

As a programmer providing an extensive array of programming for children, Discovery has a direct interest in the outcome of this proceeding. Since its founding almost 20 years ago, Discovery has been committed to serving consumers of all ages as a trusted and valued source of information presented through high quality, entertaining programs. Our award-winning children's shows appear on Discovery channels carried by both cable and satellite multichannel video program distributors ("MVPDs"), as well as the "Discovery Kids" programming block aired on the NBC television network. Our websites, including discoverykids.com, are interactive extensions of our educational and informational television programming. These sites provide visitors up-to-the-minute information about their favorite shows and access to educational resources beyond that which can be provided through MVPD systems or the broadcast medium. The target audience for our sites—even those associated with children's programming—extends beyond youngsters to their parents and other adults interested in the substantive topics and in the opportunities for children to learn more about those subjects.

Discovery fully supports the Commission's efforts to serve the particular needs of children in the television audience, including the goal of shielding youngsters age 12 and under from excessive commercialization. With this common objective in mind, Discovery would like to work with the Commission to create clear, practical and effective responses to the website issues.

I. As Currently Articulated, the Restrictions on the Display of Internet Website Address Could Inadvertently Impede the Delivery of Educational Information to Both Children and Adults

In extending the agency's regulatory reach to program-related websites, the Commission's new rule restricting the display of Internet website addresses incorporates a four-part test that is overly broad and complex. The first three factors of the test are, at best, vague and over inclusive—and, accordingly, may raise First Amendment issues. Under the first factor,

the regulated website must “offer a substantial amount of *bona fide* program-related or other noncommercial content,” but the Commission offers no guidance as to what the agency would consider a substantial amount. Under the second factor, the regulated website must “not be primarily intended for commercial purposes,” but the Order provides programmers with no understanding of how the Commission will discern intent. Under the third factor, the regulated website’s home page and “other menu pages” must “be clearly labeled to distinguish” between noncommercial and commercial material, but the Order offers no guidelines or examples. Without further direction from the agency on these points, children’s program producers and their website designers will find it impossible to create sites with any certainty of compliance with the new restrictions.

From the practical and technical standpoint, the fourth factor in the website address display restriction is particularly problematic. That factor bars the display of an address for any webpage “used for e-commerce, advertising, or other commercial purposes,” including a link to another page with commercial material. This so-called “two-click” requirement, as a conceptual matter, apparently would allow a third page to display commercial material. Assuming so, the Commission should provide more concrete discussion about how the agency expects the restraint to work. Because the Order fails to provide guidance on this point, programmers are left with myriad questions that have no obvious answers. For example:

- What type of language can be used on the second “clean” page to direct viewers to a third page that contains commercial content? Would a buffer page that tells viewers that they are now leaving an advertising-free area of the website qualify as a second page with no commercial material?
- Is there a “click-back” exemption to the two-click requirement? Because web users often toggle back and forth between pages of a site, current technology may permit them to see the first two pages without commercial material but allow advertisements to appear if the user returns to those same pages. Are these click-back viewings deemed a return to the requisite first and second clean pages, or are these viewings

considered a fourth or fifth (or more) pages that the user sees? Does it make a difference if the user employs his or her browser's "back" button, as opposed to a direct link, to return to previously viewed material?

- Furthermore, how does the two-click requirement apply to links that may appear for "sister" sites to a regulated children's programming site, such as those related to other programming designed for general audiences?

In short, the many uncertainties raised by the vague four-part test for permissible website address displays could well prove counterproductive. Because the Order provides no guidance on what practical steps should be implemented to ensure that a website complies with the restraints, MVPDs and broadcasters may feel compelled to follow the one path that would raise no regulatory questions: omitting any Internet website addresses during children's programming.²

Such refusals, in turn, could well deprive children of easy—and enticing—opportunities to expand upon the educational information presented in popular television programs such as "Strange Days at Blake Holsey High" (science), "Trading Spaces: Boys vs. Girls" (art, design and crafts), "Tutenstein" (history and archeology), and "Peep and the Big Wide World" (science literacy for preschoolers). The value of Discovery's content has been repeatedly affirmed over the years by its record of awards; in 2004, seven different television series, including "Peep," won Parents' Choice Awards and two series, including "Tutenstein," won daytime Emmys. Our websites enhance the TV experience by providing kids more content—much of it in interactive formats—on the same subjects. For example, the "Tutenstein" site allows children to learn to spell their name in Egyptian hieroglyphics and play a game that teaches them how real mummies

² In some cases, a ban on airing certain Internet website addresses may be directly contrary to the Commission's sponsorship identification rule. Discovery has had experience with program sponsors, including donors of non-monetary consideration, that use a website address as a corporate name. Where such a name does not comply with the new website address display test, the Commission is placing broadcasters and MVPDs in the uncomfortable position of choosing which FCC rule to break.

were created. In addition, Discovery's websites offer children and adults the opportunity to make larger connections through "Explore by Subject" links. A child interested in historical subjects generally, for instance, could use the Explore by Subject link on discoverykids.com to reach webpages offering an interactive guide to the Wright Brothers' first airplane flight; a modern woman's diary of a week spent living with the Amish; and, a review of archeological evidence concerning the likely murder of the "Tutenstein" inspiration, Tutankhamen, the real "boy king" of ancient Egypt.

These fun and information-rich online offerings plainly have merit—and advance the precise educational and informational goals of the FCC. The Commission should carefully refine its website address display restrictions to ensure that the sites remain useful tools for children and adults alike.

II. The Commission Should More Explicitly Detail How It Expects the Host Selling Restriction Developed for Television to Apply to Websites

Discovery also requests that the Commission reexamine and clarify how the traditional prohibition on host selling is to apply in the online context. We agree that there is a valid public interest in shielding young children from undue persuasion to buy program-related merchandise. We also understand how the Commission's long-standing prohibition on host selling operates on television: the policy prohibits "the use of program characters or show hosts to sell products in commercials during or adjacent to the shows in which the character or host appears."³ In keeping with that understanding, Discovery also avoids promotion of toys and games based on program characters during the related shows or in the commercial bumpers before or after those shows.

³ See Order at n.13.

In applying this traditional policy to websites, the Order seems to assume that the analogous restraint is both appropriately limited and easy to comprehend. Neither is the case. At this point, there is no clear method of identifying what might constitute host selling in the online environment. On television, it is plain from the Commission's enforcement cases that violations occur *either* when human beings or characters appear as commercial pitchmen *or* when the advertised product or service itself incorporates a program character. *See, e.g., Dr. Frederick Breitenfeld, Jr., President, WHYI, Inc., 7 FCC Rcd 7123 (MMB 1992).*⁴

On the Internet, however, familiar television characters are often used only to adorn a webpage or to guide children from one page to the next. For example, the character "Paz the Penguin" hosts Discovery's commercial-free "READY SET LEARN!" program block for preschool children on weekday mornings.⁵ Paz also is incorporated into the READY SET LEARN! logo, which preschoolers (and their parents) use to identify the entertaining programs specifically tailored to meet the educational needs of very young children. Yet the Order, at least by implication, appears to prohibit the READY SET LEARN! logo from appearing on any Discovery website page that sells merchandise—even those past the first two "clean" pages—although neither the logo nor the penguin is actively engaged in touting products or services. Moreover, under the Commission's *WHYY* precedent, it seems that the website promotion of any product or service incorporating a program character might violate the host selling rule—even though the Order otherwise permits the sale of program-related merchandise on appropriately

⁴ In the *WHYY* case, the Commission's Mass Media Bureau determined that a noncommercial underwriting credit for producers of a "Sesame Street" theatrical production violated the host-selling policy. The credit depicted Sesame Street program characters dancing in a stage show but did not use the characters as direct pitchmen to announce the availability of tickets.

⁵ The six-series block appears on both the TLC programming channel and the Discovery Kids digital channel.

cabined commercial sections of the website. *See* Order at ¶ 51. At the very least, the two new rules are in serious tension.

If this understanding is correct, Discovery and other programmers could not use program characters to direct web users' attention to material that may interest them nor sell via their websites any merchandise incorporating a character. The ban would apply even to web offerings of educational goods such as the award-winning READY SET LEARN products, which are expressly designed to foster preschoolers' mental and physical development.⁶ Because many of these products have educational and informational value, they buttress and reinforce the Commission's policy goals for children's programming. In fact, two products featuring READY SET LEARN's Paz the Penguin recently garnered top awards, the Gold Seal Award and the Special Needs Award, from the Oppenheim Toy Portfolio, the only independent consumer review of children's media.⁷

A regulatory restriction that puts such offerings at risk is clearly overbroad. It also would undermine the investment that Discovery and other programmers have made in their intellectual property while actually thwarting parents' ability to acquire award-winning, educationally sound toys and games incorporating characters that delight and instruct their children.

⁶ The current array of READY SET LEARN merchandise includes Paz's Tool Set, which helps toddlers develop their fine motor skills; Paz's Wooden ABC Spinner, which helps young children identify letters and shapes; and Paz's Jump & Dance Music Mat, which helps preschoolers develop problem solving, motor, and creative play skills. The content of the READY SET LEARN products pages, which identify the developmental focus of each offering, is plainly designed for parents and other adults.

⁷ The Oppenheim Toy Portfolio, created by leaders in child development, children's literature and education, tests children's products independent of industry involvement; it does not charge entry fees or accept advertisements from manufacturers. The Oppenheim Special Needs Award is given to toys that address specific learning needs in children.

III. CONCLUSION

For all of the foregoing reasons, the Commission should take additional time to fully analyze the practical difficulties and legal issues raised by the new website restrictions. Children and their parents, as well as the industry, would benefit from clearer rules that are better tailored to address legitimate concerns about commercialization of program-related websites designed for children. In light of the fact that restructuring Discovery's programming and website will take substantial resources and time to comply with the new rules and policies, we urge the Commission to refine and clarify its Order before implementing these regulations.

Respectfully submitted,

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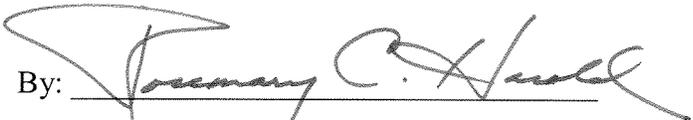
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