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“Troll! Troll in the Living Room! Thought You Ought To Know.”: Opening the Door for Extensive Copyright Litigation Under 17 U.S.C. § 120

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NOTE

“Troll! Troll in the Living Room! Thought You Ought To Know.”: Opening the Door for Extensive Copyright Litigation Under 17 U.S.C. § 120*

Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc., 9 F.4th 803 (8th Cir. 2021), cert. denied, 142 S. Ct. 2888 (2022).

Savanah R. Seyer**

I. INTRODUCTION

For many, the day of a real estate closing is filled with excitement and relief. The process of finding a family home or a building to begin a business is often arduous. On average, the search for a home lasts at least six months.¹ There are long days of showings, stressful negotiations with loan officers, and difficult decisions when purchasing a piece of property. Most buyers and sellers look forward to the day when the paperwork is signed and title, along with all the rights and privileges it affords, passes to the new owners. After closing, the new owners typically assume they are free to enjoy their new property as they see fit. They take pictures of and remodel their home, hire builders or real estate agents to assess or view the land, or even make plans to eventually sell the property. Many of these actions may require sketches of rudimentary floor plans or drawings of a home’s layout. However, the Eighth Circuit recently created a barrier for

*Title is in reference to J.K. ROWLING, *HARRY POTTER AND THE SORCERER’S STONE*, 172, (Scholastic, Inc., 1999).

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¹Dana Schultz, *The Homebuying Timeline: How Long It Takes to Buy a House – and How To Speed Things Up If You’re in a Rush*, REALTOR.COM (May 26, 2022) <https://www.realtor.com/advice/buy/first-time-homebuyer-timeline/> [<https://perma.cc/EUF2-CEMU>].

homeowners to use these plans by opening them up to potential copyright infringement lawsuits. In doing so, the Eighth Circuit infringed upon the general ability to enjoy one's property and made many common uses of private property vulnerable to legal challenges.

In *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, the Eighth Circuit provided encouraging news for copyright "trolls"—copyright holders who make frequent copyright litigation part of their business model.² Specifically, the court held that the defendant real estate agencies' floorplans were not protected from claims of copyright infringement.³ In doing so, it trod heavily on private property rights, made it easier for "trolls" to bring lawsuits based on the creation of housing floor plans, and, thus, opened the judicial system up to a wave of unnecessary litigation. Part II of this Note describes the facts and procedural background of *Designworks*. Part III examines the development of relevant copyright law as it pertains to architectural and other works. Part IV explains the Eighth Circuit's holding in *Designworks*. Part V discusses the implications of the Eighth Circuit's holding and comments on the new blueprint for copyright lawsuits and the potential for an explosion of copyright litigation, weak statutory interpretation, and erosion of private property rights in the United States.

II. FACTS AND HOLDING

Two homeowners in Columbia, Missouri, hired Columbia House of Brokers Realty, Inc. and Susan Horak Group Re/Max Boone Realty ("Defendants") to assist in the sale of their homes.⁴ Plaintiff Charles James ("Plaintiff") built and designed the homes with particular recognizable features such as a "triangular atrium design with stairs."⁵ When the Defendants listed the homes for sale, the listings included floor plans of the homes.⁶ The Defendants did not use or copy the Plaintiff's original architectural plans.⁷ One defendant drew its own floor plans after measuring the dimensions of the home, and the other defendant had a floor plan created by a contractor who measured the home and used a computer to sketch the plan.⁸ Plaintiff and his company, Designworks Homes, Inc., claimed a copyright interest in the home's design and sued for copyright

² Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 53, 58 (2014).

³ *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, 9 F.4th 803, 811 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 2888 (2022).

⁴ *Id.* at 805.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 806.

infringement based on the sketched floorplans.⁹ Defendants relied on 17 U.S.C. § 120(a)—which provides that a copyright of an “architectural work,” such as an architectural blueprint, “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.”¹⁰ The district court granted summary judgment for the Defendants on the grounds that the floorplans constituted “pictorial representations” of the Plaintiff’s homes and therefore did not infringe on the copyright.¹¹ On appeal, the Eighth Circuit held that the floorplans were “technical drawings” or “architectural plans,” not “pictorial representations,” and therefore were not protected under § 120(a).¹²

III. LEGAL BACKGROUND

United States copyright law began protecting buildings and other architectural materials after the United States joined the Berne Convention in 1989 and added the Architectural Works Copyright Protection Act (“AWCPA”).¹³ AWCPA specifically provided protection for architects’ structures and blueprints.¹⁴

A. Copyright Statutes

Under 17 U.S.C. § 106, a copyright holder has the exclusive rights to copy, reproduce, distribute, publicly display, or create “derivative works” of their copyrighted material.¹⁵ Section 120 extends copyright protection to “architectural works.”¹⁶ Architectural works are defined as “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings.”¹⁷ Section 101 states that the work may include the “overall form as well as the arrangement and composition of spaces and elements in the design.”¹⁸ However, architects, like other copyright owners, may not copyright basic ideas or “standard

⁹ *Id.*

¹⁰ *Id.*; 17 U.S.C. § 120(a).

¹¹ *Designworks*, 9 F.4th at 806.

¹² *Id.* at 811.

¹³ David E. Shipley, *The Architectural Works Copyright Protection Act At Twenty: Has Full Protection Made a Difference?*, 18 J. INTELL. PROP. L. 1, 4 (2010).

¹⁴ *Id.* at 8.

¹⁵ 17 U.S.C. § 106.

¹⁶ *Id.* § 120.

¹⁷ *Id.* § 101.

¹⁸ *Id.*

features.”¹⁹ As a result, many copyrights of architectural works are “thin,”²⁰ consisting merely of basic, “stock” features of a structure, or, put more simply, the essential features of a building common to almost every home or office.²¹ Only works “strikingly” or “substantially” similar to the thinly protected work will be considered copyright infringement.²² Another’s work is substantially similar to the protected work if it is “so similar. . . that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff’s protectible expression by taking material of substance and value.”²³

In addition to the “substantial similarity” requirement for copyright infringement, there are other significant limitations on the copyright protection of an architectural work.²⁴ For instance, under § 120(b), owners of buildings “embodying an architectural work” are permitted to destroy or alter the building without the copyright owner’s consent.²⁵ And § 120(a) provides a defense against a copyright infringement claim where the work involves the creation, distribution, or display of “pictorial representations,” if the building where the work is “embodied” is “located or ordinarily visible from a public place.”²⁶ What constitutes a “pictorial representation” of an architectural work is at the heart of lawsuits where § 120(a) is invoked as a defense.²⁷

Under § 101, “[p]ictorial works” are defined as two- and three-dimensional “[w]orks of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models and technical drawings, including architectural plans.”²⁸ On the other hand, § 120(a)—which expressly applies to “pictorial *representations*”—lists only “pictures, paintings, [and] photographs” as examples and offers no

¹⁹ *Design Basics, LLC v. Signature Constr., Inc.*, 994 F.3d 879, 886 (7th Cir. 2021).

²⁰ *Id.* at 882. A “thin” copyright means that “only very close copying of protected elements is actionable.” *Signature Constr., Inc.*, 994 F.3d at 886.

²¹ *Id.* “Generalized ideas and concepts pertaining to the placement of elements, traffic flow, and engineering strategies,” or in other words, “ideas and concepts” are not worthy of protection. *Shine v. Childs*, 382 F. Supp. 2d 602, 608–09 (2005) (citing *Sparaco v. Lawler, Matusky & Skelly Eng’rs LLP*, 303 F.3d 460, 469 (2d Cir. 2002)).

²² *Signature Constr. Inc.*, 994 F.3d at 884.

²³ *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1101 (7th Cir. 2017).

²⁴ 17 U.S.C. §§ 107–18, 120.

²⁵ *Id.* § 120(b).

²⁶ *Id.* § 120(a).

²⁷ *Morgan v. Hawthorne Homes, Inc.*, No. CIV.A. 04-1809, 2009 WL 1010476 at 12 (W.D. Pa. Apr. 14, 2009); *Sorenson v. Wolfson*, 96 F. Supp. 3d 347, 365 (S.D.N.Y. 2015); *Kipp Flores Architects, LLC v. AMH Creekside Dev., LLC*, No. SA-21-CV-01158-XR, 2022 WL 4352480 (W.D. Tex. Sept. 16, 2022).

²⁸ 17 U.S.C. § 101.

other guidance.²⁹ Thus, architecture-based copyright litigation can involve two questions: whether pictorial “works,” which explicitly include technical drawings and architectural plans, are considered separate from pictorial “representations,” and, if so, what distinguishes the two.³⁰ A large number of courts have employed statutory interpretation to find that sketched floorplans constitute pictorial representations, protecting such floorplans from infringement claims under § 120.³¹

Analysis of a statute begins with its plain meaning.³² Courts often apply the “canon against surplusage,” which “give[s] effect” to every word of a statute “if possible.”³³ The interpretation of a statute requires the reading of the entire text and consideration of the statute’s context and purpose.³⁴ [A]bsent a clearly expressed legislative intention to the contrary, [the statutory] language must ordinarily be regarded as conclusive.³⁵ Courts have used these canons to inform their analysis of § 120 and what constitutes a “pictorial representation.”³⁶

Many claims brought by architectural copyright holders are based on drawn floorplans of a building.³⁷ In addition to interpreting the meaning of “pictorial representation,” courts must sometimes determine what it means for work to be “ordinarily visible from a public place.”³⁸ In *Sorenson v. Wolfson*, the court held that rough drawings of an apartment floorplan do not infringe on the copyrighted architectural work when the apartment building is visible from a public place.³⁹ Importantly, the court’s analysis focused on whether the architectural work is visible from a public place, regardless of whether one could see inside the building or not.⁴⁰ The apartment itself in *Sorenson* was not visible from the sidewalk,

²⁹ *Id.* § 120.

³⁰ *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, 9 F.4th 803, 812 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 2888 (2022); *Sorenson*, 96 F. Supp. 3d at 357; *Kipp Flores Architects*, 2022 WL 4352480 at *14.

³¹ *Sorenson*, 96 F. Supp. 3d at 361; *Kipp Flores Architects*, 2022 WL 4352480 at *1.

³² *Ross v. Blake*, 578 U.S. 632, 638 (2016).

³³ *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001); 82 C.J.S. Statutes § 416.

³⁴ *Kasten v. St.-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7 (2011).

³⁵ *United States v. Big Crow*, 327 F.3d 685, 688 (8th Cir. 2003) (quoting *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

³⁶ *Sorenson v. Wolfson*, 96 F. Supp. 3d 347 (S.D.N.Y. 2015); *Kipp Flores Architects, LLC v. AMH Creekside Dev., LLC*, No. SA-21-CV-01158-XR, 2022 WL 4352480 at *8 (W.D. Tex. Sept. 16, 2022).

³⁷ *Sorenson*, 96 F. Supp. 3d at 353.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

but one could see the outside of the building.⁴¹ Therefore, the court reasoned, the floorplan sketches of the apartment were pictorial representations of a publicly visible architectural work and did not constitute copyright infringement of the original blueprints and design.⁴²

B. Copyright Trolls

It is quite common for owners of copyrighted architectural work to judicially enforce their copyright.⁴³ Many architectural firms use litigation and the threat of infringement claims to gain settlements and favorable judgments as a way to obtain profit.⁴⁴ These types of frequent plaintiffs are considered copyright “trolls.”⁴⁵ For example, the firm Design Basics, LLC (“Design Basics”) has filed over one hundred copyright lawsuits and pays its employees to search the internet for potential copyright violations of their home design plans.⁴⁶ According to one of the firm’s owners, these settlements and judgments are a “principal” revenue stream for the firm.⁴⁷ Predictably, courts often look unfavorably upon copyright trolls like Design Basics.⁴⁸ In one of the firm’s recent lawsuits, the Seventh Circuit defined copyright trolls as “opportunistic holders of registered copyrights whose business models center on litigation rather than creative expression,” hindering creativity while offering a “negligible societal benefit.”⁴⁹ As introduced above, however, defendants in architectural copyright infringement cases have several arguments at their disposal to protect against lawsuits copyright trolls or any other plaintiff brings.

C. Affirmative Defenses

There are many different affirmative defenses available to defendants in copyright lawsuits. One of the most common defenses is the fair use

⁴¹ *Id.*

⁴² *Id.* Similarly, the court in *Morgan v. Hawthorne Homes, Inc.*, found that drawn floorplans constituted pictorial representations under § 120 as well, under a similar rationale. 2009 WL 1010476, at *12 (W.D. Penn Apr. 14, 2009).

⁴³ See *Designworks Homes, Inc. v. Thomson Sailors Homes, L.L.C.*, 9 F.4th 961, 963 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 2888 (2022); *Rottlund Co. v. Pinnacle Corp.*, 452 F.3d 726, 729 (8th Cir. 2006); *Nelson Design Grp., LLC v. Puckett*, No. 3:07CV00177 BSM, 2009 WL 2254902, at *1 (E.D. Ark. July 28, 2009).

⁴⁴ Greenberg, *supra* note 2, at 59.

⁴⁵ *Id.* at 58.

⁴⁶ *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093 (7th Cir. 2017).

⁴⁷ *Id.*

⁴⁸ *Design Basics, LLC v. Signature Constr., Inc.*, 994 F.3d 879, 882 (7th Cir. 2021).

⁴⁹ *Id.*

doctrine, which allows for the use of copyrighted material as long as the material is used in a reasonable way—such as for educational or critical purposes.⁵⁰ Another doctrine, *scènes à faire*, provides that copyright protection is not available for parts of a work that are indispensable or customary to a work of a certain kind.⁵¹ Essentially, “functional aspects” of a work, or elements that are so necessary that they represent the underlying idea of a work, are not protected under copyright statutes.⁵²

A third related affirmative defense is the merger doctrine, which states that copyright protection does not extend to a work that encompasses the singular way to express or represent a certain idea.⁵³ In some situations, the expression, or the work, merges with the underlying idea itself.⁵⁴ To determine whether a defendant has a successful merger defense, the question is whether the work includes elements that can be separated from the “utilitarian aspects” of the underlying idea.⁵⁵ For example, in *Yankee Candle Co. v. Bridgewater Candle Co.*, the First Circuit held that candles which displayed pictures of natural works, such as flowers and fruits, on their label were not protected from infringement by a rival candle seller because there was “only one way to express the idea of these fruits and flowers: by depicting their likeness.”⁵⁶ A fourth defense is public domain, where a copyrighted work loses its protection when the work enters the public domain, or where the work contains features that are in the public domain.⁵⁷ Another defense is the de minimis use defense, where a plaintiff is required to demonstrate both that the alleged infringer copied a “protected expression” from the copyrighted work and that the “copying” was substantial.⁵⁸ The court in *Designworks* hinted that some of these defenses might be available to the defendants should they choose to bring them.⁵⁹ However, had the court correctly analyzed § 120, the other defenses would be irrelevant to the case’s outcome.

⁵⁰ COPYRIGHT LITIGATION HANDBOOK § 13:24, Elements of Fair Use (2d ed.).

⁵¹ *Id.* § 13:23, Scenes à faire Doctrine.

⁵² *Id.*

⁵³ *Id.* § 13:22, Merger Doctrine (idea/concept).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 259 F.3d 25, 35 (1st Cir. 2001). The First Circuit noted that the merger doctrine is usually applied “where the idea and expression are of items found in nature, or are found commonly in everyday life.” *Id.* at 36. For the candle labels to constitute copyright infringement, the rival candle seller would have to show that the photographs used were “nearly identical” to the original seller’s. *Id.*

⁵⁷ COPYRIGHT LITIGATION HANDBOOK, *supra* note 50, at § 13:19.

⁵⁸ *Id.* § 13:33, De Minimis Use.

⁵⁹ *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, 9 F.4th 803, 810–11 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 2888 (2022).

IV. INSTANT DECISION

In *Designworks*, the Eighth Circuit concluded that the floorplans drawn by the defendant real estate companies constituted “technical drawings” or “architectural works,” and thus were not “pictorial representations.”⁶⁰ Effectively, the court held that § 120(a) did not offer a copyright infringement defense to those who “generate and publish” floorplans because the floorplans were not pictorial representations.⁶¹ The court based its holding on new arguments at the appellate level.⁶²

The court first looked to the text of the statute itself.⁶³ The court stated that, at first glance, it was plausible that the sketched floorplans fit within the dictionary definition of “picture,” which is defined as “an individual painting, drawing, or other representation on a surface, of an object or objects.”⁶⁴ However, the court also examined the “statutory context” of the definition, including the surrounding sentences, provisions, and even the entire statute itself.⁶⁵ Looking at copyright statutes broadly, the court believed that Congress would have expressly included architectural floorplans in § 120, rather than merely lumping them in with “pictures,” if it wanted to protect such works.⁶⁶ For support, the court pointed to § 101, which specifically provides that “pictorial, graphic and sculptural works include...technical drawings, *including architectural plans*.”⁶⁷ The inclusion of these works in § 101, the court noted, suggests that Congress would have added “technical drawings” and “architectural plans” to § 120 if it thought they fit.⁶⁸ In other words, the court determined that § 120 protected work “artistic” in nature—i.e., “pictures, paintings, photographs and other pictorial representations of a work”—but it concluded that the Defendants’ floorplans were more *technical and functional* than artistic.⁶⁹ Thus, the court ultimately drew a line between art and function, and implicitly between “works” and “representations,” and held that the floorplans fell outside the scope of § 120.⁷⁰

The court also concluded that, because § 120(a) applies only to works created when the building where the work is “embodied” is visible from or located in a public area, the protections did not extend to floorplans

⁶⁰ *Id.* at 807.

⁶¹ *Id.* at 811.

⁶² *Id.* at 806–07.

⁶³ *Id.* at 806.

⁶⁴ *Id.* at 807 (quoting OXFORD ENGLISH DICTIONARY 784 (2d ed. 1989)).

⁶⁵ *Id.*

⁶⁶ *Id.* at 807–10.

⁶⁷ 17 U.S.C. § 101.

⁶⁸ *Id.*

⁶⁹ *Id.* at 808.

⁷⁰ *Id.* at 809–10.

because one must usually have access to the inside of a building to sketch a floorplan—and thus they do not constitute work viewable from a public place.⁷¹

For support, the Eighth Circuit highlighted legislative history related to the issue, including a report from the House of Representatives on the AWCPA.⁷² According to the court, this report indicated that Congress *considered* the express inclusion of floorplans in § 120(a) but ultimately concluded that floorplans do not fall within its scope of protection.⁷³

Lastly, the court discussed the National Association of Realtors' amicus brief filed on behalf of the Defendants.⁷⁴ The brief focused on § 120(b), which allows the owners of buildings with copyrighted architectural works to "alter or destroy" the work *without* consent of the copyright owner, and concluded that property owners similarly should not be required to obtain consent to draw floorplans.⁷⁵ The brief extensively highlighted the potential practical implications of requiring individuals to obtain permission from copyright owners just to make floorplans like those at issue.⁷⁶ The Eighth Circuit acknowledged these concerns but ultimately found the arguments unpersuasive, stating its task "is not a free-ranging search for the best copyright policy, but rather depends solely on statutory interpretation."⁷⁷ The court reversed the trial court's grant of summary judgment for the Defendants and stated that § 120(a) is not an available defense to a copyright infringement claim based on production and publication of floorplans of a copyrighted architectural work.⁷⁸

V. COMMENT

The Eighth Circuit's decision in *Designworks* has far-reaching implications. In holding that § 120 does not provide a defense to copyright

⁷¹ *Id.*

⁷² *Id.* (citing H.R. REP NO. 101-735, at 22 n.50). The report notes that "[t]he American Institute of Architects (AIA) proposed an amendment to section 120(a) prohibiting pictorial representations made in order to further the unauthorized design and construction of a substantially similar architectural work." *Id.* "Though that aspect of the report didn't mention floorplans and the like explicitly, it certainly appears that their unauthorized production was the source of the AIA's concern." *Id.* "The report then notes that the amendment was unnecessary because it wouldn't matter how an infringing work was built (with or without unlawfully copied floorplans) and because the proposal might 'interfere with scholarly and noncompetitive analysis of architectural works.'" *Id.*

⁷³ *Id.* at 810.

⁷⁴ *Id.* at 811.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 811–12.

infringement claims based on the creation of floorplans of architectural works, the Eighth Circuit has set the stage for increased litigation and decreased efficiency in the real estate and property development industries. This case provides a green light for copyright trolls to bring copyright infringement claims at an increased rate, with the knowledge that the statute does not offer protection for homeowners, real estate agents, appraisers, assessors, and others who use generate floorplans. Most individuals who undertake the alteration of a building or sale of property rely on floorplans for assistance.⁷⁹ On its face, it may seem rather simple to require real estate companies and property owners to pay for the right to use these floorplans just as they would for any other copyright-protected work. But this requirement places real hurdles on those in the property market and tramples the basic tenets of property law, which will in turn affect more than just copyright protection for a floorplan.

A. Court's Analysis

The Eighth Circuit's opinion directly conflicts with accepted tenets of U.S. property law and sound policy, employing an analysis that is contradictory to principles of statutory construction.

1. The Text

The Eighth Circuit began its analysis by looking at the plain text of 17 U.S.C. § 120(a).⁸⁰ The court admitted that the Defendants may have correctly asserted that floorplans fall within the dictionary definition of "picture."⁸¹ The court went on to state, however, that the floorplans should not be considered pictures because the statutory language must be interpreted within its statutory context.⁸² This type of analysis led to some confusing reasoning and a bizarre outcome. Citing the Supreme Court, the Eighth Circuit noted that words in a statute "may or may not extend to the outer limits of [their] definitional possibilities."⁸³ But, as the Eighth Circuit acknowledged in the sentence immediately preceding this citation, no stretching or extending the definition of "picture" to its "outer limits" is necessary in these cases.⁸⁴ The court specifically asserted that floorplans

⁷⁹ Brief for the Nat'l Ass'n of Realtors as Amicus Curiae Supporting Appellees, *Columbia House of Brokers Realty, Inc., et al.*, 9 F.4th 803 (No. 19-3608) at *15–16 (8th Cir. 2021).

⁸⁰ *Designworks*, 9 F.4th at 806.

⁸¹ *Id.* at 806–07 (defining "picture" in accordance with the Oxford English Dictionary as "[a]n individual painting, drawing, or other representation on a surface, of an object or objects.>").

⁸² *Id.* at 807.

⁸³ *Id.* (quoting *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006)).

⁸⁴ *Id.* at 807.

may not fit as perfectly into the statutory framework as a drawing of the outside of a house, but it conceded that they could fit nonetheless.⁸⁵ Therefore, the sketched floorplans at issue in *Designworks* fit squarely within the broad definition of a picture and nothing in the provision's "statutory context" suggests that § 120(a) should *not* extend to floorplans.⁸⁶

The court rested its conclusion in *other* provisions of the Copyright Act, arguing that Congress could have more explicitly distinguished floorplans from other works rather than including them as "pictures."⁸⁷ Specifically, the court pointed to the definition of "pictorial, graphic, and sculptural works" in § 101.⁸⁸ In this definition, "technical drawings, including architectural plans," are included as "pictorial, graphic, and sculptural works."⁸⁹ The court noted that technical drawings/architectural plans are used in the definition of a "work of visual art."⁹⁰ The court stated, without support, that floorplans could be better categorized as "technical drawings" or "architectural plans" than as "pictures."⁹¹ However, no definition of "technical drawings" or "architectural plans" is ever offered in the opinion or the statute in question.⁹² In fact, concrete definitions of this category of work are virtually non-existent in relevant case law. Yet, the court used this unsupported assertion as "evidence" that Congress had the ability to better define floorplans but chose not to.⁹³

Even if the floorplans were considered technical drawings, the terms "technical drawings/architectural plans" are used in the definition of "pictorial, graphic and sculptural works."⁹⁴ The terms' inclusion suggests that they should also be considered "pictorial representations," or an "architectural work," as the language is nearly identical, using "pictorial" in both §§ 101 and 120(a).⁹⁵

And if, for the sake of argument, technical drawings and architectural plans are not pictorial representations, the fact that floorplans were not better described in the statutes implies just as strongly that Congress considered them "pictures" or "pictorial representations," rather than

⁸⁵ *Id.*

⁸⁶ *Id.* at 807–08.

⁸⁷ *Id.*

⁸⁸ *Id.* at 807.

⁸⁹ *Id.*; 17 U.S.C. § 101.

⁹⁰ 17 U.S.C. § 101.

⁹¹ *Designworks*, 9 F.4th at 807.

⁹² *Id.*; 17 U.S.C. § 101.

⁹³ *Designworks*, 9 F.4th at 807–08.

⁹⁴ 17 U.S.C. §§ 101, 120(a).

⁹⁵ *Id.*

“technical drawings” or “architectural plans.”⁹⁶ In fact, this is a far more likely conclusion because the floorplans at issue fit within the dictionary definition of “picture” or “pictorial representation” and courts interpret them as such.⁹⁷ The Eighth Circuit ignored its prior precedent and the fundamental principle of statutory construction that the plain language of the text is conclusive.⁹⁸ The Eighth Circuit stands alone in its conclusion and has thus created an unnecessary circuit split on the issue.⁹⁹

Basic floorplans like those in *Designworks*, and plans that constitute technical drawings or architectural plans, depict buildings and the layout of the interior. In technical terms, both basic floorplans and more detailed blueprints could fit within the definition of “picture” or “pictorial representation.”¹⁰⁰ The Plaintiffs in *Designworks* argued that floorplans should be considered “graphic,” rather than “pictorial,” works because these floorplans could be used to construct an infringing architectural work.¹⁰¹ This argument, however, mischaracterizes the floorplans at issue.¹⁰² Even if the Eighth Circuit is correct, and the different intent and detail behind a type of drawing distinguishes “function” from “art,” its characterization of the floorplans is incorrect. “Architectural plans” are those created in order to guide the construction of an architectural work.¹⁰³ Floorplans, like those in *Designworks*, are not created to construct an architectural work, but instead to offer potential buyers and renters a view of an *already constructed* architectural work.¹⁰⁴ Because the work is

⁹⁶ See, e.g., *Sorenson v. Wolfson*, 96 F. Supp. 3d 347, 365 (S.D.N.Y. 2015); *Morgan v. Hawthorne Homes, Inc.*, No. CIV.A. 04-1809, 2009 WL 1010476, at *12 (W.D. Pa. Apr. 14, 2009).

⁹⁷ *Sorenson*, 96 F. Supp. 3d at 365; *Morgan*, 2009 WL 1010476 at *12; *Kipp Flores Architects, LLC v. AMH Creekside Dev., LLC*, No. SA-21-CV-01158-XR, 2022 WL 4352480 at *8 (W.D. Tex. Sept. 16, 2022).

⁹⁸ *United States v. Big Crow*, 327 F.3d 685, 688 (8th Cir. 2003) (quoting *United States v. Long Elk*, 805 F.2d 826, 828 (8th Cir. 1986)).

⁹⁹ See *Sorenson*, 96 F. Supp. 3d at 365; *Morgan*, 2009 WL 1010476 at *12; *Kipp Flores Architects*, 2022 WL 4352480 at *8. The Eighth Circuit asserts that it does not feel the need to address the split between it and the courts in *Sorenson* and *Morgan*, because the courts in those cases did not address the same arguments made by plaintiffs. However, as addressed in this case note, the arguments and analysis relied on by the Eighth Circuit is insufficient to justify the split, and the arguments in *Designworks* do not overcome a textual analysis of § 120(a). *Designworks*, 9 F.4th at 810.

¹⁰⁰ *Designworks* 9 F.4th at 807–08.

¹⁰¹ Brief for Plaintiff-Appellants at 36–37, *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, 9 F.4th 803 (8th Cir. 2021).

¹⁰² *Designworks*, 9 F.4th at 807.

¹⁰³ *What are Architectural Plans and How Does it Affect Permit Expediting?*, PERMIT ADVISORS. <https://www.permitadvisors.com/resource/what-are-architectural-plans/> [https://perma.cc/S2UW-H93P] (last visited Mar. 28, 2023).

¹⁰⁴ *Designworks*, 9 F.4th at 805–06.

already constructed, the basic floorplans are created merely for visualization purposes and should fall within the protection of § 120(a) as "pictures" or "pictorial representations" of the architectural work.¹⁰⁵

Despite this distinction, the Eighth Circuit concluded that these floorplans are not pictures or pictorial representations because they are "functional" and not "artistic."¹⁰⁶ Under the court's reasoning, the floorplans were created for a "functional" purpose, such as selling the homes, and therefore did not constitute art.¹⁰⁷ At the very least, this portion of the opinion demonstrates a short-sighted view of art itself. The floorplans were undoubtedly created for a functional purpose, but many pieces of art are created for functional purposes.¹⁰⁸ Some examples include stained-glass windows in a church or artistic signs on an interstate to show travelers they have entered a new state. Each of these things are considered art, but they also serve a functional purpose. Indeed, copyright protected art is protected even when the art is put to a functional purpose.¹⁰⁹ Consequently, this art maintains its copyright infringement exemption even when put to functional use.

For an example of a more appropriate interpretation of § 120, the Eighth Circuit need look no further than a case decided a year after *Designworks*. In *Kipp Flores Architects v. AMH Creekside Development*, the Western District of Texas directly disagreed with the Eighth Circuit.¹¹⁰ In this case, a real estate developer made renderings and floorplans of architectural works—blueprints of several residential homes—without including the architect's copyright information.¹¹¹ The *Kipp* court found that floorplans were in fact pictorial representations covered under § 120(a).¹¹² It invoked the same argument as the Eighth Circuit in *Designworks* but highlighted that the "plain, obvious, and rational meaning" of the language of a statute should be preferred over an interpretation that would require a deep study of the statute.¹¹³ Unlike the Eighth Circuit, the *Kipp* court found that art and function are not completely separate or exclusive, particularly in reference to materials

¹⁰⁵ 17 U.S.C. § 120(a); *Sorenson v. Wolfson*, 96 F. Supp. 3d 347, 365 (S.D.N.Y. 2015).

¹⁰⁶ *Designworks*, 9 F.4th at 808.

¹⁰⁷ *Id.* at 808–09.

¹⁰⁸ Tori Campbell, *Functional Art? Art, Design and the Fluidity of Genres*, ARTLAND MAGAZINE, <https://magazine.artland.com/functional-art-art-design-and-the-fluidity-of-genres/> [<https://perma.cc/K3KM-V7JZ>] (last visited Mar. 28, 2023).

¹⁰⁹ *Brandir Intern., Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142, 1147 (2d Cir. 1987).

¹¹⁰ No. SA-21-CV-01158-XR, 2022 WL 4352480 at *8 (W.D. Tex. Sept. 16, 2022).

¹¹¹ *Id.* at *1–2.

¹¹² *Id.* at *8.

¹¹³ *Id.* (quoting *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925)).

used for marketing.¹¹⁴ In *Kipp*, the court similarly looked to congressional intent, but it noted that Congress adopted the AWCPA under the assumption that “[a]rchitecture is a form of artistic expression that performs a significant societal purpose.”¹¹⁵

The Eighth Circuit also misread the portion of the provision that protects work when “the building in which the work is embodied is located in or ordinarily visible from a public place.”¹¹⁶ The court believed this language excluded floorplans from § 120(a) because one usually would need access to the interior of a building to create a floorplan.¹¹⁷ But that is not what the statute says. Rather, the statute provides only that the “*building* in which the work is embodied” must be “located or ordinarily visible from a public place.”¹¹⁸ Nothing in the statute suggests that the *work itself* must be visible from a public place.¹¹⁹ On its face, § 120(a) should protect the Defendants’ floorplans because the buildings in which the floorplans were contained are in fact visible from a public place.¹²⁰ This was a main point in *Sorenson*, where the court found that § 120(a) protected the floorplans at issue particularly because the building containing the depicted apartment was visible from a public place.¹²¹ By reading the word “building” out of the statute, the Eighth Circuit runs afoul of fundamental canons of statutory construction, most notably the “canon against surplusage.”¹²² This canon advises that every word in a statute should be read and interpreted in such a way that would give each word meaning.¹²³ The court did the exact opposite in its analysis of § 120(a) by holding that the work itself, not the building, must be visible from a public place.¹²⁴

The Eighth Circuit claimed to take a textual approach, but its analysis cannot be supported by any rational reading of the text. It flouts basic statutory construction canons and strips defendants like those in

¹¹⁴ *Id.*

¹¹⁵ *Id.* (quoting H.R. Rep. No. 101-735, at 6936, 6953 (1990)).

¹¹⁶ 17 U.S.C. § 120(a).

¹¹⁷ *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, 9 F.4th 803, 810 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 2888 (2022).

¹¹⁸ 17 U.S.C. § 120(a) (emphasis added).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Sorenson v. Wolfson*, 96 F. Supp. 3d 347, 365 (S.D.N.Y. 2015).

¹²² 82 C.J.S. Statutes § 416.

¹²³ “It’s a result that defies yet another of our longstanding canons of statutory construction—this one, the rule that we must normally seek to construe Congress’s work ‘so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant.’” *Ysleta Del Sur Pueblo v. Texas*, 142 U.S. 1929, 1939 (2022) (citing *Corley v. United States*, 556 U.S. 303, 314 (2009)).

¹²⁴ *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, 9 F.4th 803, 810 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 2888 (2022).

Designworks of an affirmative defense to which they are statutorily entitled.¹²⁵

2. Legislative History

The Eighth Circuit discussed legislative intent and the legislative history of the relevant statute, but it qualified that the text of the statute should be the main source of a court's interpretation.¹²⁶ Contrary to this qualification, the court described several pieces of legislative history concerning § 120(a) which offer little to no support of its textual analysis.¹²⁷ The court highlighted the American Institute of Architects' ("AIA") proposed amendment, where the group sought to prohibit "pictorial representations made in order to further the unauthorized design and construction of a substantially similar architectural work."¹²⁸ Without support, the court jumped to the conclusion that the AIA was most concerned with the production of floorplans.¹²⁹ And even though the court acknowledged that the amendment was not adopted because Congress feared it would prohibit the "scholarly and noncompetitive analysis of architectural works," the court asserted that Congress did not intend for § 120(a) to cover floorplans.¹³⁰ Not only did the court's reliance on legislative history run afoul to canons of statutory construction, but its use of legislative history was misguided altogether.¹³¹

The court offered no real concrete evidence for its assumptions—which were based on a non-adopted amendment proposed by a third-party group—but discredited one of the Defendant's arguments for doing the same thing.¹³² The Eighth Circuit assumed that the AIA was concerned primarily with floorplans as a work that "further[s] the unauthorized design and construction" of similar works of architecture, which confuses the purpose of these types of sketched floorplans and actual "architectural plans" such as construction blueprints.¹³³ A typical "architectural work" or "blueprint" has far more detail than the sketched floorplans that real

¹²⁵ *Id.* 809–10.

¹²⁶ *Id.* at 810.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* (quoting H.R. Rep. 101-735, at 22 n.50 (1990)).

¹³¹ *United States v. Big Crow*, 327 F.3d 685, 688 (8th Cir. 2003). (quoting *United States v. Long Elk*, 805 F.2d 826, 828 (8th Cir. 1986) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 64 L.Ed.2d 766 (1980)).

¹³² *Designworks*, 9 F.4th at 810–11.

¹³³ *Id.* at 810 (quoting H.R. Rep. 101-735, at 22 n.50 (1990)).

estate agents, homeowners, and the Defendants use.¹³⁴ A typical floorplan, such as the ones at issue, are not created in order for one to build a house based on the plans. They serve the limited functional purpose of allowing a viewer to visualize the layout of a home, not to offer the full dimensions and knowledge necessary for a builder to construct a new home from the floorplans alone.¹³⁵ In *Designworks*, the floorplans were created to help sell the already constructed homes, not to build new ones.¹³⁶ Nothing suggested that new houses would be built from these floorplans.¹³⁷ Thus, the concern the Eighth Circuit so confidently claimed the AIA held dear is irrelevant to this case.

3. “Other” Defenses

As the Defendants argued to the court, if § 120(a) does not protect the sketched floorplans, inconsistent and absurd results will follow.¹³⁸ For example, the Defendants noted that homeowners will not have the freedom to draw outlines and floorplans of their own homes, which is a common occurrence when a homeowner wants to remodel or have the home appraised.¹³⁹ These are very real concerns. Floorplans like those in *Designworks* are used in a multitude of contexts in the real estate industry.¹⁴⁰ Assessors often draw floorplans to aid in their estimation, homeowners and builders draw floorplans for remodeling visualization, and real estate agents and landlords use floorplans to show prospective buyers or renters the layout of a house or apartment.¹⁴¹ The court effectively dismissed these practical concerns by arguing that other copyright infringement affirmative defenses may apply.¹⁴² The opinion specifically mentioned the fair-use doctrine as a potential defense and suggested that this defense should be litigated on remand.¹⁴³

¹³⁴ *The Difference Between ‘Planning’ and ‘Detailed’ Drawings*, TOM SPRIGGS ARCHITECT LTD. (2022), <https://tomspriggs.com/the-difference-between-planning-and-detailed-drawings/> [<https://perma.cc/G6JH-WUU4>]; *Understanding Architectural Drawings*, CARLILE GROUP, <https://www.carlile-group.com/single-post/2017/06/12/understanding-architectural-drawings> [<https://perma.cc/9P3T-93WY>] (last visited Mar. 28, 2023).

¹³⁵ *Designworks*, 9 F.4th at 808.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 810.

¹³⁹ *Id.*

¹⁴⁰ *Floor Plan*, CEDREO (2022), <https://cedreo.com/floor-plans/> [<https://perma.cc/K9EH-32AK>].

¹⁴¹ *Id.*

¹⁴² *Designworks*, 9 F.4th at 810.

¹⁴³ *Id.* at 811.

The use of other affirmative defenses, like the fair use doctrine, does not offer the same protection as § 120 from copyright infringement claims.¹⁴⁴ Other copyright infringement affirmative defenses are of an ad hoc, case-by-case nature. One would have to litigate each claim and the court would need to apply these ad hoc defenses, like fair use, merger, or "*scenes a faire*," for each instance of a drawn floorplan.¹⁴⁵ By incorrectly holding that an affirmative defense, rather than § 120(a)'s exemption, applies to cases like *Designworks*, the court opens itself up to a multitude of nearly identical and drawn-out copyright challenges based on sketched floorplans.

B. Implications

The Eighth Circuit's holding that § 120(a) does not protect sketched floorplans from copyright infringement suits will have many effects. This decision is a victory for copyright trolls and opportunistic architecture firms, but it will likely have a chilling effect on value-increasing development in the real estate industry while also placing a greater burden on the court system.

1. Trolls, Economic Chilling, and Judicial Economy

First, the court has opened the floodgates for an onslaught of copyright infringement cases based on situations like that in *Designworks*, which, as noted above, is very common.¹⁴⁶ Even if the court on remand were to find that fair-use or another affirmative defense applied to this situation, the Eighth Circuit's refusal to apply statutory protection to these floorplans essentially means that every case must be brought before the court so that an affirmative defense can be analyzed. The other copyright infringement defenses are ad hoc doctrines which will require judicial resources to analyze each element of any copyright infringement claim, regardless of how weak, and consider whether the claim is identical to one previously brought.

For copyright trolls, this decision is a resounding victory. Now that floorplans are unprotected by § 120, trolls may litigate to their hearts desire or threaten litigation on defendants who do not have the resources to bring their defenses to court. On the other side of the coin, for the countless people who participate in the real estate market, this decision is a striking defeat. With the constant threat of litigation, many potential property owners, sellers, buyers, landlords, and other real estate professionals will simply choose not to fully exercise their rights to enjoy their property as

¹⁴⁴ 17 U.S.C. § 120.

¹⁴⁵ *Campbell v. Acuff-Rose*, 510 U.S. 569, 577–78 (1994).

¹⁴⁶ *Greenberg*, *supra* note 2, at 58.

they see fit.¹⁴⁷ For example, in a copyright infringement suit brought by Design Basics, the court awarded the defendants attorney’s fees in the amount of \$193,875.50.¹⁴⁸ The defendant’s claimed professional expenses on the litigation were \$231,362.50.¹⁴⁹ Property owners could face substantial litigation costs to vindicate their property rights in court. While the court held against Design Basics this time and awarded hefty attorney’s fees to the defendants, most potential defendants—particularly those who are not sophisticated litigants—would likely be unwilling to incur this much cost by taking the risk to litigate a copyright claim.¹⁵⁰ This failure to litigate is a negative outcome because improving and selling real estate could become far more complicated, as owners must find and pay for the copyright to the plans of their home. The potential difficulties would likely deter future home improvements.

2. Property Rights

Beyond a mere chilling effect on industry, the decision in *Designworks* directly conflicts with the basic tenets of U.S. property law. Basic rights accompany real property ownership.¹⁵¹ Particularly, property owners have the right to “possess, use and dispose of [their property],”¹⁵² and to exclude others.¹⁵³ A requirement that one pay the copyright owner merely to draft or use a floorplan places decisions about the use of property firmly in the hands of the copyright owner, infringing upon the *property* owner’s exclusive right to use the property.¹⁵⁴

Copyright owners are not required to allow others to use their copyrighted work.¹⁵⁵ As the amicus brief describes, there are various challenges to determining the scope of a floorplan’s copyright protection

¹⁴⁷ *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436–36 (1982) (citing *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)).

¹⁴⁸ *Design Basics v. Signature Constr.*, No. 16-cv-1275, 2020 U.S. Dist. LEXIS 261963, at *6 (C.D. Ill. Aug. 3, 2020).

¹⁴⁹ *Id.* at *5.

¹⁵⁰ *Id.* at *4.

¹⁵¹ *Kaiser*, 444 U.S. at 179–80.

¹⁵² *Loretto*, 458 U.S. at 435 (citing *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)).

¹⁵³ *Kaiser*, 444 U.S. at 179–80.

¹⁵⁴ Brief for the Nat. Ass’n of Realtors as Amicus Curiae Supporting Appellees, at 11, *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, 9 F.4th 803 (8th Cir. 2021).

¹⁵⁵ *Id.* at 11–12 (citing *In re Indep. Serv. Organizations Antitrust Litig.*, 203 F.3d 1322, 1329 (Fed. Cir. 2000)).

and the identity of the copyright holder.¹⁵⁶ While these obstacles will have a similar chilling effect on productivity and industry, they are also a direct infringement on the freedom and rights of property owners.¹⁵⁷ The owners no longer have their direct property rights to use their property as they see fit. Instead, the right to use their property in many ways is directly dependent on whoever owns the copyright to their property, as their property is categorized as an "architectural work."

For example, a homeowner chooses to sell their home and wants to hire an assessor or real estate agent to draft simple floorplans for an online listing. This homeowner would need to identify the original architect or other copyright holder for their home design, obtain permission to draft sketches of the home, and pay them for the right to use their copyrighted "material." As noted in the amicus brief, finding the copyright holder is often a difficult undertaking, and, even if the holder's identity is uncovered, they may simply refuse to allow the homeowner to utilize their copyrighted material. This theoretically bars the homeowner from creating sketches, using the blueprints, or making any other visual representations of the inside of the home.¹⁵⁸ A refusal to allow access to the copyright could significantly burden real estate sales as well, perhaps constituting an impermissible restraint on alienation of real property, insofar as it inhibits the homeowner from being able to advertise the home and sell the property.¹⁵⁹ The idea that real property should be freely transferable, and that the alienability of property is a boon to economic prosperity, is an important policy advanced in American property law.¹⁶⁰ While a homeowner could take the case to court and have the restraint deemed unreasonable, this course of action would again lead to expensive judicial proceedings and further delay the alienation of the home, a disfavored outcome under both the idea of judicial economy and American property law.

The court made light of these hypothetical scenarios, saying that it is not certain that owners require floorplans to undertake property improvement projects (i.e., it does not mention the use of floorplans in the sale of a home). However, it is of no consequence whether the floorplans are necessary in all contexts or not. Allowing a third party to throttle the actual property owner's basic rights is a direct affront to the tenets of property law and is sets an unfortunate precedent in the Eighth Circuit.

¹⁵⁶ Note the existence of "thin" copyright protection described above, *supra* note 20. Brief for the Nat. Ass'n of Realtors as Amicus Curiae Supporting Appellees, *supra* note 154, at 13–14.

¹⁵⁷ *Id.* at 15–16 (citing to *Javelin Invs., LLC v. McGinnis*, No. CIV A H-05-3379, 2007 WL 781190 at *5–6 (S.D. Tex. Jan. 23, 2007)).

¹⁵⁸ *Id.* at 13–14.

¹⁵⁹ Restraints on alienation of property are disfavored in the law. 61 Am. Jur. 2d Perpetuities, Etc. § 88.

¹⁶⁰ *Id.*; *Peavey v. Reynolds*, 946 So. 2d 1125, 1126 (Fla. Dist. Ct. App. 2006).

The Eighth Circuit displayed a willingness to trade individual property rights for the rights of copyright owners. It is likely that the court's preference for copyright owners over property owners will be contested in the future, and *Designworks* sets a grim tone for those on the side of individual property rights.

VI. CONCLUSION

The Eighth Circuit's decision in *Designworks Homes, Inc. v. Columbia House of Brokers Realty* is a victory for those considered to be copyright "trolls," as it provides a basis for a significant amount of litigation. The decision will not only put the judicial system under further strain, even if "other" defenses are available, but it will also impede the daily lives and work of average homeowners, real estate agents, builders, and appraisers. Copyright owners have a right to protect their materials and original work from infringement and unfair use. However, the Eighth Circuit's statutory interpretation and final assertion that copyright holders should be allowed to infringe on property rights and the efficient use of one's private property is an improper application of copyright law. Of course, the easiest way to address this issue would be for an amendment to § 120, clarifying the inclusion of floorplans in the exempted pictorial representations. Moving forward, however, litigants should bring forth defenses mentioned above, with the inclusion of an argument that a third party holding a copyright interest in one's home essentially amounts to an unreasonable restraint on alienation. If copyright law offers no reasonable statutory defenses, then, for a myriad of policy and efficiency reasons, litigants should turn to property law, the realm of law that the Eighth Circuit definitively overlooks in *Designworks*, to keep the trolls out of the living room.