

No. 21-____

IN THE
Supreme Court of the United States

COLUMBIA HOUSE OF BROKERS REALTY, INC., D/B/A
HOUSE OF BROKERS, INC., D/B/A JACKIE BULGIN &
ASSOCIATES, ET AL.,

Petitioners,

v.

DESIGNWORKS HOMES, INC. &
CHARLES LAWRENCE JAMES,

Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1990, Congress extended copyright protection to “architectural works.” *See* 17 U.S.C. §§ 101, 102(a)(8). At the same time, however, Congress provided that the copyright in an architectural work does not preclude others from making “pictures, paintings, photographs, or other pictorial representations of the work,” so long as the building is visible from a public place. *Id.* § 120(a).

In this case, petitioner real estate companies and agents created and distributed basic floor plans of family homes as part of their marketing materials. After the materials were distributed, respondent Charles James, who had built the houses approximately 20 years earlier, registered copyrights in the homes’ designs. He then sued petitioners, alleging that the floor plans infringed his copyright in the houses. The district court dismissed the case as precluded by Section 120(a). But the Eighth Circuit reversed, holding that floor plans are not a “picture” or “other pictorial representation” within the meaning of the exception. That decision draws into question the lawfulness of one of the most ubiquitous marketing practices in the real estate industry as well as the use of floor plans in other industries as diverse as insurance and home improvement.

The question presented is:

Whether floor plans constitute “pictures, paintings, photographs, or other pictorial representations” of an architectural work within the meaning of 17 U.S.C. § 120(a).

PARTIES TO THE PROCEEDING

Petitioners are: Columbia House of Brokers Realty, Inc., d/b/a House of Brokers, Inc., d/b/a Jackie Bulgin & Associates; Shannon L. O'Brien; Nicole Waldschlager; Deborah Ann Fisher; Jacqueline Bulgin, d/b/a Jackie Bulgin; Carol S. Denninghoff; Susan Horak, d/b/a The Susan Horak Group Re/Max Boone Realty; and Boone Group, Ltd., d/b/a Re/Max Boone Realty.

Respondents are: Designworks Homes, Inc. and Charles Lawrence James.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, petitioners declare as follows: (i) Columbia House of Brokers Realty, Inc. and Boone Group, Ltd. are corporate entities; and (ii) no publicly held corporation owns 10 percent or more interest in Columbia House of Brokers Realty, Inc. or Boone Group, Ltd., and neither Columbia House of Brokers Realty, Inc. nor Boone Group, Ltd. have parent corporations.

RELATED PROCEEDINGS

*Designworks Homes, Inc. v. Columbia House of
Brokers Realty, Inc.*, No. 19-3608 (8th Cir.
Aug. 16, 2021)

*Designworks Homes, Inc. v. Columbia House of
Brokers Realty, Inc.*, No. 20-3104 (8th Cir.
Aug. 16, 2021)

Designworks Homes, Inc. v. Horak, No. 20-1099
(8th Cir. Aug. 16, 2021)

Designworks Homes, Inc. v. Horak, No. 20-3107
(8th Cir. Aug. 16, 2021)

*Designworks Homes, Inc. v. Columbia House of
Brokers Realty, Inc.*, No. 2:18-cv-04090-BCW
(W.D. Mo. Dec. 4, 2019)

Designworks Homes, Inc. v. Horak, No. 2:18-cv-04093-
BCW (W.D. Mo. Dec. 17, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Columbia House of Brokers Realty, Inc., et al. respectfully petition this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 9 F.4th 803. One of the district court opinions on review is reported at 421 F. Supp. 3d 838 (Pet. App. 15a-34a), and another is unpublished (Pet. App. 35a-54a). Two district court opinions regarding attorney's fees were vacated by the court of appeals in the opinion under review but are not pertinent to this petition. The opinions are unpublished but available at 2020 WL 5986610 and 2020 WL 5986611.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2021. The court denied a timely petition for rehearing on October 5, 2021 (Pet. App. 55a-57a). On December 22, 2021, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including March 4, 2022. No. 21A264. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 120(a) of Title 17 of the U.S. Code provides:

The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations

of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.

The appendix to this petition includes additional relevant excerpts of Sections 101, 102, and 1310(h) of Title 17 (Pet. App. 58a-61a).

STATEMENT OF THE CASE

I. Legal Background

Until 1990, building designers could obtain a copyright in their plans and drawings, but “architectural structures themselves were afforded virtually no protection.” *Scholz Design, Inc. v. Sard Custom Homes, LLC*, 691 F.3d 182, 188 (2d Cir. 2012). In 1990, however, Congress enacted the Architectural Works Copyright Protection Act (AWCPA), Pub. L. No. 101-650, tit. VII, 104 Stat. 5133 (1990), to bring the United States into compliance with the Berne Convention for the Protection of Literary and Artistic Works.¹

Under the AWCPA, the Copyright Act now protects “architectural works,” 17 U.S.C. § 102(a)(8), defined as “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings,” *id.* § 101. After 1990, then, one could infringe a copyright in an

¹ See H.R. 3990, H.R. 3991, H.R. 5498, 101st Cong. (1990); 136 Cong. Rec. H363, E259-61 (daily ed. Feb. 7, 1990). Article 2(1) of the Convention requires protection for the built designs of structures, not only for architectural plans and drawings that facilitated their construction. See Berne Convention for the Protection of Literary and Artistic Works, art. 2(1), Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986), <https://tinyurl.com/vfp8rtm2>.

architectural *drawing* by copying the drawing itself, but could also infringe a copyright in the architectural *work* by constructing a copy of a building that embodied a copyrighted design.

However, “Congress did not afford architectural works full copyright protection.” *Leicester v. Warner Bros.*, 232 F.3d 1212, 1217 (9th Cir. 2000). Of most relevance to this case, Congress provided that

[t]he copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of ***pictures, paintings, photographs, or other pictorial representations of the work***, if the building in which the work is embodied is located in or ordinarily visible from a public place.

17 U.S.C. § 120(a) (emphasis added).² The House Report explained that “[t]hese uses do not interfere with the normal exploitation of architectural works.” H.R. Rep. No. 101-735, at 22 (1990). Given “the important public purpose served by these uses and the lack of harm to the copyright owner’s market,” Congress enacted “an exemption, rather than rely on the doctrine of fair use, which requires ad hoc determinations.” *Ibid.*

The question in this case is whether a drawing of a floor plan, such as those commonly used to market a property for sale, falls within this exception for

² The statute further provides that “the owners of a building embodying an architectural work may, without the consent of the author or copyright owner of the architectural work, make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building.” 17 U.S.C. § 120(b).

making “pictures, paintings, photographs, or other pictorial representations” of an architectural work. 17 U.S.C. § 120(a).

II. Factual and Procedural Background

1. In 1996, respondent Charles James built and sold a ranch style house at 4306 Melrose Drive in Columbia, Missouri. Fourteen years later, in 2010, the then-owners of the house hired petitioner Boone Group, Ltd., a real estate brokerage firm, to sell the property. Pet. App. 35a-36a. Using a tape measure and graph paper, one of the company’s agents sketched out a rough floor plan depicting the major features of the main and lower levels of the house to use in marketing the home:



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In 2018, eight years after the listing and more than 20 years after the home was constructed, James registered a copyright in the technical drawings for the house on Melrose Drive. Pet. App. 19a. Shortly thereafter, he and his construction firm, respondent Designworks Homes, Inc., sued the real estate company and its agents for copyright infringement.³

³ Respondents originally asserted infringement of two earlier registered copyrights, but the district court found that there was

The suit did not claim that petitioners copied any of the original architectural drawings for the design (which petitioners had no access to). Instead, respondents claimed that petitioners had infringed by making and disseminating their own drawing of the home's layout, particularly its allegedly original "triangular atrium design with stairs." Pet. App. 3a. Respondents sought actual and/or statutory damages, as well as interest and attorney's fees. *See* 18-cv-4093 Dist. Ct. Doc. 1, at 7.

Around the same time, respondents also filed suit against petitioner Columbia House of Brokers Realty, Inc. and various of its agents, asserting similar claims arising from those petitioners' use of floor plans to advertise another house in 2017. That house had been built 18 years earlier but, again, respondent did not register a copyright in its architectural drawings until 2018, after the alleged infringement took place and right before filing suit. As before, the suit did not allege that petitioners had copied any of respondents' architectural plans, only that they had infringed by producing a floor plan of the house as built. Pet. App. 16a-20a.

2. The district court granted summary judgment in petitioners' favor in both cases. It held that the floor plans fell within the Section 120(a) exemption for "pictures" or "other pictorial representations" of an architectural work because the floor plans were "a pictorial representation of the structure's interior as it exists." Pet. App. 29a; *id.* at 48a.

no evidence that petitioners had copied those works, a conclusion respondents did not challenge on appeal. *See* Pet. App. 40a-42a.

3. The Eighth Circuit reversed. It acknowledged that a floor plan could fit within the ordinary meaning of a “picture” or “pictorial representation.” Pet. App. 5a-6a. But it concluded that “statutory context suggests that” the text should be read differently. *Id.* at 6a, 7a-8a. The court noted that in other inapplicable provisions of the statute, Congress had used the specific terms “technical drawings” and “architectural plans.” *Id.* at 6a (citing 17 U.S.C. § 101). Based on this, the court reasoned that “if § 120(a) encompassed these floorplans, we believe Congress would’ve said so more explicitly,” *id.* at 7a, rather than assume courts would understand, as the district court had, that the ordinary meaning of “pictures . . . or other pictorial representations” was broad enough to include floor plans without Congress having to mention them specifically.

The Eighth Circuit further discerned an unwritten limitation in the statute based on its intuition that the words “pictures, paintings, photographs, or other pictorial representations” all “connote artistic expression.” Pet. App. 8a. The exception, therefore, should not be extended to pictorial representations that “serve a functional purpose,” like a floor plan. *Ibid.* The court did not address whether a photograph of the same home interior, conveying the same information and serving the same functional purpose, would count as a “photograph” within the meaning of the statute or be excluded as non-artistic as well. *Id.* at 8a-9a.

The court of appeals also “glean[ed] one more clue” from the fact that the exception only applies if the “building in which the work is embodied is located in or ordinarily visible from a public place.” Pet. App.

10a (quoting 17 U.S.C. § 120(a)). Although the exception applies to any picture of the architectural work so long as the “building” is visible from a public place, the court thought it relevant that “it would be quite difficult to create a floorplan of a building simply by viewing it from a public place.” *Ibid.*

Finally, “[f]or what it’s worth,” the court of appeals believed that the legislative history supported its interpretation. Pet. App. 10a-11a.

The panel acknowledged that every other court to have considered the question had reached the opposite conclusion. Pet. App. 11a. And the court admitted that its interpretation would impose “difficulties” for real estate agents and homeowners now charged with “identifying and contacting the owners of copyrights in architectural works to get permission to create floorplans” for marketing their homes and other uses. *Id.* at 14a. But those problems, the court believed, were for “the political branches.” *Ibid.* Moreover, the court noted that petitioners could yet assert a fair use defense, although it acknowledged that Congress had enacted Section 120 because it “did not believe that fair use, with its ad hoc approach, provided an adequate defense in these circumstances.” *Id.* at 12a.

4. The full court of appeals subsequently denied petitions for panel and en banc rehearing. Pet. App. 55a-57a.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision has cast a pall over one of the most common marketing practices in the real estate industry, based on an egregious misapplication of basic principles of statutory construction. If left unreviewed, the decision will leave hundreds of thousands of real estate firms and agents vulnerable to suits for extensive statutory damages and attorney's fees based on the millions of floor plans published during the Copyright Act's three-year limitations period. If that were not bad enough, the decision will interfere with other common uses of floor plans—for housing appraisals, insurance adjustment, commercial leases, home improvement projects, just to name a few—likewise subjecting *other* industries to similar suits for doing something no one believed was potentially unlawful until the decision in this case. The Court should grant this petition and reverse.

I. The Court Of Appeals' Untenable Interpretation Of The Copyright Act Has Opened Thousands Of Businesses To Suit For Engaging In Standard Industry Practices That Serve Important Public Purposes.

Certiorari is warranted because the decision below is indefensible and will seriously harm multiple national industries.

**A. The Court Of Appeals Upended
Congress’s Careful Calibration Of Rights
For Architectural Works.**

1. As the court of appeals acknowledged, a drawing of a floor plan fits within the ordinary meaning of the capacious terms of Section 120, which covers both “pictures” and more broadly “other pictorial representations of the [architectural] work.” 17 U.S.C. § 120(a); *see* Pet. App. 7a. The dictionary definition of a “picture” includes “a design or representation made by various means (such as painting, drawing, or photography).” *Picture*, Merriam-Webster, <https://tinyurl.com/yckz7xps> (last visited Mar. 4, 2022); *see also* Pet. App. 5a (Oxford English Dictionary defines “picture” as an “individual painting, drawing, or other representation on a surface, of an object or objects”). A floor plan is a “representation” of an architectural work no less than a photograph, sketch, or other drawing.

Even if floor plans did not “fit as comfortably within this definition as would, say, artistic sketches of the exterior of a house,” Pet. App. 5a-6a, Congress took pains to *expand* the statute beyond the core meaning of “picture” to encompass “other pictorial representations.” 17 U.S.C. § 120(a). That term would be meaningless unless it encompassed *more* than the word “picture” alone. Indeed, Congress used the term elsewhere in the statute to encompass drawings that, like a floor plan, document the features of a copyrighted work. *See id.* § 1310(h) (to register a copyright in the design of a useful article, author must submit “two copies of a drawing or *other pictorial representation* of the useful article”) (emphasis added).

That should have been the end of the case. Where a statute's text is "plain and unambiguous," courts "must apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). "The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration" or a complicated series of obtuse inferences only a lawyer could follow. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020).

Yet that is exactly what the Eighth Circuit did. It discarded the ordinary meaning of "picture" and "pictorial representation" based on a succession of inferences it drew from *other* provisions defining *other* terms and through the court's intuition about the unspoken gist of what Congress was trying to get at (but apparently failed to articulate) in the statute. That reasoning does not bear scrutiny, even on its own terms.

First, the court of appeals noted that Congress could have expressly mentioned floor plans, having included similarly specific terms (like "architectural plans" and "technical drawings") in other parts of the statute. Pet. App. 6a-9a. But that argument proves far too much. Congress could have just as easily included words like "motion picture" or "drawing" as well, words it also included in one of the provisions the court of appeals cited. See 17 U.S.C. § 101 (definition of "work of visual art"). Does that mean that a drawing is not a "picture" or that Section 120(a) does not protect film depictions of architectural works? Of course not. The entire point of using a broad phrase like "pictures, paintings, photographs, or other pictorial representations of the work," is to sweep in

everything that naturally falls within those terms *without* having to *also* specifically list every intended example. If Congress defined “fruit” in Section 1 of a statute to include “apples, bananas, and grapes,” no one would think that when Congress used “food” in Section 2, it intended to exclude bananas because it “knew how to describe [bananas] with more specificity than by simply referring to them as [food].” Pet. App. 6a.

Indeed, the other statutory provisions the Eighth Circuit cited show quite vividly why its reasoning was wrong. The court was relying on instances in which Congress defined similarly broad phrases—“pictorial, graphic, and sculptural work” and “work of visual art”—to *include* things like architectural plans and technical drawings. See Pet. App. 6a-9a (citing 17 U.S.C. § 101). The inference, if anything, is that when Congress used comparable sweeping language in Section 120(a), it intended that language also to include such examples. Of course, Congress did not provide a definition for the relevant phrases in Section 120(a). But that does not mean it intended the provision to have a narrower meaning than what ordinary usage or the statutory definitions of similar phrases would indicate.

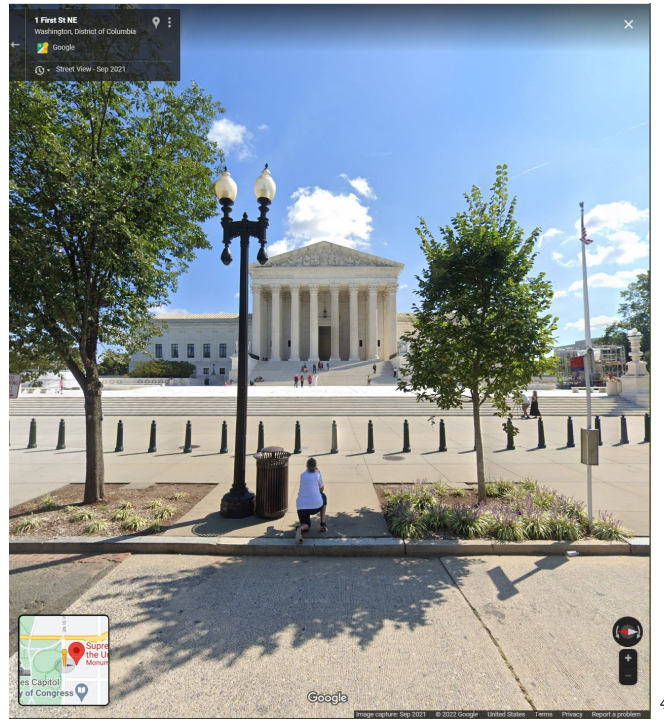
The court of appeals’ reliance on the definition of a “work of visual art,” was particularly flawed. Pet. App. 7a. In that provision, Congress declared that the term includes a “drawing,” then separately excluded from the definition “technical drawing[s].” See 17 U.S.C. § 101. The appropriate lesson is that Congress understood that the word “drawing” would naturally encompass technical drawings unless they were expressly excluded. And given that Section 120’s

reference to a “picture . . . or other pictorial representation[]” must include drawings, one would think that Congress likewise understood that a “picture” would include technical drawings and floor plans unless the statute expressly said otherwise.

Second, the Eighth Circuit believed that “the terms Congress used in § 120(a) . . . all connote artistic expression,” and therefore should be read to exclude depictions that might otherwise fall within the ordinary meaning of the statute but “serve a functional purpose.” Pet. App. 8a. But words like “picture,” “photograph,” and “other pictorial representation” do *not* connote only artistic expression. See, e.g., *Mackay Radio & Tel. Co. v. Radio Corp. of Am.*, 306 U.S. 86, 98 (1939) (referring to a “graph” as “a pictorial representation”). Take, for example, the photographs commonly used in real estate marketing. They perform *exactly* the same “functional purpose” as a floor plan—“informing potential buyers of home layouts and interiors, and, more broadly, to help sell homes.” Pet. App. 8a-9a. Yet they are clearly “photograph[s].”

Similarly, Google’s Street View, which provides photos of the exteriors of building that line public streets, performs an entirely functional purpose,

assisting users in locating and making their way to homes and businesses:



But there should be no dispute that Google’s images constitute “pictures” and “photographs” within the meaning of Section 120(a).

In fact, people take photographs or make drawings of the exteriors and interiors of buildings of all kinds for functional purposes—to record damage when filing an insurance claim, to plan a home improvement project, to develop a landscaping scheme, to document a crime scene, etc. All of these

⁴ See Google, Street View – Sep 2021, 1 First St NE, Washington, District of Columbia, <https://tinyurl.com/2v4p57et> (last visited Mar. 4, 2022).

examples are plainly “pictures” or “pictorial representations” even though their purpose is functional.

The Eighth Circuit’s belief that a “pictorial representation” must be artistic rather than functional is further undermined by other provisions of the Copyright Act discussed earlier. Section § 1310(h) uses the phrase “pictorial representation” to refer to a purely utilitarian depiction of a useful article in order to document the features of a copyrighted work, just as a floor plan documents the physical layout of a work of architecture. Likewise, the definition of “works of visual arts” begins by including all “drawings” and then excluding technical drawings. *See supra* 11-12. In so doing, Congress acknowledged that the word “drawing” naturally includes non-artistic representations like technical drawings unless specifically excluded. There is no reason to interpret the word “picture,” which plainly encompasses a drawing, any differently.

The Eighth Circuit’s attempt to distinguish between artistic and functional works also runs headlong into this Court’s admonition that nothing in copyright law should turn on a court’s evaluation of a work’s artistic quality. In *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), for example, the Court warned that it “would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of a work, outside of the narrowest and most obvious limits.” *Id.* at 582 (cleaned up). Courts are no more qualified to decide what counts as “art” than they are to decide whether a piece of art is any good.

At the same time, making Section 120(a) turn on a court's determination of whether a picture is "artistic" or "functional" would be impossible to administer. Would the following, for example, be considered a work of art or a functional architectural elevation:



Third, the Eighth Circuit noted that "it would be quite difficult to create a floorplan of a building simply by viewing it from a public place." Pet. App. 10a. The same, of course, is true of a photograph, painting, or artistic sketch of a building's interior. If the court meant that Section 120(a) does not cover *any* depiction of a building's interior, then its ruling would have even more dramatic effects, reaching the interior photos that accompany virtually every real estate listing, not to mention artistic sketches and paintings of famous interiors, or even family photos taken in the copyrighted atrium of one's own home. On the other

⁵ See Coop. Bldg. Plan Ass'n, *Complete Collection of Shoppell's Modern Houses* (1886), <https://tinyurl.com/55y73xyx>.

hand, if the Eighth Circuit did not dispute that these kinds of interior pictures fall within Section 120(a), it is hard to see why its observation supports its interpretation.

At any rate, any suggestion that Section 120(a) does not cover depictions of interior spaces is mistaken. By its plain terms, the provision protects any pictorial depiction “of *the work*, if the *building* in which the work is embodied is located in or ordinarily visible from a public place.” 17 U.S.C. § 120(a) (emphasis added). Here, there was no dispute that the “building[s]” were visible from a public street. Pet. App. 37a; *id.* at 17a. Accordingly, petitioners were entitled to make a picture of the “architectural work,” a term that includes the interior of the house (otherwise, respondents have no claim).

Finally, we are left with the court’s reading of the legislative history. The panel rightly noted that the House rejected a proposal that would have “prohibit[ed] pictorial representations made in order to further the unauthorized design and construction of a substantially similar architectural work.” Pet. App. 10a (quoting H.R. Rep. No. 101-735, at 22 n.50 (1990) (House Report)). The court acknowledged that the proposal didn’t mention floor plans, but assumed that it would reach them. *Id.* at 10a-11a. But even if that were right,⁶ the Eighth Circuit was wrong in thinking

⁶ In fact, it is doubtful that the proposal would have reached floor plans. As this case illustrates, floor plans used in real estate marketing are not “made in order to further the unauthorized . . . construction” of a new house, Pet. App. 10a (quoting House Report 22 n.50); they are created “to help sell homes,” *id.* at 9a. Floor plans are also insufficiently detailed to facilitate reconstruction of a copyrighted design. *See infra* 17-19.

that Congress rejected the proposal because “the drafters of § 120(a) evidently did not believe it covered floorplans.” *Id.* at 11a. Instead, the Report states that “an amendment was unnecessary” because if “an unauthorized substantially similar architectural work is constructed, it is irrelevant how the design of the infringing building is achieved so long as the design is not independently created.” House Report 22 n.50. In other words, if someone used a floor plan or other picture to make a copy of a building, the *creation of the building* would independently infringe the copyright and the author could pursue a claim against the builder. Given that protection, Congress believed it was unnecessary to also forbid making pictures of architectural works. *Ibid.*

2. Having concluded that floor plans were excluded under its reading of the text and legislative history, the panel gave scant attention to the statute’s underlying purposes and was indifferent to the uncontested disruption its interpretation would cause to settled industry practices.

a. The panel had no convincing explanation why Congress would have intended to shield a sketch or photograph of an atrium, but not a floor plan that conveys the same information in a different way.

Respondents argued below that floor plans are different because they can be used to reproduce a copyrighted architectural work. The Eighth Circuit properly declined to rely on that argument. Floor plans typically lack the detail necessary to reproduce a building. Note, for example, how the polygonal kitchen and living room in this floor plan from the record are given only square dimensions, with no

dimensions at all given for the supposedly signature atrium at the top of the picture:



DSW-0000100

19-3608 C.A. J.A. 18. In fact, similar floor plan depictions are commonly used in marketing blueprints for homes without fear that builders will use the floor plans off the internet in lieu of purchasing the more detailed architectural drawings.⁷ And, as just discussed, Congress considered and rejected a proposal to exclude such pictures from Section 120(a). If someone builds a

⁷ See, e.g., America's Best House Plans, Modern Farmhouse House Plan 4534-00072, <https://tinyurl.com/yv7xw7a8> (last visited Mar. 4, 2022).

copy of an architectural work, the author can sue the builder. House Report 22 n.50.

In fact, the Eighth Circuit’s decision does nothing but undermine the purposes of Section 120(a) and the Copyright Act as a whole. The goal of copyright is to give authors a sufficient incentive to create original works, without incurring excessive social costs in doing so. *See, e.g., Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1195-96 (2021). Like the photographs and sketches everyone agrees are protected by the Section 120(a) exception, floor plans “do not interfere with the normal exploitation of architectural works.” House Report 22. Designers of architectural works are fully compensated for their effort when a house is built using the design. *Ibid.* No designer gives discounts based on the assumption of future revenues trickling in for years every time the house is advertised for sale. Indeed, every single house in America was designed without that added incentive—until the decision in this case, no court had ever construed the Copyright Act to require licenses for floor plans used in marketing a family home.

On the other hand, the social costs of the Eighth Circuit’s interpretation of the Copyright Act are enormous. For example, the panel acknowledged “the difficulties” in “identifying and contacting the owners of copyrights in architectural works to get permission to create floorplans.” Pet. App. 14a. That is an understatement. Many (perhaps most) homeowners have no idea who designed their house or its relevant renovations. The home may have passed through numerous hands before it is put on the market, often decades later—American homes change hands every

13 years or so,⁸ while architectural copyrights run the life of the author plus 70 years, *see* 17 U.S.C. § 302(a).

The copyright registry is of little help either. For one thing, an architect need not register a copyright to obtain copyright protection for an architectural work; registration is only required before filing suit. *See, e.g., Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 887 (2019). Here, for example, respondents didn't register their copyright in the Melrose Road property until eight years *after* the Boone petitioners had used the floor plan in marketing the home. *See* Pet. App. 37a, 43a-44a. In addition, even if a design has been registered, it can be difficult, even impossible, to find. Because a design can be registered before it is constructed, and because the same design may be used for many houses, a homeowner cannot simply search the database for her address. In this case, for example, respondents alleged that the floor plans for the Melrose house infringed copyrights registered with the titles "Atrium ranch on walk out; Angular atrium ranch," "4804 Chilton Court, lot 108," and "2,187SF." *Id.* at 17a-18a & nn. 1-2. Even if the owner somehow manages to find those records and draw a connection to her own home, the registration may reveal only the copyright owner's name, not his contact information.⁹

At the same time, the penalty for failing to do the impossible can be enormous. Direct copyright

⁸ *See* Chris Moon, *How Long Do Homeowners Stay in Their Homes*, ValuePenguin (June 4, 2018), <https://tinyurl.com/y3yfavb8>.

⁹ *See* 18-cv-4090 Dist. Ct. Doc. 1, Ex. A (registration for "Atrium ranch on walk-out; Angular atrium ranch" with no contact information).

infringement is a strict liability tort; it is no defense that the defendant was unaware that the work was copyrighted. *See Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198 (1931). And once infringement is proven, the statute authorizes “actual damages and any additional profits of the infringer,” or statutory damages of up to \$30,000 (\$150,000 if the infringement is found willful). *See* 17 U.S.C. § 504(a), (b)-(c). The statute further authorizes costs and attorney’s fees, which can be substantial. *See id.* § 505; *see also, e.g., Builders Mut. Ins. Co. v. Allora, LLC*, 2013 WL 12250811, at *1 (E.D.N.C. Aug. 13, 2013) (describing \$212,322 attorney’s fee award in building plans infringement case).

The Eighth Circuit disregarded all of this as legally irrelevant to the proper interpretation of the Section 120(a) exemption. Pet. App. 14a. But this Court has made clear that Congress took into account “the cost of contacting owners to obtain reproduction permission” in establishing copyright’s “exceptions and exemptions.” *Google*, 141 S. Ct. at 1195. That the Eighth Circuit’s decision imposes extraordinary costs and burdens on the public without materially advancing incentives for creating copyrighted works is significant evidence that the court’s interpretation is incorrect.

b. The panel did offer the consolation of a potential fair use defense. Pet. App. 12a. But that is cold comfort and no support for its misinterpretation of Section 120(a).

To start, the panel acknowledged that a principal purpose of Section 120 is to avoid forcing defendants to rely on a defense this Court recently characterized as “notoriously fact sensitive” and therefore frequently

incapable of resolution “without a trial.” *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1513 (2020). The defense’s fact-specific balancing test also provides little prospective guidance to those attempting to decide whether they can make a floor plan or other representations of a building.

Given this, to say that real estate floor plans *might* be found lawful under the fair use provision is effectively to outlaw the practice—few homeowners or real estate agents are going to be “willing to roll the dice with a potential fair use defense,” 140 S. Ct. at 1513, risking the cost of litigation and a judgment just to include a floor plan in a property’s marketing materials.

B. The Decision Has Drawn Common Practices In Multiple Industries Into Serious Legal Doubt.

1. The Eighth Circuit’s decision is as consequential as it is wrong. Millions of existing homes are sold every month. NAR C.A. Br. 8. And as the National Association of Realtors explained in an amicus brief below, “creating floor plans is a common part of buying and selling a home.” *Ibid.* Indeed, the practice has spawned a cottage industry of companies that either prepare floor plans for such purposes or provide software to allow homeowners or real estate agents to create their own. *See id.* at 8-9.

Floor plans are widely used in marketing real estate because they provide potential customers valuable information about the properties. They are especially useful to those shopping for homes from outside an area, and for individuals for whom on-sight viewings are difficult (such as the elderly or

individuals with disabilities). They have been particularly important during the COVID pandemic, when health concerns or public safety regulations often precluded in-home tours. NAR C.A. Br. 10-11.

The problem with the Eighth Circuit’s decision is not simply that it could bring an end to a valued service for the nation’s home buyers. It is also that the court has exposed hundreds of thousands of real estate companies and agents to suits for millions of prior advertisements featuring floor plans, each potentially resulting in a judgment of hundreds of thousands of dollars in statutory damages and attorney’s fees.¹⁰ This risk is not idle speculation—the designer community has been extremely aggressive in bringing suit against those they perceive as infringing their copyrights.¹¹ There is every reason to believe that the

¹⁰ There are more than 100,000 real estate brokerage firms in the United States, and more than 3 million real estate agents. See Chris Linsell, *83 Shocking Real Estate Statistics You Need To Know*, The Close (Dec. 23, 2021), <https://tinyurl.com/2scjrccd>.

¹¹ See, e.g., *Designworks Homes, Inc. v. Thomson Sailors Homes, L.L.C.*, 9 F.4th 961 (8th Cir. 2021); *Design Basics, LLC v. Kerstiens Homes & Designs, Inc.*, 1 F.4th 502 (7th Cir. 2021); *Design Basics, LLC v. Signature Constr., Inc.*, 994 F.3d 879 (7th Cir. 2021); *YS Built LLC v. Ya Hsing Chiang Cind Huang*, 739 Fed. Appx. 414 (9th Cir. 2018); *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093 (7th Cir. 2017); *Highland Holdings, Inc. v. Mid-Continent Cas. Co.*, 687 Fed. Appx. 819 (11th Cir. 2017); *Home Design Servs., Inc. v. Turner Heritage Homes Inc.*, 825 F.3d 1314 (11th Cir. 2016); *Savant Homes, Inc. v. Collins*, 809 F.3d 1133 (10th Cir. 2016); *Medallion Homes Gulf Coast, Inc. v. Tivoli Homes of Sarasota, Inc.*, 656 Fed. Appx. 450 (11th Cir. 2016) (per curiam); *Arthur Rutenberg Homes, Inc. v. Jewel Homes, LLC*, 655 Fed. Appx. 807 (11th Cir. 2016) (per curiam); *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95 (2d Cir. 2014);

decision in this case will spur new litigation, particularly given the inducement of possible attorney’s fees awards.

The risk is compounded not only by the Copyright Act’s three-year statute of limitations (which most courts hold does not begin to run until the copyright holder is on notice of the infringement) but also by the fact that images of floor plans can survive on the internet at sites like Zillow.com for years after the listing is over. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670-71 & n.4 (2014) (noting that nine circuits apply a “discovery” accrual rule and holding that “each infringing act starts a new limitations period”). In this case, for example, respondents sued the Boone petitioners *eight years* after the Melrose house was advertised because they discovered the marketing materials still online nearly a decade later. Pet. App. 37a.

2. The effects of the decision below on the real estate industry are reason enough to grant certiorari. But the ill effects of the Eighth Circuit’s ruling are not confined to that setting. In fact, floor plans are developed and used in wide range of industries and contexts:

Bldg. Graphics, Inc. v. Lennar Corp., 708 F.3d 573 (4th Cir. 2013); *Miller’s Ale House, Inc. v. Boynton Carolina Ale House, LLC*, 702 F.3d 1312 (11th Cir. 2012); *Scholz Design, Inc. v. Sard Custom Homes, LLC*, 691 F.3d 182 (2d Cir. 2012); *Charles W. Ross Builder, Inc. v. Olsen Fine Home Bldg., LLC*, 496 Fed. Appx. 314 (4th Cir. 2012); *Intervest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914 (11th Cir. 2008); *T-Peg, Inc. v. Vt. Timber Works, Inc.*, 459 F.3d 97 (1st Cir. 2006); *Ale House Mgmt., Inc. v. Raleigh Ale House, Inc.*, 205 F.3d 137 (4th Cir. 2000); *Richard J. Zitz, Inc. v. Pereira*, 225 F.3d 646 (2d Cir. 2000).

- *Appraisals.* Real estate appraisers frequently include floor plans in their reports.¹² In fact, Fannie Mae and Freddie Mac rules—which apply to approximately half of residential mortgages—require appraisals with floor plans and other drawings of properties in many cases.¹³
- *Tax Assessments and Other State Requirements.* Likewise, tax assessors and property owners use floor plans to evaluate, document, and challenge property valuation for property and other tax assessments.¹⁴ State laws require preparation of floor plans in a variety of other contexts as well.¹⁵

¹² See, e.g., Uniform Residential Appraisal Report (Desktop), Freddie Mac Form 70D/Fannie Mae Form 1004, at 4 (July 2020), <https://tinyurl.com/3sb4766d> (requiring appraisals to include floor plans for certain properties).

¹³ See Fannie Mae, Selling Guide (Feb. 2, 2022), <https://tinyurl.com/yckvyrkb>; Freddie Mac, Single-Family Seller Servicer Guide 5601.10, <https://tinyurl.com/2kxs9j8f>; see also Jim Parrott & Mark Zandi, *GSE Reform Is Dead – Long Live GSE Reform!* 8 n.4 (May 2018), <https://tinyurl.com/yz4sjb2j>.

¹⁴ See, e.g., Cal. Rev. & Tax. Code § 2188.7(c) (requiring floor plans for some assessments); Ga. Dep’t of Cmty. Affs., Preferential Property Tax Assessment Program, <https://tinyurl.com/3wn8x82c> (last visited Mar. 4, 2022) (same); Me. Rev. Servs., *Introduction to Property Tax Assessments* 61 (June 2020), <https://tinyurl.com/r4hcy2x4> (state tax assessment records commonly include floor plans).

¹⁵ See, e.g., Ark. Code Ann. § 20-78-228 (floor plan for childcare facilities must be filed with government emergency management coordinator); Minn. Stat. Ann. § 28A.082 (floor plan required for food handler fee assessment); Minn. Stat. Ann. § 515A.2-114

- *Insurance.* Floor plans are used in processing insurance claims for damage to residential and commercial properties.¹⁶
- *Commercial Leases.* Floor plans are also frequently included in commercial leases to define the leased premises or used by parties to calculate rent based on the square footage leased.¹⁷
- *Home Improvement.* Home improvement contractors and suppliers use floor plans to assist in renovations. For example, companies like Home Depot¹⁸ and Lowe's¹⁹ offer to develop floor plans for customers planning kitchen renovations and other projects.
- *Other Retailers.* Other retailers use floor plans as well. For example, IKEA offers an online tool for making floor plans to assist in planning furniture purchases.²⁰

(amended floor plan required to relocate boundaries between adjoining condo units); Mo. Ann. Stat. § 253.559 (floor plan required for certain tax credits); S.D. Codified Laws § 42-7B-18 (floor plan required to obtain license to operate retail space).

¹⁶ See, e.g., Matterport, 3D Scanning for Insurance and Restoration, <https://tinyurl.com/77e9mkbb> (last visited Mar. 4, 2022).

¹⁷ See, e.g., Law Insider, Floor Plan Sample Clauses, <https://tinyurl.com/44rt4c7x> (last visited Mar. 4, 2022).

¹⁸ Home Depot, Home Depot Measure Service, <https://tinyurl.com/3aakvf69> (last visited Mar. 4, 2022).

¹⁹ Lowe's, Kitchen Design at Lowe's, <https://tinyurl.com/2p96bna9> (last visited Mar. 4, 2022).

²⁰ IKEA, IKEA Home Planner, <https://tinyurl.com/2p8nkupu> (last visited Mar. 4, 2022).

The Eighth Circuit's decision calls the lawfulness of these common practices into doubt and exposes all these industries to massive litigation risk.

3. The damage does not end there. By drawing a distinction between “artistic” and “functional” pictures, and by implying that no depiction taken of an interior may be covered, *see supra* 12-16, the Eighth Circuit has cast a shadow over even more ubiquitous practices, such as using interior photos in marketing homes, for insurance adjusting, or any other use a judge (or jury) might deem not “artistic” enough to fall within Section 120(a).

II. The Court Should Not Delay Review Of This Important Question.

Petitioners acknowledge that there is no circuit conflict. During the more than three decades since Congress extended copyright to architectural works subject to the Section 120(a) exception, no court has questioned the lawfulness of homeowners or others using floor plans of their own properties for marketing or any other use—until now. But that should not deter this Court from granting immediate review.

As discussed, the need for quick review is urgent. Until reviewed and reversed, the Eighth Circuit's decision will cast legal doubt over every use of a floor plan in marketing a family home, preparing an appraisal for a mortgage, planning a home improvement project, etc. The decision will affect millions of transactions in one of the most important sectors of our economy. In comparable circumstances, this Court has granted certiorari to decide important questions of copyright law despite the lack of any real circuit conflict. *See, e.g., Am. Broad. Cos. v. Aereo, Inc.,*

573 U.S. 431 (2014) (deciding whether retransmitting broadcasts over the internet infringe copyrights, no split alleged); *Golan v. Holder*, 565 U.S. 302 (2012) (deciding splitless question whether granting copyright to preexisting works in the public domain was unconstitutional).

There is no real benefit to be had from waiting. The Eighth Circuit is not going to correct itself; the full court has already denied a petition for rehearing en banc on the question. Pet. App. 55a-57a. At the same time, the advantages of further percolation are minimal. The question presented is completely straightforward, a classic question of statutory construction in which this Court is no less expert than any court of appeals. And these consolidated cases provide more than sufficient factual context to illuminate the legal question.

The potential availability of a fair use defense is no reason to delay resolving the question presented either. As the court of appeals acknowledged, Section 120(a) was enacted because “Congress did not believe that fair use, with its ad hoc approach, provided an adequate defense in these circumstances.” Pet. App. 12a. Congress designed Section 120(a) to allow cases like these to be resolved on a motion to dismiss or, at the latest, at summary judgment; because it is based on an indeterminate, fact-intensive balancing test, fair use often requires far more litigation or even a full-blown trial. *See Public.Resource.Org*, 140 S. Ct. at 1513. Thus, even if petitioners ultimately prevailed on a fair use defense—and, indeed, even if *every* floor-plan defendant did—they would do so at a cost Congress intended to spare them.

In similar circumstances, the Court has not hesitated to decide important threshold questions despite the potential availability of other defenses. *See, e.g., Egbert v. Boule*, No. 21-147 (granting certiorari to decide whether *Bivens* cause of action exists, despite possibility defendants could prevail on merits); *Tanzin v. Tanvir*, 141 S.Ct. 486, 492 n.* (2020) (deciding whether plaintiffs had damages remedy and leaving qualified immunity defense for adjudication on remand); *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201-02 (2012) (deciding political question defense and remanding for lower courts to decide merits); *see generally* Stephen M. Shapiro et al., *Supreme Court Practice* 4.18, at 4-55–4-56 (11th ed. 2019).

For example, in *Georgia v. Public.Resource.Org., Inc.*, a state commission sued a public interest group for allegedly violating Georgia’s copyright in certain annotations to the Official Code of Georgia Annotated. Like petitioners here, the defendants raised both a threshold defense (that the annotations were not copyrightable) and a fair use defense. *See Code Revision Comm’n ex rel. Gen. Assembly of Ga. v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1233 (11th Cir. 2018), *aff’d*, 140 S. Ct. 1498. Like the court of appeals in this case, the court of appeals in *Public.Resource.Org* resolved the threshold question and did not reach fair use. *See ibid.* This Court granted certiorari to consider the threshold question without regard to the possibility that fair use might provide alternative protection for the same conduct. 140 S. Ct. at 1505-06; *see also id.* at 1513 (explaining why fair use is a less certain and less desirable basis

for protecting copying Congress otherwise determined to be lawful).

Finally, the Court should not count on having future opportunities to correct the Eighth Circuit's decision. Between the settlement pressure created by *in terrorem* effects of the Copyright Act's statutory damages and attorney's fees provisions, and the costs of defending a case through appeal and certiorari, few petitions are likely to make their way to the Court again. The Court should seize the opportunity and grant certiorari while it has the chance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 4, 2022

APPENDIX

1a

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 19-3608

Designworks Homes, Inc.; Charles Lawrence James
Plaintiffs - Appellants

v.

Columbia House of Brokers Realty, Inc., doing
business as House of Brokers, Inc., doing business as
Jackie Bulgin & Associates; Shannon L. O'Brien;
Nicole Waldschlager; Deborah Ann Fisher; John
Doe I; Jacqueline Bulgin, doing business as Jackie
Bulgin; Carol S. Denninghoff
Defendants - Appellees

National Association of Realtors
Amicus on Behalf of Appellee(s)

No. 20-1099

Designworks Homes, Inc.; Charles Lawrence James
Plaintiffs - Appellants

v.

Susan Horak, doing business as The Susan Horak
Group Re/Max Boone Realty; Boone Group, Ltd.,
doing business as Re/Max Boone Realty
Defendants - Appellees

2a

National Association of Realtors
Amicus on Behalf of Appellee(s)

No. 20-3104

Designworks Homes, Inc.; Charles Lawrence James
Plaintiffs - Appellants

v.

Columbia House of Brokers Realty, Inc., doing
business as House of Brokers, Inc., doing business as
Jackie Bulgin & Associates; Shannon L. O'Brien;
Nicole Waldschlager; Deborah Ann Fisher; John
Doe I; Jacqueline Bulgin, doing business as Jackie
Bulgin; Carol S. Denninghoff
Defendants - Appellees

No. 20-3107

Designworks Homes, Inc.; Charles Lawrence James
Plaintiffs - Appellants

v.

Susan Horak, doing business as The Susan Horak
Group Re/Max Boone Realty; Boone Group, Ltd.,
doing business as Re/Max Boone Realty
Defendants - Appellees

Appeals from United States District Court
for the Western District of Missouri – Jefferson City

Submitted: June 15, 2021

Filed: August 16, 2021

Before GRUENDER, ARNOLD, and STRAS, Circuit Judges.

ARNOLD, Circuit Judge.

These cases require us to determine whether a particular copyright statute, 17 U.S.C. § 120(a), provides a defense to a claim of infringement for real estate companies, their agents, and their contractors who generate drawings of home floorplans. The district court held that it did. We disagree, but we do not rule out the possibility that some other defense might be available. We therefore reverse the district court's grants of summary judgment, vacate its orders awarding costs and attorney's fees, and remand for further proceedings.

Plaintiff Charles James built homes in Columbia, Missouri, that included a certain "triangular atrium design with stairs." The owners of two of them later hired real estate companies to help them sell their homes. One homeowner hired Columbia House of Brokers Realty, Inc., and the other hired Susan Horak, who did business as The Susan Horak Group Re/Max Boone Realty. During the process of listing the homes for sale, Columbia hired a contractor to measure and produce a computer-aided sketch of the home's floorplan, while Horak measured the home's dimensions herself and drew the floorplan on graph paper. The homes' listings included images of these floorplans for potential buyers to consider.

James and Designworks Homes, Inc.—a company James owns that has an ownership interest in the copyrights at issue—sued the real estate companies along with some of their affiliates and agents. They claimed that the defendants infringed their copyrights when they created and published the floorplans without authorization. The defendants moved for summary judgment, arguing, as relevant, that § 120(a) provided a defense to liability. That statute provides that “[t]he copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.” The district court agreed with the defendants because, it held, the floorplans were “pictorial representations” of the homes. So it granted the defendants summary judgment on the infringement claims, as well as on the plaintiffs’ claims for contributory and vicarious copyright infringement. The court later entered orders awarding costs and attorney’s fees to the defendants.

We review the district court’s grants of summary judgment, and the underlying question of statutory interpretation, de novo. *See Riegelsberger v. Air Evac EMS, Inc.*, 970 F.3d 1061, 1064 (8th Cir. 2020). We first take up a preliminary matter. The district court’s holding did not reflect a very detailed consideration of the scope of § 120(a), and not without reason. Though the plaintiffs argued that § 120(a) did not protect the defendants, their statutory-interpretation arguments were somewhat inchoate, and it was not until this appeal that those arguments began to crystalize. The

defendants point out that the plaintiffs' arguments below were much more limited than the ones advanced here and ask us not to consider many of their more-developed ones. But the interpretation and application of § 120(a) has always been a central issue in the case, and even though the plaintiffs have come up with new arguments to support their view that § 120(a) does not apply, we think this strategy represents more a "shift in approach" than a creation of an entirely new issue that we should decline to review. *See Weitz Co. v. Lloyd's of London*, 574 F.3d 885, 891 (8th Cir. 2009). Even if the arguments raised new issues, we have the discretion to consider them for the first time on appeal since this appeal presents a quintessential matter of law—the interpretation of a statute.

When interpreting a statute, we begin with the text. *See Union Pac. R.R. Co. v. United States*, 865 F.3d 1045, 1048 (8th Cir. 2017). As noted, § 120(a) applies to "pictures, paintings, photographs, or other pictorial representations of the work." The defendants maintain that the floorplans could be classified as "pictures." A first, cursory glance indicates that the defendants might be correct. Where a statute, as here, does not define a word, we generally give that word its ordinary meaning at the time Congress enacted the statute. *See Sanzone v. Mercy Health*, 954 F.3d 1031, 1040 (8th Cir. 2020). Congress enacted § 120(a) in 1990 as part of the Architectural Works Copyright Protection Act (AWCPA). The Oxford English Dictionary from that time defines "picture" in relevant part as "[a]n individual painting, drawing, or other representation on a surface, of an object or objects." *See* 11 Oxford English Dictionary 784 (2d ed. 1989). Though the floorplans here may not fit as comfortably

within this definition as would, say, artistic sketches of the exterior of a house, they might possibly fit within the definitions' literal limits, for instance as "drawing[s] . . . of an object."

But statutory interpretation is not that simple. As the Supreme Court has put it, "The definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). When interpreting a statute, we must also consider the statutory context in which the words in question appear, *see id.*, including both "the specific context in which th[e] language is used, and the broader context of the statute as a whole." *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

The statutory context suggests that the floorplans should not be considered "pictures." The broader context of the copyright statutes as a whole reveals that Congress knew how to describe floorplans with more specificity than by simply referring to them as "pictures." Take the definition of "pictorial, graphic, and sculptural works," which has been a category of work entitled to copyright protection since before Congress extended protection to architectural works like those at issue here. That category is defined to "include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, *and technical drawings, including architectural plans.*" 17 U.S.C. § 101 (emphasis added). The floorplans here certainly could be characterized more comfortably as "technical drawings" or "architectural plans" than as "pictures."

Congress therefore had more appropriate terms at the ready but did not use them. As we've explained, "when Congress does not adopt obvious alternative language, the natural implication is that it did not intend the alternative." See *Union Pac. R.R. Co.*, 865 F.3d at 1050.

There's more. These potential alternative terms are not buried in a single definition. The term "technical drawing" also appears in the definition of a "work of visual art." See 17 U.S.C. § 101. Congress added this definition in the Visual Artists Rights Act of 1990, which was enacted at the same time Congress enacted § 120(a) in the AWCPA. Pub. L. 101-650, 104 Stat. 5089. Meanwhile, the definition of "architectural work" includes "architectural plans[] or drawings." See 17 U.S.C. § 101. This definition was added to § 101 in the AWCPA itself. Pub. L. 101-650, 104 Stat. 5089. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (per curiam). In short, if § 120(a) encompassed these floorplans, we believe Congress would've said so more explicitly. Congress's failure to use alternative, better-fitting language suggests that § 120 does not encompass the floorplans drawn here.

The defendants also maintain, and the district court held, that the floorplans fit within § 120(a)'s catchall category of "other pictorial representations." Though the floorplans might possibly qualify as "pictorial representations" according to the contemporary definitions of those terms, the difficulty

once again is that, when we consider the broader statutory context, Congress could have easily resorted to other terms that it used elsewhere in the copyright statutes to ensure that § 120(a) included floorplans.

Focusing more narrowly on § 120(a) itself, there are additional reasons to think that the catchall does not include the floorplans. Generally, a word is known by the company it keeps, an interpretive principle that courts call *noscitur a sociis*. See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). Courts rely on this principle “to avoid ascribing to one word a meaning so broad that it is inconsistent with the accompanying words, thus giving unintended breadth to the Acts of Congress.” *Id.* It applies when the words are “conjoined in such a way as to indicate that they have some quality in common.” See A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 196 (2012).

We think that the terms Congress used in § 120(a) have a certain quality in common—they all connote artistic expression. Recall that that section speaks of “pictures, paintings, photographs, or other pictorial representations of” a work. Pictures (when properly interpreted as already discussed), paintings, and photographs connote expression. We think that pictorial representations, when read together with these other terms, most likely refer to pictorial representations created for similar reasons. Floorplans like the ones here, on the other hand, serve a functional purpose. Though it’s conceivable that a floorplan could be created for artistic purposes, we deal here with floorplans that all seem to agree were generated for the practical purpose of informing potential buyers of home layouts and interiors, and,

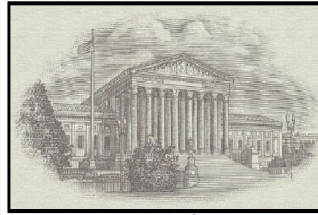
9a

more broadly, to help sell homes. They do not share the common quality that the other terms possess.

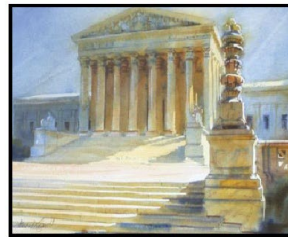
The following images from a page in the plaintiffs' reply briefs best illustrate the point:



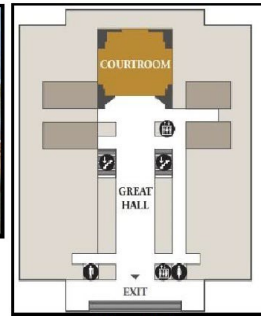
Photograph¹



Picture²



Painting³



Floor plan⁴

1. Glenn Belt, *The Supreme Court*, <https://www.flickr.com/photos/n28307/46955927024/> (taken Mar. 11, 2016).
2. Steven Noble, *Supreme Court Building*, <https://www.stevennoble.com/v/Architecture/Supreme-Court-Building-art-.jpg.html> (accessed Aug. 12, 2020).
3. Alexander Creswell, *The Supreme Court*, <https://www.pinterest.com/pin/507499451730287534/> (accessed Aug. 12, 2020).
4. The Supreme Court of the United States, *Building Floorplans*, https://www.supremecourt.gov/visiting/buildingFloorplans_rev2.pdf (accessed Aug. 12, 2020).

One of these images is not like the others.

Relatedly, when “general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words,” thanks to the interpretive principle known as *ejusdem generis*. See *Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of*

Keffeler, 537 U.S. 371, 384 (2003); *see also* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012). Applying that principle here, the words preceding the catchall in § 120(a) call to mind, once again, categories of expression rather than function. So we decline to hold that the functional floorplans here are “other pictorial representations” that § 120(a) talks about. To hold otherwise would be to render the specific enumerations superfluous. *See Yates v. United States*, 574 U.S. 528, 546 (2015) (plurality opinion).

We glean one more clue from the statutory text. Section 120(a) applies only when “the building in which the work is embodied is located in or ordinarily visible from a public place.” It is noteworthy that Congress deemed it necessary to restrict § 120(a) this way because, in most if not all cases, it would be quite difficult to create a floorplan of a building simply by viewing it from a public place. Floorplans typically stem from someone’s access to the interior of a building, though perhaps some interior features of a building are discernible from the outside. The point is that Congress did not appear to be directing § 120(a) toward floorplans.

For what it’s worth, it also is evident from a House report on the AWCPA that Congress in fact considered whether to include floorplans in § 120(a). *See* H.R. Rep. 101-735, at 22 n.50. The report notes that “[t]he American Institute of Architects (AIA) proposed an amendment to section 120(a) prohibiting pictorial representations made in order to further the unauthorized design and construction of a substantially similar architectural work.” Though that aspect of the report didn’t mention floorplans and

the like explicitly, it certainly appears that their unauthorized production was the source of the AIA's concern. The report then notes that the amendment was unnecessary because it wouldn't matter how an infringing work was built (with or without unlawfully copied floorplans) and because the proposal might "interfere with scholarly and noncompetitive analysis of architectural works." *Id.* Regardless of whether these arguments were correct, what is apparent is that the drafters of § 120(a) evidently did not believe it covered floorplans. It goes without saying that legislative history cannot overcome the statutory text. We merely point out that, for those who find legislative history relevant, the legislative history of § 120(a) supports our reading of the text rather than casting doubt on it.

The defendants resist the conclusion that § 120(a) does not apply, but we find their arguments unavailing. For the reasons already stated, we are unmoved by the argument that the floorplans fit within the literal definitions of "pictures" and "other pictorial representations" because those terms, as used in § 120(a), do not include items like these floorplans. We are also unswayed by the fact that two other courts have concluded that § 120(a) applies to floorplans similar to the ones here. *See Sorenson v. Wolfson*, 96 F. Supp. 3d 347, 365 (S.D.N.Y. 2015); *Morgan v. Hawthorne Homes, Inc.*, No. 04-1809, 2009 WL 1010476, at *12 (W.D. Pa. Apr. 14, 2009). Like the district court here, neither *Sorenson* nor *Morgan* grappled with the arguments that the plaintiffs advance on appeal, and so we do not find those cases persuasive on these questions.

The defendants also maintain that, if § 120(a) does not include the floorplans, then absurdities will result. For example, they maintain that “homeowners could not freely draw the outline of their own homes for any purpose, including remodeling projects, appraisers could not create floorplans of homes for appraisals, [and] children could not draw the shape of their own homes.” This argument fails to put § 120(a) in context. Section 120(a) is just one of several, potentially overlapping statutory defenses to copyright infringement. Nothing we say in this opinion is meant to undermine any defense other than the one found in § 120(a). It may be that many of the hypothetical uses that the defendants posit would be protected by some other defense. The fair-use defense immediately comes to mind. *See* 17 U.S.C. § 107. In fact, the defendants here raised fair use below, but the district court did not reach its potential application because it concluded that § 120(a) applied. We need not resolve that matter because we leave it to the district court on remand to do so in the first instance. Just because we close one door to protection from liability doesn’t mean that others aren’t standing open.

The defendants contend that it is not appropriate to treat fair use as a backstop defense because a House report reveals that Congress did not believe that fair use, with its ad hoc approach, provided an adequate defense in these circumstances. *See* H.R. Rep. 101-735, at 22. We note, though, that courts should derive legislative purpose from the text of the statute itself, not its legislative history. *See* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012). But even if that snippet of the report

accurately represents Congress's intent in enacting § 120, it does little (if anything) to shine light on the scope of § 120(a). It could be that Congress intended paintings to receive additional protection, but that doesn't necessarily mean that it intended floorplans to receive that additional protection as well. So we must rely on the statutory text, and, for reasons already indicated, we think that text does not encompass floorplans.

Amicus National Association of Realtors directs our attention to § 120(b), which generally allows the owner of a building embodying an architectural work to alter or destroy it without first obtaining the copyright owner's consent. Amicus contends that people generally would not alter a building without first creating plans and maintain that it would be incongruous to encourage the creation of floorplans in § 120(b) but then read § 120(a) as not including floorplans. It's unclear to us, though, that most building alterations or destructions are accompanied by floorplans or other drawings. Perhaps that's true of major projects, but many small alterations could be made without floorplans and other drawings. Even if we accept amicus's premise, the argument again ignores the role of § 120(a) as merely one of several defenses to infringement. And we think using a hidden assumption in § 120(b) is too circuitous a route for Congress to have taken to include floorplans in § 120(a), especially when Congress had a much more direct route—using better-fitting, alternative terms that it had employed elsewhere in the same and previous acts. As a result, we don't think this argument overcomes the other contextual clues we've already discussed.

Amicus also points to the difficulties its members would have identifying and contacting the owners of copyrights in architectural works to get permission to create floorplans. We see the concern. But our task “is not a free-ranging search for the best copyright policy, but rather depends solely on statutory interpretation.” *See Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017). To the extent amicus argues that the benefits of a broader statute would reduce or eliminate certain costs, it should direct its argument to the political branches.

In sum, we hold that § 120(a) does not provide a defense to copyright infringement to real estate companies, their agents, and their contractors when they generate and publish floorplans of homes they list for sale. Our decision does not preclude the district court on remand from considering whether some other defense might apply or whether the plaintiffs have demonstrated a claim of copyright infringement in the first place.

We therefore reverse the district court’s grants of summary judgment to defendants on the primary infringement claim as well as on the claims for contributory and vicarious infringement, vacate the court’s orders awarding the defendants costs and attorney’s fees, and remand for further proceedings.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

Case No. 2:18-CV-04090-BCW

DESIGNWORKS HOMES, INC., et al.
Plaintiffs,
v.
COLUMBIA HOUSE OF
BROKERS REALTY, INC., et al.,
Defendants.

ORDER

Before the Court is Defendants' Motion for Summary Judgment (Doc. #72). The Court, being duly advised of the premises, grants Defendants' motion.

BACKGROUND

On May 4, 2018, Plaintiffs Designworks Homes, Inc., a design and build company, and Charles Lawrence James, Designworks' sole shareholder (collectively "Designworks") filed the above-captioned matter against Defendants Columbia House of Brokers Realty, Inc., Shannon L. O'Brien, Nicole Waldschlager, Deborah Ann Fisher, Jacqueline Bulgin, Carol S. Denninghoff, and John Doe 1. Defendant House of Brokers Realty is a real estate licensee and/or broker hired by a non-party to sell a

residence located at 1713 Kenilworth, Columbia, Missouri. The individual defendants are real estate agents associated with the House of Brokers and involved in the listing and/or marketing for the sale of 1713 Kenilworth. (collectively, “Defendants”).

In 1996, Designworks constructed a home located at 4306 Melrose, Columbia, Missouri. The home at this address is configured using an original expression referred to as “triangular atrium design with stairs” (hereinafter, “the Design”). Designworks would use the Design in at least four other subsequent home builds, including in the 1999 construction of a home located at 1713 Kenilworth.

In February 2017, the owner of 1713 Kenilworth hired Defendants to list and market 1713 Kenilworth for sale. As part of Defendants’ attempt to sell the home, Defendants hired a third party to measure the interior of 1713 Kenilworth and create a drawing of the structure’s floorplan. (“the Floorplan”). Defendants caused the Floorplan to be published in connection with Defendants’ attempts to sell 1713 Kenilworth between February and July 2017.

Designworks’ claims against Defendants arise from the Floorplan, which Designworks alleges violates the Copyright Act of 1976, 17 U.S.C. § 501(a) and the Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (“VARA”).

Designworks alleges the following claims based on their rights in the Design and Defendants’ creation of the Floorplan: (I) copyright infringement; (II) contributory infringement; (III) vicarious infringement; and (IV) violation of VARA.

LEGAL STANDARD

A party is entitled to summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Rafos v. Outboard Marine Corp.*, 1 F.3d 707, 708 (8th Cir. 1993) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). The moving party bears the burden to establish both the lack of any genuine issue of material fact and an entitlement to judgment as a matter of law. *Celotex*, 477 U.S. at 323. In applying this burden, the Court affords to the non-moving party the benefit of all reasonable factual inferences. *Mirax Chem. Prods. Corp. v. First Interstate Commercial Corp.*, 950 F.2d 566, 569 (8th Cir. 1991)).

UNCONTROVERTED FACTS

In 1996, Designworks designed and constructed a home at 4306 Melrose in Columbia, Missouri. The home design is configured and described as a “triangular atrium design with stairs” (hereinafter, “the Design”). Between 1996 and 2001, Designworks used the Design in at least 4 other residential builds.

In 1999, Designworks designed and constructed a home, using the Design, at 1713 Kenilworth in Columbia, Missouri. The completed structure at this location is visible from a public street.

In 2004, Designworks applied for and received a copyright registration for a house in which it used the Design located at 4804 Chilton Court, Columbia, Missouri. The copyright application was titled “Atrium ranch on walk out; Angular atrium ranch.” The registration number for this copyright for “Architectural work,” effective May 10, 2004, is

VAu 623-402.¹ (“Registration C”). The deposit materials for Registration C are photographs of the exterior and interior structure at 4804 Chilton and drawings.

In 2013, Designworks applied for and received a copyright registration for an architectural work that used the Design. The copyright application was titled “2,187SF.” The registration number for this copyright for an architectural work, effective June 6, 2013, is VAu 1-133-136.² (“Registration U”). The architectural work for Registration U was never built. The deposit materials for Registration U are drawings.

On February 23, 2017, Defendants listed the home at 1713 Kenilworth for \$465,000.00. Defendant House of Brokers was the designated broker for the 1713 Kenilworth and the real estate agents for the listing were Jackie Bulgin, Shannon O’Brien, and Debbie Fisher.

¹ **Copyright Registration Number VAu000623402**

Type of Work: Visual Material

Date: May 10, 2004

Application Title: Atrium ranch on walkout; Angular atrium ranch

Title: 4804 Chilton Court, lot 108

Description: Architectural work

Copyright Claimant: Charles Lawrence James

Date of Creation: 2002

² **Copyright Registration Number VAu001133136**

Type of Work: Visual Material

Date: June 6, 2013

Application Title: 2,187SF – not yet constructed.

Title: 2,187SF.

Description: Electronic file (eService)

Copyright Claimant: Charles James

Date of Creation: 2012

On February 15, 2017, Sphero Tours / Shawn Ames (“Sphero”) sent an invoice to Defendant House of Brokers, care of Jackie Bulgin, for Sphero’s work measuring the interior dimensions and creating a computer aided design drawing of the interior of 1713 Kenilworth.³

On February 23, 2017, Defendant Jackie Bulgin completed a Residential Property Data Entry Form, MLS #308591, for 1713 Kenilworth in the Flexmls/MLS system. Bulgin selected the option to export the listing for 1713 Kenilworth to all available options, including Realtor.com, Supra, Zillow, and Homes.com. Pursuant to Bulgin’s authorization on the MLS, the Floorplan was distributed to Realtor.com, where Designworks discovered it. Defendants marketed 1713 Kenilworth using the Floorplan from February 2017 to July 2017. The house did not sell during that time period.

In April 2018, Designworks registered copyrights in the technical drawings for 4306 Melrose and for 1713 Kenilworth. The copyright application for 1713 Kenilworth was titled “1713 Kenilworth / Heritage Meadows.” The registration number for this copyright for a work of visual art is VAu 1-329-938, with a year

³ This drawing is the “Floorplan” upon which Designworks’ claims are based.

of completion of 1999.⁴ (“Registration K”). The deposit materials for Registration K are drawings. In contrast with Registration C and Registration U, which are both registered as architectural works, Registration K is registered as a technical drawing and a work of visual art.

ANALYSIS

Defendants’ motion for summary judgment argues there is no genuine issue of material fact and it is entitled to judgment as a matter of law on each of Designworks’ four claims relating to the Floorplan.

A. Defendants are entitled to summary judgment on Designworks’ claim for copyright infringement alleged in Count I.

“The Congress shall have Power . . . 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.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) (citing U.S. Const. art. I, § 8).

The Copyright Act protects “original works of authorship fixed in any tangible medium of expression” 17 U.S.C. § 102(a). The Copyright Act confers

⁴ **Copyright Registration Number V Au001133136**

Type of Work:

Date: April 22, 2018

Application Title: 1713 Kenilworth / Heritage Meadows

Title: 1713 Kenilworth / Heritage Meadows

Description:

Copyright Claimant: Charles Lawrence James

Year of Completion: 1999

upon the owner of a copyright “a bundle of exclusive rights . . .” *Harper*, 471 U.S. at 546 (citing 17 U.S.C. § 106). “[T]hese rights – to publish, copy, and distribute the author’s work – vest in the author of an original work from the time of its creation.” *Id.*

These rights, however, apply only to a work’s aspects that are independently created and have some degree of creativity. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991). Copyright protection does not cover “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.” 17 U.S.C. § 102(b).

To make a prima facie case for copyright infringement, a plaintiff must prove: (1) ownership of a valid copyright in the work allegedly infringed; and (2) the defendant copied, displayed, or distributed protected elements of the copyrighted work without authorization. *Taylor Corp. v. Four Seasons Greetings, LLC*, 315 F.3d 1039, 1042 (8th Cir. 2003) (citing *Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939, 941 (8th Cir. 1992) (citing *Feist*, 499 U.S. at 361 (“The 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.”))).

1. Defendants are entitled to summary judgment on Count I for Registration C and Registration U.

The Court of Appeals for the Eighth Circuit has observed the infringement element “[t]ypically . . . cannot be proven directly.” *Moore*, 972 F.2d at 941. “Therefore, copying can be established by

demonstration of access (by the alleged infringer) and substantial similarity (between the works at issue.).” *Id.* at 941-42.

A plaintiff alleging infringement can establish the access requirement of the infringement element “by showing that the defendants had an opportunity to view or to copy his work.” *Id.* at 942 (citing *Sid & Mary Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977)). A “bare possibility of access” is insufficient; rather, a plaintiff “must prove that the defendants had a ‘reasonable possibility’ of viewing his work.” *Id.* (citing *Ferguson v. Natl’ Broad.*, Co., 54 F.2d 111, 113 (5th Cir. 1978)).

Under the uncontroverted facts of this case, Designworks has copyrights in Registration C and in Registration U. Registration C is for an architectural work and has underlying deposit materials of structural photographs of 4804 Chilton, which uses the Design, and construction drawings. Registration U is also for an architectural work, albeit one that was never built, and its deposit materials consist of construction drawings.

With respect to Registration U, there exists no genuine issue of material fact that the structure, based on construction drawings making up Registration U’s deposit materials, was never built. Because the structure was never built, Designworks cannot show that Defendants had “a reasonable possibility” of viewing the structure based on construction drawings underlying Registration U. Additionally, there is no basis in the record for the conclusion that Defendants otherwise had an opportunity to view Designworks’ drawings at all.

Even assuming, without deciding, that Designworks can prove the other elements of copyright infringement with respect to Registration U, and even with all reasonable inferences drawn in Designworks' favor, the record does not establish Defendants had access to Designworks' copyrighted work. Defendants are entitled to summary judgment on Count I with respect to Registration U.

Similarly, with respect to Registration C, there exists no genuine issue of material fact that Defendants never had a "reasonable possibility" of viewing Designworks' construction drawings, nor the interior of 4804 Chilton. Consequently, the record presents no basis for the conclusion that Defendants ever viewed the drawings or the structure underlying Registration C. Therefore, assuming, without deciding, the record demonstrates the other elements of a claim of copyright infringement with respect to Registration C, Designworks cannot establish access to the materials protected by Registration C.

Defendants are thus entitled to summary judgment on Designworks' Count I for copyright infringement to the extent Designworks alleges that the Floorplan infringes on Registration U or Registration C.

2. Defendants are entitled to summary judgment on Count I for Registration K.

Defendants assert they are entitled to summary judgment on Count I with respect to Registration K on the overarching basis that Designworks' claim of copyright infringement is an attempt to assert ownership in copyright over an idea, which, by law, is not protectable in copyright. Defendants assert the

following arguments for why Designworks' claim of infringement of Registration K lacks merit such that Defendants are entitled to summary judgment: (1) unregistered copyrights are unenforceable; (2) the Floorplan does not infringe under 17 U.S.C. § 120(a); (3) if § 120(a) does not apply, the Floorplan does not infringe because Registration K is a technical drawing; and (4) the Floorplan does not infringe under 17 U.S.C. § 107 for fair use. (Doc. #74).

a. Defendants are not entitled to summary judgment based on Designworks' claims for infringement of unregistered aspects of 1713 Kenilworth because these unregistered aspects are within the scope of Registration K.

Defendants argue they are entitled to summary judgment to the extent Designworks alleges copyright infringement based on unregistered copyrights. In opposition, Designworks argues registration is a jurisdictional requirement only; therefore, Designworks may properly pursue a claim for copyright infringement based on the Floorplan, even though Defendants' created the Floorplan before Designworks obtained a copyright certificate for Registration K.

"Subject to certain exceptions, the Copyright Act requires copyright holders to register their works before suing for copyright infringement." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010) (citing 17 U.S.C. § 411(a)). "Upon registration of the copyright, however, a copyright owner can recover for infringement that occurred both before and after

registration” *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*, 139 S. Ct. 881, 886-87 (2019).

In this case, there is no genuine dispute of material fact that Registration K’s effective certification date is April 22, 2018, and Defendants’ allegedly infringing Floorplan was generated and used no later than July 2017. Thus, Designworks registered Registration K after the alleged infringement in this case.⁵

However, “[a]rchitectural plans and drawings are protected by copyright law as ‘pictorial, graphic, and sculptural works,’ and ‘architectural works.’” *CSM Invs., Inc. v. Everest Dev., Ltd.*, 840 F. Supp. 1304, 1309 (D. Minn. 1994) (citing 17 U.S.C. § 102(a)(5), (8)).

‘Pictorial, graphic, and sculptural works’ include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or

⁵ Designworks is not entitled to statutory damages or attorneys fees based on the timing of the construction for 1713 Kenilworth in 1999, the 2017 creation of the Floorplan, and the 2018 registration date for Registration K. 17 U.S.C. § 412 (statutory damages and attorneys fees available only where registration occurs within 3 months of publication or within 1 month of infringing act).

sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

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.

17 U.S.C. § 101.

Defendants argue they are entitled to summary judgment because Designworks’ certificate of copyright states that Registration K is for technical drawing only under § 102(a)(5), and not under § 102(a)(8) for an architectural work. Defendants assert this distinction is important because the record does not contain evidence suggesting Defendants ever had access to Designworks’ drawings, though the record demonstrates Defendants had access to the interior of 1713 Kenilworth, upon which the Floorplan is based.

Defendants’ argument relates to the scope of Registration K, which goes to the first element of Designworks’ copyright infringement claim. However, Defendants’ motion for summary judgment asserts their right to summary judgment based on the affirmative defenses of the applications of 17 U.S.C. § 120(a) and/or 17 U.S.C. § 107 for fair use. Therefore,

for purposes of Defendants' motion for summary judgment, the Court assumes, without deciding, that with all reasonable inferences drawn in Designworks' favor, the record demonstrates a prima facie case of copyright infringement of Registration K with respect to Defendants' Floorplan. From this perspective, the Court considers whether Defendants are entitled to summary judgment based on its affirmative defenses.

b. Defendants are entitled to summary judgment based on § 120(a).

Defendants argue they are entitled to summary judgment on Designworks' copyright infringement claim relative to Registration K by operation of 17 U.S.C. § 120. Designworks argues that the Floorplan does not fall within "pictorial representations" as defined in this section, and that the Floorplan was not created from a public place.

(a) Pictorial representations permitted.—The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.

17 U.S.C. § 120(a).

Before 1990, architectural plans and drawings were protected in copyright as "pictorial, graphic, and sculptural works," and completed buildings fell into the category of "useful articles" under the Copyright Act. *Leicester v. Warner Bros.*, 232 F.3d 1212, 1216-17 (9th Cir. 2000) (citing 17 U.S.C. § 101). The Architec-

tural Works Copyright Protection Act of 1990 created “a new category of copyright protection for works of architecture.” *Id.* at 1217 (citing H.R. Rep. 101-735, at 4-10.). “Congress did not afford architectural works full copyright protection; rather, it exempted the making of pictorial representations of architectural works from copyright infringement.” *Leicester*, 232 F.3d at 1217. The main justification for this exemption is due to the “public, social purpose” of architecture as an art form, and pictorial representations of architecture “do not interfere with the normal exploitation of architectural works.” *Id.* (citing H.R. 101-735, at 22). Section 120(a) particularly applies to architectural works, “rather than rely[ing] on the doctrine of fair use, which requires ad hoc determinations.” *Id.*

“[C]ourts applying the plain language of 17 U.S.C. § 120 have concluded that interior elements of a house constitute ‘architectural works.’” *Kitchen & Bath Concepts of Pittsburgh, LLC v. Eddy Homes*, No. 16-589, 2016 WL 7404559, at *4 (W.D. Pa. Dec. 22, 2016) (citing *Nason Homes v. Billy’s Constr., Inc.*, No. 3:14-CV-566, 2015 WL 6812705 (M.D. Tenn. Nov. 5, 2015); *Design Basics L.L.C. v. DeShano Cos., Inc.*, No. 10-CV-14419, 2012 WL 4321313 (E.D. Mich. Sept. 21, 2012); *Landrau v. Solis-Betancourt*, 554 F. Supp. 2d 102, 107 (D.P.R. 2007)). Moreover, § 120(a) has also been read to apply to technical drawings upon which a structure might be based. *Morgan v. Hawthorne Homes, Inc.*, No. 2:04-CV-1809, 2009 WL 1010476 (W.D. Pa. Apr. 14, 2009). “Therefore, creating a ‘pictorial representation’ of a constructed work that is located in a building visible from a public place is not an act of

infringement.” *Sorenson v. Wolfson*, 96 F. Supp. 3d 347, 365 (S.D.N.Y. 2015).

In this case, the Court considers § 120(a) from the perspective that Registration K confers copyright ownership in not only the underlying technical drawings, but also the completed structure located at 1713 Kenilworth. Pursuant to § 120(a), Designworks’ copyright in the structure located at 1713 Kenilworth, which, under the uncontroverted facts, is ordinarily visible from the public street, does not include the right for Designworks to prevent another from making a pictorial representation of the structure located at 1713 Kenilworth. To the extent Designworks argues the § 120 exemption is limited to the exterior structure of 1713 Kenilworth that is ordinarily visible from a public place, the plain language of the statute belies this argument in stating its equal application to “the building in which the work is embodied.” 17 U.S.C. § 120(a). The work at issue in this case is the Design, which is embodied in the completed architectural work located at 1713 Kenilworth, which is ordinarily visible from a public place. Consequently, Defendants’ creation of the Floorplan capturing the layout of 1713 Kenilworth is not an infringing act because the Floorplan is a pictorial representation of the structure’s interior as it exists. Defendants are thus entitled to summary judgment based on 17 U.S.C. § 120(a) on Designworks’ Count I for copyright infringement of Registration K. In light of this conclusion, the Court declines to consider whether Defendants are also entitled to summary judgment based on the other arguments raised.

B. Defendants are entitled to summary judgment on Designworks' claims for contributory and vicarious for copyright infringement alleged in Counts II and III.

Defendants argue they are entitled to summary judgment on Designworks' claims for contributory and vicarious infringement because Designworks' claim for direct infringement lacks merit.

"One infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (citations omitted). Though the Copyright Act does not expressly provide for recovery based on instances of secondary infringement, "these doctrines of secondary liability emerged from common law principles and are well established in the law." *Id.*

Contributory infringement requires a plaintiff to prove: (1) defendant's knowledge of a third party's infringing activity, and (2) that the defendant, induced, caused, or materially contributed to the infringing conduct of another. *Perfect 10, Inc. v. Visa Int'l Serv., Ass'n*, 494 F.3d 788, 796 (9th Cir. 2007) (citing *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (citing *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971))).

Similarly, but distinct from contributory infringement, vicarious infringement requires a plaintiff to demonstrate the defendant's (1) right and ability to supervise the infringing activity; and

(2) direct financial interest in the infringing activity. *Perfect 10*, 494 F.3d at 802 (citing *Grokster*, 545 U.S. 930 (vicarious infringement arises when a defendant profits from infringement while declining to stop it)).

In this case, based on the conclusion that Defendants are entitled to summary judgment on Designworks' Count I with respect to Registrations U, C, and K, Designworks has not established direct infringement, such that Designworks cannot demonstrate copyright infringement based on secondary liability as alleged in Counts II and III. Therefore, Defendants are likewise entitled to summary judgment on Designworks' Counts II and III.

C. Defendants are entitled to summary judgment on Designworks' claim for violation of VARA alleged in Count IV.

Defendants argue they are entitled to summary judgment on Designworks' Count IV for violation of the VARA, 17 U.S.C. § 106A.

VARA's purpose is the protection of "the moral rights of artists in their works," such as the artist's rights of integrity and attribution. *Teter v. Glass Onion, Inc.*, 723 F. Supp. 2d 1138, 1158 (W.D. Mo. July 12, 2010); *Cort v. St. Paul Fire & Marine Ins. Cos.*, 311 F.3d 979, 984-85 (9th Cir. 2002)).

Under VARA:

the author of a work of visual art –

(1) shall have the right –

- (A) to claim authorship of that work, and
- (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create.

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation [. . .]

17 U.S.C. § 106A.

The Copyright Act's definition section explicitly sets forth what is a work of visual art, and what is not a work of visual art, as follows:

A "work of visual art" is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

17 U.S.C. § 101.

In this case, there is no genuine issue of material fact that the drawings on which the structure at 1713 Kenilworth is based are technical drawings. Under the plain language of § 101, technical drawings are among the works of authorship not included in the definition of “a work of visual art.” Because technical drawings are specifically excluded from this category, Defendants are entitled to summary judgment to the extent Designworks alleges violation of VARA with reference to the underlying drawings for 1713 Kenilworth.

Likewise, to the extent Designworks alleges violation of VARA based on the completed structure at 1713 Kenilworth, Defendants are entitled to summary judgment. “Not every artist has rights under VARA, and not everything called ‘art’ is protected by such rights.” *Pollara v. Seymour*, 344 F.3d 265, 269 (2d. Cir. 2003). VARA’s protection is specifically limited only to those works of visual art like a painting, drawing, print, sculpture, or photograph, and not works that serve a utilitarian function, despite the addition of artistic embellishment. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 300 (7th Cir. 2011). By way of illustration, “VARA may protect a sculpture that looks like a piece

of furniture, but it does not protect a piece of utilitarian furniture, whether or not it could arguably be called a sculpture.” *Pollara*, 344 F.3d at 593. Because “an architectural work embodied in a building does not fall within the definition of a work of visual art,” Designworks cannot establish a VARA violation based on the Design as incorporated into the residence located at 1713 Kenilworth. *Landrau*, 554 F. Supp. 2d at 111 (citing *Pollara*, 344 F.3d at 270 (“Similarly, Frank Gehry’s Guggenheim Museum in Bilbao is a work, and it has recognized stature as art, but it could not be made to fit within the statute’s definition of a work of visual art. Buildings (as opposed to their design) are not subject to protection under the Copyright Act and are therefore excluded from VARA.”)). Therefore, Defendants are entitled to summary judgment on Designworks’ Count IV for violation of VARA. Accordingly, it is hereby

ORDERED Defendants’ Motion for Summary Judgment (Doc. #72) is GRANTED. It is further

ORDERED Plaintiff’s Motion for Partial Summary Judgment (Doc. #74) is DENIED AS MOOT.

IT IS SO ORDERED.

DATED: November 6, 2019

/s/ Brian C. Wimes
JUDGE BRIAN C. WIMES
UNITED STATES DISTRICT COURT

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

Case No. 2:18-CV-04093-BCW

DESIGNWORKS HOMES, INC., et al.
Plaintiffs,
v.
SUSAN HORAK, et al.,
Defendants.

ORDER

Before the Court is Defendants' Motion for Summary Judgment (Doc. #59). The Court, being duly advised of the premises, grants Defendants' motion.

Plaintiffs Designworks Homes, Inc. and its sole shareholder Charles Lawrence James ("Designworks") allege claims against Defendants Susan Horak, doing business as The Susan Horak Group Re/Max Boone Realty, and Boone Group, Ltd. doing business as Re/Max Boone Realty ("Defendants"). Designworks alleges Defendants infringed on its ownership interests in an original expression home configuration referred to as a "triangular atrium design with stairs" ("the Design"). In 1996, Designworks used the Design in the construction of a home located at 4306 Melrose Drive in Columbia, Missouri. In 2010, the homeowners

of the residence located at this address hired Defendants to market and sell the home. In connection with marketing 4306 Melrose for sale, Defendants drew and published in marketing materials the interior layout of the main and lower levels of the house at 4306 Melrose (“the Floorplan”). Designworks alleges Defendants’ Floorplan infringe on its copyrights to the Design. Designworks alleges claims against Defendants for (I) copyright infringement; (II) contributory copyright infringement; (III) vicarious infringement; and (IV) violation of the Visual Artists Rights Act, 17 U.S.C. § 106A (“VARA”). (Doc. #1).

LEGAL STANDARD

A party is entitled to summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Rafos v. Outboard Marine Corp.*, 1 F.3d 707, 708 (8th Cir. 1993) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). The moving party bears the burden to establish both the lack of any genuine issue of material fact and an entitlement to judgment as a matter of law. *Celotex*, 477 U.S. at 323. In applying this burden, the Court affords to the non-moving party the benefit of all reasonable factual inferences. *Mirax Chem. Prods. Corp. v. First Interstate Commercial Corp.*, 950 F.2d 566, 569 (8th Cir. 1991)).

UNCONTROVERTED FACTS

In 1996, Designworks designed and constructed a home at 4306 Melrose Drive using the Design. The structure’s main floor measured to occupy 2227 square feet. Between 1996 and 2001, Designworks used the Design in at least 4 other residential builds, including

for the residence constructed at 4804 Chilton Court in Columbia, Missouri.

The structure located at 4306 Melrose sits on and is visible from a public street. Both the structure at 4306 Melrose and the structure at 4804 Chilton use the Design. However, there are several differences between the two structures, including the arrangement and placement of the bedrooms, the setup of the stairs, the shape of the great rooms, the garage size, the location of the laundry room, the location and design elements of the master bathroom, the location of the main-level half bathroom, as well as other differences not separately stated here. (Doc. #60 at 11-13).

In 2010, Defendant Horak was hired to list for sale the home at 4306 Melrose. As part of the marketing materials for this real estate listing, Defendant Horak made and/or caused to be made and/or be published a drawing of the layout for the interior main and lower levels of 4306 Melrose. Defendant Horak used a tape measure to measure the interior rooms of the structure and drew the Floorplan on graph paper. Defendant Horak measured the main floor to occupy 2,341 square feet. Defendants used the Floorplan in their marketing materials for the home at 4306 Melrose.

In 2017, Designworks discovered Defendants' floorplan drawing for 4306 Melrose published online. While Defendants had access to the interior of 4306 Melrose, there is no evidence Defendants had access to any architectural drawings of 4306 Melrose, 4804 Chilton, or any other architectural drawings that used the Design. Additionally, there is no evidence Defendants had access to the interior of 4804 Chilton or, apart from 4306 Melrose, any other structure that

used the Design. Finally, there is no evidence Defendants drafted any architectural plans or any construction based on the Floorplan.

Designworks' claims relate to the following asserted copyrights to the Design:

- 1.** Copyright for plans and drawings for 4306 Melrose
- 2.** Copyright for the completed structure for 4306 Melrose
- 3.** Copyright Registration No. VAu 623-402 ("Chilton Registration")
 - a.** Title: Atrium ranch on walk-out; Angular atrium ranch
 - b.** Type: Architectural work
 - c.** Effective Date: May 10, 2004
 - d.** Deposit materials: photographs of the interior and exterior structure at 4804 Chilton, and architectural drawings
- 4.** Copyright Registration No. VAu 1-133-136 ("Never Built Registration")
 - a.** Title: 2,187SF
 - b.** Type: Architectural work
 - c.** Effective Date: June 5, 2013
 - d.** Deposit materials: architectural drawings¹
- 5.** Copyright Registration No. VAu 1-330-891 ("Melrose Registration")
 - a.** Title: Bedford Walk – 4306 Melrose Drive

¹ Nothing was constructed from architectural drawings that make up the Never Built Registration.

- b. Type: Work of visual arts
- c. Effective Date: April 22, 2018
- d. Deposit materials: architectural drawings

ANALYSIS

Defendants' motion for summary judgment argues there is no genuine issue of material fact and it is entitled to judgment as a matter of law on each of Designworks' four claims relating to the Floorplan.

A. Defendants are entitled to summary judgment on Designworks' claim for copyright infringement alleged in Count I.

Defendants argue they are entitled to summary judgment on Designworks' Count I for copyright infringement of the Chilton Registration, the Never Built Registration, and the Melrose Registration.

"The Congress shall have Power . . . 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." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) (citing U.S. Const. art. I, § 8).

The Copyright Act protects "original works of authorship fixed in any tangible medium of expression" 17 U.S.C. § 102(a). The Copyright Act confers upon the owner of a copyright "a bundle of exclusive rights" *Harper*, 471 U.S. at 546 (citing 17 U.S.C. § 106). "[T]hese rights – to publish, copy, and distribute the author's work – vest in the author of an original work from the time of its creation." *Id.* at 547.

These rights, however, apply only to a work's aspects that are independently created and have some degree of creativity. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991). Copyright protection does not cover "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." 17 U.S.C. § 102(b).

To make a prima facie case for copyright infringement, a plaintiff must prove: (1) ownership of a valid copyright in the work allegedly infringed; and (2) the defendant copied, displayed, or distributed protected elements of the copyrighted work without authorization. *Taylor Corp. v. Four Seasons Greetings, LLC*, 315 F.3d 1039, 1042 (8th Cir. 2003) (citing *Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939, 941 (8th Cir. 1992) (citing *Feist*, 499 U.S. at 361 ("The 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."))).

1. Defendants are entitled to summary judgment on the copyright infringement claim relative to the Chilton Registration and the Never Built Registration.

Defendants argue they are entitled to summary judgment on Designworks' allegations of copyright infringement of the Chilton Registration and the Never Built Registration because under the uncontroverted facts, there is no evidence that Defendants copied protectable elements of the Chilton Registration and the Never Built Registration.

For purposes of summary judgment, the Court assumes, without deciding, that Designworks has ownership in the Chilton Registration and the Never Built Registration that are valid. The Court considers whether Defendants are entitled to summary judgment with respect to the infringement element.

Where there is no direct evidence of copying on the part of an alleged infringer, a plaintiff can establish the infringement element by proving (i) access to the copyrighted material; and (ii) substantial similarity between the copyrighted material and the allegedly infringing work. *Moore*, 972 F.2d at 941. “Therefore, copying can be established by demonstration of access (by the alleged infringer) and substantial similarity (between the works at issue.)” *Id.* at 941-42.

The “access” requirement is met if the plaintiff shows that the alleged infringement “had an opportunity to view or to copy his work.” *Id.* at 942 (citing *Sid & Mary Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977)). A “bare possibility of access” is insufficient; rather, a plaintiff “must prove that the defendants had a ‘reasonable possibility’ of viewing his work.” *Moore*, 972 F.2d at 942 (citing *Ferguson v. Nat’l Broad., Co.*, 54 F.2d 111, 113 (5th Cir. 1978)).

In this case, because the issue of access is dispositive of Designworks’ copyright claim relative to the Chilton Registration and the Never Built Registration, the Court declines to consider whether these registrations and the Floorplan are substantially similar. Under the uncontroverted facts, there is no evidence Defendants had access to the architectural drawings and/or other materials making

up the Chilton Registration and/or the Never Built Registration.

With respect to the Never Built Registration, although registered as an architectural work, consists only of drawings with no resultant construction and/or other publication, the lack of evidence that Defendants ever saw or ever had an opportunity to see the Never Built Registration drawings forecloses Designworks to establish the infringement element on the Never Built Registration on this record.

Nor can Designworks establish infringement of the Chilton Registration. Though, in contrast with the Never Built Registration, the Chilton Registration has an associated completed construction, there is no evidence that Defendants ever had an opportunity to view the interior of the construction associated with the Chilton Registration. In the absence of evidence suggesting Defendants had a reasonable possibility of access to the deposit materials and/or completed construction related to the Chilton Registration, Designworks cannot establish the infringement element.

Consequently, Defendants are entitled to summary judgment on Designworks' Count I for copyright infringement of the Never Built Registration and/or the Chilton Registration.

2. Defendants are entitled to summary judgment on Count I relative to the Melrose Registration.

Defendants argue they are entitled to summary judgment on Designworks' claim for copyright infringement relative to the Melrose Registration because: (1) the Floorplan was created and/or

published before the Melrose Registration's effective date of April 22, 2018; (2) the Floorplan does not infringe by application of 17 U.S.C. § 120(a); (3) if § 120(a) does not apply, the Floorplan does not infringe because the Melrose Registration is for a technical drawing only; and (4) the Floorplan does not infringe under 17 U.S.C. § 107 for fair use. (Doc. #60).

a. Defendants are not entitled to summary judgment relative to the unregistered copyrights.

Defendants argue Designworks may only theoretically recover for copyright infringement for registered copyrights, such that Designworks' claim of infringement for the plans and drawings for 4306 Melrose ("Melrose plans") and the completed structure at 4306 Melrose ("Melrose structure") should be dismissed. Defendants thus assert a right to summary judgment on the basis that Defendants' allegedly infringing acts occurred before Designworks owned the Melrose Registration.

While the Copyright Act requires a registration as a prerequisite to filing a claim for copyright infringement, "[u]pon registration . . . a copyright owner can recover for infringement that occurred both before and after registration." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010) (citing 17 U.S.C. § 411(a)); *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*, 139 S. Ct. 881, 886-87 (2019).

Under the uncontroverted facts of this case, Designworks designed and built the structure at 4306 Melrose in 1996. The Melrose plans upon which the Melrose structure is based would have been completed no later than 1996. Defendants created the Floorplan

in 2010. The Melrose Registration, for a work of visual art, has an effective date of April 22, 2018.²

The deposit materials for the Melrose Registration consist of drawings from which the structure at 4306 Melrose was built. “Architectural plans and drawings are protected by copyright law as ‘pictorial, graphic, and sculptural works,’ and ‘architectural works.’” *CSM Invs., Inc. v. Everest Dev., Ltd.*, 840 F. Supp. 1304, 1309 (D. Minn. 1994) (citing 17 U.S.C. § 102(a)(5), (8)).

‘Pictorial, graphic, and sculptural works’ include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of

² Designworks is not entitled to statutory damages or attorneys fees based on the timing of the construction for 1713 Kenilworth in 1999, the 2017 creation of the Floorplan, and the 2018 registration date for Registration K. 17 U.S.C. § 412 (statutory damages and attorneys fees available only where registration occurs within 3 months of publication or within 1 month of infringing act).

existing independently of, the utilitarian aspects of the article.

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.

17 U.S.C. § 101.

For purposes of summary judgment, the Court assumes, without deciding, that Designworks may properly allege a claim of copyright infringement against Defendants relative to the Melrose plan and the Melrose structure on the basis that their protectable elements are contemplated by and incorporated into the Melrose Registration. Therefore, because the owner of a registered copyright may pursue a claim for infringement that occurred before the registration itself, Defendants are not entitled to summary judgment on the Melrose plan and/or the Melrose structure based on lack of registration.

Accordingly, the Court considers Defendants' motion for summary judgment assuming, without deciding, that Designworks has a valid copyright in the Melrose Registration. Additionally, because Defendants otherwise assert a right to summary judgment based on affirmative defenses, the Court assumes, without deciding, that Designworks has made a prima facie showing that the Floorplan infringes the Melrose Registration.

b. Defendants are entitled to summary judgment based on § 120(a).

Defendants argue they are entitled to summary judgment on Designworks' copyright infringement claim relative to the Melrose Registration by operation of 17 U.S.C. § 120(a). Designworks argues that the Floorplan is not a "pictorial representation," and/or Defendants did not create the Floorplan from a public place, such that § 120(a) does not apply.

The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.

17 U.S.C. § 120(a).

Before 1990, architectural plans and drawings were protected in copyright as "pictorial, graphic, and sculptural works," and completed buildings fell into the category of "useful articles" under the Copyright Act. *Leicester v. Warner Bros.*, 232 F.3d 1212, 1216-17 (9th Cir. 2000) (citing 17 U.S.C. § 101). The Architectural Works Copyright Protection Act of 1990 created "a new category of copyright protection for works of architecture." *Id.* at 1217 (citing H.R. Rep. 101-735, at 4-10). "Congress did not afford architectural works full copyright protection; rather, it exempted the making of pictorial representations of architectural works from copyright infringement." *Leicester*, 232 F.3d at 1217. The main justification for this exemption is due to the "public, social purpose" of

architecture as an art form, and pictorial representations of architecture “do not interfere with the normal exploitation of architectural works.” *Id.* (citing H.R. 101-735, at 22). Section 120(a) particularly applies to architectural works, “rather than rely[ing] on the doctrine of fair use, which requires ad hoc determinations.” *Id.*

“[C]ourts applying the plain language of 17 U.S.C. § 120 have concluded that interior elements of a house constitute ‘architectural works.’” *Kitchen & Bath Concepts of Pittsburgh, LLC v. Eddy Homes*, No. 16-589, 2016 WL 7404559, at *4 (W.D. Pa. Dec. 22, 2016) (citing *Nason Homes v. Billy’s Constr., Inc.*, No. 3:14-CV-566, 2015 WL 6812705 (M.D. Tenn. Nov. 5, 2015); *Design Basics L.L.C. v. DeShano Cos., Inc.*, No. 10-CV-14419, 2012 WL 4321313 (E.D. Mich. Sept. 21, 2012); *Landrau v. Solis-Betancourt*, 554 F. Supp. 2d 102, 107 (D.P.R. 2007)). Moreover, § 120(a) has also been read to apply to technical drawings upon which a structure might be based. *Morgan v. Hawthorne Homes, Inc.*, No. 2:04-CV-1809, 2009 WL 1010476 (W.D. Pa. Apr. 14, 2009). “Therefore, creating a ‘pictorial representation’ of a constructed work that is located in a building visible from a public place is not an act of infringement.” *Sorenson v. Wolfson*, 96 F. Supp. 3d 347, 365 (S.D.N.Y. 2015).

In this case, the Court considers § 120(a) from the perspective that Designworks’ Melrose Registration confers copyright ownership in the architectural drawings underlying the structure built at 4306 Melrose, as well as the completed structure at that location. Under the uncontroverted facts, the structure at 4306 Melrose is ordinarily visible from a public street. Further, there is no dispute Defendants

did not have access to the Melrose plans; rather, Defendants measured the interior structure of 4306 Melrose and drew the Floorplan from those measurements. Based on the foregoing, the Court is inclined to find the Floorplan does not infringe the Melrose Registration by operation of § 120(a).

While the Floorplan reflects the Design, Designworks' copyright in the Design does "not include the right to prevent the making, distributing, or public display of pictures . . . or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place." 17 U.S.C. § 120(a). Pursuant to § 120(a), Designworks' copyright ownership in the Melrose Registration, which includes the structure located at 4306 Melrose that is ordinarily visible from the public street, does not include the right for Designworks to prevent another from making a pictorial representation of the structure located at 4306 Melrose. To the extent Designworks argues § 120 is limited to pictorial representations of a copyrighted building's exterior that is ordinarily visible from a public place, the plain language of the statute belies this argument in stating its equal application to "the building in which the work is embodied." 17 U.S.C. § 120(a).

The Design at issue is embodied in the completed structure located at 4306 Melrose, which is visible from a public place. Therefore, Defendants' creation and publication of the Floorplan capturing the layout of 4306 Melrose is not an infringing act because the Floorplan is a pictorial representation of the structure's interior as it exists.

Defendants are thus entitled to summary judgment based on 17 U.S.C. § 120(a) on Designworks' Count I for copyright infringement of the Melrose Registration. In light of this conclusion, the Court declines to consider whether Defendants are also entitled to summary judgment based on the other arguments raised.

B. Defendants are entitled to summary judgment on Designworks' claims for contributory and vicarious for copyright infringement alleged in Counts II and III.

Defendants argue they are entitled to summary judgment on Designworks' claims for contributory and vicarious infringement because Designworks' claim for direct infringement lacks merit.

"One infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (citations omitted). Though the Copyright Act does not expressly provide for recovery based on instances of secondary infringement, "these doctrines of secondary liability emerged from common law principles and are well established in the law." *Id.*

Contributory infringement requires a plaintiff to prove: (1) defendant's knowledge of a third party's infringing activity, and (2) that the defendant, induced, caused, or materially contributed to the infringing conduct of another. *Perfect 10, Inc. v. Visa Int'l Serv., Ass'n*, 494 F.3d 788, 796 (9th Cir. 2007) (citing *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th

Cir. 2004) (citing *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971))).

Similarly, but distinct from contributory infringement, vicarious infringement requires a plaintiff to demonstrate the defendant's (1) right and ability to supervise the infringing activity; and (2) direct financial interest in the infringing activity. *Perfect 10*, 494 F.3d at 802 (citing *Grokster*, 545 U.S. 930 (vicarious infringement arises when a defendant profits from infringement while declining to stop it)).

In this case, based on the conclusion that Defendants are entitled to summary judgment on Designworks' Count I with respect to the Never Built Registration, the Chilton Registration, and the Melrose Registration, Designworks has not established direct infringement, such that Designworks cannot demonstrate copyright infringement based on secondary liability as alleged in Counts II and III. Therefore, Defendants are likewise entitled to summary judgment on Designworks' Counts II and III.

C. Defendants are entitled to summary judgment on Designworks' claim for violation of VARA alleged in Count IV.

Defendants argue they are entitled to summary judgment on Designworks' Count IV for violation of the VARA, 17 U.S.C. § 106A.

VARA's purpose is the protection of "the moral rights of artists in their works," such as the artist's rights of integrity and attribution. *Teter v. Glass Onion, Inc.*, 723 F. Supp. 2d 1138, 1158 (W.D. Mo. July 12, 2010); *Cort v. St. Paul Fire & Marine Ins. Cos.*, 311 F.3d 979, 984-85 (9th Cir. 2002)).

Under VARA:

the author of a work of visual art –

(1) shall have the right –

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create.

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation

[. . .]

17 U.S.C. § 106A.

The Copyright Act's definition section explicitly sets forth what is a work of visual art, and what is not a work of visual art, as follows:

A “work of visual art” is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are

signed and consecutively numbered by the author.

A work of visual art does not include—

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

17 U.S.C. § 101.

“Not every artist has rights under VARA, and not everything called ‘art’ is protected by such rights.” *Pollara v. Seymour*, 344 F.3d 265, 269 (2d. Cir. 2003). VARA’s protection is specifically limited only to those works of visual art like a painting, drawing, print, sculpture, or photograph, and not works that serve a utilitarian function, despite the addition of artistic embellishment. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 300 (7th Cir. 2011). By way of illustration, “VARA may protect a sculpture that looks like a piece of furniture, but it does not protect a piece of utilitarian furniture, whether or not it could arguably be called a sculpture.” *Pollara*, 344 F.3d at 593. “[A]n architectural work embodied in a building does not fall within the definition of a work of visual art” *Landrau*, 554

F. Supp. 2d at 111 (citing *id.*, 344 F.3d at 270) (“Similarly, Frank Gehry’s Guggenheim Museum in Bilbao is a work, and it has recognized stature as art, but it could not be made to fit within the statute’s definition of a work of visual art. Buildings (as opposed to their design) are not subject to protection under the Copyright Act and are therefore excluded from VARA.”).

In this case, the Design is incorporated into the structures located at 4804 Chilton and 4306 Melrose, these structures’ underlying architectural drawings, and the drawings making up the Never Built Registration. Because technical drawings are expressly excluded from the definition of works of visual art, the technical drawings for the Design are not protected as works of visual art under VARA. 17 U.S.C. § 101. Likewise, the Court relies on persuasive authority, in the absence of binding authority on point, to conclude that an architectural work embodied in a building does not fall within the definition of a work of visual art. *Id.* Thus, the Design, as incorporated into the structures located at 4804 Chilton and 4306 Melrose, is not, for purposes of VARA, a work of visual art. Defendants are thus entitled to summary judgment on Designworks’ Count IV. Accordingly, it is hereby

ORDERED Defendants’ Motion for Summary Judgment (Doc. #59) is GRANTED.

IT IS SO ORDERED.

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DATED: December 17, 2019

/s/ Brian C. Wimes
JUDGE BRIAN C. WIMES
UNITED STATES DISTRICT COURT

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APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 19-3608

Designworks Homes, Inc. and Charles Lawrence James
Appellants

v.

Columbia House of Brokers Realty, Inc., doing
business as House of Brokers, Inc., doing business as
Jackie Bulgin & Associates, et al.
Appellees

National Association of Realtors
Amicus on Behalf of Appellee(s)

No. 20-1099

Designworks Homes, Inc. and Charles Lawrence James
Appellants

v.

Susan Horak, doing business as The Susan Horak
Group Re/Max Boone Realty and Boone Group, Ltd.,
doing business as Re/Max Boone Realty
Appellees

National Association of Realtors
Amicus on Behalf of Appellee(s)

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No. 20-3104

Designworks Homes, Inc. and Charles Lawrence James
Appellants

v.

Columbia House of Brokers Realty, Inc., doing
business as House of Brokers, Inc., doing business as
Jackie Bulgin & Associates, et al.
Appellees

No. 20-3107

Designworks Homes, Inc. and Charles Lawrence James
Appellants

v.

Susan Horak, doing business as The Susan Horak
Group Re/Max Boone Realty; Boone Group, Ltd.,
doing business as Re/Max Boone Realty
Appellees

Appeals from United States District Court
for the Western District of Missouri – Jefferson City
(2:18-cv-04090-BCW)
(2:18-cv-04093-BCW)

ORDER

The petition for rehearing en banc is denied. The
petition for rehearing by the panel is also denied.

Judge Grasz did not participate in the
consideration or decision of this matter.

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October 5, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

/s/ Michael E. Gans

APPENDIX E

17 U.S.C. § 101 provides in relevant part:**§ 101. Definitions**

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

* * *

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.

* * *

“Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

A “work of visual art” is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

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(C) any work not subject to copyright protection under this title.

* * *

17 U.S.C. § 102 provides:

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

(b) 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.

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17 U.S.C. § 1310 provides in relevant part:

§ 1310. Application for registration

* * *

(h) PICTORIAL REPRESENTATION OF DESIGN.—The application for registration shall be accompanied by two copies of a drawing or other pictorial representation of the useful article embodying the design, having one or more views, adequate to show the design, in a form and style suitable for reproduction, which shall be deemed a part of the application.

* * *