disney further represents that the disclosure was discovered within an hour, and that the in-house counsels were contacted "to reiterate that the e-mail related to confidential documents, and they should not have received it."⁵ However, the original e-mail had already been "retransmitted by one of the original Disney recipients to a number of other Disney personnel."⁶

¹ Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control, Order Adopting Protective Order, 18 FCC Rcd 6117 (2000) (Protective Order).

² Id. at 6121-22.

³ Letter from Lawrence R. Sidman, Esq., Verner Lippert Bernhard McPherson & Hand, to Magalie Roman Salas, Secretary (Sept. 27, 2000).

⁴ Id. at 7.

⁵ Id.

⁶ Id.

Disney counsel then sent another e-mail advising the other recipients of the e-mail that it contained confidential information and to "disregard it." They were also instructed to delete the e-mail from all files.⁷ AOL seeks an investigation of this breach and asks the Commission to take appropriate remedial action.⁸

4. We agree with AOL that the violation of the Protective Order brought to our attention by Disney requires investigation. "Unauthorized disclosure of proprietary information could lead to substantial competitive and financial harm to the part submitting the information. Such disclosure could also undermine public confidence in the effectiveness and integrity of the Commission's processes, and have a chilling effect on the willingness of parties to provide us with information needed to fulfill our regulatory duties."⁹ We therefore direct Disney to provide by October 13, 2000 any additional information, beyond that provided in its letter of September 22, 2000, that is necessary to provide a full and detailed explanation of this matter, including an explanation of the steps it took to remedy the breach of the Protective Order and an explanation of why the breach of the Protective Order, discovered on September 22, 2000, was not reported to the Commission until September 27, 2000. Further, Disney shall, by October 13, 2000, provide to AOL (a) either a copy of the September 22, 2000, e-mail or a detailed description of the information contained in the e-mail; (b) the name of the originator of the e-mail; (c) the names of the two in-house counsels for the Government Relations Group of Disney's Washington, DC, office; and (d) the names of any other recipients, direct or indirect, of the September 22, 2000, e-mail or any other information contained therein.

5. We also take the following steps to remedy the breach of the Protective Order on an interim basis. We direct that all unauthorized direct or indirect recipients of the September 22, 2000, e-mail containing confidential information are prohibited from disclosing or otherwise using the information. In addition, anyone affiliated with Disney or its counsel, Verner Liipfert Bernhard McPherson & Hand, who received, read, or discussed the contents of the e-mail and who had not executed the acknowledgment of confidentiality prior to September 22, 2000, shall execute an affidavit acknowledging that they are prohibited from disclosing or otherwise using any information in the September 22, 2000, e-mail. Disney shall also provide appropriate affidavits that the e-mail has been retrieved and permanently deleted from the e-mail systems of Disney and that it has destroyed all copies in the possession of persons who had not executed the acknowledgement of confidentiality prior to September 22, 2000. These affidavits shall be provided to the Commission by October 13, 2000. AOL and Time Warner may file a response to Disney's submissions by October 18, 2000, and may suggest additional remedial measures or sanctions other than those entered in this order. Disney may reply by October 20, 2000. Upon conclusion of our investigation, we will decide what sanctions may be appropriate for the violation of the protective order.

6. Furthermore, we are concerned by the apparent laxity in procedures used by Disney and its counsel that resulted in the disclosure of the confidential material. Therefore, Disney and its counsel are precluded from any further inspection of confidential documents submitted under the Protective Order until they submit to the Commission, and the Commission approves, a description of the measures and procedures to be implemented to ensure that future breaches of the Protective Order do not occur.

⁷ Id.

⁸ Letter from George Vradenburg III, Senior Vice President, Global & Strategic Policy, AOL, to Christopher J. Wright, General Counsel (Sept. 29, 2000) at 3.

⁹ Applications of Craig O. McCaw, Transferor and American Telephone and Telegraph Company, Transferee, 9 FCC Red 5836, 5923-24 (1994).

7. This Order is issued pursuant to sections 4(i) and (j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), and authority delegated under section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Deborah Lathen
Chief
Cable Services Bureau