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Manatt Presents Oral Argument On Appeal For Football Legend Jim Brown Against Electronic Arts

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Last week Manatt lawyer Ron Katz, Chair of the firm's Sports Practice Group, presented oral argument on behalf of football legend Jim Brown to a three-judge panel of the Ninth Circuit Court of Appeals — Judges Pamela Rymer, Jay Bybee, and Gordon Quist (visiting from the Western District of Michigan). With him on the briefing were Manatt partners Mark Lee and Ben Shatz.

Jim Brown, widely considered to be the greatest football player of all time, sued videogame maker Electronic Arts (EA) for using his likeness in its highly successful *Madden NFL* videogames. Through his personal accomplishments, Brown developed substantial goodwill in his likeness and persona. Indeed, as a celebrity, Brown's image is his trademark, protectable under federal trademark law (the Lanham Act). EA, however, used Brown's image without his consent, and without licensing it from him, in its videogames, arguing that it had a First Amendment right of free speech to profit from Brown's likeness. Brown's appeal, therefore, pits trademark rights against alleged free-speech rights.

Brown's primary position at oral argument was that the district court usurped the role of the jury by making the factual finding that no consumer would be

misled into thinking that the appearance of Brown's avatar in the videogame could be construed as Brown endorsing or sponsoring the game. Because it has long been 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 as a matter of law. Judge Rymer questioned whether "the whole ballgame" could be decided by a single judge simply looking at the videogames alone.

Judge Bybee expressed concern about how, given that EA's game used avatars of thousands of football players, Brown's use might not necessarily imply an endorsement. Katz responded that saying Jim Brown was incidental to football would be like saying Babe Ruth was incidental to baseball — i.e., Brown is different from other players. Further, in the Ninth Circuit's earlier opinion of *ESS Entertainment v. Rock Star Video* involving the videogame *Grand Theft Auto* — which held that the First Amendment protected the use of a parody of a strip club's trademark as a background location in the game — the mark at issue was not of an avatar of a character the game player could control. If the game there had been something instead like a hypothetical *Grand Theft Oscar* game, in which players could control movie star avatars, the result would, and should, have been different. That sort of scenario is Brown's case. No one purchased *Grand Theft Auto* to go to the virtual strip club; but consumers do buy *Madden NFL* to simulate realistic football action by playing famous players, including a famous player like Jim Brown, whom Judge Quist called "iconic."

EA pointed out that the Jim Brown avatar in the game was "scrambled" because neither his name nor actual jersey number was used. However, as Judge Quist noted, if EA offers players the ability to play historic teams, such as the 1965 Cleveland Browns, and that virtual team includes an African-American running back with amazing abilities, then there can be no doubt that it is Jim Brown, whom Judge Quist actually saw play in 1959. As Judge Quist put it:

"If they [EA] call it a historic team, and they've got a black guy carrying the ball all the time, better than anybody else can play it, who would it be? I don't know anybody that played on the Cleveland Browns in 1964 — or 1959, when I saw him play — except one guy: I don't know the other players, but I know Jim Brown."

Immediately after oral argument in Brown's appeal, the same panel of judges heard argument in the *Keller v. Electronic Arts* appeal, in which EA argued, in an anti-SLAPP context, that its First Amendment right of free speech also allowed it to use images of college athletes in videogames without violating those players' rights of publicity.

Coincidentally, the day of Brown's argument, the California Court of Appeal issued its opinion in *No Doubt v. Activision Publishing* (2011 WL 407479), concluding that the risk of consumer confusion from using celebrity avatars was greater than the game company's "free speech" interests. Recognizing the possible effect of the *No Doubt* opinion on Brown's case, the Ninth Circuit has requested supplemental briefing from both sides, due in early March.