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Attorney Bryan Wheelock Case Evaluation



Bryan Wheelock
Direct Dial: 314-726-7505
bwheelock@harnessip.com

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VIA EMAIL: Emily.Scott@act.org
Emily Scott
Director & Lead Counsel
Legal Department
500 ACT Dr. | Iowa City, Iowa 52243-0168

Dear Ms. Scott:

I am writing on behalf of eKnowledge in response to your March 5 letter to Scott Hildebrandt at eKnowledge. I apologize for the delayed response, but I wanted to review the documents you provided and investigate the customary use of "ACT" by third parties.

Addressing the four bullet-pointed demands on page 6 of that letter, eKnowledge will cease using the phrases "ACT Diagnostic Test," "ACT Super," and "ACT/SAT Prep Program." Further eKnowledge will use phrases such as "Diagnostic testing to prepare for the ACT" or "eKnowledge's Prep Program for the ACT®/SAT®," or similar phrases to reflect that there is no affiliation between eKnowledge and ACT, Inc., and will include the ® symbol with reference to ACT, Inc.'s federally registered trademark.

Addressing the score prediction feature, this feature is based upon widely available information about scoring information, but it was never the intention of eKnowledge to misrepresent the source of the prediction. To this end, eKnowledge will hereafter identify this feature "eKnowledge Score Predictor," which should prevent any confusion about the source of the prediction.

Finally with respect to the use of the question stems from the two public ACT tests, eKnowledge believes that this is a protected fair use of these materials according to the four factors identified in 17 USC 107:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Regarding factor (1) the purpose and character of the use, eKnowledge's use of the question stems is for nonprofit educational purposes. eKnowledge provides explanation of the answers, and education on the underlying principles, of retired questions that ACT has chosen to ACT test, focusing on schools that do not otherwise have the resources to do so. The use of the freely available question stems merely provides context for eKnowledge's educational materials. eKnowledge is not operating for profit, and is in the process of formalizing its non-profit status. Because of this educational purpose and public benefit conferred, this factor favors eKnowledge. *Assn. of American Medical Colleges v. Carey*, 728 F. Supp. 873, 14 U.S.P.Q.2d 1278 (N.D.N.Y. 1990); *Newport-Mesa Unified Sch. Dist. v. Cal. Dep't of Educ.*, 371 F. Supp. 2d 1170 (C.D. Cal. 2005).

Regarding factor (2) the nature of the copyrighted work, *Preparing for the ACT*, contains retired test question stems and supplemental pedagogical content. It is significant that these questions have been made freely available to students for preparing for the ACT test, and eKnowledge is merely helping students take full advantage of these questions. Because the question stems are freely distributed to the public for a similar educational purpose, the second factor favors eKnowledge.

Regarding factor (3) the amount and substantiality of use, eKnowledge only uses the actual test question stems from *Preparing for the ACT* that are essential to test preparation, and none of the other pedagogical supporting materials. Because the only portion used is freely distributed to the public by Act, Inc., for a similar educational purpose, this third factor favors eKnowledge.

Regarding factor (4) the effect on the market, ACT Inc. and numerous states make the question stems available for free, and eKnowledge's use of those questions is in support of students who have (or are entitled to) accessed the question stems for free. eKnowledge's use of the question stems does not impact their commercial value.

Overall, eknowledge believes that the use of widely published and freely available test stems, to provide context to original educational materials in order to make those available test stems more useful to students taking an ACT test is a fair use under the copyright law that causes ACT, Inc. no injury.

Furthermore, the various exclusive arrangements ACT, Inc. has entered with Hawaii, Nebraska, Nevada, Wisconsin, Arizona, Kentucky, Mississippi, North Carolina, and Wyoming, as well as arrangements with other states obligate ACT, Inc. to license test preparation entities to use the free test preparation materials on fair, reasonable, and non-discriminatory terms.

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Published, non-confidential, actual test questions are an essential facility for providing effective test preparation, and monopolizing this resource unjustly restricts access to ACT preparation.

eKnowledge has delivered low-cost ACT test preparation services to thousands students, its continuation is essential to making sure that ACT test is a test of a student's learning ability, and not his/her parents' ability to pay for an effective preparation course. eKnowledge has always cooperated with requests from ACT, Inc. and is addressing the bulleted points in your letter, we hope that in return you will acknowledge that the limited use of question stems is a fair use, and even if you do not agree, that you will provide a license of these question stems on fair, reasonable, and non-discriminatory terms, as your monopoly position requires.

Best regards,

A handwritten signature in black ink, appearing to read "Bryan K. Wheelock". The signature is written in a cursive, flowing style with a large initial "B".

Bryan K. Wheelock