

**PENDER &  
COWARD P.C.**  
ATTORNEYS AT LAW

GREENWICH CENTRE  
192 BALLARD COURT, SUITE 400  
VIRGINIA BEACH, VA 23462-6557

TELEPHONE (757) 490-3000  
FACSIMILE (757) 497-1914  
www.pendercoward.com

H. Lee Addison, III  
S. Beryl Adler  
Mark R. Baumgartner  
R. Neal Butt  
Kathryn Byler Clark  
Paul A. Driscoll  
Lisa Ehrich  
Douglas J. Glenn  
Bradley D. Goldizen

David L. Horne  
Douglas E. Kahle  
Peter M. Kubin  
William A. Lascara  
James B. Lonergan  
Burke W. Margulies  
Richard H. Matthews  
Mary Keating O'Neill  
Beverlee R. Peters

Jeff W. Rosen  
Charles M. Sallé  
Daniel M. Schieble  
Mark E. Slaughter  
Glen W. Thompson  
A. W. VanderMeer, Jr.  
Sarah J. Zecca

**Douglas J. Glenn**  
**(757) 490-6254**  
**dglenn@pendercoward.com**

[Date]

***Via UPS Next Day Air®***

Jerry D. Cain, General Counsel  
Office of the General Counsel  
**VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY**  
219 Burruss Hall  
Blacksburg, Virginia 24061

**Re: *Press Credentialing by Virginia Tech for TechSideline.com***

**My Client: *SportsWar, L.L.C.***

**My File No.:**

Dear Mr. Cain:

I trust that you will recall that I represent SportsWar, L.L.C. ("Sportswar"), which is the parent company of TechSideline.com ("TSL"). When we last spoke regarding Virginia Tech's denial of press credentials to TSL in August of last year, I indicated in closing that I would share with you both a more detailed explanation of SportsWar's legal position and the history of TSL's relationship with the Virginia Tech Athletic Department so that you could educate yourself on the issue. I apologize for not doing so but for a number of reasons, SportsWar determined to wait through this year's football season to see if circumstances changed. Regretfully, they haven't. Therefore, we are ready to move forward.

Let me preface the balance of this letter by advising that in the interim period, SportsWar has consulted with one of the Commonwealth's most prominent law firms, Hunton & Williams, with whom I trust you are familiar, and received assurances that SportsWar's legal position is sound. In fact, we were advised that there is a strong likelihood that SportsWar will succeed on a claim to enjoin Virginia Tech's discriminatory press credential policy. Obviously, the law presents few absolutes and any assurance of success, even from a firm as well-regarded as Hunton & Williams, is just rhetoric, but you need to appreciate that we have done our homework regarding this issue. What I am offering you is not just lip-service - we are very comfortable with our legal position. That said, SportsWar would prefer to utilize its resources to grow its business model and allow Virginia Tech to spend tax dollars on something slightly more important than defending Jim Weaver's personal vendetta against TSL. The decision is yours.

## The Facts

The facts here are pretty straight forward and likely not in dispute. TSL is web-only media devoted exclusively to covering Virginia Tech athletics. TSL has a full-time General Manager<sup>1</sup> and employs many other writers and journalists who write both for publication on the TSL's website as well as for TSL's monthly magazine, *TSL Extra*. SportsWar has invested more than a million dollars in building both TSL and its sister web site, TheSabre.com, which covers University of Virginia athletics, so TSL can in no way be viewed as a so-called "fan" or "hobby" site. TSL receives millions of pageviews each month from thousands of unique visitors and is very likely the most widely-read publication covering Virginia Tech athletics with a reach far greater than the "traditional" print and broadcast media that generally cover Virginia Tech. TSL has made numerous requests for media access to the Virginia Tech Athletic Department in order that it might be treated like other media by enjoying access to players, coaches, press conferences and games. In each case, TSL's request has been denied based on Virginia Tech's stated policy that only official/designated web sites of the two competing schools are eligible for press credentials<sup>2</sup>. However, this policy has gradually expanded over time to also allow credentials to be granted to official conference web sites as well as web sites affiliated with (although not necessarily owned by) print or broadcast media. Interestingly, as Dr. Steger stated in his April 4, 2001, letter to Matt Welsh, Virginia Tech justifies its policy of excluding web-only media because the Athletic Department "must make judgment calls about the *viability* of any entity requesting press credentials," suggesting a very subjective criteria applied exclusively to web-only media [*emphasis added*]. Moreover, Virginia Tech's stated policy regarding access to the football program in particular by web-only media is at direct odds with the access afforded BeamerBall.com, which, despite being unaffiliated with any "traditional" media or an official site, has arguably greater access than any form of media covering Virginia Tech athletics.

## The Law

Courts have held generally that the press does not have a special right of access to government information not available to the public. However, once access is afforded the press, and especially when the forum for such access is created for the press (i.e. a press conference), the Courts have not developed a consensus on the question of discrimination among press organizations<sup>3</sup>. Neither the Supreme Court nor the Fourth Circuit have adjudicated the issue. Many lower courts have noted, however, that, within certain limits, equal access to official news sources must be provided to prevent the state's ability to control the content of what is published<sup>4</sup>. The First Amendment prevents public officials from restraining free speech by selectively releasing information to selected individuals. In addition, the Fourteenth Amendment provides for equal protection of the law and requires that equally

---

<sup>1</sup> You might find it interesting that TSL's General Manager, Will Stewart, is a fully accredited member of the Football Writers Association of America.

<sup>2</sup> From both information produced by Virginia Tech in response to SportsWar's FOIA request and other information SportsWar has obtained, we know that Virginia Tech has deviated from this policy on more than six occasions relative to web-only media, including having granted access to TheSabre.com. Moreover, such a policy is not universally recognized as numerous colleges routinely grant credentials to web-only media. UVa has credentialed TheSabre.com for several years and TSL was credentialed by West Virginia University for this year's football game between Virginia Tech and WVU at West Virginia. Further, TSL was also fully credentialed for this year's Gator Bowl. TSL has also been credentialed at "road" venues on two other occasions, for football and men's basketball.

<sup>3</sup> See *Newsgathering, Press Access and the First Amendment*, 44 *Stan. L. Rev.* 927 (1992), pages 944 – 947.

<sup>4</sup> *Id.*

situated individuals be treated equally. Therefore, Virginia Tech's denial of press credentials to TechSideline.com without an articulable justification suggesting a legitimate state interest in the prohibition of all web-only journalistic sites is an impermissible content-based infringement of TSL's constitutional rights.

The First Amendment prevents prior restraint on the freedom of expression. See *Quad-City Community News Service v. Jebens*, 334 F. Supp. 8, 13 (S.D. Iowa 1971). Impermissible restraint includes public officials "funneling information to the public through only certain representatives." *Id.* Therefore, "opportunities to cover official news sources must be the same for all accredited news gatherers." *Westinghouse Broadcasting Co., Inc. v. Dukakis*, 409 F. Supp. 895, 896 (D. Mass. 1976). Representatives of news organizations must be given "access with equal convenience to official news sources." *Id.* This right of access can only be infringed if the state can demonstrate a compelling contrary interest. *Id.* The singling out of companies engaged in First Amendment activities for different regulatory treatment, especially when the government actor creates the forum for such activities, is a method of both content-based and forum-based discrimination that triggers strict scrutiny under both the First Amendment and the Equal Protection Clause. Virginia Tech's policy of treating journalists for web-only media differently from other journalists cannot survive such close scrutiny. See e.g., *Arkansas Writers project, Inc., v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Carey v. Brown*, 447 U.S. 455 (1980); *Niemotko v. Maryland*, 340 U.S. 268 (1951); see generally *Kenneth L. Karst, Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975).

Virginia Tech has no obligation to make press facilities available, however, once it chooses to do so, it cannot deny access "arbitrarily or for less than compelling reasons." *Sherill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977). Certainly, under some circumstances, access to press facilities must be restricted due to space limitations. However, even in these situations all members of the press must be given a reasonable opportunity to gain equal access. See, e.g., *WPIX, Inc. v. League of Women Voters*, 595 F. Supp. 1484 (S.D. NY 1984). "Any classification which serves to penalize or restrain the exercise of a First Amendment right, unless show to be necessary to promote a *compelling* governmental interest is unconstitutional." *Quad-City*, 334 F. Supp. at 18. The state must have fixed criteria to evaluate the conditions of access. In developing such criteria, Virginia Tech must be guided by "narrow and specific standards which advance a compelling state interest." *Quad-City*, 334 F. Supp. at 23. In addition, Virginia Tech must timely inform TechSideline.com of the specific reasons for denying access in order to satisfy TSL's right to due process, especially if the decision is based, in part, on Virginia Tech's determination that the viability of TSL is in question. *Id.*

For example, in *KTSP-Taft Television and Radio Co. v. The Arizona State Lottery Commission*, 646 F. Supp. 300 (D. Ariz. 1986), a television news network sought access to broadcast the weekly lottery picks. The Lottery Commission argued that, for commercial reasons, it had contracted with one television station to broadcast all of the events, and could therefore limit access to other stations. *Id.* The court, after accepting the need for the commercial contract, nonetheless ordered the Commission to "publish minimum criteria which, if met, shall result in the receipt of a broadcast contract." *Id.* at 313; see also *Post Newsweek Stations-Connecticut Inc. v. Travelers Insurance Co.*, 510 F. Supp. 81 (D. Conn. 1981) (criteria must not be arbitrary or unduly restrictive). Thus, although the state may require certain prerequisites to access, those prerequisites must be both necessary and applied consistently. *Id.*; see also *Sherill v. Knight, supra* (government must publish or make known actual standards used to determine access.)

Generally, then, Virginia Tech may determine whether and to whom to grant press credentials as a legitimate time, place and manner restriction on speech so long as the process for doing so is content neutral, is applied consistently and is justified by a larger state interest. Virginia Tech cannot meet such a legal standard, however, by simply implementing a “blanket” policy which provides that no web-only journalistic site will be accorded press credentials. As articulated by Dr. Steger, Virginia Tech justifies such a blanket prohibition by arguing it is “fairly implemented across the board (to wit, no web-only journalist)” However, Virginia Tech does not employ a similar “blanket” policy with regard to other media; rather, credentials and access are granted on a case-by-case basis and, further, inconsistently applied such policy by affording access to at least six web-only journalists over the past three years to Virginia Tech athletic events, coaches, players and/or administrators, including TSL’s sister publication, TheSabre.com. Moreover, as noted previously, Virginia Tech supplies ongoing access to BeamerBall.com, a web-only journalistic endeavor that is neither affiliated with any form of “traditional” media or an official site.

During the course of our telephone conversation, you specifically mentioned the case of *Smith v. Plati*<sup>5</sup>. However, we do not believe that the Tenth Circuit’s opinion in *Plati* requires a Virginia court or the Fourth Circuit to disregard SportsWar’s position in this matter because the Tenth Circuit plainly did not thoroughly consider the principles underlying the public forum doctrine or those decisions that prohibit the imposition of regulations on companies engaged in First Amendment activities that single out some forums of media for different or disparate treatment. To be perfectly frank, *Plati* is bad facts making bad law and not at all analogous to our situation. First, the plaintiff in *Plati*, an attorney whom both the District Court and 10<sup>th</sup> Circuit said should have known better, operated a non-profit, “fan” web site. Second, he premised his claims in state law. As you are no doubt aware, both a state and state actor acting in an official capacity are generally entitled to sovereign immunity from suit. However, a state actor may be enjoined from enforcing an unconstitutional policy and may be personally liable for his conduct<sup>6</sup>. To fall within the said exception, a plaintiff must show (1) an ongoing violation of federal law; (2) apply only to prospective relief and (3) has no application against a State or state agency. In this instance, for the reasons outlined above, Virginia Tech, through the Athletic Director as the State Actor, has adopted a policy which violates SportsWar’s Constitutional rights as it clearly has the impact of discriminating between legitimate journalists solely on the basis of the medium in which they work. In addition, the *Plati* case began when the Internet was in its infancy and the facts do not relate in any to how TSL operates or in its relationship with Virginia Tech.

### **Conclusion**

Virginia Tech's legal position is weak. Virginia Tech's policy is unconstitutionally subjective. There are no criteria in place to assess the worthiness, or “viability” as Dr. Steger suggests, of entities desiring to cover Virginia Tech athletics. SportsWar clearly operates its sites, including TSL, as a business and TSL is clearly media. While a unilateral ban on all unofficial web-only media may have been defensible 5 years ago, it can be no longer. The Internet is now a mature and firmly established medium. Virginia Tech has yet to give us any *specific* reason for denying access. Moreover, as noted, Virginia Tech doesn’t even apply what purports to be its policy consistently. Virginia Tech has allowed access to unofficial web-only media entities, including, but not limited to BeamerBall.com, which is allowed greater access than any media entity covering Virginia Tech despite the fact that it is not even credentialled.

---

<sup>5</sup> 56 F. Supp 2d 1195 (1999), *affm’d* 2001 U.S. App. LEXIS 17040 (10<sup>th</sup> Cir. 2001)

<sup>6</sup> *Id.* at page 15 citing *Ex parte Young*, 209 U.S. 123, 52 L.Ed. 714, 28 S. Ct. 441 (1908)..

In addition to a strong legal case, we haven't even touched on the politics of this whole issue and how Virginia Tech may fare in the court of public opinion. Even if Virginia Tech manages to initially win the legal battle, it will lose the political war. Over 80,000 Hokie alumni and fans love TSL and see the site as a valuable news source. These are the same individuals who donate large sums of money to Virginia Tech, buy tickets to athletic events, buy Virginia Tech merchandise and otherwise support the University. We have thus far kept the history of this conflict very private, expecting that reasonable thinking would ultimately prevail at Virginia Tech. This, unfortunately, has not been the case. We will be informing all of our readers of the unfair treatment we have been subjected to by Virginia Tech, specifically Mr. Weaver. Enclosed please find a letter from TSL's General Manager which we will be posting conspicuously on TSL if this issue is not resolved in the coming weeks or so. We know that these "constituents" of the university will find Virginia Tech's treatment of TSL to be abhorrent and will vociferously support our position. This issue is a much bigger issue in the eyes of TSL's fans than I think Virginia Tech realizes and TSL's position is compelling. To this point, Jim Weaver has managed to keep control of this issue on "his plate" and, as such, continues to do everything possible to frustrate TSL's business. If everyone played by the same rules, fine, we could live with that. However, what Virginia Tech has is a set of rules for BeamberBall.com, different rules for other web-only and more traditional media and a very special set of rules for TSL administered personally by Mr. Weaver. Many of the reporters who cover Virginia Tech athletics have privately remarked to TSL's General Manager that what Virginia Tech is doing to TSL is unfair and are surprised it has gone on this long. Moreover, as I told you previously, TSL enjoys almost universal support throughout the Virginia Tech Athletic Department and many Athletic Department employees privately tell us that no one understands Virginia Tech's "official" position regarding TSL. Maybe you can change that. I hope so.

As I look forward to and thank you for your further word, I remain,

Very truly yours,

**Pender & Coward, P.C.**

Douglas J. Glenn

Enclosure

pc: SportsWar, L.L.C.