

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN ROE, et al.,	:	CASE NO. 3:15-cv-00111-TMR
	:	
Plaintiffs	:	Judge Hon. Thomas M. Rose
	:	
-vs-	:	
	:	
AMAZON.COM, et al.,	:	
	:	
Defendants	:	

MEMORANDUM IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT OF DEFENDANTS,
BARNES AND NOBLE, INC., AMAZON.COM, INC., and SMASHWORDS, INC.

I. Summary

Defendants’ motions for summary judgment should not be granted because each of these three corporate Defendants are not mere booksellers, they are book publishers. This status is a question of fact that is material to the issues of this case. This fact issue determines liability on at least one claim Plaintiffs have presented for the Court’s determination. Plaintiffs also submit there is a question of fact as to Defendants’ knowledge under Ohio Tort Law which renders summary judgment inappropriate. Plaintiffs also dispute Defendants’ claim they are exempt from liability under the Communications Decency Act, 47 U.S.C. § 230. Because there are

genuine issues of material fact that need to be decided in this case by a jury, the court should not grant these three Defendants' Motions for Summary Judgment.

II. Facts

John and Jane Roe were getting married. As part of their engagement celebration, they decided to have professional photos taken to commemorate and record their wedding journey. (See the submitted Declarations of both Jane and John Roe in verification of all facts set forth herein.) As part of their agreement with the photographer, they gave this individual the right to post the photos so taken on the photographer's website for advertising of her professional services. The photographer did not give any other person or entity permission to use the photos for which she had rights.¹ At no other time did John and Jane Roe give permission, in writing or otherwise, to any person or entity for the use of their photo. Neither John nor Jane Roe ever posted the photograph that is the subject of this case on social media or any other site on the internet.

Beginning in January of 2015, John and Jane Roe began enduring a tortured series of confrontations with friends and acquaintances about their photograph being on the cover of a book that can only be described as pornography.² Their engagement photo was transformed from a statement of celebration into a source of ridicule, embarrassment and shame. They became the butt of jokes and their engagement, rather than a source of joy, became a source of mortification, particularly for Jane Roe. Their photo was displayed on *The Tonight Show*, *Jimmy Kimmel Live* and media day for the Super Bowl. They received emails and other digital taunts and ridicule as the photo was appearing all over the internet including the web sites of the Defendants. The Roes live in a conservative Midwest community and, when out in the community, they were and are harassed by people about their relationship and all the

¹ And, in particular, the photo which is the subject of this case.

² Merriam-Webster online dictionary defines pornography as 1. the depiction of erotic behavior (as in pictures or writing) intended to cause sexual excitement; 2. material (as books or a photograph) that depicts erotic behavior and is intended to cause sexual excitement; 3. the depiction of acts in a sensational manner so as to arouse a quick intense emotional reaction

innuendos arising from photo of them adorning the cover of a dirty book. The couple learned, as the result of these salacious and lecherous confrontations, the subject matter of the book was of a sexual nature in which a wife was not getting her needs met during football season and began fantasizing about Ron Gronkowski, a National Football League player. The final scene in the book is a description of a sexual act in which the wife receives a football spike to her derriere, a “gronking”.

John and Jane Roe began isolating themselves. They live in small-town Troy, Ohio. The community is conservative and quiet. They have jobs and are active members of the community, since childhood. They have family as well as many friends and acquaintances. As is typical in a small Midwestern community, news of this photo spread rapidly to all corners.³ This unwanted notoriety has subjected them to more ridicule, embarrassment and shame. Since their photo has appeared persistently on the cover of a dirty book, they live in constant fear that their employers, co-workers, customers and potential customers will find out about the photo resulting in economic damage.

III. Law & Argument

- a. Defendants are more than mere booksellers, they are book publishers, and should be held accountable for publishing a book using a photo without license or permission.

Defendants are publishers, not in the sense of a legal term of art such as with the elements of defamation, but in the colloquial and everyday understanding of a book publisher. Defendants provides a platform⁴ working in concert with authors in publishing their books the same way a traditional publishing house does. To publish is “to distribute copies [of a work] to the public”. Black’s Law Dictionary 1352 (9th ed. 2009). Hugo Publishing defines the term publish as “a book produced and ready to be sold.” Hugo House Publ’g., http://hugohousepublishers.com/publishing_process/ Ex. 1 at 1, ¶ 1, (last visited July 31, 2015). Defendants acted as a publisher when it created a platform that allowed Defendant Noonan to publish his book using their publishing platform. Smashwords, *Smashwords Support Center*

³ As soon as they contacted counsel a cease and desist request was made of the Defendants but by then the damage was done and continues to this day. Once a photo is placed on the internet, it does not go away.

⁴ Just like the traditional printing on paper and binding of books found in a library.

FAQ, <https://www.smashwords.com/about/supportfaq> Ex. 10 at 3, ¶ 4 (last visited September 26, 2015). Traditional publishing houses use a vetting process that would have prevented Noonan from distributing for sale his book with the Plaintiff's photo on the cover. As Judge Livingston states in *United States v. Apple, Inc.* 791 F.3d 290 at 296 (2nd Cir. 2015).

“Since the invention of the printing press, the distribution of books has involved a fundamentally consistent process: compose a manuscript, print and bind it into physical volumes, and then ship and sell the volumes to the public.”

The booksellers are the ones to whom the already published books are sent to be sold to the public. The booksellers are not involved in the publishing process.⁵

Hugo House Publishing has outlined the traditional publishing process on their website. The traditional publishing process may or may not require the writer to have an agent – to hand over a manuscript solicited by the publishing house. Hugo House, Ex. 1 at 1, ¶ 1. Acquisitions is the step in which the publishing house uses to determine if they are interested in the manuscript. Hugo House, Ex. 1 at 2 ¶ 5. The acquisitions team will consist of editors, design, distribution and marketing employees who will make the decision as to whether or not they will publish the book. Hugo House, Ex. 1 at 2, ¶ 6. The publishing house will then make an offer and contract to publish the book if they decide the book will sell. Hugo House, Ex. 1 at 2, ¶ 7. Defendants perform these steps, less the requirement of an agent, when it provides the service for authors and the advertisement for that service.

Next, is editing the book for grammar and flow, marketing, and designing the book cover. Hugo House, Ex. 1 at 3 - 6. Defendants do not conduct the editing and design steps, as their service is commonly known as self-publishing, which in reality seems to mean self-editing. Self-publishing is clearly not publishing, as that word is known in the book industry, because to publish is to place a book in final form for distribution to booksellers for sale. “In the ordinary course of operating Nook Press, Barnes & Noble does not write or edit content...” Bock Decl. at ¶ 15. “Amazon does not otherwise read, edit, or fact check self-published books.” Watson Decl.

⁵ While the digital age may have blurred the line between a publisher and a bookseller (many entities assuming both roles) it is clear a publisher is one working in concert with the author to prepare the book in a final form for distribution to booksellers who then sell this finished product.

at ¶ 7. “Smashwords does not... undertake[] any editorial review of the books that authors and publishers publish using its service.” Coker Decl. at ¶ 8. These are steps that the author conducts as part of using the *publishing* platform. However, Defendants provide a marketing platform and advertising space that the author utilizes once the book is published⁶. The interior of the book is also designed by the publishing house. Hugo House, Ex. 1 at 5. Defendants perform this step via its publishing platform. When the user uploads the book it is formatted to fit the specifications for the publishing platform.⁷ Barnes & Noble, *FAQ*, supra, Ex. 2. Amazon, *FAQ*, supra, Ex. 3 at 3 ¶ 1. Defendant Smashwords provides a style guide that outlines its formatting requirements for publication by Smashwords. Smashwords, *FAQ*, supra, Ex. 10 at 11 ¶ 1. The final steps are printing and distribution. Hugo House, Ex. 1 at 7. Defendants figuratively and digitally print the work and distribute the book when then is placed by the publisher on the internet for purchase by consumers visiting the bookseller sites.

Defendants characterize themselves as a “book sellers” in their motion. Bock Decl. at ¶ 2. Watson Decl. at ¶ 2. Smashwords Motion for Summary Judgment at 15. Yet, Barnes & Noble paradoxically submits it “contacted Noonan about the allegations and to request replacement of the cover images.” Barnes & Noble Motion for Summary Judgment at 4. Amazon stated the same “...and directed Noonan to address the allegation for infringement.” Amazon Motion for Summay Judgment at 6. Defendants have a direct cost-sharing arrangement with the author. Watson Decl. Ex. 2 at 14. Coker Decl. Ex. A at 3. Bock Decl. Ex. A at 4. A bookseller receives books and puts them on a shelf (physical or digital) in order to sell them. If there is a complaint about the content or the cover image on the book, a mere bookseller has no ability to require the author or the publisher to change the content or image. Defendants not only had access to the author to request to make the change, they were able to demand and require Noonan to change the cover image. Barnes & Noble Motion For Summary Judgment at 4 - 5. Amazon also “direct[ed] Noonan to address the allegation of infringement.” Amazon Motion for Summary Judgment at 6. A publisher of a book has access to the author and the authority to change a

⁶ See Smashwords, *FAQ*, supra, Ex. 10 at 48 ¶ 2; Barnes & Noble, *Frequently Asked Questions*, supra, Ex. 2; Amazon, *Frequently Asked Questions*, supra, EX. 3 at 5, ¶ 1.

⁷ Placing the book in final form for distribution to and sale by a bookseller.

cover image in this manner. A book publisher has cost-sharing arrangements with the author - a mere bookseller does not. The only things a bookseller can do: sell or not sell the book.

Defendants next claim Plaintiffs cannot show that the use of the image was for a commercial purpose. Smashwords' Motion for Summary Judgment at 13. The use of the photo on the cover of the book and the resulting profit is evidence of the commercial use and commercial purpose. The purpose of this pornographic book, from the publisher's point of view, is not simply altruistic. The Defendant publishers are in the business to distribute these books and make money when the bookseller sells the book. The book publisher wants the book to sell, the same as the author does, so that money can be made from the sale of the book. Ex. 11 p8 ¶ 2. While one cannot judge a book by its cover, the design of the cover is important in the sales that will ensue. Smashwords actually requires a cover image for distribution in its premium catalog. Ex. 10 p 24 ¶ 1-2. The image chosen for use in the cover of this book assisted in the sale of the book. "The cover of a book is important for one thing – it prompts the potential buyer to pick up the book..." Hugo House, *supra*, Ex. 1 at 6. There can be little doubt Barnes & Noble's use of the image was for a commercial purpose.

Defendants also argues 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 of internet books sales." Barnes & Noble Motion For Summary Judgment at 13 (quoting *Almeida v. Amazon.com, Inc.* 456 F.3d 1316). This may be true, but it is not relevant. *Almeida* does not apply to the facts of this case. The plaintiff in *Almeida* objected to the use of her image on the book and the book's display for sale. *Almeida v. Amazon.com Inc.*, 456 F.3d 1316, 1318 (11th Cir. 2006). In the case at bar, Barnes & Noble acted as a book publisher and used Plaintiffs' engagement photo as part of the process in publishing the book. The Defendants also being sellers does not negate the fact that they participated in creating the book prior to sale. Defendants had access to the author after publishing the book in order to make demands the book be changed. Defendants are book publishers, not mere booksellers.

Barnes & Noble's process uses Nook Publishing as a publisher separate from Barnes & Noble's as bookseller for sale of books to the public. "NOOK Press gives you everything you

need to create, edit, and sell your digital books through the NOOK Bookstore all in one place.” Barnes & Noble, *FAQ*, supra, Ex. 2. (distinguishing NOOK Press from the NOOK Bookstore) “We make it fast, free, and easy for any author or publisher, anywhere in the world, to publish and distribute ebooks to the major retailers.” Smashwords, *FAQ*, supra, Ex 11 at 1 ¶ 1. Thus, because Defendants are publishers and not a mere booksellers, their argument implicating the First Amendment and incidental do not apply and should fail.

- b. The Court should not apply The Communications Decency Act in this case. To do so would be an overbroad application of the statute to a situation in which the defendants, while interactive computer service providers are actually acting as book publishers and not as speakers to which the Act would apply.

Plaintiffs submit The Communications Decency Act does not apply in this case for three reasons: 1) the statute does not provide a liability exemption for this set of facts; 2) Defendants were acting as book publishers not merely as interactive computer service providers; and 3) Ohio Revised code Chapter 2741 is consistent with 47 U.S.C. § 230.

Defendants seemingly submit the proposition that The Communications Decency Act (CDA) applies and exempts from liability in *every* situation involving any entity claiming to be an interactive computer service provider. However, while the CDA provides broad immunity, that immunity does not apply in the circumstances of this case. According to the canons of interpreting legal text, a statute is read in its entirety: “A legal instrument typically contains many interrelated parts that make up the whole. The entirety of the document thus provides the context of each of its parts.” Antonin Scalia & Bryan A. Garner, *Reading Law: Interpretation of Legal Texts* 167 (2012). To interpret the statute as a whole every provision is given effect. *Id.* at 174. This includes the prefatory materials and the title and headings. *Id.* at 217, 221. Also, “In modern practice, however, the title is adopted by the legislature.” *Id.* at 221. (internal quotations omitted).

The CDA includes prefatory materials that gave Congress’ rationale for adopting the law. Congress wanted to promote the development of the internet; preserve the free market available on the internet; encourage development of technologies to maximize user control;

remove disincentives for the development and utilization of blocking and filtering technologies; and to ensure vigorous *enforcement of federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer*. Communications Decency Act, 47 U.S.C. § 230 (b)(1)- (5) (1998)(emphasis added).

Next, the CDA specifically addresses the treatment of a “publisher or speaker”. *Id.* at § 230 (c)(1). This subsection shows the statute was referring to publisher as a legal term of art, rather than the using the colloquial and everyday form of the word. The statute goes on to identify situations in which an interactive computer service would not be held accountable. The statute gives immunity for “any action voluntarily taken in good faith... to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable...” *Id.* at (c)(2)(A).⁸ Under this section, Defendant is not liable for filtering and checking the author’s words – which the Defendants clearly chose *not* to do in this case. The CDA does not exempt defendants completely from all liability when they change their role from interactive computer service providers to one of book publishers.

These sections do not apply to the facts presented in this case. Plaintiffs are not asserting a claim that Defendants published obscene materials about them. Nor are they claiming Defendants defamed, harassed, or stalked them. Plaintiffs do not object as part of this case to the content of the book *except* as it directly relates to the their image on the cover (see below). Plaintiffs claim Defendants published a book with their photo on the cover, and without their permission, in violation of their statutory and common law rights to the commercial use of their persona and in violation of their right to privacy. The CDA neither gives immunity for nor applies to these types of claims.

There is also a presumption against federal preemption “A federal statute is presumed to supplement rather than displace state law.” Antonin Scalia & Bryan A. Garner, *Reading Law: Interpretation of Legal Texts* 290 (2012). For example, the CDA states that specific Federal

⁸ Ironically, the defendants in this case did nothing to stop the publication and sale on the internet of a pornographic. Not that they should have, but they did not.

criminal laws on obscenity and sexual exploitation of children would *not* be affected by the statute. And it specifically provides that the statute “shall not be construed to prevent any State from enforcing any State law that is consistent with this section.” Communications Decency Act, 47 U.S.C. § 230 (e)(3) (1998).

Ohio Revised Code Chapter 2741 is consistent with the CDA. Chapter 2741 does not address obscenity, harassment, stalking, excess violence, or any other enumerated or implied application of the CDA. Chapter 2741 provides a statutory remedy for the unpermitted use of a person’s photo, among other uses, if used for a commercial purpose. Chapter 2741 of the Ohio Revised Code was intended to provide a statutory right supplemental to the common law rights of privacy (*James v. Bob Ross Buick, Inc.*, 855 N.E.2d 119, 127 n.2 (2006)). To permit the broad immunity suggested by Defendants would result in no online book publishing company being held liable for its actions taken in creating and publishing a book, ebook, or otherwise no matter how reckless or indifferent to the rights of others. Certainly, that was not the intent of the CDA.

The CDA was not meant to give complete immunity to interactive computer service providers for their actions taken in committing civil wrongs, especially those involving privacy claims such as this case. The act was created to provide immunity in specific situations. Interactive computer service providers are immune from actions taken in the realm of censorship and they are immune from being held liable for the speech of others only when they are acting as interactive computer service providers. However, when they are acting as book publishers, Defendants can, and should, be liable for their failure to ensure (by vetting) that the photos its authors are using and which they are publishing for subsequent sale by a bookseller are properly licensed and/or the necessary permissions have been given.

This Court should not apply the *Almeida* case since it is factually distinguishable from the case at bar. *Almeida*, 456 F.3d 1316 (11th Cir. 2006). The publisher in the *Almeida* case was Ophelia Editions. The publisher of *A Gronking to Remember* was Nook Publishing (*Id.* at 1319), Amazon and Smashwords. In the *Almeida* case, Amazon *was* acting as a mere bookseller for which the CDA would apply and for which immunity would apply just as the *Almeida* court held.

However, Defendants in this case were acting outside their role as interactive computer service providers. They were more than mere booksellers. They first assumed the role of book publisher before the product was provided to a bookseller for sale to the public. Also, Almeida consented to the use of her photo in the book. Plaintiffs did not. *Id.* at 1318. Finally, Almeida argued that “Amazon should not display her image to *promote* the sale of *Anjos Prohibidos* because she did not consent and did not receive just compensation for the use...” *Id.* (emphasis added). Here, Plaintiffs are objecting to Defendants’ role as publisher in using their photo on the cover of *A Gronking to Remember*, a use for which Plaintiffs did not consent.

Defendants also cite *Zeran v. America Online* 129 F.3d (4th Cir. 1997), which also held that the CDA exempted an *interactive computer service* (not book publisher) from liability. However, *Zeran* is a defamation case that attempted to hold America Online (AOL) responsible as a speaker. *Id.* at 328. *Zeran* alleged AOL “unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter.” *Id.* Here, Plaintiffs are not seeking to hold Defendants accountable as speakers, but as a book publishers.

Defendant Amazon cites *Sandler v. Calcagni*, 565 F. Supp. 2d 184 (D.Me. 2008), which held that the defendant BookSurge was not liable *as a speaker* in a defamation case. That case is also distinguishable on the facts. BookSurge was a mere book printer (converting already published PDF’s into paper bound books). The Plaintiff in that case made defamation claims alleging libel and the torts false light and private facts. BookSurge would take a PDF file and print it. “Self-publishing authors upload their manuscripts...and pay BookSurge to transform those manuscripts into bound books...” *Id.* at 187. In the case at bar, Defendant Barnes & Noble, Smashwords and Amazon actually participate in the publishing process by providing a service that permits the author to upload, make changes, format, and edit the book in the program. Barnes & Noble, *FAQ, supra*, Ex. 2. Amazon, *FAQ, supra*, Ex. 3 at 4. Smashwords, *FAQ, supra*, Ex. 10 at 22. After the book is published, Defendants then provide a platform for sale of the work (a digital book store separate and distinct from their publishing activities). Barnes & Noble, *FAQ*, Ex. 2. Amazon, *FAQ*, Ex. C at 3. In *Sandler*, defendant BookSurge’s customer’s

generally “buy copies of their books...and self-distribute to local bookstores, distributors, friends, and family.” *Sandler*, 565 F.Supp. 2d 184, 190. The *Sandler* case is not applicable here because the facts are so very different.

The lines between publisher and bookseller have been blurred since the *Almeida* case was decided. The events in *Almeida* occurred from 2000 to 2003. At that time, Defendants were merely “internet bookseller[s] that provided services similar to a traditional book seller”. *Almeida*, 456 F.3d at 1325. Amazon entered the book publishing business in 2007, with its release of Kindle Direct Publishing. Amazon.com Press Release, 2011, Ex. 5. Barnes & Noble entered the publishing business in 2010 with PubIt, in 2013 with Nook Publishing, and again in 2014 with Nook Press Print Services. TechCruch article 2012, Ex. 5. Barnes & Noble Press Release, 2013, Ex.7. Barnes & Noble Press Release, 2014, Ex. 8. Smashwords, Inc. was created in 2008 and was incorporated in 2007. Smashwords, *About Smashwords*, <https://www.smashwords.com/about/supportfaq> Ex. 11 at 1. Smashwords is clearly a book publisher and serves that function for Apple who then sells the ebooks. Defendants in this case operate on a different business model and provided different services than they previously provided. As a consequence the previous case law should not be applied in this case because since those cases were decided the Defendants have entered a new business, that of book publisher.

The internet has evolved. Major publishers now promote and sell their books on their own websites, former online booksellers now publish books to sell on their websites. This does not now mean that book publishers should not be held accountable for violations of established intellectual property law, tort law, violations of rights of privacy, and other applicable laws. Defendants should be held accountable as book publishers in this case.

- c. Plaintiffs should recover under the Ohio Revised Code because the exemptions in the statute do not apply to this case, knowledge is not required for recovery, and Plaintiffs’ image does have commercial value.

Ohio Revised Code Chapter 2741 prohibits a person from “using any aspect of an individual’s persona for a commercial purpose: (1) during the individual’s lifetime...” without

the consent of that individual. Ohio Rev. Code § 2741.02 (A)(1). The statute does not prohibit the use in news broadcasts, public affairs, and the like. Ohio Rev. Code § 2741.02 (E). The Code also defines personal as “an individual’s name, voice, signature, photograph, image, likeness, or distinctive appearance, if any of these have commercial value.” Ohio Rev. Code § 2741.01 (A). Commercial purpose is “the use of or reference to an aspect of an individual’s persona (1) in connection with a place, product, merchandise, goods, services, or other commercial activities...” Ohio Rev. Code § 2741.01 (B). The statute provides the owner right to bring suit and penalties for a person who has violated the statute. Ohio Rev. Code § 2741.06 -07.

The statute specifically exempts literary or fiction works. Ohio Rev. Code § 2741.09. One Defendant’s Motion argues the ‘statute also fails because the book at issue was a fictional work and the statute “does not apply...”. Barnes & Noble Motion For Summary Judgment at 12, n.5. However, neither Ohio common law nor the Code defines the term literary or fiction work. Defendants’ interpretation of this subsection is incorrect. The statute creates the following exception:

- Section 2741.09 (A)(1)(a): creates an exception for “a literary work...fictional work... **other than an advertisement or commercial announcement not exempt under division (A)(1)(d) of this section;**”
 - This section creates the exemption for literary works other than advertisements or commercial announcements.
- Section 2741.09(A)(1)(d): creates an exception for “An advertisement or commercial announcement for a use permitted by division (A)(1)(a), (b), or (c) of this section.”
 - This section exempts advertisements or commercial announcements for literary works in (A)(1)(a), above.
- Section (A)(1)(a) then carves out an exception to the exception for those advertisements or commercial announcements which are not for items excepted under (A)(1)(a), (b), or (c).

Thus, if the work is a literary or fiction work, or an advertisement for the literary or fiction work, it is excepted under the chapter. Neither, the Code Chapter 2741 nor Ohio common law defines a literary or fiction work. Therefore, we must look elsewhere in the law to

find a definition. A well established definition of literary work is found in Federal Copyright law: 17 U.S.C. § 101 defines a literary work as “works, other than audiovisual works, **expressed in words, numbers, or other verbal or numerical symbols or indicia**, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.” (emphasis added). Using this definition, Plaintiff submits the photo at issue here does not constitute a literary or fiction work under this definition.

Only the author’s manuscript constitutes the literary or fiction work, since it is made of “words, numbers, or other verbal or numerical symbols...” 17 U.S.C. § 101. The photo of the Plaintiffs the Defendants used is a separate copyrightable aspect from the manuscript⁹. Defendants verified this separation of the image from the literary/fiction work when they required the author to change the photo on the cover of the book. The literary or fiction work itself remained totally the same. Pointedly, the Copyright Act defines photograph separately under the definition for “Pictorial, graphic, and sculptural works”. 17 U.S.C. § 101. Thus, Defendant’s manuscript is not at issue in this case, only the image of the plaintiffs

Plaintiffs certainly do not object to Defendant’ right to expression and advertisement. Plaintiffs object to the use of their persona on the cover of a raunchy fiction novel. That connection creates an association between the Plaintiffs, the characters in the book and the actions of those characters in the book. When a reader chooses a fictional work, the reader may use the image on the front of the book to create a mental image of the characters contained within. The things the protagonist does become the things the person on the cover does - to the reader they become one and the same person. “Book covers need to capture in images what the book is about. Good book covers communicate.” Hugo House, *supra*, Ex 1 at 6. This association of the Plaintiffs with *A Gronking to Remember* has subjected Plaintiffs to ridicule and embarrassment from other members in their small-town, conservative community.

⁹ The professional photographer who took the photo that was wrongfully appropriated did take a copyright on that very same photograph. Of course, the photographer does not have any rights in *A Gronking to Remember* the literary or fictional work.

The Defendants, in concert with the author, created this connection and Plaintiffs should have a right to recover damages for the unauthorized use by the Defendants.

Defendants assert there is no commercial value in Plaintiffs' persona. They cite *Kolcun v. Nationwide Ins. Co.*, No. C2-04-CV-1079, 2006 WL 1447299 (S.D. Ohio, May 24, 2006). In *Kolcun* the court found no violation of Chapter 2741 because the plaintiff in that case was an investigator and not a salesperson who would provide business for Nationwide and there was no evidence presented that Nationwide used Kolcun's name for a commercial purpose. Also, Kolcun knew of the use and did not alert Nationwide to stop the use. The action at issue in *Kolcun* was that Nationwide failed to remove a voicemail greeting. Here, Defendants acted as book publishers and failed to vet their author's works. That failure caused the publication of Plaintiffs' engagement photo on the cover of a less than tasteful book. After publication, the Defendants proceeded to sell the book, with Plaintiffs' image, for profit.

Black's Law Dictionary defines commercial value as "the rate of worth set on property or services." In *James v. Bob Ross Buick*, 167 Ohio App. 3d 338, 2006-Ohio-2638, 855 N.E.2d 119, the court found there was value in the salesman's name because his former employer used his signature to induce prospective clients' favor to Bob Ross Buick. *James* 167 Ohio App. at 343. That court relied on *Zacchini v. Scripps-Howard Broad. Co.*, 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976) and found that based on the facts in the case, there was commercial value in plaintiff's signature. The court in *James* found persuasive the *Ainsworth* case: "the appropriation of a plaintiff's image is more properly in the nature of a usurpation of the plaintiff's property rights, Illinois courts have held that it is proper to vindicate plaintiff's right to the use of his image against this deliberate violation, even if plaintiff cannot prove actual damages." *James*, 167 Ohio App. at 344 ((quoting *Ainsworth v. Century Supply Co.*, (1998) 295 Ill. App. 3d 644, 649-650, 230 Ill.Dec. 381, 693 N.E.2d 510)(internal quotes omitted)).

Here, the Roes could have sold their image for many purposes including for use on the cover of a pornographic novel, but chose not to. After removing Plaintiffs photo from the cover

of the book being offered for sale¹⁰, Defendant Noonan actually purchased another photo from a provider of such images. The fact the Roes chose not to capitalize on their engagement photo does not mean that they could not have done so; nor does that fact necessarily lead to any rational conclusion their persona does not have commercial value. Also, Defendants actually suggest that since the Roes continue in their desire to remain anonymous (as much as they can) in their connection with this pornographic book, in order to avoid further unwanted ridicule, shame and embarrassment, their likeness somehow lacks commercial value otherwise. This proposition is fallacious at best. If they were not seeking to protect their anonymity, the plaintiffs would be subject to the accusation they were aggravating rather than minimizing their damages.

- d. Plaintiffs should recover under the common law privacy tort theories for False Light Invasion of Privacy and for Appropriation Invasion of Privacy as adopted by the Supreme Court of Ohio.

- i. False Light Invasion of Privacy

In *Welling v. Weinfeld*, the Supreme Court of Ohio Recognized the privacy tort of false light, as it was outlined in the Restatement of Torts 2d § 652(e). *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E. 2d 1051. The court held “one who gives publicity to a matter concerning another that places the other before the public in a false light” is liable if “(a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted *in reckless disregard* as to the falsity of the publicized matter and the false light in which the other would be placed.” *Id.* at 464 (emphasis added).

¹⁰ It should be noted that even though the Defendants ultimately required the author to remove the Plaintiffs’ image from the cover of his book being offered for sale on their individual websites that did not remove the image from the cover of the book on the internet. A simple search will still find the Plaintiffs’ image adorning this pornographic book all over the internet. Apparently, the new reality is: once on the internet, always on the internet. Another reason a book publisher should be required to take great care before placing anybody’s image as the cover of a pornographic book on the internet.

Publicity requires that “the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.” *Id.* at 471.

The highly offensive standard “applies only when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity.” There must be “such a major misrepresentation of his character, history, or activities...” that a reasonable person would be offended. *Id.* at 472.

The knowledge element requires that the actor had “knowledge of or acted in reckless disregard as to the falsity of the matter and the false light in which the other would be placed...” *Id.* at 472. Liability attaches when the publishing party acts with knowledge or reckless disregard. *Id.* at 473.

Here, the Roe’s engagement photo was placed on the cover of “*A Gronking to Remember*”, a book that, by some, could be construed to have obscene or pornographic references. The book then caught the attention of the nation when it was the butt of jokes on late-night television. The image was spread over the internet and the news. Finally, portions were read out loud during the pre-Super Bowl press conference/media day. There are YouTube videos, recordings, and radio excerpts from interviews with a woman purporting to be the author all over the internet. In short, in a very brief period of time, the image of the Plaintiffs on the cover of this book essentially went viral.

The Roe’s take objection to their photo being associated with the book and its pornographic contents. Again, the reader looks at the cover of the book when determining whether to buy the book and when visualizing the characters within the book. Plaintiffs’ engagement photo was used, without their permission, for this purpose. It was commercialized in association with a raunchy fiction novel. This association subjected the Roes to ridicule, taunting, and ribald humor by people in their own community. The photo once a source of joy and fond memories, was converted into a source of humiliation and regret.

The author, Noonan, knew the content of the book was less than appropriate which is why he used a pseudonym and a “stand in” to conduct his interviews – the author did not want his true identity to be associated with the book. Boston.com, *I control the Boners*, <http://www.boston.com/sports/football/patriots/2015/01/06/control-the-boners-with-gronk-erotica-author-lacey-noonan/07sygY60JtQyY66I5IcvSM/story.html>, Ex. 9 at 1. Noonan acted recklessly when he expropriated the Roes engagement photo from the internet. He knew and admits he did not have permission to use the photograph. In so doing he acted in reckless disregard to the Roe’s privacy. He caused the couple in the photo to be associated *with a book that he did not even want to be associated with himself*.

The corporate defendant’s behavior was reckless when they provided a book publishing service without a minimal set of checks and balances for their role in the publishing of the book. Barnes & Noble claims it checks for plagiarism but that it relied solely on its terms of service (its own contract) for assertion of ownership of photos from its authors. Brock Decl. at ¶ 15. Defendant Amazon makes the same claim. Watson Decl. at ¶ 7. Smashwords also does not perform “editorial review of the books that authors and publishers publish...” Coker Decl. at ¶ 8. Defendants do not claim they performed any other check in relation to the covers of its book. This lack of checks of any sort when the author uploads a photo for publication constitutes reckless disregard in relation to the rights of others including copyright owners and private persons who have not licensed their photos to be placed on the cover of a raunchy book. A minimum standard to assure that such a thing would not occur would not “be impractical and prohibitively expensive” (Brock Decl. at ¶ 17) to Defendants. The Defendants could simply require from its partner authors written verification of a licensed photograph and/or a certification *when the author uploads* that he or she owns the photo by requiring documented disclosure of the photo’s origin and its permission for use.

All Defendants in this case claim concern with keeping the cost of producing the books low and relate this to the availability of their publishing services. Coker Decl. at ¶ 8-11. Brock decl. at ¶ 17. Watson decl. at ¶ 7. Yet, by raising this claim, Defendants create a question of fact for jury determination. What costs would a well-managed company incur by imposing the

minimum standards suggested above? The defendants claim that if they were required to vet their publications in order to prevent invasions in privacy or unauthorized use of copyrighted material they would have to shut down their publishing business. This suggestion is not only incredible it creates a question of fact for determination by a jury.

How costly is it for Defendants to require their partner authors to certify in documentary form where the artwork for the cover images from their books comes from; to certify in documentary form that the image is one that the author created; to certify, when the images are uploaded from the internet, that the image does not infringe on a copyright of another person; or, to certify, when the images are uploaded from the internet, that the image is being used with the permission of the individuals who are portrayed in the photo. These actions are the minimum standard that Defendants could maintain without requiring “impractical and prohibitively expensive” vetting standards. Brock Decl. ¶ 17. To claim otherwise creates a question of fact.

A reasonable person having had his or her stolen engagement photo plastered across a raunchy, cheap, somewhat obscene, pornographic novel and then made the butt of jokes for the entire late-night TV watching populace of the United States is certainly justified in being offended. A reasonable person having friends and family make comments on the photo and living in fear that co-workers and bosses, customers, potential customers and clients, would find out about the book for months up to the present are wronged and the law provides a remedy.

ii. Appropriation Invasion of Privacy

In *Zacchini*, the Supreme Court of Ohio, outlined the invasion of privacy tort of appropriation: “One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy, and the use or benefit need not necessarily be commercial.” *Zacchini v. Scripps-Howard Broad., Co.*, 47 Ohio St.2d 224, 351 N.E. 2d 454, 455 (Ohio 1976). By adopting this protection, the court sought to protect the right to the “exclusive use of [each individual’s] own identity... whether the misuse is for commercial

purpose or otherwise.” The court states that the “fundamental wrong is the appropriation.” *Id.* at 458.

The appropriate question in these cases does not revolve around profit from commercialization of the taken identity but “whether that taking and use constituted the appropriation of the defendant’s exclusive rights to his own likeness and identity.” *Id.* at 459. The court states “a man has a right in the publicity of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture...” *Id.* at 459.

Here, Plaintiffs had a right to the use of their photo to the exclusion of all but the photographer. The Defendants appropriated the photo when it was acquired without their knowledge or permission from the internet¹¹ and then uploaded to a book publishing service without any checks on whether the author owned or had rights to the photo. The Defendants all then used the book and the unexpected publicity of it to capitalize on the identity of the Roes. No one at any stage checked whether the author had the right to use the photo or where he got it. The author himself simply appropriated the image from the internet presumably without checking or paying for any right to use it as the cover of his book. He certainly never contacted the Roes nor did he obtain permission to use the image.

The Roes had the right to grant the exclusive privilege of using their likeness in conjunction with publishing a book. No Defendant in this case checked, in reckless disregard of plaintiffs’ rights, to determine if the author obtained a license or right to use the Roe’s photo in this manner. All of the Defendants in this case capitalized on that unauthorized use, throughout the publishing process before the book was offered for sale.

e. Standard for Motion for Summary Judgment

Defendants are only entitled to summary judgment if “it appears that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Sandler v. Calcagni*, 565 F. Supp. 2d 184, 191 (D.Me. 2008)(quoting Fed.R.Civ.P. 56(c)). This requires that an issue is genuine when “a reasonable jury could return a verdict for the

¹¹ The Plaintiffs did not place on social media or the internet otherwise the image that adorned the cover of this book. See attached Declarations of Jane Roe and John Roe.

nonmoving party.” *Sandler*, at 191 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248). And a material fact is such that it “has the potential to affect the outcome...” *Sandler*, at 192 (quoting *Nereida-Gonzales v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). Finally, under *Celotex* the moving party “must demonstrate an absence of evidence to support the nonmoving party’s case. *Sandler*, at 192 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325). “The court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor.” *Sandler*, at 192 (quoting *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004)).

Defendant Amazon confuses the issues when it argues Plaintiff’s case should fail because it “had no reason to know, of Noonan’s alleged unauthorized use of the photograph...” Amazon Motion for Summary Judgment at 10. Amazon also alleges that this knowledge element “is essential to the Roes’ case against Amazon...” *Id.* at 10. However, Chapter 2741 of the Ohio Revised Code makes no mention of a knowledge requirement within the text. In the case Amazon cites in support of this proposition *The Ohio State University v. Skreened*, 16 F. Supp 3d 905, 915-916, the Court makes no mention of a knowledge requirement in its discussion of the state law claim to which Amazon directs the Court.

Defendant Amazon also references *Almeida* again for its claim that Plaintiffs need to prove knowledge. It cites note three in the *Almeida* case as authority. However, the court in that case was addressing Defendant Amazon’s liability under the CDA and the Digital Millennium Copyright Act (DMCA). The Court stated that “Congress’ approach in the [DMCA], in which it granted copyright infringement immunity to innocent service providers who can provide that they do not have actual *or constructive knowledge* of the copyright infringement.” *Almeida*, 464 F.3d 1316, 1321 n.3 (emphasis added). This observation does not require a finding that the Ohio Revised Code requires Defendants to have knowledge of the unauthorized use. The Court merely stated that Amazon had neither liability nor knowledge under the facts of that case and the application of laws not at issue here.

Plaintiffs need not show knowledge under the state law statute. There is no mention within Chapter 2741 of the Ohio Revised Code of a knowledge requirement. The statute prohibits the

use of another's persona "...a person shall not use any aspect of an individual's persona for commercial purpose..." Ohio Rev. Code § 2741.01 (A). The statute makes mention of knowledge in order to recover for treble damages for "a party identified in division (E) of section 2471.02 of the Revised Code who has knowledge of the unauthorized use of the persona..." Ohio Rev. Code § 2471.07 (D)(2). Plaintiff need only make this showing of knowledge for the purpose of recovering treble damages, but does *not* prevent Plaintiff from recovery at all under the statute. Additionally, knowledge under state law includes not only actual knowledge but also the knowledge that should have been known absent the reckless disregard in failing to vet the image as part of the publishing process in conjunction with the author. This knowledge or lack of knowledge is a question of fact.

Plaintiffs submit there are multiple genuine and material issues of fact including that Defendants are book publishers not mere booksellers. Plaintiffs submit this status is sufficient to establish the Defendants' liability and prevents the application of the Communications Decency Act, a question of law. Contrary to the Defendants' claims, there are genuine issues of material fact and all Defendants fail in their burden to prove otherwise.

Defendant Smashwords raises the argument that Plaintiff's claim should be dismissed under *Potter v. Clark* (citation). Smashwords Motion for Summary Judgment at 3. Plaintiffs cite to *Potter* in stating the claim should be dismissed for failure to allege a factual or legal allegation against Smashwords. If that is true, Defendant Smashwords should have filed a motion to dismiss rather than a motion for summary judgment. Following the quote the Defendant cites, the court in *Potter*, went on to say "Assuming, *arguendo*, that plaintiff's allegations were properly addressed to defendant by virtue of his actions, we nevertheless find that the complaint was properly dismissed for failure to raise issues cognizable under 42 U.S.C. § 1983." *Potter v. Clark*, 497 F.2d 1206, 1208 (1974). That court considered each of the Plaintiff's allegations prior to dismissing his claim and found them lacking in substance. The case was not dismissed solely on the fact that the Plaintiff neglected to address, by name, specific persons

within the complaint who are already identified in the caption.¹² That plaintiff in that case did not allege sufficient facts to support a recovery under the statute at issue in that case – contrary to the allegations against the defendants in this case.

In the case at bar, Plaintiffs did not address Smashwords by name within the complaint for good reason. Plaintiffs agreed with all defense counsel (including Smashwords current counsel) before there was a ruling on the motion for leave to amend in order to obtain an agreement to the amendment to add another similarly situated corporate defendant. The history is:

1. Plaintiffs filed a request to amend the complaint after receiving information in the summary judgment motion of Apple that there was a Defendant about whom Plaintiffs had no prior knowledge and whom they concluded should have been properly included in the original complaint (another publisher, the one used by Apple).
2. Plaintiffs' counsel met with Defendants' counsel on June 24, 2015 after filing the request and an agreement was reached that the other defendants would not oppose the addition of a new defendant as long as the allegations of the original complaint remained the same.
3. On June 24, 2015, Plaintiffs' counsel obtained that agreement, prior to receiving the Court's approval, with the stipulation that Plaintiffs' counsel would not amend the text of the complaint but would only amend the caption to include the new Defendant. In that event, Defendants would not make objection to the request to amend the complaint and the amended could occur by agreement rather than requiring further intervention by the Court.
4. Plaintiffs' counsel agreed to this stipulation with no reasonable expectation it would not later be used against Plaintiffs by Defendants' counsel. It was done so that the Court's time would not be wasted.
5. On June 29, 2015, the Court approved Plaintiffs' motion but Plaintiffs nonetheless adhered to their earlier agreement with Defendants.

¹² The role played by Smashwords as a publisher of the book is already well documented in the record of this case in the Motion for Summary Judgment filed by Apple. It seems disingenuous now for that major player in these circumstances to claim it does not know its role or what claims are being asserted against it along with the other corporate defendants.

6. The amended complaint makes the same allegations against Smashwords, as a corporate defendant, as the allegations against the other corporate defendants.

Potter was decided in 1974, and since then the Supreme Court decided *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) and then *Ashcroft v. Iqbal*, 129 S. Ct. 1937, (2009). The Court in *Iqbal*, explained the *Twombly* decision further, to wit: there is a two-step process in determining the sufficiency of a complaint under Rule 8(a) of the Federal Rules of Civil Procedure. First, the court may disregard conclusory allegations that are not well pleaded and need not be accepted as true. *Iqbal*, 129 S.Ct. at 1949. Second, the court may assess the remaining allegations to determine whether they plausibly state a claim for relief. *Iqbal*, 129 S.Ct. at 1950.

Defendant Smashwords also added that it should be dismissed with prejudice, “because the Roes cannot truthfully amend their complaint to include any triable claim against Smashwords”. Smashwords Motion for Summary Judgment at 12. Plaintiffs submit the facts stated within the complaint apply to Defendant Smashwords as equally to the defendants Amazon and Barnes & Noble. Plaintiffs could truthfully amend the complaint and include Smashwords by name in paragraph 2 of claim 1, along with the other named Defendants in this case. The allegations within the complaint went unchanged due to an agreement with opposing counsel based upon an understanding that Plaintiffs would not obtain an agreement to amend the complaint without such condition.

Thus, under the standard outlined above from *Iqbal*, 129 S. Ct. 1937, (2009), Plaintiffs have alleged sufficient facts to overcome a dismissal with prejudice. In their complaint Plaintiffs allege that a book was published, the author was Jane Doe, the cover included a photo of Plaintiffs that was appropriated and used for commercial gain. At the time Plaintiffs submitted the complaint, further information was needed to litigate the complaint and Smashwords was unknown to Plaintiffs. Plaintiffs also made sufficient allegations under Chapter 2741 of the Ohio Revised Code and under Ohio tort law. Under notice pleading the claims against Smashwords are clear. There are no longer demurrers. The facts and claims alleged within the amended complaint are sufficient to overcome Defendant Smashword’s request for dismissal.

IV. Conclusion

All three defendants, Barnes & Noble, Amazon and Smashwords, worked in concert with the author to jointly publish the book, *A Gronking to Remember*. They placed the plaintiffs' photo on the cover of this pornographic book without the permission of the plaintiffs. These three defendants are publishers and not mere booksellers. This Memorandum shows there is, at the very least, a question of fact for jury determination as to whether these defendants were publishers. This memorandum also identifies additional questions of fact precluding the issuance of a summary judgment. As publishers, these three defendants owe legal duties to the plaintiffs as a consequence of using, for commercial gain, the photo of the plaintiffs without their consent (or, even knowledge, until the photo was placed all over the internet and national media). The law provides civil remedies for these wrongful acts and those remedies are set forth in the plaintiffs' First Amended Complaint. These defendants are not legally entitled to have their motions for summary judgment sustained.

/s/ Shelee M. Busch

Shelee M. Busch (0091954)
BUSCH LEGAL SERVICES
22 North Short Street
Troy, Ohio 45373
Telephone: 937-829-6697
Email: SheleeBusch@gmail.com
Attorney for Plaintiffs

/s/ David E. Beitzel

David E. Beitzel (0018224), Trial Attorney
BEITZEL LAW OFFICE
22 North Short Street
Troy, Ohio
Telephone: 937-440-9220
Facsimile: 888-779-7765
Email: dbeitzel@beitzelaw.LegalOffice.pro
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 19th day of June, 2015, the forgoing document was filed electronically with the Clerk of Court using 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/ David E. Beitzel
David E. Beitzel (0018224)
Attorney for Plaintiffs