

1 RODGER R. COLE (CSB NO. 178865)
rcole@fenwick.com

2 FENWICK & WEST LLP
 Silicon Valley Center
 3 801 California Street
 Mountain View, CA 94041
 4 Telephone: (650) 988-8500
 Facsimile: (650) 938-5200

5 JENNIFER L. KELLY (CSB NO. 193416)
jkelly@fenwick.com

6 MARY E. MILIONIS (CSB NO. 238827)
mmilionis@fenwick.com

7 FENWICK & WEST LLP
 555 California Street, 12th Floor
 8 San Francisco, CA 94104
 Telephone: (415) 875-2300
 9 Facsimile: (415) 281-1350

10 Attorneys for Plaintiffs and Counterclaim-defendants
 Capcom Co., Ltd. and Capcom Entertainment, Inc.,
 11 and Third Party Defendant Capcom U.S.A., Inc.

12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA
 14 SAN JOSE DIVISION
 15

16 CAPCOM CO., LTD. AND CAPCOM
 ENTERTAINMENT, INC.,

17 Plaintiffs,

18 v.

19 THE MKR GROUP, INC.,

20 Defendant.

21 THE MKR GROUP, INC.,

22 Counterclaim-Plaintiff and
 Third-Party Plaintiff,

23 v.

24 CAPCOM CO., LTD. AND CAPCOM
 ENTERTAINMENT, INC.,

25 Counterclaim-Defendants,

26 and

27 CAPCOM U.S.A, INC.,

28 Third-Party Defendant.

Case No. CV-08-0904 RS

**PLAINTIFFS' AND THIRD PARTY
 DEFENDANT'S OBJECTION TO
 EXHIBITS ATTACHED TO THE
 DECLARATION OF MIMI RUPP IN
 OPPOSITION TO CAPCOM'S MOTION
 TO DISMISS MKR'S COUNTERCLAIMS
 AND THIRD PARTY COMPLAINT**

[Fed. R. Civ. Proc. 12(b)(6)]

Date: September 3, 2008
 Time: 9:30 a.m.
 Courtroom: 4, 5th Floor
 Judge: The Hon. Richard Seeborg

1 Plaintiff and Counterclaim Defendants' Capcom Co., Ltd. and Capcom Entertainment, Inc.
2 and Third-Party Defendant Capcom U.S.A., Inc. (collectively "Capcom") hereby object to Exhibits
3 A, E, H, K and L to the Declaration of Mimi Rupp in Opposition to Capcom's Motion to Dismiss
4 MKR's Amended Counterclaims and Third Party Complaint ("Rupp Declaration") (Dkt. No. 49)
5 on the grounds that MKR admits that it does not hold the copyright to the 2004 film entitled *Dawn*
6 *of the Dead* (the "Remake"). See MKR's Amended Counterclaims and Third Party Complaint
7 ("Counterclaim"), Ex. O (copyright registration showing Universal City Studios LLC as
8 copyright claimant as an employer for hire). Exhibit A is a DVD copy of the Remake. Exhibits E,
9 H, K and L compare screen stills from the Remake to ones taken from Capcom's video game *Dead*
10 *Rising*.

11 MKR's copyrights extend only to the original 1979 version of *George A. Romero's Dawn*
12 *of the Dead* ("DOTD"). See Counterclaim, Ex. N (MKR's copyright registration in DOTD).
13 Without a copyright interest in the Remake, MKR has no standing to assert copyright infringement
14 claims based on alleged similarities between *Dead Rising* and the Remake. *Kouf v. Walt Disney*
15 *Pictures & Television*, 16 F.3d 1042, 1144 n.2 (9th Cir. 1994) ("To establish copyright
16 infringement [the plaintiff] must show that he owns a valid copyright in" the work at issue).
17 Furthermore, MKR's copyright in DOTD does not confer standing to allege any purported
18 infringement of the Remake. See *Murray Hill Publications, Inc. v. ABC Communications, Inc.*,
19 264 F.3d 622, 631 (6th Cir. 2001) (derivative works must be separately registered to confer
20 standing); *Dalton-Ross Homes, Inc. v. Williams*, 2007 U.S. Dist. LEXIS 64135, at *8-11 (D. Ariz.
21 Aug. 29, 2007) (same; noting that in any event the owner of the original work is required to show
22 substantial similarity between the original and its derivative).

23 MKR's lack of copyright ownership renders any assertion that *Dead Rising* somehow
24 infringes the Remake irrelevant to the present action. Although Capcom does not object to the
25 Court's review of the Remake or its related images—indeed, they demonstrate that even a licensed
26 derivative of DOTD can express the idea of zombies in a mall in a vastly different way—the
27 Remake cannot support its allegations that *Dead Rising* infringes DOTD.

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1 Accordingly, Capcom respectfully objects to Exhibits A, E, H, K and L to the Rupp
2 Declaration.

3 Dated: August 13, 2008

FENWICK & WEST LLP

5 By: /s/ Jennifer L. Kelly
6 Jennifer L. Kelly

7 Attorneys for Plaintiffs and Counterclaim Defendants
8 Capcom Co., Ltd., Capcom Entertainment, Inc., and
Third Party Defendant Capcom U.S.A., Inc.

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