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 19 defendants Capcom Co., Ltd. and Capcom
 20 Entertainment, Inc., and Third Party Defendant
 21 Capcom U.S.A., Inc.

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FENWICK & WEST LLP
 ATTORNEYS AT LAW
 MOUNTAIN VIEW

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

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

18 Plaintiffs,

19 v.

20 THE MKR GROUP, INC.,

Defendant.

Case No. CV-08-0904 RS

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

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

THE MKR GROUP, INC.,

23 Counterclaim-Plaintiff and
 Third-Party Plaintiff,

v.

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

26 Counterclaim-Defendants

and

27 CAPCOM U.S.A., INC.

28 Third-Party Defendant.

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

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

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

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

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

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

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1 Dated: June 11, 2008

2 FENWICK & WEST LLP

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

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

9 **IT IS THEREFORE ORDERED AS FOLLOWS:**

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

19 **IT IS SO ORDERED.**

20 Dated: June 12, 2008

21 By: 
22 The Honorable Richard Seeborg
23 United States District Court Judge