

July 19, 2004

Division of Enforcement
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Petition for Initiation of Complaint Against Fox News Network, LLC for Deceptive Practices Under Section 5 of the FTC Act

To the Division of Enforcement:

MoveOn.org, Inc. and Common Cause hereby petition the Commission to initiate a complaint, pursuant to section 5 of the Federal Trade Commission Act (the "Act"), 15 U.S.C. §45, against Fox News Network, LLC, ("Fox News"), for deceptive practices in the advertising and marketing of cable television programming. Specifically, Fox News has advertised and promoted the Fox News Channel ("FNC") using the slogan and mark "Fair and Balanced", but FNC's news and commentary programming is not remotely "fair" or "balanced." To the contrary, that programming is deliberately and consistently distorted and twisted to promote the Republican Party of the U.S. and an extreme right-wing viewpoint.

The Commission should institute an enforcement proceeding against Fox News; order Fox News to cease and desist from using the slogan and mark "Fair and Balanced;" and take such other action as may be appropriate to remedy the injury to consumers from Fox News' deceptive practices.

SUMMARY

By the network's own account, Fox News has consistently and regularly used the phrase "Fair and Balanced" to promote FNC's television programming. Fox News has, in fact, registered as a trademark the phrase "Fair and Balanced" for television news and for certain classes of merchandise. Last year, Fox News brought suit for trademark infringement against the publisher of a book, *Lies and the Lying Liars Who Tell Them: A Fair and Balanced Look at the Right*, and against the book's author, Al Franken.

By any objective measure, FNC's programming is not "Fair and Balanced." To the contrary, recent research and studies of the network's programming demonstrate that:

- Network management instructs line producers and correspondents to structure their coverage of events in a way that specifically promotes the positions of the Bush Administration and the Republican Party.
- The network makes no effort whatsoever to achieve any semblance of balance on its many interview shows. For example, a study of the interview show "Special Report with Brit Hume" for the last six months of 2003 concluded that conservative guests outnumbered progressive guests five to one; and a similar study of the program in 2002 concluded that conservative guests outnumbered progressive ones, 14 to one.
- The network's coverage of current events is grossly distorted and biased. For example, a recent survey showed that much higher percentages of viewers whose main source of news is FNC have misperceptions about indisputable facts about the war, than do viewers of other news outlets.

The FTC's policy is to find advertising to be deceptive, within the meaning of section 5 of the Act, if a claim was made; the claim was likely to mislead a reasonable consumer; and the claim was material. In the case of FNC, a viewer of television news who does not strongly identify with either political party or any particular ideology, or who is seeking balanced, neutral, objective news coverage, might well be induced to view FNC by reason of the claim that its coverage is "Fair and Balanced." There can be no doubt that such a consumer would be seriously misled, in that FNC's coverage is grossly distorted, unfair and unbalanced.

Under the FTC's test, a "material" claim is one that involves information that is important to consumers and likely to affect their choice of a product or service. It is difficult to imagine a claim more material to a viewer's choice of news coverage than a claim that such coverage is "Fair and Balanced." Manifestly, by its nature, such a claim is highly likely to affect a viewer's choice of television news programs.

Fox News' advertisement of FNC's programming as "Fair and Balanced" is very likely to mislead reasonable consumers and is material to their choice of such programming. For that reason, FNC's advertising is false and deceptive within the meaning of section 5 of the Act.

To be sure, Fox News is free, under the First Amendment, to present news, commentary, entertainment and any other content, on its cable networks, in any way it wishes. It has no obligation whatsoever, under any law, actually to present a "fair" or "balanced" presentation of the news.

What Fox News is not free to do, however, is to *advertise* its news programming—a service it offers to consumers in competition with other networks, both broadcast and cable—in a manner that is blatantly and grossly false and misleading. Under the Supreme Court’s “commercial speech” rulings, the government—including this agency—may ban forms of advertising that are more likely to deceive the public than to inform it. That is certainly true of Fox News’ use of the slogan “Fair and Balanced.” Moreover, any claim by Fox News to First Amendment protection for use of this slogan is further undercut by Fox’s efforts to use this slogan to *suppress* debate and free speech, through its trademark infringement action against the publisher and author of *Lies and Lying Liars*.

For these reasons, the Commission should initiate a complaint against Fox News under section 5 of the Act.

I. FACTUAL BACKGROUND

A. Fox News and FNC

Fox News Network, LLC (“Fox News”) is a subsidiary of News Corporation. In October 1996, Fox News launched the Fox News Channel (“FNC”), a cable television channel. By Fox News’ own account, FNC is now the most watched twenty-four hour news network in the nation. (Complaint, Fox News Network LLC v. Penguin Group (USA) *et al*, No. 1:03-cv-06162-RLC (U.S. Dist. Ct., S.D.N.Y., filed Aug. 14, 2003)(hereinafter “Fox Complaint Against Franken”), ¶15). Since 1996, the number of subscribers to FNC has increased from 13 million to more than 80 million. (*Id.* ¶16).

B. FNC’s Use of the Slogan “Fair and Balanced”

FNC has used “Fair and Balanced” as its primary slogan since the time of the network’s launch in October 1996. (Fox News Complaint Against Franken ¶21). In April 1997, Fox News applied to the USPTO for a trademark in the phrase “Fair & Balanced” for “entertainment services in the nature of production and distribution of television news programs.” On December 22, 1998, the trademark “Fair & Balanced” was registered on the USPTO’s Principal Register. (*Id.* ¶22).

According to Fox News’ own account in its Complaint Against Franken:

FNC continually employs the phrase “Fair and Balanced” throughout its programming. The phrase is used consistently and regularly by FNC’s on-air personalities. Fox News has also used the phrase in numerous print, radio, television and billboard advertisements. For example, news personality Brit Hume concludes every broadcast of “special Report with Brit Hume” by saying “stay tuned for news fair, balanced and unafraid.”

Fox News Complaint Against Franken ¶24. According to Fox, “‘Fair and Balanced’ has become widely known as Fox News’ signature tag line and is associated in the minds of

the public, as well as in the minds of FNC's millions of viewers, with Fox news." (*Id.* ¶26). "Because of this extensive marketing program and ratings success, 'Fair and Balanced' has become synonymous in the minds of the public with FNC." (*Id.* ¶67).

C. The False and Misleading Nature of "Fair and Balanced"

By any objective measure, FNC's presentation of news, commentary and other programming is not remotely "Fair and Balanced." To the contrary, recent studies and research demonstrate clearly that FNC's presentation of news and commentary is deliberately twisted and distorted to present but a single viewpoint: that of the Republican Party and the conservative movement in the U.S.

1. Direction of Fox News Management. FNC and/or Fox News management has repeatedly directed the network's producers and correspondents to distort their coverage and presentation of news events to present only the Republican and conservative viewpoint. A series of memoranda from John Moody, Fox News' senior vice president for news and editorial, to Fox News employees, memos presented in the newly-released documentary "Outfoxed", a copy of which is submitted as Exhibit A to this petition, clearly demonstrates such direction. Sample memos from Mr. Moody include the following excerpts:

Memo dated 05/09/2003 :

Let's spend a good deal of time on the battle over judicial nominations, which the President will address this morning. Nominees who both sides admit are qualified are being held up because of their POSSIBLE, not demonstrated, views on one issue – abortion. This should be a trademark issue for FNC today and in the days to come.

Memo dated 3/23/2004:

The so-called 9/11 commission has already been meeting. In fact, this is its eighth session. The fact that former Clinton and both former and current Bush administration officials are testifying gives it a certain tension, but this is not "what did he know and when did he know it" stuff. Don't turn this in to Watergate.

Memo dated 04/06/2004:

Kerry's speech on economy at Georgetown is likely to move onto the topic of Iraq. We should take the beginning of Kerry's speech, see if it contains new information (aside from a promise to create 10 million jobs) and see if other news at that time is more compelling. It is not required to take it start to finish.

Memo dated 04/28/2004:

Let's refer to the US marines we see in the foreground as "sharpshooters" not snipers which carries a negative connotation

Memo dated 05/06/2004:

Thursday update: The pictures from Abu Ghraib prison are disturbing. They have rightly provoked outrage. Today we have a picture – aired on Al Arabiya – of an American hostage being held with a scarf over his eyes, clearly against his will. Who’s outraged on his behalf?

The documentary includes an interview with Larry Johnson, an expert on terrorism who was formerly an on-air consultant to Fox News. Johnson states that the work environment at Fox was “a Stalinist system of fear” in which reporters and contributors were expected to toe the Republican and conservative line. In the documentary, anonymous former employees state that Fox News management displayed an “us versus them attitude” and that “those who challenged [this view], their attitudes were not well tolerated.”

According to the Columbia Journalism Review, several former Fox News employees “complained of ‘management sticking their fingers’ in the writing and editing of stories to cook the facts to make a story more palatable to right of center tastes.” One former employee said “I’ve worked at a lot of news organizations and never found that kind of manipulation.” (CJR, March 4, 1998).

New York Magazine (Nov. 17, 1997) quoted Jed Duvall, a veteran ABC reporter who went to work for, then left, Fox News, as saying, “I’ll never forget the morning that one producer came up to me and, rubbing her hands like Uriah Heep, said, ‘Let’s have something on Whitewater today.’ That sort of thing doesn’t happen at a professional news organization.”

2. Open Partisanship of Anchors and Correspondents. According to a report entitled “The Most Biased Name in News,” published by the organization Fairness and Accuracy in Media in August 2001 (FAIR 2001 Report)(copy submitted herewith as Exhibit B), in 1996, while already a Fox News anchor, Tony Snow endorsed Bob Dole for president in the Republican National Committee magazine Rising Tide. At the 2000 Republican National Convention in Philadelphia, Snow addressed the Republican Youth Caucus as a speaker, filling in for a speaker who could not make it.

Sean Hannity, co-host of the FNC program “Hannity & Colmes,” received “thunderous applause” when he spoke at a closed door House Republican Conference meeting usually closed to the working press. (US News & World Report, May 7, 2001).

3. Imbalance in Guests and Panelists. A persistent imbalance in guests and panelists on Fox’s numerous interview and panel discussion shows is illustrated by its flagship news show, “Special Report with Brit Hume.” According to a new study by FAIR, “Still Failing the ‘Fair & Balanced’ Test,” (copy attached as Exhibit C), in the last six months of 2003, conservative guests on that program outnumbered liberal or progressive guests by five to one. In that time period, of 42 guests who were current or former Democratic or Republican officials, candidates, political appointees or advisers, 35—or 83%--were Republicans. An earlier study by FAIR of the show in 2002 found that conservative guests outnumbered progressive or liberal guests, by 14 to one.

Nor is such imbalance limited to the Hume show. Two conservatives—Fred Barnes and Morton Kondracke—constitute the entire regular panel on Fox’s weekend political show, “The Beltway Boys.”

4. Imbalance in selection of topics. The “Outfoxed” documentary shows that the topics chosen for discussion or presentation on FNN talk and interview shows, and for documentaries and special reports, are heavily tilted towards what the Republican party considers “wedge” issues—issues designed to inflame and play on the fears and emotions of voters in a way calculated to increase support for the Republican Party. Issues repeatedly covered include abortion; gay marriage; display of the Ten Commandments; and president Reagan. Topics of public interest rarely covered include the environment; the economy; and immigration.

Former FNC reporter Jon Du Pre was told by his superiors, for example, that Rev. Jesse Jackson was to be made an explicit target of the network and that it was a stated policy of FNC to “shame” Rev. Jackson. Du Pre also explains that correspondents and producers were repeatedly instructed to fabricate glowing stories about former President Ronald Reagan, going so far as to create a story about a non-existent celebration of Reagan’s birthday at the Reagan Library in California.

5. Imbalance in presentation of topics. Fox News displays consistent and persistent imbalance in the presentation of topics on its news and talk shows. In the documentary, David Korb, a former freelance writer for FNC, reads a memo from Fox News management, addressing coverage of the Iraq War, and directing correspondents and producers to “keep it positive. We need to report on what’s positive out there.”

The distorted and misleading nature of the resulting coverage of the Iraq War is demonstrated by a poll taken by the University of Maryland’s Program on International Policy which showed that substantial numbers of citizens have significant misperceptions about the war and that these misperceptions were markedly higher among those whose main source of news is FNC. (“Survey shows Fox led in misleading public,” *Seattle Times*, Oct. 6, 2003, p. C-1).

For example, 33% of FNC viewers believe (falsely) that the U.S. has found weapons of mass destruction in Iraq, compared with 11% of National Public Radio listeners. Of FNC viewers, 67% believed (falsely) that the U.S. has “found links between Iraq and Al Qaeda” versus 16% of NPR listeners.

PIPA’s research director, Clay Ramsay, concluded that, “The more closely you followed Fox, the more misperceptions you had....No other news outlet came anywhere near that.” (*Seattle Times, supra*). As the *Seattle Times*’ television critic noted in her article on the survey, “That’s fodder for arguing that the only place its ‘fair and balanced’ motto really belongs is on the cover of a satirical best seller.”

II. LEGAL ANALYSIS

A. Fox News' Advertisement of FNC's Programming as "Fair and Balanced" Is a Deceptive Practice

In determining whether an advertising claim is deceptive in violation of section 5 of the Act, the FTC applies a three-pronged test: “whether ‘(1) a claim was made; (2) the claim was likely to mislead a reasonable consumer and (3) the claim was material.’” *Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000). *Accord*, *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1435 (9th Cir. 1986). “[T]he Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.” FTC Policy Statement on Deception, appended to *In the Matter of Cliffdale Associates, Inc.*, 103 F.T.C. 110, 170 (1984).

First, there is no question here that the claim—that FNC’s programming is “fair and balanced”—has been made, and made repeatedly, in advertising and promoting that programming.

Second, under the FTC’s policy, “to be deceptive, the representation, omission nor practice must be likely to mislead a reasonable consumer under the circumstances....In evaluating a particular practice, the Commission considers the totality of the practice in determining how reasonable consumers are likely to respond.” *Id.* at 176. “A material practice that misleads a significant minority of reasonable consumers is deceptive.” *Id.* In this regard, a “seller has some latitude in puffing his goods, but he is not authorized to misrepresent them or to assign to them benefits they do not possess....Statements made for the purpose of deceiving prospective purchasers cannot properly be characterized as mere puffing.” *Id.* at 185, *quoting Wilmington Chemical*, 69 F.T.C. 828, 865 (1966).

In the case of FNC, the “reasonable consumer” must be considered, not an ideologue or strong partisan, but one who is looking for objective, neutral balanced presentation of news, commentary, opinion and other programming dealing with current events and issues. Such a “reasonable” consumer would clearly be misled by the representation that FNC’s programming is “fair and balanced.” The “net impression that [the representation] is likely to make on the general populace” (FTC Policy Statement at 178, *quoting Grolier*, 91 F.T.C. 315, 430 (1978)), is that FNC’s coverage is fair, presents both sides of an issue and is unbiased. In reality, nothing could be further from the truth. FNC’s coverage is grossly, unmistakably distorted and twisted to reflect only a single viewpoint—the Republican and conservative one. Thus, the use of the slogan and mark “fair and balanced” is clearly “likely to mislead a reasonable consumer under the circumstances.”

As to the third prong of the test, “a material claim is one that ‘involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.’” *Novartis, supra*, 223 F.3d at 786, *quoting* FTC Policy

Statement, *supra*, 103 F.T.C. at 165. “If inaccurate or omitted information is material, injury is likely.” FTC Policy Statement, 103 F.T.C. at 187. “A misleading claim or omission in advertising will violate Section 5...if the omitted information would be a material factor in the consumer’s decision to purchase the product.” *Id.*, quoting *American Home Prods. Corp.*, 68 F.T.C. 136, 368 (1981), *aff’d*, 695 F.2d 681 (3d Cir. 1982). “Injury exists if consumers would have chosen differently but for the deception....Thus injury and materiality are different names for the same concept.” FTC Policy Statement, 103 F.T.C. at 191.

It is difficult to imagine a claim about news programming that would be more “material” to a viewer’s choice than a claim going to the objectivity of the programming. Clearly, a representation that programming is “fair and balanced” is calculated to, and inherently likely to, affect the choice of television viewers regarding news and current events programming, whether on broadcast or cable outlets. Some significant portion of FNC’s viewers have spent some time watching FNC—and FNC’s ratings have been inflated by these viewers—based on the false and misleading claim that the programming of FNC is “fair and balanced.” Accordingly, the “fair and balanced” claim is “material” under the Commission’s test.

For these reasons, Fox News’ advertisement of FNC’s programming as “Fair and Balanced” constitutes false advertising and a deceptive practice in violation of section 5 of the Act.

B. Fox News’ Deceptive Advertising Is Not Protected by the First Amendment

Because the product at issue here—cable television news and information programming—is itself clearly protected by the First Amendment, it is important to understand that Fox News’ deceptive *marketing* of that product is *not* so protected. To be sure, Fox News is free, under the First Amendment, to present news, commentary, entertainment and any other content, on its cable networks, in any way it wishes. It has no obligation whatsoever, under any law, actually to present a “fair” or “balanced” presentation of the news. What Fox News is *not* free to do, however, is to *advertise* its news programming—a service it offers to consumers in competition with other networks, both broadcast and cable—in a manner that is blatantly and grossly false and misleading.

Under the Supreme Court’s rulings concerning constitutional protection of “commercial speech,” “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it....” *Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York*, 447 U.S. 557 (1980). *Accord, Thompson v. Western States Medical Center*, 535 U.S. 357, 367 (2002). As one court succinctly put it in a section 5 case, “false or deceptive commercial speech is entitled to no first amendment protection whatsoever.” *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385,399 (9th Cir. 1982).

Consistent with these principles, the Commission has enforced section 5 against the deceptive or misleading marketing of products or services that themselves incorporate protected speech or expression. For example, while Encyclopedia Britannica can say anything they want in their books, the *marketing* of those books may not be conducted in a misleading or deceptive manner. *Encyclopedia Britannica*, 87 F.T.C. 421 (1976), *aff'd*, 605 F.2d 964 (7th cir. 1979), *cert. denied*, 445 U.S. 934 (1980).

Similarly, although the creators of movies, videos and music are free, under the First Amendment, to include any content they wish, the Commission has determined that section 5 prevents the marketing of such items in a way that misrepresents their content, especially to children. See, FTC to Accept Complaints About Media Violence, FTC website, www.ftc.gov/opa/2004/03/mediaviolence.htm.

In the case of Fox News, any claim to First Amendment protection is significantly undercut by Fox News' efforts to use the very slogan at issue—"Fair and Balanced"—to suppress dissent and free speech, rather than to promote it. In its Complaint Against Franken (cited above), Fox News asserted a claim of trademark infringement in an effort to prevent the distribution of a book-- *Lies and the Lying Liars Who Tell Them: A Fair and Balanced Look at the Right*—that is highly critical of the network.

For these reasons, the Commission may investigate Fox News' advertising of FNC's programming as a violation of section 5 of the Act, without concern that the finding of a violation would implicate the First Amendment.

CONCLUSION

For the reasons set forth above, the Commission should institute a complaint against Fox News under section 5 of the Act, for deceptive practices in the advertising and marketing of the programming of Fox News Channel.

Respectfully submitted,

Wes Boyd
President & Founder, MoveOn.org, Inc.
P.O. Box 9063
Berkeley, California 94709

Chellie Pingree, President
Common Cause
1250 Connecticut Ave., N.W. #600
Washington, D.C. 20036

