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Chapter 20: The Shirt Heard ‘Round the World

Colin Sullivan

Code Section Affected

Civil Code § 3344.1 (amended).

AB 585 (Cook); 2010 STAT. Ch. 20.

I. INTRODUCTION

Dan Frazier runs a small Internet business selling political bumper stickers and other paraphernalia.¹ To protest the war in Iraq, he began selling large bumper stickers listing the names of soldiers who had died with the words “Bush Lied” superimposed over the names.² After those bumper stickers sold out and Frazier realized he could no longer fit all of the fallen soldiers’ names onto a bumper sticker, he decided to transfer his design onto a shirt.³ On a black shirt, Frazier printed the names in small white text on the front and back, with the words “Bush Lied” superimposed in large red letters over the front and “They Died” over the back.⁴

After the initial run of 100 shirts did not sell well, Frazier considered donating the shirts to Goodwill.⁵ However, in early 2006, Louisiana and Oklahoma introduced laws to stop the sale of the shirts.⁶ Ironically, the laws intended to prevent the shirts from being sold actually resulted in increased sales.⁷ Because of the media attention the laws attracted, sales picked up and Frazier sold over 4,000 shirts by 2008.⁸

1. See CarryaBigSticker, <http://www.carryabigsticker.com/> (last visited Mar. 16, 2010) (on file with the *McGeorge Law Review*) (showing the online storefront for Dan Frazier’s business).

2. Dan Frazier, Speech to the ACLU Board of Directors, Arizona Chapter (Sept. 20, 2008), available at http://www.carryabigsticker.com/bush_lied_shirt.htm#speech (on file with the *McGeorge Law Review*) (“The shirt actually was an outgrowth of a large bumper sticker that had listed 500 fallen troops. The sticker had just said ‘Bush Lied.’”).

3. *Id.* (“But by the time we ran out of those stickers, a thousand more American soldiers had died in Iraq. I could not see how we were going to fit that many more names on a bumper sticker. Then I hit on the idea of doing a T-shirt.”).

4. See CarryaBigSticker, Bush Lied They Died T-Shirt, http://www.carryabigsticker.com/bush_lied_shirt.htm (last visited Apr. 10, 2010) (on file with the *McGeorge Law Review*) (portraying the front and back of the shirt in question).

5. Frazier, *supra* note 2 (“Months went by and we kept marking down the price to try to get rid of them. We had dropped the shirts from \$18 to \$10 and we still had a lot of shirts on the shelf. I thought I might have to give some shirts to Goodwill.”).

6. LA. REV. STAT. ANN. § 14:102.21 (West 2006); OKLA. STAT. tit. 21, § 839.1A (West 2006); see CarryaBigSticker, Bush Lied They Died T-Shirt, *supra* note 4 (“In early 2006, at the urging of certain family members who lost loved ones in Iraq, legislators in Oklahoma and Louisiana introduced legislation intended to stop the sale of the shirts.”).

7. See The Streisand Effect, <http://www.thestreisandeffect.com/about/> (last visited July 31, 2010) (on file with the *McGeorge Law Review*) (explaining that an attempt to censor information which actually leads to the information becoming more widespread is known as the “Streisand Effect”).

8. Frazier, *supra* note 2 (“It turned out that the publicity about the various efforts to stop my shirt sales

II. LEGAL BACKGROUND

A. “When the fall is all there is, it matters.”⁹

Many family members of fallen soldiers oppose the sale of Frazier’s shirts¹⁰ because they feel the shirts dishonor those who died in service to their country.¹¹ As a result, several state legislatures have passed laws to stop the sale of the shirts.¹² Congress also considered passing a law to stop their sale at the national level.¹³

B. Intermediate or Strict Scrutiny?

In 2008, Dan Frazier challenged Arizona’s law banning the shirt sales in federal court.¹⁴ In *Frazier v. Boomsma*, the Arizona District Court granted summary judgment in his favor.¹⁵ The main issue the court addressed in *Frazier* was which class of speech the shirts fell under—commercial speech or political speech.¹⁶

Restrictions on commercial speech are subject to intermediate scrutiny.¹⁷ This standard requires the method of restriction to directly advance a substantial government interest no more extensively than necessary to serve that interest.¹⁸

was good for business. . . . We have sold more than 4,000 shirts since then, and they keep selling.”).

9. *THE LION IN WINTER* (Avco Embassy Pictures 1968) (waiting for retribution at the hands of their father Henry II, Prince Geoffrey chastises his brother Prince Richard for being chivalrous in the face of death and Richard replies with this quote).

10. CarryaBigSticker, *Bush Lied They Died T-Shirt*, *supra* note 4; *see also* Frazier, *supra* note 2 (“In early 2006, at the urging of certain family members who lost loved ones in Iraq, legislators in Oklahoma and Louisiana introduced legislation intended to stop the sale of the shirts.”).

11. *See* CarryaBigSticker, *Bush Lied They Died T-Shirt*, *supra* note 4 (“Some have said that I should not be degrading the sacrifices of the troops”).

12. Frazier, *supra* note 2 (“Five states have passed legislation aimed at outlawing the sale of these shirts [Texas, Florida, Oklahoma, Louisiana, and Arizona.]”); TEX. BUS & COM. CODE ANN. § 35.64 (Vernon 2007) (since replaced by TEX. BUS & COM. CODE ANN. § 721.001 (Vernon 2009)); FLA. STAT. § 540.08 (West 2007); OKLA. STAT. tit. 21, § 839.1A (West 2006); LA. REV. STAT. ANN. § 14:102.21 (West 2006); ARIZ. REV. STAT. ANN §§ 13-3726, 12-761 (West 2007).

13. *Soldiers Targeted by Offensive Profiteering Act of 2006*, H.R. 5755, 109th Cong. § 987 (2006) (prohibiting the use of names or images of soldiers for certain commercial uses, but the bill died in the Subcommittee on Military Personnel).

14. *Frazier v. Boomsma*, No. 07-CV-8040-PHX-NVW, 2008 WL 3982985, at *4 (D. Ariz. Aug. 20, 2008).

15. *Id.* (granting summary judgment to Frazier).

16. *See id.* at *3 (“Distinguishing commercial speech from political speech can be difficult, especially when the speech at issue proposes a commercial transaction and contains discussion of important public issues.”).

17. *See, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring) (applying “an intermediate level of scrutiny” to commercial speech).

18. *See, e.g., id.* at 566 (explaining the analysis used to determine if a restriction on commercial speech is constitutional).

Restrictions on political speech, however, must withstand strict scrutiny.¹⁹ This standard requires that the method of restriction be narrowly tailored to achieve a compelling government interest.²⁰

In *Frazier*, the court determined the shirts constituted political speech and held the Arizona law was unconstitutional as applied to the shirts because it could not withstand strict scrutiny.²¹

C. “Once more unto the breach . . .”²²

With Chapter 20, California now joins five other states that have passed laws to prevent the sale of *Frazier*’s shirts.²³ Although Chapter 20 is similar to the law passed in Arizona, the Assembly Committee on Judiciary’s analysis of Chapter 20 predicts that it is distinguishable.²⁴

D. *The Right of Publicity*

Section 3344.1 of the Civil Code provides a cause of action for the use of a deceased personality for commercial purposes.²⁵ Prior law defined a deceased personality as “any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death.”²⁶ This creates a property right in the deceased personality’s name, voice, signature, photograph, or likeness, and allows the deceased personality’s heirs, or whomever owns the property right, to bring suit against infringers.²⁷

19. See *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (“Because [the restricting statute] burdens political speech, it is subject to strict scrutiny.”).

20. *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 45 (1983) (“For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”).

21. See *Frazier*, 2008 WL 3982985, at *4 (holding that “[i]t is impossible to separate the political from the commercial aspects of that display,” and as a result, the law cannot withstand the strict scrutiny used to evaluate restrictions on political speech).

22. WILLIAM SHAKESPEARE, *HENRY V* Act III (1598).

23. See ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 585, at 1 (Apr. 14, 2009) (“This bill is a response to Internet websites selling T-shirts and other political paraphernalia that list the names of the Iraqi war dead as a means of expressing opposition to the war in Iraq and, presumably, to make a profit as well.”).

24. See *id.* at 5 (“However, it should be pointed out that the California law is different from the Arizona law in two important respects: first, it does not impose a criminal penalty; and second, it is an amendment to an existing “right of publicity” statute that has withstood constitutional scrutiny.”).

25. See CAL. CIV. CODE § 3344.1(a)(1) (West 2010) (“Any person who uses a deceased personality’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services”).

26. *Id.* § 3344.1(h).

27. *Id.*

III. CHAPTER 20

Chapter 20 amends section 3344.1 of the Civil Code by expanding the definition of a “deceased personality” to include a natural person who gains commercial value “because of his or her death,” and not just a natural person who had commercial value “at the time of his or her death.”²⁸

IV. ANALYSIS

A. “[F]ew would quarrel with the sentiment behind this bill . . .”²⁹

Groups who want to prevent the exploitation of United States troops after death strongly support Chapter 20.³⁰ While the sentiment of these groups is understandable, Chapter 20 may not be constitutional as applied to the shirts, if the shirts are classified as political, rather than commercial speech.³¹

This debate boils down to a question of what courts consider to be commercial speech.³² If future courts to consider this issue follow the reasoning in *Frazier v. Boomsma*, Chapter 20 will likely be held unconstitutional as applied to the shirts.³³ While the Assembly Committee on Judiciary’s analysis of Chapter 20 indicates that Chapter 20 is almost certainly constitutional *on its face*, the committedd nonetheless acknowledged that it could potentially raise issues under the First Amendment, *as applied*.³⁴

28. CAL. CIV. CODE § 3344.1(h) (amended by Chapter 20).

29. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 585, at 4 (Apr.13, 2009).

30. *See id.* at 6.

The American Legion supports this bill because it will expand the definition of deceased personality to include deceased soldiers. “With some anti-war groups creating T-shirts listing our fallen soldier’s names of them,” the American Legion concludes, “we agree that these fallen heroes and their families need protection from having their names or images used by others.” The Vietnam Veterans of America, California State Council supports this bill for substantially the same reasons.

Id.

31. *See Frazier v. Boomsma*, No. 07-CV-8040-PHX-NVW, 2008 WL 3982985, at *3 (D. Ariz. Aug. 20, 2008) (“Distinguishing commercial speech from political speech can be difficult, especially when the speech at issue proposes a commercial transaction and contains discussion of important public issues.”).

32. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 585, at 4 (Apr.13, 2009) (“[I]t is possible that the bill could be unconstitutional as applied, depending, in part, upon whether a court were to find if the selling of the T-shirts with the soldiers’ names is better characterized as commercial or political speech.”).

33. *See Frazier*, 2008 WL 3982985, at *4 (holding that the statute is unconstitutional as applied to Frazier’s sale of shirts, which were considered political speech).

34. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 585, at 4 (Apr. 14, 2009) (“Certainly the bill is not facially unconstitutional, given that it merely adds another category of deceased persons to already existing law.”).

B. *Commercial or Political Speech?*

Supporters of Chapter 20 argue that putting a deceased soldier's name on a shirt sold for profit is commercial speech, which is entitled to less protection than political speech under the First Amendment.³⁵

"Indeed, protecting the publicity rights of deceased soldiers may deserve even more protection, since unlike the celebrities anticipated in the original legislation, these soldiers did not choose to thrust themselves into the limelight"³⁶ Additionally, in *Comedy III Productions v. Saderup*, the California Supreme Court held that an individual's right of publicity may trump an advertiser's right to use a celebrity's image, in certain circumstances.³⁷

Opponents of Chapter 20 argue that political speech can appear in a commercial context.³⁸ Selling shirts for profit does not automatically disqualify them as political speech.³⁹ The court in *Frazier v. Boomsma* used this reasoning to find that the shirts were protected by strict scrutiny, and that the law preventing their sale in Arizona was unconstitutional.⁴⁰

C. *"They die An equal death—The idler and the man Of mighty deeds."*⁴¹

One aspect of Chapter 20 to not receive much attention is its effect on non-soldiers.⁴² Application of Chapter 20 is not limited to soldiers, and it is possible for the heirs of deceased civilians to use Chapter 20 under its plain language.⁴³

35. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980) (citing *Ohralik v. Ohio Bar Ass'n*, 436 U.S. 447, 456 (1978)) ("[O]ur decisions have recognized 'the commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.").

36. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 585, at 4 (Apr. 14, 2009).

37. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 397-98, 21 P.3d 797, 807-08 (2001). *But see* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 585, at 4 (Apr. 14, 2009) ("Because only a handful of states have enacted laws attempting to prohibit the sale of T-shirts . . . with the names of dead soldiers on them . . . there is not a substantial body of case law to say with certainty how a court would interpret the application of this proposed bill to its intended target.").

38. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 585, at 7 (June 23, 2009) (repeating a statement by the California Newspaper Publishers Association: "Without judging a particular factual situation, there is strong argument that the creation and distribution of T-shirts with the names of deceased soldiers is political speech that is protected by the First Amendment and the California Constitution, even if the shirts are sold for a profit").

39. See *Frazier v. Boomsma*, No. 07-CV-8040-PHX-NVW, 2008 WL 3982985, at *4 (D. Ariz. Aug. 20, 2008) ("Frazier's T-shirts are themselves core political speech fully protected by the First Amendment, notwithstanding the fact that he offers them for sale.").

40. See *id.* (holding that the statute is unconstitutional as applied to Frazier's sale of shirts, which was found to be political speech).

41. HOMER, *THE ILIAD* 234 (William Cullen Bryant trans., The Riverside Press 1916) (1870).

42. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 585, at 6 (June 23, 2009) (providing a few examples of non-soldiers who could make use of this law, but very little analysis on the issue).

43. See *id.* ("This bill is not limited to protection of names, voices, photographs, or likenesses of soldiers who died in the service of the country, whether in Iraq or elsewhere.").

While the manner of death has propelled some civilians to fame,⁴⁴ there are no clear examples of commercial exploitation of the death of a civilian.⁴⁵

V. CONCLUSION

Chapter 20 may not be constitutional as applied to its intended target—products like the “Bush Lied, They Died” shirts developed by Dan Frazier.⁴⁶ The constitutionality of Chapter 20 hinges on whether the courts find the shirts to constitute commercial or political speech, as this crucial inquiry establishes the appropriate level of scrutiny for a court to apply.⁴⁷ It remains to be seen whether a name, voice, signature, photograph, or likeness of a person who becomes famous in death will be used in a way that constitutes commercial speech.

44. *See id.* (listing Lacey Peterson and Ron Goldman as two famous murder victims that would be protected by Chapter 20).

45. *But see* Darwin Awards, <http://www.darwinawards.com> (last visited July 24, 2010) (on file with the *McGeorge Law Review*) (selling merchandise related to real life stories of humiliating deaths, this website is a likely target but not a clear example).

46. *See* Frazier v. Boomsma, No. 07-CV-8040-PHX-NVW, 2008 WL 3982985, at *4 (D. Ariz. Aug. 20, 2008) (holding that a similar statute in Arizona is unconstitutional as applied to Frazier’s sale of shirts); *see also supra* note 23 and accompanying text.

47. *See* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 585, at 4 (Apr. 14, 2009) (“However, while the bill may not be facially unconstitutional, it is possible that the bill could be unconstitutional as applied, depending, in part, upon whether a court were to find if the selling of the T-shirts with the soldiers’ names is better characterized as commercial or political speech.”).