

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 10-60

Media Credential Policies Adopted by State Universities

QUESTIONS

1. May a public institution of higher education, supported by taxes paid by citizens of Tennessee, give approval to an agreement that would restrict the rights of the press and public to use material that is gained at a public event for public dissemination?
2. May a public institution of higher education, supported by taxes paid by citizens of Tennessee, give approval to an agreement that would restrict the rights of a citizen (including the media) from managing its own copyrighted material?
3. Similarly, may a public institution of higher education, supported by taxes paid by citizens of Tennessee, give approval to an agreement that would compel news media to provide a college athletic conference the right to use, without the media's consent, photographs of a sporting event taken by the media?

OPINIONS

1. Yes. A Tennessee public institution of higher education may take any legal measures that are intended to protect its rights under copyright law to photographs or other visual representations arising from athletic events involving its athletic teams. These events are not "public events." A member of the press must agree to the terms and conditions of the press credential policies in order to gain admittance and take photographs or video images of the event. The press credential policy of UT reserves the rights of UT and the SEC to images from athletic events in a variety of ways, and thereby limits the use and dissemination of photographs, video, and other representations, based upon copyright law, trademark law, and other legal principles.
2. Yes. Although this question assumes that a media outlet such as a newspaper "owns" and holds the copyright to all images originating at an athletic event without restriction, this is not the case. In order to obtain press credentials and access to the event, a media outlet must agree to certain restrictions on the use and dissemination of photographs, video, etc., that are taken at the event. Pursuant to this agreement, a media outlet retains certain rights in images

taken during the event, but must observe restrictions on those images, as well as on the manner in which they are disseminated.

3. Yes. The credential policies acknowledge that the copyright in photographs taken at an event is retained by the media organization responsible for taking the photographs. The credential policies do, however, impose certain restrictions upon the use of such photographs. The UT press credential policies do not provide that news media are compelled “. . . to provide the SEC the right to use, without the media’s consent, photographs of a sporting event taken by the media, ” although one provision of the credential policies provides that any image of the name or likeness of a member of the media that is included in an image taken at a UT athletic event may be used by UT and/or the SEC without restriction.

ANALYSIS

Your questions concern the restrictions that are placed upon the news media, and others, pursuant to the media credential policies adopted by schools such as the University of Tennessee (UT) and other members of the Southeastern Conference (SEC). The credential policies adopted by UT and other SEC schools establish ownership rights and usage restrictions upon photographs and video originating at UT athletic events. A member of the press must agree to the terms and conditions of the press credential policies in order to gain admittance and take photographs or video images of the event. The press credential policies of UT reserve the rights of UT and the SEC to images from athletic events in a variety of ways, and thereby limits the use and dissemination of photographs, video, and other representations, based upon copyright law, trademark law, and other legal principles.

According to information provided by UT, the basic credential policies adopted by SEC member institutions originate from the SEC and represent a “minimum” set of policies. Member institutions may then adopt supplemental policies in addition to the SEC standard policies. Consequently, press credential policies of SEC member institutions vary from school to school. In 2009, the SEC issued a revised set of press credential policies. It appears that the adoption of these revised policies has prompted your questions.

1. The UT media credential policies do indeed restrict the right to use images that are made at athletic events. The primary portions of the credential policies that apply to photographs¹ are as follows:

Media – General

Except for video (including any accompanying news audio) and still photographs of the Event shot by Bearer in compliance with the requirements and restrictions of this Credential (herein referred to as “Bearer Generated Video” and “Bearer

¹ The credential policies also contain provisions regarding video images, broadcast feeds, internet use, media pooling arrangements, blogging, and additional general provisions.

Generated Photographs,” or collectively as “Bearer Generated Images”) and news stories written and broadcast by Bearer, to which the copyright vests in Bearer, Bearer acknowledges that all broadcast rights, copyrights, trademarks, and other proprietary rights to the Event, and to the respective names, mascots, logos, uniform designs, and trademarks of the Southeastern Conference and its member institutions are exclusively ow[n]ed and/or licensed by the Southeastern Conference, its member institutions, and/or third parties with which the Conference or its members have agreements.

Video, film, photographs and other images of an Event (including Bearer Generated Images) may be used, broadcast, sold, licensed or distributed by Bearer only as expressly permitted herein. In addition, for avoidance of doubt, except as permitted herein, Bearer is prohibited from making available any video, film, photograph or other image of an Event (including Bearer Generated Images) to any organization, person or entity without advance written permission from the SEC, even though the planned use may be news or editorial in nature.

Bearer acknowledges that all trademark rights in the names, logos, trademarks, mascots, and uniform designs of the Conference and of the member institutions of the Conference are retained by the Conference and its members. Except for permitted use of broadcast feeds strictly in conformity herewith, nothing in these terms and conditions authorizes or allows Bearer to use any of the trademarks, copyrights or other proprietary or intellectual property rights of the SEC or of its member institutions.

Bearer Generated Images

The Credential confers on Bearer a limited, non-exclusive and non-transferable right to enter the Event venue or stadium to take Bearer Generated Images of the Event and to use, license, and sublicense such Bearer Generated Images only for news coverage or editorial purposes subject to the limitations and provisions herein, or as otherwise specifically authorized herein; provided, however, if required by the SEC or by the member hosting an Event, and if a broadcast feed of the Event via video and audio distributing facilities is provided by the SEC or its member institution, Bearer shall not take any Bearer Generated Video of the Event and shall use only such feed pursuant to and in conformity with the provisions hereof concerning broadcast feeds.

Notwithstanding any other provision of this Credential, absent the express written permission or authorization of the SEC (with respect to Bearer Generated Video) or the express written permission or authorization of all SEC member institutions that appear in a photograph, and whose present or former coaches and student athletes appear in a photograph (with respect to Bearer Generated Photographs):

(i) Bearer may not sell or license any Bearer Generated Image that features an individual and is licensed, sold or used to profit from the name or likeness of the

individual, (ii) this Credential in no respect licenses or conveys to Bearer any rights of publicity, trademark rights, or right to imply an association by Bearer with the Conference or with any of its members or their present or former coaches or student athletes; (iii) except for references by name to the SEC and its member institutions in television news broadcasts, preview shows, and special shows as otherwise permitted herein, Bearer Generated Images may not be licensed, sold or used in connection with the name or trademark of the SEC or any of its member institutions, or for or in connection with the name or trademark of the SEC or any of its member institutions, or for or in connection with endorsements, advertising, or marketing of a product, service, company, or business, (iv) Bearer Generated Images may not be reproduced on products, souvenirs, or clothing, and (v) Bearer Generated Images may not be used in a manner likely to create or that actually creates confusion in the minds of the trade or public that Bearer or its Bearer Generated Images or any elements therein, or any items on which they are reprinted, are sponsored or endorsed by, or are associated or affiliated with the SEC, its member institutions, or their present or former student-athletes or coaches, or that any of such persons or entities licensed Bearer to use their images, trademarks or copyrights.

Bearer Generated Photographs

Bearer Generated Photographs may be used (and posted on the internet) in connection with and as part of regular print news coverage, including internet print news coverage. In addition, provided that Bearer complies with the other provisions and restrictions in this Credential (including but not limited to the provisions and restrictions set forth in the preceding section entitled “Bearer Generated Images”) and that Bearer imposes upon and subjects the buyer or licensee to all such provisions and restrictions (as if the buyer or licensee had taken the photograph), Bearer may sell or relicense Bearer Generated Photographs. (Bearer is not restricted or prohibited from imposing additional restrictions, including withholding any and all rights from the buyer or licensee with respect to the Bearer Generated Photograph.) In any such sublicense, so that the SEC may pursue its rights against the licensee and will not be required to pursue Bearer, Bearer shall ensure that the SEC and its member institutions are named as intended third party beneficiaries with the right directly to enforce the requirements and provisions of this Credential against the sublicensee.

These policies apply to the press and other media persons or entities that come to the event, request media credentials, and by accepting those credentials, agree to the terms and conditions contained in the credential policies. The credential policies do not apply to spectators and “members of the public” who attend the athletic events, and who may take photographs or video images for private use. However, where spectators attend events and attempt to take photographs or images for a commercial purpose, the person creating such images may be deemed a member of the media who is required to accept the credential policies of UT and the SEC before making commercial use of such images. Nor, strictly speaking, are SEC athletic

events at UT “public events.” On the contrary, attendance requires the purchase of a ticket, and such attendance requires acceptance of certain terms and conditions regarding such matters as behavior and conduct.

While the above-quoted provisions of the credential policies are somewhat lengthy and couched in legalese, the essential restrictions imposed upon photographs generated by members of the press concern commercial uses that might be interpreted as conveying the endorsement of some product or entity by the SEC, UT, or some member of the athletic teams or staff of UT athletic teams. Under the sub-heading “Bearer Generated Images,” small roman numerals (i) through (v) address these concerns, with small roman numeral (v) setting forth what may be considered the primary concern with the potential commercial uses of images acquired at athletic events; i.e., images may not be used in a manner likely to create the false impression that some item or product is endorsed by or associated with the SEC, UT, or any member of any SEC athletic team or athletic staff.

These restrictions are consistent with protections afforded under the federal Lanham Act (*see* 15 U.S.C. §§ 1114 and 1125) for holders of trademarks, as well as corresponding protections under the state Tennessee Trade Mark Act of 2000 (*see* Tenn. Code Ann. §§ 47-25-501 – 518). Legal protections such as those set forth in trademark laws and copyright law (*see* 17 U.S.C. § 202, *et seq.*) are, by their very nature, restrictive. These laws operate by reserving rights in a person or entity and prohibiting the infringement upon those rights by all others unless through some license or other legal arrangement. Consequently, the restrictions set forth in the credential policies at issue here are neither unusual nor illegal.

2. With regard to your second question, it is again important to initially define the terms we are employing. While this question refers to a citizen’s or a media outlet’s right to “manage its own copyrighted material,” this appears to assume that a media outlet’s rights to its own material (presumably photographs or video taken at an SEC/UT athletic event) are unlimited. As already discussed, however, as a condition for access to the event, members of the media must agree in advance to the credential policies for the event. The initial provisions of the credential policies state as follows:

By accepting or using a media credential (“Credential”) for access to any game or athletic contest sponsored or hosted by the Southeastern Conference (the “SEC”) or by any one or more of its member institutions (herein an “Event” or the “Events”) each person and entity issued such a Credential (herein referred to, along with the employer of each such person, collectively as a “Bearer”) agrees to the following terms and conditions:

General

Each Bearer must be and hereby represents that he or she is acting on a specific assignment for an accredited media agency and has a legitimate working function in connection with the Event attended. The Credential is not transferable and may be revoked at any time.

The rights and privileges granted to Bearer may be terminated if any term or condition for use of the Credential is breached. The unauthorized use of the Credential subjects the Bearer to ejection from the Event.

While within the Event venue, Bearer shall, at all times, adhere to the policies in place for the Event, abide by and respect access limitations, and accept and follow directions provided by the SEC or the SEC member institution(s) hosting the Event.

Bearer assumes all risks incidental to the performance by the Bearer of Bearer's services in connection with the Event and assumes all risks incidental to each Event, whether occurring before, during or after the actual playing of the Event, and agrees that the SEC, its member institutions, and their respective agents, employees, directors, officers, student-athletes, coaches, and contractors shall not be liable for bodily injury, property damage or theft losses suffered or incurred by Bearer at the Event. Bearer understands that sports contests are physical, and that in the normal course of play it is possible for balls, players, or other objects to leave the court, track, course, or field of play and impact spectators. Bearer hereby waives and releases any and all Claims (as defined below) against the SEC and its member institutions arising directly or indirectly from any such injury, including those attributable to their negligence or that of their agents.

In the event that the name or likeness of Bearer is included in any broadcast, telecast, photograph, film, video or other media taken in connection with any Event, Bearer grants the SEC (or, if the media is controlled by a SEC member, grants such SEC member) the non-exclusive, transferable, perpetual right and license to use (and to sub-license the use of) such name and likeness in any media worldwide whether now known or thereafter devised.

Bearer agrees to indemnify and save harmless the SEC, its member institutions, and their respective agents, employees, directors, officers, student-athletes, coaches, and contractors, of and from any and all claims, liabilities, demands and causes of action asserted by persons and entities other than the SEC and its member institutions (jointly "Claims") arising out of any act or omission, or anything done or purported to have been done, by Bearer, including but not limited to Claims arising from Bearer's breach of any term or condition hereof. With respect to any Claim that might give rise to liability of the Bearer as an indemnitor, the indemnified party shall: (a) have the right to fully participate in the litigation of such claim with counsel selected by the indemnified party at the sole expense of the Bearer, and (b) not be obligated, without its consent, to participate in any settlement of such Claim.

These policies place explicit limits upon the uses made of images derived from the athletic event. Members of the media who refuse to agree to these conditions are denied entry to the event.

3. Your third question asks whether a State university may “compel news media to provide a college athletic conference the right to use, without the media’s consent, photographs of a sporting event taken by the media.” This question appears to refer to the following portion of the media credential policies quoted above:

In the event that the name or likeness of Bearer is included in any broadcast, telecast, photograph, film, video or other media taken in connection with any Event, Bearer grants the SEC (or, if the media is controlled by a SEC member, grants such SEC member) the non-exclusive, transferable, perpetual right and license to use (and to sub-license the use of) such name and likeness in any media worldwide whether now known or thereafter devised.

This provision appears to refer to video broadcast or photographic images that contain “the name or likeness” of a member of the media, such as an individual reporter or photographer, or the name of a specific newspaper or television station. In such cases, this provision obviates the need on the part of the SEC or a member institution to secure an additional release before broadcasting the video images or using the photographs in some way.

Other previously-quoted portions of the credential policies, however, acknowledge the rights of the members of the media to use their own photographs:

Bearer Generated Photographs may be used (and posted on the internet) in connection with and as part of regular print news coverage, including internet print news coverage. In addition, provided that Bearer complies with the other provisions and restrictions in this Credential (including but not limited to the provisions and restrictions set forth in the preceding section entitled “Bearer Generated Images”) and that Bearer imposes upon and subjects the buyer or licensee to all such provisions and restrictions (as if the buyer or licensee had taken the photograph), Bearer may sell or relicense Bearer Generated Photographs.

As discussed above, while members of the media may prefer not to agree to the terms and conditions set forth in the credential policies, agreement is required before entry into the athletic event. Members of the media may therefore feel “compelled” to agree to the terms of the policies, but the provisions of the credential policies are designed to protect the interests of the SEC, the member institutions, and the players and coaches who are involved in the athletic event.

The authority of a state educational institution, such as UT, to place such terms and conditions upon media access to athletic events derives from state law. The Tennessee General Assembly has vested governing authority over the operations of the University of Tennessee in a board of trustees. Tenn. Code Ann. § 49-9-209. These powers are broadly defined.² The powers of the UT board of trustees include the authority to “make bylaws, rules and regulations for the

² See generally Op. Tenn. Att’y Gen. No. 94-106 (September 9, 1994).

government of the university and the promotion of education in the university that in their opinion may be expedient or necessary.” Tenn. Code Ann. § 49-9-209(e)(1). The trustees are further empowered to purchase, receive, hold, use and dispose of “lands, tenements, goods or chattels, in such manner as to them shall seem most advantageous for the use of the university.” Tenn. Code Ann. § 49-9-209(b)(1).³ In light of these plenary powers vested in the university and its trustees, it is clear that the adoption of media credential policies such as those at issue in this opinion is well within the authority of the trustees.

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³ The Tennessee Board of Regents is vested with comparable powers over the operations and maintenance of the State University and Community College System. *See e.g.* Tenn. Code Ann. §§ 49-8-101, 202, and 203.