

The Myth of the Free Range Home Inspection Report

written by Paul Duffau

Let us pretend that a Real Estate licensee—not you, of course—happens to have the entire report of a home inspection that was completed on their listing just a week ago. The buyer backed out of the deal with your client over financing issues and now there's a new offer with a new buyer.

As a courtesy, that licensee sends over the report that they have, not noticing the fine print that says, “*Copyright 2015*” at the bottom of the cover page. Or they do notice, but, since it is just an inspection report and not a novel, believes that the inspector has overstepped their bounds.

In fact, the Licensee has probably just violated federal statutes and infringed on the copyright of the inspector who authored the report.

Copyright Basics

First, we should get a good idea of what copyright is, what it's for, and what it protects. Understand, I am not a lawyer, but I am a published author and, as such, have studied some of the ins and outs of the subject.

Copyright, as established in the U.S. Constitution, were “*to promote the Progress of Science and useful Arts.*” Before the advent of copyrights and patent-rights, the creator of an intellectual property often lost the profit derived from the ability to exclusively market that property. The Founding Fathers believed that such protection would increase the production of creative works which would, in turn, enrich everyone else. That protection to exclusive use of protected material, for profit or otherwise, as codified into law, is the copyright. Copyright applies to works of art, of literature, and works that convey ideas or information.

Great, but how does this pertain to inspection reports? Inspector Bob is not a novel-writing author, he's a home, inspector. His reports all sound the same.

That is where the concept of protected material comes into play. The inspection report is likely a protected work if it meets a couple of not-very-stringent tests. First, the report must show some originality. If the inspector is using a checklist system that offers nearly nothing in the way of interpretive comments, the work may not be protected. If, on the other hand, the inspector uses a narrative report or provides commentary on the items he has inspected, the work is protected.

Second, it must have a fixed form. That is some type of physical presence. For the purposes of copyright, electronic forms of text qualify as fixed.

Finally, it must have at least minimal creativity involved. The classic example is the phone book. While it is a collection of words and names, no creativity is involved and thus not a protected work. The list of ingredients for recipes are not considered creative but the directions on how to prepare a Beef Wellington is. Lists of data, such as all the real estate available in a particular zip code, would not be

considered to reach the minimum threshold of creativity. The easy way to think of this requirement is any judgement required or could it be done by sorting a database.

Who Owns the Report?

Now that we have the boring bits figured out, we now need to look at who exactly owns the report.

At first glance, the client would seem to own the report. The Washington State Home Inspector Standard requires the inspector to “*Provide the client a copy of the home inspection report according to the terms of the preinspection agreement.*” By standard, the inspector may not share the information from the report with a third party without specific written approval from the client.

What the standard does not require is for the inspector to relinquish the rights to his intellectual work, i.e. the report containing his observations of the subject property. This is important to note. What the client does with their copy of the report, with two important exceptions, is completely up to them. If it is a paper copy, they can shred, rend, or set the report on fire. It is theirs. They can do likewise with the digital representations as well. They can even sell their original paper copy (if it was given to them in that format.) What they cannot do, legally, is reproduce it or modify it.

From the viewpoint of a copyright holder, the attachment of the report to a third party in an email is an electronic reproduction. Most inspectors understand the need for the client to share the report with their agent or even with the sellers. Many inspectors will encourage such sharing and the more savvy of them will have that written into their reports at the copyright notice.

Since I own the rights, I also control the legal distribution of the report. In my copyright notice, I have an express prohibition against use by an unauthorized third party. Most inspection agreements will have similar language regarding third party use. There is a belief that if the copyright has not been registered with the government, then the rules do not pertain. That is not correct. The only change is the amount of damages that can be claimed in an action in court.

What about disclosure?

As a real estate licensee, you have a legal obligation to accurately transmit disclosures filled out by the seller. Expressly stated in the form is the following statement: *‘THE FOLLOWING ARE DISCLOSURES MADE BY SELLER AND ARE NOT THE REPRESENTATIONS OF ANY REAL ESTATE LICENSEE OR OTHER PARTY.’*

Sorry for shouting with the all-caps format, but that is exactly how the wording from RCW 64.06.020 is written.

The default position for most licensees is to disclose everything, which is a sensible position to take. The question regarding disclosure becomes one of *what did the seller know?*

If the buyer cancelled the contract on the basis of inspection without providing the inspection report, the seller has no additional information to disclose. If the relevant parts of the inspection report are provided to the seller, then the information contained should be disclosed, but not by releasing the report. Instead, the information, which is not protected, should be entered into a new disclosure form for the next prospective buyer.

Let's use an example.

The buyer and seller have entered into an agreement and an inspection is completed by a licensed inspector. During the course of the inspection, a sewer line backs up into the home while the inspector tests the functional flow. This event causes the buyer to withdraw from the contract, sharing entire report which includes the information that the basement flooded from a blockage in the sewer line.

As the licensee, you should be advising the seller to update the disclosures to reflect this information and whether repairs have been made to prevent a reoccurrence.

If another buyer shows up in a week, they should receive the updated disclosure, not the 'gently used' inspection report along with the receipt showing the sewer main repair. This meets your obligation to advise the seller and of providing accurate disclosures without violating the copyright of the report.

Supplying Reports to Buyers

A larger issue from the perspective of the consumer comes from the lack of contractual obligations in a re-used inspection report.

The inspector, by law, has a contractual relationship with the person who paid for the report. The contract specifies the fees, the address of the property, and a general description of the items that will and will not be inspected. The agreement is required to be signed by both the client and the inspector. When a report is re-used, this relationship does not exist. Instead, the real estate licensee has intervened into the relationship and supplanted the inspector by providing the report.

Inspection reports are time-sensitive documents that record the observations of the inspector on the day of inspection. Conditions can, and often do, change with the passage of time, rendering the original observations invalid. As an example, a water heater that was operating in June may have failed entirely by November. Similarly, dishwashers, which are notorious for developing leaks, could flood the kitchen the first time the new owner uses it.

In these cases, the consumer may not be protected. Certainly the inspector will argue that this consumer is not their client and there is no contractual obligation present, as well as point out the time lag between inspection and event. That potentially leaves the person supplying the report with responsibility.

Depending on the region, this could well lead to litigation, with all the licensees named in the suit—buyer's representation, seller's representation, and the inspector. At best, even if the plaintiff does not prevail, reputations are sure to be tarnished. At worst, it could be financially ruinous depending on the nature of the claim.

Wrap Up

Copyright does not need to be complicated, nor does protecting yourself.

First, respect the work of the inspector. Avoid handing out reports without his authorization. He may suggest that getting the buyer's permission first. Remember that we are not allowed to disclose information without the client's permission. If any significant length of time has passed or there has been a major change in weather, do not be surprised if he counts the report as outdated. In that case, simply encourage your client to get another inspection from the inspector of their choice.

Second, understand that you can share the information even if you cannot share the report itself. Use the information to update the existing disclosure forms.

Finally, avoid placing yourself in a position of possible legal jeopardy. Do not re-use an inspection report and blur the line between the various licensees. I understand you want to provide a benefit to your client, but assuming that kind of risk is what home inspectors are for in the first place.

Let us do our jobs to protect your—and our—client.