

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

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McRO, INC., d.b.a. PLANET BLUE,	:	
	:	C.A. No. 12-cv-1517-LPS-CJB
Plaintiff,	:	
	:	<u>JURY TRIAL DEMANDED</u>
v.	:	
TAKE-TWO INTERACTIVE SOFTWARE, INC.,	:	
	:	
Defendant.	:	
	:	
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THIRD AMENDED COMPLAINT FOR PATENT INFRINGEMENT

McRo, Inc., d.b.a. Planet Blue (“Planet Blue”), brings this Third Amended Complaint for patent infringement against Take-Two Interactive Software, Inc. (“Take-Two” or “Defendant”), and hereby states as follows:

NATURE OF THE ACTION

This is an action for patent infringement of United States Patent No. 6,307,576 (the “’576 Patent”) and United States Patent No. 6,611,278 (the “’278 Patent”) (collectively, the “Patents-in-Suit”) under the Patent Laws of the United States, 35 U.S.C. § 1, *et seq.*, and seeking damages and injunctive and other relief under 35 U.S.C. § 281, *et seq.*

PARTIES

1. Planet Blue is a corporation existing under the laws of Delaware, with its principal place of business at Santa Monica, California. Planet Blue is actively involved in the advertising industry as a computer graphic, visual effects, and animation services company, which services utilize methods covered by the Patents-in-Suit.

2. Upon information and belief, Defendant Take-Two is a corporation operating and existing under the laws of Delaware, with its principal place of business at 622 Broadway, New

York, New York 10012. Upon further information and belief, Take-Two is engaged in the business of developing and publishing computer and/or video games.

JURISDICTION AND VENUE

3. This is a complaint for patent infringement under 35 U.S.C. § 271. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a).

4. Upon information and belief, this Court has personal jurisdiction over Defendant because Defendant is organized under the laws of Delaware and is doing and has done substantial business in this district, including business relating to the sale and distribution for sale of computer and/or video games made using the methods claimed in the Patents-in-Suit.

5. Venue is proper in this judicial district as to Defendant pursuant to 28 U.S.C. §§ 1391 and 1400(b), because the Defendant is subject to personal jurisdiction in this judicial district and has committed acts of infringement in this judicial district.

FACTUAL BACKGROUND

6. Planet Blue is a small visual effects company that creates computer graphics and animations. Planet Blue was founded in 1988 by Maury Rosenfeld, who has been the sole owner of Planet Blue since 1993.

7. Mr. Rosenfeld has worked as a successful computer graphics/visual effects designer and animator for over twenty years. During the late 1980s, Mr. Rosenfeld won an Emmy award for his work on the show “Secrets and Mysteries.” Mr. Rosenfeld received a Monitor Award for his work on Pee Wee’s Playhouse and he received an award from the National Computer Graphics Association for his work in the International Animation Competition for “Hidden Heroes.” Mr. Rosenfeld worked with the teams that created the special effects for “Star Trek: The Next Generation” and “Max Headroom.”

8. Mr. Rosenfeld filed patent application no. 08/942,987 (the “’987 Application”), what would eventually issue as the ’576 Patent, relating to a method for performing and animating lip synchronization and facial expressions on three dimensional animated characters on October 2, 1997.

9. On October 23, 2001, the United States Patent and Trademark Office (“USPTO”) duly and lawfully issued the ’576 Patent, titled “Method for Automatically Animating Lip Synchronization and Facial Expression of Animated Characters.” The ’576 Patent is attached hereto as **Exhibit A**.

10. On August 26, 2003, the USPTO duly and lawfully issued the ’278 Patent, titled “Method for Automatically Animating Lip Synchronization and Facial Expression of Animated Characters.” The ’278 Patent is attached hereto as **Exhibit B**.

11. Each of the Patents-in-Suit is valid and enforceable.

12. Planet Blue is the assignee of all rights, title, and interest in and to the Patents-in-Suit. Planet Blue therefore holds the right to sue and recover damages for infringement thereof, including past infringement.

13. Unlike the traditional method of manually animating lip-synchronization, or a method using facial/video capture, the Patents-in-Suit cover a method and system for automating the lip-synchronization animation process and automating the animation of facial expression of three-dimensional animated characters, as used in computer and/or video games.

14. Upon information and belief, Defendant, directly or through intermediaries (including distributors, retailers, and others), has acted and is acting to develop, publish, manufacture, import, ship, distribute, offer for sale, sell, and/or advertise (including the provision of an interactive web page) various computer and/or video games. These computer and/or video

games have been and continue to be purchased by consumers in the United States, the State of Delaware, and the District of Delaware.

15. Upon information and belief, the Defendant employs software methods and processes to automate the animation of lip-synchronization and facial expression for its three-dimensional characters during the creation and development of these computer and/or video games. Upon further information and belief, the Defendant's uses of those lip synchronization and facial expression animation methods and processes to create the aforementioned computer and/or video games infringe, either literally or by equivalents, one or more claims of the Patents-in-Suit in violation of 35 U.S.C. § 271.

16. Take-Two has been aware of the Patents-in-Suit since at least January 2008, when Mr. Rosenfeld had written communications with Mr. Peter Welch, who was a Vice President and Associate General Counsel of Take-Two at the time. In these communications Mr. Rosenfeld disclosed the existence and identity of the Patents-in-Suit and the methods covered by them. Take-Two has had further knowledge of the Patents-in-Suit and its infringing activities since the date it was served with Plaintiff's original Complaint, on November 28, 2012.

17. Notwithstanding the knowledge of the Patents-in-Suit, Take-Two has not ceased its infringing activities. Since being put on notice of the Patents-in-Suit, Take-Two has continued to develop and/or publish games using software tools in addition to the animation tools used in the normal course of game development, including but not limited to FaceFX, that perform the steps of the claims in the Patents-in-Suit. Take-Two continued and continues to actively produce, market, sell, and encourage its customers to use the computer and/or video games developed using these methods that infringe the Patents-in-Suit.

18. At no time has Take-Two ever had a license or permission to use the subject matter claimed in the Patents-in-Suit.

COUNT I: INFRINGEMENT OF THE '576 PATENT

19. Planet Blue realleges and incorporates by reference paragraphs 1-18.

20. Upon information and belief, Take-Two has, as part of the development process for its computer and/or video games that include 3-dimensional animated characters, used and continues to use software processes in the United States for automatically adding lip-synchronization and facial expression to the animated characters using the phonetic structure of the words spoken by the characters and has made, used, offered to sell, sold, and/or imported, and continues to make, use, offer to sell, sell, and/or import, computer and/or video games created using those processes in the United States, including this judicial district. By using the aforementioned software processes, Take-Two has directly infringed the '576 Patent under 35 U.S.C. § 271(a), either literally or under the doctrine of equivalents. By using, offering to sell, selling, and/or importing computer and/or video games created using the aforementioned software processes, Take-Two has been and is now infringing the '576 Patent under 35 U.S.C. § 271(g), either literally or under the doctrine of equivalents.

21. Take-Two has had knowledge of the '576 Patent since at least January 2008, when Mr. Rosenfeld had written communications with Mr. Peter Welch, who was a Vice President and Associate General Counsel of Take-Two at the time. In these communications Mr. Rosenfeld disclosed the existence and identity of the Patents-in-Suit and the methods covered by them. Notwithstanding the knowledge of the '576 Patent, Take-Two has not ceased its infringing activities. Take-Two has continued to develop and/or publish games using software tools in addition to the animation tools used in the normal course of game development, including but not limited to FaceFX, that perform the steps of the claims in the '576 Patent.

Take-Two continued and continues to actively produce, market, sell, and encourage its customers to use the computer and/or video games developed using these methods that infringe the Patents-in-Suit. Take-Two's actions constitute knowing, willful, and deliberate infringement of the '576 Patent.

22. Defendant, by way of its infringing activities, has caused and continues to cause Planet Blue to suffer damages in an amount to be determined at trial. Planet Blue has no adequate remedy at law against Defendant's acts of infringement and, unless Defendant is enjoined from its infringement of the '576 Patent, Planet Blue will suffer irreparable harm.

23. Planet Blue is in compliance with the requirements of 35 U.S.C. § 287.

COUNT II: INFRINGEMENT OF THE '278 PATENT

24. Planet Blue realleges and incorporates by reference paragraphs 1-18.

25. Upon information and belief, Take-Two has, as part of the development process for its computer and/or video games that include 3-dimensional animated characters, used and continues to use software processes in the United States for automatically adding lip-synchronization and facial expression to the animated characters using the phonetic structure of the words spoken by the characters and has made, used, offered to sell, sold, and/or imported, and continues to make, use, offer to sell, sell, and/or import, computer and/or video games created using those processes in the United States, including this judicial district. By using the aforementioned software processes, Take-Two has directly infringed the '278 Patent under 35 U.S.C. § 271(a), either literally or under the doctrine of equivalents. By using, offering to sell, selling, and/or importing computer and/or video games created using the aforementioned software processes, Take-Two has been and is now infringing the '278 Patent under 35 U.S.C. § 271(g), either literally or under the doctrine of equivalents.

26. Take-Two has had knowledge of the '278 Patent since at least January 2008, when Mr. Rosenfeld had written communications with Mr. Peter Welch, who was a Vice President and Associate General Counsel of Take-Two at the time. In these communications Mr. Rosenfeld disclosed the existence and identity of the Patents-in-Suit and the methods covered by them. Notwithstanding the knowledge of the '278 Patent, Take-Two has not ceased its infringing activities. Take-Two has continued to develop and/or publish games using software tools in addition to the animation tools used in the normal course of game development, including but not limited to FaceFX, that perform the steps of the claims in the '278 Patent. Take-Two continued and continues to actively produce, market, sell, and encourage its customers to use the computer and/or video games developed using these methods that infringe the Patents-in-Suit. Take-Two's actions constitute knowing, willful, and deliberate infringement of the '278 Patent.

27. Defendant, by way of its infringing activities, has caused and continues to cause Planet Blue to suffer damages in an amount to be determined at trial. Planet Blue has no adequate remedy at law against Defendant's acts of infringement and, unless Defendant is enjoined from its infringement of the '278 Patent, Planet Blue will suffer irreparable harm.

28. Planet Blue is in compliance with the requirements of 35 U.S.C. § 287.

PRAYER FOR RELIEF

WHEREFORE, Planet Blue respectfully requests that this Court enter judgment in its favor as follows:

A. Holding that Defendant has infringed the '576 Patent, either literally or under the doctrine of equivalents, under 35 U.S.C. § 271(a);

B. Holding that the Defendant has infringed the '576 Patent, either literally or under the doctrine of equivalents, under 35 U.S.C. § 271(g);

C. Holding that the Defendant has infringed the '278 Patent, either literally or under the doctrine of equivalents, under 35 U.S.C. § 271(a);

D. Holding that the Defendant has infringed the '278 Patent, either literally or under the doctrine of equivalents, under 35 U.S.C. § 271(g);

E. Permanently enjoining Defendant and its officers, directors, agents, servants, employees, affiliates, divisions, branches, subsidiaries, parents and all others acting in concert or privity with any of them from infringing, inducing the infringement of, or contributing to the infringement of the '576 Patent;

F. Permanently enjoining Defendant and its officers, directors, agents, servants, employees, affiliates, divisions, branches, subsidiaries, parents and all others acting in concert or privity with any of them from infringing, inducing the infringement of, or contributing to the infringement of the '278 Patent;

G. Permanently enjoining the sale of the computer and/or video games created using the patented methods of the Patents-in-Suit;

H. Awarding to Planet Blue the damages to which it is entitled under 35 U.S.C. § 284 for Defendant's past infringement and any continuing or future infringement up until the date Defendant is finally and permanently enjoined from further infringement, including both compensatory damages and treble damages for willful infringement;

I. Declaring this to be an exceptional case and awarding Planet Blue attorneys' fees under 35 U.S.C. § 285;

J. Awarding Planet Blue costs and expenses in this action;

K. Awarding Planet Blue pre- and post-judgment interest on its damages; and

L. Awarding Planet Blue such other and further relief in law or in equity as this

Court deems just and proper.

JURY DEMAND

Planet Blue requests a trial by jury of any and all issues so triable.

Dated: May 15, 2014

Respectfully submitted,

FARNAN LLP

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