

No. 16-3987

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

JOHN ROE, et al.,

Plaintiffs-Appellants,

v.

AMAZON.COM, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio
Western Division
Hon. Thomas M. Rose
No. 3:15-cv-00111-TMR

**OPPOSITION BRIEF OF
DEFENDANT-APPELLEE SMASHWORDS, INC.**

Peter K. Stris
Elizabeth Rogers Brannen
Dana Berkowitz
Victor O'Connell
STRIS & MAHER LLP
725 S. Figueroa Street, Suite 1830
Los Angeles, CA 90017
Telephone: (213) 995-6800
Facsimile: (213) 261-0299

Counsel for Defendant-Appellee
Smashwords, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee Smashwords, Inc., hereby files its corporate disclosure statement as follows. Smashwords, Inc. is a privately held corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES.....	iv
STATEMENT REGARDING ORAL ARGUMENT.....	ix
INTRODUCTION	1
JURISDICTIONAL STATEMENT	2
STATEMENT OF ISSUES	3
STATEMENT OF THE CASE.....	3
I. FACTUAL BACKGROUND	3
A. Smashwords Is A Free Ebook Self-Publishing Platform And Distributor.....	3
B. McKenna Self-Publishes <i>Gronking</i> Through Smashwords	6
II. PROCEDURAL HISTORY.....	11
SUMMARY OF ARGUMENT.....	14
STANDARD OF REVIEW	16
ARGUMENT	16
I. THE DISTRICT COURT CORRECTLY GRANTED SMASHWORDS SUMMARY JUDGMENT ON FIRST AMENDMENT GROUNDS	16
A. Smashwords Cannot Be Held Liable For Distributing <i>Gronking</i> Because It Lacked Knowledge Of Any Wrongdoing.....	17
B. Smashwords Cannot Be Held Liable For Creating <i>Gronking</i> Because It Did Not Actively Participate In Creating The Allegedly Tortious Speech.....	21

II.	THE COMMUNICATIONS DECENCY ACT IS AN INDEPENDENT BASIS TO AFFIRM	23
III.	AFFIRMANCE IS ALSO WARRANTED BECAUSE PLAINTIFFS’ CLAIMS FAIL AS A MATTER OF OHIO LAW	25
A.	The Statutory Publicity Claim (Ohio Rev. Code § 2741) Fails As A Matter Of Law	26
1.	Ohio Rev. Code § 2741 Does Not Prohibit The Use Of The Photograph Of Young Couple 1 On The Cover Of <i>Gronking</i>	27
2.	Ohio Rev. Code § 2741 Specifically Permits The Use Of The Photograph Of Young Couple 1 On The Cover Of <i>Gronking</i>	32
B.	The Ohio Common Law Invasion Of Privacy Claim Fails As A Matter Of Law	35
1.	Plaintiffs’ Wrongful Appropriation Theory Of Invasion Of Privacy Is Untenable	36
2.	Plaintiffs’ False Light Theory Of Invasion Of Privacy Is Untenable	38
C.	The Restatement Of Torts § 652 Claim Is Not Actionable	40
	CONCLUSION	42
	CERTIFICATE OF COMPLIANCE	43
	DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS	44
	CERTIFICATE OF SERVICE	45

TABLE OF AUTHORITIES

Cases

<i>AE, Inc. v. Goodyear Tire & Rubber Co.</i> , 168 P.3d 507 (Colo. 2007)	40
<i>Alahverdian v. Grebinski</i> , No. 3:13-CV-00132, 2014 WL 2048190 (S.D. Ohio May 19, 2014)	41
<i>Almeida v. Amazon.com, Inc.</i> , 456 F.3d 1316 (11th Cir. 2006)	31, 32
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	16
<i>Ashby v. Hustler Magazine, Inc.</i> , 802 F.2d 856 (6th Cir. 1986)	40
<i>Authors Guild v. Google, Inc.</i> , 770 F. Supp. 2d 666 (S.D.N.Y. Mar. 22, 2011)	34
<i>Baumer v. Franklin Cty. Distilling Co.</i> , 135 F.2d 384 (6th Cir. 1943)	30
<i>Bosley v. WildWetT.com</i> , 310 F. Supp. 2d 914 (N.D. Ohio Mar. 31, 2004)	31, 32
<i>Botts v. N.Y. Times Co.</i> , No. 03-1582, 2003 U.S. Dist. LEXIS 23785 (D.N.J. Aug. 29, 2003)	39
<i>Cardozo v. True</i> , 342 So. 2d 1053 (Fla. Dist. Ct. App. Feb. 23, 1977)	17
<i>Carson v. Here's Johnny Portable Toilets, Inc.</i> , 698 F.2d 831 (6th Cir. 1983)	27, 28
<i>Cubby, Inc. v. CompuServe Inc.</i> , 776 F. Supp. 135 (S.D.N.Y. Oct. 29, 1991)	18

<i>Dunne v. Hanson</i> , No. L-01-1414, 2002 WL 947273 (Ohio Ct. App. May 10, 2002)	40
<i>Elgharib v. Napolitano</i> , 600 F.3d 597 (6th Cir. 2010)	34
<i>ETW Corp. v. Jireh Publ’g, Inc.</i> , 332 F.3d 915 (6th Cir. 2003).....	<i>passim</i>
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323, 347 (1974).....	23
<i>Hustler Magazine, Inc. v. Falwell</i> , 485 U.S. 46 (1988).....	16
<i>Jackson v. Playboy Enters., Inc.</i> , 574 F. Supp. 10 (S.D. Ohio April 1, 1983)	37, 41
<i>James v. Bob Ross Buick, Inc.</i> , 855 N.E.2d 119 (Ohio Ct. App. 2006)	35, 41
<i>Jones v. Dirty World Entm’t Recordings LLC</i> , 755 F.3d 398 (6th Cir. 2014)	24
<i>Kimzey v. Yelp! Inc.</i> , 836 F.3d 1263 (9th Cir. 2016)	24
<i>Kolcun v. Nationwide Mut. Ins. Co.</i> , No. 2:04-CV-01079, 2006 WL 1447299 (S.D. Ohio May 24, 2006)	28, 30
<i>Lerman v. Flynt Distrib. Co.</i> , 745 F.2d 123 (2d Cir. 1984).....	21
<i>Moore v. Weinstein Co.</i> , 545 F. App’x 405 (6th Cir. 2008).....	35
<i>Parisi v. Sinclair</i> , 774 F. Supp. 2d 310 (D.D.C. Mar. 31, 2011).....	21

<i>Patrick v. Cleveland Scene Publ'g</i> , 582 F. Supp. 2d 939 (N.D. Ohio 2008).....	38, 40
<i>Power v. Kirkpatrick</i> , No. 99AP-1026, 2000 WL 992028 (Ohio Ct. App. July 20, 2000).....	30
<i>Publ'ns Int'l, Ltd. v. Landoll, Inc.</i> , 164 F.3d 337 (7th Cir. 1998).....	35
<i>Reeves v. Fox Television Network</i> , 983 F. Supp. 703 (N. D. Ohio April 30, 1997)	36, 37, 38
<i>Ruffin-Steinback v. dePasse</i> , 267 F.3d 457 (6th Cir. 2001).....	28
<i>Sandler v. Calcagni</i> , 565 F. Supp. 2d 184 (D. Me. July 18, 2008).....	21, 22, 23
<i>Smith v. California</i> , 361 U.S. 147 (1959).....	17, 20
<i>St. Amant v. Thompson</i> , 390 U.S. 727 (1968).....	40
<i>Sustin v. Fee</i> , 69 Ohio St. 2d 143 (1982)	41
<i>Time, Inc. v. Hill</i> , 385 U.S. 374 (1967).....	17
<i>Vinci v. Am. Can Co.</i> , 591 N.E.2d 793 (Ohio Ct. App. 1990).....	31, 37, 39
<i>Welling v. Weinfeld</i> , 866 N.E.2d 1051 (Ohio 2007)	38, 39
<i>Zacchini v. Scripps-Howard Broad. Co.</i> , 433 U.S. 562 (1977).....	26, 28

<i>Zacchini v. Scripps-Howard Broad. Co.</i> , 351 N.E.2d 454 (Ohio 1976), <i>rev'd on other grounds</i> , 433 U.S. 562 (1977).....	26, 31, 37
---	------------

<i>Zeran v. Am. Online, Inc.</i> , 129 F.3d 327 (4th Cir. 1997).....	18, 24
---	--------

Statutes

28 U.S.C. § 1332.....	2
47 U.S.C. § 230(c)(1).....	24
47 U.S.C. § 230(e)(3).....	24
Communications Decency Act, 47 U.S.C. § 230.....	<i>passim</i>
The Copyright Act of 1976, 17 U.S.C. § 101 <i>et seq.</i>	34
Ohio Rev. Code § 2741.01	29
Ohio Rev. Code § 2741.01(A)	27, 28
Ohio Rev. Code § 2741.01(B)	27
Ohio Rev. Code § 2741.02(A)	27
Ohio Rev. Code § 2741.09(A)(1)(a)	33
Ohio Rev. Code § 2741.09(A)(1)(d).....	33

Other Authorities

Harry Kalven, Jr., <i>Privacy in Tort Law—Were Warren and Brandeis Wrong?</i> , 31 Law & Contemp. Prob. 326 (1966)	28
J. McCarthy, <i>The Rights of Publicity and Privacy</i> § 6.1 (2d ed. 2000)	26
Prosser & Keeton, <i>The Law of Torts</i> 803 (5th ed. 1984)	23

Restatement (Second) of Torts § 652.....	1, 12, 25
Restatement (Second) of Torts § 652C	31
Restatement (Second) of Torts § 652E	38
Restatement (Third) of Unfair Competition § 47	35
Tim Keeney, <i>Super Bowl Media Day 2015: Best Moments, Highlights and Twitter Reaction,</i> Bleacher Report (Jan. 27, 2015)	9

Rules

Fed. R. Civ. P. 54(b)	3
Fed. R. Civ. P. 56(d)	13

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants John and Jane Roe have not requested oral argument. Defendant-Appellee Smashwords, Inc. agrees that oral argument is not necessary. In our view, this appeal does not seriously challenge the district court's order granting summary judgment and the dispositive issues have been authoritatively decided.

If this Court would find oral argument helpful to the decisional process, Smashwords, Inc. will participate to ensure that the Court receives a full and fair presentation of the issues.

INTRODUCTION

A Gronking To Remember (“*Gronking*”) is a self-published erotic novel that describes the imaginary escapades of real-life professional athlete Rob Gronkowski. John and Jane Roe (“Plaintiffs”) are an unidentified couple who allege that their photograph briefly appeared on the cover of *Gronking* without their consent. They maintain that the use of their image in this context embarrassed them.

Plaintiffs brought this lawsuit against Greg McKenna, the individual who wrote *Gronking*, selected its cover art, and self-published it. The operative complaint alleges three violations of Ohio law: (1) publicity in violation of Ohio Rev. Code § 2741; (2) invasion of privacy under Ohio common law; and (3) invasion of privacy under the Restatement (Second) of Torts § 652. Those claims against McKenna continue to be litigated in the district court.

Plaintiffs also sued three corporate entities for the same violations of Ohio law: Amazon.com (“Amazon”), Barnes & Noble, Inc. (“Barnes & Noble”), and Smashwords, Inc. (“Smashwords”) (collectively, the “Corporate Defendants”). Each Corporate Defendant offers self-publishing services to independent authors on the express condition that they secure all necessary rights and permissions before uploading their works. Each Corporate Defendant also distributes self-published titles. McKenna used all three services to self-publish *Gronking*.

The district court granted summary judgment to the Corporate Defendants and entered final judgment in their favor upon Plaintiffs' request. It did so by correctly answering an important question of constitutional law: whether the First Amendment permits plaintiffs to hold the Corporate Defendants liable for content created by self-published authors who use the services offered by the Corporate Defendants to publish their works. Plaintiffs argued that the Corporate Defendants are liable for any tortious content they distribute. Applying longstanding First Amendment principles that require plaintiffs to show that defendants are sufficiently responsible for offending speech, the district court rejected that argument.

Should it prefer to avoid constitutional questions, this Court can affirm on either of two alternative grounds. First, the Communications Decency Act, 47 U.S.C. § 230 ("CDA"), precludes Plaintiffs' claims against the Corporate Defendants. Second, Plaintiffs have not introduced evidence sufficient to reach a jury on any of their three state law claims. Nor could they as a matter of Ohio law: Plaintiffs' likeness lacks "commercial value," and McKenna did not select it because of who they are. Put simply, Ohio law does not reach any conduct in this case.

JURISDICTIONAL STATEMENT

The district court has diversity jurisdiction over this action under 28 U.S.C. § 1332 because Plaintiffs alleged damages exceeding \$75,000 and all parties are citizens of different states. Notice of Removal, R. 1, Page ID # 1-5. On July 27, 2016,

the district court entered final judgment on all claims in favor of the Corporate Defendants. Rule 54(b) Order, R. 63, Page ID # 1020-1025. On August 24, 2016, Plaintiffs timely filed a notice of appeal. Notice of Appeal, R. 65, Page ID # 1027-1028. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The district court entered summary judgment in favor of Smashwords on all three of Plaintiffs' claims and thereafter entered final judgment pursuant to Fed. R. Civ. P. 54(b). The issue before this Court is whether that judgment should be affirmed on any of three independent grounds asserted by Smashwords below: (1) Plaintiffs cannot meet their burden under the First Amendment to show that Smashwords either knew of the offending speech or actively participated in creating it; (2) the CDA immunizes Smashwords against Plaintiff's claims based upon content provided by McKenna; and (3) Plaintiffs have failed to introduce sufficient evidence to reach a jury on any of their state law claims.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Smashwords Is A Free Ebook Self-Publishing Platform And Distributor.

Smashwords founder Mark Coker believes that no author should have to convince a publisher of the merit of her work to reach the public; rather, the public should judge for itself. Second Coker Declaration, R. 42-1, Page ID # 629. In 2008,

he launched Smashwords to enable independent authors to “self-publish.” First Coker Declaration, R. 20-3, Page ID # 174. Smashwords’ software automatically converts manuscripts submitted by authors in Microsoft Word format into electronic publication (“EPUB”) files. First Coker Declaration, R. 20-3, Page ID # 175.

To ensure that self-publishing is accessible to all, Smashwords charges no up-front fees. Second Coker Declaration, R. 42-1, Page ID # 630. It earns all its income on commission from ebook sales. Second Coker Declaration, R. 42-1, Page ID # 630. Smashwords distributes these self-published ebooks to leading online retailers and public libraries as well as for sale on its own website. Second Coker Declaration, R. 42-1, Page ID # 630. Smashwords has become the world’s largest distributor of independently published electronic books (“ebooks”), with a catalog of over 360,000 titles by over 100,000 self-published authors and small independent publishers. Second Coker Declaration, R. 42-1, Page ID # 630.

Smashwords’ no-fee business model is viable only because Smashwords does not perform any of the costly functions of a traditional publishing house. Second Coker Declaration, R. 42-1, Page ID # 630. Smashwords does not review the quality of submissions or revise them.¹ Self-published authors retain complete editorial control over their books. Second Coker Declaration, R. 42-1, Page ID # 629. They

¹ Nor does Smashwords represent to third parties that it undertakes any editorial review of the ebooks that others publish using its service. Second Coker Declaration, R. 42-1, Page ID # 630.

set their own prices, select and upload their own cover art, write their own book descriptions, and generally manage the marketing and promotion of their books. Second Coker Declaration, R. 42-1, Page ID # 629.

Smashwords nevertheless takes substantial steps to prevent authors from self-publishing tortious content. It requires all users to accept its Terms of Service before uploading any title. Second Coker Declaration, R. 42-1, Page ID # 630. The author makes specific representations and warranties regarding the work, including:

- That it “contains no materials that violate any right of privacy which is libelous or violate any personal right of any kind of any person or entity * * * or violate state and federal laws.”
- That the author has secured “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.”
- That the author “is the only author of the Work; is the sole owner the rights * * * granted; * * * [and] has full right, power, and authority to enter into this Agreement and to grant the rights granted * * * .”

Second Coker Declaration Exhibit A, R. 42-2, Page ID # 637-640. The author also agrees to indemnify Smashwords and its distributors against any contrary claims.

First Coker Declaration Exhibit 10, R. 20-3, Page ID # 235.

Smashwords also spot-checks each submission to detect blatant violations of its Terms of Service. Second Coker Declaration, R. 42-1, Page ID # 631. A trained Smashwords employee looks at the cover image, book description, and other data for obvious indicia of impropriety. Second Coker Declaration, R. 42-1, Page ID #

631. For example, the employee would flag a book that is tagged as “erotica” and that depicts a child on its cover because underage characters in sexual circumstances violate the Terms of Service. Second Coker Declaration, R. 42-1, Page ID # 631.

Submissions that pass this spot-check are approved for Smashwords’ Premium Catalog, which means that these ebooks may be distributed to other retailers and library partners. First Coker Declaration, R. 20-3, Page ID # 175; Second Coker Declaration, R. 42-1, Page ID # 630-631. Any subsequent revisions to the book cover, text, title, or description are re-reviewed. First Coker Declaration, R. 20-3, Page ID # 175-176; Second Coker Declaration, R. 42-1, Page ID # 631-632. Although Smashwords cannot ensure that the thousands of submissions it receives every week are non-infringing, it generally catches apparent violations. Second Coker Declaration, R. 42-1, Page ID # 632.²

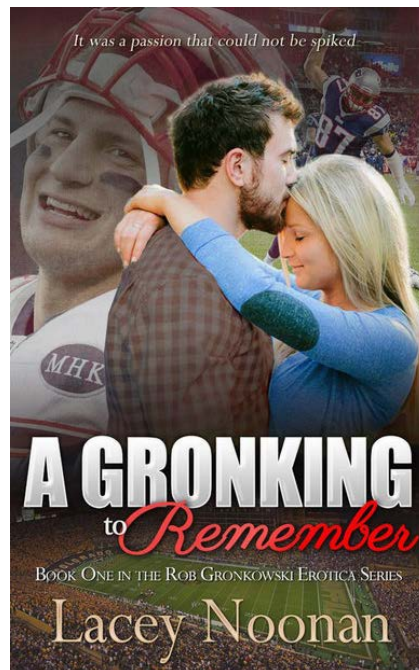
B. McKenna Self-Publishes *Gronking* Through Smashwords.

Defendant Greg McKenna wrote and self-published *Gronking* under the female pseudonym “Lacey Noonan.” First Amended Complaint, R. 28, Page ID # 541; McKenna Declaration, R. 20-4, Page ID # 240. The book is a fictional work of erotica and satire that “features the make-believe exploits of a married woman

² Smashwords’ community members, downstream retailers, and customers also notify Smashwords of improper material after publication. Second Coker Declaration, R. 42-1, Page ID # 631.

who becomes fascinated with the New England Patriots football player Rob Gronkowski.” McKenna Declaration, R. 20-4, Page ID # 240.

McKenna created the cover of *Gronking* and revised it over time. McKenna Declaration, R. 20-4, Page ID # 240-243. This case is about the image of the young couple (“Young Couple 1”) that appeared on early versions:



McKenna found the image by searching the Internet for “romantic photos” and “couples embracing” and selecting a photograph from Tumblr, a popular website that allows users to post photographs and other content. McKenna Declaration, R. 20-4, Page ID # 241. There is no evidence that the image bore a copyright designation or any other indicia of use restrictions.

In late 2014, McKenna self-published *Gronking* through services provided by the Corporate Defendants, including Smashwords. McKenna Declaration, R. 20-4,

Page ID # 241; First Coker Declaration, R. 20-3, Page ID # 176. It is undisputed that Smashwords “did not have any role in creating, designing or editing the cover or content of *Gronking*.” McKenna Declaration, R. 20-4, Page ID # 241.

On December 29, 2014, McKenna agreed to Smashwords’ Terms of Service and uploaded the book with a cover depicting Young Couple 1 and Gronkowski. McKenna Declaration, R. 20-4, Page ID # 241, 244; First Coker Declaration, R. 20-3, Page ID # 176. Smashwords made *Gronking* available for sale on its website that day. First Coker Declaration, R. 20-3, Page ID # 176. On January 12, 2015, Smashwords accepted the ebook into its Premium Catalog after McKenna edited the cover to eliminate links to other retailers. McKenna Declaration, R. 20-4, Page ID # 242; First Coker Declaration, R. 20-3, Page ID # 177.

On January 13, 2015, McKenna modified the photograph of Gronkowski on the cover to look like a drawing and uploaded the revised title to Smashwords. McKenna Declaration, R. 20-4, Page ID # 241. Smashwords accepted the book into its Premium Catalog again after re-reviewing it that day. First Coker Declaration, R. 20-3, Page ID # 177.³

On or around January 27, 2015, *Gronking* became momentarily newsworthy when it was mentioned during media day for the Super Bowl. First Amended

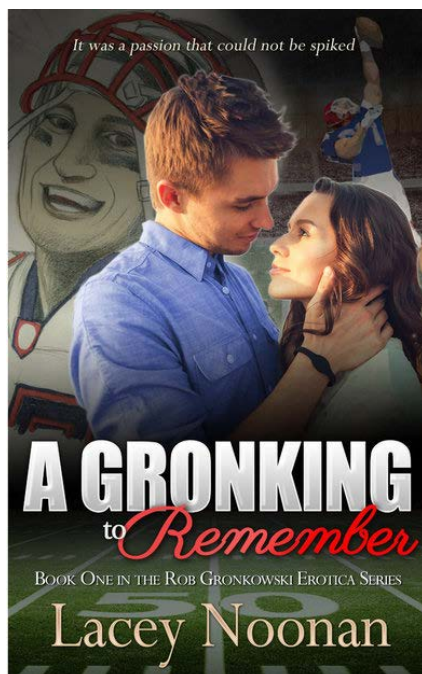
³ It is not uncommon for authors to revise book covers. Second Coker Declaration, R. 42-1, Page ID # 632.

Complaint, R. 28, Page ID # 541; John Roe Declaration, R. 51-13, Page ID # 872; Jane Roe Declaration, R. 51-12, Page ID # 867. Comedians Jimmy Kimmel and Jimmy Fallon also mentioned it on their late-night shows. First Amended Complaint, R. 28, Page ID # 541; John Roe Declaration, R. 51-13, Page ID # 872; Jane Roe Declaration, R. 51-12, Page ID # 867.⁴

As Smashwords later learned, McKenna received a cease-and-desist letter from Plaintiffs' counsel on January 29, 2015. McKenna Declaration, R. 20-4, Page ID # 242-243. No one provided the letter to Smashwords at the time. First Coker Declaration, R. 20-3, Page ID # 178.

The next day, McKenna replaced the photograph of Young Couple 1 with a stock photograph of a different young couple ("Young Couple 2") and uploaded the revised cover to Smashwords:

⁴ *Gronking* was not even the most newsworthy Gronkowski story from that day. See, e.g., Tim Keeney, *Super Bowl Media Day 2015: Best Moments, Highlights and Twitter Reaction*, Bleacher Report (Jan. 27, 2015), <http://bleacherreport.com/articles/2344219-super-bowl-media-day-2015-best-moments-highlights-and-twitter-reaction#> (Gronkowski "revealed his childhood crush was Pamela Anderson and then did a little Katy Perry karaoke * * * .").



McKenna Declaration, R. 20-4, Page ID # 242-243; First Coker Declaration, R. 20-3, Page ID # 178. On February 1, 2015, Smashwords accepted the book with the cover depicting Young Couple 2 into the Premium Catalog. First Coker Declaration, R. 20-3, Page ID # 178.

Over a week later, Smashwords first learned from retail partner Apple, Inc. that there were legal questions about the photograph of Young Couple 1. First Coker Declaration, R. 20-3, Page ID # 179 (describing February 9, 2015 email). Smashwords had no reason to know of Plaintiffs' concerns before then. *See* First Coker Declaration, R. 20-3, Page ID # 179; McKenna Declaration, R. 20-4, Page ID # 242 (the Corporate Defendants "did not know or have any reason to know that the images I used for the cover of *Gronking* were the plaintiffs in this action or that those images were used without express permission."). Although Plaintiffs claim in a

footnote in their brief to this Court, “As soon as they contacted counsel a cease and desist request was made of the corporate Defendants * * *,” Amended Brief of Plaintiffs-Appellants (“Br.”) at 7 n.3, that is incorrect. No cease-and-desist request was *ever* made to Smashwords.

Smashwords facilitated the sale of a total of five copies of *Gronking* with the photograph of Young Couple 1 on the cover. Second Coker Declaration, R. 42-1, Page ID # 632.⁵

II. PROCEDURAL HISTORY

Plaintiffs claim to be Young Couple 1. They allegedly authorized a photographer to place their photograph on the Internet to advertise her business but did not authorize anyone else to use it. Jane Roe Declaration, R. 51-12, Page ID # 866-867; John Roe Declaration, R. 51-13, Page ID # 871-872. Plaintiffs contend that the use of their image in the “less than tasteful” context of *Gronking* embarrassed them. First Amended Complaint, R. 28, Page ID # 541.

On February 24, 2015, Plaintiffs commenced this action by suing McKenna, Amazon, Barnes & Noble, and Apple, Inc. (“Apple”) in Ohio state court. *See* Notice of Removal, R. 1, Page ID # 9-16. They alleged three violations of Ohio law: (1) use of the Roes’ persona for commercial purposes in violation of Ohio Rev. Code § 2741;

⁵ This figure excludes sales in the iBooks store of now-dismissed Defendant Apple Inc. Second Coker Declaration, R. 42-1, Page ID # 632.

(2) invasion of their privacy under Ohio common law; and (3) invasion of their privacy under the Restatement of Torts § 652. *Id.* On March 27, 2015, Defendants removed to federal court. Notice of Removal, R. 1, Page ID # 1-5.

In June of 2015, Amazon, Barnes & Noble, and Apple moved for summary judgment. Apple Inc.'s Motion for Summary Judgment, R. 20, Page ID # 114-115. Apple's motion put Plaintiffs on notice that McKenna had used Smashwords to self-publish the version of *Gronking* that Apple sold. Memo. in Support of Apple Inc.'s Motion for Summary Judgment, R. 20-1, Page ID # 120-121.

On July 7, 2015, Plaintiffs amended the Complaint to add Smashwords as a defendant. First Amended Complaint, R. 28, Page ID # 540. The First Amended Complaint contains no factual or legal allegations about Smashwords. It merely adds Smashwords to the case caption. *Compare* Complaint, R. 7, Page ID # 46-51 *with* First Amended Complaint, R. 28, Page ID # 540-544.

Later that month, Amazon, Barnes & Noble, and Apple renewed their motions for summary judgment on the First Amended Complaint. *See* Barnes & Noble, Inc.'s Motion for Summary Judgment, R. 32, Page ID # 569-570; Amazon.com's Motion for Summary Judgment, R. 37, Page ID # 590-591; Apple Inc.'s Motion for Summary Judgment, R. 39, Page ID # 594-596.⁶ And on September 9, 2015,

⁶ Plaintiffs voluntarily dismissed Defendant Apple from this action on November 25, 2015. Dismissal Stipulation, R. 58, Page ID # 979-981.

Smashwords filed its own motion. *See* Smashwords, Inc.’s Motion for Summary Judgment, R. 43-1, Page ID # 650-670.

The Corporate Defendants argued that Plaintiffs could not establish their state law claims and that the First Amendment and the Communications Decency Act independently precluded liability. *See, e.g.*, Smashwords, Inc.’s Motion for Summary Judgment, R. 43-1, Page ID # 650-670.

Plaintiffs did not seek additional discovery or attempt to invoke Fed. R. Civ. P. 56(d), which authorizes courts to defer or deny motion, allow time for fact development, or issue any other appropriate order. Instead, Plaintiffs opposed the motions for summary judgment on the merits. Opposition to Summary Judgment, R. 51, Page ID # 719-743. They argued that whether the Corporate Defendants are “mere booksellers” or “book publishers” is a question of material fact for a jury. Opposition to Summary Judgment, R. 51 Page ID # 719-743.

On March 15, 2016, the district court granted the Corporate Defendants’ motions for summary judgment on First Amendment grounds. Order, R. 60, Page ID # 988-1008.⁷ After examining cases protecting booksellers and other distributors “[t]o prevent chilling and self-censorship” in traditional contexts, Order, R. 60, Page ID # 1006, the Court applied “the old standards to the new technology” and treated

⁷ By the same order, the district court denied McKenna’s motion for judgment on the pleadings, which Plaintiffs had opposed. Order, R. 60, Page ID # 988-1008.

the self-publishing services offered by the Corporate Defendants as the “next logical step after the photocopier.” Order, R. 60, Page ID # 1007.

The district court entered final judgment as to the Corporate Defendants on July 27, 2016. Rule 54(b) Order, R. 63, Page ID # 1025; Judgment, R. 64, Page ID # 1026. This appeal followed.

SUMMARY OF ARGUMENT

1. The district court correctly held that the First Amendment protects Smashwords from the claims asserted in this litigation, which seek to hold Smashwords liable for providing online software that McKenna used to convert a Microsoft Word version of *Gronking* into an EPUB file and distribute it to the public.

A. Plaintiffs cannot hold Smashwords liable for distributing *Gronking* because they have introduced no evidence to suggest that Smashwords knew or should have known that the book contained allegedly tortious content. On the contrary, the evidence conclusively establishes that Smashwords did not know and could not have known that McKenna lacked permission to use the photograph of Young Couple 1.

B. Nor can Plaintiffs hold Smashwords liable for negligently creating the allegedly tortious content because they have offered no evidence that Smashwords “actively participated” in creating the cover image. Again, it is undisputed that Smashwords had *no* “role in creating, designing or editing the cover or content of

Gronking.” Instead, McKenna used Smashwords software to automatically generate an EPUB file. Plaintiffs’ attempt to analogize Smashwords to a traditional publishing house based on its relationship with McKenna is both irrelevant and unpersuasive.

2. This Court may affirm on the alternative non-constitutional ground that Plaintiffs’ claims against Smashwords are barred by the CDA, which shields providers of interactive computer services from liability for content contributed by others.

3. This Court may also affirm on another alternative non-constitutional ground: Plaintiffs’ claims fail as a matter of Ohio law.

A. Plaintiffs’ statutory publicity claim under Ohio Rev. Code § 2741 fails because Plaintiffs’ likeness has no “commercial value” and was not used for a “commercial purpose.” It is beyond reasonable dispute that Plaintiffs’ identity has no commercial value, and that McKenna did not select their photograph because of their identity. Two express exemptions under the statute also apply: (i) *Gronking* is a “literary work” or “fictional work,” and (ii) to the extent the cover is treated separately, it is an advertisement for that work. Indeed, Plaintiffs do not dispute that the exception for advertisements applies.

B. Plaintiffs’ common law invasion of privacy claim fails because no one invaded their privacy. Rather, McKenna used an image that Plaintiffs had publicized (but for a purpose different from what Plaintiffs intended). In any event, their

misappropriation theory of privacy invasion independently fails for the same reasons that their statutory publicity claim fails. And their false light theory of privacy invasion also fails because Plaintiffs have not alleged any falsehood. At most, they have alleged that some readers *may* fantasize about them in ways they find offensive.

C. Plaintiffs' purported cause of action under Restatement of Torts § 652 is not a cause of action at all. The Restatement is a secondary source, not a source of actionable law. In any event, it is duplicative of Plaintiffs' invasion of privacy claim and fails for the same reasons.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915 (6th Cir. 2003). The central question is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED SMASHWORDS SUMMARY JUDGMENT ON FIRST AMENDMENT GROUNDS.

To hold anyone liable in tort for the content of a book, a plaintiff must show that the defendant is sufficiently responsible for the offending speech. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 49 (1988) (emphasizing “the constitutional importance * * * of the heightened level of culpability embodied in the requirement

of ‘knowing . . . or reckless’ conduct”) (internal citation omitted); *see also Cardozo v. True*, 342 So. 2d 1053, 1057 (Fla. Dist. Ct. App. Feb. 23, 1977) (“To hold those who perform this essential function liable, regardless of fault, when an injury results would severely restrict the flow of ideas they distribute.”).⁸

The district court correctly held that the First Amendment protects Smashwords and the other Corporate Defendants against all claims asserted by Plaintiffs in this litigation. The Corporate Defendants cannot be held liable for distributing *Gronking* because they did not know nor should they have known that it contained actionable speech. *See infra* at 18-21. And they cannot be held liable for their role in enabling that speech because they did not “actively participate” in creating it, nor was any of their behavior sufficiently culpable. *See infra* at 21-23.

A. Smashwords Cannot Be Held Liable For Distributing *Gronking* Because It Lacked Knowledge Of Any Wrongdoing.

Smashwords cannot be held liable simply for making an allegedly tortious book available to the public. *Smith v. California*, 361 U.S. 147, 152-53 (1959)

⁸ Plaintiffs argue that this constitutional requirement applies only to criminal obscenity and to the tort of defamation. *See Br.* at 31. That is wrong. As Amazon explains at length in its brief, the First Amendment applies “where civil liability is threatened under other guises.” Amazon *Br.* at 23 (citing, *inter alia*, *Time, Inc. v. Hill*, 385 U.S. 374, 396-97 (1967) (applying First Amendment protections to invasion of privacy claims) and *ETW*, 332 F.3d at 952-55 (applying First Amendment protections to publicity claims)). Plaintiffs’ argument is also illogical, as it would make constitutional rights contingent on the mechanism of encroachment.

("[C]onstitutional guarantees of the freedom of speech and of the press stand in the way of imposing [such liability] on the bookseller."). Instead, Plaintiffs must establish at a minimum that Smashwords knew that *Gronking* contained actionable speech. *See, e.g., Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) ("[D]istributors must at a minimum have knowledge of the existence of a defamatory statement."); *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 139-41 (S.D.N.Y. Oct. 29, 1991) ("The requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication is deeply rooted in the First Amendment.").

Plaintiffs have not offered any evidence suggesting that Smashwords knew or should have known that *Gronking* contained allegedly tortious content. To the contrary, the evidence conclusively establishes that Smashwords did not know and could not have known that McKenna lacked permission to use the photograph of Young Couple 1:

First, McKenna specifically represented to Smashwords as a condition of self-publication that his upload did not "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 Declaration, R. 20-4, Page ID # 241, 244; First Coker Declaration, R. 20-3, Page ID # 176. He also represented that he had secured any necessary "permissions" and was the "sole owner" of all relevant rights. Second Coker

Declaration Exhibit A, R. 42-2, Page ID # 637-640. And he agreed to indemnify Smashwords and its distributors against any claim contrary to these representations. First Coker Declaration Exhibit 10, R. 20-3, Page ID # 235.

Second, the generic photograph of Young Couple 1 did not and should not have caused Smashwords to question McKenna's representations. First Coker Declaration, R. 20-3, Page ID # 179 ("Smashwords did not know, or have any reason to know, that the plaintiffs objected to any of the *Gronking* covers * * * ."); McKenna Declaration, R. 20-4, Page ID # 242 (the Corporate Defendants "did not know or have any reason to know that the images I used for the cover of *Gronking* were the plaintiffs in this action or that those images were used without express permission."). The photograph lacked a copyright designation or other indicia of restricted use.

Third, neither Plaintiffs nor anyone else notified Smashwords about the potential legal issues with the photograph of Young Couple 1 until well after McKenna had replaced it with the stock photograph of Young Couple 2. Smashwords first learned of Plaintiffs' objection from retail partner Apple on February 9, 2015—i.e., ten days after McKenna uploaded the revised cover. First Coker Declaration, R. 20-3, Page ID # 179. And Plaintiffs did not notify Smashwords that they had any concerns about its rule until they added Smashwords to the caption of their Complaint on July 7, 2015. *See* First Amended Complaint, R. 28, Page ID # 540.

Plaintiffs do not argue here that Smashwords or any other Corporate Defendant had actual knowledge that the generic photograph of Young Couple 1 infringed their rights. Instead, they assert that the Corporate Defendants “intentionally remained ignorant” with respect to the source of *all* cover images even though, they say, “[t]he act of less than scrupulous authors using a cover photo without legal permission to do so was and is clearly foreseeable.” Br. at 8. *See also* Br. at 28.

Plaintiffs offer nothing to support their inflammatory “intentional blindness” argument. Nor could they, even if it were legally viable (which it is not): Smashwords requires all authors to represent that they *have* permission and to indemnify it against any claim to the contrary. *See supra* at 5. It reviews all cover photos for blatant violations. *See supra* at 5-6. That is the opposite of intentional blindness.

Plaintiffs also argue for “[a] rule requiring ePublishers to check the source of photographs submitted to them for publication,” which they describe as “a minimal imposition.” Br. at 27. But that is precisely the rule that the Supreme Court and the other federal courts have considered and repeatedly rejected for book distributors on the grounds that it impermissibly burdens First Amendment rights. *See, e.g., Smith*, 361 U.S. at 153 (“If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted

indeed.”); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 139 (2d Cir. 1984) (“Such a rule [requiring monitoring] would be an impermissible burden on the First Amendment.”); *Parisi v. Sinclair*, 774 F. Supp. 2d 310, 319 (D.D.C. Mar. 31, 2011) (“[A]nything short of actual malice would impose a tremendous burden on distributors such as booksellers to make themselves aware of the contents of the material they distribute.”).

B. Smashwords Cannot Be Held Liable For Creating *Gronking* Because It Did Not Actively Participate In Creating The Allegedly Tortious Speech.

In the alternative, Plaintiffs must establish that Smashwords played a meaningful role in creating the allegedly tortious cover of *Gronking* and that it behaved culpably in that process. *See Parisi*, 774 F. Supp. 2d at 317 (finding no liability because Amazon “did not play a role in the creation or development” of the statement at issue); *Sandler v. Calcagni*, 565 F. Supp. 2d 184, 194-95 (D. Me. July 18, 2008) (finding no liability due to BookSurge’s “minimal involvement” with the author). In *Sandler*, the district court held that BookSurge was not liable for transforming an uploaded manuscript into a hard-copy book because the company was not “an active participant in the creation of” the allegedly tortious speech where it did not edit, review, fact-check, actively market, or promote the book, and did not pay the author. 565 F. Supp. 2d at 194-95.

Plaintiffs dedicate most of their appellate brief to the role of Smashwords and the other Corporate Defendants in the self-publishing process. Plaintiffs argue that “if the Corporate Defendants are publishers, they are liable.” Br. at 17. *See also* Opposition to Summary Judgment, R. 51, Page ID # 725 (“[B]ecause Defendants are publishers and not a mere booksellers [sic], their argument implicating the First Amendment and incidental [sic] do [sic] not apply and should fail.”).⁹

Plaintiffs cite the following allegations as evidence that the Corporate Defendants are “publishers”: (1) they told McKenna to replace the image of Young Couple 1, Br. at 18-19, and generally have “access to communicate with the author and demand changes to the works,” Br. at 31; (2) they have cost-sharing arrangements with authors, Br. at 19, 31; (3) they issued press releases describing themselves as “publishers,” Br. at 21; and (4) they “check[] for plagiarism and obscenity,” Br. at 31.

The legal premise of Plaintiffs’ argument is wrong. The term “publisher” has no independent legal significance, let alone dispositive significance. *See, e.g., Sandler*, 565 F. Supp. 2d at 193 (“[T]he real test of responsibility for the tort * * * turn[s] on the scope of the defendant’s involvement.”). Rather, it is shorthand for parties who are often responsible for creating speech. *See* Prosser &

⁹ Plaintiffs “concede that if the Corporate Defendants are mere book sellers * * * then no liability attaches * * * .” Br. at 17.

Keeton, *The Law of Torts* 803 (5th ed. 1984). Even if Plaintiffs could show that the involvement of the Corporate Defendants in the self-publishing process is comparable to the role of traditional “publishers,” Plaintiffs would *also* have to establish culpability. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). They have failed to introduce *any* evidence of wrongdoing by Smashwords here.

In any event, Plaintiffs have failed to create a triable question of fact with respect to the role of Smashwords in creating the allegedly tortious speech. It is undisputed that the Corporate Defendants “did not have any role in creating, designing or editing the cover or content of *Gronking*.” McKenna Declaration, R. 20-4, Page ID # 241. None of the allegations Plaintiffs highlight is even relevant to that question. *See Sandler*, 565 F. Supp. 2d at 194-95.

II. THE COMMUNICATIONS DECENCY ACT IS AN INDEPENDENT BASIS TO AFFIRM.

The same policy concerns that animate First Amendment jurisprudence provide Smashwords and the other Corporate Defendants statutory immunity under the Communications Decency Act, 47 U.S.C. § 230 (“CDA”). The Corporate Defendants advanced this basis for summary judgment in the district court. Smashwords, Inc.’s Motion for Summary Judgment, R. 42, Page ID # 625; Barnes & Noble, Inc. and Smashwords, Inc.’s Reply, R. 57, Page ID # 964-967. Although the district court did not reach the issue after granting summary judgment on First

Amendment grounds, the CDA provides an independent non-constitutional basis for affirmance. *See* Order, R. 60, Page ID # 1008.

The CDA broadly immunizes websites from state tort liability for allegedly actionable content created by others. *See Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 408 (6th Cir. 2014) (“[C]ourts have construed the immunity provisions in § 230 broadly.”). It provides that no “interactive computer service [provider] shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1).¹⁰ And it creates federal immunity to any state law claim to the contrary: “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(e)(3). *See Zeran*, 129 F.3d at 330 (“By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”).

Plaintiffs conceded below that Smashwords provides an interactive computer service. *See* Opposition to Summary Judgment, R. 51, Page ID # 725. They admit here that their Ohio law claims seek to hold Smashwords liable based entirely on its role “as the publisher or speaker” of the cover of *Gronking*. *See, e.g.*, Br. at 17

¹⁰ “[T]he most common interactive computer services are websites.” *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1268 (9th Cir. 2016).

(“Plaintiffs have presented sufficient facts upon which reasonable minds could conclude Corporate Defendants are publishers.”). And the evidence makes clear that McKenna alone “provided” that cover within the meaning of the CDA. *See supra* at 7-8. The CDA thus immunizes Smashwords here.

Amazon and Barnes & Noble describe the CDA defense in detail in their respective briefs and respond fully to the arguments Plaintiffs advanced below. *See* Amazon Br. at 39-46, Barnes & Noble Br. at 22-29. For the sake of brevity, Smashwords does not cover that territory here. The same arguments apply.

III. AFFIRMANCE IS ALSO WARRANTED BECAUSE PLAINTIFFS’ CLAIMS FAIL AS A MATTER OF OHIO LAW.

The First Amended Complaint alleges that Smashwords committed three violations of Ohio law: (1) use of the Roes’ persona for commercial purposes in violation of Ohio Rev. Code § 2741, First Amended Complaint, R. 28, Page ID # 540-542; (2) invasion of their privacy under Ohio common law, First Amended Complaint, R. 28, Page ID # 542; and (3) invasion of their privacy under the Restatement of Torts § 652, First Amended Complaint, R. 28, Page ID # 542.

The district court did not address the elements of these claims or the evidence supporting them in connection with Smashwords’ motion for summary judgment. *See* Order, R. 60, Page ID # 1000-1008.¹¹ Instead, it correctly applied First

¹¹ The district court did address these issues in connection with McKenna’s motion for judgment on the pleadings. *See* Order, R. 60, Page ID # 991-998.

Amendment principles and concluded that Smashwords and the other Corporate Defendants may not be held liable under *any* theory. *See supra* at 17 & n.8. If this Court prefers to avoid the constitutional question, it may affirm the district court by applying settled state law principles to Plaintiffs' three state law causes of action.

Plaintiffs failed to offer evidence sufficient to reach a jury on any claim. Plaintiffs' likeness has no "commercial value" that could be appropriated in violation of either Ohio Rev. Code § 2741 or Ohio common law. In any event, there was no impermissible appropriation because depicting an image on a book cover is a classic "incidental" use. And more fundamentally, no one invaded Plaintiffs' privacy by using an image that they made publicly available on the Internet. Ohio law simply does not afford Plaintiffs the relief they seek.

A. The Statutory Publicity Claim (Ohio Rev. Code § 2741) Fails As A Matter Of Law.

The right of publicity is a creature of state law. *ETW*, 332 F.3d at 928 (citing J. McCarthy, *The Rights of Publicity and Privacy* § 6.1 (2d ed. 2000)). The Ohio Supreme Court first recognized the right under state common law in *Zacchini v. Scripps-Howard Broadcasting Co.*, 351 N.E.2d 454 (Ohio 1976), *rev'd on other grounds*, 433 U.S. 562 (1977), and the Ohio legislature later codified it in Ohio Rev. Code § 2741. *ETW*, 332 F.3d at 954 ("Ohio recognizes the right of publicity as a part of the state's common law and has recently codified that right.") (internal citations omitted).

Put simply, the right protects celebrities' commercial interests in their own identities. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) (“[A] celebrity’s identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity.”). As explained next, it offers no relief here.

1. Ohio Rev. Code § 2741 Does Not Prohibit The Use Of The Photograph Of Young Couple 1 On The Cover Of *Gronking*.

Ohio Rev. Code § 2741 proscribes a narrow type of conduct:

Except as otherwise provided in this section, a person shall not use any aspect of an individual’s *persona for a commercial purpose*: (1) During the individual’s lifetime; (2) For a period of sixty years after the date of the individual’s death; or (3) For a period of ten years after the date of death of a deceased member of the Ohio national guard or the armed forces of the United States.

Ohio Rev. Code § 2741.02(A) (emphasis added). The statute defines the terms “persona” and “commercial purpose” as follows:

(A) “Persona” means an individual’s name, voice, signature, photograph, image, likeness, or distinctive appearance, *if any of these aspects have commercial value*.

(B) “Commercial purpose” means the use of or reference to an aspect of an individual’s persona in any of the following manners: (1) On or in connection with a place, product, merchandise, goods, services, or other commercial activities *not expressly exempted under this chapter*; (2) For advertising or soliciting the purchase of products, merchandise, goods, services, or other commercial activities *not expressly exempted under this chapter*; (3) For the purpose of promoting travel to a place; (4) For the purpose of fundraising.

Ohio Rev. Code §§ 2741.01(A), 2741.01(B) (emphasis added).

The “commercial value” and “commercial purpose” requirements effectuate the purpose of the right of publicity. The Supreme Court has described that purpose as follows:

(C) ‘The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get some free aspect of the plaintiff that would have market value and for which he would normally pay.’

Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977) (quoting Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 Law & Contemp. Prob. 326, 331 (1966)). *See also Carson*, 698 F.2d at 835.

By its own terms, Ohio Rev. Code § 2741 does not apply here.

First, no one used any aspect of Plaintiffs’ “persona” as defined in the statute because their likeness lacks commercial value. *See* Ohio Rev. Code § 2741.01(A); *Ruffin-Steinback v. dePasse*, 267 F.3d 457, 462 (6th Cir. 2001) (“The majority of cases which discuss the right of publicity * * * focus on the pecuniary interest in one’s identity.”); *Kolcun v. Nationwide Mut. Ins. Co.*, No. 2:04-CV-01079, 2006 WL 1447299, at *10 (S.D. Ohio May 24, 2006) (observing that Ohio statute requires that “persona” have commercial value).

To be clear: Plaintiffs have neither alleged nor introduced any evidence suggesting that their photograph, image, likeness, appearance, or any other aspect of their identity has commercial value. To the contrary, the gravamen of this litigation

is that McKenna wrongfully publicized a photograph of ordinary, private individuals whose identities are immaterial. *See* First Amended Complaint, R. 28, Page ID # 540. (“[Plaintiffs’] identities are not being disclosed as a matter of public record herein as their privacy interests substantially outweigh the presumption of open judicial proceedings.”); Jane Roe Declaration, R. 51-12, Page ID # 866 (“I desire to keep my identity as private and confidential as possible during these proceedings and * * * would request the other parties to honor that request.”); John Roe Declaration, R. 51-13, Page ID # 871 (same).¹²

To the contrary: the First Amended Complaint and Plaintiffs’ declarations make clear that the photograph of Young Couple 1 has no intrinsic commercial value. Rather, it is a non-commercial image with purely sentimental significance. *See* First Amended Complaint, R. 28, Page ID # 541. (“The cover of the book contains a photograph of the Plaintiffs which was taken as part of their engagement journey leading toward their wedding.”); Jane Roe Declaration, R. 51-12, Page ID # 867 (“Our engagement photo was transformed from a statement of celebration into a source of ridicule * * * .”); John Roe Declaration, R. 51-13, Page ID # 872 (same).

¹² In connection with McKenna’s motion for judgment on the pleadings, the district court erroneously concluded that “Plaintiffs allege the use of a photograph which, under the statute, constitutes the use of their persona.” Order, R. 60, Page ID # 995. The court failed to consider whether Plaintiffs had alleged that any aspect of their photograph had commercial value. *See id.* (excerpting Ohio Rev. Code § 2741.01 but excluding the phrase “if any of these aspects have commercial value”).

Indeed, Plaintiffs do not and cannot allege economic damages resulting from the commercial exploitation of their photograph. *See* First Amended Complaint, R. 28, Page ID # 541 (“The use of Plaintiffs’ image has held them up to ridicule and embarrassment.”); First Amended Complaint, R. 28, Page ID # 541 (“Plaintiffs are entitled to the recovery of actual damages, including any profits derived from and attributable to such unauthorized use. In the alternative, the Plaintiffs are entitled to statutory damages in an amount of \$10,000.”).¹³

Second, no one used the photograph of Young Couple 1 for a “commercial purpose” as defined in the statute. *See* Ohio Rev. Code § 2741.01(B); *Kolcun*, 2006 WL 1447299, at *10 (Ohio statute requires that “persona” be used for “commercial purpose.”). An incidental use is not a “commercial purpose” use under Ohio law because it does not unjustly enrich anyone. *See ETW*, 332 F.3d at 930 (requiring appropriation that is “something more than the incidental publication of name or likeness”); *Bosley v. WildWetT.com*, 310 F. Supp. 2d 914, 920 (N.D. Ohio Mar. 31,

¹³ Plaintiffs claim to fear that they will realize unspecified economic damages at some point in the future. *See* Declaration of Jane Roe, R. 51-12, Page ID # 868 (“[W]e live in constant fear that employers, co-workers, and customers will find out about the photo resulting in economic damage.”); Declaration of John Roe, R. 51-13, Page ID # 873 (same). That is not the type of harm contemplated by Ohio Rev. Code § 2741. *See Baumer v. Franklin Cty. Distilling Co.*, 135 F.2d 384, 390 (6th Cir. 1943) (Ohio law does not permit recovery of speculative damages). Nor if it were, would speculation about potential future harm constitute the requisite scintilla of evidence. *See Power v. Kirkpatrick*, No. 99AP-1026, 2000 WL 992028, at *4 (Ohio Ct. App. July 20, 2000) (award of future damages requires “sufficient proof of any future impairment” and “sufficient evidence of the extent of prospective damages”).

2004) (“[I]ncidental use of one’s name or likeness is permissible.”); *Vinci v. Am. Can Co.*, 591 N.E.2d 793, 794 (Ohio Ct. App. 1990) (“[M]ere incidental use of a person’s name or likeness is not actionable under the ‘right of publicity.’”). *See also Zacchini*, 351 N.E.2d at 458 n.4 (quoting with approval Restatement (Second) of Torts § 652C (Draft No. 13) (“[N]or is the value of his likeness appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him * * * .”).

Use of a cover image on a book is a classic incidental use. *See, e.g., Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1326 (11th Cir. 2006) (“[U]se 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 book sales.”). In *Almeida*, the Eleventh Circuit rejected liability under Florida’s right of publicity statute for displaying a picture of a ten-year-old on the cover of *Anjos Proibidos*. The court held that “Amazon did not use Almeida’s image for trade, commercial, or advertising purposes as those terms are used in the statute.” *Almeida*, 456 F.3d at 1325.¹⁴

To be clear: Plaintiffs have neither alleged nor introduced any evidence suggesting that the photograph of Young Couple 1 was used for a commercial

¹⁴ For present purposes, Florida and Ohio have materially identical right of publicity statutes. *See Bosley*, 310 F. Supp. 2d at 919 (determining that it was unnecessary to undertake choice of law analysis for right of publicity claim because “there is no significant difference between Ohio and Florida law as to the issues of concern at this stage of the litigation”).

purpose. Instead, they assert precisely the incidental use that this Court and others have repeatedly held does not violate Ohio law or similar statutes. *Compare* First Amended Complaint, R. 28, Page ID # 541 (“The photograph was appropriated by the Defendants for commercial gain without the permission of the Plaintiffs * * *. The Plaintiffs were not compensated for the use of their image on the cover of these books.”) *with Almeida*, 456 F.3d at 1318 (“Almeida claims that Amazon should not display her image to promote the sale of *Anjos Proibidos* because she did not consent and did not receive just compensation for the use of her image.”).¹⁵

2. Ohio Rev. Code § 2741 Specifically Permits The Use Of The Photograph Of Young Couple 1 On The Cover Of *Gronking*.

Ohio Rev. Code § 2741 contains two provisions that make clear that the statute does not apply even if Plaintiffs’ persona has “commercial value” and the use here is “commercial.” The statute specifically exempts works of fiction:

This chapter does not apply to any of the following:

A literary work, dramatic work, fictional work, historical work, audiovisual work, or musical work regardless of the media in which the

¹⁵ The identity of Plaintiffs has no bearing on McKenna’s choice to include a photograph of Young Couple 1 on the cover of *Gronking*, just as the identity of the plaintiff in *Almeida* had nothing to do with the choice to display an image of her as a child on the cover of *Anjos Proibidos*. For that reason, there is no violation of Plaintiffs’ statutory right of publicity. By contrast, the “naked anchor woman” in *Bosley* was featured and named on the cover of the WildWetT video and all of its promotional materials *because of her identity*, and that is why WildWetT was held liable. 310 F. Supp. 2d at 923 (“[I]n the present case, the use of the images of Catherine Bosley are not merely ‘incidental to the promotion’ of the aforementioned products.”).

work appears or is transmitted, other than an advertisement or commercial announcement not exempt under division (A)(1)(d) of this section * * * .

Ohio Rev. Code § 2741.09(A)(1)(a). It also exempts advertising for such works:

An advertisement or commercial announcement for a use permitted by division (A)(1)(a) * * * of this section.

Ohio Rev. Code § 2741.09(A)(1)(d). These provisions are fatal to Plaintiffs' claim.

The photograph of Young Couple 1 on the cover of *Gronking* is exempt because (1) it appears in a “literary” or “fictional” work, and (2) to the extent it can be considered separately, it appears in an “advertisement or commercial announcement” for that work.

Section 2741.09(A)(1)(a). Plaintiffs admit that *Gronking* is “a work of pure fiction.” McKenna Declaration, R. 20-4, Page ID # 240. *See* Opposition to Summary Judgment, R. 51, Page ID # 731 (“Plaintiffs object to the use of their persona on the cover of a raunchy fiction novel.”). They therefore do not dispute that Ohio Rev. Code § 2741.09(A)(1)(a) applies to *Gronking*. Plaintiffs nevertheless insist that this exemption does not apply to the photograph of Young Couple 1 on the cover of *Gronking* because the “work” and its “cover” are distinct, and “only the author’s manuscript constitutes a * * * fictional work.” Opposition to Summary Judgment, R. 51, Page ID # 731. Plaintiffs are wrong.

The plain meaning of “work” is not “manuscript,” but rather the work in its entirety—colloquially, “from cover to cover.” *See, e.g., Authors Guild v. Google,*

Inc., 770 F. Supp. 2d 666, 678 (S.D.N.Y. Mar. 22, 2011) (describing lawsuit over Google Books as suit “for the initial act of scanning our books without permission, cover to cover”). Indeed, as Amazon explains at length in its brief, that commonsense understanding underpins Plaintiffs’ entire lawsuit here. *See* Amazon Br. at 51 (“The Roes’ entire case against Amazon hinges on the supposed association of their photograph with the particular fictional content of *Gronking*.”); *see also* Opposition to Summary Judgment, R. 51, Page ID # 731-732 (“This association of the Plaintiffs with *A Gronking to Remember* has subjected Plaintiffs to ridicule and embarrassment * * *. The Defendants, in concert with the author, created this connection * * * .”); Opposition to Summary Judgment, R. 51, Page ID # 734 (“The Roe’s [sic] take objection to their photo being associated with the book and its pornographic contents.”).¹⁶

Section 2741.09(A)(1)(d). In any event, Plaintiffs do not dispute that the cover of *Gronking* constitutes an “advertisement” for the book. To the contrary, they admit,

¹⁶ Finding no definition of “literary work” or “fictional work” in the Ohio statute or Ohio common law, Plaintiffs take their definition from the federal Copyright Act and observe that it defines “literary work” as “works * * * expressed in words, numbers, or other verbal or numerical symbols or indicia * * * .” Opposition to Summary Judgment, R. 51, Page ID # 730-731. But the Ohio statute exempts not just literary, but also other “fictional works.” Plaintiffs offer no basis to exclude photographs from the latter. And even with respect to the former, to determine the meaning of the relevant terms, we *first* give them their “natural reading,” then look to any common law definitions, then finally consider any statutory or legislative history. *Elgharib v. Napolitano*, 600 F.3d 597, 601 (6th Cir. 2010). None of these steps involves analyzing unrelated federal law.

“[T]he reader looks at the cover of the book when determining whether to buy the book * * * .” Opposition to Summary Judgment, R. 51, Page ID # 734. That is common knowledge. *See, e.g., Publ’ns Int’l, Ltd. v. Landoll, Inc.*, 164 F.3d 337, 342 (7th Cir. 1998) (“Although the adage is that you shouldn’t judge a book by its cover, many people do this; otherwise, many books would be sold without covers * * * .”).

There is thus no dispute that this exemption applies here. And that is fatal to Plaintiffs’ claim. *See Moore v. Weinstein Co.*, 545 F. App’x 405, 408 (6th Cir. 2008) (“The right of publicity does not proscribe ‘use of a person’s identity in . . . entertainment, works of fiction or nonfiction, *or in advertising that is incidental to such uses*’ * * * .”) (quoting the Restatement (Third) of Unfair Competition § 47) (emphasis added).

B. The Ohio Common Law Invasion Of Privacy Claim Fails As A Matter Of Law.

Under Ohio law, invasion of privacy includes four separate torts:

(1) intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.

James v. Bob Ross Buick, Inc., 855 N.E.2d 119, 122 (Ohio Ct. App. 2006). The First Amended Complaint alleges only “wrongful appropriation” of Plaintiffs’ likeness. *See* First Amended Complaint, R. 28, Page ID # 541-542. Plaintiffs have since

suggested that they are pursuing both appropriation and “false light” theories of relief. *See* Opposition to Summary Judgment, R. 51, Page ID # 733-737.¹⁷

Neither theory is actionable. The wrongful appropriation tort suffers the same defects as Plaintiffs’ publicity claim. *See infra* at 36-38. And the false light theory is untenable because Plaintiffs have not alleged any “falsehood.” *See infra* at 38-40.

At bottom, Plaintiffs’ “invasion of privacy” claims fail because no one invaded their privacy. *See* Amazon Br. at 51 (“As a threshold matter, a plaintiff who seeks to recover for an invasion of privacy must establish that he had a reasonable expectation of privacy. The Roes cannot make that showing.”). McKenna used an image that Plaintiffs *had already authorized to be made public* for a purpose that Plaintiffs disapprove. That injury is simply not actionable under Ohio law.

1. Plaintiffs’ Wrongful Appropriation Theory Of Invasion Of Privacy Is Untenable.

The wrongful appropriation tort requires that defendant “appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff’s name or likeness.” *Reeves v. Fox Television Network*, 983 F. Supp. 703, 710 (N. D. Ohio April 30, 1997).

¹⁷ Plaintiffs used the phrase “false light” for the first time in their opposition to Defendants’ motions for summary judgment. *Compare* First Amended Complaint, R. 28, Page ID # 540-543 *with* Opposition to Summary Judgment, R. 51, Page ID # 733-736.

This common law claim is closely related to the statutory publicity claim and has similar elements. *ETW*, 332 F.3d at 928. Again, the appropriated likeness must have commercial value. *See, e.g., Reeves*, 983 F. Supp. at 710 (“[I]n order to state a cause of action for invasion of privacy by appropriation, the complaint must allege that plaintiff’s name or likeness has some intrinsic value, which was taken by defendant for its own benefit.”); *Jackson v. Playboy Enters., Inc.*, 574 F. Supp. 10, 13 (S.D. Ohio April 1, 1983) (dismissing appropriation of likeness claim where “Plaintiffs have not given any indication that their likenesses have value in and of themselves which could be taken by someone else for his or her benefit”).

The appropriation also cannot be incidental. *See, e.g., Reeves*, 983 F. Supp. at 710 (“The fact that the defendant is engaged in the business of publication * * * out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness.”); *Zacchini*, 351 N.E.2d at 458 (distinguishing “mere incidental use of a person’s name and likeness, which is not actionable, from appropriation of the benefits associated with the person’s identity, which is”); *Vinci*, 591 N.E.2d at 794 (finding that mention of names of Olympic athletes was incidental to promotion of Dixie Cups and thus not violation of Ohio common law of appropriation because use was informational and there was no implication that athletes used, supported, or promoted the product).

The same grounds that support summary judgment on the statutory publicity claim apply: Plaintiffs' likeness lacks commercial value, *see supra* at 27-30; and the use was incidental, *see supra* at 30-32. To reiterate, Plaintiffs' identity simply has no bearing on McKenna's choice to include their photograph on the cover of his book, and that choice is therefore not actionable. *See, e.g., Reeves*, 983 F. Supp. at 710 ("Plaintiff's name and likeness has no intrinsic value. The Defendants did not include him * * * because of his name, personality, or prestige.").

2. Plaintiffs' False Light Theory Of Invasion Of Privacy Is Untenable.

To establish a claim for false light under Ohio common law, a plaintiff must show publicity that places her "before the public in a false light" where "(a) the false light * * * would be highly offensive to a reasonable person, and (b) the [defendant] 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." *Welling v. Weinfeld*, 866 N.E.2d 1051, 1054 (Ohio 2007) (adopting Restatement (Second) of Torts § 652E).

Plaintiffs have not alleged or introduced any evidence of any falsehood. *See Patrick v. Cleveland Scene Publ'g*, 582 F. Supp. 2d 939, 954 (N.D. Ohio 2008) ("The 'publicized' statement must be untrue * * * ."). Nor could they. It is well-established that depiction in a context that "obviously purports to be fictitious" does not support a false light claim because there is no falsity. *Botts v. N.Y. Times Co.*, No. 03-1582,

2003 U.S. Dist. LEXIS 23785, at *19-20 (D.N.J. Aug. 29, 2003) (finding no false light claim where advertisement containing plaintiff's name did not "purport to depict a real individual, but rather a type of person (i.e., an uneducated young African-American male)"); *see also Welling*, 866 N.E.2d at 1057-58 (holding that privacy invaded "only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken").

Here, no one misrepresented anything about Plaintiffs. Their assertion that readers may envision them undertaking the activities of the *Gronking* characters is an allegation that imaginary misrepresentation may occur. *See* Opposition to Summary Judgment, R. 51, Page ID # 734 ("[T]he reader looks at the cover of the book * * * when visualizing the characters within the book."). Not surprisingly, Plaintiffs offer no reason to believe that fantasy is actionable as falsehood. And to the extent that Plaintiffs argue the depiction of Young Couple 1 on the cover of *Gronking* suggests they authorized McKenna to use their image in that context, Ohio courts have squarely rejected that analysis. *See, e.g., Vinci*, 591 N.E.2d at 794 (finding no implication that Olympic athletes used, supported, or promoted product).

Nor have Plaintiffs introduced any evidence of culpability: "evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Ashby v. Hustler Magazine, Inc.*, 802 F.2d 856, 860 (6th

Cir. 1986) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 730-31 (1968)). And they certainly have not identified “clear and convincing” evidence of knowledge or reckless disregard. *Patrick*, 582 F. Supp. 2d at 954. As discussed at length above, Smashwords neither knew nor could have known that McKenna lacked permission to include the Young Couple 1 photograph on the cover of *Gronking*. *See supra* at 18-21.

C. The Restatement Of Torts § 652 Claim Is Not Actionable.

Plaintiffs’ purported cause of action under the Restatement of Torts is not a cause of action at all. The Restatement of Torts is not a law that Plaintiffs may enforce in Ohio or anywhere else. *See, e.g., AE, Inc. v. Goodyear Tire & Rubber Co.*, 168 P.3d 507, 509 n.1 (Colo. 2007) (“This Court is, of course, not bound by the legal principles set forth in any of the restatements of law * * * .”); *Dunne v. Hanson*, No. L-01-1414, 2002 WL 947273, at *3 (Ohio Ct. App. May 10, 2002) (explaining that sections of restatement not expressly adopted by Ohio Supreme Court are not authoritative). Restatements are merely *summaries* of principles of common law, not laws.¹⁸

¹⁸ As the American Law Institute describes the Restatement, “This work * * * offers comprehensive and concise coverage of the law of torts, with scholarly and analytical discussion of particular rules.” American Law Institute, *Restatement of the Law Second*, Torts, www.ali.org/publications/show/torts/ (last visited Jan. 27, 2017).

In any event, Plaintiffs' purported Restatement of Torts claim is also duplicative of their common law claim. Ohio expressly adopted the invasion of privacy tort as propounded by the Restatement. *Alahverdian v. Grebinski*, No. 3:13-CV-00132, 2014 WL 2048190, at *12 (S.D. Ohio May 19, 2014) ("In recognizing the tort of invasion of privacy, the Ohio Supreme Court adopted Restatement of Torts § 652(A) * * * ."); *Jackson*, 574 F. Supp. at 12 (observing that in *Sustin v. Fee*, 69 Ohio St. 2d 143 (1982), the Supreme Court of Ohio held "that it was adopting the rule of the Restatement (Second) of Torts § 652 (1977), for what constitutes an actionable invasion of privacy in Ohio"); *Bob Ross Buick*, 855 N.E.2d at 122 ("Ohio has adopted the tort of misappropriation of the name or likeness of another as propounded by the Restatement."). Accordingly, Plaintiffs' third cause of action fails for precisely the same reasons as their second cause of action.

CONCLUSION

For the reasons set forth above, the judgment of the district court should be affirmed.

Respectfully submitted,

Dated: January 27, 2017

s/ Elizabeth Rogers Brannen

Peter K. Stris

Elizabeth Rogers Brannen

Dana Berkowitz

Victor O'Connell

STRIS & MAHER LLP

725 S. Figueroa St., Ste. 1830

Los Angeles, CA 90017

Telephone: (213) 995-6800

Facsimile: (213) 261-0299

*Counsel for Defendant-Appellee
Smashwords, Inc.*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that:

1. The brief complies with the length limits set forth at Fed. R. App. P. 32(a)(7)(B) because it has 10,089 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

2. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6) because the brief is proportionately spaced using 14-point Times New Roman type.

Dated: January 27, 2017

s/ Elizabeth Rogers Brannen
Elizabeth Rogers Brannen

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendant-Appellee Smashwords, Inc. states that all relevant documents to this appeal are part of the electronic record in the Southern District of Ohio, Western Division.

Record No.	Page ID #	Description of Document
R. 1	1-16	Notice of Removal
R. 7	46-51	Complaint
R. 20	114-115	Apple Inc.'s Motion for Summary Judgment
R. 20-1	120-121	Memorandum in Support of Apple Inc.'s Motion for Summary Judgment
R. 20-3	174-235	First Coker Declaration
R. 20-4	240-244	McKenna Declaration
R. 28	540-544	First Amended Complaint
R. 32	569-570	Barnes & Noble, Inc.'s Motion for Summary Judgment
R. 37	590-591	Amazon.com's Motion for Summary Judgment
R. 39	594-596	Apple Inc.'s Motion for Summary Judgment
R. 42-1	629-632	Second Coker Declaration
R. 42-2	637-640	Exhibit A to Second Coker Declaration
R. 43-1	650-670	Smashwords, Inc.'s Motion for Summary Judgment
R. 51	719-743	Opposition to Summary Judgment
R. 51-12	866-868	Jane Roe Declaration
R. 51-13	871-873	John Roe Declaration
R. 57	964-967	Barnes & Noble, Inc. and Smashwords, Inc.'s Reply
R. 60	988-1008	Order Granting Corporate Defendants' Motions for Summary Judgment
R. 63	1020-1025	Rule 54(b) Order
R. 64	1026	Judgment
R. 65	1027-1028	Notice of Appeal

CERTIFICATE OF SERVICE

I hereby certify that, on January 27, 2017, I electronically filed the foregoing document using the Court's electronic filing system, which will notify all counsel of record authorized to receive such filings.

Dated: January 27, 2017

s/ Elizabeth Rogers Brannen
Elizabeth Rogers Brannen