

The Honorable Thomas S. Zilly

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

NINTENDO OF AMERICA INC.,

Plaintiff,

v.

DOES 1-20, d/b/a, ANXCHIP.COM,  
AXIOGAME.COM, FLASHCARDA.COM,  
MOD3DSCARDS.COM, NX-CARD.COM,  
SXFLASHCARD.COM, TXSWITCH.COM,  
and USACHIPSS.COM,

Defendants.

No. 2:20-cv-00738-TSZ

PLAINTIFF’S SUPPLEMENTAL  
MOTION TO ENFORCE JUDGMENT  
AND PERMANENT INJUNCTION

NOTE ON MOTION CALENDAR:  
November 16, 2020<sup>1</sup>

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<sup>1</sup> Because this is a motion to enforce a default judgment, Nintendo is noting this as a same day motion pursuant to LCR 7(d)(1).

1 Pursuant to Paragraph 10 of this Court’s Judgment and Permanent Injunction (the  
2 “Judgment”), in which the Court maintains “continuing jurisdiction over this action for the  
3 purpose of enforcing this Final Judgment and Permanent Injunction,” Dkt. 28, ¶ 10, Plaintiff  
4 Nintendo of America Inc. (“Nintendo”) submits this supplemental motion to enforce this Court’s  
5 Judgment.  
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10 **I. Background**

11 By way of background, on May 15, 2020, Nintendo commenced this litigation against  
12 Defendant Does 1–20, the owners and operators of websites who used their websites to sell  
13 devices that unlawfully hack the Nintendo Switch in violation of the Anti-Trafficking provisions  
14 of the Digital Millennium Copyright Act, 17 U.S.C. §§ 1201(a)(2) & 1201(b)(1) (the “DMCA”).  
15 Some of the Defendants also provided pirated versions of Nintendo’s copyrighted games on their  
16 websites, in violation of Nintendo’s exclusive rights under the Copyright Act, 17 U.S.C. §§ 106,  
17 501, & 503. *See* Compl., Dkt. 1 ¶¶ 2–5, 12–13, 25–36, 39–40. On October 6, 2020, the Court  
18 granted Plaintiff’s motion for default judgment and a permanent injunction and entered final  
19 judgment in the matter. Dkt. 28. The Court enjoined “Defendants and all third parties acting in  
20 active concert and participation with Defendants” “from supporting or facilitating access to any  
21 or all domain names, URLs, [or] websites<sup>2</sup> . . . through which Defendants traffic in  
22 circumvention devices that threaten Plaintiff’s technological protection measures or that infringe  
23 Plaintiff’s rights under the Copyright Act.” *Id.* ¶ 4. The Court specifically ordered Defendants  
24 and third parties acting in active concert and participation with Defendants to “[i]mmediately  
25 transfer,” the domains at issue in the lawsuit, *as well as “any variant or successor”* of those  
26 domain names, to Plaintiff. *Id.* ¶ 5 (emphasis added). The Court further enjoined “Defendants  
27 and all third parties acting in active concert and participation with Defendants” “from supporting  
28 or facilitating access to any or all domain names, URLs, and websites . . . or *any variant or*  
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44 <sup>2</sup> The term ‘domain name’ is interchangeable with ‘URL’ – they both refer to the name of the  
45 internet address of the website.

1 *successor thereof*, through which Defendants infringe Plaintiff’s copyrights.” *Id.* ¶ 6 (emphasis  
2 added).  
3

4 In the days following the issuance of the Judgment, Plaintiff served the Judgment on  
5 Defendants and sent the Judgment to registrars servicing the infringing websites, as third parties  
6 acting in active concert and participation with Defendants. Declaration of Cayman C. Mitchell  
7 (“Decl.”) ¶ 3.<sup>3</sup> The registrars complied with the Judgment and transferred the infringing domains  
8 to Plaintiff, and the infringing content hosted at the domain names went offline. *Id.* ¶ 5. As a  
9 result, the Doe Defendants’ unlawful sales of circumvention devices and copyright infringement,  
10 committed through the domains identified in the Complaint and Nintendo’s subsequent papers,  
11 ceased, and the Court’s Judgment initially had its intended effect of enabling Plaintiff to protect  
12 its content from infringement.<sup>4</sup>  
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## 20 **II. STXWITCH.COM**

21 Unfortunately, only a day after the domains were transferred to Nintendo, the Doe  
22 Defendants who previously operated TXSWITCH.COM (one of the domains transferred to  
23 Plaintiff) “domain hopped” and created a “copycat” website at a new domain. Decl. ¶ 6; Decl.  
24 Ex. 3. They changed a single letter in their original domain name and reappeared at  
25 STXWITCH.COM. *Id.* ¶ 7. The website currently available at the STXWITCH.COM domain  
26 *is identical to the one that had been available at the TXSWITCH.COM domain*, as can be seen in  
27 Decl. Exhibits 1 and 2, and is thus a “variant or successor” of TXSWITCH.COM and bound by  
28 the Court’s Judgment. Dkt. 28 ¶ 6; Decl. ¶¶ 8–9; *compare* Decl. Ex. 1 *with* Decl. Ex. 2. In  
29 addition to being an identical website, there are multiple other indicia demonstrating that the Doe  
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38 <sup>3</sup> Registrars are internet service providers that register domain names. Decl. ¶ 4. Registrars  
39 control the domain names, and have the power to transfer domain names from one owner to  
40 another without the consent of the original owner. *Id.*

41 <sup>4</sup> Additionally, and separately, the Department of Justice filed a criminal indictment in this  
42 District against three members of the anonymous hacking group known as Team Xecuter. *See*  
43 *United States v. Louarn, et al.*, 2:20-cr-00127-RSL (W.D. Wa.). The individuals behind Team  
44 Xecuter create the devices at issue in this action sold by the Doe Defendants, but are not  
45 defendants in this action.

1 Defendant operators of TXSWITCH.COM domain hopped, and created a successor website,  
2  
3 STXWITCH.COM:

- 4 • The banner image of STXWITCH.COM prominently reads “TXSWITCH.com”;
- 5
- 6 • The text on the browser tab at the top left of pages of the website reads “txswitch”;
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- 8 • The contact email is “txswitch@outlook.com”;
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- 10 • The linked-to Facebook page is “TXswitch”;
- 11
- 12 • The copyright notice at the bottom of the screen reads “Copyright©2019 txswitch.com  
13 All Rights Re-served.”;
- 14
- 15 • The source code of current STXWITCH.COM contains various references to the  
16 previous site TXSWITCH.COM.  
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18 *See* Decl. ¶ 9; Decl. Exs. 2, 4.  
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20 This new domain STXWITCH.COM is actively offering for sale the illegal  
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22 circumvention devices that were the subject of this suit, in flagrant violation of the Judgment,  
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24 and Nintendo has confirmed a purchase from the new domain, and the return address associated  
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26 with that shipment is the same address that appeared on a previous shipment from  
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28 TXSWITCH.COM. Decl. ¶ 10.

29 Nintendo quickly contacted the registrar of the STXWITCH.COM domain,  
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31 GoDaddy.com, LLC (“GoDaddy”)—which is the same registrar that had been servicing  
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33 TXSWITCH.COM—informing them that the content previously found at the TXSWITCH.COM  
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35 domain they had just transferred to Plaintiff had reappeared at STXWITCH.COM. *Id.* ¶ 11.  
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37 Nintendo requested that the STXWITCH.COM domain be immediately transferred as a  
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39 successor or variant of TXSWITCH.COM pursuant to the Judgment. Dkt. 28 ¶¶ 4–6. GoDaddy  
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41 responded to outside counsel for Nintendo stating that they required the domain name to be listed  
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43 in an order to take action. Decl. ¶ 13.

44 Nintendo thus seeks such an Order making clear that STXWITCH.COM, as a “variant or  
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successor” to TXSWITCH.COM, is *already covered* by the Court’s existing order, and that

1 GoDaddy—a third party acting in active concert and participation with the Doe Defendants  
2 currently operating STXWITCH.COM—must cease servicing that STXWITCH.COM domain  
3 and must transfer that domain to Nintendo. *See Proposed Order Granting Supplemental Motion*  
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5 to Enforce Judgment (“Proposed Order”) (filed as Dkt. 30-1).  
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8 Finally, in an effort to avoid further burdening the Court moving forward, Plaintiff  
9 respectfully requests that the Court’s Order confirm what its original Judgment should already  
10 make clear: that, if additional copycat websites pop up—ones that are either substantially  
11 identical to the original domains, and/or have other indicia that they are successors or variants to  
12 the original domains—those new domains are covered under the Judgment as successors to or  
13 variants of the originally-named domains as if they had been specifically listed in the Judgment.<sup>5</sup>  
14  
15 Nintendo is concerned that absent such further clarifications of the scope of the Judgment, the  
16 Doe Defendants will again domain hop, changing a letter of a domain name, and the cycle will  
17 continue to repeat with the registrar contending that the new domain is not specifically covered  
18 by the injunction and with Nintendo having to return to this Court. Nintendo thus requests that  
19 the Order include language making clear that when a new domain name is a variant of one  
20 covered by the Permanent Injunction, it should be transferred to Nintendo. *See Proposed Order*.  
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23 To be clear, Nintendo is not seeking to make registrars—or any other third parties—  
24 police the internet for Defendants’ content. Nintendo accepts its burden to track Defendants  
25 down. But once Nintendo identifies successor or variant domains, the registrars must comply  
26 with the existing Judgment without continual applications to the Court. *See Proposed Order*. In  
27 similar cases, Courts have found that, while a Plaintiff must identify any new infringing websites  
28 that the defendants create, they need not return to the Court each and every time to get  
29 supplemental orders. For instance, in *Wilens v. Doe Def. No. 1*, the Court ruled that “[f]or future  
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32 <sup>5</sup> Examples of indicia that a new domain is a successor or variant of a domain listed in the  
33 Judgment include, but are not limited to: (i) content that replicates in whole or large part the  
34 content hosted at the original domain; (ii) sales of identical unlawful circumvention devices at  
35 issue in this action; (iii) identical source code; (iv) references to the prior domain in the new  
36 domain; (v) identical contact information.  
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1 sites that [Plaintiff] identifies, [it] can send the judgment and order to domain registrars, web  
2 hosting companies, and ISPs to show that the court has enjoined Doe[s'] conduct. Put another  
3 way, [Plaintiff] may rely on the court's injunction against Doe[s] to obtain further relief from [a  
4 certain provider] or from other providers for future sites that [Plaintiff] identifies." 2015 WL  
5 5121379, at \*2 (N.D. Cal. Aug. 28, 2015), *report and recommendation adopted*, No. 14-CV-  
6 02419-LHK, 2015 WL 5542529 (N.D. Cal. Sept. 18, 2015); *see also Arista Records, LLC v.*  
7 *Tkach*, Order, Dkt. 82 (S.D.N.Y. July 9, 2015) (holding that Plaintiff has the burden to identify a  
8 defendant's infringing websites, but once a third-party ISP has knowledge of the infringement, it  
9 "may not sit on its hands").

10  
11 In sum, at a minimum, Nintendo requests that the Court enter an order that makes clear  
12 that STXWITCH.COM is a "variant or successor" to TXSWITCH.COM, and so is *already*  
13 *covered* by the Court's existing order. Indeed, that is precisely why the Final Judgment includes  
14 that language: because it was somewhat inevitable that Defendants would move domains. When  
15 Defendants themselves remain out of Nintendo's reach, Nintendo's only option to give real  
16 world effect to the Court's injunction is to enforce it against the third parties who act in active  
17 concert and participation with Defendants. Here, the relevant registrar will not comply absent an  
18 order from this Court explicitly naming STXWITCH.COM as a successor to the Defendants'  
19 Websites. As noted above, the illegal devices at issue in the instant litigation are being offered  
20 for sale under the name STXWITCH.COM. It appears that, without an order from this Court  
21 explicitly naming STXWITCH.COM as covered by the Judgment, Defendants will be able to  
22 continue thumbing their nose at this Court, frustrating the purpose of the Judgment and  
23 injunction entered by this Court.  
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1 DATED this 16th day of November, 2020.

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3 Respectfully submitted,

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