

Nintendo Commences Legal Battle Against Real World Bowser

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by Ryan Meyer



Any fan of Nintendo games and consoles can tell you that the company's most iconic virtual villain is King Bowser Koopa, generally referred to as simply "Bowser." In a strange instance of life imitating art, Nintendo filed a copyright infringement complaint on April 16, 2021, against a real-life Bowser—i.e., Gary Bowser. While King Koopa's villainy primarily involves harassing Mario and his friends and kidnapping princesses, according to Nintendo's complaint, Gary Bowser has harmed Nintendo by selling devices aimed at circumventing copyright protections for Nintendo's popular Switch and Switch Lite gaming consoles.

More specifically, Nintendo's complaint alleges that Gary Bowser is "one of the leaders of Team Xecuter, a pirate operation that unlawfully manufactures and traffics in an unauthorized operating system called the 'SX OS,' and accompanying piracy tools which install it... for commercial gain." When a customer of Team Xecuter uses the purchased piracy tools to run SX OS on a Nintendo Switch, the customer is able to run pirated versions of games on the hacked Switch for free by bypassing technological measures

meant to thwart such conduct.

Of the three counts in Nintendo's complaint, Counts One and Two relate to the Digital Millennium Copyright Act ("DMCA") (i.e., unauthorized trafficking in circumvention devices). Count Three is a copyright infringement claim based on Team Xecuter's unauthorized display on its website of images taken from Nintendo Switch games. This litigation represents a new stage in Nintendo's ongoing campaign against accused infringers. Whereas prior cases focused on copyright infringement, trademark infringement, and unfair competition claims, Nintendo's case against Gary Bowser is primarily based on the DMCA.

In the past, Nintendo filed complaints against websites that Nintendo accused of infringing its copyrights directly through reproduction and distribution of "ROM" files, as opposed to entities, like Team Xecuter, that enable customers to circumvent copyright protection. In the video game context, a "ROM" refers to the software code necessary to play a particular game. Once a user obtains a ROM, the user can play it on a PC, smart phone, or other device using an emulator—an application that emulates one or more gaming consoles. So, if the user has, for example, a ROM for a game originally released on the Nintendo Entertainment System plus a Nintendo Entertainment System emulator installed on a PC, that user can play the game on the PC. While ROMs can be obtained through various, often unlawful, sources, such as eBay or from an original game cartridge, users used to commonly obtain both the ROMs and emulators from websites that allowed users to download the files for free or for a membership fee.

Nintendo's litigation against ROM websites have been successful. For example, in 2018, a court approved a settlement and awarded Nintendo \$12.23 million in damages, and granted a permanent injunction, against a married couple based in Arizona who provided free game downloads from two websites, LoveROMS.com and LoveRetro.com, to over 17 million monthly visitors. In 2019, Nintendo filed a complaint against, Matthew Storman, the owner of RomUniverse.com, which had been online more than ten years. RomUniverse.com provided free ROM downloads but also charged a \$30/year membership fee to download unlimited ROMs at a higher speed. While that litigation is still pending, Mr. Storman has already taken RomUniverse offline. Other ROM sites have also gone offline to avoid being Nintendo's next target.

It's too early to tell whether Gary Bowser will be found liable, whether Nintendo will be awarded damages, or whether Nintendo would be able to collect such damages. However, the Team Xecuter website is already down, thus preventing future infringement. Moreover, this lawsuit will likely send a warning to other individuals and entities that Nintendo is now prepared to use the DMCA to protect its IP rights.