

allegedly infringing work to give rise to an inference of actual copying" - this analysis merges somewhat with the question of "substantial similarity" (although they are separate questions). We discuss below the similarities and dissimilarities between Timberpeg's registered plans and VTW's frame in the context of the substantial similarity inquiry. We conclude that a reasonable jury could find a sufficient degree of probative similarity exists between Timberpeg's architectural work and VTW's frame "to give rise to an inference of actual copying" for the same reasons a jury could find there is substantial similarity.

B. Substantial Similarity

The substantial similarity inquiry "entails proof that the copying was so extensive that it rendered the works so similar that the later work represented a wrongful appropriation of expression." *Johnson*, 409 F.3d at 18. The inquiry focuses not on every aspect of the copyrighted work, but on those "aspects of the plaintiff's work [that] are protectible under copyright laws and whether whatever copying took place appropriated those [protected] elements." *Id.* at 19 (second alteration in original) (quoting *Matthews v. Freedman*, 157 F.3d 25, 27 (1st Cir.1998)); see also *Feist*, 499 U.S. at 361, 111 S.Ct. 1282 (noting that wrongful copying requires showing of "copying of constituent elements of the work that are original" (emphasis added)). Summary judgment on substantial similarity is "unusual" but can be warranted on the right set of facts. See *Segrets*, 207 F.3d at 62. "Summary judgment on [substantial similarity] is appropriate only when a rational factfinder, correctly applying the pertinent legal standards, would be compelled to conclude that no substantial similarity exists between the copyrighted work and the allegedly infringing work." *Johnson*, 409 F.3d at 18.

The copyrighted work at issue is Timberpeg's architectural work as embodied in the second preliminary plans. As for the allegedly infringing works, there are both VTW's shop drawings and the frame as actually erected by VTW. The parties have assumed that the frame as erected matches VTW's shop drawings. VTW's shop drawings also reflect certain other features that VTW did not actually build - the exterior walls and the actual staircase (although VTW did build the posts that define the stair bay). We include these features as part of the allegedly infringing work when conducting the similarity analysis.

Substantial similarity can be measured by the "ordinary observer" test. *Id.* Under that test, 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." *Id.* The two works need not be exact copies to be substantially similar. Differences between the works have some effect on the inquiry, but the mere existence of differences is insufficient to end the matter in the

defendant's favor. *Id.*; see also *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 608 (1st Cir.1988) ("Slight or trivial variations between works will not preclude a finding of infringement under the ordinary observer test."). "If the points of dissimilarity not only exceed the points of similarity, but indicate that the remaining points of similarity are, within the context of plaintiff's work, of minimal importance, either quantitatively or qualitatively, then no infringement results." 4

113

Nimmer & Nimmer, supra, § 13.03[B][1][a].

The record shows the following similarities between VTW's shop drawings and Timberpeg's registered plans:

1. VTW's shop drawings and the frame as constructed had a backwards-L-shaped footprint with exactly the same dimensions as the timberframed portion of the main house in Timberpeg's plans.
 2. VTW's shop drawings and the constructed frame had a kitchen "bump-out" along the western wall, although the VTW bump-out was about two feet wider than the one in Timberpeg's plans.
 3. VTW's shop drawings showed a central switchback staircase in precisely the same location as the staircase in Timberpeg's plans, and the constructed frame included the posts used to define the stair bay.
 4. VTW's frame showed a lofted second floor in the same location and with the same dimensions as in Timberpeg's plans.
 5. VTW's frame had the same roof pitch and dimensions as in Timberpeg's plans.
 6. The plate (wall) height was the same in both Timberpeg's plans and VTW's shop drawings.
 7. VTW's shop drawings appeared to contemplate a further wing attached to the eastern wall of the timberframe; the shop drawings showed the location of exterior wall panels (which VTW would not erect but were nonetheless reflected in the drawings), and there were no such panels along the eastern side. The Timberpeg plans showed a separate stick-built wing attached to the eastern side of the timberframed portion of the home.
- VTW and the district court pointed to a number of differences shown in the record between VTW's shop drawings and Timberpeg's registered plans:
1. VTW asserts that its frame was able to support any number of designs, depending on how the panels and walls were applied to the frame, while the Timberpeg design showed a particular internal floor plan and external features. Timberpeg acknowledges that the