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February 10, 2012

Mr. Stanford McCoy  
Assistant U.S. Trade Representative  
For Intellectual Property and Innovation  
Office of the United States Trade Representative  
600 17<sup>th</sup> Street, N.W.  
Washington, D.C. 20508

**Re: 2012 Special 301 Comments on Piracy of *Nintendo* Video Game Products**

Dear Mr. McCoy:

Nintendo of America Inc. (Nintendo) submits this letter in response to the "Request for Written Submissions From the Public" which appeared in the December 28, 2011 Federal Register. In that notice, the Office of the United States Trade Representative (USTR) requested comments pursuant to Section 182 of the Trade Act of 1974 (19 U.S.C. 2242), known as "Special 301," on "countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection."

Nintendo has provided information to the International Intellectual Property Alliance (IIPA) which is included in the filing of that organization. Nintendo is associated with the IIPA through its membership in the Entertainment Software Association (ESA). This letter provides more detailed information on piracy of *Nintendo* video game products, along with Nintendo's Special 301 placement recommendations.

Nintendo, its publishers and developers are being injured by the prevalence and ease of illegal online distribution, as well as by the continued manufacture, assembly, distribution, import, export and sale of counterfeit *Nintendo* video game products across the globe. In the past few years, the scope of online piracy for Nintendo has grown dramatically. Every month tens of thousands of illegal *Nintendo* game files are detected on the Internet. The legal environment to limit the flow of these files remains extremely challenging.

Theft of *Nintendo's* video games illegally shared over the Internet impact all who create, develop, market and sell video games for the *Wii*, *Nintendo 3DS* and the *Nintendo DS* family of

handheld systems. Internet piracy continues to surge resulting in lost sales, lost jobs, lost taxes for local, state and national governments, as well as the loss of incentives to create and innovate.

Worldwide piracy of *Nintendo* video game products remains a chronic problem resulting in huge losses, despite the operation of Nintendo's anti-piracy programs in over 40 countries. Special 301 has proven to be a highly effective tool in highlighting those countries which do not provide adequate protection of copyrights and trademarks.

For 2011, Nintendo recommends that USTR designate: (1) Brazil to remain on the Watch List; (2) China for monitoring under Section 306 of the Trade Act and continued placement on the Priority Watch List; (3) Mexico to remain on the Watch List; and (4) Spain to remain on the Watch List.

Although Nintendo is not filing comments this year on Canada, it would like to unequivocally support the recommendation on Canada filed by the IIPA, specifically due to its lack of a WIPO Treaties compliant law protecting technological protection measures. Nintendo encourages Canada to enact a law that provides rights holders with the necessary protections for its technological protection measures. ISP responsibility remains another serious weakness in Canada that Nintendo believes must be addressed in the coming year, along with lack of sufficient funding for law enforcement authorities to enforce its IP laws.

### **NINTENDO OF AMERICA INC.**

Nintendo of America Inc., based in Redmond, Washington, serves as headquarters for Nintendo's operations in the Western Hemisphere and markets the highly successful line of *Nintendo* video game products. Nintendo has branch offices in Redwood City, California and New York, New York. Also located on Nintendo's campus in Redmond is Nintendo Software Technology Corporation which creates game software for *Nintendo's* video game systems. In 1999, Retro Studios was founded in Austin, Texas and is sister-company to Nintendo of America Inc. Retro is a development studio dedicated to creating products for Nintendo. Nintendo is the holder in the Western Hemisphere of the company's intellectual property rights, including copyrights and trademarks. In addition, Nintendo coordinates the worldwide anti-piracy program on behalf of its parent company, Nintendo Co. Ltd. of Kyoto, Japan.

*Nintendo* video game hardware platforms (i.e. *Wii*, *Nintendo DS*, *Nintendo DSi* and *Nintendo 3DS*) play Nintendo's proprietary game software as well as proprietary game software created by its third party licensees. There are hundreds of U.S. companies which independently create, license, market and sell *Nintendo* video game products. The earnings and employment of these companies are also adversely affected by worldwide piracy of *Nintendo* products.

## NINTENDO VIDEO GAME PRODUCTS

Nintendo sold more than 12 million total hardware units in the United States in 2011, marking the fifth year in a row that the company has accomplished that feat. This includes more than 4.5 million units of Wii, more than 4 million Nintendo 3DS systems, and more than 3.4 million units of the Nintendo DS™ family of systems. This brings the U.S. installed base for Wii and Nintendo DS to 39 million and more than 51 million, respectively.

With these record-setting video game console sales figures, it is not surprising that the popularity of pirate versions of games published both by Nintendo and by its licensees for the *Wii* and *DS* has reached unprecedented levels. Their popularity has surged because of the widespread availability of circumvention devices, although these are illegal in most countries of the world.

Nintendo does not make any of its video game software available for download on the Internet, except through its proprietary systems. Besides the *Wii* console's proprietary *Virtual Console* and *WiiWare* services, the *DSiWare* service for the *Nintendo DSi* handheld system and the eShop for the *Nintendo 3DS* system, *Wii* and *Nintendo DS* handheld video game software is only distributed in optical disc or plastic game card formats. Hence, all *Nintendo* game files offered via the Internet for download are illegal copies. Circumvention devices make these game files popular because they permit them to be played on *Nintendo* hardware for free.

### **Circumvention Devices (Game Copiers and Mod Chips) And Internet Piracy**

**Game Copiers:** Two types of circumvention devices have been developed targeting *Nintendo* hardware systems; game copiers and mod chips. Game copiers are used to circumvent the security embedded in *Nintendo DS* handheld systems to allow users to play illegal video game software. These devices also facilitate the uploading and downloading of illegal software to and from the Internet.

The following illustrates how game copiers work to circumvent Nintendo's security and how these circumvention devices facilitate the downloading of illegal game files from the Internet:



This is a popular “game copier.” A USB-to-Micro SD flash memory card reader (included in packaging) is used to transfer illegal games downloaded from the Internet from computer to a Micro SD flash memory card.



The game copier card (included in packaging) is designed exactly like an authentic *Nintendo DS* game card (except for the addition of a slot at the top of the game copier card to accept a Micro SD flash memory card). This card contains copyright protected Nintendo software (logo data) used to bypass the security of the *Nintendo DS*'s security measures.



The Micro SD flash memory card is purchased separately by the user. Game software is illegally downloaded from the Internet and stored on this Micro SD flash memory card.



The Micro SD flash memory card containing illegal game files is inserted into the game copier



The game copier card is inserted into the *Nintendo DS* card slot on the *Nintendo DS* system to play the illegal game files.

**Game Copier Card v. Authentic DS Game Card**



Game copier card (note the Micro SD flash memory card in the slot)

Authentic

**Mod Chips:** The second type of circumvention device, called a modification chip (“mod chip”), is soldered or clipped on (usually by so-called “chippers” providing “chipping” services) to the internal circuitry of a *Nintendo* video game console. Mod chips circumvent the security embedded into *Nintendo*’s *Wii* console and allow the console to run counterfeit software discs or run illegal software from external hard drives or media. Pictures of three popular mod chips are shown below.

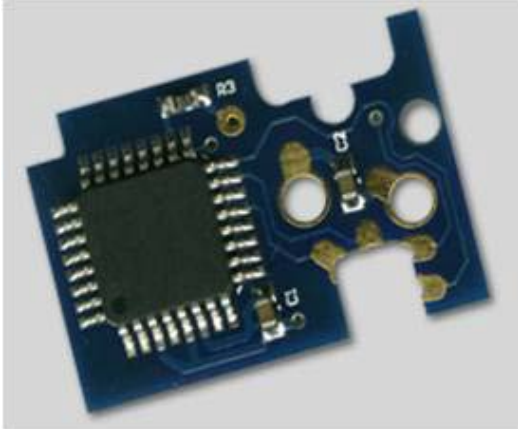


**Wasabi**

**Cyclowiz**



**Wii Key**



## **The Video Game Industry Continues To Test Circumvention Laws**

No other copyright industry has been plagued by circumvention devices like the video game industry. Unfortunately, in 2011, Nintendo continued to be at the forefront of testing circumvention laws in courts in Europe, Korea, Taiwan and the U.S. In total, Nintendo has been or remains involved in hundreds of circumvention device cases (civil and criminal) around the world, not counting the hundreds of customs and administrative actions Nintendo supports each year.

The results at this stage have been mostly positive in those countries where the laws have been tested, although there is a lack of consistency in how video games are categorized for copyright protection, and the level of technical evidence required by courts to prove the circumvention of a copyright protected work, especially in Europe.

Trademark protection is imperative to Nintendo in seizing circumvention devices. Mod chips, for example, which do not typically implicate a trademark, are difficult for authorities to seize under circumvention laws unless coupled with a mod chipping service or swept up in a raid that includes counterfeit *Wii* discs.

Given that the technology surrounding the use of circumvention devices and how these devices infringe the intellectual property of copyright owners is unique, Nintendo is actively engaged in educating government officials, police, customs officials, prosecutors and judges in numerous countries.

**Internet Piracy:** The trafficking in, sale and use of circumvention devices facilitate Internet piracy of video games because the most common way to play illegal *Wii* or *Nintendo DS* game files downloaded from the Internet on *Nintendo* video game systems is by using a circumvention device. Certain terms are commonly used when discussing Internet piracy that are defined below.

### **Internet Piracy Definitions:**

- **BitTorrent** - BitTorrent (BT) is a Peer-to-Peer (P2P) file network protocol which allows users to distribute infringing files quickly and easily. An advantage of the protocol is that it supports very large file sizes and distributes them relatively quickly, making it the most popular P2P network in the world and arguably the most popular method of acquiring infringing content.
- **Cyberlinker** - "Cyberlinkers," also known as "indexers," are websites that collect the links (a.k.a. URLs) for infringing content that users have uploaded and stored on cyberlockers. For a cyberlinker to be most effective, it must be vigilant in gathering the most up-to-date links, eliminating those which no longer work (either because the

original user removed the file, the file was corrupted somehow or a copyright owner had requested the file to be removed). The most popular cyberlinkers usually have a dedicated community that contributes links (either from uploading the infringing content themselves and sharing the link, or finding a working link from another source and sharing it).

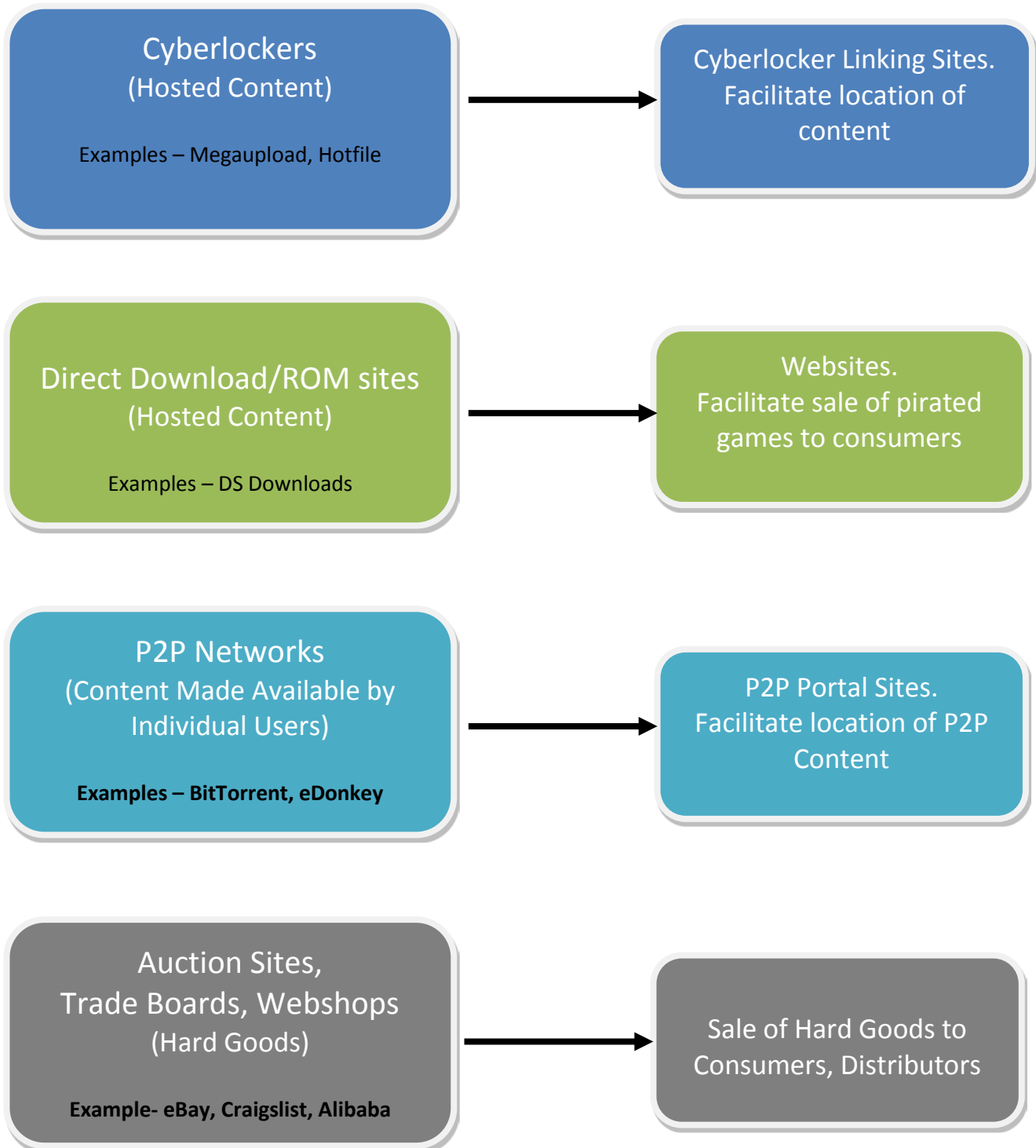
- **Cyberlocker** - "Cyberlockers," also known as "sharehosts" or "one-click hosts," are websites that provide storage space (varying in size but usually at minimum several hundred megabytes, and at maximum a few gigabytes) for any file type a user wishes to upload and store. After uploading a file, a user is commonly given a password and/or a direct URL to access that file. Many users use this functionality to store infringing content.
- **eDonkey (ed2k)** - eDonkey is another P2P file network that is older than BitTorrent. It does not support large files quite as well as BT, but does provide ease of use and searching capabilities. In addition, because of its age and design, it is more vulnerable than BitTorrent to countermeasures.
- **Marketplaces** - Any auction site, trade board or classified listing website operated with the express purpose of allowing users to advertise, buy and sell products. These websites can vary from auction-style bidding to periodic sales postings or classified ads for services offered by other users. In many cases these websites are abused by sellers looking to make a profit from illegal hard goods (game copiers, mod chips or counterfeit *Nintendo* video game products) for sale. Examples are eBay, Craigslist, Mercado Libre and Alibaba.
- **Metrics & Trend Reporting** - This is one of several specialty services that anti-piracy vendors provide. This service is the provision of data from either the monitoring or enforcement activities performed by a vendor on behalf of its client. All vendors will supply, at minimum, a report of what infringing content was discovered via monitoring services and what infringing content was acted upon via enforcement services. The best vendors will expand upon the data reported to try and identify piracy trends and other metrics that would benefit their clients' business needs.
- **Monitoring & Enforcement** - This is one of several specialty services that anti-piracy vendors provide. This service is the provision of manual or automated search techniques to locate and identify infringing content combined with manual or automated issuance of legal notification (DMCA takedown notices, Cease-and-Desist Letters or other legal warnings) to the appropriate Internet Service Provider (ISP).
- **Peer-to-Peer (P2P) Networks** - Computer networks established between users who share illegal *Nintendo* game files (or parts of files) among themselves. Users download illegal *Nintendo* game files through accessing P2P portal sites. Both BitTorrent and eDonkey are types of P2P networks.



- **P2P Portal Sites** - Websites that offer links, trackers, or indices to connect users to the P2P networks for downloading illegal *Nintendo* game files.
- **Webshops/E-Commerce Sites** - Internet retailers offering/distributing hard goods (game copiers, mod chips, counterfeit *Nintendo* products) via a website. Typically it is an individual seller per website with no take down procedure for notification of infringement.

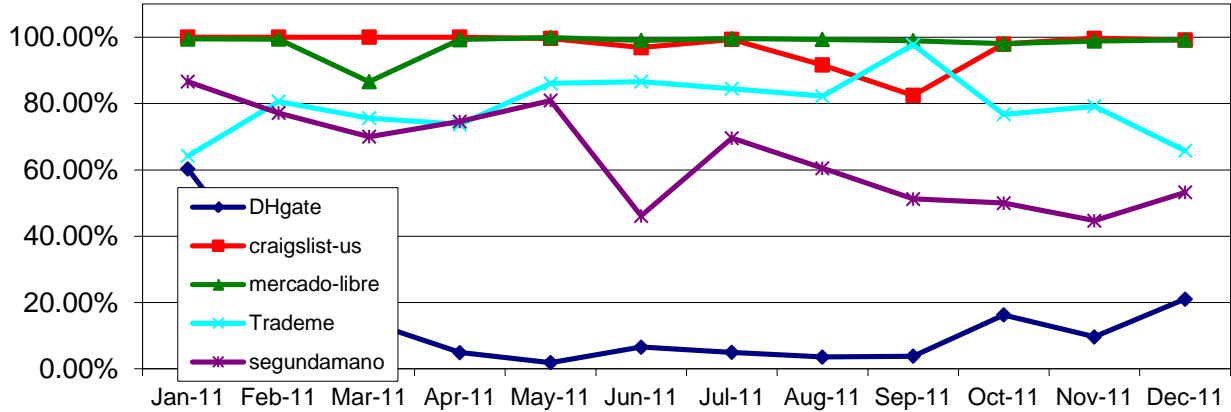
Nintendo is confronted with numerous types of piracy on the Internet but the most prevalent types of Internet piracy are set forth below.

## Most Prevalent Types of INTERNET PIRACY Impacting Nintendo



The chart below displays the monthly compliance rate for each auction site/trade board during 2011, as monitored by Nintendo. The compliance rate is based on the number of listings of game copiers detected versus the number of listings removed by the auction site or trade board at the request of Nintendo. Achieving consistently high compliance rates, especially in China and Spain, has been difficult in 2011.

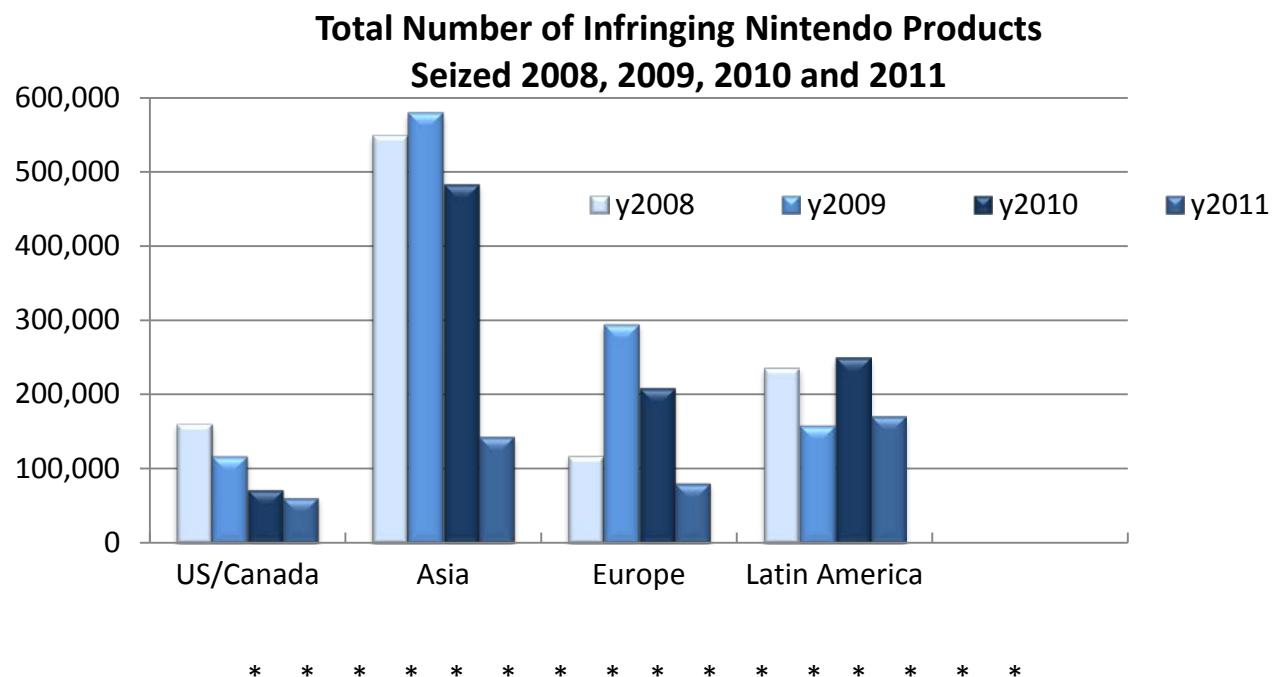
**2011 Rate of Compliance with Take Down Notices - Top 5 Marketplaces**



DHgate – China  
 Trademe – New Zealand  
 Mercado Libre – Latin America  
 Segundamano - Spain  
 Craigslist - worldwide

### Nintendo Video Game Product Seizures From 2008 To 2011

The graph below shows a general summary of where infringing *Nintendo* video game products were seized in 2008, 2009, 2010 and 2011. This includes illegal copies of *Nintendo* games, circumvention devices and component parts. Nintendo believes the increase in online piracy has caused a decrease in seized hard goods products. This is a trend Nintendo expects to continue.



Nintendo will next present its experiences over the past year in the following countries: (1) Brazil; (2) China; (3) Mexico; and (4) Spain.

## BRAZIL

Nintendo recommends that Brazil remain on the Watch List.

- Borders Between Brazil and Paraguay Remain Major Points Of Entry For Illegal Video Game Products And Additional Resources And Focus Are Needed To Combat Smuggled Goods Entering Brazil
- Internet Piracy Continues With No Adequate Legal Infrastructure In Place To Respond To The Threat It Poses To Rights holders

A high level of pirate *Nintendo* products continues to dominate the Brazilian market. There are a number of contributing factors: (1) the absence of meaningful deterrent criminal penalties against counterfeiters; (2) the increased availability of infringing circumvention devices that plague the market and further support Internet piracy with no effective legal infrastructure to address online piracy; and (3) flow of pirate products across borders such as Paraguay and Bolivia.

In Brazil, Nintendo continues to find that most game copiers<sup>1</sup> sold for the *Nintendo DS* are bundled with a memory card that already has between 40 to 150 video games downloaded on to it. The price for the bundle is up to approximately USD \$59 (or 40 cents per game). Eighty authentic games, even at a low average price of \$10 (but note the manufacturer's suggested retail price in the U.S. for a *Nintendo DS* game is \$34.99), would be \$800 which means there is no possibility that authentic video games (even at lower prices) can compete with pirated video games and circumvention devices.

Nintendo believes strong and effective communication (e.g., legitimate news publications) regarding legal actions taken against piracy by rights holders would increase awareness and deter others.

### **Local Enforcement Efforts Show Increased Activity in 2011**

In 2011 there were 43 enforcement actions (only 26 in 2010) resulting in the seizure of over 50,000 counterfeit Nintendo products, including over 15,000 *Wii* video games seized by Rio de

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<sup>1</sup> Detailed information on circumvention devices (e.g., game copiers and mod chips) can be found in the introduction section to this document. Basically, game copiers are used to circumvent the security embedded in the *Nintendo DS* handheld video game systems to allow users to play illegal video game software. These devices also facilitate the downloading of illegal software to and from the Internet.

Janeiro police in November. Targets continue to be mainly street vendors and located within known markets offering a wide variety of illegal goods. Every single police raid in 2011 targeted a street vendor or retail shop. Nintendo encourages local enforcement officials to focus on more significant source targets in 2012 such as warehouses and other distribution sites in order to have a larger impact against piracy.

Nintendo recognizes the efforts of the National Council to Combat Piracy and Intellectual Property Crimes (CNCP) to reduce piracy in Brazil with seizures conducted by federal police, military and civil polices in many cities of the country. Also, the partnership between CNCP and the local authorities in many cities is important in order to seek to administratively “close” irregular shops where consumers buy contraband and counterfeit products.

### **Criminal Prosecutions Deter Criminals But Brazil Did Not Bring Any Criminal Piracy Charges in 2011**

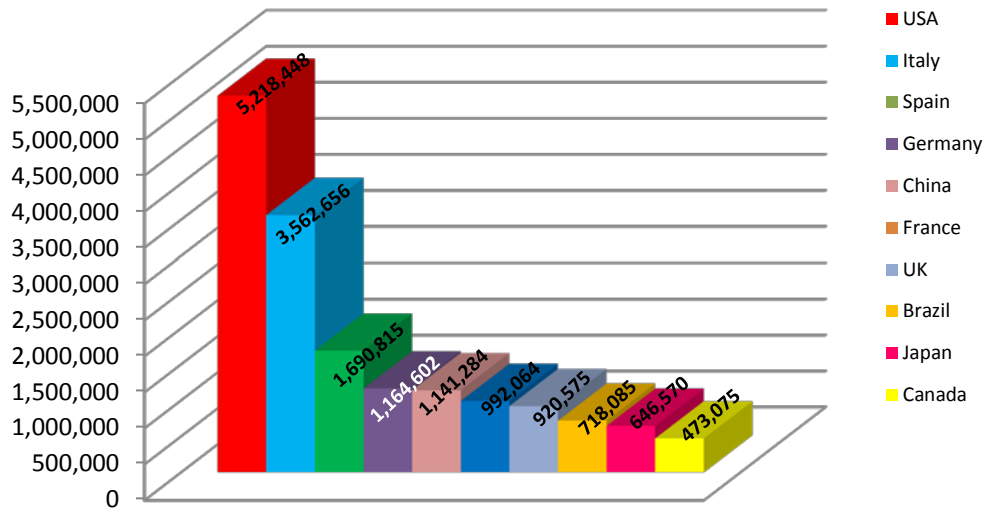
Law no. 10.695/2003 provides for criminal remedies for infringement of copyrights and related rights. Serious levels of infringement are punishable with detention and/or fines. If piracy is to be reduced, infringers must be held accountable for their illegal activities through strong prosecutions and tough sentences. Yet once again, there were no criminal prosecutions in the past year. Under the current system, there is little to deter IP crimes and significantly reduce rampant piracy in Brazil.

### **Internet Piracy Is Increasing With No Legal Infrastructure To Respond To The Threat It Poses To Rights holders**

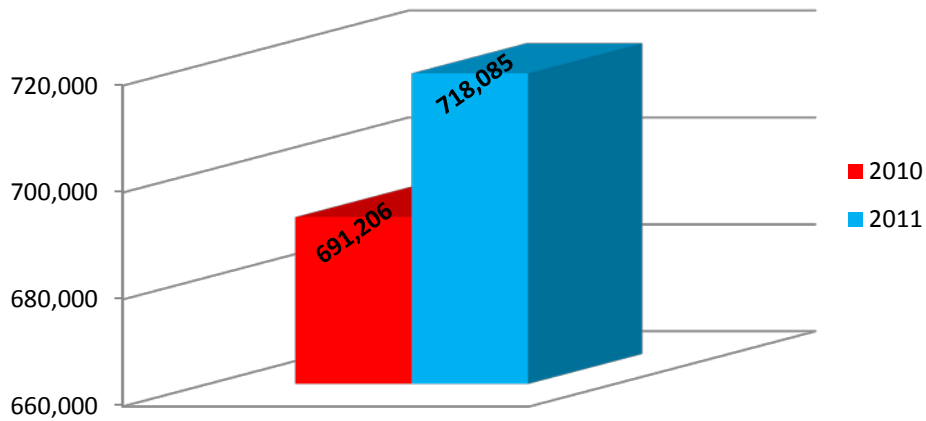
A huge challenge for Nintendo in Brazil has been the growth of Internet piracy and the availability of circumvention devices that facilitate the downloading and play of illegal *Nintendo* games. The chart below shows that once again Brazil is identified as one of the top 10 infringing countries in the world for illegal P2P downloads.

The chart below also shows that Brazil is the only country in Latin America in the top 10. While Brazil is not at the top of the list, given that broadband penetration in Brazil is significantly lower than in Europe and the U.S., this is a disproportionately high figure.

**Illegal P2P Downloads of Nintendo Games January 1, 2011 to December 31, 2011 (source: Dtecnnet)**

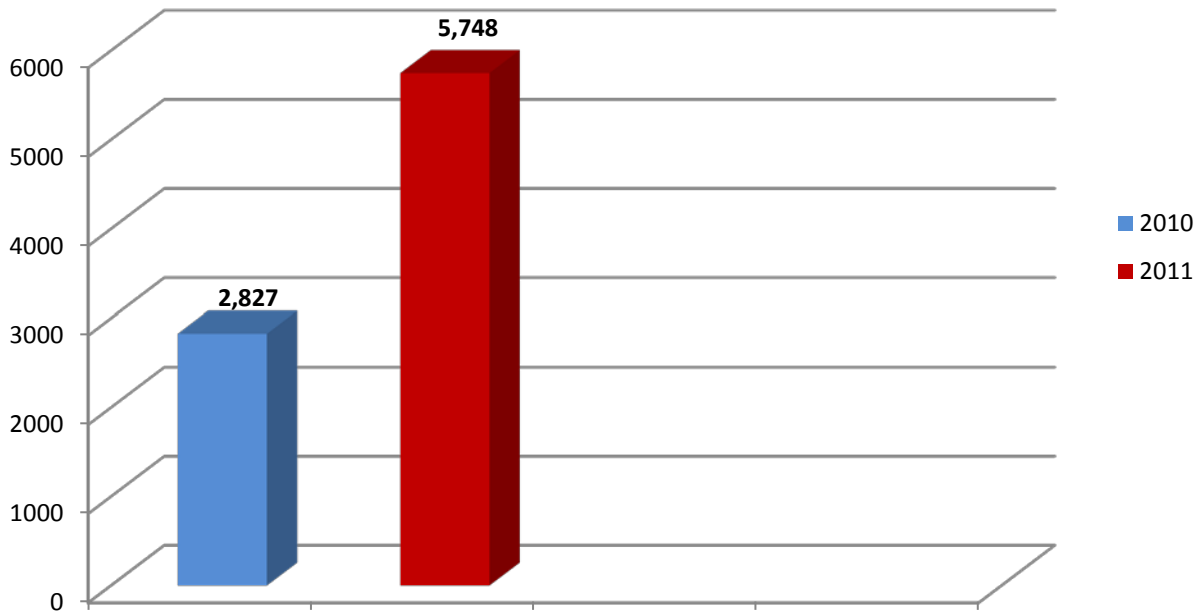


**BRAZIL - Illegal P2P Downloads of Nintendo Games - 2010 vs 2011 (source: DtecNet)**



There was approximately a 4% increase in illegal P2P downloads between 2010 and 2011, showing a slow but continuing trend for demand by Brazilian users. Online marketplace offerings of circumvention devices also increased in 2011 (see below), as would be expected given that circumvention devices are necessary in order to play the illegally downloaded video games on *Nintendo's* video game systems.

**Internet Auction Sites -- Number of Listings of Game Copiers  
on *Mercado Livre***



Internet auction sites provide an easy and relatively anonymous platform for transactions of infringing products. The chart below shows that the number of listings doubled in 2011 on the auction site, Mercado Libre, which is based in Argentina and is the largest online marketplace in Latin America. Mercado Libre covers 12 Latin American markets, and Brazil is its largest.

Fortunately, compliance of take down notices is very high through Mercado Libre, for which Nintendo is appreciative. Nintendo has worked hard to educate auction sites around the world regarding which products are illegal and why.

The increase in listings, however, does show that take down notices do not deter sellers from listing illegal products on the auction site. Enforcement by the government and publicity of those actions against infringers could help to deter consumers.

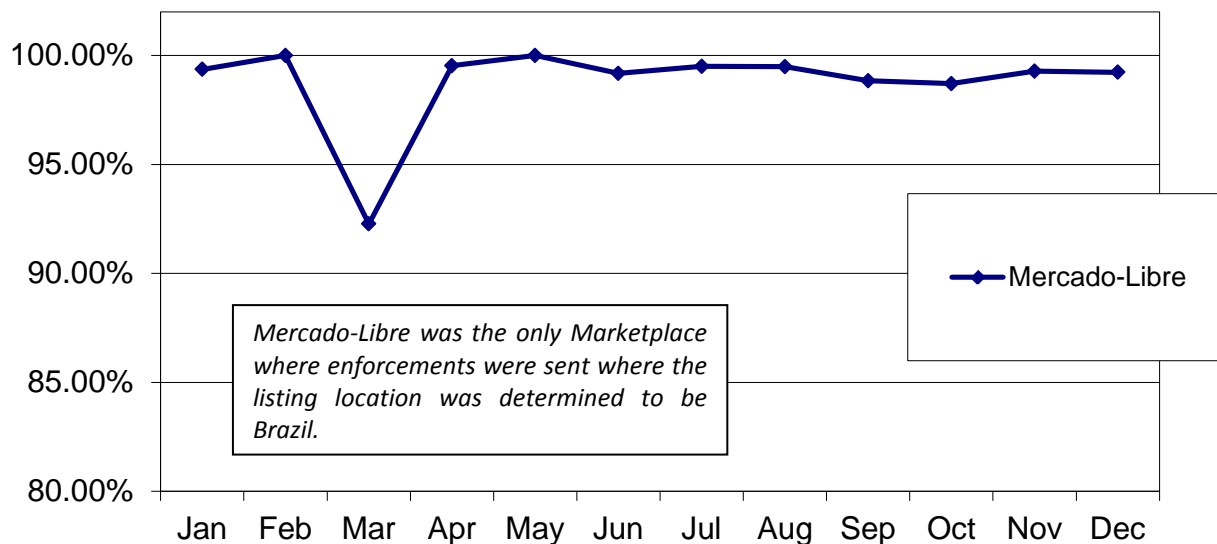


**Top 10 Countries Offering Game Copiers for Sale – 2011**  
(Source: MarkMonitor)

**Number of game copier listings found per month / per country via online marketplaces**

	Country	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Total
1	China	1171	506	1837	1134	1626	8357	542	994	1308	1717	5398	2800	27390
2	United States	1808	1339	2053	3379	3161	2124	1358	1667	859	1146	1017	953	20864
3	New Zealand	372	573	806	712	1214	1203	1062	950	668	568	721	692	9541
4	Brazil	311	287	375	423	307	608	602	581	344	464	415	1031	5748
5	Venezuela	425	251	259	300	182	414	838	553	625	386	240	584	5057
6	Spain	523	428	541	449	659	246	165	128	204	198	141	141	3823
7	Mexico	199	201	255	287	152	423	602	429	333	264	241	286	3672
8	Canada	311	173	228	321	384	292	181	201	116	151	190	152	2700
9	Netherlands	45	86	108	115	181	182	204	291	283	328	298	329	2450
10	Chile	118	83	147	125	107	162	94	128	89	140	97	115	1405

**2011 Rate of Compliance with Take Down Notices - BRAZIL**



Nintendo is a member of ABES (the entertainment software industry trade association in Brazil). In 2011, ABES sent cease and desist letters to remove illegal video game content from the Internet, resulting in the removal of 7 infringing websites specific to Nintendo, and 614 advertisements promoting Internet piracy specific to infringing Nintendo products. Internet piracy not only harms companies trying to protect their brands and intellectual property rights, but as reported in 2010 on the Ministry of Justice website, online piracy takes away two million

formal jobs and causes losses of R\$ 30 billion (approximately US \$17 billion) worth of tax revenue in Brazil every year.<sup>2</sup>

Brazil has never acceded to the WIPO Copyright Treaty and has no specific laws to protect IP owners from the unauthorized circumvention of technical protection measures, nor laws holding Internet Service Providers liable for hosting infringing web sites. This poses serious challenges when addressing the growing problem of IP violations and illegal downloads available on Brazilian web sites. **It is critical that laws be passed addressing these two serious shortcomings.**

### **High Tariffs and Taxes Drive Up Prices On Authentic Products**

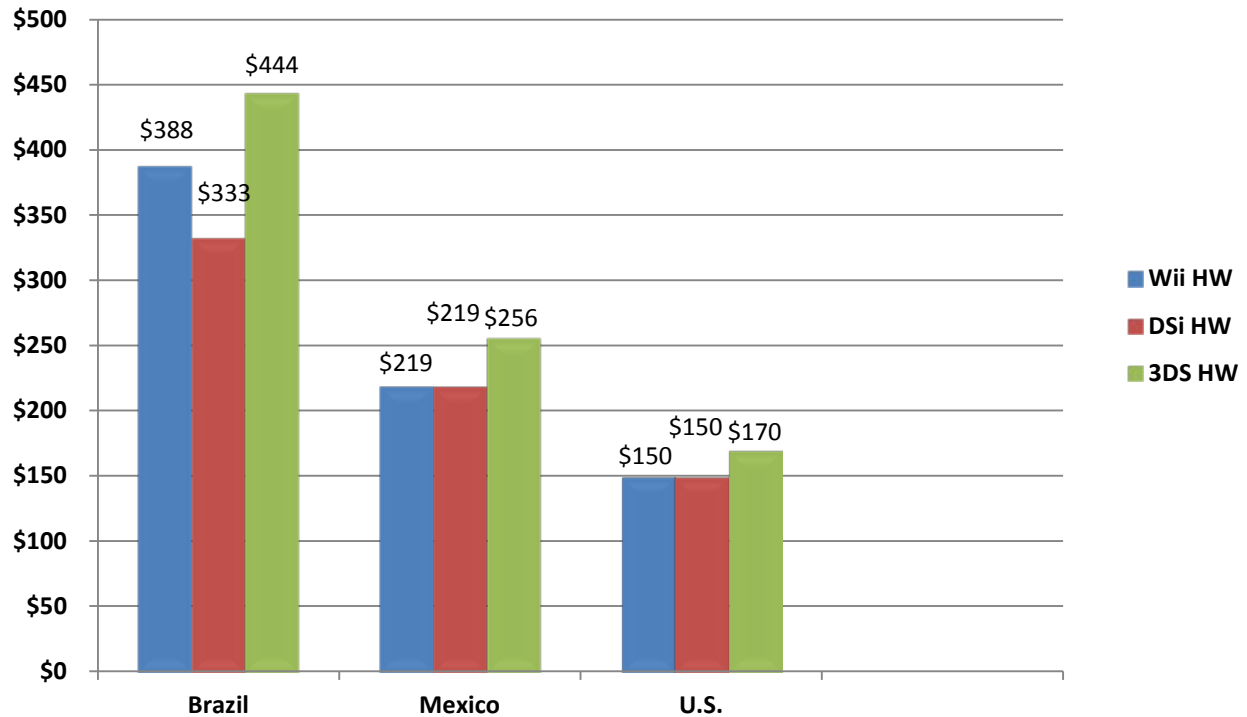
Brazil should be a leading market in Latin America for Nintendo but widespread piracy significantly reduces the market potential. One reason that piracy is attractive in Brazil is the extraordinarily high cost of authentic goods due to high tariffs and taxes imposed on imported authentic video game products.

The high taxes on imported video games and related products is one of the chief causes of piracy in Brazil.

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<sup>2</sup> See [www.mj.gov.br/combatepirataria](http://www.mj.gov.br/combatepirataria) and [www.mj.gov.br](http://www.mj.gov.br).

### Average Wii, Nintendo DSi and Nintendo 3DS Hardware Price in U.S. Dollars



#### **Recommendations**

Following are recommendations to improve IPR enforcement in Brazil:

- Adopt new laws to explicitly protect against the circumvention of technical protection measures and to hold Internet Service Providers responsible including a requirement that ISPs take down infringing content when notified by a rights holder representative.
- Publicize legal actions and raids taken against infringers to increase awareness and deter others.
- Bring criminal prosecutions of major infringers. The courts must impose stronger penalties against IP crimes to raise awareness and foster deterrence.
- Increase the number of specialized police groups that focus on Internet piracy and encourage aggressive actions against those distributing illegal content on the Internet.
- Significantly increase the number and level of sophistication of border controls and customs inspections, especially along the Brazil-Paraguay border.

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## PEOPLES' REPUBLIC OF CHINA

Nintendo recommends that China remain on the Priority Watch List and subject to Section 306 monitoring.

- China Continues To Be The Hub Of Production For Infringing *Nintendo* Video Game Products
- The Number Of Online Shopping Sites In China Selling Infringing *Nintendo* Products Is Increasing And Help Is Needed From The Government To Curtail The Growth Of These Illegal Marketplaces
- Internet Piracy is Increasing in China Thereby Adding Additional Enforcement Challenges for Rights holders

As it has been for over a decade, China is the hub of production for infringing *Nintendo* video game products, including circumvention devices. China is the leading worldwide exporter of these illicit goods. Customs services in 18 countries, including the U.S., across four continents seized nearly 84,000 infringing *Nintendo* video game products sourced from China in over 380 separate seizure actions in 2011.

Furthermore, the *Intellectual Property Rights: Fiscal Year 2011 Seizure Statistics Report* published by U.S. Customs and Border Protection's (CBP) Office of International Trade, states that 62% of all seized product in 2011 was sourced from China. In the U.S., seizures at the customs level increased 24% from 2010; and have increased 325% from a decade ago. Specifically, it is reported that of the Total Fiscal Year Domestic Value of seized goods totaled over USD\$178M, almost USD\$110,000,000 was seized from China (62%). Another trend noted in the report was the increase of smaller shipments direct to consumers within the U.S.

### **China Continued To Show Its Will And Ability to Enforce IP Rights By Continuing to Support Raids Against Individuals and Companies Assembling and Distributing Infringing Products In 2011**

Guangdong Province remains China's center for the manufacture and assembly of products that infringe Nintendo's intellectual property rights, especially Shenzhen and Guangzhou.

The cooperation of local enforcement branches plays a vital role in China when actions against infringers are warranted. Moreover, in order to fight against online infringement, high-technology investigations are needed which means greater joint efforts from both

Administration for Industry and Commerce (AIC) and Public Security Bureau (PSB) are necessary. With ever-increasing volumes of illegal products available on the Internet to worldwide consumers, along with the landscape change reported by U.S. CBP that more infringers are shipping directly to consumers in smaller sized packages, better cooperation and cross-training between local and federal law enforcement agencies is essential in curbing the accessibility of these infringing goods to the general public.

### **Recap of Criminal Cases Resolved and Brought in 2011**

On June 14, 2011, a joint raid was conducted targeting the retail booth and warehouse of a Taobao online seller. The action was initiated by 4 law enforcement offices in Shenzhen, including the newly-founded Shenzhen E-commerce office of MSA. Three people were arrested by the PSB during the action. It was the first time for Nintendo to cooperate with the local enforcement offices to act against an online seller in Shenzhen. The Taobao shop offered such low prices for counterfeit *Wii* game discs that the high volume of sales ranked the shop as a top seller. At the raid, 17,530 pieces of infringing *Nintendo* products were discovered, including 17,400 counterfeit *Wii* video game discs. In addition, 3 persons were arrested by the PSB.

Subsequently, sales records obtained from Taobao further proved that the owner of the shop engaged in rampant infringement. This shop has now been shut down and Shenzhen Bao'an Peoples Procuratorate are reviewing the case and preparing to prosecute based on copyright infringement. Nintendo is very encouraged by the contributions made by the new Shenzhen MSA E-commerce Department.

Furthermore, in a separate action, on June 15, Shenzhen General MSA initially inspected a Shenzhen manufacturer of game controllers and found 7,348 pieces of counterfeit *Wii* products, including *Wii Fit* Balance Boards, video game discs, and various other *Wii* accessories. Due to the high case value, Shenzhen General MSA showed their continued support by working with the PSB to further investigate this matter, resulting in the escalation of the case to a criminal prosecution.

### **Reluctance and Criminal Thresholds Thwart Prosecutions for Production of Circumvention Devices**

The two Shenzhen MSA cases cited above were the only two criminal cases brought to the PSB in 2011 involving counterfeit *Nintendo* video game software and various *Wii* accessories. Enforcement authorities in China remain reluctant to pursue criminal actions even for large cases, especially when it includes circumvention devices. For example, a registered factory was raided in Bao'an District, Shenzhen on September 7, 2011, with 3,200 game copiers seized. The case was not transferred for criminal action.

The decision on whether to bring criminal charges still appears arbitrary, and is certainly not transparent or based upon the significance of the commercial operation. The methodology used for placing a value on seized articles is seriously flawed and China's local Price Evaluation

Bureau (PEB) authorities should re-adjust how the value is determined for infringing items.

Imprisonment and stiff fines serve as strong deterrents to counterfeiters. Unfortunately, these remedies are not readily available in China. China must pursue infringers through criminal prosecutions in order to see a reduction in piracy.

Nintendo is pleased that China filed 2 criminal cases related to the manufacture, distribution and sale of counterfeit goods in 2011. However, the severity of the problem in China requires much more extensive use of criminal sanctions to serve as a real deterrent to criminal behavior.

### **Chinese Customs Needs to Improve Its Efforts In 2012 And Must Prevent Exportation Of Game Copiers And Other Infringing Products From China**

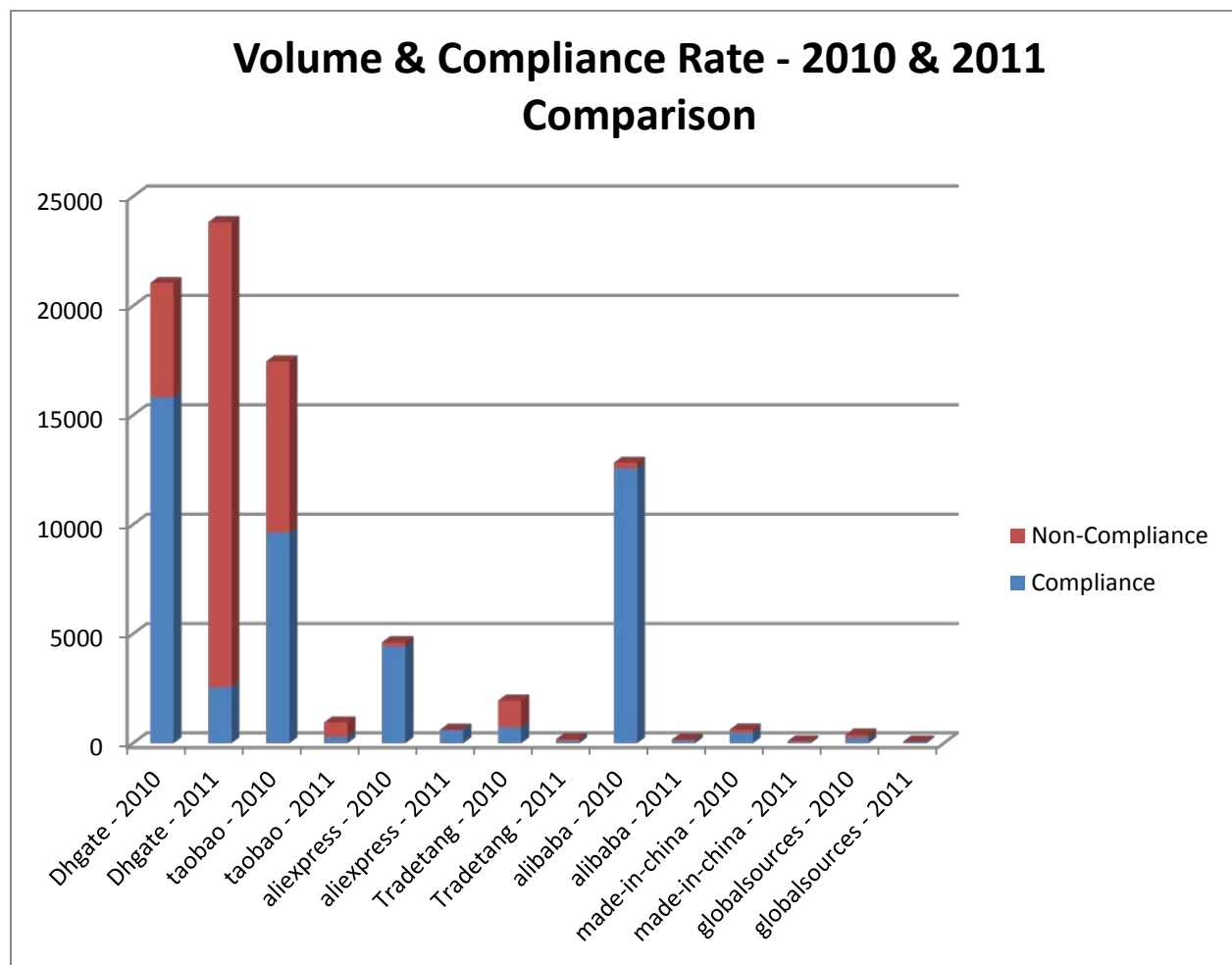
Nintendo needs more assistance from China Customs in 2012 to prevent infringing *Nintendo* goods from being exported abroad. During 2011, China Customs detained 31 shipments of suspected infringing *Nintendo* game products and seized over 4,266 products (down from 53 shipments and 7,797 products in 2010, despite significant training by Nintendo representatives in 2011).

However, no circumvention devices were seized at Customs. As millions of infringing products escape China Customs' inspection and are distributed around the world, more attention must be placed on shipments leaving the country. China Customs should make education and training of its customs agents a priority in 2012 in order to learn about identification of counterfeit products and illegal goods such as circumvention devices.

The central Chinese government should prioritize IP enforcement in Guangdong province to curb rampant counterfeiting and piracy problems in that region. The cities of Guangzhou and Shenzhen are both major economic hubs, and there are many other large industrial and manufacturing areas in the province. Additionally, with the close proximity of the province to Hong Kong, shipping of authentic – as well as counterfeit goods – is prolific. Greater attention must be given to this province, both for educating customs officers, as well as providing the resources required to handle the huge volumes of manufactured goods being exported from this region of the country. Infringers have access to Hong Kong by air, sea and pedestrian crossings. Furthermore, Shenzhen has one of the busiest ports in the world. Yet in 2011, of the 31 customs seizures only 2 cases originated in Shenzhen. Twenty one were from Guangzhou.

**The Number Of Online Shopping Sites In China Selling Infringing *Nintendo* Products Continues To Increase. Help Is Needed From The Government To Curtail The Rampant Sale of Infringing Products Via Online Marketplaces**

Online auctions, B2B (Business to Business) Exchange and trade boards (a.k.a. online shopping sites) have become the world’s fastest growing marketplace. Through these sites, consumers and merchants all over the world can easily connect to Chinese suppliers, manufacturers and distributors. Chinese sites have grown rapidly over the past year. Alibaba.com, Aliexpress.com, GlobalSources.com, Made-in-China.com, DHgate.com, Taobao.com and Tradetang.com are all auction sites and/or trade boards based in China which sell to consumers around the world. During the past twelve months, Nintendo sent nearly 26,000 takedown notices to Chinese based auction sites and trade boards just for the sale of circumvention devices.



The above chart shows the volume of takedown notices sent and compliance with said notices by eight online shopping sites based in China in 2011. Most sites complied with takedown notices. The noticeable exception is DHGate, but the high compliance rates of the other sites demonstrate that it is feasible for these sites to comply, and still grow their international customer base.

**Top 10 Countries Offering Game Copiers for Sale – 2011**  
(Source: MarkMonitor)

**Number of game copier listings found per month / per country via online marketplaces**

	Country	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec	Total
1	China	1171	506	1837	1134	1626	8357	542	994	1308	1717	5398	2800	27390
2	United States	1808	1339	2053	3379	3161	2124	1358	1667	859	1146	1017	953	20864
3	New Zealand	372	573	806	712	1214	1203	1062	950	668	568	721	692	9541
4	Brazil	311	287	375	423	307	608	602	581	344	464	415	1031	5748
5	Venezuela	425	251	259	300	182	414	838	553	625	386	240	584	5057
6	Spain	523	428	541	449	659	246	165	128	204	198	141	141	3823
7	Mexico	199	201	255	287	152	423	602	429	333	264	241	286	3672
8	Canada	311	173	228	321	384	292	181	201	116	151	190	152	2700
9	Netherlands	45	86	108	115	181	182	204	291	283	328	298	329	2450
10	Chile	118	83	147	125	107	162	94	128	89	140	97	115	1405

Some of the Chinese websites direct activities beyond China into foreign territories, thus, facilitating unlawful activities in other countries. We urge the Chinese Government to communicate to these online auction and shopping websites that it will not tolerate the sale and distribution of circumvention devices and other illegal products that harm legitimate rights holders. In particular, Nintendo believes a Chinese government crackdown on DHgate would spur the company to be more responsive to takedown notices. These online marketplace sites must proactively filter and prevent listings of circumvention devices and other infringing items and terminate the accounts of repeat infringers. Nintendo will certainly cooperate and assist any websites willing to do so.

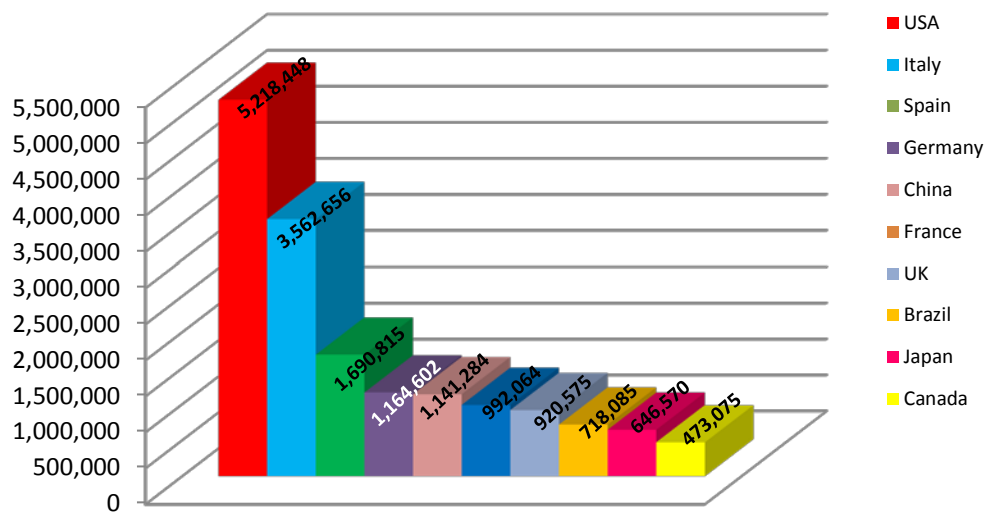
**Internet Piracy is Increasing in China Thereby Adding Additional IP Enforcement Challenges**

As discussed throughout this section, a huge challenge for Nintendo in China has been the manufacture, distribution and sale of circumvention devices that facilitate the downloading and play of illegal *Nintendo* games made available via the Internet. Coupled with the continued growth of Internet piracy, the challenges become all that much greater.

The chart below shows that China is identified as one of the top 10 infringing countries in the world for illegal P2P downloads.



**Illegal P2P Downloads of Nintendo Games January 1, 2011 to December 31, 2011 (source: Dtecnnet)**



Although China has the largest Internet population in the world with nearly half a billion active Internet users, it still does not register as having the largest amount of Internet piracy.

The United States shows 5,218,448 P2P Infringements in 2011. Reasons abound for why China's monitoring figures are so low, including:

- 1) Monitoring service has yet to fully grasp Chinese language in its monitoring
- 2) Internet censorship limits consumers access to pirated content
- 3) Personal computer ownership is low
- 4) Existing physical piracy/counterfeiting culture remains high in China

Below are additional facts that lead Nintendo to believe that, despite the reports by Nintendo's monitoring service, the Internet piracy problem in China is still significant.

First, as shown in the chart below, the top 10 file-sharing portals are all Chinese language websites, hosted in China.

Rank	Site	Lang	Host	Type	Alexa details CN		Google details CN	
					Rank	%	Users	Reach
source: Envisional (2011)								
1	gougou.com	CN	CN	BitTorrent / Xunlei links	124	89.4	20,000,000	5.90%
2	verycd.com	CN	CN	eDonkey links	92	89.3	12,000,000	3.60%
3	duowan.com	CN	CN	Cyberlinker	90	92.3	15,000,000	4.40%
4	tgbus.com	CN	CN	BitTorrent portal	216	82.5	4,200,000	1.20%
5	ali213.net	CN	CN	Cyberlinker	394	85.2	760,000	0.20%
6	qq.com	CN	CN	Web portal: cyberlocker links	2	94.7	250,000,000	74.80%
7	sina.com.cn	CN	CN	Web portal: cyberlocker links	3	93.7	150,000,000	46.50%
8	zol.com.cn	CN	CN	Web portal: cyberlocker links	31	94.6	31,000,000	9.40%
9	pchome.net	CN	CN	Cyberlinker, bittorrent, Xunlei	80	89.8	6,700,000	2.00%
10	bbs.uuu9.com	CN	CN	Web portal: cyberlocker links	146	88.3	570,000	0.20%

Other countries having varying degrees of preference for native-language websites as is evidenced throughout this report, but China in particular of any country worldwide most prefers to have native-language websites (for purposes of internet piracy.)

The second reason, which also helps drive Chinese users to native-language websites, is that Chinese users' internet access is censored by the Chinese government. The Great Firewall of China prevents access to many major English-language file-sharing portals, including sites such as ThePirateBay.org and Isohunt.com. As such, BitTorrent piracy levels are lower in China compared to other countries.

The third reason is that Chinese users simply do not own personal computers to the same degree as U.S. users. In the US, there are over 150 million PCs for a population of over 300

million. In China, there are only approximately 16 million PCs for a population of 1.3 billion. The majority of Chinese Internet users access the Internet by renting time on a personal computer at a café or other public space. They will not be able to store data on the hard drive of the PC that they are using. Instead, it is easier to access websites that provide accounts with cloud network storage to hold any pirated content they may be downloading. This is a major reason why portals such as qq.com are so popular, as they provide “one-stop shopping” for Chinese Internet users looking to download pirated content.

The fourth and final reason is that Internet piracy use is slightly depressed by the culture of counterfeiting and physical piracy that has existed in China over the past decade. Compared to the US, where physical piracy and counterfeiting is limited to certain metropolitan areas, China maintains high levels of counterfeiting despite years of crackdowns by Chinese law enforcement. When users have the ability to purchase the physical version of the content they are looking to acquire, they may not have a need for an electronic copy.

Therefore, although the raw piracy numbers are lower than the U.S., they are still remarkably high for the country given the circumstances outlined above.

### **Recommendations**

Following are suggested steps which Nintendo believes could improve IP protection in China:

- Administrative authorities should issue stiffer penalties in an effort to curtail the production and distribution of illegal products.
- The methodology used for placing a value on seized articles is seriously flawed and China’s local Price Evaluation Bureau (PEB) authorities should re-adjust how the value is determined for counterfeit items. To avoid punishment, many counterfeiters are sophisticated enough to keep inventory levels below the criminal threshold and do not retain sales records. Instead, they keep component parts on hand and then ship finished products immediately after the infringing products are assembled. To overcome this loophole, the method of valuation must include the value of all finished and partially assembled products and infringing component parts. These components often present the best evidence as to the scale of the illegal operation.
- Online marketplace websites must proactively monitor and remove listings of circumvention devices and terminate repeat infringer accounts. Also, reporting an IP violation should be made easier. Our current experience with some online marketplace websites (e.g., [www.taobao.com](http://www.taobao.com)) is that their systems for reporting an IP violation are unnecessarily complicated; a large percentage of online submissions of IP violations are rejected, and often the websites repeatedly ask IP owners to provide more and more information, delaying the actions against the infringers. Furthermore, some China-based sites require foreign rights holders to obtain Chinese trademark registrations for the marks they wish to enforce. These sites will not comply with takedown notices unless the products infringe a registered Chinese trademark. Another recent development with

Taobao, specifically, was their proposal that Nintendo work with a third-party vendor to review all takedown notices. The vendor would essentially confirm that actual rights have been violated before Taobao will remove the infringing post. These two additional requirements place exceptional burdens on the rights holders, both financially and on already stretched resources.

- Chinese Customs has weak inspection procedures and needs additional resources devoted to pursuing intellectual property crimes. Customs must develop the means to deal effectively with false documentation of shipments which makes tracking down criminals virtually impossible. Inspectors must continually be trained on how to identify infringing goods. Further, Customs needs to be better integrated into China's administrative and criminal justice systems so significant penalties can be imposed (such as suspension of the counterfeiter's foreign trading license). When Customs orders products destroyed, it must not rely on the infringer to do so. Clear procedures must be implemented to allow cases to be easily transferred to the criminal authorities for prosecution.
- China's central government should be made aware that local PSB offices need additional resources and funding to investigate intellectual property crimes. Continued education is needed to train the PSB and the prosecutors on evidence collection, in particular for IP crimes committed through the Internet.
- China must prioritize the IP enforcement actions in Guangdong province to curb rampant counterfeit or piracy issues there.
- China must continue to educate its judicial and enforcement personnel as well as the general public that piracy is a serious crime. The Government should also continue to conduct its campaigns to urge consumers to buy legitimate products and report piracy to local enforcement authorities.

\* \* \* \* \*

## MEXICO

Nintendo recommends that Mexico remain on the Watch List.

- The Mexican Government Has Existing Tools To Reduce Piracy But Has Failed To Use Them
- IP Enforcement Must Be A Priority As Shown Through Prosecutions And Sentences With A Deterrent Effect
- Only 2 Criminal Raids In 2011 Due To Delays And Changes In Government Agencies Contributed To Increased Levels of Piracy For Nintendo Video Game Products
- Solutions Are Needed to Address the Growing Internet Piracy Problems and Increased Demand For Circumvention Devices Through Online Retailers
- Mexican Industrial Property Institute (IMPI) Should Improve Itself Soon Now That the Mexican IP Law Has Been Enacted to Further Empower IMPI's Enforcement Authority

Mexico is one of Nintendo's largest markets in Latin America but high piracy rates greatly undercut Nintendo's ability to market and distribute authentic products in the country. Decreasing the number of counterfeit *Nintendo* video game products available in Mexico remains a significant challenge. Piracy remains socially acceptable by citizens throughout the country and is becoming more sophisticated with online software distribution and readily available circumvention services. While pirated products continue to saturate the Mexican market, significant obstacles to enforcement remain in the Mexican system.

### **The Mexican Government Has Existing Tools To Reduce Piracy But Has Failed To Use Them**

For decades, the Mexican Government has allowed the visible sale of infringing products, such as counterfeit *Nintendo* video game products, through informal markets. Despite 2 successful police raids which took place against notorious markets in Mexico City in 2011, the majority of enforcement in 2011 was stalled due to internal changes within agencies.

The Mexican Government must support future enforcement actions in 2012 with a zero tolerance policy in order to see any measurable results against video game piracy. With Mexico's existing tools much can already be done by increasing cooperation with enforcement officials, using newly enacted legislation on registration of trademarks with customs, taking advantage of the interest shown by the Specialized IP Unit, increasing ex-officio prosecutions,

and applying the increased penalties against piracy for commercial gain in the improved Criminal Code. When the Government holds markets and vendors selling counterfeit goods accountable, it sends a message to consumers that purchasing these illegal goods is not acceptable and there will be consequences in supporting the pirate trade in Mexico. Added pressure from the Mexican Government will help create public awareness that piracy is a serious crime.

### **Anti-Piracy Actions By The Criminal Authorities Were Deficient In 2011 Due To Changes In Government Agencies, Lack of Resources And No Defined Priorities**

The Attorney General's Office (PGR) is responsible for federal criminal enforcement and is the only body that has the authority and ability to carry out large-scale operations against organized criminal activity; however, obstacles still arise when attempting to gain the support of PGR and initiate criminal complaints against illegal vendors. Problem vendors will continue to repeat infringing sales unless the crimes can be followed by prosecutions and source investigations.

And despite the above mentioned criminal raids in 2011, levels of piracy for both *Nintendo DS* and *Wii* video game products remain high. Marketplaces such as Tepito will continue to be venues known for their ability to not only store and distribute, but also produce high volumes of counterfeit products unless problem vendors can be shut down permanently and punished for their crimes.

In April 2011, a new Attorney General was appointed and extensive changes are being made within PGR. Efforts to restructure PGR and to purge prosecutors deemed to be either corrupt or incompetent have created a great deal of instability throughout PGR, including the IP Enforcement Unit. A number of prosecutors were dismissed or resigned in 2011. While Nintendo views changes to improve PGR as a positive step, there has been an inability to procure any meaningful enforcement actions against game piracy targets.

While changes in government agencies are sometimes necessary, there must be a consistent way for agencies to handle criminal cases. More indictments and convictions need to be demanded by the authorities and followed through by the judiciary.

One of Mexico's priorities for 2012 should be greater support for the training of its officials. Judges in criminal cases need additional training in order to be better prepared in IP cases, especially with the increasingly technical aspects of piracy cases involving Internet crimes or circumvention devices.

Mexico still has the most notorious physical markets in Latin America. The Tepito, Pericoapa and Meave markets have been selling illicit products for decades, with no end in sight. Real change would mean a commitment by the government to provide resources to ensure these markets are permanently closed down if offering counterfeit goods, holding market owners accountable for the booths that are being leased to engage in illicit activities, gaining government support to aggressively prosecute IP crimes, and finding other creative strategies

to stop the distribution of pirated *Nintendo* video game products and other counterfeit goods. Another critical component that is missing is the ability to pursue major suppliers, repeat offenders and distributors of counterfeit products in order to cut off the supply network.

**The Mexican Government Must Recognize A Shift of Video Game Piracy in Mexico From Hard Goods to Internet Piracy Facilitated Through the Use of Circumvention Devices**

The Mexican Government and criminal authorities must recognize and respond to the shift of video game piracy in Mexico from hard goods to Internet piracy. Certainly the mass availability of circumvention devices, such as game copying devices and modification of *Nintendo* video game consoles, reflects the growth of Internet piracy in the country. There were 14 seizures totaling over 2,500 game copiers in 2011. Even with the continued seizure of several small shipments of game copying devices in 2011, it is apparent that methods are being altered by counterfeiters in order to avoid detection and evade potential IP infringement claims based on application of Mexican laws.

Key legislative reform is needed for effective enforcement against circumvention devices. Legislation is needed to establish criminal sanctions for the distribution or trafficking in devices used for the circumvention of technological protection measures (TPMs). Without adoption of this legislation, there will continue to be questions on whether effective legal remedies exist to prevent this form of piracy in Mexico. Effective laws must be implemented or pirates will continue to find loopholes and rely on weaknesses in current laws in order to support their rapidly growing trade of circumvention devices.

**Continuing Trend: Internet Piracy** is rising in Mexico, especially the sale of circumvention devices through online auction sites. Nintendo's online monitoring service ranks Mexico in the top 10 of those countries offering game copiers on auction sites / trade boards.

Below are two photos from the Computer and Videogame Bazaar in Mexico City taken in October 2011. The illegal sale of software in almost all locales is noticeable. The sellers communicate with other locals and/or suppliers via personal radio. They can order any title, console or accessory that the customer requires and deliver the products quickly and efficiently.

Several signs prominently displayed throughout the market advertise illegal products and services. One sign in a photo below is offering to hack / install mod chips for *Wii*, *Xbox* and *PSP*, and the other sign says “We have over 400 titles that are available for download and copy.”

According to Nintendo’s local distributor, the average retail price for a “R4” game copier is approximately 290 pesos (approx. \$21.50) with the common sale practice to include 400 games downloaded on memory cards.



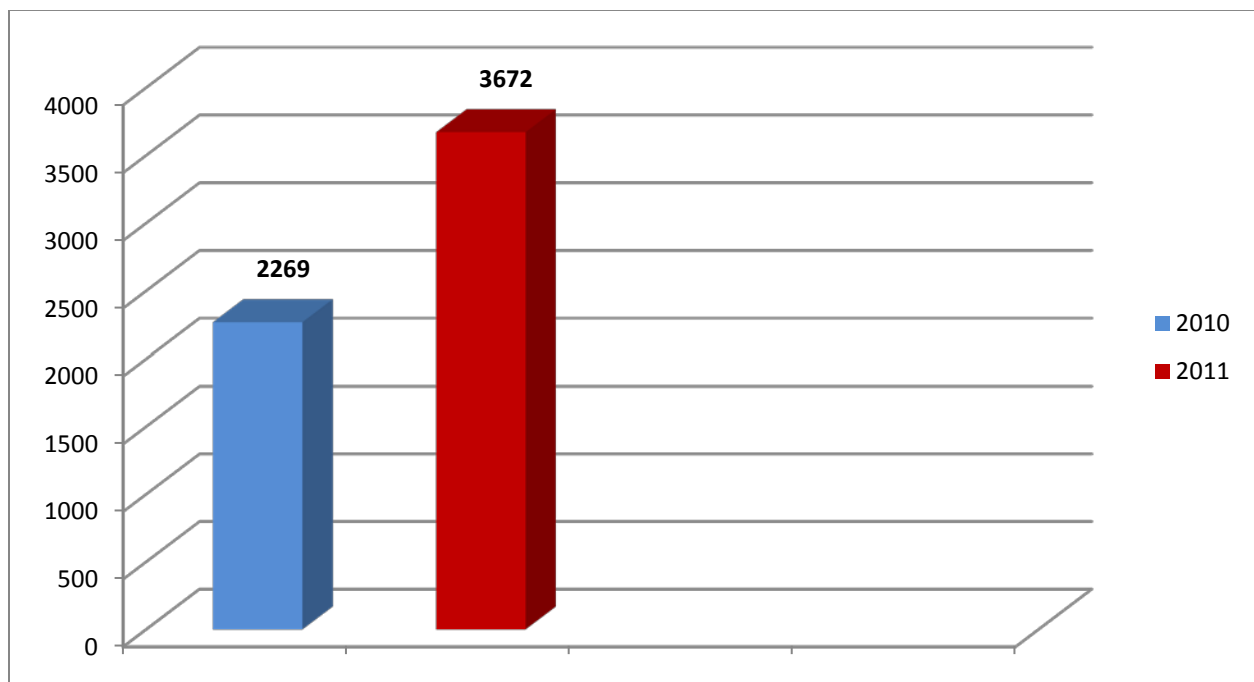


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10	Chile	118	83	147	125	107	162	94	128	89	140	97	115	1405

**Number of Listings of Game Copiers on Mercado Libre - Mexico**



The number of listings increased by 61% in 2011 showing an increasing demand for game copiers by Mexican consumers despite good compliance by Mercado Libre. The ease of access and availability for purchasing circumvention devices continues to make online marketplaces an attractive resource for consumers.

### **Nintendo Continues To Experience Good Results By the Mexican Customs Service In 2011**

Nintendo is pleased with the positive steps taken by the Mexican Customs Service in 2011. Mexican Customs supported 28 separate seizures in 2011. Nintendo appreciates the efforts of Mexican Customs to stop these products, especially when some of the circumvention devices required additional testing given that the products were not fully assembled or were shipped without labels to avoid detection.

Nintendo is also pleased with the continued willingness of Mexican Customs to participate in training and awareness sessions related to video game piracy in 2011. Several challenges, however, remain at the customs level. Customs laws should be amended in order to grant Customs officials the *ex officio* authority to stop shipments suspected of IP violations. Customs personnel today inspect imported goods with the pretext of checking dubious importation and tax issues. When notified of a potential violation, IP holders have little time to verify the counterfeit status of the merchandise and are required to coordinate burdensome paperwork in order to obtain an official order to stop the shipment. The order can only be issued by the Mexican Institute of Industrial Property (IMPI) or the PGR. Mexican Customs must be authorized to handle these matters on a regular basis since infringing shipments are imported into the Mexican territory at all times throughout the year.

Also, it is necessary for customs to comply with its international commitments by stopping illegal goods in transit to other countries. If suspected illegal goods destined for other countries are not detained, counterfeiters will use Mexico and its customs as a link for transshipment (similar to Paraguay) resulting in the softening of border controls.

A proposal for amending Mexican Customs Law has been in the Congress for almost two years and is expected to be adopted in 2012. The main purpose of these modifications is to implement a recordation system permitting IP owners to register their rights with Customs which would enable Customs to better coordinate inspections of imported goods. Additionally, the amendment would give Mexican Customs officials the power to stop a shipment suspected of IP violations. A successful recordation system would result in a more efficient process to deter the importation of counterfeits into Mexican territory.

Customs brokers should be investigated and held accountable for their role in safeguarding pirates. Right now, true infringers and illegal importers can hide their identities behind false companies or customs brokers without a trace. Authorities must find a strategy to link brokers with pirates as another mechanism to control counterfeiting.

## **Mexican Industrial Property Institute (IMPI) Should Improve Itself Soon Now That the Mexican IP Law Has Been Enacted to Further Empower Their Enforcement Authority**

There have been recent changes in IMPI that have generated, in general terms, a better understanding between the rights holders of intellectual property rights and the governmental authorities in charge of their protection.

The most significant change is positive news of the enactment of the Mexican IP law in December 2011 to enhance IMPI's authority, further empowering IMPI in their enforcement actions against counterfeiters. The amendments also provide for increased penalties for violations.

The appointment of the new General Director of IMPI shows a serious commitment to fight counterfeiting and piracy, as does the appointment of the new Divisional Director of Intellectual Property Protection. These changes, together with better communication with the right holder and their representatives should help to improve the practices and mechanisms of fighting piracy and counterfeiting.

According to the IMPI website: "IMPI aims to protect industrial property rights and to promote and disseminate the benefits the IP system offers to support the inventive and trade activities of our country, fostering the creation and development of new technologies for the benefit of society as a whole." Nintendo endorses these goals and hopes that IMPI will quickly use its new authority for more efficient enforcement. One important measure that has to be taken in order to improve IMPI's enforcement of intellectual property is to create easier and faster means to organize raids against intellectual property rights infringers.

## **Mexico Should Sign and Implement ACTA**

The long-awaited signing ceremony of the Anti-Counterfeiting Trade Agreement (ACTA) was held on October 1, 2011 in Tokyo, hosted by the Government of Japan. Signatories included Australia, Canada, Japan, Korea, Morocco, New Zealand, Singapore and the United States.

Mexico did not sign ACTA. This position should be reconsidered and Mexico's commitment to the promotion of IP enforcement and protection should be carried out through its signature on ACTA in 2012.

## **IP Education Efforts in Mexico**

In 2011, the video games trade association, Entertainment Software Association (ESA), extended its Mexico IP Education Campaign that proved to be so successful in 2010. The Mexican Department of Education is helping the industry too by supporting a new promotion by distributing over 7,000 posters highlighting a video contest to schools across Mexico City. Winners will be featured on a popular children's TV program in early 2012. Nintendo views education and consumer awareness as a critical element in changing the attitudes of citizens who continue to view piracy as socially acceptable. Nintendo is encouraged by the Mexican

Government support of this industry education campaign and remains hopeful that the campaign will yield positive results in 2012, and beyond.

### **Recommendations**

Following are suggested steps to improve IP protection in Mexico:

- The Mexican Government must continue with its actions to shut down illegal vendors of counterfeit goods in open markets, and Mexican courts and prosecutors must place more priority on IP cases, following up on indictments and seeking convictions to create deterrence.
- Explicit legislation should be enacted making it clear it is a criminal offense in Mexico to circumvent technological protection measures as required under the WIPO treaties, including legislation to impose sanctions for distribution/trafficking of devices which circumvent technical protection measures.
- With recent changes to the Mexican IP law, IMPI now has greater authority and resources to combat piracy and effectively enforce IP rights. It will be important for IMPI to use its new authority to conduct rapid investigations with more effective enforcement and stronger results.
- Customs must be granted *ex officio* authority and receive additional resources and independence (from IMPI and PGR) to improve effectiveness in seizing counterfeit goods and components. Procedures must be developed to address the shift to imports of smaller but more frequent shipments and also effectively deal with importers falsifying shipping documents and hiding behind customs brokers.
- All law enforcement authorities and judges dealing with intellectual property matters should regularly attend courses to improve their knowledge of IP laws and effective enforcement procedures.

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## SPAIN

Nintendo recommends Spain remain on the Watch List with an out-of-cycle review (OCR) to be conducted later this year.

- The Spanish Popular Government Must Continue To Take Steps to Address Internet Piracy And We Are Pleased With The Passage of the Ley Sinde Law and Regulations
- Prosecutions Relating To Copyright Infringements Committed Through the Internet Remain Challenging
- Perception of Legality Of Circumvention Devices and File Sharing Must Be Altered
- Spain Has Become a Haven For E-commerce Sellers of Circumvention Devices Who Sell to the Local and Global Markets
- Spanish Criminal Prosecutions Against Distributors of Circumvention Devices May Begin To Change Public Perception
- Deterrent Sentences Are Needed To Decrease the Widespread Availability Of Circumvention Devices In Spain
- 2011 Saw Some Significant Efforts by Spanish Authorities -- Both Police and Customs -- to Crack Down on Distribution of Circumvention Devices

Spain remains one of the leaders in the sale and distribution of circumvention devices<sup>3</sup> and for illegal downloads of video games from the Internet. The Spanish Government has moved slowly to confront Internet piracy. Legislation to improve the piracy landscape in Spain was finally introduced to the Spanish Parliament in late 2010. On March 5<sup>th</sup> 2011, the Internet anti-piracy provisions of the Sustainable Economy Bill (SEB) became law. However, the new law required the Government to approve implementing Regulations before the law became fully effective. While it was unlikely the Council of Ministers would pass the Regulations before the end of the

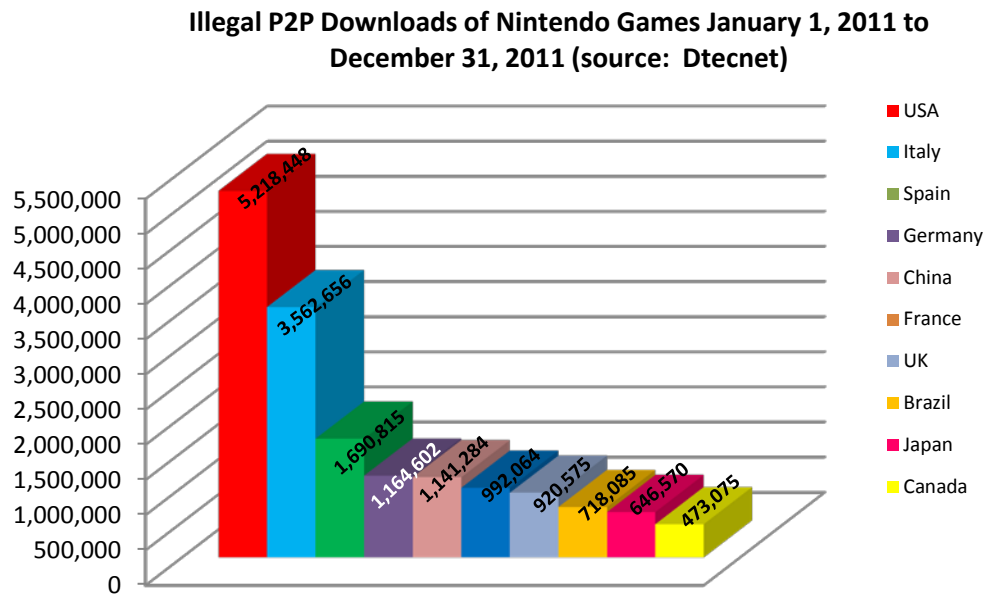
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<sup>3</sup> There are many different types of circumvention devices with the most well-known version being the R4 which is used to circumvent the security in the *Nintendo DS* family of consoles and games to allow users to play pirate copies of games. Other versions include but are not limited to M3i zero, AceKard, EZ Flash. Although these devices may be called different names, they all work the same way to breach technological protection measures.

year, on December 30th, the new Popular Government approved the implementing Regulations. Nintendo is grateful that this decisive action was taken.

### The Spanish Government Must Continue To Address Internet Piracy In 2012 Through The New Law And Implementing Regulations

The Internet is the main channel for distribution of illegal *Nintendo* video games and circumvention devices in Spain. As described in the previous section, the Spanish Government passed new legislation to help reduce Internet piracy.



Peer-to-Peer (P2P) Piracy - Despite the rise in popularity in the use of cyberlockers and cyberlocker linking sites, many Internet users in Spain are still uploading and downloading unauthorized *Nintendo* game files through P2P networks. The most popular P2P protocols for Spanish Internet users are eDonkey and BitTorrent. The chart above shows the top 10 countries for P2P downloads. Despite a massive Internet user population difference (95.3 million US/5.3 million Spain<sup>4</sup>), Spain accumulates one-third the volume of P2P piracy as compared to the US.

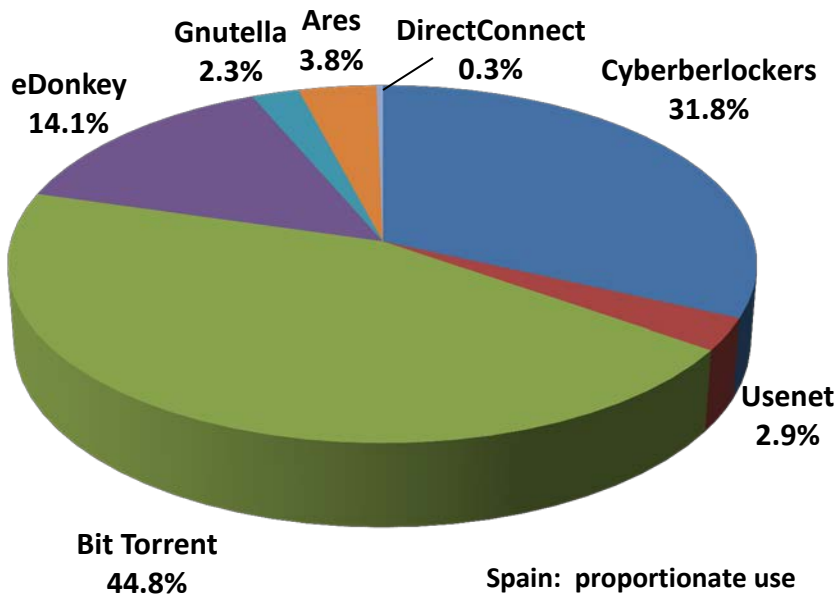
Users may access pirated files through P2P portal sites which index links to unauthorized content that is being shared by other P2P users. In the same way that cyberlocker linking sites play a crucial role in guiding Internet users to copies of pirate files stored on cyberlocker sites, so too the P2P portal sites enable illegal file sharing by listing many links on their sites that direct users to other P2P users that have a copy of the pirate file. These P2P portal sites are

<sup>4</sup> <http://www.internetworldstats.com/top20.htm>

very professional in the way that they organize their sites and index links to the pirated content, and with it they make significant advertising revenue by attracting users to their sites.

While the problem of peer-to-peer (P2P) file sharing of illegal *Nintendo* video games is still massive in Spain, multiple factors prevent Nintendo from enforcing its IP rights over P2P networks. The chart below illustrates the majority (nearly two-thirds) proportion of Internet piracy in Spain as P2P.

The question then becomes what can and will the government do to help rights holders reduce online piracy in Spain. The problem of illegal video games downloaded in Spain coming from foreign-based cyberlockers and accessed through Spanish linking sites is growing. **For Spain's new law and regs to be successful they should address illegal content and links hosted on foreign servers.**



Spain: proportionate use of different piracy arenas

source: Envisional

<u>P2P Portal Site</u>	<u>Domain Registrar</u>	<u>Domain Registrar Country</u>
elitetorrent.net	ENOM, INC.	United States (Kirkland, WA)
gamestorrents.com	ENOM, INC.	United States (Kirkland, WA)
divxatope.com	INTERNET.BS CORP.	Bahamas
tomadivx.org	ENOM, INC.	United States (Kirkland, WA)
newpct.com	ENOM, INC.	United States (Kirkland, WA)
lokotorrents.com	GODADDY.COM, LLC	United States (Scottsdale, AZ)
mejortorrent.com	MONIKER ONLINE SERVICES, INC.	United States (Pompano Beach, FL)
contorrent.com	PUBLICDOMAINREGISTRY.COM	Australia
torrentspain.com	ENOM, INC.	United States (Kirkland, WA)
conemule.com	PUBLICDOMAINREGISTRY.COM	Australia

The chart above shows the Top 10 most popular Spanish-language P2P Portal Sites. Not a single site is registered in Spain, illustrating the separation between the content and the users trying to access that content.

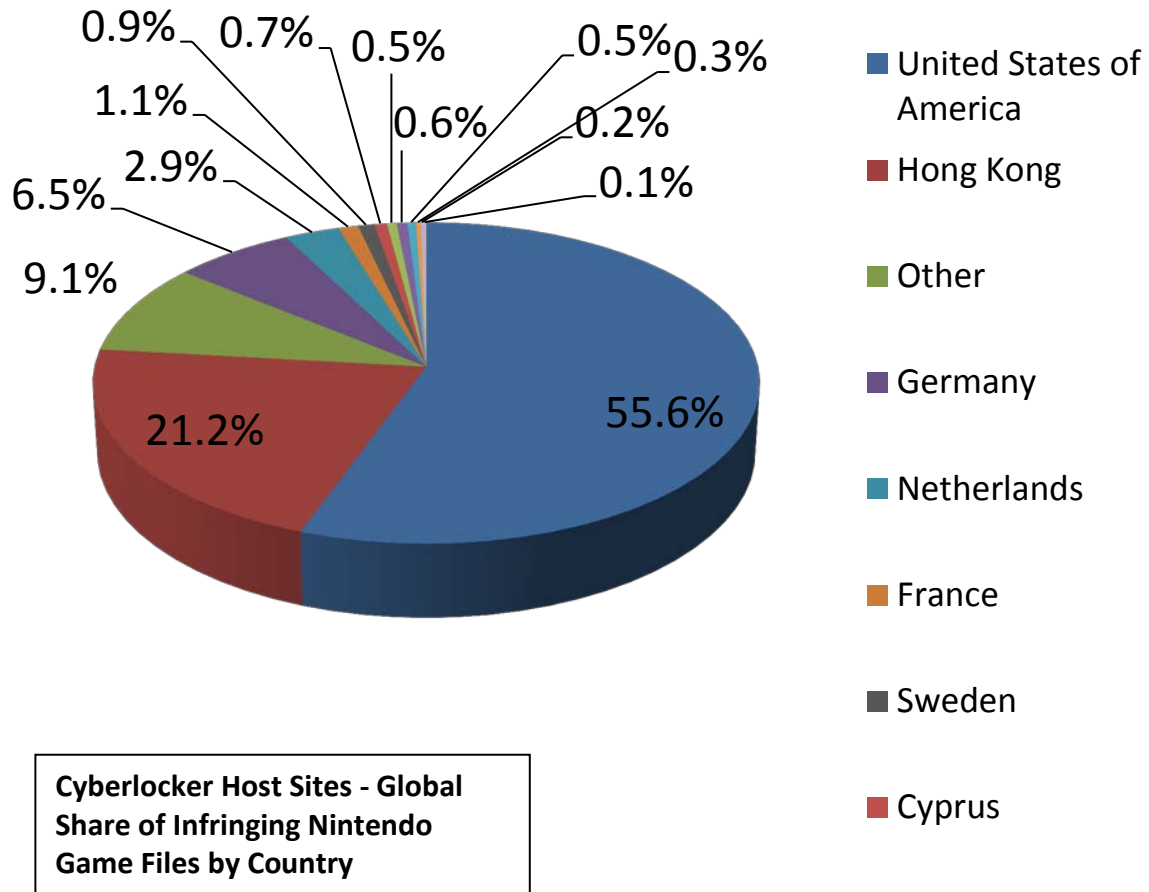
The escalating Internet piracy situation has reached staggering proportions and Nintendo is looking to the Spanish Government for leadership. All of the evidence of IP violations occurring over Spanish transmissions is available and indisputable. Intellectual property right owners, like Nintendo, must have an effective mechanism to enforce their rights when infringed online.

An important factor in understanding Internet piracy in Spain is the growth of two types of Internet piracy – cyberlockers and cyberlocker linking sites (a.k.a. “cyberlinkers”) -- which together make illegal material more accessible to Spanish consumers.

**Cyberlocker Piracy** - Cyberlockers (also known as 1-click hosts) are web sites where illegal *Nintendo* game files are uploaded on servers which are operated by cyberlocker companies. When users upload a file to a cyberlocker, they are provided with a link to where the file is stored on the cyberlocker’s servers. The uploading users can then post the links to one or more cyberlinkers and then other Internet users can access the uploaded file through the link.

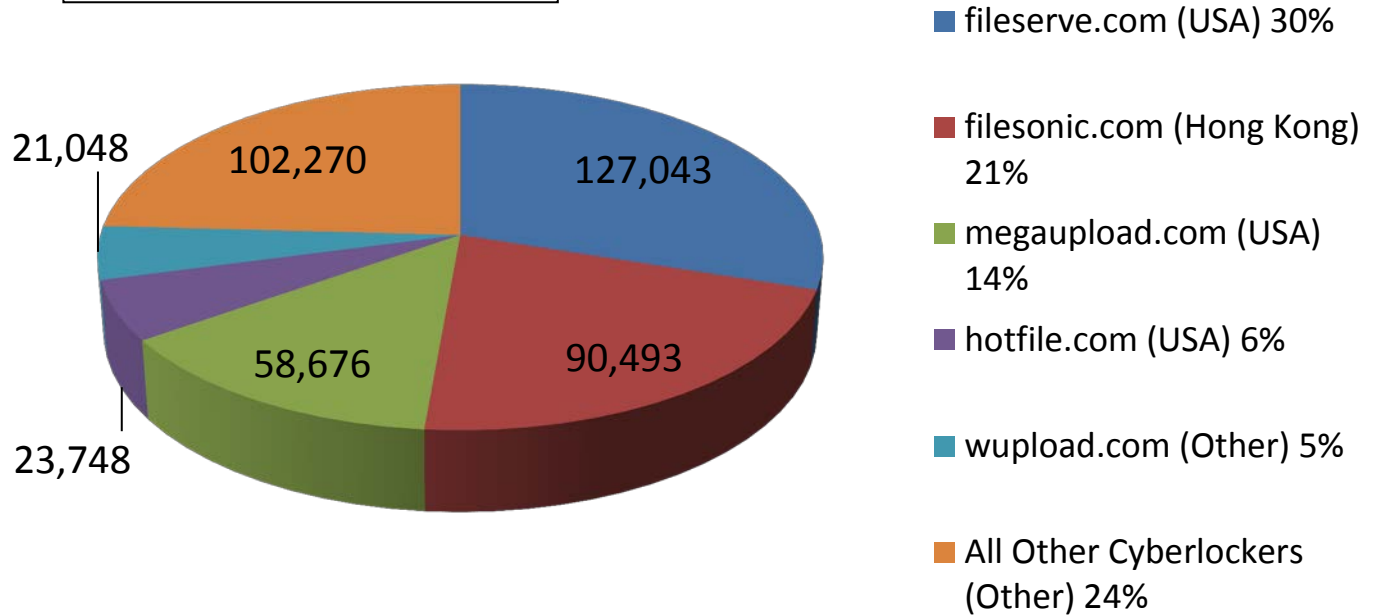
**Cyberlocker Host Sites - Global Share of Infringing Nintendo Game Files by Country** – The chart below shows that the majority of Nintendo game files that Spanish users are trying to download are not physically hosted in Spain, but rather in foreign countries. This means that for nearly the entire volume of piracy on cyberlocker host sites, Spanish Internet users are connecting to foreign websites/IP addresses.





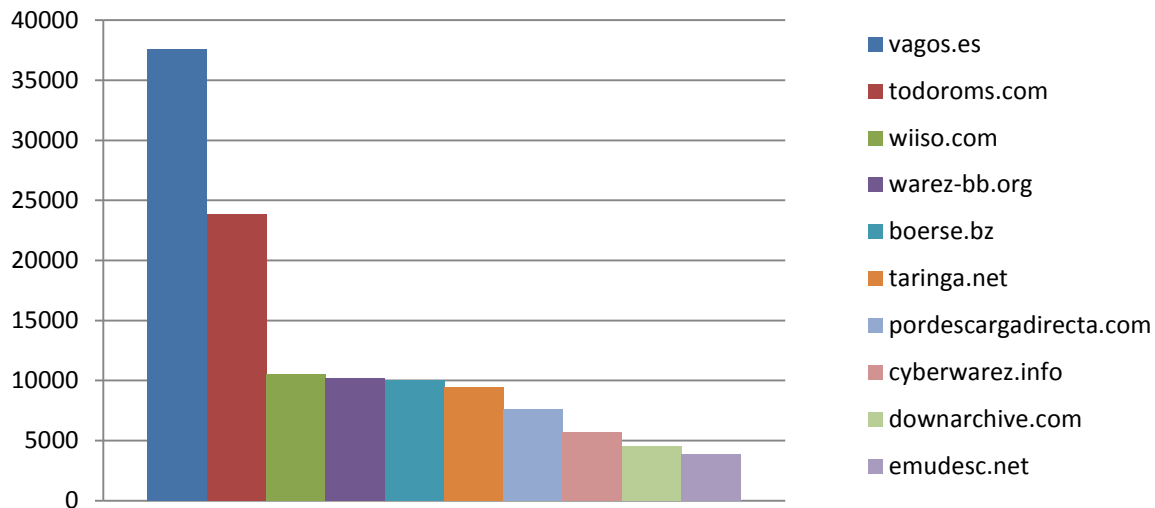
**Cyberlocker Host Sites: Share of Infringing Nintendo Game Files by Website** – The chart below shows that over half of the content on cyberlockers in the world is hosted in the US, and at minimum over 70% is not hosted in Spain. It also further illustrates just how effective site-blocking legislation could be, as the majority of infringing *Nintendo* game files hosted on cyberlockers are based on a handful of key URLs. Blocking access to these domains would greatly reduce cyberlocker piracy.

**Cyberlocker Host Sites: Share of Infringing Nintendo Game Files by Website**



**Top 10 Cyberlinker Sites (Global) – Hosting Details** – The charts and spreadsheets below further illustrate the foreign hosting trend for Spanish Internet user piracy. The chart “Top Link Sites,” shows the world's top 10 cyberlinkers by volume of pirated *Nintendo* game files. Of the top 10, only 1 cyberlinker site is hosted in Spain (#7 pordescargadirecta.com, as shown in the spreadsheet below). Continuing the trends observed in Charts 1 and 2, it is easy to see how very little of the infringing content is physically hosted in the country. Furthermore, it shows that Spanish users greatly prefer Spanish language sites.

Top Linking sites January 1, 2011 - January 31, 2011 (source: DtecNet)



<u>CYBERLINKER WEBSITE</u>	<u>HOST ISP</u>	<u>HOST COUNTRY</u>
vagos.es	LeaseWeb B.V.	Netherlands
todoroms.com	OVH SAS	United Kingdom
wiiso.com	intergenia AG	Germany
warez-bb.org	IQHost Ltd.	Russia
boerse.bz	Zen Network Technologies	United Kingdom
taringa.net	LeaseWeb USA	United States
pordescargadirecta.com	Comvive Servidores S.L.	Spain
cyberwarez.info	Fast Internet Web & Server Hosting	Czech Republic
downarchive.com	Fast Internet Web & Server Hosting	Czech Republic
emudesc.net	OVH SAS	United Kingdom

### **Prosecutions of Copyright Infringements Committed Through the Internet Remain Challenging**

Prosecutions of copyright infringements committed through the Internet remain practically impossible in Spain. Civil judges' investigative powers are not broad enough to demand that ISPs provide the personal information necessary for identifying potential infringers. Even if the information could be released, identification requirements for the owner of a website are not enforced by the Spanish Administration. Moreover, the Circular 1/2006 from the Public Prosecutor's Office also excluded illegal activity related to copyright infringement from criminal remedies making it extremely difficult for right holders to defend their rights online.

### **Circumvention Devices Remain Widely Available In Spain**

Particularly worrisome is the growth in the Spanish market for circumvention devices (particularly what are commonly called "game copiers" or "linkers" (e.g. R4 cards) in 2011. The availability of these devices moved from a niche audience in 2008 distributed in small businesses and offered on individual web pages, to large formal retail and certain major electronic product chain stores all over Spain in 2009. Police action in 2009 - 2011 against major retailers, along with Nintendo's proactive communications with its major retailers has fortunately reduced availability in nationwide electronics chain stores.

As Nintendo has obtained more and more positive court decisions against game copier sellers in other EU Member States (e.g. France, Germany, Italy, UK, Belgium and the Netherlands), Nintendo has identified an increase in the number of e-commerce sites selling game copiers operating from Spain. This has occurred to such an extent that Spain has become one of the top havens for sellers of game copiers.

Seven of the top ten game copier e-commerce sites in Europe mainly sell in Spain and are hosted in Spain (as shown by the spreadsheet below). These sites not only serve Spanish customers but also will deliver into most EU Member States and beyond (including shipping to the US). Two of these e-commerce sites, chipspain.com and ylos.com, rank 9<sup>th</sup> and 10<sup>th</sup> globally for game copiers.

Domain	Selling Country	ISP Hosting Country	Est. Visitors	Language	ISP Name
<a href="http://opirata.com">opirata.com</a>	England	United States	20,300	English	CariNet
<a href="http://chipspain.com">chipspain.com</a>	Spain	Spain	16,800	Multiple	acens Technologies, S.A
<a href="http://ylos.com">ylos.com</a>	Spain	Spain	15,800	Spanish	Telefonica de Espana
<a href="http://discoazul.com">discoazul.com</a>	Spain	Spain	15,700	Multiple	Ovh Systems
<a href="http://e-nuc.com">e-nuc.com</a>	Spain	Spain	7,900	Multiple	Ran Networks S.L.
<a href="http://todoconsolas.com">todoconsolas.com</a>	Spain	Spain	7,600	Spanish	R cable y telecomunicaciones
<a href="http://biedmeer.nl">biedmeer.nl</a>	Netherlands	Netherlands	7,100	Dutch	Oxilion B.V.
<a href="http://microcubo.com">microcubo.com</a>	Spain	Spain	6,700	Spanish	Ovh Systems
<a href="http://incopia2.com">incopia2.com</a>	Spain	Spain	6,600	Spanish	Axarnet Comunicaciones SL
<a href="http://hardstore.com">hardstore.com</a>	Italy	Sweden	5,800	English	DCS Networks AB

Under a decision in February 2011 from a criminal court of Palma de Mallorca, which followed a similar one from Palma as well in September 2010, game copiers were found to infringe Nintendo's copyrights, as well as violate anti-circumvention laws. However, with laws virtually untested, a slow-moving court system, and judges and prosecutors de-sensitized to the seriousness of intellectual property violations, Nintendo faces difficult challenges in its efforts to curb the availability of circumvention devices in Spain and hold those distributing them accountable.

### **Recommendations**

Following are suggested steps which could improve IP protection in Spain:

- Since so many illegal video games are downloaded in Spain from foreign-based cyberlockers, and accessed through cyberlocker and P2P linking sites hosted outside Spain, the Ley Sinde law and its implementing Regulations must address this by authorizing the blocking of linking sites. This should make a huge impact in reducing Internet piracy in Spain.
- Measures and standards must be adopted so that not only websites providing access to illegally obtained/released content are effectively prosecuted, but also any infringer of IP rights can be properly identified and prosecuted when it is proven that he/she has violated the law.
- The scope of preliminary injunctions granted by civil judges should be broadened to allow for ISPs to reveal the identity of its customers (i.e., Internet users) proven to be violating IP laws.
- The Spanish Government must place a high priority on educating law enforcement authorities such as judges, prosecutors and court-appointed experts about the seriousness of crimes related to the infringement of intellectual and industrial property rights. In judicial proceedings, not only the judges and prosecutors, but also court-appointed experts play a very important role. These cases are typically very technical and judges and prosecutors frequently require an independent expert report on which to base their final decision.
- To change the behaviour of Spanish consumers, an aggressive awareness campaign must be adopted to educate Internet users about the seriousness of IP crimes and the impact it has on the economy and the creative industries overall.
- Spain should work in a coordinated manner with other EU member states in the adoption of joint measures to combat counterfeiting. The major importers and distributors of counterfeit products in Spain often operate throughout Europe.

- The Spanish Government must abolish Circular 1/2006 and re-issue a new circular establishing that it is a criminal offense to illegally trade in copyrighted works, regardless if the act was done for commercial gain.
- Courts should be provided with greater resources to take on additional IP cases. With an overloaded Spanish judicial system, IP cases move too slowly to resolution.

\* \* \* \* \*

## **CONCLUSION**

The Special 301 process has become one of the most effective tools the U.S. has to encourage countries to make the necessary commitment to improve their intellectual property protection to the level of international standards. Nintendo of America Inc. respectfully submits its recommendations on Brazil, China, Mexico and Spain. Nintendo welcomes the opportunity to work with USTR and other involved federal departments and agencies in any way possible to reduce piracy in all countries, and would be pleased to provide any further information or documentation that would be helpful.

Very truly yours,

**NINTENDO OF AMERICA INC.**

A handwritten signature in black ink, appearing to read "Richard C. Flamm". The signature is written in a cursive style with a large, stylized initial "R".

Richard C. Flamm

Senior Vice President & General Counsel