

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROE, JOHN, et al.,

Plaintiffs,

v.

AMAZON.COM, INC., et al.,

Defendants.

Case No. 3:15-cv-00111

U.S. District Judge Thomas M. Rose
U.S. Magistrate Judge Michael R. Metz

**MEMORANDUM IN SUPPORT OF DEFENDANT
SMASHWORDS, INC.'S MOTION FOR SUMMARY JUDGMENT**

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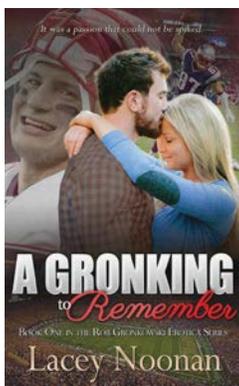
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PRELIMINARY STATEMENT

This case is about a self-published work of erotica that was momentarily newsworthy. The book at issue details the imaginary escapades of a real-life professional athlete: Rob Gronkowski of the New England Patriots. Colorfully titled *A Gronking to Remember* (“Gronking”), it was written by a man named Greg McKenna under the female pen-name “Lacey Noonan.”

Plaintiffs “John Roe” and “Jane Roe” are a couple whose image (see below) was placed by Mr. McKenna on his initial cover of *Gronking*.



McKenna Decl., ¶ 7, Exh. 3, ECF No. 23-10. According to the Roes, Mr. McKenna used their image without their consent in violation of Ohio statutory and common law.

Mr. McKenna is a self-published author. He has no agent. He has no book deal. Instead, he made *Gronking* available to the public by uploading its text and cover image to four self-publishing services: Kindle Direct Publishing, NOOK Press, Smashwords.com, and CreateSpace.

Kindle Direct is operated by Amazon.com (“Amazon”). Mr. McKenna used Kindle Direct to create a *Gronking* ebook that could be purchased and downloaded on Amazon.com. NOOK Press is operated by Barnes & Noble, Inc. (“B&N”). Mr. McKenna used NOOK Press to create a *Gronking* ebook that could be purchased and downloaded on bn.com. Smashwords.com is operated by Smashwords, Inc. (“Smashwords”), a privately-held company that is the world’s largest distributor of independent ebooks. Mr. McKenna used Smashwords to create a *Gronking*

ebook that could be purchased and downloaded through, *inter alia*, the iBooks store of Apple, Inc. (“Apple”). CreateSpace is operated by Amazon. Mr. McKenna used CreateSpace to enable the purchase of a print-on-demand version of *Gronking* by customers of Amazon and B&N.

It is undisputed that none of these companies was involved in any way in creating *Gronking* or its cover. And it is undisputed that Mr. McKenna expressly represented that he had secured all necessary permissions when he uploaded *Gronking* (and the cover he created) to Kindle Direct, NOOK Press, Smashwords.com, and CreateSpace.

On January 29, 2015, Mr. McKenna received a letter from the Roes’ counsel objecting to the use of their photograph on the *Gronking* cover. It is undisputed that Mr. McKenna immediately replaced the image and, within a day or two, uploaded revised covers to Kindle Direct, NOOK Press, Smashwords.com, and CreateSpace. Nonetheless, on February 24, 2015, the Roes filed this lawsuit. In their complaint, the Roes named as defendants not only Mr. McKenna, but also Amazon, B&N, and Apple, despite the fact that none of these companies knew, or had any reason to suspect, that Mr. McKenna had allegedly used the Roes’ image without consent. The Roes did not sue Smashwords.

On March 27, 2015, Amazon, B&N, and Apple removed to this Court. *See* ECF No. 1 (notice of removal). In early June, they each filed a motion for summary judgment. *See* ECF No. 20 (Apple motion); ECF No. 23 (B&N motion); ECF No. 24 (Amazon motion). Their papers explained in detail two independent reasons why the Roes’ complaint must be dismissed: (1) Ohio law does not prohibit distribution of this book with the Roes’ image on the cover—especially absent knowledge of any alleged wrongdoing. *See* Apple Brief, ECF No 20-1, at 12-16; B&N Brief, ECF No. 23 at 12-16; Amazon Brief, ECF No. 24-1 at 10-14. And, (2) in any event, federal law, in particular the First Amendment, precludes the imposition of strict liability (via tort or any

other theory) on distributors and self-publishing platforms. *See* Apple Brief, ECF No. 20-1, at 8-12; B&N Brief, ECF No. 23, at 8-12; Amazon Brief, ECF No. 24-1, at 16-18.

On June 19, 2015, the Roes filed a motion for leave to file an amended complaint adding Smashwords as a defendant. *See* ECF No. 26 (motion for leave). Thereafter, they filed an amended complaint. *See* First Amendment Complaint (“FAC”), ECF No. 28. The FAC is identical to the original complaint except that it adds Smashwords to the case caption. *Compare* Original Complaint, ECF No. 7 *with* FAC, ECF No. 28.

By this motion, Smashwords asks the Court to grant summary judgment in its favor on all counts. The FAC fails to include a single factual or legal allegation about Smashwords. That alone warrants dismissal. *See, e.g., Potter v. Clark*, 497 F.2d 1206, 1207 (7th Cir. 1974) (“Where a complaint alleges no specific act or conduct on the part of the defendant and the complaint is silent as to the defendant except for his name appearing in the caption, the complaint is properly dismissed, even under the liberal construction to be given pro se complaints.”).

And the dismissal should be with prejudice. Smashwords is a distributor and retailer of ebooks that provides a platform and service for independent publishing. Just like Amazon, B&N, and Apple here: Smashwords is not itself a publisher. Mr. McKenna used Smashwords.com to self-publish the ebook version of *Gronking* that Smashwords distributed to Apple’s iBooks Store. Apple Brief, ECF No. 20-1, at 4-5; First Coker Decl., ECF No. 20-4, ¶ 7. And just like Amazon, B&N, and Apple here: Smashwords did not know, or have any reason to know, that Mr. McKenna had used the Roes’ image without permission. In fact, when Mr. McKenna uploaded his ebook to Smashwords.com, he certified that he held all necessary rights to list and distribute this book with Smashwords. For that reason, as explained in further detail below, each of the two independent

bases for summary judgment advanced by Amazon, B&N, and Apple is equally applicable to Smashwords.

FACTUAL BACKGROUND

As the briefing of Amazon, B&N, and Apple thoroughly recites the facts of this dispute, we address only the facts pertaining to Smashwords.

A. The Smashwords Self-Publishing Service

Smashwords founder Mark Coker believes that every writer should be able to reach the public without having to convince a publisher of the merit and likely commercial success of his or her book. Declaration of Mark Coker in Support of Smashwords, Inc.’s Motion for Summary Judgment (“Second Coker Decl.”), ¶ 2. In 2008, he launched Smashwords as a platform and service that independent authors can use to “self-publish.” First Coker Decl. ¶ 2.¹ Smashwords’ self-published authors retain complete ownership and editorial control over the rights associated with their books. Second Coker Decl. ¶ 4. They also set their own prices, write their own book descriptions, select and upload their own cover art, and manage their books’ promotion. Second Coker Decl. ¶ 5.

Smashwords’ self-publishing tools allow users to upload works for distribution to leading online retailers and public libraries as well as for sale directly on Smashwords.com. Second Coker Decl. ¶ 6. As such, the company is both a distributor and retailer of ebooks. Smashwords authors and publishers are responsible for their own publishing activities (*e.g.*, cover design, writing, editing, formatting, pricing, marketing, or public relations). Second Coker Decl. ¶ 7. Smashwords

¹ Publishers—typically independent presses—can and do also use Smashwords’ service to publish and distribute ebooks. Second Coker Decl. ¶ 3.

does not represent to anyone that it possesses editorial control or undertakes any editorial review of the ebooks that others publish using its service. Second Coker Decl. ¶ 8.

Smashwords wants to make self-publishing easy and accessible for all writers worldwide. First Coker Decl. ¶ 2. To keep self-publishing economical and practical, Smashwords demands no up-front fees. Second Coker Decl. ¶ 9. It earns all of its income on commission. Second Coker Decl. ¶ 10. As explained below, Smashwords' business model is feasible only because it does not perform any of the costly functions of a publisher. Second Coker Decl. ¶ 11.

Smashwords has been widely recognized for its accomplishments. *See, e.g.,* <http://www.inc.com/inc5000/list/2014/industry/media/> (fastest-growing media company); <http://www.forbes.com/companies/smashwords/> (one of America's most promising companies). Second Coker Decl. ¶ 12. Indeed, it is the world's largest distributor of independent ebooks, boasting a catalog that includes over 360,000 titles submitted by over 100,000 self-published authors and small independent publishers. *Id.* In the last five years, authors who have used Smashwords have appeared on bestsellers lists such as those of USA Today and the New York Times. Second Coker Decl. ¶ 13. And in addition to enabling such commercial results, Smashwords has given authors whose work might otherwise have no outlet the chance to see the light of day.²

B. Smashwords Spot-Checks Self-Published Submissions

Smashwords does not read for editorial quality, make edits to, or fact-check self-published content—and could not possibly accomplish such an undertaking if it tried. Nevertheless,

² It is widely acknowledged that internet self-publishing has dramatically increased both the diversity of titles available to customers and authors' ability to reach the market. *See, e.g.,* Apple Brief, ECF No. 20 at 2-4.

Smashwords uses a multifaceted approach in an effort to prevent violations of its policy and to catch evident problems.³

As an initial matter, Smashwords requires each user to accept its Terms of Service before uploading any given ebook, confirming, *inter alia*, the following:

1. That “the Work contains no materials that:
 - violate any right of privacy which is libelous or ***violate any personal right or other right of any kind of any person or entity . . .***, or
 - *violate state and federal laws*”;
2. That the self-publishing author has “*secure[ed] permissions to the Work* prior to the time Author submits such work if any material from the work belongs to, or has been licensed to, someone else”; and
3. That the self-publishing author “warrant[s] and represent[s] that the work (the book) is complete and the author:
 - *is the only author of the Work*;
 - *is the sole owner of the rights . . . granted; . . . [and]*
 - *has full right, power, and authority to enter into this Agreement and to grant the rights granted . . .*”

Second Coker Decl. ¶ 14; *id.* at Exh. A (emphasis added). *See also* First Coker Decl. ¶ 19. Only after the author verifies that he or she possesses all rights to the ebook’s content (including its cover) may he or she submit it to Smashwords for distribution and sale. Second Coker Decl. ¶ 15.

Each ebook then goes through a quick review by a trained Smashwords employee who looks for detectable violations of Smashwords’ policy and formatting errors. Second Coker Decl. ¶ 16. The employee looks at the title, cover image, category, description, book file, and tags for

³ Smashwords does not have the resources or business model to accomplish the same editorial and legal review that a traditional publisher would perform. Second Coker Decl. ¶ 27. To require such review would be prohibitively time consuming and expensive. Second Coker Decl. ¶ 28. It would dramatically increase costs beyond the reasonable responsibility of a book distributor, and could put Smashwords out of business. Second Coker Decl. ¶ 28.

obvious signs that the ebook may contain illegal or improper material. Second Coker Decl. ¶ 17. For example, a book tagged as “erotica” that has a child on its cover would trigger additional review to ascertain with reasonable confidence whether the book contains underage characters in sexual circumstances, which Smashwords prohibits. Second Coker Decl. ¶ 18. Generally speaking, the most worrisome ebooks tend to have multiple characteristics that are cause for obvious concern. Second Coker Decl. ¶ 19.

If an ebook survives this process, it is approved for Smashwords’ Premium Catalog. Second Coker Decl. ¶ 20. The Premium Catalog is the subset of ebooks that may be distributed to retailers and library partners. First Coker Decl. ¶¶ 4, 5; Second Coker Decl. ¶ 21. If an author later makes changes to the ebook on Smashwords.com, certain changes (such as to price) automatically flow to downstream retailers without further review, whereas others, such as changes to the cover, body of the book, title, or description, trigger a re-review. First Coker Decl. ¶ 6; Second Coker Decl. ¶ 22. When an ebook is re-approved, updates ship automatically to Smashwords retailers. Second Coker Decl. ¶ 23.

Smashwords cannot ensure that the thousands of submissions it reviews each week never infringe on third party rights, particularly because such issues are typically not facially apparent. Second Coker Decl. ¶ 24. Nevertheless, when an author engages in an obvious violation—*e.g.*, someone other than J.K. Rowling uploads an obviously pirated or unauthorized edition of *Harry Potter*—Smashwords generally catches the misconduct and rejects the ebook. Second Coker Decl. ¶ 25. Smashwords’ community members, downstream retailers, and customers also can and do notify Smashwords of improper material after publication. Second Coker Decl. ¶ 26.

C. Smashwords Distributes *Gronking*

As the Complaint and FAC allege, Mr. McKenna both wrote and self-published *Gronking*. ECF No. 7 ¶ 3; ECF No. 28 ¶ 3. *See also* McKenna Decl., ECF No. 23-7, ¶ 1 (“I wrote [*Gronking*], created its cover, and published it”); *id.* ¶ 4 (“I am a self-published author. The easiest way to get *Gronking* . . . published and to maintain creative control over [it] was to do it myself rather than go through the difficult process of finding an agent and getting a book deal.”). Mr. McKenna self-published through several different platforms, one of which was Smashwords.com. McKenna Decl. ¶ 5; First Coker Decl., ECF No. 20-3, ¶ 7.

On December 29, 2014, Mr. McKenna first uploaded *Gronking* to Smashwords with a cover that included the photograph of a young couple (alleged to be the Roes) in an embrace. McKenna Decl. ¶ 5; First Coker Decl. ¶ 7. Before doing so, he agreed to Smashwords’ Terms of Service. McKenna Decl. ¶ 16 (“I agreed to the Terms of Service on Smashwords. . . . For Smashwords, I represented that *Gronking* would contain no materials that ‘violate any right of privacy which is libelous or violate any personal right or other right of any kind of any person or entity.’”) (alteration deleted).

On December 29, 2014, *Gronking* was made available for sale on Smashwords.com. First Coker Decl. ¶ 9. Smashwords staff rejected the book for inclusion in the Premium Catalog, however, because of a policy violation apparent on the book’s face (it included hyperlinks to other retailers). McKenna Decl. ¶ 7 (“I . . . learned that Smashwords had rejected my book from its Premium Catalog because the book included links to other ebook retailers, which was against Smashwords’ policy.”); First Coker Decl. ¶ 10. Mr. McKenna revised and re-submitted the book

on January 7, 2015, and *Gronking* was accepted into the Premium Catalog on January 12, 2015. McKenna Decl. ¶ 7; First Coker Decl. ¶ 11.⁴

The next day, Mr. McKenna modified the photograph of Rob Gronkowski on the cover of his book to look like a drawing. McKenna Decl. ¶ 8. Mr. McKenna's modification did not raise alarms at Smashwords because it is not uncommon for authors to revise their book covers as part of their efforts to distinguish and market their books. Second Coker Decl. ¶ 29. On January 13, 2015, Smashwords accepted the revised book into its Premium Catalog. First Coker Decl. ¶ 12.

On January 29, 2015, Mr. McKenna received a cease-and-desist letter from the Roes' counsel alerting him to their objections about his use of their image. McKenna Decl. ¶ 9. At that time, no one provided the cease-and-desist letter to Smashwords. First Coker Decl. ¶ 15.

On January 30, 2015, Mr. McKenna replaced the photograph with an image of a different young couple. McKenna Decl. ¶ 9; First Coker Decl. ¶ 14. On February 1, 2015, Smashwords accepted the revised submission of *Gronking* into the Premium Catalog. First Coker Decl. ¶ 15. Apart from sales in Apple's iBooks store, during the time when the image of the Roes was on its cover, only five Smashwords copies of *Gronking* were sold. Second Coker Decl. ¶ 30.

The Roes never sent Smashwords a cease and desist letter, and Smashwords did not become aware of their letters to others until well after Mr. McKenna had removed the image at issue from the *Gronking* cover. *Compare* First Coker Decl. ¶ 15 (cover with different couple accepted February 1, 2015) *with id.* ¶ 18 (Smashwords received first notice, by email from Apple, on February 9, 2015). At no time during the period when *Gronking*'s cover included the disputed image did anyone at Smashwords know or have reason to know of the Roes' concerns. *Cf.*

⁴ For a detailed factual account of Smashwords' delivery of *Gronking* to Apple, see ECF No. 20-1 at 4-6.

McKenna Decl. ¶ 18 (“As a result of the largely automated process of self-publishing a book, as well as the representations in the Terms of Service I agreed to, to the best of my knowledge, Amazon, Apple, and Barnes & Noble did not know or have any reason to know that the images I used for the cover of *Gronking* were of the plaintiffs in this action or that those images were used without express permission.”); First Coker Decl. ¶ 18 (“At no time before receipt of the [February 9, 2015] email did Smashwords have any knowledge of, or reason to know, about the plaintiffs’ objection to the cover of *Gronking*.”); First Coker Decl. ¶ 21 (“Smashwords had no communications with [Mr. McKenna] until [he] contacted Smashwords on March 10, 2015 . . .”).

LEGAL STANDARD

Summary judgment must be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “Once the moving party has identified what it believes shows an absence of a genuine dispute of material fact, the nonmoving party must go ‘beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.’” *Santiago v. Ringle*, 734 F.3d 585, 589 (6th Cir. 2013) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). “[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. Early summary judgment is appropriate where protracted litigation would have a chilling effect on the exercise of First Amendment rights. *See Compuware Corp. v. Moody’s Investors Services, Inc.*, 371 F.Supp.2d 898, 901 (E.D. Mich. 2005) (granting summary judgment of no defamation and observing that “objective facts may be determinative of

recklessness or malice, and concerns about chilling effects strongly support the grant of summary judgment when such facts show it is warranted”). *See also Osmond v. EWAP, Inc.*, 153 Cal. App. 3d 842, 854 (Cal. Ct. App. 1984).

ARGUMENT

Summary judgment is warranted because the FAC fails to include a single factual or legal allegation about Smashwords. *See infra* 11-12 (“The Roes Allege No Wrongdoing by Smashwords”). Dismissal should be with prejudice because the Roes cannot truthfully amend their complaint to include any triable claim against Smashwords. As explained below, that is true for the reasons that have previously been articulated by Amazon, B&N, and Apple. *See infra* 12-14 (“No Conduct of Smashwords Could Possibly Be Alleged that Would Support Any Cause of Action Under Ohio Statutory or Common Law.”), 14-15 (“In Any Event, the First Amendment Completely Protects Smashwords’ Distribution and Sale of *Gronking*.”)

I. The Roes Allege No Wrongdoing By Smashwords.

The Court should dismiss the FAC with prejudice as to Smashwords because the Roes have alleged nothing about Smashwords—literally, nothing. *See* FAC, ECF No. 28. After Apple filed its summary judgment motion in this case along with the accompanying declaration of Smashwords’ CEO and founder, Mark Coker, the Roes had notice that Mr. McKenna used Smashwords’ self-publishing service to create one version of *Gronking*, and that Smashwords had distributed that version of the book to Apple. Apple Brief, ECF No. 20-1, at 4-6. The Roes decided to amend to add Smashwords as a defendant in the case, but failed to make a single factual or legal allegation about Smashwords. *See* FAC, ECF No. 28. They merely added Smashwords to the case caption. *Compare* Original Complaint, ECF No. 7 *with* FAC, ECF No. 28.

It is black-letter law that such a complaint must be dismissed. *See, e.g., Potter v. Clark*, 497 F.2d 1206, 1207 (7th Cir. 1974) (“Where a complaint alleges no specific act or conduct on the

part of the defendant and the complaint is silent as to the defendant except for his name appearing in the caption, the complaint is properly dismissed, even under the liberal construction to be given pro se complaints.”); *Engle v. City of Cuyahoga Falls*, No. 5:14-cv-1161, 2015 WL 3852143, at *4 (N.D. Ohio June 22, 2015) (same); *Shelton v. Michigan Turkey Producers Co-op., Inc.*, No. 1:13cv441, 2014 WL 4388366, at *2 (W.D. Mich. Sept. 5, 2014) (same).

The Court should dismiss the FAC with prejudice because the Roes cannot truthfully amend their complaint to include any triable claim against Smashwords. That is true for the reasons articulated by Amazon, B&N, and Apple. See Apple Brief, ECF No 20-1; B&N Brief, ECF No. 23; Amazon Brief, ECF No. 24-1. Smashwords hereby incorporates the entirety of their briefs by reference. In the interest of efficiency, what follows is a short explanation of how each of the grounds for summary judgment advanced by Amazon, B&N, and Apple applies equally to Smashwords.

II. No Conduct of Smashwords Could Possibly Be Alleged that Would Support Any Cause of Action Under Ohio Statutory or Common Law.

As explained above, the FAC is devoid of any allegations regarding the conduct of Smashwords. See *supra* 11-12 (“The Roes Allege No Wrongdoing By Smashwords.”). The relevant and undisputed facts regarding Smashwords conduct are summarized above. See *supra* 4-10. For several reasons, such conduct would not subject Smashwords to liability under the statutory or common law of Ohio relied on by the Roes in the FAC:

First, the Roes’ image lacks commercial value. To state an actionable claim, Ohio’s statutory and common law right of publicity, including the tort of invasion of privacy by appropriation, require a plaintiff’s likeness to have commercial value. See, e.g., Apple Brief, ECF

No. 20-1, at 12-13.⁵ This means that a plaintiff’s persona must have some intrinsic value—value in and of itself—that someone else could allegedly take. *Id.* Not only have the Roes failed to allege any commercial value associated with their likeness, they have twice alleged the opposite. *See* Original Complaint, ECF No. 7, ¶ 1 (alleging that “their privacy interests substantially outweigh the presumption of open judicial proceedings”); *id.* ¶¶ 5-6 (alleging only that use of their image has caused “ridicule and embarrassment,” and that they own a right of publicity for commercial purposes but never gave consent); FAC, ECF No. 28, ¶¶ 1, 5-6 (same allegations).

Second, any exploitation of the Roes’ likeness was not actionable because it was not for a “commercial purpose,” as Ohio law requires. *See, e.g., Kolcun v. Nationwide Ins. Co.*, 2006 U.S. Dist. LEXIS 32835, at *28 (S.D. Ohio May 24, 2006). To the contrary, it was merely incidental to the sale of the *Gronking* book. *See ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 930 (6th Cir. 2003) (quoting Restatement (Third) of Unfair Competition § 46) (Ohio’s right of publicity law requires “appropriat[ion of] the commercial value of a person’s identity” that is “something more than the incidental publication of name or likeness.”). Here, the Roes have not alleged that anyone used their identities for a commercial purpose. *See, e.g.,* Apple Brief, ECF No. 20 at 13-15; B&N Brief, ECF No. 23 at 12-15; Amazon Brief, ECF No. 24-1 at 16-18. Nor can they show that Smashwords did anything to attempt to capitalize on any commercial value of their identities. *See id.* Smashwords merely distributed *Gronking* with the cover image selected by Mr. McKenna. *See id.* And it is beyond any serious dispute that the “use of book cover images” “is not an endorsement or promotion of any product or service, but is merely incidental to, and customary for, the business

⁵ As explained elsewhere, the third count under the Restatement is not independently actionable and is the same as plaintiffs’ second count. *See, e.g.,* B&N Brief, ECF No. 23, at 7; Apple Brief, ECF No. 20, at 7 n.1.

of internet book sales.” *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1326 (11th Cir. 2006). *See also* Amazon Brief, ECF No. 24-1 at 10-14; B&N Brief, ECF No. 23, at 8-12.

Third, to be liable under Ohio law, Smashwords would have to have known (or at least had reason to know) that Mr. McKenna did not have permission to use the Roes’ image. *See, e.g., Ohio State Univ. v. Skreened Ltd.*, 16 F. Supp. 3d 905, 915-16 (S.D. Ohio 2014). But Mr. McKenna represented to Smashwords that *Gronking* contained no materials that “violate any right of privacy which is libelous or violate any personal right or other right of any kind of any person or entity. . . .” McKenna Decl. ¶ 16(a) (alteration deleted). There was nothing about the photograph that caused or should have caused Smashwords to question his representations, and Mr. McKenna undisputedly failed to notify Smashwords or any other defendant about the claim raised by the Roes until *after* he had addressed it by uploading a different cover. McKenna Decl. ¶¶ 9, 18; First Coker Decl. ¶¶ 15, 18, 21.

Finally, Ohio’s right of publicity statute contains an applicable safe harbor. The work at issue was fictional, *see* McKenna Decl. ¶ 2 (describing *Gronking* as “a work of pure fiction”), and the statute “does not apply,” to such works or to advertising incidental to the sale thereof. *See, e.g.,* B&N Brief, ECF No. 23, at 12 n.5 (citing Ohio Rev. Code § 2741.09(A)); Apple Brief, ECF No. 20-1, at 11 n.2 and 15 (citing Ohio Rev. Code § 2741.09(A)(1)(d)).

III. In Any Event, the First Amendment Completely Protects Smashwords’ Distribution and Sale of *Gronking*.

The Constitution guarantees free speech in many contexts, but the distribution of books is especially important. As previously explained by Amazon, B&N, and Apple, the First Amendment precludes the imposition of strict liability on distributors and self-publishing platforms such as Smashwords. *See, e.g.,* Apple Brief, ECF No. 20-1, at 8-12; B&N Brief, ECF No. 23, at 8-12;

Amazon Brief, ECF No. 24-1, at 16-18. And it does so for an important reason: to prevent chilling and self-censorship. *See id.*

Booksellers cannot be held liable simply for making a book available to the public. *See, e.g.,* Apple Brief, ECF No. 20-1, at 8-11 (discussing *Smith v. California*, 361 U.S. 147 (1959), *Parisi v. Sinclair*, 774 F. Supp. 2d 310 (D.D.C. 2011), *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, (S.D.N.Y. 1991), and *Cardozo v. True*, 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977)); B&N Motion, ECF No. 23, at 10-12 (discussing *Sandler v. Calcagni*, 565 F. Supp. 2d 184 (D. Me. 2008)); Amazon Brief, ECF No. 24-1, at 11-14 (discussing *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316 (11th Cir. 2006) and *Sandler*, 565 F. Supp. 2d 184). Indeed, bookstores and other distributors generally have no duty to monitor the content of the material they distribute. *See, e.g.,* B&N Brief, ECF No. 23, at 8 (citing and quoting *Lerman v. Flynt Distributing Co.*, 745 F.2d 123 (2d Cir. 1984) and *Smith v. California*, 361 U.S. 147 (1959)).

Nor may providing a service or platform for an author to publish a book online give rise to strict liability where the provider performs no fact-checking or similar content-based editing services. *See, e.g.,* B&N Brief, ECF No. 23 at 10-12 (discussing *Sandler*, 565 F. Supp. 2d 184); Amazon Brief, ECF No. 24-1, at 10-14 (discussing *Parisi*, 774 F. Supp. 2d 310). Rather, the First Amendment limits liability to instances in which the provider knows (or has reason to know) of allegedly tortious conduct. The Communications Decency Act of 1996, 47 U.S.C. § 230, also precludes the imposition of liability on the self-publication services.⁶

⁶ The CDA precludes imposing liability on Smashwords for Mr. McKenna's use of Smashwords.com to publish *Gronking* and its cover. The CDA establishes broad federal immunity for service providers such as Smashwords for information that originates with a third-party user such as Mr. McKenna. *See, e.g.,* B&N Brief, ECF No. 23, at 6 n.2. The CDA's carve-out of intellectual property claims, properly interpreted, is inapplicable to the Roes' state law claims. *Id.* (citing *Perfect 10, Inc. v. CCBill LLC*, 448 F.3d 1102, 1119 (9th Cir. 2007) (exception applies only to federal intellectual property claims)).

Here, Smashwords had no reason to know or suspect that the Roes would contest Mr. McKenna's use of their image on the original cover of his book. Smashwords did not read for editorial quality, make any edits, or fact check *Gronking*, or suggest to anyone that it had done so. Mr. McKenna represented to Smashwords that he had all necessary rights, including with respect to the cover. Mr. McKenna did not inform Smashwords of the Roes' allegations until after he had addressed them by removing their image. McKenna Decl. ¶¶ 9, 18; First Coker Decl. ¶¶ 15, 18, 21. As such, the First Amendment immunizes Smashwords against any claims in this litigation.

CONCLUSION

For the foregoing reasons, as well as the reasons explained in Apple, B&N, and Amazon's papers, ECF Nos. 20, 23, 24-1, Smashwords respectfully asks the Court to grant summary judgment in its favor and dismiss plaintiffs' complaint with prejudice.

Dated: September 8, 2015

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 9, 2015, a copy of the foregoing was filed electronically with the Clerk of the Court using the Court's CM/ECF system, and notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

/s/ Aneca E. Lasley
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