

6. ACT is a mission-driven organization dedicated to helping people achieve education and workplace success. ACT is trusted as a leader in college and career readiness, providing high-quality assessments grounded in nearly 60 years of research. ACT offers a uniquely integrated set of solutions designed to provide personalized insights that help individuals succeed from elementary school through their career. ACT provides assessments, research, information, and program management services in the broad areas of education and workforce development.

7. Defendant Scott Hildebrandt is a natural person domiciled in the state of Utah.

8. Mr. Hildebrandt does business under the names “eKnowledge,” “eKnowledge Group, Inc.,” and “eKnowledge, LLC.”

9. Mr. Hildebrandt personally engaged in and directed the acts of infringement described herein.

10. On information and belief, Mr. Hildebrandt was previously a manager and/or member of eKnowledge, LLC, a defunct limited liability company organized under the laws of Nevada.

11. The Nevada Secretary of State’s website indicates that eKnowledge, LLC has had its status “permanently revoked,” meaning that it remained in default of its obligations for one year and has not been reinstated for five years.

12. On information and belief, Mr. Hildebrandt was also previously an officer and/or shareholder of eKnowledge Group, Inc., a defunct corporation organized under the laws of Nevada.

13. The Nevada Secretary of State’s website indicates that eKnowledge Group, Inc. has had its status “permanently revoked,” meaning that it remained in default of its obligations for one year and has not been reinstated for five years.

14. Upon information and belief, Defendant continues to represent that he is the CEO of “eKnowledge” and is doing business as “eKnowledge” despite there being no record of an up-to-date corporate registration in any state.

15. On information and belief, Defendant currently runs the eKnowledge business out of his residence in Utah, while employing a support employee in Georgia.

JURISDICTION AND VENUE

16. This Court has subject matter jurisdiction over the copyright claim pursuant to 28 U.S.C. §§ 1331 and 1338.

17. This Court has subject matter jurisdiction over the Lanham Act claims pursuant to 28 U.S.C. § 1331.

18. This Court has personal jurisdiction over Defendant Hildebrandt because he is domiciled in the state of Utah.

19. Venue is proper pursuant to 28 U.S.C. § 1391(b) because Defendant Hildebrandt resides in this judicial district.

FACTUAL ALLEGATIONS

A. ACT and the ACT Test

20. ACT, founded in 1959, is a mission-driven and trusted organization dedicated to helping people achieve education and workplace success. On November 7, 1959, more than 75,000 students took the first ACT[®] college readiness test (“the ACT” or “the ACT test”).

21. Nearly 1.4 million 2023 graduates around the U.S. took the ACT during high school.

22. The ACT contains multiple-choice tests in four areas: English, mathematics, reading and science. ACT also offers an optional writing test that does not affect a person’s Composite score. The ACT is currently one of the leading college readiness tests in the United States, measuring what students learn in high school to determine academic readiness for college.

23. Each ACT test is an original work of authorship.

24. ACT has applied for and obtained copyright registrations for its ACT tests, including the questions and answers.

25. The ACT tests may not be reproduced or distributed by third parties without permission from ACT.

B. ACT’s Test Prep Solutions for the ACT

26. In addition to the ACT test, ACT offers flexible test prep solutions to help individuals, schools, districts, and states meet goals for education and career success. Some are free of charge and others are for sale.

27. ACT offers a free ACT Official Practice Test that can be accessed by creating an account on ACT’s website.

28. In order to assist students who have an ACT account in preparing for the ACT, ACT releases official ACT tests that contain real questions given to actual students on previous test dates (“Released Tests”). Items (questions) on the Released Tests have been removed from circulation and will not appear on future secure, proctored administrations of the ACT.

29. The Released Tests are original works of authorship and subject to copyright protection and may not be reproduced, distributed or used without permission from ACT.

30. Use of ACT’s website is subject to its Terms of Use. ACT’s Terms of Use state: “Copyright: All content in the ACT Internet site is copyrighted. No material may be distributed, downloaded, modified, reused, reproduced, reposted, retransmitted, disseminated, sold, published, broadcast, circulated, or otherwise used except as expressly stated either in such materials or in

this notice without the express written permission of ACT, Inc. For permission to reproduce copyrighted materials, contact the ACT Publications Department at Publications@act.org.”

31. ACT also offers for sale the following publications:

(a) The Official ACT Prep Guide 2024-2025

(b) Subject Guides containing practice questions, detailed explanations, and test-taking strategies for each subject, including:

(i) The Official ACT English Guide.

(ii) The Official ACT Math Guide

(iii) The Official ACT Reading Guide

(iv) The Official ACT Science Guide

32. ACT has partnered with Kaplan, Inc. to create an official portfolio of online ACT preparation products offering live, content-based instruction from teachers and tutors. This product line includes The Official ACT[®] Self-Paced Course, Powered by Kaplan. Kaplan is an official ACT partner for live, online prep for the ACT test.

33. ACT knows that everyone has the potential to learn and believes that a student’s family income should not determine his or her educational or career opportunities. For this reason, ACT offers the ACT[®] test fee waiver program to eligible students, who also obtain free access to The Official ACT[®] Self-Paced Course, Powered by Kaplan[®].

C. ACT’s Intellectual Property Rights

34. ACT owns many intellectual property rights, including but not limited to copyrights related to the ACT and rights related to ACT preparation materials.

35. As relevant to this lawsuit, ACT, Inc., ACT’s predecessor-in-interest, applied for and obtained copyright registrations for its ACT tests.

36. Test forms ACT 1874 FPPE and ACT 1572 CPPE were test forms that ACT provided to the public via its free “Preparing for the ACT Test” publication.

37. ACT obtained U.S. Copyright Registration TXu 1-915-839 for the questions and answers in ACT 1874 FPPE.

38. The majority of the questions in ACT 1572 CPPE are covered by U.S. Copyright Registration TX 7-626-237. However, a small number of the questions and answers are covered by the following additional registrations: TX 4-412-610, TX 7-183-775, TX 6-967-179, TX 6-771-269, TX 7-183-775, and TX 7-399-987.

39. On May 1, 2024, ACT, Inc. assigned all rights, title, and interest to its copyrights, including the right to sue for past infringement, to ACT Education Corp., f/k/a Impact Asset Corp.

40. “ACT” is a registered trademark of ACT (the “ACT Mark” or “ACT Marks”). ACT first used ACT as a trademark on September 8, 1959.

41. ACT has substantial common law rights in its ACT Mark.

42. ACT also has multiple federal trademark and service mark registrations for its ACT Mark.

43. Among ACT’s registrations are the following wordmark registrations: U.S. Trademark Registration No. 2888069, which was issued to ACT, Inc. on September 28, 2004, and No. 4517656, which was issued to Act, Inc. on April 22, 2014.

44. ACT also owns U.S. Trademark Registration No. 7052519, which was issued on May 16, 2023 and covers ACT’s logo.

45. On May 1, 2024, ACT, Inc. assigned all rights, title, and interest to its ACT Marks, including the right to sue for past infringement, to ACT Education Corp., f/k/a Impact Asset Corp.

46. ACT has invested substantial time and money marketing, promoting, and distributing its products using the ACT Mark.

47. Due to these efforts, the ACT Mark is widely recognized by the public as a designation of the source of ACT’s testing, preparation, and other products.

D. Defendant’s Copyright Infringement

48. Plaintiff and Defendant each offer for sale ACT test preparation products and services nationwide, including in the state of Utah.

49. Defendant is operating a website as “eKnowledge” at the following address <<https://new.eknowledge.com>> (the “eKnowledge website”).

50. The eKnowledge website claims that eKnowledge has been in business since 2004 and has helped over 300,000 students.

51. The eKnowledge website states that eKnowledge is “the official e-Learning Platform of the National Federation of High School Associations,” which it claims represents “19,500 schools and 12 million students.”

52. Defendant markets and sells via the eKnowledge website the “PowerPrep” program to students and school districts that Defendant claims increases ACT scores.

53. As part of the PowerPrep program, Defendant offers a diagnostic, which the eKnowledge website claims “is [m]ade with real ACT/SAT exams.”

54. After students take the diagnostic, Defendant generates a “Smart Report” which purports to provide an ACT Score prediction and informs clients of areas that need attention.

55. Finally, Defendant claims to create a custom study plan for students that features real ACT questions.

56. Defendant promises on the eKnowledge website that students who enroll in the program will be able to access “4 Real Tests.”

57. Moreover, in describing how its program will help students with the ACT test, the eKnowledge website states that “PowerPrep gives you the most comprehensive math prep experience you can find anywhere, with multiple REAL ACT math tests.”

58. Defendant further represents that PowerPrep contains “REAL exam passages and over 200 REAL exam questions from years past” from the ACT’s English Grammar & Usage section and “hundreds of REAL exam questions and passages from recent years” from the ACT’s Reading Comprehension and Science Reasoning sections.

59. Defendant touts “Real Questions” as a benefit of the eKnowledge program over competitor testing programs.

60. Defendant does not have permission from ACT to use or distribute any ACT test, or any ACT copyrighted works, or to create any derivative works thereof.

61. Defendant does not have permission from ACT to use or distribute any ACT practice questions.

E. Defendant’s Unfair Competition

62. Defendant promotes its “ACT Diagnostic Test,” “ACT Super,” and “ACT/SAT Prep Program” on the eKnowledge website.

63. One of eKnowledge’s case studies features the ACT logo.

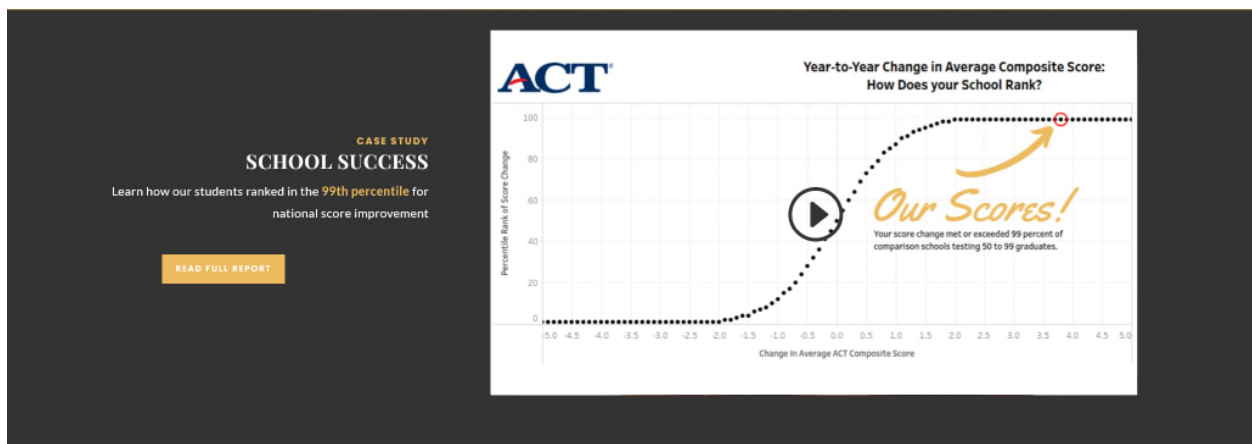


Figure 1. ACT & SAT PowerPrep Program Overview, eKnowledge (accessed on June 7, 2024), <https://new.eknowledge.com/program-overview/>.

64. Defendant further offers to provide “Real” Act Tests.

65. Defendant's eKnowledge program is not affiliated with ACT.

66. Defendant does not have permission to use the ACT Mark or ACT tests.

67. As one of its program offerings, eKnowledge claims to provide a "Score Prediction" for students who use its program. However, ACT uses a proprietary methodology to select the questions in each test and to calculate the scaled ACT score. eKnowledge does not have access to this proprietary methodology, and cannot conclusively suggest to customers that scores on eKnowledge's assessments are equivalent to scores on the ACT test.

68. Upon information and belief, Defendant is attempting to create consumer confusion and benefit from ACT's reputation and goodwill.

69. Upon information and belief, Defendant has unfairly and unjustly benefitted from consumer confusion regarding an association or affiliation between ACT and Defendant.

F. The Cease and Desist Communications

70. After ACT learned that Defendant was distributing ACT's copyrighted Released Tests, it sent an initial cease and desist letter to eKnowledge on July 18, 2022. In its communications, ACT demanded that eKnowledge remove all content that infringed on ACT's copyrights and trademark rights.

71. Since the initial letter, ACT has sent several follow up letters and had several follow up exchanges with Defendant, including attempts to reach a business solution.

72. On March 6, 2023, Defendant responded on behalf of eKnowledge to ACT's communications. In his response, Defendant confirmed that eKnowledge was using ACT's released exam questions from prior exams.

73. Unable to reach a resolution, ACT sent Defendant a final cease and desist letter on March 5, 2024. In its letter, ACT reiterated its demand that eKnowledge stop promoting and selling ACT's copyrighted testing material. ACT also demanded eKnowledge to cease use of the "ACT Diagnostic Test," "ACT Super," and "ACT/SAT Prep Program" phrasing on its website. Finally, ACT demanded that eKnowledge stop promoting score prediction as a feature of its program.

G. Defendant's Continued Willful Infringement

74. Despite being put on notice of ACT's rights and of Defendant's infringement, Defendant has continued to violate ACT's exclusive rights, codified in 17 U.S.C. § 106, without permission from ACT, including the unauthorized reproduction, distribution and performance of ACT's copyrighted works.

75. Among other things, the eKnowledge website continues to promote its use of "real" ACT tests and questions. Defendant continues to reproduce and/or distribute ACT's tests and questions without permission from ACT.

76. Defendant's use of the ACT Tests and Mark is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of Defendant with ACT, or as to the origin, sponsorship, or approval of Defendant's services, or commercial activities by ACT.

77. Defendant is intending to trade off of ACT's reputation and goodwill to the detriment of ACT.

78. Defendant's infringement is knowing and willful.

FIRST CLAIM FOR RELIEF

(Copyright Infringement; 17 U.S.C. § 101, et seq.)

79. Plaintiff repeats and incorporates by reference the allegations in the preceding paragraphs as though set forth fully herein.

80. This claim arises under the Copyright Act of 1976, 17 U.S.C. §101, et seq.

81. ACT's copyrighted works, including the ACT tests and questions, are original works of authorship that constitute copyrightable subject matter under the Copyright Act, 17 U.S.C. § 101 et seq.

82. Plaintiff owns the exclusive rights and privileges in and to the above-referenced copyrighted works, and in compliance with the law, has received from the Register of Copyrights the appropriate certificates of registration, which constitute prima facie evidence of the validity of the copyrights in the works and of the facts stated in the certificates.

83. At all relevant times, Plaintiff or its predecessor in interest has owned all applicable right, title and interest in and to these copyrighted works.

84. Defendant intentionally copied and distributed ACT's copyrighted works as described above, and has infringed and will continue to infringe Plaintiff's copyrights by reproducing and distributing, and possibly preparing derivative works of, Plaintiff's copyrighted work without Plaintiff's permissions. Defendant's infringement of Plaintiff's copyrights has been deliberate, willful and in utter disregard of Plaintiff's rights.

85. By reason of Defendant's infringement, Plaintiff has sustained and will continue to sustain substantial injury, loss, and damage.

86. As a result of Defendant's willful and intentional infringement, ACT has and will continue to suffer irreparable harm if Defendant's conduct is not enjoined.

87. As a result of Defendant's wrongful conduct, Plaintiff has suffered, and will continue to suffer, substantial damages. Plaintiff is entitled to recover damages in an amount to be proven at trial.

88. WHEREFORE, ACT seeks relief as set forth at the end of this Complaint.

SECOND CLAIM FOR RELIEF

(Violation of Lanham Act by Unfair Competition 15 U.S.C. § 1125(a)(1)(A))

89. Plaintiff repeats and incorporates by reference the allegations in the preceding paragraphs as though set forth fully herein.

90. Plaintiff owns common law rights to the ACT Marks and has a protectable interest in the Marks.

91. Defendant's claim to offer "real" ACT tests constitutes and other marketing efforts constitutes unfair competition and/or a misleading description or representation of fact, which is likely to cause confusion, to cause mistake and/or to deceive as to the affiliation, connection or association of Defendant with Plaintiff and/or as to the origin, sponsorship and approval of Defendant's goods, services and commercial activities, in violation of 15 U.S.C. § 1125(a)(1)(A).

92. Defendant's actions have been committed with the intent to cause confusion, mistake, and deceive.

93. As a result of Defendant's actions, Plaintiff has and will continue to suffer irreparable harm if Defendant's conduct is not enjoined.

94. Plaintiff has also experienced economic loss as a result of Defendant's conduct.

95. WHEREFORE, ACT seeks relief as set forth at the end of this Complaint.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays as follows:

1. Entry of a preliminary and permanent injunction enjoining and restraining Defendant and all persons acting in concert with him from:

(a) Infringing Plaintiff's copyrights;

(b) Engaging in any false or misleading marketing or promotion that misrepresent the relationship between ACT and Defendant;

(c) Engaging in any acts of unfair competition against ACT.

2. Damages in an amount to be proven at trial, including but not limited to (i) Defendant's profits, (ii) Plaintiff's actual damages, and/or statutory damages, as allowed by applicable law.

3. Punitive damages, as allowed by applicable law.

4. Reasonable attorneys' fees and costs, including expert witness fees, as permitted by applicable laws.

5. Interest, as permitted by applicable laws.

6. For such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury.

Respectfully submitted, this ____ day of August, 2024.

By: _____/s/_____

Attorneys for Plaintiff ACT Education Corp.