

This section contains:

- 1) Civil Docket for Case #: 1:09-cv-12034-MLW. Hassett v Hasselbeck Copyright Infringement Case.
- 2) Memorandum and Order October 14, 2010 in the Hassett v Hasselbeck Copyright Infringement case. The scheduled date for a Summary Judgment Hearing scheduled for November 30, 2010
- 3) Elisabeth Hasselbecks latest version of her proposal on February 24, 2008 that was submitted to the court at the Summary Judgment hearing by Mr. Orin Snyder defense counsel for Elisabeth Hasselbeck Please take note of (#3 in some notes). "Editor and Chief of Penguin books wrote me a request to write a Gluten-free cookbook" remembering Ms Hassett sent Ms Hasselbeck her book on April 4, 2008 and got confirmation from post office of receipt of the book being April 8, 2008.

United States District Court  
District of Massachusetts (Boston)  
CIVIL DOCKET FOR CASE #: 1:09-cv-12034-MLW

Hassett v. Hasselbeck et al  
Assigned to: Chief Judge Mark L. Wolf  
Cause: 17:101 Copyright Infringement

Date Filed: 11/30/2009  
Jury Demand: Plaintiff  
Nature of Suit: 820 Copyright  
Jurisdiction: Federal Question

**Plaintiff**

**Susan Hassett**

represented by **Susan Hassett**  
22 Royal Circle  
East Falmouth, MA 02536  
508-548-1604  
PRO SE

V.

**Defendant**

**Elisabeth Hasselbeck**

represented by **Laura O'Boyle**  
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**Defendant**

**Center Street Hachette Book Group**

represented by **Laura O'Boyle**  
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*LEAD ATTORNEY*  
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**Robert L. Ullmann**  
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**Robyn S. Maguire**  
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**Orin Snyder**  
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*ATTORNEY TO BE NOTICED*















**Defendant**










**John Doe**











<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
11/30/2009	 <u>1</u>	COMPLAINT against Elisabeth Hasselbeck, Center Street Hachette Book Group, John Doe, filed by Susan Hassett. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D)(Patch, Christine) (Entered: 11/30/2009)
11/30/2009	 <u>2</u>	Civil Cover Sheet & Category Sheet by Susan Hassett. (Patch, Christine) (Entered: 11/30/2009)
11/30/2009		ELECTRONIC NOTICE of Case Assignment. Chief Judge Mark L. Wolf assigned to case. If the trial Judge issues an Order of Reference of any matter in this case to a Magistrate Judge, the matter will be transmitted to Magistrate

		Judge Bowler (Patch, Christine) (Entered: 11/30/2009)
11/30/2009	 <u>3</u>	General Order 09-1, dated January 6, 2009 regarding the E-Government Act and Personal Identifiers entered. (Patch, Christine) (Entered: 11/30/2009)
11/30/2009	 <u>4</u>	Summons Issued as to Elisabeth Hasselbeck, Center Street Hachette Book Group, John Doe. <b>Counsel receiving this notice electronically should download this summons, complete one for each defendant and serve it in accordance with Fed.R.Civ.P. 4 and LR 4.1. Summons will be mailed to plaintiff(s) not receiving notice electronically for completion of service.</b> (Patch, Christine) (Entered: 11/30/2009)
11/30/2009	 <u>5</u>	REPORT on the filing of copyright case. (Patch, Christine) (Entered: 11/30/2009)
11/30/2009		Filing fee/payment: \$ 350.00, receipt number BST014061 for <u>1</u> Complaint (Russo, Patricia) (Entered: 11/30/2009)
03/15/2010	 <u>6</u>	MOTION for Extension of Time of 120 Days to serve complaint by Susan Hassett, FILED.(Boyce, Kathy) (Entered: 03/17/2010)
04/09/2010		Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered granting <u>6</u> Motion for Extension of Time to Serve Defendants. ALLOWED. The plaintiff shall serve the defendants and file the returns of service by July 13, 2010. No further extensions will be granted without good cause shown. (O'Leary, Dennis) (Entered: 04/09/2010)
05/27/2010	 <u>8</u>	MOTION for Leave to Proceed in Informa Pauperis by Susan Hassett, FILED.(Boyce, Kathy) (Entered: 05/28/2010)
05/28/2010	 <u>7</u>	MOTION to Appoint Counsel by Susan Hassett. (Attachments: # <u>1</u> (Boyce, Kathy) (Entered: 05/28/2010)
05/28/2010	 <u>9</u>	MOTION for service by the United States Marshall by Elisabeth Hasselbeck. (Attachments: # <u>1</u> Exhibit - Application to Proceed Without Prepaying fees or Costs with further attachments)(Boyce, Kathy) (Entered: 06/01/2010)
06/11/2010	 <u>10</u>	MOTION for Extension of Time to Serve Defendants by Susan Hassett, FILED.(Boyce, Kathy) (Entered: 06/11/2010)
06/11/2010	 <u>11</u>	Letter to clerk from Susan Hassett. FILED. (Attachments: # <u>1</u> Exhibit Notice of Process)(Boyce, Kathy) (Entered: 06/11/2010)
06/14/2010	 <u>16</u>	Letter/request (non-motion) from Susan Hassett, FILED. (Boyce, Kathy) (Entered: 06/24/2010)
06/15/2010	 <u>12</u>	Replacement Corrected MOTION with correction of the spelling of Deft's name Elizabeth for Service by the United States Marshal by Susan Hassett, FILED.(Boyce, Kathy) Docket text Modified on 6/16/2010 for the docket to reflect that this motion is filed to replace former motion for service by the US Marshal (Boyce, Kathy). (Entered: 06/16/2010)
06/17/2010	 <u>13</u>	MOTION for Temporary Restraining Order by Susan Hassett, FILED. (Boyce, Kathy) (Entered: 06/17/2010)

06/17/2010	 <a href="#">14</a>	MOTION for Preliminary Injunction by Susan Hassett, FILED.(Boyce, Kathy) (Entered: 06/17/2010)
06/17/2010	 <a href="#">15</a>	Letter from Susan Hassett enclosing motion for a Temporary Restraining Order FILED.(Boyce, Kathy) (Entered: 06/17/2010)
06/22/2010		DOCKET SHEET sent to Susan Hassett (PSSA, 3) (Entered: 06/22/2010)
06/22/2010	 <a href="#">17</a>	Letter to Chief Judge Wolf enclosing certified mail receipts, FILED. (Boyce, Kathy) (Entered: 06/24/2010)
06/28/2010	 <a href="#">18</a>	MOTION for Extension of Time to August 18, 2010 to Respond to Complaint and Oppose Motions for TRO and Preliminary Injunction by Center Street Hachette Book Group, Elisabeth Hasselbeck.(Maguire, Robyn) (Entered: 06/28/2010)
06/29/2010	 <a href="#">20</a>	AFFIDAVIT OF SERVICE Executed by Susan Hassett. Center Street Hachette Book Group served on 6/16/2010, answer due 7/7/2010. Acknowledgement filed by Susan Hassett. (Boyce, Kathy) (Entered: 07/02/2010)
06/29/2010	 <a href="#">21</a>	AFFIDAVIT OF SERVICE Executed by Susan Hassett. Elisabeth Hasselbeck served on 6/10/2010, answer due 7/1/2010. Acknowledgement filed by Susan Hassett. (Boyce, Kathy) (Main Document 21 replaced on 7/19/2010) (Boyce, Kathy). (Entered: 07/02/2010)
07/01/2010	 <a href="#">22</a>	MOTION for Temporary Restraining Order by Susan Hassett, FILED, c/s.(Boyce, Kathy) (Entered: 07/02/2010)
07/01/2010	 <a href="#">23</a>	MOTION for Preliminary Injunction by Susan Hassett, FILED, c/s.(Boyce, Kathy) (Additional attachment(s) added on 7/2/2010: # <a href="#">1</a> Proposed Order) (Boyce, Kathy). (Entered: 07/02/2010)
07/01/2010	 <a href="#">24</a>	Letter to Chief Judge Wolf from Susan Hassett, FILED. (Boyce, Kathy) (Entered: 07/02/2010)
07/01/2010	 <a href="#">25</a>	Copy of letter sent to counsel from Susan Hassett, FILED. (Boyce, Kathy) (Entered: 07/06/2010)
07/02/2010	 <a href="#">19</a>	MOTION for Leave to Appear Pro Hac Vice for admission of Orin Snyder and Laura O'Boyle Filing fee: \$ 100, receipt number 0101-2972107 by Center Street Hachette Book Group, Elisabeth Hasselbeck.(Maguire, Robyn) (Entered: 07/02/2010)
07/06/2010		Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered granting <a href="#">19</a> Motion for Leave to Appear Pro Hac Vice Added Orin Snyder & Laura O'Boyle. <b>Attorneys admitted Pro Hac Vice must register for electronic filing. To register go to the Court website at <a href="http://www.mad.uscourts.gov">www.mad.uscourts.gov</a>. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form. . Conditionally ALLOWED provided that by 7/20/2010 attorneys Snyder and O'Boyle file a notice of appearance with all of their contact information including telephone and fax numbers.</b> (O'Leary, Dennis) (Entered: 07/06/2010)

07/06/2010	 <a href="#">26</a>	MOTION to Identify John Doe the Ghostwriter by Susan Hassett, FILED, c/s.(Boyce, Kathy) (Entered: 07/06/2010)
07/06/2010	 <a href="#">27</a>	REPLY to Response to <a href="#">23</a> MOTION for Preliminary Injunction filed by Susan Hassett, FILED, c/s. (Boyce, Kathy) (Entered: 07/06/2010)
07/07/2010	 <a href="#">28</a>	NOTICE of Appearance by Robert L. Ullmann on behalf of Center Street Hachette Book Group, Elisabeth Hasselbeck (Ullmann, Robert) (Entered: 07/07/2010)
07/07/2010	 <a href="#">29</a>	DECLARATION re <a href="#">18</a> MOTION for Extension of Time to August 18, 2010 to Respond to Complaint and Oppose Motions for TRO and Preliminary Injunction by Center Street Hachette Book Group, Elisabeth Hasselbeck. (Ullmann, Robert) (Entered: 07/07/2010)
07/13/2010	  <a href="#">30</a>	MOTION for Preliminary Injunction, by Susan Hassett, FILED, c/s. (Attachments: # <a href="#">1</a> Proposed Order)(Boyce, Kathy) (Entered: 07/15/2010)
07/13/2010	 <a href="#">31</a>	MOTION to Stay Pending Ruling of Appointment of Counsel by Susan Hassett, FILED, c/s. (Attachments: #(1) Copy of Letter to Attorney Maguire) (Boyce, Kathy) (Entered: 07/15/2010)
07/13/2010	 <a href="#">32</a>	Second MOTION to Identify John Doe the Ghostwriter by Susan Hassett, FILED, c/s.(Boyce, Kathy) (Entered: 07/15/2010)
07/16/2010		Judge William G. Young: ENDORSED ORDER entered granting in part and denying in part <a href="#">18</a> Motion for Extension of Time "Motion allowed in part and denied in part. Any opposition to motion for TRO and preliminary must be filed on or before Monday, August 2, 2010. A pleading responsive to the complaint may be filed on or before August 18, 2010." copy mailed to plaintiff (Boyce, Kathy) (Entered: 07/16/2010)
07/16/2010		Judge William G. Young: ENDORSED ORDER entered denying <a href="#">31</a> Motion to Stay: "Motion Denied without prejudice to its renewal before Chief Judge Wolf." copy mailed to plaintiff (Boyce, Kathy) (Entered: 07/16/2010)
07/16/2010		Judge William G. Young: ENDORSED ORDER entered. re <a href="#">27</a> Reply to Response to Motion filed by Susan Hassett: "Treating this pleading as a brief in support of the plaintiff's motion for preliminary injunction, it requires no judicial action."(Boyce, Kathy) (Entered: 07/16/2010)
07/26/2010	 <a href="#">42</a>	NOTICE of Appearance by Laura O'Boyle on behalf of Elisabeth Hasselbeck, filed, c/s. (Boyce, Kathy) (Entered: 08/16/2010)
07/26/2010	 <a href="#">43</a>	NOTICE of Appearance by Orin Snyder on behalf of Center Street Hachette Book Group, Elisabeth Hasselbeck, FILED, c/s. (Boyce, Kathy) (Entered: 08/16/2010)
08/02/2010		Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered finding as moot <a href="#">9</a> Motion ; finding as moot <a href="#">10</a> Motion for Extension of Time; finding as moot <a href="#">12</a> Motion as service has been completed. (O'Leary, Dennis) (Entered: 08/02/2010)

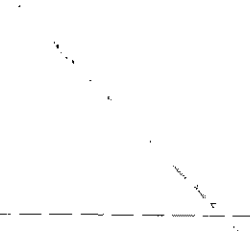
08/02/2010	 <a href="#">33</a>	MOTION to Dismiss ( <i>and Request for Oral Argument</i> ) by Center Street Hachette Book Group, Elisabeth Hasselbeck.(Maguire, Robyn) (Entered: 08/02/2010)
08/02/2010	 <a href="#">34</a>	MEMORANDUM in Support re <a href="#">33</a> MOTION to Dismiss ( <i>and Request for Oral Argument</i> ) filed by Center Street Hachette Book Group, Elisabeth Hasselbeck. (Attachments: # <a href="#">1</a> Appendix A)(Maguire, Robyn) (Entered: 08/02/2010)
08/02/2010	 <a href="#">35</a>	DECLARATION re <a href="#">33</a> MOTION to Dismiss ( <i>and Request for Oral Argument</i> ) by Center Street Hachette Book Group, Elisabeth Hasselbeck. (Attachments: # <a href="#">1</a> Exhibit 1, # <a href="#">2</a> Exhibit 2, # <a href="#">3</a> Exhibit 3, # <a href="#">4</a> Exhibit 4, # <a href="#">5</a> Exhibit 5, # <a href="#">6</a> Exhibit 6, # <a href="#">7</a> Exhibit 7, # <a href="#">8</a> Exhibit 8, # <a href="#">9</a> Exhibit 9, # <a href="#">10</a> Exhibit 10, # <a href="#">11</a> Exhibit 11, # <a href="#">12</a> Exhibit 12, # <a href="#">13</a> Exhibit 13, # <a href="#">14</a> Exhibit 14, # <a href="#">15</a> Exhibit 15, # <a href="#">16</a> Exhibit 16, # <a href="#">17</a> Exhibit 17, # <a href="#">18</a> Exhibit 18, # <a href="#">19</a> Exhibit 19, # <a href="#">20</a> Exhibit 20, # <a href="#">21</a> Exhibit 21, # <a href="#">22</a> Exhibit 22, # <a href="#">23</a> Exhibit 23, # <a href="#">24</a> Exhibit 24, # <a href="#">25</a> Exhibit 25, # <a href="#">26</a> Exhibit 26, # <a href="#">27</a> Exhibit 27, # <a href="#">28</a> Exhibit 28, # <a href="#">29</a> Exhibit 29, # <a href="#">30</a> Exhibit 30)(Maguire, Robyn) (Entered: 08/02/2010)
08/02/2010	 <a href="#">36</a>	MEMORANDUM in Opposition re <a href="#">30</a> MOTION for Preliminary Injunction, <a href="#">13</a> MOTION for Temporary Restraining Order, <a href="#">23</a> MOTION for Preliminary Injunction, <a href="#">22</a> MOTION for Temporary Restraining Order, <a href="#">14</a> MOTION for Preliminary Injunction filed by Center Street Hachette Book Group, Elisabeth Hasselbeck. (Maguire, Robyn) (Entered: 08/02/2010)
08/02/2010	 <a href="#">37</a>	MEMORANDUM in Opposition re <a href="#">32</a> MOTION to Identify John Doe the Ghostwriter, <a href="#">26</a> MOTION to Identify John Doe the Ghostwriter filed by Center Street Hachette Book Group, Elisabeth Hasselbeck. (Maguire, Robyn) (Entered: 08/02/2010)
08/03/2010	 <a href="#">38</a>	NOTICE OF MANUAL FILING by Center Street Hachette Book Group, Elisabeth Hasselbeck (Exhibits 4 and 5 cited in the Declaration (Dkt. 35)) (Maguire, Robyn) (Entered: 08/03/2010)
08/03/2010	 <a href="#">39</a>	Letter dated 8/3/10 to Mr. O'Leary from Attorney Robyn S. Maguire enclosing for manual filing hard copies of The G-Free Diet: A Gluten Free Survival Guide and Living With Celiac Disease, filed pursuant to Defendants'electronically filed Notice of Manual Filing, FILED. (Boyce, Kathy) (Entered: 08/03/2010)
08/09/2010	 <a href="#">40</a>	Copies of Letters dated 8/5/10 sent to Attorneys Doyle and Maguire from Susan Hassett to inform them that she has not received copies of motion to dismiss and memorandum in support of motion to dismiss, FILED. (Attachments: #(1) - Copy of Letter from Susan Hassett sent to Attorney Boyle)(Boyce, Kathy) (Entered: 08/09/2010)
08/12/2010	 <a href="#">41</a>	Copy of letter sent from Susan Hassett to Attorneys Doyle regarding her intention to file an opposition to motion to dismiss, FILED. (Attachments: # <a href="#">1</a> Supplement Copy of Letter sent to Attorney Maquire)(Boyce, Kathy) (Entered: 08/13/2010)

08/13/2010	 <a href="#">44</a>	Opposition to <a href="#">33</a> MOTION to Dismiss ( <i>and Request for Oral Argument</i> ) filed by Susan Hassett, FILED, c/s. (Attachments: # <a href="#">1</a> Exhibit A-I)(Boyce, Kathy) (Entered: 08/16/2010)
08/20/2010	 <a href="#">45</a>	MOTION for Leave to File <i>Reply Brief in Support of Motion to Dismiss</i> by Center Street Hachette Book Group, Elisabeth Hasselbeck. (Attachments: # <a href="#">1</a> Exhibit A)(Maguire, Robyn) (Entered: 08/20/2010)
08/26/2010		Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered granting <a href="#">45</a> Motion for Leave to File Document ; Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include - Leave to file granted on (date of order)- in the caption of the document. (O'Leary, Dennis) (Entered: 08/26/2010)
08/26/2010	 <a href="#">46</a>	REPLY to Response to <a href="#">33</a> MOTION to Dismiss ( <i>and Request for Oral Argument</i> ) filed by Center Street Hachette Book Group, Elisabeth Hasselbeck. (Maguire, Robyn) (Entered: 08/26/2010)
08/27/2010	 <a href="#">47</a>	Response by Susan Hassett to <a href="#">46</a> Reply to Response to Motion. (Attachments: # <a href="#">1</a> Attachment - Copy of letter sent to Orin Snyder, Esq.)(Boyce, Kathy) (Entered: 08/30/2010)
10/08/2010		Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered terminating <a href="#">13</a> Motion for TRO. As <u>this motion is a duplicate of docket entry no. 22</u> it is hereby terminated. (O'Leary, Dennis) (Entered: 10/08/2010)
10/08/2010		Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered terminating <a href="#">14</a> Motion for Preliminary Injunction. As this motion is a duplicate of docket entry no. 23 it is hereby terminated. (O'Leary, Dennis) (Entered: 10/08/2010)
10/12/2010		Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered terminating <a href="#">23</a> Motion for Preliminary Injunction as it is a duplicate of docket entry no. 30. (O'Leary, Dennis) (Entered: 10/12/2010)
10/12/2010		Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered terminating <a href="#">26</a> Motion Identify John Doe as it is a duplicate of docket entry no. 32. (O'Leary, Dennis) (Entered: 10/12/2010)
10/15/2010	 <a href="#">48</a>	Chief Judge Mark L. Wolf: ORDER entered denying without <a href="#">7</a> Motion to Appoint Counsel; finding as moot <a href="#">8</a> Motion for Leave to Proceed in forma pauperis; denying <a href="#">22</a> Motion for TRO; denying without prejudice <a href="#">32</a> Motion. If defendants' motion for summary judgment is denied, Hassett's Motion for Preliminary Injunction (Docket 30) will be decided at the November 30, 2010 hearing. (Boyce, Kathy) (Entered: 10/15/2010)

Case Name: □ Hassett v. Hasselbeck et al

Case Number: □ 1:09-cv-12034-MLW

Susan Hassett  
22 Royal Circle  
East Falmouth, MA 02536  
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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

SUSAN HASSETT,  
Plaintiff,

v.

ELISABETH HASSELBECK, et al.,  
Defendants.

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C.A. No. 09-12034-MLW

MEMORANDUM AND ORDER

WOLF, D.J.

October 14, 2010

I. INTRODUCTION AND PROCEDURAL HISTORY

Pro se plaintiff Susan Hassett filed a complaint alleging copyright infringement by defendants Elisabeth Hasselbeck and Center Street Hachette Book Group ("Center Street"), as well as by an unidentified ghostwriter (referred to in the complaint as John Doe). Hassett alleges that she is the author of a book entitled Living with Celiac Disease ("Living"), for which she obtained a copyright in March, 2008. She alleges that she mailed a copy of Living to Hasselbeck on April 4, 2008. She alleges that, on or about May 4, 2009, Center Street published and distributed The G Free Diet ("G Free"), a book written by Hasselbeck and the ghostwriter. She alleges that G Free contains actual copying of and is substantially similar to Living. Hassett seeks damages and injunctive relief.

Hassett is moving for leave to proceed in forma pauperis, for appointment of counsel, for a temporary restraining order or



preliminary injunction, and for an order requiring defendants to identify the alleged ghostwriter, John Doe. Defendants are moving to dismiss the complaint in its entirety. For the reasons stated below, the court is converting defendants' motion to dismiss to a motion for summary judgment, is deferring decision on Hasset's motion for a preliminary injunction, and is denying all other relief requested.

## II. DISCUSSION

### A. Motion to Dismiss

Arguing that there is no substantial similarity between Living and G Free, see Johnson v. Gordon, 409 F.3d 12, 18-19 (1st Cir. 2005) (holding that a plaintiff must prove copying by showing actual copying and substantial similarity), defendants are moving to dismiss. Because defendants argue that this motion should be decided by comparison of the two works, and because plaintiff argues that the copy of Living submitted by defendants is different from the version of Living referred to in the pleadings, the court hereby notifies the parties that it is converting defendants' motion to dismiss to a motion for summary judgment. See Fed. R. Civ. P. 12(d); Dunn v. Brown, 517 F. Supp. 2d 541, 543 n.1 (D. Mass. 2007).

Discovery and expert testimony are neither necessary nor appropriate where the only issue is the substantial similarity of written works. See Dunn, 517 F. Supp. 2d at 543-44 (citing O'Neill

v. Dell Pub. Co., Inc., 630 F.2d 685, 690 (1st Cir. 1980)). However, prior to conversion, all parties must have a reasonable opportunity to present all the material that is pertinent to such a motion. See Fed. R. Civ. P. 12(d); Giragosian v. Ryan, 547 F.3d 59, 65 (1st Cir. 2008). For example, plaintiff has expressed a desire to submit an earlier version of Living (purportedly the version mailed to Hasselbeck and protected by the 2008 copyright) and should be given an opportunity to do so.

Accordingly, the parties are being ordered to submit all the material that is pertinent to a motion for summary judgment on the issue of substantial similarity by November 1, 2010. The court will hold a hearing on defendants' motion for summary judgment on November 30, 2010, at 2:30 p.m.<sup>1</sup>

B. Motion for Preliminary Injunction

Hassett is moving for a preliminary injunction prohibiting defendants from advertising or distributing G Free and freezing the proceeds of G Free until the conclusion of the case.

" '[T]he propriety of preliminary injunctive relief depends on an amalgam of four factors: (i) the likelihood that the movant will succeed on the merits; (ii) the possibility that, without an injunction, the movant will suffer irreparable harm; (iii) the balance of relevant hardships as between the parties; and (iv) the effect of the court's ruling on the public interest.'" Waldron v.

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<sup>1</sup>Defendants are requesting oral argument on the motion.

George Weston Bakeries, Inc., 570 F.3d 5, 9 (1st Cir. 2009) (quoting Coquico, Inc. v. Rodriguez-Miranda, 562 F.3d 62, 66 (1st Cir. 2009)). "The first factor - likelihood of success - normally will weigh the heaviest in this four-part decisional calculus." Id. (citing New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002)). Although, "in most cases, 'irreparable harm constitutes a necessary threshold showing for an award of preliminary injunctive relief,'" Gonzalez-Droz v. Gonzalez-Colon, 573 F.3d 75, 79 (1st Cir. 2009) (quoting Charlesbank Equity Fund II v. Blinds To Go, Inc., 370 F.3d 151, 162 (1st Cir. 2004)), "irreparable harm is usually presumed if likelihood of success on the copyright claim has been shown." Concrete Machinery Co., Inc. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 611 (1st Cir. 1988). Indeed, in copyright cases, "the resolution of the other three factors often turns on the plaintiff's likelihood of success." Coquico, 562 F.3d at 66.

To show a likelihood of success on the merits, Hassett must show that she is likely to establish the two elements of copyright infringement: "(1) ownership of a valid copyright[;] and (2) copying of constituent elements of the work that are original." See Johnson, 409 F.3d at 17 (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991)). To establish copying, a plaintiff must show actual copying and substantial similarity. Id. at 18 (citing Secrets, Inc. v. Gillman Knitwear Co., 207 F.3d

56, 60 (1st Cir. 2000)). Actual copying is shown by direct or circumstantial evidence, including evidence of access coupled with probative similarity. See id. Substantial similarity is shown by "proof that the copying was so extensive that it rendered the works so similar that the later work represented a wrongful appropriation of expression." Id. (citing Yankee Candle Co. v. Bridgewater Candle Co., 259 F.3d 25, 33 (1st Cir. 2001)). Substantial similarity is measured by the ordinary observer test, which provides that "two works will be said to be substantially similar if a reasonable, ordinary observer, upon examination of the two works, would 'conclude that the defendant unlawfully appropriated the plaintiff's protectable expression.'" See T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F.3d 97, 112 (1st Cir. 2006) (quoting Johnson, 409 F.3d at 18)).

Importantly, the examination for substantial similarity "must focus on 'what aspects of the plaintiff's work are protectible under copyright laws and whether whatever copying took place appropriated those protected elements.'" Johnson, 409 F.3d at 19 (quoting Matthews v. Freedman, 157 F.3d 25, 27 (1st Cir. 1998)); see Yankee Candle, 259 F.3d at 33-34 ("[O]nly the 'protected expression' is relevant to an evaluation of substantial similarity."). Thus, it is necessary to recognize certain limits on the scope of copyright protection. Although an original manner of expressing ideas can be copyrighted, the ideas themselves cannot

be. See Yankee Candle, 259 F.3d at 33. Similarly, although a particular selection and arrangement of facts may be "thin[ly]" protected, the facts themselves are not. See Feist, 499 U.S. at 348-49. Under the doctrine of scenes a faire, there is no protection for "elements of a work that are for all practical purposes indispensable, or at least customary, in the treatment of a given subject matter." Coquico, 562 F.3d at 68. Additionally, "copyright law denies protection to fragmentary words and phrases and to forms of expression dictated solely at functional considerations." CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc., 97 F.3d 1504, 1519 (1st Cir. 1996) (internal quotation marks omitted); see Johnson, 409 F.3d at 24 (holding that the phrase "You're the One for Me" did not warrant copyright protection); see also Matthews, 157 F.3d at 28.

On the present record, the court lacks adequate information to find that Hassett has demonstrated a likelihood of success of the merits, because Hassett has failed to submit evidence of substantial similarity.<sup>2</sup> Although defendants have submitted a copy of G Free, Hassett has not submitted the version of Living she contends was sent to Hasselbeck, nor has Hassett provided a verified complaint or sworn declaration describing the content of

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<sup>2</sup>An evidentiary hearing to establish substantial similarity is not appropriate, as this analysis is based on the content of a written work, which Hassett can easily submit. See Campbell Soup Co. v. Giles, 47 F.3d 467, 470-71 (1st Cir. 1995).

that version of Living. The court will not make findings for the purposes of issuing a preliminary injunction or temporary restraining order based only on unverified allegations and unsworn assertions. See Kelly Services, Inc. v. Greene, 535 F. Supp. 2d 180, 181 n.1 (D. Me. 2008) ("To support or oppose a motion for a preliminary injunction, the parties must present evidence that goes beyond the unverified allegations of the pleadings." (internal quotation marks omitted)).

Without a showing of a likelihood of success on the merits, analysis of the remaining factors is unnecessary. See New Comm, 287 F.3d at 9, 13-14. The court will deny the motion for a temporary restraining order. However, in the interest of fairness and in recognition of Hasset's pro se status, the court will defer deciding the motion for a preliminary injunction until the November 30, 2010 hearing. At that time, if the motion for summary judgment is denied, the court will receive any additional evidence and live testimony offered by the parties. This evidence and testimony may relate to any of the four factors relevant to issuing a preliminary injunction, including the likelihood of success on the merits on all elements of the copyright claim. The court will then decide whether a preliminary injunction is warranted based on that additional evidence and on the summary judgment record. The parties should, therefore, be prepared at the November 30, 2010 hearing to present their witnesses and other evidence supporting or

opposing the motion for a preliminary injunction.

C. Motion to Proceed In Forma Pauperis

Hassett is moving to proceed in forma pauperis. Because she has already paid the filing fee and completed service on all identified defendants, this motion is moot. Hassett may renew the motion to proceed in forma pauperis if John Doe is identified at a later time and if Hassett is financially unable to complete service upon that person. The court will, however, consider Hassett's financial affidavit in deciding the motion to appoint counsel.

D. Motion to Appoint Counsel

Hassett is moving for appointment of counsel. Although there is no constitutional right to appointment of counsel<sup>5</sup> in a civil case, the court has discretion to appoint counsel for an indigent litigant in appropriate circumstances. See 28 U.S.C. §1915; DesRosiers v. Moran, 949 F.2d 15, 23 (1st Cir. 1991); Bemis v. Kelley, 857 F.2d 14, 15-16 (1st Cir. 1988); Cookish v. Cunningham, 787 F.2d 1, 2 (1st Cir. 1986). First, Hassett must demonstrate that she is indigent. See DesRosiers, 949 F.2d at 23. Second, Hassett must show exceptional circumstances justifying the appointment of counsel. See Cookish, 787 F.2d at 3. "Some factors which courts have found to bear on the question of exceptional circumstances in a particular case include the indigent's ability to conduct whatever factual investigation is necessary to support his or her claim; the complexity of the factual and legal issues

involved; and the capability of the indigent litigant to present the case." Id. at 3 (internal citations omitted).

Here, neither requirement has yet been met. As to the first inquiry, although Hassett submitted a financial affidavit showing a modest income and significant expenses, it is evident that she has not disclosed the value of her real property. Compare IFP Application ¶6 (disclosing mortgage payment), with IFP Application ¶5 (omitting the value of the real property associated with the mortgage). The court cannot evaluate Hassett's financial circumstances without knowledge of the assets at her disposal.

As to the second inquiry, although it is possible that exceptional circumstances will be present if the case progresses, the court does not presently find exceptional circumstances. To litigate the pending motion for summary judgment, the court expects that Hassett will provide a copy of her work, identify similarities between her work and G-Free, and attend the November 30, 2010 hearing. Hassett has already demonstrated her ability to make filings with the court and to identify purported similarities between the works at issue. Indeed, as the author of Living, Hassett is well qualified to investigate and present such similarities. Although Hassett has submitted medical records indicating that she suffers from a back injury which limits her mobility and her ability to sit for long periods of time, it appears that she is capable of attending and participating in the

November 30, 2010 hearing.<sup>3</sup>

Accordingly, the court is denying Hassett's motion to appoint counsel without prejudice to renewal if (1) Hassett submits a complete financial affidavit; and (2) the pending motion for summary judgment is denied.

E. Motion to Identify John Doe

Hassett is moving to compel defendants to identify John Doe, the alleged ghostwriter of G Free. As previously stated, discovery is not necessary prior to deciding defendants' motion for summary judgment, which could dispose of the entire case based solely on the content of the two works in question. Cf. Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980) (noting that the court need not give plaintiff an opportunity to discover the identity of unknown defendants if the case can be dismissed on other grounds). Accordingly, the motion to compel is being denied without prejudice to renewal if defendants' motion for summary judgment is denied.

III. ORDER

For the foregoing reasons, it is hereby ORDERED that:

1. Defendants' Motion to Dismiss (Docket No. 33) is treated as a motion for summary judgment arising under Federal Rule of

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<sup>3</sup>Hassett's medical records indicate that she has difficulty sitting for prolonged periods in one position. If necessary, the court will permit Hassett to stand or will take breaks during the hearing to permit Hassett to adjust positions. However, if Hassett believes that appearing at the hearing is impossible despite such accommodations, she may request permission to appear by telephone.

Civil Procedure 56. By November 1, 2010, the parties shall submit all the material that is pertinent to a motion for summary judgment on the issue of substantial similarity. By November 15, 2010, the parties shall confer and report, jointly if possible but separately if necessary, whether this case is settled. If not, the court will hold a hearing on defendants' motion for summary judgment on November 30, 2010, at 2:30 p.m.

2. Hassett's Motion for a Temporary Restraining Order (Docket No. 22) is DENIED.

3. If defendants' motion for summary judgment is denied, Hassett's Motion for a Preliminary Injunction (Docket No. 30) will be decided at the November 30, 2010 hearing.

4. Hassett's Motion to Proceed In Forma Pauperis (Docket No. 8) is MOOT. Hassett may renew the motion to proceed in forma pauperis if John Doe is identified at a later time and if Hassett is financially unable to complete service upon that person.

5. Hassett's Motion for Appointment of Counsel is DENIED without prejudice to renewal if (1) Hassett submits a complete financial affidavit; and (2) the defendants' motion for summary judgment is denied.

6. Hassett's Motion to Identify John Doe (Docket No. 32) is DENIED without prejudice to renewal if defendant's motion for summary judgment is denied.

*Charles F. Hay*  
UNITED STATES DISTRICT JUDGE

**Orders on Motions**

1:09-cv-12034-MLW Hassett v. Hasselbeck et al

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**United States District Court**

**District of Massachusetts**

**Notice of Electronic Filing**

The following transaction was entered on 10/12/2010 at 11:07 AM EDT and filed on 10/12/2010

Case Name: Hassett v. Hasselbeck et al

Case Number: 1:09-cv-12034-MLW

Filer:

Document Number: No document attached

Docket Text:

Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered terminating [26] Motion Identify John Doe as it is a duplicate of docket entry no. 32. (O'Leary, Dennis)

**1:09-cv-12034-MLW Notice has been electronically mailed to:**

Robert L. Ullmann rullmann@nutter.com, epleadings@nutter.com, jcarroll@nutter.com

Orin Snyder osnyder@gibsondunn.com

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Laura O'Boyle loboyle@gibsondunn.com

**1:09-cv-12034-MLW Notice will not be electronically mailed to:**

Susan Hassett  
22 Royal Circle  
East Falmouth, MA 02536

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1:09-cv-12034-MLW Hassett v. Hasselbeck et al

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**Docket Text:**

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