PRODEMNITY

THE straight line

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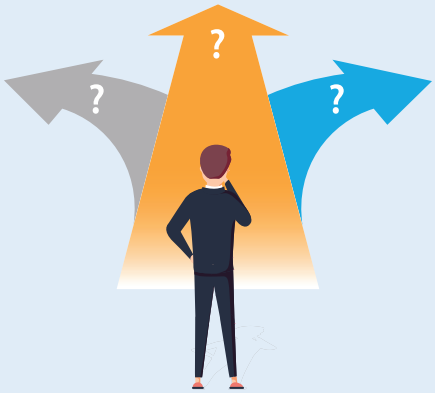

Recently, a number of new insurers have entered the Canadian professional liability market. As a result, architects are seeing competing marketing efforts by insurers and their brokers, each hoping to attract the architect's business – premiums paid by architects and commissions received by brokers – away from its present provider.

Ontario architects are in a unique position: they own the insurance company that is obliged to provide their coverage. At the same time, they are obliged to purchase the mandatory limits that apply to their practice, from the company they own – Pro-Demnity Insurance Company. New insurers attempting to break into the Ontario architect's market can only compete to provide coverage and claim limits that exceed the mandatory limits established by the architects' own company.

To attract business, competing insurance firms frequently offer a lower initial premium than what has been quoted elsewhere, and architects, like most people, are attracted to a lower price. Too often the implications of the lower priced product are not adequately understood.

In order to assist architects in dealing with the competing sources and claims, Pro-Demnity has recently provided architects with two advisories: *Making an Informed Choice* and *The Pro-Demnity Advantage*. See "Ontario architects own their own insurance company" on page 3.

— *The Editor*

Copyright and liability: What you don't know can hurt you

Or, how to limit your liability when you sell your copyright

As a copyright lawyer I sometimes get questions from architects about whether they should transfer the copyright to their projects. This is a question of commercial leverage and relative bargaining power that has no "right" answer. In some cases, the transfer of copyright can lead to potential liability, as loss of copyright often equals loss of control over how a design is implemented or modified.

In order to protect themselves from liability, architects should think carefully before transferring copyright in a design to a client. Indemnity clauses and insurance are the best ways to achieve this protection.

Copyright is a valuable asset, historically retained by an architect

Architects own copyright in the works they produce, unless they transfer that copyright by way of a contract to another.[1] Historically, architects have retained ownership of the copyright to their designs, even if those designs were commissioned by a client. Just as purchasing a copy of a book entitles you to read and enjoy that book but does not make you the owner of the creative ideas it contains, purchasing architectural drawings does not make a client the owner of the designs the drawings depict. Copyright can only be assigned, or transferred, with the express written consent of the copyright owner – the choice to assign or refrain from assigning copyright rests entirely with the copyright owner. Of course, in a commercial context, sometimes there are hard choices to make.

In the absence of copyright ownership, a client's ability to use or modify an architect's designs is limited to the rights conferred by their contract. So it is clear why many clients would rather own the designs outright: pesky architects and their high standards!

Owning the copyright to architectural designs allows a client to use them in future projects that the architect may not have contemplated at the time the designs were commissioned. Many clients want their ownership of the designs they commission to be complete and unencumbered. Owning copyright is a prerequisite to that freedom.

Old designs used in new ways

An architect called me up with the following problem: The developer of a subdivision project wanted to use a subdivision design (fully paid for) used in one municipality in a different municipality. This new municipality had lower property prices, on average, and the housing designs had to be modified to produce a less expensive product. The developer wanted a transfer of the copyright in the design (i.e. all the project drawings and designs) to enable them to proceed with that project. The original architect did not have capacity to work on this new project, but the developer was a good client, and the architect knew that more work was coming in the pipeline when things eased off.

The question was: What happens if the copyright is transferred? What are the consequences of such a transfer?

Having worked in design areas before, my first thoughts went to the potential liability.[2] The new project was going to be overseen by a qualified architect and competent engineers. However, the old design was going to be modified, and the resulting new design would be a hybrid – partly the work of the first architect and partly the work of the new architect. What if there were a design flaw? How would liability (if any) be assessed? How could you tell what caused the liability – was it construction based or design based? Who would pay for it? Whose insurance would be at risk?

Since the architect was seriously considering the copyright transfer, we had to decide how to limit the potential liability given the loss of control over the project. This could happen to you, so here are some issues to contemplate.

Negotiating to limit liability – indemnities and co-insureds

When an architect is negotiating the terms of a Client-Architect Agreement in the context of a copyright transfer, they should think carefully about how to limit their liability.[3] While architects are covered by insurance, it is dangerous to treat this insurance as a silver bullet. If an architect voluntarily assumes risks or responsibilities in excess of those covered by their insurance, they won't be compensated for losses occasioned by those commitments. Even if an architect's insurer will indemnify them for legal costs or damages arising from a given claim, legal battles are invariably time consuming and emotionally draining.

Because clients want to ensure that they are similarly protected, client-drafted contracts will often seek to transfer risk from the client to the architect, and clients may be reluctant to accept terms that limit the architect's liability. Avoiding this pitfall is important.

Limitation of liability clauses

Most standard form Client-Architect Agreements developed for use in Canada include a clause limiting the architect's liability to the extent of their insurance coverage. Some clients may be reluctant to accept such a clause, but the architect should insist that it be included. An example of such a clause drafted specifically for Ontario architects reads:

> *Notwithstanding the foregoing, the obligations and liabilities of the Architect are limited to the professional liability insurance provided by Pro-Demnity Insurance Company and any specific or excess professional liability insurance coverage in force.*

While it is a good idea to ensure that every Client-Architect Agreement an architect signs contains a limitation of liability clause, this clause will only protect the architect against claims brought by the client. Claims brought by third parties, including future owners or occupiers of buildings constructed to the architect's design, will not be subject to any restrictions set out in the Client-Architect Agreement because those third parties never consented to those restrictions. When transferring copyright, limitations of liability clauses may not be very helpful, since most of the claims could emanate from third parties.

"I'd like you to do a presentation on business ethics. If you don't have time to prepare something, just steal it off the Internet."

Being named in the client's insurance policy is a good solution

Even though architects are unlikely to have contracts with the future owners or occupiers of the structures they design, Canadian courts have found that architects nevertheless owe duties to those third parties. It may be possible for people other than the architect's client to take legal action against the architect if the architect's design caused them harm.

It is not possible to draft a clause in a Client-Architect Agreement that will preclude a third party from suing an architect. Neither the architect nor the client has the ability to waive someone else's legal rights without that person's consent. Nevertheless, it may be possible for an architect to limit their exposure to third-party claims by negotiating their Client-Architect Agreement to include a clause under which the client agrees to add the architect as a party to their insurance policy. In this way, architects might protect themselves from claims by third parties with whom they have no contractual relationship. Being a named insured can help you sleep at night.

It will be important to ensure that premiums are paid and the details of the insurance coverage are properly reviewed.

No liability for unauthorized modifications to designs and indemnity

When transferring copyright, agreements should contain clauses stipulating that the architect is not responsible for any loss or damage caused by the client's unauthorized modification of, or failure to adhere to, the architect's original designs. While it is ordinarily good practice to include a clause prohibiting clients from making changes to an architect's designs without the architect's consent, such a clause may be of limited usefulness when an architect has agreed to surrender their ability to control or restrict how their design is used.

As a result, it is suggested that the Client-Architect Agreement contain a clause clearly indicating that the architect bears no responsibility for any changes the client might make to their design. Failing to communicate to the client the consequences of making changes to the architect's designs without professional input may also be negligent.

Further, the architect should request that the client indemnify the architect for any third party claims. This may be easier said than done, as it will bind the client to compensate the architect for future claims, and that is not something developers like to agree to. Also, it may

limit the indemnity to a specific special-purpose entity that may have no assets in the future. Ideally, the entire corporate group would provide the indemnity, if possible. Insurance is therefore preferable, although indemnities with reputable and well-funded organizations can be very helpful.

Limited responsibility for future uses of design

One of the primary reasons a client may want to own the copyright to a design is that it allows them the freedom to use that design, in whole or in part, in connection with future projects. The architect must ensure that the Client-Architect Agreement clearly defines what responsibilities the architect assumes in connection with any of these future uses (ideally none).

Even if an architect decides not to offer any services in excess of providing the designs, they must still take care to limit their responsibility for any unforeseen consequences of using the designs – i.e. those that may not have been foreseeable at the time the Client-Architect Agreement was drafted. For example, legislative changes or scientific advancements might render a formerly acceptable design unfit for construction. The architect should ensure that they qualify their endorsement of their designs by noting that, while they attest to the designs' safety, suitability and legality according to the information available at the time, they are unable to guarantee that the designs will continue to be acceptable in the future, and that the client must have the designs reviewed by a qualified professional before beginning construction.

Conclusion

Copyright is a valuable asset, both to architects and to their clients. Copyright protects an architect's ability to be compensated for their creative labour by constraining how others may use and profit from their work. While that protection is important, in some circumstances, an architect might decide to exchange copyright ownership for reasonable compensation.

Given the potential dangers of such transfers, however, architects should be very careful in assessing what future uses could be made of the copyright and the potential liabilities. Each case should be looked at individually, and decisions should conform with good business sense, while limiting, as much as possible, the potential negative consequences.

— Ken Clark and Amelia McLeod

Notes

1. When a person creates an original work, they automatically and immediately own copyright in that work. Unlike someone seeking to register a trademark or obtain a patent, a creator who wants their idea to be protected by copyright does not need to file an application or navigate complicated legal hurdles in order to secure that protection. They simply need to express their idea in a tangible way – perhaps by expressing it as an image, or as a physical object (i.e. a model). Architectural firms often have employment agreements that result in vesting copyright in a single legal entity, be it a corporation or an individual.
2. Lawyers should always think of and plan for what could go wrong. We are a cheerful bunch.
3. Or, better yet, have their lawyers do it.

Ontario architects own their own insurance company

One of the valuable (and unique) assets provided to practising architects in the province of Ontario is ownership in an insurance company. Pro-Demnity Insurance Company provides the mandatory insurance to Ontario architects, and the OAA is the shareholder of the company on behalf of Ontario architects.

Like other self-regulating professions, Ontario architects are obliged to maintain professional liability insurance as a protection to the public they serve. The sole mandate of Pro-Demnity is to provide the best available insurance protection for Ontario architects. This protection may not always be the cheapest available, since several valuable extra features are already built in, and the protection is continually updated. An example is the coverage for an architect's role related to bonds and construction insurance that is unavailable elsewhere.

The value-for-money equation is one that all architects are familiar with. It forms the foundation of our relationship with our clients. In insurance, as in architecture, you get what you pay for.

An important feature of Pro-Demnity offerings is the "seamless" quality of its Increased Limits program. Now in its 20th year, this program is available for architects requiring claim limits that exceed the mandatory minimums. "Seamless" means that, in the event of a claim, there are no coverage or claims handling disputes between competing insurers and there are no surprise "double-deductibles" (each insurer may impose its own deductible – two insurers, two deductibles).

In addition, unlike other insurance available on the market, Pro-Demnity Mandatory and Increased Limits don't include a broker's commission, since no broker is involved. Money that would otherwise go to pay a broker is directed instead to the Pro-Demnity mandatory program, to help fund other unique benefits enjoyed by all Ontario architects – benefits that include:

- No-cost Cyber Liability Coverage – for computer network security claims;

(Continues on next page)

Ontario Architects (continued)

- No-cost Retirement from Practice Program – you may retire, but your policy doesn't, and Pro-Demnity covers the cost;
- No-cost Loss Prevention Advice – always available from experienced architectural advisors;
- No-cost Continuing Education Programs – year-round and province-wide;
- Defence costs that do not erode the claim limits – all your coverage goes toward settlement of your claim, and Pro-Demnity covers the legal costs;
- Aggregate limits for any project that are double the limit for a single claim;
- Aggregate limits for all claims that are four times the limit for a single claim;
- A "disappearing deductible" – if your settlement is less than $250,000, the deductible is also less, reducing, proportionally, to zero;
- Project-specific "spike-ups" in limits – a cost effective way to meet a client's requirements;

Ontario architects enjoy Business Class service at an Economy fare.

- Regular bulletins and advisories – a risk management toolkit;
- This very newsletter: ***The Straight Line*** – interesting and informative articles for architects in practice.

To assist architects in better understanding the implications of the choices being offered, and to help architects assess the value-for-money considerations, Pro-Demnity has prepared some straightforward explanations:

- ***Making an Informed Choice***, including a Due Diligence List of matters to consider; and
- ***The Pro-Demnity Advantage***, highlighting the features of the Pro-Demnity program provided to Ontario architects.

The full content of these informative tools can be accessed on the Pro-Demnity website: www.prodemnity.com.

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Pro-Demnity Insurance Company is a wholly owned subsidiary of the Ontario Association of Architects. Together with its predecessor the OAA Indemnity Plan, it has provided professional liability insurance to Ontario architects since 1987.

Questions related to the professional liability insurance program for Ontario architects may be directed to Pro-Demnity Insurance Company. Contact information for the various aspects of the program can be found on the Pro-Demnity website:

www.prodemnity.com

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