



Ms. Lillian Adeyemi, President
Texas Forensic Association

September 28, 2020

Dear Ms. Adeyemi:

As you requested, we are providing you with a discussion of the applicable law concerning Media Release Forms in Texas. Specifically, you have asked us to address the following inquiries: (1) whether the Texas Forensic Association's Media Release Form "protects" individual member schools or only the Texas Forensics Association (hereinafter "TFA") as a business entity, and (2) the extent to which the Federal Educational Rights and Privacy Act (FERPA) found in 20 U.S.C. Section 1232g; 34 CFR Part 99 applies to the media releases obtained from students.

Media Release Forms

Texas recognizes a common law right to prevent the appropriation of one's name or likeness. *Kimbrough v. Coca-Cola/USA*, 521 S.W.2d 719 (Ct. Civ. App. Tex. 1975); *U.S. Life Ins. Co. v. Hamilton*, 238 S.W.2d 289 (Ct. Civ. App. Tex. 1951); *Brown v. Ames*, 201 F.3d 654 (5th Cir. 2000); *Henley v. Dillard Dept. Stores*, 46 F. Supp.2d 587 (N.D. Tex. 1999). Under Texas law a plaintiff must establish three elements to make a misappropriation claim: (1) appropriation of the plaintiff's "name or likeness for the value associated with it"; (2) the plaintiff can be identified from the publication; and (3) the defendant received "some advantage or benefit." *Express One Intern., Inc. v. Steinbeck*, 53 S.W.3d 895 (Ct. App. Tex. 2001); *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489 (Ct. Civ. App. Tex. 1979); *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994).

A. Consent

Consent is a complete defense to a legal claim for misappropriation of name or likeness or violation of the right of publicity. Said consent can be obtained from a model release. The existence of a model release is of particular significance to a claim for commercial appropriation as "a signed release is an affirmative defense to the tort of misappropriation." *Kimbrough v. Coca-Cola USA*, 521 S.W.2d 719 (Tex. Civ. App.--Eastland 1975, writ ref'd n.r.e.). Further, the safekeeping of model releases is extremely

important. If a publisher or photographer cannot produce a signed release (due to loss or destruction, for example), it is up to the trier of fact to determine the credibility of the witnesses and to decide whether a signed release existed or not. *Asylum Enterprises, Inc. v. Michael McIntyre*, 1988 Tex. App. 814 (1988).

B. Legal Application

The TFA's Media Release Form grants the organization a property right in the recordings of students during TFA competitions. A property right can be assigned or transferred at the will of the owner. Therefore, the TFA can choose whether to assign this right to its member organizations or whether it is solely the TFA that has the right to use the property for commercial use. For example, if the TFA decided to consent to Elkins High School's use/distribution of the final round of Original Oratory from their upcoming tournament, this would be legal because the property is the property of the organization. Whether the individual TFA member schools could use this likeness depends on the agreement between the TFA and its member institutions. In short, **there is no need for a redraft or edit of the current media release unless there has been an explicit request by a TFA member school to use or distribute the recordings from TFA events.** The Media Release in and of itself does not provide any explicit protection to any entity. Should an entity be sued for the use of the recordings from a TFA tournament, that entity would have a complete defense against the claimant because the recordings are the property of the TFA, not of the individual student. The TFA would be the only entity with a legal right to the recordings, and it does not appear foreseeable at this time, that the TFA would need to make a legal claim against one of its member institutions.

Federal Educational Rights and Privacy Act (FERPA)/20 U.S.C. Section 1232g; 34 CFR Part 99

FERPA is designed to protect certain CLASSIFIED material and only covers information that is created or maintained by an educational institution (school) or an agent of the institution. *Owasso Independent School District v. Falvo* (2008). First, with the presence of a valid waiver allowing information to be released, FERPA is inapplicable. Second, recordings of extracurricular competitions are not the sort of information covered by FERPA. This Act does not bar disclosure of information that is not considered harmful or an invasion of privacy if it were to be disclosed. Basic student information is not covered by FERPA if it cannot be used to gain access to student education records. The educational information covered by FERPA is fairly specific and includes information such as, "a student's transcripts, GPA, grades, SSN, and academic (and sometimes psychological) evaluations. In the *Falvo* case mentioned above, the court held that the information covered by FERPA is narrowly classified, holding that "peer grading" was not educational information for the purposes of FERPA. Information created and maintained by TFA or by member schools in which competitor students are not even enrolled are not even remotely FERPA-related. Courts have also held that things like letters of recommendation do not meet the strict definition of "educational records" according to FERPA and have been reluctant to expand that definition beyond personal student data. Information not created by the school a student attends and maintained in the institution's files ARE NOT covered by FERPA. In short, speech and debate competitions do not trigger FERPA in any direct way.

We hope that this serves as an adequate answer to your questions; however, should you have any follow-up questions, do not hesitate to contact us again.

Very truly yours,

Your friends at
Houston Legal Network