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Hulk Hogan, the Celebrity Sex Tape, and the First Amendment

BY [ALYSSA KAPLUN](#) / ON APRIL 16, 2016

A Florida jury has decided that a grainy sex tape released without permission is worth \$115 million in compensatory damages, plus \$25 million in punitive damages, resulting in a staggering award of \$140 million.[1] Retired wrestler Hulk Hogan, whose real name is Terry G. Bollea, brought the lawsuit against the founder and former Editor-In-Chief of news and gossip website Gawker for invasion of privacy after the posting of a clip of the mid-2000's sex tape.[2] The grainy black-and-white footage, posted by Gawker in 2012, shows Bollea having sex with the wife of his friend, Todd Clem.[3] While the video itself clocks in at just under two minutes, actual sexual content comprises only approximately nine seconds of the video.[4]

The case centered on whether the video was newsworthy and the line between privacy and freedom of press. Bollea's lawyers stated that the posting of the sex tape lacked any news value, and was instead a gross invasion of privacy.[5] Bollea's lawyers urged the jury to draw a distinction between the celebrity character Hulk Hogan and Bollea's real private life. [6] Gawker countered by claiming that posting it was an act of journalism and its actions were therefore protected under the First Amendment.[7] Lawyers for Gawker founder Nick Denton and former Editor-In-Chief Albert J. Daulerio bolstered their argument on Bollea's frequent public discussion of his sex life, which "made the clip newsworthy and thus protected by the First Amendment." [8]

Gawker's lawyers have already indicated that an appeal will follow, based on the exclusion of key evidence and testimony of Clem.[9] Clem initially stated that Bollea was aware that the sex act was being filmed, but later changed his statement after being sued by Bollea.[10] Clem subsequently invoked his right against self-incrimination and was not called as a witness.[11]

While Gawker is expected to ask the judge to reduce the award through a process called remittitur and also intends to appeal the verdict, speculation about the demise of the company is already infiltrating the media.[12] As Gawker's attorney said before the jury during the punitive damages deliberation, "the verdict already rendered will be financially devastating." [13]

While the financial consequences could be dire, many legal experts remain focused on the consequences for privacy and freedom of press. Samantha Barnabas, a law professor at University at Buffalo, says the decision deeming a celebrity sex tape not newsworthy represents a "shift in American free press law." [14] In addressing the jury, a member of Gawker's legal team echoed the sentiment saying, "your verdict will send a chill down the spine of writers, producers and publishers throughout the country." [15]

Other legal scholars counter that even if Gawker loses on appeal, the effect on press freedoms will be limited.[16] Since the decision comes from a trial court, Geoffrey R. Stone, a professor at University of Chicago Law School, says that the verdict “doesn’t in itself move the bar on the constitutional question in any significant way.”[17] Experts also stress that the award is likely to be reduced.[18]

Whether the verdict will have any effect on First Amendment issues is unclear, but the ruling does reinforce that the publishing of a sex tape without consent is an invasion of privacy. [19] Implications of the decision on privacy law have yet to be seen, but what is clear is that the award will serve as a cautionary tale to other online publishers.

Alyssa Kaplun is a second-year law student at Benjamin N. Cardozo School of Law and a Staff Editor of the Cardozo Arts & Entertainment Law Journal. She hopes to pursue a career in entertainment and intellectual property law.

Sources:

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[2] Nick Madigan and Ravi Somaiya, *Hulk Hogan Awarded \$115 Million in Privacy Suit Against Gawker*, N.Y. Times (Mar. 18, 2016), <http://www.nytimes.com/2016/03/19/business/media/gawker-hulk-hogan-verdict.html>.

[3] *Id.*

[4] Edward Helmore, *Hulk's lawyers say Gawker founder was 'playing God' in closing court arguments*, The Guardian (Mar. 18, 2016, 02:33 PM), <http://www.theguardian.com/media/2016/mar/18/hulk-hogan-gawker-nick-denton-closing-arguments-trial>.

[5] Madigan and Somaiya, *supra* note 2.

[6] Laura Wagner, *Jury Awards Hulk Hogan Additional \$25 Million In Sex Tape Lawsuit Against Gawker*, NPR (Mar. 21, 2016, 08:07 PM), <http://www.npr.org/sections/thetwo-way/2016/03/18/471037070/jury-awards-hulk-hogan-115-million-in-sex-tape-lawsuit-against-gawker>.

[7] Madigan and Somaiya, *supra* note 2.

[8] Wagner, *supra* note 6.

[9] Madigan and Somaiya, *supra* note 2.

[10] *Id.*

[11] *Id.*

[12] Whitehouse, *supra* note 1.

[13] *Id.*

[14] *Id.*

[15] Tom Kludt, *Hulk Hogan jury adds \$25.1 million to Gawker's liability in sex tape case*, CNN (Mar. 21, 2016, 06:16 PM), <http://money.cnn.com/2016/03/21/media/hulk-hogan-gawker-punitive-hearing/>.

[16] Erik Eckholm, *Legal Experts See Little Effect on News Media From Hulk Hogan Verdict*, N.Y. Times (Mar. 19, 2016), <http://www.nytimes.com/2016/03/20/business/media/legal-experts-see-little-effect-on-news-media-from-hulk-hogan-verdict.html>.

[17] *Id.*

[18] *Id.*

[19] *Id.*