

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

5 Facsimile: (650) 938-5200

JENNIFER L. KELLY (CSB NO. 193416)

6 jkelly@fenwick.com

MARY E. MILIONIS (CSB NO. 238827)

7 mmilionis@fenwick.com

FENWICK & WEST LLP

8 555 California Street - 12th Floor

San Francisco, CA 94104

9 Telephone: (415) 875-2300

10 Facsimile: (415) 281-1350

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

13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA

15 SAN JOSE DIVISION

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
 23 Third-Party Plaintiff,

24 v.

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

26 Counterclaim-Defendants

27 and

28 CAPCOM U.S.A, INC.

Third-Party Defendant.

E-FILED 6/12/08

Case No. CV-08-0904 RS

**~~[PROPOSED]~~ ORDER PERMITTING
 DELIVERY AND USE OF XBOX IN
 CONNECTION WITH PLAINTIFFS'
 AND THIRD PARTY DEFENDANT'S
 MOTION TO DISMISS AMENDED
 COUNTERCLAIMS AND THIRD
 PARTY COMPLAINT**

Courtroom: 4, 5th Floor
 Judge: Hon. Richard Seeborg

1 WHEREAS, Capcom Co., Ltd. and Capcom Entertainment, Inc. commenced this action
2 on February 12, 2008, seeking a judicial declaration that their video game *Dead Rising* does not
3 infringe any copyright, trademark, or other intellectual property rights allegedly held by The
4 MKR Group, Inc. ("MKR") in the 1979 film *George A. Romero's Dawn of the Dead* or its 2004
5 remake;

6 WHEREAS, on May 12, 2008, MKR filed its Answer and Counterclaims, and on May 15,
7 2008, filed its Amended Answer, Counterclaims and Third Party Complaint ("the
8 Counterclaim"), joining Capcom U.S.A., Inc. as a third party defendant (hereinafter, all three
9 Capcom entities are referred to collectively as "Capcom");

10 WHEREAS, the Counterclaim asserts various federal and state law claims against
11 Capcom, including claims for copyright infringement based on MKR's assertion that *Dead Rising*
12 is "substantially similar" to *George A. Romero's Dawn of the Dead*, and those elements of its
13 2004 remake that are original to MKR, within the meaning of the Copyright Act;

14 WHEREAS, on June 9, 2008, Capcom will file a motion to dismiss the Counterclaim, in
15 its entirety, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the basis, *inter*
16 *alia*, that the works are not substantially similar (the "Motion to Dismiss") which, pursuant to this
17 Court's Civil Minute Order dated May 30, 2008, will be heard in this Court on August 8, 2008 at
18 9:00 a.m.;

19 WHEREAS, in connection with the Motion to Dismiss, it is appropriate for the Court to
20 review and compare the works at issue, namely, *Dead Rising* and *George A. Romero's Dawn of*
21 *the Dead* (*Christianson v. West Pub. Co.*, 149 F.2d 202, 203 (9th Cir. 1945); *Thomas v. Disney*,
22 2008 U.S. Dist. LEXIS 14643, *5 fn. 1 (N.D. Cal. February 14, 2008) (Wilkin, J.); *Zella v.*
23 *Scripps*, 2007 U.S. Dist. LEXIS 95181, *10 (C.D. Cal. December 18, 2007) (Collins, J.));

24 WHEREAS, *Dead Rising* was designed exclusively for, and therefore can only be played
25 on, the Xbox 360 platform, thus making the availability of an Xbox 360 essential to Court's
26 review of the *Dead Rising* video game.
27
28

Dated: June 11, 2008

FENWICK & WEST LLP

By: /s/ Rodger R. Cole
Rodger R. Cole


Attorneys for Plaintiffs CAPCOM CO., LTD.,
CAPCOM ENTERTAINMENT, INC. and
Counterclaim-Defendant CAPCOM U.S.A.,
INC.

IT IS THEREFORE ORDERED AS FOLLOWS:

1. Capcom may deliver an Xbox 360 to the Court (directly to this Courtroom), for the Court's use in reviewing *Dead Rising* in connection with the Motion to Dismiss;
2. The Court may, in its discretion, use the Xbox 360 to:
 - (a) Play *Dead Rising* (a copy of which will be submitted by Capcom along with its Motion to Dismiss); and/or
 - (b) view the scenes of *Dead Rising* which require little to no user interaction, including the opening scenes, and supplement its review of *Dead Rising* by reading its written script (a copy of which will be submitted by Capcom along with its Motion to Dismiss).

IT IS SO ORDERED.

Dated: June 12, 2008

By: 
The Honorable Richard Seeborg
United States District Court Judge

FENWICK & WEST LLP
ATTORNEYS AT LAW
MOUNTAIN VIEW