

Arizona Right of Publicity Statute for Soldiers Trumped by First Amendment

By Thomas W. Brooke

Peace activist and Arizona resident Dan Frazier has succeeded in his injunction action challenging a recently enacted state statute prohibiting the use of the name of any soldier, alive or deceased, on any item for sale without permission of the soldier or a legal representative. The law imposes civil and criminal penalties for using the names of American soldiers. A federal judge in Arizona, however, enjoined its enforcement against Frazier for marketing t-shirts with anti-war messages. [*Frazier v. Boomsma*](#), No. CV 07-

08040-PHX-NVW (D. Ariz. Sept. 27, 2007). The ruling casts into doubt the enforceability of similar laws passed in Florida, Louisiana, Oklahoma, and Texas.

Frazier owns and operates a website where he sells t-shirts featuring messages such as “Bush Lied-They Died” printed over a background consisting of the names of the thousands of soldiers killed in Iraq. A dozen or so family members of these soldiers expressed anger over use of their loved ones' names. As a result of these complaints, in May 2007, Arizona enacted this right of publicity statute designed to allow soldiers and their heirs to control the use of individual soldier's name, portrait or picture.

Following its passage, Flagstaff police notified Frazier that they were preparing to bring a case against him to the city attorney. Frazier brought a lawsuit and moved for a preliminary injunction against enforcement of the law against him.

The Arizona federal district court, after finding that Frazier had standing to bring the lawsuit because he had sufficient threat of injury, rejected the state's argument that the regulation was entitled to a deferential review. The court held that Frazier's t-shirts and web advertisements were not commercial speech, but instead were political speech entitled to heightened First Amendment protection.

“The mere fact that Frazier sells the t-shirts does not transform them into less-protected commercial speech. The political and commercial dimensions of the speech cannot be separated because the mode of expression has a cost.”

The court also rejected the state's assertion that the restriction was content neutral, noting that law enforcement, before enforcing the law against someone, would need to know the content of the

person's expression included the name of the dead soldiers.

The court examined the interests advanced by the state and found that none constituted the compelling state interest required to overcome the strict scrutiny analysis that applies to content-based restrictions like Arizona's statute.

The state's goal of establishing a common-law right of publicity for a soldier or soldier's family was insufficient where the soldier's name was integral to a political message, as in this case. Because a

focal point of Frazier's critique of the Iraq war is the magnitude of the personal loss that it has produced, the individual identities of the de-

ceased American soldiers are not only reasonably related to his message, but integral to it. The court also noted that, unlike actors or sports figures, the soldiers did not earn their livings from their names, and that the statute therefore loses much of its economic justification.

The court similarly rebuffed the state's argument that the statute was necessary “to prevent a misleading impression that a soldier has endorsed a particular point of view when he or she has not.” The court found that there is no credible risk of misunderstanding in this case because there is no suggestion that the troops endorse the opinions expressed.

Finally, the court held that the statute was not narrowly tailored. It contains no temporal restraint nor is it focused on soldiers whose families are grieving. While the court acknowledged the families of deceased soldiers suffer pain, and that pain may be compounded by associations with the anti-war cause a soldier did not support, the court wrote, “But we each have our own convictions of the worth of our political values and of the service we choose to give. In our diverse and democratic society, that worth is not diminished by the disagreement of others.”

After finding that Frazier had a probability of succeeding on the merits of the First Amendment question, the court also found that he had shown sufficient likelihood of irreparable harm. The choice Frazier had faced – cease an activity entitled to First Amendment protection, or face prosecution for continuing that activity – constituted sufficient potential harm to warrant a preliminary injunction, the court held.

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