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Protecting your Copyrights in the Age of Digital Design Collaboration

By Brian Pearson & Megan Smith, Attorneys

T-squares and triangles are gathering dust as architects, structural engineers, contractors, and other construction professionals increasingly utilize Building Information Modeling (BIM). BIM is an integrated digital design process that allows increased efficiency, fluid design, and collaboration on construction projects. Traditional roles in construction are being blurred and many parties may be performing design work in BIM even though they are not licensed design professionals. While BIM provides many advantages for construction professionals, it may also create problems, especially involving intellectual property rights. With multiple parties contributing to the project design model, sharing information and adding to the design; the question of who owns the model may arise.

The most desirable practice is to clearly set forth copyright ownership rights and responsibilities in the original contract documents. Focusing on the legal issues associated with BIM requires users to contemplate and address these issues prior to commencement of a project. Without such contract provisions; designers, engineers and others may find themselves between a rock and a hard place when trying to protect their copyrights. They also then face the potential risk that their work product will be used on subsequent projects without compensation or approval.

The design of a building, set out in architectural plans, technical drawings, automated databases, or other instruments of professional service is subject to copyright protection under various federal statutes. Under present copyright statutes, the copyright contributed to a "collective work" is distinct from the copyright in the collective work as a whole. As a result, there are unique intellectual property right issues that will need to be addressed in the contract documents for projects utilizing BIM.

One goal of the contract provisions is to protect the individual copyrights of the architect and the individual contributors to the BIM. Pursuant to provisions of the American Institute of Architect (AIA) and the Engineers Joint Contract Documents Committee (EJCDC) standard contracts, it is presumed that the design professional retains ownership to all intellectual property, presumably including any work within a computer model. For example, AIA Document E202-2008, Building Information Modeling Protocol Exhibit, extends copyright protection for the architect and other contributors to a building information model, stating that a "Model Element Author does not convey any ownership right in the content provided" to the model. Additionally, under the Consensus Docs 301, BIM Addendum, Section 6.1, each party owns all copyrights in all of that party's contributions to the model unless they specifically transfer the copyright in writing. Under such provisions, contributions to the model do not deprive a contributor of its copyright.

Another goal to be addressed in contract documents is the protection of an architect's copyright to all or portions of the BIM, while ensuring that collaborators and the owner can use

the BIM for project purposes. A license is a common method of providing limited use to another party while maintaining copyright protection and ultimate control. For example, under the AIA owner-architect agreements, an architect grants the owner a nonexclusive, limited license to the instruments of professional service. Similar provisions may be included to allow use of the instruments of service for the specified project purposes only. The license does not convey the architect's inherent ownership of the copyrights. Rather, the architect allows the owner to use the documents for limited purposes associated with the specific project.

However, consider the situation where a structural engineer wants to use his/her work, which has been integrated into the BIM, on a subsequent project. Would the structural engineer be able to unbundle the design to isolate its structural elements and concepts? The likely answer is no. Therefore, a BIM project collaborator is well advised to either address these issues in the contact documents or maintain a means by which to identify or isolate its contribution to the process.

At present, there is little guidance from the courts regarding copyright ownership of all or portions of a BIM. As BIM digital design processes are increasingly used by architects and collaborators, the legal landscape regarding copyright protection will expand and develop. Stay tuned for updates regarding those developments.

BIM is a useful tool. However, such a collaborative design process creates unique legal implications for the protection of intellectual property. As a result, construction professionals are wise to consider carefully such implications and ensure that appropriate language is included in the contract documents. The legal copyright issues concerning BIM are complex and constantly developing. Consult with an attorney to protect your interests prior to beginning a project utilizing BIM.

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7 Tips for Increasing Revenue and Avoiding Risk in 2011

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For businesses in the construction industry that hope to increase revenue and lower risk during 2011, here are a few things to consider doing during the winter:

1. Review the current business structure to ensure that it is receiving proper tax treatment and limiting liability.
2. Review the succession plan to ensure that it is up-to-date. If one doe not exist, consider preparing one. A strategic succession plan can be a key to funding a business owner's retirement and will increase the likelihood of financial security after their departure.
3. Employers should review their labor policies to ensure that their business is in compliance and not at risk of fines from the Department of Labor.
4. Consider future real estate needs. With current values and interest rates, now is a great time to buy or lease real estate.
5. Review insurance policies to ensure that the business has the coverage it needs at rates it can pay.
6. Review workers' compensation coverage. Make sure the business's workers' compensation agent has an accurate, up-to-date understanding of your business activities and number of employees.
7. Real estate owners should review their property tax bills carefully to determine if they are paying too much in taxes.

Proposed Senate Bill 882

Previous issues of this newsletter have discussed the Michigan Legislature's consideration of a bill that would shorten the statute of limitations for malpractice claims brought against architects, professional engineers, land surveyors, and construction contractors. The current limitations period is six years after occupancy, use, or acceptance of the work performed. As written, the bill would have reestablished a two-year deadline for filing malpractice suits against these professionals.

The bill was introduced in September of 2009 and later passed the Senate. However, the House of Representatives did not vote on the matter before the end of the final legislative session of 2010. Moving forward, if the Legislature still wishes to shorten this limitations period, it will need to reintroduce the bill as a part of its new legislative calendar in the new year. It is fairly likely that a new version of the bill will be introduced again in early 2011, and the new makeup of the House makes it increasingly likely that such a bill would pass.

Cedroni Associates v Tomblinson

Davidson Community Schools opened up bidding on a construction project and contracted with an architectural firm to aid in reviewing bid applications, investigating potential contractors, and making a recommendation regarding which contractor should be awarded the project. The plaintiff submitted the lowest bid, but was not awarded the project. The plaintiff then brought suit, alleging tortious interference with a business expectancy based on the architectural firm's allegedly improper conduct, communications, and recommendations.

On appeal, the Court of Appeals noted that the exercise of professional business judgment in making recommendations as to government contracts and projects must be afforded some level of protection and deference. However, the Court also stated that the law would not protect a party exercising such judgment where "the ostensible exercise of professional business judgment is in reality a disguised and veiled attempt to intentionally and improperly interfere with the contractual or expectant business relationship of others."

By itself, evidence that a contractor submitted the lowest bid is insufficient to make this showing. However, in *Tomblinson*, the Court found that this fact, coupled with evidence that the plaintiff was a "responsible" contractor as required by Davidson Community Schools, was enough to create a jury issue as to whether the plaintiff had a valid business expectancy based on its bid. Accordingly, the Court ruled that the plaintiff's tortious interference suit against the architectural firm could proceed to trial.

Gordon v Jim Lippens Construction, Inc.

In this case, Smith Haughey attorneys Craig Noland, Bill Henn, and Steve Stawski successfully represented the township building inspector.

The plaintiffs contracted to have a home built, and later brought suit against their builder and a township building inspector based on allegations involving a poorly constructed roof. Specifically, the plaintiffs claimed that the inspector had failed to discover the alleged deficiencies, and that this failure had led to increased repair costs. The trial court initially ruled that the plaintiffs' suit could proceed against the inspector, not withstanding the defense of governmental immunity raised by the building inspector. On appeal, though, the Court of Appeals found that the trial court should have dismissed the plaintiffs' claims against the inspector. The Court held that the inspector was entitled to governmental immunity unless the plaintiffs could establish that the building inspector was guilty of gross negligence and was "*the* proximate cause" of the plaintiffs' injuries. Because the building inspector was not determined

to be the "one most immediate, efficient, and direct cause" of the claimed damages, the governmental immunity statute protected him from liability to the plaintiffs. The Court found that the construction company alone would be responsible for any jury award based on faulty workmanship.

L. Loyer Construction Company v Department of Transportation

After a competitive bidding process, the Michigan Department of Transportation awarded the plaintiff a contract to upgrade storm sewers in Ann Arbor. Upon starting its work, the plaintiff discovered undocumented underground utility ducts, which meant that the work to be completed would have to undergo significant changes. The plaintiff therefore submitted several claims for additional compensation through MDOT's administrative review process and was awarded some additional compensation. Apparently dissatisfied with this result, the plaintiff brought suit, alleging that the project modifications were so substantial that MDOT should have been required to rebid the project.

The Court of Appeals disagreed. In its opinion, the Court noted that the contract made reference to MDOT's "1996 Standard Specifications for Construction," a document that allows the project engineer, at any time, to "direct changes in quantities and alterations in the work as are necessary to satisfactorily complete the project." Notably, the document further states that such changes "shall not invalidate the contract nor release the surety, and the Contractor shall perform work as altered." Under those standards, reinitiating the bidding process was not necessary, nor was the contract invalidated, despite the substantial changes to the work completed by the plaintiff. Instead, MDOT's administrative review process and the additional compensation offered through that process was found to be the only award to which the plaintiff was entitled.

Boylan v Fifty-Eight, LLC

Defendant Fifty-Eight, LLC, owned a home that it rented to the plaintiff. In early 2007, various portions of the home flooded, and sewage backed up into the bathroom and kitchen sinks. Fifty-Eight's property manager concluded that, during the installation of the township's new water main, a contractor had improperly graded the earth on Fifty-Eight's property and eliminated a swale that protected the home located on that property from surface-water runoff.

The plaintiff filed suit against Fifty-Eight, and Fifty-Eight filed a third-party complaint alleging liability on the part of Pamar Enterprises, the installer of the water main. At the trial-court level and again on appeal, Pamar argued that under a 2004 Michigan Supreme Court ruling, no tort action against it could proceed because its work did not give rise to a "separate and distinct duty" not contemplated by the contract, and Pamar's actions did not otherwise create a "new hazard" to the plaintiff. The trial court agreed with Pamar, stating that the damage claimed by the plaintiff constituted a "foreseeable consequence of the terms of the contract" and that there was no new hazard that would support the plaintiff's tort claim as against Pamar.

The Court of Appeals disagreed. It stated that, separate and distinct from Pamar's contract to install a new water main, the contractor also had a duty to exercise reasonable care when it entered onto and altered private property. In other words, regardless of the existence of a contract, Pamar's entry onto Fifty-Eight's land triggered several separate and distinct common-law duties to avoid permanently damaging the property. Additionally, the Court found that Pamar's construction work created a "new hazard" consisting of interference with the relevant property's drainage system. The Court explained that a party to a contract may breach a duty "separate and distinct" from the contract when it creates a "new hazard" that presents a danger to third parties. Therefore, the Court held that Pamar's rearrangement of the soil and elimination of a preexisting swale on Fifty-Eight's premises created a new hazard on the premises, and that Pamar should have foreseen that its actions could predispose the property to flooding.

Stawski Presents to ASAM About Objectives of the Contract Review System

On December 8, 2010, Steve Stawski gave a presentation on "Objectives of the Contract Review System" at the general membership meeting of the American Subcontractors Association of Michigan (ASAM). What follows is a recap of the presentation, originally printed in an ASAM publication. Any questions can be directed to Steve at 616-458-4394 or sstawski@shrr.com.

ASAM General Membership Meeting Recap: Objectives of the Contract Review System

Nearly 30 were in attendance at the ASAM General Membership meeting on Dec. 8 to hear speakers Steve Stawski of Smith Haughey and Jon Lunderberg of Buiten & Associates, LLC.

Addressing the topic, "Objectives of Contract Review System," Stawski told the audience that though they may tend to view the GC as an 800-pound gorilla with whom they can't negotiate, "there are things you can do to tweak your contract in ways that are favorable to you." He advised subcontractors to know their legal risks before making decisions.

Further recommendations were:

- Distinguish legal risks from business decisions.
- Educate your project manager on your position.
- Use "surgical modification" to make important changes.

Several Q & A's were also presented, including the following:

Q: *If a GC uses a "Standard Form" contract, can it be modified?*

A: Yes. Standard Form contracts are evolving. They are being modified, reacting to changes in the marketplace. We like to go in and expose the inconsistencies, make them seamless before a contract is signed.

Q: *Can a sub be held responsible for a contract that exists between two other parties?*

A: Absolutely. They should request that the referenced contract be sent to them. You should know what you are agreeing to.

Q: *Can owner sue to collect lost profits that it could have made?*

A: It is a danger. Classic example is a sub working on facade of a casino that wasn't able to open on time. The casino claimed they lost millions as a result, and received a $14 million award against the subcontractor.

Steve also discussed the following terms:

"Certificate of Insurance"

- It's not a policy, or a contract of insurance.
- Some insurance producers put misleading statements on the certificate of insurance.
- To know what this insurance covers, read the policy itself
- Look at the terms and coverage, not the certificate.

"Indemnification"

- Means you're being asked to pay for someone else's lawsuit.
- Indemnity provisions are all different and are all triggered in different ways.
- We want indemnity provisions to cover only what we're responsible for. Why should you be asked to cover a claim for the project as a whole?
- Can be adjusted or tweaked in a favorable way; might not win the war but can win a battle.
- Governed by state law.

"Merger/Integration"

- Means that everything you were told over phone or in person doesn't matter. All agreements outside contract don't exist.
- Even if GC tells you something different than what's in the contract, the courts, for the most part, are going to follow the "plain language terms" of the agreement.

SMITH HAUGHEY Construction Law News & Success

Chip Behler and **Brian Pearson** successfully obtained the dismissal of licensing complaints against their architect and builder clients.

Chuck Judson recently assisted two developers and one general contractor in finalizing agreements to stabilize their loan status.

Bill Henn, Craig Noland, and **Steve Stawski** successfully represented a township and its building inspector in both the trial court and on appeal in a case involving allegations of a poorly constructed roof. The township was dismissed by the trial court on the basis of governmental immunity. Ultimately, the Court of Appeals held that the inspector was also entitled to governmental immunity and that the trial court should have dismissed the case against our client.

Dan Morley and **Steve Stawski** recently presented at the "Hot Topics in Construction Law" seminar, sponsored by Rehmann. Dan's presented on "Bankruptcy and Construction Law Issues" and Steve presented on "Protecting Rights to Payment."

Steve Stawski recently authored a brief and successfully argued a motion for summary disposition to obtain a full dismissal prior to trial for an architect and engineering client in a case involving the death of a steel erection contractor.

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