

## G U E S T C O L U M N

## Fair use or 'fair and balanced'?



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Robert Greenwald's latest film, "Outfoxed," is a political documentary about Republican bias at Fox News. It is also, as the New York Times Sunday

Magazine dubbed it, a "guerrilla documentary."

In addition to interviews with former Fox employees, academic studies evaluating the "Fox effect" and internal Fox memos, Greenwald has used a significant number of clips from Fox News to show the bias that the slogan "fair and balanced" belies.

He had no permission to use those clips.

Fox has called Greenwald's use stealing. It has warned other networks that if they exploit his "illegal copyright infringement," those networks will open themselves up to similar criticism — presumably by Fox. And its legal department has complained that it was not given enough time to respond to questions the New York Times raised about the doc — and that the Times was therefore a co-conspirator in this copyright infringement.

If Greenwald's use of Fox's content is "fair use" — as we believe it plainly is — then it is no more "stealing" than walking across a sidewalk in front of a neighbor's home is trespassing on the neighbor's property.

Copyright is property, but like all property, the rights it grants are limited. "Fair use" is one such limit, constitutionally compelled, giving critics such as Greenwald the right to use a limited amount of copyrighted material without asking permission first.

Democracy depends upon such criticism — especially as the owners of our culture become fewer in number, and the power they exercise, because of media concentration, increases.

Fox claims it is "fair and balanced." Is it?

Bill O'Reilly promised Fox viewers that he would report the news of the war "without an agenda or any ideological prejudice." Did he?

These are important questions at any time, but especially now, as the answers so dramatically affect current public policy. And they can be answered effectively only with a work that can use the images that created the bias alleged.

Journalists should encourage such criticism. If news networks are not as they say they are, then journalists and critics should be able to show it. If Greenwald's argument is wrong, then let another filmmaker contradict it. Or if ABC is just as bad, then let ABC be outed, too.

Yet that thought no doubt terrifies not just Fox, but every one of the (handful of) networks that now control our airways — which is why Fox's first response to the

Greenwald film was to warn other networks not to take it seriously, or risk "opening (themselves) to having (their) copyrighted material taken out of context for partisan reasons."

Fox and others will insist that any use of their copyrighted material is "theft"; they will rally to fight this "theft" in order to protect themselves from this unwanted criticism.

Let's hope reason leads these network owners to allow this rally to fizzle.

For "fair use" is grounded in First Amendment principles. Among those principles is one that is central to news organizations generally: New York Times vs. Sullivan.

In that case, the Supreme Court held reporters are immunized in most cases from libel actions. A "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open" meant that even erroneous statements must be pro-

TECTED SO LONG AS THE ERROR WAS NOT KNOWINGLY MADE.

The same principle should guide "fair use" in the context of a film criticizing a news organization. If the reputation of public figures must be sacrificed so that news organizations have the "breathing space that they need to survive," then the scope of fair use should be interpreted to assure that critics of news organizations have the breathing space they need to survive, too.

A commitment to these free-speech values is a commitment to fighting wars of ideas with more speech, and fewer lawsuits.

It is as shameful for Fox to sue Al Franken for using "fair and balanced" as it is for Michael Moore to threaten to sue his critics for defamation. We need more debate in America, not less. And we will get more critical and insightful debate if filmmakers like Greenwald can do their work without the law requiring that lawyers look over his editor's shoulder.

Fox News is a network. It has the privilege of 24/7 access to most American citizens. If it believes it has been wronged by Greenwald's film, then let it match his criticism with criticism of its own — through its journalists, not its lawyers.

And as to whether three days was enough time for Fox's legal department to respond to a question from the New York Times, come on. If its legal department can't muster a response to a simple question in three days, I'd be happy to advise Fox where it might find faster, more efficient lawyers.

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