

Commission would need to alert broadcasters that any amount of commercialism over a certain limit would jeopardize the licensee's renewal application. By setting limits on commercialism, the Commission would ensure licensee compliance throughout the entire license period.

In sum, since a limitation on the amount of commercialism necessarily results in the prevention of excessive commercialism, there is a "reasonable fit" between the government's interest in preventing excessive commercialism and the imposition of commercial limits. Moreover, the alternative suggested by commentators would clearly be less effective.

C. Discovery Network Does Not Expand the First Amendment Protection for Commercial Speech.

Commentors erroneously rely on the Supreme Court's recent decision in Discovery Network²⁰ to argue that the status of commercial speech has been elevated to a level almost equal to that of noncommercial speech. SKC Comments at 27; Smolla Statement at 10; DMA Comments at 10. Nothing in Discovery Network, however, changes the standards set out by the Court in Central Hudson and its progeny.

In Discovery Network, the city of Cincinnati passed an ordinance that prohibited the use of newsracks for dispensing commercial handbills but not for dispensing traditional newspapers. The purpose of the ordinance was to promote safety and aesthetics. The Supreme Court held that this ordinance was unconstitutional because both the commercial and noncommercial speech at issue was equally at fault for jeopardizing safety and the appearance of the streets. Indeed, the unregulated speech (the racks containing newspapers)

²⁰ City of Cincinnati v. Discovery Network, Inc., 113 S.Ct. 1505 (1993).

was the greater culprit in causing the harm the city sought to prevent. Discovery Network, 113 S.Ct. at 1515. Relying on Fox, the Court stated:

Because the distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted, we have no difficulty concluding. . . that the city has not established the "fit" between its goals and its chosen means that is required by our opinion in Fox.

Id. The Court further stated that had the city "asserted an interest in preventing commercial harms by regulating the information distributed by respondent publishers' newsracks," such an ordinance would have likely passed constitutional muster.²¹ Id.

Thus, it would be fully consistent with Discovery Network and its predecessor cases for the Commission to find that its interest in reducing the harms wrought over the public's airwaves by excessive commercialization justifies a limitation on the number of hours a broadcaster can broadcast pure commercial speech. The government's interest is substantial and its means for doing so "reasonably fit" its asserted interest.

CONCLUSION

As discussed above, the record shows that market forces have not worked to prevent excessive commercialism in over-the-air television. On this record, there is no basis for the Commission to close this inquiry. Indeed, the record underscores the need for further study. Moreover, it would be fair to impose upon broadcasters a limitation on the amount of commercialism they are permitted to air and such a limitation would be consistent with the

²¹ Indeed, two months after the Court's decision in Discovery Network, the Court in Edge Broadcasting Co. v. FCC reaffirmed that the Constitution "affords a lesser protection to commercial speech than to other constitutionally guaranteed expression." 113 S.Ct. 2696, 2703 (1993), citing Fox, 492 U.S. at 472.

First Amendment. CSC et al. therefore urge the Commission to conduct the further proceedings outlined in CSC et al.'s initial comments.

Respectfully submitted,



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February 4, 1994