

Do not misread our opinion. Our message is directed to the plaintiffs and their counsel before us and, even more specifically, to the claims they continue to press in federal court. And our holding rests on a well-established principle of standing law—the lack of any injury in fact by virtue of the plaintiffs making no showing of a primary payer’s failure to pay a particular obligation under the Medicare Act. Other areas of law (under consumer protection statutes perhaps most especially) continue to present difficult and unsettled questions of Article III standing in the wake of *Spokeo*. We do not intend our warnings in this case to chill good-faith litigation on those broader issues of standing. But these plaintiffs’ sue first and ask questions later approach risks stretching the limits of judicial patience, and counsel for the plaintiffs would be well advised to confirm the existence of an actual injury before once again availing themselves of the judicial process.

With these observations in mind, we AFFIRM.



DESIGN BASICS, LLC, and Carmichael & Dame Designs, Inc.,
Plaintiffs-Appellants,

v.

SIGNATURE CONSTRUCTION, INC.,
et al., Defendants-Appellees.

No. 19-2716

United States Court of Appeals,
Seventh Circuit.

Argued January 22, 2020

Decided April 23, 2021

Background: Holder of registered copyrights in floor plans for suburban, single-

family tract homes brought infringement action against construction company and related companies. The United States District Court for the Central District of Illinois, Colin S. Bruce, J., 2019 WL 4805888, entered summary judgment in defendants’ favor, and plaintiff appealed.

Holdings: The Court of Appeals, Sykes, Circuit Judge, held that:

- (1) accused floor plans did not infringe plaintiff’s copyrights, and
- (2) plan that had allegedly copied plaintiff’s plan did not infringe copyright.

Affirmed.

1. Copyrights and Intellectual Property

⇌2

Copyright Act establishes prerequisites for copyright and sets limits on its scope. 17 U.S.C.A. § 101 et seq.

2. Copyrights and Intellectual Property

⇌2, 12(1)

Originality is constitutional requirement for copyright, arising by implication from Constitution’s reference to authors and writings. U.S. Const. art. 1, § 8, cl. 8; 17 U.S.C.A. § 102(a).

3. Copyrights and Intellectual Property

⇌12(1)

“Original,” as term is used in copyright, means only that work was independently created by author, as opposed to copied from other works, and that it possesses at least some minimal degree of creativity. 17 U.S.C.A. § 102(a).

See publication Words and Phrases for other judicial constructions and definitions.

4. Copyrights and Intellectual Property

⇌36

Copyright Act limits scope of copyright protection even for works that defini-

tional provisions might otherwise include. 17 U.S.C.A. § 101 et seq.

5. Copyrights and Intellectual Property
⌚51

To establish copyright infringement, two elements must be proven: ownership of valid copyright, and copying of constituent elements of work that are original.

6. Copyrights and Intellectual Property
⌚53(1)

To determine whether defendant copied constituent elements of copyrighted work that are original, court must ask whether, as factual matter, defendant copied plaintiff's protected work, as opposed to independently creating similar work, and whether copying went so far as to constitute improper appropriation.

7. Copyrights and Intellectual Property
⌚83(3.1)

In all copyright infringement cases, plaintiff must prove, as factual matter, that defendant actually copied his work.

8. Copyrights and Intellectual Property
⌚53(1)

No matter how similar plaintiff's and defendant's works are, if defendant created his independently, without knowledge of or exposure to plaintiff's work, defendant is not liable for copyright infringement.

9. Copyrights and Intellectual Property
⌚53(1)

Proof of actual copying is necessary but not sufficient to establish liability for copyright infringement; plaintiff must also prove that defendant's copying was wrongful—i.e., that defendant took enough of his protected expression, as opposed to unprotected ideas, concepts, facts, etc., to constitute unlawful appropriation of his expressive work.

10. Copyrights and Intellectual Property
⌚83(3.1)

Circumstantial case of actual copying requires evidence that defendant had access to plaintiff's copyrighted work and evidence of substantial similarity between plaintiff's work and defendant's work.

11. Copyrights and Intellectual Property
⌚83(3.1)

Ordinarily, to prove circumstantial case of copyright infringement, plaintiff must separately prove both access and similarity.

12. Copyrights and Intellectual Property
⌚83(3.1)

When used as test for actual copying in circumstantial copyright infringement case, requirement of "substantial similarity" is not limited to protected elements of plaintiff's work; similarities that relate to either protected or unprotected elements of plaintiff's work may be probative of actual copying, and inquiry simply looks for kind and degree of similarity that one would not expect to arise if two works had been created independently.

13. Copyrights and Intellectual Property
⌚83(1)

In circumstantial copyright infringement case, plaintiff has burden to show that two works are so similar that copying is better explanation for similarities than pure coincidence.

14. Copyrights and Intellectual Property
⌚53(1), 83(3.1)

Similarity that relates to unprotected elements is probative only of actual copying—not wrongful copying; wrongful copying—unlawful appropriation—requires substantial similarities between defendant's work and protected elements in plaintiff's copyrighted work.

15. Copyrights and Intellectual Property
⌚53(1)

Under ordinary observer test for unlawful appropriation of copyright, court must ask whether accused work is so similar to plaintiff's work that ordinary reasonable person would conclude that defendant unlawfully appropriated plaintiff's protectable expression by taking material of substance and value.

16. Copyrights and Intellectual Property
⌚12(2)

Standard elements in genre—called “scènes à faire” in copyright law—which get no copyright protection, are so rudimentary, commonplace, standard, or unavoidable that they do not serve to distinguish one work within class of works from another.

See publication Words and Phrases for other judicial constructions and definitions.

17. Copyrights and Intellectual Property
⌚4.5

Patents ⌚402

Copyright protects only expression; patent law is proper instrument for protecting functionality.

18. Copyrights and Intellectual Property
⌚4.5

Merger doctrine prevents use of copyright to protect idea or procedure.

19. Copyrights and Intellectual Property
⌚4.5

Under merger doctrine, when idea can be expressed in only limited ways, expression merges into idea and cannot receive copyright protection.

20. Copyrights and Intellectual Property
⌚64

In architectural genre in which copyright protection is thin, proving unlawful appropriation takes more than substantial

similarity between plaintiff's work and defendant's work; instead, only virtually identical plan infringes plaintiff's copyrighted plan.

21. Copyrights and Intellectual Property
⌚64

Construction company's floor plans for suburban, single-family tract homes did not infringe registered copyrights in floor plans; company's plans had different room dimensions, ceiling heights and styles, and exterior dimensions, some had different number of rooms, and garages were sometimes placed at different angles to homes.

22. Copyrights and Intellectual Property
⌚64

Construction company's floor plan for one-story ranch home with kitchen, breakfast room, great room, dining room, three bedrooms, and two bathrooms did not infringe copyrighted floor plan, even if company actually copied plan; company's plan had greater square footage, room dimensions were subtly different, ceilings had different heights, homes had different aspect ratios, copyrighted plan had two-car garage and its walls were parallel to the home, while accused plan featured three-car garage placed at angle to rest of home, and some rooms were located in different relative positions.

Appeal from the United States District Court for the Central District of Illinois. No. 1:16-CV-1275 — **Colin S. Bruce, Judge.**

Paul E. Harold, Attorney, Stephen M. Judge, Attorney, John D. LaDue, Attorney, Sean J. Quinn, Attorney, Southbank Legal: LaDue Curran & Kuehn LLC, South Bend, IN, Dana Andrew LeJune, Attorney, Law Office of Dana LeJune, Houston, TX, for Plaintiffs-Appellants.

Anne L. Cowgur, Attorney, Taft Stettinius & Hollister LLP, Indianapolis, IN, for Defendants-Appellees.

Before SYKES, Chief Judge, and
WOOD and HAMILTON, Circuit Judges.

SYKES, Chief Judge.

Copyright law strikes a practical balance between the intellectual-property rights of authors and the public interest in preserving the free flow of ideas and information and encouraging creative expression, all in furtherance of the constitutional purpose to “promote the Progress of Science and useful Arts.” U.S. CONST. art. 1, § 8, cl. 8; *see generally Google LLC v. Oracle Am., Inc.*, — U.S. —, 141 S. Ct. 1183, 1195, 209 L.Ed.2d 311 (2021). Copyright trolls—opportunistic holders of registered copyrights whose business models center on litigation rather than creative expression—disrupt this balance by inhibiting future creativity with negligible societal benefit. “Like the proverbial troll under the bridge, these firms try to extract rents from market participants who must choose between the cost of settlement and the costs and risks of litigation.” *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1097 (7th Cir. 2017).

Plaintiff Design Basics, LLC, is a copyright troll. *Id.* at 1096–97. The firm holds registered copyrights in thousands of floor plans for suburban, single-family tract homes, and its employees trawl the Internet in search of targets for strategic infringement suits of questionable merit. The goal is to secure “prompt settlements with defendants who would prefer to pay modest or nuisance settlements rather than be tied up in expensive litigation.” *Id.* at 1097. As we explained in *Lexington Homes*, “[t]his business strategy is far removed from the goals of the Constitution’s intellectual property clause.” *Id.* Instead, it

amounts to an “intellectual property shakedown.” *Id.* at 1096.

This appeal involves yet another Design Basics infringement action, one of more than 100 such suits in the last decade or so. *Id.* at 1097. When Design Basics was last before this court in *Lexington Homes*, we were guided by two well-established copyright doctrines—*scènes à faire* and merger—that constrain the ability of infringement plaintiffs to claim expansive intellectual-property rights in a manner that impedes future creativity. Applying these doctrines, we held that Design Basics’ copyright in its floor plans is thin. *Id.* at 1101–05. The designs consist mainly of unprotectable stock elements—a few bedrooms, a kitchen, a great room, etc.—and much of their content is dictated by functional considerations and existing design conventions for affordable, suburban, single-family homes. When copyright in an architectural work is thin, only a “strikingly similar” work will give rise to a possible infringement claim. *Id.* at 1105. Applying this standard, we held that no reasonable jury could find for Design Basics and affirmed a summary judgment against it. *Id.*

This latest appeal meets the same fate. Design Basics sued Signature Construction, Inc., and related companies, accusing them of copying ten of its registered floor plans for suburban, single-family homes. The district court entered summary judgment for the defendants based largely on the reasoning of *Lexington Homes*.

Design Basics asks us to overrule *Lexington Homes*. We decline to do so. And we take this opportunity to restate and clarify the elements of a prima facie case of infringement, both as a general matter and more particularly in cases involving works of this type in which copyright protection is thin. For this category of claims, only extremely close copying is actionable as unlawful infringement. Put more pre-

cisely, this type of claim may move forward only if the plaintiff's copyrighted design and the allegedly infringing design are virtually identical. That standard is not satisfied here, so we affirm.

I. Background

We described Design Basics' business strategy in *Lexington Homes*; a brief summary will suffice for present purposes. Design Basics holds registered copyrights in thousands of floor plans for suburban, single-family homes. *Lexington Homes*, 858 F.3d at 1096. The plans are not technical construction drawings. Rather, they are basic schematic designs, largely conceptual in nature, and depict layouts for one- and two-story single-family homes that include the typical rooms: a kitchen, a dining area, a great room, a few bedrooms, bathrooms, a laundry area, a garage, stairs, assorted closets, etc.

More than a decade ago, Patrick Carmichael and Myles Sherman bought Design Basics "as an investment opportunity."¹ *Id.* at 1096. Since then, litigation proceeds have become "a principal revenue stream" for the firm. *Id.* at 1097. Indeed, Design Basics incentivizes its employees to search the Internet for litigation targets by paying a finder's fee—a percentage of net recovery—if they locate a prospective infringement defendant. This is the core of the firm's business model. *Id.*

The firm maintains an easily accessible website displaying 2,847 floor plans. It also regularly sends mass mailings of its designs to members of the National Association of Home Builders. Over the years the firm has sent millions of publications con-

taining its floor plans to home builders. When it initiates litigation, it hopes—indeed, expects—to find these designs in the defendant's files.

This case has its genesis in that business model. In 2014 Paul Foresman, Director of Business Development at Design Basics, emailed Carmichael with the subject line: "A gift for you." Foresman told Carmichael that by using the Internet Archive's Wayback Machine, he discovered that a firm called "Signature Homes" may have copied some of Design Basics' home designs. Carmichael was initially confused because Design Basics was *already* asserting infringement claims against a firm by that name, but Foresman clarified that *this* Signature Homes—based in Illinois—was a different company. Pleased with Foresman's discovery, Carmichael wrote back: "Wow very nice gift my friend."

This infringement suit followed. In 2016 Design Basics sued Signature Construction and related companies,² alleging that they infringed ten of its floor plans. During discovery, Design Basics learned that Signature's files contained photocopies of four of its plans: "Ainsley," "2461 Shawnee," "2963 Columbus," and "9169 Kempton Court." The photocopies were found in Signature's files for homes labeled "Carlisle," "Lot 119 Lake Falls," "Lot 63 Sommer Place," and "Lot 309 Stonegate," respectively. The photocopy of Design Basics' 2461 Shawnee floor plan had red markings on it, indicating modifications to the plan. John Tanner, a draftsman at Signature, testified that he received the marked-up image from Steve Meid, a Sig-

1. Carmichael & Dame Designs, Inc., is named as an additional plaintiff. It has no independent role in this litigation, so we mention it no further.

2. The other corporate defendants are Signature Homebuilders, LLC; Signature Develop-

ment of Peoria, Inc.; Signature Homes of Bloomington, LLC; Ironwood Homes, Inc.; and Ironwood Homes of Peoria, LLC. Randy Peifer, an investor in some of the Signature companies, is also a defendant. We refer to the defendants collectively as "Signature."

nature partner, and understood that the markings were modifications that Meid wanted him to make.

At the end of lengthy discovery, Signature moved for summary judgment, relying heavily on our ruling against Design Basics in *Lexington Homes*. As we explained in that opinion, under the *scènes à faire* and merger doctrines, Design Basics' copyright protection in its floor plans is thin, *id.* at 1101–05, and therefore only a “strikingly similar” plan would give rise to an infringement claim, *id.* at 1105. Using this standard, we held that no reasonable jury could find infringement. *Id.* Along the way to this conclusion, we noted that Design Basics had not submitted expert testimony to support its claim, relying instead on a conclusory declaration from one of its draftsmen. *Id.* at 1104.

Design Basics tried to avoid that same criticism here by submitting an affidavit from a third-party expert in opposition to Signature's summary-judgment motion. The witness, Matthew McNicholas, is an architect and has served as an outside expert for Design Basics in at least 13 lawsuits. McNicholas asserted that Signature “unquestionably infringed” Design Basics' home plans.

To support that opinion, McNicholas produced a 103-page report. The first 30 pages cover his qualifications and explain his general views on architectural copyright law. Pages 32–85 are descriptions of the ten copyrighted floor plans at issue in this case. This section of his report contains narrative descriptions of the features of each Design Basics floor plan, but the descriptions are remarkably similar to one another. Indeed, some parts are almost word-for-word identical.

A few examples will illustrate. For the Design Basics floor plan called “The Linden,” McNicholas wrote: “The idea behind the plan of The Linden focuses on creating

a home for entertaining guests, and whose spaces are flexible enough to meet the needs of a broad range of potential homeowner[s].” One of the features he analyzed is the front door:

From the perspective of a guest, the sheltered front door is a welcome area, not just with the covered stoop, but also composed with walls to either side of the entry, which shelter against wind and driving rain. This consideration for waiting guests reinforces the entertainment value of this design decision.

His description of the floor plan called “The Manning” is similarly generic: “The concept driving the plan of the Manning centers around creating a home focused on entertainment, but with enough flexibility to evolve into multiple solutions as the homeowner needs, while maximizing privacy.” Again, McNicholas described the front door:

From the perspective of a guest, the sheltered front door is a welcome area, not just with the covered stoop, but also arranged with the long wall of the Living Room as a shelter against driving wind and rain, while waiting for the door to open. This consideration for waiting guests reinforces the entertainment value of this design decision.

His analysis of “The Paterson” is likewise almost identical: “The idea behind the plan of The Paterson focuses on creating a home for entertaining guests, and whose spaces are flexible enough to meet the needs of a broad range of potential homeowner[s].” Regarding the front door, McNicholas wrote:

From the perspective of a guest, the sheltered front door is not just a welcome area, but with walls to either side of the entry—which shelter against wind and driving rain—it is a considerate space. Further, the sidelight at the door

allows for transparency between the interior and exterior, and this thoughtfulness for waiting guests reinforces the entertainment value of this design decision.

In short, the McNicholas report purports to separately analyze the distinguishing features of each of the copyrighted plans at issue here, but the descriptions are so ordinary and interchangeable as to be virtually meaningless.

The McNicholas report ends with a visual section containing side-by-side comparisons of the Signature floor plans and the Design Basics plans they are alleged to infringe. As the district judge described this section of the report, the expert “employed extensive color-filling” to depict parallel rooms in the copyrighted and accused plans in matching colors in an effort “to make the plans seem more similar.” The judge rejected this technique as an attempt “to manipulate and enhance the appearance of similarity.” To control for this problem, the judge extracted the line drawings from the plans without the color-filling enhancements and confined his analysis accordingly.

Comparing the unenhanced drawings, the judge determined as a matter of law that no unlawful copying occurred. He noted multiple categories of dissimilarity between the copyrighted and accused plans:

Room dimensions are different. Some plans have more rooms than the plans they are alleged to infringe. Ceilings are of different heights, and/or are of different styles (i.e., cathedral versus flat versus tray). Exterior dimensions are different. Bathrooms are in different locations. Sinks, tubs, toilets, and showers are in different locations within bathrooms. Garages are of different sizes and/or are in a different orientation to the rest of the house.

Based on these observations and applying *Lexington Homes*, the judge had no difficulty concluding that Signature’s plans “are dissimilar enough to avoid infringing the thin copyright” in the Design Basics plans. The judge entered final judgment for Signature, and Design Basics appealed.

II. Discussion

A. Proving Copyright Infringement

[1] “Copyright and patents, the Constitution says, are to ‘promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.’” *Google*, 141 S. Ct. at 1195 (quoting U.S. CONST. art. I, § 8, cl. 8). To that end, the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, establishes the prerequisites for copyright and sets limits on its scope. *Google*, 141 S. Ct. at 1195–96 (explaining that Congress weighs “the advantages and disadvantages” of copyright protection and establishes “its boundaries and conditions, the existence of exceptions and exemptions, all by exercising its own constitutional power to write a copyright statute”).

[2,3] The basic prerequisites are these: “Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . .” 17 U.S.C. § 102(a). “Originality is a constitutional requirement” arising by implication from the Constitution’s reference to “authors” and “writings.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991). The threshold for originality is low: “Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.” *Id.* at 345, 111 S.Ct. 1282 (citing 1 MELVILLE B. NIMMER AND DAVID NIM-

MER, NIMMER ON COPYRIGHT § 2.01[A], [B] (1990)).

The Act lists categories of works that qualify for copyright protection, including “literary works,” “musical works,” “dramatic works,” and “pictorial, graphic, and sculptural works,” among others. § 102(a)(1), (2), (3), (5). “Architectural plans” and “technical drawings” are included in the statutory definition of “pictorial, graphic, and sculptural works” and can be copyrighted in this category. § 101. Until 1990, however, architectural works were not included in § 102(a) as a stand-alone category of protected works. That left some uncertainty about the status of constructed designs—i.e., the buildings themselves—among other complexities in this corner of copyright law. 1 NIMMER ON COPYRIGHT § 2A.09[A] (Rev. ed. 2020); 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:101–3:107, Westlaw (database updated March 2021).

In 1990 Congress amended the Act to create a separate category of “architectural works” in the § 102(a) list, implementing our nation’s obligations under the Berne Convention for the Protection of Literary and Artistic Works. *See* Architectural Works Copyright Protection Act, Pub. L. No. 101-650, §§ 701–706, 104 Stat. 5133 (1990) (codified at 17 U.S.C. § 102(a)(8)). The 1990 legislation added the following definition for the new statutory term “architectural work”:

An “architectural work” is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

Id. § 702 (codified at 17 U.S.C. § 101).

[4] Importantly, the Act limits the scope of copyright protection even for

“works that the definitional provisions might otherwise include.” *Google*, 141 S. Ct. at 1196. One prominent limitation captures the traditional copyright principle known as the “idea/expression dichotomy”—the line that separates copyrightable expression from noncopyrightable ideas and facts. *Golan v. Holder*, 565 U.S. 302, 328, 132 S.Ct. 873, 181 L.Ed.2d 835 (2012). Section 102(b) codifies this principle: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”

[5] The Act creates a cause of action for infringement and provides as a general matter that “[a]nyone who violates any of the exclusive [statutory] rights of the copyright owner . . . is an infringer.” 17 U.S.C. § 501(a); *see also id.* § 501(b) (providing a cause of action). This generalization doesn’t shed much light on what it takes to prove a claim, but the courts have developed and explained the plaintiff’s burden of proof. The doctrine begins with this statement from the Supreme Court: “To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist*, 499 U.S. at 361, 111 S.Ct. 1282. This concise formulation obscures a good deal of complexity beneath the surface, but it provides a basic framework for the claim.

The first element—ownership of a valid copyright—is not contested here. Design Basics registered its floor plans with the United States Copyright Office, and Signature does not dispute its ownership or the validity of the copyrights. We therefore assume, as we did in *Lexington Homes*,

“that Design Basics owns the plans and that the plans are entitled to some copyright protection, i.e., they were created independently and possess a modicum of creativity” to satisfy the minimal originality requirement. 858 F.3d at 1099.

[6] This litigation turns on the second element, as many infringement cases do. At this step of the general framework, the plaintiff must prove that the defendant “cop[ied] . . . constituent elements of the [copyrighted] work that are original.” *Feist*, 499 U.S. at 361, 111 S.Ct. 1282. This element actually encompasses two distinct questions, although our caselaw hasn’t always neatly separated them. The first question is whether, as a factual matter, the defendant copied the plaintiff’s protected work (as opposed to independently creating a similar work); the second question is whether the copying “went so far as to constitute an improper appropriation.” *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614 (7th Cir. 1982); see also 4 NIMMER ON COPYRIGHT § 13.01[B] (Rev. ed. 2020) (explaining the two components of the second element in the *Feist* framework).

The Ninth Circuit refers to these distinct subsidiary elements as “copying” and “unlawful appropriation.” *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018). The Second Circuit uses the terms “copying” and “wrongful copying.” *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 100 (2d Cir. 2014). Whatever the nomenclature, the point is to capture the important differences between the two.

[7,8] In all infringement cases, the plaintiff must prove, as a factual matter, that the defendant *actually copied* his work. *Lexington Homes*, 858 F.3d at 1099. “Proof of copying by the defendant is necessary because independent creation is a complete defense to copyright infringement.” *Rentmeester*, 883 F.3d at 1117. For

“[n]o matter how similar the plaintiff’s and the defendant’s works are, if the defendant created his independently, without knowledge of or exposure to the plaintiff’s work, the defendant is not liable for infringement.” *Id.*

[9] Importantly, proof of actual copying is necessary but not sufficient to establish liability for infringement. “Not all copying . . . is copyright infringement,” *Feist*, 499 U.S. at 361, 111 S.Ct. 1282, so the plaintiff must *also* prove that the defendant’s copying was wrongful—i.e., that the defendant took enough of his protected expression (as opposed to unprotectable ideas, concepts, facts, etc.) to constitute unlawful appropriation of his expressive work. *Rentmeester*, 883 F.3d at 1117; *Zalewski*, 754 F.3d at 100–01.

[10] The first of these subsidiary elements—let’s call it “actual copying” or “copying in fact”—can be proved either directly or indirectly. Direct evidence is rare, so many cases turn on inferences to be drawn from circumstantial evidence. A circumstantial case of actual copying requires: (1) evidence that the defendant had access to the plaintiff’s copyrighted work (enough to support a reasonable inference that the defendant had an *opportunity* to copy); and (2) evidence of a substantial similarity between the plaintiff’s work and the defendant’s work (enough to support a reasonable inference that copying *in fact* occurred). *Lexington Homes*, 858 F.3d at 1099; see also *Rentmeester*, 883 F.3d at 1117; *Zalewski*, 754 F.3d at 100–01.

[11] We have acknowledged the possibility that an accused work may bear such “an uncanny resemblance” to a copyrighted work that copying is “the only plausible explanation” for the similarity. *Lexington Homes*, 858 F.3d at 1100. In such a case, “further proof of access may not be re-

quired.” *Id.* But the exception is “rare” and reserved for “unusual cases.” *Id.* Ordinarily, “to prove a circumstantial case of copyright infringement, the plaintiff must separately prove both access and similarity.” *Id.*

Confusion sometimes arises because the test for unlawful appropriation—a distinct inquiry—*also* looks for substantial similarity between the defendant’s work and the plaintiff’s work. As the Second Circuit has explained, “a close similarity between two works is often relevant to proving *both* actual copying and wrongful copying.” *Zalewski*, 754 F.3d at 101 (emphasis added). Accordingly, the cases often use “the same term—‘substantial similarity’—to describe both the degree of similarity relevant to proof of copying and the degree of similarity necessary to establish unlawful appropriation.” *Rentmeester*, 883 F.3d at 1117. But “[t]he term means different things in those two contexts.” *Id.*

[12, 13] The difference hinges on the distinction between the protected and unprotected elements in the plaintiff’s work. *Id.*; see also *Zalewski*, 754 F.3d at 101. When used as a test for actual copying in a circumstantial case, the requirement of “substantial similarity” is not limited to the protected elements of the plaintiff’s work. Similarities that relate to either the protected *or* unprotected elements of the plaintiff’s work may be probative of actual copying; the inquiry simply looks for the kind and degree of similarity that “one would not expect to arise if the two works had been created independently.” *Rentmeester*, 883 F.3d at 1117. Put somewhat differently, in a circumstantial case, the plaintiff has the burden to show that the two works are so similar that copying is a

better explanation for the similarities than pure coincidence.

[14] But “similarity that relates to *unprotected* elements is probative only of [actual] copying—not wrongful copying.” *Zalewski*, 754 F.3d at 101 (emphasis added). *Wrongful* copying—unlawful appropriation—requires substantial similarities between the defendant’s work and *protected elements* in the plaintiff’s copyrighted work. *Rentmeester*, 883 F.3d at 1117. “When an original work contains many *unprotected* elements, . . . a close similarity between it and a copy may prove only copying, not wrongful copying.” *Zalewski*, 754 F.3d at 101.

To preserve the distinction between these two concepts, we will follow the Second Circuit’s lead and use the term “probative similarity” to refer to the degree of similarity necessary to support an inference of actual copying and the term “substantial similarity” to refer to the test for wrongful copying or unlawful appropriation. *Id.*

[15] Our circuit, like most others, uses the “ordinary observer” test for unlawful appropriation: “whether the accused work is so similar to the plaintiff’s work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff’s protect[a]ble expression by taking material of substance and value.” *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 508–09 (7th Cir. 1994) (quoting *Atari*, 672 F.2d at 614).³

B. *Scènes à Faire* and Merger

In *Lexington Homes* we explained at length that under the *scènes à faire* and merger doctrines, Design Basics holds

3. See also *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 33–34 (1st Cir. 2001); *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1214 (11th Cir. 2000); *Hartman v. Hall-*

mark Cards, Inc., 833 F.2d 117, 120 (8th Cir. 1987); *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3d Cir. 1975); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

only thin copyright protection in its floor plans. Just a brief recap is needed here.

[16] Standard elements in a genre—called *scènes à faire*⁴ in copyright law—get no copyright protection. *Scènes à faire* are “so rudimentary, commonplace, standard, or unavoidable that they do not serve to distinguish one work within a class of works from another.” *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 929 (7th Cir. 2003). If standard elements received copyright protection, then the creation of a single work in a genre would prevent others from contributing to that genre because the copyright owner would have exclusive rights in all of the genre’s basic elements.

We explained in *Lexington Homes* that Design Basics’ floor plans largely consist of *scènes à faire*. 858 F.3d at 1102–03. Every plan has a kitchen, a great room or living room, a dining room, bedrooms, bathrooms, and so forth. The arrangements of the rooms are also largely *scènes à faire*. The kitchen is always close to the dining room; the bedrooms will usually be clumped together and near a bathroom; the door from the garage into the house usually leads to the kitchen rather than the great room or living room.

What accounts for these familiar arrangements? Convention in this genre, certainly, which brings this particular type of architectural work within the *scènes à faire* doctrine.⁵ But the arrangements are also dictated by functionality. The kitchen is near the dining room so that food can easily be moved between the two rooms. The bedrooms aren’t near the front hall because guests don’t venture into the bedrooms.

[17] The functionality of the room arrangements is where the doctrine of merger comes in. Merger arises from § 102(b), which, as we’ve explained, codifies the idea–expression dichotomy and specifies that copyright never extends to an idea, procedure, principle, or concept. Copyright protects only expression; patent law is the proper instrument for protecting functionality. See *Eldred v. Ashcroft*, 537 U.S. 186, 217, 123 S.Ct. 769, 154 L.Ed.2d 683 (2003).

[18, 19] Merger doctrine prevents the use of copyright to protect an idea or procedure. If an idea or procedure can be expressed in only a few ways, it is easy to copyright every form in which the idea can be expressed, indirectly protecting the idea itself. 4 NIMMER ON COPYRIGHT § 13.03[B][3]; see also *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678–79 (1st Cir. 1967). To guard against this kind of overprotection, when an idea can be expressed in only limited ways, courts say that the expression “merges” into the idea and cannot receive copyright protection. *Lexington Homes*, 858 F.3d at 1102. For example, the forms used to implement a particular method of accounting are an expression of the accounting method and cannot be copyrighted. *Baker v. Selden*, 101 U.S. 99, 25 L.Ed. 841 (1879). The same is true for the rules of a sweepstakes competition: because there are a limited number of ways to explain the rules, the expression of the rules receives little, if any, copyright protection. *Morrissey*, 379 F.2d at 678–79.

Merger also applies to the Design Basics home plans. The functional requirements of living spaces dictate that particular rooms be placed close together. And the general concept of the affordable, multi-

4. French for “scenes for action.” *Scènes à faire*, BLACK’S LAW DICTIONARY (11th ed. 2019).

5. Recall as well that under the definition of an architectural work, “individual standard features” are not protected. 17 U.S.C. § 101.

purpose, suburban, single-family home also contributes to the design. This isn't to say that there is only *one* way to arrange the rooms in this home-design genre. But there are only a limited number of possible floor plans, and by creating more than 2,800 of these plans, Design Basics has attempted to occupy the entire field. We wondered in *Lexington Homes* if "there is any blueprint for a single-family home anywhere in the country that Design Basics could not match to one of its own designs." 858 F.3d at 1103. If Design Basics held any more than thin copyright protection in its floor plans, it would own nearly the entire field of suburban, single-family home design.

The McNicholas report reinforces our holding in *Lexington Homes* that the copyright in the Design Basics floor plans is thin. Although McNicholas set out to demonstrate the unique nature of the ten plans at issue here, his report demonstrates just the opposite. As we've explained, the report describes each floor plan in generic and often nearly identical language. The report shows that each floor plan uses the same design features to accomplish the same ends.

[20] Accordingly, although Design Basics asks us to revisit our decision in *Lexington Homes*, we see no reason to do so.⁶ To the contrary, we reiterate our conclusion that Design Basics holds only thin copyright in its floor plans. *Id.* at 1101–02. And in this particular architectural genre

in which copyright protection is thin, proving unlawful appropriation takes more than a substantial similarity between the plaintiff's work and the defendant's work. Instead, only a virtually identical plan infringes the plaintiff's copyrighted plan. *Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007, 1013–14 (7th Cir. 2005).

C. Application

We can make short work of applying these principles to this record. Except for the 2461 Shawnee plan, Design Basics has no direct evidence of actual copying. For the remaining nine plans, it must rely on circumstantial proof of actual copying, which requires evidence of both access and probative similarity.

[21] We can safely skip the issue of access. The district judge aptly observed that the Signature plans are dissimilar in material respects from the plans they are alleged to infringe. They have different room dimensions, ceiling heights and styles, and exterior dimensions. Some have a different number of rooms, and the garages are sometimes placed at different angles to the homes. These differences are enough as a matter of law to preclude an inference of actual copying.

[22] For the same reason, even if we assume that actual copying occurred in the case of the 2461 Shawnee floor plan, no reasonable jury could find unlawful appro-

6. Design Basics urges us to instead adopt the First Circuit's approach in *T-Peg, Inc. v. Vermont Timber Works, Inc.*, 459 F.3d 97 (1st Cir. 2006), which looked to similarities in the "overall form" of the buildings to assess architectural copyright infringement. *Id.* at 113–14. Design Basics is wrong to suggest that our approach differs from the First Circuit's. *T-Peg*, like *Lexington Homes*, applied well-established principles of copyright law to the facts at hand. But the facts in *T-Peg* were materially different from this case and from *Lexington*

Homes. The architectural plans at issue there were for a timber-frame home, a design driven as much by aesthetics as by functionality. *Id.* at 101. The First Circuit thus reasonably refrained from holding that the *scènes à faire* and merger doctrines meant that the timber-frame home plans received limited protection. There is no reason to think that the First Circuit would analyze plans for suburban, single-family tract homes any differently than we did in *Lexington Homes*.

priation. Signature's Lot 119 Lake Falls floor plan is not virtually identical to the 2461 Shawnee. Though both designs depict a one-story ranch with a kitchen, breakfast room, great room, dining room, three bedrooms, and two bathrooms in the same general locations, *see* Appendix, the Signature plan is different from the 2461 Shawnee in some notable ways. It has greater square footage, and the room dimensions are subtly different. The ceilings have different heights, and the two homes have different aspect ratios. The 2461 Shawnee has a two-car garage and its walls are parallel to the home, while the Lot 119 Lake Falls plan features a three-car garage placed at an angle to the rest of the home. Although most of the rooms are located in the same relative positions, some are not: where the 2461 Shawnee plan places a bathroom, the Lot 119 Lake Falls plan has a walk-in closet.

In a field unconstrained by convention and functionality, the similarity of the overall layouts of the two floor plans would be noticeable. But suburban, single-family housing is a field with many standard elements and limited possibilities for creativity, so the Lot 119 Lake Falls plan must be virtually identical to the 2461 Shawnee to

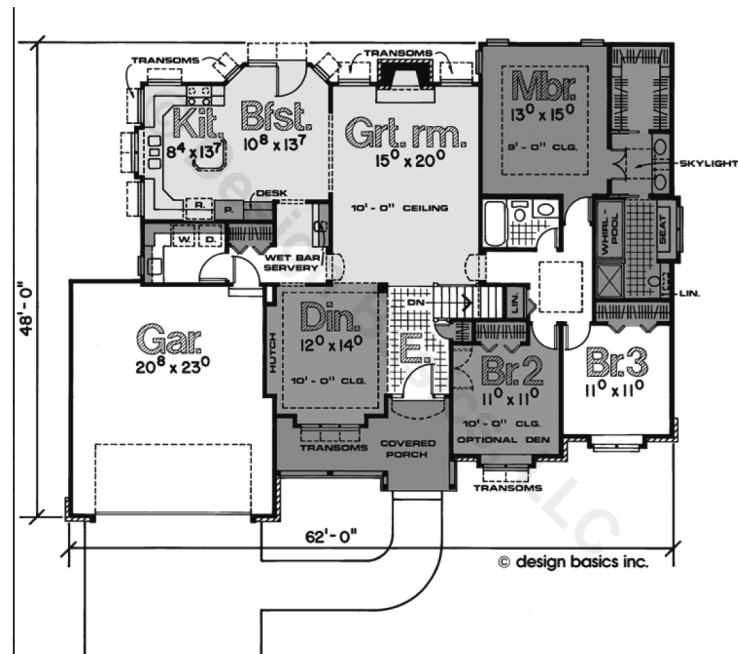
infringe Design Basics' thin copyright. Under this standard, Signature's plan is non-infringing as a matter of law.

Finally, we note for completeness that we find no flaw in the district judge's conclusion that Signature's plans are dissimilar enough to preclude liability even under ordinary substantial-similarity analysis. As we explained when discussing probative similarity, each Signature plan features different room dimensions, ceiling styles and heights, and exterior dimensions than the Design Basics plan it is alleged to infringe. The number and placement of rooms is sometimes different, as is the size and (in some cases) the location of the garage. Accordingly, the judge correctly concluded that the Signature plans are noninfringing under conventional substantial-similarity analysis; the plans are certainly not virtually identical to the Design Basics plans they are alleged to infringe. Summary judgment for Signature was proper.

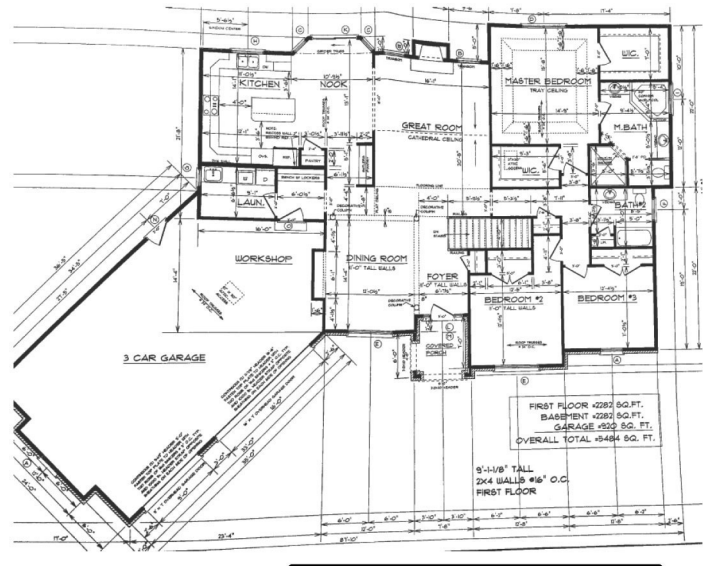
AFFIRMED

Appendix

Design Basics' 2461 Shawnee Plan



Signature Construction's Lot
119 Lake Falls Plan





Alice L. GEDATUS, Plaintiff-Appellant,

v.

Andrew M. SAUL, Commissioner of
Social Security, Defendant-
Appellee.

No. 20-1753

United States Court of Appeals,
Seventh Circuit.

Argued January 21, 2021

Decided April 23, 2021

Background: Claimant who was diagnosed with medical conditions including status-post lumbar spine fusion with continuing pain and loss of range of motion and right knee degenerative joint disease sought review of ALJ's finding that claimant was not disabled and denial of application for social security disability insurance benefits. The United States District Court for the Western District of Wisconsin, Barbara B. Crabb, Senior District Judge, affirmed. Claimant appealed.

Holdings: The Court of Appeals, Manion, Circuit Judge, held that:

- (1) substantial evidence supported ALJ's determination that claimant was not disabled, and thus not entitled to benefits;
- (2) ALJ did not violate narrative requirements of social security ruling that residual functional capacity (RFC) assessment include a discussion of why reported symptom-related functional limitations and restrictions can or cannot reasonably be accepted as consis-

tent with the medical and other evidence;

- (3) ALJ's arguably ambiguous sitting limit was harmless; and
- (4) claimant failed to establish that tremors were impairments.

Affirmed.

1. Social Security ⇌276

Court of Appeals reviews district judge's decision in a social security disability case de novo, without deference, but applies a deferential standard to ALJ's decision.

2. Social Security ⇌263(3)

Substantial evidence required to support an ALJ's decision denying social security disability insurance benefits is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Social Security Act § 205, 42 U.S.C.A. § 405(g).

3. Social Security ⇌263(3)

Whatever the meaning of "substantial" in other contexts, the threshold for such evidentiary sufficiency is not high in reviewing an ALJ's decision denying social security disability insurance benefits. Social Security Act § 205, 42 U.S.C.A. § 405(g).

See publication Words and Phrases for other judicial constructions and definitions.

4. Social Security ⇌262(3), 263(3)

Court of Appeals will not reweigh evidence, resolve debatable evidentiary conflicts, determine credibility, or substitute its judgment for administrative law judge's (ALJ) determination in a social security disability case so long as substantial evidence supports it.