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February 5, 2013

## Via Certified and First Class U.S. Mail

Public.Resource.org  
Carl Malamud  
1005 Gravenstein Highway North  
Sebastopol, CA 95472

### **Re: Your DMCA Takedown Notice Response**

Dear Mr. Malamud:

Our law firm represents the Sheet Metal and Air Conditioning Contractors National Association (“SMACNA”). SMACNA sent your organization a copyright takedown notice pursuant to the Digital Millennium Copyright Act (“DMCA”) on or about January 10, 2013. This takedown notice related to your organization publishing SMACNA’s HVAC Air Duct Leakage Test Manual (the “Publication”), which is a federally copyrighted publication, on your organization’s website.

We are in receipt of your organization’s response where it claims SMACNA is not entitled to copyright protection because the government “incorporated” portions of the Publication into the Code of Federal Regulations (“CFR”). Your organization’s legal reliance on, and conclusions relating to, the decision in Veeck v. Southern Building Code Congress Int., Inc., 293 F.3d 791 (5th Cir. 2002) is misplaced for several reasons.

First, even assuming Veeck stands for the proposition that you claim (i.e., a government’s reference to a private organization’s copyrighted work eviscerates the copyright protection), Veeck is not the applicable law. The Veeck decision came from the Fifth Circuit. California, where your organization is located, is in Ninth Federal Judicial Circuit. Accordingly, the Veeck decision has no precedential value in California.

The applicable law for the Ninth Judicial Circuit confirms that your organization cannot legally copy and distribute the Publication without SMACNA’s authorization. Specifically, the Ninth Circuit adheres to the standard set forth in Practice Management Info. Corp. v. American Med. Association, 121 F.3d 516 (9th Cir. 1997), amended by 133 F.3d 1140. In Practice Management, the Ninth Circuit held that the government’s adoption of a pre-existing private

numbering system for medical conditions by the American Medical Association did not extinguish the federal copyright protection. In other words, the copyright owner was able to legally enforce and prevent others from copying the copyrighted work. Id. at 519-520 (“we affirm the district court’s conclusion that the AMA’s copyright . . . should be enforced.”).

The same result holds true in this case with respect to SMACNA’s ability to enforce its copyrights. SMACNA does not automatically lose its copyright protection just because the government decided to cite to SMACNA’s work. SMACNA has spent significant resources developing its educational materials over the course of many decades. The idea that the government can simply cite to SMACNA’s copyrighted work and have SMACNA automatically lose its copyright protection, is unsupported by any legal authority and is fundamentally contrary to the Takings Clause in the United States Constitution.

Second, your organization appears to misinterpret the holding for Veeck. Veeck does not stand for the proposition you claim (i.e., that copyrighted standards referenced by a Regulation, become law, and therefore lose its copyright protections because the work enters the public domain). Veeck specifically noted that “copyrighted works **do not** ‘become law’ merely because a statute refers to them.” 293 F. 3d at 805 (emphasis added). As the Veeck decision noted, a work does not enter the public domain if it was authored by a private group “for reasons other than incorporation into law.” Id.; see Nielsen Company (US), LLC v. Truck Ads, LLC, 2011 WL 3857122, \*12 (N.D. Ill. 2011).

In this case, SMACNA’s Publication was authored for other reasons than to be incorporated into law. SMACNA’s publication was not intended to be a model code—it was, and is, extrinsic industry standards compiled from decades of SMACNA’s research and work to assist its members for increasing safety and complying with industry best practices. Another important distinguishing factor between SMACNA’s Publication and the facts in Veeck is that SMACNA’s Publication was only *partially* referenced in the CFR, not fully subsumed like the proposed model code at issue in Veeck. Ultimately, the holding in Veeck, if anything, supports SMACNA’s position that it retains its copyright protection for the Publication. Veeck, 293 F. 3d at 805.

Third, the United States’ Solicitor General confirmed that the Veeck decision is in harmony with other established law in the other jurisdictions. Specifically, **copyright owners are able to enforce their copyrights even when the government has incorporated portions of the copyrighted material in the law.** See e.g., Practice Management Info. Corp., 121 F.3d 516 (9th Cir. 1997); CCC Info. Servs., Inc. v. Maclean Hunter Market Reports, Inc., 44 F.3d 61 (2d Cir. 1994) (determining used car valuations used by government did not invalidate copyright and stating that the Takings Clause in the U.S. Constitution could be violated by a contrary conclusion); Nielsen Company (US), LLC v. Truck Ads, LLC, 2011 WL 3857122 (N.D. Ill. 2011) (determining FCC’s reliance on copyrighted maps did not invalidate the copyright protections of the maps).

February 5, 2013

Page 3

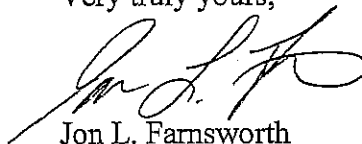
As discussed above, SMACNA's position in enforcing and protecting its copyrights is consistent with applicable law. The very lifeblood of SMACNA is based its established intellectual property rights inherent in the technical and educational materials it produces. If the totality of SMACNA's work is eligible for distribution and re-production without regard to SMACNA's intellectual property rights, SMACNA's funding will evaporate and SMACNA will eventually cease to exist. Accordingly, SMACNA takes a violation of its intellectual property rights seriously.

Please note that if the Publication remains on your organization's webpage after **February 14, 2013**, SMACNA intends to pursue its legal action against your organization to the full extent permitted by law. SMACNA reaffirms its copyright protection in the Publication and reiterates its demand for your organization to immediately remove the infringing material from your website.

With that being said, your organization should take comfort in knowing that the public may receive copies of the applicable *portions* of SMACNA's Publication referenced by the CFR by requesting them directly from the government at no charge. Alternatively, members of the public may purchase SMACNA's educational materials, guides, and other publications at <http://smacna.org/bookstore/>.

If you have further questions, please feel welcome to contact me.

Very truly yours,



Jon L. Farnsworth

JLF/sjbg

cc: Tom Soles  
William Ecklund, Esq.