

# EXHIBIT 36

to the

**JOINT OPPOSITION OF THE GAWKER DEFENDANTS AND THEIR  
COUNSEL TO PLAINTIFF'S EMERGENCY MOTION TO CONDUCT  
DISCOVERY CONCERNING POTENTIAL VIOLATION OF  
PROTECTIVE ORDER, TO COMPEL TURNOVER OF CONFIDENTIAL  
DISCOVERY MATERIALS AND FOR ORDER TO SHOW CAUSE**



# Everything You Need To Know About Hulk Hogan vs Gawker

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Since late 2012, the 62-year-old ex-wrestler Hulk Hogan has been trying to convince various courts that he has been emotionally distressed, and his privacy grossly invaded, by Gawker's publication of a 101-second excerpt of a sex tape depicting himself and his friend's wife, Heather Clem, *in flagrante delicto*.

According to Hogan's lawsuit, this emotional pain and loss of privacy are worth \$100 million, and a Florida court will soon commence to decide whether or not it agrees

with him.

The case is significant on several fronts, most notably in the First Amendment issues it raises: Gawker says it received the 30-minute tape from an anonymous source, and published a brief excerpt alongside the commentary of then-editor A.J. Daulerio (<http://gawker.com/5948770/even-for-a-minute-watching-hulk-hogan-have-sex-in-a-canopy-bed-is-not-safe-for-work-but-watch-it-anyway>); the company has maintained that the material is newsworthy and of public concern.

These considerations entitle the publisher to long-established First Amendment protections. A ruling to the contrary could have serious implications for the free press; the courts would have to break with precedent to reflect the new and growing awareness that technology in the modern age has made privacy both more dangerous to lose, and more difficult to come by.

"Don't publish just any penis. Publish the penis that tells a story."

Then there's the revenge porn angle. Revenge porn is a newly virulent crime, and as such has created areas of legal ambiguity requiring new jurisprudence. Eighteen states so far have passed revenge porn laws criminalizing the publication of sexually explicit images without the subject's consent. Such laws demonstrate that it is possible to criminalize revenge porn without damaging the First Amendment protections required by a free press.

Though the images in the present case are blurry, taken with a black and white security camera from a distance, the excerpt Gawker published shows Hogan and Clem nude and engaging, unmistakably, in fellatio and intercourse.

"[I]f sex videos are ruled fair game, it could make the already aggressive paparazzi even worse," Kashmir Hill wrote in Fusion (<http://fusion.net/story/150994/hulk-hogan-gawker-sex-tape-throwdown/>), quoting legal experts who fear that the incentives created by an atmosphere of no-holds-barred publication of "newsworthy" celebrity images might encourage lawbreaking of the "Fapping" (<http://motherboard.vice.com/tag/The+Fapping>)" variety.

US District Court Judge James Whittemore ruled for Gawker in December 2012 (<https://www.scribd.com/doc/119002988/Hogan>), citing the Eleventh Circuit's recognition that "the balance between the First Amendment and copyright is preserved, in part, by the doctrine of fair use." After he lost at the federal level, Hogan added Gawker to a second suit he had previously filed in state court against Heather Clem and her husband Bubba.

Now, it's up to a Florida judge and a six-person jury to decide: was Hulk Hogan's privacy invaded by Gawker? Does Hogan (who will have to go by his real name, Terry Gene Bollea, during the trial) have a legitimate claim to have suffered emotional distress, and did Gawker inflict that distress intentionally? Was the Hogan/Clem sex tape already newsworthy and a matter of public concern by the time of Gawker's publication? And if Gawker has harmed Terry Bollea, what damages should he be awarded?

## **The tape**

Some celebrities have made and "leaked" their own sex tapes, while others have had genuinely private recordings of their intimate moments sawed out of a 500-pound safe (<http://www.rollingstone.com/culture/features/pam-and-tommy-the-untold-story-of-the-worlds-most-infamous-sex-tape-20141222>) and splashed all over the Earth. Their subsequent distress and embarrassment can therefore be either real or feigned, and the lawsuits that follow can represent either the pursuit of justice, or a literally-naked grab for publicity and/or money. The proceedings in Florida may incidentally reveal whether Hogan is the private kind of sex tape star, unwillingly paraded before the public by a mysterious leaker and an invasive gutter press,

or the cynical kind, cleverly manipulating both the courts and the media to gin up attention and/or money for himself.

Gawker claims that Hogan made his own sex life a matter of public interest long before the publication of the so-called "highlights reel," (<http://gawker.com/5948770/even-for-a-minute-watching-hulk-hogan-have-sex-in-a-canopy-bed-is-not-safe-for-work-but-watch-it-anyway>) by discussing his intimate activities freely and in vivid detail on broadcasts such as that of Heather Clem's husband, Bubba the Love Sponge, and the Howard Stern radio show (<https://www.youtube.com/watch?v=H6k0AUwTFrc>).

.@AJDaulerio (<https://twitter.com/AJDaulerio>) has an amazing post about Hulk Hogan. It's NSFW but quit your job to read it. <http://t.co/84hZc8Ew>  
(<http://t.co/84hZc8Ew>)  
— Farhad Manjoo (@fmanjoo) October 4, 2012  
(<https://twitter.com/fmanjoo/status/253939674178007040>)

After the sex tape was published, Hogan told Howard Stern (<https://www.youtube.com/watch?v=LmPis1-wjlo>) (from around 8:36), that he slept with Heather Clem (with Bubba Clem's blessing and indeed, his encouragement) because he, Hogan, was so wrecked by the trauma of his coming divorce that he gave in to the "relentless" come-ons of Heather Clem, who "kept going down that road," even though at first he treated the whole idea like a joke. Hogan knew that the Clems had "an alternative lifestyle," he says. One day though, he went over there, "just to say hello," and whoops! You know. The woman tempted him, and he did eat.

Time passed, and Hogan got a divorce (<http://www.people.com/article/paul-hogan-linda-divorce-finalized>). The Clems, too, were divorced (<http://www.tampabay.com/blogs/juice/content/bubba-love-sponge-owes-wife-1150-month-divorce-not-much-else>). And then Gawker published the sex tape.

Hogan sued Bubba Clem, Heather Clem, and Gawker in his original federal complaint in October of 2012, claiming he had no knowledge that he was being filmed. Bubba steadfastly maintained the opposite, telling Howard Stern that Hogan had known

about the camera the whole time (<https://www.youtube.com/watch?v=aVGRLRHv-nM>) (from about 4:24).

(For what it's worth, while watching the "highlights reel," which I found on a Howard Stern fan blog, I had the distinct impression that both parties did know they were being filmed—in particular, Hogan seems to stand aside from time to time, so that the camera can see Heather Clem lying on the bed.)

But just days after his Howard Stern appearance, Bubba Clem changed his story, claiming that he was now satisfied that Hogan had been unaware of the camera. Hogan dropped him from the suit. Then Bubba formally transferred the copyright of the sex tape to Hogan.

Elizabeth Rosenthal Traub, a representative for Terry Bollea, confirmed in a one-sentence email Tuesday night that Bollea has settled his claims against Heather Clem, leaving just the Gawker defendants in the suit.

A source close to the proceedings told Motherboard that Heather Clem will not be available to testify owing to a "long-planned vacation."

## **Obscenity and the First Amendment**

Hulk Hogan's sex life may seem a sordid topic for a serious test of First Amendment principles, but in fact, from *Hustler Magazine vs. Falwell* (<http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2023&context=facpubs>) to *FCC v. Pacifica Foundation* ([http://www.oyez.org/cases/1970-1979/1977/1977\\_77\\_528](http://www.oyez.org/cases/1970-1979/1977/1977_77_528)) (the Supreme Court case involving George Carlin's "Filthy Words" routine), the most significant legal tests of American speech rights have involved matters relating to vulgarity and obscenity.

As the arch-conservative Justice William Rehnquist wrote in *Hustler vs. Falwell*, the inherent subjectivity of what constitutes "outrageousness"... "would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of

their dislike of a particular expression, and cannot, consistently with the First Amendment, form a basis for the award of damages for conduct." Though it may seem counterintuitive, the defense of wild, vulgar and violent speech is an essential bulwark against the erosion of First Amendment protections.

"There's a learned passivity in the media surrounding anything that might find its way into court," Gawker's executive editor, Tommy Craggs, told me. "If a reporter thinks [something] is true, and there is evidence to support that to the reporter's satisfaction, then there is no earthly reason why it shouldn't be out there. That is the entire philosophy of this company."

Daulerio's commentary on the original "highlights reel"

(<http://gawker.com/5948770/even-for-a-minute-watching-hulk-hogan-have-sex-in-a-canopy-bed-is-not-safe-for-work-but-watch-it-anyway>) is witty and entertaining, and worth reading most of all for his penetrating observations on the ordinariness and vulnerability of celebrities. The excerpted video is the springboard for a broader examination of our complicatedly voyeuristic celebrity-obsessed society.

Tommy Craggs told me that he commends this approach to the young journalists he teaches from time to time. "Don't publish just any penis," he said. "Publish the penis that tells a story."

A coalition of media organizations filed a motion to prevent the trial from being closed to the public

Gawker has been sued many times. But litigation is expensive, and that's why media companies routinely settle cases like these, Gawker president and general counsel Heather Dietrick told me. "Even if you really believe in your arguments, as we do here, you know you are facing a long and expensive fight, especially if you have a very

aggressive plaintiff."

Gawker loves to spill secrets, it's true. But the company argues that the Hulk Hogan whose sex talk in public has been so frequent and so explicit bears little resemblance to the "American Hero" he used to play as a wrestler, the one who reminded children to take their vitamins and say their prayers. Gawker says that despite his earlier wholesome image, the real Hogan has little privacy left to violate.

### **On the docket**

Last week, Gawker won access to evidence gathered in a related FBI investigation (<http://www.capitalnewyork.com/article/media/2015/06/8570926/gawker-wins-lawsuit-against-fbi-hulk-hogan-case>) including 1,168 pages of documents and three different sex tapes featuring Hogan and Heather Clem.

The court's decision to allow the defense access to the FBI materials prompted an avalanche of filings from Hogan's lawyers, who are now frantically trying to close the trial to the public and press, and to seal a multitude of documents.

These documents make for perplexing reading. Hogan's lawyers are the ones who involved the FBI in the first place. Now that the proceeds of the FBI's investigations are to be made public, it appears that Hogan and his lawyers are moving heaven and earth to prevent the very thing they originally sought: an airing of the facts.

It's difficult to avoid the impression that the FBI documents and DVDs must contain material of intense interest to Gawker's lawyers, to the public, or both. Or they might contain information that is damaging to Hogan in some other way.

In any case, the FBI recordings have been forwarded to the state court judge, who will decide whether or not they contain evidence relevant to the case. The judge is expected to make the relevant parts, if any, available to Gawker's lawyers any minute now.



There are two things to be decided next. First a coalition of media organizations including First Look Media, BuzzFeed, CNN, AP, Vox Media, and an ABC broadcast affiliate owned by Scripps Media filed a motion Tuesday (<https://firstlook.org/theintercept/2015/06/30/first-look-media-wants-able-watch-hulk-hogans-sex-tape/>) to prevent the trial from being closed to the public. Second, barring complications, the case itself is still on the docket for trial for ten days beginning July 6th.

The outcome is unforeseeable: in an interview with the *New York Times* (<http://www.nytimes.com/2015/06/14/business/media/gawker-nick-denton-moment-of-truth.html>), Gawker CEO Nick Denton gave his privately-owned company one in ten odds of a “disaster,” by which he meant a result that would require him to sell a controlling interest in Gawker in order to stay afloat.

Circuit Judge Pamela Campbell has insisted (<http://www.tampabay.com/news/courts/civil/hulk-hogan-trial-against-gawker-set-for-next-week/2235524>) that the trial “is not going to be a carnival,” in aid of which, presumably, she is limiting Hogan, or Bollea, to “a single plain bandana.”

**Correction:** An earlier version of this story said Hulk Hogan “presumably” signed a privacy waiver with the FBI so that the agency could help find the leaker. In fact, Hogan was compelled by a court to sign the waiver.

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**TOPICS:** sex tape law (/tag/sex+tape+law), Law (/tag/Law), sex tapes (/tag/sex+tapes), hulk hogan (/tag/hulk+hogan), terry bollea (/tag/terry+bollea), gawker (/tag/gawker), gawker media (/tag/gawker+media), first amendment (/tag/first+amendment), revenge porn (/tag/revenge+porn), heather clem (/tag/heather+clem), bubba clem (/tag/bubba+clem), howard stern (/tag/howard+stern), media (/tag/media), free press (/tag/free+press)

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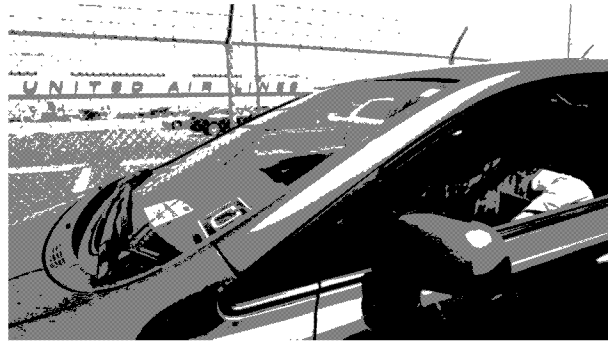
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