

# When Pictures Aren't Pictures: Real Estate Agent-Generated Floor Plans Are Outside Copyright Infringement Exception for Pictorial Representations

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Examining whether the Architectural Works Copyright Protection Act enacted in 1990 protects the creation of floor plans, the US Court of Appeals for the Eighth Circuit held that such technical drawings generated for practical, rather than artistic, purposes are not covered by a statutory exception that removes the right to control pictures, paintings, photographs or other pictorial representations of their work from architects. *Designworks Homes, Inc. et al. v. Columbia House of Brokers Realty, Inc. et al.*, Case Nos. 19-3608, 20-1099, -3104, 20-3107 (8th Cir. Aug. 16, 2021) (Arnold, J.)

The facts of the case are relatively simple: In the course of selling designed homes, homebuilders hired real estate agents to generate floor plans for use in their listings. The designers of the homes registered copyrights in the homes themselves, then sued the homebuilders and their real estate agents for copyright infringement.

The issue for the Court was whether 17 U.S.C. § 120(a), a statute designed to limit the scope of copyright protection for architectural works, applied to the floor plans that the real estate agents developed. Section 120(a) excludes from the scope of a copyright in an architectural work “the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work.” The district court held that the floor plans fell within Section 120(a)’s exclusion and, thus, were not covered by the copyright.

The Eighth Circuit disagreed. Employing numerous canons of statutory construction, the Court held that the functional floor plans were neither pictures nor “other pictorial representations” within the meaning of the statute. Drawing from 1990s dictionaries, the Court reasoned that although a floor plan could conceivably be a picture, context showed otherwise. For example, Congress used the phrase “technical drawings” elsewhere in the copyright statute; thus, had Congress intended to exclude them here, it knew how to do so. Moreover, the types of floor plans at issue here were—in the Court’s view—not similar to the other listed categories of items for which copyright protection had been curtailed as the plans did not have any artistic expression.

**Practice Note:** Not all hope is lost for the homebuilder or developer. Although the Eighth Circuit declined to expressly consider other defenses, it explained that there were others that very readily

could apply, including the doctrine of fair use.

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