

## RULE OF LAW

# Make Benefit Glorious Legal System of America

*By Cameron Stracher*

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Borat's best joke may soon be America's civil justice system.

Last week, two college students featured in the hit movie "Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan," sued the producers of the film in Los Angeles Superior Court. The "mockumentary," which is a blend of fiction and nonfiction, features comedian Sacha Baron Cohen as he travels from his "home" in Kazakhstan across the U.S., encountering various bigots, dopes and dupes along the way. Mr. Cohen has an uncanny ability to fool people (including politicians and journalists) into believing that he is really a boorish, cringe-making foreign journalist, rather than a comedian.

In this guise, Mr. Cohen asks a gun dealer which is the best weapon to kill a Jew and, without missing a beat, the gun dealer replies "a 9mm or a .45." In another scene, he elicits boisterous cheers from a rodeo crowd when he praises President Bush's "war of terror." Not since Tocqueville has there been a more astute observer of American cultural mores.



**Sacha B. Cohen**

Apparently, however, two young college men, identified only as John Doe 1 and John Doe 2, don't agree. In the film, they make drunken, racist comments. They have sued for "misappropriation" of their name, voice, image and "likeness," among other claims. Although they signed releases granting the filmmakers permission to tape them, they claim they were promised the film would not be shown in the U.S. and that their names would not be disclosed. They also assert they were plied with alcohol "to loosen up" before signing the release. Now, like all red-blooded Americans, they want money.

The tort of "misappropriation" is one of four "invasion of privacy" torts essentially invented by Samuel Warren and future Supreme Court Justice Louis D. Brandeis in an 1890 law review article (the others are false light, publication of private facts, and intrusion on seclusion). In general, a plaintiff can sue for misappropriation if his image has been used for commercial purposes.

For example, if a bicycle company used a picture of Lance Armstrong without his permission to advertise its wares, Mr. Armstrong would have a misappropriation claim. There are, however, some well-recognized exceptions that protect "reality" television and movie productions from claims by ordinary people caught in the lens. For one thing, courts often require that a plaintiff be well-known to the public before he can state a claim for misappropriation. They reason that someone who isn't has no image worth

appropriating. In addition, some courts have found that the use must be more than "incidental," e.g., it must show the plaintiff directly promoting the product at issue.

More importantly, the First Amendment protects the use of a plaintiff's image, no matter how famous, for newsworthy or artistic purposes. Thus, if Mr. Armstrong's photo appeared on the front page of a newspaper when he won the Tour de France, he could not bring a claim for misappropriation even if the newspaper sold thousands of extra copies to his fans who wanted to read about his achievement. Similarly, an ordinary person dancing nude on a beach has no claim for misappropriation if she is subsequently shown on a news report about spring break in Florida. In both instances, by appearing in public in a manner likely to attract attention, Mr. Armstrong and the nude dancer subject themselves to report, criticism and comment -- expressive activity protected by the First Amendment.

The courts, however, have not always drawn a clear line. Thus in a number of lawsuits against the producers of the "Girls Gone Wild" video series, courts have split about whether the plaintiffs could maintain a cause of action for misappropriation, some finding that videotapes of young women freely exposing their breasts were protected under the First Amendment, others finding that they were not. Similarly, in New York, a court dismissed a misappropriation claim against a photographer for displaying a photograph of a Hasidic Jew taken without his permission, but another court recently allowed a misappropriation claim by a woman walking on a sidewalk who was mentioned derogatorily in an HBO reality series.

It's difficult to understand the guiding principle at work in these disparate results, except to speculate that courts are bending over backward to find a way to compensate sympathetic plaintiffs when they sue wealthy defendants. The misappropriation tort rightly protects the commercial value of a person's image and likeness, but when it is used as a weapon against embarrassment or to silence others from speaking, it has been stretched too far.

Most plaintiffs claiming misappropriation do not dispute the statements (or actions) at issue; instead, they seek compensation for how they were portrayed, challenging the editorial judgment of newspapers and filmmakers that would ordinarily be protected in a libel or false light case. By suing over the use of their images, plaintiffs hope to avoid the protections courts have established under the First Amendment for free speech. "This is not about speech," we can imagine them arguing. "It's about using someone in a movie and not compensating him."

Leaving aside the validity of the release the Borat plaintiffs signed, these plaintiffs (and others like them) should not be compensated. They are not actors, after all. Their images are not being used to promote a movie. Rather, they have been caught on film doing some things they wished they hadn't. This may be embarrassing, and may even injure their reputations, but by behaving as they did they fairly subject themselves to reporting, comment and criticism. Even a journalist from Kazakhstan knows that.

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