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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO DIVISION

19 PUBLIC.RESOURCE.ORG,) Case No. 13-cv-00815-SC
20)
Plaintiff,) **NOTICE OF MOTION AND MOTION**
21) **FOR DEFAULT JUDGMENT AND**
v.) **MEMORANDUM OF POINTS AND**
22) **AUTHORITIES IN SUPPORT**
SHEET METAL AND AIR CONDITIONING) **THEREOF**
23 CONTRACTORS' NATIONAL)
ASSOCIATION, INC.,)
24) Date: July 19, 2013
Defendant.) Time: 10:00 a.m.
25) Courtroom: 1, 17th Floor
Judge: The Hon. Samuel Conti

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NOTICE OF MOTION AND MOTION FOR DEFAULT JUDGMENT

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiff Public Resource hereby moves for default judgment against Defendant Sheet Metal and Air Conditioning Contractors' National Association. The hearing will occur on July 19, 2013, at 10:00 a.m., or at another time that the Court designates, in the courtroom of the Honorable Samuel Conti, San Francisco Courthouse, Courtroom 1 - 17th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102. This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Court's files in this action, the arguments of counsel, and any other matter the Court may properly consider.

Dated: May 29, 2013

By: /s/ Andrew P. Bridges
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22	<i>Craigslist, Inc. v. Naturemarket, Inc.</i> ,
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6 *Schwarzenegger v. Fred Martin Motor Co.*,
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9 *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*,
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10 *Walters v. Shaw/Guehnemann Corp.*,
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12 *Wheaton v. Peters*,
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2 10 C.F.R. § 434.403 1, 2, 5

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5 65 Fed. Reg. 60000-11 (Oct. 6, 2000) (codified at 10 C.F.R. pts. 434 & 435) 5

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7 Compendium II of Copyright Office Practices § 206.01 (1984) 13

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9 N.Y. Comp. Codes R. & Regs. tit. 19, § 1240.1 (2010) 6, 19

10 Wash. Admin. Code § 51-11-503 (2006) (repealed 2012)..... 6

11 Magna Carta cl. 29 (1297) 14

12 1 *Goldstein on Copyright* § 2.5 (Aspen Publishers, Rev. Ed. 2012) 16

13 1 *Nimmer on Copyright* § 5.12 (Matthew Bender, Rev. Ed. 2004) 16, 21

14 Thomas Henry Bingham, *The Rule of Law* (Penguin Press 2011)..... 13

15 Brief for the United States as Amicus Curiae, *S. Bldg. Code Cong. Int’l, Inc. v. Veeck*
 (2003) (No. 02-355) 21

16 Robert C. Byrd, *The Senate of the Roman Republic: Addresses on the History of Roman*
 17 *Constitutionalism* (Gov’t Printing Office 1995) 14

18 Peter L. Strauss, *Private Standards Organizations and Public Law*, Columbia Public Law
 19 Research Paper No. 13-334, Dec. 27, 2012 19

20 Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge Univ.
 Press 2004) 13, 14

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

This case is about the lawful publication of, and public access to, the law. Public.Resource.Org, Inc. (“Public Resource”) is a nonprofit corporation dedicated to improving public access to government records and the law. To do so, it acquires copies of these records, including legal decisions, tax and securities filings, statutes, and regulations, and then publishes them online in easily accessible formats that make them more useful to readers, entirely free of charge. Its contributions to the public interest have been recognized by the Judicial Conference of the United States and members of Congress, among others.¹

In the past few years, Public Resource’s mission has come to encompass the publication of health and safety codes that federal, state, and local governments have incorporated into law. Standards-setting bodies, like Defendant Sheet Metal and Air Conditioning Contractors’ National Association (“SMACNA” or “Defendant”) in this case, often develop the codes and then encourage their incorporation into law. Public access to such codes can be crucial when, for example, there is an industrial accident, a disaster such as the Moore, Oklahoma tornado, or when a homebuyer simply wishes to evaluate whether her builder complied with the law in constructing a house. Publishing the codes online, in a readily accessible format, makes it possible for reporters and other interested citizens not only to view them easily, but also to search and excerpt them, craft new documents from them comparing health and safety requirements, and otherwise generate new insights.

On October 6, 2000, the United States Department of Energy (“DOE”) issued final regulations providing energy efficiency standards for federal commercial and residential buildings. Among those regulations was 10 C.F.R. § 434.403.2.9.3, which requires that certain components of heating and air conditioning systems be constructed “in accordance with RS-34,

¹ See, e.g., Letter from U.S. Representatives John Boehner and Darrell Issa to Carl Malamud, President, Public Resource (Jan. 5, 2011), *available at* https://bulk.resource.org/courts.gov/foia/gov.house.20110105_from.pdf; Letter from the Honorable Lee H. Rosenthal, Chair, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, to Carl Malamud, President, Public Resource (July 16, 2008), *available at* <https://public.resource.org/scribd/7512576.pdf>.

1 RS-35, and RS-36 (incorporated by reference, *see* § 434.701).” Section 434.701 identifies RS-35
2 as a manual SMACNA first published in 1985 (“RS-35” or the “1985 Manual”).² By issuing this
3 final regulation, the DOE incorporated RS-35 into federal law. Multiple states subsequently
4 incorporated RS-35 into their respective laws.

5 As part of its ongoing work to improve public access to the law, on July 4, 2012, Public
6 Resource published both 10 C.F.R. § 434.403.2.9.3 and its mandatory RS-35 text, *i.e.*, the 1985
7 Manual. Several months later, SMACNA demanded that Public Resource delete RS-35 from its
8 website, claiming copyright in the document and alleging that the publication constituted
9 infringement of that copyright. In response, Public Resource explained that because RS-35 was
10 part of the law, it was also part of the public domain. Undeterred, SMACNA escalated its threats.
11 Public Resource therefore filed this action for declaratory relief to resolve the controversy and
12 disabled public access to the document pending its outcome. SMACNA was properly served with
13 the Complaint and has expressly refused to respond.

14 Contrary to SMACNA’s contention, copyright law does not bar publication of RS-35.
15 Since 1834, courts have repeatedly held that the law belongs in the public domain, and is
16 therefore material that the public may—and indeed should—publish freely. That principle is
17 fundamental to our legal and democratic systems, and it applies equally to judicial decisions,
18 court records, statutes, regulations, and standards that have been incorporated into law, such as
19 RS-35. Standards-setting organizations, also known as standards-development organizations
20 (“SDOs”), must not be permitted to use specious legal claims to impede public access to the law.

21 Nonetheless, SMACNA has refused to concede the issue, and its legal threats have chilled
22 Public Resource’s ability to publish the law. SMACNA’s refusal to litigate this matter should not
23 render it the *de facto* victor. Accordingly, Public Resource respectfully moves this Court to enter
24 a judgment declaring that the RS-35 is public domain material and enjoining SMACNA from
25 asserting any copyright claim against Public Resource relating to the document.

26
27 ² The full title of the manual, as identified in the regulations, is “HVAC Air Duct Leakage Test
28 Manual, 1st edition, 1985, Sheet Metal and Air-Conditioning Contractors’ National Association,
Inc., 4201 Lafayette Center Drive, Chantilly, VA 20151”

1 **II. STATEMENT OF FACTS**

2 Public Resource's Complaint alleges the following facts, which the Court should accept as
3 true for the purposes of a motion for default judgment that does not seek damages. *TeleVideo*
4 *Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

5 **A. The Parties**

6 Plaintiff Public Resource is a California non-profit corporation that is dedicated to making
7 primary legal materials and other important government records available to the public. (Compl.
8 ¶ 2.) As part of this work, Public Resource acquires and posts various codes and standards that
9 have been incorporated into federal and state laws, such as building codes, fire safety codes,
10 pipeline safety standards, and food safety standards. (*Id.*) By improving public access to
11 governing codes, Public Resource helps citizens, businesses, journalists, consumer advocates,
12 researchers, and others to educate themselves regarding laws that govern their lives, laws that
13 they are required to obey. (*Id.* ¶ 3.)

14 Defendant SMACNA is a self-described international association of union contractors and
15 a "standards-setting organization." (*Id.* ¶ 10 & Ex. F.) According to its website, SMACNA has
16 1,834 members in 103 chapters throughout the United States, Canada, Australia and Brazil,
17 including eight chapters in California and three in the Bay Area. (*Id.*)

18 **B. SMACNA's Efforts to Have Its Standards Incorporated Into Law**

19 SMACNA's mission is, in part, to create industry standards, including technical
20 requirements, and to ensure that they are nationally adopted, particularly through incorporation
21 into government regulations. On its website, SMACNA notes that a benefit of participation in its
22 trade association is the ability to wield collective power to "affect positive impact in business
23 management educational endeavors; legislative influence; industry regulatory conditions, such as
24 code requirements, project specification development, and installation procedures." (Compl. ¶ 19
25 & Ex. E.) Similarly, SMACNA also notes on its website that an explicit benefit of association
26 participation is government adoption of its proposed regulations: "The voluntary technical
27 standards and manuals developed by SMACNA have found worldwide acceptance by the
28 construction community, as well as foreign government agencies. ANSI, the American National

1 Standards Institute, has accredited SMACNA as a standards-setting organization.” (*Id.* ¶ 20 &
2 Ex. F.)

3 SMACNA has also been explicit elsewhere about its intent that governments adopt its
4 proposed statutory and regulatory language. On February 20, 2003, SMACNA issued a
5 “technical paper” entitled “Building Code Update.” The paper discusses the effort by the
6 International Code Council (“ICC”) “to develop a single set of comprehensive and coordinated
7 national [building] codes” that could be used in all of the United States. According to the paper,
8 available via SMACNA’s website, SMACNA’s participation with the ICC further its goals of
9 having favorable model codes adopted into law:

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

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

27 (*Id.* ¶ 21 & Ex. G.) Indeed, a description of this white paper on the SMACNA website makes
28 clear this goal of encouraging nationwide adoption of its standards:

29 This technical paper reviews the Model Building Code process of the International
30 Code Council (ICC) and National Fire Protection Association (NFPA) Building
31 5000 Code and addresses SMACNA National’s position with regards to the efforts
32 of the code community to develop a single set of comprehensive and coordinated
33 national codes. SMACNA National has long been involved in the code setting
34 process to ensure that the SMACNA Standards currently utilized by the HVAC
35 industry would be included as the basis for duct construction.

36 (*Id.* ¶ 21 & Ex. H.)

37 Other examples of SMACNA’s efforts to encourage governments to adopt its codes as
38 mandatory abound. In its November 7, 2003 newsletter, for example, SMACNA stated that its

1 “Round Industrial Duct Construction Standards” had been “approved as an American National
 2 Standard” by the American National Standards Institute (“ANSI”), and that “ANSI recognition
 3 increases the potential that SMACNA’s standards are internationally adopted for industry and
 4 regulatory use,” while also “encouraging wider domestic use of SMACNA’s standard by state-
 5 and local-code governing bodies as well as the design and engineering community.” (*Id.* ¶ 22 &
 6 Ex. I.)

7 **C. The Federal Government and State Governments Have Incorporated RS-35**
 8 **Into Law**

9 After a rulemaking proceeding, the DOE expressly incorporated by reference the entire
 10 RS-35 into a final regulation that it issued on October 6, 2000. *See* Energy Code for New Federal
 11 Commercial and Multi-Family High Rise Residential Buildings, 65 Fed. Reg. 60000-11 (Oct. 6,
 12 2000) (codified at 10 C.F.R. pts. 434 & 435). The incorporation by reference of RS-35, as
 13 codified at 10 C.F.R. § 434.403.2.9.3, states, in part:

14 403.2.9.3 Duct and Plenum Construction. All air-handling ductwork and plenums
 15 shall be constructed and erected in accordance with RS-34, RS-35, and RS-36
 (incorporated by reference, *see* § 434.701).

16 Correspondingly, 10 C.F.R. § 434.701 identifies RS-35 to be: “HVAC Air Duct Leakage Test
 17 Manual, 1st edition, 1985, Sheet Metal and Air-Conditioning Contractors’ National Association,
 18 Inc., 4201 Lafayette Center Drive, Chantilly, VA 20151.”³ RS-35 articulates specific standards
 19 and installation and testing requirements regarding heating, ventilation, and air-conditioning
 20 systems.

21 The federal government incorporated by reference RS-35 after assessment of the DOE’s
 22 regulations by technical experts, publication of a notice in the Federal Register, comments by
 23 members of the public and industry, a conclusion by the DOE that incorporation by reference was
 24 appropriate and necessary, and then approval of that incorporation by the Office of the Federal
 25 Register. (Compl. ¶ 28; *see also* 65 Fed. Reg. 60000-11.) Pursuant to 1 C.F.R. § 51.3, the

26 _____
 27 ³ SMACNA asserted in its letter of February 5, 2013 that the 1985 manual was “only *partially*
 28 referenced in the CFR.” (Compl. Ex. D (emphasis in original).) But that is not the case. The
 DOE regulation expressly incorporates, at § 434.403.2.9.3, the entire SMACNA manual, not a
 particular portion.

1 Director of the Federal Register must approve each instance of incorporation by reference that
2 federal agencies request. (*Id.* & Compl. ¶ 27.) As a standard that the Code of Federal
3 Regulations has expressly incorporated by reference, RS-35 is now the law of the United States,
4 and compliance with RS-35 is mandatory. (Compl. ¶ 29.)

5 State governments have incorporated RS-35 into law as well. *See, e.g.*, N.Y. Comp.
6 Codes R. & Regs. tit. 19, § 1240.1 (2010) (Compl. Exs. L & M.) In addition, a Minnesota
7 regulation previously in effect, Minn. R. 7676 (2005) (Compl. Ex. N), incorporated by reference
8 RS-35. *See id.* § 7676.0400 Subpart 1(H) (repealed 2009, *see*
9 <https://www.revisor.mn.gov/rules/?id=7670.0400>) (“The following standards and references are
10 incorporated by reference . . . H. HVAC Air Duct Leakage Test Manual, Section 4, 1985 edition,
11 as published by the Sheet Metal and Air Conditioning Contractors National Association, Inc.,
12 Vienna, Virginia.”). Similarly, a Washington regulation previously in effect, Wash. Admin. Code
13 § 51-11-503.10.1 (2006) (repealed 2012, *see* [http://apps.leg.wa.gov/wac/default.aspx?cite=51-11-](http://apps.leg.wa.gov/wac/default.aspx?cite=51-11-0503)
14 [0503](http://apps.leg.wa.gov/wac/default.aspx?cite=51-11-0503)) (Compl. Ex. O), made compliance with RS-35 mandatory. While these Minnesota and
15 Washington provisions have been repealed, they were at one time the laws of their respective
16 states and thus remain documents of relevance to citizens who want to understand the history and
17 dynamics of legislation on these issues. Citizens who fail to follow standards such as RS-35 that
18 are incorporated by reference into regulations can be subjected to fines or imprisonment. *See,*
19 *e.g.*, N.Y. Energy L. § 11-108 (McKinney 2011) (violations of N.Y. Comp. Codes R. & Regs. tit.
20 19, § 1240.1 (2010) punishable by fines of up to \$1,000 per violation or imprisonment of up to 30
21 days in jail, or both); Minn. Stat. § 216C.30 (1999) (violations of Minn. R. 7676(1)(H) (2005)
22 while it was in effect were misdemeanors punishable by fines of up to \$10,000 per violation).

23 As noted above, *supra* Section II.B, in each instance the incorporation of RS-35 into law
24 was no unintended outcome; SMACNA affirmatively favored having its standards incorporated
25 into law.

26 **D. This Dispute**

27 To advance its mission, on May 3, 2012, Public Resource purchased from SMACNA’s
28 online store a paper copy of RS-35 because that manual has been incorporated into federal and

1 state law. (Compl. ¶ 35.) RS-35 cost \$64.00, plus \$9.98 shipping, for a total of \$73.98. (*Id.*) On
2 July 4, 2012, Public Resource posted RS-35 online in PDF format on one of its websites at
3 <https://law.resource.org/pub/us/cfr/ibr/005/smacna.hvac.1985.pdf>. (*Id.* ¶ 36.)

4 On January 11, 2013, Public Resource received a notification of claimed copyright
5 infringement pursuant to the Digital Millennium Copyright Act requesting deletion of RS-35,
6 from SMACNA's agent, Attributor Corporation of San Mateo, California. (*Id.* ¶ 38 & Ex. B.)
7 The notice alleged that the public posting of RS-35 on Public Resource's website infringed
8 SMACNA's copyright in RS-35 and demanded that Public Resource remove the document from
9 the website. (*Id.*) On January 11, 2013, Carl Malamud, President of Public Resource, responded,
10 explaining that the publication of RS-35 did not infringe copyright because RS-35 had been
11 incorporated into law. (*Id.* ¶ 39 & Ex. B.)

12 On February 8, 2013, Public Resource received by email a letter, dated February 5, 2013,
13 from Jon L. Farnsworth, counsel for SMACNA, asserting that the posting violated SMACNA's
14 copyright. (*Id.* ¶ 40 & Ex. C.) The letter stated that if RS-35

15 remains on your organization's webpage after February 14, 2013, SMACNA
16 intends to pursue its legal action against your organization to the full extent
17 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.

18 *Id.*

19 Mr. Farnsworth further claimed that,

20 the public may receive copies of the applicable *portions* of SMACNA's
21 Publication referenced by the CFR by requesting them directly from the
22 government at no charge. Alternatively, members of the public may purchase
SMACNA's educational materials, guides, and other publications at
<http://smacna.org/bookstore>.

23 *Id.* (emphasis in original). In truth, RS-35 is now no longer available for purchase online at the
24 SMACNA website cited by Mr. Farnsworth. (*Id.* ¶ 10.) Moreover, the United States does not
25 make RS-35 available to the general public for free, either online or on request, unless a person
26 travels to Washington, DC, and makes arrangements to review RS-35 at a federal government
27 office. See Nat'l Archives, *Federal Register: Incorporation by Reference*,
28 <http://www.archives.gov/federal-register/cfr/ibr-locations.html> (last visited May 22, 2013). A

1 successor SMACNA manual, the HVAC Air Duct Leakage Test Manual, 2nd Edition, published
2 in 2012, is available for purchase at <http://smacna.org/bookstore> for the price of \$104. (Compl.
3 ¶ 42.) Nevertheless, RS-35 continues to be the document that federal regulations incorporate by
4 reference, and thus it continues to be the law of the United States. (*Id.* ¶ 43.)

5 On February 9, 2013, after receiving the letter from Mr. Farnsworth, Public Resource
6 removed RS-35 from its website, left in its place the cover sheet, and added the correspondence
7 between representatives of SMACNA and Public Resource. (*Id.* ¶ 44 & Ex. D.) On February 22,
8 2013, Public Resource filed this lawsuit.

9 On March 1, 2013, counsel for Public Resource Corynne McSherry sent a Notice of a
10 Lawsuit and Request to Waive Service of a Summons to Mr. Farnsworth. (Dkt. No. 11.)
11 Mr. Farnsworth returned to Ms. McSherry a signed Waiver of the Service of Summons, dated
12 March 14, 2013, acknowledging that SMACNA's response to the Complaint was due on or
13 before April 30, 2013. (*Id.*) On May 3, 2013, Mr. Farnsworth informed Ms. McSherry by email
14 that SMACNA did not intend to file a responsive pleading. (Dkt. No. 18, Ex. 1.) Accordingly, on
15 May 8, 2013, the Clerk entered default against SMACNA. (Dkt. No. 20.)

16 **III. JURISDICTION**

17 **A. Subject Matter Jurisdiction**

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

21 There remains a real and actual controversy between Public Resource and Defendant
22 SMACNA regarding whether posting RS-35 infringes any SMACNA copyright. As the Supreme
23 Court has explained, Article III requires that the dispute at issue be “‘definite and concrete,
24 touching the legal relations of parties having adverse legal interests’; and that it be ‘real and
25 substantial’ and ‘admi[t] of specific relief through a decree of a conclusive character, as
26 distinguished from an opinion advising what the law would be upon a hypothetical state of
27 facts.’” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Aetna Life Ins.*
28 *Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)). Here, Public Resource and SMACNA have

1 adverse legal interests based on SMACNA’s assertion of copyright in a specific document, RS-
2 35, that can be resolved through a specific decree from this Court finding that the document is
3 public domain material and enjoining SMACNA from asserting a copyright claim against Public
4 Resource.

5 SMACNA’s decision not to defend its position does not change the analysis. SMACNA
6 has not, for example, granted Public Resource a broad covenant not sue, or anything like it.
7 Public Resource does not know whether SMACNA’s decision is based on Public Resource’s own
8 choice to take down the document pending a ruling from this court. Of course, a declaratory
9 judgment plaintiff may eliminate an “imminent threat of harm by simply not doing what he
10 claimed the right to do,” as Public Resource has done here, but that choice does not eliminate
11 subject matter jurisdiction as well. *Id.* at 129. Public Resource’s action was effectively coerced
12 and “[t]he dilemma posed by that coercion—putting the challenger to the choice between
13 abandoning his rights or risking prosecution—is a dilemma that it was the very purpose of the
14 Declaratory Judgment Act to ameliorate.” *Id.* (internal quotation marks omitted).

15 That coercion continues. Indeed, SMACNA’s unpredictable behavior—sharply
16 threatening legal action against Public Resource, then refusing to argue the issue before this court
17 and, when pressed, informing Public Resource only that the organization “is not *intending* on
18 filing a responsive pleading” (emphasis added)—does nothing to assure Public Resource that
19 SMACNA will not resume its threats or sue Public Resource if Public Resource re-posts the
20 document absent a determination by this Court. As a result, Public Resource is still forced to
21 choose between abandoning its rights or risking prosecution.

22 **B. Personal Jurisdiction**

23 This Court has specific personal jurisdiction over SMACNA. California’s long-arm
24 statute authorizes specific personal jurisdiction over nonresident defendants to the full extent
25 permitted by the Due Process Clause of the United States Constitution. *See Panavision Int’l, L.P.*
26 *v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998). The analysis turns on three factors:

- 27 (1) The non-resident defendant must purposefully direct activities or
28 consummate some transaction with the forum or resident thereof; or perform some
act which he purposefully avails himself of the privilege of conducting activities in

1 the forum;

2 (2) the claim must be one which arises out of or relates to the defendant's
3 forum-related activities; and

4 (3) the exercise of jurisdiction must comport with fair play and substantial
5 justice.

6 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). Because Public
7 Resources satisfies the first two requirements, the burden shifts to SMACNA to present a
8 “compelling case” that the exercise of jurisdiction would be unreasonable. *Mavrix Photo, Inc. v.*
9 *Brand Techs., Inc.*, 647 F.3d 1218, 1228 (9th Cir. 2011).

10 **1. Purposeful Direction**

11 A defendant has purposefully directed its activities at the forum if it “(1) committed an
12 intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt
13 of which is suffered and which the defendant knows is likely to be suffered in the forum state.”
14 *Id.* (citing *Bancroft & Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000)).
15 Here, all three factors support specific jurisdiction. *First*, SMACNA committed intentional acts
16 directed at this forum: it deliberately sent a DMCA takedown notice (via its California-based
17 agent) followed by a cease-and-desist letter to Public Resource. *Second*, SMACNA expressly
18 aimed its conduct at this forum: it sought to cause a California-based organization to disable
19 public access to RS-35. *See, e.g., Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039,
20 1053 (N.D. Cal. 2010) (“Because Plaintiff is headquartered in California and maintains its
21 website in California, Defendants’ actions directly targeted California, and Defendants knew that
22 Plaintiff would suffer the brunt of its harm in California.”). *Third*, SMACNA accomplished its
23 purpose, thereby causing harm in California: intimidated by the legal threat, Public Resource
24 disabled public access to RS-35.

25 **2. Arising From Forum-Related Activities**

26 This action arises from the legal threat SMACNA made directly to Public Resource, a
27 nonprofit corporation located in this forum, arising from Public Resource’s activities in
28 California.

1 **3. Reasonableness**

2 Because Public Resource has established the first two requirements for exercising specific
3 personal jurisdiction, SMACNA must present a “compelling case” that asserting jurisdiction
4 would be unreasonable. *Mavrix*, 647 F.3d at 1228. SMACNA waived its opportunity to make
5 that showing by ignoring this lawsuit. *See Craigslist, Inc. v. Kerbel*, 2012 WL 3166798, at *6
6 (N.D. Cal. Aug. 2, 2012). In any event, there is nothing unreasonable about asserting personal
7 jurisdiction here. SMACNA threatened a nonprofit corporation it knew to be located in
8 California. Thus, it had “fair warning” that Public Resource might seek declaratory relief.
9 *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, (1985); *see also World-Wide Volkswagen*
10 *Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (personal jurisdiction in a remote forum is
11 reasonable if the defendant “should reasonably anticipate being haled into court there”).

12 **IV. ARGUMENT**

13 After entry of default under Federal Rule of Civil Procedure 55(a), a federal district court
14 may enter a default judgment under Rule 55(b). “The general rule of law is that upon default the
15 factual allegations of the complaint, except those relating to the amount of damages, will be taken
16 as true.” *TeleVideo Sys*, 826 F.2d at 917-18 (internal quotation marks and citation omitted).
17 Damages are not at issue in this case. Procedurally proper motions for default judgment “are
18 more often granted than denied.” *PepsiCo v. Triunfo-Mex, Inc.*, 189 F.R.D. 431, 432 (C.D. Cal.
19 1999).

20 The “decision whether to enter a default judgment is a discretionary one.” *Aldabe v.*
21 *Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). “Factors which may be considered by courts in
22 exercising discretion as to the entry of a default judgment include: (1) the possibility of prejudice
23 to the plaintiff, (2) the merits of plaintiff’s substantive claim, (3) the sufficiency of the complaint,
24 (4) the sum of money at stake in the action, (5) the possibility of a dispute concerning material
25 facts, (6) whether the default was due to excusable neglect, and (7) the strong policy underlying
26 the Federal Rules of Civil Procedure favoring decisions on the merits.” *See Eitel v. McCool*, 782
27 F.2d 1470, 1471-72 (9th Cir. 1986).

28 Public Resource easily meets this standard.

1 **A. The Motion Is Procedurally Proper**

2 Public Resource has satisfied all of the requirements for a Default Judgment. SMACNA
3 waived formal service (Dkt. No. 11) and confirmed that it will not respond. (Dkt. No. 18, Ex. 1.)
4 Appropriately the Clerk has entered default. (Dkt. No. 20.)

5 **B. The Discretionary Factors Favor A Default Judgment**

6 Factors (4), (5), (6) and (7) can be dispensed with quickly. Public Resource is not seeking
7 damages (Factor 4). The material facts are based on the public record, Defendant’s own
8 statements, and reasonable inferences therefrom (Factor 5). Having affirmatively asserted that it
9 does not intend to participate in the case, SMACNA cannot claim “excusable neglect” (Factor 6).
10 Finally, federal policy does not prevent default judgment where a defendant simply refuses to
11 respond (Factor 7). *See Walters v. Shaw/Guehnemann Corp.*, 2004 WL 1465721, at *4 (N.D.
12 Cal. Apr. 15, 2004) (“Although federal policy may favor decisions on the merits, Federal Rule of
13 Civil Procedure 55(b) permits entry of default judgment in situations such as this where
14 defendants refuse to litigate.”).

15 As for the remaining factors, each favors a default judgment here.

16 **1. The Merits and Sufficiency of Public Resource’s Complaint**
17 **(Factors 2 and 3)**

18 The Complaint contains sufficient detail to allege the cause of action and support the
19 requested remedy of a declaratory judgment consistent with nearly two centuries of legal
20 precedent. No copyright exists under United States law where a standard has been incorporated
21 into law. In this case, RS-35 was incorporated by reference into federal regulations, and multiple
22 states have expressly incorporated it into their official regulations. As part of the law of the
23 United States, it is necessarily public domain material.

24 **a. The Law Is Not Subject to Copyright Protection**

25 It is a longstanding principle that law cannot be copyrighted. The foundational case in
26 U.S. law is *Wheaton v. Peters*, 33 U.S. 591 (1834), in which one of the Supreme Court’s own
27 official reporters claimed copyright in his annotated collections of the Court’s opinions. The
28 Court declared that “no reporter has or can have any copyright in the written opinions delivered

1 by this Court.” 33 U.S. at 668. Similarly, in *Banks v. Manchester*, 128 U.S. 244 (1888), the
2 Court rejected a copyright claim by a court reporter for a collection of the opinions of the Ohio
3 Supreme Court. *Id.* at 253 (“The whole work done by the judges constitutes the authentic
4 exposition and interpretation of the law, which, binding every citizen, is free for publication to all,
5 whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute.”).
6 In 1898, the Court of Appeals for the Sixth Circuit observed that “any person desiring to publish
7 the statutes of a state may use any copy of such statutes to be found in any printed book, whether
8 such book be the property of the state or the property of an individual.” *Howell v. Miller*, 91 F.
9 129, 137 (6th Cir. 1898) (Harlan, J.).

10 The passage of time has only strengthened this principle. As the Fifth Circuit noted more
11 than 100 years later, decisions such as *Banks* “represent[] a continuous understanding that ‘the
12 law,’ whether articulated in judicial opinions or legislative acts or ordinances, is in the public
13 domain and thus not amenable to copyright.” *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d
14 791, 796 (5th Cir. 2002) (*en banc*), *cert. denied*, 539 U.S. 969 (2003). Outside the courts,
15 legislators and administrators have followed suit. The 1976 Copyright Act, 17 U.S.C. § 105,
16 specifically denies protection to U.S. government works, federal statutes, and regulations. *See id.*
17 (“Copyright protection under this title is not available for any work of the United States
18 Government . . .”). The U.S. Copyright Office has expanded on this fundamental commitment:

19 Edicts of government, such as judicial opinions, administrative rulings, legislative
20 enactments, public ordinances, and similar official legal documents are not
21 copyrightable for reasons of public policy. This applies to such works whether
they are Federal, State, or local as well as to those of foreign governments.

22 Compendium II of Copyright Office Practices § 206.01 (1984).

23 Indeed, the principle that the law must be public and available to citizens to read and
24 speak has its roots in the concept of the rule of law itself, as well as central provisions of our
25 Constitution. *See generally* Thomas Henry Bingham, *The Rule of Law* 37-38 (Penguin Press
26 2011) (“The law must be accessible . . . the successful conduct of trade, investment and business
27 generally is promoted by a body of accessible legal rules governing commercial rights and
28 obligations.”); Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* 34 (Cambridge

1 Univ. Press 2004) (“Citizens are subject only to the law, not to the arbitrary will or judgment of
2 another who wields coercive government power. This entails that the laws be declared publicly
3 in clear terms in advance.”). That is why, going back to ancient times, societies that replaced the
4 rule of tyrants with the rule of law prominently displayed the laws in public places for all to see.
5 *See, e.g.*, Robert C. Byrd, *The Senate of the Roman Republic: Addresses on the History of Roman*
6 *Constitutionalism* 33, 128, 135 (Gov’t Printing Office 1995).

7 As this history suggests, open access to the law is essential to a free society. Citizens are
8 expected to obey the law, but they cannot do so effectively if they do not know it. Further, the
9 First Amendment right to freedom of speech is imperiled if citizens are barred from freely
10 communicating the provisions of the law to each other. *Cf. Nieman v. VersusLaw, Inc.*, 2013 WL
11 1150277, at *2 (7th Cir. Mar. 19, 2013) (“The First Amendment privileges the publication of
12 facts contained in lawfully obtained judicial records, even if reasonable people would want them
13 concealed.”). By the same token, equal protection of the laws and due process are jeopardized if
14 some citizens can afford to purchase access to the laws that all of us are bound to obey (with
15 potential criminal penalties for non-compliance), but others cannot. *Cf. Harper v. Va. State Bd. of*
16 *Elections*, 383 U.S. 663, 666 (1966) (a state violates the Equal Protection Clause “whenever it
17 makes the affluence of the voter or payment of any fee an electoral standard”); *see also* Magna
18 Carta cl. 29 (1297) (“We will sell to no man, we will not deny or defer to any man either Justice
19 or Right.”).

20 Accordingly, for nearly two centuries it has been a fundamental precept of American law
21 that the texts that make up the law reside in the public domain and should not be bought, sold, or
22 rationed. People must have the right—an unfettered right—to read and speak their own laws.

23 **b. Standards That Become Law Are Not Subject to Copyright**

24 The fundamental right to access and share the law does not disappear when the law in
25 question is a technical standard. Indeed, it must not, for such standards now constitute substantial
26 portions of the laws that govern our conduct. Although these technical standards are often
27 developed by SDOs, they are then regularly adopted into law, or “incorporated by reference.”
28 Once incorporated, they become mandatory requirements just as surely as the Code of Federal

1 Regulations, the Federal Rules of Civil Procedure, or any other binding set of government
2 regulations.

3 The process for incorporating such standard is rigorous. In the case of RS-35, the DOE
4 followed the notice-and-comment rulemaking procedures set out in the Administrative Procedure
5 Act. *See* 5 U.S.C. § 553. Accordingly, the regulation incorporating RS-35 was assessed by
6 government technical experts, a notice proposing incorporation was published in the Federal
7 Register, the public and industry technical experts had an opportunity to submit comments, and,
8 at the end of this lengthy process prescribed by statute, the DOE determined that incorporation by
9 reference was appropriate. (Compl. ¶ 28.) The Director of the Federal Register then approved
10 the incorporation. *See* 10 C.F.R. § 434.701.1 (“The following standards have been approved for
11 incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C.
12 § 522(a) and 1 C.F.R. part 51 . . . RS-35: HVAC Air Duct Leakage Test Manual, 1st edition,
13 1985, Sheet Metal and Air-Conditioning Contractors’ National Association, Inc., 4201 Lafayette
14 Center Drive, Chantilly, VA 20151.”). With that adoption, RS-35 became the law of the United
15 States.

16 At the same time, RS-35 became public domain material. As the Fifth Circuit concluded
17 in *Veeck*, once a standard is incorporated into the law, the people become its owner. In that case,
18 Peter Veeck, a Texas resident who hosted a noncommercial website collecting information about
19 north Texas, purchased and then published online model building codes that had been
20 incorporated into the laws of two Texas towns. 293 F.3d at 793. The private organization that
21 initially developed the codes accused Veeck of copyright infringement. Sitting *en banc*, the Fifth
22 Circuit rejected the claim:

23 Lawmaking bodies in this country enact rules and regulations only with the
24 consent of the governed. The very process of lawmaking demands and
25 incorporates contributions by “the people,” in an infinite variety of individual and
26 organizational capacities. Even when a governmental body consciously decides to
27 enact proposed model building codes, it does so based on various legislative
28 considerations, the sum of which produce its version of “the law.” In performing
their function, the lawmakers represent the public will, and the public are the final
“authors” of the law . . .

[P]ublic ownership of the law means precisely that “the law” is in the “public
domain” for whatever use the citizens choose to make of it. Citizens may

1 reproduce copies of the law for many purposes, not only to guide their actions but
2 to influence future legislation, educate their neighborhood association, or simply to
amuse.

3 293 F.3d at 799.

4 The Fifth Circuit’s opinion in *Veck* is the most definitive pronouncement on the subject.
5 See 1 *Nimmer on Copyright* § 5.12[A] (Matthew Bender, Rev. Ed. 2004) (“When SBCCI sought a
6 writ of *certiorari*, the Supreme Court ordered the Solicitor General to express the views of the
7 United States. In response, the government took the position that the Fifth Circuit had correctly
8 decided this case. Because the Court denied the writ, this *en banc* opinion, which concludes a
9 quarter-century of ferment, has become the most definitive pronouncement on the subject”
10 (footnotes omitted)); see also 1 *Goldstein on Copyright* § 2.5.2.1 (Aspen Publishers, Rev. Ed.
11 2012) (“*Veck*’s holding that, as enacted into law, privately adopted codes are uncopyrightable is
12 sound both in law and in principle.”). Its reasoning also echoes that of the First Circuit in *Bldg.*
13 *Officials & Code Admin. v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980) (“*BOCA*”). In *BOCA*,
14 the court vacated a preliminary injunction issued to the creator and copyright holder of a model
15 building code that had been adopted into law by Massachusetts. The Court remanded for further
16 proceedings observing:

17 The citizens are the authors of the law, and therefore its owners, regardless of who
18 actually drafts the provisions, because the law derives its authority from the
19 consent of the public, expressed through the democratic process . . . citizens must
have free access to the laws which govern them . . .

20 [I]t is hard to see how the public’s essential due process right of free access to the
21 law (including a necessary right freely to copy and circulate all or part of a given
law for various purposes), can be reconciled with the exclusivity afforded a private
copyright holder

22 628 F.2d at 734, 736.

23 In addition, RS-35 has become a precise “fact” (or series of facts) that can only be
24 expressed one way and that is not subject to copyright protection. As the Fifth Circuit noted in
25 *Veck*, once adopted into law, “codes are ‘facts’ under copyright law. They are the unique,
26 unalterable expression of the ‘idea’ that constitutes local law.” 293 F.3d at 801. Further, the
27 Fifth Circuit expressly rejected the notion that some laws might be “less factual” than others:

28 It should be obvious that for copyright purposes, laws are “facts”: the U.S.

1 Constitution is a fact; the Federal Tax Code and its regulations are facts; the Texas
2 Uniform Commercial Code is a fact. Surely, in principle, the building codes of
rural Texas hamlets are no less “facts” than the products of more august legislative
or regulatory bodies.

3 *Id.*

4 *Veeck* is on all fours with this dispute. Nonetheless, SMACNA sought to avoid *Veeck* by
5 invoking the Ninth Circuit’s ruling in *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d
6 516 (9th Cir. 1997), in one of its takedown demands. (See Compl. Ex. C.) However, *Practice*
7 *Management* presented an entirely distinct set of circumstances. *Veeck*, 293 F.3d at 804. In that
8 case, the American Medical Association (“AMA”) had created and copyrighted a coding system,
9 the Physician’s Current Procedural Terminology (“CPT”), for physicians to report their services.
10 *Practice Mgmt.*, 121 F.3d at 517. The AMA granted the federal Health Care Financing
11 Administration (“HCFA”) a non-exclusive, royalty-free license to use the CPT in exchange for
12 HCFA’s promise that it would not use any other coding system. *Id.* at 517-18. HCFA
13 subsequently created, for Medicare and Medicaid claims, its own coding system, the HCFA
14 common procedure coding system (“HCPCS”), that included the AMA codes but added new
15 information that HCFA developed. See *Veeck*, 293 F.3d at 805 (citing 50 Fed. Reg. 40895,
16 40897). Practice Management (“PMI”), a publisher of medical books, sought from the AMA a
17 discount to use the CPT (not the government’s HCPCS) and, when the AMA refused to provide
18 the discount, PMI sought a declaratory judgment that the AMA’s copyright was unenforceable.
19 *Practice Mgmt.*, 121 F.3d at 518. Under these facts, the Ninth Circuit concluded that the AMA’s
20 copyright in the CPT was, in theory, enforceable as against PMI.⁴ *Id.* at 520, 521.

21 That is not this case. *First*, the plaintiff in *Practice Management*, PMI, was seeking to
22 invalidate the copyright on the AMA coding system only (the CPT), not the government’s own
23 document, the HCPCS, and the two documents were by no means identical. As noted in *Veeck*:

24 [U]nlike *Veeck*, Practice Management Information Corporation, a commercial
25 publisher of medical textbooks, was not trying to publish its own version of the
26 HCPCS. Practice Management desired to sell a cheaper edition of the AMA’s
code, which was also used by insurance companies and had other non-
governmental uses. *It is not clear how the Ninth Circuit would have decided the*

27 ⁴ Nevertheless, the Court ultimately refused to enforce the AMA’s copyright, concluding that the
28 AMA had abused its copyright by extracting HCFA’s agreement not to adopt any coding system
besides the CPT. *Id.* at 521.

1 *case if Practice Management had published a copy of the HCPCS.*

2 293 F.3d at 805 (emphasis added). In other words, what had become “the law” was quite distinct
3 from the coding system *as a coding system*, and it appeared that PMI was not interested in
4 publishing the former. In this case, by contrast, as in *Veck*, Public Resource wishes to publish
5 only what has been expressly adopted as law.

6 *Second*, in contrast to the coding lists—tables with selection and arrangement of words
7 matched to numbers—at issue in *Practice Management*, RS-35 reads and functions as a law. In
8 *Practice Management* the medical codes were not themselves the law, even if certain regulations
9 required persons to refer to the codes. Here, as with the text of the model building code in *Veck*,
10 RS-35 constitutes part of the law itself, imposing numerous specific requirements and technical
11 specifications—in this case for people with responsibility for constructing, maintaining, and
12 evaluating air ducts, as this sample provision illustrates:

13 g. Externally insulated ducts located outside of buildings shall be sealed before
14 being insulated, as though they were outside. If air leak sites in ducts located
15 outside of buildings are exposed to weather, they shall receive exterior duct
16 sealant. An exterior duct sealant is defined as a sealant that is marketed
17 specifically as forming a positive air- and watertight seal, bonding well to the
18 metal involved, remaining flexible with metal movement, and having a service
19 temperature range of -30°F (-34°C) to 175°F (79°C). If exposed to direct sunlight,
20 it shall be ultraviolet ray- and ozone-resistant or shall, after curing, be painted with
21 a compatible coating that provides such resistance. The term sealant is not limited
22 to adhesives or mastics but includes tapes and combinations of open-weave fabric
23 or absorbent strips and mastics.

24 (Compl. Ex. A § 1.3.) Like the building code in *Veck*, the incorporation by reference into the
25 Code of Federal Regulations of a document such as RS-35 imposes an obligation to comply—
26 because the provisions of the incorporated document are part of the regulation itself.

27 To be clear, and as several circuit courts have recognized, “copyrighted works do not
28 ‘become law’ merely because a statute refers to them.” *See Veck*, 293 F.3d at 805. In *CCC Info.*
Servs. Inc. v. McLean Hunter Mkt. Reports, Inc., 44 F.3d 61 (2d Cir. 1994), for example, the
Second Circuit worried that invalidating the copyrights at issue in the cases before them (a
compilation of used car values that state insurance regulations had identified as an alternative
standard) could have called into question, for example, “the copyrightability of school books once

1 they were assigned as part of a mandatory school curriculum.” *Id.* at 74.

2 In this case, however, the material in question has not simply been approved by a
3 government agency. *See Veeck*, 293 F.3d at 805 (“*CCC and Practice Management* ‘involved
4 compilations of data that had received governmental approval, not content that had been enacted
5 into positive law’” (quoting 1 *Goldstein on Copyright* § 2.49 n.45.2)). Rather, it has been
6 expressly adopted as the law of the land through the incorporation by reference process set out by
7 federal statute and regulations. As much as landmark health care acts or Supreme Court civil
8 rights decisions, technical codes like RS-35—for building, electrical, plumbing, transportation
9 and other vital functions—touch the lives of Americans every day. Business owners, workers,
10 and consumers need to know these directives in order to operate their businesses lawfully and to
11 determine whether neighbors, contractors, or competitors are in compliance. In addition,
12 violations of regulations that incorporate standards such as RS-35 can even carry criminal
13 penalties. *See, e.g.*, N.Y. Energy L. § 11-108 (McKinney 2011) (providing for fines of up to
14 \$1,000 per violation or imprisonment of up to 30 days in jail, or both, for violations of regulations
15 that include N.Y. Comp. Codes R. & Regs. tit. 19, § 1240.1 (2010), which incorporates RS-35 by
16 reference).

17 *Third*, the concern (expressed by the courts in *Practice Management*, 121 F.3d at 518-19,
18 and *CCC*, 44 F.3d at 74) that depriving privately created materials of copyright protection might
19 undermine the economic incentive to create them, does not apply here. RS-35’s only value now
20 is *as law*. It is no longer the operative SMACNA manual for air duct leakage testing; it was
21 superseded by a new SMACNA manual in 2012. SMACNA no longer even offers RS-35 for sale
22 on its website; it sells the 2012 manual instead. SMACNA does not appear to be seeking revenue
23 from RS-35. Any economic incentive for creating RS-35 has run its course.⁵

24 Moreover, industry organizations like SMACNA have strong alternative reasons to
25 continue creating standards. The organizations presumably believe their standards are

26 ⁵ Even if the document was available for purchase, to charge for it would be inappropriate
27 “monopoly pricing of the law, not copyright pricing to the market for voluntary consensus
28 standards.” Peter L. Strauss, *Private Standards Organizations and Public Law*, Columbia Public
Law Research Paper No. 13-334, Dec. 27, 2012, at 13, available at
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2194210.

1 appropriate, carefully crafted guidelines for their industry, and they want their existing and
2 planned products and services to comply with the law. An efficient way to do that is to write the
3 laws themselves. As the court in *Veck* observed,

4 “[I]t is difficult to imagine an area of creative endeavor in which the copyright
5 incentive is needed less. Trade organizations have powerful reasons stemming
6 from industry standardization, quality control, and self-regulation to produce these
7 model codes; it is unlikely that, without copyright, they will cease producing
8 them.”

9 293 F.3d at 806 (quoting 1 *Goldstein* § 2.5.2, at 2:51). Indeed, if SDOs oppose having the law
10 adopt their standards as public domain, they could oppose incorporation in the rulemaking
11 proceedings, explaining that they do not wish to surrender control over their work. Not
12 surprisingly, they do not. Further, these industry organizations have many other means of earning
13 revenue, including selling interpretive material related to incorporated standards, *id.* at 806,
14 selling other standards that are not incorporated into law, and charging membership dues and
15 conference fees, all of which are current sources of income for SMACNA. *See* Sheet Metal and
16 Air Conditioning Contractors’ National Association, Form 990, Filing to the Internal Revenue
17 Service, Period Ending 12/2011, Employer ID 36-2099048, *available at*
18 https://bulk.resource.org/irs.gov/eo/2012_11_EO/36-2099048_990O_201112.pdf (last visited
19 May 22, 2013).⁶

20 Indeed, RS-35 is a prime example of the insignificance of the copyright incentive for the
21 standards-setting activities of organizations such as SMACNA. Fifteen years passed between the
22 initial release of RS-35 and its incorporation into DOE regulations. The argument that the
23 activities of SDOs would be animated by contingent events so far in the future strains credulity,

24 ⁶ As part of its mission of improving access to public records, and in partnership with the Internal
25 Revenue Service, Public Resource publishes millions of tax records for exempt organizations and
26 private foundations, including SMACNA. *See* Public Resource, *Reports of Exempt*
27 *Organizations*, *available at* <https://bulk.resource.org/irs.gov/eo/readme.html> (last visited May 22,
28 2013) (noting that “[t]his service provides bulk access to 6,905,384 filings of exempt
organizations to the Internal Revenue Service. Each month, we process DVDs from the IRS for
Private Foundations (Type PF), Exempt Organizations (Type EO), and unrelated business income
(Type T).”). Form 990s are available to the public through a variety of sources. *See, e.g.,*
GuideStar, *Sheet Metal & Air Conditioning Contractors Natl Assn Inc.*, *available at*
[http://www.guidestar.org/organizations/36-2099048/sheet-metal-air-conditioning-contractors-](http://www.guidestar.org/organizations/36-2099048/sheet-metal-air-conditioning-contractors-natl-assn.aspx)
[natl-assn.aspx](http://www.guidestar.org/organizations/36-2099048/sheet-metal-air-conditioning-contractors-natl-assn.aspx) (last visited May 22, 2013) (offering several recent SMACNA Form 990s for
\$125).

1 especially given that SMACNA stopped selling RS-35 even after it had been incorporated into
2 federal and state law. Moreover, the Fifth Circuit’s decision in *Veck*, which held that laws such
3 as RS-35 cannot be copyrighted, was reached over a decade ago, and the U.S. Solicitor General
4 publicly acknowledged that “[t]he court of appeals reached the correct result” in that case. Brief
5 for the United States as Amicus Curiae, *S. Bldg. Code Cong. Int’l, Inc. v. Veck* (2003) (No. 02-
6 355), at 1, available at [http://www.justice.gov/osg/briefs/2002/2pet/6invt/2002-
7 0355.pet.ami.inv.pdf](http://www.justice.gov/osg/briefs/2002/2pet/6invt/2002-0355.pet.ami.inv.pdf). Accordingly, SDOs such as SMACNA have been on notice for more than a
8 decade that copyright claims regarding standards such as RS-35 that are incorporated into law
9 likely would not be enforceable and yet they have continued to develop them, including
10 SMACNA’s 2012 updated edition of the HVAC Air Duct Leakage Test Manual. *See 1 Nimmer*
11 *on Copyright* § 5.12[A] (noting that *Veck* “has become the most definitive pronouncement on the
12 subject”).

13 **c. Copyright Protection is Particularly Harmful Under the**
14 **Circumstances**

15 The facts of this case demonstrate the real danger of allowing private organizations to
16 claim copyright in the law. Given that it has apparently lost interest in making RS-35 accessible
17 (even at a high cost), SMACNA should be welcoming Public Resource’s effort to step in and fill
18 the gap. Instead, it has aggressively warned Public Resource not to share it. In other words,
19 SMACNA no longer wishes to provide access to the law, but doesn’t want anyone else to do so
20 either. *Compare Practice Mgmt.*, 121 F.3d at 519 (“There is no evidence that anyone wishing to
21 use the CPT has any difficulty obtaining access to it.”).

22 This is a remarkable position. It runs directly contrary to the fundamental purposes of
23 copyright: to promote the development and dissemination of writings that shape our common
24 culture—including our laws. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10
25 (1994) (noting that “the goals of the copyright law [are] to stimulate the creation and publication
26 of edifying matter” (internal quotation marks and citation omitted)).

27 Not coincidentally, SMACNA’s position would also undermine the requirements of the
28 Freedom of the Information Act (FOIA), 5 U.S.C. § 552. Under FOIA, materials, such as

1 standards and technical requirements, that are incorporated by reference into a federal regulation
2 are deemed effectively published only if such directives are “reasonably available to the class of
3 persons affected thereby.” 5 U.S.C. § 552(a)(1); 1 C.F.R. § 51.7(a)(4). That reasonable
4 availability is precisely what Public Resource hopes to promote.

5 **2. Prejudice to Public Resource (Factor 1)**

6 **a. Prejudice to Public Resource**

7 Denial of a default judgment would prejudice both Public Resource and the public
8 interest. Public Resource wishes to do nothing more or less than improve public access to a
9 manual that is no longer sold by SMACNA but nonetheless remains incorporated into federal and
10 state law. It seeks no compensation for the publication.

11 SMACNA has repeatedly threatened to sue Public Resource for this activity. It declines
12 now to show up in Court to defend its position, but nothing other than a judgment prevents it
13 from instigating a new lawsuit against Public Resource should Public Resource re-post the
14 document. Moreover, Public Resource has invested the time and extensive effort to improve on
15 its initial posting. It can now re-post RS-35 in the more useful HTML format upon resolution of
16 this lawsuit. Absent a default judgment, however, a legal sword of Damocles hangs over that
17 effort.

18 **b. Prejudice to the Public Interest**

19 Public Resource seeks to publish RS-35—and other materials that have been incorporated
20 into the law—because of the far-reaching benefits to the public interest of making such materials
21 broadly available. When legal requirements governing building safety, transportation safety,
22 energy safety, food and water safety, and other important areas are readily available to all without
23 restriction, society benefits. First responders and government officials can do more to protect
24 citizens. Small enterprises can more easily and affordably comply with the law and build new
25 businesses. Students, educators, scientists, engineers, policy advocates, journalists, and
26 government workers can more easily read the standards; learn about technology, commerce, and
27 government; and consider way to improve the standards.

28 The public can also work to improve upon the accessibility and usefulness of the

1 standards by making searchable databases or better navigational tools. Of the standards it has
2 published, Public Resource has reset several hundred into HTML files and is now prepared to
3 post RS-35 in this format. Public Resource also has redrawn many graphics within standards in
4 the open Scalable Vector Graphics (SVG) format, so they can be manipulated. Public Resource
5 has reset mathematical formulas into the Math Markup Language (MML), providing better access
6 for the visually impaired and better functionality for users. Other transformative uses become
7 possible with HTML documents. Proper metadata can be added to document headers, making
8 them discoverable by search engines. Access protocols allow bulk access and resynchronization
9 to large collections of documents. Digital signatures allow users to verify that documents have
10 not been modified.

11 Where, as here, a standard is not available anywhere online, the public interest in allowing
12 Public Resource to post the standard is particularly strong. Indeed, SMACNA's opposition to
13 publication of RS-35 is indefensible as a matter of law and policy. Moreover, Public Resource
14 has acted in good faith, responding amicably to SMACNA's concerns and then, faced with a
15 serious legal threat, disabling access to the document and asking this Court to rule on the dispute.
16 The Court should not allow SMACNA's failure to participate in this litigation to diminish the
17 remedies Public Resource deserves and impede public access to the law.

18 **V. RELIEF SOUGHT**

19 For the foregoing reasons, Plaintiff Public Resource seeks a declaratory judgment
20 pursuant to 28 U.S.C. § 2201, *et seq.* and the Copyright Act (Title 17 of the United States Code).
21 Specifically, Plaintiff requests that the Court issue an Order (1) declaring that the 1985 HVAC
22 Air Duct Leakage Test Manual, incorporated into the Code of Federal Regulations as RS-35, *see*
23 10 C.F.R. § 434.701, is public domain material under the Copyright Act of the United States of
24 America, the United States Constitution, and judicial decisions construing such laws, doctrines,
25 and provisions; (2) enjoining SMACNA, its agents, attorneys, and assigns from asserting a
26 copyright claim against Public Resource in connection with any publication of RS-35; and

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28 ///

1 (3) awarding Public Resource costs and attorneys fees incurred in connection with this litigation,
2 the amount to be determined in a subsequent proceeding.

3 Dated: May 29, 2013

By: /s/ Andrew P. Bridges

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