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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

JOHN J. SIMON, an individual,

Plaintiff,

v.

VISUAL CONCEPTS ENTERTAINMENT,

a California corporation,

2K GAMES, INC., a Delaware corporation,

and

DOES 1–10, inclusive,

Defendants.

Case No. 3:16-cv-3440

COMPLAINT FOR DAMAGES

DEMAND FOR JURY TRIAL



1 Plaintiff John J. Simon, by and through his attorneys of record, states and alleges
2 as follows:

3 **INTRODUCTION**

4 1. In 1978, Plaintiff John J. Simon authored the music and lyrics for a
5 musical composition entitled “Everything You Are To Me” (the “Work”).

6 2. In 1978, Plaintiff created an audio recording of the Work.

7 3. In 1979, Plaintiff obtained a registration with the United States Copyright
8 Office covering his Work, copyright registration No. PAu000118014.

9 4. In 2015, Defendants published and released a basketball simulation video
10 game entitled NBA 2K16 (the “Video Game”).

11 5. Without any consent from Plaintiff, Defendants copied significant portions
12 of the recording of the Work as part of the musical soundtrack to the Video Game.

13 6. Thereafter, Defendants distributed and sold millions of copies of the Video
14 Game, which contained significant portions of the Work.

15 7. Defendants have wrongfully profited from their copying and use of
16 Plaintiff’s Work, and Plaintiff has been harmed.

17 **JURISDICTION AND VENUE**

18 8. This Court has subject matter jurisdiction over this action pursuant to 28
19 U.S.C. §1331 for Plaintiff’s claim under the Copyright Act, 17 U.S.C. §§501 *et seq.*

20 9. Venue is proper pursuant to 28 U.S.C. §1391 because Defendants Visual
21 Concepts Entertainment and 2K Games, Inc. reside in this District.

22 10. This Court has personal jurisdiction over Defendants because they are
23 headquartered in California, engaged in their misconduct from California, and have
24 substantial, continuous, and systematic contacts with California.

25 **INTRADISTRICT ASSIGNMENT**

26 11. Because this lawsuit is an intellectual property action, pursuant to Local
27 Civil Rule 3-2, this action should be assigned on a district-wide basis.

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PARTIES

12. Plaintiff John J. Simon is an individual residing in Sebastopol, California.

13. Defendant Visual Concepts Entertainment (“Visual Concepts”) is a California corporation with its primary office in Novato, California.

14. Defendant 2K Games, Inc. (“2K Games”) is a Delaware corporation with its primary office in Novato, California.

15. Plaintiff does not know the true names and capacities, whether individual, associate, corporate, or otherwise, of Defendants sued herein as Does 1–10 inclusive, and Plaintiff therefore sues these Defendants by such fictitious names. Plaintiff will amend this complaint to state the true names and capacities of Does 1–10 once they have been discovered. Plaintiff is informed and believes, and, on that basis, alleges that each Defendant sued herein by a fictitious name is in some way liable and responsible to Plaintiff based on the facts alleged herein.

FACTUAL ALLEGATIONS

Plaintiff & Plaintiff’s Work

16. Plaintiff is a classically-trained pianist, jazz musician, and electronic music composer.

17. Plaintiff received a bachelor’s degree and master’s degree in music composition from the Ester Boyer College of Music at Temple University.

18. While attending Temple University, Plaintiff instructed graduate and undergraduate classes in electronic music.

19. Additionally, using a large “C” Series Moog modular synthesizer, Plaintiff composed several compositions that explored the avant-garde of the electronic music genre.

20. In the late 1970s, Plaintiff formed the band Melisma, which performed extensively throughout the Philadelphia area.

21. In 1978, Plaintiff composed the music and lyrics for a musical composition entitled “Everything You Are To Me” (the “Work”).

1 22. Plaintiff was the sole author of the Work.

2 23. Thereafter, in 1978, Plaintiff made an audio recording of the Work, in
3 which Plaintiff produced the recording and was the sole instrumental performer. Another
4 member of the band Melisma, Bob Marcelonis, performed the vocal track of the
5 recording at Plaintiff's direction. Mr. Marcelonis did not exercise any control over the
6 recording, and Plaintiff and Mr. Marcelonis both understood that Plaintiff would be the
7 sole author of the recording.

8 24. Plaintiff elected to include the recording of the Work in his band
9 Melisma's album entitled "Like Trolls."

10 25. The Like Trolls album was sold to the general public and remains
11 available in certain online fora and used record shops.

12 26. In 1979, Plaintiff obtained a registration with the United States Copyright
13 Office covering his Work, copyright registration No. PAu000118014.

14 27. Plaintiff has not assigned his copyright in the Work or his copyright in the
15 performance of the Work to any person.

16 28. With the exception of the placement of the Work on the album Like Trolls,
17 Plaintiff has not licensed his copyrights in the Work or his copyright in his performance
18 of the Work to any person.

19 29. Plaintiff did not give the band Melisma any right to sublicense the Work or
20 the recording of the Work.

21 **Defendants' Business & the Video Game**

22 30. Defendants Visual Concepts and 2K Games are subsidiaries of Take-
23 Two Interactive, Inc. ("Take-Two Interactive").

24 31. Visual Concepts is a video game developer based in Novato, California.
25 Visual Concepts is best known for developing Take-Two Interactive's and 2K Games'
26 sports simulation video games.

27 32. 2K Games is a marketer, publisher, and distributor of video games,
28 including a wide variety of console and PC titles.

1 33. Released in September 2015, the Video Game is the 17th installment of
2 the NBA2K franchise.

3 34. On information and belief, Visual Concepts and 2K Games collaborated
4 in the creation and publication of the basketball simulation video game NBA 2K16.

5 35. On information and belief, Visual Concepts developed the Video Game,
6 and 2K Games published, marketed, and distributed the Video Game.

7 36. The Video Game was initially released on the Microsoft Windows, Xbox
8 One, Xbox 360, PlayStation 3, and PlayStation 4 consoles. A mobile version of the
9 Video Game was released the following month for Android and iOS.

10 37. Defendants sold over 4 million copies of the Video Game in the first week
11 of release, and sales of the Video Game have led Take-Two Interactive's revenue in
12 2015 and 2016.

13 Defendants' Misconduct

14 38. Defendants included a musical soundtrack in the Video Game.

15 39. Among the music Defendants included in the Video Game is a song
16 entitled "Clean Living," ostensibly by RJ2D (the "Infringing Song").

17 40. The Infringing Song includes substantial exact excerpts from Plaintiff's
18 Work, including the following:

Everything You Are To Me		Clean Living	
Time Location	Lyric/Music	Time Location	Approx. Length. ¹
0:10:09	"Everything you are to me"	0:39:17	7.0 seconds
0:10:09	"Everything you are to me"	3:25:01	7.0 seconds
0:15:09	"Makes Me Think That You Could Be"	0:48:09	7.0 seconds
0:15:09	"Makes Me Think That You Could Be"	3:36:07	7.0 seconds
0:29:07	"The End to All My"	0:53:07	3.5 seconds
0:29:07	"The End to All My"	3:41:04	3.5 seconds
0:32:05	"Everything You Touch Turns Right"	0:57:06	5.0 seconds

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¹ The "Approx. Length" column refers to the duration of the infringing excerpt from the Work in the Infringing Song.



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0:32:05	“Everything You Touch Turns Right”	3:34:11	5.0 seconds
0:37:00	“Underneath Your Very Hands”	1:07:57	5.0 seconds
0:37:00	“Underneath Your Very Hands”	3:55:05	5.0 seconds
1:31:08	“Everybody’s Life Goes On”	1:52:01	6.2 seconds
1:37:01	“Like A Melancholy Song”	2:03:54	5.2 seconds
1:37:01	“People See Me Differently”	2:11:05	5.2 seconds
1:58:08	“Not The Way That You See Me”	2:21:09	5.3 seconds
0:00:00	Vamp 1	0:46:16	4.6 seconds
0:00:00	Vamp 1	1:17:03	4.6 seconds
0:00:00	Vamp 1	1:58:02	4.6 seconds
0:04:08	Vamp 2	2:15:04	4.7 seconds
0:04:08	Vamp 2	2:24:04	4.7 seconds
0:04:08	Vamp 2	3:53:00	1.1 seconds

41. Defendants had access to Plaintiff’s Work during the creation of the Game because Plaintiff’s recording of the Work was accessible to the public in used record shops and online fora.

42. Defendants created, published, distributed, and sold millions of copies of the Video Game.

43. Defendants did not seek Plaintiff’s authorization or consent to use Plaintiff’s Work in any manner, and Plaintiff did not authorize Defendants’ use of the Work.

44. Defendants did not seek Plaintiff’s authorization or consent to use Plaintiff’s recording of the Work in any manner, and Plaintiff did not authorize Defendants’ use of the recording of the Work.

45. Defendants did not seek to serve Plaintiff with a notice of intention to obtain a compulsory license and did not obtain a compulsory license for the Work.

46. As a result of Defendants’ misconduct, Defendants have earned wrongful profits and Plaintiff has been harmed.

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FIRST CAUSE OF ACTION

(Copyright Infringement)

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3 47. Plaintiff repeats and incorporates by reference the allegations in
4 Paragraphs 1–46 above.

5 48. Plaintiff owns a valid copyright in the Work, which is an original, creative
6 work.

7 49. Plaintiff has an active and valid copyright registration covering the Work
8 as a musical composition, Registration No. PAu000118014.

9 50. Plaintiff owns a valid copyright in Plaintiff’s recording of the Work, which
10 is an original, creative sound recording.

11 51. Without any authorization or consent, Visual Concepts prepared
12 derivative works based on the Work and based on the recording of the Work.

13 52. Without any authorization or consent, Visual Concepts and 2K Games
14 reproduced the Work and the recording of the Work in copies or phonorecords.

15 53. Without any authorization or consent, 2K Games distributed copies or
16 phonorecords of the Work and the recording of the Work to the public by sale or lease.

17 54. As a result of Defendants’ conduct, Plaintiff has been harmed and
18 Defendants have wrongfully profited.

PRAYER FOR RELIEF

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20 WHEREFORE, Plaintiff prays for a judgment against Defendants as follows:

- 21 1. For an award of damages in an amount to be proved at trial, comprising
22 the following:
- 23 a. Compensatory damages in the form of Plaintiff’s lost profits and
24 Defendants’ wrongful profits, including through the calculation of a
25 reasonable royalty, pursuant to 17 U.S.C. §504;
 - 26 b. Plaintiff’s attorney’s fees pursuant to 17 U.S.C. §505;
 - 27 c. Plaintiff’s costs of suit;
 - 28 d. Pre-judgment interest to the extent allowed by law; and

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2. Such other and additional relief as the Court deems just and proper.

Dated: June 20, 2016

KRONENBERGER ROSENFELD, LLP

By: s/ Jeffrey M. Rosenfeld
Jeffrey M. Rosenfeld

Attorneys for Plaintiff John J. Simon

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial of this action by jury.

Dated: June 20, 2016

KRONENBERGER ROSENFELD, LLP

By: s/ Jeffrey M. Rosenfeld
Jeffrey M. Rosenfeld

Attorneys for Plaintiff John J. Simon

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