

Whose Plan Is It Anyway?

Floor Plans and Copyright Laws

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It is a safe bet that most Americans would be startled to hear they could be sued for copyright infringement for making floor plans of their own homes. Many homebuyers rely on floor plans in real estate listings to decide whether to purchase a residence, and their ability to secure financing for that transaction is often contingent on an appraisal that requires the creation of a floor plan. After acquiring a dwelling, homeowners will often make floor plans to tackle installations, arrange furniture, and complete do-it-yourself projects. On top of that, many localities require homeowners to submit floor plans before they can renovate their property. And when it comes time to sell, many Americans expect they will be able to use floor plans to secure the maximum value possible. The notion that all this conduct and more would flout the Copyright Act might cause even the mildest of homeowners to wonder what congress was thinking.

This statement is from the summary set out in the amicus brief filed with the U.S. Supreme Court by the

Takeaway

In 2021, the U.S. Court of Appeals for the Eighth Circuit ruled that real estate professionals can't use floor plans for marketing purposes without proper authorization. Because Texas falls under the Fifth Circuit, the ruling does not currently apply there. However, that could change if Texas courts choose to follow it or if the Supreme Court rules on the issue.

National Association of Realtors (NAR) and 17 other real-estate-related entities in April 2022 in support of the petitioners in the case of Columbia House of Brokers Realty Inc. vs. Designworks Homes Inc. The case addressed whether preparing a floor plan on a property constitutes a violation of an architect's copyrighted plans under the U.S. Copyright Act.

What were NAR's arguments, what was the Supreme Court's ruling, and how might it affect Texas homeowners and real estate professionals?

Copyright Infringement or Not? That is the Question

Designworks Homes Inc., an architectural firm, brought this case against Columbia House of Brokers Realty Inc., a real estate broker, alleging its sales agent’s computer-generated floor plan for use in marketing to sell a home was a copyright infringement of Designworks’ architectural plans.

The law at issue in this case is §120(a) of the Copyright Act. That statute provides an exclusion to the copyright protection of architectural plans stating 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.”

Although the district court in Missouri found the floor plans were “pictorial representations” and, therefore, not an infringement, upon appeal, the decision was reversed. In August 2021, the U.S. Court of Appeals for the Eighth Circuit ruled that the broker’s computer-generated floor plans were not one of the categories set out in the Copyright Act, so the broker did infringe on the architect’s copyright by creating and publishing the floor plans without authorization.

The appellate court’s decision was based on an analysis of the statutory language stating:

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. Floor plans like the ones here, on the other hand, serve a functional purpose. Though it’s conceivable that a floor plan could be created for artistic purposes, we deal here with floor plans that all seem to agree were generated for the practical purpose of informing potential buyers of home layouts and interiors, and, more broadly, to help sell homes. They do not share the common quality that the other terms possess. [9 F. 4th 803 (8th Circuit 2021)]

Though the Eighth Circuit’s opinion did suggest the “fair use” exception might offer some protection, it has not been litigated yet. The broker appealed the ruling to the Supreme Court.

NAR’s Argument to the Supreme Court

In April 2022, NAR and 17 other real estate industry organizations filed an amicus brief in support of the broker’s position that floor plans created by homeowners or real estate agents did not constitute a copyright infringement. The purpose of an amicus brief is to share knowledge or perspective of the subject matter with the court by a person or entity that is not a party to the actual case.

The amicus brief requested the Supreme Court grant certiorari (take the case) and reverse the Eighth Circuit Appellate Court’s interpretation of the copyright exception. The chief argument presented was that the Eighth Circuit’s reasoning was deeply flawed and contrary to years of precedent, both legal and everyday usage stating:

The decision below threatens not only homeowners with sanctions for the use, enjoyment, and disposition of their property, but the many sectors of the economy linked to real estate as well. And it does so based not on the operative text—the court of appeals never denied that floor plans fit within the ordinary meaning of “pictures” or “pictorial representations”—but on a misguided chain of inferences from statutory context. Yet nothing in the reasoning below justifies replacing the most natural meaning of the Copyright Act with an esoteric one—especially a reading that threatens to upend the use of floor plans that are critical to the nation’s trillion-dollar real estate industry.

They also provided key statistics and factors highlighting potential harm to home sellers and buyers if the Eighth Circuit’s ruling stands, such as:

- Two-thirds of homebuyers who shop on the Internet (95 percent of all homebuyers) found floor plans useful.
- Listings with floor plans on Zillow attract the most views.
- Eighty-one percent of homebuyers in a national survey say they are more likely to tour a home if its listing includes a floor plan.
- Mortgage lenders generally require an appraisal with a floor plan.

- Many jurisdictions require floor plans with applications for renovations.
- The decision opens up a new “hunting ground for enterprising copyright trolls” to threaten homeowners, real estate agents, appraisers, floor plan software companies, and home improvement and furniture companies.
- The decision puts the 1.5 million real estate agents and the 81 million homeowners in the U.S. at risk for expensive litigation.

The full brief is online and can be downloaded by using the QR code.



What the Supreme Court Did

On June 27, 2022, the Supreme Court declined to review the case, which means the ruling of the Eighth Circuit Court stands.

Keep in mind the Supreme Court is under no obligation to consider positions set out in an amicus brief. What this means practically is the Supreme Court is waiting to see if another U.S. Court of Appeals for another circuit finds *§120(a) includes floor plans under “pictorial representation” and floor plans are not an infringement. If that happens, they will likely take a case to resolve conflicting interpretations of federal law.*

Effect on Texans

What does this case mean for real estate professionals and homeowners in Texas? Texas is not under the jurisdiction of the U.S. Court of Appeals for the Eighth Circuit (Texas falls under the Fifth Circuit), so their ruling does not have to be followed by lower courts in Texas. However, with no other appellate court precedent on whether floor plans fall under the §120(a) copyright infringement exception, Texas courts could choose to follow it.

The best-case scenario would be for another case to be filed on this issue in another circuit court who finds floor plans are covered by the §120(a) exception. Then the Supreme Court could take the case and resolve the conflicting interpretation of that section. Who knows when that will happen and which way they will rule. Another option would be for Congress to amend §120(a) to specifically include floor plans in the exception. Again, not likely in the near future unless the national groups that filed the amicus brief lobby strongly for it.

Although there is not much real estate professionals can do about floor plans they’ve posted on the Internet or Multiple Listing Service in the past, perhaps some additional planning needs to take place going forward until this issue is ultimately resolved.

First, don’t publish a floor plan on a public forum, such as a public-facing website, unless you have written permission from the architect who drew the original plans. Of course, this is practical only for newer homes where the architect is known and easily located. Also, understand the potential risk of continuing to generate floor plans to use in marketing properties and communicate that to clients.

Some clients and real estate professionals might consider whether the reward of continuing to use floor plans in the same way outweighs the risk of copyright infringement litigation. Brokers might consider updating their copyright policy to include a statement on floor plans. 📌

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