

1 Corynne McSherry (SBN 221504)
2 corynne@eff.org
3 Matt Zimmerman (SBN 212423)
4 mattz@eff.org
5 ELECTRONIC FRONTIER FOUNDATION
6 454 Shotwell Street
7 San Francisco, CA 94110
8 Telephone: (415) 436-9333
9 Facsimile: (415) 436-9993

10 David Halperin (*pro hac vice* pending)
11 davidhalperinc@gmail.com
12 3333 14th Street NW, Suite 205
13 Washington, DC 20010

14 Attorneys for Plaintiff
15 PUBLIC.RESOURCE.ORG

ORIGINAL
FILED

FEB 22 2013

RICHARD W. WASHINGTON
CLERK OF DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MEJ

16 UNITED STATES DISTRICT COURT
17 FOR THE NORTHERN DISTRICT OF CALIFORNIA

18 PUBLIC.RESOURCE.ORG,

19 Plaintiff,

20 v.

21 SHEET METAL AND AIR CONDITIONING
22 CONTRACTORS' NATIONAL
23 ASSOCIATION, INC.

24 Defendant.

C 13 0815
Case No.: _____

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

JURY TRIAL DEMANDED

1 Plaintiff Public.Resource.Org, Inc. (“Public Resource”), by and through its attorneys, brings
2 this action and alleges against Defendant Sheet Metal and Air Conditioning Contractors National
3 Association (“SMACNA”), as follows:

4 NATURE OF ACTION AND RELIEF SOUGHT

5 1. This is a declaratory judgment action to vindicate the right of the public to access,
6 read, speak, and thereby use the law. Specifically, it seeks to vindicate Public Resource’s right to
7 post online a technical manual, the 1985 HVAC Air Duct Leakage Test Manual (“the 1985
8 manual”), that has been explicitly incorporated into federal and state law and that articulates
9 specific standards and installation and testing requirements regarding heating, ventilation, and air
10 conditioning systems.

11 2. Public Resource is a non-profit organization dedicated to improving citizens’ ability
12 to access the laws and codes that govern their lives. As part of this work, Public Resource acquires
13 and makes readily available to the public various codes and standards that have been incorporated
14 into federal and state laws, such as fire safety codes, pipeline safety standards, and food safety
15 standards.

16 3. By improving public access to governing codes, Public Resource helps enable
17 citizens, businesses, journalists, consumer advocates, researchers, and others to educate themselves
18 regarding rules affecting the public.

19 4. To advance its mission, on or about July 4, 2012, Public Resource posted a copy of
20 the 1985 manual on its website, <http://law.resource.org>. As set forth below, the 1985 manual has
21 been incorporated into state and federal law. A true and correct copy of the manual as posted is
22 attached hereto as **Exhibit A**.

23 5. On or about January 10, 2013, Public Resource received a copyright takedown
24 notice from SMACNA’s agent, Contributor Corporation of San Mateo, California, pursuant to the
25 Digital Millennium Copyright Act, alleging that the public posting of the 1985 manual on Public
26 Resource’s website constituted copyright infringement. Public Resource responded, explaining
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1 that it had not violated copyright law. A true and correct copy of this correspondence is attached
2 hereto as **Exhibit B**.

3 6. On February 8, 2013, Public Resource received a letter (dated February 5, 2013)
4 from Jon L. Farnsworth, counsel for SMACNA, asserting that the posting violated SMACNA's
5 copyright and threatening legal action if the posting was not removed by February 14, 2013. On
6 February 9, 2013, Public Resource removed the 1985 manual from its website, left the cover sheet
7 posted, and added at that URL, <https://law.resource.org/pub/us/cfr/ibr/005/smacna.hvac.1985.pdf>,
8 the correspondence between representatives of SMACNA and Public Resource. A true and correct
9 copy of the letter from Mr. Farnsworth to Mr. Malamud is attached hereto as **Exhibit C**. A true
10 and correct copy of the correspondence as posted on Public Resource's website is attached hereto
11 as **Exhibit D**.

12 7. Technical manuals like the 1985 manual at issue in this case, explicitly adopted by
13 federal regulation, have the force of law and impose affirmative obligations on citizens. As much
14 as landmark health care acts or Supreme Court civil rights decisions, these technical
15 requirements—for building, electrical, plumbing, transportation—touch the lives of Americans
16 every day. Business owners, workers, and consumers need to know these directives in order to
17 operate their businesses lawfully, to avoid penalties, and to determine whether neighbors,
18 contractors, or competitors are in compliance.

19 8. Public Resource brings this action for declaratory and injunctive relief to clarify the
20 rights of the parties and to refute SMACNA's assertions of copyright infringement.

21 **PARTIES**

22 9. Plaintiff Public Resource, based in Sebastopol, California, is a California non-profit
23 corporation with its principal place of business at Public.Resource.Org, 1005 Gravenstein Hwy.
24 North, Sebastopol, CA 95472.

25 10. Defendant Sheet Metal and Air Conditioning Contractors National Association
26 ("SMACNA") is a self-described international association of union contractors and a "standards-
27 setting organization" with its headquarters in at 4201 Lafayette Center Drive, Chantilly, Virginia
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1 20151-1219. According to its website, SMACNA has 1,834 members in 103 chapters throughout
2 the United States, Canada, Australia and Brazil, including eight chapters in California, including
3 three Bay Area Chapters. SMACNA conducts substantial business in California.

4 **JURISDICTION**

5 11. This action arises under the copyright laws of the United States, 17 U.S.C. §§ 101,
6 *et seq.* and the United States Constitution. This Court has subject matter jurisdiction over these
7 claims pursuant to 28 U.S.C. §§ 1331 and 1338 and the Declaratory Judgment Act, 28 U.S.C.
8 § 2201.

9 12. This Court has personal jurisdiction over Defendant SMACNA because SMACNA
10 conducts regular business in California, because SMACNA issued its copyright threat to Public
11 Resource in California, and because its agent for copyright takedowns, Attributor Corporation, is
12 based on California.

13 **VENUE AND INTRADISTRICT ASSIGNMENT**

14 13. Venue for this action is proper under 28 U.S.C. §1391(b)(2).

15 14. This is an intellectual property action. Pursuant to Local Rule 3-2(c), it shall be
16 assigned on a district-wide basis.

17 **FACTUAL ALLEGATIONS**

18 **Public Resource**

19 15. Public Resource is a non-profit corporation dedicated to making primary legal
20 materials and other important government records available to the public.

21 16. Public Resource also helps further the purposes of the Freedom of the Information
22 Act (FOIA), 5 U.S.C. § 552. Under FOIA, materials, such as standards and technical requirements,
23 that are incorporated by reference into a federal regulation are deemed effectively published only if
24 such directives are “reasonably available to the class of persons affected thereby.” 5 U.S.C.
25 § 552(a)(1), 1 CFR(a)(4). In the age of the Internet, making such directives “reasonably available”
26 means, at a minimum, posting them on the Internet for citizens to readily access without charge.
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Sheet Metal and Air Conditioning Contractors' National Association (SMACNA)

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17. On information and belief, part of SMACNA's mission is to create industry standards, including technical requirements, and to ensure that they are nationally adopted, particularly through incorporation into government regulations.

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18. On information and belief, SMACNA standards address all facets of the sheet metal industry, from duct construction and installation to air pollution control, from energy recovery to roofing. SMACNA's Technical Resources Department fields several thousand technical questions annually from architects, engineers, manufacturers and government personnel.

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19. According to the SMACNA Membership Benefits document available on its website at http://www.smacna.org/pdf/about/membership_benefits.pdf:

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SMACNA is a trade association and an association is made up of people. Association people join together to concentrate their collective efforts on the needs and problems of an industry, society, or cause. By uniting, they combine their talents and resources to address and satisfy needs and seek resolution to problems that they are unable to satisfactorily address individually. By joining together they are able to consolidate their influence and power to affect change. This collective power can be effective in a variety of ways. The most common application of this collective influence for construction associations is in the area of labor relations, most notably collective bargaining and unity, for the express purpose of achieving equitable employment conditions. But the same unity can be used to affect positive impact in business management educational endeavors; legislative influence; industry regulatory conditions, such as code requirements, project specification development, and installation procedures. The application of this collective influence can be initiated at the local, state, regional, national, and international levels. The potential for positive impact in all of these areas and at all of these levels of influence is awesome.

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By coming together to form a local sheet metal contractors association you start down the path of building a power base to influence the environment in which each of you conducts business. In affiliating as a Chapter of SMACNA, you expand your power base to the national level. The flow of power or potential influence runs both ways you increase the power base of SMACNA and SMACNA provides you with expanded power influencers.

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A true and correct copy of the SMACNA Membership Benefits document is attached hereto as **Exhibit E.**

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20. According to SMACNA’s website at <http://www.smacna.org/about/>:

The voluntary technical standards and manuals developed by SMACNA Contractors have found worldwide acceptance by the construction community, as well as foreign government agencies. ANSI, the American National Standards Institute, has accredited SMACNA as a standards-setting organization. SMACNA does not seek to enforce its standards or provide accreditation for compliance.

A true and correct copy of the webpage “About SMACNA” is attached hereto as **Exhibit F**.

21. On or about February 20, 2003, SMACNA issued a “technical paper” entitled “Building Code Update.” The paper discusses the effort by the International Code Council (ICC) “to develop a single set of comprehensive and coordinated national [building] codes” that could be used in all of the United States. According to the paper, linked to on SMACNA’s website at http://www.smacna.org/technical/download.cfm?download_file=icc-nfpabuildingcodes2-03.pdf:

The ICC Codes benefit SMACNA members & building industry professionals by now assisting them to move into different regions within the U.S. and international environment with a single set of model codes. SMACNA’s participation in the ICC code setting process ensured that the SMACNA Standards currently utilized in the HVAC industry would be included as the basis for duct construction. After the three model code organizations united to form the ICC and provided the first and only complete set of building codes for the country, the Department of Defense (DoD) recognized the enormous benefits this simplification could provide to military construction and is working to build its criteria, standards, and guide specifications around commercially developed consensus codes, and bring its design practices more in line with those of the private sector....

SMACNA’s support is for a single set of model codes with all relevant code organizations participating in that effort. We believe that by participating in both the ICC and NFPA 5000 Building Code process that we again see the formation of a final product of standards that will serve to enhance the public’s confidence in building code officials and keep this nation’s competitive edge in the evolving global market.

A true and correct copy of the SMACNA Building Code Update is attached hereto as **Exhibit G**.

A description of this technical paper on the SMACNA website (at <http://www.smacna.org/technical/index.cfm?fuseaction=papers>) states:

This technical paper reviews the Model Building Code process of the International Code Council (ICC) and National Fire Protection Association (NFPA) Building 5000 Code and addresses SMACNA

1 National's position with regards to the efforts of the code community to
2 develop a single set of comprehensive and coordinated national codes.
3 SMACNA National has long been involved in the code setting process to
4 ensure that the SMACNA Standards currently utilized by the HVAC
5 industry would be included as the basis for duct construction.

6 A true and correct copy of this technical paper is attached hereto as **Exhibit H**.

7 22. SMACNA stated in its newsletter dated November 7, 2003 (available at
8 http://www.smacna.org/news/news_preview.cfm?id=5112):

9 The American National Standards Institute (ANSI) announced that
10 SMACNA's "Round Industrial Duct Construction Standards," second
11 edition, has been approved as an American National Standard.

12 ANSI recognition increases the potential that SMACNA's standards are
13 internationally adopted for industry and regulatory use. The approval will
14 also encourage wider domestic use of SMACNA's standard by state- and
15 local-code governing bodies as well as the design and engineering
16 community. The new ANSI status will also enhance SMACNA's overall
17 credibility as a standards-developing organization, both domestically and
18 internationally.

19 A true and correct copy of this newsletter is attached hereto as **Exhibit I**.

20 **Incorporation Into Law of the 1985 Manual**

21 23. The 1985 manual identifies leakage limits for ducts and outlines procedures for
22 testing ducts for conformity with air leakage limits set forth in project specifications.

23 24. Managing air duct leakage is crucial to energy conservation and is an integral part of
24 model codes such as the International Energy Conservation Code, as well as a key part of the
25 Department of Energy-specified energy conservation efforts that resulted in incorporation by
26 reference of the 1985 manual.

27 25. The 1985 manual was incorporated into a final regulation issued by the U.S.
28 Department of Energy on October 6, 2000. *See* 65 Federal Register 60000-01.

29 26. The incorporation by reference of the 1985 manual, as codified at Title 10 of the
30 Code of Federal Regulations, section 434.403.2.9.3, states, in part:

31 403.2.9.3 Duct and Plenum Construction. All air-handling ductwork and plenums
32 shall be constructed and erected in accordance with RS-34, RS-35, and RS-36
33 (incorporated by reference, see § 434.701)....

34 A true and correct copy of 10 CFR section 434.403.2.9.3 is attached hereto as **Exhibit J**.

1 Section 434.701 of Title 10 CFR identifies RS-36 to be: “HVAC Air Duct Leakage Test Manual,
2 1st edition, 1985, Sheet Metal and Air-Conditioning Contractors' National Association, Inc., 4201
3 Lafayette Center Drive, Chantilly, VA 20151.” A true and correct copy of 10 CFR section 434.701
4 is attached hereto as **Exhibit K**.

5 27. Pursuant to Section 51 of 1 CFR, the Director of the Federal Register is required to
6 approve each instance of incorporation by reference requested by federal agencies.

7 28. The federal government's incorporation by reference of the 1985 manual was
8 undertaken after assessment by technical experts, publication of a notice in the Federal Register,
9 comments by members of the public and industry and technical experts, followed by a
10 determination by the Department of Energy that Incorporation by Reference was appropriate and
11 necessary and then approval of that incorporation by the Office of the Federal Register.

12 29. As a standard that has been expressly incorporated by reference into the Code of
13 Federal Regulations, the 1985 HVAC Air Duct Leakage Test Manual is the law of the United
14 States, and compliance with the 1985 manual is mandatory.

15 30. Title 19 of The New York Code, Rules and Regulations (NYCRR), Part 1240,
16 incorporates by reference the 1985 manual. A true and correct copy of 19 NYCRR 1240.1, which
17 indicates that “a publication entitled Energy Conservation Construction Code of New York State,
18 publication date: August 2010, published by the International Code Council, Inc.” is incorporated
19 into Part 1240 by reference, is attached as **Exhibit L**. A true and correct copy of a page on the
20 website of the International Code Council, Inc., which indicates that the 1985 manual has been
21 incorporated into the New York City Rules and Regulations, Part 1240, is attached hereto as
22 **Exhibit M**.

23 31. The Minnesota Energy Code, Chapter 7676, incorporates by reference the 1985
24 manual. *See* Section 7676.0400 Subpart 1(H) (“The following standards and references are
25 incorporated by reference... H. HVAC Air Duct Leakage Test Manual, Section 4, 1985 edition, as
26 published by the Sheet Metal and Air Conditioning Contractors National Association, Inc., Vienna,
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1 Virginia.”). A true and correct copy of the Minnesota Energy Code, Chapter 7676, is attached
2 hereto as **Exhibit N**.

3 32. The Washington Administrative Code, WAC 51-11-0503, Section 503.10.1, makes
4 compliance with the 1985 manual mandatory. A true and correct copy of the Washington State
5 Energy Code, WAC 51-11-0503, Section 503.10.1, is attached hereto as **Exhibit O**.

6 33. On information and belief, the United States does not make the 1985 manual
7 available to the general public for free, either online or on request.

8 34. On information and belief, SMACNA does not make the 1985 manual available to
9 the general public for free, either online or on request.

10 35. On May 3, 2012, Public Resource purchased a paper copy of the 1985 manual from
11 SMACNA’s online store for the sum of \$64.00, plus \$9.98 shipping, for a total of \$73.98.

12 36. On or about July 4, 2012, Public Resource posted the 1985 manual online in pdf
13 format on its website at <https://law.resource.org/pub/us/cfr/ibr/005/smaccna.hvac.1985.pdf>.

14 37. Prepended to the 1985 manual, Public Resource included a cover sheet which stated,
15 in relevant part:

16 By the Authority Vested By Part 5 of the United States Code § 552(a) and
17 Part 1 of the Code of Regulations § 51 the attached document has been
18 duly INCORPORATED BY REFERENCE and shall be considered legally
19 binding upon all citizens and residents of the United States of America.

20 HEED THIS NOTICE: Criminal penalties may apply for noncompliance.

21 Document Name: SMACNA: HVAC Air Duct Leakage Test Manual

22 CFR Section(s): 10 CFR 434.403.2.9.3

23 Standards Body: Sheet Metal and Air Conditioning Contractors National
24 Association

25 **SMACNA’S Threats and Demands for Removal**

26 38. On January 11, 2013, Eraj Siddiqui of Attributor Corporation sent a “DMCA Notice
27 of Copyright Infringement” by email to Carl Malamud, President of Public Resource, demanding,
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1 on behalf of SMACNA, that Public Resource remove the 1985 manual from the Public Resource
2 website. *See Exhibit B.*

3 39. On January 11, 2013, Carl Malamud replied by email to Mr. Siddiqui explaining
4 that the publication of the 1985 manual did not infringe copyright because that manual had been
5 incorporated into law. *See Exhibit D.*

6 40. On February 8, 2013, attorney Jon L. Farnsworth, representing SMACNA, emailed
7 a letter, dated February 5, 2013, to Carl Malamud, *see Exhibit C.* The letter stated in part that if
8 the 1985 manual

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

15 The letter from Mr. Farnsworth further states (emphasis in original):

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

22 41. On information and belief, the 1985 manual is no longer available for purchase
23 online at <http://smacna.org/bookstore/>, the SMACNA website cited by Mr. Farnsworth.

24 42. On information and belief, The HVAC Air Duct Leakage Test Manual, 2nd Edition,
25 published in 2012, is available for purchase at <http://smacna.org/bookstore/> for the price of \$104.

26 43. The 1985 manual remains the document incorporated by reference in federal
27 regulations and thus is the law of the United States.

28 44. On February 9, 2013, Public Resource removed the 1985 manual from its website,
left the cover sheet posted, and added at that URL,
<https://law.resource.org/pub/us/cfr/ibr/005/smacna.hvac.1985.pdf>, the correspondence between
Mr. Siddiqui, Mr. Malamud, and Mr. Farnsworth.

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FIRST CAUSE OF ACTION

**[Declaratory Relief Pursuant to 28 U.S.C. § 2201, *et seq.* (Declaratory Judgment Act) and the
Copyright Act (Title 17 of the U.S. Code)]**

45. Plaintiff incorporates by reference the allegations in each of the preceding paragraphs as if fully set forth in this paragraph.

46. There is a real and actual controversy between Plaintiff and Defendant regarding whether posting the 1985 manual constitutes infringement of a copyright lawfully owned or administered by Defendant. SMACNA’s conduct has forced Public Resource to choose between fulfilling its public mission and risking legal liability. The controversy between Public Resource and SMACNA is thus real and substantial and demands specific relief through a decree of a conclusive character, namely that Public Resource may re-post the 1985 manual without legal liability.

47. Public Resource’s publication of the 1985 manual, and its proposed republication thereof, was and is lawful, consistent with the Copyright Act of the United States of America, the United States Constitution, and judicial decisions construing such laws, doctrines, and provisions.

48. Public Resource is entitled to declaratory judgment that the publication of the 1985 manual does not violate copyright law.

PRAYER FOR RELIEF

Wherefore, Plaintiff prays for judgment against the Defendant as follows:

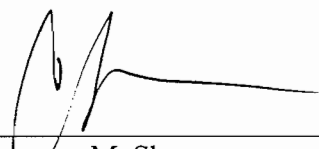
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1. For a declaration that Public Resource’s publication of the 1985 manual online does not infringe any copyright interest held by SMACNA;
 2. For an order enjoining SMACNA, its agents, attorneys, and assigns from asserting a copyright claim against Public Resource in connection with publication of the 1985 manual;
 3. For costs of suit incurred herein, including reasonable attorneys’ fees; and
 4. For such other and further relief as the Court may deem just and proper.

Plaintiff requests a jury trial on all issues triable to a jury in this matter.

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Dated: February 21, 2013

By:



Colynne McSherry
Matthew Zimmerman
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Tel: (415) 436-9333
Fax: (415) 436-9993
mattz@eff.org

David Halperin
3333 14th Street NW, Suite 205
Washington, DC 20010
davidhalperindc@gmail.com

Attorneys for Plaintiff Public.Resource.Org