

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

LEXMARK INTERNATIONAL, INC. :
 :
 Plaintiff, :
 : Case No. 02-571-KSF
 v. :
 :
 STATIC CONTROL COMPONENTS, INC. :
 :
 Defendant. :

MEMORANDUM OF THE AUTOMOTIVE PARTS REBUILDERS
ASSOCIATION IN THE NATURE OF AN AMICUS
CURIAE BRIEF IN SUPPORT OF DEFENDANT

In support of opposition of the Defendant, Static Control Components, Inc. to the Motion for Preliminary Injunction filed by Plaintiff, Lexmark International, Inc, the Automotive Parts Rebuilders Association, by and through counsel submits the following:

THE MOTOR VEHICLE PARTS REBUILDING/REMANUFACTURING INDUSTRY

The Automotive Parts Rebuilders Association (APRA), is the international trade association for companies which rebuild and remanufacture motor vehicle parts for resale and reuse. APRA members rebuild the mechanical parts of vehicles such as transmissions, alternators, brakes, clutches, CV joints, etc. APRA has over 1,800 members worldwide.

Motor vehicle parts rebuilding is not a new industry. It began almost as soon as the first "horseless carriage" broke down. However, the scarcity of replacement parts during World War II nurtured the industry's growth, and since then, the economic and environmental benefits of rebuilding have made it a major industry in the U.S. In a 1996 survey by Boston University, it

was estimated that the industry consisted of over 50,000 firms with total annual sales of over \$36 billion dollars.

Rebuilt/remanufactured mechanical parts constitute a significant portion of the parts resold for use on motor vehicles after they have left the dealer's showroom. For many types of parts, they represent by far the largest percentage of sales in the motor vehicle aftermarket. For example, sales of rebuilt brake shoes, rotating electrical parts, starters and alternators make up about 90 percent of the total market for those parts.

For all makes and models of vehicles, rebuilt mechanical parts sell for about 20-40% below the cost of new parts and carry competitive warranties. They thus provide a lower priced alternative to new parts for people of modest means and small businesses. For older model vehicles and other equipment, a rebuilt part may be the only replacement alternative because the original manufacturer of the vehicle will have exhausted its supply of new parts. If vehicle parts were no longer rebuilt, almost 25% of the U.S. road fleet and an even greater percentage of the off-road vehicles would have to be retired well before they are functionally obsolete.

Before a part can be labeled rebuilt or remanufactured (these terms mean the same thing) it must be dismantled; have all of its internal and external parts thoroughly cleaned, including eliminating all rust and corrosion; have all impaired, defective, missing or worn components restored to a sound condition or replaced with new or rebuilt components; and have such machining or other operations performed as are necessary to put the part in sound working condition. After re-assembly and testing the part normally performs as well, and sometimes better, than the original part.

Rebuilding of motor vehicle parts is also sound environmental policy. By reusing the spent motor vehicle part and giving it a second, third or even additional lives the rebuilder keeps

the part out of the nation's landfills. Moreover it preserves the metal and other natural resources which would have had to be used to create a new part. Finally, it saves energy. It is estimated that rebuilding a part uses only about 15% of the energy needed to create a new one.

EFFECT OF COMPUTER CONTROL ON PARTS REBUILDING/REMANUFACTURING

The ability of a rebuilder to sell its product is directly dependent on whether that product can be re-used in a motor vehicle. Generally, there is no problem with such re-use because rebuilding does not modify the original product (except when a design flaw has been identified and corrected) and rebuilt products perform similarly to original parts. However, if an artificial barrier can be erected, i.e., a barrier that has nothing to do with the performance of the part, then any person with the ability to raise such a barrier and control access around or through it, can control use and re-use of the part even after it has been sold in commerce.

The use of computers in motor vehicles has increased dramatically over the past decade. This increased use has placed the means in the hands of the motor vehicle manufacturers to erect such artificial barricades. By using the on-board computer or electronic control module to first monitor and then control and modify the functioning of other parts in vehicles, the manufacturers now have the means to dictate what criteria a part must or must meet if it is to work in coordination with the ECU and the other parts of the vehicle. While such criteria are normally performance related, they do not have to be.

This has become even more of a problem, now that almost all significant parts of the vehicle have their own computer chip. The software on this chip, like the Lexmark Toner Loading Program on its chips, communicates with the software in the ECU. It would be easy for a vehicle manufacturer to program into the software in the ECU and on the part chip a "secret handshake" such as Lexmark has done. If so, even a part originally manufactured by the vehicle

manufacturer might not be able to be reused, unless the rebuilder or service technician had access to the “secret handshake”.

CLEAN AIR ACT PROHIBITIONS ON ACCESS CODES

In 1990 the U.S. Congress recognized the potential for use of such secret handshakes and codes to disrupt the service and repair market for motor vehicles. In the Clean Air Act Amendments of 1990, it included a section specifically to deal with that possibility with respect to emissions-related parts. Section 202(m) of the Act (42 USC §7521(m)), a copy of which is attached hereto as Exhibit A, requires vehicle manufacturers to install on-board-diagnostic (OBD) computers in their new vehicles. These OBD computers are to provide notice of parts and systems malfunctions which could indicate an increase in emissions and to store diagnostic information for use later by a service technician repairing the vehicle. Subsection (m)(4) of Section 202 (42 USC §7521(m)(4)) contains certain requirements to assure that independent service technicians have the ability to access information in the OBD computers to service and repair emissions-related parts. These requirements include:

“In promulgating regulations under this subsection, the Administrator shall require -----

...

(B) that access to the emissions control diagnostic system through such converters shall be unrestricted and shall not require any access code or any device which is only available from a vehicle manufacturer; and

...

In the regulation promulgated to implement Section 202(m)(4), the Environmental Protection Agency required standardized access to OBD computers and no limitation on access

to the information in the systems needed for diagnostic purposes. 40 C.F.R. §86.094-17(h). (See Exhibit B attached hereto.)

Under Federal law the State of California has the right to enact Clean Air laws which differ from the Federal Act. It is the only state which has this right. In its legislation California was even more specific in preventing use of access codes with OBD systems. In relevant part, Section 43105.5(a) of the California Health and Safety Code, attached hereto as Exhibit C, states:

(a) For all 1994 and later model-year motor vehicles equipped with on-board-diagnostic systems (OBD's) and certified in accordance with the test procedures adopted pursuant to Section 43104, the state board, not later than January 1, 2002, shall adopt regulations that require a motor vehicle manufacturer to do all of the following to the extent not limited or prohibited by federal law...:


...

(5) Not utilize any access or recognition code or any type of encryption for the purpose of preventing a vehicle owner from using an emissions-related motor vehicle parts with the exception of the powertrain control modules, engine control modules and transmission control modules, that has not been manufactured by that manufacturer or any of its original equipment suppliers.

That language is repeated almost verbatim in the regulations the California Air Resources Board adopted pursuant to the law. 13 Calif. Code of Regulation, §1969(h). (See Exhibit D attached hereto.)

Both the Federal and California laws were intended to do one thing, i.e., to prevent motor vehicle manufacturers from creating a code or password which would deny entry into the system and prevent service by independents and the use of parts other than its own.

APRA does not believe that 17 U.S.C. Section 1201(a)(2) was intended to protect manufacturers like Lexmark from limiting competition for their products by permitting them to require an access code or other pass key so that other products which perform the same function could not be used. Moreover, it appears that other sections of the Act, notably Section 1201(f) were included specifically to allow conduct similar to that of Defendant. In this case Lexmark has created an access code, i.e., its secret handshake, not to protect the copying and use of its copyrighted material, the Toner Loading Program, but to deny anyone other than itself the ability to create or rebuild parts to work with its copier systems. This is exactly what Congress decided it did not want in the motor vehicle industry. If this Court agrees with Lexmark and holds that the Digital Millennium Copyright Act prevents the Defendant from selling its product, the application of such ruling to the motor vehicle industry would be directly contrary to the language of Section 202(m)(4) of the Clean Air Act. APRA does not believe that this is what Congress intended in passing the Digital Millennium Copyright Act.



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