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By Lindsay Coleman[1]

Sports[1]in the United States has transformed from a simple backyard game into a $150 billion industry.[2] As a result of this transformation, athletes have evolved from mere players to business investments. Aside from developing the technical prowess of star athletes on the field, sports teams also cultivate these athletes' likenesses, personas and brands off the field. Branding athletes, particularly those athletes who become the face of the franchise, can reap lucrative rewards for the team.[3] Branding develops instant recognition between fans, athletes and their teams. This strong connection of the athlete with his brand and team makes his likeness a valuable marketing tool for third party marketers looking to capitalize on the ever-growing sports industry. Accordingly, many companies, especially videogame producers, use prominent athletes to help promote their products. Within their sports games, these companies simulate the physical attributes, movements and persona of star quarterbacks, wide receivers, goalies and more to create as realistic a gaming experience as possible. While many of these athletes are compensated for the use of their image in the games, many others are not.[4] Recently, several former college and professional athletes have filed lawsuits against these game companies and other advertisers under the Lanham Act[5] for incorporating their likenesses into games and marketing campaigns without compensating or receiving consent from the athletes before doing so.[6]

Although these cases include claims under the right of publicity, the Lanham Act applies federal—and therefore, more expansive—protections on the rights an athlete has in his persona and likeness. The right of publicity applies unevenly across states, with varied protection in each state based on the interpretations of state statutes governing the right of publicity. In general, a right of publicity claim is more suited to an infringement case based on an athlete's persona because it is triggered by a lower standard than the "likelihood of confusion" standard that trademark law requires.[7] However, such a claim is limited by the inability to enforce infringement case across states, making the trademark infringement option more attractive.[8] This article will evaluate whether Section 43(a) of the Lanham Act is broad enough to extend to infringement claims from former athletes over the unauthorized use of their likenesses by applying *Brown v. Electronic Arts, Inc.*[9] to the analysis of Lanham Act protection.[10] The article first analyzes the arguments and holding in *Brown* as a means to explain the trademark issues that video game producers like Electronic Arts (EA) raise by using realistic, recognizable players in their sports games.

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2. 1 Glenn M. Wong, Essentials of Sports Law § 1.2 (3d ed. 2002).

3. Dannean J. Hetzel, *Professional Athletes and Sports Teams: The Nexus of their Identity Protection*, 11 Sports Law. J. 141, 167 (2004).

4. Barbara A. Solomon, *Can the Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act is a Proper Substitute for a Federal Right of Publicity*, 94 Trademark Rep. 1202, 1202 (2004).

5. 15 U.S.C. § 1051 *et seq*. (2006).

6. *See* Complaint, Brown v. Electronic Arts, Inc., No. 2:09-cv-01598-FMC-RZx (C.D. Cal. Mar. 6, 2009)[hereinafter Brown Complaint]; Keller v. Electronic Arts, Inc., No. CV-09-1967 (N.D. Cal. May 5, 2009) [hereinafter Keller Complaint].

7. *See, e.g.* Cal. Civ. Code § 3344(a) (West 2009) ("Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such persons prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof . . . .").

8. 5 Thomas J. McCarthy, *McCarthy on Trademarks and Unfair Competition* § 28:12 (4th ed. 2009).

9. Brown Complaint, *supra* note 5.

10. *See* 15 U.S.C. § 1125 (2006) (specifying that any person may bring a civil action in relation to any goods or services that use words, terms or symbols that create a false designation of origin, false or misleading description or representation of fact).

Next, the article assesses the scope of the Lanham Act in its application to *Brown* and other similar cases. Finally, the article concludes with recommendations for video game producers and athletes on how to succeed in future cases.

The increasingly realistic sports-themed video games generate huge profits for game producers.[11] Sports leagues, like the National Football League (NFL) and the National Collegiate Athletics Association (NCAA), make money on these games by licensing their logos and brands to the game producer.[12] However, most of the money raised through licensing fees does not trickle down to the athletes, and this inequitable treatment has spurred lawsuits by players against video game producers. In March 2009, Jim Brown, a retired professional football player in the NFL, filed suit against EA for misappropriation of his likeness as a player on the Cleveland Browns NFL team in EA's *Madden NFL* game.[13]

In the 2009 version of *Madden NFL*—the most recent edition at issue in Brown's complaint—a user has the option to play virtual NFL football in several ways.[14] The most straightforward mode of play for *Madden* users is the franchise mode, in which each user compiles a fantasy team by drafting players among other teams in the league. In this mode, users have access to all of the current NFL rosters and can select any player in the NFL. To select their teams, users flip through pages of players that each contain an individual player's headshot, current team, height and weight, position, and game statistics.[15] In franchise mode, the current players' identities are clear to the user because EA has licensed the rights to their images and likenesses. Once the team is compiled, users can play an entire season with their teams and act as team owners and managers by trading players. At the end of each season, users have another draft of the new players entering the league. The new players are fictitious, computer-generated characters that do not represent any real life players. Their player pages are also computer generated, with a graphic headshot instead of a photograph of the player, and names that do not exist in the NFL. Franchise mode allows users to act as team managers in a highly realistic setting for multiple seasons in a row. When playing in this mode, users recognize the current NFL players and understand that the computer-generated future players do not correspond to any real-life players.

In addition to franchise mode, users also have the option of playing *Madden* in exhibition mode. This allows the users to select entire teams rather than individual players, but uses historic players in addition to current NFL stars. Users can select either an "All-Time" team, composed of the best players on that team from throughout history, or the complete team from a particular year. In both of these instances, historic players like Brown are included in the game as part of a team. EA includes the same level of detail for all of these players, even the historic players who have not licensed their likeness rights to EA, but makes a few minor changes to avoid presenting an exact copy of the actual player on the player profile page and in the game. Generally, the changes include switching a number, excluding a player's name, and distorting the player's appearance. Although users may not individually select any players in exhibition mode, they can still manipulate the appearances of and add names to historic players to resemble the athletes that seem to be anonymous.[16] In other words, placed in the context of either the All-Time

11. EA's top-selling game in the third quarter of 2008 was *Madden NFL*, selling 2,994,000 games—2,958,000 in the U.S.—during that period, the top global seller of video games. Matt Martin, *Madden is best global seller in Q3*, Games Industry, Oct. 11, 2008, http://www.gamesindustry.biz/articles/madden-is-best-global-seller-in-q3.

12. EA signed a licensing deal with the NFL and the NFL Players Association for the exclusive use of official player names and likenesses. Anastasios Kaburakis et al., *NCAA Student-Athletes' Rights of Publicity, EA Sports, and the Video Game Industry: The Keller Forecast*, 27 Ent. & Sports Law. 1, 15 (Summer 2009) (citing Tim Surette & Curt Feldman, *Big Deal: EA and NFL Ink Exclusive Licensing Agreement*, Gamespot.com, Dec. 13, 2004, 2:53 PM, http://www.gamespot.com/news/2004/12/13/news_6114977.html ("The deal . . . is an exclusive five-year licensing deal granting EA the sole rights to the NFL's teams, stadiums, and players.")). The NCAA has a similar agreement with EA, signing its most recent deal in 2004 for licensing rights to the teams, stadiums, and schools. Kaburakis, *The Keller Forecast*, 27 Ent. & Sports Law at 15 (quoting Press Release, Stage Select.com, CLC Grants EA Exclusive College Football Videogame License, Apr. 11, 2005, 2:43 PM EST, http://www.stageselect.com/N1109-press-release-clc-grants-ea-exclusive-college-foot.aspx).

13. Brown Complaint, *supra* note 5.

14. *Id.* at 5, 7. Although Brown first learned about the use of his likeness in the 2008 version of *Madden NFL*, he later discovered that his likeness had been used in all yearly editions dating back to 2001, in addition to the 2009 version. *Id.*

15. Madden 2008 08 2009 09 Player ratings, http://www.youtube.com/watch?v=SlqHdYDTpYI&feature=fvw (last visited Nov. 11, 2009) (showing the pages for each available player in the first draft of franchise mode, all of whom correspond to current NFL players).

16. *See, e.g.,* All Time Cincinnati Bengals vs All Time Cleveland Browns Pt 1, http://www.youtube.com/user/Franchiseplay#p/u/37/mN-4GJFKFzQ (last visited Nov. 11, 2009) (demonstrating the match-up of two All-Time teams, one which included Jim Brown, number 32, in which the user manipulated the nameless players by adding their real names and changing their numbers to simulate as real a game as possible of these two all-star teams).

team or the team from a particular year, fans generally know the identities of the players, even when those players are not given names, have different numbers, and possibly have different appearances. With the rest of the information about the players—like position, team, and statistics—users know even the nameless players.

Brown's complaint centered around Section 43(a) of the Lanham Act, specifically the unauthorized use of his likeness in the *Madden* game and the false endorsement that followed from this use. Brown is always represented in *Madden* as a member of the team he played on during his football career, the Cleveland Browns.[17] However, despite being represented anonymously, Brown's likeness is clearly apparent in the physical attributes given to the virtual player, especially because Brown is such a famous and celebrated athlete and actor. While the current players have already agreed to be compensated for the use of their likenesses at the start of their careers with the NFL, older players like Brown never had the opportunity to negotiate such terms, leaving their likenesses uncontrolled by the NFL and its licensees.[18] Without prior agreement as to the control of their likenesses, players like Brown maintain propriety over their own personas and are not precluded from bringing complaints against video game manufacturers. This distinction is important because current NFL athletes license their images at the time of contract signing and cannot bring lawsuits like *Brown*, but NCAA athletes do not sign away the rights to their likenesses[19] and can therefore continue to file trademark claims against video game producers.[20] NCAA athletes retain control over their likenesses, but the debate continues to rage on over whether they should be allowed to receive compensation for their playing time.[21] NFL athletes, on the other hand, have perhaps signed away too many of their rights by agreeing to a playing contract in the league, and future players may challenge the inclusion of likeness rights in the contracts, particularly if the athlete is extraordinarily famous and could command much more money in licensing fees than the NFL is willing to concede.

Based on the theory that he has control over his own likeness, Brown argued that EA used his image without consent or compensation in the *Madden* game, which constitutes false endorsement. Section 43(a) provides for civil remedies for anyone damaged by the use of "any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact."[22] To prove a claim for false endorsement under Section 43(a), plaintiffs must prove three main elements: "(1) the mark is legally protectable, (2) the plaintiff owns the mark, and (3) the defendant's use of the mark to identify goods or services is likely to create confusion concerning the plaintiff's sponsorship."[23] Additionally, courts have adopted a grab bag of requirements that help them assess the merits of the false endorsement situation. For example, the Ninth Circuit considers the following factors, each of which carries a different amount of weight in the infringement analysis: (1) the level of recognition that the plaintiff has among the segment of the society for whom the defendant's product is intended; (2) the relatedness of the fame or success of the plaintiff to the defendant's product; (3) the similarity of the likeness used by the defendant to the actual plaintiff; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) defendant's intent on selecting the plaintiff; and (8) likelihood of expansion of the product lines.[24] In his complaint, Brown applied only a few of

17. *Id.* Brown's likeness is used as a part of the 1965 Cleveland Browns "historical" team and on the "All-Browns" team. His character is anonymous in the sense that his number is changed in the game to 37, where he played with number 32, but that is the only substantive change to the character. *See* Katie Thomas, *Retired N.F.L. Player Jim Brown Loses Lawsuit Against Video Game Publisher*, N. Y. Times, September 30, 2009, *available at* http://www.nytimes.com/2009/09/30/sports/ncaafootball/30colleges.html.

18. Brown Complaint, *supra* note 5, at 5-6.

19. Under NCAA rules, all college athletes competing in the NCAA are strictly prohibited from receiving remuneration for their activities as college athletes, including compensation for the use of their names, images, or likenesses. College athletes are also barred from authorizing the use of their names and images in commercial use. *See* Matthew G. Matzkin, *Getting' Played: How the Video Game Industry Violates College Athletes' Rights of Publicity By Not Paying for their Likenesses*, 21 Loy. L.A. Ent. L. Rev. 227, 228 (2001).

20. Former Arizona State University quarterback, Sam Keller, filed a class-action lawsuit July 2009 against EA for the unauthorized use of his likeness in its *NCAA Football* game, but did not state a claim under the Lanham Act and instead claimed infringement under the right of publicity theory. *See* Keller Complaint, *supra* note 5.

21. *See* Kristine Mueller, *No Control Over Their Rights of Publicity: College Athletes Left Sitting on the Bench*, 2 DePaul J. Sports L. & Pol'y 70, 86 (2004) (arguing that most athletes should be compensated for their skills at the college level because most will not make it to professional leagues, forcing them to lose out on the profits their universities made from their performances and personas).

22. 15 U.S.C. § 1125(a)(1) (2006).

23. Anastasios Kaburakis et al., *NCAA Student-Athletes' Rights of Publicity, EA Sports, and the Video Game Industry: The Keller Forecast*, 27 Ent. & Sports Law. 1, 29 (Summer 2009).

24. Downing v. Abercrombie & Fitch, 265 F.3d 994, 1007-08 (9th Cir. 2001) (adapting the factors set forth in AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979) as they apply to cases involving celebrity personas).

the main elements required to prove false endorsement.

Brown could have strengthened his complaint by applying the *Abercrombie* factors to his Lanham Act discussion.[25] Widely considered the greatest football player of all time,[26] Jim Brown was selected to play in the Pro Bowl in each of the nine seasons he played in the NFL and was subsequently inducted into the Pro Football Hall of Fame in 1971.[27] Based on the fame and success that Brown achieved while in the NFL, he is widely recognized among football fans as the greatest football player of all time. The connection between Brown's success on the field and EA's use of his image in *Madden NFL* is obviously strong, with Brown's football skills integral to the use of his likeness in the game. Simply put, Brown was a hall of fame running back for the Cleveland Browns and is represented in a football game as a running back on the Cleveland Browns.

The similarity of Brown to his likeness in *Madden* is a stretch in this case because EA only depicts Brown as a nameless player with a different number and an altered appearance. However, the similarities of his team, year played, position and other athletic attributes are enough to make him recognizable to football fans. The Ninth Circuit in *White v. Samsung Electronics*[28] held that a Samsung commercial depicting a robot with a blond wig, long gown, and large jewelry standing in front of a game board and in the process of turning block letters on the board was confusingly similar to Vanna White, the popular hostess of the game show "Wheel of Fortune."[29] The court noted that even though plenty of women have blond hair and wear long gowns and big jewelry, all of the facts put together show that consumers would recognize this robot as an impersonation of Vanna White.[30] To further explain its reasoning, the court analogized Samsung's advertisement to a hypothetical advertisement depicting a robot with male features, an African-American complexion, a red basketball uniform with the number twenty-three on it, black hightop sneakers, and a bald head, dunking a basketball with one hand.[31] Based on this description, the court is certain that everyone would understand that robot to be a depiction of Michael Jordan.[32] The Michael Jordan hypothetical is largely analogous to Jim Brown's representation in *Madden*, except that Brown's character is even more realistic and lifelike because EA has created a person instead of a robot with all of the same attributes as Brown. Additionally, Brown's team, position, and athletic strengths are identical, where the Michael Jordan robot only wore his team color and number.

Continuing with the *Abercrombie* factors that Brown should have asserted to bolster his claim, there is no evidence of actual confusion on the record, and it is a difficult factor to prove without evidence. Nonetheless, users might be confused and think that Brown endorsed *Madden NFL* because they can easily recognize the presence of his character in the exhibition mode games. However, users might not be confused given the difference in presentation of the current NFL players and the historic players like Brown, particularly in use of a computer-sculpted image of Brown's headshot that is different from all other current NFL players. Without evidence of actual confusion, though, this factor would have been difficult for Brown to prove. Football fans are generally zealous followers of specific players and teams for decades, which almost assures a finding that there is a high level of consumer care about whether Jim Brown is in *Madden*. EA is aware that its historic players are also an important part of its NFL games. In addition to the exhibition mode, EA also released a special addition to the newest version of *Madden NFL* called the *AFL Legacy Pack*, which allows users to play games against the original American Football League (AFL) teams.[33] Clearly, specific players from throughout the history of professional football are just as interesting to users as the current players. It is clear that Brown's likeness was specifically targeted by EA to include in the game given his reputation as the greatest football player of all time coupled with the strong user interest in *Madden* that historic players generate. Finally, EA continues to expand its *Madden* games, and with high user interest in looking back to historic players and playing other old teams, it is clear that without any action, Brown's image would continue to be appropriated by EA without his

25. *Abercrombie*, 265 F.3d at 1007-08.

26. Ron Smith, The Sporting News Selects Football's 100 Greatest Players: A Celebration of the 20th Century's Best (Sporting News Publishing Company 1999), *available at* http://tsn.sportingnews.com/nfl/100/1.html (nominating Jim Brown as the number one greatest football player of the 20th Century).

27. Hall of Fame Member: Jim Brown, http://www.profootballhof.com/hof/member.aspx?player_id=33 (last visited Nov. 11, 2009).

28. 971 F.2d 1395 (9th Cir. 1992).

29. *White*, 971 F.2d at 1399.

30. *Id.*

31. *Id.*

32. *Id.*

33. Alexander Sliwinski, *Madden 10 AFL Legacy Pack Takes the Field Sept. 24*, Joystiq, Sept. 9, 2009, http://www.joystiq.com/2009/09/09/madden-10-afl-legacy-pack-takes-the-field-sept-24/.

approval.

Without asserting the *Abercrombie* factors, the court is left with a scaled down infringement argument that does not correspond as closely to traditional infringement analyses that apply to goods. Instead, the court applies the basic test for false endorsement laid out in the statute, which requires the plaintiff to first show that he has a legally protectable mark. Courts have held that a celebrity's persona can serve as a legally protectable mark,[34] especially when the celebrity's name, voice, appearance, or likeness is well known to a large portion of the public. Brown argued that he is well known to the entire football-viewing public as the "greatest football player of all time," given his induction into the NFL Hall of Fame, College Football Hall of Fame, and the Lacrosse Hall of Fame.[35] He also claims to have "achieved significant fame and recognition off the field as a star of both film and television over the last four decades."[36] Applying Brown's arguments to the general pool of athletes, it is clear that athletes only have a legally protectable mark if they have gained significant fame or have developed a recognizable and distinctive attribute or likeness. Without the added factor of fame, it would be difficult for an athlete to succeed in an infringement suit because he would have little evidence to show damage to a persona that few people recognize.

The next step of the analysis is determining whether the athlete owns the mark. When Brown was a player in the NFL, he did not have the opportunity to negotiate licensing terms of his likeness like current players do at the start of their contracts, nor could he have envisioned the evolution of the sports and video games industries into behemoth money makers that use players' images as vehicles for profits. Because Brown never licensed his persona to any video game manufacturers in connection with his role as a star athlete for the Cleveland Browns, he is the definitive owner of his mark and has "retained exclusive ownership and control in his likeness."[37] Most "historical" players who are not current professional athletes but are featured in sports games likely face similar circumstances as those of Brown and have retained the exclusive ownership of their persona. Current professional athletes, however, do not maintain ownership over their likeness in several key areas, particularly when they are acting as employees or representatives of their teams.

Finally, the most crucial element in proving infringement is a showing of confusion of the plaintiff's sponsorship. Preventing consumer confusion is one of the bedrocks of trademark law, and the Lanham Act is structured around protecting consumers from confusion in the marketplace to assist in a more efficient economy. In addition to confusion, the Lanham Act also rewards mark owners for the good will they have put into the product to encourage clear and truthful advertising. With these policy goals in mind, Brown argued that EA's inclusion of such a similar character in physical attributes and team connection to Brown's real-life athletic image and exploits can create confusion as to whether Brown endorsed the product. Despite these similarities, the court in *Brown* held that EA's First Amendment right to speech through video games was a complete defense to Brown's false endorsement claim.[38]

The confusion claim would have been boosted by a showing of other factors that the court takes into consideration when considering false endorsement claims such as Brown's. Specifically, Brown should have shown or described exactly how similar the virtual character was to the real person. Without a visual image of Brown's picture next to a screenshot of the game or a detailed description of the similarities between the two characters on factors like height, weight, and distinguishing characteristics, the court had a difficult time assessing the lengths that EA went to copy the likeness and persona of Brown.[39] As one of 1,500 characters in the game, Brown failed to show how EA's copy of his persona was distinct from any of the other historical players' virtual characters, despite his place in athletic history as one of the greatest players of all time.[40] By not mentioning any of these additional factors, Brown did not assert all of the issues courts look at to help them decide trademark cases. Courts are rarely

34. 5 Thomas J. McCarthy, *McCarthy on Trademarks and Unfair Competition* § 28:15 (4th ed. 2009). *See also* White v. Samsung Electronic American, Inc., 971 F.2d 1395, 1400 (9th Cir. 1992) ("In cases involving confusion over endorsement by a celebrity plaintiff, "mark" means the celebrity's persona."); Allen v. National Video, Inc., 610 F. Supp. 612, 627 (S.D.N.Y. 1985) (adopting the view that a person's name, persona and personal attributes can be considered a "mark" that can be protected if that person has built up a reputation by investing in a particular public image and if the name and likeness of the person are well-known).

35. Brown Complaint, *supra* note 5, at 3-4.

36. *Id.* at ¶ 12. *See* Jim Brown, *IMDB*, http://www.imdb.com/name/nm0000987/ (listing fifty-six movies in which Brown has appeared as an actor).

37. Brown Complaint, *supra* note 5, at 7.

38. Brown v. Electronic Arts, Inc., No. 2:09-cv-01598-FMC-RZx, p. 5 (C.D. Cal. Sept. 23, 2009).

39. *Id.* at p. 8 ("Mere use of the likeness, without more, is insufficient to make the use explicitly misleading.").

40. *Id.* at p. 8.

clear about how they weigh the various factors in their analysis, so by not making all the possible arguments, Brown presented a weaker case than he could have.

The failure of Brown's case is not indicative of the strength of this claim overall, though. If athletes can bring cases that have a substantial amount of evidence in their favor, and can also show that the video game manufacturers acted in bad faith and hurt the good will that the athletes have put into their mark, the First Amendment defense will likely not stand up to the trademark law. However, in this case, the court did not have any strong evidence to show that EA explicitly copied Brown's image, persona and likeness to sell more video games, an action that would obviously mislead consumers into thinking that Brown endorsed the game.[41] In the absence of strong evidence to support Brown's claim of false endorsement, the court took the easy path and precluded further consideration of the Lanham Act claim by deciding that video games deserved First Amendment protection.[42] Had Brown presented images of his character next to screenshots of his *Madden* character, the court might have better understood the possibility of confusion presented by EA's use of almost identical images and attributes. Instead, without any images of the video game, the court had to blindly follow the trademark claims. Absent these crucial images, it was easier for the court to err on the side of free speech than on an individual's right to his likeness. The *Brown* case faltered because Brown could not show how the virtual character's representation harmed his image with his fans or his future profit-making potential by altering his public persona.

Despite Brown's failure to put forth enough facts to support his claims was a critical error, but the court's eagerness to skirt the substantive issue Brown raised about protection of his likeness under the Lanham Act in favor of a weak First Amendment argument was equally erroneous. The court held that the First Amendment is a complete defense to Brown's false endorsement claim under the Lanham Act, and that video games count as a form of expression protected by the First Amendment.[43] The cases that the court relies upon, however, focus on the affirmative right for violent video games to exist under the First Amendment.[44] While some people might see football as a violent sport, the contents of *Madden*, which only simulates football game playing, does not rise to the same level of violence depicted in video games that simulate war, death and criminal activity. The subject matter of *Madden* is not in the same category of any of the games mentioned by the court. Additionally, the cases cited by the court only address the question of whether the video games are allowed to exist, and do not tackle the issue of whether the First Amendment precludes the trademark rights of a former NFL player whose likeness is appropriated in a video game.

Another argument proffered by the court is that *Madden NFL* contains enough creative elements that it qualifies as an expressive work that is protected under the First Amendment.[45] Citing the creativity of the game producers in how they "realistically replicate NFL football" and create and compile the "stadiums, athletes, coaches, fans, sound effects, music, and commentary," the court finds *Madden* to be an expressive work.[46] In the supporting case, *Romantics v. Activision Publishing, Inc.*,[47] the popular rock band, the Romantics, sued the producer of the *Guitar Hero* video game that simulates music playing. The court in *Romantics* found that the game was an expressive work because of the presence of a story line and character development.[48] *Madden* has a similar type of story line as *Guitar Hero*, in that the users control how the story line moves, but the game clearly moves from one moment in time to another, especially in the franchise mode. EA has also included a substantial amount of character development in *Madden*, studying the specific movements of each player to help mimic the athletes as realistically as possible in the game. Both the story line and character development are present in *Madden*, but it is still distinguishable from *Romantics* because the contested content in *Romantics* is a song, rather than the image of the band. Music is highly creative and easily protected under the First Amendment, but the actions of athletes in sporting events is anything but a creative endeavor. Indeed, the point of *Madden* is to create as realistic a sporting simulation as possible, whereas *Guitar Hero* encourages the creative outlet of music creation.

41. *Id.*

42. *Id.* at pp. 6-9

43. *Id.* at p. 5 (quoting Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 958 (9th Cir. 2009)).

44. The court cites three cases to support its statement that video games are a form of expression that can be protected by the First Amendment. *See id.*; Kirby v. Sega of America, 144 Cal. App. 4th 47, 58 (Ct. App. Cal. 2006); Interactive Digital Software Ass'n v. St. Louis, 329 F.3d 954, 956-58 (8th Cir. 2003) (holding that "violent" video games are a protected form of speech).

45. *Brown*, *supra* note 37, at 7 (citing Romantics v. Activision Publ'g, Inc., 574 F. Supp. 2d 758, 765-66 (E.D. Mich. 2008).

46. *Id.*

47. 574 F. Supp. 2d 758 (E.D. Mich. 2008).

48. *Romantics*, 574 F. Supp. 2d at 766.

Finally, the court dismisses the idea that just because *Madden* is meant to be realistic does not mean it cannot be protected under the First Amendment. Citing a case about a Tiger Woods portraitist, *ETW Corp. v. Jireh Publishing*,[49] the court concludes that realism in expression does not preclude protection of the First Amendment.[50] In *ETW*, defendant published work by an artist who created a painting called "The Masters of Augusta" that commemorated Tiger Woods's victory at the Masters Tournament.[51] The court struck down ETW's Lanham Act theory of false endorsement in favor of Jireh's First Amendment claim because "in general the Lanham Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression,"[52] and consumer confusion would be minimal as a result of the painting. Although *ETW* presents a strong case for the protection of free expression under the First Amendment, it deals with a painting that was carefully recreated by hand and eye from a live event. Instead, in *Madden*, EA used facts rather than interpretations to create the video game and the players' pages. Without interpreting and reimagining the facts, EA's actions should be considered manufacturing instead of expression. EA manufactured aspects of Brown's and other retired players' likenesses to make the game more realistic and make sure that the statistics, appearances, team affiliations and positions were similar enough to such a recognizable player as Brown that the players would understand and appreciate the addition of Brown into the line-up. The First Amendment analysis could have been better suited to the specific facts of this case. Without such attention to the issues involved in Brown's complaint, the court in this case entered an opinion without considering the full extent of the Lanham Act claims and instead jumped into a First Amendment analysis that was misplaced.

The recent lawsuits filed by former athletes for trademark infringement under the Lanham Act, though unsuccessful thus far, are important checks on the appropriation of images that sports marketers and advertisers have increasingly utilized to create more realistic video games. Athletes' rights under Section 43(a) of the Lanham Act are the best avenue for athletes to pursue when seeking enforcement of the rights to their valuable persona, and should not be overlooked merely because of these initial setbacks. Courts are more than willing to enforce trademark claims for celebrities and athletes, particularly when the mark infringement directly harms the plaintiff's public image. The Lanham Act is sufficiently broad to include claims such as Brown's given past case history, but the cases brought thus far were not strong enough to justify an infringement decision.

49. 332 F.3d 915 (6th Cir. 2003).
50. *Brown*, *supra* note 37, at 7.
51. *ETW*, 332 F.3d at 918.
52. *Id.* at 927.