

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

**ASSESSMENT TECHNOLOGIES
INSTITUTE, LLC,**

Plaintiff,

v.

CATHY PARKES, d/b/a LEVEL UP RN,

Defendant.

Case No. 2:19-CV-2514-JAR-KGG

MEMORANDUM AND ORDER

This matter is before the Court on Plaintiff Assessment Technologies Institute, LLC's ("ATI") Motion for Preliminary Injunction (Doc. 13) and Defendant Cathy Parkes ("Parkes") Motion to Strike or Alternatively Motion for Leave to File a Surreply (Doc 44). ATI seeks to enjoin Parkes from continuing to sell nursing-education study cards and placing nursing-education videos on YouTube or elsewhere that infringe on ATI's copyrights and/or misappropriate ATI's trade secrets in breach of its contracts with Parkes. ATI further requests Parkes be ordered to remove certain nursing-education videos from YouTube. These matters are fully briefed, and the Court heard a full day of evidence and argument on plaintiff's preliminary injunction motion on November 12, 2019. The Court has considered the parties' briefs, the evidence adduced at the hearing, the parties' oral arguments and is prepared to rule. Given that some, but not all, portions of Parkes' nursing-education materials are likely to infringe on and misappropriate trade secrets of ATI's programs, the Court grants in part and denies in part ATI's motion for preliminary injunction. The Court denies Defendant's motion to strike and grants its alternative motion to file a surreply.

I. Introduction

ATI spent years and millions of dollars developing, maintaining, and improving a package of products that includes review materials, assessment and remediation methodology, practice examinations, actual proctored examinations, and myriad other study tools including electronic flash cards and various types of video presentation. ATI's proctored examinations are not only actual tests that measure student performance, but are designed, through a proprietary algorithm developed by ATI, to measure deficits and performance that are addressed through focused remediation by ATI.

ATI has a client base exceeding 50% of the 4000 nursing-education providers in the United States as well as some international clients. Defendant Cathy Parkes, who matriculated at a nursing school in 2013–2015 that used ATI's products, including practice and proctored examinations, continued to use her ATI-issued account after she had passed her licensing examination—the National Council Licensure Examination for the licensing of nurses in the United States (“NCLEX”)—and became a registered nurse. ATI claims that Parkes breached her contract with ATI, entered into back when she was a nursing student and purchased the ATI materials, agreeing to ATI's terms and conditions to not use or disclose ATI's materials directly or derivatively.

Beginning in late 2017, Parkes began offering YouTube videos that discussed some of ATI's materials. Upon ATI's request, Parkes removed the videos from YouTube. But Parkes replaced these with new videos that ATI claims infringe on its copyrights and misappropriate its trade secrets, by revealing in a coded fashion what test questions and answers students would encounter on ATI proctored examinations. In 2018, Parkes began selling study flash cards that ATI claims infringe its copyrighted Review Modules. ATI further alleges that this

misappropriation of its actual test questions and answers—its trade secrets—has harmed ATI’s reputation surrounding the integrity of its tests and its assessments.

Nursing education involves core concepts that are recognized broadly in the field and that nursing graduates are expected to master, such that they can pass the NCLEX. ATI materials, like the many textbooks it referenced in its materials, and like other nursing textbooks and educational materials in the record, cover these core concepts, which ATI organized and compiled around nine Review Modules. There is no dispute that despite the common core of knowledge and subject matters covered in nursing education materials, such materials are copyrightable. Indeed, Defendant claims that her flash cards and videos are copyrighted or copyrightable. The questions presented here are whether Defendant copied ATI’s undisputedly copyrighted materials, which undisputedly represent a compilation, and whether Defendant misappropriated portions of ATI’s materials that are protected trade secrets.

II. Findings of Fact

The Court heard a full day of evidence on ATI’s motion for preliminary injunction. ATI called four witnesses at the hearing: Dr. Jerry Gorham, Vice President of Assessment Sciences for Ascend Learning, LLC, the parent company of ATI; Mark Williams-Abrams, Chief Product Officer of ATI; Michael Lynch, Senior Vice President of the ATI Nursing Education division of ATI; and Jaime Fiorucci-Hughes, Vice President of Strategic Partnerships/Global Markets for ATI Nursing.

Parkes called one expert witness, Dr. Jessica Coviello, Associate Professor of Nursing at Yale School of Nursing. Cathy Parkes did not testify at or attend the hearing. After considering the parties’ briefs, witness testimony, and documentary evidence, the Court makes the following findings of fact for purposes of deciding the preliminary injunction motion.

A. ATI

Plaintiff ATI licenses nursing-education materials to nursing schools nationwide. It provides services to over half of nursing schools in the United States. Its offerings are multifold: it licenses nursing program curriculum including products such as textbooks, videos, digital study cards, “ATI Review Modules,” and “ATI Proctored Exams,” and “ATI Practice Exams” that assess preparedness for the NCLEX. Nursing schools can use the ATI exams to function as nursing students’ graded exams for purposes of obtaining their degree. ATI also offers “ATI Pulse” and “ATI Comprehensive Predictor,” which is a predictive algorithm and remediation program to help students assess their preparedness for the NCLEX and identify areas for improvement. ATI owns copyrights to these materials.

B. Cathy Parkes

Defendant Cathy Parkes is a registered nurse in California, and the creator of Level Up RN, formerly called “Pass the ATI.” Parkes attended an accelerated nursing program at a California nursing school from 2013–2015 that licensed ATI’s products, including practice and proctored exams. To access ATI materials required by her school, Parkes was required to create and access an ATI account. When she did so, she expressly agreed to ATI’s Terms and Conditions by clicking “I agree.” These included terms prohibiting disclosure, copying, selling, distributing, or creating derivative works of ATI educational material. Parkes agreed to ATI’s Terms and Conditions a second time in 2016 so she could continue accessing the account after her graduation. Parkes continued to access her ATI account for about three and a half years after graduation.

In November 2017, after graduating nursing school, Parkes created the website “PassTheATI.com,” a YouTube account titled “Pass the ATI,” and social media accounts labeled

“Pass the ATI.” Parkes uploaded videos of herself, allegedly discussing ATI Review Modules. In May 2018, Parkes began selling study cards with one deck corresponding to each of ATI’s nine Review Modules.

In October 2018, ATI sent Parkes a cease and desist letter, notifying her that “Pass the ATI” infringed on ATI’s trademark rights. In response, Parkes did not change her content, but instead changed her domain name to “LevelUpRN.com.” However, “PassTheATI.com” still redirects users to LevelUpRN.com.

On May 10, 2019, ATI sent a second infringement notice demanding Parkes remove her content from YouTube. On June 27, 2019, Parkes removed all her YouTube videos, and began uploading replacement videos that made no express reference to ATI. These are the videos now at issue. The parties engaged in settlement discussions from May 30–July 12, 2019. ATI filed suit six weeks after those discussions ended.

C. ATI Review Modules

Nursing schools that license ATI exams may require their students to purchase ATI’s student materials, including Review Modules. ATI’s Review Modules are intended to help students prepare for ATI exams, and ultimately the NCLEX. There is one Module for each of the nine ATI Proctored Exam topics:

- RN Fundamentals
- RN Leadership
- RN Nutrition
- RN Adult Medical Surgical
- RN Community Health
- RN Maternal Newborn
- RN Mental Health
- RN Nursing Care of Children
- RN Pharmacology

As Mr. Williams-Abrams testified, ATI has curated, digested, and presented information in a unique way within its modules, while retaining the accuracy of nursing information. Industry experts and ATI's own experts determined several years ago that dividing this material into nine modules was the most effective way to convey it to students. Creating the modules requires research, selection, and compilation of materials into a useable format. Specifically, it takes sixty or more employees working for two years to build one Review Module from scratch at a cost of \$600,000. It costs ATI \$400,000 to maintain each of its Modules with updates every three years. To create and maintain its Modules, ATI consults external contractors who are nursing experts, advisory boards, health care providers, as well as external sources such as the World Health Organization and the Centers for Disease Control and Prevention.

D. Similarities Between Parkes' Study Cards and ATI Review Modules

The organization, structure and depth of information contained in Parkes' study cards is similar to ATI's Review Modules. Examples ATI uses to illustrate nursing concepts are also found in Parkes' material to illustrate those same concepts. Parkes' study decks correspond in name, number, and subject-matter to each of ATI's Review Modules. Parkes' study decks are called:

- Nursing Fundamentals
- Nursing Leadership
- Nutrition for Nursing
- Medical Surgical Nursing
- Community Health Nursing
- Maternal Newborn Nursing
- Mental Health Nursing
- Pediatric Nursing
- Pharmacology¹

¹ Minor discrepancies exist between how Parkes refers to her study decks throughout her own briefs, and how the parties refer to them in the briefs and evidence in the record. For consistency and clarity, the Court will refer to Parkes' decks as they are named in Ex. 14-10. Defendant did not object to admission of this exhibit. Further, a "Lab Values" study deck is briefly mentioned in Parkes' briefing (Doc. 27 at 11), but it was not discussed

The names of Parkes’ nine study decks align with the names of ATI’s Review Modules—in some instances they are identical and in others, almost identical. For example, one ATI Review Module is titled “Nutrition for Nursing” just as Parkes’ corresponding deck and video are titled “Nutrition for Nursing”; ATI’s “Fundamentals for Nursing” is Parkes’ “Nursing Fundamentals” in both her card deck and video.² Additionally, ATI has a Review Module named “Nursing Leadership and Management,” which covers patient conflicts and torts against patients that commonly arise in the nursing profession. The Review Modules’ chapters are titled “Managing Client Care,” “Coordinating Client Care,” “Professional Responsibilities,” “Maintaining a Safe Environment,” and “Facility Protocols.”³ Parkes’ corresponding deck and video are both titled “Nursing Leadership” and cover the same topics.⁴

Parkes’ study cards are also similar in structure to ATI’s Review Modules. ATI has nine Review Modules, and Parkes has nine corresponding study decks. Parkes’ units within her study decks also track with the units in ATI’s Review Modules. For example, Mr. Williams-Abrams testified Parkes’ Maternal Newborn Nursing study cards contain the same four units as ATI’s Maternal Newborn Module. The names of Parkes’ units also correspond with ATI’s naming conventions. Specifically, two of ATI’s units in the Maternal Newborn Nursing Module—“Antepartum Nursing Care” and “Postpartum Nursing Care”—are labeled with the exact same title in Parkes’ corresponding study deck.⁵ The other two units in this ATI Review Module are

in the parties’ arguments in their briefs, nor at the hearing by either party. The Court, therefore, does not address this additional study deck.

² Ex. 14-10 at 31.

³ Ex. 14-12 at 19–20.

⁴ Ex. 14-10 at 31; Ex. 28-6 at 2.

⁵ Ex. 14-10 at 33.

“Intrapartum Nursing Care Section: Labor and Delivery” and “Newborn Nursing Care.”⁶ Parkes’ titles for these units are “Labor and Delivery” and “Newborn Assessment and Care,” respectively.⁷ As Mr. Williams-Abrams testified, Parkes mirrors the unit, chapter and sub-topic structure of ATI. This structure is not a generic presentation. For example, ATI has four units in its Maternal Newborn Review Module, and twenty-seven chapters; no other textbooks contain that same structure. In her testimony, Dr. Coviello repeatedly characterizes this and similar material as merely common core curriculum for nursing schools not protected by copyright. But, Dr. Coviello is offered as an expert in her capacity as a nurse practitioner and nursing educator. Accordingly, the Court does not consider her opinions on copying and copyright law to be probative on the issue of similarity.

Similarities between ATI and Parkes’ content are also present at the micro level. For example, Mr. Williams-Abrams testified that ATI presents the condition “placenta previa” in a way very different from nursing textbooks. For example, one text—Pillitteri—organizes its presentation of this condition into headers over several pages of content, while ATI presents it in a brief format with just essential information a student needs to pass ATI tests. Notably, Parkes mirrors ATI’s unique presentation.⁸

Many specific examples that ATI uses to illustrate nursing concepts also appear in Parkes’ study cards. Mr. Williams-Abrams testified that Parkes copied unique examples for nursing concepts that ATI developed with its consultants. Parkes uses the example of a father who loses his job and subsequently destroys his child’s toy to demonstrate “displacement.”⁹

⁶ Ex. 14-10 at 33.

⁷ *Id.*

⁸ *Id.* at 41.

⁹ *Id.* at 51; Doc 27 at 27.

This is the exact illustration of “displacement” offered by ATI.¹⁰ Parkes admitted this appeared in her study card, arguing it was “at worst *de minimis* copying” and has since removed it from her deck.¹¹ Parkes uses the same example of “stuporous behavior” that appears in ATI’s Review Modules: “rubbing the sternum.”¹² Parkes also uses ATI’s example of a man bringing his wife flowers following an instance of domestic abuse; both examples appear under the subhead “undoing” in ATI’s Mental Health Module and Parkes’ Mental Health card deck.¹³

Other similar examples of verbatim, rephrased, or reworded content are present in the record. They appear in the following study card decks that correspond to ATI Review Modules: Community Health Nursing,¹⁴ Nursing Fundamentals,¹⁵ Nursing Leadership and Management,¹⁶ Maternal Newborn Nursing,¹⁷ Mental Health Nursing,¹⁸ Pediatric Nursing,¹⁹ and Nutrition for Nursing.²⁰ These specific examples of verbatim, rephrased, or reworded content that appear in Parkes’ study cards also track the same order of progression as ATI’s material. However, ATI presents no particular examples of copying from its RN Adult Medical Surgical Review Module to Parkes’ Medical Surgical Nursing study card deck. And, ATI points to just one example of rephrased or reworded copying in Parkes’ Pharmacology study deck.²¹

¹⁰ Ex. 14-10 at 51.

¹¹ Doc. 27 at 27.

¹² Ex. 14-10 at 49.

¹³ Ex. 34-25 at 5.

¹⁴ *Id.* at 44–47.

¹⁵ *Id.* at 51–58.

¹⁶ *Id.* at 16–24.

¹⁷ *Id.* at 26–28.

¹⁸ *Id.* at 3–14.

¹⁹ *Id.* at 30–37.

²⁰ *Id.* at 39–42.

²¹ *Id.* at 49.

Dr. Coviello testified that to the extent there is any similarity between ATI and Parkes' material, it is limited to general nursing knowledge that is not owned by ATI or Parkes. She testified that Parkes' material provides nursing facts that can be reviewed and memorized, and are accessible to a different type of learner than ATI's materials. Further, Dr. Coviello testified the similar examples that ATI points to are merely nursing facts. For example, she testified the way that ATI or Parkes describes the "placenta previa" is the same way it would be described in other authorities. However, Dr. Coviello points to just one source—the Loudermilk text—that discusses placenta previa; the text covers the condition in a pages-long explanation, unlike ATI's and Parkes' brief, bulleted summary of the condition. The Court accordingly finds Dr. Coviello's testimony is not evidence of an uncopyrightable nursing fact, but rather evidence that nursing concepts can be organized in unique and varying ways, capable of earning copyright protection. Further, Dr. Coviello testified "rubbing the sternum" is something commonly taught in acute care, and not an example of "painful stimuli" unique to ATI. Yet, her testimony on this subject centers around the fact she has taught this nursing practice in acute care; she does not testify that this example is the hallmark for "painful stimuli," routinely used by nursing texts. In fact, she points the Court to no other sources that use "rubbing the sternum" as an example of painful stimuli. Thus, the Court does not consider this testimony as evidence that Parkes did not copy.

Parkes' units in her Mental Health study card deck track with ATI's units within its Mental Health Review Module.²² Dr. Coviello testified this is because it is a natural sequence—starting with basic knowledge and progressing toward population-based knowledge. She testified this order of progression aligns with the content that nurses should know, and this is

²² Ex. 14-10 at 43.

evidenced by similar presentation in the mental health section of another textbook, Townsend.²³

The Court finds that while ATI's module and the Townsend textbook follow the same sequence of information, the structure of presentation of that material, as well as how the material is titled and classified, is different. On the other hand, Parkes materials largely follow the same sequence, structure of presentation, titles and classifications of ATI's materials.

Specifically, Townsend's unit titled "Psychiatric/Mental Health Nursing Interventions" is aligned in the exhibit with ATI's "Traditional Nonpharmacological Therapies" unit. Parkes' similar unit is titled "Non-pharmacological Therapies."²⁴ Exhibit 28-38 aligns Townsend's "Care of Clients with Psychiatric Disorders" unit with *two* ATI units: "Psychological Disorders and Psychopharmacological Therapies."²⁵ Parkes' units in her study cards, like ATI's materials, are divided into two units, called "Mental Health Disorders" and "Pharmacological Therapies."²⁶ And, while the Townsend text does not have a unit that corresponds to ATI's "Psychiatric Emergencies," nor the chapter within ATI's Specific Populations unit titled "Care of Clients Who Are Dying and/or Grieving,"²⁷ Parkes' final unit in her Mental Health Study deck is titled "Loss/Grief and Psychiatric Emergencies."²⁸

Some of Parkes' study cards material has an original element. Parkes materials include a *few* instances of mnemonic devices to aid in memorization in Parkes' cards; ATI does not use mnemonics.

²³ *Id.*

²⁴ *Id.*

²⁵ Ex. 28-38 at 2.

²⁶ Ex. 14-10 at 43.

²⁷ Ex. 28-38 at 2.

²⁸ Ex. 14-10 at 43.

E. ATI Review Modules Are Unique Among Nursing-Education Resources

ATI's Review Modules are markedly different from prominent nursing texts in terms of organization, structure, and depth of information presented. As Mr. Williams-Abrams testified, ATI arranges its materials differently than a typical textbook; textbooks contain a thorough presentation of curriculum while ATI presents only the most essential information. Side-by-side comparisons of tables-of-contents in nursing texts and ATI's Review Module units show differences in the volume of content discussed in each source, and how material is organized and named.²⁹

For example, differences exist between ATI's Maternal Newborn Review Module and Pillitteri, Loudermilk, and Varney's Midwifery texts excerpts on the same subject. While each of these sources presents childbearing in chronological order—labor and delivery after antepartum care, but before newborn care—each source conveys the subjects in different depths, structures, and type and number of sub-topics covered or not covered. Pillitteri's maternal newborn text is organized into three units with a different unit structure and chapter organization than ATI; Loudermilk uses an eight-unit structure, unlike ATI's four-unit structure; and Varney's Midwifery Parts 1–3 are not covered in ATI's Maternal Newborn Nursing Module.

Although Dr. Coviello testified ATI follows the same presentation structure as some nursing texts, she also acknowledged differences between ATI and the various textbooks. Varney's, Pillitteri's, and Loudermilk's texts cover material that is not covered in ATI's Review Module. And, Dr. Coviello acknowledged that she did not include a side-by-side comparison of Loudermilk and ATI's Maternal Newborn Review Module in her declaration because

²⁹ Ex. 28-35 at 2; Ex. 28-36 at 2; Ex. 28-37 at 2.

Loudermilk would need to jump over hundreds of pages to arrive at the same sequence as ATI's presentation of material.

None of the five school curricula that Dr. Coviello reviewed divided their material into the same nine topics as ATI Review Modules, or even into nine topics at all. Yet, Parkes' study cards track with ATI's structure. Further, there is no evidence that Parkes gathered her material from any other sources besides ATI. Parkes did not testify; and in her declaration, Parkes does not assert that she gathered her material from any other sources. And, Dr. Coviello testified she never spoke to or requested to speak to Parkes regarding sources Parkes relied on in creating her study cards or videos.

F. ATI Proctored and Practice Exams

The security of ATI's exams is essential to its business because its clients—nursing schools—purchase licensed ATI exams to accurately assess their students and prepare them for the NCLEX. Such assessment requires that exam “test items” and answers are not readily disclosed to students. Dr. Gorham testified the term “test item” is used instead of “question” because not every item asks a question, but rather requests the examinee to do a task, such as choose the best response to a nursing situation. These test items and answers are highly secure—even faculty are not allowed to see them. ATI protects the secrecy of its proctored exams by following the Copyright Office's Secure Test Procedures, maintaining a strictly controlled test environment, requiring proctors and students to enter confidentiality agreements prior to accessing an ATI Proctored Exam, and employing an ATI Test Security Team that further preserves this confidentiality. Parkes does not contest that she twice agreed to ATI's Terms and Conditions that expressly prohibit disclosure of information contained in ATI's exams.

Parkes' uploaded YouTube video playlists that correspond to ATI's nine Review

Modules and Proctored Exam subjects as follows:

- Nursing Fundamentals
- Nursing Leadership
- Nutrition for Nursing
- Medical Surgical Nursing
- Community Health Nursing
- Maternal Newborn (OB) Nursing
- Mental Health Nursing
- Pediatric Nursing
- Nursing Pharmacology³⁰

Dr. Gorham testified ATI began investigating Parkes' videos after a nursing-school client contacted ATI, expressing concern that Parkes' videos are teaching to the test. His investigation team went through each video and identified places where Parkes signaled examination content, then compared it to exam items that Parkes had been exposed to.

During its investigation, ATI found a number of instances in Parkes' videos where Parkes gave verbal signals that she was disclosing an answer to an ATI exam question. ATI was alarmed that Parkes highlighted these answers in her YouTube videos with oral flags such as "this is super important for your test," "I would definitely be familiar with [] for your exam," "I would definitely remember []," and its "super important that you know []."³¹

ATI introduced a chart that shows time stamps of instances where the investigation found Parkes signaled a proctored item next to the test question or item disclosed. ATI's Information Technology group logged over 240 instances of Parkes accessing ATI products from 2013 to 2019. While Parkes was a nursing student, from 2013–2015, she was exposed to ATI's

³⁰ Ex. 28-6. Parkes has other YouTube video playlists, not at issue here.

³¹ Ex. 34-28 (referencing document filed under seal at Doc. 38-1 at 5).

proctored exams, which her nursing school used as actual exams for its students. After she graduated in 2015, Parkes no longer had access to actual proctored exams through her ATI account, but she could still access practice exams. After her 2015 graduation, Parkes took about twenty-seven ATI Practice Exams. Dr. Gorham testified that he can think of no reason why someone would access ATI's materials after obtaining their nursing license unless they were harvesting information from the products.

ATI test items use a multiple-choice format. Each test item is followed by four suggested answers, of which the examinee tries to select the correct one. There could be more correct answers to the question posed, but ATI lists only one correct answer (per question) among the possible answers.

For each of the instances of disclosure identified in the investigation, Parkes had been exposed to the proctored exam item on one of the tests. During these instances of disclosure, Parkes discusses similar material in her YouTube videos that correspond in name and substance to ATI's nine Review Modules and test subjects. For example, an ATI Proctored Exam question asks: [REDACTED]

[REDACTED] The possible answers are:

[REDACTED]

[REDACTED]² The correct answer is

[REDACTED] Parkes flagged this test item in one of her [REDACTED] videos as [REDACTED]

[REDACTED]³³ Specifically, she says:

[REDACTED]

³² *Id.*

³³ Ex. 34-28 (referencing document filed under seal at Doc. 38-1 at 4).

[REDACTED]
[REDACTED]³⁴

As Dr. Coviello testified, the symptoms of [REDACTED] are important for nurses to know because a [REDACTED] can indicate that the [REDACTED] is not [REDACTED] which can be fatal to a patient. Yet, Dr. Coviello did not explain why Parkes would focus on this, but not other important information related to a patient with [REDACTED]. The Court finds that Parkes focused on this particular information because she knew the content of ATI's test items and answers.

Another ATI Proctored Exam question asks: [REDACTED]

[REDACTED]
[REDACTED] The possible answers are [REDACTED]

[REDACTED]
[REDACTED] The correct answer is [REDACTED]
[REDACTED]³⁵ Similarly, Parkes flags [REDACTED] as an important consideration prior to [REDACTED]. Specifically, she says: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁶

ATI offers thirty-two additional instances of Parkes discussing a nursing subject by focusing on the specific information that ATI tests on, including the precise answer ATI seeks to

³⁴ *Id.*

³⁵ Ex. 34-28 (referencing document filed under seal at Doc. 38-1 at 2).

³⁶ *Id.*

that test item.³⁷ The examples offered by ATI occur in Parkes' Medical Surgical Nursing videos 2, 4, 14, 20, 22, 25, 26 and 34; Nursing Pharmacology videos 4, 8, 17, 20, and 39; and Maternal Newborn (OB) Nursing videos 2, 5, 6, 8, 10 and 12.³⁸ Dr. Gorham testified Parkes is referring specifically to the ATI exams when she says "test;" the key difference from the videos she removed and replaced on YouTube, in which she explicitly referenced the "ATI" exams.

The Court finds, as Dr. Gorham testified, that Parkes is not just teaching nursing facts in these videos. Rather, Parkes' videos focus on the key to a specific test item rather than the subject-matter generally. For example, with respect to [REDACTED] Parkes points out the answer to the ATI question—[REDACTED]—rather than other information important [REDACTED]. As Dr. Gorham testified, there are other important nursing facts surrounding [REDACTED] including that a patient needs to be [REDACTED] because it allows doctors to [REDACTED]. [REDACTED] While Parkes mentions [REDACTED] she does not discuss why it is important medically, as she does with [REDACTED].

G. Evidence of Harm to ATI

Mr. Lynch testified that the nursing-education industry is highly competitive because there are only 4000 nursing programs, and therefore a limited number of potential clients. The industry is reputation-driven because nursing-school clients choose a test-preparation company such as ATI or Kaplan based on NCLEX pass rates of schools that use their products. An NCLEX pass rate is important to nursing school clients because a minimum pass rate is required to maintain their accreditation. ATI's reputation is dependent upon the security and reliability of exams that predict how a student will perform on the NCLEX. As Mr. Lynch testified, if ATI's

³⁷ Ex. 34-28 (referencing document filed under seal at Doc. 38-1 at 2-19).

³⁸ *Id.*

reputation for security and reliability of its products is compromised, ATI has no value to bring to its clients.

Mr. Lynch testified that two categories of ATI products are particularly harmed by Parkes' conduct—products in the “ATI Learning Loop” and “ATI Pulse.” The “ATI Learning Loop” educational philosophy allows students to apply information at a higher level rather than just learning facts. This process detects areas of weakness in students' study and directs them to remediation. The review assessments and Proctored Exams are part of this Learning Loop process. ATI has roughly twelve psychometricians that are experts at writing higher-level questions like those that appear on the NCLEX.

ATI Pulse is a proprietary predictive algorithm that helps students understand their probability of passing the NCLEX. It took three to four years and over \$100,000 to create the predictive algorithm, and the ongoing process of supporting it costs millions of dollars. It is used in conjunction with the nine proctored assessments to which ATI's nine Review Modules correspond. In addition to predicting NCLEX pass rates, ATI Pulse encourages students to be more engaged with the Learning Loop process; based on how a student performs on an ATI exam, Pulse gives the student feedback and directs them to remediation tools.

Mr. Lynch testified that Parkes' videos and study cards harm ATI's business in a significant way because she is teaching to the test and signaling how to answer specific questions. This jeopardizes the validity and reliability of the assessment and yields false or inflated scores when students have not truly mastered the content. Parkes' conduct harms the reliability of ATI's predictive algorithms and harms students who are given false probabilities of their NCLEX pass rate based on inflated preliminary assessment scores.

These concerns are evidenced by client communications. Mr. Lynch has received in-person feedback and emails from clients expressing concerns about whether ATI's exams have been compromised. When a complaint like this is received, he testified, it is directed to the ATI security team to investigate. Mr. Lynch testified to specific emails from ATI clients that caused particular concern. Specifically, a faculty member at [REDACTED] wrote: "My greatest concern is it appears she is teaching them how to pass a test, advertising her proficiency level 3 performance. This may significantly impact the ATI Learning Loop process."³⁹ As Mr. Lynch testified, this is concerning to ATI because Parkes has inside knowledge of tested material and is sharing it, which impacts the ATI Learning Loop Process. Specifically, with a client like [REDACTED] that has [REDACTED] campuses and hundreds of faculty members, it jeopardizes ATI's business of selling secure exams when someone else is selling a shortcut to the test after having already taken it herself.

A second email from Professor Berlynn Ching of Golden West College School of Nursing expressed similar concerns:

[T]he students have told me that they would have never been able to answer certain test questions without Cathy specifically discussing it. An example that the students told me about was: [REDACTED] do not go together as [REDACTED] I can also confirm that when I reviewed the "Mastery of Content" (confidential sheet that is for an educator's eyes only), this sheet stated that [REDACTED] is an item that is included in ATI test questions.⁴⁰

This email also states that Ms. Ching personally watched some of Parkes' videos and remembered that Parkes mentioned that [REDACTED] will more than likely be tested on ATI. This stood out to her because [REDACTED] was listed on the Mastery of Content sheet that is for educator's

³⁹ Ex. 14-2.

⁴⁰ Ex. 14-3.

eyes only as a topic that ATI tests on. She also stated “[w]hen I looked at the Mastery of content [sic] “cheat sheet” that I had while reviewing the videos, what she stated matched what the MH ATI [sic] test was going to test students on with a high percentage of accuracy.”⁴¹ The email further stated that Ms. Ching observed that students scored higher than she had ever seen before on Mental Health and Pediatrics portions of the ATI, and that “[t]his is very curious given that the Peds and MH content we teach at Golden West are very limited due to our curriculum change.”⁴² Mr. Lynch testified that another comment in Ms. Ching’s email is particularly concerning for ATI’s reputation: “If Cathy Parkes videos are so good with prepping students, why have students paid for ATI when they can watch Cathy Parkes’ videos for free and pass NCLEX?”⁴³

Mr. Lynch testified regarding a third client-email from Associate Professor Amy Thach of Golden West College School of Nursing that read: “I do need to let you know that at our last faculty meeting, we did discuss if ATI exams are compromised (not sure if you heard about Kathy Parks [sic] and the YouTube ATI videos that state exactly what questions will be on what exams?)”⁴⁴ As Mr. Lynch testified, this is concerning because an entire faculty, not just one instructor, has concerns that ATI’s tests are compromised.

Mr. Lynch also testified he received an email from a client when Parkes’ business was still named “Pass the ATI,” asking whether Parkes study materials were an authorized resource endorsed by ATI. He further testified that ATI has been forced to spend significant time and resources to address questions from confused and concerned customers.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Ex. 14-4.

Out of roughly 2750 clients, there are only six emails from five schools documenting security concerns relating to Parkes' material on the record. Yet, most communications between ATI and its clients occur in person to ATI sales representatives. Other schools brought similar concerns to ATI's attention in the weeks before the preliminary injunction hearing, such as [REDACTED] and [REDACTED]. And, as Mr. Lynch testified, the nursing-education industry is a small community that interacts on list serves and at conferences; if rumor that ATI's exams are no longer secure spreads, it will be damaging to ATI's business.

ATI has retained 95 percent of its nursing school clients from 2016 to 2018, even in the midst of Parkes' study card launch in May 2018 and her continuing video posts. Parkes' offers evidence that at one [REDACTED] campus, NCLEX pass rates have not fallen from 2018 to 2019; however, she presented no evidence about pass rates for any other nursing schools. But Ms. Fiorruci-Hughes had numerous conversations with executives from [REDACTED]—one of her clients—regarding Parkes' content. One [REDACTED] campus had an incident where thirteen students failed the NCLEX who performed 95 percent of probability of passing from the ATI predictive algorithm. Ms. Fiorruci-Hughes also testified that during an August 6, 2019 meeting with [REDACTED] executives including the Chief Financial Officer and President of the University, a concern was raised about the validity of ATI's assessments because of Parkes' resources. After that meeting, Ms. Fiorruci-Hughes continued to see students at [REDACTED] campuses passing ATI's exit exam but failing the NCLEX. Further, a member of the [REDACTED] faculty who serves in a dean capacity at the school expressed a concern that if students were able to shortcut the ATI Learning Loop using Parkes' material, students' grades would be falsely inflated.

Ms. Fiorrucci-Huges further testified that Parkes' conduct is harming ATI's relationship with [REDACTED] and the school's faith in the security and efficacy of ATI's exams and predictive tools, especially at a time when ATI is in the midst of contract renewal negotiations with [REDACTED] [REDACTED] and [REDACTED] Nursing Schools have also raised concerns with Ms. Fiorrucci-Huges regarding Parkes' business in 2019.

III. Legal Standard

A preliminary injunction "is an extraordinary remedy," so "the right to relief must be clear and unequivocal."⁴⁵ "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."⁴⁶ "[A]ny modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible."⁴⁷ "Additionally, some preliminary injunctions are disfavored and require a stronger showing by the movant," thus, "movants must satisfy a heightened standard."⁴⁸ These disfavored injunctions are "preliminary injunctions that alter the status quo; [] mandatory preliminary injunctions; and [] preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits."⁴⁹ These disfavored injunctions "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal

⁴⁵ *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1256 (10th Cir. 2003).

⁴⁶ *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

⁴⁷ *N.M. Dep't of Game & Fish v. U.S. Dep't of the Interior*, 854 F.3d 1236, 1246 (10th Cir. 2017) (quoting *Diné Citizens Against Ruining Our Eyn't v. Jewell*, 839 F.3d 1276, 1287 (10th Cir. 2016)).

⁴⁸ *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016).

⁴⁹ *Id.* (citing *Awad v. Zirriax*, 670 F.3d 111, 1125 (10th Cir. 2012)).

course.”⁵⁰ ATI’s motion seeks to alter the status quo because it requires Parkes to affirmatively remove her videos from YouTube and cease sales of her study card decks. It is therefore disfavored and the Court thus applies a heightened standard.

A. Likelihood of Success on the Merits

1. Copyright Infringement

Copyright infringement requires a claimant to show “(1) ownership of a valid copyright and (2) copying of constituent elements of the work that are original.”⁵¹ A certificate of registration of a copyright is prima facie evidence of the validity of the copyright and facts stated in its certificate.⁵² A plaintiff can show copying “by establishing that defendant had access to the copyrighted work and that there are probative similarities between the copyrighted material and the allegedly copied material.”⁵³ Substantial similarities are present where “the accused work is so similar to the plaintiff’s work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff’s protectible expression by taking material of substance and value.”⁵⁴ “The touchstone of the analysis is the ‘overall similarities rather than the minute differences between the two works.’”⁵⁵ “Facts, whether alone or as part of a compilation, are not original and therefore may not be copyrighted. A factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but the copyright is limited to the particular selection or arrangement.”⁵⁶

⁵⁰ *Id.*

⁵¹ *Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1292, 1300 (10th Cir. 2014).

⁵² 17 U.S.C. § 410(c).

⁵³ *La Resolana Architects, PA v. Reno, Inc.*, 555 F.3d 1171, 1178 (10th Cir. 2009).

⁵⁴ *Country Kids ‘N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1288 (10th Cir. 1996) (citing *Atari, Inc. v. N. Am. Philips Consumer Elec. Corp.*, 672 F.2d 607, 614 (7th Cir. 1982)).

⁵⁵ *Id.* (quoting *Atari*, 672 F.2d at 618).

⁵⁶ *Feist Publ’ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991).

While nursing facts themselves are not copyrightable Parkes admits that ATI's Review Modules are a factual compilation. The question presented here is whether Defendant, who undisputedly accessed ATI's materials, copied ATI's undisputedly copyrighted materials. Parkes' argument that ATI's copyright is "thin" and thus does not protect factual compilations is not persuasive. Parkes points to *Feist Publishing v. Rural Telephone Service Co.*, where the Supreme Court held a phone book company could not prevent other companies from creating phone books because alphabetical arrangement of phone listings was a factual compilation not protected by copyright.⁵⁷ However, that alphabetical phonebook listings are not protectable does not support a conclusion that the organizational structure of a comprehensive medical test preparation program like ATI is also not protectable. Listing of phone numbers alphabetically is essential for a phone book to be functional, allowing a user to look up a particular person's number. In contrast, nursing information can be organized and presented in numerous ways while retaining educational function.

Further, Parkes argues while this "thin" copyright allows ATI to prevent others from selling ATI materials as their own, it does not preclude anyone else from discussing, referencing, or teaching the core nursing curriculum found in ATI products. Parkes cites *Lipton v. Nature Co.*⁵⁸ to support this proposition, but her argument is similarly flawed. Although Parkes is correct that the *Lipton* Court stated "facts are considered to be in the public domain and therefore not protectable under copyright law," that court went on to explain that "a *compilation* of facts may be protectable in certain instances."⁵⁹ Moreover, Parkes undermines her own argument that "core nursing curriculum" cannot be protected by copyright, because she places the "©" symbol

⁵⁷ *Feist*, 499 U.S. at 363.

⁵⁸ *Lipton v. Nature Co.*, 71 F.3d 464, 471 (2d Cir. 1995).

⁵⁹ *Id.* at 470 (emphasis added).

on her study cards to prevent others from copying *her*. Accordingly, the Court turns its attention to whether Parkes copied ATI's materials.

ATI has curated, digested, and presented information in a unique way while retaining the accuracy of nursing information. Thus, Parkes' mirroring of this presentation cannot be attributed to merely presenting nursing facts in the only logical way. The Court finds Parkes' study cards are substantially similar to ATI's Review Modules, evidenced by her study cards' structure, and specific instances of ATI's original content that appear in her study cards.

a. Structural and Organizational Similarities

Organizational and structural similarities between ATI's Review Modules and Parkes' study cards are numerous. Parkes organized her study cards into nine decks that correspond in name and content to ATI's nine Review Modules. Parkes named her nine study decks—in some instances identical to and in others virtually the same—as ATI's Review Modules. That some of these corresponding decks differ slightly in name—such as “Fundamentals for Nursing” and “Nursing Fundamentals”⁶⁰—does not destroy the overall structural similarity; all nine of Parkes' titles are functionally equivalent to the titles of ATI's nine Review Modules.

Tellingly, one of Parkes' similarly-named decks is for a rather generic topic that could be given many other accurate titles. ATI's Review Module “Nursing Leadership and Management” covers topics such as conflicts with patients, professional responsibility, and torts against patients that commonly arise in the nursing profession. Parkes' corresponding deck and video are both titled “Nursing Leadership.” Yet, there are a myriad of other names Parkes could have chosen to describe conflicts, torts, and client care, perhaps more descriptive than labeling these concepts

⁶⁰ Ex. 14-10 at 31.

“Leadership.” That Parkes’ study card deck and video names align, strikingly, with ATI’s Review Modules is further evidence of copying.

Parkes’ similarly-named study decks also track ATI’s Review Modules in terms of units within its nine topics. This is particularly evident in the Maternal Newborn Module where Parkes’ and ATI’s materials contain the same four units; both sources contain the units “Antepartum Nursing Care” and “Postpartum Nursing Care” and ATI’s “Intrapartum Nursing Care Section: Labor and Delivery” and “Newborn Nursing Care” correspond to Parkes’ “Labor and Delivery” and “Newborn Nursing Care” units.⁶¹ Parkes’ argument that labor and delivery must be taught after antepartum care, but before newborn care does not change the analysis. Although every source on the record presents maternal nursing chronologically, they vary within this chronological progression in terms of subdivision of topics, and depth and breadth of information. No nursing-education resources on the record presents maternal care as ATI: four units divided into twenty-seven chapters. Yet, Parkes mirrors ATI’s structure in this unit.

Similarly, Parkes’ Mental Health study deck is structured the same as ATI’s Mental Health Review Module. Dr. Coviello’s testimony that this is merely a result of a natural sequencing of material on this subject is not persuasive because other nursing-education materials structure their mental health materials differently than ATI. Specifically, the Townsend text divides units differently than ATI, and ATI omits much of the material that Townsend includes. For example, Townsend’s “Psychiatric/Mental Health Nursing Intervention” aligns with ATI’s “Traditional Nonpharmacological Therapies” unit in Exhibit 14-10 at 43. Parke’s corresponding unit is named almost identically to ATI’s: “Non-pharmacological

⁶¹ *Id.* at 33.

Therapies.”⁶² And, although ATI structures one of Townsend’s units into two separate units of its own ((1) “Psychological Disorders” and (2) “Pharmacological Therapies” instead of Townsend’s one-unit structure titled “Care of Clients with Psychiatric Disorders”), Parkes mirrors ATI’s two-unit structure. Her units are titled “Mental Health Disorders” and “Pharmacological Therapies,” which align strikingly with ATI’s “Psychological Disorders” and “Pharmacological Therapies.”⁶³ Moreover, units not included in the Townsend text that appear in ATI’s Review Module also appear in Parkes’ material: Townsend does not have a unit similar to ATI’s “Psychiatric Emergencies” nor to ATI’s “Care of Clients Who Are Dying and/or Grieving,” while Parkes final unit in her study deck is “Loss/Grief and Psychiatric Emergencies.”⁶⁴ These clear structural similarities are further evidence of copying.

Parkes argues ATI covers the same material in the same order as prominent nursing texts because this is a standard order of presenting nursing material. Yet, there is no evidence in the record of other resources that present information like ATI does. For example, Pillitteri’s maternal newborn text has three units while ATI has 4 units. Loudermilk’s maternal newborn text has eight units, compared to ATI’s four. And, Varney’s Midwifery text contains units that ATI does not cover whatsoever. Although it covers the same concepts as other nursing texts presented to the Court, ATI uses a three-tiered structure, composed of units, chapters, and subsections. It’s arrangement, structure, and depth of factual information is unique. Indeed, this Court has previously found “the manner in which [plaintiff] expresses these ideas and methods, including structure, format, and selection and arrangement of themes, is protectable if it is

⁶² *Id.* at 43.

⁶³ *Id.*; Ex. 28-38 at 2.

⁶⁴ Ex. 28-38 at 2; Ex. 14-10 at 43.

original.”⁶⁵ There are many other ways to present this information. Thus, it speaks loudly to the Court that Parkes chose to structure her material exactly as ATI had.

b. Specific Instances of Copying

Specific instances of verbatim, reworded, and rephrased material in Parkes’ study cards fall within the same order and structure of ATI’s Review Modules. Most alarming are Parkes’ conceptual examples that track exactly with ATI’s Review Module examples of the same concepts. For instance, both ATI and Parkes use the example of a father who loses his job and subsequently destroys his child’s toy to demonstrate “displacement.”⁶⁶ That Parkes admitted this is “at worst *de minimis* copying,”⁶⁷ and removed it from her deck is further evidence of copying. Again, ATI and Parkes use the same example of “rubbing the sternum” to illustrate “stuporous behavior.”⁶⁸ And, both ATI’s Mental Health Module and Parkes’ Mental Health Card deck describe a man who brings his wife flowers following an instance of domestic abuse, both to illustrate “undoing.”⁶⁹ More examples are laced throughout Parkes’ study cards among voluminous pieces of content that appear to be rephrasing and shortening of ATI’s content. Revealingly, these verbatim examples, rephrasing, and rewording appear in the same order as ATI’s presentation of the material that Parkes also emulates.

Other specific examples of verbatim, rephrased, or reworded content appear in the following study card decks that correspond to ATI Review Modules: Community Health

⁶⁵ *Kindergartners Count, Inc. v. Demoulin*, 249 F. Supp. 2d 1214, 1229 (D. Kan. 2003).

⁶⁶ Ex. 14-10 at 51.

⁶⁷ Doc. 27 at 27.

⁶⁸ Ex. 14-10 at 49.

⁶⁹ Ex. 34-25 at 5.

Nursing,⁷⁰ Nursing Fundamentals,⁷¹ Nursing Leadership and Management,⁷² Maternal Newborn Nursing,⁷³ Mental Health Nursing,⁷⁴ Pediatric Nursing,⁷⁵ and Nutrition for Nursing⁷⁶.

ATI does not, however, present particular examples of copying from its RN Adult Medical Surgical Review Module to Parkes' Medical Surgical Nursing study card deck. Although, this deck fits within Parkes' structure that is strikingly similar to ATI's structure, the Court does not find this deck is substantially similar to ATI's material based on the record presented at this preliminary stage. Similarly, ATI points to just one example of rephrased or reworded copying in Parkes' Pharmacology study deck.⁷⁷ Although ATI contends Parkes tracked the same list of medications presented by ATI, it did not present enough evidence for the Court to determine whether Parkes' pharmacology material constitutes copying of ATI's medication list or is merely an iteration of medications commonly taught in nursing curricula. The Court cannot find substantial similarity in Parkes' Pharmacology study deck at this preliminary stage.

Parkes' videos, although largely at issue concerning the misappropriation claim, further point to likelihood of infringement. There is one video playlist for each of the nine Review Modules and Study card decks. Within the nine videos that track with ATI's, Parkes suggests answers to actual ATI exam questions on the same subject as her corresponding video. This

⁷⁰ Ex. 34-25 at 44-47.

⁷¹ *Id.* at 51-58.

⁷² *Id.* at 16-24.

⁷³ *Id.* at 26-28.

⁷⁴ *Id.* at 3-14.

⁷⁵ *Id.* at 30-37.

⁷⁶ *Id.* at 39-42.

⁷⁷ *Id.* at 49.

alone, perhaps, is not enough to show infringement. Yet, considered alongside the evidence discussed above, it strengthens the Court's finding that substantial similarities are present to demonstrate likelihood of success on ATI's copyright infringement claims.

The few original mnemonic devices in the record are not enough to change the Court's analysis when considering the overall similarities rather than minute differences between the two works. Similarities in the overarching structure and presentation of ATI and Parkes' materials, coupled with specific and voluminous examples of copying rise to the level of substantiality such that the Court finds ATI likely to succeed on the merits of its copyright claim for seven of Parkes' nine study card decks: Community Health Nursing, Nursing Fundamentals, Nursing Leadership and Management, Maternal Newborn Nursing, Mental Health Nursing, Pediatric Nursing, and Nutrition for Nursing.

2. Misappropriation of Trade Secrets

Trade secrets, under the Defend Trade Secrets Act ("DTSA") are "all forms and types of financial, business, scientific, technical, economic, or engineering information" if the owner takes "reasonable measures to keep such information secret" and "the information derives independent economic value . . . from [that information] not being generally known to, and not being readily ascertainable through proper means by, another person."⁷⁸ Whether a trade secret exists is a question for the trier of fact.⁷⁹ Misappropriation occurs when a non-owner acquires the trade secret "who knows or has reason to know that the trade secret was acquired by

⁷⁸ 18 U.S.C. § 1839(3)(A)–(B).

⁷⁹ *Dodson Int'l. Parts, Inc. v. Altendorf*, 347 F. Supp. 2d 997, 1010 (D. Kan. 2004).

improper means,” or when a non-owner discloses or uses a trade secret “without express or implied consent.”⁸⁰ The Kansas Uniform Trade Secrets Act (“KUTSA”) mirrors the DTSA.⁸¹

It is uncontested that ATI protects the secrecy of its proctored exams by following the Copyright Office’s Secure Test Procedures, maintaining a strictly controlled test environment, requiring proctors and students to enter confidentiality agreements prior to accessing an ATI Proctored Exam, and employing an ATI Test Security Team that further preserves this confidentiality. ATI derives independent economic value from the security of these exam questions because its clients—nursing schools—license exams from ATI to accurately assess its students and prepare them for the NCLEX. Such assessment requires that exam answers are not readily ascertainable. Although the general nursing information used to develop ATI’s exam questions is readily ascertainable, it does not follow that the arrangement of that material into a particular format of question and answer is also readily ascertainable. Further, Parkes had reason to know this information was disclosed without express or implied consent; she does not contest that she twice agreed to ATI’s Terms and Conditions that expressly prohibit disclosure of information contained in ATI’s exams, regardless of the ultimate validity of those contacts.

⁸⁰ 19 U.S.C. § 1839(5)(A) & (B)(i)–(ii). The “disclosure or use” prong requires the person who discloses or uses the trade secret to have:

“(i) used improper means to acquire knowledge of the trade secret; (ii) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was--(I) derived from or through a person who had used improper means to acquire the trade secret; (II) acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or (III) derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; or (iii) before a material change of the position of the person, knew or had reason to know that-- (I) the trade secret was a trade secret; and (II) knowledge of the trade secret had been acquired by accident or mistake.”

18 U.S.C. § 1839(B)(i)-(iii).

⁸¹ K.S.A. § 60-3320.

Parkes disclosed some of these trade secrets in her YouTube videos, demonstrated by the structure of ATI questions and how Parkes reveals them. ATI exam questions offer four suggested answers, of which the student tries to select the correct one. There could, perhaps, be more correct answers to the question posed, but none are offered by ATI as a possible choice. Tellingly, in her videos, Parkes discusses the same material tested in a particular ATI question, and flags it in her speech as something “important to know,” or another similar verbal cue.⁸² She then discloses the answer to the ATI exam question. That she does not give another possible correct answer to the question, but the correct answer of the four offered in ATI’s exams is strong evidence of misappropriation.

For example, Parkes reveals the answer to ATI’s proctored exam question over what symptom [REDACTED]
[REDACTED] The correct answer is [REDACTED] Certainly, there are other conditions that [REDACTED] may experience that the nurse [REDACTED]
[REDACTED]—they are just not listed as possible answers here. Yet, in Parkes’ [REDACTED]
[REDACTED] she flags [REDACTED]⁸³

Parkes reveals the answer to an ATI question over [REDACTED] in one of her videos in a similar fashion. ATI’s Proctored Exam question asks [REDACTED]
[REDACTED] Parkes’ discusses the correct answer—[REDACTED]—in detail, while not focusing on other important things for patients to know [REDACTED] For example, although [REDACTED] is also [REDACTED] Parkes’ only lists this requirement while focusing in on

⁸² Ex. 34-28 (referencing document filed under seal at Doc. 38-1 at 5).

⁸³ *Id.*

[REDACTED]

[REDACTED]

[REDACTED]⁸⁴ ATI presents over two-dozen similar instances of Parkes’ coded question and answer disclosures.⁸⁵ There are other ways to teach this same material than the specific way in which ATI tests on its secure exams. Thus, that Parkes homes in on the correct answer to ATI’s test items rather than discussing topics holistically is evidence of disclosure.

It does not change the analysis that Parkes does not publish verbatim test questions and answers or explicitly announce she is revealing secure information. Parkes relies on three cases for the proposition that to find misappropriation of secure exam questions and answers, the Court must be able to compare original and misappropriated materials side-by-side.⁸⁶ This is an incorrect statement of these cases.

Educational Testing Service v. Simon and *National Conference of Bar Examiners v. Saccuzzo* concerned only copyright infringement, and examined whether substantial similarities were present; they have no bearing on whether trade secrets were misappropriated.⁸⁷ In fact, these cases do more to undercut Parkes’ copyright infringement defense than to support her misappropriation defense.⁸⁸ Those cases found “copying of even a few test questions was sufficient to justify a preliminary injunction against copying of any test” and “[s]ubstantial

⁸⁴ Ex. 34-28 (referencing document filed under seal at Doc. 38-1 at 2).

⁸⁵ Doc. 38-1 at 2-19 (sealed).

⁸⁶ *Am. Registry of Radiologic Technologists v. Bennett*, 939 F. Supp. 2d 695 (W.D. Tex. 2013); *Educ. Testing Serv. v. Simon*, 95 F. Supp. 2d 1081 (C.D. Cal. 1999); *Nat’l Conference of Bar Exam’rs v. Saccuzzo*, No. 03CV0737BTM (NLS), 2003 WL 21467772 (S.D. Cal. June 10, 2003).

⁸⁷ *Simon*, 95 F. Supp. 2d at 1081; *Saccuzzo*, No. 03CV0737BTM (NLS), 2003 WL 21467772 at *1.

⁸⁸ *Saccuzzo*, No. 03CV0737BTM (NLS), 2003 WL 21467772, at *7 (citing *Educ. Testing Serv. v. Katzman*, 793 F.2d 533, 542–43 (3d Cir. 1986), *abrogated on other grounds by TD Bank N.A. v. Hill*, 928 F.3d 259 (3d Cir. 2019); *Simon*, 95 F. Supp. at 1088.

similarity does not require verbatim copying; [defendant] cannot escape copyright liability by claiming that its copying of secure teste questions is not word-for-word”⁸⁹

Parkes’ reliance on *American Registry of Radiologic Technologists v. Bennett* is also misplaced. Although there was a misappropriation claim in *American Registry*, the Court found the Plaintiff did not establish acquisition by improper means and did not progress to the disclosure analysis.⁹⁰ Thus, the Court did not discuss side-by-side comparisons in the misappropriation context. Regardless, the portion of this case that Parkes cites also concerns copyright infringement and is thus also inapplicable.

Accordingly, the Court finds ATI has made a strong showing that it is likely to succeed on its misappropriation claim.

3. Breach of Contract

The Court need not reach the issue of whether ATI is likely to succeed on the merits of its breach of contract claim. This analysis is unnecessary because the Court finds likelihood of success on its copyright infringement and misappropriation of trade secrets claims; in combination with the other preliminary injunction factors, the Court partially grants preliminary relief on these bases. Additionally, Kansas law suggests preliminary injunctive relief is not generally appropriate for breach of contract claims.⁹¹ Damages for breach can generally be calculated in, and remedied by, money damages.⁹² Accordingly, the Court turns next to analysis on the remaining preliminary injunction factors.

⁸⁹ *Id.*

⁹⁰ *Am. Registry*, 939 F. Supp. at 711.

⁹¹ See *Wichita Wire v. Lenox Mfg*, 726 P.2d 287, 292 (Kan. Ct. App. 1986).

⁹² *Id.*

B. Irreparable Harm

To constitute irreparable harm, the injury “must be both certain and great.”⁹³ It “is often suffered when ‘the injury can[not] be adequately atoned for in money,’ or when ‘the district court cannot remedy [the injury] following a final determination on the merits.’”⁹⁴ “Loss of customers, loss of goodwill, and threats to a business’ viability have been found to constitute irreparable harm,”⁹⁵ as well as customer confusion.⁹⁶ Loss of goodwill can occur, specifically, as a result of copyright infringement.⁹⁷

Here, harm to ATI’s business viability and goodwill is present. Parkes’ conduct jeopardizes ATI’s business viability; specifically, ATI Pulse and ATI Comprehensive Predictor, which ATI spent millions of dollars to create and support. ATI’s exam material must remain secret to accurately assess students’ progress and predict NCLEX outcomes. Parkes puts this predictive model at risk by disclosing exam questions and answers, albeit in a coded fashion. This is evidenced by ATI client’s concerns over the security of ATI’s exams. For example, ATI clients have expressed they are concerned Parkes’ is teaching to the test which “may significantly impact the ATI Learning Loop process.”⁹⁸ Another client, Golden West College School of Nursing, discussed Parkes’ content at their faculty meetings and asked ATI if it “heard about Kathy Parks [sic] and the YouTube ATI videos that state exactly what questions will be on

⁹³ *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (quoting *Wis. Gas Co. v. Fed. Energy Regulatory Comm’n*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

⁹⁴ *Id.* (quoting *Am. Hosp. Ass’n v. Harris*, 625 F. 2d 1328, 1331 (1980)).

⁹⁵ *Retiree, Inc. v. Anspach*, No. 12-2079, 2013 WL 3820729, at *6 (D. Kan. July 23, 2013), *aff’d*, 660 F. App’x 582 (10th Cir. 2016); *see also Advisors Excel, LLC v. Zagula Kaye Consulting, LLC*, No. 15-4010-DDC-KGS, 2015 WL 736344, at *5 (D. Kan. Feb. 20, 2015).

⁹⁶ *See Advisors Excel*, No. 15-4010-DDC-KGS, 2015 WL 736344, at *4 (D. Kan. Feb. 20, 2015).

⁹⁷ *Harolds Stores, Inc. v. Dillard Dept. Stores, Inc.*, 82 F.3d 1533, 1547 (10th Cir. 1996).

⁹⁸ Ex. 14-2.

what exams.”⁹⁹ A professor from Golden West College also brought concerns to ATI about a specific example of answer disclosure she discovered regarding [REDACTED] and [REDACTED]. She expressed additional concerns to ATI: over uncharacteristically high test scores that did not reflect subjects that the school focused on in its curriculum, and that Parkes’ material tracks with ATI’s faculty-only mastery of content sheet that instructed educators what material ATI would test. These client concerns demonstrate reputational harm to ATI’s business as a result of Parkes’ conduct; each client addresses security concerns specifically as a result of Parkes’ videos.

Only six emails from five nursing schools are in the record. Yet, the Court finds irreparable harm is still met given the reputational harm to ATI that its exams are no longer secure. Additionally, each of these five schools still represent substantial business. For example, [REDACTED] has over [REDACTED] campuses, and ATI is currently undergoing contract renewal negotiations with this client that are being impacted by security concerns. That ATI has not yet lost clients does not preclude a finding of irreparable harm absent injunction.

Additionally, without an injunction, ATI will continue to suffer reputational harm caused by customer confusion between ATI and Parkes’ products, and decreased confidence in the security and reliability of ATI exams. Parkes created customer confusion between her study cards and videos with slogans that advertise products to prepare for passing the ATI combined with content similar to ATI’s offerings. Nursing-school customers contacted ATI to ask whether Parkes was affiliated with ATI or if ATI knew that Parkes was doing business in questionable ways, and ATI spent time and resources addressing those concerns. This harm is magnified by the fact that Parkes initially named her business and affiliated social media accounts “Pass the

⁹⁹ Ex. 14-4.

ATI.” Although she changed the name—upon demand from ATI—to “Level Up RN,” her materials still piggyback on ATI’s overall structure. Further, although Parkes insists her rebranding eliminated any possible confusion, “www.PassTheATI.com” still redirects users to “www.LevelUpRN.com.” Certainly, if a nursing student typed “PassTheATI.com” in the browser search bar to seek study materials, there is good reason to be confused upon finding nursing-education study materials, after being automatically redirected to LevelUpRN.com.

While Parkes correctly offers that “likelihood of confusion” is part of the trademark infringement claim, and ATI brings no such claim, Parkes misses the broader implication. Confusion between ATI’s material and Parkes’ material bolsters ATI’s showing of “substantial similarity” to demonstrate copyright infringement. And, ATI demonstrates confusion here to show irreparable harm for purposes of the preliminary injunction test, rather than the underlying claim. This Court finds customer confusion between ATI and Parkes’ products serves as evidence of harm to its goodwill. That customer confusion evidences substantial similarity is not a novel concept. In *Kleier*, the court found substantial similarities where defendant’s advertising program “created a likelihood of confusion or deception in the public domain as to the approval or licensing basis for defendant’s use of the copyrighted work.”¹⁰⁰

However, this Court finds no evidence of harm to nursing students by being ill-prepared for the NCLEX. Further, the Court does not find NCLEX pass rates have declined among ATI’s clients’ students. Although anomalies in students’ scores at one [REDACTED] campus could point to inflated grades, the Court cannot find on this evidence alone that Parkes’ conduct is causing NCLEX failures.

¹⁰⁰ *Kleier Advert., Inc. v. Premier Pontiac, Inc.*, No. 86-C-1015-C, 1987 WL 11878, at *2 (N.D. Okla. Jan. 28, 1987), *aff’d in part, rev’d in part on other grounds*, 921 F.2d 1036 (10th Cir. 1990).

Parkes' contention that ATI is estopped from showing irreparable harm because it delayed in filing suit is without merit. Delay only counts against irreparable harm if the party is unreasonably sitting on its rights.¹⁰¹ A three-month delay in bringing suit while settlement negotiations are ongoing is not unreasonable.¹⁰² ATI sued less than two months after settlement discussions ended in July 2019. ATI did not unreasonably delay prior to settlement negotiations either as ATI was, on multiple occasions, engaged in communication with Parkes regarding the infringing nature of her products, related to both potential trademark and copyright infringement.

C. Balance of Harms

Generally, the balance of hardships prong tilts in favor of the party seeking injunction in the intellectual property context.¹⁰³ This injunction is no exception. As discussed above, ATI will suffer harm to its business viability and goodwill. Further, the damaged security of ATI's exams and reputational harm to its ability to accurately assess nursing students' progress and preparation for the NCLEX tilt the balance in favor of ATI. These harms are evidenced by likely infringement, customer confusion, Parkes' disclosure of specific test questions, and ATI client communications questioning the security of ATI's tests and reliability of its predictive tools.

An injunction will harm Parkes, although it flows entirely from her likely infringement and misappropriation. And, it takes minimal effort for Parkes to cease sales, remove videos from YouTube, and refrain from posting additional infringing videos. More substantially, this

¹⁰¹ *Fish v. Kobach*, 840 F.3d 710 (10th Cir. 2016).

¹⁰² *Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543–44 (10th Cir. 1994).

¹⁰³ See *eBay Inc. v. MerExchange, LLC*, 547 U.S. 388, 392 (2006) (in the patent context); *Autoskill Inc. v. Nat'l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1498 (10th Cir. 1993), abrogated on other grounds by *TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, 661 F.3d 495 (10th Cir. 2011) (“[T]he potential injury to an allegedly infringing party caused by an injunction ‘merits little equitable consideration and is insufficient to outweigh the continued wrongful infringement.’” (quoting *Ga. Television Co. v. TC News Clips of Atlanta, Inc.*, 718 F. Supp. 939, 949 (N.D. Ga. 1989))).

injunction will likely cost her revenue from sales and from YouTube views. Yet, this harm also flows from her likely infringement. Any harm to Parkes is outweighed by harm to ATI and its nursing school clients.

Further, this injunction causes minimal harm to Parkes because it is narrow in scope: Parkes only must take down specified videos and cease sales of specified decks of study cards where the Court has found a likelihood of success on Plaintiff's copyright infringement and misappropriation claims. She may continue sale of the study card decks not herein enjoined, and may leave videos not herein enjoined on YouTube. She need not refrain from creating a new, lawful nursing study program, teaching in her spare time, or practicing nursing.

Finally, both Parkes and ATI argue *Tri-State Generation & Transmission Association, Inc. v. Shoshone River Power, Inc.*¹⁰⁴ supports their respective positions that injunctions threatening trade business or viability are only granted in dire circumstances—each arguing that his own business viability is at risk. This case is inapplicable here. In *Tri-State*, the Tenth Circuit considered whether dissolution of an injunction postponing an electric distribution cooperative's sale of shares was proper.¹⁰⁵ Such sale would threaten the existence of a parent-cooperative of which the cooperative was a member.¹⁰⁶ The Tenth Circuit upheld the injunction until full litigation of the claims reasoning little harm came to the cooperative by postponing sale of its shares, and much harm came to the parent-cooperative if it were no longer extant.¹⁰⁷

Here, the parties are not subsidiaries of each other, nor related to each other in any formal way. The absence of an injunction in *Tri-State* threatened the parent-cooperative's existence

¹⁰⁴ 805 F.2d 351 (10th Cir. 1986).

¹⁰⁵ *Id.* at 351.

¹⁰⁶ *Id.* at 357.

¹⁰⁷ *Id.* at 360.

where here, grant of an injunction requires Parkes to stop selling only some of her study decks and take down some of her videos; she is free to replace those materials with non-infringing ones and the very existence of her business is not threatened. These circumstances are straightforward compared to those in *Tri-State* which the Tenth Circuit deemed a “sheer complexity,” and the case is not instructive here.¹⁰⁸

Parkes argues she is harmed by this injunction because ATI is “Goliath” and she is “David”; she is a compassionate nurse trying to help others become licensed, and ATI is a giant who only cares about keeping its market share. Yet, however large or small a company, ATI is still afforded protection for the copyrights it holds, and redress for misappropriation of its trade secrets—protection it seems likely Parkes violated. Harm to ATI and its clients weighs heavier than harm to Parks for enjoining only aspects of her business that the Court finds—at this preliminary stage—are likely to infringe ATI’s copyrights and misappropriate its trade secrets.

D. Public Interest

Public interest in upholding the security of professional exams and upholding valid copyrights is present here. ATI points to *Simon*, which identified California’s public policy interests in ensuring the accuracy of standardized test scores, upholding the integrity of the licensed teaching profession, “and ensuring that only qualified individuals are certified to teach in public schools.”¹⁰⁹ There, a corporation that developed and administered standardized tests sued a test-preparation company for disclosing its teacher’s licensure exam questions and answers.¹¹⁰

¹⁰⁸ *Id.* at 357.

¹⁰⁹ *Simon*, 95 F. Supp. 2d at 1092.

¹¹⁰ *Id.*

ATI argues Parkes' material helps students memorize facts and misappropriated questions and answers, rather than teaching comprehension and application of concepts. This contravenes *Simon*, it argues, by allowing unqualified individuals to pass the ATI exams, pass the NCLEX, and ultimately enter the nursing profession. Alternatively, it argues, Parkes' conduct would allow students to pass the ATI exams with memorized answers but be ill-prepared for the NCLEX. ATI has not presented evidence to support this argument. In fact, Parkes demonstrates that NCLEX pass rates have not fallen between 2018 and 2019 for at least one school that ATI expressed particular concern over. That scores may fall in the future does not support ATI's argument that unqualified individuals are entering or will enter the nursing profession.

Yet, public interest in keeping professional exams secure and in upholding valid copyrights are present here.¹¹¹ As discussed above, it is likely that Parkes misappropriated ATI's trade secrets. Immediate relief is necessary, because the longer Parkes discloses the secure exam questions and answers the more the security of the exams—the reason nursing schools contract with ATI and an integral part of ATI's offerings—is eroded.

Harm to the security of ATI's exams, and reputational harm from this perceived and real lack of security is occurring. By virtue of Parkes disclosing material protected by copyright as well as secure trade secrets, ATI customers have begun to question the reliability and security of ATI's proctored exams. The public has an interest in protecting valid copyrights and trade secrets to encourage innovation. Immediate relief is therefore in the public interest, because continued disclosure of registered and protected material during the pendency of this case will deteriorate ATI's security in the products it spent significant time and money developing,

¹¹¹ See *Autoskill*, 994 F. 2d at 1499.

implementing and updating. If Parkes' conduct is not enjoined, ATI's products will continue to be damaged as its exam questions and answers necessarily derive value from being generally unknown.

Parkes' argument that her conduct should not be enjoined because she is addressing the shortage of nurses by helping nursing students pass their exams, especially nonnative English speakers and those from lower-income backgrounds, fails. She presents no evidence that her materials have contributed to non-English or poorer students passing the NCLEX that otherwise would not have.

E. Security

Generally, grant of a preliminary injunction requires the movant to give security in an amount the court deems proper to pay damages sustained by a wrongfully enjoined party.¹¹² But, security is not mandatory. "[A] trial court may, in the exercise of discretion, determine a bond is unnecessary to secure a preliminary injunction if there is an absence of proof showing likelihood of harm."¹¹³ ATI argues that the bond requirement should be waived because Parkes does not request it post one. However, the Court must still consider "whether the circumstances of a particular case justify the unusual practice of leaving the enjoined party bereft of security" or it "has not completed the task mandated by Rule 65."¹¹⁴ Given Parkes failure to request a bond, the Court declines to order at this time that ATI post a bond.

IV. Parkes' Motion to Strike

Parkes filed a motion to strike new material in support of ATI's Motion for Preliminary Injunction or, alternatively, motion for leave to file a surreply (Doc. 44). Parkes argues ATI

¹¹² Fed. R. Civ. P. 65(c).

¹¹³ *Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461, 1462 (10th Cir. 1987).

¹¹⁴ *Id.*

insulated new material from her analysis and response by including it for the first time in ATI's reply brief to its motion for preliminary injunction. The parties each had a full and fair opportunity to consider evidence at their full-day evidentiary hearing. Accordingly, the Court finds Parkes is not prejudiced and denies her motion to strike. Nonetheless, the Court will grant Parkes' alternative request for leave and has considered Parkes' surreply in deciding the motion for preliminary injunction.

V. Conclusion

IT IS THEREFORE ORDERED BY THE COURT that Plaintiffs' Motion for Preliminary Injunction (Doc. 13) is **granted in part and denied in part**.

Defendant is hereby enjoined from selling or distributing her study card decks on the following subjects: Community Health Nursing, Maternal Newborn Nursing, Mental Health Nursing, Nursing Fundamentals, Nursing Leadership, Nutrition for Nursing, and Pediatric Nursing.

Further, Defendant is ordered to remove the following videos from the following playlists from YouTube, and is enjoined from posting, sharing or viewing them on other platforms: Maternal Newborn (OB) Nursing videos indicated as videos 2, 5, 6, 8, 10 and 12 in Doc. 38-1 at 2-19; Medical Surgical Nursing videos indicated as videos 2, 4, 14, 20, 22, 25, 26, and 34 in Doc. 38-1 at 2-19; Nursing Pharmacology videos indicated as videos 4, 8, 17, 20, and 39 in Doc. 38-1 at 2-19.

Defendant may continue to sell her other study card decks and leave the remaining video playlists on YouTube. Defendant is not enjoined from creating other, non-infringing nursing material.

IT IS FURTHER ORDERED that Defendant's Motion to Strike or alternatively Motion for Leave to File a Surreply is (Doc. 44) is **granted in part and denied in part**. Defendant's Motion to Strike is **denied**. Defendant's Motion for Leave to File a Surreply is **granted**. Defendant is directed to file the surreply attached to her motion forthwith.

IT IS SO ORDERED.

Dated: December 9, 2019

s/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE