

# LEGAL ALERT

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## UNSUSPECTINGLY FOLLOWING YOUR FLOOR PLAN INTO AN ARCHITECTURAL COPYRIGHT WALL

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Earlier this month, the U.S. Supreme Court was asked to consider revisiting an August 2021 decision made by the U.S. Court of Appeals for the Eighth Circuit (*Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, Case No. 19-3608 (8th Cir. 2021)). The Eighth Circuit decision is presented as upsetting a long held real estate industry practice of relying on reproductions of architectural floor plans in their marketing and sales materials. While architectural copyrights are seen as having the narrowest scope of protection of all copyrights, the implications of the Eighth Circuit decision may have far-reaching implications of expanding these protections across many industries such as, in real estate, construction, and building development.

In August 2021, the U.S. Court of Appeals for the Eighth Circuit issued its decision indicating pictorial floor plan reproductions, of an otherwise constructed building, may be found liable for copyright infringement as architectural copyrights. In the case in question, a builder created floor plans for homes that included architectural copyright protected features (i.e., triangular atrium design with stairs). Owners of the homes later hired real estate professionals to sell their homes. When listing the homes, multiple realtors created sketches reproducing the floor plans of the homes. These sketches were provided in marketing materials for the sale of the homes. The builder brought suit against the realtors for infringing the architectural copyrights by reproducing and publishing the floor plans without authorization. The 1990 statute, establishing architectural copyrights, provides an exception (which narrows the protection for architectural copyrights) that states “[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.” See 17 U.S.C. §§ 120(a). The realtors believed their reproductions of the floor plans were protected from suit for infringement by this exception – but the Eighth Circuit has decided otherwise.



From the real estate industry's perspective, the Eighth Circuit incorrectly decided that the above-mentioned defense to infringement of an architectural copyright is much narrower than first believed. While the implications of this decision are rooted in realty practices the decision may have far reaching implications for related activities in the construction industry such as, for example, developers or contractors who may generate or rely on pictorial reproductions of floor plans for building improvements, marketing, and sales. It is still uncertain how far this decision will reach. The petitioners argued it will upset the use of floor plan reproductions in appraisals for mortgages, tax assessments, property evaluation documents, insurance documents, commercial leases, building improvements, etc.

The issue in dispute is based on the statutory interpretation of the above exception for architectural copyrights. The Eighth Circuit found that the words of the exception (e.g., pictures) possess a narrower meaning, under the statute, than an ordinary meaning that might otherwise be supported by a dictionary definition. The Eighth Circuit drew a distinction between granting this exception for "artistic" reproductions as opposed to "functional" reproductions. As the Eighth Circuit decided, functional reproductions appear to not be covered by the exception while artistic reproductions are. The Eighth Circuit does not necessarily draw a clear line as to what would be deemed functional over what would be deemed artistic, other than to indicate the floor plans in question were functional – letting this nuance remain subject to future litigation. The Eighth Circuit does leave the door open for other fair use exceptions as a mechanism to avoid liability. However, this has created an uproar and uncertainty surrounding the use of a floor plan as outlined in the context above.

At this moment in time, the Eighth Circuit decision stands. A lot of industries are watching whether the U.S. Supreme Court will take on this question. Alternatively, if the Supreme Court does not take on this question, a lot might also be told by the District Court who must revisit their prior decision in view of the Eighth Circuit's decision. For the time being, it will be important to take these details into consideration before reproducing floor plans otherwise protected as architectural copyrights.

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