No. 21-1217

IN THE

Supreme Court of the United States

COLUMBIA HOUSE OF BROKERS REALTY, INC., D/B/A HOUSE OF BROKERS, INC., D/B/A JACKIE BULGIN & ASSOCIATES, ET AL.,

Petitioners,

v.

DESIGNWORKS HOMES, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF COPYRIGHT SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are copyright law scholars. They file this brief because they are convinced that the Eighth Circuit's decision in this case misunderstands the subject matter of architectural works. *Amici* are:

Zachary L. Catanzaro, Assistant Professor of Law at the St. Thomas University College of Law.

Brian L. Frye, Spears-Gilbert Professor of Law at the University of Kentucky J. David Rosenberg College of Law.

Robert Heverly, Associate Professor of Law at Albany Law School.

Jason M. Schultz, Professor of Clinical Law at NYU School of Law.

Rebecca Tushnet, Frank Stanton Professor of the First Amendment at Harvard Law School.

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[1] Counsel of record for each of the parties received timely notice of the intent to file this brief, and all parties have provided written consent to its filing. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

René Magritte famously painted a pipe with the caption, in French, "This is not a pipe."[2] His point was that his painting was not itself a pipe, but merely a representation.

Like Magritte's painting, a floor plan is not a home. The Copyright Act draws a careful distinction between a floor plan for a home and the home itself. The former falls in the category of pictorial, graphic, and sculptural works,[3] and a well-developed body of case law[4] limits the scope of the author's exclusive rights in such a work to the extent that it's a useful article—as a home surely is.

An architectural work is the design of a building, and a home is an embodiment of an architectural work. But section 120(a) of the Copyright Act states, in no uncertain terms, that the copyright in an architectural work doesn't include the right to prevent others from making pictorial representations of the work. So floor plans of a house can't infringe an architectural

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[2] René Magritte, LA TRAHISON DES IMAGES (CECI N'EST PAS UNE PIPE) (1929); *see* https://collections.lacma.org/node/239578.

[3] 17 U.S.C. § 102(a)(5).

[4] *See, e.g., Star Athletica, L.L.C.* v. *Varsity Brands, Inc.,* 580 U.S. ___, 137 S. Ct. 1002 (2017); *Brandir Int'l, Inc.* v. *Cascade Pac. Lumber Co.,* 834 F.2d 1142 (2d Cir. 1987); *see also, e.g.,* Letter from Copyright Review Board, U.S. Copyright Office, to Andrew Epstein, https://copyright.gov/rulings-filings/review-board/docs/log-cabin.pdf (May 25, 2018) (affirming refusal to register façade of log cabin as a pictorial, graphic, and sculptural work on the ground that it was a useful article without non-useful design elements that could be copyrighted).

work copyright, because creating those plans isn't contrary to any exclusive right held by the author.

This all makes perfect sense. Congress was reluctant to grant copyright protection to buildings in the first place. It did so, begrudgingly, because such protection is compelled by the Berne Convention. In so doing, Congress made certain not to upset the limits that already applied to copyright protection for pictorial representations of architectural works.

Accordingly, copyright in an architectural work doesn't include the exclusive right to reproduce images of that building in any other medium, including a floor plan drawing. That's what section 120(a) says, and what it was intended to say.

ARGUMENT

I. The Copyright Act's protection of "architectural works" is required by the Berne Convention, but is distinct from any protection for architectural plans.

Copyright protects architectural works because the Berne Convention for the Protection of Literary and Artistic Works[5] requires it. The United States became a party to the Convention—a member of the Berne Union—on March 1, 1989, the effective date of the Berne Convention Implementation Act of 1988.[6]

The Convention defines the "literary and artistic works" it protects to include "works of . . . architec-

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[5] Sept. 9, 1886, as revised on July 24, 1971, and amended in 1979, S. Treaty Doc. No. 99-27 (1986) (hereinafter, Berne Convention).

[6] Pub. L. No. 100-568, 102 Stat. 2853.

ture," among other things.[7] Members of the Berne Union thus must protect the rights of authors in their architectural works.

The Berne Convention separately states that "works of applied art," including "illustrations, maps, plans, sketches and three-dimensional works relative to . . . architecture," are included within "literary and artistic works."[8] Under the Convention, then, the plans for an architectural work are a work of applied art "relative" to architecture, but are not themselves a work of architecture. In other words, the Berne Convention protects both representations of architecture and architectural works.

The Copyright Act makes the same distinction. Prior to adopting the Architectural Works Copyright Protection Act,[9] Congress tasked the Copyright Office with studying whether the Copyright Act should be further amended to implement the Berne Convention's requirements.[10] Consistent with the distinction made in the Convention, the Register's Report calls plans, diagrams, and the like "works related to architecture," while reserving the term "works of architecture" for "the actual structures—e.g., monuments and buildings."[11]

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[7] Berne Convention, *supra* n.5, art. 2, ¶ 1.

[8] *Id.*

[9] Pub. L. No. 101-650, tit. VII, 104 Stat. 5133 (1990).

[10] U.S. COPYRIGHT OFFICE, THE REPORT OF THE REGISTER OF COPYRIGHTS ON WORKS OF ARCHITECTURE, App. A (June 19, 1989) (hereinafter, REPORT OF THE REGISTER OF COPYRIGHTS).

[11] *Id.* at 2.

The Report recognized that works related to architecture were already "unequivocally protected" by the Copyright Act.[12] Indeed, the Copyright Act already expressly included "architectural plans" among the "technical drawings" that were within the category of pictorial, graphic, and sculptural works.[13] The Copyright Office thus focused on other questions, including whether copyright should allow an author of architectural plans "to prohibit the unauthorized construction of the work of architecture depicted therein."[14]

As the Report noted, cases at that time were "fairly consistent in refusing to extend copyright in architectural plans to encompass the structures depicted therein."[15] Because the Convention required protection for the structures, the Report noted that then-existing "U.S. law may well prove inadequate to fulfill the requirements of the Berne Convention."[16] One potential solution would be to create a new subject matter category for works of architecture—i.e., for the buildings themselves.[17] After receiving the Report, Congress enacted the Architectural Works Copyright Protection Act to "address the Register's concerns" about the adequacy of the Copyright Act's protection

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[12] *Id.* at 4.

[13] 17 U.S.C. § 101; Berne Implementation Act of 1988, Pub. L. No. 100-568, § 4(a)(1)(A), 102 Stat. 2853, 2854 (adding "architectural plans" to definition of "pictorial, graphic, and sculptural works").

[14] REPORT OF THE REGISTER OF COPYRIGHTS, *supra* n.10, at 4, 5.

[15] *Id.* at 220.

[16] *Id.* at 221.

[17] *Id.* at 223–24.

for "the constructed design of architectural structures."[18]

The Copyright Act thus defines an "architectural work" as the design *of a building*.[19] Accordingly, constructing a building could infringe the copyright in that architectural work.[20] That is what the Berne Convention requires, and what Congress understood it was doing:

> By creating a new category of protectible subject matter in new section 102(a)(8), and, therefore, by deliberately not encompassing architectural works as pictorial, graphic, or sculptural works in existing section 102(a)(5), the copyrightability of architectural works shall not be evaluated under the separability test applicable to pictorial, graphic, or sculptural works embodied in useful articles.[21]

Simultaneously, however, Congress chose not to remove architectural plans from the scope of pictorial, graphic, and sculptural works.[22] Congress knew that this choice would "raise questions regarding the relationship between copyright in the architectural work and copyright in plans and drawings."[23] Congress's

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[18] H.R. REP. NO. 101-735, at 4, 6 (1990).

[19] 17 U.S.C. § 101 ("An 'architectural work' is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings.").

[20] *See* 17 U.S.C. § 102(a)(8).

[21] H.R. REP. NO. 101-735, at 20.

[22] 17 U.S.C. § 101 (defining "pictorial, graphic, and sculptural works" to include "architectural plans").

[23] H.R. REP. NO. 101-735, at 19.

intent was "to keep these two forms of protection separate."[24]

II. Congress intended that section 120(a) clarify the scope of copyright in architectural works.

Congress found copyright in architectural works confusing and realized copyright owners and courts would probably also find it confusing.[25] In particular, Congress knew people would be confused about what copyright in an architectural work did and didn't protect. Congress was worried that people might misunderstand copyright in an architectural work to include the exclusive right to create images of a building as well.

So Congress made sure there could be no doubt that a pictorial representation of a building can't infringe the copyright in an architectural work by adding section 120(a), which provides:

> 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.[26]

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[24] *Id.*

[25] *See, e.g., id.* at 12 (observing that copyright experts disagreed about whether United States copyright law already protected architectural works, among other things).

[26] 17 U.S.C. § 120(a).

This of course makes perfect sense. A drawing isn't a building.

The language of section 120(a) is drafted as broadly as possible to cover any "pictorial representation" of an architectural work. That means any image, of any kind. Under the Copyright Act, a "pictorial" representation is any image copyright can protect:

> "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. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are

> capable of existing independently of, the utilitarian aspects of the article.[27]

Given the express mention of "architectural plans" in the Copyright Act's definition of pictorial, graphic, and sculptural works, it's no surprise that the Copyright Office specifically describes a "technical drawing" of an architectural plan as a "pictorial work."[28]

Indeed, the definitions in section 101 are controlling for uses in title 17.[29] And the definitions apply with equal force to "variant forms" of those terms.[30] Thus, when Congress referred to "pictorial representations" in section 120(a), after having defined pictorial, graphic, and sculptural works to include "technical drawings, including architectural plans," that meant there was no need expressly to mention architectural plans yet again. Instead, the failure to provide otherwise means that the term "pictorial representations" encompasses technical drawings, including architectural plans.

Again, this makes perfect sense. The design of a building is an architectural work. Architectural plans

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[27] 17 U.S.C. § 101.

[28] U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 926.1 (3d ed. 2021) (noting that to assert a claim in both "a technical drawing and the architectural work depicted therein," in addition to an application to register the architectural work, the applicant should file "a separate application to *register the technical drawing as a pictorial work*, even though the deposit copy(ies) for both applications may be the same") (emphasis added).

[29] 17 U.S.C. § 101 (stating that, "[e]xcept as otherwise provided in this title, as used in this title, the following terms and their variant forms" have the meanings that follow).

[30] *Id.*

for the building, however, are a pictorial, graphic, and sculptural work, and thus subject to all the limitations that apply to such works. Section 120(a) ensures that this doctrinal division is respected.

CONCLUSION

A painting is not a pipe. Floor plans are not a building. And an architectural work copyright can't prevent others from creating floor plans of a building.

The Court should grant the petition and reverse.

Respectfully submitted,

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