

This section contains:

- 1) This section is the transcript from the minutes to an actual document by the Reporter: Richard H. Romano, RPR Official Court Reporter. Hearing before Judge Mark L Wolf in the Hassett v Hasselbeck Copyright Infringement Case #1:09-cv-MLw at the Summary Judgment Hearing on November 30, 2010

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 1:09-cv-12034-MLW

SUSAN HASSETT,
Plaintiff

vs.

ELISABETH HASSELBECK, et al,
Defendants

For Hearing Before:
Chief Judge Mark L. Wolf

Motion Session

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, November 30, 2010

REPORTER: RICHARD H. ROMANOW, RPR
Official Court Reporter
United States District Court
One Courthouse Way, Room 5200, Boston, MA 02210
bulldog@richromanow.com

A P P E A R A N C E S

1
2
3 SUSAN HASSETT

4 22 Royal Circle
5 East Falmouth, Massachusetts 02536
6 (508) 548-1604
7 Pro Se plaintiff

8
9 ORIN SNYDER, ESQ.

10 LAURA O'BOYLE, ESQ.

11 Gibson Dunn & Crutcher
12 200 Park Avenue
13 New York, New York 10166
14 (212) 351-2400

15 Email: Osnyder@gibsondunn.com

16 and

17 ROBYN S. MAGUIRE, ESQ.

18 Nutter, McClennen & Fish, LLP

19 Seaport West

20 155 Seaport Boulevard

21 Boston, Massachusetts 02210-2604

22 (617) 439-2000

23 Email: Rmaguire@nutter.com

24 For the Defendants
25

1 P R O C E E D I N G S

2 (Begins, 2:45 p.m.)

3 THE CLERK: This is Civil Action 09-12034,
4 Susan Hassett versus Elisabeth Hasselbeck, et al. The
5 Court is in session. You may be seated.

6 THE COURT: Good afternoon. Would those
7 present to participate please identify themselves for
8 the record.

9 MS. HASSETT: Sue Hassett, pro se plaintiff.

10 THE COURT: Okay.

11 MR. SNYDER: Good afternoon. Orin Snyder for
12 the defendants, your Honor.

13 MS. O'BOYLE: Laura O'Boyle for the
14 defendants.

15 MS. MAGUIRE: And Robyn Maguire for the
16 defendants.

17 THE COURT: Okay. This is an alleged
18 copyright infringement case in which Ms. Hassett is
19 representing herself. In my October 14, 2010 order, I
20 denied the plaintiff's motion for a temporary
21 restraining order and her request for appointment of
22 counsel, among other things.

23 In addressing the motion for the temporary
24 restraining order, I briefly stated the applicable law
25 regarding copyright infringement, it's at Pages 4 to 6,

1 and it's law that's not intuitively obvious, I find, but
2 it's really essential to analyzing the claims in this
3 case. I ordered Ms. Hassett to provide evidence of the
4 alleged substantial similarity between her copyrighted
5 book, "Living with Celiac Disease," and the defendant's
6 book, "The G Free Diet." I also converted the motion to
7 dismiss, the defendant had brought, to a motion for
8 summary judgment.

9 I've received a response to the October 14 order,
10 that the plaintiff has provided the 2008 edition of what
11 I'll call "Living," her book, that she referenced
12 initially, but she also told me that's the same as the
13 2009 version of her book except that there are page
14 numbers in the 2009 version and some spellings were
15 corrected. Is that right?

16 MS. HASSETT: Yeah, the self-published one,
17 the one I -- this one was a 2008 copyright and when it
18 got published from the self-publisher, it was just the
19 2009 copyright.

20 THE COURT: Well, that's fine. But we're
21 going to focus on the 2009 book, you told me they're the
22 same, and that one has page numbers.

23 MS. HASSETT: Yeah.

24 THE COURT: So it would be more intelligible.

25 All right. And the plaintiff has also identified

1 additional alleged similarities between the two books.

2 All right. On a motion for summary judgment
3 relating to an alleged copyright violation, the First
4 Circuit has said that summary judgment, essentially
5 there's a two-part test involved. The plaintiff has the
6 burden ultimately of proving two elements of copyright
7 infringement, ownership of a valid copyright, the
8 copying of constituent elements of the works that are
9 original. The key, for analytical purposes is, at this
10 point, particularly is whether there's a substantial
11 similarity between protected, the parts of Ms. Hassett's
12 book, and one or more parts of the defendant's book?

13 The First Circuit has said that summary judgment
14 on substantial similarity is appropriate only when a
15 rational factfinder correctly applying the pertinent
16 legal standards would be compelled to conclude that no
17 substantial similarity exists between the copyrighted
18 work and the allegedly infringing work, and I think more
19 particularly it has to be the protected parts of the
20 copyrighted book because not -- well, you can get a
21 copyright, but not every statement in the book is
22 subject to copyright protection.

23 Basically under this standard, as the First
24 Circuit's instructed, no discovery is necessary to
25 determine substantial similarity. The Court has to

1 compare the two books and the pertinent parts of the two
2 books. And even if I assume copying, at this point,
3 without finding it, summary judgment may be appropriate
4 if no rational factfinder could find the required
5 substantial similarity between Ms. Hassett's book, or
6 any protected parts of Ms. Hassett's book, and the
7 defendant's book.

8 With very valuable assistance from my law clerk,
9 I've studied this closely. My tentative view is -- and
10 it's tentative, that the defendant is entitled to
11 summary judgment because any similarities between the
12 two books that arise out of parts of "Living,"
13 Ms. Hassett's book, are not protected by copyright law.
14 The law instructs you can't -- you don't have copyright
15 protection for ideas. You don't have copyright
16 protection for short phrases, "Rome wasn't built in a
17 day." You don't have copyright protection for facts.
18 You don't have copyright protection generally for
19 format.

20 So while I'm interested in hearing all the
21 argument, I think instead of hearing first from the
22 defendant, because I've studied the papers deeply, it
23 would be very helpful to have Ms. Hassett do what I was
24 encouraging in my October 14 order. What I'd like you
25 to do is point me -- show me your best example of what

1 you think -- just let me finish. I'm going to get to
2 you in just a second. I want you to show me your best
3 example of what you think is a protected part of your
4 book and then the part of Ms. Hasselbeck's book that is
5 substantially similar.

6 MS. HASSETT: Okay.

7 THE COURT: And I'm going to have you give me
8 a couple of examples and we'll go that way.

9 MS. HASSETT: Can I give you my, um -- okay.
10 Since I sent you the information, I went through the
11 symptoms in the book. Now, I haven't --

12 THE COURT: You went through what?

13 MS. HASSETT: All the symptoms in the book. I
14 had a chapter called "My Symptoms" and I had another
15 chapter of all the symptoms that I had compiled in my
16 book for the years that I had done it, right? So
17 Ms. Hasselbeck has 70 symptoms in her book, 68 of those
18 symptoms appear in my book. 48 symptoms I have, myself,
19 in my book in my symptoms. All 48 symptoms appear in
20 Ms. Hasselbeck's book.

21 In my chapter for children, I have 20 --

22 THE COURT: Well, let's see it. Let's go --

23 MS. HASSETT: Would you like to see it?

24 THE COURT: Yeah, and I've got the book here.
25 So we're going to --

1 MS. HASSETT: See I put the symptoms next to
2 each other from all the symptoms --

3 THE COURT: I know. In what pages?

4 MS. HASSETT: In my book?

5 (Pause.)

6 MS. HASSETT: Well, her book, all her symptoms
7 were scattered throughout her whole book. My chapter
8 would be -- my symptoms are Chapter 3, Page 27. And
9 then the chapter before that would be Page 24 and 25 and
10 26.

11 So -- so what I did was take every symptom from
12 both books and compiled a list and put all the symptoms
13 of Ms. Hasselbeck on the left, all my symptoms on the
14 right, so that you can see that. It's a list that I
15 compiled --

16 THE COURT: Do you want to hand it up?

17 MS. HASSETT: Sure.

18 THE COURT: Do you have a copy for the
19 defendant?

20 MS. HASSETT: Yup.

21 THE COURT: Okay, give them a copy.

22 (Hands up and to defendants.)

23 THE COURT: All right. We'll make this
24 Exhibit 1 of today's date.

25 (Exhibit 1, marked.)

1 THE COURT: (Reads.) Let me see if I can
2 understand this. Ms. Hasselbeck, the left side, and
3 Ms. Hassett, the right side.

4 MS. HASSETT: Now, I know that symptoms are --
5 some are common knowledge, but I've compiled this list
6 for over ten years in my book. How can two people, from
7 two different walks of life, have all the same
8 information in the books?

9 THE COURT: Well, I can attempt to -- I cited
10 for you the **Feist** case by the Supreme Court on the
11 telephone books and -- you know, which was a classic
12 compilation case, and they both have, I think,
13 everybody's telephone number and in the same
14 alphabetical order, but the Supreme Court's said, you
15 know, the telephone numbers, organized that way, weren't
16 copyrightable because they're -- they're facts.

17 MS. HASSETT: But this was a compilation of my
18 research for years and years and years. And even in my
19 children's chapter, I mean -- well, maybe the words
20 were -- what I'm saying is it's just like they went
21 through my book and took what they wanted and -- it's
22 just a compilation of my work.

23 I mean, I -- I've even gone over the evidence
24 again and there's more similarities. It just can't be a
25 coincidence that so many phrases are --

1 THE COURT: You know what might be helpful?
2 Let me see what the defendants say about the symptoms,
3 okay?

4 MS. HASSETT: Okay.

5 THE COURT: And then I'll let you give me some
6 other examples.

7 MR. SNYDER: Yes, thank you, your Honor. I
8 neglected to mention that Elisabeth Hasselbeck is in
9 court here, your Honor.

10 THE COURT: Okay.

11 MR. SNYDER: Your Honor -- as your Honor
12 noted, symptoms are medical facts, medical data that the
13 copyright law does not protect. It cannot protect. If
14 the copyright law protected medical symptoms, then
15 doctors, scholars and others would be precluded from
16 writing books about those symptoms and that's why the
17 copyright law only protects original expression that
18 might describe those symptoms. So, if, for example, the
19 plaintiff alleged that she described a particular
20 symptom with creativity and originality in some
21 expressive context and that expressive context
22 surrounding the medical symptom itself was appropriated,
23 then she might state a claim. There is no such
24 allegation. There's no allegation at all that an
25 expression of a particular symptom is similar, that is,

1 the same expressive words used.

2 Separately, your Honor, to the extent she is
3 claiming or alleging a compilation copyright or an
4 infringement of a compilation, the plaintiff herself
5 acknowledged that the arrangement of these symptoms is
6 fundamentally dissimilar in the two works. So there can
7 be no claim --

8 THE COURT: Dissimilar because Ms. Hassett
9 just said that the symptoms are dispersed throughout
10 Ms. Hasselbeck's book and not presented the way they are
11 in Ms. Hassett's book?

12 MR. SNYDER: Precisely, your Honor. So if,
13 for example, the defendant's book listed the symptoms in
14 the precise order, which reflected some expressive or
15 creative choice, there could be a claim. But there is
16 no such allegation. And the Supreme Court, as your
17 Honor indicated, in the **Feist** case, makes clear that
18 copyright protection attaches to a factual compilation,
19 only in rare circumstances, and that is a thin
20 protection, and you would need to have essentially a
21 mirror image or a mere exact copy of the arrangement of
22 otherwise unprotected medical facts, not just random
23 generic similarities.

24 And I'll note, your Honor, that the reason we
25 inundated the Court with so much prior art was simply to

1 underscore the point that these medical facts, these
2 symptoms, for example, are ubiquitous and inevitable to
3 this genre. And so I am looking at, your Honor, a book
4 that actually Ms. Hasselbeck credits in her book as
5 important to her primary research, a book by Peter
6 Green, the Director of Celiac Disease at Columbia
7 University, and I'll get you the cite in a moment, but
8 the very first section of that book is entitled
9 "Symptoms" and it goes through in detail what the
10 symptoms are.

11 And I would say, finally, your Honor, that it is
12 not a coincidence that the two books list similar
13 symptoms, it is a medical reality that these two women
14 share the same condition which produces these symptoms
15 about which so many people have written. And so I think
16 that this claim failed, like all the other claims that
17 are based on medical facts, which essentially constitute
18 the guts of the plaintiff's case. Thank you, your
19 Honor.

20 MS. HASSETT: Um, I disagree with that. I
21 have my friend, whom I dedicated my book to, over here
22 and we come from the same town and we don't have the
23 same symptoms. And in Dr. Green's book, he does not
24 have the exact same symptoms that I have in my book. He
25 doesn't have the compilation of symptoms that I put in

1 my book, such as Ms. Hasselbeck does. There's no two
2 celiacs that would have the same exact symptoms.

3 So my friend over here, she doesn't have any of
4 the same symptoms as me and she suffers from other
5 autoimmune disorders that I don't have. So I can't
6 agree with that.

7 I've spent 10 years compiling this book and --

8 THE COURT: I'm interested in hearing other
9 examples. You're representing yourself and, I think,
10 that imposes on me a special obligation to, you know,
11 figure out the law, which I always try to do, and see
12 how it fits with the facts.

13 MS. HASSETT: I mean, then that would be okay
14 to say that I took Dr. Green's book and copied it when
15 I -- you know what I mean?

16 THE COURT: Well, this -- I explained some of
17 this in my October order. Certain ideas -- even facts
18 are not protected by a copyright even though you've got
19 a copyright on the book, and ideas, as I understand it
20 at the moment, are not protected, it's the expression of
21 the ideas. So if somebody --

22 MS. HASSETT: So if --

23 THE COURT: Let me just finish. It's a tricky
24 thing because copyright law tries to strike a balance.
25 We want to, in this country, encourage originality, but

1 the Supreme Court explained this in that *Feist* case that
2 it really has two dimensions. We want people to have
3 ideas, to express their ideas, but we don't want that to
4 be the end of the inquiry. We want people to read their
5 book and if they bring some originality to it, you know,
6 they can express similar ideas. But somebody would have
7 to look at it and say, "These are substantially
8 similar." I'd have to find, at this point, that it
9 would be reasonable for somebody to look at a protected
10 part of your book and Ms. Hasselbeck's book and said,
11 "Ms. Hassett showed originality in doing this and I
12 conclude that Ms. Hasselbeck copied that." And, you
13 know, if it's like in Dr. Green's book or someplace
14 else, it may just be an idea or a fact. These symptoms
15 are among the symptoms that people -- the disease you
16 struggle with or suffer from or now have.

17 MS. HASSETT: Yeah.

18 THE COURT: And part of it's -- as I said, the
19 law is not -- it's not intuitively obvious on this. I
20 mean, it wouldn't necessarily be a copyright violation
21 for Ms. Hasselbeck to have got your book in the mail
22 and, as a result, decided to write her own book and
23 cover some of the same subject matter, including what
24 are the symptoms.

25 What's the next example you want to show me?

1 MS. HASSETT: I mean, it just seems as though
2 the whole book has been taken apart and put together in
3 her book.

4 THE COURT: Taken apart and put together?

5 MS. HASSETT: Yes, you know what I mean?
6 She's taken parts of my book and reworded it. But it
7 goes on for pages and pages and pages. And my book only
8 has -- because of -- really it only has 50 pages of
9 straight knowledge, because I wanted to jamb-pack it,
10 and then the rest was vitamins and enzymes and she
11 didn't -- nothing was touched out of that, and then the
12 other half of the book was all recipes.

13 So it just seemed strange to me that over --
14 almost 50 pages of my book are exactly the same as in
15 her book. Whereas if you look at Dr. Green's book,
16 there's not a whole volume of the same information in
17 both books.

18 THE COURT: It's your argument that the same
19 information is in the same book --

20 MS. HASSETT: But page after page after page.

21 THE COURT: Well, I've been trying to put this
22 under the microscope, so you need to show me the pages,
23 because it's the expression of an idea, I think, rather
24 than the idea or the information that the copyright laws
25 protect.

1 You know, point me to something that suggests --

2 MS. HASSETT: Well, for instance, this.

3 "People who can challenge it could not challenge it" --

4 THE COURT: Well, let me ask you this. What
5 page are you reading from and from what?

6 MS. HASSETT: 18.

7 THE COURT: Of your book?

8 MS. HASSETT: Yeah.

9 THE COURT: Okay, Page 18.

10 MS. HASSETT: And 25 in her book.

11 THE COURT: Okay, let me get those two pages.

12 (Gets pages.)

13 THE COURT: 18 and 25. All right.

14 MS. HASSETT: 18 will be Chapter 2, second to
15 the last sentence or third to the last sentence from the
16 bottom, Paragraph 2.

17 THE COURT: Okay, I think it's Chapter 1.

18 MS. HASSETT: Chapter 1, yeah. It's Chapter 1
19 after Page 2.

20 THE COURT: Okay. So your book says "People"
21 --

22 MS. HASSETT: -- "can challenge it, could not
23 challenge it, but if they do not, it's not likely to
24 kill them, but it still does not mean they're not doing
25 damage."

1 THE COURT: Okay, hold on a second. Let's
2 read this more slowly. "It's people with, who can
3 challenge it, should not challenge it, but they do" --
4 "but it," and maybe that means "if," "they do, it is not
5 likely to kill him or her, but this still does not mean
6 it is not doing damage that you can't feel or see."

7 MS. HASSETT: Right.

8 THE COURT: So that's a sentence.

9 MS. HASSETT: And then further would be the
10 first sentence of 25, up on the top. "People who are
11 asymptomatic face the rather different challenge" --

12 THE COURT: Hold on a second. I don't see
13 that. Oh, here. Oh, okay, it starts on 24.

14 MS. HASSETT: Right, Page 24, the last three
15 words.

16 THE COURT: Okay, let me read it because I'll
17 read it more slowly and he'll write it down right.

18 MS. HASSETT: Okay.

19 THE COURT: Tell me if I'm reading the right
20 sentence. "People who are asymptomatic face the rather
21 difficult challenge of turning away from food that does
22 not feel like it's doing damage."

23 All right. So you both are talking about food
24 that may not feel like it's doing damage.

25 MS. HASSETT: Right. What I'm --

1 THE COURT: Go ahead.

2 MS. HASSETT: If you took one of these phrases
3 or whatever and said that that was it, it would be fine,
4 but it goes on for page after page after page of -- I
5 mean, it's just -- do you want another one?

6 THE COURT: Well, here, let's just go one at a
7 time. So what does the defendant say about that?

8 MR. SNYDER: I'm having -- with all due
9 respect to Ms. Hassett, I'm having difficulty
10 understanding her argument. To the extent she's saying
11 that both books talk about a challenge, certainly, um,
12 that is not protectable. It's not original expression.
13 It seems to me that, um, that the word "challenge" is
14 not protectable. It seems as if the expression here is
15 fundamentally dissimilar. They're talking about maybe
16 related concepts, but different concepts. But even if
17 they're talking about --

18 THE COURT: Well, it looks like the same
19 concept.

20 MR. SNYDER: But even if they're talking about
21 precisely the same concept, an idea, a concept is not
22 protected under Section 102, Title 17 of the Copyright
23 Act, which commands that "No case gets copy protection
24 for an original work or authorship to the extent of any
25 idea, procedure, process, system, concept, principle, et

1 cetera," and this is a quintessential idea or a concept
2 which belongs to the world and over which this plaintiff
3 has no monopoly. If she did, future authors trying to
4 educate people with celiac disease and the public at
5 large would be precluded from talking about this idea.
6 That's not what the copyright law --

7 THE COURT: Well, the second book,
8 Hasselbeck's book, you know, uses the terms "doing
9 damage" and "challenge." Why could a rational
10 factfinder not find these lines are substantially
11 similar?

12 MR. SNYDER: It's clear, your Honor, that the
13 use of, um, short words and phrases such as these, um,
14 in works exceeding hundreds of pages cannot support an
15 infringement claim. The courts in this circuit and
16 elsewhere routinely dispose of claims based on allegedly
17 some of the words or short phrases that are far more
18 substantial even than this.

19 THE COURT: What cases do you particularly
20 have in mind?

21 MR. SNYDER: The First Circuit 1996 case **CMM**
22 **Cable** in which -- involving two similar radio program
23 promotions and the Court there held that phrases that
24 were a lot, frankly, more original than the
25 juxtaposition of "challenge" and "damage" were found to

1 be nonactionable under the scenes a faire doctrine which
2 the First Circuit held that "cliche language that is
3 typically used to convey a particular idea," and in that
4 case it was, "If you're still on the clock at quitting
5 time, clock in and make \$50 an hour," is certainly much
6 more expressive or original than the use of generic
7 words "challenge" and "damage," which you would expect
8 to find in a self-help book, your Honor, about a medical
9 condition.

10 Indeed we point your Honor at Exhibit 11 to my
11 declaration, two examples in Peter Green's book, again,
12 where he talks about a "gluten challenge" and he talks
13 about what the gluten challenge consists of, and the use
14 of the word "damage" is a word that is synonymous with
15 "harm." And it's almost inevitable, it's certainly
16 predictable as a word to be used in talking about a
17 disease that causes pain and distress. And so I don't
18 think it's a close call, your Honor. More is needed.

19 The Second Circuit, in a case **Arica vs. Palmer**, in
20 discussing the question of how much language is
21 necessary to find -- for a reasonable lay observant to
22 find actual similarity, states that there needs to be
23 enough appropriation of plaintiff's, quote, "sequence of
24 thoughts, choice of words, emphasis and arrangement, to
25 satisfy the minimal threshold of required creativity."

1 THE COURT: What page are you reading from?

2 MR. SNYDER: I'm sorry. This is from the
3 **Arica** case and I don't have the jump site with me now.
4 I'm sorry. I'll get it in a moment.

5 In other words, that case reaffirms the
6 longstanding principle that's embedded in the copyright
7 law that you need an "exact copy," and I'm paraphrasing,
8 of more than isolated words and phrases. Because,
9 again, if Ms. Hassett has a monopoly over the
10 juxtaposition of the words "challenge" and "damage" in a
11 medical self-help book, um, the purposes of the
12 copyright law would be subverted and not upheld.

13 THE COURT: Okay. So I think I understand
14 your positions on that example.

15 Would you like to say a little bit more on that?

16 MS. HASSETT: Well, for one -- like I said,
17 for one example to be -- but they go on and on and on.

18 THE COURT: Would you then --

19 MS. HASSETT: Well, I mean --

20 THE COURT: Wait. Please let me finish.
21 Please give me another one.

22 MS. HASSETT: Okay. (Looks.) Okay, "I have
23 suffered for years upon years" --

24 THE COURT: I'm sorry. What page are you on?

25 MS. HASSETT: Page 18 and Page 7.

1 THE COURT: Okay. So Page 18 in your book?

2 MS. HASSETT: Yeah, the bottom of 18, the last
3 three sentences, "I have suffered for years upon years."

4 THE COURT: No, just read it slowly.

5 MS. HASSETT: "I have suffered for years upon
6 years upon years with this disease. I told doctors I
7 wanted a celiac test before they would give me one and
8 then I got myself one and I literally saved my own
9 life."

10 "I began to wonder why so many doctors ignored my
11 theory" --

12 THE COURT: Hold on just a second. That's not
13 what comes next with what I'm looking at.

14 MS. HASSETT: No, sorry, that's Page 7.

15 THE COURT: Oh, okay. So you say: "I have
16 suffered for years upon years upon years with this
17 disease. I told doctors I wanted a celiac test years
18 before they would give me one." Okay, that's Page 18 in
19 your book.

20 MS. HASSETT: Yes.

21 THE COURT: And now Page 8 of the defendant's
22 book, is that what you want me to look at?

23 MS. HASSETT: Well, I have to find it.

24 (Pause.) I can't find it now.

25 THE COURT: Well, hold on a second.

1 (Pause.)

2 THE COURT: Take your time and we'll go to
3 another example.

4 MS. HASSETT: Okay. (Searches.) Okay. How
5 about on Page 19, Paragraph 2.

6 THE COURT: Of your book?

7 MS. HASSETT: Yup.

8 (Turns.)

9 THE COURT: Would you slowly read the sentence
10 you want me to look at.

11 MS. HASSETT: Yeah. Just -- okay. "I went to
12 three different gastrointestinal specialists and a few
13 doctors and they had every other answer except celiac
14 disease and when I told them I wanted a celiac test,
15 they would still not give me one."

16 THE COURT: Hold on just a second. You say
17 this is on Page 19?

18 MS. HASSETT: In the big paragraph.

19 THE COURT: In the big paragraph in the middle
20 of the page?

21 MS. HASSETT: Yeah, the third sentence. Oh,
22 no, that's -- yeah. Yeah.

23 THE COURT: Oh, I see it now.

24 MS. HASSETT: On Page 19 and then on her Page
25 18.

1 THE COURT: It says: "I went to three
2 different gastrointestinal specialists and a few other
3 doctors and they had every other answer except celiac
4 disease even when I told them I wanted a celiac test,
5 they would not give me one."

6 Okay. Then in the defendant's book, what page?

7 MS. HASSETT: Page 18, Paragraph 3.

8 THE COURT: Paragraph 3.

9 MS. HASSETT: It says --

10 (Pause.)

11 THE COURT: Where it says --

12 MS. HASSETT: "For years after."

13 THE COURT: "-- diagnosing myself with celiac
14 disease, I struggled to find a doctor who would listen
15 to my theories."

16 MS. HASSETT: "I told the doctors, and there
17 were lots of them, that I thought I had celiac disease.
18 They looked at me as if I was crazy and I was speaking
19 the wrong language. They just flat out dismissed the
20 condition."

21 THE COURT: All right. So in your view those
22 two sentences are expressing the same idea?

23 MS. HASSETT: Right.

24 THE COURT: Did they use the same words?

25 MS. HASSETT: "The celiac test."

1 (Pause.)

2 THE COURT: All right. Well, I think it's
3 only your book that talks about a test there, isn't it?

4 MS. HASSETT: It seems to me that everything
5 is thrashed around. We can go on to another one, if you
6 want.

7 THE COURT: Well, why don't I let the
8 defendant speak briefly to this one.

9 MR. SNYDER: Yes, your Honor. Briefly. These
10 are clearly markedly dissimilar in expressive content,
11 that is, a totally different expression. Maybe they're
12 expressing the same idea, but obviously it's a totally
13 different original expression. Moreover, what they
14 reflect are the personal narratives of two authors in
15 self-help books. It is a stock element that is both
16 predictable and inevitable in books of this sort, which
17 is why courts consistently reject copyright infringement
18 claims based on such elements.

19 An example is in the recent **Seinfeld** -- in the
20 **LaPine vs. Seinfeld** case, cited to the Court in our
21 briefs, which involve two cookbooks about how to eat
22 healthy and improve your children's meals. The court,
23 in granting summary judgment, found that no reasonable
24 factfinder could find actionable similarity with respect
25 to protected expression which cited, among other things,

1 the author's descriptions of their personal struggles
2 regarding the subject matter of the book, holding that
3 that idea or concept is a stock element flowing from the
4 idea and not protected unless substantially similar in
5 expression, which it obviously is not.

6 THE COURT: All right. Do you want to give me
7 one more example, please.

8 MS. HASSETT: (Searches.)

9 THE COURT: Or, actually, you can think about
10 that a bit.

11 I think what would be helpful at this point --
12 it's the defendant's motion to dismiss, so there must be
13 something you're prepared to say as an overview. Why
14 don't you give me the essence of it and then I'll give
15 the plaintiff a chance to respond.

16 MR. SNYDER: Yes, your Honor. I think I've
17 touched on most of the salient points, so I'll just
18 summarize what the highlights of what I think are the
19 critical points, which really are set forth in your
20 Honor's October 14th order, the hornbook legal
21 principles that govern this motion.

22 Which is that, as your Honor said, only aspects of
23 the plaintiff's work that are protected by copyright law
24 can be considered, and the **Yankee Candle** case makes that
25 clear and also instructs, as **CMM Cable** does, a

1 dissection to remove the unprotectable items. Um, ideas
2 are not protected. Facts are not protected. Stock
3 elements which are customary in the treatment of a given
4 subject, such as personal narratives about seeking
5 medical attention and the like, are not protected. And
6 words and short phrases are not protected, precisely for
7 the reason your Honor had said, which is the very
8 intention that the copyright laws are designed to foster
9 originality, but at the same time they can't suppress or
10 inhibit originality and creativity. So the courts have
11 developed and the First Circuit has developed a very
12 clear set of principles.

13 And applied here, in comparing these two works,
14 your Honor, when all of the unprotectable elements are
15 dissected, what you're left with are two fundamentally
16 dissimilar works. There is no similarity once the
17 unprotected elements are stripped out. All that exists,
18 frankly, and our brief sets it forth in some detail, are
19 marked dissimilarities in the content and structure and
20 tone and expressive content and, frankly, in the concept
21 itself.

22 So basic medical facts are not to be considered
23 and that makes up the bulk of the plaintiff's
24 allegations. And I won't belabor disclosing those
25 unless the Court has any questions about that.

1 THE COURT: That's okay.

2 And what would you like me to consider generally?

3 MS. HASSETT: The whole compilation of my work
4 was gone through and used for their own agenda. I mean,
5 I've shown ample similarities. I have more to show
6 you. I've showed you the four -- I mean, all the
7 symptoms that are similar. It just can't be a
8 coincidence that these two works are so similar.

9 The attorneys are saying that they're not similar,
10 but they're the ones who are saying it. People who have
11 read my book, both books, say that they're similar and
12 that they have been copied.

13 I mean, I spent 10 years on this book and then I,
14 out of a gesture of good faith, I sent it to
15 Ms. Hasselbeck and it seems like -- it appears that
16 almost 50 pages of my work has been gone through and
17 used. I've shown access -- I've shown that the
18 copyright is on March of 2008. I mean, I can show you
19 that she -- and Publishers Marketplace or whatever,
20 she's signed a contract -- I mean, she's submitted a
21 proposal on April 14th of 2008, she signed a contract on
22 the 18th and started promoting it on the 21st. Is that
23 -- I mean, it seems very coincidental to me.

24 THE COURT: Well, for present purposes, I
25 don't think the defendant is saying you don't have

1 enough evidence of copyright or even of copying, they're
2 not agreeing or admitting to copying, but they're saying
3 that if your book influenced Ms. Hasselbeck's book, it
4 was the ideas, not the expression of the ideas, and it's
5 the expression that's protected. Because when people
6 write a book -- I mean, this is what the Supreme Court
7 says. If you write a book, like you wrote a book, um,
8 to try to help other people, you know, if they're moved
9 to write their own book on the same subject, influenced
10 by your ideas, that's legal, not illegal.

11 MS. HASSETT: That makes it okay for somebody
12 to take somebody else's work that they worked for almost
13 a decade on and use it as their own and just bring it up
14 throughout their book the way that --

15 THE COURT: Did you read that **Feist** decision
16 from the Supreme Court, F-E-I-S-T, that I cited in
17 October?

18 (Silence.)

19 THE COURT: No? Did you read it?

20 MS. HASSETT: No.

21 THE COURT: Before you go home -- I'm going to
22 take this matter under advisement. I'm going to write a
23 decision and you'll get it. But I'm going to send you
24 home with a copy of that decision, because this is --
25 you know, this is the United States Supreme Court

1 essentially addressing the law relating to your argument
2 in a way that you might find surprising. But it
3 explains why.

4 MR. SNYDER: Your Honor, could I just be heard
5 for one moment, your Honor?

6 THE COURT: Sure.

7 MR. SNYDER: Given Ms. Hassett's pro se
8 status, it may be a little unusual, but I wanted to say
9 something to the Court and to Ms. Hassett which might be
10 helpful.

11 We, for the purpose of this motion, as your Honor
12 indicated, presume, but do not admit, copy and access,
13 as we must on a motion to dismiss because both are pled,
14 and although this is not relevant to the pending motion
15 and should not be considered obviously by the Court in
16 the pending motion, I would want to also, with the
17 Court's permission, give Ms. Hassett, to take home, or
18 look at, maybe, a proposal that Ms. Hasselbeck -- which
19 Ms. Hasselbeck submitted to her publisher months before
20 Ms. Hassett allegedly mailed her submission to "The
21 View," which may not -- it certainly is not --

22 THE COURT: If you want you can do the
23 following. I'll let you make it part of the record,
24 because I converted this to summary judgment. However,
25 it wouldn't be -- if this were the issue, "Did she get

1 the idea from you?" They wouldn't grant summary
2 judgment, because they would have some evidence that she
3 thought of it earlier, and you would have evidence that
4 you sent her her book and a short time later she made
5 the proposal. So a jury might come out different ways
6 on that. You wouldn't lose on summary judgment on that.

7 MR. SNYDER: Certainly, your Honor. And I'm
8 simply saying that since Ms. Hassett certainly feels
9 passionate about this, I thought it might make her feel
10 a little better about --

11 THE COURT: No, I think --

12 MS. HASSETT: Don't worry about me.

13 THE COURT: Well, you've been through a lot.
14 You've both been through a lot.

15 MS. HASSETT: But that's not what this is all
16 about. This is about -- I truly believe that there has
17 been an infringement on my copyright. I believe my
18 compilation was used and dispersed throughout her book
19 and --

20 THE COURT: Yeah, but the --

21 MS. HASSETT: So if it wasn't intact, it was
22 intact when she received it and then she just disbursed
23 it. But yet she gave other people credit in her book.
24 You know what I'm saying? So what would have been the
25 harm if she wanted to use my --

1 THE COURT: And to give you credit.

2 MS. HASSETT: Credit where, I mean --

3 THE COURT: All right.

4 Two things. One, I'm going to let you submit that
5 document for the record and we'll send everybody home
6 with a copy of that, too. But this document is not
7 going to operate to defeat your claim. It could be
8 meaningful if this case got to trial. But you wouldn't
9 lose at this point because of this document.

10 On the other hand, I think what I was trying to
11 show you is, whether you win or whether you lose, um,
12 you know, they have reason to argue that Ms. Hasselbeck
13 didn't get the idea from you and you'll just have one
14 more piece of information, although it's not a piece of
15 information that's going to influence how I decide this
16 present motion.

17 All right. Do you have the document?

18 MR. SNYDER: Yes, your Honor.

19 THE COURT: We'll make this Exhibit 2. What's
20 it called?

21 MS. HASSETT: I mean, he's saying that, but in
22 Publishers Marketplace it says that she submitted her
23 proposal on the 18th. So like you said if --

24 THE COURT: Well, let me ask you this. Are
25 you interested in seeing this document?

1 MS. HASSETT: Sure.

2 MR. SNYDER: Your Honor, what I would like to
3 do is because Ms. Hasselbeck sent it to counsel, I'm
4 just a little concerned that I need to redact out --

5 THE COURT: We'll do it.

6 MR. SNYDER: Okay. Thank you.

7 THE COURT: Before you go home you'll have a
8 redacted version.

9 All right? Is there some more you'd like to say,
10 Ms. Hassett?

11 MS. HASSETT: Um --

12 THE COURT: I think I get your point.

13 MS. HASSETT: Okay.

14 THE COURT: But you'll get some of these
15 points better, or see at least the complexity of it, if
16 you read that decision that I'm also going to send you
17 home with. You might think the Supreme Court is wrong,
18 but --

19 MS. HASSETT: Well, I just don't think it
20 should be right that this should be able to happen. I
21 mean, I didn't write this book for money or for any of
22 that, I wrote this book to help people. And when it was
23 taken -- the stuff that she used in my book -- her book
24 does not do a celiac such as myself any good. I'm a
25 celiac who can't eat any commercial product. I live my

1 life in a natural and direct approach. That's the way
2 the book was. And then I believe that she took my
3 compilation and just disbursed it throughout her book.

4 Like I can't eat any commercial product because
5 even though the commercial products say that they're
6 gluten free, they still contain gluten and still
7 maintain their gluten status. I'm a person who has zero
8 tolerance whatsoever to gluten.

9 THE COURT: So you say she disbursed it
10 throughout the book?

11 MS. HASSETT: And just changed the words a
12 little bit. I mean, I've done -- since the symptoms
13 that I sent you, I did another batch of them. I mean, I
14 can just pick parts all out so that even though they
15 were changed around a little bit, it's still a
16 compilation of my work. Even though it was disbursed in
17 a different way, I still believe it's a compilation of
18 my work.

19 THE COURT: Okay. Well, I'm going to take
20 this matter under advisement. At this point I'm not
21 going to act on any of the other motions. I don't
22 perceive a reasonable likelihood of success on the
23 merits. But if I change my view, deciding a motion for
24 summary judgment, then we'll come back and do the
25 preliminary injunction. If I grant summary judgment,

1 there's no issue of a preliminary injunction.

2 So my excellent staff and I have been paying
3 careful attention to what you've been submitting --

4 MS. HASSETT: Do you want the rest of what I
5 have that I did this before --

6 THE COURT: No, you gave me lots of it in
7 advance and I just asked you for your best examples and
8 you gave me that and I'm familiar with the whole books
9 and your arguments today. So this isn't a time to be
10 giving me more. I gave you an order and told you when
11 to give me more.

12 MS. HASSETT: Okay.

13 THE COURT: Now, you know, you've made your
14 written submission, you've made your energetic
15 arguments, and I'm going to consider them. Okay? But I
16 encourage you to read this Supreme Court case.

17 MS. HASSETT: I will.

18 THE COURT: All right. And if you think the
19 Supreme Court got it wrong, and you eventually think I
20 got it wrong -- well, if you think I got it wrong,
21 you're going to be able to appeal to the Court of
22 Appeals for the First Circuit. But if you think the law
23 just doesn't strike the right balance, talk to your
24 congressman. They have to rewrite the law. All right?

25 Is there anything further for today?

1 MR. SNYDER: No, your Honor. Thank you.

2 THE COURT: The Court is in recess.

3 (Ends, 3:30 p.m.)

4

5 C E R T I F I C A T E

6

7 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do
8 hereby certify that the foregoing record is a true and
9 accurate transcription of my stenographic notes, before
10 Chief Judge Mark L. Wolf, on Tuesday, November 30, 2010,
11 to the best of my skill and ability.

12

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16 /s/ Richard H. Romanow 12-17-10

17 RICHARD H. ROMANOW Date

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