

---

# Hughes Hubbard & Reed

## Not All Zombies Are Created Equal: Owners of Rights to "Dawn of the Dead" Lose Copyright Suit Over Popular Video Game

Rita M. Haeusler  
Client Advisories

Hughes Hubbard & Reed LLP • A New York Limited Liability Partnership  
One Battery Park Plaza • New York, New York 10004-1482 • +1 (212) 837-6000

Attorney advertising. Readers are advised that prior results do not guarantee a similar outcome. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. For information regarding the selection process of awards, please visit <https://www.hugheshubbard.com/legal-notices-methodologies>.

---

In a decision that shocked some in Hollywood, a California district court recently held that a popular video game did not infringe on the copyrights of a previously-released motion picture, even though, at first glance, the game and film contained strikingly similar characters, themes, and plot lines. With video games becoming more "cinematic" in their stories and themes and the industry now established as a substantial source of revenue, this decision highlights the difficulty that film copyright holders may have in asserting ownership rights in video game elements and preventing others from profiting on their protected works without permission. The protected work at issue in *Capcom Co. v. The MKR Group Ltd.* was George A. Romero's *Dawn of the Dead*, a film about a small group of people who are trapped in a shopping mall overrun by zombies. *Dead Rising* is a video game that shares the same basic premise and many of the same details. Both works are set in rural towns and feature protagonists who are tough, cynical journalists with short brown hair and a leather jacket. Similarly, in both works, the protagonist arrives by helicopter and survives by utilizing food and weapons located inside the mall. The game even shares the film's unexplained tendency to dress an inordinate number of zombies in plaid shirts. Gamedaily, a popular website that reviews video games, even commented that "Dead Rising is about as close as you'll probably get to being a part of George Romero's film, *Dawn of the Dead*." A cynic might conclude that Capcom, the company that created *Dead Rising*, was attempting to cater to the *Dawn of the Dead* fan base by capturing the movie experience and presenting it in video game form. In fact, as noted in the decision, Capcom approached MKR Group, the owners of the rights to *Dawn of the Dead*, to enquire about licensing the film's elements for the video game. It is unclear why no agreement was ever reached but Capcom went ahead with the release and took the somewhat unusual step of placing a disclaimer on the box stating that "THIS GAME WAS NOT DEVELOPED, APPROVED OR LICENSED BY THE OWNERS OF GEORGE AV. ROMERO'S DAWN OF THE DEAD TM." However, this strategy also came with certain risks. Recognizing the potential for litigation, Capcom sought a declaratory judgment that no copyright infringement had taken place, arguing that the differences between the two works far outweigh the similarities. MKR Group countered by alleging copyright infringement. To succeed on

its claim, MKR Group would have had to show that Dawn of the Dead and Dead Rising were "substantially similar" in their "protected elements." To meet this standard, the Ninth Circuit requires that the copyright holder satisfy both an "intrinsic test" and an "extrinsic test." The "intrinsic test" examines an ordinary person's subjective impressions of the similarities between the two works and is exclusively within the province of the jury. When a court finds that the claim fails the "extrinsic test," as was the case here, it is dismissed before the jury is faced with this inquiry. The "extrinsic test" is described as an "objective" test of similarity in the "expression of protectable ideas." To simplify this abstract legal concept, courts generally require that similar elements be present and that these elements be "expressed" in analogous ways. If similarities exist but are outweighed by accompanying differences, this standard is not met. This is a difficult standard for copyright holders, as evidenced by this case. In ruling in favor of Capcom, the court identified several differences between the game and film. For example, with regard to plot, the court noted that the helicopter rides occur at different points in each story. Similarly, the journalist in Dawn of the Dead is middle-aged and non-athletic, while his counterpart in Dead Rising is young and physically fit. The two characters also possess contrasting personalities. Furthermore, the game lacked anti-consumerism themes present in the film and proceeded at a faster pace. Differences in dialogue, mood and setting were also noted. Distinctions such as these were sufficient to defeat the infringement claim. In contrast, the district court viewed the parallels between the game and film as a "string of disconnected facts." Copyright infringement cases are always fact-specific. It is therefore difficult to draw clear conclusions about how this case might impact other situations involving video games containing themes and plot lines that resemble films or other dramatic works. However, because of the uncertainty facing both game developers and publishers like Capcom-which was concerned enough about the case to take the pre-emptive step of a declaratory judgment action-and film owners, these parties should carefully evaluate possible infringement claims. They also may want to explore entering into licensing agreements that will provide the certainty of an agreed-upon royalty scheme and provisions related to the scope and use of the licensed property, rather than risk, cost and uncertainty of litigation.

## Related People



**Rita M. Haeusler**

## Related Areas of Focus

[Media, Technology & Commercial Transactions](#)