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12 Attorneys for Defendant
UPCODES, INC.

14 IN THE UNITED STATES DISTRICT COURT
15 FOR THE CENTRAL DISTRICT OF CALIFORNIA
16 WESTERN DIVISION

17 NATIONAL FIRE PROTECTION
ASSOCIATION, INC.,

18 Plaintiff,

19 v.

20 UPCODES, INC.,

21 Defendant.

Case No. 2:21-cv-05262-DSF (Ex)

**DEFENDANT UPCODES, INC.'S
ANSWER AND AFFIRMATIVE
DEFENSES TO PLAINTIFF'S
COMPLAINT FOR COPYRIGHT
INFRINGEMENT AND
COUNTERCLAIM**

DEMAND FOR JURY TRIAL

22 Ctrm: 7D
23 Judge: Honorable Dale S. Fischer
24
25
26
27
28

1 Pursuant to Federal Rule of Civil Procedure 15, Defendant UpCodes, Inc.
2 (“UpCodes”) hereby answers Plaintiff National Fire Protection Association, Inc.’s
3 (“NFPA”) Complaint for Copyright Infringement as follows. All allegations not
4 specifically admitted herein are denied.
5

6 INTRODUCTION¹

7
8 1. UpCodes admits it markets its online services to the AEC industries and
9 laypeople. UpCodes admits it did not seek a license to use NFPA’s model codes.
10 Otherwise denied.
11

12 2. UpCodes lacks sufficient knowledge or information to admit or deny the
13 allegations in this paragraph and on that basis denies them.

14 3. UpCodes lacks sufficient knowledge or information to admit or deny the
15 allegations in this paragraph and on that basis denies them.
16

17 4. Denied.

18 5. UpCodes admits that it offers the public free and full access to the building
19 codes adopted into law by various jurisdictions around the country and charges a
20 subscription fee for additional features such as advanced search and collaboration tools.
21 Otherwise denied.
22
23
24
25
26

27 ¹ UpCodes neither admits nor denies the contents of the various headings and subheadings
28 in the Complaint, which are reproduced herein solely for convenience.

1 6. UpCodes admits that hundreds of thousands of users utilize its service to
2 access the building codes adopted into law by various jurisdictions around the country,
3 and that in March 2021 UpCodes announced \$3.36 million in funding. Otherwise denied.
4

5 7. Denied.

6 8. The allegations in this paragraph state legal conclusions, which do not
7 require a response. To the extent a response is required, UpCodes denies the allegations
8 in this paragraph.
9

10 9. UpCodes admits that NFPA correctly quotes selected portions of Pub. L. No.
11 104-113 § 12(d) and 15 U.S.C. § 272(b)(3). UpCodes denies that the OFR IBR handbook
12 “instructs” federal agencies to take the steps recited in this paragraph. UpCodes lacks
13 sufficient knowledge or information to admit or deny the remaining allegations in this
14 paragraph and on that basis denies them.
15
16

17 10. The allegations in this paragraph state legal conclusions, which do not
18 require a response. To the extent a response is required, UpCodes denies the allegations
19 in this paragraph.
20

21 11. Denied.

22 12. UpCodes lacks sufficient knowledge or information to admit or deny the
23 allegations in this paragraph and on that basis denies them.
24

25 13. Denied.
26
27
28

THE PARTIES

14. UpCodes lacks sufficient knowledge or information to admit or deny the allegations in this paragraph and on that basis denies them.

15. UpCodes admits it is a Delaware corporation. UpCodes admits that on February 15, 2021, it filed a Statement of Information with the California Secretary of State signed by Scott Reynolds stating that its mailing address and the street address of its principal executive office, its CEO, its Secretary, and its CFO is 340 South Lemon Avenue, #9050, Walnut, California 91789. UpCodes denies the remaining allegations in this paragraph.

JURISDICTION AND VENUE

16. UpCodes admits that this purports to be an action for infringement and contributory infringement of copyright. UpCodes lacks sufficient knowledge or information to admit or deny the remaining allegations in this paragraph and on that basis denies them.

17. Admitted.

18. For the purposes of this action only, UpCodes admits that venue is proper in this District.

BACKGROUND FACTS

NFPA And The Creation Of Its Copyrighted Works

19. UpCodes lacks sufficient knowledge or information to admit or deny the allegations in this paragraph and on that basis denies them.

1 20. UpCodes admits that NFPA publishes more than 300 model codes and
2 standards, including NFPA 70 and NFPA 101. UpCodes lacks sufficient knowledge or
3 information to admit or deny the allegations in this paragraph and on that basis denies
4 them.
5

6 21. UpCodes lacks sufficient knowledge or information to admit or deny the
7 allegations in this paragraph and on that basis denies them.
8

9 22. UpCodes admits that according to public records NFPA pays salaries to its
10 staff. UpCodes lacks sufficient knowledge or information to admit or deny the remaining
11 allegations in this paragraph and on that basis denies them.
12

13 23. UpCodes lacks sufficient knowledge or information to admit or deny the
14 allegations in this paragraph and on that basis denies them.
15

16 24. UpCodes admits that the U.S. Copyright Office issued certificates of
17 copyright registration as set forth on Exhibit A. UpCodes denies the remainder of the
18 allegations in paragraph 24.
19

20 25. UpCodes lacks sufficient knowledge or information to admit or deny the
21 allegations in this paragraph and on that basis denies them.
22

23 26. UpCodes admits that NFPA makes some of its publications available on the
24 internet in read-only format to users who register an account with NFPA using their name
25 and contact information and subject to agreement to NFPA's terms of use. UpCodes lacks
26 sufficient knowledge or information to admit or deny the remaining allegations in this
27 paragraph and on that basis denies them.
28

1 27. UpCodes lacks sufficient knowledge or information to admit or deny the
2 allegations in this paragraph and on that basis denies them.

3
4 28. UpCodes lacks sufficient knowledge or information to admit or deny the
5 allegations in this paragraph and on that basis denies them.

6 29. UpCodes lacks sufficient knowledge or information to admit or deny that
7 “NFPA does not authorize copying or distribution of the Works without a license,” and on
8 that basis denies this allegation. UpCodes denies the remaining allegations in this
9 paragraph.
10

11 **UpCodes And Its Infringing Activities**

12
13 30. Admitted.

14 31. UpCodes admits that its home page states: “UpCodes helps the AEC industry
15 deliver code compliant buildings. We provide tools to manage building codes, avoid
16 project delays, and clarify requirements.” UpCodes denies the remaining allegations of
17 this paragraph.
18

19 32. UpCodes admits that, on certain pages on its website, under the heading
20 “TRUSTED BY INDUSTRY LEADERS,” UpCodes features AEC companies such as
21 Clark Construction, Fluor, SOM, and Stantec. UpCodes denies the remaining allegations
22 of this paragraph.
23

24 33. UpCodes admits it markets its service to participants in the AEC industries.
25 UpCodes admits it includes workflows on its website for various professionals, including
26 general contractors, architects, subcontractors, code consultants, owners, and others.
27
28

UpCodes admits that, at the website https://up.codes/workflows/general_contractor, it states, “More accurate pre-construction services” and “Stay on time and on budget” and “Work from up-to-date code.” UpCodes denies the remaining allegations in this paragraph.

34. Denied.

35. UpCodes admits the screenshot in Paragraph 35 of the Complaint accurately depicts a portion of the UpCodes website. UpCodes denies the remaining allegations of this paragraph.

36. UpCodes admits that the screenshot included in Paragraph 36 accurately represents the cited URL, with the addition of a red box. UpCodes denies any remaining allegations in this paragraph.

37. UpCodes admits that UpCodes provides information on adoptions of codes into the law of numerous jurisdictions, and provides information on whether those codes were adopted with or without amendment. UpCodes admits that UpCodes permits visitors to click on a jurisdiction to view the text of law applicable in that jurisdiction. UpCodes denies any remaining allegations in this paragraph.

38. UpCodes admits that, at the website <https://up.codes/viewer/colorado/nfpa-70-2020/chapter/2/wiring-andprotection#200>, UpCodes has posted a portion of the law of the state of Colorado. UpCodes admits that it reproduces the entirety of that section of Colorado’s law, including the portion marked “Informational Note.” To the extent allegations in this paragraph state legal conclusions, they do not require a response. To

1 the extent a response is required, UpCodes denies the remaining allegations in this
2 paragraph.

3
4 39. UpCodes admits that it allows all users, without requiring a login, to print the
5 law or download the law as a PDF. Otherwise denied.

6
7 40. UpCodes admits that it offers a premium service with additional advanced
8 search and collaboration tools, and that the image accurately reflects a portion of the
9 UpCodes site. Otherwise denied.

10
11 41. UpCodes admits that, in March 2021, it announced \$3.36 million dollars in
12 funding, bringing its total raised to \$4.15 million, and had 500,000 monthly active users.
13 UpCodes denies the remaining allegations in this paragraph.

14
15 42. UpCodes admits that it made the Twitter post depicted in the screenshot in
16 Paragraph 42. Otherwise denied.

17 **UpCodes Threatens NFPA With Irreparable Harm**

18
19 43. UpCodes admits that it began posting laws based on NFPA codes on April 1,
20 2021. Otherwise denied.

21 44. Denied.

22 45. Denied.

23
24 46. Denied.

25 **UpCodes Harms The Public Interest**

26
27 47. Denied.

1 48. The allegations in this paragraph state legal conclusions that do not require a
2 response. To the extent a response is deemed required, denied.

3
4 49. UpCodes lacks sufficient knowledge or information to admit or deny the
5 allegations in this paragraph and on that basis denies them.

6 50. Denied.

7
8 51. Denied.

9 52. UpCodes lacks sufficient knowledge or information to admit or deny the
10 allegations in this paragraph and on that basis denies them. To the extent allegations in
11 this paragraph state legal conclusions, they do not require a response. To the extent a
12 response is required, UpCodes denies the remaining allegations in this paragraph.

13
14 53. Denied.

15
16 **FIRST CAUSE OF ACTION**

17 **(Direct Copyright Infringement, 17 U.S.C. §§ 106(1), (2), (3), (5))**

18 54. UpCodes incorporates herein by reference each and every response to
19 NFPA's foregoing allegations.

20
21 55. UpCodes admits that NFPA has registered a number of its model codes with
22 the U.S. Copyright Office.

23
24 56. Denied.

25 57. Denied.

26 58. Denied.

27
28 59. Denied.

1 60. Denied.

2 61. Denied.

3 62. Denied.

4
5 **SECOND CAUSE OF ACTION**

6 **(Indirect Copyright Infringement, 17 U.S.C. §§ 106(1), (2), (3), (5))**

7
8 63. UpCodes incorporates herein by reference each and every response to
9 NFPA's foregoing allegations.

10 64. Denied.

11 65. Denied.

12 66. Denied.

13 67. Denied.

14 68. Denied.

15 69. Denied.

16
17
18 **PRAYER FOR RELIEF**

19
20 In response to the Prayer for Relief, UpCodes denies that NFPA is entitled to the
21 requested relief, or to any relief whatsoever.

22 **DEMAND FOR JURY TRIAL**

23
24 Pursuant to Federal Rule of Civil Procedure 38(b) and otherwise, UpCodes hereby
25 demands trial by jury of NFPA's claims.

1 **SEVENTH AFFIRMATIVE DEFENSE**

2 NFPA does not own copyright in the material in which NFPA claims copyright
3
4 because that material was authored in whole or in part by third parties.

5 **EIGHTH AFFIRMATIVE DEFENSE**

6 To the extent there is copying of copyrightable expression, that copying is de
7
8 minimis.

9 **NINTH AFFIRMATIVE DEFENSE**

10 To the extent there is copying of copyrightable expression, that copying constitutes
11
12 fair use.

COUNTERCLAIM

UpCodes, Inc., by and through its undersigned counsel, brings this counterclaim against National Fire Protection Association, Inc. and alleges as follows:

PARTIES

1. Counterclaim-Plaintiff UpCodes, Inc. (“UpCodes”) is a corporation organized and existing under the laws of Delaware with a mailing address of 340 South Lemon Avenue, #9050, Walnut, California 91789.

2. Upon information and belief, Counterclaim-Defendant National Fire Protection Association, Inc. (“NFPA”) is a Massachusetts nonprofit corporation with its principal place of business located at One Batterymarch Park, Quincy, Massachusetts 02169.

JURISDICTION AND VENUE

3. The Court has subject matter jurisdiction over this counterclaim under 28 U.S.C. § 1338(a) and 28 U.S.C. § 2201.

4. This Court has personal jurisdiction over NFPA because NFPA submitted to such jurisdiction for purposes of this counterclaim by filing the underlying case against UpCodes in this District.

5. Venue in this District is proper under 28 U.S.C. § 1391 and § 1400 because a substantial part of the events giving rise to this counterclaim, including the filing of the underlying case against UpCodes, occurred in this District.

FACTUAL BACKGROUND

6. UpCodes operates the UpCodes service, located at <https://up.codes>.

7. UpCodes was founded to make it easier for both industry professionals and laypeople to understand how to comply with state and local building codes.

8. UpCodes allows its users to search for relevant building codes and other relevant laws on a per-jurisdiction basis.

9. UpCodes shows its users an integrated view of the law. It presents the law as adopted by particular jurisdictions, including amendments or modifications to model codes that jurisdictions have chosen to adopt.

10. UpCodes does not publish model codes. Some jurisdictions adopt model codes as the law without making any amendments to the text, and so the substance of certain jurisdictions' codes may be identical to the model codes that they adopted.

11. UpCodes does not require visitors to its website to register for an UpCodes account in order to view any of the available laws.

12. UpCodes does not charge money for access to any of the available laws.

13. UpCodes allows all users to copy and paste sections of the law, as well as print the law out.

14. UpCodes is the only place, online or offline, where someone can access the integrated text, including local amendments and modifications, of many of the laws available on UpCodes.

1 15. UpCodes offers a subscription service with additional features and
2 collaboration tools. These include allowing users to compare codes of different
3 jurisdictions, and to search across multiple codes in a particular jurisdiction.
4

5 16. Some materials accessible on UpCodes also appears in one or more NFPA
6 publications. This material is referred to herein as the “Posted Laws.” All of this material
7 carries the force of law in one or more jurisdictions.
8

9 17. At least one purpose for which the Posted Laws were created was for
10 incorporation into law.
11

12 18. NFPA made affirmative efforts to encourage one or more jurisdictions to
13 incorporate the Posted Laws into the laws of that jurisdiction.
14

15 19. The Posted Laws were incorporated into law in one or more jurisdictions.

16 20. The Posted Laws are laws of general applicability in one or more
17 jurisdictions.
18

19 21. One or more jurisdictions impose criminal penalties for violating the
20 requirements of the Posted Laws.
21

22 22. No one can own the law.

23 23. The authentic exposition of the law, binding on every citizen, is free for
24 publication to all.
25

26 24. A real and substantial controversy exists between the parties regarding the
27 subject matter of this counterclaim because NFPA has brought a claim for copyright
28

1 infringement against UpCodes based, at least in part, on the accessibility of the Posted
2 Laws on the UpCodes service.

3
4 **FIRST COUNTERCLAIM**

5 **(Declaratory Judgment of No Copyright Infringement)**

6 25. UpCodes incorporates herein by reference the contents of each of the
7 preceding paragraphs.

8
9 26. The inclusion of the Posted Laws on UpCodes does not infringe any
10 copyright of NFPA because it is in the public domain because it is the law.

11
12 27. The inclusion of the Posted Laws on UpCodes does not infringe any
13 copyright of NFPA because the text of every law constitutes a fact that cannot be
14 accurately expressed any other way, and thus merges with any expression contained in
15 that text.

16
17 28. The inclusion of the Posted Laws on UpCodes does not infringe any
18 copyright of NFPA because any claim of infringement is barred or limited by the
19 idea/expression dichotomy.

20
21 29. The inclusion of the Posted Laws on UpCodes does not infringe any
22 copyright of NFPA because the Posted Laws constitutes “scenes a faire.”

23
24 30. The inclusion of the Posted Laws on UpCodes does not infringe any
25 copyright of NFPA because any claims of infringement are barred or limited by the
26 government edicts doctrine.

1 31. The inclusion of the Posted Laws on UpCodes does not infringe any
2 copyright of NFPA because the Posted Laws were authored in whole or in part by third
3 parties.
4

5 32. The inclusion of the Posted Laws on UpCodes does not infringe any
6 copyright of NFPA because, to the extent there is copying of copyrightable expression,
7 that copying is de minimis.
8

9 33. The inclusion of the Posted laws on UpCodes does not infringe any copyright
10 of NFPA because, to the extent there is copying of copyrightable expression, that copying
11 constitutes fair use.
12

13 34. UpCodes is entitled to a judicial declaration that the inclusion of the Posted
14 Laws on UpCodes does not infringe any copyright of NFPA.
15

16 **PRAYER FOR RELIEF**

17 Wherefore, UpCodes prays that a judgment be entered against NFPA as follows:

- 18 a. That the Court declare that UpCodes is not liable for copyright
19 infringement arising out of the inclusion of the Posted Laws on
20 UpCodes.
21
- 22 b. That the Court declare that NFPA lacks a valid copyright in any
23 portion of the Posted Laws;
24
- 25 c. That the Court award UpCodes costs of suit, including reasonable
26 attorneys' fees under the Copyright Act; and
27
28

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2021 the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the attorneys of record in this case.

/s/ Joseph C. Gratz
JOSEPH C. GRATZ