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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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GENERAL CHARLES E. "CHUCK"
YEAGER (RET.),

Plaintiff,

v.

NO. 2:07-cv-02517 FCD GGH

MEMORANDUM AND ORDER

CINGULAR WIRELESS LLC;
BELLSOUTH; SBC COMMUNICATIONS;
AMERICAN TELEPHONE & TELEGRAPH;
and DOES 1 to 200, inclusive,

Defendants.

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This matter comes before the court on defendant AT&T
Mobility, LLC's ("AT&T" or "defendant")¹ motion for summary
judgment pursuant to Rule 56 of the Federal Rules of Civil
Procedure. Plaintiff General Charles E. "Chuck" Yeager
("Yeager" or "plaintiff") opposes the motion. For the reasons

¹ On March 27, 2008, pursuant to the parties' stipulation, the court ordered that AT&T Mobility LLC be substituted as defendant. All other named defendants were dismissed without prejudice. (Stip. & Order [Docket #12], filed Mar. 27, 2008.)

1 set forth herein,² defendant's motion for summary judgment is
2 DENIED.

3 **BACKGROUND**³

4 This case arises out of the use of plaintiff's name in a
5 publication issued by Cingular Wireless entitled "Cingular
6 Wireless Announces Enhanced Emergency Preparedness Program for
7 2006 Hurricane Season" (the "Publication").⁴ (UMF ¶ 1.)
8 Plaintiff Yeager served in the United States Army Air Corps for
9 many years. (Dep. of General Charles "Chuck" Yeager ("Yeager
10 Dep."), Ex. B to Decl. of Steven E. McDonald ("McDonald Decl.")
11 [Docket #57], filed Oct. 13, 2009, at 13.) He was trained to be
12 a combat pilot and a test pilot after enlisting at the age of
13 eighteen. (Id.) On October 14, 1947, as part of the mission of
14 the United States Air Force to try to break the sound barrier,
15 Yeager was the first pilot to exceed the speed of sound. (Id.
16 at 17-18.)

17 The Publication at issue was released on May 17, 2006
18 through PR Newswire and posted on Cingular's website. (UMF ¶
19 2.) The Publication is 755 words long and contains information

20
21 ² Because oral argument will not be of material
22 assistance, the court orders this matter submitted on the
briefs. See E.D. Cal. L.R. 78-230(h).

23 ³ Unless otherwise noted, the facts herein are
24 undisputed. (See Pl.'s Response to Def.'s Separate Statement of
25 Undisputed Material Facts in Supp. of Mot. for Summ. J. ("UMF")
26 [Docket #56], filed Oct. 13, 2009, at 1-8.) Where the facts are
disputed, the court recounts plaintiff's version of the facts.
(See Pl.'s Statement of Disputed Facts ("DF") [Docket #56],
filed Oct. 13, 2009, at 8-12.)

27 ⁴ The complaint alleges that defendant Cingular Wireless
28 LLC issued the material, but the Stipulation and Order was based
upon express representations that defendant At&T was responsible
for the Publication. (Stip. & Order [Docket #12].)

1 about Cingular's preparedness for disasters, such as hurricanes,
2 through its emergency preparedness equipment that includes its
3 MACH1 and MACH2 mobile command centers. (UMF ¶¶ 3, 15.) In the
4 fifth paragraph, the Publication also provides:

5 Nearly 60 years ago, the legendary test pilot Chuck
6 Yeager broke the sound barrier and achieved Mach 1.
7 Today, Cingular is breaking another kind of barrier
8 with our MACH 1 and MACH 2 mobile command centers,
9 which will enable us to respond rapidly to hurricanes
10 and minimize their impact on our customers," de la Vega
11 said.

12 (UMF ¶ 4.)

13 The Publication neither includes a picture of plaintiff nor
14 mentions plaintiff's name in any headline or headings. (UMF ¶¶
15 7-8.) It does not propose a commercial transaction, nor does it
16 offer for sale any specific products or services. (UMF ¶ 8.)
17 The Publication also does not state that plaintiff endorses or
18 has enjoyed benefits from Cingular, AT&T, or any of their
19 products or services. (UMF ¶¶ 10-11.)

20 The executive director of media relations for AT&T Mobility
21 who wrote the Publication, Mark Siegel ("Siegel"), testified
22 that the purpose of the press release was "two-fold. (DF ¶ 5;
23 Dep. of Mark Siegel ("Siegel Dep.") at 16:18.) First, AT&T
24 sought to demonstrate its commitment "to improve our efforts to
25 restore services as quickly as possible after a natural
26 disaster." (Siegel Dep. at 16:18-21.) Second, it sought "to
27 create positive associations in people's mind with the AT&T
28 brand so they would think highly" of the company." (Id. at
16:22-23.) Siegel noted the connection between MACH, the
acronym for defendant's technology, and MACH, the sound barrier;
he crafted the Publication to make an association between

1 breaking the sound barrier and breaking new barriers of disaster
2 preparedness. (Id. at 18:12-17; DF ¶ 8.) Plaintiff contends
3 that AT&T used his name within the Publication in order
4 capitalize upon his name, reputation, and iconic image.
5 Plaintiff further asserts that his name was used as a "hook" to
6 entice an audience to read about defendant's improved services.
7 (See DF ¶¶ 6-7, 11; Pls.' Opp'n to Def.'s Mot. for Summ. J.
8 ("Opp'n"), filed Oct. 13, 2009, at 3.)

9 Plaintiff brings claims for (1) violation of California
10 common law right to privacy/right to control publicity and
11 likeness (also known as a common law claim for commercial
12 misappropriation); (2) violation of California Civil Code §
13 3344; (3) violation of the Lanham Act, 15 U.S.C. § 1125(a); (4)
14 unjust enrichment; (5) violation of California Business and
15 Professions Code § 17200; and (6) violation of California False
16 Advertising Act. (Compl., filed Nov. 21, 2007.) Defendant
17 seeks summary judgment against plaintiff on all claims for
18 relief.⁵

19 STANDARD

20 The Federal Rules of Civil Procedure provide for summary
21 judgment where "the pleadings, the discovery and disclosure
22 materials on file, and any affidavits show that there is no
23 genuine issue as to any material fact and that the movant is
24 entitled to judgment as a matter of law." Fed. R. Civ. P.
25 56(c); see California v. Campbell, 138 F.3d 772, 780 (9th Cir.

26
27 ⁵ Plaintiff filed a supplemental opposition to which
28 defendant objects. The court considers neither plaintiff's
supplemental opposition nor defendant's response thereto.

1 1998). The evidence must be viewed in the light most favorable
2 to the nonmoving party. See Lopez v. Smith, 203 F.3d 1122, 1131
3 (9th Cir. 2000) (en banc).

4 The moving party bears the initial burden of demonstrating
5 the absence of a genuine issue of fact. See Celotex Corp. v.
6 Catrett, 477 U.S. 317, 325 (1986). If the moving party fails to
7 meet this burden, "the nonmoving party has no obligation to
8 produce anything, even if the nonmoving party would have the
9 ultimate burden of persuasion at trial." Nissan Fire & Marine
10 Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102-03 (9th Cir. 2000).
11 However, if the nonmoving party has the burden of proof at
12 trial, the moving party only needs to show "that there is an
13 absence of evidence to support the nonmoving party's case."
14 Celotex Corp., 477 U.S. at 325.

15 Once the moving party has met its burden of proof, the
16 nonmoving party must produce evidence on which a reasonable
17 trier of fact could find in its favor viewing the record as a
18 whole in light of the evidentiary burden the law places on that
19 party. See Triton Energy Corp. v. Square D Co., 68 F.3d 1216,
20 1221 (9th Cir. 1995). The nonmoving party cannot simply rest on
21 its allegations without any significant probative evidence
22 tending to support the complaint. See Nissan Fire & Marine, 210
23 F.3d at 1107. Instead, through admissible evidence the
24 nonmoving party "must set forth specific facts showing that
25 there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

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1 ANALYSIS

2 A. Common Law and Statutory Claims for Misappropriation

3 Plaintiff claims that defendant violated his rights to
4 control the use of his name and identity because defendant made
5 unauthorized use of plaintiff's name to promote defendant's
6 unrelated products and services. (Pl.'s Opp'n Mot. Summ. J.
7 ("Pl.'s Opp'n"), filed Oct. 13, 2009, at 9.) "California
8 recognizes, in its common law and its statutes, 'the right of a
9 person whose identity has commercial value-most often a
10 celebrity-to control the commercial use of that identity.'" Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1184 (9th
11 Cir. 2001)(quoting Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1098
12 (9th Cir. 1992)). To state a claim for misappropriation of
13 likeness under common law, a plaintiff must prove: "(1) the
14 defendant's use of the plaintiff's identity; (2) the
15 appropriation of plaintiff's name or likeness to defendant's
16 advantage, commercially or otherwise; (3) lack of consent; and
17 (4) resulting injury. Downing v. Abercrombie & Fitch, 265 F.3d
18 994, 1001 (9th Cir. 2001) (citing Eastwood v. Superior Court,
19 149 Cal. App. 3d 409, 417 (1983)). Section 3344 of the
20 California Civil Code complements the common law cause of action
21 for commercial misappropriation. See Abdul-Jabbar v. Gen.
22 Motors Corp., 85 F.3d 407, 414 (9th Cir. 1996). A plaintiff
23 making a claim under Section 3344 must "allege a knowing use by
24 the defendant as well as a direct connection between the alleged
25 use and the commercial purpose," in addition to proving the
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1 elements of the common law cause of action.⁶ Downing, 265 F.3d
2 at 1001.

3 Defendant argues that summary judgment should be granted as
4 to both plaintiff's common law and statutory claims based upon
5 the applicability of two affirmative defenses, arguing that (1)
6 the First Amendment protects the Publication because it contains
7 newsworthy matter and is not commercial speech; and (2) the
8 doctrine of incidental use protects the "fleeting and
9 inconsequential" use of plaintiff's name. (Def.'s Mem. Mot.
10 Summ. J. ("Def.'s Mem."), filed Oct. 1, 2009.)

11 **1. The First Amendment Defense**

12 "Under both the common law cause of action and the
13 statutory cause of action, 'no cause of action will lie for the
14 publication of matters in the public interest, which rests on
15 the right of the public to know and the freedom of the press to
16 tell it.'" Downing, 265 F.3d at 1001 (quoting Montana v. San
17 Jose Mercury News, 34 Cal. App. 4th 790, 793 (1995)). "The
18 First Amendment requires that the right to be protected from
19 unauthorized publicity 'be balanced against the public interest
20 in the dissemination of news and information consistent with the
21 democratic processes under the constitutional guaranties of
22 freedom of speech and of the press.'" Gionfriddo v. Major
23 League Baseball, 94 Cal. App. 4th 400, 409 (1st Dist. 2001)
24 (quoting Gill v. Hearst Publ'g Co., 40 Cal. 2d 224, 228 (1953));

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26 ⁶ California Civil Code § 3344(a) provides in relevant
27 part that "[a]ny person who knowingly uses another's name . . .
28 in any manner . . . for purposes of advertising or selling, or
soliciting purchases of . . . goods or services, without such
person's prior consent . . . shall be liable for any damages
sustained by the person or persons injured as a result thereof."

1 Downing, 265 F.3d at 1001 (noting that the court "must find a
2 proper accommodation between the competing concerns of freedom
3 of speech and the right of publicity). In order to balance
4 these countervailing interests, a court must consider "the
5 nature of the precise information conveyed and the context of
6 the communication." Id. at 410.

7 The First Amendment defense extends to publications about
8 people "who, by their accomplishments, . . . create a legitimate
9 and widespread attention to their activities." Eastwood v.
10 Superior Court, 149 Cal. App. 3d 409, 422 (1983). Nevertheless,
11 "this defense is not absolute." Downing, 265 F.3d at 1001. A
12 tenuous connection between the unauthorized use of a person's
13 name or likeness and the matter of public interest can remove
14 the publication from the First Amendment's protection. See id.
15 at 1002. Moreover, if the speech is classified as commercial
16 speech, it is not actionable "when the plaintiff's identity is
17 used, without consent, to promote an unrelated product."
18 Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400, 413
19 (2001); Hoffman, 255 F.3d at 1185 (noting that when a defendant
20 uses "an aspect of the celebrity's identity entirely and
21 directly for the purpose of selling a product," such use does
22 not "implicate the First Amendment's protection of expressions
23 of editorial opinion").

24 **a. Commercial Speech**

25 Defendant argues that the Publication is noncommercial
26 speech that deserves the full protection of the First Amendment.
27 (Def.'s Mem. at 10-11.) Specifically, defendant contends it is
28 undisputed that the Publication does not propose any commercial

1 transactions and does not offer any products or services. (Id.)

2 The "core notion" of commercial speech is that it "does not
3 more than propose a commercial transaction." Bolger v. Youngs
4 Drug Prods. Co., 463 U.S. 60, 66 (1983) (citations and
5 quotations omitted); see Hoffman, 255 F.3d at 1184. However,
6 the "boundary between commercial and noncommercial speech has
7 yet to be clearly delineated." Hoffman, 255 F.3d at 1184. On
8 one end of the spectrum, an advertisement is "clearly commercial
9 speech." Id. at 1185; see e.g. Abdul-Jabbar, 85 F.3d at 409;
10 Waits, 978 F.2d at 1097-98. On the other end of the spectrum is
11 speech that, when viewed as a whole, expresses editorial comment
12 on matters of interest to the public. See Hoffman, 255 F.3d at
13 1185 (holding that magazine article that used an altered
14 photograph of a male celebrity to showcase a designer gown was
15 noncommercial speech because the article did not have the sole
16 purpose of selling a particular product, complemented the
17 magazine issue's focus on Hollywood past and present, and
18 combined fashion photography, humor, and visual and verbal
19 editorial comment); Montana, 34 Cal. App. 4th at 793-95 (holding
20 that relatively contemporaneous reprinting of poster of football
21 player that appeared in newspaper article about Super Bowl
22 victory received full protection under the First Amendment).

23 Informational publications that refer to or promote a
24 specific product, but are not mere proposals to engage in
25 commercial transactions, present a closer question regarding the
26 appropriate classification of the type of speech. Bolger v.
27 Youngs Drug Prods. Corp., 463 U.S. 60, 66-67 (1983). In Bolger,
28 the court considered whether the plaintiff's informational

1 pamphlet was commercial or noncommercial speech in order to
2 determined the extent of First Amendment Protection. Id. The
3 eight page pamphlet, entitled "Plain Talk about Venereal
4 Disease," provided information regarding the prevention of
5 venereal diseases and repeatedly discussed the advantages of
6 using condoms without any specific reference to those
7 manufactured by the plaintiff. Id. at 62 n.4, 66 n.13. The
8 single reference to the plaintiff's specific product was at the
9 very bottom of the last page, which stated that the pamphlet was
10 contributed as a public service by the plaintiff, who
11 distributed condoms. Id. The Court noted that the pamphlet
12 contained discussions of important public issues. Id. at 67.
13 However, the Court also made clear that "advertising which links
14 a product to a current public debate is not thereby entitled to
15 the constitutional protection afforded noncommercial speech."
16 Id. at 68 (quoting Central Hudson Gas & Elec. Corp. v. Pub.
17 Serv. Comm'n of N.Y., 447 U.S. 530, 563 n.5). Based upon the
18 totality of the characteristics of the pamphlet, namely that the
19 plaintiff had an economic motive in mailing the pamphlets, it
20 was conceded to be an advertisement, and it referenced a
21 specific product, the Court held that the pamphlet was properly
22 characterized as commercial speech. Id.

23 In this case, looking at all of its characteristics, the
24 Publication is properly categorized as commercial speech. The
25 central theme of the Publication is how defendant's emergency
26 preparedness program enhances its wireless services.
27 Defendant's name as a service provider is mentioned multiple
28 times throughout the Publication. Further, the Publication did

1 not seek to inform the reader about emergency preparedness
2 generally, but rather how defendant's wireless service
3 specifically had been improved to handle such emergencies.
4 Indeed, the writer of the Publication testified that the purpose
5 of the Publication was, in part, to create positive associations
6 with the AT&T brand. (See Siegel Deposition 16:18-23.) As
7 such, it is reasonable to infer that defendant had an economic
8 motivation underlying the Publication's distribution. Further,
9 defendant's name as a service provider is mentioned multiple
10 times throughout the Publication. While none of these facts
11 alone is necessarily dispositive, a review of the Publication as
12 a whole supports a finding that it is commercial speech.

13 The facts of the case are similar to those the Court found
14 dispositive in Bolger. 463 U.S. 60. In both cases, the speech
15 did not directly propose any commercial transactions or offer
16 any products or services. See id. at 62 n.4. Rather, the
17 material emphasized the benefits of defendant's product
18 generally. See id. Further, in this case, defendant's service
19 was explicitly referred to throughout the body of the writing,
20 while in Bolger, the distributor's specific product was
21 referenced only once at the end of the pamphlet. See id.
22 Accordingly, even though both the Publication in this case and
23 the pamphlet in Bolger contained discussions of important public
24 issues, because the Court concluded the content of the pamphlet
25 supported a finding of commercial speech, the content of the
26 Publication similarly supports such a finding.

27 Defendant argues that, similar to Hoffman, the commercial
28 aspects of the Publication are intertwined with expressive

1 aspects, thus protecting the Publication as a whole as
2 noncommercial speech. (Def.'s Mem. at 11.) However, the facts
3 before the court in Hoffman are distinguishable from the facts
4 before the court in this case. At issue in Hoffman was a
5 feature article in a magazine that complemented the issue's
6 focus on the history of Hollywood. Hoffman, 255 F.3d at 1185.
7 Viewing the article in context, the Hoffman court described it
8 as a combination of fashion photography, humor, and visual and
9 verbal editorial comment, implicating the First Amendment's
10 protection of expressions of editorial opinion. Id. The
11 Hoffman court also noted that the defendant received no
12 consideration from the designers for featuring the clothing in
13 the altered photograph. Id. at 1185. Under these facts, the use
14 of the altered photograph as an illustration in the article
15 constituted protected noncommercial use. Id. at 1186. In this
16 case, however, the Publication's sole purpose was to promote
17 defendant's services. It provided information about defendant's
18 program, but expressed no editorial comment on public safety
19 issues during a natural disaster or any other related issue.
20 Accordingly, the First Amendment's protection of expressions of
21 editorial opinion is not likewise implicated under the facts in
22 this case. See Downing, 265 F.3d at 1003 n.2 (distinguishing
23 from Hoffman because the defendant used plaintiffs' names and
24 photographs to promote its products while the magazine in
25 Hoffman was unconnected to and received no consideration for
26 showcasing the designer dress).

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1 Therefore, the court concludes that the Publication at
2 issue is commercial speech for purposes of the First Amendment
3 defense.

4 **b. Newsworthiness**

5 Defendant also argues that the First Amendment protects the
6 Publication's use of plaintiff's name because the Publication
7 reported on matters of public interest. (Def.'s Mem. at 9.)
8 Specifically, defendant argues that the Publication was issued
9 subsequent to the devastation wrought by Hurricane Katrina,
10 Hurricane Wilma, and Hurricane Rita.⁷ Defendant characterizes
11 the information in the Publication as information addressing
12 public safety concerns and whether its customers can continue to
13 rely on defendant's services during a natural disaster.

14 Plaintiff contends that defendant's Publication was not issued
15 solely to convey information of public interest, but rather,
16 "was directed for a profit commercial enterprise." (Opp'n at
17 3.)

18 Where a plaintiff's identity is used, without consent, to
19 promote an unrelated product, such speech is actionable. See
20 Downing, 265 F.3d 994; Newcombe v. Adolf Coors Co., 157 F.3d
21 686, 691-94 (9th Cir. 1998) (use of pitcher's image in beer
22 advertisement); Abdul-Jabbar, 85 F.3d at 409 (use of basketball
23 star's former name in a television car commercial); Waits, 978
24 F.2d at 1097-98 (use of imitation of singer's voice in a radio
25 snack-food commercial); White v. Samsung Electronics Am., Inc.,

26
27 ⁷ The court notes, however, that the Publication
28 contains no editorial expression related to the specified
hurricanes.

1 971 F.2d 1395, 1396 (9th Cir. 1992) (use of gameshow hostess's
2 likeness in advertisement for electronic products). In Downing,
3 clothing manufacturer Abercrombie & Fitch ("Abercrombie") used a
4 photograph of plaintiffs competing in a surfing competition.
5 Downing, 265 F.3d at 1000. The photograph was placed in a
6 clothing catalog that also included news and editorial pieces
7 about the surfing culture. Id. While the surfing theme of the
8 catalog was conceded to be a matter of public interest, the
9 Downing court found that the photograph's use did not contribute
10 significantly to the editorial pieces about surfing culture.
11 Id. at 1002 ("The catalog did not explain that [the plaintiffs]
12 were legends of the sport and did not in any way connect [the
13 plaintiffs] with the story preceding it."). Rather, the court
14 reasoned that the defendant used the plaintiffs' photograph
15 "essentially as window-dressing to advance the catalog's surf-
16 theme." Id. Therefore, because the plaintiffs' likeness was
17 used primarily to attract consumers to the unrelated product for
18 sale in the sales catalog, such use was not protected by the
19 First Amendment defense. Id.

20 In this case, the context of the communication and the
21 nature of the information conveyed demonstrate that plaintiff
22 Yeager's name and accomplishments were used to attract attention
23 to defendant's unrelated wireless services. While emergency
24 preparedness and the availability of wireless services following
25 a natural disaster are matters of public interest and concern,
26 as set forth above, the Publication in this case was not purely
27 informational in nature; rather, it is properly characterized as
28 commercial speech because, *inter alia*, it aimed to positively

1 market defendant's services by linking them to that public
2 concern. Further, plaintiff's name and accomplishments in
3 breaking the sound barrier are wholly unrelated to defendant's
4 mobile command centers and cellular service in emergency
5 situations.⁸ Indeed, as reflected by Siegel's testimony, the
6 use of plaintiff's name was carefully crafted as part of a
7 strategy to promote defendant's brand. (See Siegel Deposition,
8 at 11:9-12, 16:16-23.) Even if the content of defendant's
9 Publication could otherwise be considered within the public
10 interest, the illustrative use of plaintiff's name does not
11 contribute significantly to that interest; Like the use in
12 Downing, which the court characterized as "window-dressing," the
13 connection between public safety issues during hurricane season
14 and the use of plaintiff's name is tenuous at best. See
15 Downing, 265 F.3d at 1002.

16 Accordingly, defendant is not entitled to summary judgment
17 on its asserted First Amendment defense.

18 **2. Incidental Use**

19 "The contours of the incidental use doctrine are not
20 well-defined in California." Aliqo v. Time-Life Books, Inc.,
21 1994 U.S. Dist. LEXIS 21559, at *6 (N.D. Cal. Dec. 19, 1994).
22 "However, the general rule is that incidental use of a
23 plaintiff's name or likeness does not give rise to liability"
24 under a common law claim of commercial misappropriation or an

25
26 ⁸ Furthermore, even though plaintiff's achievement may
27 be said to be newsworthy, "its use is not automatically
28 privileged." See Abdul-Jabbar, 85 F.3d at 456 (holding that the
newsworthiness of a former basketball player's record-breaking
achievement did not entitle the defendant to use the player's
identity in the context of an unrelated car commercial).

1 action under Section 3344. Id. at *8. The rationale underlying
2 this doctrine is that an incidental use has no commercial value,
3 and allowing recovery to anyone briefly depicted or referred to
4 would unduly burden expressive activity. Pooley v. Nat. Hole-
5 In-One Ass'n, 89 F. Supp. 2d 1108, 1112 (D. Ariz. 2000).

6 Whether the use of a plaintiff's name or likeness falls
7 within the incidental use exception to liability "is determined
8 by the role that the use of the plaintiff's name or likeness
9 plays in the main purpose and subject of the work at issue."
10 Preston v. Martin Bregman Prods., Inc., 765 F. Supp. 116, 119
11 (S.D.N.Y. 1991). Generally, "a plaintiff's name is not
12 appropriated by mere mention of it." Restatement (Second) of
13 Torts § 652C, comment *d*. A claim is also not actionable when a
14 plaintiff's likeness is appropriated because "it is published
15 for purposes other than taking advantage of his reputation,
16 prestige, or other value associated with him." Id.

17 In determining whether the doctrine of incidental use
18 applies, courts have considered "(1) whether the use has a
19 unique quality or value that would result in commercial profit
20 to the defendant, (2) whether the use contributes something of
21 significance, (3) the relationship between the reference to the
22 plaintiff and the purpose and subject of the work, and (4) the
23 duration, prominence or repetition of the likeness relative to
24 the rest of the publication." Aligo, 1994 U.S. Dist. LEXIS
25 21559, at *7-8 (internal citations omitted). Even if the
26 mention of a plaintiff's name or likeness is brief, if the use
27 stands out prominently within the commercial speech or enhances
28 the marketability of the defendant's product or service, the

1 doctrine of incidental use is inapplicable. See Pooley, 89 F.
2 Supp. 2d at 1113. In Pooley, the defendant used, without
3 consent, the name of likeness of the plaintiff, a professional
4 golfer who was well-known for making a hole-in-one shot and
5 winning one million dollars as a result, in a marketing video
6 for its "Million Dollar Hole-in-One" fundraising service. Id.
7 at 1110-11. The footage of the plaintiff constituted only six
8 seconds of the entire eight minute video. Id. While the court
9 noted the duration of the use was relatively short in relation
10 to the rest of the publication, the court found that the use was
11 "crucial" to the defendant's advertisement because without it,
12 the video would not have been as attractive to the target
13 audience and because the plaintiff's hole-in-one was not
14 fungible to that of any other golfer. Id. at 1112-13. The
15 court also found that the plaintiff "was specifically selected
16 because of his distinction and his wide market appeal." Id. at
17 1113. Accordingly, the court concluded that the incidental use
18 doctrine did not apply because the use of the plaintiff's name
19 and likeness was integral to the defendant's advertisement and
20 "clearly enhanced the marketability of [the] defendant's
21 services." Id.; see also Schifano v. Greene County Greyhound
22 Park, Inc., 624 So. 2d 178, 181 (Ala. 1993) (distinguishing the
23 incidental use of a photograph of an unidentified and unknown
24 person from the use of the recognizable name of a former college
25 football star and an experienced radio announcer for
26 solicitation purposes); cf. Aliqo, 1994 U.S. Dist. LEXIS 21559,
27 at *8 (holding that four-second appearance of a magazine cover
28 featuring photograph of unnamed and unidentified plaintiff in a

1 29-minute "infomercial" promoting a rock music anthology was
2 incidental use because it was one of dozens of magazine covers
3 used in the infomercial and insignificant to the purpose of
4 selling a music anthology); Preston, 765 F. Supp. at 118-19
5 (holding that four-second facial appearance of unidentified and
6 unnamed plaintiff in a street scene, shot from a moving vehicle
7 in low light, during the opening credits of a movie was
8 incidental use because it contributed nothing to the movie's
9 storyline); Ladany v. William Morrow & Co., 465 F. Supp. 870,
10 881 (S.D.N.Y. 1978) (holding that incidental use doctrine
11 applied when plaintiff was one of 101 characters in a book
12 discussing in detail the Olympic massacre in Munich and the book
13 referred to plaintiff only when discussing one out of the many
14 aspects of the tragedy).

15 In this case, under the circumstances in which defendant's
16 name and identity was used, the court cannot conclude that the
17 incidental use doctrine applies. Plaintiff's name and identity
18 is unique and non-fungible in that he is the person associated
19 with breaking the sound barrier for the first time. The use of
20 his name and identity links defendant's new technology to
21 plaintiff's name and accomplishments. Indeed, as set forth
22 above, the evidence reveals that the Publication was crafted in
23 order to make that very association and to "create positive
24 associations in people's mind with the AT&T brand." (Siegel
25 Dep. at 16, 18.) While the use of plaintiff's name and
26 reference to his accomplishment was a small part of the 755-word
27 Publication, the association of defendant's services with a
28 historical feat is a use that may help to pique the interest of

1 a newsman deciding whether to follow up on a press release.
2 (See Deposition of Albert Levy at 111:4-19.) Therefore, like in
3 Pooley, the use of plaintiff's name and identity uniquely
4 enhanced the marketability of defendant's service. See also
5 Henley v. Dillard Dep't Stores, 46 F. Supp. 2d 587, 592 (N.D.
6 Tex. 1999) (holding that incidental use defense did not apply
7 where the defendant used the value associated with a well-known
8 musician's name in a "wordplay" in order to attract consumers'
9 attention); Accordingly, defendant is not entitled to summary
10 judgment on its asserted incidental use defense.

11 Because under the facts before the court the defendant
12 cannot establish as a matter of law that its use of plaintiff's
13 name and identity is protected by the First Amendment or by the
14 incidental use doctrine, defendant's motion for summary judgment
15 on plaintiff's common law and statutory claims of commercial
16 misappropriation is DENIED.

17 **B. Lanham Act**

18 Plaintiff claims that defendant violated the Lanham Act,
19 specifically 15 U.S.C. § 1125(a), because the appearance of
20 plaintiff's name in the Publication is likely to cause confusion
21 about plaintiff's affiliation or connection to defendant.
22 (Pl.'s Opp'n at 11.) "Section 43(a) of the Lanham Act, 15
23 U.S.C. § 1125(a), prohibits, *inter alia*, the use of any symbol
24 or device which is likely to deceive consumers as to the
25 association, sponsorship, or approval of goods or services by
26 another person." Wendt v. Host Int'l, 125 F.3d 806, 812 (9th
27 Cir. 1997). "An express purpose of the Lanham Act is to protect
28 commercial parties against unfair competition." Abdul-Jabbar,

1 85 F.3d at 410 (quoting Waits, 978 F.2d at 1108)). A false
2 endorsement claim is actionable under the Lanham Act if such
3 claim is based on the unauthorized use of a uniquely
4 distinguishing characteristic of a celebrity's identity that is
5 likely to confuse consumers as to the plaintiff's sponsorship or
6 approval of the product. Wendt, 125 F.3d at 812. "Because the
7 names and likenesses of celebrities are commonly . . . used in a
8 wide variety of publications, Lanham Act jurisprudence places
9 great importance on the likelihood of consumer confusion as the
10 'determinative issue' in false endorsement claims. Kournikova
11 v. General Media Commc'ns., Inc., 278 F. Supp. 2d 1111, 1120
12 (C.D. Cal. 2003). The likelihood that a well-known individual's
13 name or likeness was used to promote a product with which he has
14 no association raises the possibility of commercial injury. Id.

15 Defendant contends that plaintiff's claim fails as a matter
16 of law because (1) plaintiff must and cannot demonstrate triable
17 issues of fact regarding actual confusion because the
18 Publication does not contain any express endorsement; and (2)
19 the nominative fair use doctrine supports summary judgment.⁹
20 (Def.'s Mem. at 13, 15.)

21 **1. Likelihood Of Confusion**

22 "In cases involving confusion over endorsement by a
23 celebrity plaintiff, 'mark' means the celebrity's persona."
24

25 ⁹ Defendant also argues that the Lanham Act claim fails
26 because plaintiff, as a public figure featured in a
27 noncommercial speech, bears the burden of proving with clear and
28 convincing evidence that defendant acted with actual malice.
However, for reasons mentioned *supra*, the court does not
characterize the Publication as noncommercial speech and,
accordingly, need not reach the issue of actual malice.

1 White, 971 F.2d at 1400. In such cases, the Ninth Circuit has
2 utilized the eight-factor test set forth in AMF, Inc. v.
3 Sleekcraft Boats, 599 F.2d 341 (9th Cir. 1979), to determine
4 whether there is a likelihood of confusion regarding endorsement
5 arising out of a defendant's use of a plaintiff's mark.
6 Downing, 265 F.3d at 1007; Abdul-Jabbar, 85 F.3d at 413; White,
7 971 F.2d at 1400. These factors include:

- 8 (1) strength of the plaintiff's mark;
- 9 (2) relatedness of the goods;
- 10 (3) similarity of the marks;
- 11 (4) evidence of actual confusion;
- 12 (5) marketing channels used;
- 13 (6) likely degree of purchaser care;
- 14 (7) defendant's intent in selecting the mark; and
- 15 (8) likelihood of expansion of the product lines.

16 White, 971 F.2d at 1400. These factors "are not necessarily of
17 equal importance, nor do they necessarily apply to every case."
18 Downing, 265 F.3d at 1008. Further, because "[t]he Lanham Act's
19 'likelihood of confusion' standard is predominantly factual in
20 nature . . . [s]ummary judgment is inappropriate when a jury
21 could reasonably conclude that most of the factors weigh in a
22 plaintiff's favor." Wendt, 125 F.3d at 812.

23 In this case, plaintiff has presented sufficient evidence
24 regarding likelihood of confusion to withstand summary judgment.
25 Both plaintiff and defendant agree that Yeager is a public
26 figure publicly associated with his accomplishment in breaking
27 the sound barrier. (See Pl.'s Opp'n at 4; Def.'s Mem. at 12.)
28 As such, his "mark" is strong. Further, there is no dispute
that defendant used plaintiff's mark in its Publication, which
was directed at creating positive associations with its
services. A jury could infer that under these facts,

1 defendant's intent was to capitalize upon the positive
2 associations with plaintiff's name by implying endorsement in
3 order to achieve its objectives. While there is little
4 relationship between plaintiff's mark and the cellular services
5 in emergency situations and scant specific evidence regarding
6 actual confusion, the court cannot find that defendant is
7 entitled to judgment as a matter of law at this stage in the
8 litigation.¹⁰

9 2. **Nominative Fair Use**

10 Nominative fair use is a specific defense to claims under
11 the Lanham Act applied to "a class of cases where the use of the
12 trademark does not attempt to capitalize on consumer confusion
13 or to appropriate the cachet of one product for a different
14 one." New Kids On The Block v. New Am. Publ'g, Inc., 971 F.2d
15 302, 308 (9th Cir. 1992); see Abdul-Jabbar v. Gen. Motors Corp.,
16 85 F.3d 407, 412 (9th Cir. 1996).

17 To establish a nominative fair use defense, a defendant
18 must prove three elements:

19 (1) the product or service in question must be one not
20 readily identifiable without use of the trademark;

21 (2) only so much of the mark or marks may be used as is
22 reasonably necessary to identify the product or
23 service; and

24 (3) the user must do nothing that would, in conjunction
25 with the mark, suggest sponsorship or endorsement by

26 ¹⁰ The court notes that neither party fully addresses the
27 application of the Sleekcraft factors in their briefs. Rather,
28 defendant only argues that there has been no evidence of actual
confusion. While this factor is important, it is not
determinative. Further, while somewhat vague, Victoria Yeager
testified that she received phone calls regarding confusion as
to whether plaintiff endorsed defendant's services. (Dep. of
Victoria Yeager, Ex. H to Stroud Decl., at 134:2-13.)

1 the trademark holder.
2 Downing, 265 F.3d at 994.¹¹ The doctrine of nominative fair use
3 applies only when the mark is "the only word reasonably
4 available to describe a particular thing." Abdul-Jabbar, 85
5 F.3d at 412. "Because it does not implicate the source-
6 identification function that is the purpose of the trademark . .
7 . such use is fair because it does not imply sponsorship or
8 endorsement by the trademark holder." Id.; see Cairns v.
9 Franklin Mint Co., 292 F.3d 1139, 155 (9th Cir. 2002) (holding
10 that there was no confusion regarding endorsement where the
11 plaintiff's mark was not so closely associated with the
12 plaintiff that any mention would suggest sponsorship or
13 endorsement).

14 Where a celebrity's name is used in a commercial, there are
15 triable issues of fact regarding whether such use implies
16 endorsement. In Abdul-Jabbar, the defendant car manufacturer
17 used the plaintiff's name in a commercial, comparing the famous
18 basketball player's college basketball record to the defendant's
19 awards for its car. 85 F.3d at 409. The court noted that by
20 closely analogizing the plaintiff's record of being voted the
21 best player in three consecutive years to the defendant's
22 product being placed on the "best buy" list three years in a
23 row, the defendant "arguably attempted to appropriate the cachet
24 of one product for another, if not also to capitalize on
25 consumer confusion. Id. at 413 (internal quotations omitted).

26
27 ¹¹ The parties do not discuss the first two elements of
28 this defense, but rather focus their arguments on the third
element, the likelihood of consumer confusion regarding
endorsement because of defendant's conduct.

1 The court held that because the "use of celebrity endorsements
2 in television commercials is so well established by commercial
3 custom," a jury might find an implied endorsement through the
4 defendant's use of the plaintiff's name. Id. ("Many people may
5 assume that when a celebrity's name is used in a television
6 commercial, the celebrity endorses the product advertised.
7 Likelihood of confusion is therefore a question for the jury.").
8 Accordingly, the court held that there was a question of fact as
9 whether the defendant was entitled to the nominative fair use
10 defense. Id.

11 In this case, defendant has failed to meet its burden in
12 establishing that the nominative fair use defense applies as a
13 matter of law. Defendant used plaintiff's name and
14 accomplishments to support its own product, specifically
15 comparing plaintiff's feat in breaking the sound barrier to
16 defendant's technological advancements. While not featured in a
17 television commercial, the deliberate, closely-tied analogy in a
18 press release directed to create positive associations with
19 defendant's product is sufficient to raise a triable issue of
20 fact regarding implied endorsement.¹² Indeed, Victoria Yeager
21 testified that after the press release, she received a few calls
22 inquiring about whether Yeager endorsed AT&T. (Dep. of Victoria
23 Yeager, Ex. H to Stroud Decl., at 134:2-13.) Therefore, on the

24
25 ¹² Furthermore, while defendant argues that its limited
26 reference to plaintiff's name and accomplishment is insufficient
27 to imply endorsement, it fails to proffer any evidence regarding
28 what type of use would imply endorsement for purposes of
comparison. Cf. Cairns, 292 F.3d at 1154-55 (holding that the
absence of statements regarding authorization that the defendant
used in relation to other products supported applicability of
nominative fair use defense).

1 record before the court, defendant is not entitled to summary
2 judgment on its asserted nominative fair use defense.

3 Accordingly, defendant's motion for summary judgment on the
4 Lanham Act claim is DENIED.

5 **C. Plaintiff's Remaining Claims**

6 Finally, defendant contends that plaintiff's claims for
7 violation of California Business and Professions Code § 17200,
8 violation of California False Advertising Act, and unjust
9 enrichment must be dismissed because they are substantially
10 congruent to plaintiff's commercial misappropriation and Lanham
11 Act claims. Because, as set forth above, the court finds
12 defendant's prior arguments unpersuasive, defendant's motion for
13 summary judgment on the remaining state law claims is also
14 DENIED.

15 **CONCLUSION**

16 For the foregoing reasons, defendants' motion for summary
17 judgment is DENIED.

18 IT IS SO ORDERED.

19 DATED: December 7, 2009



20
21 FRANK C. DAMRELL, JR.
22 UNITED STATES DISTRICT JUDGE
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25
26
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