

SUPREME COURT OF THE STATE OF NEW
COUNTY OF NEW YORK

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FOX NEWS NETWORK, LLC, :
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 Plaintiff, :
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 v. :
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 PENGUIN GROUP (USA), INC. and ALAN :
 S. FRANKEN, :
 :
 Defendants. :
 :
-----X

Index No. 602514/2003
Purchased: 8/8/2003

COMPLAINT

Plaintiff Fox News Network, LLC (“Fox News” or “Plaintiff”), by its undersigned counsel, for its Complaint against defendants Penguin Group (USA) Inc. (“Penguin”) and Alan S. Franken (“Franken”) (collectively “Defendants”) alleges as follows:

NATURE OF THE ACTION

1. This is an action for preliminary and permanent injunctive relief and damages. Fox News seeks relief against the defendants for trademark infringement and trademark dilution under federal and New York statutory law, and unfair competition under federal and New York statutory and common law.
2. Fox News, the owner and operator of the world famous Fox News Channel (“FNC”), is the owner of a federal trademark registration in the mark “Fair & Balanced”. Fox News has used the mark “Fair & Balanced”, sometimes depicted as “Fair and Balanced” (the “Trademark”) to distinguish and brand FNC’s distinctive method of newsgathering and reporting since its well-publicized launch in October 1996. “Fair & Balanced” has been a registered trademark of Fox News since December 22, 1998. Fox News has made continuous use of the Trademark since 1996, and the mark has become a signature slogan of FNC.

3. Fox News employs a variety of on-air news personalities to give FNC its distinctive, number one rated position in the national cable news marketplace. Prominent among those news personalities is Bill O'Reilly ("O'Reilly"), who is the host of cable television news's number one rated program "The O'Reilly Factor." O'Reilly is the author of several books, including two national bestsellers entitled The O'Reilly Factor: The Good, the Bad and the Completely Ridiculous in American Life (Broadway Books 2000) and The No Spin Zone: Confrontations With the Powerful and Famous in America (Broadway Books 2001). Both the phrases "The O'Reilly Factor" and "No Spin Zone," contained in the titles of O'Reilly's books, are registered trademarks of Fox News, which were used with permission.

4. Upon information and belief, Penguin, through its imprint, EP Dutton ("Dutton"), plans to publish Lies and the Lying Liars Who Tell Them: A Fair And Balanced Look At The Right, written by Franken (the "Book"), on September 22, 2003. Penguin also plans to release an Audiobook and Audio CD version of the book through Penguin Audiobook. The preliminary cover of the Book (the "Preliminary Cover"), which is on display, among other places, in advertisements for the Internet sale of advance copies of the Book and on defendant Franken's official Internet web site, prominently features Fox News' trademark "Fair and Balanced" as well as a photograph of O'Reilly in what appears to be the FNC television studio. Fox News has not given the Defendants permission to use its famous trademark on the Preliminary Cover, or to use any other artwork that would convey the incorrect message that Fox News had endorsed or sponsored the Book or the Preliminary Cover.

5. The Preliminary Cover improperly contains the "Fair and Balanced" trademark and mimics the look and style of the two aforementioned O'Reilly books. Defendants' intent in using Trademark in this unauthorized fashion is clear – they seek to exploit Fox News'

trademark, confuse the public as to the origin of the book, and accordingly, boost sales of the Book. This behavior constitutes willful trademark infringement in violation of the Lanham Act as well as unfair competition under the Lanham Act and New York common law.

6. Moreover, since Franken's reputation as a political commentator is not of the same caliber as the stellar reputations of FNC's on-air talent, any association between Franken and Fox News is likely to blur or tarnish Fox News' distinctive mark in violation of 15 U.S.C. § 1125(c)(1) and New York General Business Law § 360-1.

7. As a matter of law, this likelihood of confusion and dilution is causing Fox News to suffer irreparable harm. This harm is heightened when it is compared to the insignificant harm to Defendants if an injunction is issued. Defendants' Book has not yet been published or distributed. A preliminary injunction would merely mean that Defendants would be forced to stop advertising the Book with the Preliminary Cover. Defendants would be free to continue preparing the contents of the Book and advertising the Book with a different cover until this matter is resolved. Even if this Court were to issue a permanent injunction, such an injunction would, at most, force the Defendants to rename the Book and design a new cover. Defendants' harm is, therefore, negligible.

8. So that Fox News may protect its valuable trademark rights, this Court should preliminarily and permanently enjoin Defendants from using the "Fair and Balanced" trademark or any other Fox News trademark, and from using any and all photographs of O'Reilly or any other Fox News on-air talent on the cover of their Book.

THE PARTIES

9. Fox News is a limited liability company organized and existing under the laws of the State of Delaware. Fox News' principal place of business is located at 1211 Avenue of the Americas, New York, New York 10036.

10. Upon information and belief, defendant Penguin is a corporation organized and existing under the laws of the State of Delaware. Penguin's principal place of business is located at 375 Hudson Street, New York, NY 10014.

11. Upon information and belief, defendant Franken is an individual residing ~~REDACTED~~, New York, New York. Franken achieved some renown as a comedy writer in the 1970's, when he worked for the television program "Saturday Night Live." Since 1995, after Franken left a second stint with "Saturday Night Live," he has attempted to remake himself into a political commentator. In 1998, Franken wrote and hosted a political television program called "Lateline," which appeared on the NBC television network. Upon information and belief, Franken's guests on "Lateline" included well-known political figures Richard Gephardt, Jerry Falwell and Robert Reich. "Lateline" was cancelled after only 19 episodes. Since then, Franken has made dozens of appearances on television news programs, including FNC. Franken has appeared as a guest on FNC at least ten times from March 1998 until as late as December 2002. However, he is not affiliated in any way with Fox News. Upon information and belief, Franken is currently attempting to gain support to start a political talk radio program.

JURISDICTION AND VENUE

12. This Court has jurisdiction over Defendants pursuant to New York Civil Practice Law and Rules ("C.P.L.R.") 302(a)(1), (2) and (4).

13. Venue is proper in this Court under C.P.L.R. 503 because the principal offices of Fox News and Penguin are in New York County.

BACKGROUND

FOX NEWS CHANNEL: "FAIR AND BALANCED"

14. FNC was launched in October 1996. From the time of its launch until the present, FNC has been dedicated to presenting news in what it believes to be an unbiased fashion, eschewing ideological or political affiliation and allowing the viewer to reach his or her own conclusions about the news. FNC was created as a specific alternative to what its founders perceived as a liberal bias in the American media. Fox News' message and philosophy are reflected in its programming decisions. For example, a highly-rated show on FNC, "Hannity and Colmes" is a primetime debate driven show featuring Sean Hannity, a conservative political analyst, and Alan Colmes, a liberal political analyst. Other popular shows on FNC include "On the Record with Greta Van Susteren," "Special Report with Brit Hume," "The Fox Report with Shepard Smith," and the number-one rated morning cable news show "Fox & Friends."

15. FNC's balanced approach to reporting the news has become extremely popular and FNC is now the most watched twenty-four hour news network in the nation. FNC regularly scores better ratings than do its chief competitors, MSNBC and CNN. Indeed, during the 2003 war in Iraq, FNC was the most watched cable news source for up to the minute news. According to Advertising Age magazine, FNC is "the biggest cable winner" and its "grip on the crown seems even tighter now."

16. At present FNC has over 80 million subscribers throughout the United States. This number is up from 13 million subscribers at the time of the network's inception. Indeed, FNC's subscribership has grown steadily every year since its initial launch.

17. Currently, "The O'Reilly Factor" is the most popular program on FNC. "The O'Reilly Factor" bills itself as a "No-Spin Zone" and the goal of the program is to present the

audience with the straight facts while allowing the audience to reach its own conclusions about the news. "The O'Reilly Factor" airs daily at 8:00 p.m. EST and repeats at 11:00 p.m. EST. Bill O'Reilly also has a syndicated radio show, "The Radio Factor," which airs in 357 markets and a syndicated weekly newspaper column that is run in newspapers throughout the United States. According to the New York Daily News, "[w]ith marquee personalities like Bill O'Reilly, FOX has now trounced CNN in the ratings for 18 straight months and is almost doubling the Turner network's primetime ratings."

18. O'Reilly himself has become a national celebrity and one of America's most trusted sources of news and information. He is inextricably linked with Fox News and the "Fair and Balanced" trademark in the minds of the viewing public.

19. Several FNC anchors and hosts are authors of books. Among those books written by FNC television personalities, in addition to the aforementioned O'Reilly books, are: Let Freedom Ring: Winning the War Over Liberalism by Sean Hannity; Red, White & Liberal: Why Left is Right and Right is Wrong, by Alan Colmes; My Turn at the Bully Pulpit: Straight Talk About Things That Drive Me Nuts, by Greta Van Susteren, an as yet untitled work by John Gibson and a series of books titled "War Stories" based on the FNC Television Show "War Stories with Oliver North."

THE "FAIR AND BALANCED" TRADEMARK

20. To reflect its unique approach to the reporting of news, FNC adopted the slogan "Fair and Balanced", along with the phrase "We Report, You Decide" at the time of the network's inception.

21. In particular, FNC has used "Fair and Balanced" as a primary slogan since the time of its launch in October 7, 1996.

22. On April 23, 1997, Fox News applied to the United States Patent and Trademark Office (“PTO”) 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, Fox News’ trademark in “Fair & Balanced” was registered on the PTO’s Principal Register. Since then, Fox News has also obtained a registration on the Principal Register in “Fair. Balanced. Unafraid.” (Reg. No. 2,713,414) in connection with neckties.

23. Since 1997, Fox News has expended \$61 million and thousands of hours in promoting and advertising its brand, including the “Fair and Balanced” mark. These marketing efforts have a global reach.

24. 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.”

25. In addition, Fox News has developed merchandise for sale in The Fox News Shop on its web site, www.foxnews.com, that includes the “Fair and Balanced” logo. For example, a mug sold on the Fox News web site has the Fox News logo on the front and the mark “Fair and Balanced” inside the mug. Another Fox News mug contains the phrase “Balance is Important in News and Hot Coffee.” There is also a “Fair and Balanced” necktie available for sale on the Fox News web site in a number of colors.

26. “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.

THE PRELIMINARY COVER

27. The Book, which upon information and belief, is scheduled for publication on September 22, 2003, has been described by Franken as a criticism of right wing leaders and media spokespeople. In an interview, Franken conceded that the Book is not about O'Reilly.

28. According to counsel for Penguin, the contents of the Book have not yet been completed. However, a version of the Preliminary Cover has been widely circulated.

29. The Book's Preliminary Cover shows a photograph of Franken on the right side of the cover with his arms crossed. Franken is wearing a conservative business suit, a conservative, patriotic, red and blue striped tie, and appears to be standing inside a television newsroom that contains a number of television monitors depicting different images. Four of those monitors contain on-screen images of political analyst Ann Coulter, President George W. Bush, Vice-President Dick Cheney and O'Reilly. The image of O'Reilly is taken directly from the easily recognizable Fox News studio set. Directly over these images, in large red type is the word "LIES" and, continuing below the images in smaller, yellow letters are the words "and the Lying Liars Who Tell Them."

30. In the bottom quarter of the Preliminary Cover, in prominent white letters against a red background are the words "A Fair and Balanced Look At The Right." A portion of the globe, similar to that used in numerous advertisements for Fox News, appears near that wording. A copy of the Preliminary Cover is annexed hereto at Exhibit A.

31. The "Fair and Balanced" trademark is the only trademark on the Preliminary Cover. Despite this fact, there is no disclaimer on the Preliminary Cover or on the inside fly leaves of the Book stating that the Book is not endorsed or authorized by Fox News.

32. The Preliminary Cover bears a striking similarity to the cover of The O'Reilly Factor: The Good, the Bad and the Completely Ridiculous in American Life. Indeed, the image of O'Reilly on the Preliminary Cover is taken from the same place where O'Reilly is depicted on the cover of his own book; namely, the FNC studio. A copy of the cover of that book is annexed hereto as Exhibit B.

33. The Preliminary Cover has been used in commerce to advertise the Book. The Preliminary Cover appears on the Internet web sites for Amazon.com (www.amazon.com) and Barnes and Noble Booksellers (www.bn.com) as an advertisement for the Book. A visitor to the Amazon.com or BarnesandNoble.com web sites can pre-order the Book. Thus, the images on the Preliminary Cover are being used to sell the Book.

FOX NEWS AND O'REILLY ARE MADE AWARE OF THE COVER

34. Fox News first became aware of the Preliminary Cover of the Book on or about May 30, 2003.

35. On that date, O'Reilly and Franken were both panelists at a luncheon presentation conducted during the American Booksellers Association Book Expo America (the "Book Expo"), a trade show for American book publishers and booksellers, in Los Angeles, California. During the panel discussion Franken displayed a copy of the Book with the Preliminary Cover and announced that the cover design was preliminary.

36. Shortly thereafter, O'Reilly and Franken engaged in a heated debate about the title and cover of the Book, in which O'Reilly voiced his distaste for name-calling in political analysis. During the debate, Franken made pointed reference to the phrase "Fair and Balanced" in the title of his book and indicated that it was a reference to FNC.

37. Further, when O'Reilly voiced his objection to the Book cover and the use of the terms "Liars" and "Fair and Balanced," Franken encouraged O'Reilly to air footage of the debate on the "The O'Reilly Factor" and insisted that O'Reilly allow him to be in the editing room so that, when O'Reilly showed footage of the debate on "The O'Reilly Factor," the coverage would be "fair and balanced." Franken suggested to O'Reilly that he discuss the Book on "The O'Reilly Factor" because "it will help sales if you talk about my book on your show."

38. Franken's animus towards O'Reilly and Fox News is hardly surprising. He has verbally attacked Fox News reporters in the past.

39. For example, at the annual dinner hosted by the White House Correspondents' Association on April 26, 2003, Franken antagonized and verbally attacked the Fox News personalities in attendance, in particular Alan Colmes, co-host of FNC's "Hannity & Colmes."

FOX NEWS' EFFORTS TO RESOLVE THE DISPUTE

40. Defendants did not seek Fox News' consent to use Fox News' trademark "Fair and Balanced" on the cover, nor has Fox News authorized either Penguin or Franken to use the Trademark.

41. As a result, on June 9, 2003, Fox News sent a letter to Carol Baron, president of Dutton, objecting to the use of the phrase "Fair and Balanced" on the cover of the Book as infringing Fox News' trademark. In the letter, Fox News demanded that Penguin remove the photograph of O'Reilly from the cover of the Book, provide written assurance that no photograph of O'Reilly would be used for the cover of the Book and provide written assurance that the phrase "Fair and Balanced" would be removed from the cover of the Book.

42. On June 19, 2003, counsel for Penguin replied to that letter, and refused to comply with those demands. In that letter, counsel for Penguin contended that its use of “Fair and Balanced” was merely “adjectival”.

43. In response, that same afternoon, Fox News sent a letter to counsel for Penguin in which it repeated its earlier demands.

44. On June 23, 2003, counsel for Penguin replied to Fox News’ letter and again refused to comply with Fox News’ demand. Instead, counsel for Penguin offered to consider replacing the current photograph of O’Reilly with a different photograph of O’Reilly.

COUNT 1

(Federal Trademark Infringement (15 U.S.C. § 1114(1)))

45. Plaintiff repeats and realleges the allegations of paragraphs 1 through 44 of this Complaint as if fully set forth herein.

46. The Trademark is a valid mark entitled to protection because it was registered with the PTO on December 27, 1998. Moreover, it is a strong mark that has acquired secondary meaning.

47. Defendants’ use of the Trademark, or a colorable imitation thereof, on the Preliminary Cover is likely to cause confusion among the public about whether Fox News has authorized or endorsed the Book, and about whether Franken is affiliated with FNC. Defendants’ use of Franken’s image in a newsroom setting, along with O’Reilly’s image on the cover of the Book and use of Fox News’ trademark adds to the likelihood of confusion and gives the false impression that Franken is somehow associated with FNC or that FNC somehow endorsed the Book.

48. Defendants intend to use the Trademark to capitalize on Fox News’ name and reputation in order to sell the Book.

49. Defendants' unauthorized use of the Trademark infringes upon Fox News' trademark rights under 15 U.S.C. § 1114(1).

50. As a result, Fox News is suffering irreparable harm.

51. Fox News is, therefore, entitled to preliminary and permanent injunctive relief and money damages.

COUNT 2
(Unfair Competition (15 U.S.C. § 1125(a)))

52. Plaintiff repeats and realleges the allegations of paragraphs 1 through 44 of this Complaint as if fully set forth herein.

53. Defendants' use of the Trademark on the Preliminary Cover is likely to cause confusion among the public about whether Fox News has authorized or endorsed the Book, and about whether Franken is affiliated with FNC. Defendants' use of Franken's image in a newsroom setting, along with O'Reilly's image on the cover of the Book and use of Fox News' trademark adds to the likelihood of confusion and gives the false impression that Franken is somehow associated with FNC or that FNC somehow endorsed the Book. Defendants' plan to use the Trademark and O'Reilly's image to capitalize on Fox News' name and reputation in order to sell the Book constitutes unfair competition and false designation and thus infringes upon Fox News' rights under 15 U.S.C. § 1125(a).

54. As a result, Fox News is suffering irreparable harm.

55. Fox News is, therefore, entitled to preliminary and permanent injunctive relief and money damages.

COUNT 3

(New York Trademark Infringement (G.B.L. § 133))

56. Plaintiff repeats and realleges the allegations of paragraphs 1 through 44 of this Complaint as if fully set forth herein.

57. Defendants' unauthorized use of the Trademark infringes upon Fox News' trademark rights under New York General Business Law ("G.B.L.") § 133.

58. Fox News is, therefore, entitled to preliminary and permanent injunctive relief and money damages.

COUNT 4

(Common Law Unfair Competition)

59. Plaintiff repeats and realleges the allegations of paragraphs 1 through 44 of this Complaint as if fully set forth herein.

60. Defendants' use of the Trademark in the Book is likely to cause confusion among the public about whether Fox News has authorized or endorsed the Book.

61. Defendants' use of the Trademark is in bad faith as Penguin has refused Fox News' request to cease its use of the Trademark.

62. Defendants' unauthorized use of the Trademark constitutes common law unfair competition.

63. Fox News is irreparably harmed by Defendants' actions.

64. Fox News is, therefore, entitled to preliminary and permanent injunction relief and money damages.

COUNT 5

(Federal Trademark Dilution (15 U.S.C. § 1125(c)(1)))

65. Plaintiff repeats and realleges the allegations of paragraphs 1 through 44 of this Complaint as if fully set forth herein.

66. "Fair and Balanced" is a famous and distinctive mark that has acquired significant secondary meaning through FNC's extensive marketing campaigns and through the continued ratings growth of FNC.

67. Because of this extensive marketing program and ratings success, "Fair and Balanced" has become synonymous in the minds of the public with FNC.

68. Defendants' use of the "Fair and Balanced" trademark on the Preliminary Cover of the Book, which has been used to promote the Book and as an advertisement for the Book, is a commercial use of Fox News' mark.

69. Defendants' use of the "Fair and Balanced" mark occurred almost seven years after FNC's first use of the Trademark. Indeed, as Franken admitted during at the Book Expo, the "Fair and Balanced" trademark was, in fact, used on the preliminary cover of the Book for the express intention of capitalizing on FNC's reputation.

70. Defendants' use of the Trademark causes a dilution of the distinctive quality of the Trademark because it lessens the capacity of the Trademark to identify or distinguish FNC.

71. Defendants' unauthorized use of the Trademark causes a dilution of the Trademark in violation of 15 U.S.C. § 1125(c)(1).

72. Fox News is irreparably harmed by the dilution of its Trademark.

73. Fox News is, therefore, entitled to preliminary and permanent injunctive relief.

COUNT 6

(New York Trademark Dilution (G.B.L. § 360-1))

74. Plaintiff repeats and realleges the allegations of paragraphs 1 through 44 of this Complaint as if fully set forth herein.

75. "Fair and Balanced" is a famous and distinctive mark that has acquired significant secondary meaning through FNC's extensive marketing campaigns and through the continued growth of FNC.

76. Because of this extensive marketing program and ratings success, "Fair and Balanced" has become synonymous in the minds of the public with FNC.

77. Franken has recently been described as a "C-level political commentator" who is "increasingly unfunny." Franken has physically accosted Fox News personalities in the past, and was reported to have appeared either intoxicated or deranged as he flew into a rage near a table of Fox News personalities at a press correspondents' dinner in April 2003. Franken is neither a journalist nor a television news personality. He is not a well-respected voice in American politics; rather, he appears to be shrill and unstable. His views lack any serious depth or insight. Franken is commonly perceived as having to trade off of the name recognition of others in order to make money. One commentator has referred to Franken as a "parasite" for attempting to trade off of Fox News' brand and O'Reilly's fame in the Preliminary Cover of his Book.

78. Defendants' use of "Fair and Balanced" dilutes the Trademark because it blurs the distinctiveness of the Trademark. Defendants' use of the mark will cause the Trademark to lose its ability to serve as a unique identifier of FNC.

79. Defendants' use of the Trademark also tarnishes the mark by associating the mark with Franken's sophomoric approach to political commentary. Such a use lessens the reputation of FNC for having a team of first-rate journalists and news personalities who gather, report, and analyze the news.

80. Defendants' unauthorized use of the Trademark causes a dilution of the Trademark in violation of G.B.L. § 360-1.

81. As a result of Defendants' actions, Fox News is irreparably harmed by the dilution of its Trademark.

82. Fox News is, therefore, entitled to preliminary and permanent injunctive relief.

WHEREFORE, Plaintiff respectfully prays that this Court grant the following relief:

1. Orders for preliminary and permanent injunctions enjoining Defendants, and their agents, servants, employees, affiliates, parents, subsidiaries, directors, officers, and attorneys and those persons in active concert or participation with them:
 - a) from using the mark or phrase "Fair and Balanced" in connection with the sale of any goods or provision of any services;
 - b) from using any logo, trade name or trademark which may be calculated to falsely represent, or which has the effect of falsely representing, that the services or products of defendants are sponsored by, authorized by, or in any way associated with Fox News;
 - c) from further infringing Fox News' trademark;
 - d) from further diluting Fox News' trademark;
 - e) from otherwise unfairly competing with Fox News; and
 - f) from using any photographs of Fox News' on-air talent, including, without limitation, O'Reilly on the cover of or in any advertising or promotional materials for the promotion of the Book;
2. an order awarding Fox News compensatory damages in an amount to be determined;
3. an order awarding Fox News punitive damages in an amount to be determined;
4. an order awarding Fox News its reasonable attorneys' fees; and

5. Such other and further relief as this Court deems just and proper.

Dated: New York, New York
August 7, 2003

HOGAN & HARTSON L.L.P.

By: 

Dori Ann Hanswirth
Tracey A. Tiska
Katherine M. Bolger
875 Third Avenue
New York, New York 10022
(212) 918-3000

Attorneys for Plaintiff Fox News
Network, LLC

#1 NEW YORK TIMES BESTSELLING AUTHOR

AL FRANKEN



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*A Fair and Balanced
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the
O'Reilly
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The Good,
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BILL O'REILLY
Host of Fox News Channel's The O'Reilly Factor

Exhibit B



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