

The National Association of REALTORS®

Floorplan Copyright Litigation

Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.
Kipp Flores Architects, LLC v. AMH Creekside Dev., LLC, et. al

September 2023

Recent judicial decisions have led to confusion regarding copyright protections for the use and recreation of floorplans. Below is an update on the current status of two lawsuits related to the issue.

Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc. 2:18-cv-04093 (W.D. Mo.)

Two Missouri real estate brokerages were sued by an original architect of homes after the brokerages created and included floorplans in the homes' listing content. After an [adverse decision](#) out of the U.S. Court of Appeals for the Eighth Circuit, defendant Brokerages [appealed](#) to the U.S. Supreme Court seeking to address the novel question of whether the creation of floorplans infringe the original architect's copyright in the home's original design. NAR, along with 17 other organizations, submitted an [amicus brief](#) in support of the petition.

On June 27, 2022, and with a lack of a circuit court split, the U.S. Supreme Court denied the defendant Brokerages' petition for writ of certiorari to review the Eighth Circuit's holding that the district court erred in holding that the *Copyright Act* Section 120(a) provides a defense to the infringement claim against the defendant brokerages for the use of the floorplans. Section 120(a) states the making and distribution of "pictures, paintings, photographs or other pictorial representations" of architectural works is not an infringement of the original designer's copyright, but the court held against the Brokerages' application of the exemption for the recreated floorplans.

The cases were remanded back to the District Court of the Western District of Missouri. The parties recently concluded the briefing where the defendant brokerages argue that the "fair use" defense applies to its use of the floorplans. The court's decision is still pending and will hinge on the balancing of the four factors regarding the application of fair use:

- 1) the character of use including whether commercial or nonprofit educational;
- 2) the nature of the copyrighted work;
- 3) the amount and substantiality of the portion used; and,
- 4) the effect on the potential market for or value of the copyrighted work.

Kipp Flores Architects, LLC v. AMH Creekside Dev., LLC, et. al. 5:21-CV-01158 (W.D. Tex.)

Architecture Firm Kipp Flores ("KFA") owned several architectural copyrights and filed copyright infringement claims involving the dissemination of the floorplan renderings in marketing materials against three defendants in the U.S. District Court for the Western District of Texas.

KFA entered into a license agreement with defendant American Housing Ventures, LLC ("AHV"), a real estate development firm, for the use of KFA's copyrighted architectural works for various developments in Texas. AHV assigned its rights to use KFA's copyrighted works to defendant AMH Creekside for another development in Texas. AHV also hired a graphics company to generate stylized floorplan drawings for marketing purposes, and the graphics company executed a limited use agreement with KFA, which required the parties to include KFA's "Copyright Management Information" (CMI). KFA claimed the defendants published the architectural works without the CMI in violation of the license agreement and alleged direct and contributory copyright infringement.



On September 16, 2022, the court dismissed KFA's copyright infringement claim for the dissemination of marketing materials including floorplan renderings with prejudice, and specifically rejected the Eighth Circuit's reasoning in Designworks. **The court analyzed Section 120(a) and disagreed with the Designworks holding by stating, "floorplans and renderings constitute pictorial representations as contemplated by § 120(a)."** The court further rejected the Eighth Circuit's analysis that floorplans are not exempted under 120(a) because they serve a functional purpose and stated that "art and function are not mutually exclusive, and marketing materials may be and usually are both."

Additionally, in a footnote, the court states the following about Section 120(a): **"Further, accepting the Eighth Circuit's reasoning in Designworks would have additional undesirable consequences. For example, real estate agents often include simplified floorplans with other pictures of homes for sale on the Multiple Listing Service to market their listings and assist buyers in assessing a home's layout. It is unreasonable to assume that Congress intended to subject real estate agents to copyright infringement liability for a floorplan posted online."**

KFA has not filed an appeal, with the last order dated March 8, 2023 outlining a schedule for the conclusion of discovery. A trial date is set for September 30, 2024.

Guidance

NAR strongly disagrees with the decision and analysis in the Designworks case and believes that the Eighth Circuit erred in holding that use of independent renderings of floorplans is not an exempted use under the U.S. Copyright Act, as detailed in the KFA case. The Eighth Circuit's decision is binding only on the states in its circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota). We are confident that the District Court of the Western District of Missouri will find that the use of the floorplans qualifies as fair use and will rule in favor of the brokerage defendants in Designworks.

NAR will continue its efforts to ensure that independent renderings of floorplans can be used by REALTORS®, homeowners, and others for important purposes such as appraisals, renovations, and home sales without the fear of copyright infringement.

For the latest information, stay tuned to
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