

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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DESIGNWORKS HOMES, INC., CHARLES LAWRENCE JAMES,

*Plaintiff-Appellants,*

v.

COLUMBIA HOUSE OF BROKERS REALTY, INC., D/B/A HOUSE OF  
BROKERS, INC., D/B/A JACKIE BULGIN & ASSOCIATES, SHANNON L.  
O'BRIEN, NICOLE WALDSCHLAGER, DEBORAH ANN FISHER, JOHN  
DOE I, JACQUELINE BULGIN D/B/A/ JACKIE BULGIN, CAROL S.  
DENNINGHOFF,

*Defendant-Appellees.*

On Appeal from the United States District Court  
for the Western District of Missouri  
No. 2:18-cv-04090-BCW  
Hon. Brian C. Wimes, United States District Judge

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**BRIEF OF APPELLANTS**

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## **SUMMARY OF THE CASE**

Appellants respectfully request 30 minutes of total time for oral argument for both this case and its companion appeal, No. 20-1099.

Each of these appeals raises two issues of first impression regarding the scope of 17 U.S.C. § 120(a). The first issue is a threshold issue about whether Section 120(a) applies here. Specifically, no appellate court has considered whether Section 120(a) applies to architectural plans.

If Section 120(a) does apply here, the second issue goes to Section 120(a)'s effect. No appellate court has considered whether Section 120(a), where it applies, is a restriction on remedies or a complete defense to infringement. Substantial oral argument time would permit counsel to address this Court's questions on both issues.

## CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Designworks Homes, Inc., hereby makes the following disclosures:

1. Designworks Homes, Inc. has no parent corporation.
2. No publicly held corporation owns 10% or more of the stock issued by Designworks Homes, Inc.

Date: March 10, 2020

Respectfully submitted,

/s/ Andrew Grimm

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## INTRODUCTION

In the late 1980s, Congress wanted to clarify that buildings were eligible for copyright protection.

Protecting architects and architectural works through property rights would further the constitutional purposes underlying the Copyright Clause. H.R. Rep. 101-735, at 12 (1990). It would also make good on the treaty obligations stemming from President Reagan’s decision to join the “world’s most important copyright treaty.” Id. at 8.

Initial legislative proposals included provisions to protect the “interests of the real estate industry.” Id. at 11, 11 n.21. Then, Congress decided realtors didn’t need special exemptions. Later bills didn’t have any. See generally H.R. 3990, 101st Cong. (1990); H.R. 5498, 101st Cong. (1990) (enacted text). Markets and licensing would work for realtors seeking to use architectural plans, just as markets work for all other manner of copyrighted works.

Also, as it sought to clarify that buildings were eligible for copyright protection, Congress debated whether to permit injunctive relief. Some in Congress worried that injunctions ordering demolition or cessation of construction would be wasteful. Yet, via unanimous voice votes in the House and Senate, Congress ultimately passed a bill without any categorical prohibition on injunctions. See H.R. 5498.

Congress had decided it could safely entrust the federal judiciary to balance the equities and the public interest in deciding when to issue injunctions. H.R. Rep. 101-735, at 14.

Yet Congress also decided to create specific protections for certain uses by homeowners and the public “[a]s a counterbalance to the injunctive relief authority of copyright holders” generally. See id. These restrictions are codified at 17 U.S.C. § 120—the statutory provisions at issue here. Specifically, Section 120(a) permits the public to make “pictures, paintings, photographs, or other pictorial representations” of buildings but nowhere applies to *graphic* works such as architectural floor plans.

Here, a realtor hired a third party to make a buildable floor plan and posted it online when selling a house, *without* seeking the permission of, or paying a royalty to, the copyright owner.

Below, the district court held that 17 U.S.C. § 120(a) authorized this use. Yet the district court erred because Section 120(a) was intended, as its text confirms, to permit photography and painting of publicly visible buildings—not to let realtors create technical floor plans and post them online to supplement their business. Id. at 22. And, *even if* it applied, Section 120(a) limits architects’ “right to prevent” certain uses but nowhere eliminates architects’ entitlement to compensation for commercial uses.

Thus, the district court erred below. It misconstrued a statutory provision permitting the public to depict buildings as a blank check for realtors to profit off an architect's floor plans without authorization and without payment. This Court should reverse.

## **JURISDICTIONAL STATEMENT**

(A) This appeal concerns claims of copyright infringement that arise under federal copyright law. JA 5-7.<sup>1</sup> The district court had exclusive federal question jurisdiction. 28 U.S.C. §§ 1331, 1338(a).

(B) The district court entered final judgment below. JA 180. This Court has appellate jurisdiction. 28 U.S.C. § 1291.

(C) The district court entered judgment on December 4, 2019. JA 180. Plaintiff-Appellants Designworks Homes, Inc. and Charles James filed a notice of appeal on December 5, 2019. JA 181.

(D) This appeal is from a final order and judgment. JA 180.

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<sup>1</sup> JA cites are to the Joint Appendix and ADD citations are to the Addendum. Footnotes are generally omitted from quoted sources.

## RELEVANT STATUTORY PROVISIONS

- Section 101 of Title 17 of United States Code reads, in pertinent part:

### **§ 101. Definitions**

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

[...]

An “architectural work” is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

[...]

“Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. [...]

- Section 120 of Title 17 of United States Code reads:

### **§ 120. Scope of exclusive rights in architectural works**

- (a) Pictorial representations permitted.

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.

(b) Alterations to and destruction of buildings.

Notwithstanding the provisions of section 106(2), the owners of a building embodying an architectural work may, without the consent of the author or copyright owner of the architectural work, make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building.

## STATEMENT OF ISSUES

1. The Copyright Act protects “pictorial, graphic, and sculptural works.” Pictorial works are fine art, photographs, prints and art reproductions. Graphic works are maps, globes, charts, diagrams, two-dimensional models, and technical drawings, including architectural plans. Is an architectural floor plan a pictorial work?

No, it’s a graphic work.

See 17 U.S.C. §§ 101, 120(a). Compare §§ 101, 102(a) (defining “pictorial, graphic, and sculptural works” and granting them protection) with § 120(a) (applying only to pictorial representations, not to graphic works).

Apposite Cases: Park v. Skidmore, Owings & Merrill LLP, 2019 U.S. Dist. LEXIS 171566, \*27 (S.D.N.Y. Sept. 30, 2019) (distinction between pictorial works and graphic works); Robert R. Jones Assoc., Inc. v. Nino Homes, 858 F.2d 274, 278 (6th Cir. 1988) (floor plans are technical drawings, not aesthetic works); United States v. Torres, 920 F.3d 1215, 1216 (8th Cir. 2019) (statutory

interpretation); Yates v. United States, 574 U.S. 528, 543-544 (2015) (statutory interpretation).

2. The Copyright Act repeatedly uses the phrase “not an infringement” to signal a complete defense to infringement. At issue here, Section 120(a) of the Copyright Act limits only the copyright owners’ “right to prevent” certain uses. Is Section 120(a)’s limitation on the “right to prevent” a complete defense to copyright infringement?

No, it’s a restriction on remedies, not a defense to infringement.

See 17 U.S.C §§ 120(a), 501. Compare 17 U.S.C. § 120(a) (no “right to prevent” certain uses) with §§ 107-108, 110-112, 117, 121-121A (certain uses “not an infringement of copyright”).

Apposite cases: Fahmy v. Jay-Z, 908 F.3d 383, 392 (9th 2018) (discussing Egyptian moral rights generally and



right to prevent); United States v. Flute, 929 F.3d 584, 587 (8th Cir. 2019) (statutory interpretation); United States v. Krause, 914 F.3d 1122, 1127 (8th Cir.2018) (same); Doe v. Gillespie, 867 F.3d 1034, 1043 (8th Cir. 2017) (same).

## STATEMENT OF THE CASE

### A. Factual Summary

Plaintiff-Appellant Charles L. James has dedicated much of his life to designing and building homes. He has spent over 30 years learning and honing his craft at home building. JA 50, 138.

When Mr. James was just 13 years old, he began spending summers helping his father, who was also a builder. JA 50. These formative experiences inspired Mr. James to start his own businesses designing and building homes. In 1986, Mr. James started his business under the name C.L. James Construction. JA 49. Then, in the early 2000s, Mr. James incorporated a new company, Plaintiff-Appellant DesignWorks Homes, Inc., that he has worked with since. JA 50.

Mr. James and DesignWorks Homes run a soup-to-nuts operation. Mr. James tackles everything from sketching initial designs all the way through final construction of the homes—even handling the carpentry and cabinetry for the homes he has built. See, e.g., JA 56-57.

For this reason, Mr. James considers himself an artist in the sense that he creates “truly unique home designs[.]” JA 138. He has described himself as “part three dimensional wood sculpturist, and part home designer[.]” JA 138.

In the 1990s, Mr. James pioneered an innovative triangular atrium design. JA 70, 72-73. Mr. James incorporated this triangular atrium design into homes as a creative “twist on the ranch style home.” JA 73. In all his years of researching, building, and designing homes, he had never seen anything like it. JA 73.

This unique triangular atrium design creates a dramatic effect. JA 72. The triangular atrium adds depth to the rear wall of the house and is positioned so as to strike the viewer from the moment “you open the front door[.]” JA 72. This innovative design creates a “house that is unlike any other[.]” JA 138.

Mr. James’ innovative triangular atrium designs have received awards. JA 61. For example, Mr. James has won a Home Builder Association Regency award, claiming first place in the home’s category. JA 61-62. Since he first developed this triangular atrium, Mr. James has incorporated his innovative atrium design into several homes which he and his company built in Missouri. JA 138-139

Wanting to protect designs that are the result of years of creative processes, Mr. James and his company have registered multiple copyrights dating back to the mid-1990s. JA 138-139.

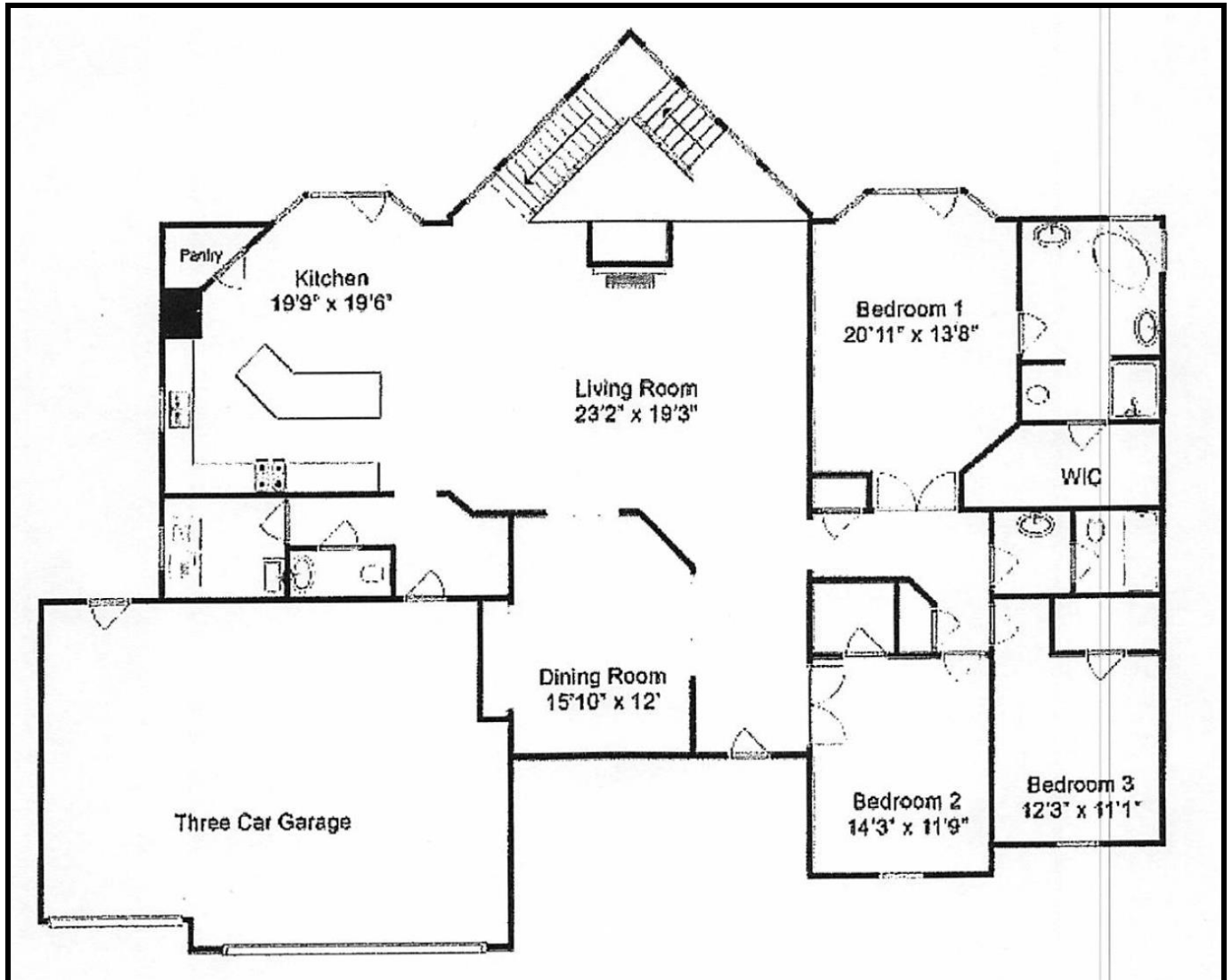
Yet registering his copyright interest did not succeed in getting others to respect his rights in his designs.

Pertinent here, Mr. James became aware that Defendant-Appellees House of Brokers and some of its realtors (collectively “House of Brokers”) had listed the home he built at 1713 Kenilworth Drive in Columbia, Missouri, for resale. JA 17, 126.

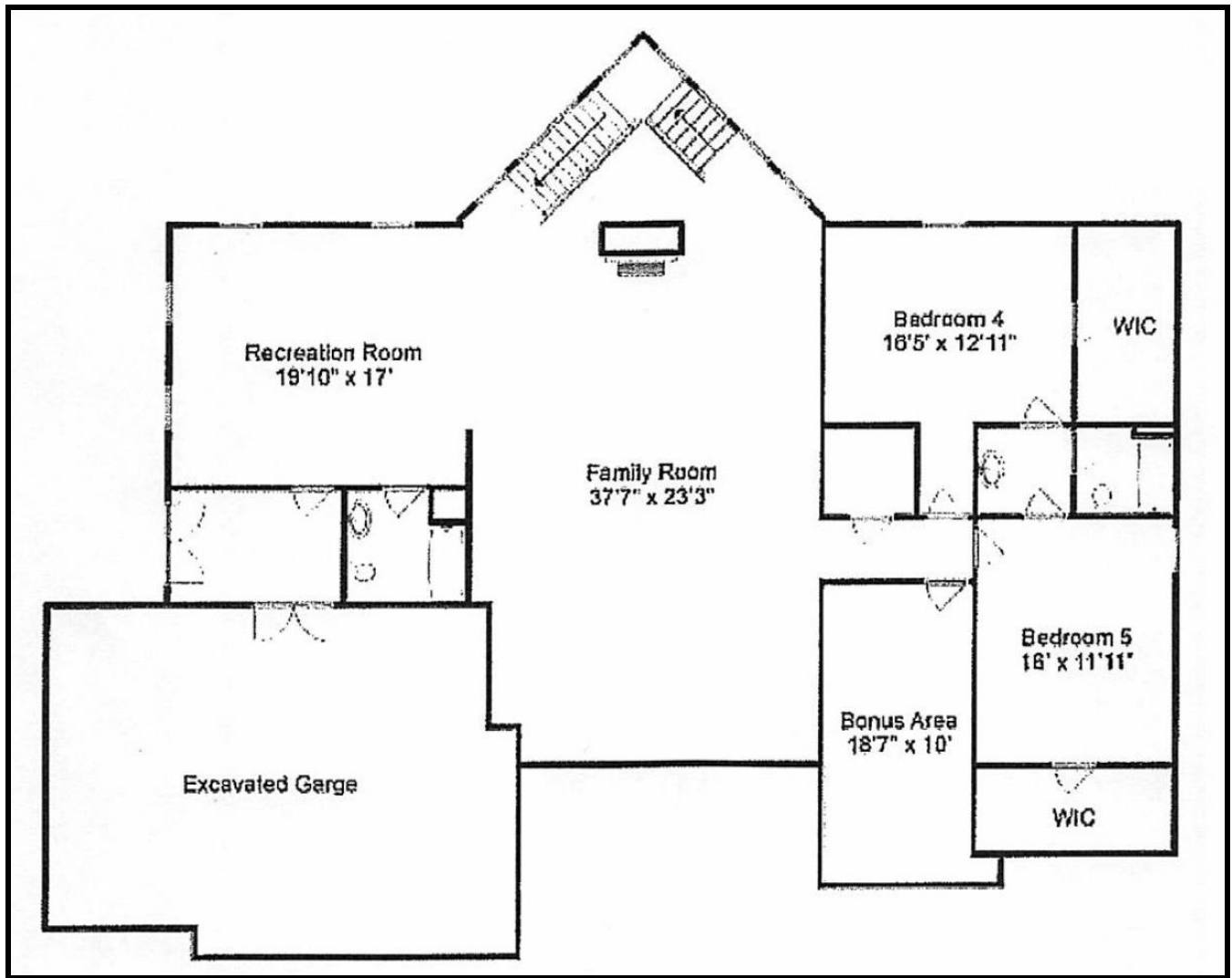
To his utter dismay, Mr. James learned that House of Brokers had put detailed, to-scale floor plans of 1713 Kenilworth online, exposing plans for his unique atrium design to the world—without payment and without permission. JA 125, 156-169.

House of Brokers neither attempted to license the floor plans from Mr. James nor asked for permission to post copies of these floorplans online. JA 125. Instead, House of Brokers paid a third-party company to measure the interior dimensions of 1713 Kenilworth and to use architectural software to create unauthorized architectural plans. ADD 4; JA 156-159.

Posting these materials online provides a recipe for copycats to take Mr. James’ design: a competitor of Mr. James could build an imitating house from these floor plans alone. These unauthorized floor plans that House of Brokers posted online are shown below:



ADD 20 (unauthorized floor plan).



ADD 21 (unauthorized floor plan).

House of Brokers then widely distributed these infringing floor plans.

ADD 4. House of Brokers uploaded these technical drawings to the internet and publicized their infringing floor plans on both printed materials and on various websites. ADD 4. House of Brokers posted these on sites such as Realtor.com, Zillow.com, and Homes.com—all without attempting to ask Mr. James' permission. ADD 4.

House of Brokers used these plans commercially to supplement its own business. Yet they have never paid Mr. James a penny for use of his copyrighted works. Instead, House of Brokers paid a third party to copy the design at 1713 Kenilworth. Emphatically, these technical floor plans, designed using architectural software, are precise and detailed enough to permit rival builders to copy Mr. James' work, undermining the value in his design.

## **B. Procedural History**

After Mr. James discovered the infringing floorplans on Realtor.com, JA 140, he sought redress for the unauthorized, commercial exploitation of his copyrights.

He and his company sued in the United States District Court for the Western District of Missouri, bringing claims against House of Brokers for direct, vicarious and contributory copyright infringement. JA 5-7.

The parties filed cross-motions for summary judgment. ADD 16-17. The cross-motions disputed whether 17 U.S.C. § 120(a) applied to architectural floor plans. See JA 25-29, 36-37, 167-170.

On November 6, 2019, the district court granted House of Brokers’ motion for summary judgment. ADD 1. The district court held that House of Brokers was “entitled to summary judgment based on 17 U.S.C. §120(a)”—treating its statutory provisions as a complete defense rather than a restriction on remedies. ADD at 13.

The district court entered final judgment on December 4, 2019. JA 180. Mr. James and his company timely filed their notice of appeal on December 5, 2019. JA 181-183.



## SUMMARY OF ARGUMENT

- I. The elements of copyright infringement were met below. This appeal pertains to 17 U.S.C. § 120(a).
- II. Section 120(a) of the Copyright Act only applies where the image of a constructed building is copied into “pictures, paintings, photographs, or other pictorial representations[.]” Elsewhere, the Copyright Act distinguishes between *pictorial* works and *graphic* works. Section 120(a)’s exclusive reference to pictorial works clarifies that it does not apply to graphic works. The infringing work at issue here—a dimensioned floor plan—is a graphic work. Therefore, Section 120(a) does not apply here. The district court erred in applying it below.
- III. Even if Section 120(a) applied here, Section 120(a) is not a complete defense to infringement. Where the Copyright Act provides a complete defense, it specifies that certain uses are “not an infringement[.]” Section 120(a) has no such language. Instead, Section 120(a) limits only the copyright holder’s “right to prevent” certain uses. Therefore, Section 120(a) is a restriction on remedies, not a complete defense. The district court erred in treating it as a complete defense to infringement.

## **STANDARD OF REVIEW**

This Court “review[s] a district court’s grant of summary judgment de novo, using the same standards applied by the district court.” Schoolhouse, Inc. v. Anderson, 275 F.3d 726, 728 (8th Cir. 2002).

## ARGUMENT

### **I. SECTION 120(a), NOT THE ELEMENTS OF COPYRIGHT INFRINGEMENT, ARE AT ISSUE IN THIS APPEAL.**

#### **A. The elements of infringement were met below and are not at issue on appeal.**

This appeal raises two issues of first impression at the appellate level about the scope of 17 U.S.C. § 120(a).

The *elements* of copyright infringement are not at issue. “To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

First, it’s undisputed that Plaintiff-Appellants Designworks Homes, Inc. and Charles James (collectively “Designworks”) “designed and constructed a home” at 1713 Kenilworth Drive in Columbia, Missouri. ADD 3. Designworks is the copyright author because it designed and constructed 1713 Kenilworth, *i.e.*, because the home’s details “owe their origin to [Designworks’] act of authorship.” See Feist, 499 U.S. at 347.

The house that Designworks constructed is protected as an “architectural work[.]” 17 U.S.C. § 102(a)(8); see also 17 U.S.C. § 101 (defining “architectural work”).

Because Designworks is the copyright author, copyright ownership “vests initially” in Designworks. 17 U.S.C. § 201(a). Also, Designworks has also registered copyrights. ADD 5, 8-10. And, Designworks has not transferred its copyright ownership. Thus, Designworks owns a valid architectural copyright in 1713 Kenilworth.

The first element of copyright infringement was met below and is not at issue on appeal.

Second, it’s undisputed that House of Brokers copied constituent elements of 1713 Kenilworth, *i.e.*, that the second element of copyright infringement is also met here.

It’s undisputed that House of Brokers paid a third party to measure the interior dimensions of 1713 Kenilworth and to use architectural software to create a to-scale floor plan with listed dimensions. ADD 4. It’s also undisputed that House of Brokers then reproduced this floor plan and distributed it widely, including on its own website and many others. ADD 4.

Thus, House of Brokers infringed Designworks’ “exclusive rights” in its 1713 Kenilworth designs by preparing a derivative floor plan, reproducing it, and publicly distributing it online. 17 U.S.C. § 106(1)-(3) (giving the copyright owner “exclusive rights” to “reproduce the copyrighted work[,]” to “prepare derivative works[,]” and to publicly “distribute copies”).

It does not excuse House of Brokers that it copied from the 1713 Kenilworth’s architectural work into a different type of work, namely architectural plans. That merely means House of Brokers’ paid a third party to create an infringing derivative work.

A “derivative work” is a “a work based upon one or more preexisting works” and may take any “form in which a [preexisting] work may be recast, transformed, or adapted.” 17 U.S.C. § 101 (defining “derivative work”). Yet Designworks has the “exclusive right[]” to “prepare derivative works” based on 1713 Kenilworth. 17 U.S.C. §§ 106, 106(2) (emphasis added).

Designworks’ derivative rights explain why it “is, of course, fundamental that copyright in a work protects against unauthorized copying, not only in the original medium in which the work was produced, but also in other media as well.” 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 2A.08[E][3][c] (2019) (emphasis added).

The derivative right explains why, for example, “copyright in a photograph precludes not only its photographic reproduction but also drawing or any other form of unauthorized copying”—barring an applicable affirmative defense to infringement. Id.; see also, e.g., KNB Enterprises v. Matthews, 78 Cal. App. 4th 362, 369 (2000) (same) (quoting Nimmer on Copyright (1999) in preemption analysis).

The same goes for House of Brokers’ copying of the 1713 Kenilworth design into an unauthorized floor plan. House of Brokers prepared an infringing derivative work.

For example, in one case, a defendant argued that its derivative work was not infringing because the derivative wasn’t a building like what that defendant had copied. T-Peg, Inc. v. Vt. Timber Works, Inc., 459 F.3d 97, 115 n.9 (1st Cir. 2006). The First Circuit dispatched this argument summarily in a footnote: the “fundamental problem [with this argument] is that the statute does not require that the *infringing* work meet the definition of an architectural work.” Id. (emphasis in original).

Thus, the second element of copyright infringement is met as well: House of Brokers infringed by preparing a derivative work, reproducing that infringing work, and publicly distributing it.

**B. Section 120(a) was the basis of the decision below.**

The district court, however, did not base its decision on a failure to meet the elements of infringement. See generally ADD 1-17. Instead, the district court granted summary judgment based on 17 U.S.C. § 120(a). ADD 11-14. Section 120(a) reads as follows:

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.

17 U.S.C. § 120(a).

Breaking that down, Section 120(a) applies only if a defendant copied from a particular type of work, *i.e.* a publicly visible building. Also, Section 120(a) applies only if a defendant copied into particular types of works, *i.e.* “pictures, paintings, photographs or other pictorial representations.” In turn, where it applies, Section 120(a) only limits the copyright owner’s “right to prevent” certain uses—without eliminating that owner’s economic interests.

Section 120(a) applies only if a defendant ***copied from*** “an architectural work that has been constructed” if that constructed building “is located in or ordinarily visible from a public place.” Id. It’s undisputed that House of Brokers qualifies for this aspect of Section 120(a). House of Brokers copied from 1713 Kenilworth, which is a building “visible from a public street.” ADD 3.

Further, Section 120(a) applies only if a defendant *copied into* “pictures, paintings, photographs, or other pictorial representations” of the building. 17 U.S.C. § 120(a). This aspect of Section 120(a) is disputed. House of Brokers does not qualify for this aspect of Section 120(a)’s requirements.

The Copyright Act draws a distinction between *pictorial* works and *graphic* works. Pictorial works include “fine art” and “photographs, prints and art reproductions.” See 17 U.S.C. § 101 (listing pictorial works in the definition of “pictorial, graphic, and sculptural works”). By contrast, graphic works include “maps, globes, charts, diagrams, [two-dimensional] models and technical drawings, *including architectural plans*.” See *id.* (emphasis added, listing graphic works that are not listed in Section 120(a)).

By its express language, Section 120(a) only applies to *pictorial* works.<sup>2</sup>

Yet House of Brokers made a *graphic* work. House of Brokers used architectural software to copy 1713 Kenilworth’s design into a technical floor plan listing the home’s dimensions.

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<sup>2</sup> Section 120(a) refers to pictorial “*representations*” rather than pictorial *works*. The distinction between “works” and “representations” slightly broadens Section 120(a)’s scope by clarifying that Section 120(a) applies to “representations” even if they are not original or creative enough to be independently copyrightable “*works*.” See generally *Feist*, 499 U.S. 340 (1991) (copyrightability standard). Because copyrightability is not at issue in this appeal, this Brief treats the words “representations” and “works” interchangeably.



Therefore, House of Brokers copied 1713 Kenilworth's design into what the Copyright Act considers a graphic work, not a pictorial work. House of Brokers' infringing floor plan is not within the ambit of Section 120(a) because Section 120(a) applies only to pictorial works. A to-scale, dimensioned floor plan is a graphic representation of the home. Therefore, Section 120(a) does not apply here. See Section II, *infra*.

Moreover, Section 120(a) limits only the copyright owner's "***right to prevent***" certain uses. 17 U.S.C. § 120(a) (emphasis added). Where it applies, Section 120(a) is a restriction on remedies, not a complete defense. Thus, even if it did apply, Section 120(a) is at most a basis for *partial* summary judgment, not final judgment.

Elsewhere, the Copyright Act repeatedly clarifies that certain uses are "not an infringement[.]" Yet there is no such statement in Section 120(a). Elsewhere, including in Section 120(b), the Copyright Act repeatedly clarifies that certain acts are permitted "notwithstanding the provisions" of section 106 (which grants the copyright owner "exclusive rights"). Section 120(a) has no such statement. These textual differences clarify that Section 120(a) is a restriction on remedies, not a complete defense to infringement.

Even if Section 120(a) applied here, it is a restriction on remedies, not a complete defense. See Section III, *infra*.

## II. THE DISTRICT COURT ERRONEOUSLY APPLIED SECTION 120(a) TO A GRAPHIC WORK.

Below, the district court granted summary judgment based on Section 120(a). See Section II.A, *infra*.

Yet when Congress enacted a defense to permit the public to paint and photograph buildings, it did not exempt all manner of possible images. Instead, Congress drafted a defense that applied to “pictures, paintings, photographs, or other pictorial representations.” 17 U.S.C. § 120(a).

The Copyright Act is clear that Section 120(a)’s list does *not* apply to all images. After all, Congress uses a broader defined term to refer to visual images more generally, *i.e.*, the defined term “pictorial, graphic, and sculptural works[.]” See 17 U.S.C. § 101 (defining that term).

Congress chose not to use that defined term in Section 120(a). Rather, Congress provided a narrower scope to Section 120(a) by limiting to a subset, *i.e.*, to pictorial but not to graphic or sculptural works.

For the purposes of Section 120(a), not all images are created equal. See Section II.B, *infra*.

Here, House of Brokers paid a third-party to copy 1713 Kenilworth's design into a functional graphic work using architectural software. This infringing floorplan is outside the scope of Section 120(a). House of Brokers' infringing floorplan is not akin to a photograph, painting, or drawing of a house. It's a diagram and technical image (with listed dimensions) that could be used to build an infringing house. Therefore, the district court erred in applying Section 120(a) below. See Section II.C, *infra*.

Further, Congress had sound policy objectives in mind when it granted permissions to the *public* in Section 120(a). Congress wanted to permit the public to enjoy architecture as a public art (by painting, photographing, or drawing pictures of buildings).

Yet Congress had no intention to weaken architects' control over their architectural *designs*. In protecting the public, Congress did not provide special exemptions for the interests of the real estate industry to commercially exploit architects' home designs without payment or authorization.

And, the record demonstrates that paying a reasonable royalty to architects for such uses would not break the bank: House of Brokers paid over \$500 to have a third party make the infringing plans. Some of that amount should have been paid to the rightsholder in the first place. A reasonable payment to the rightsholder, before infringing, could avoid litigation altogether. See Section I.D, *infra*.

**A. The district court applied Section 120(a) to a dimensioned floorplan.**

Below, House of Brokers moved for summary judgment based on Section 120(a). JA 25-29. Designworks opposed the application of Section 120(a), arguing that the floor plan at issue was not a “pictorial representation” of 1713 Kenilworth. JA 167-170.

The district court granted House of Brokers’ motion. ADD 1, 11-13. The district court correctly determined that 1713 Kenilworth was ordinarily visible from a public place (the sidewalk) and that Section 120(a) applies both to a building’s interiors and exteriors where it applies. ADD 12. This portion of the district court’s analysis is not challenged here on appeal.

Yet the district court further held that House of Brokers’ infringing floor plans were pictorial representations, to which Section 120(a) applied. ADD 12-13. This was error.

Under the Copyright Act’s distinctions, House of Brokers’ infringing floor plans are appropriately classified as graphic works to which Section 120(a) does not apply. See Sections II.B, II.C, *infra*. Thus, the district court erred below. This Court should reverse.

**B. Section 120(a) only applies to pictorial works—not graphic works.**

The fundamental flaw in the district court’s statutory interpretation is that it failed to take account of Congress’ distinction between pictorial works and graphic works.

The Copyright Act draws this distinction. In copyright, pictorial works are aesthetic, primarily expressive images. Graphic works are functional, primarily utilitarian images. Section 120(a) only applies to pictorial works, *i.e.*, only applies to “pictures, paintings, photographs, or other pictorial representations[.]” 17 U.S.C. § 120(a).

This essential distinction between graphic works and pictorial works stems from statutory interpretation of the Copyright Act, generally, and Section 120(a), specifically. To interpret the Copyright Act, as with all statutes, courts “begin by analyzing the statutory language.” See Rotkiske v. Klemm, 140 S. Ct. 355, 360 (2019) (internal quotations omitted).

The “starting point in interpreting a statute is always the language of the statute itself.” United States v. Flute, 929 F.3d 584, 587 (8th Cir. 2019). The Supreme Court “ha[s] stated *time and again* that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” Id. at 590 (emphasis added) (quoting Conn. Nat’l Bank v. Germain, 503 U.S. 249, 253-54, (1992)).

“What makes this case unusual, however, is that the *ordinary meaning* of the [key] phrase ‘[other pictorial representations]’ is intertwined with its technical *legal meaning*[.]” See United States v. Torres, 920 F.3d 1215, 1216 (8th Cir. 2019) (emphasis in original).

Here, the key phrase at issue in Section 120(a)—other pictorial representations—“is a term of art” under the Copyright Act reflecting that Section 120(a) applies to a *subset* of a *broad*er category. See Gustafson v. Alloyd Co., 513 U.S. 561, 576 (1995).

The use of the word “pictorial” in Section 120(a) is a cross-reference to a broader category of works, *i.e.*, “***pictorial***, graphic, and sculptural works.” Compare 17 U.S.C. §§ 101 (defining “[p]ictorial, graphical, and sculptural works”), 102(a)(5) (granting copyright protection to “pictorial, graphic, and sculptural works”) with 17 U.S.C. § 120(a) (applying only to “pictorial representations”).

Critically, the Copyright Act has as a broad category of works: “pictorial, graphic, and sculptural works.” Section 120(a) applies to only one of those three: *pictorial* but not graphic or sculptural works. Indeed, the word “pictorial” in Section 120(a) is an *adjective*. “Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality.” Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 368 (2018).

In the instance of Section 120(a), Congress modified “representations” to indicate that not all representations of a building are covered by the defense. Only pictorial representations are covered.

In turn, pictorial representations are a subset of all possible “pictorial, graphic, and sculptural” works defined in Section 101. Yet the Copyright Act nowhere defines precisely what this subset is.

The word “other” in “other pictorial representations” indicates that the preceding types of works in Section 120(a)’s list are enumerated examples of pictorial representations. 17 U.S.C. § 120(a). Thus, comparing the catch-all “other pictorial representations” to the enumerated “pictures, paintings, photographs” helps to clarify where Section 120(a) applies. Id. Namely, pictures, paintings, and photographs are three types of pictorial representations that fall within Section 120(a)’s scope.

“Of course, statutory language cannot be construed in a vacuum[.]” Weyerhaeuser, 139 S. Ct. at 368 (existing brackets and quotes omitted). Rather, Section 120(a)’s phrase other pictorial works must be considered “in its statutory context.” Id.

“Congressional intent or meaning is **not** discerned by considering merely a portion of a statutory provision **in isolation, but rather** by reading the complete provision **in the context of the statute as a whole.**” Doe v. Gillespie, 867 F.3d 1034, 1043 (8th Cir. 2017) (emphasis added).

This “whole-text canon” is among the “basic rules of statutory interpretation”:

Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.

Id. (quoting Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 167 (2012)).

Therefore, “in ascertaining the **plain meaning** of the statute, [we] must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.” Nordgren v. Burlington N. R.R., 101 F.3d 1246, 1250 (8th Cir. 1996) (emphasis added); Public Water Supply Dist. No. 3 v. City of Lebanon, 605 F.3d 511, 520 (8th Cir. 2010) (same).



By examining the Copyright Act as a whole, one encounters the definition for pictorial, graphic, and sculptural works:

“Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine [art], graphic [art], and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.

17 U.S.C. § 101.

Notably, there is significant overlap with Section 120(a). The types of work enumerated in Section 120(a) are also listed in Section 101’s definition of “pictorial, graphic, and sculptural works”:

17 U.S.C. § 120(a)	17 U.S.C. § 101
“pictures”	“include [...] prints and art reproductions”
“paintings”	“fine [art]”
“photographs”	“photographs”

The converse is not true.

Section’s 101’s definition enumerates types of works that do not appear in Section 120(a): “maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.” 17 U.S.C. § 101. This partial overlap reinforces the idea that Section 120(a)’s “pictorial” works are a subset of Section 101’s “pictorial, graphic, and sculptural works.”

One might be tempted to think that the two lists, in Sections 101 and 120(a), are synonymous. Yet the statute is clear that “pictorial representations” are not synonymous with “pictorial, graphic, and sculptural works” because Congress uses different text:

- “The Copyright Act makes clear that Congress knew to use the phrase ‘pictorial, graphic, or sculptural works’ when it meant to refer to such works, see, e.g., 17 U.S.C. §§ 106(5), 108(i), yet it did not do so in Section 120(a).” Park v. Skidmore, Owings & Merrill LLP, 2019 U.S. Dist. LEXIS 171566, \*27 (S.D.N.Y. Sept. 30, 2019) (Sullivan, J.).
- In other words, the fact that Section 120(a) uses the word “pictorial” but not “graphic” or “sculptural” is a strong indication. It indicates that the Copyright Act distinguishes among “pictorial”, “graphic”, and “sculptural” works. By the statutory canon of *expressio unius*, only pictorial works are eligible for the defense in Section 120(a) because Congress used that term to the *exclusion* of the terms “graphic” and “sculptural” there. 17 U.S.C. § 120(a); see also 17 U.S.C. § 121(b)(2) (also making a standalone reference to “pictorial works”).

- In fact, Congress even distinguished between *pictorial* and *graphic* works in still further parts of the Copyright Act. For example, when defining an “instructional text[,]” the Copyright Act distinguishes between “literary, pictorial, or graphic works[.]” 17 U.S.C. § 101 (emphasis added). See also 17 U.S.C. § 109(i) (“with respect to pictorial or graphic works” (emphasis added)).

Taken together, these statutory references and usages give a compelling indication that *pictorial* and *graphic* works are *not* synonymous. Although Congress often speaks of pictorial, graphic, and sculptural works collectively, it also references them separately, like in Section 120(a).

“Under the whole-statute and consistent-usage canons, there is no reason to doubt that” Congress meant pictorial works, and pictorial works alone, when it said pictorial works without any reference to graphic works or sculptural works in Section 120(a). See Saxton v. Fed. Hous. Fin. Agency, 901 F.3d 954, 961 (8th Cir. 2018).

Section 120(a)’s reference to pictorial work means graphic works need not apply. Section 120(a) applies only to pictorial works. For the purposes of Section 120(a), not all images are created equal.

**C. A dimensioned floorplan is a graphic work, so Section 120(a) does not apply here.**

The Copyright Act distinguishes between pictorial and graphic works.

Section 120(a) only applies to pictorial works. See Section II.B, *supra*.

Yet, discerning the line between the two, generally, and which ones House of Brokers' unauthorized floor plans are, specifically, is a more difficult task of statutory interpretation.<sup>3</sup>

Here, House of Brokers' paid a third party to create unauthorized floor plans using a specialized architectural software called automated "computer aided design"—or AutoCAD for short. See ADD 4. AutoCAD is a "software application for designing and drafting architectural blueprints." Sorenson v. Wolfson, 96 F. Supp. 3d 347, 353 (S.D.N.Y. 2015).

It's not a layperson's doodle but a professional product that could be used to build an infringing house. The statutory question is whether House of Brokers' unauthorized floor plans are *pictorial* (where Section 120(a) applies) or *graphic* (where it doesn't).

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<sup>3</sup> By contrast, distinguishing sculptural works from graphic and pictorial works is easy: the former are "three dimensional" objects and the latter are "two dimensional" images. See 17 U.S.C. § 101; see also Park, 2019 U.S. Dist. LEXIS 171566, at \*27 (Section 120(a) does not apply to sculptural works).

Ordinarily, dictionary definitions address undefined statutory language. Here, however, dictionary definitions of the words pictorial and graphic provide “scant guidance.” See Peter v. NantKwest, Inc., 140 S. Ct. 365, 372 (2019).

Pictorial means “of or relating to a painter, a painting, or the painting or drawing of pictures[.]” Definition of Pictorial by Merriam-Webster, Merriam Webster (Mar. 5, 2020), <https://www.merriam-webster.com/dictionary/pictorial>. Graphic means “of or relating to the pictorial arts[.]” Definition of Graphic by Merriam-Webster, Merriam Webster (Mar. 5, 2020), <https://www.merriam-webster.com/dictionary/graphic>.

That’s not much help. The dictionary defines graphic in terms of pictorial. Nonetheless, because the statute treats them *differently*, they cannot be treated *synonymously*: the “record of statutory usage” requires that they be distinguished. See NantKwest, 140 S. Ct. at 373.

Two other canons of statutory interpretation— *noscitur a sociis* and *ejusdem generis*—are more insightful. Courts “look to *noscitur a sociis*, the well-worn Latin phrase that tells us that statutory words are often known by the company they keep[.]” Lagos v. United States, 138 S. Ct. 1684, 1688-1689 (2018). Indeed, this canon is helpful to choose “between those competing definitions[.]” McDonnell v. United States, 136 S. Ct. 2355, 2368-2369 (2016).

“While ‘not an inescapable rule,’ this canon ‘is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.’” *Id.* (emphasis added). In a list of words, *noscitur* can “cabin the contextual meaning” and “avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.” *Yates v. United States*, 574 U.S. 528, 543-544 (2015).

Likewise, a “canon related to *noscitur a sociis, ejusdem generis*, counsels: ‘Where general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.’” *Id.* at 545 (cleaned up).

Applying these canons here gives the following insights:

- The works listed in Section 120(a) (“pictures, paintings photographs”) are all aesthetic, primarily expressive images.
- The remaining two-dimensional works listed in Section 101’s definition of pictorial, graphic, and sculptural works that are absent from Section 120(a) are functional, utilitarian works “including architectural plans.” 17 U.S.C. § 101; see Robert R. Jones Assoc.,

Inc. v. Nino Homes, 858 F.2d 274, 278 (6th Cir. 1988) (“And, although the Copyright Act does not expressly refer to architectural plans, the statute does afford protection to ‘pictorial, graphic, and sculptural works,’ 17 U.S.C. § 102(a)(5), which are defined as including ‘technical drawings, diagrams, and models.’”)⁴

- For those who use legislative history, the legislative history to the 1990 Architectural Works Copyright Protection Act that enacted Section 120(a) reinforces this reading. Noting its intention to protect *buildings* as well as *plans*, it refers to floor plans and buildable drawings as follows: “The current U.S. Copyright Act expressly includes ‘diagrams, models, and technical drawings, including architectural plans’ as a species of protected ‘pictorial, graphic, and sculptural work.’” H.R. Rep. 101-735 at 11. In other words, architectural floor plans are not among the types listed in Section 120(a). Furthermore, the legislative history gives a purpose for Section 120(a): to protect tourists taking pictures and scholars studying architecture as an art form, rather than in the business of

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<sup>4</sup> Later, Congress added the phrase “including architectural plans” to the end of this list, near the phrase “technical drawings, diagrams, and models”—near the listed functional works rather than aesthetic works included earlier in Section 101’s list.

selling buildings and plans. Id. at 21-22. This reinforces a distinction between aesthetic pictorial works and functional graphic works.

- This aesthetic vs. functional distinction is further reinforced by the definition of a work of visual art in Section 101. The Visual Artists Rights Act of 1990 (“VARA”) was passed along with the Architectural Works Copyright Protection Act. The VARA added a new defined term: “work of visual art.” This defined term and distinction also clarifies that Congress was drawing lines via aesthetic and utilitarian works. A work of visual art is “a painting, drawing, print, or sculpture” or “a still photographic image[.]” 17 U.S.C. § 101(1)-(2) (defining “work of visual art”). Yet a work of visual art “does not include” the following: “any poster, map, globe, chart, **technical drawing**, **diagram**, **model**, applied art, motion picture or other audiovisual work[.]” Id. (emphasis added). This is a further textual clue that Congress’ line was between aesthetical pictorial works and functional graphic works.



Altogether, the statutory context (especially Section 101); the canons of statutory interpretation; the legislative history; and the few cases that address this distinction between pictorial and graphic works draw a line between aesthetic pictorial works and functional, utilitarian, graphic works. Photographs and paintings and aesthetic drawing are pictorial. A “poster, map, globe, chart, *technical drawing, diagram*”—including the ones at issue here—are graphic. 17 U.S.C. § 101 (emphasis added).

Considering all these relevant legal authorities, it becomes clear that architectural floor plans are *graphic works* to which Section 120(a) does not apply. This Court should reverse.

**D. Strong policy rationales underlie the different treatment for pictorial and graphic works under Section 120(a).**

Designworks believes that the Copyright Act's distinction between graphic works and pictorial works controls this appeal. A technical drawing like a floor plan is a graphic work to which Section 120(a) does not apply.

Nonetheless, House of Brokers suggested below that ruling in Designworks' favor would lead to a parade of horrors. House of Brokers has it backwards: the policy balance favors Designworks.

Here's why:

- Upholding copyright owners' rights in technical graphic works won't interfere with the public's right to paint, photograph, or otherwise depict houses generally. Rather, it would merely mean realtors would need to do what happens in every other copyright market: pay the rightsholder when making commercial uses of their copyrighted works. Pragmatically, it would mean that some portion of the amount spent on obtaining a floorplan would go rightsholders, rather than all to a third party who exploits the rightsholders' works without permission or payment.

- Below, House of Brokers suggested that children outlining their own homes would become liable if a court held in favor of Designworks. That’s a canard. Properly construing Section 120(a) to exclude build-ready AutoCAD floor plans won’t implicate little kids in federal lawsuits. Even if it did, the Copyright Act gives judges all the tools they need to dispose of and deter such outrageous claims via copyright’s legion of affirmative defenses, *especially* fair use to protect homeowners and non-commercial uses. See 17 U.S.C. § 107(1) (affirmative defense weighing “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”); see also 17 U.S.C. §§ 107-122. Such objectively unreasonable cases would also face the specter of fee-shifting. 17 U.S.C. § 505.
- In fact, protecting copyrights in these floor plans might empower homeowners. By meaningfully protecting homes from unauthorized and highly detailed online distributions of their layouts, this Court can respect that “a man’s home is his castle.” A privacy-focused family could obtain copyrights and use them to reap some measure of privacy and dignity until they want to put their house on the market. After all,

just because the architect is the *initial* owner of copyright doesn't mean the homeowner cannot request the rights when purchasing the home.

- Finally, affirming would create a massive **loophole** in architects' rights. It's important to realize that House of Brokers would own a copyright in unauthorized floor plans if Designworks loses this appeal. In turn, that would mean House of Brokers would have exclusive rights in those floor plans. It could reproduce them as it pleases. It could also prepare derivative works—including by constructing buildings based on those floor plans. If Designworks loses, its loss will produce a massive doctrinal loophole in architectural copyrights that would eviscerate architects' derivative rights under Section 106(2).

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For all these policy reasons as well, this Court should reverse.

**III. THE DISTRICT COURT ERRONEOUSLY APPLIED SECTION 120(a) AS A COMPLETE DEFENSE.**

**A. The district court held there was no infringement because of Section 120(a).**

In moving for summary judgment, House of Brokers asserted that Section 120(a) provides a “complete defense” to infringement. JA 28. Designworks opposed the application of Section 120(a) at all. JA 167-170. To Designworks, applying Section 120(a) would be “like trying to fit a square peg into a round hole[.]” JA 170.

The district court held that Section 120(a) not only applied to House of Brokers’ unauthorized floor plans; it also held that Section 120(a) made the creation of unauthorized floor plans “not an infringing act.” ADD 13. The district court treated Section 120(a) as a complete defense.

This was error. Even if it applied here, Section 120(a) operates as a limitation on remedies—a limitation on the “right to prevent”—rather than a defense to infringement. This Court should reverse.

**B. Section 120(a) only affects the “right to prevent.”**

By its plain terms, Section 120(a) only affects “the right to prevent” certain uses of architectural works. 17 U.S.C. 120(a) (“The copyright in an architectural work that has been constructed does not include the *right to prevent* [...]” (emphasis added)). Section 120(a) does not, however, provide an absolute defense to infringement.

As before, this issue raises a question of statutory interpretation.

Courts conduct statutory interpretation “by analyzing the statutory language. Rotkiske, 140 S. Ct. at 360 (2019) (internal citations removed). “If the words of a statute are unambiguous, this first step of the interpretive inquiry is our last.” Id.

Below, the district court erred in treating Section 120(a) as a complete defense to infringement when it granted summary judgment. The plain language of Section 120(a) makes clear that this provision affects only a right to prevent certain uses, not the ultimate question of liability for infringement. The district court’s interpretation of Section 120(a) as a complete defense to infringement departs from the text’s plain meaning.

Critically, the statutory language of Section 120(a) stands in stark contrast to the numerous provisions found throughout the Copyright Act which plainly state that certain uses are “not an infringement”.

Throughout Chapter 1 of the Copyright Act, when Congress wants to provide a complete defense to infringement, it does clearly by employing a straightforward phrase: “not an infringement of copyright.” E.g., 17 U.S.C. §§ 107 (“not an infringement of copyright”); 108(a) (“not an infringement of copyright”); 110 (“not infringements of copyright”); 111 (“not an infringement of copyright”); 112 (“not an infringement of copyright”); 114(d)(3)(D) (“not an infringement ”); 117(a) (“not an infringement”); 121(a) (“not an infringement”); 121(c) (“not an infringement”).

Notably, Congress has employed this most straightforward phrase “not an infringement” in provisions of the Act that both pre-date and post-date the enactment of Section 120(a) in 1990. Compare 17 U.S.C. § 107 with 17 U.S.C. § 121.

The Act’s repeated and continued use of this straightforward phrase—“not an infringement”—serves as overwhelming evidence that the comparative absence of any similar language in Section 120(a) was by Congress’ conscious choice and intentional design. If Congress had wanted to say the uses discussed in Section 120(a) were not infringements, it would have said so clearly as it does throughout many of the Copyright Act’s other provisions.

Simply put, Congress does not hide the ball when it wants to declare that a certain use is not an infringement. It just says it.

The Copyright Act is replete with repeated uses of the phrase “not an infringement of copyright” where an absolute defense to infringement applies. By contrast, such language is nowhere to be found in Section 120(a).

Emphatically, “Congressional intent or meaning is not discerned by considering merely a portion of a statutory provision in isolation, but rather by reading the complete provision **in the context of the statute as a whole.**”

Gillespie, 867 F.3d at 1043 (8th Cir. 2017) (emphasis added). Read in context of the Copyright Act as a whole, it is overwhelmingly clear that Section 120(a) is not an absolute defense to infringement.

Indeed, the Supreme Court “ha[s] stated *time and again* that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” Flute, 929 F.3d at 590 (emphasis added) (quoting Conn. Nat’l Bank v. Germain, 503 U.S. 249, 253-54, (1992)); United States v. Krause, 914 F.3d 1122, 1127 (8th Cir.2018) (same).

So too here. When Congress decides that a particular use is not an infringement, it says what it means quite plainly with the phrase “not an infringement.” By contrast, the absence of such language in Section 120(a) betrays that Section 120(a) is not a complete defense to infringement.

If Congress wanted it to be, it would have said as much.



The Copyright Act leaves little guesswork for readers to determine when a particular use is not an infringement. House of Brokers and the district court, however, missed the forest for the trees. They committed the common interpretative error of reading Section 120(a) in isolation—instead of as part of the Copyright Act.

“Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.” Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 167 (2012).

The entire text, its structure and the “logical relation of its many parts” firmly establishes that Section 120(a) is a *partial* limitation on certain remedies (*i.e.* injunctive relief and punitive statutory damages) rather a wholesale defense to liability.

What is more, Section 120(a) is not even a carve out to any of the particular enumerated rights granted to a copyright owner under Section 106.

17 U.S.C. § 501 sets forth the definition of copyright infringement. It reads, in pertinent part:

Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 [...] is an infringer of the copyright or right of the author[.]

17 U.S.C. §501(a) (emphasis added).

The exclusive rights mentioned in Section 501 are enumerated in Section 106. 17 U.S.C. §106.

Ordinarily, when a copyright owner sues for infringement, they have at their disposal a full panoply of remedies. 17 U.S.C. §§ 502 (injunctions), 503 (impoundment), 504 (damages and infringer's profits or statutory damages), 505 (costs and attorney's fees).

These exclusive rights and remedies, however, are subject to certain limitations enumerated in Sections 107-122. Sections 107-122 present a cluster of limitations on the scope of a copyright owner's exclusive rights and available remedies.

Notably, not all limitations are created equal.

The limitations codified in Sections 107-122 lay out an incredibly nuanced set of limitations in painstakingly precise and remarkably granular detail. Cf. 17 U.S.C. § 111 (extraordinarily complex section of the Act).

A review of these sections reveals Congress’ careful construction of a delicate balance between copyright holders’ interests and carve outs for many salutary uses—achieved via a cornucopia of complete defenses, statutory and reasonable royalties, and limitations on certain exclusive rights.

Section 120(a) is grouped amongst these provisions.

Yet, Section 120(a) has different text. Its clarification of the scope of rights in architectural works stands on a different footing from many of its neighboring limitation provisions. For example, some limitation provisions provide an absolute defense to infringement of copyright, as discussed above. See, e.g., 17 U.S.C. § 107 (fair use “not an infringement”). These sections expressly employ the shockingly simple phrase “not an infringement” to clarify their effect.

Other limitation provisions provide a specific carve out to one or more of the exclusive rights bestowed in Section 106. See, e.g., 17 U.S.C. §§ 109(a) (“Notwithstanding the provisions of section 106(3) [...]”); 114(d) (“Notwithstanding the provisions of section 106(6) [...]”). In such sections, Congress employs the “notwithstanding” language and then identifies which exclusive rights have a new exception.

Crucially, Section 120(a) takes neither approach. Section 120(a) does not provide an absolute defense to infringement by using the “not an infringement” language. Nor does Section 120(a) carve out any of the enumerated 106 rights from a copyright owner's rights in architectural works, by employing the “notwithstanding” language.

Perhaps, the fact that Section 120(a) is not a complete defense comes into clearest focus by comparison to its closest statutory neighbor: Section 120(b). Compare 17 U.S.C. § 120(b) (“Notwithstanding the provisions of section 106(2)[...]”) with 17 U.S.C. § 120(a) (no such language providing exemptions from an exclusive right).

Section 120(a) contains no such language.

Thus, read in the context of the statute’s language and usage, it becomes apparent that Section 120(a) does not provide a complete defense to copyright infringement. Nor does Section 120(a) act as a carve out from any of the enumerated Section 106 rights afforded to a copyright owners. Section 120(a) simply clarifies that the rightsholder has no “right to prevent” certain uses. The “right to prevent” is all that Section 120(a) affects.

So, what does the lack of a “right to prevent” mean? Notably, Section 106 does not list a right to prevent amongst the six enumerated rights afforded a copyright owner. See 17 U.S.C. 106.

Instead, the phrase “right to prevent” appears only three times throughout the entire Copyright Act:

- 17 U.S.C §106A (granting “right[s] to prevent” certain uses for “works of visual art”)
- 17 U.S.C §113(c) (clarifying that rights in pictorial, graphic, and sculptural copyrights “does not include any right to prevent” certain uses)
- 17 U.S.C. §120(a) (clarifying rights in certain architectural works does “not include the right to prevent” certain uses).

Notably, Section 106A grants “right[s] to prevent” while Section 120(a) prohibits a “right to prevent[.]” This mirror-image language is telling. It gives a textual clue as to what Section 120(a) accomplishes since it is not a defense or a carve out to anything in Section 106. Comparison of Section 120(a) to Section 106A shows “the statute’s purpose, revealed by its language[.]” See United States v. Stitt, 139 S. Ct. 399, 405 (2018) (emphasis added).

In 1989, the United States became subject to an obligation to provide moral rights for authors upon acceding to the Berne Convention, an international copyright treaty. See generally Berne Convention Implementation Act (“BCIA”) of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified through Title 17).

“Taken from the French phrase *droit moral*, the term ‘**moral rights**’ generally refers to certain **non-economic rights** that are considered personal to an author.” A Report of the Register of Copyrights: Authors, Attribution and Integrity: Examining Moral Rights in the United States, 6 (accessed Mar. 5, 2020; published Apr. 2019), <https://www.copyright.gov/policy/moralrights/full-report.pdf> (bold emphasis added).

In 1990, Congress passed the Visual Artists Rights Act, which complied with the Berne Convention by guaranteeing to authors of “works of visual art” *rights to prevent* false attributions and the distortion, mutilation, or modification of their works. See generally Visual Artists Rights Act (“VARA”) of 1990, Pub. L. No. 101-650, 104 Stat. 5128, 5128–29 (primarily codified at 17 U.S.C. § 106A).

Section 106A imported European-style moral rights (including a right to prevent) for certain works. It is against the backdrop of these newfound moral rights that Section 120(a) was enacted. Indeed, Section 120(a) and Section 106A were enacted *simultaneously*.

The prospect of European non-economic moral rights, however, caused significant concerns in the business community. Opponents “contended that the ‘introduction’ of moral rights in the United States would upset existing business practices[.]” Paul Goldstein, Goldstein on Copyright, Appendix A-14 at A:640 (2020).

While Section 106A was enacted giving purely non-economic “right[s] to prevent” certain acts with respect to the fine arts, Section 120(a) was enacted with the opposite goal in mind: to preserve economic rights to remuneration while prohibiting the injunctive relief or punitive damages that could prevent the public from broadly engaging on a non-commercial basis with the public art of architecture.

In sum, Section 120(a) is not a complete defense to infringement. The statute would say so if it was. Section 120(a) is not a carve out from the exclusive rights in Section 106. Instead, Section 120(a) is a restriction on remedies, the mirror image of moral rights. While “moral rights holders may seek only injunctive relief[,]” see Fahmy v. Jay-Z, 908 F.3d 383, 392 (9th 2018) (construing Egyptian moral rights), copyright owners in architectural works may only seek non-prohibitive economic remedies when Section 120(a) applies to commercial uses, like the ones at issue here.

Of course, the idea of separating economic interests from proprietary interests is not unheard of in American law. The Copyright Act does it frequently. See, e.g., 17 U.S.C. §§ 114-115 (compulsory licenses).

Section 120(a) prevents an architectural rights holder’s ability to prevent certain uses. It does not follow, however, that such uses do not constitute

infringement as defined by the statute, subject to reasonable remedies that do not rise to the level of an effectual prohibition.



**C. There was still infringement here, even if there was no “right to prevent.”**

Because floor plans are graphic works, House of Brokers’ infringing works do not qualify for Section 120(a)’s limitation on rights. See Section II, *supra*. Even if Section 120(a) did apply, however, House of Brokers still infringed Designworks’ reproduction, derivative, and distribution rights.

Thus, while Section 120(a) would limit the ability to prevent such use (*i.e.*, through injunctions or punitive statutory damages), nothing in Section 120(a) limits the availability of non-injunctive reasonable economic relief from commercial infringements.

House of Brokers’ argument that 120(a) provides a complete defense to copyright infringement is untenable. Such a position is irreconcilable with the plain meaning of Section 120(a).

Moreover, its position that a rightsholder is not entitled to any compensation for the economic exploitation of his work is unreasonable. It’s all the more unreasonable because House of Brokers already paid a third party to produce the infringing floor plan. It should have paid Designworks a reasonable rate as well.

## CONCLUSION

This Court should reverse and remand on the direct and indirect claims of infringement.

Date: March 10, 2020

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

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## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing BRIEF OF APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: March 10, 2020

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