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10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 INTEL CORPORATION,

15 Plaintiff,

16 v.

17 AMERICAS NEWS INTEL PUBLISHING,
18 LLC,

19 Defendant.

CASE NO. CV 09-05085 CRB

**DEFENDANT’S REPLY IN SUPPORT
OF MOTION TO DISMISS INTEL
CORPORATION’S COMPLAINT**

Date: March 19, 2010
Time: 10:00 a.m.
Courtroom: 8, 19th Floor
Judge: Hon. Charles R. Breyer

20
21 Defendant America’s News Intel Publishing, LLC (“ANIP”) hereby submits its
22 memorandum of points and authorities, in addition to the affirmations submitted herewith, in
23 further support of its motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6).
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Dated: February 19, 2010

CARR & FERRELL *LLP*

By: /s/ Colby B. Springer

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Cook, Perkiss and Liehe, Inc. v. Northern California Collection Service Inc.,
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INTRODUCTION AND FACTUAL OVERVIEW

1
2 The papers submitted by plaintiff Intel Corporation (“Intel”) demonstrate two things, but
3 neither of them provides a legitimate basis for this Court to deny this motion. To the contrary,
4 Intel’s opposition “makes the case” for ANIP’s motion to dismiss the complaint.

5 Intel’s submissions are—first and foremost—compelling proof that Intel has no substantive
6 response to the defendant ANIP’s demonstration, as set forth in its moving papers, that there is no
7 merit to Intel’s claims. While Intel’s claims ‘sound’ in trademark, they substantively lack any legal
8 correlation to the same. Intel’s entire case—regardless of how artfully, creatively, or expansively
9 pleaded—is premised on its assertion that anyone can be the owner of a word in the English
10 language. In this case, Intel seeks to claim dominion to the word “intel,” meaning “intelligence.”
11 Unable to rebut this fundamental point, Intel fails to even try.

12 What Intel’s opposition secondly demonstrates, however, is more troubling. Intel
13 essentially argues that regardless of whether it has any rights to assert, that Intel should be
14 completely immune to Federal Rule of Civil Procedure 12(b)(6) because it literally ‘pled’ all the
15 elements of each cause of action. For Intel, the merits do not matter so long as the correct formulas
16 and incantations are cut-and-pasted from a form book into a word processing program. The
17 troubling aspect of Intel’s posture is that the Court is effectively asked to endorse a brutal and
18 cynical corporate strategy of filing completely meritless litigation against immensely outgunned
19 small businesses and individuals who cannot afford litigation. All of which is ‘no problem,’ so
20 long as Intel says the ‘magic words’ for each cause of action and is subsequently “given the
21 opportunity to present evidence,” which is double speak for scorched-earth litigation.

22 Contrary to Intel’s suggestion, Rule 12(b)(6) is not merely a spell-checker. A Rule 12(b)(6)
23 motion is an—and in fact *the*—appropriate vehicle for certain lawsuits that, on simple inspection,
24 do not make out plausible claims for legal relief. As the Supreme Court has now twice made
25 crystal-clear, there is some point where even the minimal pleading requirements are not met, where
26 even given every benefit of the doubt, the facts alleged cannot in any way be scrambled to create a
27 cause of action. This is not the situation where a plaintiff has pleaded facts that in themselves may
28 add up to a valid legal claim, but has inadvertently or un-artfully set forth inappropriate legal

1 theories as the basis for recovery. The Court knows Intel has great lawyers that are capable of
2 drafting perfect pleadings of any number of causes of action. But there still has to be a “there
3 there,” and here—there is not.

4 It is ultimately necessary to address the so-called factual allegations by plaintiff that
5 defendant ANIP has, despite its obviously non-trademark use of the word “intel,” allegedly made—
6 or, notwithstanding the absence of the facts submitted in the opposition, has subsequently made—
7 actual trademark use of the INTEL mark because of a “parking page” at domain names including
8 the world “intel.” As the affirmations submitted herewith demonstrate, nothing could be further
9 from the truth. The irony is, in no small part as a result of Intel’s wrongful harassment, that
10 defendant abandoned a number of his domain names. The *hosting company* with which those
11 domains were registered subsequently posted ‘parking pages’—including INTEL-related links—on
12 its own accord.

13 Despite the fact that Intel’s recent submission of various screen shots and other information
14 that was—and always was—publically and readily available, but nevertheless concerning
15 allegations not set forth or otherwise supported by its complaint, Intel’s hoped-for salvation from
16 the relevant facts here—the bona fide use of the word “intel” by a consultant and publisher in the
17 business of providing intelligence (*i.e.*, intel) about Mexico and South America—is all this case is
18 about. And this is all the reason this Court needs to put an end to Intel’s abuse of the law and the
19 court system in pursuit of patently meritless legal claims against individuals and firms otherwise
20 too small to fight back.

21 LEGAL ARGUMENT

22 **A. PLAINTIFF’S ALLEGATIONS SOUNDING IN TRADEMARK INFRINGEMENT** 23 **FAIL TO STATE CLAIMS FOR WHICH RELIEF CAN BE GRANTED.**

24 Intel’s opposition is premised on the idea that as long as allegations are pleaded artfully,
25 then they can never be dismissed. Intel’s position is that the Court is not charged, under Federal
26 Rule 12(b)(6), with applying the facts pled to the legal theories pled, but merely to act as a legal
27 writing instructor checking to see if all the elements of the causes of action claimed have been
28 included. Merits, Intel claims, are never at issue at the pleadings stage. This is obviously not the

1 law, and the Supreme Court has gone to considerable pains to make this clear, insisting that courts
2 determine the “plausibility” of a pleading before permitting a plaintiff to engage the powerful and
3 potentially destructive machinery of federal litigation on behalf of its asserted interests.

4 Facts matter even at the pleading stage. The holding in *Bell Atlantic Corp. v. Twombly*, 550
5 U.S. 544, 127 S.Ct. 1955 (2007), eliminated any doubt on this score. The Supreme Court went so
6 far as to reinforce this point less than two years later in deciding *Ashcroft v. Iqbal*, 129 S.Ct. 1937
7 (2009), which held that bare legal conclusions are not sufficient to state a claim under Federal Rule
8 of Civil Procedure Rule 8.

9 As is well known, *Twombly* explicitly abrogated the previous rule that “a complaint should
10 not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can
11 prove no set of facts in support of his claim which would entitle him to relief.” 550 U.S. at 561, 127
12 S.Ct. at 1968. Rather, in order to survive a motion to dismiss for failure to state a claim, a plaintiff
13 must allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570, 127
14 S.Ct. at 1974. While a complaint need not plead “detailed factual allegations,” the factual
15 allegations it does include “must be enough to raise a right to relief above the speculative
16 level.” *Id.* at 555, 127 S.Ct. at 1964-65. The Supreme Court also made it clear that that Federal
17 Rule of Civil Procedure 8(a)(2) requires a “showing” that the plaintiff is entitled to relief, “rather
18 than a blanket assertion” of entitlement to relief. *Id.* at 556, 127 S.Ct. at 1965 n. 3.

19 Pleadings that merely provide “fair notice” of the nature of a plaintiff’s claim are not
20 enough; rather, the Court taught, factual allegations will only survive a motion to dismiss when
21 they establish the substantive factual “grounds” on which that claim rests. *Id.* “The pleading must
22 contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a
23 legally cognizable right of action.” *Id.* at 555, 127 S.Ct. at 1965. The court, therefore, does not
24 accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual
25 allegations. See *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *Iqbal*, 129 S.Ct. at
26 1950 (“pleadings that . . . are no more than conclusions, are not entitled to the assumption of
27 truth”). Indeed, the Court must “consider the factual allegations in respondent’s complaint to
28 determine if they plausibly suggest an entitlement to relief.” *Iqbal*, 129 S.Ct. at 1951.

1 Notwithstanding all this, Intel would have the Court believe that no Lanham Act or related
2 claim, no matter how absurd, could ever be dismissed at the pleadings stage. This was not true
3 even prior to *Twombly* and *Iqbal*. See, e.g., *Cook, Perkiss and Liehe, Inc. v. Northern California*
4 *Collection Service Inc.*, 911 F.2d 242, 246 (9th Cir. 1990) (finding that although the court must
5 accept material allegations as true, it may still determine as a matter of law whether an alleged
6 misrepresentation is actionable under the Lanham Act). Even more so, such an assertion is not true
7 now. To the contrary, the Court is duty-bound to apply the facts alleged in the pleadings to the
8 legal theories pled to see if, under Rule 12(b)(6), a plaintiff has a right to relief—in trademark
9 claims as much as any other. If the court, upon such analysis, concludes that a plaintiff does not
10 have “a protectable interest in the name” it seeks to vindicate by litigation, that plaintiff’s Lanham
11 Act claim fails as a matter of law. *Closed Loop Marketing, Inc. v. Closed Loop Marketing, LLC*,
12 589 F. Supp. 2d 1211, 1220 (E.D. Cal. 2008). The Court in *Closed Loop Marketing* also faced a
13 plaintiff that insisted on the right to litigate its claim and not to be “bothered with” the facts. The
14 Eastern District of California disagreed:

15 [T]his question—which category a name fits into—is at least in part a question of
16 fact. Plaintiff argues that this court is therefore unable to resolve this question
17 against plaintiff on a motion to dismiss. However, the requirement that the court
18 accept all plaintiff’s factual allegations as true, and construe the available evidence
19 in the light most favorable to plaintiff, does not compel the court to accept plaintiff’s
20 conclusory allegations as to which category the name “closed loop marketing” fits
21 into. Instead, **the court asks whether the plaintiff’s allegations or the judicially
22 noticed facts are sufficient to resolve this question.**

23 *Closed Loop Marketing, id.* at 1217 (emphasis added; citations omitted).

24 Similarly, this Court did not hesitate to look at the facts on which a claim of trademark
25 infringement was based in *Capcom Co., Ltd. v. MKR Group, Inc.*, 2008 WL 4661479 (N.D. Cal.
26 October 20, 2008) and to find them wanting. The Court closely analyzed the factual allegations in
27 this “intellectual property rights dispute, plucked from the world of marauding zombies.” Focusing
28 on the purposes of the Lanham Act—protection of trademarks from consumer confusion over the
source of origin of a product or service—the Court rejected the suggestion that artful pleadings
vitiates the need for legal cognizable allegations of facts making out infringement:

1 In support of its counterclaim, MKR pleads that Capcom seeks to capitalize on: (1)
2 Romero's name on a disclaimer; (2) the term “dead” in its title; (3) the zombie head
3 design trademark on Dead Rising's packaging; and (4) the “plaid boy” costume
4 consisting of a blood stained, plaid shirt, and a zombie mask. MKR sufficiently has
5 pled source identifying elements, rather than the ideas and creative content
6 that Dastar prohibits. These source identifying elements are what the Lanham Act is
7 intended to protect despite Capcom's arguments to the contrary. . . .

8 While MKR has sufficiently pled source identifying elements, the three contested
9 elements fail to rise to the level of a violation of the Lanham Act **as a matter of law**.

10 *Id.* at 12-13 (emphasis added; footnotes omitted).

11 The Court must do the same here, and ask the question: Is the use of the word “intel” in
12 describing services that provide a word popularly understood to mean “intelligence information” a
13 violation of the Lanham Act because a company sells computer chips using the word INTEL as a
14 trademark? If Intel’s argument were accepted, the result would be the exemption of the Lanham
15 Act from the Rule 12(b)(6)’s effects and to endorse the use of the courts to file meritless claims.
16 There is no reason the Court should want to do that, and no legal, equitable or policy ground on
17 which it should.

18 **B. PLAINTIFF’S SUBMISSIONS REGARDING THE USE OF THE INTEL MARK ON**
19 **A “PARKING PAGE” UTILIZING AN INTEL DOMAIN ARE BOTH FACTUALLY**
20 **ERRONEOUS AND SHOULD NOT BE CONSIDERED BY THE COURT.**

21 Intel attempts to salvage its claim by after-the-fact adding to it materials and information
22 that were previously and otherwise available in the form of screen shots from one or more domain
23 names, owned by defendant, on which there is content that might suggest use of the INTEL mark.
24 The problem for Intel is that, besides the fact that these allegations cannot be contained in the facts
25 alleged in the complaint, Intel cannot plausibly allege that defendant is responsible for these used,
26 both because it has no factual basis to do so, and because, as demonstrated in the affirmations
27 filed herewith, the screen shots submitted are merely standard uploads by the defendant’s hosting
28 company—*not the defendant*—and utilized on abandoned web pages.

29 If a district court relies on materials outside the pleadings in making its ruling, it treats the
30 motion to dismiss as one for summary judgment and give the nonmoving party an opportunity to
31 respond. Fed. R. Civ. P. 12(d); *see United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003). “A

1 court may, however, consider certain materials-documents attached to the complaint, documents
2 incorporated by reference in the complaint, or matters of judicial notice-without converting the
3 motion to dismiss into a motion for summary judgment.” *Ritchie*, 342 F.3d at 908.

4 Intel does not benefit either way. If the Court ignores Intel’s new submissions and
5 allegations, which clearly exceed the scope of the facts alleged in the Complaint, there is nothing
6 more to discuss. If the Court does consider those submissions on *any* basis, it will either
7 acknowledge one of two things if not both.

8 One is that the plaintiff has failed, in light of all the information before the Court, to allege a
9 plausible basis for alleging that defendant posted the “parking pages” in question. The pages are
10 clearly and obviously generic holding places for abandoned domain names that have no connection
11 to defendant. There is no factual or legal basis for Intel, or the Court, to presume that defendant
12 uploaded them merely because his now-defunct company is the registrant of the domain name.

13 Alternatively, the Court will consider as well the affirmation of defendant’s principal.
14 Through that affirmation, Intel’s principal testifies that he, like Intel, had no knowledge of the
15 existence of these pages when it filed this complaint. The only logical corollary is that these pages
16 were uploaded by an unnamed and unaffiliated hosting company that does just the same across the
17 Internet with respect to unused domain names under its control.

18 Either way, this distraction is unavailing for Intel, and its claim of trademark infringement
19 based on the use of the word “intel” by defendant must fail.

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CONCLUSION

Accordingly, for all of the foregoing reasons, this Court should grant defendants' Motion to Dismiss the Complaint.

Respectfully submitted,

Dated: February 19, 2010

CARR & FERRELL *LLP*

By: /s/ Colby B. Springer

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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 INTEL CORPORATION,
15
16 Plaintiff,
17 v.
18 AMERICAS NEWS INTEL PUBLISHING,
LLC,
19 Defendant.

CASE NO. CV 09-05085 CRB

**DECLARATION OF JEFFREY
WRIGHT IN SUPPORT OF AMERICAS
NEWS INTEL PUBLISHING, LLC’S
MOTION TO DISMISS INTEL
CORPORATION’S COMPLAINT**

Date: March 19, 2010
Time: 10:00 a.m.
Courtroom: 8, 19th Floor
Judge: Hon. Charles R. Breyer

22 I, the undersigned, JEFFREY WRIGHT, declare as follows:

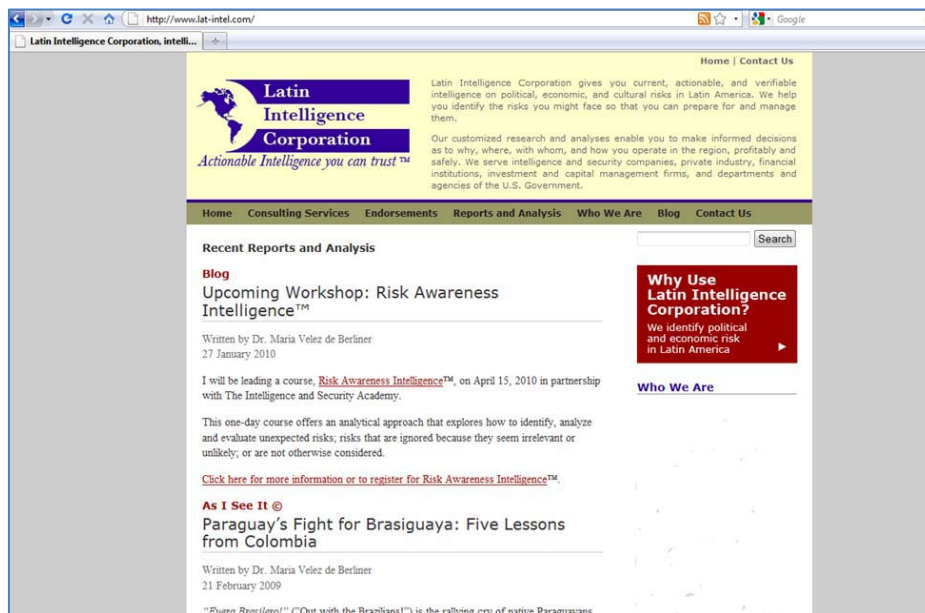
23 1. I am the principal of defendant Americas News Intel Publishing LLC (“ANIP”) and
24 the facts set out here are within my personal knowledge. If called upon to do so I could and would
25 testify to the truth thereof.

26 2. Plaintiff Intel Corporation (“Intel”) includes, in its opposition to ANIP’s motion to
27 dismiss, a number of screen shots that it maintains prove that I have used the word “intel,” which is
28 a common word meaning “intelligence,” or caused the word to be used in a manner that is likely to

1 cause confusion with its trademark INTEL. This is entirely incorrect.

2 3. I first encountered the majority of the information captured by these screen shots for
3 the first time in Intel's submissions. The "story" Intel wishes to tell with these submissions ,
4 especially to the extent it intends to accuse me any willful conduct that would interfere with its
5 rights, is misleading at best, and inaccurate or false at worst, as I explain herein.

6 4. Mexico Watch newsletters were launched in 1994 by a company called Orbis
7 Publications LLC ("Orbis"). In August 2005, Orbis announced the sale of Mexico Watch. I
8 formed Americas News Intel Publishing LLC in the state of Florida for the purpose of acquiring
9 Mexico Watch. The name was selected after extensive research in order to avoid confusion or
10 trademark conflict with competitors, and to broaden the focus of the company beyond Mexico. It
11 also was deliberately as descriptive as possible, because we were publishers of Panamerican news
12 intelligence or "intel." The word intel is frequently employed by newsletter companies competing
13 in this area; see, for example, <http://www.lat-intel.com/> (a screen shot of today's date is below)
14 where "intel" in the domain name corresponds to the title of the website and the company:



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Figure A

25 5. The domain name latinintel.com was registered shortly after we formed the
26 company. Because the domain name was to be used as both the portal URL and for email, the
27 criteria were that it be short, descriptive, easy-to-remember, and, importantly, easy to communicate
28 to non-English speakers. All desirable domains with the word "America" in them had been

1 registered, so latinintel.com was selected. Americasnewsintelpublishing.com was also registered
2 and pointed to latinintel.com, but it did not meet these operational criteria.

3 6. In October 2005, Americas News Intel Publishing LLC began issuing Mexico Watch
4 newsletters via the email address mexico@latinintel.com, attached to the name “Mexico Watch
5 News Bureau.” Please see the attached Exhibit A.

6 7. In 2007, Americas News Intel Publishing LLC launched a market research initiative.
7 In order to avoid the appearance of a conflict of interest with our news analysis division, we
8 operated under the names “Americas News Intelligence.” We published the first in-depth, original-
9 source study of the Mexican video game market in Nov. 2007. It received widespread attention,
10 including prominent mention in numerous articles in both the leading national business magazine
11 Expansion and the leading national daily Reforma. The report carried the same logo that our
12 newsletters carried. Please see the attached Exhibit B.

13 8. In 2008, Americas News Intel Publishing LLC further expanded into consulting,
14 specifically into trade/customs consulting. To that end, the company created the Latin Intel Trade
15 Consulting division, and registered the domain names latininteltradeconsulting.com,
16 latininteltrade.com, and latinintel-tc.com. For the sake of brevity, stronger brand identity, and ease
17 of communication with non-English-speaking clients, the last of these domains was designated as
18 the principal one.

19 9. When Intel’s harassment finally forced me to discontinue publication of the Mexico
20 Watch Intelligence Service newsletter, I closed down ANIP’s consulting arm as well.

21 10. In fact, however, I had not made active use of latinintel-tc.com domain since well
22 before then. Beginning in 2008, the site at that domain became a popular target for hackers, who
23 embedded malware deep in the subdirectories that controlled the page’s content. The ANIP trade
24 consulting webpage was frequently defaced. We received notices in this time period from
25 Malaysian, European, and Google security monitors alerting us and alerting Bluehost to the
26 presence of these files. Out of exasperation, I took it down even before the newsletter was
27 suspended.

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1 11. On Nov. 23 and 24, 2009, we received the last such notice, though the attack this
2 time was on americasnewsintel.com, which triggered an automatic Terms of Service violation with
3 Bluehost. Our Web hosting account (which hosted the domain in question, as well
4 as latinintel.com and latinintel-tc.com, among others) was in turn deactivated immediately.
5 Bluehost has a blanket policy to cancel accounts after a certain number of severe security breaches,
6 in order to prevent their IP range being blacklisted.

7 12. Our domain registration account with Bluehost was not affected, however. I moved
8 most of the company's domains to another hosting service, but I did not move a number which had
9 been inactive for some time and hence had not been implicated in the most severe hacking exploits.
10 These domains had not been expelled by Bluehost, and I was not aware of any reason to move
11 them. Among these was latinintel-tc.com. These domains were left inactive at Bluehost's domain
12 registration service, but no site was hosted there. The name servers were not reconfigured.

13 13. Upon seeing for the first time the placeholder that Bluehost installed at the latinintel-
14 tc.com URL in a screen shot submitted on this motion by the defendant, I contacted Bluehost
15 technical support by telephone to ask how this had happened. I was advised us that all unassigned
16 domains registered at Bluehost and not hosted elsewhere were automatically filled with
17 placeholders or "parking" pages, the content of which is automatically generated by the domain
18 name itself. In fact Exhibit A to Ian Boyd's declaration, which Intel submitted as "proof" that I am
19 a domain name squatter, is just a standard webhost placeholder. The page says right on it, "This
20 page parked courtesy of Bluehost.com" This is not something I authorized, or created, or benefited
21 from in any way.

22 14. I immediately changed the name servers of all dormant domains registered at
23 Bluehost to point to my new webhost. As a precautionary measure, in order to preempt further
24 misuse of our domain, I reinstated the Latin Intel Trade Consulting Web site, although the service
25 is no longer active. A screen shot of what the website looks like right now, and as it has looked for
26 almost a week, is set out below as Figure B:

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Figure B

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

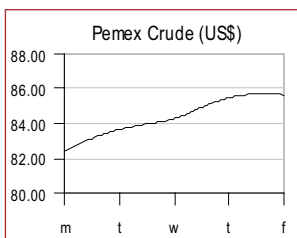
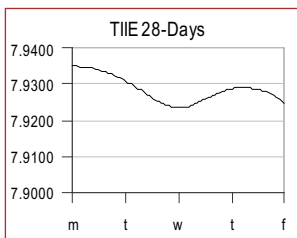
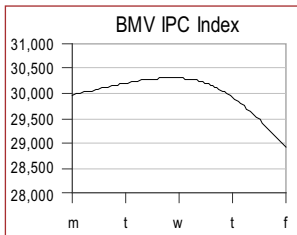
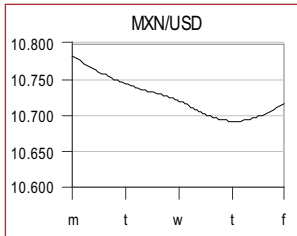
Executed at San Antonio, Texas this February 19, 2010.

JEFFREY WRIGHT

MEXICO WATCH

WEEKLY BRIEFING
MEXICO CITY FEBRUARY 29, 2008

A weekly intelligence service
on political, business and economic
developments in Mexico



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POLITICS

PRI Lowers The Energy Reform Bar. Sen. Francisco Labastida, head of the **Senate Energy Committee** and a leader for the opposition **PRI** during talks on energy reform, reiterated statements made last week that the prospects for passage of a comprehensive package measure slim to none. He said some support might allow for limited alliances along the maritime border with the US, where legislators worry foreign drilling will tap into Mexican crude in trans-border oil fields. The senator says all other exploration and development should be strictly within Pemex's purvey, and resources should be concentrated on near-shore and land deposits. In other words, the status quo. PRI Sen. **Manlio Fabio Beltrones** echoed Labastida's position, saying the energy reform should be approved in "two parts." First, the country should strengthen **Pemex** finances. Once the results from that effort are in, **Congress** may then contemplate a comprehensive reform. Lawmakers have already been throwing money at the problem – including \$20 billion this year – but **Pemex** this week said output from its huge Cantarell field will plunge up to 20 percent this year, even as the company pumps \$5 billion into new production technologies.

ECONOMY

GDP Contracts In December. The December GDP proxy, the **Igae**, came out this week, and since fourth-quarter GDP has already been published, we would usually say it was a bit of a moot point. GDP offers a more robust reading than the **Igae**. However, it can be a useful measure of the month-to-month trend of the economy. On that point, December was rather interesting. On a seasonally adjusted basis, the **Igae** declined 0.08 percent from November, a 1.0-percent annualized rate in the red. That is the second consecutive month of downward movement after November's decline of 0.2 percent, or 2.4 percent annualized. As a result, the annualized trend rate was marking a negative 0.1-percent pace, not a sharp contraction, but definitely at odds with the 3.0-percent Q4 growth rate we reported last week. The takeaway message: Despite the overall increase in output in the October-through-December period, the economy was clearly softening toward the end of the quarter.

2007 Factory Workforce Stable. **Inegi** published full-year manufacturing stats for 2007 showing employment growth essentially nil in the factory sector. The headcount index rose merely 0.4 percent at an annual rate. Seasonally adjusted data show the sector hiring for most of the first half of the year, but those gains were wiped out by reductions in the second half, with the biggest losses coming in November and December, down 2.1 percent and 2.7 percent, respectively. The number of hours logged by line workers was similarly flat with 2006; the work-hours index ticked up 0.1 percent. This indicator tends to be more volatile, so it helps to look at its trendline. On that basis, after a negative trend in January, work hours tended to increase steadily until August. Then the trend reversed all the way through December, annihilating the earlier gains. In addition, **Inegi** said average manufacturing pay rose 1.1 percent in real terms, which would be 4.86 percent in nominal terms. Wages paid to factory workers hiked 1.8 percent in real terms, while staff and management recorded 1.0-percent raises. Perquisites increased 0.1 percent.

Current Account Gap At 0.8pct Of GDP. The current account deficit ballooned to \$7.4 billion in 2007, an increase of 232 percent over 2006, the **Bank of Mexico** said in its full-year balance-of-payments report. Ballooned is a relative term. The gap is equal to a very manageable 0.8 percent of GDP, compared with 5.4 percent for the US. The central bank



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said that the pace of imports outstripped exports mostly as the cost of importing gasoline from abroad climbed while US demand for Mexican goods faltered. The deficit in merchandise trade was mitigated by a positive balance in other current account line items. Tourism revenues increased 6.0 percent to \$12.9 billion, whereas Mexican travelers abroad only increased spending 3.3 percent to \$8.4 billion. Migrant transfers, which had padded the current account in recent years with double-digit growth, stagnated at \$24.4 billion, a 1.0-percent gain. On the other side of the ledger, the capital account jumped by 1060 percent to \$19.6 billion, thanks mostly to portfolio investment inflows growing by 1041 percent to \$14.8 billion. FDI sucked \$23.2 billion into the country with a 20.8-percent increase, as we previously reported, but mounting investments by Mexican companies abroad – up 183.4 percent to \$17.4 billion in 2007 – are starting to offset the FDI balance. Overall, given the difference between the current and capital accounts, plus accounting and valuation adjustments, foreign reserves accumulation amounted to \$10.3 billion last year.

Tax, Oil Revenue Higher. The **Finance Ministry** reported a fiscal surplus of 37.8 billion pesos, or \$3.6 billion, in the month of January. The income represented a decline in real terms of 4.8 percent from the same month of 2007, but most of that was due to extraordinary revenue in the year-ago month from the sale of the government's stake in a group of airports. The income tax take increased by 8.2 percent, though the effect of the new **Single Rate Business Tax (IETU)** did not yet register. Value-added tax receipts increased 5.8 percent. Programmable federal spending grew by 10.0 percent. The first IETU provisional payments were due on Feb. 18, and the results will thus be reflected in next month's public finances report. However, the Finance Ministry estimated that it collected \$700 million in the first round of payments.

BUSINESS

Building Bridges. Infrastructure opportunities for US companies were played up at a Mexico City investor conference organized by the **US Commercial Service** and the **US Trade and Development Agency**: US and Mexico, Building Partnerships in Infrastructure. The conference aimed to guide US companies in, "identifying business opportunities and securing contracts associated with **National Infrastructure Program** projects." It was attended by half a dozen top Mexican cabinet ministers and US Commerce Secretary **Carlos Gutierrez**. Officials profiled 35 potential projects ranging in size from \$45 million to \$2 billion. Highlighted examples included four railroad projects on the US-Mexico border and a number of highway concessions expected to be tendered this year and next.

CORPORATE

Bombardier Inaugurates. President **Felipe Calderon** formally inaugurated **Bombardier's** first plant at its aerospace park at the Queretaro international airport, an ambitious project the company hopes to develop into "an international aerospace node such as Montreal, Wichita, Toulouse or Hamburg," CEO **Pierre Beaudoin** said. Pleased by the success of initial manufacturing efforts, Bombardier has accelerated its plans for Mexico, shifting from wire harnesses in 2006 to entire fuselages by 2007. It now says flight control rudders and stabilizers will be added this year. It is hiring new workers, boosting headcount from 900 to 1,200 in 2008 and to 2,000 by 2010. The company has slated at least \$200 million in total investment from 2005 to 2012. Calderon urged company officials to consider building finished jets at the facility.

IN BRIEF

Tourism: The **Mexican Tourism Promotion Council** will boost its advertising budget in the US from 250 million pesos to 350 million pesos in order to entice US tourists to Mexico who cannot afford to head to Europe this year.

M&A: **Pilkington**, the UK-based unit of Japanese glassmaker **Nippon Sheet Glass**, lost its bid to block Monterrey-based **Vitro** from merging its **Vitro Plan** unit – in which Pilkington owns 35 percent – into **Vimexico**, a new company. A Nuevo Leon district court further ordered Pilkington to pay Vitro all legal costs stemming from the dispute.

Trade: Mexico will begin importing dairy cows and cattle from Canada next month after lifting a five-year-old ban because of mad cow disease. Restrictions will be lifted on livestock that is younger than 30 months and doesn't come from any of the farms where mad cow disease was reported in Canada.

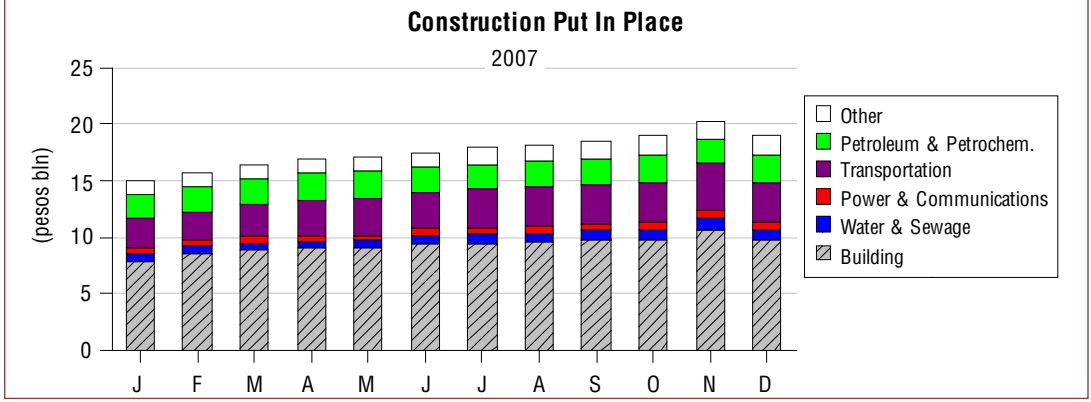
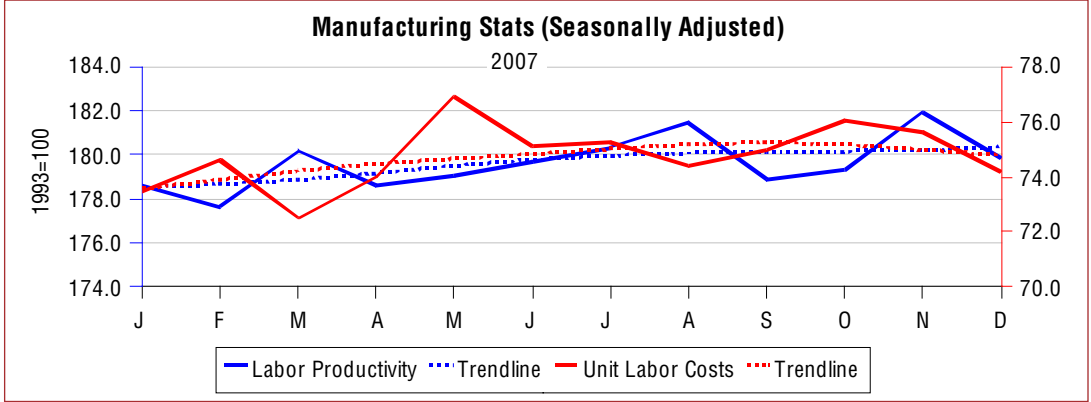
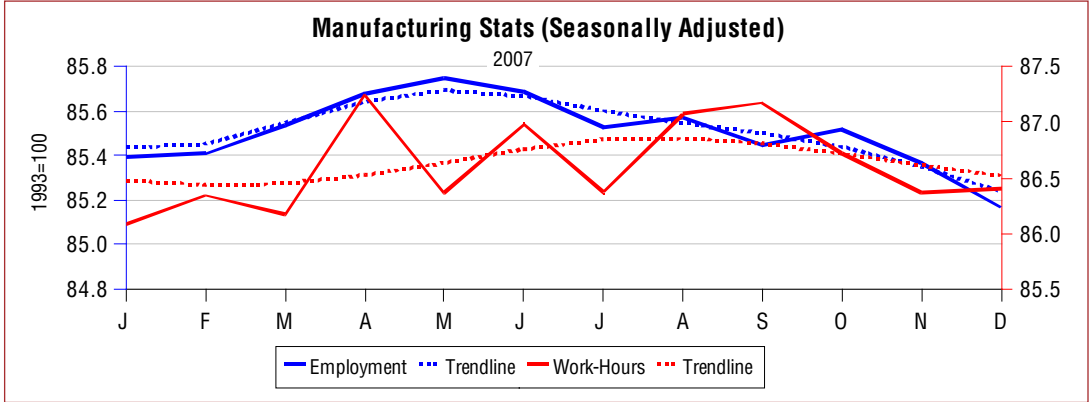
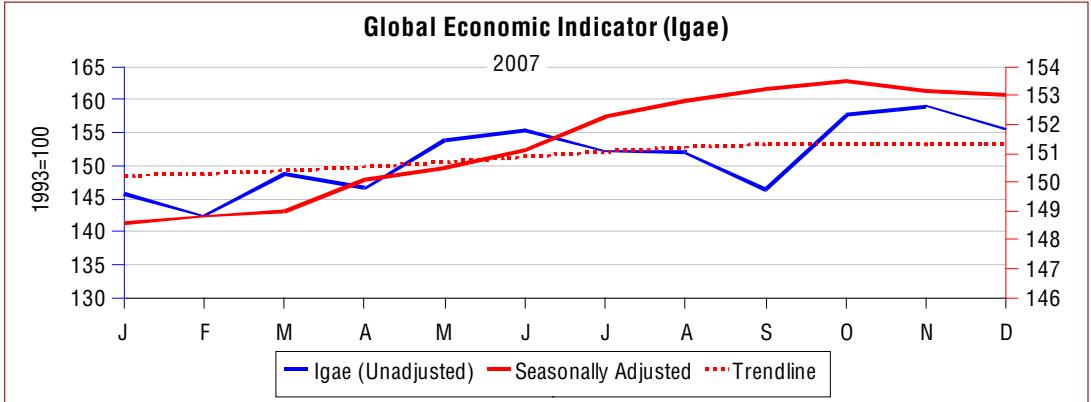
Next Week: The **IMEF** February manufacturing and services diffusion indices, the **Inegi** February manufacturing survey, the February consumer confidence report, the Bank of Mexico's consensus forecast compilation, and February inflation are due out.

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DATA WATCH



Source: Inegi

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Videogame Demographics

The year 2005 marked a turning point in Mexican demographics. Between 1990 and 2005, an average of 2.3 million births were recorded annually in Mexico. But 2005 will be the last year in which more than 2 million Mexicans are born in a single year, due a slowing birthrate. The number is projected to decline each year going forward. Also in 2005, more than 2 million Mexicans turned 18 – again, for the first time in history. There will be more than 2 million Mexicans turning 18 every year through 2019. More than any other gamer generation, these will be increasingly educated, technologically savvy, and have access to credit in a low-inflation, stable macroeconomic environment. With each passing year, they will also be more likely to have grown up in a household with a game console or computer or both.

From the point of view of the videogame industry, that means wave after wave of potential consumers will be hitting the market for decades to come. According to a recent study by **Brain Research** on 8-to-12 year-old tweens, 34 percent of respondents reported playing video games as an after school activity, fourth after television, 86 percent, homework, 61 percent, and soccer, 42 percent. (The sum exceeds 100 percent because respondents were permitted more than one answer.)

Mexico has a relatively young population, with 30 percent under the age of 14, and another 23 percent between 14 and 25. The working age population, the 15-64 age bracket, will peak at 68 percent in 2025 before declining to 62 percent by 2050. Conversely, the elderly cohort, 65 years old and above, is expected to reach 21 percent in 2050, more than triple its current 6 percent. As a result, the country's median age will rise from the current 24 years to 43 years in 2050.

Mexican consumers between the ages of 16 and 24 years old make up almost 55 percent of the population, the highest percentage of any upper-middle income country in the world. Seven states concentrate a little more than half of the total population of 105 million estimated in 2007. The State of Mexico has 14.0 million residents, the Federal District 8.7 million, Veracruz 7.1 million, Jalisco 6.8 million, Puebla 5.4 million, Guanajuato 4.9 million and Chiapas 4.3 million. Roughly 30 percent of the total population live in the nation's five largest metropolitan areas: Mexico City (19.2 million), Guadalajara (4.1 million), Monterrey (3.7 million), Puebla-Tlaxcala (2.1 million), and Toluca (1.6 million). The population is largely urban, with 68.2 percent living in cities with populations of 15,000 or more.

According to the **Entertainment Software Association**, the average age of gamers in the US is 33, and the most frequent buyer is 40 years old. In 2006, 93 percent of computer game buyers and 83 percent of console game buyers were over the age of 18. Mexico, however, has a younger gamer population, due to several factors. For starters, the median age, the median age in Mexico is 12 years below that of the US, where it is 36. The overall population is younger on average, weighting the curve toward a lower median. Thus, all else being equal, the average Mexican gamer should be 21, or 12 years younger than the average US gamer.

But all else is not equal. Consoles and software were not as widely available in Mexico as they were in the US 10 to 20 years ago, when



Population Indicators

	<u>2007</u>	<u>2012</u>	<u>2022</u>	<u>2050</u>
Population Mid-Year	105,790,725	110,022,552	117,007,442	121,855,703
Men	52,066,743	53,949,488	56,989,139	58,520,261
Women	53,723,982	56,073,064	60,018,303	63,335,442
Births	1,971,734	1,901,394	1,787,877	1,347,882
Deaths	509,230	557,637	675,118	1,200,005

Source: National Population Commission

the current young adult population was becoming acquainted with video games. Where they were available, most Mexicans could not afford them.

The crisis of 1982 wiped out middle-class disposable income levels – real GDP per capita plunged by nearly 20 percent over the next five years. From roughly 1989 to 1994, Mexico experienced a broad consumer revival, a period in which videogames proliferated once again among the youth.

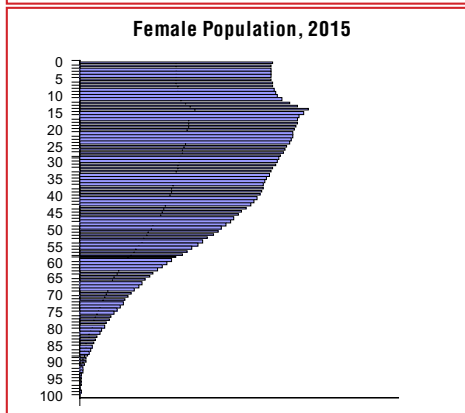
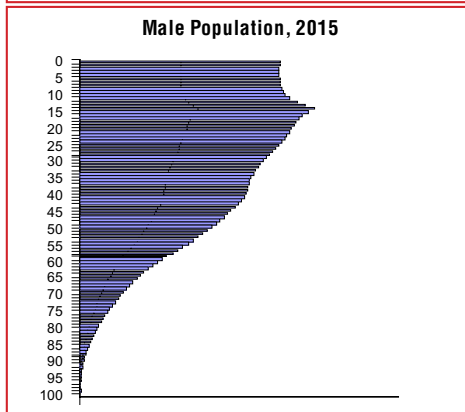
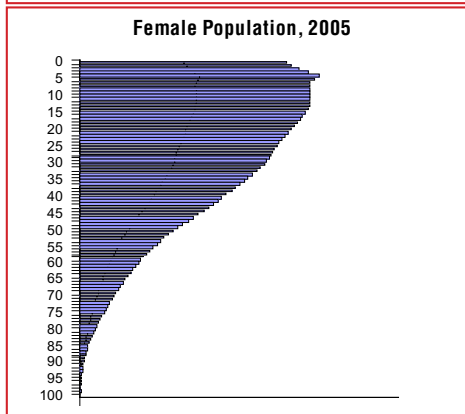
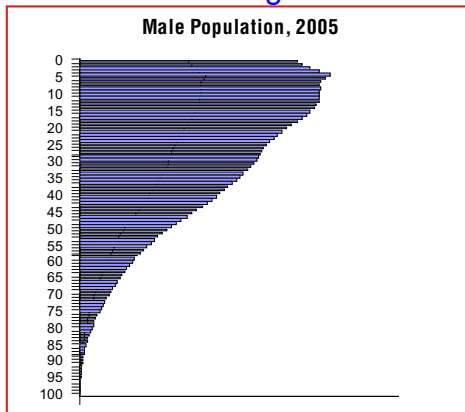
But GDP per capita had still not regained pre-1982 levels by 1995, when another severe crisis struck in the aftermath of the December 1994 peso devaluation. Once again, consumer credit dried up and purchasing power plummeted, especially in the populous middle-class segment, closing a prime indoctrination window. The successive economic crises of the mid-1980s and mid-1990s thus likely reduced the median age of the current gaming population even further.

Given these premises, we estimate that the median gamer age is slightly below 20 in Mexico. There is evidence to support this supposition. At the 2006 **Electronic Games Show** (see EGS, below), roughly one-third of attendees were between 16 and 20 years of age, while the same proportion was 21 to 25. The next largest age group, 11 to 15, comprised 16 percent. Another 9 percent represented the 26-to-30 age group, and only the remaining 7 percent was comprised of gamers above the age of 30.

Installed Base Estimates

According to a report compiled by first-party companies, the installed base of consoles reached slightly more than 3 million at the end of 2006 – including all consoles, from legacy to next generation. Given that there were 25 million households in Mexico that year, that suggests that at a minimum, 12 percent of households has at least one gamer living in it. ANI believes levels of penetration, while relatively low vis-a-vis the US, are actually much higher than 12 percent.

Though the national statistics agency **Inegi** does not collect data on console ownership, it does provide a tally of goods ownership that provide



a pretty clear picture of the growth in big-ticket items including home electronics. For example, in 2000, only 9 percent of households had a computer. In 2005, the proportion had risen to 21 percent. Television ownership went from 86 percent to 99 percent. Growth has been most dramatic in the lower percentiles – particularly in the D+ socio-economic class, which is gaining access to credit for the first time.

Internet Users Breakdown By Age, 2006

Total	100%
6 to 11 years	7.1%
12 to 17 years	28.4%
18 to 24 years	26.2%
25 to 34 years	18.2%
35 to 44 years	9.9%
45 to 54 years	7.2%
55 and more	3.0%

Source: Inegi

A separate study by the **Mexican Internet Association** found that 59 percent of Internet users report owning a console in their home. Government statistics show the population of Internet users to be 18.7 million, meaning 11.1 million Internet users have a console in their home. In other words, considering only the Internet-using population, 10.5 percent of Mexicans own a console.

That leaves roughly 87 million Mexicans that do not use the Internet. How many have a game console? The rates are presumably lower than 59 percent. But even if only 10 percent of non-Internet users own a console, the proportion of Mexican households with a console jumps to 19 percent. If 20 percent of non-Internet users own a console, it jumps to 27 percent. In the 'C' class of consumers, only 9.5 percent of homes have Internet, but 79.8 percent a VCR

One particularly interesting segment will be young, unmarried gamers (YUGS) living with their parents or parent. It is common in Mexico to remain living in the family home until the first marriage. Individuals who have entered the workforce but have not yet wed thus earn an income but have minimal living costs. A high proportion of their income is therefore discretionary. In 1995, this was fairly insignificant. Women married at the age of 20, and men at 23, on average. In 2005, however, the average age increased substantially. Women are now married at the age of 25 and men 28 – resulting in up to a decade of cash flush YUGGIES at a prime gamer age.

Mexican demographics support a sustained boom to keep the snowball barreling ahead over the next decade at least. The population is younger, and a big bolt of prime game-age Mexicans will be entering the job market. This momentum behind this wave is enhanced by a stable macro-economy, an emerging boom in young unmarried gamers with high levels of discretionary income, and a surge in consumer credit.

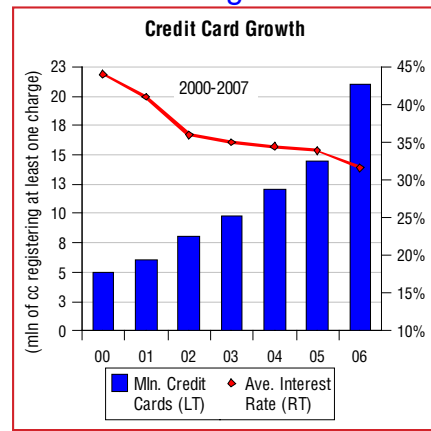
Consumer Credit

A major driver of the recent surge in videogame sales has been increased penetration of both personal computers and gaming consoles in the home. In turn this has been favored by the dramatic growth of consumer credit.

According to the **Bank of Mexico**, household debt went from 9.3 percent of GDP to 14.1 percent between 2000 and 2006 – nearly 5 points of GDP. Most of the growth came in the form of consumer credit, which grew from 1.0 percent to 4.2 percent of GDP in the same period. The central bank cites three main reasons: (1) a stable macroeconomy (namely inflation) and a benign external economic environment has led to lower interest rates across all maturities; (2) a greater availability of internal financial resources; and (3) households have sought to renew their stock of durable consumer goods, which had suffered a great deterioration in the 1995 crisis.



The infusion of consumer credit into the economy has ample room to grow. Mexican households, on average, spend 5.1 percent of their disposable income on debt service. That compares with 19.0 percent in Chile, 15.0 percent in Spain, and 19.4 percent in the US. Macroeconomic risks to the recent growth cycle, such as a spike in inflation or interest rates, are remote. Therefore, the support to home ownership of computers and consoles promises to continue near present rates for the foreseeable future.

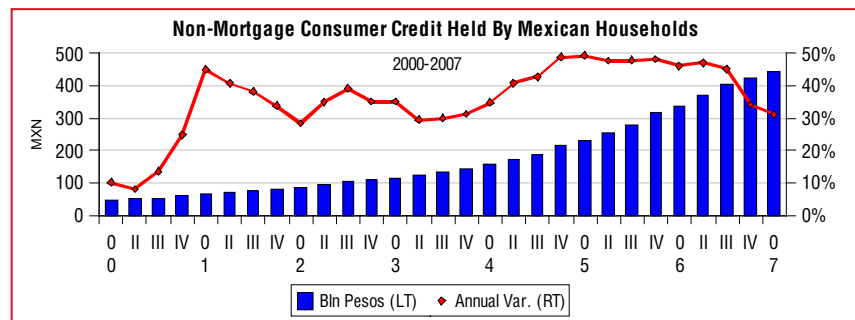


Competition among banks to capture share in the burgeoning consumer credit market has begun to spur lending into increasingly lower strata of the population. For example, in 2000, only 26,100 households in the third, fourth and fifth deciles possessed credit cards. In 2006, the number had grown to 137,100. During 2006, banks issued 8.7 million new credit cards – 40 percent of which went to people with no credit history.

According to a study in the Mexico City greater metropolitan area by the federal consumer protection agency, **Profeco**, 49.2 percent of residents reported acquiring durable consumer goods on credit. Of that number, 24.0 percent used a credit card, making plastic the preferred form for purchasing big-ticket items after cash. Another 19.0 percent opted for in-store payment plans, while the remaining 5.7 percent used layaway plans or publicly underwritten Fonacot loans. The survey also showed that home electronics goods were the leading target of credit buys, claiming 50.4 percent of the total. That includes game consoles, though a further breakdown was not available.

The expansion of consumer credit supports future VG hardware and software sales in several important ways beyond simply augmenting discretionary income. Firstly, it helps smooth out consumer cycles compared with the broader business cycle. Secondly, it has put the acquisition of gaming equipment within reach literally of millions of Mexicans for the first time. While credit facilitates purchases of a personal computer or console for upper- and middle-classes, for the low-income consumer with reduced possibility for saving it is often the only option. Thirdly, it has favored a shift toward the formal retail sector. While virtually all retailers we surveyed offered some type of credit plan, street markets, mom-and-pop operations and counterfeiters do not. Plus, when consumers acquire a console on credit, they typically pick up one more more game cartridges either as additional purchases or as part of a bundle package.

Consumer credit is seen leveling off over the next few years, but it will still remain a strong driver for videogame hardware and software consumption. One major retailer projects that its credit portfolio will stabilize at 13 percent to 15 percent, going forward. In particular, the influx of credit into the lower economic classes will bring tens of millions of new consumers into the formal videogame sector in coming years.



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Consumer Profile

Though the national statistics agency Inegi does not collect data on console ownership, it does provide a tally of goods ownership that provide a pretty clear picture of the growth in big-ticket items including home electronics. For example, in 2000, only 9 percent of households had a computer. In 2005, the proportion had risen to 20 percent. Television ownership went from 86 percent to 99 percent. Refrigerator and washing machine ownership went from 69 percent and 52 percent to 79 percent and 63 percent, respectively. Growth has been most dramatic in the lower percentiles – particularly in the D+ socioeconomic class, which is gaining access to credit for the first time.

Money Spending Per Household By Decile US\$ 2006

Total	\$8,537.08
I	\$2,070.70
II	\$3,108.09
III	\$4,134.19
IV	\$4,830.42
V	\$5,898.86
VI	\$6,853.00
VII	\$8,061.79
VIII	\$9,956.61
IX	\$13,135.02
X	\$27,235.15

Source: Inegi

Average household income in Mexico rose 10.1 percent from 2004 to 2006, with the poorest homes modestly increasing their share of total income. In 2006, the 60 percent of households with the lowest income received 27.6 percent of total income, compared with 25.3 percent in 2000 and 26.9 percent in 2004. The top 10 percent of homes received 35.7 percent of the total, compared with 38.6 percent in 2000 and 36.2 percent in 2004. The top 10 percent of homes saw the smallest increase in household income with a gain of 6.7 percent, while the bottom 10 percent saw an increase of 23.8 percent.

The **Mexican Association of Market Research and Public Opinion Agencies** (AMAI) has developed a socioeconomic classification system for Mexico: A/B (upper class), C+/C (upper middle class, middle class), D+ working class, D/E (working poor, underclass).

Households in the A/B category have annual incomes of US\$90,000 or more and are generally stocked with a wide range of high-end consumer electronics, making them an attractive segment for the videogame industry. One publisher executive said that the company preferred to allocate marketing resources in the upscale department store chain Palacio de Hierro, even though it has only nine points of sale, because of a high A/B mix among its shoppers. On the upside, A/B households have large levels of disposable income and are less likely to purchase pirated goods, not only because they can more easily afford them, but also due to a social stigma attached to counterfeit goods among the wealthier classes and the plain fact that markets where pirated goods are available are viewed as unsafe. On the downside, the market comprises less than 8 percent of all households. Moreover, according to the (AMAI), A/B consumers travel abroad “at least once a year,” meaning that they are more likely to acquire videogame software and hardware in the US or other countries with lower retail prices.

Households in the C+ category have incomes ranging from US\$35,000 to US\$89,000, and they account for 13 percent of Mexican homes. Though these consumers are likely to own staple durable goods such as a refrigerator, television, and vehicle, they are much less likely to possess peripheral items such as a videogame console. For example, 48 percent of C+ households have a personal computer, compared with 82.9 percent of A/B

Current Monetary Spending Growth, Real Variation

	2000-2002	2002-2004	2004-2006
Total	-1.7%	4.9%	7.5%
Clothing	7.2%	-3.7%	10.5%
Healthcare	12.5%	15.9%	9.7%
Household Appliances	-15.9%	-5.4%	8.9%
Housing	14.7%	-3.2%	7.7%
Education & Entertainment	-9.1%	0.2%	6.9%
Transportation	1.8%	2.9%	6.3%
Food & Beverages	0.4%	5.0%	2.7%
Other	2.2%	24.0%	4.5%



homes. They are also less likely to travel abroad: “at most once a year,” according to the AMAI.

Households in the C category have significantly lower levels of disposable income than the A/B/C+ strata, with annual incomes ranging from US\$12,000 to US\$34,000. Making up 17 percent of the total population, these households have on average two televisions and a VCR, but less than one-third have pay TV in their house, versus 71 percent among A/B homes. One key difference as consumers drop from C+ to C: while the former is likely to have two credit cards, less than half of C households have even one.

The most interesting consumer segment from the standpoint of the videogame industry could very well be the next level down: D+. It comprises by far the largest population with 37 percent of all households falling into this class. Therefore, there are nearly as many D+ consumers as A/B, C+ and C combined. With annual incomes of US\$7,000 to US\$11,000, the range of disposable income varies significantly from the top D+ consumers to the bottom: The top third spends more than twice as much on entertainment than the bottom third.

The penetration of goods in D+ class households is growing at a faster pace than the population as a whole. For example, the proportion of total Mexican households with a computer grew 222 percent from 9 percent to 20 percent between 2000 and 2005. In D+ households, it grew 260 percent from 5 percent to 13 percent. This is partly due to real wage growth. Between 2000 and 2005, their incomes grew an average of 13.5 percent, versus 6.5 percent across all socioeconomic classes. It also due to the massive growth of consumer credit. Though fewer than 5 percent of D+ households have credit cards, many are able to acquire in-store credit plans. In particular, furniture and electronic stores such as Coppel and **Elektra** specialize in financing big-ticket purchases with credit plans that include small weekly payments and long payback periods. Given their scarce levels of disposable income, access to credit means that these consumers can make purchases that they would otherwise not be able to. The potential here should not be underestimated. **Sony** made more sales of its Playstation2 console in **Coppel** than in any other store in 2006, and 30 percent of **Xbox** console owners (not Xbox 360) in Mexico are D+ consumers, according to Microsoft.

Finally, the D/E class represents a large population of consumers that are very unlikely to acquire either a console or home computer. The remaining 30 percent of households fall into these final two categories. Only 3.6 percent of D households and 0.9 percent of E households own a PC. These consumers are too poor to even be considered a piracy risk – even US\$1 pirated games are a significant expenditure and they wouldn’t have anywhere to play them anyways.

One particularly interesting segment that videogame retailers should pay special attention to going forward will be young, unmarried gamers (YUGS) living with their parents or parent. It is common in Mexico for young adults to remain living in the family home until their first marriage. Individuals who have entered the workforce but have not yet wed thus earn an income but have minimal living costs. A high proportion of their income is therefore discretionary. In 1995, this was fairly insignificant. Women married at the age of 20, and men at 23, on average. In 2005, however, the average age increased substantially. Women are now married at the age of 25 and men 28 – resulting in up to a decade of cash flush YUGGIES at a prime gamer age.

Black & Gray Markets

As prices go down, options improve in terms of both timing and variety of selection, formal retail outlets gain in geographic coverage, and in-store and bank credit expands, piracy will be squeezed by the legitimate sector. However, based on the experience from other industries, progress will be slow and halting, and there will be retreats. Ultimately, a major shift in Mexican law enforcement capabilities and participation by the videogame industry

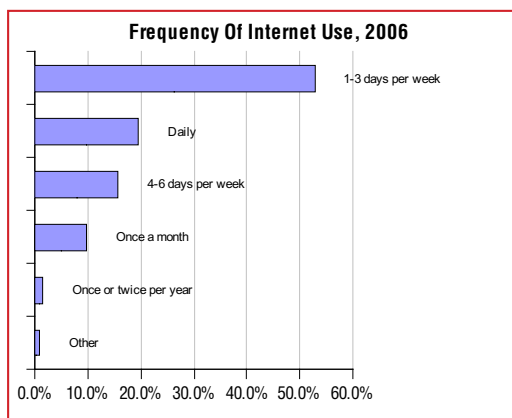


The sensational growth in 2006 in videogame hardware and software sales was not limited to the formal sector. According to the **Entertainment Software Association**, piracy rates in videogames, the rate of videogame piracy, including software for computers, consoles and handhelds, jumped from 75 percent in 2005 to 85 percent last year.

Counterfeiting of software is a graver problem for games played on personal computers, but is not limited to them. The problem is seriously underestimated by some in the industry. One executive reported that, "We have not detected any piracy of our videogames." However, an ESA representative estimated that 30 percent to 40 percent of the counterfeit games they find in pirate markets are in "cartridge" form for console use. PC software is generally counterfeited in Mexico through the illegal reproduction of optical disks, whereas software for both handhelds and consoles are reproduced in Asia and smuggled to Mexico in parts, where they are assembled in clandestine factories or workshops. Both are sold openly in street markets and via the Internet.

The networks running the piracy mafias are large and sophisticated. Aside from the software available at their informal booth, vendors carry large catalogs listing thousands of titles in all categories and various languages. Programs are stored in nearby warehouses. Technicians are available to crack a security chip on a console for a fee. In addition, consoles and handhelds are acquired wholesale from legitimate Mexican distributors and sold at the markets with cracked chips – frequently bundled with 10 or 20 counterfeit cartridges.

Pirated good are also widely available online. For example, a search for the phrase "xbox chip" on ebay.com renders zero results, but on mercadolibre.com.mx, ebay's Mexico subsidiary, it turns up 116 results.



Individuals who "crack" their consoles face downsides. For one, their warranty is invalidated (which is also true for units acquired abroad). Secondly, they may not be able to gain access to online videogame services via the console, such as **Xbox Live** – although in Mexico there are only 3.5 broadband subscribers per 100 people, versus 20 in the US, Japan and Europe.

The protection of intellectual property in Mexico is governed by federal law. Under the previous administration of President **Vicente Fox**, the government launched a vigorous national anti-piracy campaign that includes agencies such as **Mexican Customs** and the **Federal Attorney General's Office**, as well as private sector participants and legal specialists. The current administration of **Felipe Calderon** has adopted the program and is officially continuing it. In May 2007, Calderon's **National Development Plan** (the constitutionally mandated planning document for his six-year administration) made explicit reference to the protection of intellectual property – the first time a National Development Plan has done so.

The ESA utilizes a two-pronged approach to combat software piracy. On one hand, it develops public awareness campaigns to emphasize the damage to the domestic industry caused by the consumption of counterfeit products. On the other, it has stepped up enforcement in cooperation with the government. The majority of security actions are executing through a



private law firm representing a specific company. The firm will file a criminal complaint on behalf of the company regarding a location where counterfeits of the company's products are being sold, and federal agencies will conduct a raid of that location. The products are confiscated and the person is detained, though in nearly all cases companies do not proceed with prosecution efforts. The end result is that the bootlegger switches to another company's products. Some companies, notably **Nintendo**, have been very aggressive and successful in suppressing piracy of their products in determined markets, though most third-party publishers have no strategy on this front.

Piracy overall is not necessarily diminished by this strategy, but at least in the case of business software, piracy rates diminished for the first time in 2006, from 65 percent to 63 percent, according to the **Business Software Alliance**, which pursues similar policies.

Gray Market

The size of the gray market is currently unknown. Most estimates range widely, from as low as 9 percent to 40 percent.

An important slice of the gray market comprises legitimate merchants that import hardware and software from the US or other countries and distribute to established storefronts. Therefore, while **Sony Playstation3** was not introduced by authorized channels in Mexico until August 2007, the platform was widely available in retail outlets for US\$1,000 and above. Because authorized distribution of consoles came so late to Mexico, parallel import channels had many years to grow in size and sophistication.

There is no legal precedent governing parallel import activity as there is in the US and Europe. The **Mexican Institute of Intellectual Property (IMPI)** has not defined regulations in this sense, and no federal court rulings have been issued.

In addition, a large number of software and to a lesser extent hardware are smuggled into Mexico by private individuals to sell either online, in the informal market, or in brick and mortar storefronts. Though such activity is technically illegal, it is virtually impossible to enforce effectively. Small-scale undeclared imports flow across the border in volumes that completely overwhelm existing resources. Mexicans made 115 million day trips across the US-Mexico border in 2006, and only a small fraction are inspected upon return.

Baggage Carry

Finally, a large proportion of the gray market is made up of declared and undeclared goods for personal use, also known as baggage-carry. Mexican tourists and business travelers spent \$7.4 billion in the US in 2006, fourth behind Japan, the UK, and Canada. As of June 2007, **Mexicans Customs Law** was updated in Article 50 so that Mexicans traveling abroad are entitled to bring a videogame console into the country duty-free. In addition, they may bring duty-free 10 DVDs and 30 CDs. Though the text of the law does not specify whether that includes videogames, one customs official confirmed that they are covered within the exemption. In addition, Mexicans are allowed to bring in five toys of any type, including videogames. Even before the change to the law, millions of undeclared consoles and games were brought in for personal use. Now, that number will only increase.

Speculating without extensive statistical field research is nearly impossible. However, conservatively speaking, one in 8 Mexican households is believed to have a videogame console – counting authorized sales only. That means that game-owners made 15 million trips across the border into the US, where new games are 20 percent cheaper and consoles are often hundreds of dollars less.

In terms of software, if console-owning travelers purchased just



one game in 10 percent of those trips, then the number of console cartridges in baggage carry would be 1,500,000, or 33 percent of the formal white market sales from 2006. In terms of hardware, using the same conservative sample of one in 8 households, the number of consoles would be 1,500,000, or 50 percent of the industry's estimates for the installed base. That does not include 6 million additional extended road trips beyond the border zone (adding up to another 1.1 million game-owners). Nor does it include the 2.8 million Mexicans who traveled by air to the US in 2006. These visitors have an average household income of US\$85,500 and 84 percent of them went shopping during their stay. Two-thirds were males with an average age of 42. For 10 percent of all travelers, it was their first trip to the US.

While it is difficult to estimate the incidence of baggage carry, it common knowledge among Mexican gamers that US travel represents a major consumer opportunity. As one interviewee told us: "We don't mind so much paying an extra US\$10 or US\$20 for a videogame, but you can save hundreds on a console. That's why whenever we want a console and we hear that someone is going to the US or maybe an uncle is coming down, we ask them to buy it for us there." Or another: "When I was a teenager, I was a 'drugstore kid' because I didn't have a console at home and I spent all my time at the drugstore playing whatever videogame machine they had. Now I have all the consoles in my home – except for the Wii. I'm waiting until my next trip to the US to get that."

When the large number of baggage carry consoles and cartridges are added to videogame merchandise smuggled in for resale and to the merchandise imported legally by unauthorized dealers, it is easy to see why we believe that size of the gray market is critically underestimated by the industry, and is likely at least 40 percent of the total market.



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AMERICAS NEWS INTEL PUBLISHING

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

INTEL CORPORATION,

Plaintiff,

v.

AMERICAS NEWS INTEL PUBLISHING, LLC,

Defendant.

CASE NO. C09-5085 (PVT)

**DECLARATION OF RONALD D.
COLEMAN IN SUPPORT OF AMERICAS
NEWS INTEL PUBLISHING, LLC'S
MOTION TO DISMISS INTEL
CORPORATION'S COMPLAINT**

I, the undersigned, RONALD D. COLEMAN, declare as follows:

1. I am an attorney admitted to practice before the courts of the States of New York and New Jersey and numerous United States District Courts, and before this Court *pro hac vice*. I am a member of the firm of Goetz Fitzpatrick LLP and counsel to defendant Americas News Intel Publishing, LLC

1 (“ANIP”). The facts set out herein are within my personal knowledge, or are based on documents in my
2 possession and other information to which I have access in the course of my duties. If called upon to do so
3 I could and would testify to the truth thereof.

4 2. I make this Declaration in order to place before the Court certain information that is widely
5 available on the Internet concerning the “parking” or placeholder pages submitted by defendant in opposition
6 to ANIP’s motion to dismiss. Those submissions suggest that the screen shots of these placeholder pages
7 reflect content uploaded by or on behalf of ANIP. Familiarity with practices in the web hosting business,
8 however, or even perusal of the Internet, readily demonstrates that this is entirely inaccurate.

9 3. Exhibit A to Ian Boyd’s declaration states, “This page parked courtesy of Bluehost.com.”
10 In fact, a search of the Internet for web pages utilizing the same “parking” page turns up countless
11 examples of them. What is particularly interesting, however, is that many of them have the
12 following legend at the bottom:
13

The page you have requested is currently under construction.
If you are the website owner you must remove this temporary page prior
to viewing your site.
It is named "default.html" and is located in your /public_html folder.
If you need help uploading your files please click here.

14
15
16
17
18 Examples of the Bluehost.com parking pages I found on the Internet which bear this statement, are
19 attached as Exhibit A.

20 4. Neither of the two exhibits in the Boyd Declaration depicting these pages, which are
21 absolutely identical in terms of the content, graphics and text—in every way, except for the domain
22 name and the links generated—shows this statement on it. This does not, however, appear to be a
23 purposeful omission. Numerous other otherwise identical pages do not have it. See Exhibit B. All
24 of them, however, do state “This page parked courtesy of Bluehost.com.”
25

I declare under penalty of perjury under the laws of the United States of America that the foregoing

1 is true and correct.

2

3 Executed at Clifton, New Jersey this February 19, 2010.

4

5



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RONALD D. COLEMAN

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EXHIBIT **B**



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