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Liable, Naaaht: The Mockumentary: Litigation, Liability and the First Amendment in the Works of Sacha Baron Cohen

Roy S. Gutterman*

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* Associate Professor of Communications Law and Journalism and director of the Tully Center for Free Speech at the S.I. Newhouse School of Public Communications at Syracuse University. He also holds a courtesy appointment at the Syracuse University's College of Law. Special thanks to reference librarian Kim Wilson in helping secure some primary documents for this article.

"What I care about most is freedom of man, the liberation of the individual man from the network of moral and social convention in which he believes, or rather in which he thinks he believes, and which encloses him and limits him and makes him narrower, smaller, sometimes even worse than he really is."
– Federico Fellini[1]

"*Please, you come see my film, if it not success, I will be execute.*"
– Borat Sagdiyev[2]

I. Introduction

When actor and provocateur Sacha Baron Cohen goes into character, the results are witty, sarcastic and biting. Baron Cohen is a comedic chameleon, and his range allows him to assume a variety of characters; he has created the socially awkward and mustachioed Borat Sagdiyev, the super-confident Israeli ex-military interviewer Erran Morad, the stunningly ignorant English cockney rapper known as Ali G., and the flamboyant and irreverent Austrian gay fashionista journalist Bruno. [3]

A master of disguise, Baron Cohen is also a master of a genre–the hybrid "mockumentary"–that blends truth and fiction. Baron Cohen has starred in, produced or written three successful mockumentary films: two *Borat* movies and *Bruno*, and two mockumentary television series: *The Ali G*

[1] Federico Fellini, Fellini on Fellini 157-58 (1976).

[2] Borat! Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan (20th Century Fox Films 2006).

[3] *See* Ewan Fletcher, *What It's Really Like to Get Pranked By Sacha Baron Cohen*, Telegraph (July 12, 2018), https://www.telegraph.co.uk/tv/0/really-like-get-pranked-sacha-baron-cohen/ [https://perma.cc/6SXS-HK9Q].

Show and *Who Is America?*.[4] *Borat* has been hailed as a modern, biting exploration of American society,[5] but critics have also vilified Baron Cohen for both his tactics and his message.[6]

This article analyzes the legal issues surrounding the mockumentary format through Sacha Baron Cohen's productions and the litigation against them. Disgruntled subjects have sued Baron Cohen in tort for defamation, invasion of privacy, and fraud. While Baron Cohen has successfully employed a variety of procedural, substantive, contractual and constitutional defenses to protect his art and humor, [7] the litigation continues.[8] The 2020 release of the sequel[9] to the record-breaking 2006 pop cult classic *Borat! Cultural Learnings of America for Make Benefit Nation of Kazakhstan*,[10] though unlikely, could again call upon courts to wrestle with this hybrid art form.

This article argues that the mockumentary genre as a hybrid storytelling format demands strong legal protections under the law, particularly the First Amendment. A review of the cases against mockumentarian Sacha

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[4] *See id.*

[5] *See* Manohla Dargis, *From Kazakhstan, Without a Clue*, N.Y. Times (Nov. 3, 2006), https://www.nytimes.com/2006/11/03/movies/from-kazakhstan-without-a-clue.html [https://perma.cc/JH7J-ZZW5] ("The brilliance of 'Borat' is that its comedy is as pitiless as its social satire, and as brainy.").

[6] *See* Cate Blouke, *Borat, Sacha Baron Cohen, and the Seriousness of (Mock) Documentary*, 6 Comedy Stud. 4, 5 (2015).

[7] Fletcher, *supra* note 3. This article will discuss litigation stemming from six Sacha Baron Cohen vehicles:

(1) Borat Subsequent Moviefilm (Amazon Studios 2020);

(2) Who is America? (Showtime Networks 2018);

(3) Brüno (Universal Pictures 2009);

(4) Borat! Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan (20th Century Fox Films 2006);

(5) *Da Ali G. Show* (HBO/BBC 2000-04);

(6) *The 11 O'Clock Show* (BBC 1998-2000).

[8] Most recently, embattled former Alabama U.S. Senate candidate and State Supreme Court Justice Roy Moore sued Sacha Baron Cohen in federal court. The court dismissed Moore's case, but Moore filed a timely notice of appeal the same day. *See* Moore v. Cohen, 2021 U.S. Dist. LEXIS 130344 (S.D.N.Y. July 13, 2021).

[9] *See Borat Subsequent Moviefilm*, IMDb https://www.imdb.com/title/tt13143964/ [https://perma.cc/R5Z4-ETXF]. New footage was added to Amazon Prime in May 2021, *see* Rachel Leishman, *New 'Borat Subsequent Moviefilm' Footage Coming to Amazon Next Week Including a 40-Minute Reality Show*, Collider (May 20, 2021), https://collider.com/new-borat-2-footage-amazon-prime-video/ [https://perma.cc/M7XW-TAA4].

[10] Joshua Rich, *Is No. 1! "Borat" Breaks Records*, Ent. Weekly (Nov. 3, 2006, 5:00 AM), https://ew.com/article/2006/11/03/no-1-borat-breaks-records/ [https://perma.cc/8P38-Q3EF].

Baron Cohen reveals why this modern, and sometimes cringeworthy, storytelling technique demands statutory or constitutional protection or both. These political, social, and artistic expressions are clearly protected under the First Amendment. Even courts that utilize constitutional restraint to avoid deciding Baron Cohen cases on free speech grounds channel the spirit of the First Amendment in their denial of claims.[11] As courts uphold much-needed protection under the First Amendment for parody and satire, they are just as protective of the contracts the participants all sign before they appear in the productions.

Winning in court or avoiding litigation altogether is vital to an artist's ability to create and distribute, especially when an artist's productions make such bold political and satirical statements as do Sacha Baron Cohen productions. Courts must protect "the brilliance of 'Borat'" with its "pitiless" but "brainy" social satire.[12] Parts I, II, and III lay the foundation for the analysis of the Baron Cohen cases in Part IV. Cases against Sacha Baron Cohen are discussed in depth in the Appendix in Part VI following the Conclusion in Part V.

II. Contextualizing the "Mockumentary"

A. Blending Truth and Fiction: Defining the "Mockumentary"

Taken together, film scholars Cynthia J. Miller and Craig Hight sketch a definition of the mockumentary: In part, this hybrid film form blends social commentary and humor to create biting social critique.[13] Hight describes the mockumentary as "the corpus of fictional texts which engage in a sustained appropriation of documentary aesthetics, but more texts than mockumentary can fall into such a definition."[14] Hight goes on:

> Most mockumentaries, and certainly the most popular examples, derive from the intention to use documentary and reality-based forms to generate parody and satire . . . Both parody and satire sample something of their

[11] *Moore*, 2021 U.S. Dist. LEXIS 130344, at *9-*10, *25-*28. *See also* Moore v. Cohen, 2019 U.S. Dist. LEXIS 94361, at *1, *2-*3 (D.D.C. 2019) ("Although the Court has serious doubts about the merits of each of the plaintiff's arguments, it must forego addressing their shortcomings because it lacks jurisdiction to consider the motion for reconsideration.").

[12] *See* Dargis, *supra* note 5.

[13] *See* Too Bold for the Box Office: The Mockumentary from Big Screen to Small, xi (Cynthia. J. Miller ed., 2012).

[14] Craig Hight, Television Mockumentary: Reflexivity, Satire and A Call to Play 16 (2010).

> textual targets in order to offer forms of commentary, but they can be distinguished by their agendas, the nature of their appropriations and ultimately the readings they encourage of audiences.[15]

Cynthia Miller also offers a perspective on defining the mockumentary:

> [M]ockumentaries have always been about more than just cynical laughs purchased at the expense of the people, events, and ideas that animate our worlds. They exist in a place where social commentary, cultural critique, and the crisis of representation collide, where humor – whether in the form of blatant laughter or simply rueful shakes of the head – meets reflection.[16]

This article approaches the definition of the mockumentary as a form of documentary filmmaking that blends the truthful elements of a documentary with fictional and satirical elements that aim to "mock" its unwitting subjects.[17] Mockumentaries rely on traditional documentary style filmmaking techniques to mimic the real-life aspect of the documentary.[18] The mockumentary mimics an actual documentary–it gives the impression of reality by weaving in documentary film's reality-based elements–but the production is orchestrated by a fictional character.[19]

Mocking, as Sacha Baron Cohen often does, is just one "stance" a fake documentary can take; they also copy, mimic, gimmick, play with, scorn, ridicule, invert, reverse, repeat, ironize, satirize, affirm, subvert, pervert, convert and translate.[20] Feature films such as *Citizen Kane,*[21] *The Spaghetti Harvest*,[22] and Federico Fellini's *The Clowns*[23] exemplify the mockumentary format, and were released before Baron Cohen was born. More contemporary feature films told in the mockumentary format include *This is Spinal Tap*,[24]

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[15] *Id.* at 25.

[16] Miller, *supra* note 13, at xi.

[17] *See* Leshu Torchin, *Cultural Learnings of* Borat *Make for Benefit Glorious Study of Documentary,* 38 Film & Hist. 53 (2008).

[18] *See* Kimberlianne Podlas, *Artistic License or Breach of Contract? Creator Liability for Deceptive or "Defective" Documentary Films and Television Programs*, 33 Loy. L.A. Ent. L. Rev. 67, 82 (2013).

[19] *See id.*

[20] *See* Alisa Lebow, *"Faking What? Making a Mockery of Documentary"*, *in* F is for Phony 223 (Alexandra Juhasz & Jesse Lerner eds., Univ. of Minn. Press 2006).

[21] (RKO Radio Pictures 1944).

[22] (BBC 1957).

[23] (Leone Film 1970).

[24] (Embassy Pictures 1984).

Best in Show,[25] and the *Blair Witch Project*.[26] *The Office* brought versions of the mockumentary to the television screen.[27]

The genre of truth-based documentary story-telling has been referred to as "documentary deception."[28] Film and cinema scholars question the ethics of mockumentaries:[29] subjects are told the film will be about one thing, but the final product shows them in ways they never would have agreed to in the first place.[30] Some argue that plaintiffs embarrassed by their depiction are entitled to damages, prompting litigation.[31] The mockumentary mimics an actual documentary by giving the impression of reality by weaving in documentary filmmaking techniques. The production of a mockumentary, however, is orchestrated by a fictional character. Baron Cohen's twist on the mockumentary is predicated in large part on deceiving its unsuspecting subjects through the use of fictional characters sent to shock and deceive. Sacha Baron Cohen in character often elicits responses participants do not approve of.

While critics hailed *Borat* as a modern, biting exploration of American society,[32] others were less than complimentary and some outright hostile.[33] A staffer for a former congressman who was approached by Baron Cohen's production company but figured out the ruse described the attempted prank and prankster:

> He mercilessly pranked his guests, leading astronaut Buzz Aldrin into cringeworthy conversations or small-town bar patrons in an anti-Semitic singalong. Today, with his new CBS/Showtime production "Who is America?," he's even more determined to humiliate. He's not interested in benign practical jokes. He won't set up a piano that rolls slowly away from its pianist; he won't drive a car into an office to shock the new receptionist. If you're a Republican, Cohen wants to destroy you.[34]

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[25] (Warner Bros. Pictures 2000).

[26] (Artisan Ent. 1999).

[27] The American adaptation of *The Office* aired on NBC from 2005 to 2013.

[28] *See* Podlas, *supra* note 18, at 82.

[29] *See* Lebow, *supra* note 20, at 223.

[30] Podlas, *supra* note 18.

[31] *Id.*

[32] *See* Dargis, *supra* note 5 (discussing the "brilliance" of *Borat*).

[33] *Village 'Humiliated' by Borat Satire*, BBC NEWS (Oct. 26, 2008), http://news.bbc.co.uk/2/hi/europe/7686885.stm [https://perma.cc/U269-MQJ8].

[34] Michael Caputo, *Sacha Baron Cohen Tried to Prank Me. Here's How I Knew It Was a Scam.*, POLITICO, (July 27, 2018), https://www.politico.com/magazine/story/2018/07/27/sacha-baron-cohen-prank-emails-who-is-america-219073/ [https://perma.cc/T7R8-BAHK].

B. Pre-Borat Litigation of the Mockumentary

As a genre, the mockumentary has origins as early as October 30, 1938, when Orson Welles infamously and controversially surprised a radio audience with a broadcast of *War of the Worlds*.[35] *War of the Worlds* told the story of a fake alien invasion of New Jersey although the audience was not informed of this fact.[36] The live broadcast caused widespread panic; there were allegations of two fatal heart attacks and hundreds fainted or fled their homes.[37] Additionally, the broadcast generated a spate of unspecified and unsuccessful lawsuits against Welles, and also prompted reforms to Federal Communications Commission regulations.[38] Some scholars have questioned the broadcast's actual impact, pointing out that subsequent news accounts belie the mythical reports of widespread panic.[39]

While early mockumentaries like *War of the Worlds* generated controversy,[40] there were no significant legal challenges until 1998. In 1999, the satirical black comedy *Drop Dead Gorgeous* was released; however, the film was originally scheduled to be released with the title "Dairy Queens." The national fast-food and ice cream company by the same name successfully sought an injunction blocking the use of its name and trademarked logo in *American Dairy Queen v. New Line Productions*.[41] Dairy Queen argued that viewers would associate the food chain with the raunchy subject matter of the film.[42] The court accepted Dairy Queen's arguments that its trademark would be diluted, confused, and irreparably harmed if the filmmakers used its name in the title of a movie meant to shock and offend.[43] Despite the significant First Amendment interests at stake with the film, the court gave

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[35] *See* JOHN GOSLING & HOWARD KOCH, WAGING THE WAR OF THE WORLDS: A HISTORY OF THE 1938 RADIO BROADCAST AND RESULTING PANIC, INCLUDING THE ORIGINAL SCRIPT 87-89 (2009).

[36] *Id*.

[37] *Id.* at 56.

[38] *Id*. at 86-89. Welles, in his characteristic youthful insouciance, laughed off the lawsuits but the FCC strengthened its rules on broadcasting false information. The FCC never sanctioned Welles or the radio network.

[39] In fact, the reports of widespread panic were fleeting, likely perpetuated by newspapers for a few days following the broadcast. *See* Jefferson Pooley & Michael J. Socolow, *The Myth of the* War of the Worlds *Panic*, SLATE (Oct. 28, 2013, 11:51 PM), https://slate.com/culture/2013/10/orson-welles-war-of-the-worlds-panic-myth-the-infamous-radio-broadcast-did-not-cause-a-nationwide-hysteria.html [https://perma.cc/7HP5-LCH6].

[40] *See* GOSLING & KOCH, *supra* note 35.

[41] *See* 35 F.Supp.2d 727, 728-29 (D. Minn. 1998).

[42] *Id.* at 728-29.

[43] *Id.* at 735.

more weight to the company's trademark dilution and confusion arguments. Critically, plaintiffs did not challenge the film's content. The court went on to note:[44]

> The case asks whether the film's expressive content – surely protected by the First Amendment – is embodied in its content, or its title, or both. Importantly, ADQ does not challenge, nor does it ask the Court to consider, a single word of the film's script; it does not seek to modify a line. Rather, ADQ's only concern is with the title "Dairy Queens." There is no effort of any kind to modify or muzzle New Line's views or expressions concerning the Midwest beauty contests, "dairy country," or the film's asserted objectionable sexual, racial, or religious content. ADQ simply wants to keep the public from developing the sense that it is a sponsor or endorser of New Line's film, or has voluntarily lent its name to it.[45]

The torchbearer of the modern reality-based, unscripted prank program is Allen Funt. Funt created and hosted the long-running and ground-breaking television show, *Candid Camera*, which ran on network television for more than 50 years.[46] The show employed hidden cameras and actors capturing ordinary people in embarrassing and awkward, but usually benign, situations. Some of Funt's favorite gags including talking mailboxes, talking horses, or cars without a motor.[47] After the iconic reveal, "Smile, you're on *Candid Camera*," people were given a release to sign and $50.[48]

Candid Camera did not generate a single reported opinion. Perhaps this speaks to Funt's benign tone or a reflection of a simpler, less-litigious era. Funt recalled one woman, a legal secretary, who refused to sign the release because her lawyers wanted more money.[49] Though it was billed as a comedy show, Funt considered himself a social psychologist as much as he was a comedian.[50] Other early television shows followed *Candid Camera's* mantle like *Hidden Video,*[51] Dick Clark's TV's Bloopers & Practical Jokes.[52] Even more modern prank and gag shows have origins in the *Candid Camera*-format, and potential legal and liability issues surrounding mockumentaries

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[44] *Id.* at 733-34.
[45] *Id.* at 733.
[46] ALLEN FUNT, CANDIDLY, ALLEN FUNT: A MILLION SMILES LATER 45-48 (1994).
[47] *Id.* at 203-14.
[48] *Id.* at 48.
[49] *Id.* at 48-49.
[50] *See id.* at 221.
[51] *See id.* at 189.
[52] *See* Dick Clark Co. v. Alan Landsburg Prods., 1985 U.S. Dist. LEXIS 18924 (C.D. Cal. 1985) (describing the blooper format in a copyright case).

must include a look at more recent prank or gag shows and reality television.

The trend of courts upholding contracts in reality television and prank show cases offers support because of the similarity of the tort-based litigation at issue there and in the mockumentary context.[53] Like in the mockumentary, participants voluntarily agree to appear in the shows and are often displeased with their on-screen depictions.[54] Courts do not readily sympathize with plaintiffs who signed valid contracts. In one case involving the reality show *90 Day Fiancé*, the court enforced a release from liability: "By signing the Agreement/Release, Plaintiffs also acknowledged that the show might reveal material that is personal, intimate, embarrassing and could depict them in an unfavorable light and Plaintiffs consented to grant Defendants the right and sole discretion to include such material in their show."[55]

Prank productions *Punk'd* and *Jackass* ushered in issues of copycats–often children–emulating dangerous pranks and stunts. [56] But holding entertainers liable for unforeseen harm resulting from their productions is a historically large ask of tort law.[57] Tort-based and contractual litigation linked to prank shows and reality television is routinely dismissed when featured participants signed releases from liability.[58] *Wired* magazine cheekily branded the prank genre "Extreme *Candid Camera* [with l]awsuits, fisticuffs, [and] PhD dissertations."[59] Before his talk show, Jimmy Kimmel produced *Crank Yankers*; it ran from 2002-2008 first on Comedy Central

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[53] *See* Shoemaker v. Discovery Commc'ns, LLC, 2017 N.Y. Misc. LEXIS 3551 (N.Y. Sup. Ct. 2017); *see also* Shapiro v. NFGTV, Inc., 2018 U.S. Dist. LEXIS 22879, at *20 (S.D.N.Y. 2018).

[54] *See*, *e.g.*, Klapper v. Graziano, 129 A.D.3d 674, 674-75 (N.Y. App. Div. 2015).

[55] *Shoemaker*, 2017 N.Y. Misc. LEXIS 3551, at *4 (N.Y. Sup. Ct. 2017).

[56] *See* Mark Conrad, *The 'Jackass' Syndrome: Are Televised Warnings Enough?* LAW.COM (Mar. 15, 2001) ("But even if the warnings were inadequate or not broadcast at all, a significant First Amendment defense exists.").

[57] *See* Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989) (holding producers of the film *The Warriors* not liable for a murder following a screening of the film); *see also* McCollum v. CBS, 202 Cal.App.3d 989 (Cal. Ct. App. 1988) (holding singer Ozzy Osbourne not liable when a teen committed suicide after listening to the song "Suicide Solution").

[58] *See infra* discussion in Section V.

[59] Scott Brown, Wired*'s Guide to Hoaxes: How to Give – and Take – a Joke*, WIRED (Aug. 24, 2009, 12:00 PM), https://www.wired.com/2009/08/mf-hoax/ [https://perma.cc/9Q5C-MCNQ].

and then MTV.[60] Reality television is a distant cousin to the mockumentary, but its criticism and litigation offers insight into mockumentary liability.[61]

III. Who is Sacha Baron Cohen?

British actor and comedian Sacha Baron Cohen first burst onto British television and later HBO with his character, Ali G., the ignorant and offensive cockney wannabe rapper.[62] Today Baron Cohen is best known for his guerilla-style mockumentaries.[63] The common denominator among the characters is the chameleon-like Baron Cohen. In his undercover encounters, he captures awkwardness, ignorance, and hypocrisy with the precision of a documentarian employing cinema verité, while also incorporating expert parody, satire, and cringe-worthy humor.[64] He is both revered as a comedic genius and social satirist and reviled as a provocateur who uses the cloak of disguise, deception, and shell companies to embarrass unsuspecting and unwitting good Samaritans who welcome him into their worlds with rolling cameras.[65]

A master of humor, language, and dialect, Baron Cohen further cemented his spot in popular culture.[66] He has appeared in a Madonna music video,[67] garnered a large global audience and box office success, as well as

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[60] The show is referenced in an article in the satirical law review, *The Green Bag*, in a discussion about hypothetical legal issues and courtroom dramas involving famous puppets and ventriloquist dummies including Captain Kangaroo's Mr. Moose, Howdy Doody, Shari Lewis's Lamp Chop and an array of Muppets. *See* Parker B. Potter, Jr., *Puppet Law*, 9 Green Bag 2d 153 (2006). *Crank Yankers* was also the subject of a breach of contract lawsuit over its creation. *See Courthouse Steps*, N.Y. L.J. on April 16, 2003.

[61] *See generally* Catherine Riley, *Signing in Glitter or Blood?: Unconscionability and Reality Television Contracts*, 3 N.Y.U. J. Intell. Prop. & Ent. L. 106 (2013) (arguing that reality television contracts in general are enforceable and generally not unenforceable under the unconscionability doctrine).

[62] *See* Hight, *supra* note 14, at 211.

[63] *See Sacha Baron Cohen Biography*, IMDb https://www.imdb.com/name/nm0056187/bio [https://perma.cc/5XU8-56PB] (last visited Oct. 30, 2021).

[64] Hight, *supra* note 14, at 211.

[65] Blouke, *supra* note 6, at 5 ("In spite of such acclaim, the film also garnered accusations of racism, misogyny, and sheer vulgarity. Described by many as anti-Semitic, homophobic, and chauvinist, Borat espouses ideas and elicits interview responses that are nothing if not inflammatory and controversial.").

[66] *Id.*

[67] Hight, *supra* note 14, at 211. *See also* Madonna, *Madonna – Music (Official Video)*, YouTube (Oct. 26, 2009), https://www.youtube.com/watch?v=SDz2oW0NMFk [https://perma.cc/L5CA-A32E].

critical acclaim.[68] In 2021, Baron Cohen received an Oscar nomination for Best Supporting Actor Academy Award for his portrayal of Abbie Hoffman[69] in *The Trial of the Chicago* 7. Also in 2021, the *Borat* sequel received an Oscar nomination for Best Adapted Screenplay.[70] His depiction of Israeli spy Eli Cohen also drew praise.[71]

Baron Cohen introduced his unique take on the mockumentary that engages in biting political satire and commentary [72] and "confuses genres." In *Borat*, for example, "a *fictional* television host steps out of the mock travelogue on his *fictional* hometown and steps into a journey through a *real* America."[73] *Borat* is "neither purely fictional, nor entirely 'real.' . . . Borat is working from a loosely scripted position, whereas the people he interacts with are not . . . aware of the adopted nature of [Baron Cohen's] persona."[74] Still, the existence of "ridiculous characters conducting absurd interviews of seemingly unsuspecting individuals" does not preclude the enforcement of valid contracts, as the court recently held in *Moore v. Cohen*.[75]

Because of the unscripted, spontaneous and guerilla-style nature of *Candid Camera, Jackass*, *Punk'd*, and Baron Cohen's work, there appears to be a direct line between the works, but they might as well be from different planets. Though *Candid Camera* would catch people in embarrassing situations, sometimes an unsuspecting spouse out with someone else or someone playing hooky from school or work, its tone was more muted than that of Baron Cohen's. Baron Cohen's twist on the mockumentary is predicated in large part on deceiving its unsuspecting subjects through the use of fictional characters sent to offend, shock, and deceive. *Dairy Queens* and the other mockumentaries may mimic the story-telling techniques of documentary productions, but they are substantially different from Sacha Baron Cohen's works. As much as the storytelling techniques replicate the documentary format and the productions resemble a traditional documentary, these were

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[68] *Id; see also* Fletcher, *supra* note 3 (noting Borat generated an estimated $500 million in revenues while Brüno generated almost $140 million).

[69] *The 93rd Academy Awards — 2021*, Acad. of Motion Picture Arts & Scis., www.oscars.org/oscars/ceremonies/2021 [https://perma.cc/72KN-TKKC] (last visited Dec. 29, 2021).

[70] *Id.*

[71] Simon Abrams, *Sacha Baron Cohen Plays it Straight in 'The Spy'*, N.Y. Times (Oct. 26, 2020), https://www.nytimes.com/2019/09/06/arts/television/sacha-baron-cohen-the-spy.html [https://perma.cc/HV9D-G5NY].

[72] *See* Lebow, *supra* note 20.

[73] Torchin, *supra* note 17, at 53 (emphasis added).

[74] Blouke, *supra* note 6, at 17.

[75] Moore v. Cohen, 2021 U.S. Dist. LEXIS 130344, at *36 (S.D.N.Y. 2021).

fully scripted productions with professional actors.[76] These are feature films and pure entertainment, through and through. These examples may have the feel of a real documentary, which facilitates the story and the humor, but they were fictional stories presented in a storytelling narrative as a faux documentary.

In his own words, in a rare out-of-character interview after the release of *Who Is America?,* Baron Cohen described that he viewed his work as a stand against dictatorship and authoritarianism: "I felt I had to do something."[77] His mockumentaries certainly are *something* as they expose some of society's ugly underbelly through a skewed lens with cringeworthy, blushworthy, and sometimes hilarious and entertaining results.

IV. An Analysis of the Cases Against Sacha Baron Cohen

As much as Baron Cohen's body of work has been described as "hilarious" and "insightful," it also forged "a trail of destruction."[78] While shows like *The Office* incorporate faux documentary story-telling techniques, these films and shows employ some of the same tools as Baron Cohen but avoid tort liability because they are scripted and feature paid actors, not unsuspecting regular people.

Baron Cohen's catalogue has generated lawsuits by more than a dozen plaintiffs and reported opinions in seven cases in federal and state courts. These cases are discussed in more detail in the Appendix, *infra*.[79] One case, *Moore v. Sacha Baron Cohen,* was dismissed on summary judgement in July 2021, but a notice of appeal was filed the same day.[80] Another case involving an unsuccessful claim for copyright infringement was also decided in Baron Cohen's favor, but is not a subject of review for this article.[81]

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[76] *See* Hight, *supra* note 14, at 27-28.

[77] *Sacha Baron Cohen on 'Borat' Ethics and Why His Disguise Days Are Over*, NPR (Feb. 22, 2021, 1:36 PM), https://www.npr.org/transcripts/970115927 [https://perma.cc/FJ6E-A8AJ] (interview with Terry Gross).

[78] Fletcher, *supra* note 3.

[79] This article focuses on the cases with reported opinions. One case that generated significant publicity, *John Doe v. One America Productions, Inc.*, involved two fraternity brothers depicted in Borat. The plaintiffs claimed they were deceived and appeared in the movie as drunken buffoons and sued for contractual fraud. A California Superior Court judge dismissed the claim in 2007. No. SC 091723 (Cal. Sup. Ct. Nov. 9, 2006).

[80] *See* Plaintiffs' Notice of Appeal, *Moore*, 2021 U.S. Dist. LEXIS 130344, (No. 21-01703).

[81] *See* Musero v. Mosaic Media Grp., Inc., 2010 U.S. Dist. LEXIS 153583 (C.D. Cal. 2010).

Though the plaintiffs invoke a variety of tort and contract claims and they come from different places and backgrounds–a driving instructor, etiquette experts, a bingo hall operator, a retired Alabama Supreme Court justice/former U.S. Senate candidate, frat boys, and a man on the street–their litigation shares a common theme: they were deceived into participating in films in which they were publicly embarrassed. The judges dismissing these claims also weave a common thread, perhaps best summarized by Judge Preska, who dismissed six separate cases concerning the film *Borat* in the Southern District of New York[82]:

> [T]he movie employs as its chief medium a brand of humor that appeals to the most childish and vulgar in its viewers. At its core, however, *Borat* attempts an ironic commentary of "modern" American culture, contrasting the backwardness of its protagonist with the social ills [that] afflict supposedly sophisticated society. The movie challenges its viewers to confront, not only the bizarre and offensive Borat character himself, but the equally bizarre and offensive reactions he elicits from average "Americans."[83]

The plaintiffs in the Baron Cohen cases signed straightforward, often just one-page contracts known as Standard Consent Agreements (SCAs) prior to their participation in a "documentary-style" film.[84] Producers regu-

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[82] *See* Cedeno v. 20th Century Fox, No. 07-CIV-07251 (S.D.N.Y. Aug. 14, 2007), without a reported opinion, the court approved plaintiff's voluntary dismissal of an invasion of privacy claim filed by a man who appeared in a fleeting scene aboard a New York City subway car in which Borat released a chicken from his suitcase. The suit was initially filed in New York State Supreme Court but was removed to the Southern District and later dismissed because New York's invasion of privacy statute, New York Civil Rights Law §§ 50-51 requires an unlawful use of a person's image or likeness must be purely commercial and the feature film did not meet that standard. *See* Stipulation of Dismissal (February 4, 2008).

[83] Psenicska v. 20th Century Fox, 2008 U.S. Dist. LEXIS 69214, at *3-4 (S.D.N.Y. 2008) (quoting Lemerond v. Twentieth Century Fox Film Corp., 2008 U.S. Dist. LEXIS 26947 (S.D.N.Y. 2008)).

[84] In its entirety, the waiver clause in Paragraph 4 in both *Ex parte Cohen* and *Moore* reads:

> The Participant specifically, but without limitation, waives, and agrees not to bring at any time in the future, any claims against the Producer, or against any of its assignees or licensees or anyone associated with the Film, that include assertions of (a) infringement of rights of publicity or misappropriation (such as any allegedly improper or unauthorized use of the Participant's name or likeness or image), (b) damages caused by 'acts of God' (such as, but not limited to, injuries from natural disasters), (c) damages caused by acts of terrorism or war, (d) intrusion (such as any allegedly offensive behavior or questioning or any invasion of privacy), (e) false light

larly disguised the plot and the actors. Participants often received a nominal fee in the range of $200-$350 for their appearance. Plaintiffs, however, allege deceitful contract negotiations leading some to seek judicial intervention and protection under the contractual doctrines of deception, fraud, and ambiguity.[85]

Perhaps nothing exemplifies the visceral reaction to *Borat* from viewers, critics, and participants of the films than the story of Glod, Romania, the fictional stand-in for Borat's hometown in Kazakhstan. The villagers were paid small sums to appear in the film, but felt humiliated and were infuriated by their depiction as backwards and worse.[86] After the film's release, one man told a Western reporter, "If I see Borat, I will kill him with my own hands."[87] Instead, two villagers and the village itself enlisted the assistance of a German lawyer who filed an unsuccessful suit in federal court in New York.[88] Kazakhstan's President Nusultan Nazarbayev's initially challenged *Borat*, blocking distribution of film clips and threatening to sue.[89]

(such as any allegedly false or misleading portrayal of the Participant), (f) infliction of emotional distress (whether allegedly intentional or negligent), (g) trespass (to property or person), (h) breach of any alleged contract (whether the alleged contract is verbal or in writing), (i) allegedly deceptive business or trade practices, (j) copyright or trademark infringement, (k) defamation (such as any allegedly false statements made on the Film), (l) violations of Section 43(a) of the Lanham Act (such as allegedly false or misleading statements or suggestions about the Participant in relation to the Film or the Film in relation to the Participant), (m) prima facie tort (such as alleged intentional harm to the Participant), (n) fraud (such as any alleged deception or surprise about the Film or this consent agreement), (o) breach of alleged moral rights, or (p) tortious or wrongful interference with any contracts or business of the Participant, or any claim arising out of the Participant's viewing of any sexually-oriented materials or activities.

Ex parte Cohen, 988 So.2d 508, 510-11 (Ala. 2008); *Moore*, 2021 U.S. Dist. LEXIS 130344, at *15.

[85] *See* Psenicska v. 20th Century Fox Film Corp., 409 F. App'x 368, 368-70 (2d Cir. 2009). *See also* Moore v. Cohen, 2019 U.S. Dist. LEXIS 94361, at *4 (D.D.C. 2019).

[86] *Village 'Humiliated' by Borat Satire*, *supra* note 33.

[87] Lama Hasan, *'If I See Borat, I Will Kill Him with My Own Hands'*, ABC NEWS (July 8, 2008, 1:13 PM), https://abcnews.go.com/International/Entertainment/story?id=2659018 [https://perma.cc/UCT3-Y2L7].

[88] *See* Todorache v. Twentieth Century Fox Film Corp., No. 06-CV-13369 (S.D.N.Y. Nov. 20, 2006); *see also* Fletcher *supra* note 3.

[89] *Attacks on the Press 2006: Kazakhstan*, CPJ (Feb. 5, 2007), https://cpj.org/2007/02/attacks-on-the-press-2006-kazakhstan/ [https://perma.cc/8P8K-KKHQ].

The government later backtracked and vowed not to interfere with the film's distribution.[90]

Courts wrestle with categorizing the mockumentary. Because the mockumentary genre does not fit comfortably into a specific category for liability purposes, there is room for analysis and clarification. This is especially worth investigating because the mockumentary format is flexible and helps to facilitate the joke. On one hand, the mockumentary is no different than an actual documentary, weaving truthful elements into a journalistic medium. On the other hand, when that material is facilitated by one of Baron Cohen's many outrageously offensive fictional characters, the analysis shifts to include protections from libel in fiction and parody and satire. Opinions involving Sacha Baron Cohen are catalogued in more detail in the Appendix. What follows is an analysis of the seven reported cases included in the Appendix, *infra*.

A. Enforcement of Standard Consent Agreements & Tension with Tort Law

1. Contract Law Shields the Mockumentary from Liability[91]

As strong as the First Amendment protections of parody, satire, and comedy have been in the mockumentary cases, the courts have been even more resolute about dismissing the tort claims under traditional contract law.[92] As the *Moore* court showed, applying contract law also allows the courts to eschew the First Amendment application.[93] Because the mockumentary genre incorporates and replicates elements of reality television, contract-based defenses to litigation emerging from reality television provides an additional, non-constitutional body of law supporting the mockumentary.[94]

Mutual agreement to an agreed-upon set of terms leads to a contract.[95] *Williston on Contracts* states: "A contract is a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law

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[90] *Id.*

[91] *See* JOHN CALAMARI & JOSEPH PERILLO, CONTRACTS 1-2 (3d ed.1987) ("Every contract involves at least one promise which has legal consequences. (1) A legally enforceable agreement.").

[92] *Id.*

[93] *See* Moore v. Cohen, 2021 U.S. Dist. LEXIS 130344, at *10 (S.D.N.Y. 2001).

[94] *See* Bihag v. A&E TV Networks, 669 F. App'x 17 (2d Cir. 2016); Klapper v. Graziano, 41 Misc.3d 401 (N.Y. Sup. Ct. 2013).

[95] CALAMARI & PERILLO, *supra* note 91, at 25.

in some way recognizes as a duty."[96] A common theme arose and is exemplified by the facts of *Moore*. There, former Alabama politician Roy Moore alleged he was misled into thinking he was agreeing to appear on Israeli television. But instead, he was contracting with a shell company masquerading as such.[97] Baron Cohen relied more and more on the services of top Hollywood lawyers, with the help of whom he has formally registered more than 20 bogus production companies, complete with convincing letterheads and websites extolling their "world-class facilities, and state-of-the-art equipment." With such elaborate subterfuge, who would suspect that Longman Parke Productions, Amesbury Chase, or even Deutsches Unterhaltungsfernsehen were not all they claimed to be?[98]

In the Baron Cohen mockumentary cases, the producers employed variations of a Standard Consent Agreement in which the "participants" agree to forego a broad range of lawsuits that may arise from their appearance in the production.[99] The contracts included several standard clauses, including a choice of law clause designating New York as the situs for any litigation.[100] The participants agreed to be filmed and depicted in the film and relinquish ownership rights regarding the content.[101]

The clause most critical to the discussion of tort liability is Paragraph 4, which expressly disclaims liability for the same exact torts many of the

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[96] WILLISTON ON CONTRACTS §1 (Walter H.E. Jaeger ed., 3d ed. 1957) (quoting the Restatement of Contracts §1 (1932)); *see also* Stewart D. Aaron & Jessica Caterina, *Contract Formation Under New York Law: By Choice or Through Inadvertence*, 66 SYRACUSE. L. REV. 855, 856 (2016) (citing Kowalchuk v. Stroup, 61 A.D.3d 118, 121 (N.Y. App. Div. 2009)) ("A contract is binding if there is an offer, acceptance, consideration, mutual assent, an intent to be bound, and both sides agree on all the essential terms.")

[97] See Moore, 2021 U.S. Dist. LEXIS 130344, at *12-13.

[98] Fletcher, *supra* note 3; *see also* Panda Kroll, *Teaching Through a Study in the Borat Litigation: Judges Find Public Policy Support for Mischief*, 3 J. WORLD UNIVS. F. 127, 129 (2010). *See also Moore*, 2021 U.S. Dist. Lexis 130344.

[99] *See* Ex parte Cohen, 988 So.2d 508, 510-11 (Ala. 2008).

[100] For example, Paragraph 6 in the Standard Consent Agreement states:

> Although the Participant agrees not to bring any claim in connection with the Film or its production, if any claim nevertheless is made, the Participant agrees that any such claim must be brought before, and adjudicated by, only a competent court located in the State of New York and County of New York, under the laws of the State of New York.

Ex parte Cohen, 988 So.2d at 511; *Moore*, 2021 U.S. Dist. LEXIS 130344 at *15.

[101] Paragraphs 1 and 2 in the Standard Consent Agreement state:

> 1. The Participant agrees to be filmed and audiotaped by the Producer for a documentary-style film (the 'Film'). It is understood that the Producer hopes to reach a young adult audience by using entertaining content and formats.

Baron Cohen plaintiffs litigated: defamation, invasion of privacy, intentional infliction of emotional distress, and fraud.[102] The main tort claims in the mockumentary cases discussed above are for defamation and invasion of privacy.

Under the Restatement (Second) of Torts, there are four elements for defamation: 1) a false and defamatory statement about a person; 2) published

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> 2. The Participant agrees that any rights that the Participant may have in the Film or the Participant's contribution to the Film are hereby assigned to the Producer, and that the Producer shall be exclusively entitled to use, or to assign or license to others the right to use, the Film and any recorded material that includes the Participant without restriction in any media throughout the universe in perpetuity and without liability to the Participant, and the Participant hereby grants any consents required for those purposes. The Participant also agrees to allow the Producer, and any of its assignees or licensees, to use the Participant's contribution, photograph, film footage, and biographical material in connection not only with the Film, but also in any advertising, marketing or publicity for the Film and in connection with any ancillary products associated with the Film.

Ex parte Cohen, 988 So.2d at 510; *Moore*, 2021 U.S. Dist. LEXIS 130344 at *15.

[102] In its entirety, the waiver clause in Paragraph 4 in both *Ex parte Cohen* (the Martin case) and *Moore* reads:

> The Participant specifically, but without limitation, waives, and agrees not to bring at any time in the future, any claims against the Producer, or against any of its assignees or licensees or anyone associated with the Film, that include assertions of (a) infringement of rights of publicity or misappropriation (such as any allegedly improper or unauthorized use of the Participant's name or likeness or image), (b) damages caused by 'acts of God' (such as, but not limited to, injuries from natural disasters), (c) damages caused by acts of terrorism or war, (d) intrusion (such as any allegedly offensive behavior or questioning or any invasion of privacy), (e) false light (such as any allegedly false or misleading portrayal of the Participant), (f) infliction of emotional distress (whether allegedly intentional or negligent), (g) trespass (to property or person), (h) breach of any alleged contract (whether the alleged contract is verbal or in writing), (i) allegedly deceptive business or trade practices, (j) copyright or trademark infringement, (k) defamation (such as any allegedly false statements made on the Film), (l) violations of Section 43(a) of the Lanham Act (such as allegedly false or misleading statements or suggestions about the Participant in relation to the Film or the Film in relation to the Participant), (m) prima facie tort (such as alleged intentional harm to the Participant), (n) fraud (such as any alleged deception or surprise about the Film or this consent agreement), (o) breach of alleged moral rights, or (p) tortious or wrongful interference with any contracts or business of the Participant, or any claim arising out of the Participant's viewing of any sexually-oriented materials or activities.

Ex parte Cohen, 988 So.2d at 510-11; *Moore*, 2021 U.S. Dist. LEXIS 130344 at *15.

to a third party without privilege; 3) with fault, either negligence by the publisher; and 4) actionable irrespective of special harm.[103] In his treatise, Dean Prosser wrote of the similarity and distinction between defamation and false light, noting, "It seems clear, however, that it must be something that would be objectionable to the ordinary reasonable person under the circumstances."[104] The invasion of privacy claims mostly focused on false light and commercial appropriation of the plaintiff's image or likeness. In another treatise, Judge Sack notes that purpose of the false light tort is to compensate for injured feelings, not harm to the plaintiff's reputation.[105] Judge Sack also notes that false light often plays a "subsidiary role" in litigation.[106]

With the contracts themselves, the named plaintiff in *Psenicska* described having a document thrust upon him in haste and also acknowledged that he signed the release without reading it.[107] Roy Moore–the embattled former State Supreme Court Justice and candidate for the U.S. Senate–argued that his contract was not valid even though he crossed out content and added hand-written language regarding not addressing offensive or sexual content in his interview.[108]

The facts of *Psenicska* and *Moore*[109] highlight the "muddy interstices" between contract and tort law.[110] Professor Russell Korobkin has dubbed

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[103] *See generally* ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS §2:1 (5th ed. 2017).

[104] PROSSSER & KEETON ON THE LAW OF TORTS 864 (W. Page Keeton ed., 5th ed. 1984). It should also be noted that false light is recognized by roughly two-thirds of the states.

[105] RESTATEMENT (SECOND) OF TORTS §652E (1977):

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to the other for invasion of privacy if: a) the false light in which the other was placed would be highly offensive to a reasonable person, and b) the actor had knowledge of or acted in a reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

[106] SACK, *supra* note 103, at §12:3.

[107] *See* Defendants Memorandum of Law in Support of Motion to Dismiss, Psenicska v. Twentieth Century Fox Film Corp., 2008 U.S. Dist. LEXIS 69214 (No. 07-CIV-10972).

[108] The *Moore* Court also rejected plaintiff's argument that when he crossed out certain language related to "any allegedly sexual oriented or offensive behavior or questioning" that Moore was able to reinstate his claims. Moore v. Cohen, 2021 U.S. Dist. Lexis 130344, at *16 (S.D.N.Y. 2021).

[109] *Moore*, 2021 U.S. Dist. LEXIS 130344.

[110] Russell Korobkin, *The Borat Problem in Negotiation: Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts*, 101 CALIF. L. REV. 51, 55 (2013) (applying, with great precision, blackletter contract law to question and criticize the dismissal of lawsuits in the first wave of *Borat* lawsuits).

this "the Borat Problem." Professor Korobkin's thoughtful "Borat Solution" would hold drafters to more precise language, for instance above and beyond "documentary-style" and allow plaintiffs more leeway under contract theories of specific assent, while also loosening the interpretation of fraud.[111] However, the courts in the Baron Cohen cases found the contracts to be clear, unambiguous, legitimate and binding.

In their treatise, Calamari & Perillo describe fraud as: "Whenever a party has fraudulently induced another to enter into a transaction under circumstance giving the latter the right to bring a tort action for deceit, the deceived party may instead elect to avoid the transaction and claim restitution."[112] Courts apply a subjective test to interpret whether intentional misrepresentations during negotiations were serious or deceptive enough to void a contract.[113] Under New York law, to invalidate a contract based on fraud in the inducement, the plaintiff must show that the party "made a misstatement of material fact or failed to state facts necessary to avoid its statements being materially misleading."[114]

The misrepresentation of a material fact has both subjective and objective elements.[115] Whether the subterfuge of shell production companies or even misstatements about who the interviewer would be and where the film would be shown seemed less of a concern to the courts because of how New York handles the contractual doctrine of reliance, which the parties agreed to forego in the Standard Consent Agreements.

The courts in both *Psenicska* and *Moore* looked to the contractual language itself to reject the fraud in the inducement arguments, finding the contracts, which were practically identical, employed an explicit reliance disclaimer, which all the plaintiffs signed.[116] Judge Preska wrote and was later quoted in *Moore*: "Plaintiff may not claim to have relied on a statement

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[111] *Id.* at 102-03.

[112] Calamari & Perillo, *supra* note 91, at 356

[113] *Id.* at 357.

[114] Glen Banks, New York Contract Law: A Guide for Non-New York Attorneys 109 (2014).

[115] *Id.* at 109-10. One leading case, *Hoffenberg v. Hoffman & Pollok,* which Baron Cohen and producers relied in *Psenicska*, lays out an eight-prong analysis for proving fraudulent inducement: "(1) that the defendant made a representation, (2) as to a material fact, (3) which was false, (4) and known to be false by the defendant, (5) that the representation was made for the purpose of inducing the other party to rely upon it, (6) that the other party rightfully did so rely, (7) in ignorance of its falsity (8) to his injury." 248 F.Supp.2d 303, 310 (S.D.N.Y. 2003) (*see* Defendants' Memorandum of Law in Support of Motion to Dismiss*, Psenicska*, No. 07-CIV-10972).

[116] *Psenicska*, 2008 U.S. Dist. LEXIS 69214, at *4-6.

upon which he or she has explicitly disclaimed reliance."[117] The contracts explicitly disclaimed both fraud and reliance on representations made outside of the contract.[118] New York specifically allows a participant to disclaim reliance in a contract, which the *Psenicska* and *Moore* courts applied and affirmed.[119]

Courts also look critically at the purpose of the contract as the court did in *Ex parte Cohen*, discussed *infra*. The court in *Olson*, also discussed *infra*, plainly stated its opinion on the purpose of *Bruno*:

> [T]he purpose of *Bruno* was to show audiences what would happen when a film crew followed a blatantly-homosexual character . . . as he interacted with members of the public, raising issues of homosexuality, gay culture and same sex partnerships in an attempt to craft a sly commentary on the state of homophobia in our society.[120]

2. Illustrative Examples from Reality Television and Prank Shows

Because the mockumentary genre incorporates and replicates elements of reality television, contract-based defenses to litigation emerging from reality television cases are also instructive of how courts will approach constitutional questions in mockumentary litigation.[121]

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[117] *Id.* at *6; Moore v. Cohen, 2021 U.S. Dist. LEXIS 130344, at

[118] For example, in the *Moore* agreement, in addition to waiving his right to litigate after-the-fact, Paragraph 5 declares that the participant "acknowledges that in entering into [this agreement], the Participant is not relying upon any promises or statements made by anyone about the nature of the Program or the identity, behavior, or qualifications of any other Participants, cast members, or other persons involved in the Program. Participant is signing this agreement with no expectations or understandings concerning the conduct, offensive or otherwise, of anyone involved in this Program." *Moore*, 2021 U.S. Dist. LEXIS 130344 (SCA appended to exhibits).

[119] *Moore*, 2021 U.S. Dist. LEXIS 130344 at *21 ("Under New York law, when a 'contract states that a contracting party disclaims the existence of or reliance upon specified representations, that party will not be allowed to claim that he was defrauded into entering the contract in reliance on those representations.") (quoting PetEdge, Inc. v. Garg, 234 F.Supp.3d 477 (S.D.N.Y. 2017).

[120] Olson v. Cohen, 2011 Cal. App. Unpub. LEXIS 6888, at *41 (Cal. App. Div. 2011).

[121] *See* Bihag v. A&E TV Networks, 669 F. App'x 17 (2d Cir. 2016); *see also* Klapper v. Graziano, 129 A.D.3d 674 (N.Y. App. Div. 2015).

Under the waiver clause and others like it, courts have been firm in denying claims since the late 1990s.[122] In *Bihag v. A&E Television Networks*, the Second Circuit reinforced a valid contractual release for a participant in the reality television show *Dog, the Bounty Hunter*.[123] The *Bihag* court wrote: "The language of the releases is not ambiguous by any stretch. To the contrary, this language is clear, broad, and dispositive. Bihag is bound by the agreements he voluntarily signed, which expressly bar the claims he has attempted to assert in this case."[124] Similarly, in *Klapper v. Graziano*, the Appellate Division of New York held that a plastic surgeon who appeared on the reality television show *Mob Wives* could not sue for libel, invasion of privacy, or tortious interference because he "knowingly" signed a release.[125]

In *Weil v. Johnson,* a New York state court judge upheld a release for a documentary film that was secured with "sheepish" or "surreptitious" means.[126] The film, "Born Rich", was about the children of super wealthy families. The plaintiff, Luke Weil, heir to a gaming fortune, was one of eleven subjects interviewed and depicted in the documentary film.[127] Like all those depicted in the film, he signed a release.[128] Plaintiff alleged fraud because the release was secured while the filmmaker was a student and represented that the film would be a "student production" rather than a commercial documentary film.[129] Specifically, Weil alleged "defendant Jamie Johnson sheepishly, surreptitiously, and in the vein of irrelevancy flashed a document in front of the plaintiff . . . indicating that the plaintiff Luke Weil's signature on said document was a prerequisite to the plaintiff's effectuation of the interview to be used in his project and . . . was an irrelevant

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[122] *See, e.g.*, Shoemaker v. Discovery Commc'ns, LLC, 2017 N.Y. Misc. LEXIS 3551 (N.Y. Sup. Ct. 2017) (involving the reality television show *90 Day Fiancé*); *see also* Shapiro v. NFGTV, Inc., 2018 U.S. Dist. LEXIS 22879 (S.D.N.Y. Feb. 8, 2018) ("The 'clear, broad, and dispositive[ ]' language used in the release agreed to by Plaintiff bars Plaintiff from asserting any claims related to her participation in the program, including those involving fraud.").

[123] *See Bihag*, 669 F. App'x at 17, 19.

[124] *Id.*

[125] *See Klapper*, 129 A.D.3d at 675-76 ("Such releases, which are commonly used in the entertainment industry, are enforceable and should not lightly be set aside. The allegations against the corporate defendants are insufficient to demonstrate willful or grossly negligent acts or intentional misconduct which would render the appearance release unenforceable.").

[126] 2002 N.Y. Misc. LEXIS 1728 (N.Y. Sup. Ct. 2002).

[127] *Id.* at *2.

[128] *Id.*

[129] *Id.* at *5.

formality."[130] It did not matter to the *Weil* court: "the . . . Releases signed by plaintiff appear valid and binding on their face."[131]

B. Omnipresent First Amendment Protections Remain Relevant

Because the tort claims frequently invoked in these cases implicate several First Amendment defenses, assessing the context also plays an important role.

Context is critical in determining a defamation case, including such factors as whether the plaintiff is a public or private figure or government official or someone involved in a matter of public interest.[132] This public designation under the tort of defamation would also trigger actual malice under *Times v. Sullivan*[133] and its progeny, requiring the plaintiff to prove the statements were published either knowing they were false or with reckless disregard for the truth.[134] A truth or falsity analysis under *Times v. Sullivan* requires the court to determine whether the statements can be proven true or false or whether they can be regarded as pure opinion. Under *Sullivan*, statements of pure opinion are protected by the First Amendment.[135] Both actual malice and protected opinion channel the legal analysis into two categories that receive strong First Amendment protections: libel in fiction and parody/satire, which generally blunt the falsity element for defamation.

If libel in fiction and actual malice do not provide enough immunity because of the realistic or cinema verité elements of the mockumentary, then the broader, yet equally important, parody and satire defense could aid in the filmmakers' defense.[136] Again, the context is critical.[137]

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[130] *Id.* at *5

[131] *Id.* at *6. The plaintiff's invasion of privacy for appropriation of image and likeness was also rejected because the documentary film could not be considered commercial or advertising. *Id.* at *9-*10, *12. ("Courts have extended 'newsworthiness' protection to a wide variety of publications in the name of 'public interest.'")

[132] *See generally* Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

[133] 376 U.S. 254 (1954).

[134] *See* Gertz v. Welch, 418 U.S. 323 (1974).

[135] See *Milkovich*, 497 U.S. at 19-20.

[136] *See* Jeff Todd, *Satire in Defamation Law: Toward a Critical Understanding*, 35 REV. LITIG. 45, 50-51 (2016).

[137] *See* Clay Calvert & Matthew D. Bunker, *Know Your Audience: Risky Speech at the Intersection of Meaning and Value in First Amendment Jurisprudence*, 35 LOY. L.A. ENT. L. REV. 141, 148-49 (2015) ("[E]ven if a speaker assumes his audience is rational, the speaker still must make complicated determinations regarding what a rational audience would understand about, for example, different conventions of writing, such as parody and satire, or a complex genre of music, such as rap.") (footnotes omitted).

1. Application of Libel in Fiction to Fiction of the Mockumentary

If the mockumentary is fully vested as a bona fide work of fiction, it would be immune from liability for defamation or invasion of privacy under the "libel in fiction" doctrine. Libel in fiction is a subcategory of defamation stemming from works of fiction that depict actual people.[138] The critical point in a libel in fiction defense is that work is a piece of the fictional entertainment, failing at least two of the prima facie elements of a defamation claim: (1) falsity of fact and (2) of and concerning the plaintiff.[139]

One recent high-profile case, *Greene v. Paramount Pictures Corp.,* emerged from the feature film *The Wolf of Wall Street*, starring Leonardo DiCaprio as real-life persona Jordan Belfort.[140] The defamation claim failed because even though the film was based on the life of its principal character, Belfort, the film included numerous composite characters and fictional elements.[141] The court also referenced a disclaimer appended to the credits.[142] The plaintiff, however, claimed a character in the film named Nicky "Rugrat" Koskoff was based on his persona and cited multiple reasons: He worked at the firm, held a similar job title, and wore a toupee while engaged in a range of illegal activity and debauchery.[143] The Second Circuit, however, held that "no reasonable viewer of the Film would believe that the defendants intended the Koskoff character to be a depiction of Greene."[144]

Although libel in fiction claims are not often successful, a New York Court rejected a motion to dismiss in a case emanating from the fictional television show, *Law & Order*.[145] Even though the court allowed the case to go forward, it wrote,

> Because of the counterintuitive nature of a libel-in-fiction claim—in which a plaintiff claims that something that is fictional is not factually accurate—two separate elements of the traditional defamation claim converge. Any libel plaintiff must show that the alleged defamation is "of and

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[138] *See* Lee S. Brenner et al., *Real Characters: Lawsuits Claiming Libel in Fiction Are Decided on the Basis of Whether the Work is "Of and Concerning" the Plaintiff*, 35 L.A. LAWYER 40 (2012); *see also* Robert D. Richards, *When "Ripped from the Headlines" Means "See You in Court": Libel by Fiction and the Tort-Law Twist on a Controversial Defamation Concept*, 13 TEX. REV. ENT. & SPORTS L. 117 (2012).

[139] *See generally* Davis v. Costa-Gavras, 619 F. Supp. 1372, 1375 (S.D.N.Y. 1985).

[140] Greene v. Paramount Pictures Corp., 813 F. App'x 728 (2d Cir. 2020).

[141] *Id.* at 729-30.

[142] *Id.*

[143] *Id.* at 730.

[144] *Id.* at 731.

[145] Batra v. Wolf, 2008 N.Y. Misc. LEXIS 1933 (N.Y. Sup. Ct. 2008).

> concerning" the plaintiff and that it is false. In the fiction context, the plaintiff must also show that the viewer was "totally convinced that the episode in all aspects as far as the plaintiff is concerned is not fiction at all."[146]

Perhaps another case, *Pring v. Penthouse*, may provide some of the most compelling arguments discussing not only a fictional account but an offensive, "gross," and "vulgar" depiction.[147] The article at issue in *Pring* was a fictional spoof of the Miss America beauty pageant and included some highly offensive descriptions that the plaintiff sought to litigate through a defamation lawsuit.[148]

With a libel in fiction suit, the court must look at two issues: First, whether the statement is of and concerning the plaintiff. Second, whether a "reasonable reader or viewer" would think the content was real or believable.[149] The court wrote: "Although a story may be repugnant in the extreme to an ordinary reader, and we have encountered no difficulty in placing this story in such a category, the typical standards and doctrines under the First Amendment must nevertheless be applied."[150] The *Pring* court outlined the proper test:

> The test is not whether the story is or is not characterized as 'fiction,' 'humor,' or anything else in the publication, but whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated. If it could not be so understood, the charged portions could not be taken literally.[151]

Thus, libel in fiction is only applicable when a reasonable viewer would not take the content as real.

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[146] *Id.* at *5 (citations omitted).

[147] 695 F.2d 438 (10th Cir. 1982).

[148] *Id.* at 439-41.

[149] *Id.* at 442.

[150] *Id.* at 443. The court added:

> The story is a gross, unpleasant, crude, distorted attempt to ridicule the Miss America contest and contestants. It has no redeeming features whatever. There is no accounting for the vast divergence in views and ideas. However, the First Amendment was intended to cover them all. The First Amendment is not limited to ideas, statements, or positions which are accepted; which are not outrageous; which are decent and popular; which are constructive or have some redeeming element; or which do not deviate from community standards and norms; or which are within prevailing religious or moral standards.

Id.a

[151] *Id.* at 442.

Applying the *Pring* prongs and a common-sense understanding of the facts, it would seem difficult for a plaintiff to successfully sue the producers of a mockumentary because of the primacy of the second prong: no reasonable reader or viewer would understand the content as reasonably believable. This prong indemnifies the large body of purely fictional work, such as a film like *This is Spinal Tap* or the television show *The Office*. No reasonable viewer expects scripted entertainment with performing actors to be anything beyond fictional entertainment.

But the Baron Cohen mockumentary encounters potential difficulty with the first prong because even though Borat, Brüno, or any of Baron Cohen's other characters are purely fictional, their encounters are with real people. The character is camouflaged through costumes, accents and fictional biographies. Further, the production operates through a series of legally established production companies created for the sole purpose of both hiding and indemnifying the true identities of the people behind the films.[152] Thus, the libel in fiction discussion could encounter difficulty at *Pring*'s first prong, "of and concerning," because the plaintiffs are real, not fictionalized or composite characters. The courts, nevertheless, have repeatedly and emphatically dismissed the claims on motions to dismiss and, with the *Moore* case, on summary judgment.[153]

2. Historical Protection for Parody & Satire

Parody and satire have secured a special place under the First Amendment under the *Hustler Magazine v. Falwell*.[154] This case emerged from a parody of a Campari Liqueur advertisement published in an adult magazine.[155] The *Hustler* parody, which included a small disclaimer at the bottom, declaring, "ad parody not to be taken seriously," included a series of crude, offensive statements in a mock-interview format in which the Reverend Jerry Falwell, a televangelist,[156] was depicted as engaging in a drunken, incestuous encounter with his mother in an outhouse in Lynchburg, Virginia.[157]

The content, while amusing and entertaining to some, struck a nerve with Rev. Falwell, who litigated a libel, privacy, and intentional infliction

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[152] *See* Moore v. Cohen, 2021 U.S. Dist. Lexis 130344 (S.D.N.Y. 2021).
[153] *Id.* at *24 (granting motion for summary judgment).
[154] 485 U.S. 46 (1988).
[155] *Id.* at 48.
[156] *Id.*
[157] *Id.*

of emotional distress lawsuit all the way to the Supreme Court.[158] The claims for defamation and invasion of privacy were dismissed under the parody and satire doctrine because no reasonable reader, even a *Hustler* magazine reader, could view the statements as true. But a federal jury awarded Falwell $100,000 in compensatory damages and $50,000 in punitive damages on the intentional infliction of emotional distress claim.[159]

The court, however, reversed in an opinion by Chief Justice Rehnquist and saw through Falwell's attempt to circumvent the actual malice privilege on a matter of parody and satire.[160] The Chief Justice discussed the historic role of parody and satire in the American marketplace of ideas:

> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. . . . We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions.[161]

The Court also credited the practical reality that creators of parody should be immune from tort liability because no reasonable viewer or reader could accept the joke as a truthful statement.[162] Parody as a tool for criticism on public affairs and the people behind public issues further buttressed its First Amendment underpinnings.[163]

Because satirists can make statements and critiques that are unparalleled in other venues, the First Amendment firmly protects this content.[164] Other judicial opinions protecting parody and satire, though, cover straight efforts at humor,[165] not the hybrid mockumentary format. Nevertheless,

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[158] *Id.* at 48-49.

[159] *Id.*

[160] *Id.* at 53. ("Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject.")

[161] *Id.* at 50-51.

[162] *Id.*

[163] *Id.*

[164] *See also* Roy S. Gutterman, New York Times Co. v. Sullivan*: No Joking Matter – 50 Years of Protecting Humor, Satire and Jokers*, 12 FIRST AMEND. L. REV. 497 (2014); Laura E. Little, *Just a Joke: Defamatory Humor and Incongruity's Promise*, 21 S. CAL. INTERDIS. L.J. 93 (2011).

[165] *See, e.g.*, Frank v. NBC, 506 N.Y.S.2d 869 (N.Y. App. Div. 1986) (dismissing a defamation claim by an accountant who was satirized on Saturday Night Live's Weekend Update, a fake news parody section of the live television show); *see also* New Times v. Isaacks, 146 S.W.3d 144 (Tex. 2004) (holding reasonable readers of an alternative newspaper could not reasonably interpret a satirical piece as a truthful publication).

courts in several Baron Cohen mockumentary cases properly ruled the films should not be subject to tort liability because they are so clearly satirical that even if unwitting participants were depicted unfavorably, reasonable viewers would view this as parody.[166] Judge Preska emphatically stated that these films are protected as satire and her statement has been cited in subsequent Baron Cohen cases.[167] Even though the participants are not in on the joke, the viewers are, which would also minimize the harm from the publication or depiction.[168]

V. Conclusion

Baron Cohen's brand of humor is not for everyone. For all the people laughing at his interview with former Vice President Dick Cheney, asking to have his waterboarding kit autographed, participants themselves often find their depictions embarrassing, not humorous. Sarah Palin called one of his characters "truly sick" and walked off the set.[169] Palin later went to social media, posting that she was duped, joining "a long list of American public personalities who have fallen victim to the evil, exploitive, sick 'humor' of the British 'comedian' Sacha Baron Cohen, enabled and sponsored by CBS/Showtime."[170] But this so-called "sick humor" is exactly the kind of speech that is and ought to be protected under the law and the First Amendment.

There may indeed be some sympathy out there for the random citizen seemingly duped into an uncomfortable and even humiliating situation with one of Baron Cohen's absurd characters making inappropriate or offensive

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[166] *See supra* for analysis on *Doe, Lemerond*, *Psenicska*, and *Olson*. For a summary of the reported opinions against Sacha Baron Cohen, *see infra* Appendix.

[167] *See Moore*, 2021 U.S. Dist. Lexis 130344 at *22-*23. In *Moore*, Judge Cronan wrote: "It is simply inconceivable that the Program's audience would have found a segment with Judge Moore activating a supposed pedophile-detecting wand to be grounded in any factual basis. Id. at *37.

[168] *Id.* ("Given the satirical nature of that segment and the context in which it was presented, no reasonable viewer would have interpreted Cohen's conduct during the interview as asserting factual statements concerning Judge Moore.").

[169] Fletcher, *supra* note 3.

[170] Matt Wilstein, *Sacha Baron Cohen Reveals His Painful Sarah Palin 'Dilemma'*, Daily Beast (June 10, 2020, 10:18 AM), https://www.thedailybeast.com/sacha-baron-cohen-reveals-his-painful-sarah-palin-dilemma-on-showtimes-who-is-america [https://perma.cc/AJ58-M26G]. Baron Cohen did not include the Palin encounter because it did not meet his standard for humor, saying, "Just like her candidacy for vice president, she wasn't good enough to make the show." *Id.*

statements, or exhibiting offensive and unusual behavior.[171] Emerging from a restroom with a bag of human waste obviously throws a monkey wrench into an etiquette lesson, as the Alabama etiquette coach in *Martin* alleged.

Judge Sack, in his treatise, characterizes the tension that this article seeks to flesh out: "There is no 'magic bullet' that can prevent plaintiffs' attempts to use novel tort theories to evade established principles protecting speech, nor the creative lawyers likely to cease in their search for new avenues to recovery."[172] While the appeal in *Moore* is still pending and the *Borat* sequel is still relatively fresh, potential liability is still a concern. The technology to produce and post or otherwise disseminate future mockumentaries facilitates the art form and commentary. Future filmmakers, artists, writers and producers will need to take significant steps to protect their commentary, comedy and art. Luckily, the courts, the law, and the First Amendment are standing right behind them.

VI. Appendix of Cases Against Sacha Baron Cohen

(1) *Johnston v. One America Productions* (Borat) (2008)

In *Johnston v. One America Productions*, a federal court in Mississippi dismissed a privacy suit by a woman who appeared in three seconds of the film *Borat* during which she, in attendance at a Pentecostal camp, appeared raising her arms in praise to God while Borat spoke in tongues and acted as if he was being converted by the minister.[173] In the four-count complaint, the plaintiff claimed: (1) the filming invaded her privacy and appropriated her image and likeness and (2) depicted her in a false light (another invasion of privacy claim); (3) the release she signed should not be enforced because she

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[171] Michael Psenicska recounted his contract negotiation: he was approached by a production company from California and participated in the film:

> I don't have the foggiest why they chose me but they got me good . . . I remember sitting in the car. It was 90 degrees, they were late and I was ready to leave. Then this young guy jumps in and thrusts $500 in my hand. Unfortunately I took it. Then he gives me this piece of paper. He told me it was a release form. I'm not an idiot – I have a masters in mathematics – but I'm thinking that it was a public service-type documentary so I didn't' read it. I trusted the guy.

Fletcher, *supra* note 3.

[172] Sack, *supra* note 103, §13:11.

[173] Johnston v. One America Productions, 2007 U.S. Dist. LEXIS 62029, at *4 (N.D. Miss. Aug. 22, 2007).

did not know Borat's true identity; and (4) gross negligence.[174] In its motion to dismiss, defendants successfully argued that not only are the claims not cognizable, but also the film was protected under the First Amendment.[175]

The court analyzed plaintiff's claims under four distinct theories of a right to privacy cause of action recognized in Mississippi: (1) intentional intrusion upon the seclusion of another; (2) appropriation of another's identity; (3) public disclosure of private facts; and (4) false light.[176] The court held that plaintiff did not state a claim under either (1) or (3) because plaintiff was attending a public religious meeting with no expectation of privacy or seclusion.[177] However, the claim under appropriation could stand because "defendants did not obtain the plaintiff's explicit permission to be featured in . . . a major motion picture,"[178] and the claim under false light could stand because there remained reasonable questions for the jury whether the scene in which plaintiff was depicted "would be highly objectionable to a reasonable person in the plaintiff's position . . . such that a person in the plaintiff's position would believe others would believe she willingly participated in a mocking of her religion" and that defendant knew that the plaintiff would feel aggrieved by the publicity in the eyes of her community.[179]

Perhaps the most relevant aspect of the court's analysis discusses the nature of the film: "*Borat* is different from a purely fictional work since, although the viewer is aware that the plot itself is fictional and that the characters of Borat and his producer are fictional, the viewer is also aware that the vast majority, if not all, of the other people featured in the movie are non-public figures who are not actors and are likely unaware that Borat is not a Kazakhstani reporter filming a documentary for Kazakhstan."[180]

Following the ruling, defendants sought reconsideration as well as an interlocutory appeal, before the parties eventually stipulated to dismissal.[181] In its reconsideration order, the court, explaining why *Borat* does not qualify for default First Amendment protection as other forms of entertainment sold for profit might, wrote:

> As this court has previously maintained, unlike the massive majority of mainstream films that the public has viewed, the film *Borat* is not simply

[174] *See id.* at *4-5.
[175] *See id.* at *5.
[176] *See id.* at *11.
[177] *See id.* at *12.
[178] *Id.* at *23.
[179] *Id.* at *17.
[180] *Id.* at *24-25.
[181] *See* Stipulation of Dismissal with Prejudice, Johnston v. One America Productions, 2007 U.S. Dist. LEXIS 62029 (N.D. Miss. July 29, 2008) (2:07cv42-P-S).

> an ordinary expressive, fictional work with fictional actors. Nor is it a pure documentary. Rather, the film is a unique mixture of documentary and fiction which blurs the boundaries of both genres to such a degree that many reasonable viewers could question whether or not the majority of people portrayed in the film are willing participants. It is this nature of the film that does not bring it squarely in the realm of *Joseph Burstyn, Inc. v. Wilson*.[182]

(2) *Lemerond v. Twentieth Century Fox Film Corp.* (Borat) (2008)

In *Lemerond v. Twentieth Century Fox Film Corp.*,[183] *Borat* generated a lawsuit by a man captured on film being approached by Sacha Baron Cohen and then running away from the camera at the intersection of 5th Avenue and 57th Street in New York City.[184] In the 13-second exchange, the Borat character, described by the court as using a heavy accent, attempted to shake plaintiff's hand, saying, "Hello, nice to meet you. I'm new in town. My name a Borat."[185] Plaintiff then ran away, "in apparent terror, screaming 'Get away!' and 'What are you doing?'"[186] Plaintiff's face was digitally pixelated in the trailer, but not in the film itself, though plaintiff never gave consent for the use of his image.[187] Plaintiff invoked New York's invasion of privacy statute, New York Civil Rights Law § 51, which provides a civil remedy for the unlawful or unconsented to use of a person's image or likeness for commercial purposes.[188]

The court held that *Borat* fit "squarely within the newsworthiness exception" to the statute, which provides that "nonconsensual use[s] of a plaintiff's image to depict 'newsworthy events or matters of public interest'" do not fall within the statute's reach.[189] The court wrote:

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[182] *See* Johnston v. One Am. Prod., 2007 U.S. Dist. LEXIS 73450, at *1-154 (N.D. Miss. Oct. 2, 2007) (contrasting the instant case, where "defendants' right to free speech is not unfettered," with *Wilson*, where the First Amendment prevented a government agency from rescinding a license for public exhibition of a motion picture).

[183] Lemerond v. Twentieth Century Fox Film Corp., 2008 U.S. Dist. LEXIS 26947 (S.D.N.Y. March 31, 2008).

[184] *See id*. at *2.

[185] *Id*.

[186] *Id*.

[187] *Id*. at *2-3.

[188] *Id*. at *3. The court explained that New York does not recognize a common law privacy right, which further weakened plaintiff's case.

[189] *Id*. at *4-7 (citing Stephano v. News Group Publ'ns, Inc., 474 N.E.2d 580, 584-585 (N.Y. 1984)).

> At its core . . . *Borat* attempts an ironic commentary of "modern" American culture, contrasting the backwardness of its protagonist with the social ills afflict [sic] supposedly sophisticated society. The movie challenges its viewers to confront, not only the bizarre and offensive Borat character himself, but the equally bizarre and offensive reactions he elicits from "average" Americans. Indeed, its message lies in that juxtaposition and the implicit accusation that "the time will come when it will disgust you to look in a mirror." Such clearly falls within the wide scope of what New York courts have held to be a matter of public interest.[190]

Because New York has no common law privacy cause of action and the only relief for privacy violations is available under New York Civil Rights Law §§ 50-51, the court found plaintiff's unjust enrichment claim equally unavailing.[191] The court was also unmoved by the fact that plaintiff's image was used in the film's promotional trailer, writing in a footnote that even a film's trailer, although commercial, does not negate the depiction of a matter of public interest.[192]

(3) *Ex parte Cohen* (Borat) (2008)

In *Ex parte Cohen*, an Alabama etiquette teacher, who was filmed providing lessons during a staged dinner with Borat, challenged her signed consent agreement all the way to the Alabama Supreme Court.[193] The dinner, for which Kathie Martin was paid $350, was secured after a producer contacted Martin inquiring about whether she would give an etiquette dining lesson to "a foreign reporter traveling in the United States" for a documentary for Belarusian television.[194] The court characterized the encounter: "It is sufficient to say that an eventful meal ensued during which the alleged reporter engaged in behavior that would generally be considered boorish and offensive."[195]

Martin's primary challenge went to the validity of the contract, which released the producers of the film from liability for a variety of torts and contracts claims.[196] Martin argued that an Alabama statute voided the consent agreement because the only defendant that was a signatory to that

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[190] *Id.* at *6-7.
[191] *See id.* at *8-9.
[192] *See id.* at *7, n.1 (quoting Man v. Warner Bros., Inc. 317 F. Supp. 50, 52 (S.D.N.Y. 1970)).
[193] *See Ex parte* Cohen, 988 So. 2d at 508.
[194] *Id.* at 510.
[195] *Id.* at 511.
[196] *See id.* at 510-11.

agreement was not qualified to do business in Alabama.[197] The court, however, sided with the defendants, who argued that the Commerce Clause of the U.S. Constitution barred application of the Alabama statute to an interstate commercial activity.[198] The court concluded:

> The petitioners have established that the primary purpose of the transaction between Springland Films and Martin was interstate commerce, specifically, to provide for Martin's appearance in a film that might be used "without restriction in any media throughout the universe." Because the purpose of that transaction was interstate commerce, the Commerce Clause of the United States Constitution precludes the courts of this State from applying §10-2B-15.02(a) to prevent the petitioners from enforcing the consent agreement. Because the petitioners have a clear, legal right to the relief they seek – an order directing the Jefferson Circuit Court to vacate its order holding the consent agreement void and unenforceable – their petition for the writ of mandamus is granted.[199]

(4) *Psenicska v. Twentieth Century Fox Film Corp.* (Borat) (2009)

In *Psenicska v. Twentieth Century Fox Film Corp.*, a consolidated case, three plaintiffs who appeared in *Borat* sued for fraud, unjust enrichment, and intentional infliction of emotional distress, claiming they were misled about the nature of the "documentary-style" film.[200]

At the district court level, the plaintiffs challenged the validity of their signed consent agreements, arguing that the agreement, and specifically, the term "documentary-style film," is ambiguous and therefore unenforceable.[201] The court rejected that argument, finding that not only is the phrase unambiguous, but that *Borat* clearly falls into a category of "documentary-style films" for which Psenicska, in his brief, offered his own definition.[202] The court wrote:

> *Borat* is a film "displaying the characteristics of a film that provides a factual record or report." The Movie comprises interviews with real people and depictions of real events that are intended to provide a "factual record or report" albeit of a fictional character's journey. Across America. . .The fact that Borat is a fictional character, however, does nothing to diminish

[197] *See id.* at 512.
[198] *See id.*
[199] *Id.* at 515.
[200] *Psenicska*, 409 F. App'x at 370.
[201] *See Psenicska*, 2008 U.S. Dist. LEXIS 69214 at *15.
[202] *See id.* at *17-18.

> the fact that his fictional story is told in the *style* of a true one. Indeed, *Borat* owes such effectiveness as it may have to that very fact.[203]

Furthermore, the humorous nature of the film did not vitiate the contract: "Nor does the fact that *Borat* employs humor disqualify it from the 'documentary-style' genre. . . . Humor is perfectly consistent with documentary."[204]

The Second Circuit affirmed the district court's dismissal, finding that no reasonable trier of fact could find that *Borat* was not a documentary-style film.[205] The court wrote:

> While the character "Borat" is fictional, the film unmistakably tells the story of his travels in the *style* of a traditional, fact-based documentary. Indeed, the film's stylistic similarity to the straight documentary form is among its central comedic conceits, employed to set the protagonist's antics in high relief. Thus, as the district court correctly observed, the film "comprises interviews with real people and depictions of real events that are intended to provide a factual record or report albeit of a fictional character's journey across America.". . .Whatever the outer reaches of the "documentary-style" genre, *Borat* falls well shy of the frontier.[206]

(5) *Doe v. Channel Four Tv Corp. (*The Ali G. Show) (2010)

In *Doe v. Channel Four TV Corp.*, a California appellate court, in an unpublished opinion, affirmed summary judgment in a defamation suit based on Baron Cohen's character Ali G., the self-styled, British, white, wannabe gangster rapper who speaks crude gibberish on his faux talk show.[207] The case here emanated from a nonsensical comment Ali G. made during an interview with the author Gore Vidal in which he named plaintiff as a woman with whom he had previously had sexual relations.[208] Baron Cohen had actually met plaintiff in 1987 at a summer camp but had not had a sexual relationship with her and lost touch.[209]

The plaintiff sought general damages and injunctive relief, suing for libel, slander, invasion of privacy, fraud, breach of contract, negligence, neg-

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[203] *Id.* at *18-19.
[204] *Id.* at *19, n.13.
[205] *See Psenicska*, 409 F. App'x at 370.
[206] *Id.* (quoting *Psenicska*, 2008 U.S. Dist. LEXIS 69214 at *15).
[207] *See* Doe v. Channel Four Tv Corp., 2010 Cal. App. Unpub. LEXIS 2468, (Cal. Ct. App. Apr. 6, 2010).
[208] *See id.* at *3.
[209] *See id.* at *2.

ligent misrepresentation, and negligent infliction of emotional distress.[210] The trial court dismissed the suit after a summary judgment hearing because: (1) no reasonable person could consider the statements factual; and (2) a settlement agreement and release signed by plaintiff in 2006 barred any causes of action arising out of the show.[211]

The appellate court likewise found that the defamation claim was not cognizable because no reasonable viewer could view the statements as factual or believable.[212] It failed the tort's first prong of falsity, as the court considered the alleged defamation under the category of "satirical, hyperbolic, imaginative, or figurative statements [that] are protected because the context and tenor of the statements negate the impression that the author seriously is maintaining an assertion of actual fact."[213] The court wrote:

> [W[e conclude that no reasonable viewer of the episode could have understood Ali G's statements in a defamatory sense. Cohen uttered the statements while in character, pretending to be a gangster rap artist of a different race than his own. Because the statements purported to address a fictional character's prior relationship, a reasonable viewer could not have understood the statements to convey a provably false assertion of fact but instead merely as a joke or parody.[214]

The context of a fictional comedy show also weighed into the court's rationale.[215] As a matter of protected content, particularly comedic material, the court found significant First Amendment protection because the context and circumstances would not yield a reasonable connection to the truth.[216] Quoting from *Polygram Records v. Superior Court*, the court concluded: "To hold otherwise would run afoul of the First Amendment and chill the free speech rights of all comedy performers, and humorists, to the genuine detriment of our society."[217]

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[210] *See id.* at *6.

[211] *See id.* at *7-8.

[212] *See id.* at *12-13.

[213] *Id.* at *13-14 (quoting Franklin v. Dynamic Details, Inc., 116 Cal.App.4th 375, 385 (Cal. Ct. App. 2004)).

[214] *Id.* at *15-16.

[215] *See id.* at *17. ("The Ali G character made the statements during a comedy show in the context of an interview with Vidal involving a sense of other comedic and sometimes crude statements that could not be reasonably understood as asserting actual facts.").

[216] *See id.* at *21.

[217] *Id.* at *22 (quoting Polygram Records v. Superior Court, 170 Cal.App.3d 543, 553 (Cal. Ct. App. 1985)).

(6) *Olson v. Sacha Baron Cohen* (Brüno) (2011)

In *Olson v. Sacha Baron Cohen*, a California appellate court affirmed a lower court's dismissal of nine tort-based claims brought by a charity bingo organizer against Baron Cohen after Baron Cohen's character, Brüno, participated as a "celebrity host" at plaintiff's bingo game, calling bingo numbers while providing vulgar commentary laced with homosexual references.[218] The critical inquiry focused on the film's protection under the First Amendment and California's anti-SLAPP law, section 425.16.[219]

In May 2007, plaintiffs agreed to participate in a "documentary-style" movie, alleging they were told that a celebrity wanted to call the bingo numbers and that the filmed segments would be included in a documentary about bingo to be shown on networks such as PBS and the Discovery Channel.[220] Plaintiffs were paid $300 in exchange for signing a location agreement.[221] Additionally, plaintiffs signed a "Standard Consent Agreement" and were paid $20 each to be filmed for a "documentary-style film."[222]

Prompted by "Brüno's" vulgar behavior in calling bingo numbers, plaintiff confronted Baron Cohen, which culminated in security guards escorting Cohen off the stage.[223] Shortly after the confrontation, plaintiff was unable to regain her composure, "sobbing uncontrollably."[224] When she stood up from her chair, she lost consciousness and fell to the concrete floor, hitting her head, and, according to plaintiffs, causing "two brain bleeds" that confined her to a wheelchair and walker after the incident.[225]

The defense was primarily based on California's anti-SLAPP law, under which Baron Cohen argued that the conduct and words spoken by Cohen while he appeared as "Brüno" was in furtherance of Baron Cohen's right of free speech in making the film in connection with a matter of public interest.[226] While defendants submitted movie reviews and declarations of the artistic elements encompassed in the film affording it First Amendment protection, plaintiffs argued Baron Cohen's conduct was not free speech, but

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[218] *See* Olson v. Cohen, 2011 Cal. App. Unpub. LEXIS 6888 (Sept. 12, 2011).
[219] *See id.* at *1-2.
[220] *See id.* at *4-5.
[221] *See Id.* at *5-6. In exchange for signing the agreement, plaintiffs agreed not to bring future legal action or claims in connection with the production, including any claims for emotional distress, intentional torts, or fraud (based on any alleged deception about the film).
[222] *Id.* at *6.
[223] *See id.* at *10.
[224] *Id.* at *11.
[225] *Id.*
[226] *See id.* at *12.

rather a verbal attack on plaintiff with access to the private venue secured through lies and deception.[227]

After oral arguments on defendants' motion to strike plaintiffs' complaint, the trial court took judicial notice of the news articles and the background on the Brüno character:

> The court noted that the facts concerning Cohen's work, his portrayals of characters, and the fact that *Brüno* presented a satirical perspective on homosexuality, gay culture, were in the court's view notorious and of common knowledge. The court observed that the issues presented by *Brüno* were of public interest and were historically and continuously controversial; and the protected speech and conduct consisted of Brüno's references to homosexual relations, which Cohen expressed to provoke a reaction from appellant for the purpose of satire and commentary.[228]

As a procedural remedy to dismiss lawsuits challenging constitutionally protected rights, the court interpreted and applied the anti-SLAPP statute, holding that the defendants had demonstrated that plaintiffs' claims arose from conduct (namely, conduct of defendants), while filming *Brüno*, that was protected speech.[229]

The appellate court affirmed.[230] California courts apply a two-step process in evaluating anti-SLAPP motions, first deciding whether the defendant made a "threshold showing" that the underlying action was protected activity, and if the defendant makes such showing, shifting the burden to the plaintiff to demonstrate a probability of prevailing on the merits of the claim.[231] The court determined that Baron Cohen satisfied his initial burden by demonstrating that his conduct was "in furtherance of . . . the constitutional right of free speech in connection with a public issue or an issue of public interest."[232]

In its discussion, the court made some important statements about the role of films in the marketplace of ideas: "Movies and films generally are

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[227] *See id.* at *13-14.

[228] *Id.* at *15.

[229] *See id.* California's anti-SLAPP law, section 425.16 states: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Cal. §425.16.

[230] *See id.* at *17.

[231] *See id.* at *19.

[232] *Id.* at 25.

considered 'expressive works' subject to First Amendment protections."[233] The court added that a film's being undertaken for profit does not vitiate its constitutional value.[234] The movie's purpose was "to "depict 'Brüno' in various locations and under circumstances where his conduct and statements might prompt a strong homophobic reaction from those around him for the purpose of entertainment and social satire. Cohen's conduct was in aid of and incorporated into the film, and is thusly entitled to constitutional protection."[235]

The court further explained that speech need only meet a low threshold to satisfy the requirement that it be in connection with an issue of public interest. Using *Seelig v. Infinity Broadcasting Corp.*—a case involving a reality television show contestant who was later discussed on a radio show—as an illustration, the court expounded on how the broad nature of what constitutes public interest speaks volumes to both the term itself and the role of media across platforms: "By having chosen to participate as a contestant in the television show, plaintiff voluntarily subjected herself to inevitable scrutiny and potential ridicule by the public and the media."[236] In the instant case, not only did the court find that plaintiff had "voluntarily engaged" with Baron Cohen while cameras filmed their encounter, but also that the segment at issue and the film in general related to a matter of public interest:

> First, as to the matter of public issue–there can be no doubt that homosexuality, gay culture, lifestyles, rights and the public reactions to those issues present matters of public interest and controversy. Second, the evidence in the record also supports the lower court's finding that "the purpose of *Brüno* was to show audiences what would happen when a film crew followed a blatantly-homosexual character. . .as he interacted with members of the public, raising issues of homosexuality, gay culture and same sex partnerships in an attempt to craft a sly commentary on the state of homophobia in our society.[237]

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[233] *Id.* at *23-24. ("Movies are a 'significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of political or social doctrine to the subtle shaping of thought which characterize all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.'" (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-502 (1952)).

[234] *See id.* at 24.

[235] *Id.* at *25.

[236] *Id.* at *34 (citing Seelig v. Infinity Broadcasting Corp., 97 Cal. App. 4th 785, 808 (Cal. Ct. App. 2002).

[237] *Id.* at *41-42.

(7) *Moore v. Cohen* (Who is America?) (2021)

The most recent and only active case as of this writing is *Moore v. Cohen*.[238] In 2018, former U.S. Senate candidate and Alabama Supreme Court Justice Roy Moore and his wife sued Baron Cohen, Showtime, and CBS for defamation (per se), intentional infliction of emotional distress, and fraud.[239] This case emerged from Baron Cohen's Showtime mockumentary series *Who is America?*, in which Baron Cohen assumed the identity of Captain Erran Morad, an Israeli anti-terrorism, military, and espionage expert who wanted to interview plaintiff for Israeli television.[240] The controversial segment involved Morad testing a new military tool, a security scanner that can detect and identify pedophiles. During Moore's unsuccessful Senate campaign in 2017, allegations surfaced that he engaged in sexual encounters with underage women decades earlier when he was in his 30s.[241]

After the case was removed to the Southern District of New York, the court granted defendant's motion for summary judgment, concluding that Moore's claims were barred by the waiver clause in the agreement that he signed prior to the interview.[242] The court concluded that Moore expressly waived the causes of action he attempted to bring under the plain language of the standard consent agreement that he signed.[243]

Moore argued the contract was invalid because the signatory, Yerushalayim TV, was not a legitimate producer, and the phony production company duped him into participating in the interview under false pre-

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[238] *See* Moore v. Cohen, 2019 U.S. Dist. LEXIS 94361; *see also* Moore v. Cohen, 2021 U.S. Dist. LEXIS 130344.

[239] *See* Complaint for Defamation, Intentional Infliction of Emotional Distress and Fraud, Moore v. Cohen, 2019 U.S. Dist. LEXIS 94361 (1-19-cv-04977).

[240] *See* Memorandum of Law in Support of Defendant's Motion to Dismiss, Moore 19 Civ. 4977 (JPC), 3-6 (S.D. N.Y. Sept. 12, 2019). In different disguises, Baron Cohen played a conservative citizen journalist, Billy Wayne Ruddick, Jr., Ph.D., who interviewed Bernie Sanders and Jill Stein, posing irreverent and potentially offensive questions. In another segment, he interviewed a gun rights advocate and convinced him to promote an anti-terrorism program arming children with guns called "Kinderguardians." And, in another segment, in his Morad character, he interviewed former Vice President Dick Cheney, asking Cheney to autograph his "waterboarding kit," which consisted of a towel and plastic milk jug. *Id.* at 5. The Cheney interview was also peppered with numerous off-color statements and double entendres.

[241] *See id.*

[242] Moore filed a timely notice of appeal. See *Moore*, 2021 U.S. Dist. LEXIS 130344.

[243] *See Moore*, 2021 U.S. Dist. LEXIS 130344, at *16.

tenses.[244] The argument focused on the meaning of the term "producer," which the court ruled easily encompassed Baron Cohen, Showtime, and other companies associated with the production, including the Baron Cohen production companies which are legally established, legitimate business entities.[245] The court also rejected Moore's attempt to litigate the sexual content addressed in the interview, writing, "There is no language in the SCA that obligated defendants to refrain from any particular conduct or questioning during the course of the interview."[246] Finally, the court was unconvinced by Moore's claims of fraudulent inducement, finding that, in the consent agreement, Moore specifically disclaimed reliance on representations about the program, meaning he could not use such representations as evidence that he was fraudulently induced to participate.[247]

As Moore's wife was not a signatory to the consent agreement, the court analyzed and dismissed her claims for intentional infliction of emotional distress and fraud under First Amendment principles.[248] The court first determined that the content of the segment featuring Moore involved matters of public concern[249] before reaching its ultimate conclusion:

> Given the satirical nature of that segment and the context in which it was presented, no reasonable viewer would have interpreted Cohen's conduct during the interview as asserting factual statements concerning Judge Moore. Because both of Kayla Moore's claims are premised on reputational damage arising from that segment, her claims are barred by the First Amendment and must be dismissed.[250]

[244] *See id.* at *12-13.
[245] *See id.*
[246] *Id.* at *17-18.
[247] *See id.* at *20.
[248] *See id.* at *24.
[249] *See id.* at *30.
[250] *Id.* at *37.