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Manatt Represents Football Legend In Appeal Against Electronic Arts

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Last week Manatt lawyers filed an opening brief in the Ninth Circuit Court of Appeals on behalf of football legend Jim Brown. This opening salvo in Brown's appeal was widely reported, including coverage in the *New York Times* and by the Associated Press.

Brown, of course, is a member of both the college and professional football Halls of Fame, and is perhaps best known as the record-breaking running back for the NFL's Cleveland Browns from 1957 to 1965. The *Sporting News* selected Brown as the greatest football player of all time, and he has been designated a number one player in the "All Madden, All Millennium" football team. Brown parlayed the fame he gained through his extraordinary athletic accomplishments into a career in entertainment (e.g., film and television roles) and public service (e.g., founding the Amer-I-Can program for inner-city youth). Through his hard work, unique achievements, and public service, Brown, now 74 years old, has become widely known to the public, and has developed substantial goodwill in his likeness and persona.

Enter Electronic Arts ("EA"), a multi-billion dollar videogame company. One of EA's most popular series of videogames, *Madden NFL*, allows gamers to play highly realistic professional football. So realistic, in fact, that EA uses the team trademarks of current players' likeness pursuant to licenses it obtains from the NFL and the NFL Players' Association. The *Madden NFL* game, however, also allows gamers to play vintage (i.e., historic) teams, which – in EA's words – feature "Real Old School Teams And Players," including "fifty of the NFL's greatest players and every All-Madden team."

Accordingly, Brown is among the retired players portrayed in

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Madden NFL, in classic teams such as the '65 Browns and an All Browns team available on the game. Yet EA never licensed this use of Brown's image and persona.

Instead, as established in *Adderley v. NFLPA* (a \$28,100,000 jury verdict also handled by Manatt), rather than purchase licenses from the NFL Players' Association to use the likenesses of retired players, EA simply "scrambled" those images superficially. Thus, Brown's name (and, in most versions of the game, correct jersey number) are not used in the game. For instance, gamers playing the Championship 1965 Browns team in *Madden NFL 2009*, can control a 29-year-old, right-handed, African American running back, with 9 years of NFL experience, 6'2" tall, 228 lbs., having a "player ability rating" in the game of 99 (i.e., the highest possible skill level). All of that data matches Brown's actual statistics. But in the game, the "Brown" character's jersey number is changed to 47 (rather than his actual number of 32). Even so, gamers can edit the Brown avatar's appearance to insert his correct jersey number and input his actual name onto the character.

Although EA consistently denied using Brown's likeness or persona, *Madden NFL* consumers scoffed at that notion. One *Madden NFL* player stated that "[t]o say [Jim Brown is not in the Madden NFL game] is like calling the grass purple and hoping that you're talking to a blind man." Another consumer stated that to claim that "the running back on the [Madden NFL game] could be anyone but Jim Brown is an absolute joke." After all, one cannot play a realistically recreated 1965 Browns team without including representations of that team's actual players, especially its most famous player.

When Brown learned that Defendant Electronic Arts (EA) was using his image and persona as an avatar in *Madden NFL* without his permission, he sued for federal trademark violation and state law right of publicity claims. Brown's complaint alleged that EA's practices misled consumers — allegations that are supported by authority from the leading trademark treatise, which states that over 90% of consumers believe that the use of a celebrity image in a product means that the image is licensed.

Nonetheless, the district court dismissed Brown's trademark claim, concluding that EA had a First Amendment right to profit by including Brown's likeness in its games. Having disposed of Brown's federal claim, the district court then declined to address

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his state law claims. Having been summarily ejected from court, Brown turned to Manatt to handle his appeal.

Manatt's opening brief for Brown explains that the district court should not itself have resolved the question of whether EA's conduct was misleading. That is a factual issue properly determined by a jury. And – given that it has long been well established that the public reflexively concludes that, if a celebrity is "in" something, then the celebrity must have provided permission or endorsement – Brown's case should not have been dismissed out of hand.

EA's immediate response to Brown's brief has been to ask for a 45-day extension of time (on top of the usual 30 days it has to prepare a response). Brown's case raises novel legal issues of tremendous importance. The game is afoot, so stay tuned!

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For additional information on this issue, contact:



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