

## Unauthorized Use of Celeb's Name in Press Release Could Cost You

By Andrew L. Goldstein

A recent case held that the unauthorized use of Chuck Yeager's name in a press release for a wireless service is a violation of Yeager's rights, even though the reference to Yeager was in a historical context.

Chuck Yeager is a World War II hero and a renowned test pilot. Yeager was the first person to break the speed of sound, known as Mach 1, and, shortly thereafter, he was also the first person to exceed 2.4 times the speed of sound, known as Mach 2.

Cingular Wireless launched a new service designed to respond to disasters or emergencies to ensure the continued provision of cellular service and issued a "Press Release" which stated:


"Nearly 60 years ago, the legendary test pilot Chuck Yeager broke the sound barrier and achieved Mach 1. Today, Cingular is breaking another kind of barrier with our Mach 1 and Mach 2 mobile command centers, which will enable us to respond rapidly to hurricanes and minimize their impact on our customers."

Yeager sued Cingular in a California federal court for, among other things, violations of his right of publicity and false endorsement. *Yeager v. Cingular Wireless LLC*, 2008 US Dist. LEXIS 46449 (E.D. Cal. 2008).

Cingular filed a motion to dismiss all of Yeager's claims. Cingular argued that its publication was a "news release" addressing a matter of public interest, namely, emergency preparedness, and was therefore entitled to protection under the First Amendment. The First Amendment allows the use of a person's identity in a publication if the publication relates to a matter of public interest, such as the reporting of news. However, the First Amendment will not apply when a person's identity is used, without consent, to promote an unrelated product or service of the publisher. The use of a celebrity's identity in an advertisement that is merely illustrative of a commercial theme or product and does not contribute significantly to a matter of public interest is not entitled to protection under the First Amendment. The court stated that although Cingular's piece was titled as a "news release," it was really an advertisement that promoted a service, namely, Cingular's cellular service, which is unrelated to Yeager's accomplishments. Therefore, the court rejected the First Amendment defense.

Cingular also argued that the false endorsement claims should be dismissed because Yeager's historical accomplishments in breaking the sound barrier are in the public domain. The court disagreed, ruling that Yeager had a protectable interest in his name and that Cingular's use of his name was likely to cause confusion or deceive consumers as to whether Yeager was endorsing Cingular's services.

Lastly, Cingular claimed that the reference to Yeager was a permitted "incidental" use and the "fair use" defense applied. An "incidental use" of a celebrity's name will not result in liability if the use has no commercial value or where the name is used for purposes other than taking advantage of the reputation, prestige and value associated with the celebrity. The court, however, rejected this defense and held that Cingular's use of Yeager's name was made for pecuniary gain and was intended to take advantage of Yeager's reputation. Therefore, the Cingular ad was not an "incidental use."



Similarly, the “fair use” defense applies when the defendant uses the plaintiff’s trademark to describe the plaintiff’s product (such as in a comparative ad), and the use does not imply sponsorship or endorsement by the plaintiff. The court refused to dismiss Yeager’s claims based on the “fair use” defense in light of his allegation that Cingular’s piece deceived consumers into believing that Yeager had an affiliation, connection and/or association with Cingular.

Accordingly, the court did not dismiss Yeager’s claims and ruled that Yeager’s case against Cingular can proceed.

This case illustrates two points: 1) labeling a promotional piece as a “press release” and claiming that it is newsworthy will not avoid liability under the First Amendment if the piece, at its essence, is merely promoting a company’s goods or services; and, 2) using a celebrity’s name without permission, even in connection with a historical reference, could lead to liability. It is likely that Cingular could have avoided this lawsuit if it had not used Yeager’s name and instead stated: “Nearly 60 years ago, man broke the sound barrier and achieved Mach 1.”

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