

Deconstructing the Blueprint for Infringement: Remedying Flawed Interpretations of the § 120(a) Exception to Architecture Copyrights

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INTRODUCTION

Drafting the Architectural Works Copyright Protection Act of 1990 (“AWCPA”) consisted of a bizarre hodgepodge of considerations.¹ Ostensibly, the goal of the Act was to bring the United States unquestionably into compliance with the Berne Convention for the Protection of Literary and Artistic Works,² which the United States had just recently joined, with as minimal an impact on U.S. law as possible. In reality, this goal—itself not without built-in tensions—was but one of several competing forces at play in the drafting process. The other forces generally fell into three camps. There were the proponents of preserving the interests and expanding the rights of America’s architects in one corner. In the opposite corner, with a seemingly outsized influence, were the proponents of the rights of America’s architectural photographers. Finally, and most abstractly, there were the proponents of preserving the elusive integrity of copyright law itself. As a testament to this elusiveness, the most active debates were fought not between the architects and photographers, but rather among America’s foremost copyright experts whose various normative frameworks led them to competing views on how best to facilitate the progression of the law.

While all views were considered, the final product is unsurprisingly flawed: an amalgamation of poorly assimilated concepts with rampant logical loopholes. The flaws are most evident in § 120, the scope of copyright protection for architecture. Section 120(a) provides an exception, common to nearly all Berne Union members,

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1. Architectural Works Copyright Protection Act, 17 U.S.C. §§ 101, 102(a), 120 (1990).

2. World Intell. Prop. Org [WIPO], *Berne Convention for the Protection of Literary and Artistic Works*, S. Treaty Doc. No. 99-27 (Sept. 9, 1886).

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allowing buildings to be replicated in other artists' two-dimensional works without violating the copyright of the building's architect.³ During the drafting process, while there was debate over the exact wording, there was little debate over whether to include this exception, as it seemed fairly innocuous and important for the endurance of the urban photography industry.⁴

In 2022, the U.S. District Court for the Western District of Texas interpreted this exception to allow a realtor to reproduce and distribute the blueprints of a single-family home for marketing purposes without the consent of its architect.⁵ As confounding a conclusion as this may seem to those well-versed in copyright law, it is actually not entirely unfounded in the text. This is due in part to an edit that was made during the drafting of the definition section of the Act to include "architectural plans" in the definition of "architectural works,"⁶ thus arguably extending the same exception from the exterior of constructed buildings to their blueprints. As such, in an effort to meet its Berne obligations and provide added copyright protection for America's architects, Congress may have inadvertently stripped architects of a right that they previously held.

Before the passage of the AWCPA, architectural blueprints were protected as "[p]ictorial, graphic, and sculptural works,"⁷ and were therefore protected against unauthorized reproduction in two-dimensional form. That said, these blueprints were not protected against construction of the buildings depicted in them because the buildings themselves were nearly always considered "useful articles," with few to no conceptually separable elements.⁸ This protection for blueprints was clarified and codified in the Berne Convention Implementation Act of 1988,⁹ which added "diagrams, models, and technical drawings, including architectural plans" to the definition of "[p]ictorial, graphic, and sculptural works."¹⁰ Substantively, the result of this amendment—that architectural plans that contained copyrightable elements could not be reproduced and distributed without the consent of the copyright owner—made no difference except to appease those concerned about the lack of explicit statutory language responsive to Berne Convention requirements. The real substantive change

3. 17 U.S.C. § 120(a).

4. Testimony from David Daileida, American Institute of Architects ("AIA") former Director: "The AIA has no desire to curtail the innocent activities of photography, painting, or other pictorial representation or display of architectural works for private purposes." *Architectural Design Protection: Hearing on H.R. 3990 and H.R. 3991 Before the H. Comm. on the Judiciary*, 101st Congress 111 (1990) [hereinafter *Hearing*] (statement of David Daileida, Former Director, AIA). Letter from Charles D. Ossola, American Society of Magazine Photographers ("ASMP") Counsel: "Removal of the photography exception will not effectively deter architects and builders intent upon copying the design of a building, but would instead prevent photographers from freely exercising their rights to choose the appropriate subject matter for their work." *Id.* at 197 (letter from Charles D. Ossola, Counsel, ASMP).

5. *Kipp Flores Architects, LLC v. AMH Creekside Dev., LLC*, No. SA-21-CV-01158-XR, 2022 WL 4352480 (W.D. Tex. Sept. 16, 2022).

6. 17 U.S.C. § 101.

7. *Id.*

8. *Id.*

9. Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

10. H.R. REP. NO. 101-735, at 11 (1990).

came a year later with the AWCPA, which created a new copyright subject matter category: “architectural works.” This category covers both plans and constructed works, thus protecting against the construction of buildings from protected plans.¹¹

It is important to note here that the AWCPA was not intended to replace the copyright protection in blueprints as “pictorial, graphic, and sculptural works,” nor was it meant to take precedence over that right. After the AWCPA, architectural blueprints are simultaneously protected both as “architectural works” and as “pictorial, graphic, and sculptural works.” These two forms of copyright protection bring with them different standards and different exceptions, but they are meant to coexist. Protection as a “pictorial, graphic, and sculptural work” is subject to the conceptual separability test. However, those elements that are deemed copyrightable are always protected against unauthorized reproduction. As noted above, the AWCPA includes a pictorial representations exception. In applying the pictorial representations exception to architectural plans, as the U.S. District Court for the Western District of Texas did, however, the protection that copyright holders previously held against reproduction of their plans as “pictorial, graphic, and sculptural works” is lost. Loss of that protection means that there is no statutory means of preventing rampant copying and distributing of architectural blueprints of constructed buildings visible from public places. It also means that protection as “pictorial, graphic, and sculptural works” for architectural plans is rendered toothless.

This is a problem for a few reasons. First, for the most successful architects, there exists a market in their blueprints and architectural drawings as art forms themselves. A quick Google search reveals that one can purchase prints of the original architectural plans of renowned architectural works, such as those by Frank Lloyd Wright, Frank Gehry, and Michael Graves.¹² These prints contain as much artistic value as any other prints and thus Wright, Gehry, and Graves deserve the right to control the market for their original drawings just as much as Hopper, O’Keeffe, and Warhol do. Second, while it remains unlawful to construct buildings out of blueprints without the authority of the owners of the copyrights in the blueprints, there are other economic benefits that might come from copying and distributing the blueprint. Other architects might consciously or subconsciously copy those blueprints, without authorization from their authors. Realtors might circulate the blueprints to potential buyers, to promote houses on the market.¹³ The purpose of copyright law is to provide incentives to authors to create works by granting them limited monopolies on their works. With nearly no monopolies on their blueprints, architects may find that they lack incentive to create them. More abstractly, this would allow one section of the Copyright Act to invalidate another section of the Copyright Act, thus rendering the entire Act unstable.

11. 17 U.S.C. § 101.

12. See, e.g., *Frank Gehry*, COMPOSITION GALLERY, <https://www.composition.gallery/artist/frank-gehry/> [https://perma.cc/DTF5-V62C] [<https://web.archive.org/web/20231013153216/https://www.composition.gallery/artist/frank-gehry/>] (last visited Oct. 18, 2023).

13. See *infra* Part II.B.

In order to ensure that architectural plans remain protected against reproduction and the integrity of copyright law is preserved, Congress or the courts must reiterate the persistent protection of plans as “pictorial, graphic, and sculptural works” and clarify that, while an “architectural work” could be any physical manifestation of architecture, the § 120(a) exception applies only to the constructed exterior (or publicly accessible interior elements, such as the interior of the Capitol building’s dome) of the work. This interpretation is simple, but understanding why it was necessary to add architectural plans to the definition of “architectural works,” how Congress failed to perceive the ambiguities that addition potentially introduced, and where to go from here requires in-depth analysis of the legislative history and text. Part I of this Note will present the requisite background information, including the history of the inclusion of architecture in the Berne Convention, U.S. implementation of the Convention, expert opinions on the language at issue, and international interpretations. Part II will address the problems that have emerged in subsequent case law and the paradox that the intended beneficiaries might not be the actual beneficiaries of this protection. Finally, Part III will present solutions to the problem.

I. BACKGROUND: BERNE AND BEYOND

A. THE BERNE CONVENTION

The United International Bureaux for the Protection of Intellectual Property (now the World Intellectual Property Organization or “WIPO”) adopted the Berne Convention for the Protection of Literary and Artistic Works in 1886, after Western Europeans embraced the notion that in order to fully protect their works, they would require multinational agreements.¹⁴ Prior to the Berne Convention, there were numerous bilateral copyright treaties, but there was no comprehensive protection for authors in other countries, and thus the protection that did exist was not adequate to prevent rampant copying abroad.¹⁵ In 1878, under the guidance of Victor Hugo, the *Association Littéraire* (and later *et Artistique*) *Internationale* (“ALAI”) was founded to promote the rights of authors worldwide. In 1879, visual artists were added to their ranks.¹⁶ ALAI soon started advocating for “fuller international copyright relations.”¹⁷ At its 1882 Congress in Rome, Dr. Paul Schmidt of the German Publisher’s Guild proposed a multilateral treaty created in the interest of all parties relevant to copyright protection. This included artists and authors, of course, but also publishers, booksellers, composers, and music houses. At the end of the Congress, it was decided that there would be a conference held in Berne to address the matter. This conference took place in 1883 and resulted in a draft of ten articles which would remain largely unchanged in

14. WIPO, *supra* note 2. SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 38 (3d ed. 2022) at 38.

15. *Id.* at 25–38.

16. *Id.* at 45–47.

17. *Id.* at 51.

the Berne Convention deliberations.¹⁸ In 1886, what would 100 years later be described by U.S. congressmen as “the world’s most important copyright convention,”¹⁹ the Berne Convention for the Protection of Literary and Artistic Works was adopted.²⁰

While there was support for protecting architecture as early as the 1880s, and “plans, sketches and plastic works relative to . . . architecture”²¹ were included in the Convention, there was no mention of architectural works at any of the initial Berne conferences, and they were not added to the Convention until the 1908 Berlin Revision Conference.²² Although member nations were not required to protect architectural works, many member nations protected constructed buildings in their national legislation prior to 1908. The ALAI conducted a study in advance of the 1896 Paris Conference and concluded, based on its assessment that the protection of architectural works in Berne Union nations was inequitable, that architecture should be added to the Convention. This suggestion received backlash from a few union members, most notably Germany and the United Kingdom, who believed protection for architectural plans was sufficient. However, the majority of nations disagreed with Germany and the United Kingdom because constructing buildings from plans was not considered an infringing reproduction in many member nations, and some buildings were constructed without plans.²³ Interestingly, the U.S. Congress echoed this same debate 100 years later.²⁴ At the 1896 Conference, limited protection for architectural works was added. Union members were not required to enact national legislation protecting architectural works, but, for those that already had such national legislation, the protections of the treaty would be extended to that area. The intention was to induce members who did not have such legislation to add it—and it worked.²⁵ Union members started to change their minds, and the Commission added architectural works to the list of protected artistic works in 1908.²⁶

While the term “architectural works” was added to the Convention, it was not defined. Rather, Union members were left to determine what it would mean within their own national copyright schemata, so long as both plans and constructed buildings were protected.²⁷ This fact opened the door for the congressional debates that are the focus of this Note.

B. BERNE IMPLEMENTATION LEGISLATION

On March 1, 1989, the 100th Congress of the United States ratified the Berne Convention and enacted the first implementation legislation, without adding

18. *Id.* at 54–56.

19. H.R. REP. NO. 101-735, at 10 (1990).

20. RICKETSON & GINSBURG, *supra* note 14, at 75.

21. WIPO, *supra* note 2.

22. RICKETSON & GINSBURG, *supra* note 14, at 443–45.

23. *Id.* at 443–45.

24. *See infra* Part I.B.

25. RICKETSON & GINSBURG, *supra* note 14, at 444.

26. *Id.* at 441.

27. *Id.* at 446.

architectural works as a protected category. In the late 1980s, a consensus emerged in Congress in favor of joining the Convention, so the State Department established a working group to assess the compatibility of existing U.S. law with the Convention.²⁸ The working group found that U.S. law was incompatible with the Berne Convention's inclusion of architectural works in mandatorily protected subject matter because constructed architectural works would fail the separability test for "pictorial, graphic, and sculptural works" under the Copyright Act, and therefore U.S. law had inadequate protection both for constructed buildings and against unauthorized construction of buildings from plans.²⁹ Four different Berne implementation acts were introduced in the Subcommittee on Courts, Intellectual Property and the Administration of Justice, including one by the Reagan administration. The goal of these bills was to ensure that the United States was in compliance with the Convention, but that U.S. copyright law would be altered as minimally as possible.³⁰ Architectural works were hardly mentioned in the hearings until the final day, February 10, 1988, at which point copyright scholars Paul Goldstein and Barbara Ringer testified that existing American law provided sufficient protection to meet the Berne requirements for architecture.³¹ As such, under the banner of minimalism, the Berne Convention Implementation Act³² was passed without adding "architectural works" as a protected category,³³ though architectural plans were added to the definition of "pictorial, graphic, and sculptural works" to clarify existing U.S. law, which already tended to protect them as such.³⁴

C. INTRODUCTION OF THE AWCPA

Not entirely confident in their conclusions, Goldstein and Ringer recommended Subcommittee Chairman Robert Kastenmeier do further research on the subject. He commissioned a study by the Copyright Office, which published a notice in the Federal Register. After a thorough analysis of copyright protection for architecture in the United States and abroad—including eleven comments from architects, engineers, and law firms—the Register of Copyrights, Ralph Oman, concluded that U.S. law may have been inadequate after all.³⁵ Within the Copyright Office, there was no consensus. In fact, Oman wrote in the preface to the report:

I know of no other issue to arise in the Copyright Office that has engendered such deep and bitterly fought professional disagreements. Instead of our usual dainty and refined

28. See *Hearing, supra* note 4 (statement of Jeffrey M. Samuels, Assistant Commissioner, Trademarks, Patent and Trademark Office).

29. See *id.* (statement of Ralph Oman, Register of Copyrights, Library of Congress).

30. See *id.* (statement of Jeffrey M. Samuels, Assistant Commissioner, Trademarks, Patent and Trademark Office).

31. See *id.* (statement of Ralph Oman, Register of Copyrights, Library of Congress).

32. Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

33. See *Hearing, supra* note 4 (statement of Ralph Oman, Register of Copyrights, Library of Congress).

34. See *id.* (statement of Jeffrey M. Samuels, Assistant Commissioner, Trademarks, Patent and Trademark Office).

35. *Id.* (statement of Jeffrey M. Samuels, Assistant Commissioner, Trademarks, Patent and Trademark Office).

cerebral discourse, we had robust, knock-down-drag-out fights, and in the last act I wound up with more bodies on the floor around me than Macbeth.

To be safe, Oman recommended Congress enact further legislation on the subject.³⁶

As such, the topic of protection for architectural works was again picked up the following year and legislation protecting architectural works was ultimately enacted by the 101st Congress. Subcommittee Chairman Kastenmeier introduced two bills in the House Judiciary Committee on February 7, 1990. The first, H.R. 3990, or the Architectural Works Copyright Protection Act (“AWCPA”), was intended “to amend title 17, United States Code, to protect works of architecture by creating a new category of copyright subject matter.”³⁷ The second, H.R. 3991, or the Unique Architectural Structures Copyright Act, was intended “to amend title 17, United States Code, by modifying the definition of ‘useful article’ to exclude unique architectural structures.”³⁸ After extensive deliberations in the Subcommittee on Courts, Intellectual Property and the Administration of Justice (discussed in depth below), the Unique Architectural Structures Copyright Act was abandoned and the AWCPA was integrated into an omnibus copyright reform bill, H.R. 5498, or the Copyright Amendments Act of 1990.³⁹ The AWCPA became law later that year, “plac[ing] the United States in full compliance with its multilateral treaty obligations as specified in the Berne Convention for the Protection of Literary and Artistic Works with respect to works of architecture, by creating a new category of copyright subject matter for the constructed design of buildings.”⁴⁰

D. DRAFTING DEBATES: “ARCHITECTURAL WORKS” AND § 120(A)

The two linguistic points that were in contention during the drafting of the Architectural Works Copyright Protection Act and that are most pertinent to this Note are the definition of “architectural works” and the specific carve-outs granted by § 120(a). The AWCPA added “architectural works” as a subject matter category in § 102 of the Copyright Act.⁴¹ It also added “architectural works” to the definition section, § 101.⁴² The definition of “architectural works” was already a contentious topic among copyright experts who disagreed over whether it was necessary, implied, or harmful to include architectural plans and drawings in the definition, as well as buildings. “[T]echnical drawings, including architectural plans” already received protection as pictorial, graphic, and sculptural works,⁴³ but there was debate as to whether protection

36. U.S. COPYRIGHT OFF., THE REPORT OF THE REGISTER OF COPYRIGHTS ON WORKS OF ARCHITECTURE (1989).

37. H.R. 3990, 101st Cong. (1990) (enacted).

38. H.R. 3991, 101st Cong. (1990).

39. H.R. 5498, 101st Cong. (1990) (enacted).

40. H.R. REP. NO. 101-735, at 4 (1990).

41. 17 U.S.C. § 102.

42. 17 U.S.C. § 101.

43. *Id.*

for plans and buildings as separate categories would prevent unauthorized construction of buildings from plans.⁴⁴

Despite later proving to be the most problematic section of the AWCOPA, § 120(a) received relatively little debate during the drafting process. Like many other Berne Union members, the United States cabined its copyright protection for architecture in an exception for pictorial representations of buildings visible to the public.⁴⁵ Between the first draft and the final draft, the phrase “or ordinarily visible from” was added after “located in a public place” to include private properties that can be seen from the street.⁴⁶ However, it was noted in the congressional explanation of the amendment that this was not intended to condone trespassing to make pictorial representations.⁴⁷ In mentioning trespassing as a line that could not be crossed, Congress exposed the gray area that remains: Would the interior of a building that could be seen from the street through a big window qualify as “ordinarily visible from a public place”? What about the interior of a building that the public was invited inside to see? At its most extreme, would the interior always be fair game as long as the exterior was “ordinarily visible from a public place” and the viewer was not trespassing? None of this was addressed in the drafting process. Additionally, the phrase “that has been constructed” was added after “architectural work,” and “or other three-dimensional structure” was stricken to avoid answering the question of whether this statute should apply to bridges and highways.⁴⁸ But what ultimately proved to be the most problematic aspect of § 120(a) was in fact its application to “architectural works.”

The Berne Convention itself did not define “architectural works”⁴⁹ and made minimal mention of exceptions for reproductions of architecture in other works of art. Article 2(1) of the Convention defines “literary and artistic works” and includes “every production in the literary, scientific and artistic domain, *whatever may be the mode or form of its expression*.”⁵⁰ This article supports the idea that “architectural works” should include all manifestations of the work, including plans and constructed buildings. But Article 2(2) states “[i]t shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.”⁵¹ The notion of “works in general” or “specified categories of works” suggests that “architectural works” and

44. See *infra* pp. 153–55.

45. *Id.*

46. H.R. Rep. No. 101-735, at 22 n.48 (1990).

47. *Id.*

48. *Id.* at 20.

49. WIPO, *supra* note 2. But see the 2003 WIPO guide to the Berne Convention, written a decade after the passage of the AWCOPA, which added a definition: “*Work of Architecture*: A creation in the field of the art of constructing buildings, bridges and similar structures. Such creations are usually understood as comprising both the plans, designs, sketches and models serving as a basis for construction – and the completed buildings, bridges and similar structures themselves. The term ‘works of architecture’ appears in the non-exhaustive list of literary and artistic works in Article 2(1) of the Berne Convention.”

50. WIPO, *supra* note 2 (emphasis added).

51. *Id.*

“architectural plans” might be two different categories of works—both necessarily protectible upon fixation, but inherently different based on their forms of fixation.

According to the report by the Register of Copyrights, draft model law principles were circulated in the 1980s, and these draft principles included one on reproduction exceptions.⁵² Principle WA7 held that

The reproduction of the external images of works of architecture by means of photography, cinematography, painting, sculpture, drawing or similar methods should not require the authorization of their authors if it is done for private purposes or, even if it is done for commercial purposes, where the works of architecture are on a public street, road or square or in any other place normally accessible to the public.⁵³

The report noted that this principle received mixed reactions. Some thought it took away too much of the rights and market that architects should have in the pictorial reproductions of their work. There were suggestions that the principle should clarify whether it only covers images of external elements of a constructed work or also internal elements and whether these reproductions may be commercial in nature. However, the report noted that no such changes received sufficient support, so “Principle WA7 has been reproduced without changes.”⁵⁴

The Tunis Model Law on Copyright for Developing Countries paints a different picture. The model law was adopted in 1976 after WIPO and UNESCO “deemed [it] appropriate to provide States with a text of a model law which, if they so desired, they could take as a pattern when framing or revising domestic legislation, having regard to their particular interests.”⁵⁵ Section 7 of the Model Law references two forms of reproductions to be excepted:

The reproduction of works of art and of architecture, in a film or in a television broadcast, and the communication to the public of the works so reproduced, if the said works are permanently located in a place where they can be viewed by the public or are included in the film or in the broadcast only by way of background or as incidental to the essential matters represented;

The reproduction, by photographic or similar process, by public libraries, non-commercial documentation centers, scientific institutions and educational establishments, of literary, artistic or scientific works which have already been lawfully made available to the public, provided that such reproduction and the number of copies made are limited to the needs of their activities, do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.⁵⁶

A far cry from the architectural photography coffee table books so thoroughly safeguarded in the United States, these reproductions are incidental, not commercial,

52. U.S. COPYRIGHT OFF., *supra* note 36, at 150.

53. UNESCO/WIPO/CGE/SYN 3-111 Part II, Draft Model Provisions for Legislation in the Field of Copyright at 19 (Apr. 11, 1988).

54. U.S. COPYRIGHT OFF., *supra* note 36, at 154.

55. TUNIS MODEL LAW ON COPYRIGHT FOR DEVELOPING COUNTRIES, at 3 (WIPO 1976).

56. *Id.* § 7(iv)–(v).

in nature and seemingly granted out of necessity. It is worth noting these differences to highlight that, while Congress claimed to simply be minimalistically adhering to its Berne obligations, in actuality, it made several conscious choices that went beyond what was necessary.⁵⁷

In that vein, the reproduction exception legislation of other Berne Union members sheds light on the choices that were made in the United States. The Register's report provides a survey of "Foreign Laws on Works of Architecture."⁵⁸ The report noted that most nations follow a standard for these exceptions to their copyright law, highlighting, for example, that Ireland has the "standard exemption for reproductions" and Senegal "provides the usual public place exemption."⁵⁹ What the report failed to note was that these "standard exemptions" actually fall into two distinct camps that have been conflated. In one camp, there are exemptions for an array of reproductions because the reproductions themselves are a market worth protecting. In the other camp, there are the exemptions for films and broadcasts out of necessity because buildings will always be incidentally included in the background. Examples of the first camp include Chile, where the law provides complete exemption for "photographs, cinematography, television, and any other analogous process," and Poland, where it grants "[i]n the domain of fine art, any person may reproduce architectural works, except for building purposes."⁶⁰ Examples of the second camp include The Central African Republic, where the law provides an exception only for "reproduction with a view to cinematography, sound or television broadcasting or public communication of works of art and architecture permanently located in a public place or included in a film or broadcast in an accessory manner or that are merely incidental to the main subject"; Iceland, where the exemption is qualified by the notion that if the work of architecture "constitutes the chief motif of a picture which is used for commercial purposes, then the author shall be entitled to remuneration"; and The Netherlands, where the exception is only for the exterior of buildings and does not include images in which the work is the principal focus or a reconstruction.⁶¹ All of these models were available to lawmakers prior to the drafting of the AWCPA and therefore could have factored into some of the choices that were made. However, they were not mentioned in the debates.

E. EXPERT TESTIMONY

During the deliberations over H.R. 3990 and H.R. 3991 in the Subcommittee on Courts, Intellectual Property and the Administration of Justice of the Committee on the Judiciary, expert testimony came from three groups: architects, architecture photographers, and copyright experts. Among the architects, there were three sources of testimony: a representative of the American Institute of Architects, a representative of the Wright Foundation, and renowned architect Michael Graves. The American

57. See *infra* pp. 156-157.

58. See U.S. COPYRIGHT OFF., *supra* note 36.

59. *Id.* at 177-78, 187.

60. *Id.* at 169, 186.

61. *Id.* at 168, 176, 183.

Society of Magazine Photographers (now called the American Society of Media Photographers) represented the photographers. Finally, Columbia Law School Professor Jane Ginsburg, Register of Copyrights Ralph Oman, and Assistant Commissioner of Patents and Trademarks Jeffrey Samuels all represented the interests of copyright law.

Michael Graves, whose testimony was intended to shed light on “problems that [he] as an architect, would have with one-of-a-kind buildings and those with a unique artistic character,”⁶² was mainly concerned with the arbitrary distinction made in § 120(a) between architecture located in a public place and architecture located in private. He noted that architects “frequently document their work through photography for purposes of publication, marketing materials, entry in design competitions, reference and scholarship. Thus, buildings not accessible to the public, as well as private areas of buildings, should be treated in the same manner as public areas of public buildings.”⁶³ While Graves made a compelling point about the market for architectural photography that is lost to architects, he seemed to misunderstand the reason for not extending this exception to privately located architectural works—so as not to appear to condone trespassing. Ralph Oman responded to Graves’s concern:

[T]here was a slight misconception as to what the distinction between private and public related to. He seemed to think that photographs of public buildings would be treated differently than photographs of private residences. In fact, he will have the right to protect brochures, flyers, and other works that contain photographs without distinction between public and private structures. Based on this misunderstanding, Mr. Graves was urging that the public and private distinction be eliminated. I think that under any circumstance the photographs that Mr. Graves includes in his brochures and flyers would be protected normally under the traditional copyright law.⁶⁴

As the representative for the American Institute of Architects (“AIA”), David Daileda highlighted the need for sensitivity with regard to the actual interests of architects and noted that the pictorial representations exception was potentially a problem. Daileda was concerned that, without specific language prohibiting such activity, the pictorial representations exception may enable “the indirect copying of protected architectural works.”⁶⁵ He warned of new technology that allows users to upload photographs of buildings and receive architectural blueprints of those buildings in return.⁶⁶ Like Graves, Daileda seemed to neglect the role of other areas of the law. In reality this fear is likely unnecessary, given that such a reconstruction would be an act of infringement, whether a prohibition against reconstruction was included in § 120(a) or not. The AIA also advocated in favor of limiting the pictorial

62. *Hearing*, *supra* note 4, at 11 (statement of Michael Graves, President, Michael Graves Architects).

63. *Id.* at 19–20 (statement of Michael Graves, President, Michael Graves Architects).

64. *Id.* at 44 (statement of Ralph Oman, Register of Copyrights, Library of Congress).

65. *Id.* at 111, 116 (statement of David Daileda, Former Director, AIA).

66. *Id.* at 116 (statement of David Daileda, Former Director, AIA).

representations exception to instances when the architectural work is not the primary subject of the pictorial representation, as is the case in France.⁶⁷

Similar to Graves, Richard Carney of the Frank Lloyd Wright Foundation warned of the dangers of copying that great architects face, noting “[a]s working architects, we personally have been victimized by knowledgeable copycats.”⁶⁸ He also expressed his support for § 120(a) but warned against extending this protection to reproductions of architectural drawings, stating “in light of the significant social and economic benefits which redound to architects from the exhibition, sale or transfer of original architectural drawings, it must be made clear that this exemption does not apply to original architectural drawings.”⁶⁹ This fear proved the wisest of all those held by testifying architects. In fact, had it been given weight during the drafting process, the events that are the topic of this Note would have been prevented.

The American Society of Magazine Photographers (“ASMP”) wrote to the subcommittee to express its belief that the pictorial representations exception was “vitaly important to professional photographers” and society at large.⁷⁰ In the letter, the ASMP expressed its understanding that the AIA was incorrect in its assumption that the pictorial representation exception would enable infringement by means of unauthorized construction of buildings because that infringement would still be unlawful. Further, it noted that “it would surely be overkill to try to discourage infringement of an architect’s rights in buildings by prohibiting or limiting the taking of photographs of buildings,” as that would be a massive loss for photographers who would likely feel inclined to shy away from photographing buildings, all for the remote possibility of subsequent infringement of architectural copyrights.⁷¹ It warned that, without the pictorial representations exception, photographers would lose their rights “to choose the appropriate subject matter for their work,” which would in turn be a great loss to society and would be “inimical to the copyright law objective of promoting the dissemination of creative works to the public.”⁷²

This logic is flawed for a number of reasons and yet seems to have been accepted by the drafters. First, it is not true that without this exception, photographers have complete freedom to choose their subject matter. For example, photographers do not have the right (beyond fair use) to exploit images of publicly displayed “pictorial, graphic, and sculptural works”; there is no “public placement” exception to the scope of copyright in those works.⁷³ Outside the realm of copyright, there is also subject matter that is forbidden because of privacy concerns.⁷⁴

67. *Id.* at 125 (statement of David Daileida, Former Director, AIA).

68. *Id.* at 137 (statement of Richard Carney, Managing Trustee & CEO, Frank Lloyd Wright Foundation).

69. *Id.* at 147 (statement of Richard Carney, Managing Trustee & CEO, Frank Lloyd Wright Foundation).

70. *Id.* at 195 (letter from Charles D. Ossola, Counsel, ASMP).

71. *Id.* at 197 (letter from Charles D. Ossola, Counsel, ASMP).

72. *Id.* at 196 (letter from Charles D. Ossola, Counsel, ASMP).

73. 17 U.S.C. § 101.

74. For a discussion on the right of publicity, see, e.g., RESTATEMENT OF THE L. (SECOND), TORTS § 652 (1977).

Second, architectural photography may be of great benefit to society, but those benefits would still exist if architects' copyrights covered the right to authorize photographs and license out the rights to photographers. Movie adaptations of books are greatly beneficial to society and, unless the book is in the public domain, only exist when the authors of said books grant the rights to the filmmakers.⁷⁵ It is even possible that photography of buildings is so lucrative that allowing architects to license out the rights would benefit architects while causing no more harm to photographers than already exists relative to publicly displayed "pictorial, graphic, and sculptural works," whose authors enjoy exclusive reproduction rights including over pictorial representations. This arrangement would not be "inimical to the copyright law objective of promoting the dissemination of creative works to the public"⁷⁶ as these works would still be disseminated, just by the architect rather than the photographer.

That said, Congress never considered the possibility that architects would hold the rights to authorize photographs of their works. This was likely because photographers had long freely photographed buildings and thus, despite buildings now holding copyright protection, maintaining the status quo meant not extending that protection to pictorial representations. This might not have been the case had "architectural works" been included as a subcategory of "pictorial, graphic, and sculptural works," which are not subject to pictorial representation exceptions, instead of as its own category of protected works. In some ways, the decision to maintain the status quo was paradoxically quite radical because it created a copyright subject matter category that can be freely replicated in two-dimensional form for the first time.

Professor Jane Ginsburg wrote to the subcommittee to express five concerns that she and the students in her Columbia Law School copyright class had with the bill.⁷⁷ She highlighted two of them in particular, one being that protection for architectural plans and structures should not be considered distinct and the other being that the pictorial representation exception need not be broader for architecture than it is for other public outdoor artwork.

Beginning with the first concern, Ginsburg feared that there existed a gap in protection for architectural plans (covered under "pictorial, graphic, and sculptural works") and constructed buildings (covered under the AWCPA). She found it unlikely that courts would adequately and consistently protect against construction of buildings from plans based on any existing theories. The theory that the new building would be an unlawful copy so long as the plans were already embodied in a constructed building elsewhere would not cover buildings that had not yet been built. The theory that the constructed buildings would constitute infringement regardless would often fail as well. This is because unauthorized constructions are not protectable, as works must be fixed with the authority of their author to be considered fixed for the purpose of copyright protection. Ginsburg added, "If the building is not independently protectable, construction from the plans can be infringement only if the resulting building meets

75. 17 U.S.C. § 106(2).

76. *Hearing*, *supra* note 4, at 196 (letter from Charles D. Ossola, Counsel, ASMP).

77. *See id.* (letter from Jane C. Ginsburg, Associate Professor, Columbia Law School).

the pictorial graphic and sculptural work standard of separability. This is a standard few buildings as a whole are likely to meet.”⁷⁸ Ginsburg also noted that, generally, the form of fixation is irrelevant in copyright law (i.e., a song is copyrightable whether it is fixed in sheet music or a sound recording) and there is no reason why architecture should be treated any differently.⁷⁹ These arguments were persuasive to Congress, and the definition of “architectural works” was amended to include both plans and constructed buildings.⁸⁰

As for the second concern, Ginsburg argued that it was unnecessary to grant an exception for two-dimensional representations of architecture when the same exception was not granted for other forms of public artwork. In contrast to the points raised by the ASMP, Ginsburg posited that “[i]n general, the bill appears to remove from the architect’s control and compensation significant commercial exploitations of the work, in a manner neither coherent nor justified.”⁸¹ She suggested amending the pictorial representations exception to apply only to noncommercial representations in which the architectural work is not the primary subject.⁸² On these points, Congress chose not to oblige.

Ralph Oman, the Register of Copyrights and author of the report that inspired the passage of AWCPA, did not share Ginsburg’s concern that “architectural works” would not be adequately protected without including architectural plans in their definition but supported the amendment as long as it was clear that architectural plans were simply a different manifestation of constructed buildings and not a separate type of architectural work. Oman explained several reasons why it might be beneficial to distinguish between architectural plans and constructed buildings. First, he warned of confusion that might arise when architectural plans are protected both as “pictorial, graphic, and sculptural works,” for which the separability test could be applied, and as “architectural works,” for which the separability test was consciously avoided. He worried that architectural works would be subjected to the more limited scope of protection of “pictorial, graphic, and sculptural works” as a result of this confusion. Oman, like Carney, also warned against applying the pictorial representations exemption to architectural plans, as that would “be inconsistent with our Berne obligations There is a healthy market for original architectural drawings, providing architects with additional revenue and exposure.”⁸³ He feared “[i]nclusion of architectural plans within the definition of architectural works would lead to drafting problems for these exemptions.”⁸⁴ This fear proved prophetic, but it is not necessarily an argument in favor of excluding architectural plans from the definition of

78. *Id.* at 185 (letter from Jane C. Ginsburg, Associate Professor, Columbia Law School).

79. *Id.* at 185–86 (letter from Jane C. Ginsburg, Associate Professor, Columbia Law School).

80. H.R. REP. NO. 101-735, at 20 (1990).

81. *Hearing, supra* note 4, at 187 (letter from Jane C. Ginsburg, Associate Professor, Columbia Law School).

82. *Id.*

83. *Id.* at 70 n.32 (statement of Ralph Oman, Register of Copyrights, Library of Congress).

84. *Id.* at 64 (statement of Ralph Oman, Register of Copyrights, Library of Congress).

“architectural works” as an equally viable option would be to just apply the exception to “constructed architectural works.”⁸⁵

Oman also disagreed that including architectural plans in “architectural works” would be necessary for adequate protection. He reasoned that builders getting away with “scooping” buildings from others’ plans was not a risk because, if the builders had the plans without the consent of the copyright owners, they would be charged with copyright infringement for copying the plans or conversion for taking the original plans. He also clarified what he perceived to be confusion over the difference between the access standard and the copying standard, stating that any building that was a copy of another constructed building would be considered an infringement of the original building, whether the second builder had access to it through the building itself or only through its plans. That said, Oman was not opposed to Ginsburg’s proposal, so long as Congress made it clear that “architectural work as currently defined in H.R. 3990 can be depicted both in a built structure and in plans,” while “the plans themselves would still be regarded as pictorial or graphic works, governed entirely by 17 U.S.C. 102(5),” and concluded this section of his testimony by stating: “[A]lthough I do not believe the perceived gap exists, if the Subcommittee wishes to clarify the issue beyond any doubt, I can support the proposed language so long as it is made clear that architectural works, however depicted, are governed by new section 102(8).”⁸⁶

Finally, Jeffrey Samuels, acting as Commissioner for Trademark at the time and speaking on behalf of the administration, added little to the conversation but generally supported the bill. In vague terms, he emphasized that

It is important to remember that the guiding principle of copyright is to protect an author’s expression of his or her ideas, while at the same time leaving those ideas in the open marketplace, to be used and developed by all. Any legislation in this area should carefully maintain this critical balance, already struck in the Copyright Act of 1976.⁸⁷

He provided no concrete examples of what he meant by this.

All of the testimonies were considered and the final draft was enacted in 1990. In the enacted act, the definition of “architectural works” 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.”⁸⁸ Additionally, § 120(a) as enacted 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,

85. *Id.* at 66–68 (statement of Ralph Oman, Register of Copyrights, Library of Congress) (emphasis added).

86. *Id.* at 68 (statement of Ralph Oman, Register of Copyrights, Library of Congress).

87. *Id.* at 99–100 (statement of Jeffrey M. Samuels, Assistant Commissioner, Trademarks, Patent and Trademark Office).

88. 17 U.S.C. § 101.

if the building in which the work is embodied is located in or ordinarily visible from a public place.⁸⁹

This language reflects a balance between the two most important interests highlighted in the deliberations. The first is the need to prevent loopholes that would allow would-be infringers to make lawful copies by constructing a building based on lawfully obtained blueprints. The second is the need to preserve the ability to make two-dimensional recreations of constructed buildings so that the buildings can be sufficiently appreciated for their value to society.⁹⁰ However, despite Congress's best intentions, the chosen language failed to adequately balance those needs.

II. SUBSEQUENT DEVELOPMENTS: *DESIGNWORKS* AND *KIPP FLORES*

A. CONTEXT

For thirty years, between the enactment of the Architectural Works Copyright Protection Act of 1990 and the recent cases on the scope of § 120(a), the Act seemed to be achieving its intended purpose of providing enhanced copyright protection for architecture per the Berne Convention obligations. Two cases from 2021 and 2022 forced architects and copyright scholars alike to reconsider the utility of the language of the AWCPA as enacted. The issues that scholars warned of during the drafting process finally came to fruition, turning the AWCPA on its head. Under the most recent rule out of the Western District of Texas, architects are left with considerably less protection than they held in 1989, before the enactment of the AWCPA.⁹¹ Section 120(a) has become the exception that swallowed the rule, granting near-complete freedom to reproduce any architectural work, so long as a building has been constructed and is visible from a public place.⁹² Congress added architectural plans to the definition of “architectural works” to ensure, despite this assumption, that plans would be completely protected. Yet, in doing so, Congress unintentionally left architectural plans more vulnerable than they have been since prior to their addition to the definition of “pictorial, graphic, and sculptural works.”⁹³

Stepping back, before looking at the cases, it is important to first address what the purpose of the Act was and who the intended beneficiaries of the Act were. The main purpose of the Act was to meet the requirements of the Berne Convention and to “at a minimum . . . provide the equivalent kind of protection to our American designers and

89. 17 U.S.C. § 120(a).

90. See H.R. REP. NO. 101-735 (1990).

91. *Kipp Flores Architects, LLC v. AMH Creekside Dev., LLC*, No. SA-21-CV-01158-XR, 2022 WL 4352480 (W.D. Tex. Sept. 16, 2022).

92. Shrewd readers will observe that such a notion is completely antithetical to the assumption made by the Register of Copyrights, Ralph Oman, prior to the enactment of the AWCPA that unauthorized construction of buildings from lawfully obtained blueprints would be prevented so long as a building had already been constructed because the access standard does not require the new building to have been copied from the prior building itself. See *supra* p. 155.

93. 17 U.S.C. § 101.

architects as is provided to their counterparts in foreign countries.”⁹⁴ However, if this was the only goal, Congress could have adopted the Model Law wholesale. Congress unsurprisingly chose not to do this and instead catered its law to the specific needs of the American people. Despite testimony from architects to the contrary, it is probably the case that the main de facto beneficiaries of this protection were smaller architectural firms responsible for designing suburban single-family housing developments. Both Graves and Carney spoke about the necessity of protecting great architects from copying.⁹⁵ Though I do not doubt the veracity of their statements, observation alone (from the perspective of a non-architect, no less) suggests that the risk of copying great works of architecture was probably not the most significant ill that Congress intended to remedy in enacting the AWCPA. Walking down the streets of Manhattan, I can observe that the most famous buildings are one of a kind, a stark difference from the Silver Spring, Maryland, neighborhood I grew up in, where nearly every house was identical. As far as I know, the houses in my neighborhood were designed by the same architect and therefore were not infringements, but I can only assume that copying goes unpunished far more often among the rank and file than among the fabulous. This hypothesis is further supported by the report of the Register of Copyrights, which states,

Since most copyright infringement suits involve single-family housing, and smaller architectural firms are responsible for the design of most single-family housing, an extension of copyright protection to prohibit the construction of substantially similar buildings based on unauthorized use of the plans that depict the building may improve the economic well-being of smaller architectural firms.⁹⁶

Conversely, the pictorial representations exception was clearly drafted with big-name architects in mind. Oman noted in his testimony that “two-dimensional reproductions of architectural works, such as photographs, postcards, and T-shirts are not a necessary component of [the architect’s] economic incentive, and serve a valuable public interest in promoting familiarity, appreciation and criticism of architectural works.” Of course, it goes without saying that few “photographs, postcards and T-shirts” depicting suburban housing developments are on the market, let alone serving a “valuable public interest.”⁹⁷

Returning to the concept of the two camps that reproduction exemptions fall into internationally, the United States does not neatly fall into either. On one hand, while

94. *Hearing, supra* note 4, at 9 (statement of Carlos Moorhead, Ranking Minority Member, Subcommittee on Courts, Intellectual Property, and the Administration of Justice & Bill Co-Sponsor).

95. *See id.* (statement of Michael Graves, President, Michael Graves Architects; statement of Richard Carney, Managing Trustee & CEO, Frank Lloyd Wright Foundation).

96. U.S. COPYRIGHT OFF., *supra* note 36, at 12. This notion is also suggested by Paul Goldstein in his casebook on copyright: “Most architectural works cases deal with alleged infringement of designs less fanciful than the one involved in *Shine*. A good deal of litigation concerns competing plans for mass-produced ‘semi-custom’ development homes, which consist of a combination of elements that might be called ‘standard features,’ incapable of copyright protection in themselves.” PAUL GOLDSTEIN, COPYRIGHT 216 (1996).

97. *Hearing, supra* note 4, at 70 (statement of Ralph Oman, Register of Copyrights, Library of Congress).

§ 120(a) does not itself fall into the latter camp (exemptions for films and broadcasts out of necessity), such exemptions already exist for “pictorial, graphic, and sculptural works.” Section 118 of the Copyright Act provides that parties must either negotiate to allow protected “pictorial, graphic, and sculptural works” to be featured in public broadcasts or obtain a compulsory license.⁹⁸ Interestingly, this exemption was not extended to cover “architectural works” in or after the AWCPA. Thus, constructed buildings, which are only covered as “architectural works,” are not subject to this exemption. In the report describing amendments made to H.R. 1990, Representative Jack Brooks highlighted the importance of protecting photography for the purposes of tourism.⁹⁹ But, given that film is a significant export of the United States,¹⁰⁰ it is interesting that no mention was made about protecting the film industry. While this was likely an oversight, it is indicative of a larger theme that Congress may not have sufficiently considered its options in drafting § 120(a).

It seems uniquely American that the main beneficiaries of this protection are architects of residential, single-family homes (though this is impossible to know from the statutory text, as it is nowhere expressed in the language itself). This dynamic sheds an interesting light on the pictorial representations exception, as the works that benefit the most from this protection are affected the least by the exception while the works affected the most by the exception benefit the least from protection. Though ostensibly the law is to be applied evenly to all “architectural works,” it is clear (and may have even been so for some during the drafting process) that the effect of the law is that little changes for big name architects, while smaller architects have practically unbounded protection. In this way, the United States managed to both enhance protection for architecture and provide an exception for photography where they were most needed. This protection and exception might have been entirely effective if not for the drafting errors that allowed courts to read in a pictorial representations exception to copyrights in architectural plans.

B. DESIGNWORKS

The first case to address the issue of pictorial representations of architectural plans was *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*¹⁰¹ In 2019, the U.S. District Court for the Western District of Missouri heard the case and held that the reproduction of floorplans by the defendants did not constitute an infringement

98. 17 U.S.C. § 118.

99. He noted poetically: “We rarely appreciate works of architecture alone, but instead typically view them in conjunction with other structures and the environment at large, where, at their best, they serve to express the goals and aspirations of the entire community.” H.R. REP. NO. 101-735, at 12 (1990).

100. Statista Research Department, *Export Revenue Generated by U.S. Motion Picture and Video Production and Distribution from 2015 To 2018*, STATISTA (Jan. 5, 2023) <https://www.statista.com/statistics/948925/motion-picture-video-production-distribution-export-revenue-usa/> [https://perma.cc/37ZU-YRD6] [https://web.archive.org/web/20231114022554/https://www.statista.com/statistics/948925/motion-picture-video-production-distribution-export-revenue-usa/].

101. *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, 9 F.4th 803 (8th Cir. 2021).

because it fell under the purview of § 120(a). In that case, the architectural firm, Designworks, brought a claim against real estate agents, Columbia House of Brokers, who published floorplans of Designworks's designs as part of their efforts to sell the homes. The defendants argued that they were entitled to summary judgment because the publication of floor plans fell under the pictorial representation exception in § 120(a). The plaintiffs argued that floorplans were not pictorial representations and the building was not visible from a public place. The court found in favor of the defendants after concluding that, because the building itself is ordinarily visible from a public place, any two-dimensional representation is allowed, including two-dimensional representations of elements that are not ordinarily visible from a public place. This is because the statute says a *work* may be reproduced "if the *building* in which the work is embodied is located in or ordinarily visible from a public place,"¹⁰² not if the work being copied is itself ordinarily visible from a public place. The court stated:

The work at issue in this case is the Design, which is embodied in the completed architectural work located at 1713 Kenilworth, which is ordinarily visible from a public place. Consequently, Defendants' creation of the Floorplan capturing the layout of 1713 Kenilworth is not an infringing act because the Floorplan is a pictorial representation of the structure's interior as it exists.¹⁰³

This is not an implausible argument and could even be a valid interpretation based on a textualist reading of the statute, but it is obviously counter to the goal of enhanced protection for architectural works.

The plaintiffs appealed and the Eighth Circuit heard the case in 2021. That court reversed, holding that floorplans do not come within the exception for pictorial representations. The court employed several classic tools of statutory interpretation. First, it considered the ordinary public meaning of the word "pictures" and concluded that, out of context, it might be acceptable to define a floorplan as a "picture." However, words must be interpreted within their broader contexts and in this case, the broader context suggested that floorplans were not "pictures." "[A]rchitectural plans" are explicitly put forth in other parts of the statute, so it should not be taken for granted that Congress intended the exception to include "architectural plans" if it did not specify "architectural plans."¹⁰⁴ The court then used the canons of *noscitur a sociis* and *ejusdem generis* to show that all other words in the list connote artistic expression, so other "pictorial representations" should as well. Purely functional architectural blueprints should not be included in their ranks.¹⁰⁵

While the Eighth Circuit's holding was correct, the logic the court used to reach it does not hold water because the purpose of including "pictorial representations" in addition to "pictures"¹⁰⁶ is likely to evoke the broader understanding of pictorial works

102. 17 U.S.C. § 120(a) (emphasis added).

103. *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, 421 F. Supp. 3d 838, 846–47 (W.D. Mo. 2019), *rev'd*, 9 F.4th 803 (8th Cir. 2021).

104. *Designworks Homes, Inc.*, 9 F.4th at 807–08, *cert. denied*, 142 S. Ct. 2888 (2022).

105. *Designworks Homes, Inc.*, 9 F.4th at 808–10.

106. 17 U.S.C. § 120(a).

as a subset of “pictorial, graphic, and sculptural works,” defined earlier in the statute,¹⁰⁷ which is deliberately not confined to works of artistic expression. As further support, the Compendium of U.S. Copyright Office Practices provides representative examples of “pictorial works” and “graphic works.” Examples under “pictorial works” include maps, technical drawings, and diagrams, all potentially purely functional works.¹⁰⁸ Congress was not picking terms in a vacuum. After the study conducted by the Register of Copyrights, commissioned by Representative Robert Kastenmeier, the bill’s drafter and sponsor, Congress had access to all the language selected by other Berne Union members in their own exceptions. Congress consciously chose to use the term “pictorial representation” despite the fact that no other Union members had used this term. It is conceivable that Congress intended for the term to specifically include engravings and other such artistic expressions, but then it could have said so, as other Berne Union members did.¹⁰⁹ It can hardly be a coincidence that the word Congress chose just so happens to be a subset of a term already defined in the same statute,¹¹⁰ and therefore the term must be interpreted the way it is interpreted earlier in the statute.

In reality, Congress likely did not plan for this particular situation in its word choice because of the “ordinarily visible from a public place” qualification—the internal design of a building would not be considered viewable from a public place. The court did eventually acknowledge this point, highlighting that the public place factor also informs this situation because it would be nearly impossible to recreate floorplans by viewing a building from a public place. Therefore, Congress could not have intended for this exception to cover floorplans.¹¹¹

C. *KIPP FLORES*

The next court to take up the topic of floorplans as pictorial representations was the District Court for the Western District of Texas in *Kipp Flores Architects, LLC v. AMH Creekside Development, LLC*.¹¹² The plaintiff there alleged that its designs were distributed without its Copyright Management Information, in violation of the licensing agreement between the parties. Because the licensing agreement was violated, the designs were unlawfully distributed without the consent of the copyright owner, thus infringing Kipp Flores’s copyright in the architectural blueprints. Among other defenses, the defendant, AMH Creekside Development, argued that the floorplans it distributed were “pictorial representations” and therefore were exempted under § 120(a). The plaintiff asserted that the § 120(a) exception should not apply to its architectural blueprints because they were protected both as “architectural works” and

107. 17 U.S.C. § 101.

108. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 503.1(B) (3d ed. 2021).

109. *Supra* p. 150.

110. 17 U.S.C. § 101.

111. *Designworks Homes, Inc.*, 9 F.4th at 810.

112. *Kipp Flores Architects, LLC v. AMH Creekside Dev., LLC*, No. SA-21-CV-01158-XR, 2022 WL 4352480 (W.D. Tex. Sept. 16, 2022).

as “pictorial, graphic, and sculptural works.” The court countered that § 120(a) “protects pictorial representations regardless of whether the copyright holder has a copyright in the structure itself or in the technical drawings.”¹¹³ The court, however, did not explain why the limitations on the “architectural works” copyright should trump the protections for “pictorial, graphic, and sculptural works” copyright. In fact, prior case law confirms that the scope of “architectural works” copyright does not override that of “pictorial, graphic, and sculptural works,”¹¹⁴ but this court did not address that authority. Thus, the court wrote a massive exception into copyrights for “pictorial, graphic, and sculptural works” that certainly was not intended.¹¹⁵

Additionally, despite presenting the § 120(a) test as “(1) that the alleged infringing work constitutes a picture, painting, photograph, or other pictorial representation of the copyrighted architectural work and (2) that the copyrighted architectural work has been constructed and is ordinarily visible from a public place,”¹¹⁶ the court never actually addressed the “public place” prong. Though the court did not explicitly state as much, it seemed to rely on a similar argument to that made by the Western District of Missouri—that it only matters that the building itself is ordinarily visible from a public place, not that the particular element copied is.¹¹⁷ The court briefly addressed timing (focusing on the words “has been”) and concluded that the homes were already constructed at the time of the distribution of the floorplans, contrary to the allegations of the plaintiff. As such, the court concluded that the defendant met the second prong as well.¹¹⁸

In *Kipp Flores Architects, LLC v. Pradera SFR, LLC*, the same court heard a case from the same plaintiff, based on the same background facts as the above case.¹¹⁹ In this case, the court found that § 120(a) was inapplicable because the alleged distribution of infringing blueprints occurred before the building was constructed, and therefore the

113. *Id.* at *8 (citing *Builders Mut. Ins. Co. v. Donald A. Gardner Architects, Inc.*, 856 F. Supp. 2d 773, 777 (D.S.C. 2012)).

114. *See* *Scholz Design, Inc. v. Sard Custom Homes, LLC*, 691 F.3d 182 (2d Cir. 2012).

115. Congress gave little explanation as to how the interplay between the overlapping subject matter categories protecting architectural plans would function, but Congress said enough to make it clear that its intention was not for the “architectural works” exception to override “pictorial, graphic, and sculptural works” protection. The only explicit mention of the interplay in the congressional explanation of the amendment was as follows: “An individual creating an architectural work by depicting that work in plans or drawing will have two separate copyrights, one in the architectural work (17 USC § 102(a)(8)), the other in the plans or drawings (17 U.S.C. § 102(a)(5)). Either or both of these copyrights may be infringed and eligible separately for damages.” H.R. REP. NO. 101-735, at 19 (1990). In his testimony before the subcommittee, Register of Copyrights Ralph Oman noted that, even if architectural plans were included in the definition of architectural works, “[t]his protection is wholly apart from that currently granted to architectural plans, drawings, and models as ‘pictorial, graphic, and sculptural works.’” *Hearing*, *supra* note 4, at 58–59 (statement of Ralph Oman, Register of Copyrights, Library of Congress). More abstractly, it was mentioned several times in the drafting process that the bill is meant to change copyright law as minimalistically as possible. This would imply that the changes were not intended to invalidate or override another section of the law. *See id.* (statement of Ralph Oman, Register of Copyrights, Library of Congress); *supra* Part I(B).

116. *Kipp Flores Architects, LLC*, 2022 WL 4352480, at *7.

117. *See supra* p. 158.

118. *Kipp Flores Architects, LLC*, 2022 WL 4352480, at *7.

119. *See Kipp Flores Architects, LLC v. Pradera SFR, LLC*, 2023 WL 28723 (W.D. Tex. Jan. 2, 2023).

building was not “ordinarily visible from a public place.”¹²⁰ In essence, the court restated the rule it hinted at in *Kipp Flores Architects, LLC v. AMH Creekside Development, LLC*, that § 120(a) is always applicable to blueprints, so long as the building has been constructed.¹²¹

This rule obviously does not make any sense. Why would Congress make a distinction, in allowing the copying of blueprints, between blueprints of buildings that have not been constructed and blueprints of buildings that have? If anything, this court reached the opposite conclusion of that intended by Congress in granting the right to distribute blueprints only in circumstances that would disrupt the rights of the owner of a copyright in a constructed building and not in circumstances that would not.

These holdings flip the intentions and beneficiaries of the Act on their heads. If one were to read § 120(a) as saying that architectural plans for constructed buildings visible from a public place can be copied with impunity, as the Western District of Texas has, then architects are objectively in a worse position than they were before the enactment of the AWCPA because, under that reading, the AWCPA protects buildings but strips protection for the plans and representations of the buildings once they have been constructed and are publicly visible. For high-end architects, that means a market they may have had in artistic renderings of their architectural plans has now been eliminated. For low-end architects, there is a risk that realtors might circulate their blueprints and the architects will not be able to stop them (though the architects will still be able to obtain relief against others actually building properties based on their blueprints).

III. SOLUTION: JUDICIAL OR CONGRESSIONAL CLARIFICATION

Ultimately, while these problems are complex, the solutions are not. The Supreme Court already denied certiorari to *Columbia House of Brokers Realty, Inc. v. Designworks Homes, Inc.*, prior to the publication of the Western District of Texas’s decision in *Kipp Flores*, and thus does not presently have jurisdiction to remedy the errors of this doctrine.¹²² However, the Fifth Circuit, and any other court that may encounter this doctrine, must take the opportunity to clarify this issue. But they must not stop at rectifying the misunderstanding of copyright law as it currently stands. They must take this opportunity to quash extending § 120(a) to third-party pictorial representations of blueprints.

They may do so through a few different methods of statutory interpretation. The court might apply a purposivist lens, through which it would come to the conclusion that the intent of Congress was to provide an exception to copyrights in architecture for two-dimensional representations of the exterior of constructed works of architecture. The court might also apply the absurdity canon to negate a reading that strips architects of previously-held protection rather than providing them with

120. 17 U.S.C. § 120(a).

121. *Kipp Flores Architects, LLC*, 2023 WL 28723, at *15–16.

122. *Columbia House of Brokers Realty, Inc. v. Designworks Homes, Inc.*, 142 S. Ct. 2888 (2022).

enhanced protection. Even by applying a textualist lens, the court might conclude that the clause “that has been constructed,”¹²³ which is included after the first mention of an architectural work in the statute, should be read in after every mention of architectural works. This would result in a read that the pictorial representations are only authorized for works that have been constructed, if the pictorial representations themselves are of works that have been constructed (eliminating the possibility of creating a two-dimensional representation of a blueprint). Additionally, the “publicly visible” criterion should be interpreted to mean that the aspect replicated is itself “publicly visible.”

If anomalous judicial interpretations persist, Congress should amend the statute accordingly: One amendment must clarify that, while “architectural works” can be manifested as plans or constructed buildings, § 120(a) applies only to those manifested as constructed buildings. Another amendment should clarify the interior versus exterior debate. I propose the following language:

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 constructed elements of the building that are visible to the public, if the building in which the work is embodied is located in or ordinarily visible from a public place.

Congress should also consider the goals motivating the § 120(a) exception and whether other types of exceptions should be statutorily granted as well. For instance, exceptions for miniature three-dimensional representations or representations in films or broadcasts might achieve the ends of promoting tourism and properly appreciating American landmarks.

IV. CONCLUSION

Without the proposed changes, this crisis transcends architecture. Architects and the owners of copyrights in architecture are clearly harmed by a holding that strips them of protection against copying and distributing copyrighted blueprints. But copyright law itself is also harmed by such a rule. “Pictorial, graphic, and sculptural works” copyrights for architectural plans are rendered essentially void so long as a building has been constructed from the plans and that building is “ordinarily visible from a public place.”¹²⁴ This scheme engenders a problematic gap in copyright law. If one section of the law is allowed to invalidate another, without explicitly stating such, the entire system is unreliable. Furthermore, if explicit efforts by Congress to expand the rights of a group of artists result in an interpretation that dramatically decreases those same rights, the law is fundamentally flawed. Congress or the courts must take the first opportunity to remedy this flaw in order to preserve the rights of architects and the integrity of copyright law in America.

123. 17 U.S.C. § 120(a).

124. *Id.*