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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Richard Seeborg, Magistrate Judge

CAPCOM COMPANY LTD., et al.,)

)

)

Plaintiffs,)

)

VS.)

NO. C 08-00904 RS

)

THE MKR GROUP, INC.,)

)

Defendant.)

)

San Jose, California

Wednesday, September 3, 2008

**TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND
RECORDING**

APPEARANCES:

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1 Wednesday - September 3, 2008

10:21 a.m.

2
3 **THE CLERK:** Calling case number C 08-00904 RS.
4 Capcom Company, et al. versus the MKR Group Incorporated.
5 Counsel come forward, please.

6 **MR. COLE:** Good morning, Your Honor. Roger Cole of
7 Fenwick & West for Capcom.

8 **THE COURT:** Good morning, Mr. Cole.

9 **MR. McCABE:** Good morning, Your Honor. Philip
10 McCabe from Kenyon & Kenyon for MKR.

11 **THE COURT:** Good morning, Mr. McCabe.

12 **MR. COLE:** And also with me, Your Honor.

13 **MS. KELLY:** Jennifer Lloyd Kelly for Capcom. Good
14 morning.

15 **THE COURT:** Good morning.

16 **MS. MILIONIS:** And MaryBeth Milionis also for
17 Capcom.

18 **THE COURT:** Good morning.

19 **MR. McCABE:** And Deborah Coleman from Kenyon for
20 MKR, Your Honor.

21 **THE COURT:** Good morning to all of you.

22 Let me start out with the issue of what I can
23 consider and what I can't in connection with the pending motion
24 to dismiss the counterclaims. You know, I'll tell you
25 tentatively what I think is appropriately in the hopper and

1 what I think is outside of the parameters of proper
2 consideration on a motion of this kind.

3 I think there isn't any disagreement, as I
4 understand it, that I can consider the exhibits that comprise
5 the actual 1997 movie. Is it '97?

6 **MR. McCABE:** 1979, Your Honor.

7 **THE COURT:** '79. Yeah, I inverted it. The *Dawn of*
8 *the Dead* movie and the game and the script to the movie, and
9 the script to the game, which I know is objected to by MKR, I
10 view that more in the form of almost a demonstrative exhibit
11 that is useful in terms of using in conjunction with the game
12 itself. I agree that it's probably not admissible as an
13 exhibit to be considered, but I don't see why I can't use it,
14 if I want to, as I would with a jury sometimes if they're
15 viewing something that's a video, they might have as to assist
16 them some transcript.

17 With respect to the other items, I am disinclined to
18 think -- I've got Exhibits 5 through 44, I think are the
19 numbers, and I've been asked to take judicial notice of those
20 and they're various materials. I don't even know what they all
21 are.

22 I'm inclined to think that that's not appropriate
23 material for me to consider. I don't think it's appropriate
24 material to take judicial -- for me to take judicial notice of.
25 It's not of the sort that I think is subject to Rule 201(b) of

1 the Rules of Evidence. So I'm inclined not to consider that
2 material on this motion, but I'm not foreclosing some
3 discussion about that. I just thought you'd be entitled to
4 know my reaction to that.

5 Then there's also a -- and I think MKR is offering
6 the 2004 film; is that right?

7 **MR. McCABE:** Yes, Your Honor.

8 **THE COURT:** Yes. I have some -- I'm not sure why
9 that should be considered. My understanding is there aren't
10 any rights being asserted. There's no contention that MKR has
11 any rights to the 2004 film, so I'm not sure why I should be
12 considering on the motion to dismiss the counterclaims, the
13 2004 film, but we can hear a bit on that if you want.

14 So, that's kind of the threshold question of what
15 gets in the hopper and what is not. Now, if you want to
16 address that before we go into the meat of the motion, we can;
17 or if you want to just barrel ahead. Anyone want to be heard
18 on the question of what should be considered?

19 **MR. COLE:** I would just like to have two points, if
20 I may, Your Honor.

21 **THE COURT:** Okay.

22 **MR. COLE:** First, on the script for the game *Dead*
23 *Rising*, Your Honor can look at it as evidence or a
24 demonstrative exhibit. I don't think you need to take request
25 for judicial notice of it.

1 There are two cases right on point that we cite in
2 our papers from the Ninth Circuit. One is the *Litchfield* case,
3 which involves the movie *ET*, and in that case the District
4 Court reviewed the movie and the script. It went up to appeal
5 in the Ninth Circuit. The Ninth Circuit expressly said it did
6 not review the movie. It just looked at the script. So I
7 think that the script itself is fair game.

8 **THE COURT:** Well, MKR suggests that there's a
9 difference between a video game script and -- I think the
10 script of the movie, I agree with you. I don't think
11 there's -- of the '79 movie. The question is more the script
12 to the game.

13 **MR. COLE:** Yes. And in the *ET* case and the
14 *Litchfield* case, Your Honor, the alleged infringing work was
15 the *ET* movie. So the plaintiff said, "*ET* copies my screenplay
16 and sues over *ET*." District Court looks at the two in
17 determining a substantial similarity analysis, looks at the
18 infringing work *ET*, also looks at the script of *ET* as a
19 reference point. The Ninth Circuit affirms the Court's
20 dismissal on substantial similarity and just looks at the
21 infringing work script, *ET*.

22 So, likewise, here, the work itself, *Dead Rising*
23 there's no questions properly before the Court.

24 **THE COURT:** Correct.

25 **MR. COLE:** *Litchfield* says Your Honor can also look

1 at the script behind *Dead Rising* just like *Litchfield* did
2 looking at the script for *ET*.

3 **THE COURT:** Right. And my question is, though, MKR
4 suggests there's a different circumstance when we're talking
5 about a film and its script, and a game and its script, because
6 the script, at least as I understand their argument, does not
7 reflect the game in the same way that the script reflects a
8 movie. Now, you don't agree with that, I take it.

9 **MR. COLE:** I certainly agree that the interactive
10 nature of the game makes these works more dissimilar than if
11 you are comparing two movies. I certainly agree with the MKR's
12 point and the assumption behind their argument there.

13 But, Your Honor, a video game is interactive. A
14 person could sit in the smoothie shop of *Dead Rising* all day
15 long and kill zombies, or they could be more adventurous and
16 try to solve the mystery that Carlito presents and why the
17 zombies are there, and go out and solve these case files and
18 eventually discover that it's this parasitic bee that's caused
19 the zombification.

20 So different players are going to absolutely have --
21 accede different story lines, but the story line behind the
22 game is the script that we've attached to the Niida
23 declaration.

24 **THE COURT:** Right.

25 **MR. McCABE:** Your Honor --

1 **THE COURT:** Yes.

2 **MR. McCABE:** -- my point is exactly what you said,
3 which is that the game doesn't have to follow a particular
4 line. For example, if you look at the cut scenes, there's
5 about six different endings. In some of those endings the
6 protagonist ends up fighting a tank.

7 **THE COURT:** Right.

8 **MR. McCABE:** In other endings, protagonists or other
9 characters end up taking a helicopter out of there, which is
10 exactly what happens in the *Dawn of the Dead* movies. It's
11 another iconic scene from that movie. If you just have the
12 script, you're going to miss the key point of potential
13 infringement.

14 **THE COURT:** Well, I don't think --

15 **MR. McCABE:** As a demonstrative, Your Honor, I
16 understand but --

17 **THE COURT:** Right.

18 **MR. McCABE:** -- I'm actually admitting that I don't
19 see it.

20 **THE COURT:** Okay. Well, I think that these are
21 not -- these are sort of side issues to the important ones.

22 Let me also just advise you that I did, so that you
23 know what I looked at, I did -- I looked at large portions of
24 the '79 movie, and I also poorly played the game through the
25 assistance of my law clerk. I did try. So I have done both of

1 those things. So, you know, for your benefit that I have
2 viewed it. You can assume that I have.

3 Okay. Another more process question before we get
4 into the meat of this, and it's a question I have been
5 ruminating about. In the event that the motion to dismiss the
6 counterclaims will be granted in this instance, what's the
7 effect then on the declaratory relief claim that has been
8 brought by Capcom? I mean, what happens at that point?

9 **MR. COLE:** I think, Your Honor, what would happen is
10 that we would subsequently just make either a motion for
11 judgment or discuss with MKR a proposed order and file judgment
12 that would dispose of the declaratory relief claims.

13 **THE COURT:** Because effectively a decision on the
14 motion -- and perhaps -- and I want to know Mr. McCabe's view
15 of this, but is effectively this motion, if it's granted, ends
16 the case, because these are mirrored -- the dec relief
17 affirmative claims are mirrored in the counterclaims or is that
18 not so?

19 **MR. McCABE:** Frankly, Your Honor, we haven't
20 considered that issue. We'd be happy as counsel suggested to
21 talk to them in that circumstance; and if it's truly a mirror
22 image, if there's nothing really left to it, then we could
23 probably find a way to stipulate to that to move the matter up
24 if necessary.

25 **THE COURT:** I mean, I'm not suggesting that that's

1 going -- even that that should be a consideration one way or
2 the other and, you know, look at this motion as this motion;
3 but I was just trying to figure out what the effect of it was
4 because it's postured in a somewhat unusual way, but okay. Not
5 unprecedented but just somewhat different.

6 **MR. COLE:** And, Your Honor, we would stipulate that
7 if the motion to dismiss is granted, that the dec relief claims
8 would be dismissed.

9 **THE COURT:** Yeah, okay.

10 All right. Well, let's now get into the meat of the
11 issue. It's a very interesting case, interesting setting.

12 I also, in the interest of full disclosure, tell you
13 that until this case I knew very little about zombie movies or
14 any of this stuff. So I don't know if it's a good or bad thing
15 for you, but you have a blank slate in terms of this whole
16 world.

17 So, why don't I just go ahead and let you present,
18 Mr. Cole, any way you want to present.

19 **MR. COLE:** Okay, great.

20 I have a couple of demonstrative orders, Your Honor,
21 that I would like to show.

22 **THE COURT:** Okay.

23 **MR. COLE:** And I also have copies for the Court. If
24 I may present them to you. I'm going to have to approach your
25 clerk as well, Your Honor.

1 **THE COURT:** Yes. And I also have an easel somewhere
2 if you want to -- not that one --

3 **UNIDENTIFIED SPEAKER:** They may not fit.

4 **THE COURT:** -- but I have a smaller easel in the
5 jury room. Pardon me?

6 **UNIDENTIFIED SPEAKER:** They may not fit.

7 **THE COURT:** Okay. All right. Well, you do it any
8 way you want to do it. There is one available, but why don't
9 you go ahead, and --

10 **MR. COLE:** I'm going to set that up here. Can
11 everyone see that?

12 **THE COURT:** Yes. Actually, I think our easel will
13 probably work for you, so you won't have to -- we use -- things
14 of that size have been on it before, so...

15 **MR. COLE:** Do you want us to wait for Ms. Brown to
16 a --

17 **THE COURT:** Yeah. Why don't you wait for a moment
18 for her to come back.

19 (Pause in proceedings.)

20 **THE COURT:** It's small but sturdy. Okay, good.

21 **MR. COLE:** Okay. Thank you, Your Honor.

22 Your Honor, to state a claim and ultimately prevail
23 on the copyright infringement matter, MKR must prove that
24 there's substantial similarity between *Dawn of the Dead* and
25 *Dead Rising*; and in the Ninth Circuit, to prove substantial

1 similarity, that's determined under the framework of an
2 extrinsic test that's performed by Your Honor and an intrinsic
3 test.

4 Capcom's motion challenges MKR's ability to satisfy
5 the extrinsic test; and, as a matter of law, if they cannot
6 satisfy the intrinsic test, then Capcom's motion should be
7 granted, the works are not substantially similar and the case
8 should be dismissed.

9 *Funky Films*, the Ninth Circuit case which deals with
10 the funeral parlor works, provides an excellent description of
11 this at 462 F. 3rd 1077, quote:

12 "Extrinsic analysis is objective in nature.

13 It depends not on the responses of the trier of
14 fact but on specific criteria which can be
15 listed and analyzed."

16 And there are two components to that, Your Honor.
17 The first is the determination of what is protectable and what
18 is not protectable in the infringement analysis.

19 The second is, after the Court has done that
20 analysis, a comparison of the concrete similarities in the
21 works to determine if there are similarities.

22 On the first, the exclusion, *Funky Films* makes clear
23 that scenes a faire, which flow naturally from generic plot
24 lines, are not protectable. We must take care to inquire only
25 whether the protectable elements standing alone are

1 substantially similar. In so doing, we filter out and
2 disregard the nonprotectable elements in making our
3 substantial-similarity determination.

4 And, on the second point, once that filtration is
5 done, there's a comparison of the concrete elements, *Funky*
6 *Films*. The extrinsic test focuses on articulable similarities
7 between the plot, themes, dialogue, mood, setting, pace,
8 characters, and sequence of events. In applying the extrinsic
9 test the Court compares not the basic plot ideas for stories,
10 but the actual concrete elements that make up the total
11 sequence of events and the relationships between the major
12 characters.

13 Your Honor, these are the claims similarities that
14 MKR has identified between *Dawn of the Dead* and *Dead Rising*;
15 and under the first step, the filtration step in determining
16 whether or not these similarities are protectable, none of them
17 are.

18 The first, zombies in a mall, that is a plot idea,
19 Your Honor, and that is not a protectable. Clear Ninth Circuit
20 authority. We cite six cases in our brief that, frankly, have
21 more similarities and plot ideas than *Dawn of the Dead* and *Dead*
22 *Rising*. There's the *Berkic* case, which is the people killing
23 young folks for organs and selling them to rich people.
24 There's the *Williams* case, which is the *Jurassic Park*; *Funky*
25 *Films*, which is the *Funeral Parlor Homes*; *Kouf*, which is the

1 *Honey I Shrunk the Kids and the Formula; Thomas*, which is the
2 *Finding Nemo* case; and *Bethea*, which is *The Apprentice and the*
3 *CEO*. In all six of those cases there were fairly similar plot
4 lines and even a handful of elements that the plaintiffs
5 asserted were similar to the works of the defendant; and all
6 six of them, Ninth Circuit and District Courts in the Circuit
7 found that those plot lines are not enough to satisfy
8 substantial similarity. Likewise, zombies in a mall,
9 Your Honor, is an unprotectable plot idea that cannot be part
10 of the substantial similarity that this Court analyzes.

11 Similarly, in addition to the plot ideas, other
12 similarities that flow from that are not protected. So, for
13 example, in *Williams*, which is the *Jurassic Park* case, the
14 similar ideas were dinosaurs used. Both the plaintiff's work
15 and the defendant's work had dinosaurs used in them, and they
16 also have these similarities: Encounters with small dinosaurs,
17 encounters with brachiosaurus, visits to dinosaur nurseries,
18 tours with automated vehicles and recorded guides, stranded
19 characters encountering ferocious dinosaurs, characters in
20 boats being pursued by dinosaurs, dinosaurs escaping from
21 paddock fences, and characters escaping pack-hunting dinosaurs
22 through the intervention of another dinosaur.

23 All those similarities were in both works. And what
24 did the Second Circuit do in the *Jurassic Park* case? It
25 filtered out all of those elements as flowing from the basic

1 plot idea of a dinosaur zoo.

2 So, just as zombies in a mall is a plot idea that is
3 not protectable, scenes a faire that naturally flow from the
4 idea of zombies in a mall are also not protectable. Examples,
5 a bi-level megamall. You have zombies in a mall having a
6 two-story mall or a one-story mall is a classic scenes a faire.
7 Having a gun shop in a mall. Well, in a video game where the
8 idea is that you are battling zombies, you'll need weapons,
9 whether it's a knife store, a gun store, or a smoothie shop or
10 you use a blender to kill a zombie, all of these are natural
11 scenes a faire that flow from having zombies in a mall.

12 **THE COURT:** Well, the scenes a faire concept is, and
13 perhaps I'm taking it too far, and tell me if I am, that there
14 is an inevitability element to it that if you start with
15 zombies in a mall, the scenes a faire concept is there's only
16 one way that will flow from the beginning point being zombies
17 in a mall, and is that correct?

18 **MR. COLE:** Well, there are two doctrines in play,
19 Your Honor. One is the merger doctrine --

20 **THE COURT:** Right. Right.

21 **MR. COLE:** -- and that is where there is only one
22 way to express an idea.

23 **THE COURT:** Right.

24 **MR. COLE:** And then there's a scenes a faire
25 doctrine, which is more inclusive of natural elements flowing

1 from the plot idea.

2 **THE COURT:** So the scenes a faire, and I appreciate
3 the distinction you're drawing, scenes a faire doesn't have
4 this only-one-way-you-can-go concept, that's only the merger
5 document.

6 **MR. COLE:** That's correct. And I'll point you to
7 *Funky Films*. Scenes a faire, which flow naturally from generic
8 plot lines, are not protectable. So it's a question of what
9 flows.

10 So, in the *Jurassic Park* case, I listed off eight or
11 nine elements that were in both works; and in that case, the
12 Court found those are -- they naturally flow from the idea of a
13 dinosaur zoo. So, having stranded characters encountering
14 ferocious dinosaurs was an idea that naturally flowed from a
15 dinosaur zoo.

16 **THE COURT:** But, why, for example, would a bi-level
17 mall -- I mean, you could have four levels. You could have one
18 level. I mean, why is it that now -- using again -- focusing
19 for a moment on the scenes a faire concept, why does it
20 naturally flow?

21 I mean, granted a mall can have two levels; and so,
22 if all scenes a faire says, if it's not an unusual event, then
23 scenes a faire makes it nonprotectable, that would be rather a
24 vast concept. I mean, an expansive concept.

25 **MR. COLE:** Well, there are two points there,

1 Your Honor. One, is it's just not being original, which is the
2 point Your Honor makes, which everybody knows there could be a
3 one- or a two-story mall. That's absolutely true. The mall
4 over on Stevens Creek is two stories.

5 But scenes a faire is whether it flows naturally
6 from the work. So if you want to have a situation where Frank
7 West is going to be killing zombies in a manor -- you know
8 different manors having two floors is a nice way to have a
9 video game.

10 **THE COURT:** Okay.

11 **MR. COLE:** The other point about it is the mall in
12 *Dead Rising* emulates a modern megamall, if you will, which is
13 why we also believe that this fails on the lack of originality
14 doctrine.

15 So, continuing, these ideas, these individual ideas,
16 are -- in themselves are not protectable. There's no question
17 that the idea of a mall gun shop, a helicopter to a mall
18 departure, those are all classic ideas that are not
19 protectable. There may be protection in the way that they're
20 expressed, but there's no allegation in the Complaint or in the
21 opposition to our motion that the expression itself is copied.
22 It's just that this list of similarities of ideas is copied.

23 Now, the second -- assume for a moment now,
24 Your Honor, that you find each and every one of these
25 similarities is, in fact, protectable. Then you have a second

1 step to go through in analyzing the works.

2 (Pause in proceedings.)

3 **THE COURT:** As you go into this, and I realize this
4 is perhaps jumping ahead a bit, but it's your argument, as I
5 understand it, that all of the references by your counterpart
6 to the critical -- the movie critics in this area all
7 concluding that this is, not to put a fine point on it, a
8 ripoff of George Romero's *Dawn of the Dead*, that all goes to
9 the intrinsic element that you don't think I get to?

10 **MR. COLE:** That's exactly right.

11 **THE COURT:** All right.

12 **MR. COLE:** Your Honor, there's no question that the
13 intrinsic element is for the jury. Stipulated. No question
14 about that; but if you don't satisfy the extrinsic element and
15 the intrinsic element, the claim fails as a matter of law.

16 **THE COURT:** And I can't even take into account the
17 fact that there is a pool of opinion out there that perceives
18 of this as being a ripoff.

19 **MR. COLE:** Your Honor, it's irrelevant. Two points
20 there. Number one, it's the Court's job to perform the
21 extrinsic analysis and determine what is protectable expression
22 and what will go to the jury. That is the part of the test
23 that is entrusted in the Court.

24 The jury will ultimately decide if it gets there,
25 once the Court determines what's protectable, whether or not

1 the overall look and feel, and they have the gut reaction,
2 which is -- they'll have the reaction that the critics do or
3 not in reaching an infringement decision.

4 **THE COURT:** Well, in a sense I suppose your argument
5 is one item could well be -- to use the -- say it's a ripoff of
6 another, but if it doesn't have protectable elements in it,
7 then so what? It's not an actionable -- it may well be that
8 they're taking advantage, but taking advantage doesn't
9 necessarily violate the copyright laws of the -- or the Lanham
10 Act if you're talking about trademark.

11 **MR. COLE:** That's exactly right, Your Honor, and let
12 me give you two examples.

13 One is the *Warner versus ABC* case out of the Second
14 Circuit, and there the issue was the television show *Greatest*
15 *American Hero*, and the owners of the *Superman* movies sued
16 saying that the *American Greatest Hero* was a knockoff of
17 *Superman*. And they went out and did a survey and asked people,
18 "Does *American Greatest Hero* conjure up the idea of *Superman*?"
19 And the evidence was overwhelming that, yes, it did. Second
20 Circuit said irrelevant to substantial similarity analysis.

21 There's no -- and, again, just to take a quick
22 timeout, as Your Honor knows, copyright law protects
23 expression. It does not protect ideas. The Article I,
24 Section 8, Clause 16, constitutional grant of monopoly to a
25 copyright author is a grant of expression. In an exchange for

1 that monopoly grant, the author gives up his idea to the public
2 domain.

3 So, now, back to Your Honor's question. So on
4 *Warner*, the Second Circuit said the survey evidence is
5 irrelevant. So even if *Greatest American Hero* conjured up the
6 idea of *Superman* doesn't matter in the substantial similarity
7 analysis.

8 Another example, Your Honor, is the *Identity Arts*
9 case, which is the District Court case from Judge Hamilton or
10 Judge Wilken, and that was the case which had the faux movie
11 trailer that had little stories before the actual feature film
12 and at the end the punch line was, "The cell phone's coming
13 from the audience." Super-clever idea in my opinion. The
14 plaintiffs presented it. The defendants came up with three
15 separate stories that all ended with the same punch line, "The
16 cell phone's coming from the audience."

17 Now, if you looked at these works side by side, most
18 of the public would probably say the second works were ripoffs
19 of the first because they took the idea of it's coming from the
20 audience, but that's not the analysis. The analysis under the
21 extrinsic test is, one, are there protectable elements; and,
22 two, going through these eight factors.

23 So, if I may continue then on the eight factors,
24 Your Honor?

25 **THE COURT:** Go ahead.

1 **MR. COLE:** So after -- now, again, assume for a
2 moment, assume that every element MKR has identified is a
3 protectable expression and is in both works. Assume that. You
4 still have to go through the eight factors that are set forth
5 in *Funky Films* and a host of Ninth Circuit cases that are
6 cited, Your Honor, in our brief.

7 And when Your Honor goes through these eight
8 factors, you find that the work, the expression of the works is
9 just dramatically different.

10 The plot and the sequence of events, Your Honor has
11 seen the film. You know that it starts out with them in a
12 television news studio. The main male character, Stephen, he's
13 a pilot for the telephone -- for the traffic helicopter. His
14 girlfriend, Francine, they're going to escape; and the pilot,
15 two SWAT gentleman, Peter and Roger, join them. They fly off
16 in this helicopter trying to escape the zombies. They find a
17 mall while they're in the helicopter. They think it's a
18 perfect refuge. They stay there for months. It is shown by
19 Francine becoming increasingly pregnant, going from morning
20 sickness to being pregnant. And they ravage the mall, which it
21 ultimately ends with the bikers breaking in because the bikers
22 want to have access to the mall. Contrast that to *Dead Rising*.

23 And one other point about *Dawn of the Dead*. There
24 the four characters were going to the mall to escape the
25 zombies. *Dead Rising*, Frank West he's going to the mall

1 because he wants to find out what's going on. He's a photo
2 journalist, not a pilot, and he travels to the mall to
3 investigate the cause of the zombie outbreak.

4 Why does he go in a helicopter? Because the
5 National Guard has quarantined the entire town of Willamette,
6 Colorado. The only way he could get to the mall is by
7 helicopter. He gets to the helicopter. He spends the next 72
8 hours, in game time not realtime, 72 hours exploring the mall
9 trying to find out the origins of the zombie outbreaks, slaying
10 the zombies, and rescuing as many survivors as he can.

11 He ultimately discovers that if the player goes all
12 the way through the game that the zombie outbreak was caused by
13 this gentleman named Carlito who is from Santa Cabeza, and he's
14 getting revenge on the U. S. government for trying to mass
15 produce cattle. And there's a parasitic bee that caused this.
16 The U. S. government wipes out an entire town in Latin America.
17 Carlito comes to Willamette, releases the bees. There are
18 bombs in the mall that are eventually going to be released and
19 causes zombification of the, theoretically, of the entire
20 United States.

21 So that -- and Frank West, if you're a successful
22 player, successfully uncovers this story and forces the U. S.
23 government to acknowledge its role in the destruction of this
24 town in Latin America. Radically different plots and sequences
25 of events.

1 Now, compare those two stories, Your Honor, with the
2 stories in *Berkic*, which was the organ killing. You know,
3 those plots were dead on. *Williams*, the *Jurassic Park* dinosaur
4 case; *Funky Films*, the parlor case; *Kouf*, *I Shrunk the Kids*;
5 *Thomas*, *Finding Nemo*; and *Bethea*, which is *The Apprentice and*
6 *CEO*, there, Your Honor, those two stories had similar plot
7 lines and courts found no substantial similarity.

8 **THE COURT:** Remind me --

9 **MR. COLE:** Yes.

10 **THE COURT:** -- on those decisions which ones were on
11 summary judgment and which ones were motions to dismiss? First
12 question.

13 **MR. COLE:** Yes.

14 **THE COURT:** Because I think your counterparts are
15 suggesting that at least I have to go back and look, but many
16 of them were on summary judgment. Okay. Is that right?

17 **MR. COLE:** Some were and some weren't, and I'm happy
18 to identify them, but if you want to have your second question.

19 **THE COURT:** Okay. Well, for those that are decided
20 on summary judgment, is it your contention that there would
21 be -- I'm thinking of how best to -- why -- I guess the
22 question, and it's one you can't answer, is why weren't those,
23 under your theory, decided on a motion to dismiss? I mean,
24 what were the factual issues that were developed that the Court
25 looked to as -- or the lack of factual issues? In other words,

1 why did those get to summary judgment? That may not be a fair
2 question because you weren't counsel on those cases, but did
3 the Court comment in any of those decisions as to why it had
4 reached the summary judgment stage?

5 **MR. COLE:** In none of them the Court particularly
6 commented on that, but in several of the summary judgment cases
7 the Court only looked at the two works. But this is -- I agree
8 that this is an important point, you know, is this ripe on a
9 motion to dismiss, and if I may address that now, Your Honor.
10 The short answer is, you bet it is.

11 Three-points on that. Number one, the Ninth Circuit
12 expressly authorizes this Court to grant this motion to dismiss
13 on substantial similarity, and I refer you there to the
14 *Christianson versus West Publishing* case. There there were two
15 maps were the works at issue. Both maps were before the Court
16 and the District Court granted the motion to dismiss. And the
17 Ninth Circuit said there's ample authority for holding that
18 when the copyrighted work and the alleged infringement are both
19 before the Court capable of examination and comparison,
20 noninfringement can be determined on a motion to dismiss.

21 Here, as Your Honor indicated at the beginning of
22 the hearing, the works are before the Court. You're capable of
23 comparing them. Under *Christianson*, motion to dismiss is ripe.
24 That was a 1945 case.

25 *Funky Films* in 2006, which is the funeral parlor

1 case, the District Court only compared the two works at issue.
2 Why was summary judgment and not motion to dismiss? I can't
3 answer the procedural question of why the litigants chose that
4 path.

5 **THE COURT:** Does the *Funky Films* decision indicate
6 whether or not there was a motion to dismiss that was denied?

7 **MR. COLE:** It does not.

8 **THE COURT:** Okay.

9 **MR. COLE:** The Ninth Circuit decision does not.

10 **THE COURT:** Okay.

11 **MR. COLE:** But in *Funky Films* on summary judgment
12 the District Court only looked at the two works, granted
13 summary judgment on substantial similarity, and the Ninth
14 Circuit affirmed and said, quote, "Substantial similarity may
15 often be decided as a matter of law." So that's the first
16 point, Your Honor.

17 The second point is that District Courts, including
18 those sitting in this District, have followed that Ninth
19 Circuit guidance, looked at the two works at issue on motion to
20 dismiss, and granted the 12(b)(6). We cite six California
21 District Court cases in our reply brief that granted motions to
22 dismiss. Four of them I want to highlight very briefly.

23 *Zella*, which was the Rachael Ray case, there the
24 plaintiff asserted that he or she came up with the idea of a
25 superstar cooking show and the Rachael Ray cooking series was a

1 knockoff. Judge Collins of the Central District reviewed a
2 series of cases on this issue of whether or not motions to
3 dismiss versus summary judgment were appropriate. Judge
4 Collins cited eight cases and, frankly, easily concluded that
5 motion to dismiss was appropriate since the works were before
6 the Court.

7 The *Thomas versus Disney* case, which is *Finding*
8 *Nemo*, there Judge Wilken cited the *Christianson* case that I
9 just cited and granted the motion to dismiss.

10 *Identity Arts*, which was the Judge Hamilton case
11 involving the faux movie trailers, "It's coming from the
12 audience," cited *Funky Films* and *Christianson*, the two cases I
13 just mentioned, and held it was proper to rule on a 12(c)
14 motion for judgment on the pleadings. Judge Wilkens -- Judge
15 Wilken, excuse me, in the *Cano* case also granted a motion for
16 judgment on the pleadings.

17 So, Ninth Circuit does it, District Courts do it.
18 How about this Court? Both works are before the Court.
19 There's no question Your Honor can review these works, and
20 there's nothing more that's alleged in the opposition, or
21 asserted in the opposition, that Your Honor needs to review.
22 So what else could you review? And, frankly, even if there
23 were assertions to that point, they would be irrelevant.

24 We cite the *Boyle versus Stephens* case coming out of
25 New York, which makes clear that the works themselves in a

1 copyright case control over any allegations. So even if you
2 asserted something about the works, if Your Honor determines by
3 looking at the works themselves that there's no substantial
4 similarity, end of the analysis.

5 **THE COURT:** Okay.

6 **MR. COLE:** Okay. So just to finish on these eight
7 factors. We talked plot and sequence.

8 Setting, we have very different settings. We have
9 the Monroeville Mall in Pennsylvania. A classic '70's era mall
10 with an ice rink and JC Penney. The Willamnette, Colorado,
11 mall it's a modern mall. It has theme sections, a roller
12 coster, a grocery store, a smoothie shop, a theater, et cetera.

13 Now, compare those to -- the contrast of those
14 settings with the *Jurassic Park* case where there were both
15 dinosaurs used, with the *Funky Films* case where they both were
16 funeral parlors, or the *Thomas* case, the *Finding Nemo* case,
17 where they both were in the ocean and the fish tank. All of
18 those settings much more similar than ours, no substantial
19 similarity in any of those cases.

20 Themes. MKR asserts that mall culture and the
21 insidious consumerism is their theme. Our theme is slaying
22 zombies. Your Honor has seen it. They're not similar themes.

23 Characters. There are four lead characters in *Dawn*
24 *of the Dead*. Stephen, the pilot; Francine, the pregnant
25 girlfriend; Peter and Roger, the two SWAT, Philadelphia SWAT

1 men.

2 In ours there's Frank West. He's the lead
3 character. He's a photojournalist. There's some discussion in
4 the papers about whether or not Stephen the pilot, the
5 traffic/television pilot, and Frank West, the photojournalist,
6 are both journalists. Even assuming that a pilot and a
7 journalist can be considered the same, that's not enough. The
8 *Eaton* case we cite in our papers says that occupation alone is
9 not enough when looking at characters.

10 And I want to refer back to my initial quote from
11 *Funky Films*, which is, when you are looking at these factors,
12 Your Honor, and specifically characters, the Court compares the
13 actual concrete elements that make up the total sequence of
14 events and the relationship between the major characters.

15 So, even if you think that a television traffic
16 pilot and a photojournalist are the same, the relationship
17 between Frank West on his own slaying zombies, investigating
18 the cause, and these four characters hiding out in a mall from
19 the zombies are very different.

20 One last point. This analysis or MKR's analysis
21 completely ignores the dozens of minor characters that are in
22 *Dead Rising*; Carlito, the one who planted the bee; his sister
23 Isabel -- Isabela; Dr. Barnaby, who was in charge of the lab
24 down in Latin America; the Homeland Security officers; the
25 janitors. There are 50 survivors in the *Dead Rising* mall.

1 There were no survivors in the *Dawn of the Dead*. All of those
2 other characters cannot be discounted.

3 And *Funky Films* and *Identity Arts*, both *Funky Films*'
4 summary judgment/*Identity Arts*' motion to dismiss, both Courts
5 looked at the characters that were not in the original work in
6 assessing this factor.

7 So, again --

8 **THE COURT:** I take it that you would agree that just
9 because one, the allegedly infringing work, has more
10 characters, is more complicated, has more extensive plot in
11 some of these different categories, that does not -- if in fact
12 there was a sufficient similarity between -- substantial
13 similarity on protective alone, it's the fact that one is much
14 more developed than the other, it wouldn't take you out from
15 under.

16 **MR. COLE:** I agree with that question as Your Honor
17 has posed it.

18 **THE COURT:** Okay.

19 **MR. COLE:** But, if I could restate the question,
20 it's: If Peter, the traffic pilot, and Frank West, the
21 photojournalist, were closer in character development, could
22 there be an issue? Sure. Luckily that's not the situation
23 before the Court.

24 **THE COURT:** Yes, but if they were closer together
25 and then you identify there's a -- you know, the SWAT team

1 members, there is an African American SWAT team member in it
2 and an African American character that's kind of leading the
3 pack in the *Dead Rising*. I mean, if you had several of these
4 and you did find that they were sufficiently connected,
5 sufficiently similar, then the fact that there are 50 other
6 characters in *Dead Rising* wouldn't obviate the substantial
7 similarity of the four, but you've already -- I think you
8 candidly acknowledged that that by itself is not. You are
9 saying there isn't the underlying substantial similarity, so it
10 doesn't much matter.

11 Go ahead.

12 **MR. COLE:** Just one point I wanted to raise with
13 Your Honor, which is the list of similarities. It's the *Kouf*
14 case, that's what I couldn't remember, which is the *Honey I*
15 *Shrunk My Kids*, there the Ninth Circuit compared these two plot
16 ideas. Both were an idea of accidentally shrinking kids, and
17 there were a handful of similar scenes; a sprinkler scene, a
18 lawn mower scene. There were seven or eight similar scenes
19 that were identified by the plaintiff. And the Ninth Circuit
20 said that those kind of what the Ninth Circuit called random
21 similarities were, quote-unquote, the Ninth Circuit was
22 unimpressed with that list of random similarities, because it's
23 these factors that make up the whole of the work and comparison
24 of the articulable elements as a whole of the work.

25 So, it's not, to answer Your Honor's question, it's

1 not enough that there be some similarities and a handful of
2 other similarities. It's the whole of the work that the Court
3 is looking at in the extrinsic test.

4 The other point about having characters the same,
5 the *Identity Arts* court was very persuasive. Plaintiff cannot
6 merely sweep aside the presence of so many other varied
7 characters who appear in differing spots and whose attributes
8 and demeanor bear no similarity with respect to one another.
9 So that's the point on the characters, Your Honor.

10 To finish these last three elements, the mood, very
11 different by the nature of the works. *Dawn of the Dead* is a
12 passive participation. There's anxiety, suspense in the mood
13 with the four characters riding out trying to wait out the
14 zombies.

15 *Dead Rising* very different, interactive game;
16 action, adventure. Frank West trying to solve the mystery.

17 Pace. It's a slow -- *Dawn of the Dead* is months
18 long. It's not clear from the movie how long, but we know it's
19 months long from Francine's pregnancy versus *Dead Rising* is a
20 72-hour period where Frank is trying to solve the mystery.

21 Dialogue. There's only one similarity identified by
22 MKR. Their tagline, "When there is no more room in hell, the
23 dead will walk the earth," versus the line in *Dead Rising*,
24 "This, my friend, is hell," that fails as a matter of law. Two
25 reasons.

1 Number one, that line itself is not a protectable
2 copyright expression, "When there's no more room in hell, the
3 dead will walk the earth."

4 Second, it's insufficient substantial similarity. I
5 refer to two cases there, Your Honor. One, again, is the
6 *Identity Arts* case, the faux movie trailer where they said,
7 "It's coming from the audience," that was the punch line of
8 both works.

9 The other is a case named *Benjamin* which involved
10 the movie *Sweet Home Alabama*, and there the female wanting a
11 divorce from her husband and in both cases said, "Sign the
12 divorce papers," and then, quote, "I have a plane to catch."
13 In both situations, identical lines, a Court found insufficient
14 substantial similarity.

15 So that's our copyright argument, Your Honor. I'm
16 happy to switch to the Lanham Act now.

17 **THE COURT:** Yeah. So this is going to be the second
18 counterclaim --

19 **MR. COLE:** That is correct.

20 **THE COURT:** -- second claim for relief,
21 counterclaim?

22 **MR. COLE:** That's correct, Your Honor.

23 So, from the opposition papers, Your Honor, it
24 appears that MKR is asserting three trademark claims: The
25 zombie head, the names of the titles, and the disclaimer. And

1 none of these -- none of these can state a Lanham Act claim as
2 a matter of law.

3 First of all, the zombie head is just not used. But
4 digression, Your Honor, these two are the covers of the actual
5 works themselves.

6 **THE COURT:** Okay.

7 **MR. COLE:** This is the zombie head. MKR has
8 registered the zombie head right there. It's Exhibit D to
9 their counterclaims. They've registered it with the Patent &
10 Trademark Office. This zombie head does not appear anywhere in
11 our packaging. It's just not used.

12 The second claim is *Dead Rising* and whether or not
13 *Dead Rising* can infringe George A. Romero's *Dawn of the Dead*
14 because both have the word "dead" in them doesn't fly for two
15 reasons.

16 Number one, the word "dead" has no source
17 identifier. The counterclaim has a series of articles attached
18 as exhibits which demonstrate that Mr. Romero has a series of
19 these zombie movies starting with *Night of the Living Dead*. He
20 has five movies. All of them have "dead" in the title. So
21 "dead" itself cannot be source identifying.

22 I also refer Your Honor to the case we cite in our
23 papers, *National Distillers*, which there the two marks were
24 "Teton Glacier" versus "Glacier Bay" for vodka and the
25 commonality, obviously, was "glacier" and the Court held no

1 infringement because if the -- what you take from the
2 plaintiffs' or claimants' name as one word and it's not the
3 whole and it doesn't identify the owner's product without the
4 rest of the mark, insufficient as a matter of law.

5 By the way this is an issue you can resolve on a
6 motion to dismiss. We have -- we cite *Marvel* in our papers.
7 The Court there looked at the marks "Statesman" versus "Captain
8 America" and granted the motion to dismiss.

9 Second reason the titles, Your Honor, cannot be
10 infringing is under the *Rogers* case out of the Second Circuit.
11 It's the seminal case in the country on the question of when
12 titles can be subject to trademark infringement; and because of
13 the First Amendment protection for titles, there are only two
14 situations where a title can be considered a trademark
15 infringement. One is when the title has no artistic relevance
16 to the underlying work. *Dead Rising* clearly relates to the
17 underlying work.

18 The second situation is when the title misleads
19 expressed -- excuse me, explicitly misleads as to the source of
20 the work. That's a standard that MKR could not meet in
21 comparing these two works under *Rogers* or the *Barbie* song case
22 that we addressed.

23 This issue, too, is subject to a motion to dismiss,
24 Your Honor. In the *Woodard* case cited in our reply papers the
25 Court granted a 12(b)(6) motion.

1 The final is the disclaimer issue, whether or not a
2 disclaimer can cause confusion. MKR comes up with a very
3 creative argument that because we have a disclaimer, that can
4 cause confusion. We have not been able to identify a single
5 case in the country to suggest a disclaimer in and of itself
6 could cause confusion.

7 To the contrary, we think that this is a classic
8 nominative fair use. Under the *New Kids* Ninth Circuit test,
9 there are three factors in determining whether it's a
10 nominative fair use. One, could the product not be readily
11 identifiable without using the trademark? How else could we
12 identify George A. Romero's *Dawn of the Dead* without saying
13 "George A. Romero's *Dawn of the Dead*"?

14 The second factor is, you only use as much of the
15 mark as needed. MKR suggests we could have just said "*Dawn of*
16 *the Dead*." That's inaccurate because that would have referred
17 to the 2004 remake which MKR has no rights in. The 1979 film
18 and their trademark is "George A. Romero's *Dawn of the Dead*."
19 So that's the only thing we could have used to identify the
20 mark.

21 And the third factor under the *New Kids* test is you
22 do nothing to suggest sponsorship. I'm not sure how more clear
23 Capcom could have been saying that this game was not developed,
24 approved, or licensed by the owners or creators. Case dead on
25 point on this, Your Honor is *Playboy versus Welles*. There

1 Terri Welles was the 1991 playmate of the year. She had a Web
2 site devoted to her photos and other acting skills, and she
3 claimed on the Web site that she was the playmate of the year
4 of 1981, and on the Web site she -- the Ninth Circuit described
5 it as Welles affirmatively disavows any sponsorship or
6 endorsement. Her site contains a clear statement disclaiming
7 any connection to Playboy. They found nominative fair use, the
8 disclaimer. She could use the Playboy mark in her disclaimer
9 in support of the third factor. The same should be here.

10 So, then, with those three out, the only impossible
11 claim of infringement left is what Your Honor hinted at
12 earlier, which is *Dead Rising* provoking the idea of *Dawn of the*
13 *Dead* in people and that is just not protectable as a matter of
14 law, Your Honor. And I refer you there to the *Dastar* case
15 which is discussed extensively in our papers, and the United
16 States Supreme Court held their that Lanham Act protects the
17 source identification of products. It protects the CD itself.
18 Where did this CD come from? It does not protect the source of
19 ideas or -- it does not protect the source of ideas.

20 And, so, the idea of zombies in a mall is just not
21 subject to a Lanham Act claim. That goes to far to -- to close
22 to the Copyright Act and what Copyright Act protects.

23 And the last point on that is that if anybody is
24 identified as the source of zombies in a mall it's Mr. Romero.
25 It's not MKR. And this comes straight from their amended

1 cross-claims. In paragraph 41 they say the public identifies
2 this with Mr. Romero, and they also cite to a case out of the
3 Northern District of Illinois entitled *Don Associates*. Very
4 interesting. In that case the District Court in the Northern
5 District of Illinois already found that Mr. Romero had
6 secondary meaning with *Dawn of the Dead*, not MKR. So it's
7 pretty tough for them to now say that they are the ones who
8 have source identification with *Dawn of the Dead*. So that's
9 our Lanham Act argument, Your Honor.

10 And essentially the last -- the third and fourth
11 claim, 17200 and the Common Law Unfair Competition, they just
12 incorporate the rest of the claims. There are no new
13 allegations in there. And, so, to the extent that they're
14 based on the copyrighted works, they're preempted by Section
15 301 of the Copyright Act. To the extent that they're based on
16 the Lanham Act, they're substantially congruent to the Lanham
17 Act and subject to dismissal.

18 **THE COURT:** Okay. This last -- you have another
19 exhibit and I was just --

20 **MR. COLE:** Oh, and, yes, just for sake of
21 completeness, Your Honor, this is -- the last one is the
22 backside of the two works.

23 **THE COURT:** I see.

24 **MR. COLE:** And, so, I just wanted -- I didn't want
25 there to be -- when we say the zombie head is not used, I

1 didn't want there to be any confusion that it could be used on
2 the back, for example.

3 **THE COURT:** All right. Okay. Very well.

4 **MR. COLE:** Thank you very much, Your Honor.

5 **THE COURT:** Thank you.

6 Mr. McCabe?

7 **MR. McCABE:** Yes, Your Honor.

8 You just heard Capcom's counsel talk an awful lot
9 about every other case in the world and the facts of every
10 other case in the world except the case Your Honor is trying to
11 decide, and there's a good reason why he doesn't want
12 Your Honor to pay any attention to what's happening in this
13 case.

14 When you look at the real story, you realize the
15 value and importance of the creative idea that George Romero
16 and MKR, the copyright owner, had in *Dawn of the Dead* and you
17 realize the recognition that that has received in the real
18 world. They want Your Honor to go away in a closet somewhere
19 and accept all of their arguments on what's unprotectable.

20 **THE COURT:** Well, let me ask you on the -- and I
21 don't think I disagree with you that they're saying I'm
22 supposed to look at this without the context, if you will, of
23 how it's perceived in the public or the like. Aren't they
24 right about that? I mean, aren't I, to some extent, supposed
25 to put blinders on in the extent that I'm supposed to focus on

1 the extrinsic test regardless of what the community or those
2 who like these particular movies or these games may think?

3 **MR. McCABE:** No, Your Honor. You're supposed to
4 look at things in the real world, and you're supposed to look
5 at things in context. They say it's an unprotectable idea.
6 They say it's a scene a faire. If it's a scene a faire, where
7 was it before? It's nowhere before.

8 The idea of having the principal characters come in
9 by helicopter to this mall, which was being besieged by
10 zombies, and then hide out in a control room there, and then go
11 through a whole sequence of looting and visiting the shops,
12 including a gun shop, which is not common at all in malls, and
13 then at the very end make, under unpromising circumstances, as
14 Your Honor will see if you've seen the movie, was a very
15 distinctive, very creative, very important contribution. You
16 don't have to take my word for it. It received high praise.
17 We put that in the pleadings. Roger Ebert of *Siskel & Ebert*
18 called it one of the finest horror films ever made, and there's
19 other awards that it has received.

20 You know the creative concept was important because
21 in 2004 Universal Studios took a license for a remake of *Dawn*
22 *of the Dead*; and when they took that license, they made another
23 movie and they had a box office of over \$100 million.

24 So far from being some stock scene, far from being
25 something that is routine or just generic, this was a very

1 distinctive, very striking creative effort and was recognized
2 by such in the real world; and that's in our pleadings too,
3 Your Honor, on this 12(b)(6) motion.

4 About the same time -- I'm sorry.

5 **THE COURT:** Can I ask a question? I'm sorry to
6 interrupt, but in your motion papers at page 6 you're talking
7 about similarity. In the heading it says, "*Dawn of the Dead*
8 and *Dead Rising* are substantial similar," and then you say,
9 "Capcom tells only half the story." Next sentence: (reading)

10 "Capcom neglects to mention that if a
11 showing of similarity is made on the extrinsic
12 evaluation of a work, it is wrong for a Court to
13 resolve the intrinsic evaluation of such work on
14 summary judgment," let alone on dismissal,
15 motion to dismiss.

16 Is that -- I just want to make sure. You are not
17 suggesting that the test on the motion to dismiss is simple
18 similarity? It's still substantial similarity; isn't it?

19 In other words, when I'm looking at this, what I'm
20 looking at to determine in whether or not applying the
21 extrinsic test there is substantial similarity, because you
22 drop the word "substantial," and I just want to make sure that
23 you're not suggesting that there's a reduced level of
24 similarity for purposes of a motion to dismiss as opposed to an
25 ultimate determination in the case.

1 **MR. McCABE:** No, Your Honor.

2 **THE COURT:** Okay.

3 **MR. McCABE:** I'm simply suggesting that you
4 shouldn't make that decision in a vacuum. You should
5 understand the real-world creative merit of these ideas which
6 they are calling stock, which they're calling scenes a faire.

7 **THE COURT:** And who tells me that I should take that
8 into account?

9 **MR. McCABE:** That, I think, is simply part of the
10 relevant evidence to understand the work. I don't think
11 counsel can get up here -- if you look at that chart over here,
12 basically what you've got is just a lawyer on their side
13 standing up and telling you, "Don't worry about it. All this
14 stuff is unprotectable ideas. All this stuff is scenes a
15 faire," which is literally things that must be done --

16 **THE COURT:** Uh-huh.

17 **MR. McCABE:** -- "all of this is unoriginal." You're
18 just having a lawyer make all these representations on a
19 12(b)(6) motion. "All of this is sublimated by the merger
20 doctrine. There's no similarity." They just say, "Ah, there's
21 no similarity there." Forty different points at which counsel
22 is just saying, "Trust me on this 12(b)(6) motion, Your Honor.
23 Don't wait and collect any evidence. Don't take a look at the
24 situation. Just go ahead without any evidence whatsoever,
25 without any understanding of the creative contribution to write

1 this case off."

2 **THE COURT:** Well, what is your reaction to some of
3 the cases that he's presented to me, some apparently out of
4 this District, you know, Judge Wilken and Judge Hamilton on
5 some of these cases, that apparently on a motion to dismiss
6 they have made these determinations?

7 **MR. McCABE:** And those are cases, Your Honor,
8 they're rare instances where there might just be one similarity
9 alleged, like the cell phone ringing, or something like that,
10 or where the situation might have such a limited relationship,
11 there's a script that's been sitting in somebody's drawer for
12 10 years and it happens to slightly resemble a Steven Spielberg
13 movie, the Courts feel comfortable saying to themselves, "Look,
14 the connections are so minor here that we can make a decision
15 in this unusual circumstance."

16 The *Berkic* case, which they cite and rely on, points
17 out that decisions on summary judgment on extrinsic similarity
18 are not favored it says very clearly. There are a few
19 instances in which you have only one or two similarities or
20 which things are in the public domain and flow naturally.

21 And one example of that is they cite a case about
22 two movies on karate -- two games, excuse me, two video games
23 on karate. Well, karate itself is in the public domain so
24 these games are going to have certain scenes, certain scenarios
25 that will play out together just as a result of the fact that

1 they're about karate.

2 **THE COURT:** In analyzing this, were this on a motion
3 for summary judgment and not a motion for -- motion to dismiss,
4 a 12(b)(6) motion, what would be relevant information for me to
5 consider in applying the extrinsic test?

6 **MR. McCABE:** Sure.

7 **THE COURT:** I mean, what -- according to your
8 argument, I mean, you presumably would just assume have parties
9 neither file a motion to dismiss nor a motion for summary
10 judgment on your counterclaims. But let's assume that there is
11 no motion to dismiss but there is a motion for summary judgment
12 on your copyright counterclaim where I'm going to be applying,
13 as every one seems to agree, the extrinsic test. What is it
14 that I would be in a position to take into account that is not
15 before me now?

16 **MR. McCABE:** Sure. Scenes a faire, scenes that have
17 to happen. Well, what would we find out in discovery? How did
18 they come to this scene?

19 You can put zombies in a million different places,
20 Your Honor. One reason we know that is because they have
21 another series of games called *Resident Evil* where the zombies
22 aren't in a mall. They don't have to be in a mall. They don't
23 have to be in a bi-level mall. They don't have to be in a
24 bi-level mall with a gun store that's being looted. None of
25 that has to happen. That's not a scene a faire.

1 If you look at the development work behind this in
2 discovery, maybe you'd find out that this is not something that
3 had to happen but this is something that was deliberately
4 selected to happen because they were trying to trade on the
5 creative reputation and the copyrighted materials in the
6 original famous Romero movie.

7 Unoriginal, we can have an expert, you've seen in
8 some of the cases talk about expert presentations, look at
9 everything that went before; and what you're going to find with
10 respect to this idea of the zombies parachuting in -- excuse
11 me, the characters coming in on a helicopter and then going
12 into the mall and defending it against the zombies, and all of
13 the scenes that go with that that we've talked about, the gun
14 shop and all that flows out of that, it's very original. It's
15 very creative because we're not going to see evidence of other
16 things that have happened similar to that.

17 What you're also going to find, perhaps, is
18 admissions against interest, admissions by them that they are
19 attempting to trade on or to copy the *Dawn of the Dead* film.

20 **THE COURT:** Oh, well, that by itself is a good
21 example for us to mull over for a moment. If there was an
22 executive within Capcom that says, you know, in discovery you
23 find an e-mail or what have you that says, "We're going to do a
24 game with zombies in a mall because we're trying to replicate
25 George Romero's *Dawn of the Dead*," I mean, that whole element,

1 that whole aspect of the intrinsic test, as I think both
2 parties agree, that would be particularly relevant; wouldn't
3 it?

4 **MR. McCABE:** It would be, and it would be because
5 unoriginal to MKR goes down the drain. They're not putting
6 zombies in the mall because zombies in the mall is unoriginal.
7 They're not putting it in there because it's a scene a faire.
8 They're putting it in there because it came from a famous,
9 distinctive movie, and that tells Your Honor something you need
10 to know about its merit in doing your extrinsic analysis. It
11 really would.

12 And as we go down and take a look at the history of
13 this thing, I think it's also relevant to note that just as
14 this very successful Universal Studios remake comes out in
15 2004, Capcom decides to make a video game about zombies, and
16 that video game has the character arriving by helicopter at the
17 shopping mall being besieged by zombies and going to that same
18 type of gun store and then, at least in some endings, exiting
19 that way.

20 And, again, I think an admission against interest,
21 the recognition of creative value, it realizes it needs a
22 license and it contacts MKR in 2004 about the availability of
23 the license to rights from the *Dawn of the Dead*. Well, why do
24 you do that if *Dawn of the Dead* is stock, if *Dawn of the Dead*
25 is unoriginal, if *Dawn of the Dead* is just one of a zillion

1 zombie movies with the same thing?

2 MKR said those rights were available, but Capcom
3 didn't pursue a license. Instead, Capcom made that game very
4 knowingly with all of those similarities to *Dawn of the Dead*
5 and all they did is they slapped a disclaimer on it, they just
6 stuck a disclaimer on it up front, and then they put it out and
7 hoped that they could get away with it. They didn't. When the
8 game reviewers came out and saw it, they immediately tagged it
9 as a ripoff, as Your Honor commented before, of *Dawn of the*
10 *Dead*.

11 **THE COURT:** Well, then let's then go to the whole
12 series of questions that I asked Mr. Cole and now it's your
13 turn to wrestle with it. He was clear that his view is the law
14 reflects that none of that goes into the extrinsic substantial
15 similarity analysis. What do you plan to say that that does go
16 into it?

17 **MR. McCABE:** I'm saying that's real-world evidence
18 of creative merit of *Dawn of the Dead*. It's not just some
19 individual game buyers making some similarity declaration or
20 it's not just a jury making a finding of fact on intrinsic
21 similarity.

22 **THE COURT:** Well, then it goes into the category,
23 and I realize they created this, so you may not want to
24 entirely embrace it, but unoriginal. Because it doesn't go
25 into the -- that does not go to the question of whether or not

1 it's a protectable idea. I mean, it doesn't matter what people
2 are saying out in the marketplace. If it's protected -- if
3 it's an unprotectable idea, they may perceive it as a complete
4 ripoff, and the answer on a copyright claim is: So what?

5 **MR. McCABE:** It does, Your Honor, because copyright
6 under our Constitution protects works of original authorship,
7 and this goes to its originality. This goes to the fact
8 that --

9 **THE COURT:** Rights of original authorship, which are
10 expressions, not -- an idea cannot, as we all agree, cannot be
11 copyright -- it's not copyrightable. So if an idea is ascribed
12 to someone and then subsequently someone takes that idea and
13 puts something out that is perceived as being a ripoff, that
14 doesn't necessarily violate the copyright laws even if it's
15 perceived as a ripoff.

16 **MR. McCABE:** But, Your Honor, this is far more than
17 an abstract idea. It's a fully realized creative treatment of
18 a particular situation involving zombies with a particular
19 sequence with a helicopter going in with the real live
20 protagonists, with the zombies in the mall.

21 By the way, they do fight, contrary to what they
22 said in their board, when they come in in the movie, they do
23 fight the zombies right away. They do have that. It's not
24 just that they fight them at the end as opposing counsel is
25 stating.

1 But then they go through and they have these scenes
2 where they're arming themselves in the gun store. They have
3 these scenes where they're being chased through these utility
4 areas. They have these scenes where they're taking refuge in
5 this control room, and that is a realized creative expression
6 that has achieved extraordinary acclaim and that was
7 deliberately appropriated by MKR.

8 What they want Your Honor to do is give them a
9 get-out-of-jail-free card. They want, on a motion to dismiss,
10 they want a free pass because they don't want anybody looking
11 too closely or too carefully at this situation.

12 And, as far as the close relationship, I mean,
13 *U.S.A. Today* is saying: (reading)

14 "Dead Rising is best described as an
15 interactive version of George A. Romero's horror
16 flick *Dawn of the Dead*."

17 You can't get a more clear-cut identification of the
18 content. The *San Francisco Chronicle*: (reading)

19 "The video game setup is a complete theft of
20 the 1978 George A. Romero classic *Dawn of the*
21 *Dead* right down of the music being piped through
22 the mall speakers."

23 The computer game reviewers who do this thing
24 routinely all come to the same conclusion. It's a gorgeous and
25 fully interactive game world ripped straight out of George

1 Romero's *Dawn of the Dead*, and we have a number of other cites.
2 That tells you the strong recognition of the creative work in
3 *Dawn of the Dead* and the extent of its appropriation in *Dead*
4 *Rising*.

5 And as far as the copyright claim is concerned,
6 we've talked about it before, it should not be dismissed under
7 Rule 12(b)(6) because if you look at the pleadings, we own the
8 copyright. There's not going to be a dispute about that.

9 There's an allegation of infringement. Okay. So
10 far we have pleaded our cause of action, and I've talked
11 already about the similarities. You are allowed, Your Honor,
12 to look at the underlying works. We talked about that.

13 Your Honor has quite correctly and properly excluded
14 the millage of zombie movies which they piled in. We disagree
15 with their characterization of most of them, frankly. I don't
16 think they show what they said they show. I'm not going to go
17 into that. We have Your Honor's ruling on it.

18 So we don't have, at this point, we don't have the
19 full body of work and the perspective that we'll have later on
20 in the case about what is a scene a faire, about what's
21 original, et cetera, et cetera, and even how strong an idea
22 this is or is not in terms of protection and expression,
23 although, I think, you have enough to go on to understand that
24 it was a very powerful creative expression and it deserves
25 substantial protection.

1 Once you reach that circumstance, you can't just
2 have counsel parse up everything and say, "Oh, I think each one
3 of these is unprotectable and you don't have to look at the
4 fact that there's one, two, three, four, five, six, seven,
5 eight, nine, et cetera, ideas that we've taken."

6 You have to have a situation where you go beyond the
7 pleadings, where you take the discovery that needs to be taken
8 to understand what's really going on in this case. I don't
9 think it's even going to be amendable to a real summary
10 judgment motion, but it's too early to tell that. We haven't
11 got any discovery on that.

12 The fact that there's a handful of cases that deal
13 with maybe a very generic common element, like a police drama
14 with foot chases and are willing to grant a motion to dismiss
15 or a motion for summary judgment, doesn't control in this case
16 given the facts of this case in the real world.

17 We also talked about the *Metcalf* case where the
18 Court pointed out that where there's significant group of
19 elements, the collective similarities can lead to a conclusion
20 that there may be infringement, lead to a reversal of a grant
21 of summary judgment; and *Metcalf* noted that the totality of the
22 similarities goes beyond the necessities of the theme and
23 belies any claim of literary accident. This one is sure not an
24 accident. We know that. We know how this one was developed.
25 We know that at one of his interviews one of the game designers

1 showed up in a *Dawn of the Dead* shirt. So we know what they
2 were coming from.

3 As far as the trademark claims are concerned --

4 **THE COURT:** Well, let me ask you one more question
5 on the copyright before we get to that --

6 **MR. McCABE:** Sure.

7 **THE COURT:** -- and that's to pick up on the point
8 that you were making. If I understood you correctly,
9 Mr. McCabe, you were sort of suggesting that, more than
10 suggesting, you're saying that when I go back and look at the
11 case authority that Mr. Cole has gone over with me, I'm going
12 to find that in those instances where motions to dismiss have
13 been granted, we have a very discrete -- one or two discrete
14 issues with respect to ideas and whether or not they're
15 protected, and in those rare instances a motion to dismiss can
16 be granted. And I'll go back and look at those with a mind's
17 eye to that question.

18 But then you said, "Well, look at this list. There
19 are," and I'm not counting them, but they're 10 items --

20 **MR. McCABE:** 40 elements.

21 **THE COURT:** -- however many; and almost by
22 definition, if I heard you right, you're saying, because there
23 are so many things to put down on a chart, that almost, in and
24 of itself, shows that this is not a case that is amendable to a
25 motion to dismiss.

1 But isn't it true that if simply the number of
2 things on a list of this kind is not of any particular
3 significance? Because you can have 25 things on the chart and
4 if none of them are protectable ideas, if they don't rise to
5 that level, then you don't have a copyright claim. So the
6 numbers by -- the fact that we got 14, 15, 25 is somewhat
7 irrelevant; isn't it?

8 **MR. McCABE:** Depending on the case, Your Honor, I
9 don't think it is here. If this idea, if this idea here, in
10 our game, our two video games --

11 **THE COURT:** Uh-huh.

12 **MR. McCABE:** -- if this idea is karate.

13 **THE COURT:** Uh-huh.

14 **MR. McCABE:** -- okay, we're not having a fight about
15 whether it's protectable or not, Capcom and MKR. But this idea
16 is what I told you that decides, when we went through the whole
17 scenario, that idea has got real-world creative value. It's
18 been acknowledged by critics. It's had a remake for a hundred
19 million dollars. It is -- the idea that you can just say,
20 "I'll take a look at the pleadings and I know it's
21 unprotectable," it's not karate. It is a distinct original
22 vision and it doesn't fall that easily.

23 Scenes a faire, well, yeah in karate we know we have
24 to have certain scenes a faire; but we don't know, and
25 certainly in the record before us, we don't know you have to

1 have these kinds of scenes. You can -- as counsel himself
2 pointed out, you don't have to have a gun shop if you want to
3 get weapons to kill a zombie. You can have a whole bunch of
4 different kinds of shops. You can do it a lot of different
5 ways. You don't have to arrive in a helicopter. I mean, how
6 many movies have we seen where the hero comes crashing through
7 barricades and cars or trucks or whatever? So you certainly
8 can't say on the pleadings that these things are all scenes a
9 faire.

10 Unoriginal, I think, when you look at the tribute
11 this work has received, that it can't be deemed on the
12 pleadings unoriginal and no similarity is just a conclusion we
13 can all argue about. I mean, they argue about how close our
14 traffic reporter is to their photojournalist. I mean, people
15 can go back and forth on that, Your Honor, but it's not
16 something that is resolved on pleadings.

17 **THE COURT:** Okay, the trademark claim.

18 **MR. McCABE:** The trademark claim I just want to
19 touch on briefly. Again on the pleadings, and I....

20 (Pause in proceedings.)

21 **MR. McCABE:** Same thing on the pleadings. We have
22 federally registered trademarks, as counsel has correctly
23 pointed out, on the zombie head and on George A. Romero's *Dawn*
24 *of the Dead*, and we've alleged infringement of those. At the
25 pleading stage, that should be all that we need.

1 In terms of getting rid of them all, they're simply
2 saying that a disclaimer that specifically mentions our movie,
3 which is a famous movie, plus the title *Dead Rising* can't
4 possibly infringe as a matter of law. I don't think that works
5 on the pleading. The idea that *Dead Rising* can't conjure up
6 the idea of *Dawn of the Dead*, I don't think you decide that on
7 the pleading.

8 **THE COURT:** Do you have a case that you can direct
9 me to, and perhaps it is in your papers, where a disclaimer has
10 been deemed to be a trademark violation.

11 **MR. McCABE:** I think we have cases. We don't have
12 that per se, Your Honor, but I think we have cases in our brief
13 where it points out that disclaimers are not necessarily
14 effective at all in ameliorating that type of situation.

15 **THE COURT:** All right.

16 **MR. McCABE:** I don't think we have one where --

17 **THE COURT:** I understand that point. That's a
18 somewhat related point. You're saying it may not, a disclaimer
19 may not work to get you out from under. It's somewhat a
20 different proposition to argue, as I think you've argued, that
21 the disclaimer itself operates as a part of your trademark
22 violation by making reference to, in this instance, George
23 Romero's *Dawn of the Dead*.

24 **MR. McCABE:** Well, I'll tell you, I agree with you,
25 Your Honor, there's no specific case, but I think we have one

1 because look at that list of reviewers' comments that we've
2 got. The disclaimer goes out and the reviewers all say, "This
3 was taken right from *Dawn of the Dead*." This disclaimer,
4 deliberately or not, is having exactly the opposite effect.
5 It's bringing a famous movie to everybody's attention.

6 **THE COURT:** How could you have a disclaimer, though,
7 if you didn't name the work?

8 **MR. McCABE:** They didn't need a disclaimer. They
9 had two options. Number one, don't take material from *Dawn of*
10 *the Dead*; number two, take a license. They almost tried option
11 two, but for whatever reason they backed out.

12 **THE COURT:** So your argument is essentially that
13 because -- the predicate of your argument is because they've --
14 they're already in the position of violating your trademark by
15 putting a disclaimer out there, that means they're getting
16 themselves further in the field of trademark violation?

17 **MR. McCABE:** I think the combination of the *Dead*
18 *Rising* title plus the disclaimer means that this shouldn't be
19 dismissed on the pleadings.

20 We talk about discovery again. Let's say we go into
21 discovery, Your Honor, and we find that they're getting e-mails
22 from gamers all over the place saying, "Boy, you guys -- it's
23 great that you got, you know, in connection with Romero's *Day*
24 *of the Dead* -- *Dawn of the Dead*. It's great you have this
25 property," et cetera, et cetera, that's the kind of things you

1 find in discovery.

2 **THE COURT:** I just have to say, I'll just tell you
3 that I'm having some trouble with your trademark claim because
4 it really does seem to me that, it's -- I think, we can all
5 agree that "dead" is not a word that is trademarkable, and I
6 just don't see where the trademark elements are being
7 replicated in -- the items that you have protected are
8 replicated in what they're presenting.

9 **MR. McCABE:** Well, the question, I think, is whether
10 people are going to make a source connection between *Dawn of*
11 *the Dead* and *Dead Rising*, the idea of the rising and the *Dawn*
12 *of the Dead*. It will make a difference that many, many movies
13 have video game spinoffs. I mean, that happens all the time.
14 My son has been playing *Lego Star Wars* forever.

15 **THE COURT:** Sure.

16 **MR. McCABE:** So it's a natural connection to make.

17 And I think at the pleading stage it's a well-played
18 claim. We know we have the Lanham Act registration. We've
19 pled the infringement.

20 And as far as the zombie head logo, by the way,
21 they're pointing up here, it's a bald zombie right over the
22 disclaimer just sitting there. Why is he there? I wonder. I
23 don't know. We don't have any discovery, nothing's gone
24 forward in this case. But it seems of a pattern, and the
25 pattern is to appropriate key elements of a very creative work

1 and hope to get away with it without suffering any penalty; and
2 to also hope that Your Honor will dispose of this case at the
3 pleading stage without allowing any discovery, without looking
4 into the matter in more depth, and without giving MKR a chance
5 to fully develop its case.

6 **THE COURT:** Well, it seems to me that the big divide
7 between you is, and I'm sure Capcom is not going to say, nor
8 would I expect them to say at this juncture, "Oh, yes, we did.
9 When all is said and done, what we're doing is we're trying to
10 ride off the success of *Dawn of the Dead*." But their argument
11 for our present purposes is, "Even if we were, it is still for
12 you to find a legal basis to say that the conduct is wrongful,
13 and simply saying that we are trying to take advantage of *Dawn*
14 *of the Dead* is not enough. It doesn't -- you still have to
15 have the requisite elements of both a copyright claim and a
16 trademark claim."

17 And a lot of the argument I'm hearing is, "Come on,
18 Judge, it's clear that they are taking advantage of our
19 protective intellectual property rights in a general sense."
20 But you still then have to bring a cognizable claim under these
21 legal theories; and they're saying it doesn't -- you don't
22 satisfy that test, even if in the grand scheme of things they
23 may well be riding off your success.

24 **MR. McCABE:** On this motion we have satisfied it,
25 Your Honor. We pointed to a whole series of similarities, and

1 then the question becomes: Can you get rid of it on a
2 12(b)(6)?

3 And I'll give you an example. They tendered to
4 Your Honor a proposed order and it talks about a proposed
5 similarity. It says, "Mall is rural and bi-level with gun
6 store and helipad." I don't know malls like that. That's not
7 a typical mall, gun stores and helipads.

8 And they want Your Honor to rule in their favor
9 because there's no protection for stock elements of genre.
10 There's no protection for scenes a faire. I mean, at this
11 early stage on the pleading it's a very, very drastic thing to
12 do to just cut this case off, and they're trying to get it done
13 through asking Your Honor to implicitly make a whole series of
14 factual findings and conclusions supporting their theories, and
15 say, "Okay, MKR you don't even get a chance to take any
16 discovery. You don't even get a chance to present your case."

17 I don't think that's the right answer, Your Honor.
18 I think it's important to look at the real world here. I don't
19 think we're in the case where there's one cell phone and nobody
20 knows what the merit of the one cell phone idea is.

21 We have a very good idea of what the merit of *Dawn*
22 *of the Dead* is. It got critical acclaim. It has financial
23 success. It's been remade. And I think it's received the
24 ultimate tribute of being copied by Capcom. I wish they'd
25 taken a license but they didn't, and that's why we're here.

1 But I do not think that this is one of those rare
2 cases where you should dismiss the pleadings. I think this is
3 one where you should heed the idea of not favoring motions for
4 summary judgment on extrinsic evidence.

5 Thank you for your time and consideration.

6 **THE COURT:** Well, let me ask you also, before you
7 sit down, Mr. McCabe, on the other two claims for relief, your
8 17200 claim and then your common law trademark/unfair
9 competition misappropriation solution, if you want to touch on
10 those.

11 **MR. McCABE:** I think I do, because I think they flow
12 mostly out of this whole idea of the similarities that we are
13 talking about here.

14 There was a point at which they were arguing that we
15 were just duplicating copyright and then couldn't sustain the
16 claims for that reason. But, as you see from the trademark
17 claim that we have before, we have a whole series of federally
18 registered rights that are not copyright, that are different
19 from copyright, and we made assertion claims on those. I think
20 they also would serve to justify our State law claims too,
21 Your Honor. So we're not end running copyright, but we have
22 claims that are related to the Lanham Act claim.

23 **THE COURT:** All right.

24 **MR. McCABE:** Thank you.

25 **THE COURT:** Anything further, Mr. Cole?

1 **MR. COLE:** If I may, Your Honor.

2 **THE COURT:** All right. Well, how about another five
3 minutes or so?

4 **MR. COLE:** Deal.

5 **THE COURT:** Okay.

6 **MR. COLE:** I just want to hit on four or five
7 points, Your Honor.

8 First, Mr. McCabe repeatedly says Your Honor should
9 look at the real world. Respectfully, I'm not sure what
10 Mr. McCabe means by that, but that's not the law. The law is
11 Your Honor is to look at the two works at issue, compare those
12 two works under the extrinsic test, look at the eight factors
13 in *Funky Films* and *Thomas versus Disney* that we cite, and
14 determine whether or not, under those factors, there's
15 substantial similarity.

16 Again, on the motion to dismiss cases, the *Finding*
17 *Nemo*, the *Identity Arts*, all of those cases just looked at the
18 two works at issue and the Court determined on a motion to
19 dismiss whether or not there was substantial similarity.

20 **THE COURT:** Do you think I will find -- I mean, I
21 will find what I will find so to some extent we won't spend too
22 much time on this; but Mr. McCabe is suggesting that those
23 cases are distinguishable from our case here because upon close
24 inspection, well, discovery, is that the fight in those will be
25 over one or two items, as to whether or not those are

1 protectable or not, and that we have a case where we have a
2 laundry list of substantially similar items.

3 **MR. COLE:** Your Honor, I think when you read -- in
4 our opening brief we have a series of bullet points of six
5 cases that are Ninth Circuit and District Court cases: *Berkic*,
6 *Williams*, *Funky Films*, *Kouf*, *Thomas*, *Bethea*. Frankly,
7 Your Honor, my reading of those cases is that those plot lines
8 and the alleged similarities in those cases are a lot closer
9 calls than the call Your Honor has to make on this case. Same
10 thing with *Finding Nemo*. Two fishes getting stranded in an
11 ocean. They end up in fishbowls. They use similar plot lines,
12 similar similarities are identified, motions to dismiss granted
13 in the *Thomas* case.

14 Your Honor asked a question about discovery, and
15 it's a point I wanted to address. No need for discovery here.
16 The works themselves are enough to decide the motion. *Funky*
17 *Films*, the parlor case, Ninth Circuit just looked at the works
18 even though it was a summary judgment case. *Zella*, the Rachael
19 Ray case; *Thomas versus Disney*; *Identity Arts*, all just looked
20 at the works themselves and not discovery.

21 Mr. McCabe suggested that if they do discovery, they
22 might --

23 **THE COURT:** And they did that on summary judgment,
24 even though it was -- and those aren't motion to dismiss cases,
25 but you're saying all they did on summary judgment was look at

1 the works.

2 **MR. COLE:** *Funky Films*, summary judgment, just
3 looked at works; but *Zella*, *Thomas versus Disney*, *Identity Arts*
4 were 12(b)(6) cases.

5 **THE COURT:** I understand.

6 **MR. COLE:** There was a suggestion that maybe there
7 could be something found in discovery that we tried --

8 **THE COURT:** Admissions against interest?

9 **MR. COLE:** Admissions against interest, exactly.

10 I refer Your Honor to the *See* case, S-E-E, out of
11 the Ninth Circuit. There it says: (reading)

12 "The only discovery claims suggests the
13 production of early drafts of defendant's play
14 on the theory they might reflect copying from
15 plaintiff's play that was disguised or deleted
16 in later drafts. Copying, deleted, or so
17 disguised as unrecognizable is not copying."

18 So even if they find something in the admission, an
19 admission against interest, that we tried to adapt Mr. Romero's
20 film, if Your Honor decides, looking at the two works at issue,
21 it's irrelevant.

22 I also --

23 **THE COURT:** Certainly it becomes relevant on the
24 intrinsic test later on.

25 **MR. COLE:** Perhaps.

1 **THE COURT:** Yeah.

2 **MR. COLE:** Not a question we have to address here.

3 One other case I want to refer Your Honor to that we
4 cite, the *Sinicola v. Warner Brother* case. There the plaintiff
5 or claimant made exactly the argument Mr. McCabe made that *Dead*
6 *Rising* is an adaption or we're trying to play off Mr. Romero's
7 *Dawn of the Dead*. Here's what the Eastern District of New York
8 had to say: (reading)

9 "Even assuming the film is adapted from the
10 novel, a defendant may legitimately avoid
11 infringement by intentionally making sufficient
12 changes in a work which would otherwise be
13 regarded as substantially similar to that of
14 plaintiffs. Copyright infringement requires a
15 showing of substantial similarity whether or not
16 the work is adapted from another. Even if a
17 subsequent work reminds people of an earlier
18 work," "even if a subsequent work reminds people
19 of an earlier work, there is still no
20 infringement and the absence of substantial
21 similarity."

22 So even if they take discovery, Your Honor, it's not
23 going to change what Your Honor would do at summary judgment,
24 which is look at the two works at issue and determine whether
25 or not there are any similarities.

1 *Metcalf* Mr. McCabe referenced and they make the
2 argument that they satisfied the *Metcalf* case. *Metcalf* is a
3 very unique situation where Judge Kozinski looked at the
4 television show *City of Angels*, and it was based on a -- there
5 was a treatment submitted and it was similar. Here's what
6 Judge Kozinski had to say about the similarities in the
7 storylines: (reading)

8 "The similarities proffered by the Metcalfs
9 are not protectable when considered
10 individually. They're either too generic or
11 constitute scenes a faire."

12 So individual elements in the *Metcalf* case, which
13 Your Honor will find to be quite striking, were not protectable
14 in and of themselves according to Judge Kozinski. Judge
15 Kozinski then went on and said: (reading)

16 "But these unprotectable similarities and
17 the sequence in which they were presented in the
18 *City of Angels* television show could give rise
19 to a copyright infringement claim."

20 No such allegation here, Your Honor. There's no
21 allegation that these handful of alleged similarities are
22 presented in the same sequence in *Dead Rising* as they are in
23 *Dawn of the Dead*.

24 **THE COURT:** Is that so? I mean, I think there is
25 some suggestion to the extent that we're talking about a

1 helicopter going to the mall and then landing there, and I
2 mean, there is some sequential suggestion there; isn't there?

3 **MR. COLE:** That's the only one, Your Honor. So one
4 sequence versus the list that you'll find in the *Metcalf* case.
5 And even the helicopter is not the same because what happens in
6 *Dawn of the Dead*, the movie starts out in the television news
7 studio. They try to escape Philadelphia by flying in a
8 helicopter, and they find what they think is an abandoned mall.
9 Very different than Frank West hearing about this quarantine
10 Willamette, Colorado, and intentionally taking a helicopter to
11 fly to a mall.

12 **THE COURT:** Well, I agree with you that the motive
13 appears to be different in terms of why they find themselves on
14 a helicopter going to a mall and landing on a helipad at the
15 mall; but in both the game and the movie, they're doing the
16 same thing. It may be that they're doing the same thing for
17 ostensibly different reasons, but they are doing the same
18 thing.

19 **MR. COLE:** They are. And, Your Honor, in *Williams*
20 the *Jurassic Park* case in the Second Circuit, the Second
21 Circuit said exactly what Your Honor did. They said in both
22 situations the people went to the dinosaur zoo, but in that
23 *Jurassic Park* case the Second Circuit also found that the
24 motives of the people going to the zoo were very different, and
25 so they found that element not to be substantially similar.

1 And even if, even if you assume that this list of
2 elements are protectable -- I'm sorry, I mean, they are in the
3 same sequence, you find they're not protectable but they are in
4 the same sequence to state a *Metcalf* claim, under *Metcalf*, it's
5 not substantial similarity anymore. It has to be striking.
6 That's what Judge Kozinski said. He found if you're going to
7 rely on a sequence or combination of unprotectable elements,
8 there has to be striking similarity. That was found also in
9 the *Identity Arts* and the *Cano* case; and, respectfully, there's
10 no way MKR could say that *Dead Rising* is a striking similarity
11 of *Dawn of the Dead*.

12 Two brief points on the trademark claim. Mr. McCabe
13 suggested that because they've asserted ownership and
14 infringement, that's enough to survive a 12(b)(6). I disagree.
15 Under *Twombly*, you have to have facts that suggest a claim is
16 at least plausible. I see none here.

17 Second, Mr. McCabe said that *Dead Rising* conjures up
18 the idea of *Dawn of the Dead*. Maybe. Not protectable as a
19 matter of law. That's *Dastar*, also the *RFD* case that we cite.

20 Finally, he tries to keep the common law claims
21 alive by saying that the Lanham Act claims also give rise to
22 common law claims. Perhaps, but if Your Honor finds that the
23 Lanham Act claims fail, so too do the State Law claims if they
24 are substantially congruent. If you review the fourth claim
25 for relief, it's an incorporation of the Lanham Act claims.

1 There's no new facts in the Common Law claims. So if
2 Your Honor grants the motion on the Lanham Act claim, the State
3 law claims thus fail, fail as well.

4 **THE COURT:** So that's true about the 17200 claim as
5 well, also?

6 **MR. COLE:** Yes, to the extent that they rely on the
7 Lanham Act claims, yes. To the extent they rely on the
8 copyright claims, they're preempted by Section 301 of the
9 Copyright Act. And, as Your Honor will see when you're
10 reviewing those, the averments in those two claims, they're
11 just incorporation. There's nothing new.

12 Final point, and this is from Judge Wilken in the
13 *Finding Nemo* case. She read the play script. She looked at
14 *Finding Nemo* and reviewed the factors in the extrinsic test,
15 and this is what Judge Wilken held: (reading)

16 "The Court finds that plaintiff's copyright
17 claim fails as a matter of law. Because this
18 finding is based on the works themselves and not
19 on plaintiff's pleadings, leave to amend will be
20 futile."

21 I think the same thing is true here, Your Honor.
22 Your Honor has the works before the Court. You are perfectly
23 capable of examination under the *Christianson* case. Motion to
24 dismiss is appropriate, and there is no suggestion that MKR
25 could assert anything that would save their claim.

1 Thank you very much for your time, Your Honor.

2 **THE COURT:** Thank you.

3 **MR. McCABE:** One sentence, Your Honor.

4 **THE COURT:** Well, one sentence. I'll let you do
5 that.

6 **MR. McCABE:** MKR doesn't have to say that there's a
7 striking similarity between their *Dawn of the Dead* movie and
8 their *Dead Rising* game, because the reviewers said it for them
9 again and again and again.

10 **THE COURT:** All right. Going to the point that
11 Mr. Cole made with respect to the decision by Judge Kozinski in
12 the *Metcalfe* decision, are you alleging the sequence point? Are
13 you embracing that concept?

14 **MR. McCABE:** Yes, because they did not only arrive
15 by helicopter but they disembark, and then they find the refuge
16 in the control room, and then they find the gun shop, and then
17 they loot the gun shop; and then toward the end of it, at least
18 in some of the endings, we have the same kind of departure by
19 the helicopter. I think it's been recognized again and again
20 as a very strong creative work for many of those key reasons.

21 Thank you for your time, Your Honor.

22 **THE COURT:** Thank you.

23 Well, I have my homework. Very, very good argument,
24 I appreciate it very much, for all counsel. I'll go back, as I
25 say, pour into it and give you an order. Thank you.

1 **MR. COLE:** Thank you very much Your Honor.

2 **MR. McCABE:** Thank you.

3 (Proceedings adjourned at 11:55 a.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U. S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

/S/ Kelly Bryce 10/6/08

Signature of Transcriber Date