

Scott Hildebrandt
1271 Aspen Avenue
Provo, Utah 84604

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

ACT Education Corp. f/k/a ACT., Inc., Plaintiff,	CASE NO.: 2:24-cv-00703
v. Scott Hildebrandt, an Individual, d/b/a eKnowledge a/k/a eKnowledge, LLC, a/k/a eKnowledge Group. Inc.;	ANSWER TO PLAINTIFF ACT EDUCATION CORP. F/K/A ACT., INC COMPLAINT FOR
Defendant	1. COPYRIGHT INFRINGEMENT 2. UNFAIR COMPETITION UNDER THE LANHAM ACT

**DEFENDANT'S ANSWER TO PLAINTIFF'S COMPLAINT FOR WILLFUL
COPYRIGHT INFRINGEMENT AND VIOLATIONS OF THE LANHAM ACT**

Scott Hildebrandt, an individual and DBA eKnowledge, responds pro se to the Complaint for Willful Copyright Infringement and Unfair Competition filed by Plaintiff ACT Education Corp., f/k/a ACT, Inc. as follows:

INTRODUCTION

1. As a pro se litigant, I am unfamiliar with the rules and procedures of the Utah Federal District Court. I ask the court for lenience in this regard.
2. We are a very small organization that I run with my son and a handful of other full and part-time 1099 workers. The organization fluctuates between 2 and 5 people, and has been operated as a functional not-for-profit since 2005. However, we are actively in the process of converting to an official 501(c)(3) by the end of Q1 2025.

3. My father was a Lt. Colonel and fighter pilot in the Air Force and we moved around all over the globe. I wanted to create a program that would give military members and others a high-quality SAT/ACT prep option to even out the playing field when preparing for the SAT/ACT exams. Over the years we have worked very hard to create this valuable resource.

4. The goal has been to make high quality SAT/ACT prep available at a price that anyone can afford.

5. I have personally created most of the content, and my son has coded most of the website and program. We have both committed tens of thousands of hours to this project.

6. Over the years, by our estimates it has helped over 300,000 families (mostly military and homeschool.)

7. The not-for-profit ACT organization has existed for 65 years. Very recently, in April of 2024, there was a claimed transfer and purchase of the ACT not-for-profit 65-year-old organization by the private equity fund called Nexus Capital Management, LP. We will constantly draw a distinction between the 65-year-old ACT not-for-profit and the new entity owned by Nexus Capital Management.

8. For that reason, within this Answer, “ACT nfp” will refer to the 65-year-old quasi-public organization that developed all of the content, copyrights, goodwill, and favored public standing, and who placed, for free, PDF versions of many of their retired exams into the public domain for many decades, and whose leadership publicly (on the Internet) referred to those retired exams as “copyleft.”

9. “ACT Nexus Capital” will be used synonymously with Plaintiff in identifying the newly-created, private-equity-owned, for-profit corporation called “ACT Education Corporation,” which claims to have purchased (in April 2024) all of ACT nfp’s content, goodwill, and favored public standing.

10. In or about October of 2024, approximately 5 months after allegedly converting control over ACT nfp to ACT Nexus Capital Management private equity, the Plaintiff filed this federal lawsuit against me personally and dba eKnowledge in the US District Court for the District of Utah. The core of ACT Nexus Capital claim is that the use of ACT nfp’s retired questions, which for decades had been released for free to the general public, constitutes willful copyright infringement and unfair competition under the federal Lanham Act that ACT Nexus Capital can sue to enforce.

11. We have continuously offered to edit any language on our website or in our program that ACT Nexus Capital felt might confuse the general public into thinking that we were associated with ACT Nexus Capital. We offered to pay a fair licensing fee for the 295 retired questions we are using. All efforts to settle were rejected.

12. We have consistently maintained that we will work with ACT Nexus Capital in any way they deem is necessary, but we (and ALL test prep organizations) must continue to have the use of all the retired exams that were placed into the public domain, including the 295 retired

stems in our program, in order to properly, fairly, and equally prepare students to take the college entrance ACT exam.

13. Approximately 2-weeks ago, after rejecting another offer to settle, ACT Nexus Capital refused to allow additional time to locate competent legal representation. We explained that the Dec 2, 2024 deadline for filing an Answer would not allow us sufficient time to find competent legal counsel. They would not agree to a further continuance. Since that time, we have been seeking, and will continue to diligently seek, competent legal representation.

14. ACT Nexus Capital is fully aware of our very limited cash flow and financial position because prior to filing their lawsuit, during settlement discussions, they requested 3-years of our profit and loss statements. They claimed they needed that information in order to figure out how much they would charge for licensing their questions. We prepared and submitted those documents with high hopes of working out a fair arrangement. But of course, as we now know, this was simply a trick to obtain information about our financial position to assess how financially vulnerable we might be to defend against ACT Nexus Capital in their predetermined plan to use ACT nfp's copyleft retired exam questions to crush competition.

15. Further, we believe this lawsuit is part of larger legal strategy aimed at eliminating competition. By first suing such a small but effective organization who has very limited financial resources, ACT Nexus Capital believes they can set a legal precedent to be used against other organizations as they move through the process of consolidating test making and test prepping under a single for-profit private equity firm.

16. This case presents highly technical legal issues along with what we believe are incredibly important public policy and fair use issues that will impact millions of families, students, schools, states, and even the potential future and nature of the entire college entrance exam system.

17. The issues presented deserve a robust defense, far beyond what I alone am able to do. So, we are doing everything we can to find such representation.

18. We are filing this Answer pro se in order to avoid a default judgement, while we continue our search for legal representation.

19. We ask the court for an opportunity to amend this answer to include possible counterclaims, once competent counsel is found.

ADMISSIONS AND DENIALS

20. Defendant denies the allegations in paragraph 1 of the Complaint.

21. Defendant denies the allegations in paragraph 2 of the Complaint.

22. Defendant denies the allegations in paragraph 3 of the Complaint.

23. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the Complaint, and on that basis denies them.

24. Defendant denies in part and lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of the Complaint, and on that basis denies them. However, Defendant more fully explains ACT Nexus Capital's corporate iterations and convoluted nature below.

25. Defendant denies in part and lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6 of the Complaint, and on that basis denies them. However, Defendant more fully explains ACT nfp and ACT Nexus Capital's alleged mission statement and 65-year history as a not-for-profit, educationally favored, quasi-public, entity and the corresponding nature as it relates to this case.

26 Defendant admits the allegations in paragraph 7 of the Complaint.

27. Defendant admits in part and denies in part the allegations in paragraph 8 of the Complaint. Defendant admits that we do business as eKnowledge.

28. Defendant admits in part and denies in part the allegations in paragraph 9 of the Complaint. We do business as eKnowledge. While Mr. Hildebrandt directed the acts of eKnowledge, those acts never willfully infringed Plaintiffs copyrights, did not create unfair competition under the Lanham Act, and did not create consumer confusion or benefits from ACT Nexus Capital's reputation, goodwill, or trademarks.

29 Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 10 of the Complaint, and on that basis denies them.

30. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 11 of the Complaint, and on that basis denies them.

32. Defendant admits in part and denies in part the allegations in paragraph 12 of the Complaint. Mr. Hildebrandt, at one point, held shares in eKnowledge Group, Inc. Everything else is denied.

33. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13 of the Complaint, and on that basis denies them.

34. Defendant admits in part and denies in part the allegations in paragraph 14 of the Complaint. Mr. Hildebrandt directs the actions of dba eKnowledge. Everything else is denied.

35. Defendant admits in part and denies in part the allegations in paragraph 15 of the Complaint. The research, content creation, IT, and coding, is all primarily done from Utah while customer support is handled in Georgia by a worker. We have hired part-time and full-time workers periodically to assist with all phases, and those workers have lived in various states in the United States and other countries. Everything else is denied.

36. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the Complaint regarding claims of subject matter

jurisdiction over Plaintiff's copyright claims under 28 §§ USC 1331 and 1338, and on that basis denies them.

37. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 17 of the Complaint regarding claims of subject matter jurisdiction over the Plaintiff's Lanham Act claim under 28 USC § 1331, and on that basis denies them.

38. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 18 of the Complaint regarding personal Jurisdiction over Plaintiff, Mr. Hildebrandt, and on that basis denies them.

39. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 19 of the Complaint regarding proper venue, and on that basis denies them.

40. Defendant has insufficient information to form a belief as to other allegations contained in **Paragraph 20** of the Complaint, and on that basis denies them. However, all of these claims will be more fully analyzed within Defendant's defenses below.

41. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 21 of the Complaint, and on that basis denies them, including the claim regarding whether 1.4 million 2023 high school graduates took the ACT exam.

42. Defendant admits in part the allegations in Paragraph 22 regarding the contents of the ACT exam (English, Math, Reading, and Science Reasoning and optional essay writing portion.) However, Defendant strongly denies the Plaintiffs allegation that it is simply "**one of** the leading college readiness tests in the United States." According to ACT Nexus Capital's own website, it has more market share than the SAT, and together the ACT and SAT dominate virtually all college entrance exams. Everything else is also denied.

43. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 23 of the Complaint, and on that basis denies them, including whether ACT Nexus Capital's tests are original works of authorship. In fact, three quarters of the exam is passage-based—meaning multiple questions relate to a single passage. Most of those passages are NOT written by the ACT Nexus Capital. There is equally a question regarding the Math and Grammar sections because those sections test the general concepts and principles of math, grammar, and punctuation, which general principles are not copyrightable.

44. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 24 of the Complaint, and on that basis denies them.

45. Defendant denies the allegations in paragraph 25 of the Complaint. Whether or not ACT question stems placed into the public domain by ACT nfp for decades can be used by third parties is at the heart of this matter and will be thoroughly explored within Defendant's defenses and possible future counterclaims.

46. Defendant denies all the allegations in paragraph 26 of the Complaint. Specifically, Defendant denies that ACT Nexus Capital's test prep is "flexible." While the private equity firm that controls ACT may selfishly claim "flexibility," from the general public's and students' perspective, it's the polar opposite. ACT Nexus Capital's attempt to crush competition and manipulate the general public means their test prep is most certainly INFLEXIBLE—they want to be the sole provider of college entrance exams *and* the prep for that test. This is precisely the reason that Plaintiff has brought this lawsuit: to control access to quality and diversified equal prep by the general public, students, schools, districts, and states. Further, to defend the rights of those students and the general public is precisely why eKnowledge will vigorously defend this case.

47. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 27 of the Complaint, and on that basis denies them.

48. To the extent that the claims in paragraph 28 of the Complaint indicate that for decades ACT nfp has placed into the public domain several "retired" exams, Defendant admits and agrees with the allegations. Those exams have been readily available to anyone searching the Internet and were in PDF format all over the Internet for many decades. We accept the allegation that Plaintiff never used those retired exam questions inside of any future exams. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 28, including those related to ACT Nexus Capital's state of mind regarding its reasons for allowing students to create an account and access some content as ACT Nexus Capital claims, and on that basis denies them all.

49. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 29 of the Complaint, and on that basis denies them. We especially deny the claim that the ACT nfp exams that they publicly released for decades are original works. As previously noted, three quarters of the exam is passage-based and NONE of those passages were written by ACT Nexus Capital. There is equally a question regarding the Math and Grammar sections because those sections test concepts and principles of math, grammar, and punctuation, which we believe to be non-copyrightable. The claim that the retired questions, which were released by ACT nfp for decades for free to the general public, somehow now require ACT Nexus Capital's authorization is adamantly denied. Everything else in this paragraph is denied.

50. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 30 of the Complaint, and on that basis denies them. ACT Nexus Capital's current terms of use do not apply to Defendant. As previously stated, all of the question stems used by Defendant have been freely available in PDF format online for decades because ACT nfp placed them into the public domain, encouraged their wide use, and explained they were considered copyleft. Also, we believe once discovery begins it is highly likely that we will find many statements from ACT nfp that directly explain their motivation behind placing the retired exams into the public domain and their hope that people would use them in precisely the way we are using them.

51. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 31 of the Complaint, and on that basis denies them.

52. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 32 of the Complaint, and on that basis denies them.

53. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 33 of the Complaint, and on that basis denies them. However, this claim is completely irrelevant to any issue in this case because any extant fee waiver program would be 100% under ACT Nexus Capital's control and therefore would rely solely on the generosity of a private equity investment firm. Nothing compels them to offer fee waivers and those waivers may disappear at any moment.

54. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 34 of the Complaint, and on that basis denies them. Additionally, Defendant submits that such a broad claim that ACT Nexus Capital owns many copyrights is not relevant to this cause of action.

55. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 35 of the Complaint, and on that basis denies them.

56. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 36 of the Complaint, and on that basis denies them. Defendant does admit that ACT nfp for decades released many retired exams and test questions, and that all of the questions used by Defendant came from those publicly released exams (Forms 1874 and 1572.)

57. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 37 of the Complaint, and on that basis denies them.

58. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 38 of the Complaint, and on that basis denies them.

59. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 39 of the Complaint, and on that basis denies them.

60. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 40 of the Complaint, and on that basis denies them.

61. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 41 of the Complaint, and on that basis denies them.

62. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 42 of the Complaint, and on that basis denies them.

63. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 43 of the Complaint, and on that basis denies them.

64. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 44 of the Complaint, and on that basis denies them.

65. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 45 of the Complaint, and on that basis denies them.

66. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 46 of the Complaint, and on that basis denies them.

67. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 47 of the Complaint, and on that basis denies them.

68. Relating to Paragraph 48, Defendant admits that it offers its own ACT Prep program called PowerPrep at sponsored discount pricing. Those discounts are typically between 95% and 100%, and Defendant's program is sponsored and supported by many not-for-profit organizations including many military and homeschool organizations. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the other allegations contained in Paragraph 48, and on that basis denies them.

69. Relating to paragraph 49, Defendant acknowledges it owns the website located at <http://new.eKnowledge.com>. However, the vast bulk of website traffic and sales moves through all of our affiliate subsites where members of the aforementioned eKnowledge-affiliated Military, NFP, and other organizations can get sponsored and receive either free or drastically discounted programs (typically 95-100% discount.)

Examples:

The landing page for Military.com: <http://www.eKnowledge.com/mil>

The landing page for the National Federation of State High School Associations (NFHS): <http://eKnowledge.com/NFHS>

The landing page for the Association of the United States Army: <https://www.eKnowledge.com/AUSA> (however, access to this page is restricted behind the AUSA's membership paywall)

The landing page for the Military Officers Association of America: <https://www.eKnowledge.com/MOAA>

The landing page for the Iowa High School Athletic Association: <https://www.eKnowledge.com/IAHSAA>

The landing page for Home Educators Association of Virginia: <https://www.eKnowledge.com/HEAV>

The landing page for American Heritage Girls: <https://www.eKnowledge.com/AHG>

The landing page for Commander Navy Installations: <https://www.eKnowledge.com/CNIC>

The landing page for Texas Home School Coalition: <https://www.eKnowledge.com/THSC>

70. Over the years we have developed relationships with many similar groups and organizations. They use their communications channels to let their membership know about the sponsorship discounts. Additionally, we pass the goodwill onto the affiliate and allow them to use the relationship in any way that benefits their organization. We allow the affiliate to claim the discount exists as a benefit of membership with that organization. We do not charge the affiliate any money.

71. The entire purpose of eKnowledge has always been to expand access to world-class SAT/ACT prep at either free or at such a discount that anyone could afford it. In fact, the biggest hurdle we face is users thinking this is “too good to be true.” But it is true. And we hope it remains true, even though ACT Nexus Capital wants to control the key to the front door of all post-secondary admissions and how all students access post-secondary education in American colleges and universities.

72. Defendant PROUDLY admits the allegation in Paragraph 51 that we are the “official e-learning platform of the National Federation of State High School Associations (NFHS)”—a 15+ year relationship. However, we do NOT claim that NFHS represents 19,500 schools and over 12 million students—the NFHS claims that. The NFHS is a 501(c)(3) nonprofit that has existed for over 100 years. See <https://www.nfhs.org/who-we-are/aboutus-for-more-information>. NFHS is the national organization that counts all 51 member state associations (including Washington DC.)

73. Defendant PROUDLY admits the allegations in Paragraph 52 that we provide world-class ACT Prep at a price point that any parent, student, or school can afford. We do not merely “claim” that our program increases student scores; there is strong supporting evidence in independent data from public high schools. We have also received over 40,000 unsolicited comments and many 5-star ratings. Many parents and students state that our program changed the course of their student’s lives. The most poignant comments come from military members with extremely limited budgets who are stationed all over the world. They pray that God will bless us for this work. It’s one of the biggest motivations for us and what has justified my spending a significant amount of my personal money to keep the project afloat.

74. We have conveyed all of this background information to ACT Nexus Capital during our efforts to find a resolution. We have shared the letters written by the heads of various military organizations on our behalf that directly ask that ACT Nexus Capital allow eKnowledge to continue providing its program because it is so valuable to their military and other members. We literally begged ACT Nexus Capital to understand the vital role we are playing in the lives of families and students all over the world.

75. This is a representative comment (of the ~40,000) from program users:

“Hello. My name is LTJG Christian Bisher and I am stationed at NAS Lemoore in California’s central valley. I recently completed a tour at a Super Hornet squadron and I am now at a school house for Sailors fresh from boot camp. Most of my jobs have been as a Division Officer, where I directly oversee a group of enlisted personnel and interact with them on a daily basis. In any

enlisted Sailors quest to become a commissioned officer or enroll in an off-base college or university, taking the ACT or SAT is their first step. Most Sailors are very intimidated about taking the ACT or SAT and usually do not have the money to buy even the study books. During my four and a half years in the Navy, this is the best offer for valuable study material I have seen. I am personally aware of many Sailors and Marines that can use this study material and I am going to get it to them. I am also sure others in the military are taking advantage of this offer. I would like to say thank you for making this material available, which would otherwise be unattainable, available to these Sailors and Marines.”

76. Defendant denies in part and admits in part the allegations contained Paragraph 53. The PowerPrep Program begins to diagnose a student from the first question they are given in the program. We ask the student to stop after each question they get wrong and go through the extremely detailed explanation for that missed question, before they move forward. We call this remediation. So, the program does not include a traditional “diagnostic” pre-test. Rather, it continuously diagnoses each student as they work through the program. That process is ongoing. Included in the process are 295 of the retired questions that ACT nfp released many years ago to the general public as copyleft content. But it also includes many other questions and thousands of other pieces of learning content, including text, video, and graphs and charts. We tell students that we are including those “real ACT questions” because that is the proper way to describe them. Everything else is denied.

77. Defendant denies in part and admits in part the allegations contained Paragraph 54. Students begin working inside our program and from the first question, the program is analyzing their progress. But they are learning right from the first question (immediately remediating each missed questions) as they proceed. Once they complete the equivalent of an entire exam, the PowerPrep program tallies their results and gives them a projected score **range** based upon our internal algorithm. We do not “purport” to provide an ACT score prediction, we provide one—it’s our prediction based on how they are doing in the program. Everything else is denied.

78. Defendant denies in part and admits in part the allegations contained Paragraph 55. Once students complete the first full number of questions that make up an actual ACT test (approximately 225 questions spread across the four subject areas of English, Math, Reading, and Science Reasoning), the PowerPrep program will create a custom study plan based on those results. It will then continuously track how the student is improving and it will adjust the predicted score range based on the student’s improvement as they proceed through their custom study plan. The Custom Study Plan comes from all the content inside our classroom. That classroom contains hundreds of hours of videos, text, audio, and teaching. Mixed within that process are additional real ACT question stems that were taken from the raft of retired questions and tests that ACT nfp released over decades and encouraged people to use for free.

79. It is important to understand that while the PowerPrep Program includes ~295 previously retired ACT question stems (not the explanations provided by ACT nfp), the PowerPrep program contains 165,463 teaching content nodes that are NOT ACT question stems.

So, only 0.17% of the nodes are ACT question stems and 99.83% of the nodes are **not** ACT question stems.

80. Explained another way, **those previously released** ACT question stems make up 2,360 KB of the program, while our other eKnowledge content and files combine to 8,989,257 KB (~9 gigabytes, GB). So, only 0.026% of the program by file size is ACT stems, and 99.97% of the content is **not** ACT question stems.

81. Beyond the content program (videos, text, graphics etc.,) which is 99.97% different from the ACT question stems, we have developed and continue to maintain the design and code for the PowerPrep program (server, client, and associated admin tools), several associated proprietary business applications, databases, state-of-the-art software development processes and tools, automated deployment pipelines, various eKnowledge websites, along with the associated IT infrastructure. We estimate this work exceeds 1,000,000 lines of code. This also represents over 8,000 individual updates and versions to our codebase.

82. Defendant denies in part and admits in part the allegations contained Paragraph 56. Students cannot access inside the program any of the additional ACT exams that were released into the public domain by ACT nfp. There were courtesy links to the retired exams on our website; however, since ACT Nexus Capital objected to this, we broke the links on our site. Therefore, there is no way for a student or anyone visiting our website to access the any unmodified freely released ACT exams from within our program or from within our website. Everything else is denied.

83. Defendant denies in part and admits in part the allegations contained Paragraph 57. The comprehensive nature of our math section comes from the many hours of teaching and hundreds of pages of explanations. Any reference to real ACT questions, again refers to those retired questions that were released into the public domain over decades. The program uses those questions to check whether a student is understanding our teaching and to provide an opportunity to remediate a missed question by using our thorough explanations.

84. Here is just one example of how this works. A real ACT math question might ask about the concept of graphing an equation that includes absolute values: example $y = |x-6|$. However, what is actually being tested is the student's understanding of the generalized equation for graphing absolute values: $y = a|x + h| + v$. If the student misses that question, there is a 42-minute video and over 30 pages of text and graphics that teaches the student everything about that concept. That process repeats around every single question.

85. Additionally, we analyze every passage within a test and provide a detailed explanation of the passage, an analysis of every difficult vocabulary word in the passage, and a sentence-by-sentence review of the grammar that dissects each sentence by subject and verb, and then analyzes every other word in the sentence and how it's used.

86. Each passage has approximately two hours of available content time BEFORE a student even begins answering the questions linked to that passage. Then each question associated to the passage also contains a detailed explanation with a video and text and graphics.

Most explanations have between 10 minutes and 1.5 hours of content explanation. There are over 50 hours of content JUST in the first “diagnostic” test before the student even begins working on their custom study plan.

87. Relating to the claims in paragraph 58, to the extent they are not already addressed, Defendant incorporates its answer from Complaint Paragraphs 53-57. Everything else is denied.

88. Relating to the claims in Paragraph 59, the claim that PowerPrep contains “real questions” is merely a description of the PowerPrep program’s contents—a description which is necessary to avoid marketplace confusion. For decades, every competitor has had the same access to those freely available retired test questions, so the playing field has always been universally level. We believe this is the precise motivation behind ACT nfp’s release of those retired exams over multiple decades.

89. It is ACT Nexus Capital that is using their purported copyrights in a way that ACT nfp never used to bludgeon competitors and to forevermore make the playing field UNEVEN and tilted within ACT Nexus Capital’s exclusive control.

90. Defendant claims that to properly prepare a student for the ACT exam, a student MUST have access to actual ACT questions—that is imperative, and ACT Nexus Capital is well aware of this fact.

91. We believe that is a central reason why ACT nfp released those retired exam questions and exams into the public domain—because for 60 years the ACT test maker fully understood that fairness and equity and meeting the terms of their mission statement demanded that students and the general public have free access. All other allegations or claims of Paragraph 59 are denied.

92. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 60 of the Complaint, and on that basis denies them. Until discovery is completed, we cannot know what affirmative rights ACT nfp might have directly or indirectly imparted to the general public.

93. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 61 of the Complaint, and on that basis denies them. Until discovery is completed, we cannot know what affirmative rights ACT nfp might have directly or indirectly imparted to the general public.

94. Defendant denies in part and admits in part the allegations contained Paragraph 62. eKnowledge promotes its own proprietary diagnostic for its course that includes some of the 295 ACT question stems that ACT nfp released into the public domain for decades. We also promote our PowerPrep Super Course for the ACT.

95. Defendant denies in part and admits in part the allegations contained Paragraph 63. The screenshot included in this paragraph was taken directly from the ACT nfp website several years ago. That site contains an application that allows users to enter the scores for their class/cohorts and then ACT nfp compares those scores and creates a graph, like the one seen in

the screenshot. The report and graph generated by ACT nfp indicated that the class/cohorts in our study was in the 99th percentile for improvement. In order to correctly report the results and give credit to ACT nfp for the graph, we included the actual screenshot. This was not an attempt to confuse the marketplace. However, in deference to ACT Nexus Capital’s subsequent request, we removed the ACT logo and replaced it with text that says, “this graph generated by ACT.ORG”

Our AVERAGE student ranks 99th percentile for improvement!

Average improvement

ACT 4-13 points SAT 150-450 points

IMAGINE what YOUR child will do!

Graph generated by ACT.ORG™

Year-to-year change in average composite score

Percentile rank of score change

Change in Average ACT composite score

Learn more

Our Scores!

Your score change met or exceeded 99 percent of comparison schools testing 50 to 99 graduates.

The screenshot shows a young man with a backpack and headphones pointing towards the camera. To his right is a graph with a dotted line representing a cumulative distribution function. The x-axis is labeled 'Change in Average ACT composite score' and ranges from -5.0 to 5.0. The y-axis is labeled 'Percentile rank of score change' and ranges from 0 to 100. A red circle highlights the text 'Graph generated by ACT.ORG™' in the top left corner of the graph area. A yellow arrow points from the text 'Our Scores!' to a point on the curve at approximately x=3.8, y=99. A purple button labeled 'Learn more' is positioned near the curve.

<https://app.powerprep10.eknowledge.com/affiliate/mil>

CASE STUDY

SCHOOL SUCCESS

Learn how our students ranked in the 99th percentile for national score improvement

READ FULL REPORT

Graph generated by ACT.ORG™

Year-to-Year Change in Average Composite Score: How Does your School Rank?

Percentile Rank of Score Change

Change in Average ACT Composite Score

Our Scores!

Your score change met or exceeded 99 percent of comparison schools testing 50 to 99 graduates.

The screenshot shows a dark-themed webpage layout. On the left, there is a 'CASE STUDY' section titled 'SCHOOL SUCCESS' with a sub-headline 'Learn how our students ranked in the 99th percentile for national score improvement' and a yellow button labeled 'READ FULL REPORT'. On the right, there is a graph similar to the one in the previous screenshot, but with a play button icon overlaid on the curve. The text 'Graph generated by ACT.ORG™' is in the top left, and 'Year-to-Year Change in Average Composite Score: How Does your School Rank?' is in the top right. A yellow arrow points from the text 'Our Scores!' to the 99th percentile mark on the curve.

<https://new.eknowledge.com/program-overview/>

96. Defendant denies in part and admits in part the allegations contained Paragraph 64. As previously stated, we provide 295 question stems that ACT nfp released into the public domain over decades. We do not provide the actual ACT exams (even though those entire exams were released into the public domain and should remain so.)

97. Defendant admits the allegations in Paragraph 65 of the Complaint. Further, Defendant has assiduously conveyed to users of the program and the website that eKnowledge is not affiliated with ACT.

a. At the bottom of every page in the footer is the following disclaimer:

“ACT® is a registered trademark belonging to ACT, Inc. ACT, Inc. is not involved with or affiliated with eknowledge.com, nor does ACT, Inc. endorse or sponsor any of the products or services offered by eknowledge.com.”

b. At the top of the main landing page, in the welcome we are very clear that we are providing our own PowerPrep for the SAT/ACT exams:

The screenshot shows the top navigation bar of the eKnowledge website. On the left is the eKnowledge logo. On the right are links for 'Program Overview', 'About the Tests', 'Research', and 'Student Login', along with a shopping cart icon and a user profile icon. Below the navigation bar is a large teal banner with the text 'Welcome Military.com Families' in a large, bold, black font. Underneath this, in a smaller black font, is the text 'Your sponsored PowerPrep™ for ACT/SAT is seconds away'. The words 'PowerPrep™ for ACT/SAT' are circled in red. Below the banner is a light blue horizontal bar. At the bottom of the screenshot, the URL 'https://app.powerprep10.eknowledge.com/affiliate/mil' is displayed.

eKnowledge Program Overview About the Tests Research Student Login

Welcome Military.com Families

Your sponsored PowerPrep™ for ACT/SAT is seconds away

<https://app.powerprep10.eknowledge.com/affiliate/mil>


c. We added a registered trademark symbol in most places where the word ACT appears, and our program is called “the PowerPrep for the ACT”

Select Exam & Program

[ACT® Exams](#)
[SAT® Exams](#)
[Both Exams](#)

Select your discounted **PowerPrep™ for ACT** Compare all programs Program slideshow

Standard for ACT




- ✓ One-time Fee
- ✓ 1-year use license
- ✓ Tons of content
- ✓ 50+ hours of videos

Full Price: ~~-\$350~~
You Pay: \$19.99
1-year license

[Add to Cart](#)
View Details

Premium for ACT




- ✓ One-time Fee
- ✓ 1-year use license
- ✓ Twice as much content
- ✓ 100+ hours of videos

Full Price: ~~-\$750~~
You Pay: \$39.99
1-year license

[Add to Cart](#)
View Details

Super Course for ACT



- ✓ One-time Fee
- ✓ 1-year use license
- ✓ 4X as much content
- ✓ 150+ hours of videos
- ✓ Unlimited Live Teacher Chat

Full Price: ~~-\$1200~~
You Pay: \$49.99
1-year license

[Add to Cart](#)
View Details

<https://app.powerprep10.eknowledge.com/affiliate/mil>

98. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 66 of the Complaint, and on that basis denies them. Until discovery is completed, we cannot know what affirmative rights ACT nfp might have directly or indirectly imparted to the general public.

99. Defendant denies in part and admits in part the allegations contained Paragraph 67. We do provide our own “Score Prediction” for students who use the PowerPrep. Everything else is denied.

100. Defendant adamantly denies the allegations contained Paragraph 68.

101. Defendant adamantly denies the allegations contained Paragraph 69.

102. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 70 of the Complaint, and on that basis denies them.

103. Defendant adamantly denies the allegations contained Paragraph 71. ACT Nexus Capital at all times acted in bad faith and never attempted to reach a fair settlement.

104. Relating to Paragraph 72, Defendant has consistently acknowledged at all points during voluntary communications with ACT Nexus Capital that we are using 295 of the question

stems that ACT nfp released for decades for free into the public domain and encouraged the question stems be used in the precise manner that we are using them. In fact, we gave ACT Nexus Capital a free program and detailed explanation how they could use the program and where the question stems were located inside the program.

This was done in response to a communication from ACT Nexus Capital. Those communications indicated to us that if the use of the ACT nfp question stems made up an insubstantial amount of our program, that Plaintiff would look favorably on that and probably allow their continued use. That is why we gave them unfiltered access to everything and why we did the analysis that showed the 295 question stems made up far less than .026% of our program and over 99.9% of the program was NOT ACT nfp question stems.

105. Defendant adamantly denies the allegations contained Paragraph 73. ACT Nexus Capital has always been able to reach a fair resolution of this case and we have been willing to work with them in any fair way to ensure there is no confusion in the marketplace. Everything else is also denied and is more thoroughly analyzed below inside our affirmative defenses.

106. Defendant adamantly denies the allegations contained Paragraph 74, and it is more thoroughly analyzed below inside our affirmative defenses and counterclaims.

107. Defendant adamantly denies the allegations contained Paragraph 75, and it is more thoroughly analyzed below inside our affirmative defenses.

108. Defendant adamantly denies the allegations contained Paragraph 76, and it is more thoroughly analyzed below inside our affirmative defenses.

109. Defendant adamantly denies the allegations contained Paragraph 77, and it is more thoroughly analyzed below inside our affirmative defenses.

110. Defendant adamantly denies the allegations contained Paragraph 78, and it is more thoroughly analyzed below inside our affirmative defenses and counterclaims.

ACT NEXUS CAPITAL'S FIRST CLAIM FOR RELIEF

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

111. Relating to all claims contained within ACT NEXUS CAPITAL'S FIRST CLAIM FOR RELIEF, paragraphs 79-88, Defendant either directly denies or lacks knowledge or information sufficient to form a belief as to the truth of the allegations, and denies them on that basis.

112. **Denial of Infringement:** Defendant denies that it has willfully infringed or otherwise violated any copyrights held by Plaintiff as alleged in paragraphs. Defendant asserts that any use of material was either under fair use, not substantial enough to constitute infringement, the alleged copyrights had been abandoned or left, or other basis to be proven at trial.

113. **Fair Use:** Defendant claims that its use of any copyrighted materials was for purposes described under 17 U.S.C. § 107, and qualify as fair use.

114. **No Financial Harm:** Officers of ACT nfp have previously claimed that the publicly-released question stems have no financial value to their organization, and therefore, no financial harm occurred from using the question stems that ACT nfp voluntarily placed into the public domain for decades.

115. **Ownership:** Due to the way ACT, Inc. transitioned from nonprofit to for-profit status, there is legitimate question about whether the for-profit entity owns the copyrighted works in question.

116. **Lack of Registration:** Defendant avers that, to the best of its knowledge, the Plaintiff has not registered the copyrights in question with the U.S. Copyright Office, which is required for statutory infringement actions.

117. **No Willfulness:** Defendant denies any allegation of willful infringement, claiming that any actions taken were in good faith or without knowledge of Plaintiff's copyright.

ACT NEXUS CAPITAL'S SECOND CLAIM FOR RELIEF

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

118. Relating to all claims contained within ACT NEXUS CAPITAL'S SECOND CLAIM FOR RELIEF, paragraphs 89-95, Defendant either directly denies or lacks knowledge or information sufficient to form a belief as to the truth of the allegations, and denies the allegations on that basis.

A. No Unfair Practices:

119. Defendant denies that it has engaged in any unfair competition or false advertising as alleged.

B. No Likelihood of Confusion:

120. Defendant asserts there is no likelihood of confusion between its products or services and those of the Plaintiff. Nothing within our program or site creates any consumer confusion, mistake, or deception regarding the source, sponsorship, or approval of its goods or services.

C. Product names ("ACT Super" / "ACT/SAT Prep Program")

121. Directly relating to paragraph 62: eKnowledge provides an ACT test preparation program called PowerPrep. There are three variations ("Standard", "Premium" and "Super") available for students studying for ACT and SAT exams. The product name in question is properly "PowerPrep ACT Super". This phraseology means, "The PowerPrep product, for ACT

(as opposed to the SAT), and in the ‘Super’ variation.” In response to Plaintiff’s unfounded concerns over marketplace confusion and in the spirit of good faith, Defendant has changed its product naming scheme to match the pattern “PowerPrep Super for ACT” to further clarify the separation between Plaintiff and Defendant.

D. ACT Diagnostic Test

122. Directly relating to paragraphs 62, 77, 91-92: Defendant’s use of the phrase “ACT Diagnostic Test” describes a pedagogical instrument in which students answer exam questions. The diagnostic instrument also involves 20-40 hours of student work, guided by many hours of original instructional materials. The presence or absence of Plaintiff’s allegedly copyrighted materials does not alter the intent of the phrase relative to trademark: to describe an instrument (of whatever nature, composition, or efficacy) which diagnoses a student’s readiness for the ACT exam. There are few English phrases which can accurately and succinctly convey this intent.

Defendant categorically denies claims that he violated 15 U.S.C. § 1125(a)(1)(A), and denies all claims of intent to do so. Defendant, at all times, has remained willing to modify “ACT Diagnostic Test” verbiage to further enhance clarity, and believes the business interests of Defendant and Plaintiff are aligned in this matter.

E. Real ACT Test

123. Directly relating to paragraphs 64, 70/72/74/75/76, 91: Any reference to a “real ACT test” is a reference to the 295 previously-released and retired ACT exam questions. The PowerPrep does not redistribute unmodified copies of previously released retired ACT exams. For example, students cannot download copies of the documents “Test form ACT 1874 FPRE” or “ACT 1572 CPRE” (PDF documents published by Plaintiff) from within PowerPrep.

As used by Defendant, “Real ACT Test” is a descriptive phrase, used with the intent to clarify authorship and avoid marketplace confusion. While Defendant rejects the Plaintiff’s copyright infringement claim, Defendant uses the term “Real ACT test” and related language precisely to ensure clarity about origin and authorship, to respect Plaintiff’s reputation, and to comply with 15 U.S.C. § 1125(a)(1)(A).

Defendant remains willing to modify “real ACT test” verbiage to further enhance clarity, and believes the business interests of Defendant and Plaintiff are aligned in this matter.

F. Descriptive Fair Use

124. Directly relating to paragraphs 62/64, 68-69, 78, 90, 91-92: eKnowledge's use of the terms in question are 1) purely descriptive, 2) used in good faith, and 3) no association with ACT Education Corp (or ACT, Inc.) has ever been stated or implied. Such uses fall within the boundaries of descriptive fair use.

G. Nominative Fair Use

125. Directly relating to paragraphs 62/64, 68, 69, 78, 90, 91-92: It is impossible to sell exam preparation tools without referring to the exam for which students are being prepared. Therefore, defendant's uses of the ACT mark also meet the requirements for nominative fair use: 1) Defendant's product is not readily identifiable without use of the trademark; 2) Only so much of the mark is used as is reasonably necessary to identify the product; and 3) no suggestion of sponsorship or endorsement was ever made by Defendant—nor was one alleged in Plaintiff's Complaint.

H. Advertising & Promotion is Allowed

126. The Lanham Act expressly applies nominative and descriptive fair use doctrine to advertising and promotion that "permits consumers to compare goods or services" (15 USC 1125(c)(3)(A)(i)). Defendant's use of the terms considered in paragraphs 62 and 64 (and especially the verbiage around "real ACT tests") is necessary to allow consumers to accurately compare Defendant's products against competing test preparation products and services. therefore, the complaints in paragraphs 62 and 64 are not be actionable under the Lanham Act according to 15 USC 1125(c)(3)(A)(i). These complaints would therefore be reduced to their underlying copyright infringement allegations.

I. Lack of Confusion

127. Directly relating to paragraphs 68-69, 76, 91-92: Plaintiff has not demonstrated any *actual* marketplace confusion.

J. Remedies

128. Directly relating to paragraphs 62, 64, 68, 69, 77, 92: Formal disavowals of any and all affiliation or association between Plaintiff and Defendant are present in the footers of Defendant's informational and eCommerce webpages and inside of PowerPrep programs. Per

Plaintiff request, eKnowledge added the Registered Trademark symbol (®) after uses of “ACT” on its major sales funnel landing webpages. Fair use notwithstanding, Defendant also reworded its product names (i.e. “ACT Super” is now “PowerPrep Super Course for ACT”) in a good-faith attempt to further clarify that PowerPrep is NOT associated with ACT Education Corp.

Directly relating to paragraphs 62, 64, 68, 69, 75-78, 92-94: Defendant remains willing to reasonably negotiate on verbiage, and to further clarify the total absence of association between eKnowledge and ACT Education Corp, while bearing in mind the foregoing arguments about Nominative and Descriptive fair use.

K. Score Prediction

129. Directly relating to paragraphs 67, 92: Complaint 67 enjoins Defendant’s use of the phrase “**Score Prediction**” due to an alleged association with the proprietary score provided by plaintiff to customers of Plaintiff. Plaintiff has not claimed to own any trademark associated with score prediction, nor is such an overly broad concept likely to be granted a trademark.

Directly relating to paragraphs 67, 68-69, 92: Defendant uses the term “score prediction” for the express purpose of distinguishing between Plaintiff’s proprietary score and Defendant’s best guess. Additionally, Defendant’s “Score prediction” displays a probable score *range*, making confusion on this matter nearly impossible. Defendant actively desires that the distinction between prediction and actual score be clear to Defendant’s customers; confusion in this matter would be significantly detrimental to Defendant’s customers and to Defendant’s reputation as an exam *preparation* company.

L. Benefit from ACT’s Reputation and Goodwill

130. Directly relating to paragraphs 68-69, 76-77, 92: Complaint 68 states that Defendant “is attempting to create consumer confusion and benefit from ACT’s reputation and goodwill.” Complaint 69 alleges that Defendant has done so. Defendant categorically denies these allegations.

M. Defendant’s Desire for Brand Clarity

131. Directly relating to paragraphs 68-69, 76-77, 92: The ACT exam is inarguably a high quality and important exam—this is the reason eKnowledge developed prep materials for it. The eKnowledge brand gets its value precisely from its perceived *contrast* with the norms of the

“educational establishment,” of which ACT and Kaplan are the epitome. Were brand confusion between eKnowledge and ACT to exist, it would be detrimental to the eKnowledge brand identity.

N. Legitimate Business Practices: Defendant’s marketing and sales practices are legitimate,

132. ethical, and in compliance with all relevant laws, including the Lanham Act.

133. Any claims not specifically denied above, are generally denied.

DEFENDANT’S FACTUAL ALLEGATION

A. ACT

134. Since its inception in 1959, the American College Testing organization (ACT) has been organized as a nonprofit entity (ACT nfp).

135. As a nonprofit educational institution, ACT nfp has obtained a highly privileged and quasi-public role in the education ecosystem. Public monies are used for their testing services, and state-funded scholarships are directly tied to students’ ACT scores. Additionally, public and private entities purchase the data that ACT nfp. has acquired from students who were either required to take their exam or students who voluntarily took their exam because their college or university required either the SAT or ACT exam.

136. In April of this year (2024), ACT nfp announced they had been purchased by a private equity fund called Nexus Capital (hereinafter ACT, Inc.)

137. Prior to this move, a few years ago, ACT nfp entered a partnership with Kaplan (owned by the private conglomerate Graham Holdings) to provide exclusive live online ACT prep.

B. eKnowledge

138. We are a very small organization run by a father and son team. Over the years, we have worked with hundreds of organizations, students, and families.

139. My father was a Lt. Colonel and fighter pilot in the Air Force and we moved around all over the globe when I was a child. I wanted to create a program that would give military members and others a high quality and affordable option to even out the playing field when preparing for the SAT/ACT exams. Over the years we have worked very hard to create this valuable resource.

140. The size of the company has hovered between 2 and 5 people. I have personally created most of the content, and my son has coded most of the website and program. We have both committed tens of thousands of hours to this project.

141. Since 2005, we have acted functionally as a not-for-profit, delivering high quality SAT/ACT prep for free and deeply discounted prices to other NFP organizations and their members (especially military & homeschool, and a handful of impacted schools).

142. We are mission driven to provide high quality SAT/ACT prep to everyone at a price point that anyone can afford (free or deeply discounted.)

143. Beginning in approximately 2018 we decided to rework our program to make it compatible with a formal high school classroom setting. During the past 5 years we built out new curriculum and class management software, and pilot-tested our program with a handful of schools from varying socioeconomic areas: including a small public school on the Navajo Reservation in Southeastern Utah, a large public school in a more affluent area near Salt Lake City, a very diverse public school in Knoxville, TN, and several small religious private schools in Pennsylvania, South Carolina, and Alabama.

144. During this transition period while we were incubating the expanded curriculum and new software, we had significant negative cashflow which I personally covered.

145. The independent data collected from these schools indicates strong support, teacher, and school buy-in, and impressive score improvements by students: students spending 20+ hours of focused time/effort in the program improved an avg of 4 ACT points—up to 13 points. These same results were replicated over two years of studies.

146. Having now proven our in-classroom model, we are in the process of converting eKnowledge to an official 501(c)(3)—something we have consistently communicated to ACT, Inc. since they initiated this process.

147. Next, we will find donors, foundations, corporations, and organizations who share our goals to provide programs either fully sponsored for free or at such a low cost that any school, parent, or student who wants the programs can get them. The conversion to a 501(c)(3) is in process and should be completed first quarter of 2025.

C. Vendor Lock-In:

148. Over decades and owing to their nonprofit status, ACT secured a privileged position within the U.S. educational framework: 1) the ACT test is used as a high school exit exam, compelling students to take the exam; 2) many states pay for students' ACT tests; 3) many states have established policies linking student performance on the ACT test to taxpayer-supported, state-funded scholarships, and 4) many states link public school funding to school's average ACT score. Example: <https://www.tspr.org/illinois-public-radio/2024-07-08/illinois-switching-to-act-exams-for-state-assessments>

D. Direct Tax Payer Support:

149. Many of the factors impacting vendor lock-in also apply to this category. Many states pay for their students to take the ACT because they have made the ACT exam mandatory for high school students, and they link scholarships paid by tax dollars directly to students' ACT scores.

Example: State of Tennessee: https://tennessee.edu/wp-content/uploads/2021/08/UTS_BreakfastWithCounselors.pdf

Example: State of Illinois: <https://www.tspr.org/illinois-public-radio/2024-07-08/illinois-switching-to-act-exams-for-state-assessments>

E. Monopolistic Practices:

150. Leading up to, and in expectation of the sale of ACT nfp to Nexus Capital, ACT nfp entered into an **exclusive** partnership with Kaplan (owned privately by Graham Holdings Company—formerly The Washington Post) to offer live online ACT prep. Nexus Capital Partners and the Graham Holdings Company want to use the copyright held by the ACT nfp organization to forcibly eliminate any competition in the test prep arena. These two private firms want to totally control both the ACT *exam* and the ACT *prep*. There is also potential for the SAT to be enveloped in this scheme.

F. Blackbox Control of testing and prep:

151. Student have a right to fair, equal, competitive access to competing college entrance exam prep—public policy requires such access. Fair competition requires access to all retired exams in order to analyze them in order to figure out what is being tested and how it's being tested and how best to teach to the exam.

G. Unfair Business Practices:

152. The question stems that ACT nfp freely placed into the public domain decades ago, were developed solely because of ACT nfp's favored position in the market, which was created by their NFP status and quasi-public relationship with states and colleges and universities, and from the revenue they received from over 100,000,000 students. As a result, the retired questions held no commercial value for ACT nfp. According to Michael J. Paparella, Former West Region Director at ACT (1980-2004) *"If the practice test questions are from retired forms of the tests now in the public domain...they would be in the category of copyleft."* <https://www.quora.com/Will-I-face-any-copyright-issues-if-I-use-the-questions-in-the-official-SAT-guide-in-my-SAT-preparation-videos>

153. The question stems were of no commercial value to ACT nfp until very recently when they entered the exclusive agreement with Kaplan to provide Live Online prep and when Nexus Capital purchased ACT nfp. **See press release from ACT, Inc.** <https://www.act.org/content/act/en/newsroom/act-kaplan-partnership.html>

154. At that point, their value came from their ability to enforce the claimed copyright against providers of ACT Prep in order to control the market.

155. Also, eKnowledge does not provide Live Online prep. Our prep is 100% asynchronous. In this sense, we are not a direct competitor with ACT Inc.'s stated use of the question stems—even after the sale of ACT nfp to Nexus Capital and their partnership with Graham Holdings' Kaplan.

156. We have used 295 of the freely-available retired ACT test question stems. These question stems came from ACT form 1864 FPRE and half of form 1572 CPRE. ACT retired exams have been in the public domain for free since at least 2000 when we first started to build our program.

157. We do not use the ACT explanations—just the call of the question or question stems with the distractors. (Example: “What is the main point of the passage?” “What is the enclosed area of the figure above?”)

158. Real question stems from retired exams are necessary for students to fairly, equally, and properly prepare for the ACT exam.

159. However, the 295 stems make up an infinitesimally small portion of our program (PowerPrep).

160. **PowerPrep Content nodes:** ACT question stems (295). Other eKnowledge content nodes (165,463). So, 0.17% of the nodes are ACT question stems and 99.83% of the nodes are not ACT question stems.

161. **PowerPrep Data file sizes:** ACT question stems = 2,360 kb. Other eKnowledge files combine to 8,989,257 kb. So, 0.026% by file size are ACT stems, and 99.97% of the content is **not** ACT question stems.

162. Over 99% of the PowerPrep’s content is new. Each use of a publicly released question stem could be considered a non-commercial use, limited in nature, and used purely for educational teaching purposes.

163. Beyond the content program (videos, text, graphics etc.,) which is 99.97% different from the ACT question stems, we have developed and continue to maintain the design and code for the PowerPrep program (server, client, and associated admin tools), several associated proprietary business applications, databases, state-of-the-art software development processes and tools, automated deployment pipelines, various eKnowledge websites, along with the associated IT infrastructure. We estimate this work exceeds 1,000,000 lines of code. This also represents over 8,000 individual updates and versions to our codebase.

164. The average ACT composite score has been on a downward trend. For instance, the class of 2023 had an average score of 19.5, which is the lowest average since 1991, marking six consecutive years of declines in average scores.

<https://www.npr.org/2023/10/12/1205404298/act-test-scores-college-admissions-30-year-low>

165. Fewer students are meeting the ACT's college readiness benchmarks. In 2023, only 21% of students met all four benchmarks (English, math, reading, and science), while 43% did not meet any, which was a record high for the latter category. Even the ACT, Inc. CEO stated that this is, “*a worrisome trend that began long before ...Covid..., and has persisted.*” ACT CEO Janet Godwin. <https://abcnews.go.com/US/high-school-class-2022-lowest-act-scores-30/story?id=91497084>

166. However, in contrast to the general decline, students using the eKnowledge program have shown an average of 4-points improvement and up to 13-point increases.

AFFIRMATIVE DEFENSES

A. Estoppel, Laches, and Reliance

167. Plaintiff's delay in bringing this action has prejudiced Defendant, who has relied on Plaintiff's silence to its detriment. The question stems at issue are from retired exams, which were made freely available to the public for decades.

B. Failure to Mitigate Damages

168. Plaintiff has not taken reasonable steps to mitigate any alleged damages.

C. First Amendment

169. Defendant's use of any material falls under the protection of the First Amendment as free expression.

Unclean Hands

170. Plaintiff comes to court with unclean hands

171. Nonprofit organizations must continuously serve a stated mission for the public good.

172. The relevant portions of ACT's mission statement can be summarized as two-parts: 1. Create high quality assessments, and 2. Increase student access and educational fairness.

A. Assessments

173. "ACT aims to assist students in achieving success in their academic pursuits, from high school through college and beyond, by providing tools like the ACT test to measure college readiness." (taken from act.org website)

174. We could not locate anything in their 60-Year Mission Statement that mention test prep being part of their mission statement. Everything is related to creating assessments.

175. Their mission has always been centered on educational assessments and NOT on exam prep.

B. Access and Fairness

176. ACT's "North Star": <https://www.act.org/content/act/en/about-act/north-star.html>

ACT's mission statement page "Bringing our North Star to Life" clearly states that they know inequity is a problem, as is lack of access to educational resources.

177. **ACT's Center for Equity in Learning:** <https://www.act.org/content/act/en/about-act/equity-at-act.html> This dedicated webpage again states, in bold and above-the-fold, "ACT exists to fight for fairness in education and create a world where everyone can discover and fulfill their potential."

178. "ACT is working alongside our stakeholders to ensure that gaps in access and opportunity continue to be identified and addressed."

C. Misrepresented nature of Plaintiff's goods, services, and commercial activities

179. By converting the ACT nfp to a privately owned equity firm, ACT Nexus Capital cannot faithfully maintain their claimed mission statement that focuses on "access" and "fairness." Those ideals are antithetical to ACT Nexus Capital's overarching fiduciary duty to maximize profit for its shareholders. The two concepts are in direct conflict. Nevertheless, ACT Nexus Capital continues to falsely claim they are mission driven to increase "access to educational resources" and "fight for educational fairness".

180. ACT Nexus Capital's corporate structure demands that it work at cross-purposes with students, parents, schools, states, and the general public. The new corporate ACT cannot serve two masters. They must either serve their shareholders by maximizing profits, or they must serve the public trust and work to increase access and fairness.

181. Plaintiff's leadership team has demonstrably different goals from its predecessor and is falsely claiming to continue uninterrupted the mission of ACT nfp.

182. Plaintiff advertises and promotes their commercial activities as innocent, semi-sacred, non-commercial(ish), and wholly in the public interest. They represent that they desire only to increase educational access and give everyone a fair shot. But their behavior indicates the opposite.

183. By their corporate persona, mission statements, press releases, etc., Plaintiff has crafted a misleading representation of fact in their commercial promotion, wherein they misrepresent the nature, characteristics, and qualities of their commercial activities.

D. Bad Faith Use of Settlement Process

184. ACT Nexus Capital is fully aware of our very limited cash flow and financial position because prior to filing their lawsuit, during settlement discussions, they requested 3-years of our profit and loss statements. They claimed they needed that information in order to figure out how much they would charge for licensing their questions. We prepared and submitted those documents with high hopes of working out a fair arrangement. But of course, as we now know, this was simply a trick to obtain information about our financial position to assess how financially vulnerable we might be to defend against ACT Nexus Capital in their predetermined plan to use ACT nfp's copyleft retired exam questions to crush competition.

185. Further, we believe this lawsuit is part of larger legal strategy aimed at eliminating competition. By first suing such a small but effective organization who has very limited financial resources, ACT Nexus Capital believes they can set a legal precedent to be used against other organizations as they move through the process of consolidating test making and test prepping under a single for-profit private equity firm.

PRAYER FOR RELIEF

WHEREFORE, Defendant prays for judgment as follows:

1. Dismissal of Plaintiff's Complaint with prejudice;
2. A declaration that Defendant has not infringed any copyrights or engaged in unfair competition;
3. Because of 1) the favored and quasi-public position that allowed ACT nfp to develop their exam over the past 60 years, 2) the duopolistic nature of the college entrance exam that has emerged, and 3) because ACT, Inc. (owned by the private equity firm Nexus Capital) is attempting to inappropriately control student access to competent and equal prep for their college entrance exam, we are asking the court for a declaration and order that once an ACT exam is completed, that test belongs to the public domain and must be released for public scrutiny and analysis, and that all questions from the test are therefore freely available to the public;
4. In the alternative, we are seeking an order disallowing Nexus' purchase of ACT nfp;
5. An award of Defendant's costs and attorneys' fees incurred in defending this action;
6. Such other and further relief as the Court may deem just and proper.