



Nintendo of America Inc.
4820 150th Avenue N.E.
Redmond, WA 98052 U.S.A.

425-882-2040
Fax 425-882-3585

February 17, 2009

Ms. Jennifer Choe Groves
Senior Director for Intellectual Property and Innovation and
Chair of the Special 301 Committee
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 Ms. Choe Groves:

Nintendo of America Inc. (Nintendo) submits this letter in response to the "Request for Written Submissions From the Public" which appeared in the January 23, 2009 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. Through Nintendo's anti-piracy efforts and cooperation of various government enforcement authorities, over 1.1 million infringing *Nintendo* products and components were seized worldwide in 2008.

Worldwide piracy of *Nintendo* video game products remains a chronic problem resulting in huge losses, despite Nintendo's anti-piracy programs in almost 50 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 2009, Nintendo recommends that USTR designate: (1) China for monitoring under Section 306 of the Trade Act and Priority Watch List; (2) Mexico to be placed on the Priority Watch List; (3) Paraguay to remain under Section 306 monitoring; and (4) Brazil, Republic of Korea and Spain be included on the Watch List.

Although Nintendo did not file 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 take up this issue again and pass a law that has the similar potential to the last copyright reform bill introduced in Parliament, namely the defunct Bill C-61. ISP responsibility is another serious weakness in Canada that Nintendo believes must be addressed in the coming year, along with lack of appropriate funding for law enforcement authorities to enforce its IP laws.

Last year, Nintendo filed comments regarding Hong Kong without making a recommendation for placement on a Special 301 listing. Due to improvements in a number of areas, Nintendo has not included detailed comments on Hong Kong in this filing. Nintendo will continue to be active in the area of enforcement in Hong Kong due to its proximity to China. Hong Kong serves as a major transshipment point for pirated *Nintendo* video games and circumvention devices originating in China, destined for other Asian countries, as well as the U.S., Europe and Latin America.

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 GameCube*, *Game Boy Advance* and *Nintendo DS*) play Nintendo's proprietary game software as well as games 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 of these companies are also adversely affected by worldwide piracy of these 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 2008 in the United States. The *Nintendo DS* handheld video gaming system sold almost 10 million units in the U.S. during 2008. Since its 2004 release, over 96 million *DS* systems have been sold worldwide.

The *Wii* ranked second and sold over ten million units in 2008 in the U.S. Since its release in November 2006, over 45 million consoles have been sold worldwide.

With these record-setting video game hardware sales figures, it is not surprising that the popularity of pirate versions of games published both by Nintendo and by its third party licensees for the *Wii* and *DS* has reached unprecedented levels. Their popularity has surged because of the widespread availability of circumvention devices, though 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 system. *Nintendo DS* software is only distributed in a plastic game card that is inserted into *Nintendo DS* hardware. Besides the proprietary *Wii* virtual console, *Wii* software is only distributed in optical disc format. Hence, all *Nintendo* game files offered via the Internet for download are illegal copies. Circumvention devices make these games popular because they permit them to be played on *Nintendo* hardware.

Circumvention Devices (Game Copiers and Mod Chips) & Internet Piracy (P2P and ROM Downloads)

Game Copiers: Two types of circumvention devices have been developed targeting *Nintendo* hardware systems. Game copiers are used to circumvent the security embedded in the *Nintendo DS* and the *Game Boy Advance* handheld systems. These "game copying devices" are used to copy video game software, without authorization, onto any type of memory device or hard drive of a personal computer. This enables the user to make, play and distribute illegal copies of *Nintendo* video game software. These devices also facilitate the uploading and downloading of illegal software to and from the Internet. Other than games offered directly to the *Wii* console through a proprietary system, Nintendo does not distribute its game software on the Internet. Accordingly, all *Nintendo* games offered on websites and all other types of networks are illegal copies which violate the company's copyrights and trademarks.

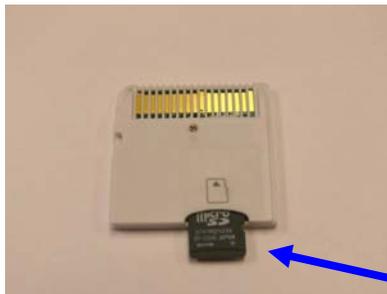


USB-to-Micro SD flash memory card reader used to transfer illegal games downloaded from the Internet from computer to Micro SD flash memory card

Game copier card which is designed exactly like an authentic *Nintendo DS* game



Micro SD flash memory card purchased separately by the user in which the game software illegally downloaded from the Internet is stored



Micro SD flash memory card is inserted into the game copier card



Game copier card is inserted into the *Nintendo DS* card slot on the *Nintendo DS* system

Mod Chips: The second type of circumvention device, called a modification chip (“mod chip”), is soldered (usually by so-called “chippers” providing “chipping” services) to the internal components of a *Nintendo* video game console. Mod chips circumvent the security embedded into *Nintendo's* hardware console and allow the console to run counterfeit software discs. Counterfeit *Game Cube* discs cannot be played unless the respective hardware console has been modified with a mod chip. Mod chips also facilitate the playing of counterfeit video games on the *Wii* console.

The D2C Pro Chip



No other copyright industry has been plagued by circumvention devices like the video game industry. Unfortunately, in 2008, Nintendo found itself at the forefront of testing circumvention laws at the customs level all over the world, and in courts in Europe and Korea.

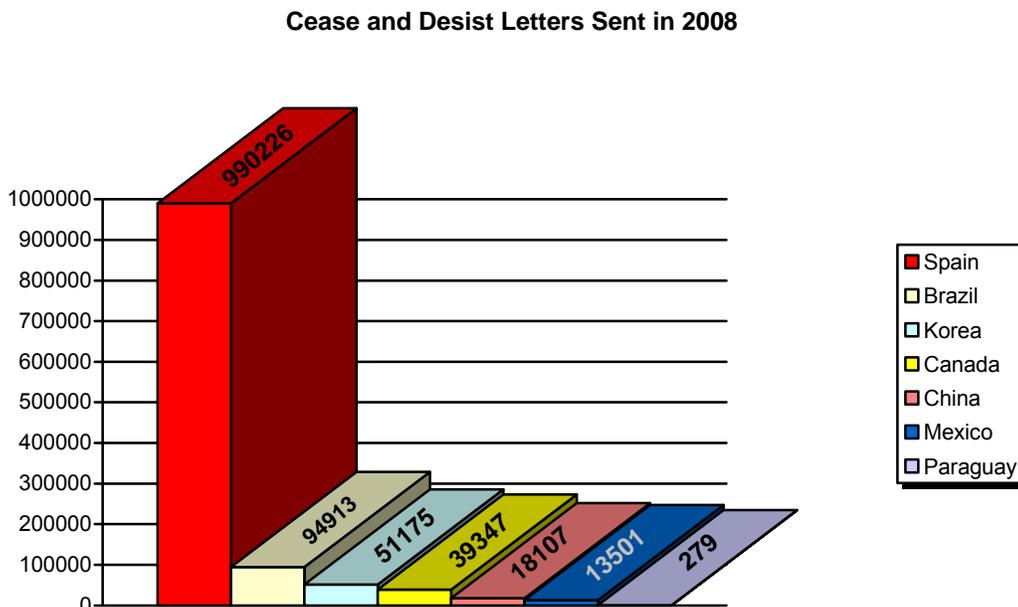
The results at this early stage have been positive in those few territories where the law has been tested, although there is a lack of consistency in how video games are categorized for protection, and the level of technical detail required by courts to prove the circumvention of a copyright protected work, especially in Europe. Also challenging and frustrating is being unable to rely on protection against circumvention laws under a country’s copyright law due to the narrow views prosecutors may take with respect to an untested area of law.

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.

As game copying devices allow for the playing of illegally downloaded *Nintendo* software via the Internet, unfortunately, both the sale of the devices and Internet piracy have grown significantly in many countries around the world. Internet users are able to download illegal *Wii* software and burn the game data to an optical disc. The only way to play the disc containing the illegal content is by using a modified *Wii* hardware console. Nintendo has found that sales of legitimate software lag significantly behind historic expectations based on numbers of hardware units sold in countries with poor records of enforcement against circumvention devices, such as with the *DS* and game copiers in Spain.

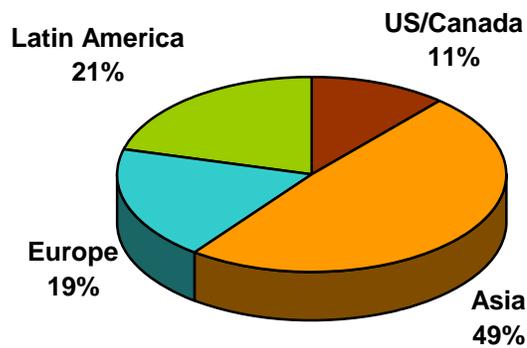
Given that the technology surrounding the use of circumvention devices and how these devices infringe the intellectual property of copyright owners is new, Nintendo is actively engaged in educating consumers, distributors, importers and exporters, government officials, police, customs officials, prosecutors and judges. A part of this process includes sending out educational letters about these devices and how they infringe Nintendo's intellectual property. In some cases, cease and desist letters are sent out to known infringers.

The chart below shows how many cease and desist letters have been sent out on behalf of Nintendo in 2008 to known infringers in those countries which are the subject of this filing. The majority of these notices were sent from our online monitoring service for illegal downloads of game files detected, but it also includes cease and desist notices sent to Amazon.com, ebay, individual web shop owners, and those notices sent out by local law firms.



The pie chart below shows a general summary of where *Nintendo's* video game products were seized in 2008. This includes illegal copies of *Nintendo* games, circumvention devices and component parts.

2008 Infringing Nintendo Video Game Products Seized



Nintendo will now present its experiences over the past year in the following countries: (1) Brazil; (2) China; (3) Korea; (4) Mexico; (5) Paraguay; and (6) Spain.

BRAZIL

- Federal Anti-Piracy Actions Are Not Reducing Piracy of *Nintendo* Products In Brazil
- Local Enforcement Efforts Are Weak
- Efforts To Prosecute Infringers For Piracy Are Virtually Non-Existent
- Customs And Border Control Failed To Seize A Single Shipment Of *Nintendo* Video Game Products In Brazil In 2008
- Internet Piracy Is Increasing With No Legal Infrastructure In Place To Respond To The Threat It Poses To Rightsholders
- High Tariffs And Taxes Constitute A Market Barrier

Nintendo recommends that Brazil remain on the Watch List because of the high level of pirate *Nintendo* products dominating the market. A number of factors contribute: (1) weak, though improving, national IP enforcement efforts; (2) the absence of meaningful deterrent criminal penalties against counterfeiters; (3) soaring levels of Internet piracy supported by the availability of infringing circumvention devices that plague the market; and (4) high tariffs and taxes which greatly distinguish the cost between the pirate and legitimate goods.

Federal Anti-Piracy Actions Are Not Reducing Piracy Of *Nintendo* Products In Brazil

The National Council to Combat Piracy and Intellectual Property Crimes (CNCP) was created 4 years ago. Since its formation, Brazil has reported successful actions resulting in high levels of seized counterfeit products. Unfortunately, these raids appear to be narrowly focused on specific market segments and have not reduced the availability of pirate *Nintendo* products. Nintendo's local distributors report that piracy of *Nintendo* video games has worsened in the past 12 months, with an estimated piracy rate of 94% -- up 14% from the previous year. The estimated piracy rate of *Nintendo DS* software alone in 2008 has increased from 60% to 95%.

According to online CNCP reports posted by the Brazilian Ministry of Justice, in 2007 such raids resulted in confiscated counterfeit goods with an estimated value of R\$ 1 billion (approximately US \$ 420 million)¹. For the first half of 2008, such raids reached

¹ See www.mj.gov.br/combatepirataria and www.mj.gov.br.

an estimated value of R\$ 519 M (approximately US \$ 218 million).

This same website reports that for the period between 2006 and 2008, the Federal Police conducted 541 operations and arrested 1,517 people for piracy-related activity.

Local Enforcement Efforts are Weak

In 2008, Nintendo participated in 43 company and industry-led actions in Brazil, resulting in the seizure of approximately 10,000 counterfeit *Nintendo* video game products. The enforcement actions were conducted by local authorities as the result of the industry's aggressive push to improve the market situation in Brazil.

Targets were mainly street vendors and known markets offering a wide variety of illegal goods. While this can be temporarily effective, it is important to focus on more significant source targets such as warehouses and other distribution sites in order to have a lasting impact against piracy. Nintendo has seen no evidence of police surveillance or investigations which could lead to identifying the source(s) of the infringing goods.

Since seizures were a result of complaints filed by the industry organization and its members, Nintendo would like to see local police conduct more actions on their own initiative, along with pursuing more significant targets that could lead to major suppliers and distributors of infringing video game products.

Efforts to Prosecute Infringers for Piracy are Virtually Non-existent

Enforcement efforts against IP crimes are rarely followed by criminal prosecutions even though Law no. 10.695/2003 provides that infringement of copyrights and related rights is a crime punishable with detention and/or fines. Current insignificant penalty levels will not change illegal behavior or act as a deterrent against future piracy. Although greater penalties, including imprisonment for 2 to 4 years plus significant fines, are available where reproduction of infringing goods has a profit motive, these are seldom if ever imposed.

Infringers must be held accountable for their illegal activities through strong prosecutions and tough sentences. Under the current system, there is little to deter IP crimes and significantly reduce rampant piracy in Brazil.

Customs and Border Control Have Failed to Seize a Single Shipment of *Nintendo* Video Game Products in Brazil in 2008

Nintendo is particularly disappointed by the failure of Brazilian Customs to target and seize infringing video game products entering the country through Paraguay, one of the

world's largest smuggling centers. Although the Ministry of Justice reports that Brazilian Customs had a record number of seizures in 2008 at Brazilian ports, Nintendo has not received notice of a single detainment or seizure of *Nintendo* video game products. It is crucial that Brazilian Customs consistently and rigorously patrol its borders to stop the flow of counterfeit video game products from Paraguay and beyond.

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 has emerged 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. According to recent online monitoring reports, Brazil is identified as one of the top ten infringing countries in the world related to Internet piracy². Internet auction sites such as Mercado Livre provide a new and relatively anonymous platform for transactions of infringing products.

Recent online reports by the CNCP recognize that piracy of products normally found on the streets has migrated to the Internet, which pose a much greater potential for harm. In July, the Federal Police initiated Operation I-Commerce 2 in order to attack hacking groups and organized distribution of illegal content on the Internet. Nintendo is encouraged by these efforts as well as by the creation of specialized teams to combat online piracy such as the Cyber Crime Division SSP-SP – 4^o Delegateship – DIG-DEIC in São Paulo and the DICAT in Brasilia.

According to ABES (the entertainment software industry trade association in Brazil of which Nintendo is a member), in 2008, ABES sent cease and desist letters to pursue and remove illegal video game content from the Internet, resulting in the removal of 335 infringing web sites, 14,693 illegal auction sales and 2,693 advertisements promoting Internet piracy. Internet piracy not only harms companies trying to protect their brands and intellectual property rights, like Nintendo, but as the Brazilian Government recently reported on the Ministry of Justice website, online piracy takes away two million formal jobs and loses of R\$ 30 billion (approximately US \$12 billion) worth of tax revenue in Brazil every year.³

Still, there is work to be done. 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.

² DeTechNet, recent monitoring for the period of December 5, 2008 to January 4, 2009 on two Nintendo titles: *Animal Crossing: City Folk* for the *Wii* and *Pokemon: Shadows of Almia* for the *Nintendo DS*.

³ See www.mj.gov.br/combatepirataria and www.mj.gov.br.

It is critical that laws be passed addressing these two serious shortcomings.

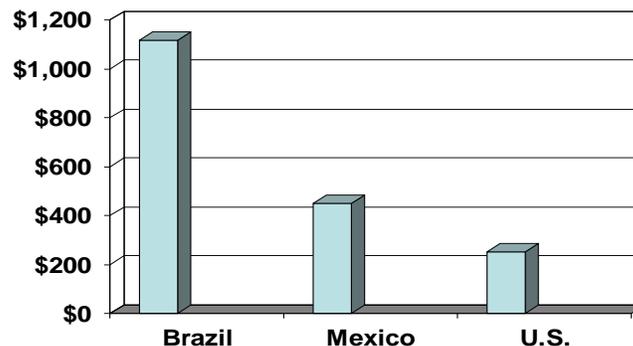
High Tariffs and Taxes Constitute a Market Barrier

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.

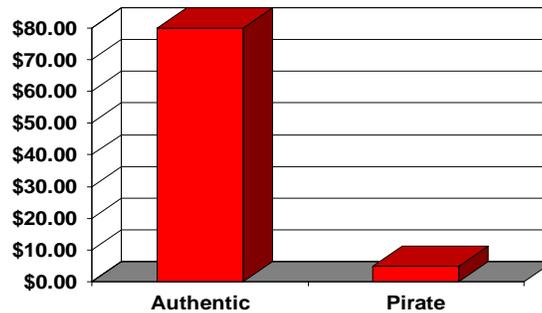
Taxes and tariffs constitute a tremendous barrier to market entry by pricing legitimate goods out of reach for most consumers. For example, *Nintendo's Wii* video game console has a manufacturer's suggested retail price in the U.S. of approximately \$250 but sells for the equivalent of \$1115 in Brazil 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 the manufacturer's suggested retail price in the U.S. is \$34.99, is sold for the equivalent of \$80 while 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.

Average Wii Hardware Price
in U.S. Dollars



Brazil
Authentic vs. Pirate Nintendo DS Software Price
in U.S. Dollars



Recommendations

Following are suggested recommendations to improve IPR enforcement in Brazil:

- Local Brazilian police should conduct more actions on their own initiative and pursue more significant targets that could lead to major suppliers and distributors of infringing video game products.
- Authorities must bring more criminal prosecutions and the courts must impose stronger penalties against IP crimes to raise awareness and foster deterrence.
- Continue the support 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. This would encourage customs officers and seizures would have a stronger impact if cases were referred to the appropriate authorities for criminal prosecution.
- Adopt new laws to explicitly protect against the circumvention of technical protection measures; to hold Internet Service Providers responsible and require them to take down infringing content when notified.
- 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.

* * * * *

PEOPLES' REPUBLIC OF CHINA

- China Should Work In The Coming Year To Eliminate Those Barriers To Its IPR Enforcement Laws According To The January 2009 WTO Dispute Settlement Panel Decision
- China Continues To Be The Hub Of Production For Infringing *Nintendo* Video Game Products
- Nintendo Is Pleased To Report That 2 Criminal Convictions Were Issued In 2008, Sentences Include Jail Time And Monetary Penalties
- Chinese Customs Must Prevent Shipments Of Game Copiers And Other Infringing Products 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

Nintendo recommends that China remain on the Priority Watch List and subject to Section 306 monitoring. Similar to past years, throughout 2008, China remained the international production center of infringing *Nintendo* video game products. From Canada to the port at Rotterdam, customs seizures of illegally manufactured circumvention devices and other counterfeit hard goods lead back to China. China is clearly the leading production site, has the largest domestic consumption of these illicit products, and is the leading worldwide exporter of counterfeit *Nintendo* video game products and circumvention devices.

China Should Work in the Coming Year to Eliminate Those Barriers to its IPR Enforcement Laws According to the January 2009 WTO Dispute Settlement Panel Decision

Nintendo fully supported the WTO dispute settlement case filed by the United States against China (DS-362) due to the shortcomings in China's legal regime for protecting and enforcing copyrights and trademarks. China should take this opportunity to correct its regime and improve IPR enforcement according to its obligations under the TRIPs Agreement.

China Continues to be the Hub of Production for Infringing *Nintendo* Video Game Products

Almost 400,000 infringing *Nintendo* goods were seized in China during 2008. Customs authorities in 12 countries around the globe seized over 80,000 counterfeit *Nintendo* video game products originating in China. Over 23,000 game copiers were seized in China in 2008. Thus, the total number of seized goods in China went down from last year even as the number of raids went up. Regrettably, this may be due to the legal threshold loophole under Chinese law which incentivizes these criminals to maintain low numbers of infringing products in one place at any one time. Mass production can be very high so long as inventory is kept low.

Production in China may be moving away from less valuable products like *Game Boy* and *Wii* discs to more profitable circumvention device manufacturing. The game copiers being manufactured in China are rapidly distributed at an alarming rate to markets around the world. While many products are shipped directly from Chinese ports, Hong Kong is perhaps the single largest transshipment point for counterfeits manufactured in China.

Nintendo continues to focus its anti-piracy activities in Guangdong Province. Guangdong Province is the home to countless factories and wholesalers producing and distributing mass quantities of counterfeit *Nintendo* software and circumvention devices. Based upon complaints filed by Nintendo, a total of 87 factories, warehouses and retail operations were raided in 2008 by local Administration for Industry & Commerce (AIC) personnel under China's trademark laws. Among the 87 seizures, 8 of them received administrative fines in the range of RMB 3,000 and RMB 30,000 (approximately US\$400 to US\$4,000), and 2 of the 87 were prosecuted and received criminal convictions.

Nintendo is Pleased that 2 Criminal Convictions Were Issued in 2008; Sentences Include Jail Time and Monetary Penalties

On May 15, 2008, acting upon Nintendo's complaint, Guangzhou Yuexiou Public Security Bureau (PSB) officers conducted a raid against an electronic appliance store and its warehouse. Approximately 2,000 counterfeit *Game Boy* game cartridges and over 20,000 *Game Boy* labels were seized. PSB officers detained the manager of the appliance store for trademark infringement.

A subsequent investigation conducted by Nintendo uncovered a husband and wife as primary operators of the infringing operation supplying the counterfeit *Nintendo Game Boy* products to the appliance store and other retail shops. The investigation also revealed that the couple fled to Beijing to evade arrest. With evidence in hand, Nintendo filed a criminal complaint with both Yuexiou PSB and Beijing PSB seeking their assistance in arresting the couple. On June 23, 2008, 5 Yuexiou PSB officers flew to Beijing to arrest the husband and wife team. The wife was not found in Beijing and remains wanted by authorities.

On December 30, 2008, the Guangzhou Yuexiu People's Court issued court rulings against both the husband and manager of the appliance store. The manager received a 12 month sentence and a fine of RMB 10,000 (approximately US\$1,333). The husband received a 36 month sentence and a fine of RMB 100,000 (approximately US\$13,330) and his wife remains at large. Both defendants who have been sentenced have appealed the court decisions.

Unfortunately, the low number of infringing goods seized at this store and warehouse are typical of seizures in China where it pays to keep inventories below the legal thresholds. Other seizures in China during 2008 netted even more infringing goods. For example, an August 12 raid against one manufacturing company yielded over 26,000 infringing goods, and separate raids on September 27 yielded over 40,000 *Wii* optical discs and over 240,000 infringing *Wii* optical discs. Yet no criminal charges have been brought against these larger criminal operations. The decision on when to bring criminal charges appears arbitrary, is certainly not transparent, and appears not to be based upon the significance of the commercial operation.

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 2 prison sentences related to counterfeiting in 2008. However, these convictions amount to well intentioned, but token efforts. The severity of the problem in China requires further criminal action to serve as a real deterrent to criminal behavior.

Chinese Customs Must Prevent Shipments of Game Copiers and other Infringing Products Out of China

Despite the flow of millions of counterfeits from China that are distributed globally, Chinese Customs authorities seized only 12 small parcels of counterfeit *Nintendo* video games in 2008. Counterfeit *Nintendo* products continue to flow freely out of China into the global market place. Chinese customs has failed to vigorously target and inspect items exported from Guangdong Province, in particular game copiers. During the year, customs authorities in 12 other countries seized pirate *Nintendo* products originating from China. We urge Chinese customs to proactively inspect and seize shipments of game copiers and other infringing products.

The Number Of Online Shopping Sites In China Selling Infringing *Nintendo* Products Is Increasing And Help Is Needed From The Government To Curtail The Growth Of These Illegal Marketplaces

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. Alibaba.com, Made-in-China.com, DHgate.com, Ec21.com, Global

Source.com are just a few examples of popular online auctions or online shopping sites in China. All offer game copiers for sale. For example, using “R4” as a search word on www.alibaba.com, over 17,000 listings of R4 are currently available for sale.⁴ 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 web sites that it will not tolerate the sale and distribution from China of circumvention devices and other illegal products that harm legitimate rightsholders.

The following shows a screen shot of one webshop listings – over 17,000 -- of a popular game copier called the “R4.”

The screenshot shows the Alibaba.com website interface. At the top, a navigation bar includes 'Home > Buy > Search: R4 17,687 Products'. Below this is the main search area with 'R4' entered in the search box and 'All Categories' selected. A 'Popular Searches' section lists various products like 'electric scooter' and 'digital photo frame'. Below the search results, there are sections for 'Refine R4 By' (with sub-sections for Related Categories, Manufacturing Region, Main Export Markets, and Business Type) and a list of product listings. The first listing is for 'R4 DS Revolution Card' by Goldenbridge International (HK) Stock Co., Ltd. The second listing is for 'Genuine R4 ds card+tf card, R4 SDHC Ultra+tf card, sdhc R4 Ultra, R4 ds, DS R4 Card, R4 DS Adapter, R4 DS Lite Card, dsst, mini card' with a price range of US\$4.5~6.5. A 'Trade Alert' sidebar on the right offers to send the latest product offers for 'R4' by mail. A banner at the bottom right says 'More products on display More inquiries'.

⁴ Search conducted February 6, 2009.

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 490 raids have been conducted targeting factories, warehouses and retail outlets in China. Until 2008, only three cases were considered for criminal prosecution and only one prosecution was lodged, resulting in the convictions of a factory owner and four employees. The 2008 case based on the May 15 raid represents the second criminal prosecution during this seven year period. In addition to the PSB, Chinese administrative agencies must be granted the authority to transfer cases to the People Procurator for further prosecution.
- Major criminal organizations operate well-developed and protected distribution networks in China, with close connections to Hong Kong and Taiwan. China, Hong Kong and Taiwan must work together to investigate and pursue these organizations.
- Despite the flow of millions of counterfeits from China that are distributed globally, Chinese Customs authorities seized only 12 small shipments of counterfeit *Nintendo* video games in 2008. Chinese customs has weak inspection procedures and need 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. Penalties must be high enough to serve as a deterrent and procedures must be implemented to allow cases to be easily transferred to the

Ms. Choe Groves
Office of the United States Trade Representative
February 17, 2009

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.

* * * * *

REPUBLIC OF KOREA

- Internet Piracy In Korea Continues To Increase
- Web-Hard Services Make Up Over 66% Of *Nintendo's* Game Files Available On The Internet In Korea
- *Nintendo's* September 2007 Criminal Complaint Against 2 OSPs And 4 Individuals Is Still Pending While Illegal Content Continues To Be Downloaded
- The Availability Of Circumvention Devices In Korea Is Increasing
- Positive Signs Include Consistent Customs Seizures And Courts Now Starting To Hold Distributors Of Circumvention Devices Accountable
- Courts Are Using The Computer Programs Protection Act In Holding Distributors Of Circumventing Devices Accountable
- Massive Customs Raid Of 10 Premises Seizing Over 75,000 Game Copiers At The Beginning Of 2009 Is Another Positive Sign The Government Is Serious About Enforcement
- Police Departments In Korea Are Also Beginning To Conduct Raids Against Retail Shops
- Korea-US Free Trade Agreement Is Important To U.S. Rightsholders

Nintendo recommends that Korea remain on the Watch List. Nintendo has invested heavily in the Korean market by working closely with local game development studios and localizing *Nintendo* games for its Korean customers. The country ranks as one of the top countries in the world for its high broadband penetration. Sadly, the broadband capabilities also prompt massive Internet piracy that stifles the sale of legitimate *Nintendo* video game products.

Internet Piracy In Korea Continues To Increase

Nintendo does not make any of its video game software available for download on the Internet, except through its proprietary system. *DS* software is only distributed in a plastic game card that is inserted into *Nintendo DS* hardware. Besides the proprietary *Wii* virtual console, *Wii* software is only distributed in optical disc format. Hence, all *Nintendo* game files offered via the Internet for download are illegal copies. For

example, within a short period of time after the release of an authentic game called *Final Fantasy CC* in Japan, Nintendo was able to detect that the game was uploaded on the Internet and subsequently downloaded and/or transmitted over 100,000 times via Korean networks. On average, at least 10,000 illegal copies of *Nintendo DS* and *Wii* game files are available for download on Korean Internet networks weekly.

As the Internet becomes a popular venue for merchants to sell their products, Nintendo monitors it for the sale of circumvention devices since *Nintendo* game files available illegally on the Internet cannot be played unless a circumvention device is used. In 2008, 47,561⁵ warning letters were sent out in Korea to open markets, online sellers, and online shopping mall sites (e.g., www.auction.co.kr), requesting them to stop offering game copiers and mod chips for sale. Some online shopping mall sites have agreed to remove the listings of game copiers detected by Nintendo but repeat listings of illegal items continue to be a challenge. With no deterrent penalties to apply pressure on the sellers in Korea, they continue to freely offer circumvention devices and other illegal items.

Web-Hard Services Make Up Over 66% Of *Nintendo's* Game Files Available On The Internet In Korea⁶

Web-hard networks are popular Korean online service providers (OSP) that are closed online file-sharing networks. These networks enable users to store and transmit large files in a password protected environment. The OSP provides the member with the password. There are usually numerous community websites contained within the web-hard service networks called "Internet clubs," established to focus on particular types of files. In fact, there are Internet clubs that are solely dedicated to the unlawful file-exchange of *Nintendo DS* and *Wii* games.

These OSPs promote and facilitate uploading and downloading of illegal content. A member who uploads any file is granted points or "cybercash" by the OSP when the file is downloaded by another member. The more content downloaded, the more points or "cybercash" the member who uploaded the content earns. Members can use these points or cybercash to download content within the networked community. Members can also purchase tangible commodities such as gift certificates or electronic products through the Internet shopping malls connected with the web-hard service network. Cybercash or points can even be purchased from the OSPs.

This business structure clearly promotes members to upload materials by sharing profits earned from other members who download materials from the website. Certainly, the OSPs are profiting from the illegal activity and have no incentive to proactively terminate

⁵ This total figure includes warning letters sent to online webshop retailers, brick and mortar retailers in Korea, and auction sites by a combination of the Softsave Corporation online monitoring service, Nintendo of Korea and a local law firm hired by Nintendo.

⁶ Softsave, proprietary report made available on request.

the illegal content found within their networks.

Nintendo's September 2007 Criminal Complaint Against 2 OSPs And 4 Individuals Is Still Pending While Illegal Content Continues To Be Downloaded

As reported last year, Nintendo has been active in issuing letters to numerous OSPs with evidence of intellectual property violations, requesting they block the transmission of thousands of infringing *Nintendo* game files.⁷

Despite the fact that Nintendo provided the OSPs with key words enabling them to identify infringing software, the availability of *Nintendo* game files freely shared via the Internet clubs has increased. As a result of this non-compliance, Nintendo sought relief through the criminal judicial system. In September 2007, Nintendo filed a criminal complaint with the Seoul Central Prosecutor's Office against 2 OSPs and 4 individuals involved in uploading illegal *Nintendo* game files. Nintendo's case was eventually re-assigned to the same prosecutor at the High-Tech Crime Investigation Department of the Seoul Central Prosecutor's Office who was examining a criminal complaint filed by a group of movie studios against OSPs (including one OSP named in Nintendo's criminal complaint) involved in the uploading and downloading of movie files, since the two cases covered similar issues.

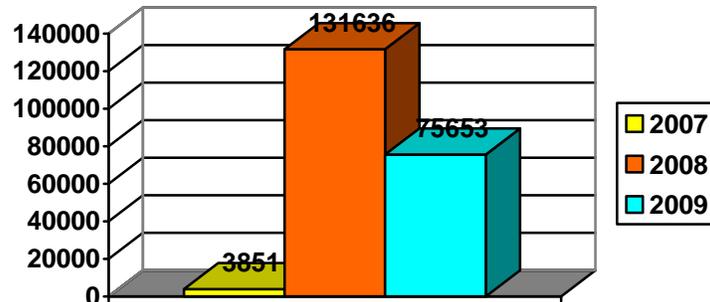
Nintendo's case has been put on hold while the prosecutor waits for a court decision in the similar case brought by the movie studios and on February 12, 2009, a decision was issued in the movie studio case imposing fines and/or jail sentence against all OSPs named as defendants in the case. Thus, Nintendo is hopeful that the prosecutor will soon make a decision on indicting the defendants named in Nintendo's case. In the meantime, the slow criminal process is benefiting those profiting from illegal content shared over the Internet

The Availability Of Circumvention Devices In Korea Is Increasing

The availability of circumvention devices, such as game copiers for the *Nintendo DS* and mod chips for the *Wii* console, has become a serious problem in Korea. These devices are prevalent and readily available on the Internet and at the retail level. The number of game copiers reportedly seized in 2008 by the Korean Customs Service (KCS) totals over 131,000. Although this alarmingly high number is indicative of the severity of the problem in Korea, Nintendo applauds the inspections conducted by Korean Customs and the detention of these circumvention devices.

⁷ See page 6 for chart on the number of cease and desist letters sent out by Nintendo.

Game Copiers Seized in Korea



Positive Signs with Consistent Customs Seizures and Courts Now Starting to Hold Distributors of Circumvention Devices Accountable

In 2007, Nintendo increased pressure on Korean prosecutors and the KCS starting with a criminal complaint filed with the Incheon Airport Customs Office against an importer of 300 game copiers. This importer was found guilty on April 30, 2008 under a pro forma order (i.e., without formal trial). After the guilty decision was rendered, sending a signal to KCS about the illegality of these devices, KCS has been actively investigating the importers and sellers of game copiers.

As noted above, based upon the information Nintendo has received from KCS, 38 shipments containing over 131,000 game copiers, including the most popular product called the R4, were seized at customs in Korea in 2008. All shipments of game copiers were exported from China and Hong Kong. Nintendo applauds the inspections conducted by Incheon Airport Customs, Incheon Customs, Incheon Airport International Mail Customs and Kimpo Customs for detaining these circumvention devices. Nintendo urges other customs offices throughout Korea to adopt similar measures to stop the shipments of game copiers.

Courts Are Relying Upon The Computer Programs Protection Act In Holding Distributors Of Circumventing Devices Accountable

In April 2008, Kimpo Customs seized 2,000 game copiers. A formal indictment was brought against the importer. This is a critical case for Nintendo against those offering game copiers for sale because the importer is vigorously presenting his defense against violation of the Computer Programs Protection Act for circumventing Nintendo's technical protection measures. Nintendo has been actively engaged in this trial and in the 4 hearings thus far. In addition to the multiple written affidavits submitted by Nintendo's engineers, Nintendo held several meetings and is working closely with the assigned prosecutor to train and provide technical assistance on the operation of game copiers and technical protection measures employed in the *Nintendo DS* system. The next hearing is set for March 9, 2009. Nintendo is hopeful that the importer will be held

liable for a criminal offense under the Computer Programs Protection Act for circumventing Nintendo's technical protection measures.

Through early February 2009, Korean prosecutor's offices have indicted 45 importers and sellers of game copiers. Twenty-eight of these importers/sellers received guilty decisions from district courts (with or without formal trial) resulting in penalties from approximately US\$360 to US\$5,030, depending on the quantity of game copiers seized. Two importers each received an 8 month jail sentence with 2 years probation.

Massive Customs Raid Of 10 Premises Seizing Over 75,000 Game Copiers At The Beginning Of 2009 Is Another Positive Sign The Korean Government Is Serious About Enforcement

Nintendo was very pleased to learn that on January 15, 2009, 64 KCS investigators jointly raided physical locations of 8 business entities involved in Internet sales of game copiers and of 2 individuals, who were involved in the supplying of game copiers, and seized a total of 75,653 game copiers. This is a great boost to the enforcement efforts already undertaken by KCS.

Further, as a result of the raids, one indictment has already been filed against a representative of one business entity selling game copiers over the Internet, while other business entities and individuals are being further investigated by KCS at this time.

Police Departments Are Also Beginning To Conduct Raids Against Retail Shops

In addition to Korean Customs, Nintendo sought assistance from local police departments and submitted petitions against retail shops selling game copiers. As a result, local police departments conducted criminal raids against 8 retail shops. Three of the shop owners were indicted late last year. The other 5 are under criminal investigation.

Korea – U.S. Free Trade Agreement Is Important To U.S. Rightsholders

The U.S. and Korea signed a Free Trade Agreement (FTA) on June 30, 2007, but it is not yet in force. The provisions set forth in the FTA place stronger burdens on the OSPs and provide strong legal remedies against the circumvention of effective technological protection measures.

Nintendo believes the U.S. - Korea FTA will provide much greater protection of U.S. rightsholders in Korea and strongly supports its adoption by both countries in 2009.

Recommendations

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

- Obligate the OSPs to gather and maintain legitimate contact information for users in order to disclose the identity of infringers to the IP owner for occasions when OSPs are notified.
- Provide training to enforcement officials, including prosecutors, on Internet piracy and circumvention devices.
- Urge enforcement authorities to secure deterrent convictions against OSPs and those who upload illegal content who are facilitating file sharing and piracy of *Nintendo* games and other copyrighted works.
- Allocate substantially greater resources to the Ministry of Culture, Sports and Tourism for conducting investigations of Internet infringements.
- Continue enforcement efforts to seize imports of circumvention devices and impose deterrent sanctions against the importers.
- Urge local police to initiate raids and seizures against importers, Internet sellers, distributors, retail outlets and street markets selling circumvention devices, followed by arrests, prosecutions and deterrent sentences.
- Urge Korean authorities to consistently publicize their enforcement actions to educate the public and serve as a warning and a deterrent for consumers.

* * * * *

MEXICO

- The Mexican Government Must Recognize The Seriousness Of The Piracy Problem And Start Using Existing Enforcement Tools
- Anti-Piracy Actions By The Mexican Government In 2008 Were Wholly Inadequate
- Nintendo Is Pleased To Share Its Observations Based On 20 Years Of Active Enforcement Actions In Mexico
- The Willingness Of Mexican Customs And Mexican Postal Service To Be Trained By Trademark Owners Was A Positive Sign In 2008
- Mexican Industrial Property Institute (IMPI) Must Be Improved
- Nintendo Would Like To See Real Results With The Security And Prosperity Partnership Of North America (SPP)
- Mexico's Participation In Negotiating The Anti-Counterfeiting Trade Agreement (ACTA) Is Encouraging But Enforcement Efforts Need To Move Forward Now
- Nintendo's Trademark Dispute Remains Unresolved With No Opposition Procedure Available For Parties To Dispute

Nintendo recommends that Mexico be elevated to the Priority Watch List. 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. Decrease 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, have been selling substantial amounts of illicit goods for decades without repercussion.

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

The Mexican Government Must Recognize The Seriousness Of The Piracy Problem And Start Using Existing Enforcement Tools

For decades, the Mexican Government has allowed the visible sale of infringing

products, such as counterfeit *Nintendo* video game products, through informal markets such as Pericoapa, Meave, Tepito and San Juan de Dios. Federal and local authorities make no effort to halt the sale of these goods, even when clearly identified as counterfeit products.

The lack of response by the Government in holding markets and vendors selling counterfeit goods accountable sends a message to consumers that purchasing these illegal goods is acceptable and there are no consequences in supporting the pirate trade in Mexico.

The Mexican Government is currently 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). While *Nintendo* supports all efforts by the Mexican Government to educate and inform the public about piracy, more concrete action is needed. The Mexican Government should aggressively implement existing enforcement tools, such as seizing properties used to sell or store counterfeit goods and support more criminal prosecutions against persons involved in intellectual property crimes.

Anti-Piracy Actions By The Mexican Government In 2008 Were Wholly Inadequate

The Attorney General's Office (PGR) is the only body that has the authority and ability to carry out large scale operations against organized criminal activity, however, *Nintendo* faces obstacles when attempting to gain the support of PGR and initiate criminal complaints against illegal vendors.

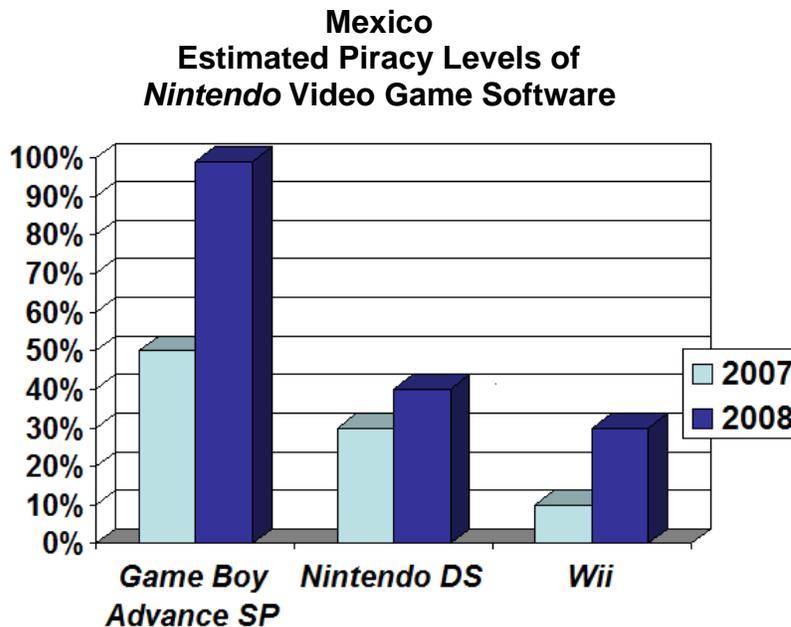
During 2008, *Nintendo* attempted to carry out numerous legal actions in key piracy markets (Meave and Pericoapa) by presenting the PGR with criminal complaints. PGR objected to any type of raid in these markets because they were negotiating the "conversion" program with market owners. This "conversion" effort eventually fell short of reaching any positive results. In addition to falling short, *Nintendo's* legal counsel reports that the "conversion" program may violate Mexican law.

Nintendo is hopeful that the PGR will offer stronger support for enforcing actions against the sale of illegal video game products in 2009 when joint actions are conducted throughout Mexico. Actions from 2008 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 the industry trade association (the ESA) seized 28,800 video games (including 8,600 counterfeit *Nintendo* video games). Additionally, burners and over 10,000 pieces of counterfeit game packaging manuals were seized showing assembly operations within Tepito. This merely hints at the volume of pirated goods Tepito produces at all times.

- San Juan de Dios and La Fayuca, well-known markets in Guadalajara, have a very aggressive atmosphere with more than 3,000 booths full of counterfeit products. During 2008, Nintendo, as an industry member of the ESA, conducted simultaneous raids with the support of PGR. The results overall were positive -- 126,800 video games (including approximately 10,000 counterfeit *Nintendo* video games were seized). Additionally, over 665,000 pieces of counterfeit packaging were seized, giving further evidence of in-country assembly of counterfeit video game products. It was necessary to cancel one raid due to the risk of extreme violence and threats by angry rioters.
- A seizure was conducted at Bazaar Lomas Verdes, located in northern Mexico City, occupying the space of the former PERINORTE market (out of business for political reasons), resulting in the capture of two tons of counterfeit video game products, including approximately 5,500 counterfeit video games for *Nintendo DS Lite*, *Wii* and *Game Boy*.

Despite the above-mentioned criminal raids in 2008, Nintendo's local distributors report an increase in the levels of piracy for *Nintendo* video game products from the previous year.



Nintendo Is Pleased To Share Its Observations Based On 20 Years Of Active Enforcement Actions In Mexico

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.
2. The logistics presently available to raid a Mexican informal market are conditionally set by the PGR and its head of the IP Enforcement Area and do not work because of the "conversion program."
3. Nintendo seizes considerable amounts of counterfeit *Nintendo* video game products when a raid is conducted. 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.
4. The violence encountered in each raid is becoming more serious and the Mexican Government is not taking 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.
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, 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 and distributors of counterfeit products in order to cut off the supply network.

The Willingness Of Mexican Customs And Mexican Postal Service To Be Trained By Trademark Owners Is A Positive Sign

Without a doubt, the best news during 2008 was the willingness of Mexican Customs to learn from trademark owners through training sessions conducted in different areas of Mexico, and the increased attention of Mexican customs officers to shipping containers with infringing products, even during their busiest times.

Mexican Customs seized approximately 135,000 counterfeit *Nintendo* video game products in 2008. While the total number of seized goods is significant, Nintendo believes it is only a tiny fraction of the amount of counterfeit products that flow freely into the country. Most of the customs seizures involved counterfeit components of *Nintendo* products that were intended for in-country assembly. Historically, the components are shipped from Asia with a final destination of Mexico. The counterfeit components destined for Mexico indicate that major assembly operations are underway.



Counterfeit *Nintendo* components seized by Lazaro Customs in June 2008. The components were shipped from China. The importer was investigated but never located. This is a common theme when attempting to pursue assembly operations and major suppliers of counterfeit goods. The information is normally falsified and not traceable. Mexican counterfeiters continue to have strong connections to Asian factories that produce fake components.

Independence from the Mexican Industrial Property Institute (IMPI) and PGR to enforce IP rights is crucial for Mexican customs. If these structural problems are not resolved the system will be unprepared to control the volume of pirated products that enter Mexican ports when customs offices try to decrease the amount of internal corruption.

Private inspectors must be allowed in each customs location to support importation entries and as an attempt to cut down on corruption. Customs training sessions have been a positive example and hopefully there will be more opportunities for training sessions in the future.

Mexican Industrial Property Institute (IMPI) Must Be Improved

IMPI is currently more focused on follow-up actions and raising awareness of the fight against piracy with a political emphasis. There are several areas for improvement by the IMPI. IMPI actions are merely “inspections” whereby infringing products can be seized. IMPI is performing non-binding inspections without positive results and using inspectors that frequently slow down or further create obstacles during litigation.

IMPI needs help for the purpose of conducting heavy raids in dangerous places, such as by the Federal Preventive Police (FPP), but the FPP does not currently have the capability or resources to act against IP cases except for Internet investigations. When IMPI seizes counterfeit products, it can take years to issue a final decision. Meanwhile the infringers continue their illegal distribution at alternate locations. IMPI's actions have had little impact on the market and certainly do not serve as deterrence against piracy.

There is no process in place for dealing with seized counterfeit products. IMPI does not have secure storage facilities nor the financial resources to handle large quantities of products. As a result, the burden of securing counterfeit products is placed on the IP owner. As IMPI is slow to decide on actions, often it is an expensive burden on the IP owner.

In addition, injunctive relief issued against infringers is rarely enforced by IMPI and the orders are consistently challenged before Federal Courts. There are constant disputes about IMPI's procedures on the applicability of the Federal Law on Administrative Procedures between the Judicial Federal Courts and the Fiscal and Administrative Tribunal.

Nintendo Would Like To See Real Results With The Security And Prosperity Partnership Of North America (SPP)

Nintendo applauds the position taken by the Mexican Government on its involvement in the SPP. It appears the Mexican Government is placing serious attention on the trilateral initiative between the U.S., Mexico and Canada. Nintendo is highly supportive of this initiative but would like to see real results originating from the SPP before commenting further.

Mexico's Participation In Negotiating The Anti-Counterfeiting Trade Agreement (ACTA) Is Encouraging But Enforcement Efforts Need To Move Forward Now

Mexico has been a participant in the ACTA multilateral IPR negotiations since late 2007 with the U.S. and some of its key trading partners, such as Canada, Japan, the EU and Morocco. Nintendo is encouraged that Mexico wants to promote the ACTA in an effort to put in place a better framework for IPR protection and enforcement but Mexico does not have to wait for the ACTA to begin improving enforcement of intellectual property within its own country.

Nintendo's Trademark Dispute Remains Unresolved With No Opposition Procedure Available For Parties To Dispute

Nintendo's trademark dispute in Mexico, now in its 20th year, over full rights to the famous *Game Boy* trademark was not resolved during 2008. Specific details of the dispute have been outlined in Nintendo's Special 301 submissions from 2002 – 2008. It

is also the subject of a trade complaint filed with the Department of Commerce in November, 2001, which remains pending.

In summary, Grupo Von Haucke (GVH), a company owned by Juan Manuel del Castillo Von Haucke, was granted rights to the famous *Game Boy* name in 1989. Von Haucke has no right to the mark under international law and Mexico is the only country in the Western Hemisphere in which an individual or organization other than Nintendo has any rights to the *Game Boy* trademark. Mexican law has no opposition procedure and IMPI generally ignores opposition writs, leaving cancellation the only alternative for an aggrieved rightsholder. The cancellation process may take years to be resolved, as in the GVH case. All Nintendo's attempts to recover the *Game Boy* mark under Mexican law have been fruitless.

Recommendations

Following are suggested steps to improve IP protection in Mexico:

- The Mexican Government must begin to support 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's non-binding inspectors and the "conversion program" negotiations should be discontinued because trademark owners are seeing no decrease in piracy and informal mall owners should be held accountable for hosting piracy on their premises.
- Trademark cancellation procedures are weak and must be strengthened to comply with Mexican law, particularly article 62 of the Regulations of Industrial Property.
- Legislation must be enacted making it a criminal offense to deal in circumventing technological protection measures.
- It is critical that procedures involving filing of criminal complaints and the issuance of search warrants be improved.
- IMPI should receive the authority and resources to combat piracy and effectively enforce IP rights.
- A process must be established for dealing with confiscated counterfeit goods. Customs, IMPI and AGO are all impacted by the lack of procedures. There must be an effective procedure implemented that outlines how to handle the products while the case is pending and how the goods will be destroyed.

- Customs must receive additional resources and independence (from IMPI and PGR) to improve effectiveness in seizing counterfeit goods and components. Procedures must be developed to effectively deal with importers falsifying shipping documents.
- 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, Brazil and Peru have done.
- The Mexican Government should also begin 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 dealing with intellectual property matters must be constantly trained and attend courses to improve their knowledge of IP laws and effective enforcement procedures.

* * * * *

PARAGUAY

- Border Controls Are Key To Decreasing Piracy
- Nintendo's Anti-Piracy Actions In Paraguay Demonstrate Infringing Goods Are Imported But Also Locally Produced
- U.S. And Paraguay Memorandum Of Understanding Is A Positive Step But Many Obligations Remain Unimplemented
- Corruption Continues To Hamper Anti-Piracy Efforts
- Revised Criminal Code Will Increase Nintendo's Enforcement Actions Against Circumvention Devices

Nintendo recommends that Paraguay remain subject to Section 306 monitoring. Nintendo has been actively enforcing its intellectual property rights in Paraguay for the past 20 years because the country continues to be a major hub and transshipment point for pirate *Nintendo* video game products entering Latin America from Asia. In addition, with a history of lax enforcement, pirates have set up assembly operations within Paraguay's borders. Seizures involving *Nintendo* video game products in 2008 have involved thousands of finished optical media and cartridge based games, as well as pirate components including packaging, labels and cartridge housings intended for assembly into finished goods. Based on information from Nintendo's Latin American distributors, the percentage of the current market for *Nintendo* video game software is estimated to be an alarming 98% counterfeit.

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 lack of effective measures 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. Some controls at the border have forced pirates to use alternative means and locations to sell and export illicit video game products including countless river and dry crossing areas. Paraguayan customs has made token seizures of this type of contraband, but these random actions have failed to produce a deterrent effect. 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 Argentina consumers.

Paraguayan authorities have made minimal attempts to control these 3 commercial areas, the river and dry border crossings. The responsibility for this control rests with the Paraguayan customs. Despite U.S. efforts through 'Plan Umbral'⁸ and U.S. Immigration and Customs Enforcement help in establishing Paraguayan enforcement groups to assist in the fight against piracy, such groups have yet to produce significant results. In addition, they have been plagued with corruption, leading to several reorganizations and changes of personnel.

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

In 2008, Nintendo had 2 customs seizures resulting in the seizure of approximately 9,400 *Nintendo* video game products.

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

Enforcement activities involving *Nintendo* products in 2008 demonstrated continued sales of pirate video games in cartridge and optical media formats, both imported and locally produced, as well as evidence of games being assembled in Paraguay.

The elite anti-piracy unit, the UTE, under the Ministry of Industry and Commerce, continues to conduct the majority of the successful enforcement actions taken by Paraguayan authorities. The unit has demonstrated increased investigative capabilities largely attributed to training provided by the U.S. The UTE conducted 5 enforcement actions in which 4,280 illegal *Nintendo* products were seized in 2008. One operation uncovered multiple warehouses storing and assembling counterfeit *Nintendo* video game products on site, including 54 CD burners used to reproduce video games. Operating with 100% U.S. Government funding, the UTE has the verbal support of the Paraguayan Government, however, the absence of funding to cover expenses not assumed by the U.S. Government speaks a different story. The lack of a Paraguayan budget and the status of the UTE as an inter-governmental task force, with no status as an independent Paraguayan Government entity, place it at risk of elimination if U.S. Government funding is terminated, or there is a political change in Paraguay.

⁸ 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).

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

Nintendo believes that the Memorandum of Understanding (MOU) signed by the U.S. and Paraguay in April, 2008 has been effective in moving forward positive IPR actions; however, some of the most important aspects of the Memorandum remain unimplemented by the Paraguayan Government. The MOU is supposed to commit the Paraguayan Government to seriously enforce intellectual property rights and one positive step by Paraguay includes signing the revised Penal Code. 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
- Implementing administrative and legislative mechanisms for improving the financial management of the UTE.

Corruption Continues To Hamper Anti-Piracy Efforts

Despite steps taken under various U.S. funded programs, such as 'Plan Umbral,' to eliminate corruption in Paraguay, the anti-piracy arena continues to exhibit numerous examples of this scourge.

An unfortunate example experienced by Nintendo occurred last September. Nintendo investigators conducted a sensitive investigation involving a possible *Nintendo DS* software smuggling operation. To avoid leaks, careful precautions were taken when requesting the raid warrant from the court. Unfortunately, the target was alerted hours before the raid and the evidence was gone. Blatant cases of information leaks and corruption continue to plague successful enforcement actions in Paraguay.

In August, the Director of Paraguay Customs was replaced for the first time in 5 years. The new Paraguayan Administration announced a campaign to reduce corruption within customs and increase customs revenue. But the agency has thus far failed to take a stand on piracy issues, as evidenced by the continued movement of pirated goods through numerous points of customs entry.

Finally, the recordation department established in customs at the end of 2007 and designed to facilitate customs' notifications to IPR holders has yet to become fully active. In concept, IPR holders would be allowed to verify product authenticity for registered product entering ports.

While Nintendo applauds the new Customs Director's public stance on corruption, Nintendo is concerned about the lack of priority given to anti-piracy efforts as evidenced by the failure to activate the recordation department, the stifling of the Administrative

Coordination of Customs Investigations (CAIA) unit, and the continued flow of pirate goods in and out of Paraguay.

Revised Criminal Code Will Increase Nintendo's Enforcement Actions Against Circumvention Devices

The revised criminal code (Law No. 3440/08), finally approved by the Government of Paraguay in July, provides much needed changes to Article 184 pertaining to copyright enforcement. The revisions will take effect in July 2009.

New Article 184a prohibits the unauthorized circumvention of security measures designed to protect copyright works, punishable with up to 3 years in prison or a fine. Nintendo is hopeful that this prohibition will curb the sale of mod chips and modification of its consoles, currently a widespread practice in Paraguay.

The revisions to the law categorize the production, reproduction, importation, or sale of circumvention devices as a 'serious' offense, punishable by a prison sentence of 2 to 8 years. A 'serious' offense is defined as one that results from industrialized production or mass commercialization; results from the production of articles of significant economic value; causes a sizable pecuniary injury, or uses an underage individual in the act.

The courts' interpretation of the terms of a serious offense will determine the real impact of these changes. The revisions also expand the existing money laundering Article (196) to include copyright violations, as defined in Article 184a, as a crime used to facilitate money laundering. Money laundering is punishable by a fine or up to 5 years in prison under the new law.

While it is disappointing that copyright violations can continue to be punished with fines, Nintendo is hopeful that the implementation of the revisions will create a stronger deterrence against serious copyright crimes in Paraguay relating to the act of circumvention and the distribution of the circumvention devices.

Recommendations

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

- Paraguay should establish anti-piracy enforcement as one of the primary focal points of the border enforcement program, and create an effective and uncorrupt enforcement body to protect the borders and all points of entry.
- Vital to winning the battle against piracy, the U.S. Government should continue its financial and educational support of the UTE as well as applying pressure on Paraguay to change the status of the UTE to an independent entity with its own budget. Prosecutors and judges should enforce stiffer penalties or the success of the revisions of the Penal Code will be in jeopardy.

- 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 increase the number of prosecutors in Ciudad del Este to efficiently and effectively pursue the new penalty possibilities under the revised Penal Code. Helpful to this end, 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.
- Nintendo encourages the U.S. to continue training and funding through programs such as 'Plan Umbral' to decrease corruption levels.
- The U.S. should support the establishment of designated IPR judges, specially trained in IP law, with the ability to issue raid warrants nationwide.
- It is important for the U.S. to use training and programs such as 'Plan Umbral' to develop an honest and effective anti-piracy group within the Paraguayan National Police division of Economic Crimes unit.

* * * * *

SPAIN

- The Widespread Availability Of Circumvention Devices In Spain Is Alarming
- The Spanish Government's Leadership Is Needed To Address Internet Piracy Of *Nintendo's* Video Game Products, Including Game Copiers
- Nintendo Congratulates Spanish National Police For Recent Raids Against Retail Outlets Offering Game Copiers
- Nintendo Considers Education In Spain A Priority In Its Fight Against Piracy In The EU
- Customs Authorities Play An Important Role In Enforcing IPR And Nintendo Is Seeing Positive Signs In This Area In Spain

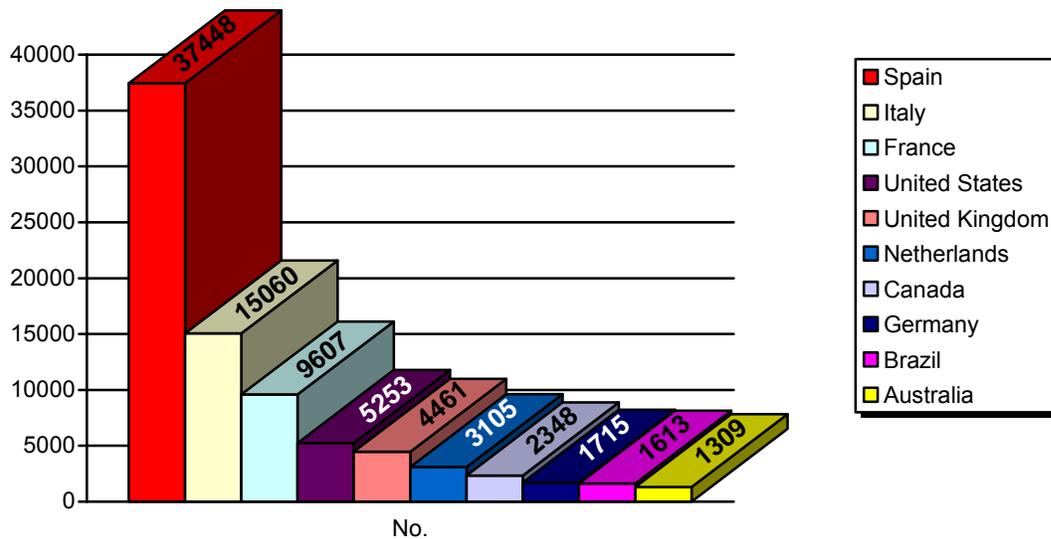
Nintendo recommends that Spain remain on the Watch List. Spain is by far the leader in Europe for use of counterfeit *Nintendo* video game products, both hard goods and illegal downloads of video games from the Internet. This illegal marketing and use of infringing goods by consumers is expanding at an alarming rate.

The Widespread Availability Of Circumvention Devices In Spain Is Alarming

Particularly worrisome is the growth in the Spanish market for game copiers in 2008. The availability of these devices has moved from a niche audience distributed in small businesses and offered on individual web pages, to formal retail and certain major (medium and large) electronic product chain stores all over Spain. The copiers are easily accessible online from many websites based in Spain and elsewhere.

Under Spanish laws, game copiers may infringe Nintendo's trademark and copyrights, as well as violate anti-circumvention laws. With laws 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. Moreover, consumers that acquire the game copiers are also harmed because the use of the device may void consumer warranties should the game copier cause a defect to the *DS* handheld system.

Illegal File Sharing of Nintendo Games Detected in December 2008
(source: DtecNet)



The Spanish Government's Leadership Is Needed To Address Internet Piracy Of *Nintendo's* Video Game Products, Including Game Copiers

More than any other distribution channel, the Internet has become the main tool for distribution of game copiers and illegal *Nintendo* video games. As Internet piracy in Spain worsens, the government continues to take a hands-off approach to requests by the copyright industries to assist with this scourge.

Despite obligations under EU law, Spain has failed to adequately implement its minimum obligations on ISP liability into law. Nintendo is left with virtually no means to remove illegal games from the Internet in Spain. The Spanish Government has offered various excuses for why ISPs do not have a duty to take illegal content down, including possible privacy violations.⁹ Meanwhile, given the legal uncertainties, prosecutors hesitate to bring cases addressing online piracy.

The escalating Internet piracy situation has reached staggering proportions and Nintendo is looking to the Spanish Government for leadership in this area. All of the evidence of gross IP violations occurring on Spanish transmissions is available and indisputable. Intellectual property right owners, like Nintendo, should have an effective mechanism to enforce their rights when infringed online. Currently this mechanism does not exist in Spain.

⁹ European Court of Justice, *Promusicae vs. Telefonica*, January 29, 2008.

Measures and standards must be adopted so that Internet service providers can be held accountable for the content on their servers that infringes intellectual and industrial property rights, when this infringing content is made known to them. Nintendo must have some means to notify the OSPs in Spain when infringing conduct is detected and takedown procedures by the OSPs should be adopted, including implementation of effective graduated response procedures. It is imperative that the Spanish Government take a leadership role in helping all IP rightsholders deal with this worsening problem.

With the prevalence of illegal video game files online in Spain, the demand for game copiers grows, both via crafty online web shops and through brick and mortar retail establishments, since *Nintendo* game files available illegally on the Internet cannot be played unless a circumvention device is used. Nintendo has detected two typical types of web pages that carry out activities that infringe Nintendo's intellectual and industrial property rights.

First are the web shops that offer game copiers for sale online and the operator of the online web shop is known. The usual tactic of these sellers is to offer illegal products online together with legal products, so all products sold have the appearance of legality. In many cases this type of web page offers game copiers on both a retail and wholesale basis.

Then there are web shops that offer game copiers for sale online and the identity of the operator of the web shop is unknown. In both cases, Nintendo cooperates with the National Police. Action will be taken against these websites as if they were an establishment open to the public. Web sites that are more opaque and do not identify the person responsible for them, have also been reported to the Secretary of State for Telecommunications for being in violation of Spanish law on electronic commerce.

Nintendo Congratulates Spanish National Police For Recent Raids Against Retail Outlets Offering Game Copiers

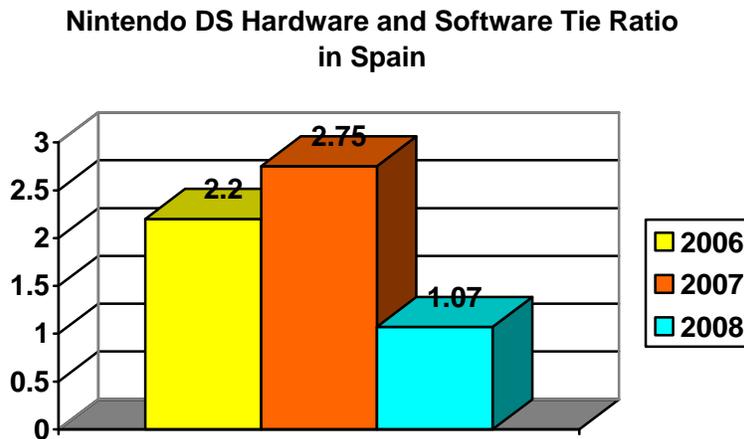
This past December, the National Police took forceful action against video game piracy, successfully completing a national operation against distribution of game copiers for Nintendo.

A total of 15 raids were performed against a large retail chain store in different locations throughout Spain, chiefly in Madrid and Barcelona, but also in 6 smaller cities. The raids resulted in the confiscation of approximately 1,150 game copier devices distributed under the name "M3 DS Real." Retail dealers generally only need store small numbers of the devices given the quick and immediate access to them by suppliers.

The operation was carried out by members of the Section for Offences against Industrial and Intellectual Property, which forms part of the Brigade for the Investigation of Specialised Offences (BIE) of the Criminal Investigation Department of the General

Commissioner's Office, with collaboration from officers belonging to the Regional Police Headquarters of Cataluña, Valencia, Castilla León and Castilla La Mancha.

The investigation began after Nintendo lodged a criminal complaint against a well-known computer equipment chain whose stores also distributed game copiers.



This chart shows the hardware sales tie ratio to software sales in Spain. For every *Nintendo DS* sale in 2006, 2.2 pieces of software were sold and in 2007, 2.75 pieces of software were sold.

In 2008, with the alarming increase in availability of game copiers, this tie ratio has dropped to 1.07 pieces of software for every *Nintendo DS* sale in Spain.

Nintendo Considers Education in Spain a Priority in its Fight Against Piracy in the EU

During 2008, Nintendo has taken several legal steps in Spain to fight IP infringement. In Spain, the first step when an alleged infringer is made known to Nintendo, is to seek resolution amicably through a notification process. This “cease and desist” process is a legal requirement in Spain and is intended to promote out-of-court settlements of disputes to avoid sometimes protracted and costly proceedings, which may lead to uncertain results.

Although a legal requirement in Spain, this type of notification to, or education of, the alleged infringers is also an important element of Nintendo's anti-piracy program in Spain because some legitimate retailers who distribute authentic *Nintendo* products are bundling authentic video game products with illegal game copiers unaware of the legal implications of the sale of the game copiers. As a result, some of the largest of Nintendo's legitimate distributors and major chain stores are being notified through the cease and desist process, and ultimately being held accountable for the sale of illegal devices, such as game copiers.

When the distributors do not comply with the cease and desist notices, more serious legal steps are taken. Nintendo does not hesitate to report the illegal activities to the police. Nintendo is working closely with the Spanish police, in particular with the section of the Special Investigation Brigade dealing with crimes against intellectual and industrial property. The Spanish Police carried out two major operations in 2008 against establishments that were distributing game copiers.

The police actions can give rise to criminal court proceedings. Nintendo's aim is not just to defend its rights actively in the most egregious cases, but also to promote a clear public understanding that these products are illegal and those who distribute them will be prosecuted. Hopefully, better informed consumers and retail distributors will reduce demand and restrict the scope of distribution.

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

In Spain, the customs authorities carry out important work to prevent entry into the country of fake or counterfeit products that infringe Nintendo's intellectual property rights.

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 judicial proceeding based on its intellectual and industrial property rights, or the goods are released.

Nintendo, as a major holder of intellectual and industrial property rights, has registered its rights with the Spanish customs authorities for many years. Throughout 2008, it also focused its attention on two types of new products that have appeared on the market, game copiers and counterfeit *Nintendo DS* consoles.

Nintendo has put significant effort into training customs officers on how to detect game copiers and counterfeit *Nintendo DS* handheld systems. Education is especially important since the rights inherent in game copiers are not as obvious as might be in other cases (if, for example, the counterfeit trademark is not shown on the product packaging). Thus, Nintendo has participated in training seminars organized by the customs authorities and has supplied anti-counterfeiting manuals which contain photographs and explanations of details that easily allow the differentiation between original products and counterfeit products and the recognition of what game copiers and other types of circumvention devices look like and how they infringe Nintendo's intellectual property rights.

Along with details of the physical characteristics customs agents may encounter with such products, detailed information is provided on the methods of entry of original *Nintendo* products (both software and hardware) into Spain, so that customs agents, depending on the origin of the goods, can more easily identify those products that may be suspected of being counterfeit products or otherwise illegal. Nintendo also has provided information on companies suspected of importing counterfeits. Such information is useful because it allows identification of shipments of counterfeit goods without having to physically inspect every container passing through customs in Spain.

The attitude and readiness to cooperate by the customs authorities in Spain is very positive. The results regarding the volume of goods seized at customs to date are still modest but this is due largely to the fact that the vast majority of counterfeit goods do not enter Spain directly from their country of origin (which in most cases is China or Korea), but first enter Europe through the ports of Rotterdam or Amsterdam, and then are distributed to other European countries.

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 for the most part reduced to the inspection and control of any suspect goods coming from countries outside the EU. But with continuing education for customs agents on 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 2009

Recommendations

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

- Measures and standards must be adopted so that Internet service providers can be held accountable for the content on their servers that infringes intellectual and industrial property rights, when this infringing content is made known to them. Nintendo must have some means to notify the OSPs in Spain when infringing conduct is detected and takedown procedures by the OSPs should be adopted, including implementation of effective graduated response procedures. It is imperative that the Spanish Government take a leadership role in helping all IP rightsholders deal with this worsening problem.
- Consumers should be educated concerning the illegality of products that infringe and circumvent intellectual property; and how the availability of these products should not be confused with their legality. This will help to avoid confusion by the public in thinking they are purchasing a legitimate product. In this regard, Nintendo will continue its campaign of sending educational letters, and cease and desist notices

to such establishments, as well as filing complaints and encouraging police action against those who fail to regard such notification.

- Judges and prosecutors should be sensitized to the seriousness of crimes related to infringement of intellectual and industrial property rights. Although in Spain the Criminal Code recognizes as a crime many of the behaviours associated with counterfeit commerce, when it comes to seeking a criminal conviction in relation thereto, Spanish judges and courts are very cautious, acquitting defendants in most cases due to reluctance to find all elements of the offense are present (primarily knowledge of the registration and ownership of the intellectual and industrial property rights allegedly infringed, and the profit motive).
- Spain should work in a coordinated manner with other EU member states in the adoption of joint measures to combat counterfeit commerce. Given that the major importers and distributors of counterfeit products in Spain are the same as in other European Union countries, as well as the fact that most of them work over the Internet through online marketplace websites, it would be very beneficial if the judicial measures taken against one of these distributors in a European country were to be rapidly implemented in the others.
- Customs authorities should be provided with greater technical and personnel resources so they can increase the number of interceptions of counterfeit goods, as well as being able to control small mailings through which many counterfeit products enter Spain.

* * * * *

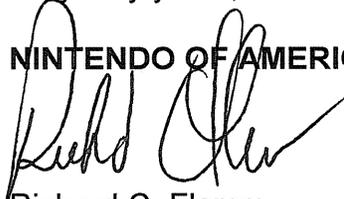
Ms. Choe Groves
Office of the United States Trade Representative
February 17, 2009

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, Korea, 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.



Richard C. Flamm
Senior Vice President & General Counsel