



Nintendo of America Inc.
4600 150th Avenue N.E.
Redmond, WA 98052 U.S.A.

425-882-2040
Fax 425-882-3585

February 15, 2011

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

Re: 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 30, 2010 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 continued manufacture, assembly, distribution, import, export and sale of counterfeit *Nintendo* video game products across the globe, and especially now through the prevalence and ease of illegal online distribution. Through Nintendo's anti-piracy efforts and cooperation of various government enforcement authorities, millions of counterfeit *Nintendo* products and components have been seized worldwide. In the past few years, the scope of Nintendo's online anti-piracy program has grown. Every month millions of illegal *Nintendo* game files are detected on the Internet. The legal environment to limit the flow of these files remains 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* and *Nintendo DS* 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; (4) Paraguay to remain under Section 306 monitoring; and (5) Spain to be elevated to Priority Watch List with an out-of-cycle review (OCR) to be conducted later this year.

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 pass Bill C-32, the Copyright Modernization Act, introduced in Parliament last year, to provide rightsholders with the necessary protections for its technological protection measures. ISP responsibility is 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. 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 the soon to be released *Nintendo 3DS*) play Nintendo's proprietary game software as well as proprietary game software created by its third party licensees. There are over 100 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's current generation video game hardware systems ranked number one and number two as the best selling systems in 2010 in the United States. The *Nintendo DS* handheld video gaming systems sold more than 8.5 million units in the U.S. during 2010. Since its 2004 release, over 144 million *Nintendo DS* and *Nintendo DSi* handheld video game systems have been sold worldwide.

The *Wii* ranked second and sold more than 7 million units in 2010 in the U.S. Since its release in November 2006, over 84 million *Wii* consoles have been sold worldwide.

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 and the *DSiWare* service for the *Nintendo DSi* handheld 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 the *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:



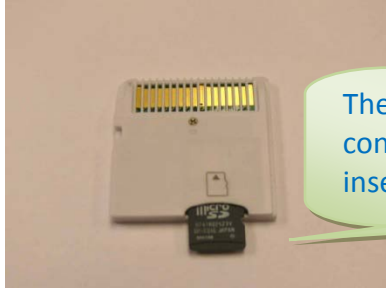
This is a popular “game copier.” A USB-to-Micro SD flash memory card reader (included in packaging) is used to transfer illegal games downloaded from the Internet from computer to a Micro SD flash memory card.



The game copier card (included in packaging) is designed exactly like an authentic *Nintendo DS* game card. 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



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.

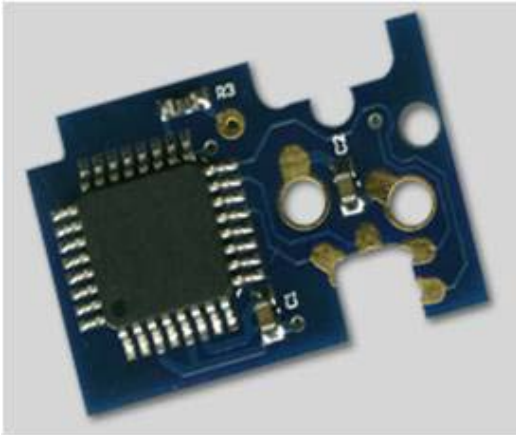


Wasabi

Cyclowiz



Wii Key



Continuing Trend: Soft modding involves the use of downloaded software – instead of a mod chip – to modify a video game console in order to unlock or disable security features employed by Nintendo. Like a mod chip, this also enables the play of pirated game software.

Soft modding is increasingly replacing the use of mod chips in some markets.

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 2010, Nintendo continued to be at the forefront of testing circumvention laws at the customs level all over the world, and in courts in Europe, Korea 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 new, Nintendo is actively engaged in educating consumers, distributors, importers and exporters, government officials, police, customs officials, prosecutors and judges in numerous countries. A part of this process includes sending out educational letters about these devices and explaining how they infringe Nintendo's intellectual property. In some cases, cease and desist letters are sent out to known infringers.

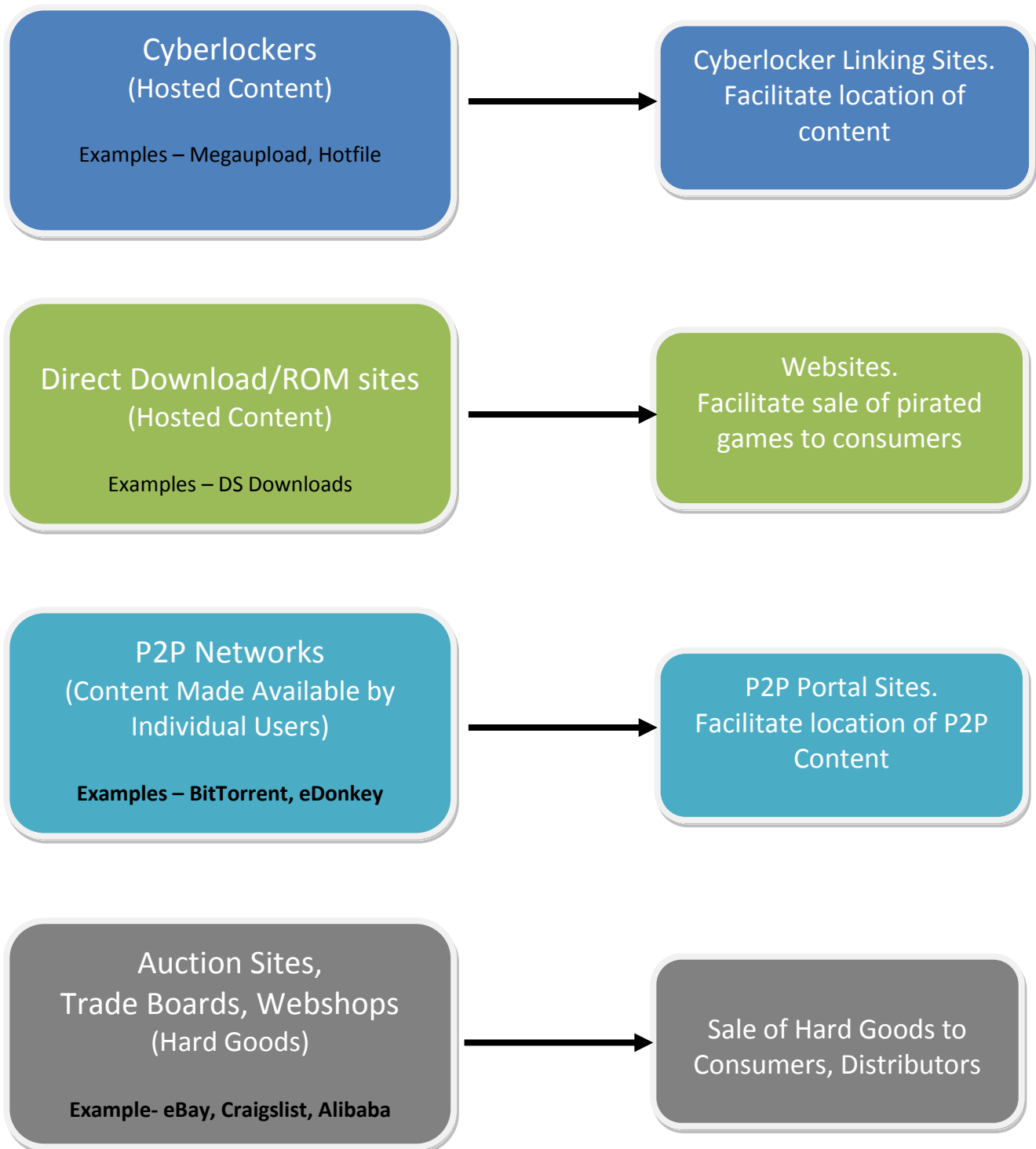
Internet Piracy: The trafficking in, sale and use of circumvention devices facilitate Internet piracy of video games because the most common way to play illegal *Wii* or *Nintendo DS* game files downloaded from the Internet on *Nintendo* video game systems is by using a circumvention device. Certain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

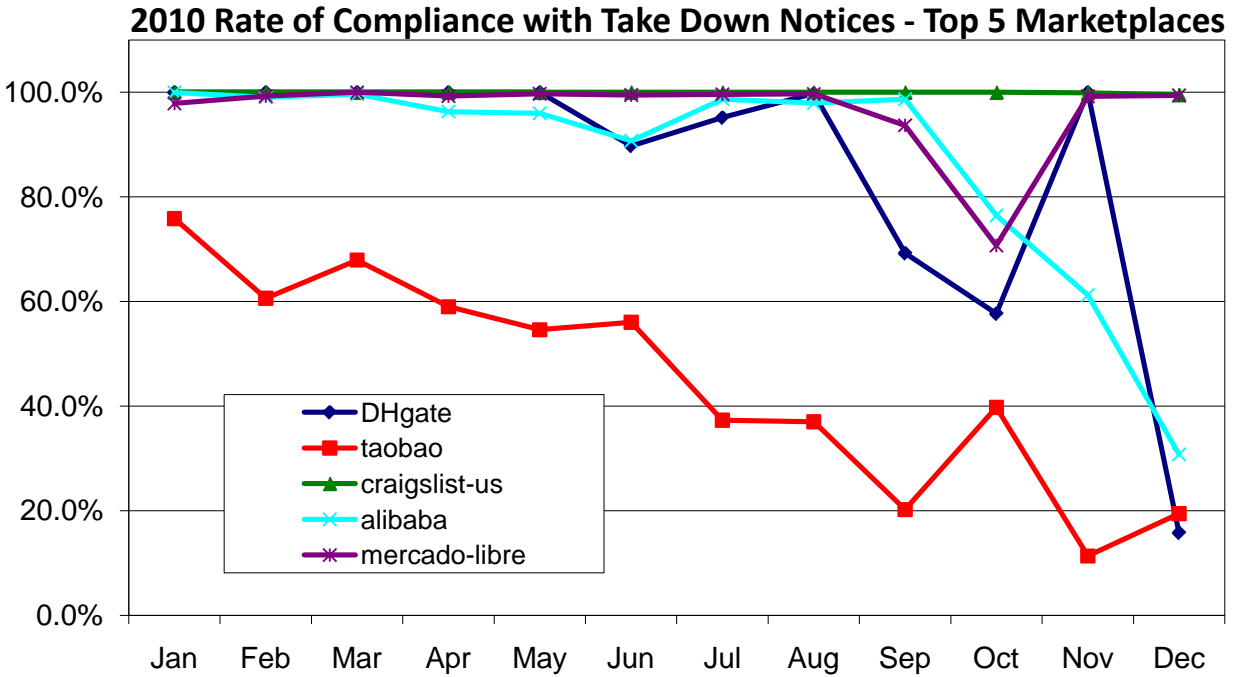
Internet Piracy Definitions:

- **Online Marketplace** - Online auction sites, trade boards, and classified listing websites enable numerous sellers to offer illegal hard goods (game copiers, mod chips or counterfeit *Nintendo* products) for sale. Examples are eBay, Craigslist and Alibaba.
- **Webshops/E-Commerce Sites** - Internet retailer 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.
- **Peer-to-Peer (P2P) Networks** - Computer networks established between users where they share illegal *Nintendo* game files (or parts of files) among themselves. Users download illegal *Nintendo* game files through accessing P2P portal sites.
- **P2P Portal Sites** - Websites offer links, trackers, or indices to connect users to the P2P networks for downloading illegal *Nintendo* game files.
- **Cyberlockers/1-Click Hosts** - Cyberlockers (also known as 1-click hosts) are websites 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 uploaders can then post such links to one or more cyberlocker linking sites and then other Internet users can access the uploaded file through the link.
- **Cyberlocker Linking Sites** - Websites, forums or blogs providing links for users to download illegal *Nintendo* game files from the cyberlockers/1-Click hosts.

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





DHgate, TaoBao and Alibaba – based in China
 Mercado Libre – Latin America
 Craigslist - worldwide

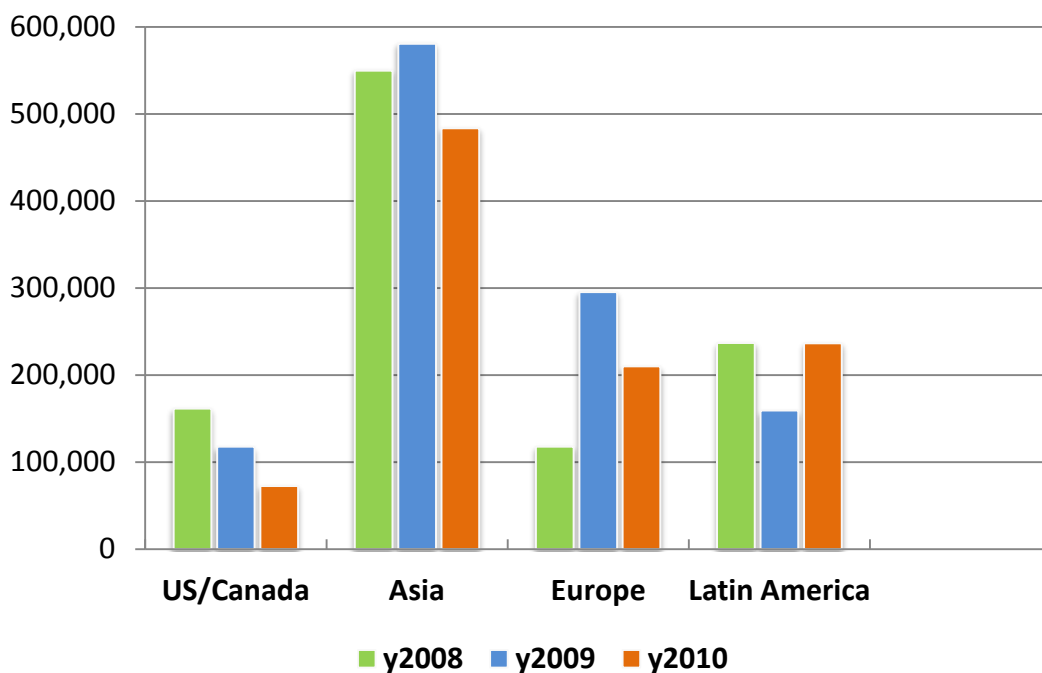
The chart above displays the monthly compliance rate for each auction site/tradeboard during 2010, as monitored by Nintendo. The compliance rate is based on the number of listings of game copiers detected versus the number of listings removed by the auction site or tradeboard at the request of Nintendo.

Three of the top marketplaces selling game copiers are based in China: DHgate, TaoBao and Alibaba. All 3 have inconsistent compliance rates, while Craigslist is consistently responsive to take down notices. Mercado Libre’s compliance rate reflects the inconsistent circumvention device protection in the Latin American region. Nintendo worked to educate site operators on how game copiers infringe Nintendo’s IP rights and circumvent Nintendo’s technical protection measures.

Nintendo Video Game Product Seizures From 2008 To 2010

The graph below shows a general summary of where infringing *Nintendo* video game products were seized in 2008, 2009 and 2010. This includes illegal copies of *Nintendo* games, circumvention devices and component parts.

Total Number of Infringing Nintendo Products Seized in 2008, 2009 and 2010



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Nintendo will next present its experiences over the past year in the following countries:
(1) Brazil; (2) China; (3) Mexico; (4) Paraguay; and (5) Spain.

BRAZIL

Nintendo recommends that Brazil remain on the Watch List.

- Nintendo Is Pleased That The Number Of Seizures For The Industry (According To CNCP) Increased In 2010 At Borders, Ports And Airports
- 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 Is Increasing With No Adequate Legal Infrastructure In Place To Respond To The Threat It Poses To Rightsholders
- High Price of Legitimate Products Is A Primary Reason Consumers Buy Pirated Products In Informal Markets
- High Tariffs And Taxes Increase Cost of Legitimate Goods, Constitute A Market Barrier And Become An Incentive For Smuggling Goods And Supplying Counterfeit Video Games To Brazilian Consumers.

A high level of pirate *Nintendo* products continues to dominate the Brazilian market. There are a number of contributing factors: (1) high tariffs and taxes which greatly differentiate the price between pirate and legitimate goods; (2) the absence of meaningful deterrent criminal penalties against counterfeiters; and (3) the increased availability of infringing circumvention devices that plague the market and further support the soaring levels of Internet piracy widely available and easily accessible in Brazil.

Software sales for the *Wii* and *Nintendo DS* handheld video game systems have been impacted significantly due to the increasing availability of circumvention devices, such as game copying devices, as well as counterfeit *Wii* software imported through informal distribution channels and sources (i.e. Paraguay border, door-to-door, local counterfeit, etc).

In Brazil, for 2010 Nintendo continues to find that most game copiers¹ sold for the *Nintendo DS*

¹ 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.

are bundled with a memory card that already has up to 80 video games downloaded on to it. The price for the bundle is approximately USD \$69. 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 rightsholders would increase awareness and deter others.

Continuing Trend: Soft modding has become a serious and growing problem in Brazil. Soft modding involves the use of downloaded software – instead of a mod chip – to modify a video game console in order to unlock or disable security features employed by Nintendo. This enables the play of pirated game software.

In Brazil, a soft modding service industry has developed where consumers pay someone to install/download the software for them, similar to the mod chipping services that burgeoned when mod chips needed to be soldered into the *Wii* console.

Investigations in 2010 revealed many modding operations in Paraguay specifically targeting the Brazilian consumer.

Nintendo Is Pleased That The Number Of Seizures According To CNCP Has Increased In 2010 At Borders, Ports And Airports

The National Council to Combat Piracy and Intellectual Property Crimes (CNCP) was created five years ago. Since its formation, Brazil has reported successful actions resulting in higher levels of seized counterfeit products. From 2004 to September of 2010, Brazil seized the equivalent of \$600 million USD per year in contraband.² In 2010, the estimated amount of counterfeit software used by consumers was reduced by 4% in the country, according to a study reported by the President of CNCP.³ The major reason cited in the study for Brazilians buying counterfeit/contraband products is the high price of legitimate products, as mentioned in a market research study coordinated by RJ-Fecomercio (The Federation of Commerce of Rio de

² See <http://exame.abril.com.br/economia/brasil/noticias/brasil-apreende-r-1-bilhao-ano-mercadorias-contrabandeadas-595368>.

³ Id.

Janeiro).⁴ The study also claims that 88% of consumers would not buy bootleg products if the price difference were not so steep.

Nintendo looks forward to reviewing the CNCP's 2010 seizure numbers in more detail when they are officially released. Despite improved actions and seizures, the demand for counterfeit products (not limited to entertainment software) by Brazilian consumers remains a serious problem. For example, according to Fecomercio-RJ Research, 48% of consumers bought counterfeit products in 2010. The equivalent 2006 figure was 42% of consumers.

Nintendo is very pleased that one of the tasks of the CNCP is to draft a bill which will include proposed changes identified by the institutions involved in combating piracy. The proposed changes to existing legislation aim to provide greater transparency, efficiency and speed to police actions involving piracy. The text was finalized in January 2011, and passed evaluation of the Union, becoming the first bill sent to Congress on February 1, 2011.

Local Enforcement Efforts Show Fewer Actions But Greater Quantities Seized

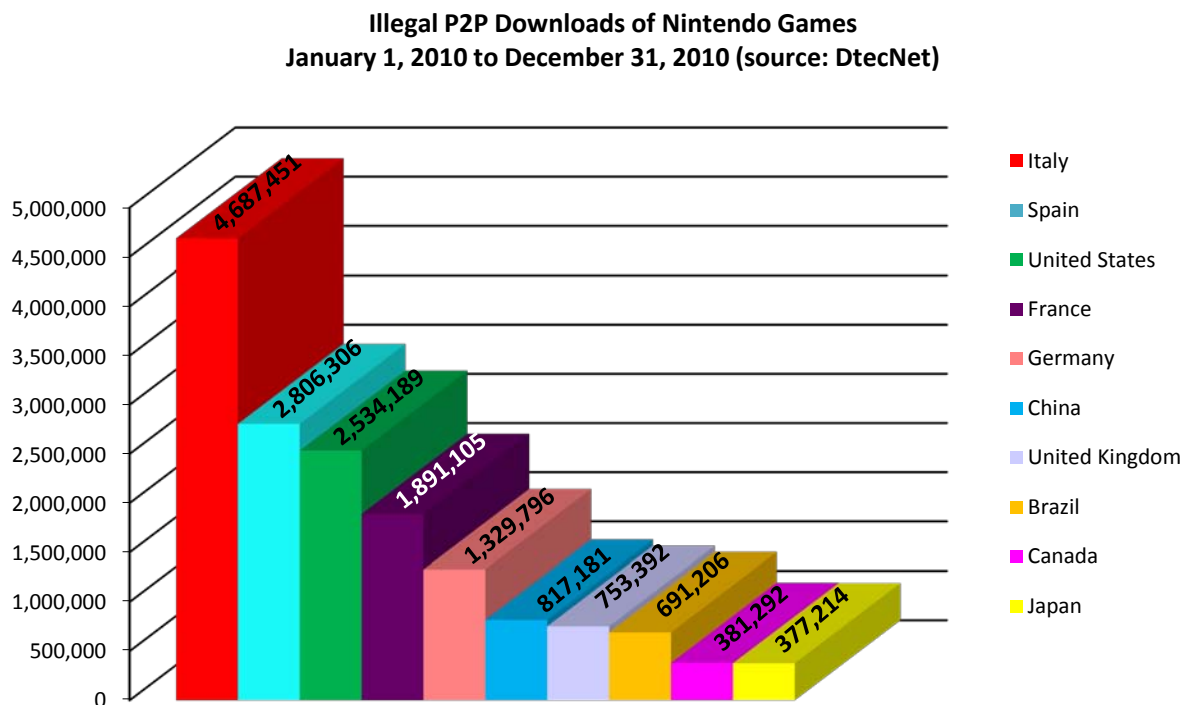
In 2010 there were 26 enforcement actions resulting in the seizure of 52,087 counterfeit Nintendo products, including 38,620 infringing Nintendo video games seized by Manaus Customs. In 2009 there were 33 enforcement actions seizing 9,476 products. Targets continue to be mainly street vendors and known markets offering a wide variety of illegal goods. Every single police raid in 2010 targeted a street vendor or retail shop. Nintendo encourages local enforcement officials to focus on more significant source targets in 2011 such as warehouses and other distribution sites in order to have a larger impact against piracy.

Nintendo recognizes CNCP efforts 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.

⁴ See <http://www.fecomercio-rj.org.br/publico/media/estudo.pdf>. The fourth edition of the market research survey on the impact of piracy on consumption was carried out by the Brazilian Institute of Public Opinion and Statistics (IBOPE) together with the American Chamber of Commerce (AmCham) and the Brazil-USA Business Council in a partnership with Angardi (National Association for Intellectual Rights Warranty) – report written by Machado, Solange Mata, 2009 – proves tax loss stems from piracy. As an example, seven sectors of the economy alone (clothing, athletic shoes, toys, watches, perfumes, make-up, electronic games and motorcycle parts) represent a loss of R\$ 18.8 billion in taxes.

Criminal Prosecutions Deter Criminals But Brazil Did Not Bring Any Criminal Piracy Charges in 2010

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. Infringers must be held accountable in Brazil for their illegal activities through strong prosecutions and tough sentences if piracy is to be reduced. Yet once again, there were no criminal prosecutions in Brazil in the past year. Under the current system, there is little to deter IP crimes and significantly reduce rampant piracy in Brazil.

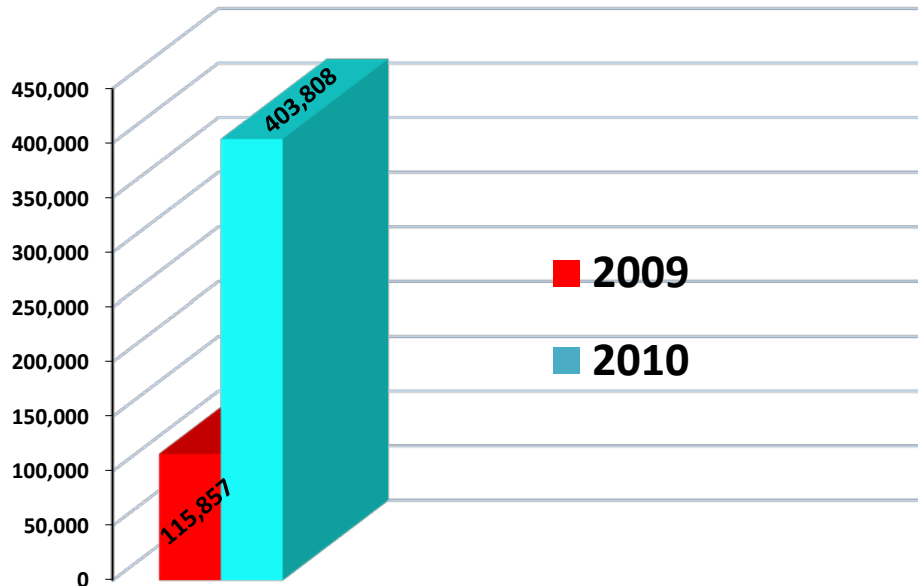


Internet Piracy Is Increasing In Brazil With No Legal Infrastructure In Place To Respond To The Threat It Poses To Rightsholders

A huge challenge that continues to worsen for Nintendo in Brazil has been the enormous growth of Internet piracy and the availability of circumvention devices that facilitate the downloading and play of illegal *Nintendo* games made available via the Internet. Internet auction sites provide an easy and relatively anonymous platform for transactions of infringing products. The above chart shows that once again Brazil is identified as one of the top 10 infringing countries in the world for illegal P2P downloads.

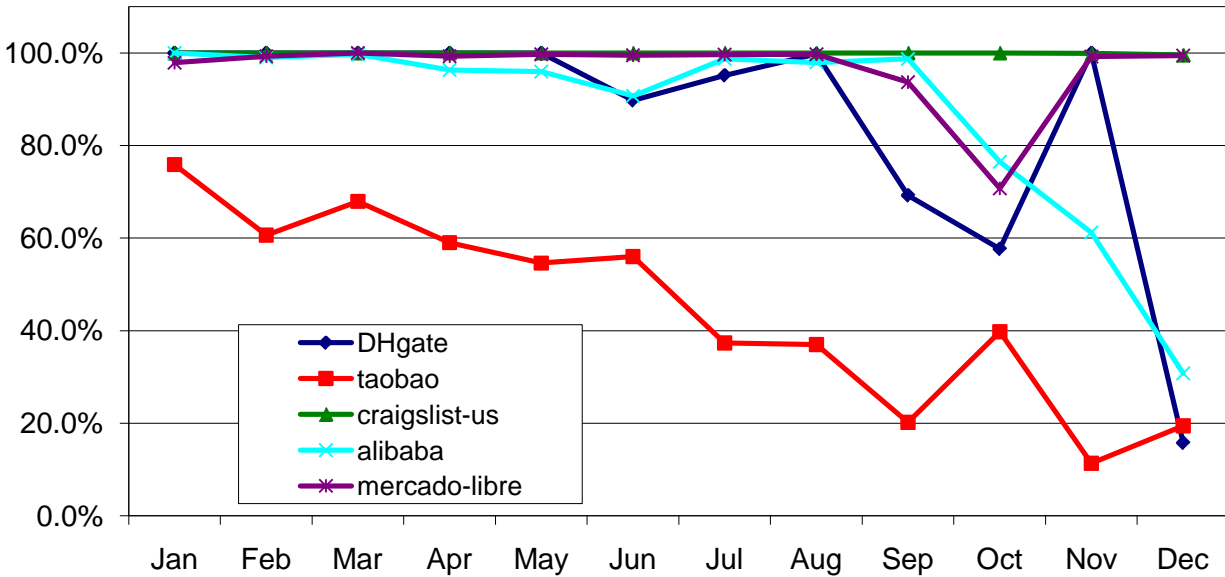
The chart above also shows that Brazil is the only country in Latin America on the top 10. While Brazil is not at the top of the list, given that broadband penetration in Brazil is significantly lower than in Europe and the U.S., this is a disproportionately high figure, especially since there are few tools available to rightsholders to fight Internet piracy in Brazil.

**BRAZIL - Illegal P2P Downloads of Nintendo Games
July 1, 2009 - December 31, 2009 and
July 1, 2010 - December 31, 2010 (source: DtecNet)**



The increase in illegal P2P downloads between 2009 and 2010 is startling. The chart above compares the last 6 months of 2009 to the last 6 months of 2010. There were three times the number of illegal downloads in this time period in 2010 compared to 2009 (i.e., 115,857 illegal downloads for the last 6 months of 2009 compared to 403,808 for the last 6 months of 2010).

2010 Rate of Compliance with Take Down Notices - Top 5 Marketplaces



The chart above displays the monthly compliance rate for each auction site/tradeboard during 2010. The compliance rate is based on the number of listings detected versus the number of listings removed by the auction site or tradeboard.

Mercado Libre, which is based in Argentina, is the largest online marketplace in Latin America covering 12 Latin American markets, including its largest market Brazil. Mercado Libre continues to be in the top 5 marketplaces selling game copiers. Its compliance is inconsistent but Nintendo continues to educate site operators on how game copiers infringe Nintendo’s IP rights and circumvent Nintendo’s technical protection measures.

Last year, online reports by the CNCP recognized that piracy of products normally found on the streets continued to migrate to the Internet, which posed a much greater potential for harm. Nintendo was encouraged by the creation of specialized teams to combat online piracy such as the Cyber Crime Division SSP-SP – 4º Delegateship – DIG-DEIC in São Paulo and the DICAT in Brasília. CNCP has not released its 2010 statistics -- but Nintendo hopes there was a greater focus on online piracy in 2010 and will indeed be in 2011.

According to ABES (the entertainment software industry trade association in Brazil of which Nintendo is a member), in 2010, ABES sent cease and desist letters to remove illegal video game content from the Internet, resulting in the removal of 345 infringing websites, and 1081 advertisements promoting Internet piracy. Internet piracy not only harms companies trying to protect their brands and intellectual property rights, like Nintendo, but as reported last year 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.⁵

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 Constitute a Market Barrier

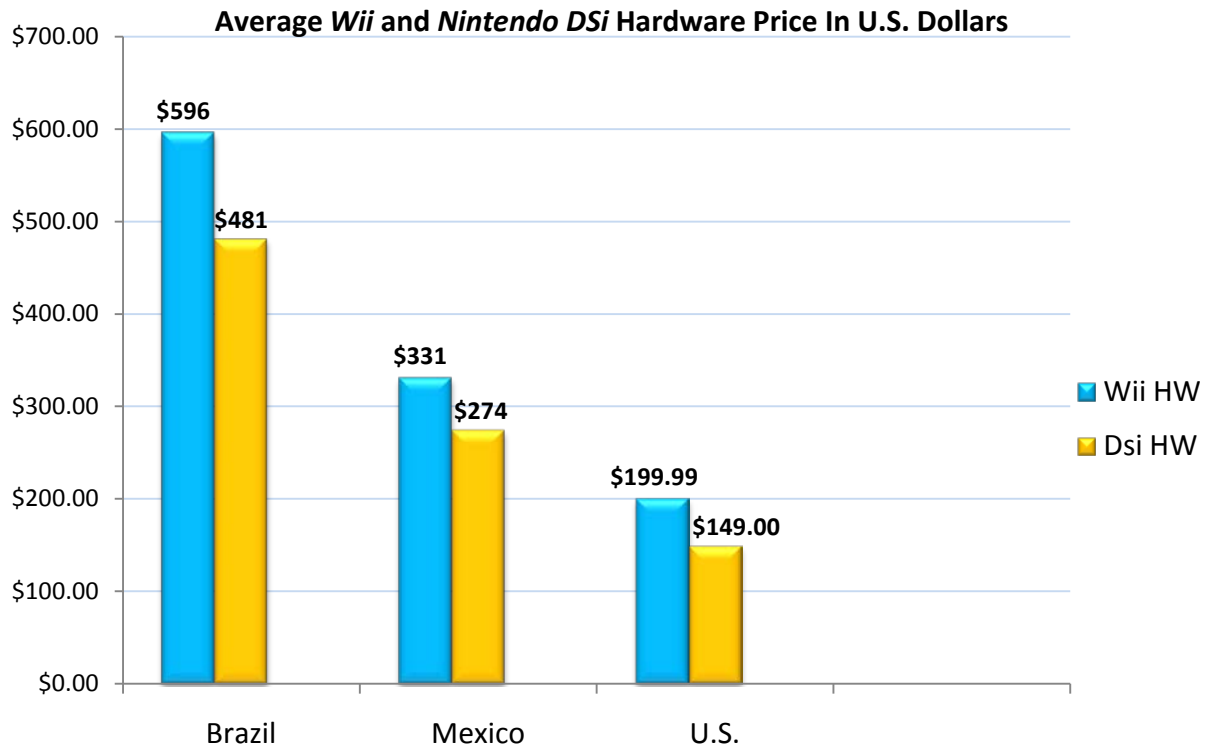
Brazil should be a leading market in Latin America for Nintendo but widespread piracy significantly reduces the market potential. One reason for the attractiveness of counterfeit products in Brazil is the extraordinarily high cost of authentic goods due to high tariffs and taxes imposed on imported authentic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

Taxes and tariffs constitute a tremendous barrier to market entry by pricing legitimate goods out of reach for most consumers. For example, *Nintendo's Wii* video game console has a manufacturer's suggested retail price in the U.S. of approximately \$200 but, according to the latest market survey conducted, sells in Brazil for between \$500 to \$900 because of high tariffs and taxes. The specific taxes and tariffs imposed on Nintendo imports were listed in Nintendo's 2006 and 2007 Special 301 comments.

Similarly, an authentic *Nintendo DS* game, which has a manufacturer's suggested retail price in the U.S. of \$34.99, is sold in Brazil for the equivalent of \$80. The counterfeit game sells for the equivalent of \$5 – less than one-tenth the cost of the authentic product. Brazil's complex tax system makes the price of *Nintendo* video games the highest in the hemisphere. The current tax structure prevents companies such as Nintendo from providing a reasonably priced alternative to pirated products and developing a market presence.

The taxation on the importation of video games and related products is one of the chief causes of piracy in Brazil.

² See www.mj.gov.br/combatepirataria and www.mj.gov.br.



Recommendations

Following are recommendations to improve IPR enforcement in Brazil:

- Strongly encourage the Brazilian Government to adequately address the current tax and duty structure to encourage the growth of the video game industry, which in turn will benefit the national economy by creating local jobs and increase government revenues now lost to Internet piracy.
- 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 hackers and organized distribution of 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.
- Adopt new laws to explicitly protect against the circumvention of technical protection measures; and to hold Internet Service Providers responsible and require them to take down infringing content when notified.

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
- At Nintendo's Behest, Local Enforcement Agencies In Guangdong And Four Other Provinces More Than Doubled The Number Of Raids Against Factories And Assembly Operations In 2010, Though Overall Raid Numbers Declined From 2009
- Chinese Prosecutors Brought Two New Criminal Actions Relating To Infringement Of *Nintendo* Video Game Products In 2010, Down From 5 In 2009. Three Defendants Received Jail Terms During The Year Based on 2009 Raids. Administrative Fines Were Levied In An Additional Seven Cases
- Chinese Customs Significantly Increased The Number Of Seizures Of Infringing *Nintendo* Products Being Exported From China In 2010. However, Total Number Of Items Seized Remained Very Small Compared To The Number Of Infringing Items Exported From China
- 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

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 20 countries, including the U.S., across five continents seized more than 175,000 infringing *Nintendo* video game products sourced from China in over 300 separate seizure actions in 2010. The domestic market in China is comprised almost entirely of counterfeit *Nintendo* video game products.

China Continued To Show Its Will And Ability to Enforce IP Rights By Undertaking More Raids of Factories In 2010

Guangdong Province remains China's center for the manufacture and assembly of products that infringe *Nintendo's* intellectual property rights, especially Shenzhen and Guangdong. However, *Nintendo* also paid close attention to infringement issues in other areas of China, and four Customs seizures occurred outside the Guangdong region. Based upon information provided filed by *Nintendo*, a total of 125 factories/assembly operations, warehouses and retail booths were raided in 2010 by local authorities including the AIC, TSB, PSB, and the Shenzhen Market Supervision Administration (MSA).

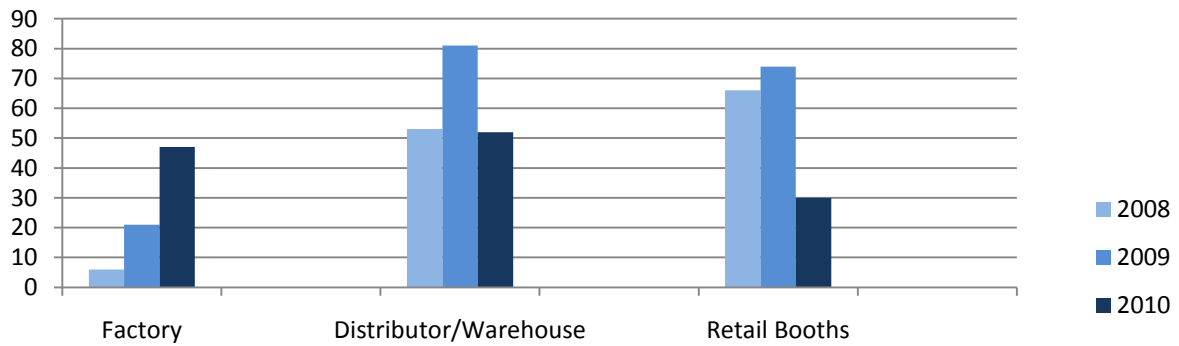
While the overall number of raids targeting sites producing, storing or distributing infringing Nintendo video game products declined significantly in 2010 from 2009, Nintendo is pleased to report that Chinese authorities cooperated in many more raids against factories for infringing goods in 2010. While there were only six raids on factories in 2008, that number more than tripled to 21 in 2009. In 2010, authorities raided 45 factories at Nintendo’s behest – more than double 2009’s total. Consequently, the overall number of infringing items seized by administrative authorities in 2010 is 343,445, compared to 278,411 seized products in 2009. Authorities dealt with trademark infringement complaints quickly and conducted raid actions in an expeditious manner. Nintendo is very grateful for their assistance.

Administrative Decisions Issued in 2010 Involving Piracy of Nintendo Video Game Products

Location	Issuing Authority	Enforcement date	Penalty Decision	Penalty Issue Date
Futian District, Shenzhen	MSA of Shenzhen Municipality, Futian Branch	15-May-10	1. 130 Wii pirated game discs, 1,400 game copiers were seized 2. A fine of 10,000 RMB (USD\$1,500)	1-Jul-10
Futian District, Shenzhen	MSA of Shenzhen Municipality, Futian Branch	23-Dec-09	1. 108 game copiers ⁶ were seized 2. 4 component parts of counterfeit Wii controllers were seized 3. A fine of 2240 RMB (USD\$340)	29-Feb-10
Futian District, Shenzhen	MSA of Shenzhen Municipality, Futian Branch	5-Jan-10	1. 320 game copiers were seized 2. A fine of 5,000 RMB (USD\$760)	12-Feb-10
International Electronic Market, Futian, Shenzhen	MSA of Shenzhen Municipality, Futian Branch	26-Apr-10	1. 42 component parts of counterfeit game controllers, 1,300 counterfeit DS game cartridges, 140 game copiers, 210 Wii pirated game discs and 1,064 component parts of GBA game cartridges were seized 2. A fine of 3,000 RMB (USD\$455)	11-Jun-10
Futian District, Shenzhen	MSA of Shenzhen Municipality, Futian Branch	24-Jun-10	1. 34 game copiers, 23 component parts of game controllers and 105 Wii pirated game discs were seized 2. A fine of 1,256 RMB (USD\$190)	12-Aug-10
Futian District, Shenzhen	MSA of Shenzhen Municipality, Futian Branch	20-Aug-10	1. 220 game copiers 2. A fine of 7,700 RMB (USD\$1,200)	22-Oct-10

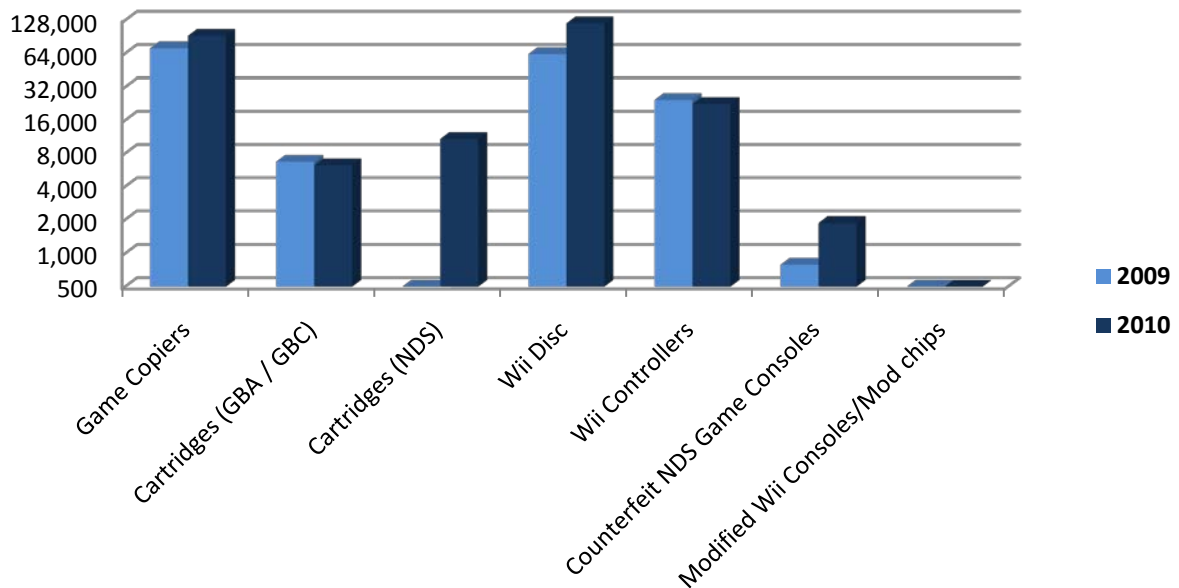
⁶ Detailed information on circumvention devices (e.g., game copiers and mod chips) can be found in the introduction section to this document. Basically, game copiers are used to circumvent the security embedded in the *Nintendo DS* handheld video game systems to allow users to play illegal video game software. These devices also facilitate the downloading of illegal software to and from the Internet.

Overall China Enforcement Actions Taken in 2008, 2009 and 2010



As seen above, Nintendo experienced fewer investigations and raids on distribution facilities and retail booths in 2010. After multiple investigations and raids on retail booths turned up little inventory or leads to the larger entities distributing game copiers, all efforts were focused on production and/or assembly factories and workshops.

Seizures in China 2009 vs. 2010



Recap of Criminal Cases Resolved and Brought in 2010

Nintendo has long argued that China must greatly increase its utilization of criminal prosecutions to deter piracy. Unfortunately, the number of criminal cases brought in 2010 involving infringing Nintendo products declined from five brought in 2009, (two of which involved the same defendant) to only two in 2010. Decisions were announced in three of the five 2009 cases, as well as one of the 2010 cases, and Nintendo is pleased that sentences included significant jail time. A judicial decision has not yet been announced for the remaining 2010 case.

The first 2009 case that resulted in a criminal judgment began on May 22, 2009, when the Shenzhen Bao'an AIC carried out a raid on a factory and its warehouse. The AIC confiscated over 5,500 *Wii* accessories and parts. The case was transferred to the PSB for criminal action and in April 2010, the court sentenced the defendant to two years imprisonment, a three-year probation and a penal fine of RMB 30,000 yuan (USD\$4,500).

A second case began on December 2, 2009, when the Guangzhou TSB conducted a raid on a factory and its warehouse. Authorities seized 231 *Wii* consoles, almost 700 counterfeit *Nintendo DS* handheld game console components, 20,950 pieces of housing for *Nintendo DS* game consoles, 1,400 packing boxes for *Nintendo DS* game consoles and 558 pieces of counterfeit *Wii* remotes and nunchuks. In December 2010, Guangzhou Liwan People's Court found the defendant guilty of infringing Nintendo's trademarks and sentenced him to three years of imprisonment, plus four years of probation. The court also imposed a fine of RMB 800,000 (USD\$120,500).

Also, on December 10, 2009, Shenzhen Bao'an AIC conducted raids on two factories operated by the same individual, Chen Bo. During the raid, the authorities confiscated more than 21,000 counterfeit parts for *Wii* accessories, as well as over 35,000 copies of printed materials. This case was also transferred to PSB for criminal action. In July 2010, the court sentenced the defendant to one year imprisonment, a two-year probation and a penal fine of RMB 20,000 yuan (USD\$3,000).

One other case mentioned in Nintendo's 2010 filing – based on an October 2009 raid in Shenzhen -- has now been pending before the PSB for 15 months. Nintendo does not know if criminal charges will be brought in this case.

Criminal charges were brought in two cases based on 2010 raids, resulting in one decision being handed down in October, 2010. On January 26, 2010, PSB carried out a raid on a factory in Guangzhou that was assembling counterfeit *Nintendo* game consoles, both *Wii* and *Nintendo DS*, and *Wii* accessories. More than 216 counterfeit game consoles and 108 hard modded *Wii* consoles were found. Also seized were over 1,100 counterfeit *Wii* console covers and 6,500 counterfeit *Wii* accessories. Due to the high value of the seized products involved in this case, the defendant was arrested on site, but later granted bail and released. PSB prosecuted the defendant who received a sentence of three years imprisonment, a four-year probation and a penal fine of RMB 100,000 yuan (USD\$15,000).

On March 22, 2010, a successful raid was conducted on a factory operating as Hongtaining Technology Co., Ltd. with a valid business license by Shenzhen Bao'an AIC, which was found to be manufacturing huge quantities of counterfeit *Wii* remotes. The authorities confiscated approximately 12,000 counterfeit *Wii* accessories, as well as 5,000 counterfeit packing boxes and 5,000 counterfeit instruction manuals for *Wii* remotes. The case was transferred to PSB for criminal action but there is no word yet on whether criminal charges will be brought.

Criminal Thresholds Thwart Prosecutions for Production of Circumvention Devices

All of the criminal cases brought by or referred to the PSB in 2009 and 2010 involved counterfeit *Nintendo* hardware or accessories. Generally, it is more likely that large quantities of these items will meet criminal thresholds for prosecution. To date, authorities still avoid pursuing criminal actions for cases involving seizures of circumvention devices and pirated video games. For example, a factory was raided in Baiyun, Guangzhou on June 2, 2010 where 8,346 game copiers were seized; a similar raid in Liwan, Guangzhou on March 12, 2010 netted 19,360 pirated *Wii* game discs. Neither of these has been transferred for criminal action despite the large quantities involved in the seizures and potential economic harm caused to Nintendo.

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 consider re-adjusting how the value is determined for counterfeit items.

Imprisonment and stiff fines serve as strong deterrents to counterfeiters. China must pursue infringers through criminal prosecutions in order to see a reduction in counterfeiting.

Nintendo is pleased that China imposed 4 prison sentences and filed 2 criminal cases related to counterfeiting in 2010. 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 Improved Its Efforts In 2010 And Must Continue To Prevent Exportation Of Game Copiers And Other Infringing Products From China

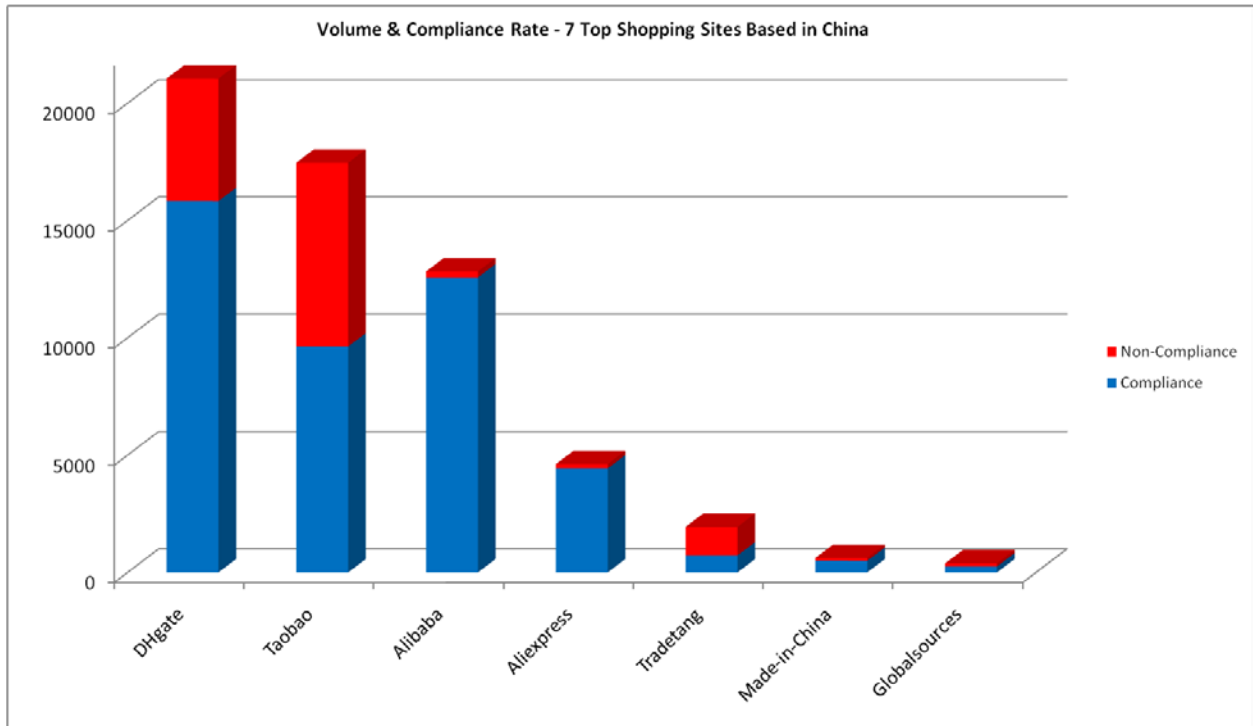
Nintendo appreciates that China Customs increased its efforts in preventing infringing *Nintendo* goods from being exported abroad in 2010. During the year, China Customs detained 53 shipments of suspected infringing *Nintendo* video game products; seizing over 7,797 products,

which was a marked improvement over 2009. However, it is still far from enough as millions of infringing products escape China Customs' inspection and are distributed around the world. China Customs should make education and training of its customs agents a priority in 2011 in order to learn about identification of counterfeit products and illegal goods such as circumvention devices.

Moreover, at present, requiring infringers to destroy their own infringing products is unrealistic and nonsensical. The minimal fines generally handed down as punishment offer little deterrence or risk, and are simply seen as the cost of doing business. Thus, it is necessary for China Customs to strengthen its enforcement efforts towards entities that export infringing goods, as well as apply stricter punitive measures on those who export infringing items, especially repeat infringers.

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

Online auctions, B2B 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 be connected to Chinese suppliers and manufacturers. 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 59,000 takedown notices to Chinese based auction sites and trade boards for the sale of circumvention devices.



The above chart shows the volume of takedown notices sent and compliance with said notices by the seven leading online shopping sites based in China for the period January through December 2010. Compliance rates differ markedly but the high compliance rates of sites like DHgate and Alibaba demonstrate that it is feasible for these sites to comply, and still grow their international customer base. DHgate complied with 100% of these notices for the first five months of the year, only to slip back into an inconsistent pattern, and end the year with one of the lowest monthly compliance rate of any of the sites – just over 15%. For the year, Alibaba.com had the highest compliance rate and Tradetang by far the lowest.

Aliexpress.com, a commercial website founded by Alibaba Group in April 2010 is a trade board created to support small orders from overseas buyers, most of whom are individuals. Aliexpress.com is also intended to be Alibaba's express channel for wholesale transactions. In most cases, products are offered on aliexpress.com at a much lower price than other trade boards and/or auction sites, which is very attractive to consumers. Unfortunately this also makes the website attractive to those engaging in criminal activities. With its rapid development, this website gained almost instant popularity and attracts worldwide traffic.

In 2010, Nintendo sent nearly 17,500 takedown notices to Alibaba.com and Aliexpress.com combined for offers to sell illegal game copiers. Alibaba Group recognizes the negative impact of intellectual property infringement and has actively acted to delete the infringing listings with the help of right owners. Nintendo, with the assistance of its trade association, engaged Alibaba Group in numerous discussions in an effort to obtain better compliance with takedown notices. Alibaba Group should be commended for their willingness to discuss these issues directly with the rights owners and to reach an amicable resolution. Nintendo experienced a

sharp increase in compliance in the Fall of 2010, resulting in an overall compliance rate of 98% for the calendar year. New sellers of counterfeit and illegal products are added regularly and the rights owner simply cannot monitor each posting. Urgent attention should be extended to develop an efficient solution to prevent the posting of illegal products on these sites.

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 rightsholders. 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.

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 stock 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.
- Even when criminal thresholds are met, some cases are not accepted by the PSB because the PSB is not satisfied with the evidence provided by the administrative authorities, or the People's Procuratorate is not satisfied with the investigative work of the PSB. Since the beginning of 2002, nearly 775 raids have been conducted targeting factories, warehouses and retail outlets in China. Until 2010, only 10 cases were considered for criminal prosecution and only 7 prosecutions were lodged, resulting in the convictions of 7 factory owners and 4 employees. In these seven cases, four infringers were sentenced to imprisonment with probation. In addition to the PSB, Chinese administrative agencies must be granted the authority to transfer cases to the People Procurator for further prosecution.
- Online marketplace websites must proactively monitor and remove listings of circumvention devices and terminate repeat infringer accounts.

- 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. When Customs orders products destroyed, it must not rely on the infringer to do so. Penalties must be high enough to serve as a deterrent and procedures must be implemented to allow cases to be easily transferred to the criminal authorities for prosecution.
- 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.

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MEXICO

Nintendo recommends that Mexico remain on the Watch List.

- The Mexican Government Has Existing Tools To Reduce Piracy But Must First Make Enforcement A Priority
- Despite Positive Criminal Raids In 2010, Nintendo Reports High Levels Of Piracy For Its Video Game Products.
- Nintendo's Observations Based On Over 20 Years Of Active Enforcement Actions In Mexico Include A Fundamental Lack of Case Conclusion
- Mexican Industrial Property Institute (IMPI) Must Be Improved
- Nintendo Is Pleased There Was A Significant Increase In The Number of Seizures Conducted by Mexican Customs in 2010

Mexico is Nintendo's largest market 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. Popular informal markets notorious for offering pirate products, such as Tepito and Mercado San Juan de Dios, have been selling substantial amounts of illicit goods for decades without repercussion.

Piracy remains socially acceptable by citizens throughout the country. While pirated products continue to saturate the Mexican market, significant obstacles to enforcement remain in the Mexican system, including structural problems, the role of organized crime and the constant threat of violence.

The Mexican Government Has Existing Tools To Reduce Piracy But Must First Make Enforcement A Priority

For decades, the Mexican Government has allowed the visible sale of infringing products, such as counterfeit *Nintendo* video game products, through informal markets. Despite this, Nintendo acknowledges some successful police raids which took place against notorious markets in Mexico City and Guadalajara in 2010. The Mexican Army was even present during an important raid against counterfeit traders in Guadalajara's San Juan de Dios market in December 2010, making possible the positive results of the raid by providing added protection.

The Mexican Government must continue this momentum and support future operations with a zero tolerance policy in order to see any measurable results against video game piracy.

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.

In 2008 and 2009 the Mexican Government focused on promoting enforcement through diplomacy, consisting of awareness programs, non-obligatory inspections, and "conversion programs" (i.e., negotiations with informal market owners in an effort to control the sale of counterfeit goods). The conversion programs were particularly disappointing, as no visible results were observed in two years of negotiations. Further, during this period no raids were possible at important markets such as Plaza Meave and Pericoapa, where piracy of *Nintendo* video game products continued unabated and market owners were safeguarded.

Fortunately, things changed in 2010 with the appointment of the new commissioner to the Attorney General's Office (PGR). Important flea markets such as Plaza Meave and Pericopa were finally raided in 2010 after the termination of the conversion program.

Anti-Piracy Actions By The Criminal Authorities Remained Constant In 2010 From The Previous Year and Piracy Levels Remain High

The PGR 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.

We are hopeful that doing away with negotiation tactics and restoring IP enforcement and criminal raids against notorious marketplaces known for the distribution of illicit goods will send a stronger message to market owners, vendors and consumers that piracy will not be tolerated.

Nintendo appreciates the efforts of the PGR, Federal and local security police officers, the Specialized IP Unit and Mexican Army for raids that were conducted in 2010. There were seven criminal raids in 2010 involving counterfeit *Nintendo* video game products, the same number of raids as in the previous year. Nintendo is hopeful that the PGR will offer stronger support for enforcement actions against the sale of illegal video game products in 2011, and that the number of such raids will sharply increase this year. Notable actions from 2010 are described below:

- Mexico City's downtown Tepito area is the center and distribution hub for pirated products for the whole country. Nintendo, along with its industry trade association,

ESA, backed four raids of the Tepito market resulting in the seizure of approximately 50,000 counterfeit *Nintendo* products. The operations uncovered several Tepito laboratories where local burning and production of counterfeit video game discs was taking place.

- In December 2010, the video game industry and PGR raided Guadalajara's San Juan de Dios market and seized over 90,000 counterfeit video game products including approximately 26,000 counterfeit products for Nintendo platforms. Dozens of booths were raided and the action was supported by Federal and local security police and the Mexican Army.

Despite the above mentioned criminal raids in 2010, levels of piracy for both *Nintendo DS* and *Wii* video game products remain high.

Marketplaces such as Tepito and San Juan de Dios will continue to be venues known for their ability to store, produce and distribute high volumes of counterfeit products unless problem vendors can be shut down permanently and punished for their crimes.

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 (cumulative total) with questionable and sporadic compliance rates. Continued lack of knowledge and understanding regarding the illegal nature of these devices spurs resistance from online sellers.

Nintendo's Observations Based On Over 20 Years Of Active Enforcement Actions In Mexico Include A Fundamental Lack of Case Conclusion

1. Criminal procedures have changed little in the past 20 years. Procedures for filing criminal complaints and issuing search warrants must be improved. It is critical that anti-piracy actions be conducted in a swift manner. Current laws offer few alternatives in the way of efficient prosecution reviews; the in-house technical experts appointed for counterfeit product evaluations must be replaced and police support and back-up to execute a raid must be enhanced. Currently, availability of support depends on the urgency of other priorities. Threats of violence continue to hinder police support as more and more resources are required (and often not available) to carry out a single raid.

Although the current authorities have upheld positive efforts in 2010, there remain several weaknesses. For example, the Specialized IP Unit shows more interest in increasing the number of seizures and seized goods but there is no significant end result. Currently, there is no consistency in the way that all offices handle criminal cases. The Mexican Government

needs to develop a better strategy to deter piracy from different fronts. It is not enough just doing one seizure after another. More indictments and convictions need to be demanded by the authorities and followed through by the judiciary.

2. It is important that the Mexican Government support 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. Judges have denied search warrants or avoided indictments for IP matters because they do not understand copyright and trademark violations and continue to designate such crimes as a low priority.
3. Nintendo seizes considerable amounts of counterfeit *Nintendo* video game products when a raid is conducted. In 2010, a total of 78,000 counterfeit *Nintendo* products were seized by criminal authorities. However, target vendors immediately go back to restocking pirate products because there is no deterrence when the risk of fine or jail time is so low. Therefore, the parameter by which authorities are measured needs to be changed from the number of raids or goods they seize to the number of convictions achieved. Furthermore, the destruction of seized product is inconsistent and has been treated more like a political event instead of as a crucial part of the legal process.
4. The violence encountered in each raid remains serious and it is imperative that the Mexican Government continue to take measures to avoid possible tragedies. More and more resources are necessary for the authorities to carry out safe actions. Often, raids must be postponed because of threats of violence or lack of sufficient resources to support a raid. Fortunately several complicated raids in 2010 resulted in relatively safe proceedings thanks in part to added security forces and Mexican Army support.
5. The Tepito, Pericoapa and Meave markets have been selling illicit products for decades, with no end in sight. Real change would mean permanently closing down private booths that are 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.
6. The Mexican Government and criminal authorities must recognize the shift of video game piracy in Mexico from hard goods to circumvention devices such as game copying devices and modification of *Nintendo* video game consoles to circumvent the security technology. Even with the seizure of several small shipments of game copying devices in 2010, 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. Many vendors in the informal markets now provide soft-modding services by installing a series of

software applications, no longer needing to install physical mod chips to the internal hardware.

7. The work conducted by the in-house experts from the PGR's Expert Division is crucial to enforcement actions. These experts confirm whether a product is counterfeit and are relied upon for their knowledge and expertise in determining IP violations. For this reason it is a priority to ensure they are well trained.

Several problems face the in-house experts. Since they require genuine specimens to be compared with the allegedly counterfeit ones in order to be able to render their testimony, IP owners must spend resources to provide samples to the authority. This becomes expensive for rightsholders when dealing with luxury goods.

This practice needs to change. IP owners cannot be burdened to submit so many specimens. The in-house Expert Division of the PGR should find a mechanism that allows them to issue their opinions in an efficient manner, for instance, with catalogs or identification manuals.

8. Significant seizures took place during 2010 but destruction of the illegal goods is a major concern for rightsholders. IP owners have discovered merchandise previously seized by the PGR back in the market. The destruction of goods is a crucial part of the legal process. Rightsholders should receive reliable confirmation from the Mexican government that seized goods have been destroyed.





Examples above of game copiers (R4i) seized by Monterrey Customs in 2010. Shipments of devices are being imported into Mexico from Asia. Some products boast blatant infringement by commercializing Nintendo's trademarked characters on the packaging.



During a November 2010 raid in Tepito authorities found and dismantled a video game laboratory that was operating inside this apartment.



In August 2010, authorities raided Bazar Pericoapa in Mexico City. In addition to pirated Nintendo games and game copying devices, catalogs of discs were displayed listing Nintendo video game titles that could be burned on demand.

Nintendo Experienced An Increase In The Number of Customs Seizures In 2010

Nintendo is pleased with the positive steps taken by the Mexican Customs Service in 2010. These efforts resulted in an increase in the amount of overall seized goods during 2010, including for Nintendo-specific seizures. Mexican Customs supported 22 separate seizures in 2010, a significant increase from the handful of seizures supported in 2009 (although the quantities of seized goods were significantly lower in 2010 with approximately 3,400 products confiscated as compared to 43,000 products the previous year). Several of the shipments involved circumvention devices exported from Asia.

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. In connection herewith, Nintendo congratulates Mexican Customs for being recognized by the World Customs Organization with its IPR Trophy in 2010.⁷

Nintendo is pleased that Mexican Customs showed increased willingness to participate in training and awareness sessions related to video game piracy in 2010. One training in particular was attended by customs at the southern border between Mexico and Guatemala and included officials from Guatemala Customs who in most cases had not received previous training. As a result of the training session, both Mexican and Guatemalan Customs authorities agreed to improve communication and collaboration regarding piracy issues at the border.

Several challenges 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.

Right holders face several challenges before obtaining the above-mentioned resolution. For example, the order can only be issued by the Mexican Institute of Industrial Property (IMPI) or the PGR. IMPI however, can only be notified about cases related to confusingly similar trademarks. Additionally, IMPI closes its offices on several occasions, especially during the holidays when volumes of imported products are especially high. 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.

In recent years, new trends have emerged showing that counterfeiters have developed different methods for shipping and importing infringing goods. Multiple shipments with smaller quantities are shipped on a more frequent basis and replace the major container loads that typically held tens of thousands of products. Courier packages with a few pieces are now becoming the norm. This creates more intelligence work for the authorities to match senders,

⁷ See http://wcoomdpublishings.org/downloadable/download/sample/sample_id/94/ at p. 20.

names, and addresses and can be increasingly cumbersome when names change or are intentionally falsified. Mexican authorities must have the means and resources to investigate and pursue convictions in these customs cases instead of just seizing items.

Regardless of the frequency or size of the shipments, counterfeit components continue to be shipped into Mexico from Asian factories. The counterfeit components destined for Mexico indicate that major in-country assembly operations are underway. As a consequence of smaller but more frequent shipments, there are increasing numbers of seizure notices received from Customs that in turn increase the number of complaints filed with the PGR. Cases opened by the PGR doubled in 2010 compared to the previous year. Due to the high volume of complaints, it poses real challenges for the authorities to commit to handling every case.

In 2010, the Specialized IP Unit of the PGR did agree to handle every case that was filed. However, once the official order of a seizure was issued, the PGR would send the file to the local customs office, where the goods were detained, to handle as expert evaluations or statements. This makes for a much more expensive proceeding for IP holders, as representatives have to move from one local office to another, incurring significant travel expenses, even though each matter is handled by the same authority. A more coordinated approach is required. To make the process more efficient, local offices should conduct coordinated actions and collaborate with each other.

A proposal for amending Mexican Customs Law has been in the Congress for almost two years. 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 (in addition to giving Mexican Customs officials the power to stop a shipment suspected of IP violations (see above)). A successful recordation system would result in a more efficient process to deter the importation of counterfeits into Mexican territory.

Although the Mexican Customs Service has improved efforts in the last couple of years, another challenge for rightsholders is caused by the fact that the central office does not have entire control of all customs offices. For example, Manzanillo, one of the largest ports in Mexico with significant imports coming from Asia, remains as an independent entity, which causes problems when the local authorities order the release of cargo even when a complaint is duly filed with the main office in Mexico City. Mexican Customs and PGR's main offices need to increase collaboration and assume responsibility from all local offices to ensure consistency and transparency when seizing infringing cargo throughout Mexico.

It is important that Mexico pass the bill currently pending in the Senate creating a centralized customs registration database to assist with identifying piracy, just as Argentina, Paraguay, and Peru have strived to do. A centralized database would be a key component in creating a more effective customs process for seizing counterfeit

Mexican Industrial Property Institute (IMPI) Must Be Improved

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 but rightsholders have been waiting for years to see improvements from IMPI. Inspections conducted by IMPI are expensive for IP owners and on some occasions ineffective because vendors question IMPI’s authority when the agency demands inspections and undertakes seizures. Actions coordinated through IMPI can be especially challenging when taken in conflict-laden zones like Tepito or downtown Mexico City.

Resolution of IMPI cases can take years before a final case ruling, even when the defendant does not respond to the complaint. If the plaintiff finally receives a decision, it may take additional years to confirm that the seized goods are destroyed. Meanwhile, IP rights holders are responsible for continuous storage costs.

IMPI officials are a political face for Mexican IP and often participate in IP committees and international forums. Therefore, their activities should correlate to the public’s needs by issuing accurate decisions in a timely manner.

IP Education Efforts in Mexico

In 2010, meetings took place with the Mexican Copyright Office and Ministry of Education to focus on the IP education project spearheaded by the video game industry. The Ministry of Education offered its support for the education campaign and further facilitated the distribution of the campaign’s materials in Mexico City elementary schools. 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 industry education campaign supported by the Mexican government and remains hopeful that the campaign will yield positive results in 2011.

Recommendations

Following are suggested steps to improve IP protection in Mexico:

- The Mexican Government must take more aggressive action to shut down illegal vendors of counterfeit goods in open markets and Mexican courts and prosecutors must place more priority on IP cases.
- PGR must do more intelligence work to find the sources of the pirated goods by continuing with investigations rather than dropping them following a seizure. The results from Mexican authorities cannot be solely measured by the number of raids or

goods that are seized. It is important that prosecutors follow up on indictments and seek convictions to truly see a deterrent effect.

- Customs brokers as well as market place owners should be investigated. Authorities must find a strategy to link them with pirates as they may be a good source of information and another mechanism to control counterfeiting. Right now, true infringers can hide their identity behind false companies or customs brokers without a trace. More scrutiny needs to be placed on Customs brokers and market owners so they will think twice before getting involved with any infringer.
- Legislation must be enacted making it more clear it is a criminal offense in Mexico to circumvent technological protection measures as required under the WIPO treaties.
- It is critical that procedures involving filing of criminal complaints and the issuance of search warrants be improved (e.g., more consistency between criminal offices, especially within the Specialized IP Unit).
- Mexican Industrial Property Institute (IMPI) must have greater authority and resources to combat piracy and effectively enforce IP rights. IMPI must take more seriously the priority of IP cases to which they are assigned and with more efficiency.
- A process must be established for dealing with confiscated counterfeit goods. Customs, IMPI and PGR are all impacted by the lack of procedures. There must be an effective procedure implemented that outlines how to handle seized products while the case is pending and how the goods will be destroyed.
- 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.
- The Specialized IP Unit must be able to pursue all cases that are presented to it despite the amount of goods that might be involved, the type of infringer or the location where the infringement is taking place, as well as establish consistency in procedures. Lack of budget is not an acceptable excuse.
- Solutions are needed to address the growing Internet piracy problems, as file sharing and downloading of illegal content to memory cards is becoming a more efficient way of doing business without excess inventory in the warehouses.
- Mexico should pass a bill pending in the Senate to create a centralized customs registration database to assist with identifying piracy, just as Argentina, Paraguay, and Peru have done.

- The Mexican Government should continue to support an aggressive educational campaign to demonstrate to the general public the impact piracy has on its local economy and the benefits of supporting legitimate businesses that pay taxes.
- 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.
- Nintendo strongly encourages Mexico to amend Article 424 of the Federal Criminal Code to impose sanctions for the distribution of devices which circumvent technological protection measures (TPMs). Without adoption of this legislation, there will continue to be questions on whether or not effective legal remedies to prevent this form of piracy exist in Mexico. Effective directives 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 in Mexico.

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PARAGUAY

Nintendo recommends that Paraguay remain subject to Section 306 monitoring.

- Border Controls Are Key To Decreasing Piracy
- Nintendo's Anti-Piracy Actions In Paraguay Demonstrate Infringing Goods Are Imported But Also Locally Produced
- Nintendo Strongly Urges Reinstatement Of The Full Capabilities of the UTE
- Extension of U.S. And Paraguay Memorandum Of Understanding through 2011 Is A Positive Step But Many Obligations Remain Unimplemented
- Corruption Continues To Hamper Anti-Piracy Efforts
- Revised Criminal Code Has Increased Nintendo's Enforcement Actions Against Circumvention Devices But Legal Follow-Through Is Lacking
- Large Seizures By Uruguayan Customs Authorities Indicate Pirate Video Game Products Are Increasingly Being Shipped To Paraguay From Asia Through Montevideo.

Nintendo has been actively enforcing its intellectual property rights in Paraguay for the past 22 years. Throughout those two decades, Paraguay has been a major hub and transshipment point for pirate *Nintendo* video game products entering Latin America from Asia. Seizures involving *Nintendo* video game products in 2010 involved optical media discs for the *Wii*, modified *Wii* consoles and circumvention devices⁸, as well as packaging and pirate components intended for in-country assembly into finished game copiers in order to avoid detection at the borders. However, in 2010 circumvention devices were not as frequently displayed or advertised openly to customers. Rather, the devices were more likely concealed and sold to Brazilian or other buyers or shipped in separate components to avoid detection.

⁸ Detailed information on circumvention devices (e.g., game copiers and mod chips) can be found in the introduction section to this document. These devices facilitate the downloading of illegal software to and from the Internet.

Border Controls are Key to Decreasing Piracy

The city of Ciudad del Este is identified as the second largest free-trade area in the world, after Hong Kong. The city continues to be the focal point of pirate activities in Paraguay, largely due to ineffective enforcement on the Paraguay/Brazil border, particularly in the area of the “Friendship Bridge,” which links Ciudad del Este with the Brazilian city of Foz do Iguacu. Three other commercial concentrations continue to be increasingly prominent with respect to the flow of pirate products: Pedro Juan Caballero, Salto del Guaira, and Encarnación. The initial two cities impact the Brazilian market while the third is directed towards consumers in Argentina. Paraguayan authorities have made minimal attempts to control these three commercial areas, as well as river and dry border crossings.

Emerging Trend: Uruguay is another country directly implicated by Paraguayan piracy due to its geographical proximity, and Montevideo’s long standing role as a transit point for containers destined for Paraguay.

For example, In June 2010, 6,000 counterfeit *Wii* video games were seized by Uruguayan police officers when they apprehended a truck transporting the goods to Paraguay. In February 2010 Uruguayan customs seized 88,500 counterfeit *Nintendo* products in transit to Paraguay from China.

Paraguayan customs made token seizures of infringing contraband in past years, but these random actions never produced a deterrent effect. Furthermore, customs methods and procedures are inconsistently applied. The result is a lack of attention to detail by customs agents needed for IP owners to effectively seize infringing products. For example, in December 2010, a container of suspected counterfeit *Nintendo* products was “lost” by customs before identification could be made due to the failure to enter products into the customs database before dispatching the goods to the importer.

The responsibility for border control rests with the Paraguayan customs. Units established under ‘Plan Umbral’⁹ in 2007 with assistance from U.S. Immigration and Customs Enforcement and re-enforced under Plan Umbral II have proven to be ineffective in the fight against piracy and have yet to produce significant results.

While the Customs investigative entity, Administrative Coordination of Customs Investigations (CAIA), appears to be a functioning and uncorrupt unit, the operational unit, COIA, has suffered

⁹ Plan Umbral is a program created by the Paraguayan Government, funded by the Millennium Challenge Corporation, and implemented by The U.S. Agency for International Development (USAID) and the Presidential Council for the Modernization of Public Administration (Paraguay) (www.programaumbral.gov.py/informes-en.php).

several changes in leadership because of legal issues. Additionally, COIA's resources are very limited when pursuing counterfeit electronics since much of the Unit's attention is focused on other government priorities such as illegal food products entering Paraguay.

In July 2010, Nintendo conducted training—coordinated as part of Plan Umbral – with CAIA and Customs Border Enforcement (DETAVE) to increase awareness of pirated *Nintendo* products.

Example: Despite being a major transshipment point and with the 2nd largest free-trade area (Ciudad del Este) in the world, Paraguayan Customs did not seize any *Nintendo* video game products during 2010 or 2009 at the border.

2000 = 9 actions / 496,086 products seized

2001 = 6 actions / 71,986 products seized

2002 = 3 actions / 4,932 products seized

2003 = 0

2004 = 3 actions / 100,600 products seized

2005 = 6 actions / 167,424 products seized

2006 = 0

2007 = 0

2008 = 2 actions / 9,450 products seized

2009 = 0

2010 = 0

Further, significant quantities of pirate video games are entering through the airports in Ciudad del Este and the capital city of Asunción, both in passenger suitcases and through courier services, for eventual sale in Brazil, Argentina and Uruguay. Paraguayan customs has not implemented significant control measures in the airport transit system which is a well known route for infringing goods.

Nintendo's Anti-Piracy Actions In Paraguay Demonstrate Infringing Goods Are Imported But Also Locally Produced

Enforcement activities involving *Nintendo* video game products in 2010 demonstrated continued sales of pirate video games in cartridge and optical media formats, both imported and locally produced, as well as modified game consoles often destined for Brazil.

The successful anti-piracy unit, the UTE, under the Ministry of Industry and Commerce, which conducted the majority of the successful enforcement actions taken by Paraguayan authorities in 2009 was dismantled at the end of that year. The former team was eventually replaced with a new coordinator and sub-coordinator along with a three person team. While some of the

members had an investigative background, the coordinator is a political figure who also holds another position within the Ministry and none of the members had experience in anti-piracy investigations.

Nonetheless, the unit was able to execute a couple of operations focused on video game product targets that had been raided by the UTE in other years. These brought very limited results. In September, the sub-coordinator resigned from the unit along with the other members leaving only the coordinator. From September through the end of the year, the one man unit conducted several raids aimed at modified consoles, modchip and pirated video game targets with very limited results. During this period, the UTE continued to receive training from USAID (Plan Umbral II) and US State Department's International Bureau on Narcotics and Law Enforcement (INL).

On a more positive note, President Lugo signed a decree in November 2010 re-creating the UTE indicating that the unit may have political support for the first time. In addition, the government added a line item in the budget to provide for the first time Paraguayan funding for the UTE. At the close of 2010, potential new members of the unit proposed by the Ministry of Industry and Commerce, Ministry of Finance and the Ministry of Interior were being hired. The members selected began training in January 2011 through the USAID coordinated Plan Umbral II and INL.

Nintendo Strongly Urges Reinstatement Of The Full Capabilities Of The UTE.

If the re-established UTE is deemed viable once the new members are in place, Nintendo encourages very close U.S. Government involvement in providing training and funding, allowing for monitoring of investigations and seizure actions carried out to ensure transparency and the absence of corruption in the unit.

Extension of U.S. And Paraguay Memorandum Of Understanding Through 2011 Is A Positive Step But Many Obligations Remain Unimplemented

In November 2009, Paraguay and the U.S. agreed to extend the 2008 version of the Memorandum of Understanding (MOU) through 31 December, 2011. The MOU is supposed to commit the Paraguayan Government to seriously enforce intellectual property rights. Despite the positive step by Paraguay in 2009 of signing the revised Penal Code creating stiffer penalties for trademark crimes, in practice the effect has been practically non-existent. Nintendo encourages the U.S. Government to continue to pressure and assist Paraguay to implement some of the action items not yet undertaken, including:

- Strengthening border enforcement to include *ex officio* actions
- Sustaining enforcement on points of sale, including tourist locations and markets
- Seizing infringers' assets upon conviction

Corruption Continues To Hamper Anti-Piracy Efforts

Despite the promises of the current government, which entered into power in August 2008, to eliminate corruption in Paraguay, the anti-piracy arena continues to exhibit numerous examples of this scourge.

Conducting raids targeting warehouses and retail outlets housing counterfeit and pirated goods has become increasingly difficult due to blatant cases of corruption that continue to preclude successful enforcement actions.

In February, the Supreme Court issued a resolution requiring a judge to accompany all raids and container inspections in Ciudad del Este. A second resolution issued in April, designated two individuals as the only judges allowed to issue raid warrants and authorizations for container inspections pertaining to IPR and Customs cases. This resolution required one of these two judges to personally attend these actions. This is an onerous requirement as well as one that limits enforcement cases to the schedules of busy judges. The second resolution also stipulates that payments must be made for a judge to be present during a raid. The payments to the judge and assistant are \$500-\$600, greatly increasing the cost of enforcement.

While the current government made initial declarations of intentions to combat corruption, Nintendo has seen little evidence that true progress has been made, especially in the areas of the judicial system and border enforcement. In fact, some situations have led Nintendo to conclude that corruption in 2010 was worse than the previous year.

The President's appointment of a former anti-corruption prosecutor as Customs Director at the end of 2009 has proved to be a positive step forward in combating corruption. The Director established an office of internal investigations that has successfully investigated corrupt Customs officers and he has submitted the cases to the Prosecutor's office for prosecution. The office, which receives support from USAID (Plan Umbral II) has created a sense of fear among Customs agents responsible for inspecting shipments. While Customs did not seize counterfeit *Nintendo* products in shipments in 2010, CAIA and the Control Unit (Fiscalization) are making attempts to conduct investigations and container inspections targeting potentially infringing *Nintendo* products. Despite this advancement, counterfeit products continue to slip through borders unnoticed and corruption continues, as evidenced by the continued movement of pirated goods through numerous points of customs entry.

The National Police Economic Crimes unit continues to be plagued with corruption and is ineffective against piracy. The National Police, Department of Investigations, office of Trademark and Document Fraud, which also has responsibilities, but limited resources, for combating piracy, also continued to exist only in name. While the Economic Crimes unit did provide support during raids, neither of the units seized *Nintendo* products in 2010.

The Revised Criminal Code Has Enabled An Increase In Nintendo's Enforcement Actions Against Circumvention Devices But Legal Follow-Through is Lacking

The revised criminal code (Law No. 3440/08), which took effect in July 2009, provided much needed changes to Article 184 pertaining to circumvention devices and also increased penalties for copyright and trademark offenses. Article 184a prohibits the unauthorized circumvention of security measures designed to protect copyrighted works, punishable with up to 3 years in prison or a fine.

While Nintendo conducted several successful seizure operations targeting circumvention devices and modified consoles in cooperation with one prosecutor's unit in Ciudad del Este, the decisions made by the Ciudad del Este judges in the cases have been disappointing.

In the majority of cases in late 2009 and 2010, seized modified *Wii* consoles and modchips were ultimately returned to the infringing party or left in the care of the defendant instead of being confiscated and stored at the prosecutor's warehouse. This followed a judge's decision in each case. To date, Nintendo has been unable to destroy any modified consoles or modchips.

Example - In January 2010, Nintendo successfully conducted enforcement actions with the Public Ministry in Ciudad del Este targeting modified game consoles, modchips and game copiers. These actions resulted in the seizure of a significant quantity of modified consoles and circumvention devices.

However, when the judge, prosecutor, and expert witness visited the warehouse to conduct the final log of infringing consoles that had been left sealed in the defendant's warehouse, the units had been obviously tampered with and many were missing. Despite the prosecutor's objection to the state of the sealed evidence, the judge returned all the modified consoles and circumvention devices to the defendant. This action exemplifies deficiencies in the legal system and ultimately jeopardizes Paraguay's ability to benefit from a fully functioning legal regime.

Based on a two month investigation into a major modification lab and pirate operation, Nintendo investigators estimated the group was producing 1,000 modded consoles per day. By the time the raid was coordinated by police and the prosecutor's office of Ciudad del Este, the quantity of infringing merchandise found at all targets did not meet the expectations of the raid team. The modification lab had been cleaned out revealing that the infringers had been alerted to the raid plans.

There are countless such examples of disappointing IP enforcement results created by leaks and corruption in the Paraguayan legal system.

In August, Nintendo co-sponsored training for officials from the Asuncion Prosecutor's office, Customs, the UTE, and Treasury officers; however, not a single prosecutor or assistant attended, limiting the value of the training.

Nintendo is concerned about the complete lack of understanding and implementation of the law prohibiting circumvention devices on the part of judges in Ciudad del Este.

Creation of the New Intellectual Property Specialized Unit: A Positive Step Forward

The IPR Prosecutor's units formerly known as the 'Trademark Units' were replaced by the UEPI-Unidad Especializada de Propiedad Intelectual. Eventually, the unit will include an Intellectual Property Crime Director and an IP Expert Witness; however, these positions have not yet been approved by the Attorney General. To date, the only significant change has been the addition of an IPR Prosecutor in Encarnacion, a border town with Argentina and major land port for containers entering Paraguay. The project provides for two additional prosecutors in Encarnacion.

At the time of this writing, the Public Ministry's IPR working group was drafting a "Manual of Internal Proceedings" to standardize the prosecution criteria. Other IPR law enforcement agencies including Customs – CAIA, the UTE and the Ministry of Industry and Commerce were invited to become part of the group to analyze future IPR joint investigative procedures.

Recommendations

The following steps are suggested to improve IP protection in Paraguay:

- Vital to winning the battle against piracy, the U.S. Government must stay involved and pressure Paraguay in its reinstatement of UTE and to support training, funding and monitoring of investigations and actions while keeping corruption at bay.
- Prosecutors and judges should enforce the revisions of the Penal Code or it will never be successful.
- Also critical to the success of the revisions to the Penal Code will be training of customs and border agents, prosecutors and judges on the identification and function of circumvention devices. Nintendo encourages the U.S. Government to fund training on the illegality of such devices.
- The Paraguayan Government should investigate judges in Ciudad del Este who are suspected of being corrupt, and remove them if found to be corrupt. Also helpful to

improving the judicial system, courts must establish and enforce standards for testimony issued by expert witnesses and issue serious sanctions, including the loss of the expert witness license, for experts who intentionally present false testimony.

- While Nintendo encourages the U.S. to continue training and funding through programs such as 'Plan Umbral' to decrease corruption levels, improvements need to be made in the area of customs enforcement training.
- The U.S. should support the establishment of honest, designated IPR judges, specially trained in IP law, with the ability to issue raid warrants nationwide.
- Units set up under 'Plan Umbral' need support in order to develop an honest and effective anti-piracy group within the Paraguayan National Police division of Economic Crimes unit, as well as the within the IPR unit of the Department of Investigation of the National Police.
- Paraguayan Customs must take positive steps to monitor and detect counterfeit products crossing its borders to effectively reduce piracy.

* * * * *

SPAIN

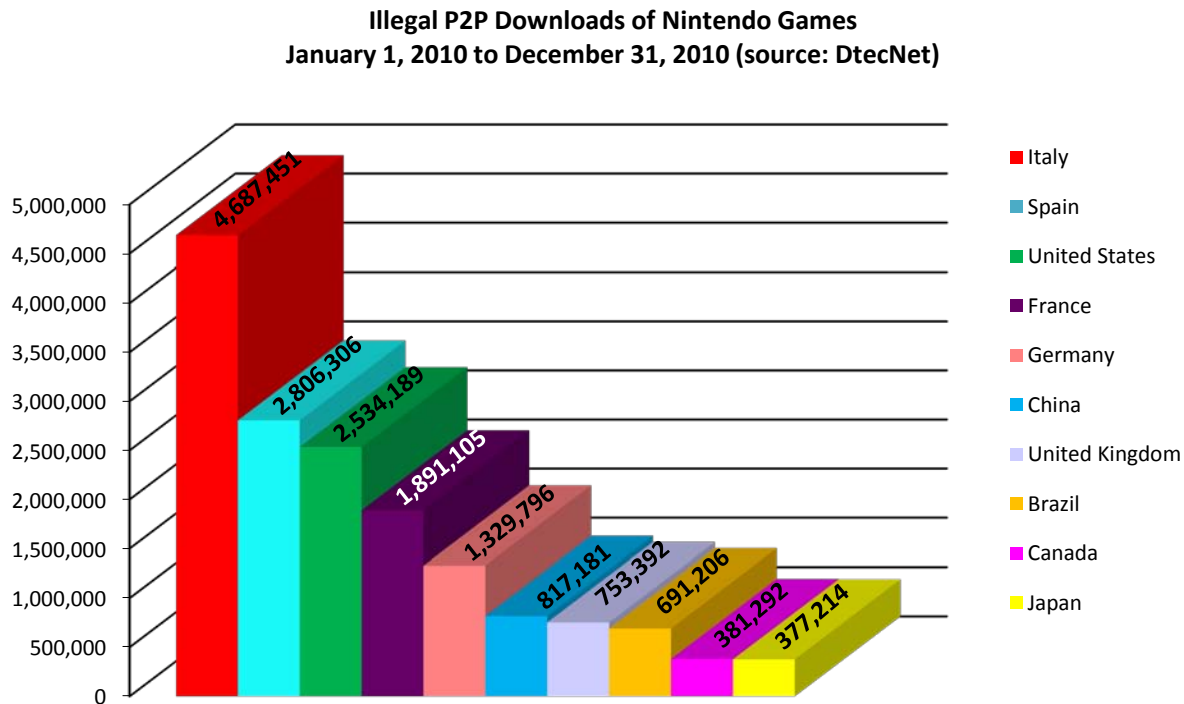
Nintendo recommends Spain be elevated to Priority Watch List with an out-of-cycle review (OCR) to be conducted later this year.

- The Spanish Government Must Take Steps to Address Internet Piracy And Thus Far the Spanish Parliament Has Refused To Assist
- Civil Proceedings Relating To Copyright Infringements Committed Through the Internet Remain Challenging
- Perception of Legality Of Circumvention Devices and File Sharing Must Be Altered
- 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
- 2010 Saw Significant Efforts by Spanish Authorities -- Both Police and Customs -- to Crack Down on Distribution of Circumvention Devices

Spain remains a leader in Europe for use of counterfeit *Nintendo* video game products, both hard goods and 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 not offered to the Spanish Parliament until late 2010 and with little pressure for passage by any political party. Finally, on December 21, 2010, the Spanish lower house of Parliament rejected the initiative that rightsholders hoped would improve Internet enforcement in Spain. The Spanish Senate could, in theory, reconsider this decision, but in the meantime Internet piracy flourishes.

The Spanish Government Must Take Steps To Address Internet Piracy And Action Is Needed in 2011

The Internet is the main channel for distribution of illegal *Nintendo* video games and circumvention devices in Spain¹⁰. As Internet piracy in Spain worsened, the government took two commendable steps that could have helped to reduce online piracy.



First, in November 2009 the government formed an inter-departmental commission to address Internet piracy. Second, the Economic Sustainability bill was introduced which could have provided rightsholders a means to elicit badly needed help from the Spanish Government to assist with enforcement of IP rights. Government will and commitment, however, were not sufficient to ensure passage of the anti-piracy provisions of the bill at the first voting in Parliament at the end of 2010. In the Senate, an agreement with the main opposition party (PP) will be necessary if the Government wants to reintroduce the anti-piracy provisions.

Meanwhile, 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

¹⁰ Detailed information on circumvention devices (e.g., game copiers and mod chips) can be found in the introduction section to this document. At this time, between game copiers and mod chips, game copiers are the more significant problem in Spain for Nintendo. 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.

property right owners, like Nintendo, must have an effective mechanism to enforce their rights when infringed online.

An important factor in promoting Internet piracy in Spain is the growth of two types of Internet piracy – cyberlockers and cyberlocker linking sites -- which together make illegal material more accessible to Spanish consumers.

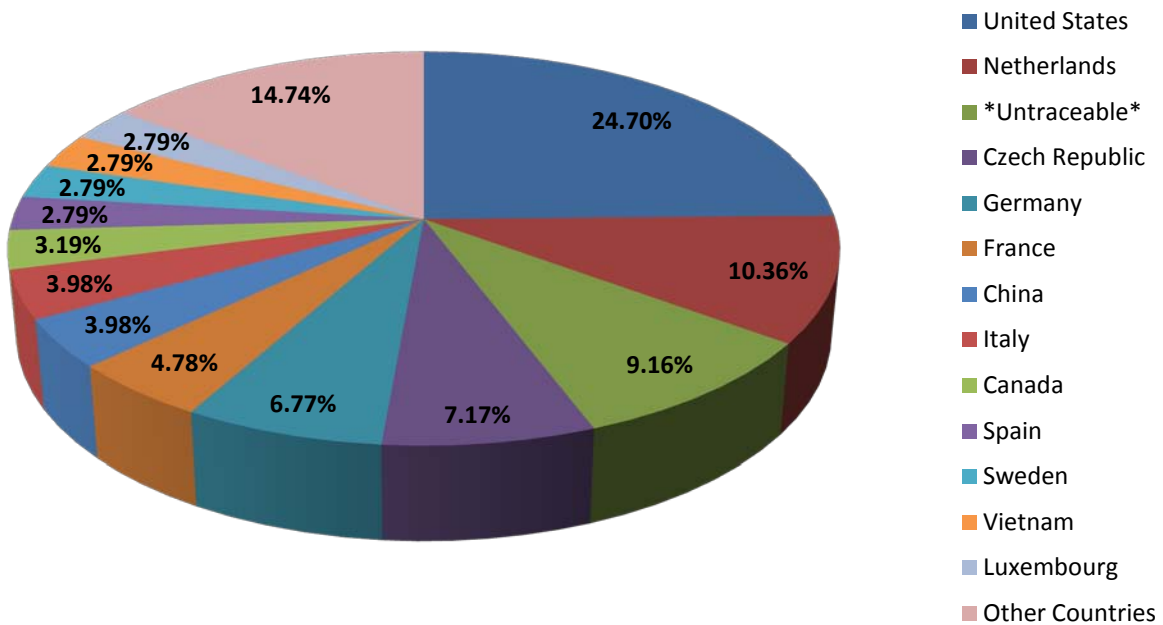
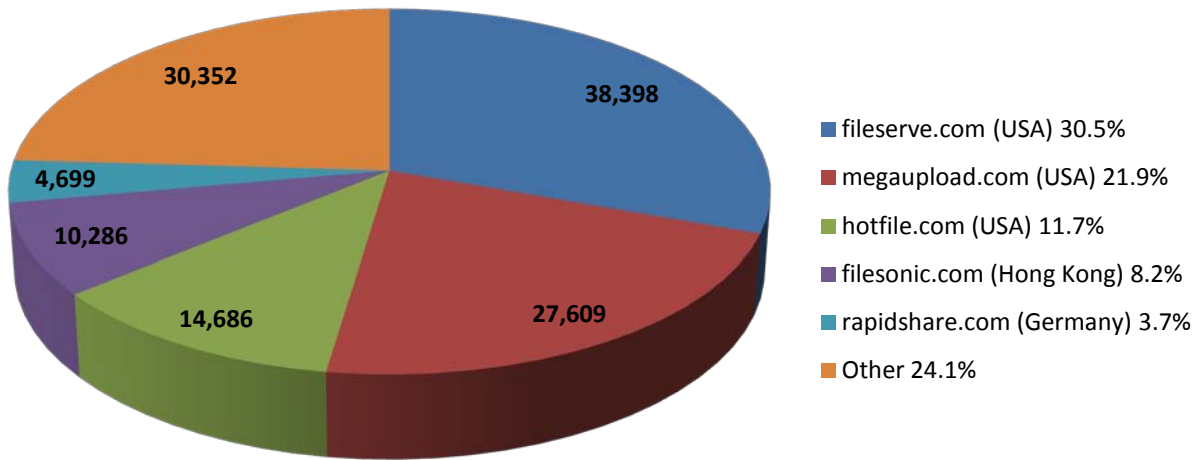
Cyberlocker Piracy - Cyberlockers (also known as 1-click hosts) are web sites where illegal *Nintendo* game files are uploaded on servers which are operated by cyberlocker companies. When users upload a file to a cyberlocker, they are provided with a link to where the file is stored on the cyberlocker's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

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, including the lack of government support and motivation.

The question then becomes what can and will the government do to help rightsholders reduce online piracy in Spain. Illegal video games downloaded in Spain come primarily from foreign-based cyberlockers, which are typically accessed through Spanish linking sites. For any anti-piracy provisions passed in Spain to be successful they should be properly funded and address illegal content hosted on foreign servers.

CYBERLOCKER CHART BELOW: The first chart below illustrates the top 5 cyberlockers storing illegal *Nintendo* game files during the fourth quarter of 2010. Takedown notices are sent to cyberlocker companies by Nintendo's online monitoring service. For example, for the 4th quarter in 2010, 14,686 illegal *Nintendo* game files were detected on hotfile.com and take down notices regarding these files were sent to the company. Of those infringing *Nintendo* titles detected during this period, 11.7% were hosted by hotfile.com.

None of the top 5 cyberlocker companies are based in Spain.



LINKING SITES CHART ABOVE: The second chart above illustrates the top linking sites. As there is no central way to search files on cyberlockers, linking sites act as portals to connect users to the illegal files stored on the cyberlockers for download.

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 making available and downloading unauthorized *Nintendo* game files through P2P networks. The most popular P2P networks for Spanish Internet users are eDonkey and BitTorrent.

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 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.

Civil Prosecutions of Copyright Infringements Committed Through the Internet Remain Challenging

Civil 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.

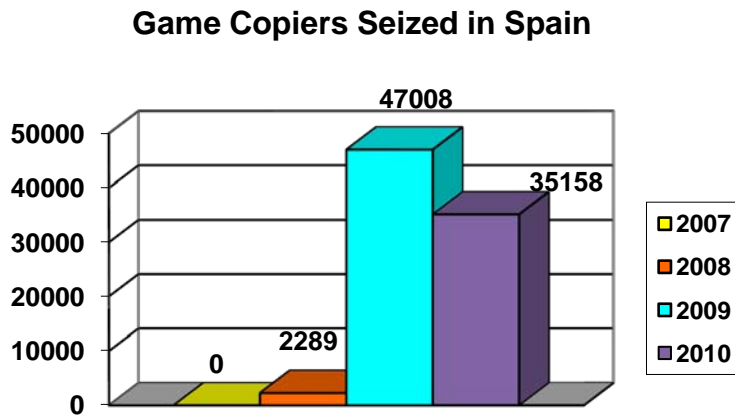
Additionally, there are no identification requirements from the Spanish Government for the owner of a website and, consequently, there are no records to review in order to obtain this information by other means. In this context, and since the Circular 1/2006 from the Public Prosecutor's Office also excluded illegal activity related to copyright infringement from criminal remedies, the unfortunate situation for right holders is that they have no means to defend their rights online, neither in the civil nor criminal jurisdiction.

Circumvention Devices Remain Widely Available In Spain

Particularly worrisome is the growth in the Spanish market for game copiers in 2010. 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 and 2010 against major retailers and Nintendo's proactive communications with its major retailers fortunately reduced availability in nationwide electronics chain stores. Yet the copiers remain easily accessible online from many websites based in Spain and elsewhere.

Under a recent decision in September 2010 from Palma, game copiers were found to infringe Nintendo's trademark and copyrights, as well as violate anti-circumvention laws. 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.



Perception of Legality Of Circumvention Devices and File Sharing Must Be Altered

While police actions in 2009/2010 and subsequent publicity (including on television) have attempted to alter the public's view, in general there remains a widespread perception among video game players in Spain that circumvention devices are legal. Both game copiers and mod-chips are still easily accessible online from many websites based in Spain and elsewhere. This perception also pertains to the sharing of infringing content via P2P file sharing networks.

Unfortunately, altering this perception has not been a priority for the Government. There has been no sustained effort to educate users about the damage that Internet piracy causes to the content industry, the economy in general, and to Spain's international image as a center of piracy. The media and public have widely interpreted Circular 1/2006, an official document issued by the Attorney General, as condoning P2P file sharing, with nothing done by the Government to counter that misinterpretation.

Nintendo Hopes The First Spanish Prosecution of A Distributor of Circumvention Devices Will Begin To Change Public Perception

A judicial prosecution that began in 2009 involving circumvention devices could begin to change public perceptions. Prosecutors in Avilés (Asturias) brought a criminal action against one of the principal distributors of game copiers in Spain. This company distributed large quantities of game copiers to both individuals and retailers through its Internet web page. Though the trial stage for this case, and other cases like it, has only begun, based on the investigation during preliminary proceedings the judges have determined there is adequate evidence to support a criminal case.

In September 2010, the first decision was issued by a court of Palma (Balearic Islands) holding distributors of circumvention devices guilty of violations under Spanish law. Prison sentences and fines on the defendants were imposed but suspended after an agreement with the Public Prosecutor. Nonetheless Nintendo hopes that this milestone decision may initiate a string of similar ones from the other Spanish courts and may serve as a deterrent to criminal activity and sensitize the Spanish public to the infringing nature of game copiers.

Additionally, there seems to be a growing understanding among Spanish authorities generally, especially the police, that game copiers infringe Nintendo's intellectual property rights.

Nintendo Congratulates Spanish Authorities For Action in 2010

In April 2010, the police carried out three series of major raids in the area of Madrid involving Nintendo products. Over 12,400 infringing items were seized, most of them game copiers.

In May 2010, following a Guardia Civil investigation, a criminal court ordered preliminary relief measures against 3 of the most notorious websites in Spanish used to download pirate games: www.espalnds.com, www.espalwii.com, www.espalzone.com. These sites remain closed as of now.

Customs Authorities Play an Important Role In Enforcing IPR And Nintendo Is Seeing Positive Signs In This Area In Spain

Spanish customs are instrumental in preventing entry of fake or counterfeit products into the country. Under European Regulation EC No. 1383/2003, owners of intellectual and industrial property rights can record their rights with the customs department and have products that are suspected of infringing intellectual and industrial property rights seized. In practice, Spanish customs authorities will stop a suspect shipment and contact Nintendo representatives. Once Nintendo confirms a violation, the products are detained. Either the importer will forfeit the goods or Nintendo must initiate a judicial proceeding to prevent the release of the goods to the importer.

Nintendo, as a major holder of intellectual and industrial property rights, has registered its rights with Spanish customs authorities for many years. Throughout 2009 and 2010 it focused its attention on game copiers. In 2008 Nintendo invested heavily in training customs staff. This appeared to have very positive results, as the volume of goods seized increased significantly in 2009 and 2010. In 2010, customs conducted 34 seizures of circumvention devices involving 25,617 units as well as one raid involving 7,000 other infringing *Nintendo* video game products. In 2009, customs conducted 35 seizures of circumvention devices involving roughly 13,000 units as well as 10 raids involving 1500 other infringing *Nintendo* video game products.

Under the treaties of the European Union on free movement of goods, once the merchandise is introduced in Europe, it circulates freely throughout the EU without any check by customs agents in each country. Thus, the capacity for customs agents in Spain to intervene is reduced

to the inspection and control of any suspect goods coming from countries outside the EU. But with continuing education for customs agents on the detection of game copiers and counterfeit goods, coupled with information on companies supplying these illegal goods, Spanish customs agents are well prepared to assist Nintendo in its fight to reduce piracy in Spain in 2011. Nevertheless, if the Government were to increase resources, both technical and personnel, Customs could do much more to stamp out piracy in Spain.

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 linking sites hosted outside Spain, government measures (through the Senate version of the Economic Sustainability bill or elsewhere) must address this by authorizing the blocking of linking sites which would 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 in order to identify infringers should be broadened so that, among other possible actions, ISPs can request any personal data for identification purposes from its customers (i.e., Internet users) when there is sufficient evidence of a potential infringement.
- Educating and increasing the awareness of individuals (consumers) and professionals (judges, prosecutors, and experts) about the seriousness of crimes related to the infringement of intellectual and industrial property rights should be a priority in Spain. 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.
- Spain should work in a coordinated manner with other EU member states in the adoption of joint measures to combat counterfeit commerce. 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.

- Customs authorities should be provided with greater technical and personnel resources so they can increase the number of inspections and have the capacity to deal with mail-order type shipments attempting to enter Spain.
- 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, Paraguay 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 these 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 initial "R" and "C".

Richard C. Flamm
Senior Vice President & General Counsel