

OUTSIDE COUNSEL

BY KENT RAYGOR AND BARDIA BAKHTARI

Great Success! 'Borat's' Release Agreement Averts Liability

In November 2006, British comedian Sacha Baron Cohen released a film based on his popular television character, Borat Sagdiyev, entitled "Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan" (Twentieth Century Fox, 2006).

In the film, Borat, a fictional journalist from Kazakhstan, travels across America to learn more about American culture, interacting along the way with numerous individuals who are unaware that Borat is a fictional character and that much of what Mr. Cohen says and does is loosely scripted. Instead, the filmmakers informed these people that they were being filmed for a documentary on American culture to be shown in Kazakhstan or Belarus. Several of the people Borat meets with share opinions with the purported journalist that they most likely would not have expressed had they understood the film was not a documentary to be released only in an obscure former Soviet bloc country, but rather, a "mockumentary" to be released worldwide by a major Hollywood studio.

The film was, as Borat himself would say, a "Great Success!," taking in \$26.4 million on a limited release of 837 screens during its first weekend, the biggest opening weekend to date for a film released in under 1,000 theatres.¹ With an estimated production budget of \$18 million, the film grossed over \$128 million domestically as of March 2007 and another \$131 million internationally, for a total worldwide gross of \$260,405,958 as of July 1, 2007.² Mr. Cohen himself even won a Golden Globe award for his portrayal of the film's title character.

While the film had audiences around the world laughing, some of those involved in the filming of "Borat" were not. The release of "Borat" provoked the filing of several lawsuits, some even more than a year after the film debuted, by participants against the film's producers and distributors alleging causes of action for fraud and infringement or invasion of the rights of publicity and privacy.³

At the heart of each suit was an allegation that the filmmakers had deceived the plaintiff during the production, and the plaintiff had consented to being filmed only for something entirely different than what ultimately was released to the public. Despite these



Kent Raygor

Bardia Bakhtari

allegations, no plaintiff has yet prevailed against the filmmakers, likely due to the fact that the filmmakers had each participant sign a short but comprehensive release agreement, which, at less than two pages long and containing just six operative clauses, has been instrumental in shielding the filmmakers from liability.⁴ Filmmakers embarking upon similar productions would be wise to emulate the Borat Release Agreement. A summary of the Release Agreement's primary provisions follows.

Preamble

The Borat Release Agreement starts with a brief preamble that simply acknowledges that the participant, in exchange for a lump sum and the opportunity to appear in a motion picture, agrees to the provisions that follow. This puts the participant on notice that a contractual obligation is being formed: payment of money (e.g., consideration) to the participant by the producers in exchange for the participant's assent to the terms of the Release Agreement.

Agreement to Be Filmed

The Release Agreement contains a clause acknowledging that the participant agrees to be filmed for a "documentary-style film." This creates defenses that filmmakers can later use to defend against a claim for invasion of privacy by appropriation. By using the phrase "documentary-style film" or something similar, filmmakers can help preempt an allegation that the participant was unaware he or she was being filmed for a comedic mockumentary as opposed to a documentary, and avoids committing the filmmaker to a specific genre of film. In drafting such a clause, a filmmaker should also include language where the participant acknowledges that his or her participation will be part of a larger work, which could be edited in such a way that the participant appears in contexts or places different than those he or

she might presently contemplate. Doing so will further prevent the participant from later claiming he or she was unfairly surprised by the final product.⁵

Assignment of Rights

This clause is one of the most important in any release agreement. In addition to avoiding liability from infringement or misappropriation of the right of publicity, the Borat filmmakers also wanted to ensure that when the film was released an individual participant would not have a claim against any of the film's profits. Instead of delineating the specific rights the participant agreed to assign, the producers played it safe by having the participant agree to assign any rights he or she might arguably have in the film. The participant also agreed to allow the producers to use, assign, or license the participant's contribution (whether it be film footage, biographical material, or a photograph) in any advertising, marketing, or publicity in connection with the film. This protects the filmmakers from a claim that the participant only authorized use in the film's content, and not for the film's promotion. Filmmakers drafting similar release agreements should also require that the participant grant to the producers any and all rights for any derivative or ancillary uses, or commercial products related to the film.⁶

Waiver of Claims

This clause is the most important for limiting the filmmakers' liability to the participant. Essentially, the filmmakers anticipated every possible claim a participant could bring, and had the participant agree to waive and never bring it. Not surprisingly, these are the exact types of claims the plaintiffs who have unsuccessfully sued the filmmakers of Borat have been asserting. But by having the participant specifically agree to waive and not bring such claims, he or she will be forced to argue that the entire agreement should be rescinded by a court—a very steep, uphill battle. In addition to listing every claim a participant might have, the filmmaker should also include a general waiver to cover any claims not previously elucidated.⁷

Choice of Law

• **And Forum Selection Clause.** The Borat Release Agreement included a New York choice of law and choice of forum provision. Including such a provision in any contract is always a good idea—all parties will know, from the outset, where and under what laws any dispute will be adjudicated should relations

Kent Raygor is a partner at Sheppard, Mullin, Richter & Hampton in Los Angeles. **Bardia Bakhtari** is an associate in the firm's New York office.

between them sour. Here, the filmmakers, who likely reasonably expected that someone might try to assert a claim, likely examined the laws in various potential jurisdictions and determined that New York courts and law would provide a better basis for adjudicating any such disputes than other jurisdictions and their law. In fact, the filmmakers have used this forum selection clause to transfer a federal lawsuit filed in Alabama to New York.⁸

New York is attractive because it does not recognize either a common law right of privacy or a common law right of publicity. Any rights a plaintiff has for these types of claims must fit within New York's privacy statute, which is construed narrowly.⁹ It is not surprising, then, that the "Borat" filmmakers would seek to limit their liability by including in the Release Agreement a choice of law provision requiring the participant to bring any claim—despite the fact that he or she had already agreed to waive it elsewhere in the contract—under the laws of the state that is the least inclined to recognize any of the rights the participant might claim to have. The fact that New York state has a very narrow view of the rights of publicity and privacy may explain why none of the "Borat" suits were filed in New York, but rather, in jurisdictions that either expressly recognize or tend to recognize the types of rights these plaintiffs claim were violated.

A filmmaker should also consider including an arbitration provision in the choice of law clause to avoid litigation in the courts. Arbitration is often a faster and cheaper way to adjudicate disputes, but it also allows the filmmaker to keep any disputes confidential if it so chooses. (Of course, the irony in this situation is that plaintiffs who sue in public court often generate much greater publicity for the challenged production, thereby increasing the exposure the plaintiff claims to want to avoid.) An arbitration provision can also provide that disputes are to take place in one locale for the sake of convenience (e.g., California), but that the arbitrator is to apply another state's laws (e.g., New York). An arbitration provision should also state that if an issue concerning the arbitrability of the underlying dispute arises, then that, too, should be decided by the arbitrator. This will help ensure that any dispute remains in a confidential arbitration, and will not spill over into the public forum of the courts. The arbitration provision should conclude by noting that both parties agree that the decision of the arbitrator shall be binding and enforceable in a court located in the same jurisdiction as the one delineated by the Release Agreement's choice of law provision.

Irrevocability

• **And Four Corners Provisions.** Both irrevocability and four corners provisions are standard in many contracts and operate to further limit a filmmakers' liability. A participant looking to either get a piece of the film's profits or bring claims against the filmmakers would essentially need to rescind the contract altogether. But including an irrevocability clause sets up a roadblock to such an argument, helping prevent the participant from later claiming that the contract as a whole or any of its terms can be terminated.¹⁰

In addition, every first-year law student is taught that when interpreting a contract, courts first look at

what is written within the four corners of the agreement.¹¹ By expressly providing that the Release Agreement reflects the entire agreement between the producers and the participant, the filmmakers can help preempt any claims for breach of contract based on an allegation that what was included in the film is not what the participant agreed to when signing the release. Furthermore, by having the participant acknowledge that he or she "is not relying on any

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promises or statements made by anyone about the nature of the Work," the filmmakers further protect themselves from claims that they deceived the participant, which of course is an allegation that resonates through every "Borat" lawsuit.

Additional Considerations

Two final points are worth noting. First, the Borat Release Agreement is less than two pages long, which itself is important. A court can be reluctant to enforce a longer release agreement, arguing that a layperson cannot reasonably be expected to fully comprehend a lengthy legal document. By keeping the contract concise, the filmmaker can be more confident that the agreement will be enforced.

Second, a filmmaker should include at the end of any release a brief section that lists the participant's physical characteristics and identification information (e.g., sex, height, age, date of birth, hair, clothing, name, address, phone number, and Social Security Number). This allows the filmmaker to prove that the plaintiff who later brings a lawsuit was the same participant who signed the release at issue during production. Additionally, this ensures that the filmmaker does not obtain the release of a minor, as many courts will refuse to enforce such an agreement, on the ground that minors lack the capacity to enter into legal contracts.

Conclusion

Although "Borat" was a "Great Success!" at box offices worldwide, its filmmakers quickly found themselves embroiled in litigation with the participants that made the film a hit. A well-crafted Release Agreement used during the production of "Borat," however, allowed the filmmakers to avoid liability to a number of participants bringing a variety of claims. Other filmmakers looking to avoid liability in filming their next project should look to the release agreement from "Borat" as a model, and should draft agreements containing similar provisions in order to ensure that any claims will be quickly disposed of at the outset of litigation.

co.uk/world/2006/nov/07/usa.filmnews.

2. See <http://pro.imdb.com/title/tt0443453/boxoffice> (subscription required).

3. These lawsuits brought by participants in the film include:
1. *Does v. One America Prods. Inc.*, Case No. SC091723 (Cal. Sup. Ct. Nov. 9, 2006);
 2. *Todorache v. Twentieth Century Fox Film Corp.*, Case No. 06-CV-13369 (S.D.N.Y. Nov. 20, 2006);
 3. *Streit v. Twentieth Century Fox Film Corp.*, Case No. CV-07-J-1918-S (N.D. Ala. Oct. 19, 2007);
 4. *Psenicka v. Twentieth Century Fox Film Corp.*, Case No. 07-CV-10972 (S.D.N.Y. Dec. 3, 2007).

4. Some participants in the film that appeared on camera, but did not sign the Release Agreement, also brought lawsuits against the filmmakers. These lawsuits, not discussed here, are:

1. *Johnston v. One America Prods. Inc.*, Case No. 2:07-CV-042-P-B (N.D. Miss. March 20, 2007);
2. *Lemerond v. Twentieth Century Fox Film Corp.*, Case No. 07-CV-4635 (S.D.N.Y. June 1, 2007).

5. Some suggested language:

I understand that Producer is producing a documentary-style film or other audiovisual work (the "Work"), that it hopes to reach a young adult audience by using entertaining content and formats, and that my participation in the Work will be part of a larger work, which could be edited in such a way that I appear in contexts or places, or with people or things, other than those I might presently contemplate, and that my recorded statements could be edited to change the intent, content, or context of what I was originally recorded as stating.

6. Some suggested language:

I grant to _____ and its employees, subsidiaries, affiliates, parents, successors, assigns and licensees (collectively, "Producer"), the right, and the right to assign or license to others the right, to film, videotape, audiotape, photograph, record, reproduce, edit and otherwise use my name, likeness, biographical information, appearance, actions, conversations and/or voice (collectively, the "Attributes") in whole or in part, by any and all means, media, devices, processes and technology now or hereafter known or devised, in perpetuity and anywhere, in or in connection with: (a) the Work; (b) any advertising, publicizing, promotion, exhibition or exploitation of the Work; (c) any derivative or ancillary uses related to use of the Attributes in the Work; (d) any ancillary commercial products or services associated with the Work (including, but not limited to, merchandise, contests, commercial tie-ins, etc.); and (e) any form of media or product other than the Work. I agree that Producer shall have no obligation to use the Attributes.

7. Some suggested language:

I release and waive, and agree not to bring at any time in the future, any and all claims and demands against Producer, or against anyone associated with the Work, arising from or in connection with Producer's use of the Attributes, including, but not limited to, assertions of: (a) rights of publicity infringement or misappropriation (including any allegedly improper or unauthorized use of the Attributes); (b) misappropriation of idea or concept; (c) damages caused by personal injury or death; (d) damages caused by 'acts of God' (including injuries from natural disasters); (e) damages caused by acts of terrorism or war; (f) intrusion (including any allegedly offensive behavior or questioning or any invasion of privacy); (g) presenting me in a false light (including any allegedly false or misleading portrayal of me); (h) intentional or negligent infliction of emotional distress; (i) trespass to property or person; (j) breach of any verbal, written or implied contract; (k) deceptive or unfair business or trade practices; (l) copyright, trademark, service mark, or trade name infringement; (m) defamation, libel, or slander (including any allegedly false statements made in the Work); (n) violations of Lanham Act Section 43(a) or any similar State law (including any allegedly false or misleading statements or suggestions about my relation to the Work or the Work's relation to me); (o) fraud (including any alleged deception or surprise about the Work or this Agreement); (p) breach of alleged moral rights; (q) tortious or wrongful interference with any of my contracts or business; and (r) any other claimed violation of a personal or property right.

8. See Court Order, *Streit v. Twentieth Century Fox Film Corp.*, Case No. CV-07-J-1918-S (N.D. Ala. Jan. 24, 2008).

9. See N.Y. CIV. RIGHTS LAW §§50-51; see also *Messenger v. Gruner + Jahr Printing and Publ'g*, 94 NY2d 436 (N.Y. 2000).

10. Some suggested language:

I understand that Producer is relying on this Agreement in spending time, money, and effort on the Work and my participation in it. I agree, for this and other reasons, that in no event may I terminate this Agreement or the rights or releases I grant in it, or obtain injunctive or other equitable relief arising from Producer's use of the Attributes.

11. See *United States ex rel. AWL Indus. Inc. v. Site Remediation Servs. Corp.*, 92 F.Supp.2d 132, 135 (E.D.N.Y. 2000) ("Where the terms of a contract are clear and unambiguous...the contract is to be interpreted with reference only to the four corners of the document").

1. See Dan Glaister, "Niice... 'Borat' Is Biggest Small Film in US Ever," THE GUARDIAN, Nov. 6, 2006; see <http://www.guardian>.