

Exhibit D

Exhibit D



CERTIFICATE

By Authority Of THE UNITED STATES OF AMERICA Legally Binding Document

By the Authority Vested By Part 5 of the United States Code § 552(a) and Part 1 of the Code of Regulations § 51 the attached document has been duly INCORPORATED BY REFERENCE and shall be considered legally binding upon all citizens and residents of the United States of America. *HEED THIS NOTICE:* Criminal penalties may apply for noncompliance.



Document Name: SMACCNA: HVAC Air Duct Leakage Test Manual

CFR Section(s): 10 CFR 434.403.2.9.3

Standards Body: Sheet Metal and Air Conditioning Contractors
National Association



Official Incorporator:

THE EXECUTIVE DIRECTOR
OFFICE OF THE FEDERAL REGISTER
WASHINGTON, D.C.

From: remedies@attributor.com
Subject: This is a verified DMCA Removal Request from Attributor
Date: January 10, 2013 7:23:58 PM PST
To: carl@media.org
Reply-To: remedies@attributor.com

*** Sent via Email – DMCA Notice of Copyright Infringement ***

Dear Sir/Madam,

I certify under penalty of perjury, that I am an agent authorized to act on behalf of the owner of the intellectual property rights and that the information contained in this notice is accurate.

I have a good faith belief that the page or material listed below is not authorized by law for use by the individual(s) associated with the identified page listed below or their agents and therefore infringes the copyright owner's rights.

I HEREBY DEMAND THAT YOU ACT EXPEDITIOUSLY TO REMOVE OR DISABLE ACCESS TO THE PAGE OR MATERIAL CLAIMED TO BE INFRINGING.

This notice is sent pursuant to the Digital Millennium Copyright Act (DMCA), the European Union's Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (2001/29/EC), and/or other laws and regulations relevant in European Union member states or other jurisdictions.

My contact information is as follows:

Organization name: Attributor Corporation as agent for Rights Holders listed below
Email: counter-notice@attributor.com
Phone: 650-340-9601
Mailing address:
119 South B Street
Suite A,
San Mateo, CA 94401

My electronic signature follows:

Sincerely,
/Eraj Siddiqui/
Eraj Siddiqui
Attributor, Inc.

*** INFRINGING PAGE OR MATERIAL ***

Infringing page/material that I demand be disabled or removed in consideration of the above:

Rights Holder: Sheet Metal and Air Conditioning Contractors National Association

Original Work: HVAC Air Duct Leakage Test Manual

Infringing URL: <https://law.resource.org/pub/us/cfr/ibr/005/smaccna.hvac.1985.pdf>

From: Carl Malamud <carl@media.org>
Subject: **Re: This is a verified DMCA Removal Request from Contributor**
Date: January 11, 2013 9:14:47 AM PST
To: remedies@contributor.com
Cc: David Halperin <davidhalperindc@gmail.com>

Dear Mr. Siddiqui:

* * * Sent via Electronic Mail and World Wide Web * * *

I am in receipt of your communication of January 13, 2013 in regards to smaccna.hvac.1985.pdf, the HVAC Air Duct Leakage Test Manual as published by the Sheet Metal and Air Conditioning Contractors National Association.

The HVAC Air Duct Leakage Test Manual has been incorporated by reference and is legally mandated by the United States in Title 10 of the Code of Federal Regulations, Section 434.403.2.9.3. The HVAC Air Duct Leakage Test Manual has also been incorporated by reference and is required by law in Title 19, New York City Rules and Regulations, Part 1240 as well as Chapter 7676 of the Minnesota Energy Code.

As this document has been incorporated into both Federal and State law, long-standing precedent of the United States Supreme Court holds that copyright claims cannot prevent citizens from reading, knowing, and speaking the law. See *Wheaton v. Peters*, 33 U.S. 591 (1834); *Banks v. Manchester*, 128 U.S. 244 (1888).

While the standards drafted by the Sheet Metal and Air Conditioning Contractors National Association were entitled to copyright protection when issued, once incorporated into state or federal law these standards became the law, and thus have entered the public domain. Chief Judge Edith H. Jones of the 5th Circuit expressed this principle clearly in her opinion in *Veeck v. Southern Building Code Congress*, which concerned a model building code incorporated in the law of two Texas towns:

"The issue in this en banc case is the extent to which a private organization may assert copyright protection for its model codes, after the models have been adopted by a legislative body and become 'the law.' Specifically, may a code-writing organization prevent a website operator from posting the text of a model code where the code is identified simply as the building code of a city that enacted the model code as law? Our short answer is that as law, the model codes enter the public domain and are not subject to the copyright holder's exclusive prerogatives. As model codes, however, the organization's works retain their protected status." 293 F.3d 791 (5th Cir. 2002) (en banc).

As you can see by looking at the document in question, a cover sheet has been prepended to clearly spell out the section of the law--in this case the Code of Federal Regulations--that created the incorporation by reference into the law. Incorporation into the Code of Federal Regulations is not a casual affair and requires that the regulator follow a carefully prescribed procedure and that the incorporation be approved specifically by the Executive Director of the Office of the Federal Register.

The purpose of requiring the HVAC Air Duct Leakage Test Manual is to help promote the public safety. It was incorporated into the law because of the high quality and integrity of the work and it is the very purpose of the law that the citizens should know and follow the requirements. I'm sure you will agree that our noncommercial posting of these legally mandated regulations helps to inform citizens and promote the public safety.

I would be happy to discuss this matter further if you wish.

Best regards,

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

On Jan 10, 2013, at 7:23 PM, remedies@attributor.com wrote:

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San Mateo, CA 94401

My electronic signature follows:

Sincerely,
/Eraj Siddiqui/
Eraj Siddiqui
Attributor, Inc.

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Original Work: HVAC Air Duct Leakage Test Manual

Infringing URL: <https://law.resource.org/pub/us/cfr/ibr/005/smaccna.hvac.1985.pdf>

Felhaber Larson Fenlon & Vogt

A Professional Association – Attorneys at Law

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E-mail: jfarnsworth@felhaber.com

Reply to St. Paul Office

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St. Paul, MN 55101-2136
651 222 6321 | Fax 651 222 8905

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

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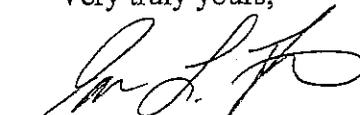
As discussed above, SMACNA's position in enforcing and protecting its copyrights is consistent with applicable law. The very lifeblood of SMACNA is based its established intellectual property rights inherent in the technical and educational materials it produces. If the totality of SMACNA's work is eligible 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.