How to Analyze Substantial Similarity in a Copyright Infringement Claim: Susan Hassett's Self-Published Living with Celiac Disease versus Elisabeth Hasselbeck's The G Free Diet

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Susan Hassett, a self-published author, sued Elisabeth Hasselbeck, her publisher, and an alleged ghost-writer for allegedly copying her book Living with Celiac Disease. Hassett claimed to have mailed her book to Hasselbeck about one year prior to the publication of Hasselbeck's book about celiac disease, The G Free Diet, and that Hasselbeck copied Hassett's book. Hasselbeck obtained summary judgment because the Court found that "a rational factfinder, correctly applying the pertinent legal standards, would be compelled to conclude that no substantial similarity exists between [the books]." *Hassett v. Hasselbeck*, C.A. No. 09-12034 (D. Mass. Dec. 3, 2010).[1] The Court's choice of procedure and analysis of the similarities of the works are instructive for those seeking to claim copyright infringement in self-published works and those wanting to defend themselves from such claims.

To expedite the lawsuit the Court converted Hasselbeck's motion to dismiss to a summary judgment motion under Fed. R. Civ. P. 12(d). Significantly, this permitted the court to enter judgment for Hasselbeck after deciding the motion rather than giving Hassett another chance by filing an amended complaint. In cases of two published works where the only real issue is similarity, such a choice seems reasonable to resolve the parties' dispute quickly.

To prove copyright infringement, Hassett had to allege sufficiently and ultimately prove that: 1) she owned a valid copyright; 2) Hasselbeck et al. actually copied Hassett's work; and 3) the works were substantially similar. Failure to prove any one of these elements would be fatal to Hassett's claim. The Court found that the works were not substantially similar.

[1] Available at http://scholar.google.com/scholar_case?case=17920997967884410870.

In analyzing the substantial similarity of the works, the Court noted that only the aspects of Hassett's work "protectable under copyright law" were at issue. That is, similarity of original copyrightable expression is all that matters. Copyright law cannot and does not protect ideas, facts, systems, concepts, or principles. Nor does it protect short phrases. It is in this analysis that Hassett's claim failed.

Hassett identified the following similarities between the books to support her claim: listing the symptoms of celiac disease, listing the foods and other products that may contain gluten, suggestions on avoiding contact with gluten in everyday life, discussions of celiac disease in children, the link between gluten consumption and autism, and discussing that children with Down syndrome are at increased risk of developing celiac disease.

Hassett also introduced examples of alleged actual similarities, including the following passages from the parties' respective books:

Hassett	Hasselbeck
"Over time you purchase a new product even if you have used it before you should still call and make sure it is gluten free. The reason being sometimes manufacturers will change the starch in a product and not change the label on the product or the label on the box that the product came out of. Call the company and ask for it in writing again and again and again if you have to. . . . Remember to always tell them that you have celiac and you have zero tolerance for gluten so you may not even have trace amounts. Also make sure they can identify where all the starches in a product are derived from. Also ask if it has been packaged on a belt where products containing wheat have been packaged. As well as has the belt been Cleaned in between packaging."	Step 3: Call back periodically. Yes, it sounds like a hassle, but "better safe than sorry" is your new mantra, and following up with companies can pay off. Call back every so often to make sure any once-questionable foods are still gluten-free. Companies frequently change their manufacturing sites or acquire a new brand without altering their product labels. If you are buying chips, cereal, or any other grain-based food from a major company, you want to check that the product is not only G-free, but processed in G-free facilities as well. A corn chip could be riding down a clean conveyor belt one week, and dusted with wheat cracker residue the next. Even if you've been G-free for years, you may want to do these follow-ups on a regular basis.
Do not ever "double dip" This means use one knife for your butter, one for your condiments. If your knife is dirty get another one. For celiac's with severe cases that one crumb in your jelly could be your last.	It's important to label your spreads, too, so that family members know not to stick their crumb-encrusted knives in there. As with everything else in our kitchen, the entire family is welcome to all of my foods, but I have a strict policy against double-dipping — I will have your head if I see any breadcrumbs in my peanut butter or jelly!

Hassett	Hasselbeck
A person with celiac disease should only shop in the outer isles of the supermarket. The reason being the only thing down the other isles is things you can't have. So why torture yourself. Especially if you just find out you have the disease.	The foods on the outer aisles of the supermarket should be the foundation of your diet — of any diet, really, with or without gluten. Basic, natural foods that have kept humans going since long before the invention of sliced bread.

As the Court noted in comparing passages in the books,[2] the similarities Hassett identified often were similarities in ideas, short phrases, or basic facts about celiac disease.

Hassett, in an effort to preserve her claim, attempted to rely upon the theory of compilation copyright. As the Court characterized it, "Hassett asserts that defendants extracted ideas, facts, and short pieces of text from Living, changed the text, and then dispersed this information throughout G Free in a new arrangement." The Court found Hassett's theory "flawed as a matter of law… Any facts and ideas arguably copied from Living have been thoroughly reshuffled and restated, and any lingering similarities arise out of individual words or short phrases excluded from protection."

As can be seen from the Court's above analysis, what one author finds similar, an impartial fact-finder may find not actionable under copyright law. Many authors within a genre will present similar ideas in sufficiently different ways. Here, the idea was living with celiac disease. It is only the protectable expression that may be subject to a copyright infringement claim.

Self-published authors must carefully consider whether to bring copyright infringement claims because the Copyright Act permits the prevailing party (plaintiff or defendant) to recover its reasonable attorneys' fees. The award of attorneys' fees is at the court's discretion. 17 U.S.C. § 505. Publishers may also consider seeking fees from plaintiffs with particularly unmeritorious claims to deter others from suing the publishers without getting sound advice from an attorney.

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[2] The Court referred to many more, but these three should give you the gist of what Hassett found similar in the works and the Court found not substantially similar under the copyright law.