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THE MKR GROUP, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CAPCOM CO., LTD. and CAPCOM
ENTERTAINMENT, INC.,

Plaintiffs,

v.

THE MKR GROUP, INC.,

Defendant.

THE MKR GROUP, INC.,
Counterclaim-Plaintiff and Third-Party
Plaintiff,

v.

CAPCOM CO., LTD. and CAPCOM
ENTERTAINMENT, INC.,

Counterclaim-Defendants,

and

CAPCOM U.S.A., INC.,

Third-Party Defendant.

Case No. 3:08-CV-00904 (RS)(MED)

Hearing Date: September 3, 2008

Time: 9:30 a.m.

Honorable Richard Seeborg

**THE MKR GROUP, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
CAPCOM'S MOTION TO DISMISS MKR'S
AMENDED COUNTERCLAIMS AND
THIRD PARTY COMPLAINT**

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1 **I. INTRODUCTION**

2 Capcom¹ plainly and impermissibly copied salient elements of The MKR Group, Inc.'s
 3 ("MKR") *Dawn of the Dead* films (the "Films") to "avoid the drudgery in working up something
 4 fresh." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994). The Copyright Act of
 5 1976 grants copyright owners the exclusive right to authorize "derivative works," defined as any
 6 form in which a work may be transformed, recast or adapted; video game versions of blockbuster
 7 films like *Dawn of the Dead* are quintessential examples of derivative works. *See* 17 U.S.C.
 8 § 106(2). Moreover, the Lanham Act and state law guard against, *inter alia*, wrongful
 9 exploitation of the tremendous goodwill embodied in MKR's DAWN OF THE DEAD brand. *See*
 10 15 U.S.C. § 1125(a)-(c); Counterclaims ¶ 17.

11 Capcom is not merely paying homage to George Romero, nor is it parodying the Films or
 12 MKR's DAWN OF THE DEAD and GEORGE A. ROMERO'S DAWN OF THE DEAD®
 13 trademarks (collectively, the "DAWN OF THE DEAD Marks"). Rather, in *Dead Rising*
 14 (sometimes referred to herein as the "Infringing Game"), Capcom has willfully copied a
 15 substantial amount of the Films' protected expression, and now attempts to label such protected
 16 expression "stock elements." In addition to the Films' copyrighted elements, Capcom has
 17 pilfered the Films' source-identifying components -- such as the *Dawn of the Dead* title,² George
 18 A. Romero's name, and MKR's ZOMBIE HEAD Design® trademark -- to successfully capitalize
 19 on the DAWN OF THE DEAD Marks, and entice the enormous DAWN OF THE DEAD fan base
 20 to purchase the Infringing Game. Capcom's encroachment upon MKR's exclusive rights severely
 21 limits MKR's ability to develop and market a successful video game version of its Films.
 22 Moreover, if Capcom develops the Infringing Game into a feature film,³ then MKR's ability to

23 _____
 24 ¹ "Capcom" collectively refers to Plaintiffs/Counterclaim-Defendants Capcom Co., Ltd.,
 Capcom Entertainment, Inc., and Third-Party Defendant Capcom U.S.A., Inc.

25 ² "Dawn of the Dead" and "Dead Rising" share the term "DEAD" and the same meaning of
 26 zombies awakening.

27 ³ Declaration of Mimi Rupp ("Rupp Decl.") at ¶ 16, Ex. N (*LA Weekly* reporting that
 28 Capcom is planning on developing certain of its video games into feature films (like Capcom's
Resident Evil game and feature film franchise)).

1 license movie remakes and other derivative works based on its Films is radically and unfairly
2 compromised.

3 To add insult to injury, Capcom expressly enquired about the availability of a license from
4 MKR to adapt the Films into a video game, but failed to pursue it. MKR Counterclaims ¶ 17.
5 Instead, Capcom cavalierly proceeded with the creation and distribution of the Infringing Game
6 on its own. *Id.* Capcom's conduct not only suggests a contempt for MKR's rights, but for
7 intellectual property law in general.⁴ Now that Capcom is finally being held accountable for its
8 wanton infringement of the Films and the intellectual property therein -- from which it has reaped
9 millions of dollars in revenues, while at the same time effectively co-opting the market -- it hopes
10 that the Court will fall for its siren call that "zombies in a mall are not protectable." But
11 conclusory statements which mischaracterize the uncanny, substantial similarities between the
12 works as "stock elements" are insufficient grounds to justify a dismissal motion.

13 As will be demonstrated below, Capcom's siren call fails for two reasons. First,
14 Capcom's indiscriminate appropriation of the Films goes well beyond merely copying the alleged
15 idea of "zombies in a mall."⁵ (In fact, as explained below, the *idea* behind the Films is a critique
16 of consumerism, which is conveyed through the unique metaphoric expression of zombies in a
17 mall.) Second, Capcom wholly disregards the different protections afforded under copyright law
18 and trademark law. Despite Capcom's valiant attempt to distract the Court with its "stock
19 elements" rhetoric, MKR simply seeks to protect its valuable copyrighted and trademarked
20 intellectual property against illegal exploitation, as it is entitled to do under federal and state law.

23 ⁴ Capcom's wholesale exploitation of Mr. Romero's name, the "DAWN OF THE DEAD"
24 brand, and the Films' most salient elements is so brazen that Keiji Inafune, the Infringing Game's
creator, wore a DAWN OF THE DEAD t-shirt in an interview. Counterclaims ¶ 15.

25 ⁵ In its memorandum of law, Capcom hedges this claim by shoehorning multiple elements
26 into its 'unprotectable idea': "...[T]he Court must filter out any similarities between [*Dead*
27 *Rising* and the Films] based on the shared basic plot *idea* of humans taking refuge in and battling
28 zombies in a suburban shopping mall accessed via helicopter during a massive zombie outbreak."
(Capcom Memo at p. 11). Of course, the Court is under no obligation to filter out the substantial
and significant protectable elements which Capcom willfully and wantonly copied.

Contrary to Capcom's assertions, MKR's Counterclaims are not required on a dismissal motion to withstand the scrutiny of what is essentially a summary judgment motion. As Capcom well knows, a complaint (or counterclaim) is simply required to provide notice to the adverse party of the nature of the claims against it. Capcom's motion ignores the minimal requirements of notice pleading, and instead asks the Court to decide the merits of MKR's Counterclaims on the pleadings, rather than to determine whether MKR has adequately stated its claims for relief under Rule 12(b)(6). The Court should reject Capcom's invitation to ignore the Federal Rules.

II. FACTUAL BACKGROUND

The very core of MKR's business is the exploitation of its valuable intellectual property. Specifically, MKR's primary business almost since its inception in 1977 has been to monetize the value of the copyright and trademark rights in its motion pictures. Through authorized licensees, MKR is also a seller of ancillary merchandise. One of MKR's key properties is *Dawn of the Dead*, the original 1979 version of which was produced by MKR's president and principal shareholder, Richard P. Rubinstein. This film was directed by George A. Romero, one of the most respected and critically honored horror film directors worldwide since the early 1970s. In or around 2004, MKR licensed a remake of the film, which was released and distributed in the United States by Universal Pictures. Counterclaims ¶ 6.

MKR's *Dawn of the Dead* series of motion pictures constitutes an enormously successful film franchise. Both the original film and the authorized remake are extremely well known to the public; they have been profitable theatrically, on cable television, and on home video to this day. Counterclaims ¶ 7. The 1979 film continues to earn significant revenue, as evidenced from the more than one million DVD units which have been shipped in the United States since 2004, and from its October 4, 2007 Blu-ray DVD release, which earned MKR over \$80,000 in royalties within 90 days. *Id.* Considering that the budget for the original *Dawn of the Dead* was approximately \$650,000, and the film earned over \$7,000,000 in its first two years of theatrical release, the 1979 Film is one of the most profitable horror movies of all time. *Id.* The 2004 remake (the "2004 Film") has also been highly successful, grossing over \$100 million worldwide. *Id.* at ¶ 6.

1 In addition to financial success, Mr. Romero's unique commentary on suburban mall
 2 culture (the rights to which are owned by MKR) has garnered unparalleled critical acclaim for
 3 over thirty years. Counterclaims ¶ 8. Roger Ebert, Pulitzer Prize-winning, renowned film critic
 4 for *The Chicago Sun-Times*, noted that "*Dawn of the Dead* is one of the best horror ever
 5 made . . .," and gave the film his top four star rating. *Id.* In 2005, the DVD release of *Dawn of*
 6 *the Dead* won the Academy of Science Fiction, Fantasy & Horror Films' prestigious "Saturn
 7 Award" for "Best DVD Classic Film Release." (By comparison, *E.T.: The Extra-Terrestrial* won
 8 this category in 2002.) *Id.* at ¶ 8.

9 In 2004, Capcom contacted MKR to enquire about the availability of a license to use
 10 elements from MKR's *Dawn of the Dead* films in a video game.⁶ Counterclaims ¶¶ 14, 21.
 11 Although MKR advised Capcom that the rights were available, Capcom failed to pursue the
 12 matter further, and no license was ever negotiated or granted. *Id.* Two years later, MKR became
 13 aware of Capcom's promotional videos for *Dead Rising*, which embodied scenes that were
 14 strikingly similar to scenes in the Films. *Id.* In August 2006, Capcom released the Infringing
 15 Game without MKR's consent. *Id.* at ¶ 15. MKR's belief that Capcom was intentionally
 16 capitalizing on the Films' outstanding fame to market *Dead Rising* was swiftly confirmed by
 17 game industry experts and fans, who noted that *Dead Rising* was a blatant "rip off" of the 1979
 18 Film. *Id.* at ¶ 13.

19 Among the similarities noted in the Counterclaims are: (1) both works are set in a bi-level
 20 "mega" shopping mall; (2) the mall has a gun shop; (3) the mall is located in a rural area with
 21 National Guardsmen patrolling the mall's environs; (4) both works are set in motion by a
 22 helicopter that takes the lead characters to the mall, which is besieged by crazed, flesh-eating
 23 zombies; (5) many of the zombies wear plaid shirts; (6) both works feature a subtext critique of
 24 sensationalistic journalism through their use of tough, cynical journalists, with short brown hair
 25 and leather jackets, as a lead male character; (7) both works feature the creative use of quotidian
 26

27 ⁶ Interestingly, Capcom was apparently tired of rehashing its own zombie franchise,
 28 *Resident Evil*, and decided that exploiting MKR's Films was more lucrative than the toil and
 uncertainty of developing an original zombie-themed game.

1 items (e.g., propane tanks, screwdrivers, fireplace tools, chainsaws, and vehicles) to kill zombies;
 2 (8) both works are a “carnavalesque parody of rampant consumerism”;⁷ (9) both works use Muzak
 3 for comedic effect (juxtaposing banal with the horrific); and (10) *Dead Rising*’s dialogue
 4 references the tagline for the 1979 film’s release (“When there’s no more room in hell, the dead
 5 will walk the earth”).⁸

6 MKR anticipates that discovery will unearth even more facts supporting its already well-
 7 pled claim, especially given the Infringing Game’s dependence on the player’s skill and choices
 8 made during play (Capcom Memo at 5, n.6), which makes any given scene far less accessible
 9 than in a film.

10 **III. MKR HAS STATED A VALID COPYRIGHT CLAIM TO PROTECT ITS** 11 **ORIGINAL *EXPRESSION***

12 **A. Because MKR’s Claims are Plausible on Their Face, MKR is Entitled** 13 **to Offer Evidence to Support Them**

14 Since Federal Rule of Civil Procedure 8(a) requires only a “short and plain statement of
 15 the claim showing that the pleader is entitled to relief,” the Ninth Circuit recognizes “a powerful
 16 presumption against rejecting pleadings for failure to state a claim.” *Gilligan v. Jamco*
 17 *Development Corp.*, 108 F.3d 246, 248-49 (9th Cir. 1997) (citing *Hall v. City of Santa Barbara*,
 18 833 F.2d 1270, 1274 (9th Cir.1986) (“It is axiomatic that ‘[t]he motion to dismiss for failure to
 19 state a claim is viewed with disfavor and is rarely granted.’”).

20 On a Rule 12(b)(6) dismissal motion, the issue is not whether a claimant will ultimately
 21 prevail, but whether it is entitled to offer evidence to support its claims. *Scheuer v. Rhodes*, 416
 22 U.S. 232, 236 (1974), *abrogated on other grounds*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).
 23 Although mere labels, conclusions and formulaic recitations of a claim’s elements are

24 ⁷ Capcom tries to minimize this element through trite generalizations such as “comedy is in
 25 the eye beholder”, arguing that if *Dead Rising* is a dark comedy, it is only in the mind of the
 26 player. But a comparison of the 1979 Film and the Infringing Game reveals that the 1979 Film
 27 and the Infringing Game share the same tone and constitute dark parodies of the excesses of our
 28 materialistic culture.

⁸ The proprietary rights to this famous line (in favor of one of MKR’s predecessors-in-
 interest) have been expressly recognized in federal court. *See, Dawn Associates v. Links*, 203
 U.S.P.Q. 831, 835 (N.D. Ill. 1978).

insufficient, the Rules require “only enough facts to state a claim to relief that is plausible on its face,” assuming all allegations are true. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65, 1974 (2007). Indeed, a well-pleaded complaint may proceed even if actual proof of those facts is improbable, and “that a recovery is very remote and unlikely.” *Id.*, quoting *Scheuer*, 416 U.S. at 236.

If, on a Rule 12(b)(6) motion, matters outside the pleadings are presented and not excluded by the Court, the motion must be treated as one for summary judgment under Rule 56. In that case, the Court must allow “sufficient fact gathering” so that all parties may present *all material made pertinent by Rule 56*. *Lucas v. Bechtel Corp.*, 633 F.2d 757, 759 (9th Cir. 1980). As detailed in Section VI below, this Court should exclude the extraneous evidence presented in Capcom’s Request for Judicial Notice rather than convert the instant motion to one for summary judgment. In the alternative, if the Court so converts the instant motion, MKR respectfully requests an opportunity to take discovery.

B. *Dawn of the Dead* and *Dead Rising* are Substantially Similar

Capcom tells only half the story in its presentation of the substantial similarity test. Capcom neglects to mention that if a showing of similarity is made on the extrinsic evaluation of a work, it is wrong for a court to resolve the intrinsic evaluation of such work on summary judgment, let alone on a dismissal motion. *Shaw v. Lindheim*, 919 F.2d 1353, 1360-61 (9th Cir. 1990). Instead, the fact-finder must make the subjective intrinsic evaluation of the work. *Id.* The finder of fact, applying the “ordinary reasonable person” standard, must look at the works as a whole to evaluate their “total concept and feel.” *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164, 1167 (9th Cir. 1977) (“The two works involved in this appeal should be considered and tested, not hypercritically or with meticulous scrutiny, but by the observations and impressions of the average reasonable reader and spectator.”).

Capcom claims that the “well-worn” plot idea of “humans taking refuge in and battling zombies in a suburban shopping mall accessed via helicopter during a massive zombie outbreak” is part of the public domain, and therefore cannot be copyrighted. However, Capcom confuses idea with expression in several respects. First, the idea underlying MKR’s Films is rampant,

1 mindless consumerism. MKR has expressed this idea through the portrayal of consumers (*e.g.*,
 2 mall goers) as zombies trying to wrest control of a shopping mall from survivors. In the Films,
 3 the viewer may vicariously experience the undeniable pleasures of an unchecked shopping spree
 4 through the protagonists' giddy looting of stores in the mall. Rupp Decl. at ¶ 15, Ex. M. But at
 5 the same time, the Films force the viewer to confront the sinister underbelly of such retail bliss by
 6 portraying the mall as a prison populated by zombies (stand-ins for doltish consumers, submissive
 7 to the powers of compulsive consumption). Indeed, the zombies symbolize humans robbed of
 8 their agency, reduced to parasitic undead who feed upon human flesh, literally, and the environs
 9 of the mall, figuratively. *Id.* (In the 1979 film, Peter explains to Stephen why the zombies are
 10 trying to break into the mall: "It's not us they're after, it's the place.")

11 Second, Capcom loads so many elements into its characterization of the "idea,"⁹ it is clear
 12 that this "idea" is actually protectable expression. Although "[t]he sine qua non of copyright is
 13 originality," the "requisite level of creativity is extremely low; even a slight amount will suffice."
 14 *Feist Pubs., Inc. v. Rural Telephone Svc. Co.*, 499 U.S. 340, 345 (1991); 1 Paul Goldstein,
 15 *Goldstein On Copyright* § 2.2.1 (3d ed. 2005). The Supreme Court notes that the "vast majority
 16 of works will make the grade quite easily, as they possess some creative spark, 'no matter how
 17 crude, humble or obvious' it might be." *Id.* (citing 1 Melville B. Nimmer & David Nimmer,
 18 *Nimmer on Copyright* § 1.08 [C][1]); *see also* 1 Goldstein § 2.2.1.¹⁰

19 Third, even assuming *arguendo* that this "humans taking refuge in and battling zombies in
 20 a suburban shopping mall accessed via helicopter during a massive zombie outbreak" plot device

21 _____
 22 ⁹ As noted above, Capcom characterizes the idea as: "humans taking refuge in and battling
 23 zombies in a suburban shopping mall accessed via helicopter during a massive zombie outbreak."
 (Capcom Memo at p. 11).

24 ¹⁰ Capcom further stacks the deck by citing nearly exclusively summary judgment cases for
 25 the proposition that courts routinely dismiss infringement claims when only a basic plot idea has
 26 been copied. Moreover, these cases generally concern the comparison of a screenplay or story
 27 concept with a realized work, which does not apply to the comparison of a visual work with
 28 another visual work. For example, *Thomas v. Walt Disney Co.*, 85 U.S.P.Q.2d 1874 (N.D. Cal.
 2008)—the only dismissal motion case cited for this proposition—compared a story submission
 to a film, and therefore did not consider any visual similarities.

1 is a “well-worn cliché,” Capcom has no justification for copying as many salient, protectable
 2 elements from the Films as it does in *Dead Rising*. In particular, as side-by-side screen shots
 3 illustrate (Rupp Decl. at ¶¶ 4-14, Exs. B-L), Capcom slavishly copies iconic scenes from the
 4 Films. As visual works, there is nothing to filter out from the respective stills, because the stills
 5 are copyrighted expression in themselves. While it may be true that any artist can visually render
 6 the idea of a zombie or a gaggle of zombies in a mall parking lot, he may not copy another’s
 7 embodiment of this idea as Capcom has done. Capcom cannot copy MKR’s expression. Rather,
 8 Capcom must create its own original expression. *Harper & Row v. Nation Enters.*, 471 U.S. 539,
 9 556-57 (1985).

10 Fourth, Capcom seeks to manipulate the level of abstraction to justify its copying. As
 11 noted in *Metcalf v. Bochco*, while the plot premises such as “boy meets girl” are not protectable
 12 when considered individually, the presences of many “generic similarities [can] . . . satisfy the
 13 extrinsic test.” 294 F.3d 1069, 1074 (9th Cir. 2002). In the instant dispute, the works at issue
 14 may be abstracted as follows (from idea to protectable expression):

- 15 • Two works about zombies;
- 16 • Two works about flesh-eating (not brain-eating) zombies;
- 17 • Two works about survivors battling flesh-eating zombies;
- 18 • Two works about survivors battling flesh-eating zombies in the suburbs;
- 19 • Two works about survivors battling flesh-eating zombies in a shopping mall in a
 20 rural setting;
- 21 • Two works about survivors desperately trying to keep the zombies from invading a
 22 mall in a rural setting, which functions as a sanctuary;
- 23 • Two works about survivors desperately trying to keep the zombies from invading a
 24 mall in a rural setting, which functions as a sanctuary, with much action taking
 25 place on a mall rooftop (complete with the highly unusual helicopter landing pad),
 26 in a helicopter, in an open atrium plaza with fountains, in an elevator, in an
 27 abandoned service corridor, and in utilitarian “safe” control rooms which function
 28 as the sleeping area for the male protagonists;

- 1 • Two works about survivors desperately trying to keep the zombies from invading a
2 mall in a rural setting, which functions as a sanctuary, with much action taking
3 place on a mall rooftop (complete with the highly unusual helicopter landing pad),
4 in a gun store in a mall (also highly unusual), in a helicopter, in an open atrium
5 plaza with fountains, in an elevator, in an abandoned service corridor, and in
6 utilitarian “safe” control rooms which function as the sleeping area for the male
7 protagonists, who try to figure out the mystery of the zombies, *i.e.*, “what are
8 they?”
- 9 • Two dark comedies about survivors desperately trying to keep the zombies from
10 invading a mall in a rural setting and murderous and psychotic street toughs, *e.g.*,
11 the marauding motorcycle gang members, which functions as a sanctuary, with
12 much action taking place on a mall rooftop (complete with the highly unusual
13 helicopter landing pad), in a gun store in a mall (also highly unusual), in a
14 helicopter, in an open atrium plaza with fountains, in an elevator, in an abandoned
15 service corridor, and in utilitarian “safe” control rooms which function as the
16 sleeping area for the leading male characters, who are hard-boiled journalists¹¹
17 who try to figure out the mystery of the zombies, *i.e.*, “what are they?”

18 Because the works contain so many similarities at a nearly granular level of abstraction, it
19 follows that (1) Capcom’s copying exceeds mere “stock ideas,” and (2) MKR has satisfied the
20 “extrinsic test.” *Metcalf*, 294 F.3d 1074. Indeed, the copied elements which Capcom claims
21 “naturally flow” from “zombies at a mall” (*e.g.*, a leading male journalist with short brown hair
22 and a leather jacket; bi-level upscale mall with a gun store and a helicopter landing pad; a mall

23 ¹¹ Capcom makes much of the fact that the leading male character in the 1979 Film is a
24 television traffic helicopter pilot, presumably responsible for traffic reports and any “disaster”
25 news requiring helicopter coverage such as fires—*i.e.*, not the august stature of Pulitzer-prize
26 winning journalists—and therefore not worthy of the title of journalist. However, the journalist in
27 the *Infringing Game* is a rag tag freelance photographer, a position not exactly befitting Edward
28 R. Murrow either. Moreover, Capcom’s cynical attempt to slightly alter the leading male’s
occupation from traffic reporter/pilot to freelance photographer, both of whom illustrate a send-up
of the sensationalism of mass media, does not give it free license to exploit a substantial amount
of the Films’ protected expression.

1 filled with shoppers wearing flannel shirts; campy violence; substantial use of a helicopter;
 2 creative use of quotidian items to kill zombies; a “carnavalesque parody of rampant
 3 consumerism”) must be considered, not filtered out. Accordingly, there is no justification for
 4 dismissing MKR’s well-pled Counterclaims without, at minimum, providing MKR an
 5 opportunity to offer evidence at trial to support its claims.

6 **C. The Merger and *Scenes á Faire* Doctrines Do Not Apply Because the**
 7 **Ideas Can be Expressed in a Plurality of Manners**

8 Capcom misinterprets the merger doctrine. This doctrine does not apply when the same
 9 idea can be expressed in a plurality of different manners. *Apple Computer, Inc. v. Formula Int’l,*
 10 *Inc.*, 725 F.2d 521, 525 (9th Cir. 1984); 1 Goldstein, § 2.3.2-2.3.2.1. At a minimum, Capcom can
 11 represent zombies at a mall without quoting iconic scenes from the Films. Capcom’s mall is
 12 essentially a visual facsimile of the mall in the 2004 Film, *e.g.*, an upscale bi-level mall with
 13 marble walls and a similar layout; moreover, many of the zombies and fellow survivors are
 14 inexplicably wearing flannel shirts. It does not naturally flow that upscale contemporary
 15 shoppers wear a statistically disproportionate number of flannel shirts, which are a signature of
 16 the 1979 Film, which is set in rural Pennsylvania -- a time and place where flannel shirts were *de*
 17 *riguer*. In particular, the Infringing Game features a distinctive zombie character wearing a red
 18 and black flannel shirt; this character appears prominently in the “vignettes” feature. Such
 19 character is an analogue to the 1979 Film’s “Plaid Boy” zombie, who was such a distinctive
 20 character that MKR licenses a trademarked Halloween costume featuring a zombie mask and a
 21 bloody, ripped red, black and green plaid shirt.

22 Moreover, *Night of the Comet* -- the lone “zombie-themed” film which Capcom cites for
 23 the proposition that “zombies in a shopping mall” are to a zombie movie as “foot chases and Irish
 24 cops” are to a police drama -- illustrates how “zombies at a mall” can be articulated in a myriad of
 25 different ways. As a preliminary matter, it is important to note the gamesmanship on Capcom’s
 26 part by its representation that *Night of the Comet* is about fighting zombies at a shopping mall.
 27 The only relevant scene takes place at a department store, and lasts for approximately ten
 28

1 minutes, or only 10 to 15% of the film. Most of *Night of the Comet* is set in other locations,
 2 ranging from a movie theater to a radio station to an underground bunker.

3 In *Night of the Comet*, the sisters/protagonists do not leave the department store, which is
 4 allegedly part of a “shopping arcade” that the viewer never sees. The sisters’ motivation for
 5 going to the department store is not to flee the menace of swarming zombies; rather, it is the
 6 allure of a free shopping spree. Further, the “zombies” featured in *Night of the Comet* are not
 7 “undead” – they are humans who have been partially exposed to the comet of the title, and as a
 8 result are dying slowly. *Night of the Comet*’s so-called “zombies” generally do not kill solely to
 9 acquire human flesh for sustenance. For example, the zombies in the department store tie up the
 10 sisters and attempt to shoot them with guns for shoplifting, before the girls are rescued.

11 The merger doctrine only applies if an idea and the expression of it are so inextricably
 12 entwined that they are one: *i.e.*, there is only one possible way to express and embody the idea in
 13 a work. *See, e.g., CDN Inc. v. Kapes*, 197 F.3d 1256, 1261 (9th Cir. 1999). Here, it follows that
 14 the merger doctrine does not apply, because the only limitation to representing zombies in a mall
 15 is a game developer’s or director’s imagination.

16 Turning to Capcom’s fallback position that most of the similarities between the works
 17 constitute “*scenes á faire*,” and are therefore not copyrightable, Capcom misses the point that
 18 *scenes á faire* —literally “scenes that must be done”—are clichéd storylines or common visual
 19 references, such as “star-crossed lovers,” or the depiction of Santa Claus with a traditional Santa
 20 costume, white beard, and nose like a cherry. *Schwarz v. Universal Pictures Co.*, 85 F.Supp. 270,
 21 275 (S.D. Cal. 1949); *Nichols v. Universal Pictures*, 45 F.2d 119, 122 (2d Cir. 1930); *Russ Berrie*
 22 *& Co., Inc. v. Jerry Elsner Co.*, 482 F. Supp. 980, 986 (S.D.N.Y. 1980); *see also Metcalf*, 294
 23 F.3d at 1074 (9th Cir. 2002). By contrast, Capcom’s wholesale exploitation of copyrightable
 24 elements -- such as a leading male journalist with short brown hair and a leather jacket; bi-level
 25 upscale mall with a gun store; a mall filled with shoppers wearing flannel shirts and swarming
 26 flesh-eating zombies; campy violence; substantial use of a helicopter; creative use of quotidian
 27 items to kill zombies, a “carnavalesque parody of rampant consumerism” -- goes far beyond any
 28 understanding of *scenes á faire*. *See, e.g., Metcalf*, 294 F.3d at 1074 (reversing summary

1 judgment for defendant because “the presence of so many generic similarities [e.g., *scenes á*
 2 *faire*] . . . satisfy the extrinsic test . . . even if none of these common plot elements [an idealistic
 3 young professional choosing between financial and emotional reward and love triangles among
 4 young professionals] is remarkably unusual in and of itself, the fact that both [works] contain all
 5 of these similar events gives rise to a triable question of substantial similarity of protected
 6 expression.”) (quotation omitted).

7 Further, Capcom fails to recognize that the Ninth Circuit now applies the *scenes á faire*
 8 analysis at the infringement stage, and not the copyrightability stage, of the analysis. *Montwillo*
 9 *v. Tull*, No. C 07-3947, 2008 WL 2264574 (N.D. Cal. June 2, 2008) (denying summary judgment
 10 motion and rejecting defendant’s *scenes á faire* defense); *Satava v. Lowry*, 323 F.3d 805, 810 (9th
 11 Cir. 2003). In *Montwillo*, this Court cautioned against the error of expanding the *scenes á faire*
 12 defense into a doctrine of non-copyrightability. Capcom incorrectly applies the *scenes á faire*
 13 doctrine like a whipsaw, dicing up the Films into non-copyrightable pieces. This is a classic
 14 misapplication of the doctrine.¹² Rather, the Court must consider MKR’s creative decisions as a
 15 whole. See *Montwillo*, 2008 WL 2264574, at * 6. Moreover, the mere fact that elements have
 16 appeared in a prior work does not mean such elements are *scenes á faire*. *Swirsky v. Carey*, 376
 17 F.3d 841, 850 (9th Cir. 2004). The standard is considerably higher; such elements must appear
 18 often enough in the type of work at issue that it truly may be said to be commonplace. *Id.* Such
 19 elements cannot be “‘commonplace’ by definition if [they are] shared by only two [works].” *Id.*

20 Despite Capcom’s attempt to convince the Court that “zombies at a shopping mall” is a
 21 subgenre of zombie films, the Films are the sole expression of a novel metaphor which brilliantly
 22 juxtaposes absurdly profane, gory zombies with the hopelessly mundane and antiseptic consumer
 23 shopping mall. At least one academic has published an article explicating this metaphor. Rupp
 24 Decl. at ¶ 15, Ex. M. (“The importance of place in the experience of shopping is explicitly
 25 acknowledged in *Dawn of the Dead* when Peter explains to Stephen that the zombies are

26 ¹² Although similarities arising from the mere appearance of *scenes á faire* elements do not
 27 count in the substantial similarity analysis, the particular treatment of *scenes á faire* elements can
 28 constitute original expression, and should therefore be considered. See, e.g., *Kurt S. Adler, Inc. v.*
World Bazaars, Inc., 897 F. Supp.92, 95 (S.D.N.Y. 1995).

continuing to clamour outside the mall because they feel a residual connection with the place: ‘It’s not us they’re after, it’s the place. They remember that they want to be here.’). The Infringing Game impermissibly replicates this “carnavalesque of rampant consumerism” down to stealing the famous shopping spree at a gun store within the mall. *Id.*

D. The Game Industry Media Recognizes and Decries *Dead Rising*’s Infringement

What gives the ultimate lie to Capcom’s position on copyright infringement, is the overwhelming public response to *Dead Rising*, which has recognized the Game for exactly what it is – a blatant infringement of the Films. If the critical test is the reaction of the ordinary observer or reasonable person, a myriad of such individuals have noted that *Dead Rising* is simply a videogame adaptation of the Films:

- The video game’s setup is a complete theft of the 1978 George A. Romero classic ‘Dawn of the Dead,’ right down to the Muzak being piped through the mall speakers.” *San Francisco Chronicle*, August 15, 2006.
- “*Dead Rising* is best described as an interactive version of George A. Romero’s horror flick, *Dawn of the Dead*, in which a flesh-eating mob of zombies attempts to break into a shopping mall to attack the people inside.” *USA Today*, August 17, 2006.
- “It’s a gorgeous and fully interactive game world ripped straight out of George Romero’s *Dawn of the Dead*. Just like in that movie, the characters in *Dead Rising* choose to take refuge in the best place to find food and weapons.” *Computerandvideogames.com*, March 23, 2006.
- “Taking a page directly from George Romero’s classic gorefest *Dawn of the Dead*, the majority of *Dead Rising*’s action takes place inside a large mall that’s been overrun by the undead.” *Gamespy.com*, January 6, 2006.
- “You won’t have to look at more than a few frames of *Dead Rising* to realize its similarities to Romero’s *Dawn of the Dead*.” *Teamxbox.com*, May 12, 2006.
- “Lately however, zombie movies have gone from cheesy to cheesier, taking a back seat to other horrifying tales until a few years ago when George A. Romero’s original

Dawn of the Dead was remade for present times. It was both satirical and horrifying, taking a place in a world where zombies had overrun the rest of civilization, less a few survivors who took to the once safe haven of a shopping mall. Replace the title of *Dawn of the Dead* with *Dead Rising* and you've basically got the premise for Capcom's first voyage on the Xbox 360." *Teamxbox.com*, July 12, 2006.

- "[D]awn of the Dead"...took a satirical look at everything from the consumer culture permeating American society to racism to the skewed way the media covers disasters....I was a bit surprised, then, that Capcom would so obviously lift the setting for their latest zombiefest, called *Dead Rising*, from George Romero's masterpiece. Didn't they know that fans would cry foul?" *Gamespy.com*, July 6, 2006.
- "[T]his is a game you should play for how well it appreciates, honors, and finally does justice to its subject material. The front of the box carries this disclaimer: 'This game was not developed, approved, or licensed by the owners or creators of George A. Romero's *Dawn of the Dead*'. Yeah, whatever, Capcom lawyers. We've been waiting a long while for a developer to live up to the potential of Romero's vision. And as we said at the top of this review: It's about time!" *Yahoo! Games*, August 10, 2006.
- "Like Clive Barker's *Jericho*, it was also refused classification by the USK. With it's [sic] unremitting gore, it's [sic] got an almost slapstick violence that harks back to moments in *Evil Dead* and of course *Dawn of the Dead*. If there was a video nasty for the Xbox 360 then *Dead Rising*, with its casually horrific disembowlings [sic], cannibalism and voyeurism, is it." *Xboxer.tv*, January 31, 2008.

Counterclaim ¶ 18. Capcom attempts to minimize such widespread and immediate reaction to the *Infringing Game* by arguing that industry experts, who are well-versed in the horror genre and video games, are ill-equipped to determine whether the respective visual works are substantially similar. But these individuals – who share the outlook and perspective of the fan base for whom they write – are in fact ideally suited to make such evaluation. At a minimum, their reactions demonstrate that MKR is entitled to "its day in court" on its copyright infringement claim.

1 **IV. MKR HAS STATED A VALID LANHAM ACT CLAIM TO PROTECT ITS**
 2 **SOURCE-IDENTIFYING ELEMENTS**

3 Capcom attempts to characterize MKR's Lanham Act claims as "nothing but a second,
 4 repackaged copyright claim masquerading as a Lanham Act claim." Capcom Memo at 21.
 5 MKR's Counterclaims, however, plainly allege Lanham Act violations distinct from copyright
 6 law. The core of MKR's Lanham Act claims is Capcom's wholesale exploitation of MKR's
 7 DAWN OF THE DEAD Marks¹³ and other source-identifying elements from the Films to entice
 8 the enormous DAWN OF THE DEAD fan base.

9 Trademark and copyright law serve fundamentally different purposes, and protect against
 10 separate wrongs, even if the claims arise from the same set of facts. *Bach v. Forever Living*
 11 *Products U.S., Inc.*, 473 F.Supp.2d 1110, 1117 (W.D. Wash. 2007). Whereas copyright law
 12 protects the creative work as a whole, trademark law protects those particular symbols, elements
 13 or devices which identify a product in the marketplace, and prevents misappropriation or
 14 confusion as to its source. *Id.*, citing *RDF Media Ltd. v. Fox Broad. Co.*, 372 F. Supp. 2d 556,
 15 563 (C.D. Cal. 2005); *Whitehead v. CBS/Viacom, Inc.*, 315 F. Supp. 2d 1, 13 (D.D.C. 2004).

16 Citing *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), and
 17 related cases, Capcom asserts that MKR is using trademark law to protect ideas and other creative
 18 content. Capcom Memo at 21-23. MKR's Counterclaims, however, explicitly ground its Lanham
 19 Act claims in Capcom's exploitation of those components of the Films which are *source-*
 20 *identifying*. For example, Paragraph 16 alleges:

21 Above and beyond copying the films' major elements, Capcom has
 22 sought to capitalize on the fame of George A. Romero, and on the
 23 fame of the title "DAWN OF THE DEAD", by using the similar
 24 title "DEAD RISING", and by placing a "notice" on the packaging
 25 for "DEAD RISING" . . . which was neither authorized nor
 26 requested by MKR . . . It exploits Mr. Romero's fame, and the fame
 27 of the "DAWN OF THE DEAD" title, to attract buyers. In
 28 addition, Capcom displays a colorable imitation of MKR's famous

13 Secondary meaning to the DAWN OF THE DEAD mark has been expressly recognized in
 federal court. *See, Dawn Associates v. Links*, 203 U.S.P.Q. 831, 836 (N.D. Ill. 1978) ("Plaintiffs
 have adequately established that both 'Night of the Living Dead' and 'Dawn of the Dead' have
 achieved a secondary meaning . . .").

1 ZOMBIE HEAD trademark on the packaging for “DEAD
2 RISING”.

3 Thus, as opposed to using trademark law to prosecute the plagiarism of *content*, as in
4 *Dastar*, MKR’s Lanham Act claims seek to protect the Films’ *source-identifying elements* — *e.g.*,
5 Mr. Romero’s name, the *Dawn of the Dead* title, and the ZOMBIE HEAD Design® trademark on
6 the Infringing Game’s packaging. Capcom’s use of the Films’ source-identifying elements reflect
7 Capcom’s intent to trade-off of the fame of Mr. Romero and the *Dawn of the Dead* films to entice
8 consumers who are fans of Mr. Romero and *Dawn of the Dead*.

9 For another example, MKR’s DAWN OF THE DEAD licensed merchandise includes a
10 trademark “PLAID BOY” costume consisting of a blood stained, distressed plaid shirt and a
11 zombie mask. Counterclaims ¶ 11, Ex. C. As discussed above, Capcom inexplicably portrays
12 many upscale shoppers in flannel shirts—thus misappropriating MKR’s trademark rights in order
13 to tap into the Films’ enormous fan base.

14 Under similar circumstances, many courts have analyzed the same set of facts under both
15 trademark and copyright law without concluding that the trademark claims were “piggybacking”
16 on the copyright claims. *See, e.g., Bach*, 473 F.Supp.2d at 1117-18 (considering both trademark
17 claims grounded in the *Jonathan Livingston Seagull* name, title and trade dress, and copyright
18 claims grounded in the character, text and images), *citing Mattel Inc. v. Walking Mountain*
19 *Prods.*, 353 F.3d 792 (9th Cir. 2003) (considering copyright and trademark implications of series
20 of photographs depicting Barbie in various absurd positions); *Dr. Seuss Enters., L.P. v. Penguin*
21 *Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997) (affirming grant of preliminary injunction as
22 violating Dr. Seuss’s copyright and trademark rights); *Nintendo of Am., Inc. v. Dragon Pacific*
23 *Int’l*, 40 F.3d 1007 (9th Cir.1994) (affirming damages award under both copyright and trademark
24 law where defendant copied and sold Nintendo games (copyright infringement) but advertised
25 that they were Nintendo products (trademark violation)); *Toho Co., Ltd. v. William Morrow &*
26 *Co.*, 33 F.Supp.2d 1206 (C.D. Cal. 1998) (issuing preliminary injunction against book entitled
27 “Godzilla” (trademark violation) which included images and photographs from original Godzilla
28 film and descriptions of the Godzilla character (copyright violations)). MKR’s Counterclaims

1 similarly recognize the different rights protected under copyright law and trademark law; thus,
2 MKR has adequately stated a claim under the Lanham Act.

3 Capcom's other conclusory arguments with respect to MKR's Lanham Act claims
4 (confined to suggestive footnotes) are wholly unfounded upon law or fact. First, Capcom
5 maintains that MKR cannot and does not allege that the marks DEAD RISING and DAWN OF
6 THE DEAD are confusingly similar in and of themselves. However, Paragraph 43 of MKR's
7 Counterclaims plainly states: "'DEAD RISING' is confusingly similar to MKR's trademark
8 'DAWN OF THE DEAD'."¹⁴ As noted *supra*, both titles share the term "DEAD" and connote
9 the same meaning of zombies awakening.

10 Second, Capcom asserts that MKR cannot establish a Lanham Act violation based on the
11 disclaimer on *Dead Rising*'s packaging. To the contrary, courts have expressly found that such a
12 disclaimer *ipso facto dilutes a trademark and may itself cause consumer confusion*. *E. & J. Gallo*
13 *Winery v. Gallo Cattle Co.*, 12 U.S.P.Q.2d 1657, 1989 WL 159628, at **19, 30 (E.D. Cal. 1989);
14 *see also Beacon Mut. Ins. Co. v. OneBeacon Ins. Corp.*, 376 F. Supp. 2d 251, 266 (D.R.I. 2005)
15 ("the efficacy of disclaimers generally is in doubt"), *citing Home Box Office, Inc. v.*
16 *Showtime/The Movie Channel, Inc.*, 832 F.2d 1311, 1315-16 (2d Cir. 1987).

17 Capcom's assertion that its disclaimer somehow constitutes nominative fair use is equally
18 misguided. Nominative fair use only applies when the alleged infringer needs to use another's
19 mark to describe its product, such as an automobile repair shop which must be able to convey that
20 it repairs Volkswagen cars. *Volkswagenwerk Aktiengesellschaft v. Church*, 411 F.2d 350 (9th
21 Cir. 1969). Such nominative fair use requires that the alleged infringer prove: (1) that the product
22 or service in question is not readily identifiable without use of the trademark; (2) that only so
23 much of the mark is used as is reasonably necessary to identify the product or service; and (3) that
24 the user do nothing which would, in conjunction with the mark, suggest sponsorship or
25 endorsement by the trademark holder. *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407,
26

27 ¹⁴ Despite the erroneous reference to "DEAD RISING" as MKR's trademark instead of
28 Capcom's trademark, the allegation remains clear, especially in light of the pending opposition
proceeding, also mentioned in the Counterclaims ¶ 16.

1 412 (9th Cir. 1996), *citing New Kids on the Block v. News America Pub., Inc.*, 971 F.2d 302,
 2 308 (9th Cir. 1992).

3 Whereas the failure of *any* prong will defeat a nominative fair use defense, all three
 4 prongs fail in this case. *See Playboy Enters. v. Welles, Inc.*, 279 F.3d 796, 804 (9th Cir. 2002).
 5 First, the prominent use of the mark “GEORGE A. ROMERO’S DAWN OF THE DEAD®” is
 6 not necessary to describe *Dead Rising*; Capcom may freely and accurately describe its video
 7 game without using MKR’s mark. Second, by referring to “GEORGE A. ROMERO’S DAWN
 8 OF THE DEAD,” Capcom misappropriates not only the *Dawn of the Dead* title, but also George
 9 A. Romero’s name. Capcom could have readily identified “Dawn of the Dead” without reference
 10 to Mr. Romero. Thus, Capcom uses more of the mark than is reasonably necessary, and the
 11 second prong fails as well. The third requirement—doing nothing to suggest sponsorship or
 12 endorsement—“is merely the other side of the likelihood-of-confusion coin.” *Brother Records,*
 13 *Inc. v. Jardine*, 318 F.3d 900, 909 n.5 (9th Cir. 2003). As discussed above, disclaimers may
 14 *themselves* cause consumer confusion. Capcom is not merely referring to MKR’s Films, but is
 15 doing so in a form and manner -- *i.e.*, through a disclaimer -- which constitutes misappropriation.
 16 Not surprisingly, Capcom cannot point to a single case where use of another’s mark in a
 17 disclaimer constituted nominative fair use. Hence, the third prong also fails, so nominative fair
 18 use cannot defeat the adequacy of MKR’s stated claims.

19 With respect to Capcom’s last argument -- reverse passing off -- as discussed above,
 20 MKR’s Lanham Act claims are based on Capcom’s infringement of MKR’s source-identifying
 21 elements, not the Films’ content (which is the subject of its copyright claims). Thus, MKR does
 22 not allege reverse passing off, which occurs when an infringer obtains a second party’s goods,
 23 removes the second party’s name, and markets the second party’s goods under its own name.
 24 *Summit Machine Tool Mfg. Corp. v. Victor CNC Systems, Inc.*, 7 F.3d 1434, 1437 (9th Cir. 1993).

V. MKR’S STATE LAW CLAIMS ARE NOT PREEMPTED BECAUSE THEY SEEK TO PROTECT RIGHTS NOT AFFORDED BY COPYRIGHT LAW

Finally, Capcom asserts that MKR’s state law claims fail because they are preempted by the Copyright Act. This assertion also lacks merit. The Ninth Circuit has developed a two-part test to determine whether the Act preempts a state law claim:

We must first determine whether the “subject matter” of the state law claim falls within the subject matter of copyright as described in 17 U.S.C. §§ 102 and 103. Second, assuming that it does, we must determine whether the rights asserted under state law are equivalent to the rights contained in 17 U.S.C. § 106, which articulates the exclusive rights of copyright holders.

Brackett v. Hilton Hotels Corp., No. 3:08-cv-02100, slip op. at 13 (N.D. Cal. Jun. 30, 2008) (Rupp Decl. at ¶ 17, Ex. O), *quoting Laws v. Sony Music Entm’t*, 448 F.3d 1134, 1137-38 (9th Cir. 2006). Essentially, this analysis determines “whether the state law claim contains an element not shared by the federal law; an element which changes the nature of the action so that it is qualitatively different from a copyright infringement claim.” *Brackett*, slip op. at 13, *quoting Summit*, 7 F.3d at 1439-40.

Again, in this case, MKR’s state law claims are grounded in Capcom’s misuse of MKR’s statutory and common law *source-identifying elements*, not of MKR’s *content*. Thus, even if the Films were the general “subject matter” of the state law claim, the rights asserted under state law are not equivalent to those protected by the Copyright Act.

As with MKR’s Lanham Act claims, state law regarding trademarks and unfair competition exists independently from copyright law. *Internat’l Order of Job’s Daughters v. Lindeburg and Co.*, 633 F.2d 912, 916 (9th Cir. 1980). In general, the common law protects against the broad business tort of “unfair competition,” *of which trademark infringement is one species*. *Id.* at 915. In addition to the federal protection afforded by the Lanham Act, state statutory or common law may protect against trademark infringement and other types of unfair competition, such as misappropriation as alleged herein. *Id.* at 916. MKR has adequately stated both Lanham Act and state law claims which stand independent of any rights to the Films’

1 *content* under copyright law. Thus, MKR's state law claims are well-pled as well. *See Brackett*,
 2 slip op. at 14 (denying defendants' motion to dismiss plaintiff's state law claims, since "where a
 3 state law claim adds an additional element, it is not preempted by Section 301").

4 **VI. THE COURT SHOULD EXCLUDE EXHIBITS 5-44 TO CAPCOM'S**
 5 **REQUEST FOR JUDICIAL NOTICE**

6 Pursuant to Federal Rule of Evidence 201(e), MKR opposes in part Capcom's request for
 7 judicial notice, asks the Court to strike all references to the media and documents which are
 8 attached as Exhibits 5-44 to the Request for Judicial Notice in Support of Plaintiffs' and Third-
 9 Party Defendant's Motion to Dismiss Amended Counterclaims and Third Party Complaint (DI
 10 # 37) ("Capcom RJN").

11 In ruling on a Rule 12(b)(6) motion, a district court generally may not consider any
 12 material beyond the pleadings. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) (*overruled on*
 13 *other grounds*, *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1123-24 (9th Cir. 2002)),
 14 *citing Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir.
 15 1990); *see also Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). There are,
 16 however, two exceptions to this rule. *Lee*, 250 F.3d at 688. First, a court may consider
 17 documents whose contents are alleged in the complaint and whose authenticity no party
 18 questions. *Branch*, 14 F.3d at 453; *see also Lee*, 250 F.3d at 688. Second, under Fed. R. Evid.
 19 201, a court may take judicial notice of "matters of public record." *Lee*, 250 F.3d at 688-89.

20 When "matters outside the pleading are presented to and not excluded by the court, the
 21 motion *shall* be treated as one for summary judgment and disposed of as provided in Rule 56."
 22 *Lee*, 250 F.3d at 688 (emphasis in original), *quoting* FED. R. CIV. P. 12(b)(6); *Branch*, 14 F.3d at
 23 453. In such case, "all parties shall be given reasonable opportunity to present all material made
 24 pertinent to such a motion by Rule 56." *Branch*, 14 F.3d at 453, *quoting* FED. R. CIV. P. 12(b)(6).
 25 In turn, Rule 56(f) requires a court to refuse summary judgment where the nonmoving party has
 26 not had the opportunity to discover information which is essential to its opposition. *Anderson v.*
 27 *Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5, 257 (1986).

1 MKR does not oppose Capcom's introduction of Exhibits 1-4. Exhibits 1 and 4 embody
 2 the 1979 Film and the Infringing Game, respectively, the contents of which are alleged in MKR's
 3 Counterclaims. Exhibits 2 and 3 (a synopsis and certified script, respectively, of the 1979 Film)
 4 were filed with the U.S. Copyright Office, and are therefore matters of public record. MKR does
 5 not dispute the authenticity or content of these documents, and therefore agrees that they are
 6 admissible for purposes of Capcom's motion.

7 In addition, MKR notes that the contents of the 2004 Film are alleged in its
 8 Counterclaims. Therefore, MKR respectfully requests that the Court also consider the 2004 Film.
 9 *See Rupp Decl. at ¶ 3, Ex. A.*

10 Capcom's remaining exhibits, however, as well as its alleged "fact" that generic elements
 11 are present in zombie-themed films and video games, grossly exceed the scope of allowable
 12 evidence in a dismissal motion under Rule 12(b)(6). Thus, the Court must either exclude them or
 13 convert the instant motion to one for summary judgment. Conversion to a summary judgment
 14 motion, however, would be premature. Therefore, MKR respectfully requests that the Court
 15 entirely exclude Capcom's Exhibits 5-44, and deny Capcom's request for judicial notice of
 16 alleged generic or "stock" elements.

17 **A. Exhibits 5-44 Grossly Exceed the Scope of Allowable Evidence on a**
 18 **Motion to Dismiss**

19 Exhibit 5 purports to be the "script of *Dead Rising*." However, despite its alleged
 20 "authentication" by the Niida Declaration, the script wholly lacks foundation, as the Niida
 21 Declaration does not disclose *who* wrote the script, *when*, or for *what purpose*. Moreover, since
 22 the Infringing Game's scenario unfolds according to the player's skill and choices made during
 23 game play, MKR cannot easily verify the contents of this purported script (which was not filed
 24 with the Copyright Office), and therefore disputes its contents. A court "may not defenestrate
 25 established evidentiary processes, thereby rendering inoperative the standard mechanisms of
 26 proof and scrutiny, if the evidence in question is at all vulnerable to reasonable dispute." *Lussier*
 27 *v. Runyon*, 50 F.3d 1103, 1114 (1st Cir. 1995). Thus, the Court should reject Exhibit 5 to
 28 Capcom's Request for Judicial Notice.

1 The remainder of Capcom's proffered evidence, Exhibits 6-44, comprises films and video
 2 games which are offered to show the allegedly generic elements of the Films. However, these
 3 "piece[s] of evidentiary matter that do[] not exist independently of the complaint" are
 4 inappropriate evidence upon this dismissal motion. *DeMarco v. DepoTech Corp.*, 149 F. Supp.
 5 2d 1212, 1220 (S.D. Cal. 2001), *distinguishing Branch*, 14 F.3d 449.

6 **B. Judicial Notice Does Not Apply to Exhibits 5-44**

7 Capcom requests judicial notice of Exhibits 5-44 as well as its alleged "stock" elements.
 8 Federal Rule of Evidence 201 "permits a court to take judicial notice of two kinds of facts:
 9 (1) those that are generally known within the court's territorial jurisdiction; and (2) those that are
 10 capable of accurate and ready determination by resort to sources whose accuracy cannot
 11 reasonably be questioned, for example, almanac, dictionary, calendar or similar source." *Walker*
 12 *v. Woodford*, 454 F. Supp. 2d 1007, 1022 (S.D. Cal. 2006). Put differently, "the fact must be one
 13 that only an unreasonable person would insist on disputing." *Id.*, *quoting United States v. Jones*,
 14 29 F.3d 1549, 1553 (11th Cir. 1994). Taking judicial notice under this rule "preclude[s] a party
 15 from introducing evidence and in effect, direct[s] a verdict against him as to the fact noticed."
 16 *Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1311 (S.D. Cal. 2003).

17 The Ninth Circuit tends to be strict with its application of Rule 201(b). *Von Grabe*, 312 F.
 18 Supp. 2d at 1311. A court may not take judicial notice of any matter which is "subject to
 19 reasonable dispute," even if such matter is documented in a public record. *Lee*, 250 F.3d at 689-
 20 90, *quoting* FED. R. EVID. 201(b); *Copple v. Astrella & Rice, P.C.*, 442 F. Supp. 2d 829,
 21 835 (N.D. Cal. 2006); *Walker*, 454 F. Supp. 2d at 1022. The party requesting judicial notice
 22 bears the burden of persuading the court that the particular fact is not reasonably subject to
 23 dispute, and is capable of immediate and accurate determination. *Jasso v. Citizens*
 24 *Telecommunications Co. of CA, Inc.*, No. CIV S-05-2649, 2007 WL 97036, at *2 (E.D. Cal. Jan.
 25 9, 2007), *citing In re Tyrone F. Conner Corp., Inc.*, 140 B.R. 771, 781 (E.D. Cal. 1992). Upon
 26 timely request, a party is entitled to an opportunity to be heard as to the propriety of taking
 27 judicial notice and the tenor of the matter noticed. FED. R. EVID. 201(e).

Capcom's assertion that Exhibits 5-44 are "generally known within the territorial jurisdiction of the court" is wholly improper. "Generally known" facts "are those that exist in the unrefreshed, unaided recollection of the populace at large." *Lussier*, 50 F.3d at 1114. This standard does not apply to the obscure and historic works upon which Capcom relies. Capcom cites *Twentieth Century Fox Film Corp. v. Marvel Ents.*, 155 F. Supp. 2d 1, 41 (S.D.N.Y. 2001), wherein the court judicially recognized Obi-Wan Kenobi's nurturing of the gifted Luke Skywalker in *Star Wars*. However, the six *Star Wars* films reportedly rank in the all-time top 32 grossing films in the U.S.—including three of the top ten. *All Time Top 1000 Grossing Films (US)* - *MovieWeb*, <http://www.movieweb.com/movies/boxoffice/alltime.php> (as of Jul. 8, 2008, 23:45 GMT). Thus, whereas *Star Wars*' plot may indeed exist in the unrefreshed, unaided recollection of the populace at large, the same cannot be said for such films as *White Zombie* (1932) and *I Walked With a Zombie* (1943).

The other two cases cited by Capcom -- *Gal v. Viacom Int'l, Inc.*, 518 F. Supp. 2d 526, 546-47 (S.D.N.Y. 2007) and *Sobhani v. @Radical.Media, Inc.*, 257 F. Supp. 2d 1234, 1235-36 n.1 (C.D. Cal. 2003) -- are likewise distinguishable. Whereas both concern summary judgment motions, not dismissal motions, the *Gal* court had *denied* the earlier dismissal motion, expressly rejecting the notion that the plaintiff had "claim[ed] substantial similarity based exclusively on alleged similarities in ideas and common stock elements." 403 F. Supp. 2d 294, 308 (S.D.N.Y. 2005). For its part, the *Sobhani* court judicially noticed the content of *Castaway* because the commercials at issue specifically parodied the film. *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1129 n.3 (C.D. Cal. 2007), *citing Sobhani*, 257 F. Supp. 2d at 1235-36 n.1. In contrast, of course, MKR's Counterclaims do not reference the contents of Capcom's proffered exhibits.

Aside from the films and video games, Capcom also seeks to introduce copies of various Wikipedia articles. Far from a source "whose accuracy cannot reasonably be questioned," however, Wikipedia has—by its own admission—faced criticism concerning systematic bias and inconsistencies, lack of reliability and accuracy, and risks of vandalism. *See Wikipedia, Wikipedia*, <http://en.wikipedia/wiki/Wikipedia> (describing criticisms of Wikipedia) (as of Jul. 8, 2008, 21:55 GMT). For this reason, courts have expressly questioned or rejected Wikipedia's

1 reliability. *E.g.*, *Nordwall v. Sec’y of Health and Human Servs.*, No. 05-123V, 2008 WL 857661,
 2 at *7 n.6 (Fed. Cl. Feb. 19, 2008) (“Wikipedia may not be a reliable source of information”),
 3 citing *Campbell ex rel. Campbell v. Sec’y of Health and Human Servs.*, 69 Fed. Cl. 775, 781 (Fed.
 4 Cl. 2006) (information drawn from Wikipedia does not “remotely meet” the reliability
 5 requirements of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993)). Thus, judicial
 6 notice of these exhibits is especially inappropriate.

7 Moreover, even if Exhibits 5-44 were somehow publicly known, MKR vigorously
 8 disputes Capcom’s characterization of the subject films and video games. For example, as
 9 detailed in Section III above, Capcom grossly exaggerates the alleged similarities between the
 10 Films and *Night of the Comet* (Exhibit 21). Likewise, MKR vigorously denies the generic or
 11 “stock” elements of which Capcom requests judicial notice. These “facts”—which necessarily
 12 require analysis of Capcom’s proffered *evidence*—“are not only disputed, they form the essence
 13 of the controversy at hand.” *Von Grabe*, 312 F. Supp. 2d at 1312. Capcom may not misuse Rule
 14 201 to effectively circumvent its burden of proof and duty to litigate this case. *Id.*

15 C. The Court Should Exclude Capcom’s Proffered Evidence Rather Than 16 Convert This Dismissal Motion

17 When matters outside the pleading are presented to a court on a Rule 12(b)(6) motion, a
 18 court must either exclude the evidence or convert the motion to one for summary judgment. *See*
 19 *Lee*, 250 F.3d at 688, *quoting* FED. R. CIV. P. 12(b)(6); *Branch*, 14 F.3d at 453. In that case, a
 20 court must allow “sufficient fact gathering” so that all parties may present *all material made*
 21 *pertinent by Rule 56*. *Lucas*, 633 F.2d at 759 (9th Cir. 1980). Given the facts and procedural
 22 posture of this case, exclusion is the far more appropriate recourse.

23 The present dispute concerns a video game which unfolds according to the skill of the
 24 player and choices made during game play. Thus, as opposed to the Films, whose individual
 25 scenes are fixed and easily accessible, discovery concerning the history and content of the
 26 Infringing Game is crucial to MKR’s development of factual support for its claims. Since such
 27 discovery is currently in its infancy, converting this dismissal motion into one for summary
 28 judgment would deprive MKR of the “reasonable opportunity to complete discovery and to

1 present necessary factual support for [its] complaint allegations.” *Lucas*, 633 F.2d at 759. Hence,
 2 MKR respectfully submits that conversion to a summary judgment motion is premature, and that
 3 the better alternative is to simply exclude Exhibits 5-44. In the alternative, should the Court so
 4 convert the instant motion, MKR respectfully requests notice and an opportunity to take
 5 discovery for purposes of responding with evidence (an opportunity not afforded by the present
 6 motion). *See id.*; FED. R. CIV. P. 56(f).

7 VII. CONCLUSION

8 For the foregoing reasons, MKR respectfully requests the Court find that MKR has
 9 effectively stated its claims, and thus DENY Capcom’s motion to dismiss.

10
 11 KENYON & KENYON LLP

12
 13
 14 Dated: July 23, 2008

By: /s/ Allen J. Baden

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