

In the Supreme Court of the United States

COLUMBIA HOUSE OF BROKERS REALTY, INC., D/B/A HOUSE OF BROKERS, D/B/A JACKIE BULGIN & ASSOCIATES; SANNON L. O'BRIEN; NICOLE WALDSCHLAGER; DEBORAH ANN FISHER; JOHN DOE I; JACQUELINE BULGIN, D/B/A JACKIE BULGIN; CAROL S. DENNINGHOFF; SUSAN HORAK, D/B/A THE SUSAN HORAK GROUP RE/MAX BOONE REALTY; BOONE GROUP, LTD., D/B/A RE/MAX BOONE REALTY,

Petitioners,

v.

DESIGNWORKS HOMES, INC. & CHARLES LAWRENCE JAMES,

Respondents.

APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI FROM JANUARY 3, 2022 TO MARCH 4, 2022

To the Honorable Brett M. Kavanaugh, as Circuit Justice for the Eighth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, petitioners¹ Columbia House of Brokers Realty, Inc., d/b/a House of Brokers, d/b/a Jackie Bulgin & Associates; Sannon L. O'Brien; Nicole Waldschlager; Deborah Ann Fisher; John Doe I; Jacqueline Bulgin, d/b/a Jackie Bulgin; Carol S. Denninghoff; Susan Horak, d/b/a The Susan Horak Group Re/Max Boone Realty; Boone Group, Ltd., d/b/a Re/Max Boone Realty respectfully request that the time to file a Petition for a Writ of Certiorari be extended 60 days from January 3, 2022, to and including

¹ 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.

March 4, 2022. The U.S. Court of Appeals for the Eighth Circuit denied a timely filed petition for rehearing en banc on October 5, 2021, App. B, *infra*, after issuing its opinion and judgment, App. A, *infra*, on August 16, 2021. Absent an extension, the petition would be due on January 3, 2022. This application is being filed at least 10 days before that date. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254 to review this case.

Background

1. Respondents Charles Lawrence James, though his company Designworks Homes, Inc., designs homes in the Columbia, Missouri area. One feature of his design is a triangular atrium with stairs. App. A at 3. Owners of two of the houses designed by James decided to sell their houses, and hired the various petitioners and their entities to assist with the sales process. *Id.* at 3-4. During preparation for the sales, petitioners measured the inside of the homes and prepared floorplans for the layout of the home. *Ibid.* Petitioners then included images of the floorplans in sales and marketing materials that were distributed to the public during the sales process. *Ibid.*

Respondents brought suit against the petitioner real estate companies, their agents, and affiliates for copyright infringement regarding the use of the floorplans in the sales materials without prior authorization. App. A at 3-4. As a defense, petitioners asserted that 17 U.S.C. § 120(a) permitted their use of the floorplans without violating any copyright interests of respondents. App. A at 4. That provision states that a “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). According to petitioners, because the homes were “ordinarily visible from a public place” and the floorplans were “pictures, paintings, photographs or other pictorial representations” of the home, the defense should apply.

2. The district court agreed, granting summary judgment to petitioners on the copyright infringement claims as well as on respondents’ contributory and vicarious infringement claims. *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, 421 F. Supp. 3d 838 (W.D. Mo. 2019). In relevant part, the district court concluded that the plain language of 17 U.S.C. § 120, as enacted in The Architectural Works Copyright Protection Act of 1990 (“AWCPA”), should be interpreted so that any “copyright in the structure . . . does not include the right for Designworks to prevent another from making a pictorial representation of the structure.” *Designworks Homes*, 421 F. Supp. 3d at 846-47. Consistent with other district courts that have considered this issue, the district court concluded that the “building in which the work is embodied” is not limited to only the “exterior structure” of the house, but also must be read to include the interior of the house as part of the “completed architectural work.” *Ibid.* Based on this interpretation of the statute, the production of the homes’ floorplan and use in marketing and sales materials did not constitute copyright infringement. *Ibid.*

3. The Eighth Circuit, however, disagreed with the district court's interpretation of Section 120(a) as applied to the interior of a home. First, the court of appeals concluded that a floorplan could not be considered to be a "picture" under Section 120(a). App. A at 5-6. The court found that floorplans "may not fit as comfortably within" a contemporaneous dictionary definition of "picture" "as would, say, artistic sketches of the exterior of the house," but that a floorplan could be considered a "drawing . . . of an object" under that dictionary definition. *Ibid.* Nevertheless, looking at the "statutory context" of Section 120, other provisions of the Copyright Act, and the court's own views on how Congress *could have* drafted Section 120(a) to encompass floorplans, the court rejected the more expansive view of "picture" expressed in the dictionary definition. App. A at 5-7.

Next, the court of appeals held that floorplans also did not fit within "§120(a)'s catchall category of 'other pictorial representations.'" App. A at 7-8. Although the court admitted that normally a floorplan would "qualify as 'pictorial representations' according to the contemporaneous definitions of those terms," the court relied on the *noscitur a sociis* and *eiusdem generis* canons of construction to reject that interpretation of "pictorial representations" as too broad and inconsistent with the surrounding terms in Section 120(a). *Id.* at 7-10. Additionally, the court noted that Congress limited Section 120(a) to works "located in or ordinarily visible from a public place," while most floorplans cannot be reconstructed simply using public views of a property. *Id.* at 10. In the court's view, this supported its interpretation that "Congress did not appear to be directing § 120(a) towards floorplans." *Ibid.* Finally,

the court looked to legislative history from the AWCPA as supporting its limited construction of Section 120(a). *Id.* at 10-11. At bottom, even though the court recognized that two district courts had “concluded that § 120(a) applies to floorplans similar to the ones here,” *id.* at 11, the court found that floorplans did not fit within the defense in Section 120(a), and summary judgment of non-infringement should have been denied.²

Petitioners then filed a timely petition for rehearing and rehearing en banc, which the Eighth Circuit denied on October 5, 2021. App. B. at 1.

4. Accordingly, the question presented here will be of great interest to the Court and businesses that participate in real estate and home improvement marketplaces. The broad impact of the Eighth Circuit’s decision is clear—the creation of a floorplan for a constructed house is an act of copyright infringement not protected by Section 120(a), even if the floorplan is produced with the permission and at the encouragement of the property’s owner. Thus, *anytime* owners of real estate intend to sell property and include a floorplan in the sales and marketing materials—a step necessary in the modern, online, fast-moving real estate marketplace—the seller or her agents must obtain permission to do so by the architectural copyright holder.

² The National Association of Realtors participated at the Eighth Circuit as an amicus in support of respondents, arguing that a narrow interpretation of Section 120(a) would conflict with Section 120(b), which permits the owner of a building to demolish or alter it without first obtaining the copyright owner’s consent. The court rejected that argument because it concluded that it was “unclear to us . . . that most building alterations or destructions are accompanied by floorplans.” App. A at 12. Similarly, the court rejected amicus’s claim that the court’s interpretation would greatly hinder the sale of homes because of the difficulty of identifying the owners of copyrights in architectural works, with the court concluding that the amicus “should direct its argument to the political branches.” *Id.* at 13.

The petition will argue that Congress clearly did not intend for this hinderance on the real estate market to exist, which is why Congress provided in Section 120(a) a defense against exactly these sorts of claims of copyright infringement. The petition will describe how petitioners' interpretation is most consistent with the plain language of Section 120(a) and surrounding portions of the Copyright Act, in addition to contemporaneous dictionary definitions and case law construing the statute. The petition will also make clear the dramatic expansion of liability for millions of homeowners and real estate agents created by the decision below, both for homeowners that intend to sell their property in a fully functioning marketplace and even those that merely hope to remodel their homes using contractors that need floorplans to safely complete a renovation.

Reasons for Granting an Extension of Time

The time to file a Petition for a Writ of Certiorari should be extended for 60 days for at least three reasons:

1. The press of other matters before this and other courts makes the existing deadline on January 3, 2022, difficult to meet. Petitioners have recently retained Supreme Court counsel to assist in preparing this petition. And in addition to this petition, counsel for petitioners will be filing a response brief in the Eleventh Circuit in *Apple, Inc. v. Corellium, LLC*, No. 21-12835, on December 20; will be filing an opposition to an expected Rule 23(f) application in the Second Circuit in *Arkansas Teacher Retirement Systems v. Goldman Sachs Group, Inc.*, on remand from this Court; will be presenting oral argument in the Ninth Circuit in *Trendsettah USA*,

Inc. v. Swisher International, Inc., No. 20-56016, on January 14; will be filing a reply brief in the Third Circuit in *Kajmowicz v. Whitaker*, No. 21-2434, on January 18; and will be preparing for and teaching the Supreme Court litigation clinic for Harvard Law School's January Winter Term. The additional time will assist counsel in preparing a concise and well-researched petition that will be of maximum benefit to this Court.

2. Whether or not the extension is granted, the petition will be considered during this Term—and, if the petition were granted, it would be argued in the next Term. The extension is thus unlikely to substantially delay the resolution of this case or prejudice any party.

3. Finally, the Court is likely to grant the petition. While further research is necessary to fully elucidate the basis for that review, the petition will raise significant concerns about the Eighth Circuit's approach to statutory construction regarding Section 120(a), and the dramatic impacts the Eighth Circuit's construction will have on the real estate market. Given that millions of homes are sold each year in the United States, and a large percentage of those homes rely on marketing materials—including online at websites like Zillow or Redfin—that include floorplans, the impact of the Eighth Circuit's interpretation of Section 120(a) is obvious. By rejecting broad, contemporaneous definitions of the plain language of Section 120(a) for a constrained interpretation based on improper application of canons of construction, the Eighth Circuit dramatically broadened copyright liability for homeowners and real estate agents. By now requiring a license or permission from every holder of an

architectural work's copyright before a floorplan can even be produced, including by the homeowner herself, the Eighth Circuit's interpretation significantly impacts the real estate marketplace in the United States in a manner that is plainly inconsistent with Congress's intent in enacting the AWCPA and Section 120(a). Given the breadth and importance of this market to the broader economy in this country, this Court's immediate intervention is necessary to correct the Eighth Circuit's approach before it undermines proper functioning of the entire real estate market.

Conclusion

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended for 60 days to and including March 4, 2022.

Respectfully submitted,



Patrick D. Kuehl, Jr.
RIMON, P.C.
633 E. 63rd Street, Suite 220
Kansas City, Missouri 64110
(816) 839-7471
patrick.kuehl@rimonlaw.com

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tgoldstein@goldsteinrussell.com

December 17, 2021