Taking a Bite Out of Michael Vick's Publicity Rights: An Analysis of How teh Right of Publicity Should be Treated After a Celebrity is Convicted of a Crime

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NOTES

TAking a bite out of Michael Vick's Publicity Rights: An Analysis of How the Right of Publicity Should Be Treated After a Celebrity Is Convicted of a Crime

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I. INTRODUCTION: THE KICKOFF

In the sporting world, professional athletes' ability to earn large amounts of money from licensing the use of their names or images is far reaching. In numerous instances, the financial earnings that professional athletes gain from various endorsements often compete with the amount that they earn from their respective sports. For instance, in 2008, golfer Tiger Woods earned $105 million from endorsements; boxer Floyd Mayweather, Jr. received $20.25 million in endorsements; basketball player Lebron James earned $28 million from endorsements; and football player Peyton Manning earned $13 million from endorsements. The high financial reward that is often obtained by companies that are endorsed by famous athletes encourages them to pay large amounts to use the athlete's image when marketing various products. In order for professional athletes to collect all of the money they rightfully deserve via their celebrity, there must be a means of protection against the use of their persona. Since the desire to safeguard a professional athlete's name and likeness is of extreme financial importance, it has played an essential role in the development of the right of publicity.

The right of publicity resulted from the common law right of privacy. Essentially, it allows any person—but most often a celebrity—to determine and protect the manner by which his or her name, likeness, image, or other aspects of identity are used to obtain a profit. A right of publicity claim is allowed, and damages and injunctive relief may be awarded, when one "appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade."
allowance of right of publicity claims is spreading, and such protections currently exist to some degree, either by statute or common law, in at least thirty states. 12

While many celebrities are granted protection of their personas by the right of publicity, certain classes of famous individuals who become notorious solely for their participation in a criminal activity often are not given such protection. For instance, in states where right of publicity claims are allowed, professional athletes are typically recognized as possessing such claims and are allowed to seek action against those who do not have a license to use the athlete's name or image. 13 In contrast, courts are reluctant to allow a notorious criminal—or family members of a notorious criminal—to claim a violation of publicity rights against those who use the criminal's name or likeness. 14 In light of the varying treatment of the right of publicity in terms of celebrities and notorious criminals, one would imagine that courts will soon face a dilemma when those two categories of persons collide. Indeed, such a dilemma has arisen with a situation involving Michael Vick, a former starting quarterback in the National Football League.

Following the indictment of Michael Vick on dogfighting charges and his subsequent acceptance of a plea agreement, 15 numerous individuals and organizations began marketing and selling assorted “anti-Vick” products for large sums of money. 16 Since Michael Vick was an internationally known professional football player prior to admitting his participation in dogfighting, he had a right to prevent the unauthorized use of his identity and likeness before he was charged with criminal activity. Although Vick has recently been cast into the public eye for a different and criminal reason, it is still reasonable to believe that he could maintain a suit against those using his football persona to sell anti-Vick products for a profit. While courts would not allow Michael Vick to profit from his criminal involvement with dogfighting, it should not be legal for other individuals

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13 See Haealan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (recognizing the publicity rights of a baseball player in the use of his photograph).
14 See Maritote v. Desilu Prods., Inc., 345 F.2d 418, 420 (7th Cir. 1965) (holding that the family members of notorious mobster Al Capone did not have a right of publicity claim against a production company that used his identity).
to use his athletic identity, name, and likeness to realize a profit on the anti-Vick products without his approval.

This Note will analyze the use of the right of publicity when there is a contrast between those classes of famous individuals that are usually allowed to assert such claims and those who are not. In doing so, this Note will explore the history and development of the right of publicity as it relates to athletes as well as criminals. It will focus on the right of publicity arguments that Michael Vick can advance to prevent the sale of anti-Vick products without his permission. Additionally, this Note will compare and contrast the different policy decisions behind the enforcement of a celebrity's right of publicity. This Note will offer courts a solution on how to manage situations where an athlete or celebrity who has been convicted of a crime wishes to enforce his or her right of publicity to prevent the use of his or her name, likeness, or identity by others for a financial gain. Finally, this Note contends that because Michael Vick was a well-known celebrity and had publicity rights prior to his conviction on dogfighting charges, he should be able to maintain such rights against those using his criminal conviction as a decoy to exploit his image and athletic persona to sell various anti-Vick products.

II. BACKGROUND: 1ST AND 10

A. MICHAEL VICK AND THE DOGFIGHTING CHARGES

On July 17, 2007, the life of Michael Vick, the starting quarterback for the Atlanta Falcons, was permanently altered. Vick and three other defendants were charged by a federal grand jury in Richmond, Virginia with conspiring to engage in competitive dogfighting, procuring and training pit bulls for fighting, and conducting the enterprise across state lines. A month later, the star football player elected to enter into a plea agreement in which he admitted to conspiracy in the form of a dogfighting ring and helping to kill pit bulls, both of which are felonies. Vick was sentenced to twenty-three months in prison on December 10, 2007.

Almost immediately after the public became aware of Vick's involvement with dogfighting, numerous anti-Vick products began to surface. For instance, on

19 Id.
August 24, 2007, an auction conducted on the eBay website resulted in a $7,400 sale of twenty-two Michael Vick football cards that had been chewed and slobbered on by two Missouri dogs. Additionally, some individuals have even used Vick's name and likeness to create a dog toy known as the "Vick Dog Chew Toy." The chew toy is a miniature character whose appearance is identical to that of Vick. The character wears a black number seven jersey and carries a small football in its left hand, just as Vick did when he played in the National Football League. Strikingly, the individuals selling both the Vick Dog Chew Toy and the chewed up Vick trading cards are blatantly emphasizing the fact that these products are referring to Michael Vick.

B. RIGHT OF PUBLICITY VS. RIGHT OF PRIVACY

As previously noted, the right of publicity finds its roots in the common law right of privacy. The right of privacy was first discussed in a famous law review article written by Louis Brandeis and Samuel Warren in 1890. They argued that the right of privacy should be used to prevent embarrassing disclosures by the media. However, when applying the right of privacy to various cases, early courts experienced difficulties as to its extent. Thus, the need for an additional approach to protecting the publicity rights of an individual was becoming evident.

As described by J. Thomas McCarthy, the distinction between the right of publicity and the right of privacy is fairly straightforward. Unlike the right of privacy—which seeks to protect a personal interest—the right of publicity is intended to protect a commercial interest in one's identity. One who successfully files a claim for the violation of a right of privacy is often awarded damages based on the impact of the violation on that individual's mental status. In contrast, the right of publicity is considered a property right. Therefore,

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21 Vick Football Cards, supra note 16.
22 Michael Vick Dog Chew Toy, supra note 16.
23 See id. (illustrating the chew toy wearing the same jersey that Vick wore when he played for the Atlanta Falcons).
24 Carrier, supra note 8, at 159.
27 Id. (noting the split of authority in various states with regards to the right of privacy).
28 Id. § 28.6.
29 Carrier, supra note 8, at 160.
30 Stapleton & McMurphy, supra note 1, at 26–27.
31 Id. at 31 (quoting J. Thomas McCarthy, The Human Persona as Commercial Property: The Right of Publicity, 19 Colum.-VLA J.L. & Arts 129, 134 (1995)).
damages are often awarded with regards to the commercial injury to the business value of the plaintiff's identity due to the defendant's use of his or her identity.\textsuperscript{32}

C. EARLY DEVELOPMENT OF THE RIGHT OF PUBLICITY

The term "right of publicity" was first used in \textit{Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.}\textsuperscript{33} In \textit{Haelan}, two separate chewing gum manufacturers were in dispute over the "exclusive right to use the photographs of leading baseball-players."\textsuperscript{34} The plaintiff contracted with a ball-player for the right to use his photograph in connection with the sale of chewing gum for a specific term.\textsuperscript{35} While aware of the plaintiff's contract, the defendant deliberately induced the same ball-player to allow the defendant to use his photograph in connection with the sale of the defendant's gum during the same period that the plaintiff contracted with the athlete.\textsuperscript{36} In rejecting the defendant's contention that a man does not have a legal interest in the publication of his picture other than a personal right not to have his feelings injured, the court introduced the phrase "right of publicity."\textsuperscript{37} The majority found that an individual has publicity rights in his photograph, meaning the individual has the right to grant the exclusive use of his picture.\textsuperscript{38} The court noted that prominent individuals would "feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways."\textsuperscript{39} In essence, the court recognized for the first time that a property right in one's identity can be legally divided from the person in a manner in which privacy cannot.\textsuperscript{40} Following the \textit{Haelan} decision, this country has seen numerous cases further defining the degree of the right of publicity.

D. THE RIGHT OF PUBLICITY DEFINED

"Many states have long recognized the value and importance of an individual's '15 minutes of fame' and have explicitly codified a property right in

\begin{itemize}
  \item \textsuperscript{32} Id.
  \item \textsuperscript{33} 202 F.2d 866, 868 (2d Cir. 1953).
  \item \textsuperscript{34} Id. at 867.
  \item \textsuperscript{35} Id.
  \item \textsuperscript{36} Id.
  \item \textsuperscript{37} Id. at 868.
  \item \textsuperscript{38} Id.
  \item \textsuperscript{39} Id.
\end{itemize}
an individual’s identity.” As of 2008, at least nineteen states recognize a right of publicity in their statutes and at least eleven others recognize it at common law. For instance, in the state of California, for a plaintiff to prevail on a claim of misappropriation of his or her name or likeness, the plaintiff must show: “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to the defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.” In New Jersey, the right of publicity typically applies when one party uses a highly publicized individual’s reputation or accomplishments to his or her advantage. While the right of publicity may vary slightly from state to state, the primary goal of this right is to allow every individual to control the use of his or her name, likeness, or other indicia of identity for commercial use. Thus it is unlawful for one to use the identity of another person to sell or market a product without a license or that individual’s consent. Additionally, those who wish to nationally advertise various products must comply with the law of all fifty states and not simply the law of the state in which they are located. So for an advertisement that is run nationally—including via the internet—the advertiser must comply with the right of publicity law of the state maintaining the most severe restrictions.

Generally, a plaintiff will have a prima facie case for a right of publicity claim if he or she is able to show: (1) validity; (2) infringement; (3) commercial value in the defendant’s use of plaintiff’s identity or persona; (4) identity of plaintiff is recognizable from defendant’s use. Essentially, the plaintiff must prove that he or she “owns an enforceable right in the identity of a human being” and that the “[d]efendant, without permission, has used some aspect of identity or persona in such a way that [the] plaintiff is identifiable from defendant’s use,” and that the “[d]efendant’s use is likely to cause damage to the commercial value of that persona.”

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41 State Right to Publicity Laws, supra note 12.
42 Id.
44 Id. at 1111–12.
45 Id. at 1111 (discussing the definition of right of publicity as defined in § 46 of the Restatement (Third) of Unfair Competition).
46 McCarthy & Anderson, supra note 40, at 197.
47 Id. at 199.
48 Id.
49 MCCARTHY, supra note 26, § 28.7.
50 Id.
E. THE RIGHT OF PUBLICITY FURTHER EXPLORED IN CASE LAW

Following the Haelan case, more celebrities have become concerned with protecting their names, likenesses, and identities from the commercial use of others. In Midler v. Ford Motor Co., the defendant used popular songs of the 1970s in a series of television commercials used to market and advertise its automobiles. However, when Bette Midler, a nationally known actress and singer, refused to participate in the production of a commercial, the advertising company for Ford Motors employed someone who sounded exactly like Midler to recreate her hit song “Do You Want to Dance.” After learning of the commercial, Midler brought a misappropriation claim against the defendant. Although the commercial did not use Midler’s name or face, the court found a tort had potentially been committed and ruled that Midler had made a sufficient showing to defeat summary judgment. It viewed the use of a famous celebrity’s voice, especially that of a singer, to be as distinguishable as the actual face of the celebrity. The court held that “when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs.”

A few years later in White v. Samsung Electronics America, Inc., the United States Court of Appeals for the Ninth Circuit was again forced to tackle the right of publicity issue. In that case, Vanna White, a hostess for the Wheel of Fortune television show, brought a suit against Samsung Electronics. The defendants used a female-like robot and various props in a group of advertisements to create a resemblance to White without her permission. The court looked to the common law right of publicity and extended that right to include means of appropriation other than only that of name or likeness. Although Samsung did not appropriate Vanna White’s identity in the most obvious manner—by using a robot and not using her name—the company’s action was still found to have invoked her identity. In creating such a commercial, Samsung directly
implicated the "commercial interests which the right of publicity is designed to protect."\(^\text{62}\)

F. FIRST AMENDMENT DEFENSES TO RIGHT OF PUBLICITY CLAIMS

1. Transformative and Expressive Work. When the use of the name, likeness, persona, or image of a professional athlete or celebrity is "transformative," there may be a First Amendment defense for the user.\(^\text{63}\) This type of defense was explored in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*\(^\text{64}\) In that case, an artist created lithographic prints and silkscreened images of The Three Stooges, placed the images on T-shirts, and sold them, ultimately earning a profit of roughly $75,000.\(^\text{65}\) When the production company owning the rights to the images of The Three Stooges filed a right of publicity claim against the artist, the California Supreme Court ruled against the artist who created the work.\(^\text{66}\) The court based its evaluation on a determination of whether the work was transformative, believing that factor must be determined in order to properly align the right of publicity with the First Amendment.\(^\text{67}\) The court focused on the shared goal of the right of publicity with that of copyright law.\(^\text{68}\) In doing so, the court emphasized the desire to encourage free expression and creativity by protecting certain types of expression.\(^\text{69}\) Essentially work that is created as an extension of an artist's expression, in a unique and original fashion, is often allotted free speech immunity.\(^\text{70}\) Even any advertisements for such works are also granted protection under the First Amendment.\(^\text{71}\) However, the court noted that when there is a direct trespass on the publicity rights of another without any significant expression being added in creating the object, the legal interest in protecting one's rights clearly outweighs the interest in allowing an artist to express such imitative work.\(^\text{72}\) Although finding against the artist, the court recognized that

\(^{62}\) *Id.* at 1398.

\(^{63}\) MARC A. FRANKLIN ET AL., MASS MEDIA LAW: CASES AND MATERIALS (7th ed. 2005).

\(^{64}\) *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001).

\(^{65}\) *Id.* at 800–01.

\(^{66}\) *Id.* at 811.

\(^{67}\) *Id.* at 808.

\(^{68}\) *Id.*

\(^{69}\) *Id.*

\(^{70}\) *See ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 937 (6th Cir. 2003) (finding an artist's painting of a professional golfer to be an expression entitled to the full protection of the First Amendment).

\(^{71}\) MCCARTHY, *supra* note 26, § 28:41.

\(^{72}\) *Id.*
when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame.\(^73\)

2. **Newsworthiness.** When information about a celebrity is newsworthy, the protections—such as the freedom of speech and freedom of the press—granted under the First Amendment are often used in limiting the application of the right of publicity.\(^74\) In *Paulsen v. Personality Posters, Inc.*, the New York Supreme Court stated:

Consonant with constitutional considerations, it has consistently been emphasized that the statute [protecting the commercial exploitation of public figures] was not intended to limit activities involving the dissemination of news or information concerning matters of public interest and that such activities are privileged and do not fall within “the purposes of trade.”\(^75\)

Similarly, when evaluating the freedom of speech issue, the California Supreme Court noted that it is important to strike a proper balance between the freedom of expression and the relative importance of the interests that are at stake.\(^76\) Freedom of speech principles tend to expand from newsworthy information to expressive entertainment as well.\(^77\) Courts have tackled the issue of determining the difference between informing and entertaining throughout the years and some have determined that they are very closely related.\(^78\) In *Winters v. New York*, for example, the court noted that “[t]he line between the informing and the entertaining is too elusive for the protection of [the] basic right” of free speech and free press.\(^79\) In *Zacchini v. Scripps-Howard Broadcasting Co.*, the United States Supreme Court stated that “entertainment itself can be important news.”\(^80\) Additionally, in *Guglielmi v. Spelling-Goldberg Productions*, the court found that “works of fiction are constitutionally protected in the same manner as political treatises

\(^{73}\) Id. at 810.

\(^{74}\) Stapleton & McMurphy, supra note 1, at 44 (stating that a First Amendment defense in a right of publicity suit is the most difficult to overcome).


\(^{76}\) Comedy III Prods., 21 P.3d at 805.

\(^{77}\) MCCARTHY, supra note 26, § 28:40.

\(^{78}\) Id.


and topical news stories." Lastly, the United States Supreme Court has even recognized that "entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works . . . fall within the First Amendment guarantee." Thus, these cases make it apparent that news and (to a certain extent) entertainment are both protected under the First Amendment. However, it is important to note that, while the First Amendment may be used as a defense to a right of publicity claim, it may only be used to the extent that the material is not false commercial speech. Since commercial speech often encourages the buying decisions of consumers, such use must be truthful and non-misleading to warrant a free speech defense. Thus, while a professional athlete cannot assert a right of publicity claim to prevent the publication of his name and picture in an article detailing his performance in a particular game, he may use the right of publicity to prevent the unlicensed use of his name and persona to falsely advertise for certain products.

3. Parody. A parody is defined as "a transformative use of a well-known work for purposes of satirizing, ridiculing, critiquing, or commenting on the original work as opposed to merely alluding to the original to draw attention to the later work." With regards to constitutional law, a parody is typically considered free speech. However, the role of parody as it applies specifically to the right of publicity has been disputed by various courts for many years. This issue was thoroughly analyzed in Cardtoons, L.C. v. Major League Baseball Players Ass'n, in which the Tenth Circuit affirmed the ruling that while the defendant's trading cards, which parodied major league baseball players and teams, infringed on the professional athletes' right of publicity, the players' claims were trumped by Cardtoons' First Amendment rights. In Cardtoons, the defendants hired a political cartoonist, an artist, and a sports author and journalist, who used the caricatures of the professional athletes to provide humorous commentary. Many aspects of professional baseball and its players were parodied, including high

83 MCCARTHY, supra note 26, § 28:40.
84 Id.
85 Id.
87 McCarthy & Anderson, supra note 40, at 198.
88 Id.
89 BLACK'S LAW DICTIONARY 1149 (8th ed. 2004).
90 Id.
91 Id.
92 Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959 passim (10th Cir. 1996).
93 Id.
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salaries, vanity, and personal characteristics of the players. When the Major
League Baseball Players Association (MLBPA) issued a cease and desist order to
Cardtoons, the company filed a lawsuit seeking a declaratory judgment that its
cards did not violate the publicity rights of the players or the MLBPA. In
determining whether Cardtoons should be granted declaratory relief, the court
engaged in a three-part evaluation. The court analyzed: (1) whether the cards
produced by Cardtoons infringed upon the MLBPA's property rights; (2) whether
the First Amendment protected the cards that were produced; and (3) whether the
property rights against Cardtoons outweighed its right to free expression. The
court first found that Cardtoons infringed on the publicity rights of the MLBPA
because of its obvious use of the players' likenesses.

However, the court expressed some difficulty in determining whether the First
Amendment protected the cards that were produced. Since there was very little
precedent regarding the protection of parody as it pertains to athletes, the court
did not have a precise route to follow in deciding this issue. Thus, the court
stated, "speech that does no more than propose a commercial transaction . . . is
commercial speech." It found that the cards could not be classified as
commercial speech primarily because they did not simply promote a different,
unrelated product. Instead, the court believed that Cardtoons' parody trading
cards should be granted full protection under the First Amendment because the
"cards provide[d] social commentary on public figures, major league baseball
players, who are involved in a significant commercial enterprise, major league
baseball." Thirdly, in evaluating the balance between the MLBPA's property right versus
Cardtoons' First Amendment right to free expression, the court examined the
value of parody to society and determined that effective criticism is only obtained
by those creating parodies through the use of images and other objects that are
familiar to society. Ultimately, the court focused on the aims of intellectual
property law and expanding creative expression. In sum, the court found little

94 Stapleton & McMurphy, supra note 1, at 50.
95 Cardtoons, 95 F.3d at 963–64.
96 Id. at 966–76.
97 Id.
98 Id. at 968.
99 Carrer, supra note 8, at 166.
100 Id.
101 Cardtoons, 95 F.3d at 970.
102 Id.
103 Id. at 969.
104 Id. at 972.
105 Id. at 976.
benefit in granting the MLBPA the ability to prevent the players' images from being used in parodies. ¹⁰⁶

G. THE RIGHT OF PUBLICITY AS IT PERTAINS TO ATHLETES

From the time of its inception, the right of publicity has been heavily litigated in the domain of professional athletics. Although Haelen, discussed above, was the first case to coin the phrase "right of publicity," a prior case involving a professional athlete was also important in the development of the phrase. In O'Brien v. Pabst Sales Co., a famous football player brought an action against a beer company for invading his right of privacy by publishing his photograph on a football calendar that advertised beer. ¹⁰⁷ Although the court did not rule in his favor on that claim, the case highlighted the inadequacy of the right of privacy in satisfying the needs of celebrities and high profile athletes when it comes to controlling the commercial dissemination of their own names. ¹⁰⁸ Following O'Brien and the subsequent Haelen decision, athletes such as Michael Jordan, ¹⁰⁹ Muhammad Ali,¹¹⁰ and Kareem Abdul-Jabbar,¹¹¹ sued—or their license owners brought suits—for a violation of the right of publicity.¹¹² While some athletes have succeeded on a right of publicity claim and others have not, the recurring theme in most cases focuses on whether the basic elements discussed below can be proven.¹¹³

1. Validity. As previously noted, in order for a plaintiff to bring a right of publicity claim, he typically first must establish validity.¹¹⁴ The validity requirement can be likened to the concept of "standing to sue."¹¹⁵ Since the right of publicity is assignable, the plaintiff in such a suit can be either the professional athlete (or the athlete's agent) whose persona is at issue, or a party to whom the athlete has licensed the right to use his or her identity.¹¹⁶

In MJ & Partners Restaurant Ltd. v. Zadikoff, there was a validity issue in the right of publicity claim.¹¹⁷ The plaintiffs had an exclusive license granted by
professional basketball player Michael Jordan to use his persona in creating a restaurant in Chicago.\textsuperscript{118} The plaintiffs brought a lawsuit after learning that Jordan had also negotiated with the chief executive officer of the plaintiffs’ restaurant to open a competing restaurant that would contain certain characteristics associated with Jordan.\textsuperscript{119} Guest appearances, food selection, and name displays were all ways in which the rival restaurant planned to capitalize on the Jordan label.\textsuperscript{120} In rejecting the defendants’ argument that the plaintiffs could not assert a claim for misappropriation because Jordan, the actual person who had been violated, was the only one who could sue, the court stated that “[s]ince the tort of misappropriation is premised on a person’s economic interest in publicity rights, the range of plaintiffs who have standing to make a misappropriation claim expands to the extent that such publicity rights are assignable.”\textsuperscript{121} Consequently, since Jordan granted the exclusive right in the usage of his name to the plaintiffs via the licensing agreement, the court found that the plaintiffs had sufficient standing to bring a misappropriation or right of publicity claim.\textsuperscript{122}

2. Identifiability. The second element of importance in a typical right of publicity claim is infringement.\textsuperscript{123} This element is determined by an “identifiability” test.\textsuperscript{124} This test requires that “only a more than de minimis number of ordinary viewers (or listeners) of defendant’s use can identify the plaintiff.”\textsuperscript{125} In \textit{Motschenbacher v. R.J. Reynolds Tobacco Co.}, the court tackled the issue of identifiability as it applies to the infringement element of the right of publicity.\textsuperscript{126} The plaintiff, a professional race car driver, was “internationally known and recognized in racing circles and by racing fans” and repeatedly “individualized” his cars to set them apart from those of other drivers.\textsuperscript{127} Although his facial features were not visible, Motschenbacher brought a claim for misappropriation when the defendants televised a commercial depicting numerous race cars, including the plaintiff’s car.\textsuperscript{128} The court ruled that the plaintiff himself was unrecognizable while driving the vehicle in the commercial, but the distinctive decorations that appeared on the race car were peculiar to his

\textsuperscript{118} Id. at 924.
\textsuperscript{119} Id. at 925–26.
\textsuperscript{120} Id. at 926.
\textsuperscript{121} Id. at 930.
\textsuperscript{122} Id.
\textsuperscript{123} Stapleton & McMurphy, \textit{supra} note 1, at 35.
\textsuperscript{124} \textit{MCCARTHY, supra} note 26, § 28:7.
\textsuperscript{125} Id.
\textsuperscript{126} \textit{Motschenbacher v. R.J. Reynolds Tobacco Co.}, 498 F.2d 821 (9th Cir. 1974).
\textsuperscript{127} Id. at 822.
\textsuperscript{128} Id.
car and caused some people to believe that the car was indeed the plaintiff's.\textsuperscript{129} Therefore it could be inferred that the person driving the car was the plaintiff.\textsuperscript{130} Although the driver himself was not recognizable, the court's reasoning suggests that objects that can be linked to a celebrity in the eyes of the reasonable person satisfies the identifiability requirement of the right of publicity, and such claims should be allowed.

Additionally, in \textit{Ali v. Playgirl, Inc.}, the court was presented with the question of whether a monthly magazine violated the publicity rights of former heavyweight boxing champion Muhammad Ali.\textsuperscript{131} Similar to the \textit{Motschenbacher} case discussed above, the defendant magazine company used an image that could be closely associated with a celebrity. More precisely, in an issue of \textit{Playgirl} magazine, a picture was used, which resembled Muhammad Ali depicting "a nude black man seated in the corner of a boxing ring."\textsuperscript{132} The photograph was entitled "Mystery Man" but contained the phrase "the Greatest," which was often used by Ali to describe himself.\textsuperscript{133} The court found that the "cheekbones, broad nose and widest brown eyes, together with the distinctive smile and close cropped black hair" could be likened to the famous boxer.\textsuperscript{134} Even though the photograph was not exactly that of Muhammad Ali, the court still found that the image could be identified as the boxer.\textsuperscript{135} Thus, the "identifiability" element of a typical right of publicity claim has often been extended to include any image or figure that can be clearly recognizable as that of a professional athlete.

3. \textit{Harm to the Commercial Value of the Celebrity}. Typically, the third element that must be satisfied for a right of publicity claim is that the defendant "used [the] plaintiff's identity or persona in a way that is likely to cause damage to the commercial value of that identity or persona."\textsuperscript{136} Since most professional athletes essentially sell the use of their name, likeness, or persona to companies for a financial gain, there is little doubt that when another party uses those characteristics, there is an invasion on the commercial value that can be obtained by the celebrity or the person who maintains a license for such use.

An example of a dispute over the impact on commercial value of a celebrity's persona is demonstrated in \textit{Hoffman v. Capital Cities/ABC, Inc.}.\textsuperscript{137} In that case, the famous actor, Dustin Hoffman, brought a suit against a Los Angeles magazine

\textsuperscript{129} \textit{Id.} at 827.
\textsuperscript{130} \textit{Id.}
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.} at 726-27.
\textsuperscript{134} \textit{Id.} at 726.
\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{Stapleton & McMurphy, supra note 1, at 41.}
\textsuperscript{137} \textit{Hoffman v. Capital Cities/ABC, Inc.}, 255 F.3d 1180 (9th Cir. 2001).
company after it combined his face and head with the body of a male model wearing a "spaghetti-strapped, cream-colored, silk evening dress and high-heeled sandals." The image was based on the movie *Tootsie*, in which Hoffman portrayed a male character who dressed as a woman to earn a role in a television soap opera. The illustration, entitled "Grand Illusions," contained altered images from famous films to make it appear as if the actors were actually wearing the current fashion trends. Although the magazine did not receive Hoffman's permission for the use of his image, the court nonetheless found that he did not have a valid claim for a violation of the right of publicity because such use was not considered "pure commercial speech." Essentially, the court found no infringement because the image was not used solely for the purpose of selling a product.

Notably, in a strikingly similar case involving the advertisement of clothing products, the Ninth Circuit reached a completely different outcome than the court in *Hoffman*. In *Downing v. Abercrombie & Fitch*, the court ruled that the defendant's use of images and names of a particular group of well-known surfers in its catalogue without the surfers' permission presented a sufficient claim for a violation of their right of publicity. The court determined that a jury could reasonably find that the purpose of the advertisement was to use the names and images of the surfers to market the company's clothing and generate a sales profit. The defendant was attempting to capitalize on the individual's fame without compensating them, which raised an issue of material fact concerning whether the plaintiffs' names and likeness had been misappropriated. The commercial value of the surfers' celebrity-status was being harmed because their images were being used without permission by another entity to achieve monetary success.

H. THE RIGHT OF PUBLICITY AS IT PERTAINS TO CRIMINALS

Since criminal law is public law, there is currently very little case law considering the publicity rights of those who have committed a crime. Numerous states have passed laws to prevent criminals from receiving media profits.
Money received from movies, books, television shows, or any other source that is derived from any depiction of the criminal's activities may be taken by the state and awarded to the victims.\textsuperscript{147} Such "Son of Sam" statutes have been altered by many states to ensure that the statutes do not violate constitutional constraints.\textsuperscript{148} Additionally, in \textit{Maritore}, the Seventh Circuit did not allow family members of notorious criminal Al Capone to succeed on an infringement claim.\textsuperscript{149} Although the case was not based on the publicity rights of a criminal, the court's desire not to allow such a claim is evident in the opinion.\textsuperscript{150} Lastly, policy inferences can be drawn from a recent incident involving the trial of a serial killer and a dispute he had with the producers of the movie \textit{Alpha Dog}.\textsuperscript{151} While the suspected murderer had not yet been convicted and was awaiting trial, he attempted to prevent the release of a film that told his life story.\textsuperscript{152} The production company, Universal Studios, argued that delaying the release of the film would be an unconstitutional prior restraint on free speech, and the court ultimately rejected the suspected murderer's claim.\textsuperscript{153} While the suspected criminal's purpose for wanting to prevent the release of the film while he was awaiting trial may have been that he wanted an unbiased jury, as opposed to wanting only to protect the commercial value of his persona, this instance presented a right of publicity claim of a murder suspect that was eventually denied by the court.\textsuperscript{154} These examples indicate that unless there is some extraordinary circumstance, only criminals with a flawless argument will be able to succeed on a right of publicity claim.

\textsuperscript{147} Id.


\textsuperscript{149} Maritore v. Desilu Prods., Inc., 345 F.2d 418 (7th Cir. 1965).

\textsuperscript{150} See id. at 420 (quoting William Shakespeare and emphasizing that the criminal acts someone does become a part of public history).


\textsuperscript{152} See id. (explaining \textit{Alpha Dog} was a film that told the story of Jesse James Hollywood, the youngest person to appear on the FBI's most-wanted list).

\textsuperscript{153} Id.

\textsuperscript{154} Id.
III. DISCUSSION: 4TH AND INCHES

A. THEORY BEHIND THE LACK OF PUBLICITY RIGHTS ALLOTTED TO NOTORIOUS CRIMINALS WHO BECOME FAMOUS SOLELY FROM THEIR PARTICIPATION IN CRIMINAL ACTIVITIES

The idea of allowing well-known criminals to protect their names, voices, personas, or likenesses from the commercial exploitation of another would likely pass little muster in the American court system. The first problem with such an allowance is the troubling thought that the law would, in a sense, be promoting criminal behavior. A plausible argument could be made that if the United States court system allows the persona of a criminal to be awarded protection from the commercial use of others, more criminals may be encouraged to participate in illegal activities. If these individuals are aware that they are the only persons who may obtain a future profit from their notorious persona, they may seek to capitalize from their unlawful behavior.

A second dilemma that arises in allowing criminals to maintain a right of publicity claim is its contradiction to the newsworthiness exception that is typically allowed as a defense to such claims. Essentially, criminal law is considered to be public, and since it is likely to impact many people, the information is considered newsworthy and of high interest to the public. Thus, if all criminals who engage in wrongful conduct are awarded a right of publicity in their persona, it could severely infringe on the newsworthiness protection granted by the First Amendment against right of publicity claims.

Third, in most cases involving violation of publicity rights, courts typically appear to allow such claims when the famous individual has intended to earn a profit in his or her persona by engaging in an activity with the purpose of bringing about popularity. The celebrity’s intent in such cases was to become famous and to ultimately have the ability to use his or her identity in a commercial manner of his or her liking to achieve a financial gain. Obviously, the same cannot always be said for those who have become notorious for committing criminal offenses. Oftentimes, when individuals commit violent acts, they do not want to be apprehended or do not want the public to know what they have done. Yet if the court allows such an individual to possess a right of publicity claim against those who use his or her persona for commercial purposes, it will be allowing the

155 See infra Part III.c.2.
156 See Midler v. Ford Motor Co., 849 F.2d 460, 460 (9th Cir. 1988) (finding the replication of a famous singer’s voice valid to defeat summary judgment); see also White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1395 (9th Cir. 1992) (noting the use of a celebrity-look-alike robot sufficient to defeat summary judgment in a right of publicity claim).
criminal to protect an identity that he or she did not intend to become famous and valuable. This would undermine the commercial value element of the right of publicity. As a result of these policy issues, along with the case law discussed above, it is extremely unlikely for someone who has become a celebrity from criminal activity to seek and succeed on publicity claims. However, if the individual had reached celebrity status prior to being charged for the crime, as in the instance of Michael Vick, he or she would have a strong argument for the continual protection of such rights.

B. MICHAEL VICK'S RIGHT OF PUBLICITY CLAIMS AGAINST THOSE SELLING THE VARIOUS ANTI-VICK PRODUCTS

The Michael Vick dogfighting charges, combined with the subsequent selling of numerous anti-Vick products, presents an extremely unique application of publicity rights, which has not previously been heavily litigated in the courts. Like most professional athletes and celebrities, prior to his conviction, Michael Vick possessed—or assigned to the National Football League or an authorized agent—the publicity rights protecting the use of his name, image, likeness, and any other type of recognizable feature of his persona, from those attempting to use such traits in order to procure a financial gain. However, following his conviction, the difficulty arises in determining whether Vick still possesses those rights, which could potentially be categorized as public law. Specifically, the court would have to decide if the alteration of an already famous individual's public status allows others to use his previous celebrity status to earn a profit.

While there have been numerous anti-Vick products to surface following this incident, the production and sale of the Vick Dog Chew Toy presents the strongest display of an infringement on the publicity rights of Michael Vick. The seller of this product essentially created a miniature statue that is closely associated with Vick. The chew toy model is an African-American football player who is wearing a black number seven jersey and carrying a football in his left hand. Similarly, Vick was a unique left-handed quarterback, wore the same number seven jersey throughout his entire professional football career, and also sported a black jersey with red numbering when his team, the Atlanta Falcons, played a home game. The name, hairstyle, facial features and other qualities of the

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157 McCarthy, supra note 26, § 28:8.
158 Michael Vick Dog Chew Toy, supra note 16.
159 Id.
160 Id.
product illustrate a close resemblance to the persona of Michael Vick.\textsuperscript{162} Although the website selling the chew toy contains a disclaimer, the creator should not be relieved of liability. The disclaimer states:

The World Famous Vick Dog Chew Toy is a fictional character. It's [sic] use is not intended to harm anyone living or dead. It is a novelty character and a pet chew toy. The World Famous Vick Dog Chew Toy is being used to bring awareness to animal abuse. Any similarities to the National Football League MVP and All Star Michael Vick are false. The image of Vick Dog Chew Toy used on our website is an exact representation of The World Famous Vick Dog Chew Toy. VickDogChewToy.Com is not affiliated with the NFL or Michael Vick, nor do we make any claim thereof. All names, characters, images and logos on this site are protected by trademark, copyright, and other intellectual property laws. All rights in the products and creations are owned by Showbiz Promotions, LLC.\textsuperscript{163}

While it is a valiant attempt, this disclaimer should be held invalid because it essentially goes against the overall principle of the right of publicity. The creators are suggesting that although they have used Vick's name, identity, and likeness, they still do not intend to link the product to his celebrity. As observed in the \textit{Ali} case,\textsuperscript{164} even if the makers of the chew toys claim that they are not associating the product with Vick, if a reasonable person would view the product and find a close enough resemblance to Vick, there is an obvious infringement on his right of publicity and such acts should be prevented.

This disclaimer is in direct conflict with the protection of Vick's right of publicity and should not be allowed to prevent any claims that are brought forth. While the creators of the chew toys may believe that they are free from liability, it appears that Vick has a plausible argument for at least an injunctive order preventing the sale of such a product under a test similar to that promoted by \textit{McCarthy}\textsuperscript{165} and also from various cases dealing with right of publicity claims.\textsuperscript{166}

As previously noted, the first step in a typical right of publicity claim that Michael Vick must satisfy is the issue of validity.\textsuperscript{167} This would likely be of little

\begin{footnotes}
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\item[162] Michael Vick Dog Chew Toy, supra note 16.
\item[163] Id.
\item[164] See supra notes 134–35 and accompanying text.
\item[165] See supra note 49 and accompanying text.
\item[167] See supra note 49 and accompanying text.
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concern for Vick and his representatives if they elect to file suit against the sellers of such products. As observed in *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, every celebrity inherently maintains the right to protect the use of his persona.  

Given Vick's established popularity from playing professional football, he should easily satisfy the validity requirement that is vital in succeeding on a right of publicity claim.

Secondly, Vick must prove the infringement element of a right of publicity claim. In other words, if Vick hopes to prevail on this claim he must illustrate that the seller of the chew toy used some aspect of his "identity or persona in such a way that [Vick] is identifiable from [the seller's] use." Again, it is not likely that Vick will have much difficulty satisfying this requirement. The chew toy bears Vick's name and illustrates an extremely close resemblance to his facial features, persona, and likeness. Under an analysis similar to that of the court in the *Ali* case, the chew toy product will be found as a close association to Michael Vick and thus infringing on his right of publicity.

Additionally, Vick will have to show that the distribution of the chew toy by this company is likely to cause damage to the commercial value of his persona in the future. On its face, this requirement appears to present the greatest difficulty for Vick's claim. Since it is highly unlikely that Vick will attempt to sell similar anti-Vick products in the future, one may believe that Vick would have difficulty in preventing others from selling such a product. However, if Vick is simply able to illustrate that this product will damage his financial earnings in the near future by bringing about an unlawful tarnishing of his name, image, and persona, he should be able to succeed on this element of his claim against the chew toy sellers. Vick's argument must demonstrate that by allowing this product to be sold and distributed without his approval, his other potential endorsement opportunities in the future will be jeopardized. Specifically, he must show that shoe contracts, athletic clothing agreements, and various other financial ventures

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168 *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) ("For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses [sic], trains, and subways. The right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their picture.").

169 *See supra* note 50 and accompanying text.

170 *Michael Vick Dog Chew Toy, supra* note 16.

171 *See* Ali v. Playgirl, Inc., 447 F. Supp. 723, 726 (S.D.N.Y. 1978) (noting that a person maintains an equitable action when his or her persona is used for trade purposes without consent).

172 *See supra* note 50 and accompanying text.
will be harmed due to the constant negative reminder of his criminal involvement with dogfighting by the selling of the anti-Vick products.

Those opposed to allowing Vick to succeed on a right of publicity claim may argue that such a decision will contradict numerous societal values, as detailed above. However, although Vick was convicted of participating in the extremely disturbing activity of dogfighting, his right of publicity claim—and those of athletes and celebrities in similar situations—is different from other criminals who may try to assert right of publicity claims against those using their images to sell products for financial gain. Most importantly, Vick did not become famous solely from his participation in an illegal activity. While Vick may have become even more of a household name following his dogfighting conviction, it is likely that many people around the world were already familiar with him as an outstanding professional athlete. His renown as one of the most electrifying starting quarterbacks in the National Football League established Vick as a celebrity with publicity rights long before his criminal conviction.

The Michael Vick situation could be vital to the continual development of the right of publicity. In future incidents, when an already famous celebrity later receives a great amount of media attention due to his or her participation in an illegal activity, a possible solution for courts to determine whether this individual may assert a right of publicity claim to prevent others from misappropriating his or her image is to engage in a balancing test. The right of publicity is primarily concerned with protecting the economic value of a celebrity's image. Therefore the test that courts develop must consider the value to society of the product being sold versus the actual invasion on the athlete or celebrity's potential earnings in the future. If such a balancing test were used in evaluating Michael Vick's claims against those selling the anti-Vick products, the result would likely be in his favor.

Prior to Vick's sentencing, those currently using his name, image, and persona to sell products would not have been able to do so without possessing his permission or a valid licensing agreement. While it is conceded that Vick will probably be unsuccessful in succeeding on claims regarding materials that are of significance to the general public—such as the notes from his public apology—it is difficult to fathom that the sale of products using his athletic

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173 See supra Part III.A.

174 See Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978) (finding that the use of an image that could be linked to that of famous boxer Muhammad Ali was a publicity violation by a newspaper); see also Rose v. Triple Crown Nutrition, Inc., 2007 WL 707348 (M.D. Pa. 2007) (holding that the use of a professional baseball player's photograph without authorization and for the defendant's own commercial advantage resulted in a cause of action based on the right of publicity).

persona do not violate his publicity rights. In creating the Vick Dog Chew Toy, the sellers have essentially designed a product that clearly duplicates Vick’s name and image. While the makers claim that the product’s purpose is to raise awareness of animal abuse, the level of significant value that this product brings to society is minimal. Indeed, if there is any value whatsoever, it should not be viewed at a level that outweighs the protections that Vick should have in preventing the unlawful use of his persona by another for financial gain. In essence, it appears as if the sellers of such products are using Vick’s criminal activity and subsequent conviction as an excuse to partake in the misappropriation of his image to obtain a profit. While the creators may attempt to assert various defenses, the fundamental purpose of such a right of publicity, while it may not be extended to allow an individual to profit from his or her own criminal activity, is such that it seems inappropriate for another individual or company to circumvent the law and misappropriate an athlete’s image or likeness for a profit following a criminal conviction or allegation.

The right of publicity has been used throughout the years to protect the commercial use of a celebrity’s identity. Under this principle, and given the amount of allowance that has been granted to celebrities of Vick’s stature, if Vick is allowed an injunction against those who are marketing and selling the anti-Vick products—in exchange for a guarantee that he will not use his criminal conviction in the future to make a profit on his image—then the right of publicity will have served its purpose in preventing the misappropriation of a celebrity’s image without permission, in an attempt to obtain a profit.

C. AN EXPLORATION OF WHY THE VARIOUS FIRST AMENDMENT DEFENSES WILL BE UNSUCCESSFUL IN DENYING MICHAEL VICK’S CLAIMS

1. Transformative and Expressive Work. If the transformative defense to a right of publicity claim is evaluated under the analysis presented in the Comedy III Productions case, it does not appear that the sellers of the Vick Dog Chew Toy will be able to achieve success in asserting such a defense if Vick filed a claim. While the sellers of the product could argue that, in creating a small chew toy for dogs, they have implemented their own creative artistic abilities, the facts sustain a similar comparison to the artist in Comedy III Productions. In that case, the artist used charcoal to create a unique drawing of celebrities, yet the court did not rule

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176 See infra notes 178–82 and accompanying text.
177 McCarthy & Anderson, supra note 40, at 197.
178 See supra note 64 and accompanying text.
179 See supra note 65 and accompanying text.
In this instance, the creators of the Vick Dog Chew Toy did not implement a level of artistic expression that by any means resembled the level of artistic expression of the artists in *Comedy III Productions*. If it is believed that the creators used any artistic ability at all in creating an exact duplication of Vick's image, it has to be extremely low. Similar to the court's argument in *Comedy III Productions*, it can be argued that the value of protecting Vick's commercial exploitation by the sellers of such products is greater than protecting the very little artistic expression that went into their creation. Thus, sellers of the Vick Dog Chew Toy should not be allotted the protections of the transformative defense as it has been used in cases such as *Comedy III Productions*.

Additionally the makers of the chew toys are not simply using Vick's image in an expressive work. Instead, the sellers have chosen to use his name and likeness in creating a product for sale that can be closely linked to him. Since the actual object should not be protected from a right of publicity claim, the advertisement for the product on the website and through other channels also should not be protected.

2. *Newsworthiness.* In observance of the products concerning Vick, the newsworthy defense will be highly unsuccessful if asserted by those who are selling and marketing the Vick Dog Chew Toy. As previously noted, this First Amendment defense may be used in situations where the seller is engaging in the dissemination of newsworthy information. In order to prevent the invasion of freedom of speech and freedom of the press by the courts, individuals with newsworthy information that is beneficial to the public must be allowed to distribute such information without being hampered by right of publicity claims. In this instance, although the information revolving around the investigation and subsequent conviction of Vick on dogfighting charges surely amounts to newsworthy information, it is difficult to envision that the distribution of the chew toy amounts to being a newsworthy product.

If the distribution of such products are deemed to fall within the confines of the newsworthy allowance of the First Amendment this could lead to numerous misapplications of the right of publicity in the future and may severely limit the amount of control that a celebrity will have on the use of his or her image, likeness, persona, or identity for a financial gain. For instance, suppose that Larry Bird, a legendary basketball player who possesses publicity rights in his identity...
because of his celebrity-status, was given a speeding ticket while driving a Jaguar sports car down a rural road. Once this information reaches the general public via television, newspaper, or some other communication medium, would this then grant a Jaguar car dealership the permission to use Bird’s image in order to advertise its sports cars for sale to the general public? This hypothetical illustrates the problems that would likely occur with such a generous allowance of the newsworthy tag on certain products. Just as in the situation involving Vick’s claim against those selling the Vick Dog Chew Toy, if the distributors are able to assert that the products should be sold because they meet the newsworthy requirement of the First Amendment, this allowance may be applied too loosely in the future. Thus every situation involving a professional athlete or celebrity brought into the media’s limelight would give anyone an excuse to misappropriate the likeness of that celebrity for a profit. A celebrity’s birthday celebration, an athlete’s game-winning performance, and even a celebrity’s traffic violation may be fair game for marketers to use in selling a product. Therefore, the best method for the courts to determine whether a product that contains the use of a celebrity’s name, image, persona, or likeness should be granted First Amendment protection under the newsworthy allowance is a case-by-case analysis. Again, the court should engage in a balancing test, weighing the celebrity’s right of publicity against the level of newsworthiness that is brought about by the production of the good.

In the instance involving Vick, such a balancing test would reveal that the Vick Dog Chew Toys fail to add to the newsworthiness of information that is brought to the public. The duplication of Vick’s image in the form of a chew toy for dogs does not present information to the public that is worthy of protection; instead, it exemplifies the seller taking advantage of an opportunity to misappropriate a celebrity’s image to earn a profit. Therefore, the newsworthy defense under the First Amendment would not suffice if a claim was brought by Vick against the distributors of the Vick Dog Chew Toy to prohibit the selling of the product.

3. Parody. The parody exception presents perhaps the most difficult obstacle for Vick to overcome if he hopes to prevail on a right of publicity claim against the sellers of the chew toy. As observed in Cardtoons, when a product provides information regarding public figures, whether by comedic means or in a serious manner, First Amendment protection may typically be asserted. However, in this situation, while Vick arguably falls within the category of being a public figure, the parody exception should not apply to the creation of the dog chew toys. In Cardtoons, the defendants illustrated an obvious intent of poking fun at the salaries and attitudes of the professional baseball players by using captions and

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184 See supra note 92 and accompanying text.
certain characteristics alluding to the athletes. Here, however, the chew toy makers have simply reproduced the image of Michael Vick in order to sell a product for dogs to obtain a profit. While the makers are using the recent conviction of Vick to sell a product, it is not clear that they intend to use the product to provide social commentary on a public figure. In the end, the seller’s intent was to use the image, likeness, name, and persona of Michael Vick and his unfortunate involvement with dogfighting to receive a great financial gain from the selling of the Vick Dog Chew Toy products.

IV. CONCLUSION: THE EXTRA POINT

The ability of professional athletes to implement the right of publicity to protect the use of their name, image, persona, and identity from those attempting to use it to obtain a great financial advantage has historically proven to be of great significance. The protection of such a right allows athletes to obtain the highest possible value for the hard work and commitment they put into developing their celebrity. As observed in this Note, while professional athletes and other notable celebrities have been afforded this type of protection, those who have become famous solely from their participation in criminal activities are likely not to receive the same protections; however, protections provided by the right of publicity might still be extended to those who had already attained celebrity status prior to conviction.

In situations similar to that of Vick, a professional athlete who maintained a high level of publicity rights prior to being convicted of a felony or any other type of criminal act, courts will be forced to engage in a balancing test. The desire to protect the property interests maintained by the athlete before and after his criminal conviction must be weighed against the public interest in the reproduction of the individual’s image or persona by others for a financial gain. In most instances, such a case-by-case analysis should reveal that the desire to prevent the misappropriation of a celebrity’s image should be continued to an extent even if he or she is later convicted of a crime.

Importantly, although the actions that Vick has been convicted of are unacceptable in American society, those acts do not justify the use of his athletic image and persona by those hoping to earn a profit, like the sellers of the Vick Dog Chew Toy. A celebrity’s illegal activity does not provide another person the opportunity to infringe on a right that is typically recognized in a majority of jurisdictions in the United States.

185 See supra note 94 and accompanying text.
Lastly, it is important to note the extent to which the publicity claims of Vick should exist against those who have misappropriated his image. It would be morally inappropriate for courts to allow Vick—or any other celebrity who has been convicted of criminal activity—to deny the use of his image by others because he would like to profit from his criminal involvement. Instead, Vick should be granted an injunction to prevent the use of his athletic image by the producers of the Vick Dog Chew Toy and others using his image or persona to earn a profit. The injunction should be granted with the requirement that Vick, too, does not use his increased fame from his criminal conviction as a way to earn financial gain in the future. For instance, after being released from prison, Vick should be able to maintain the right to market his image to interested suitors based on his athletic success or any other characteristic that does not involve his criminal conviction for dogfighting. By allowing Michael Vick and other celebrities similarly situated to prevent the misappropriation of their image and identity by way of an injunction, courts will be allowing them to maintain a fundamental right of publicity, while not running afoul of moral issues.

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