

No. 03-5400

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United States Court of Appeals  
for the Sixth Circuit

Lexmark International, Inc.,  
Plaintiff-Appellee,

vs.

Static Control Components, Inc.,  
Defendant-Appellant.

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**BRIEF OF *AMICUS CURIAE* SONY COMPUTER  
ENTERTAINMENT AMERICA INC. SUPPORTING  
LEXMARK INTERNATIONAL, INC. SEEKING  
AFFIRMANCE**

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Appeal from the  
United States District Court for the Eastern District of Kentucky  
(Civil Action No. 02-571-KSF)

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

(This statement should be placed immediately preceding the table of contents in the brief of the party. See copy of 6th Cir. R. 26.1 on page 2 of this form.)

Lexmark International, Inc.,

Plaintiff-Appellee,

v.

Static Control Components, Inc.,

Defendant-Appellant.

**DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST**

Pursuant to 6th Cir. R. 26.1, Sony Computer Entertainment America Inc.,  
(Name of Party) a Delaware corporation  
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? Yes

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Sony Computer Entertainment America Inc. is wholly owned by Sony Computer Entertainment Inc., a Japanese corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No

If the answer is YES, list the identity of such corporation and the nature of the financial interest:

  
(Signature of Counsel)

July 30, 2003  
(Date)

6CA-1

(Over)

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I

**STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF  
AUTHORITY FOR *AMICUS* TO FILE<sup>1</sup>**

Sony Computer Entertainment America Inc. (SCEA), in conjunction with its parent and sister companies Sony Computer Entertainment Inc. and Sony Computer Entertainment Europe, manufacture and distribute the PlayStation family of home entertainment products. These products are electronic game systems designed to connect to a television and allow users to play CD-ROM and DVD video game software. Authorized PlayStation games are copyrighted works of SCEA and/or its licensees. Each game includes a copyrighted computer program and an audio-visual work, which appears on screen when an authorized game is played through one of the PlayStation systems, which also contain digital works that are copyrighted. PlayStation 2 also is enabled for online gaming. At present, this primarily involves peer-to-peer game play that requires each user have a console and a copy of the software.

PlayStation and PlayStation 2 hardware architecture is designed to allow only the operation of legitimate, authorized products licensed for distribution in the geographical territory where a console is sold. These practices and precautions protect the exclusive rights of SCEA and its

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<sup>1</sup> In accordance with Federal Rule of Appellate Procedure 29(b), Sony Computer Entertainment America Inc. seeks leave by separate motion to file this *amicus curiae* brief.

licensees to copy, sell, distribute, and manufacture their authorized and copyrighted software, and to ensure the successful development and distribution of PlayStation products.

Access security measures also allow SCEA and its licensees to exert control over the nature and quality of the goods and services bearing their trademarks. Or, more precisely, access control technology ensures that unauthorized products bearing false designations (including developer or publisher trademarks, PlayStation marks, and game franchise trademarks) cannot be played or viewed through a PlayStation console and, thus, cannot weaken the associated trademarks.

Technological access controls do not hinder the essential non-infringing use of PlayStation video games — playing the game on an authorized console by the consumer in the home. Rather, these controls allow SCEA to maintain a high level of quality control and protect consumers against the deficiencies of counterfeit games and other unauthorized software.

While SCEA has no direct financial interest in the outcome of this litigation, it has a vital interest in the protection of its copyrighted works and those of its licensees, and, thus, in the protections afforded by the Digital Millennium Copyright Act, 17 USC §§1201-1205 et seq. (DMCA). Here, the district court ruled access control measures are not improper extensions or enlargements of existing copyrights, but rather, are plainly allowed under and protected by the DMCA. The district court, accordingly, granted Appellee

Lexmark International, Inc.'s (Lexmark) motion for preliminary injunctive relief protecting its copyrighted digital works against circumvention activity.

In seeking to overturn the injunction, Appellant Static Control Components, Inc. (SCC) is urging the Court to all but eviscerate the circumvention protections afforded by the DMCA. Such a result would be contrary to both the plain language and purpose of the DMCA, and the damage it would potentially cause to copyrighted digital works would be profound. The DMCA's prohibitions against circumvention activity and the manufacture and distribution of circumvention tools were enacted to *reinforce* the technological protections put in place by copyright owners like SCEA and those in its industry. Indeed, it is the combination of technical and legal deterrents that provides the maximum defense against illegal access and use of copyrighted materials. SCEA therefore urges the Court to affirm the district court's order and uphold the preliminary injunction.

## II

### SUMMARY OF ARGUMENT

In ordering the preliminary injunction below, the district court undertook a thorough analysis of conduct that is prohibited by the DMCA on the one hand, and conduct that expressly is excepted from Act, on other, and applied this law to the facts of this case. That analysis led it to conclude that the Act disallows — and makes no exception for — circumvention of access

control measures undertaken to engage in the unauthorized duplication of a copyrighted work, and that SCC's conduct amounted to such a circumvention.

On appeal, SCC and its *amicus curiae* adopt a creative, but wholly misdirected, approach to challenging the district court's determination. Recognizing that the DMCA has been subject to criticism by those who consider it ill-advised and draconian, SCC and its *amicus curiae* attempt to cast this case as a textbook example of why the Act is flawed and how its preemptive nature encourages courts to supposedly extend copyright protections beyond those envisioned by Congress. But just because SCC disapproves of the DMCA, does not mean the Act was misapplied by the district court.

SCC's real complaint is *not* with the DMCA's application in this case, but instead with the well-settled scope of copyright as applied to digital works, and with the Act itself. In urging reversal, SCC asks this Court to choose between two unprecedented leaps. According to SCC, the Court either must find that the computer programs protected by Lexmark's access control measures are not subject to copyright, or it must conclude — despite Congressional mandate to the contrary — that courts have independent authority to exempt classes of products from the DMCA's anti-circumvention provisions. The district court wisely rejected these invitations to ignore established precedent and overreach the bounds of judicial authority. This Court should follow its lead, and recognize that criticisms of the scope of



copyright protection for digital works, or the operation of the DMCA, are issues for Congress, not the courts.

With the enactment of the DMCA, Congress comprehensively addressed the diverse and competing concerns of copyright holders, their market competitors, and the public at large. It established a thorough regulatory structure aimed at prohibiting the manufacture and distribution of products and devices that circumvent technological access control measures designed to protect copyrighted works. It also charged the experts at the Copyright Office and the Librarian of Congress with determining what classes of works should be exempted from the Act's restrictions against circumvention of technical measures. The result is a set of uniform, national anti-circumvention standards that are among the most stringent in the world.

Lexmark properly invoked and sought the protection of these Congressional policy choices. Having received certificates of registration for copyrights in its toner loading programs and having otherwise satisfied the tests for copyrightability, these programs are protected works. Under the DMCA, Lexmark is entitled to use access control measures to secure the copyrighted works contained in its printers and authorized print cartridges.

SCC essentially takes issue with Congress' policy choices. It urged the district court, and now urges this Court, to displace the expert regulatory judgments of the Copyright Office and Librarian of Congress and substitute, instead, those of individual courts. As SCC would have it, any

time the independent economic significance of a copyrighted work can be called into question, a court will be compelled to find that a DMCA exception is created, and a competitor's circumvention measures will survive — no matter how much they might conflict with and undermine express statutory language, and no matter that they fall within no Congressionally approved exemption.

Under SCC's approach there would be nothing left of the Congressional policy choices as to how intellectual property can best be protected and competition can best be promoted. The appropriateness of exempting classes of works from the prohibitions the DMCA otherwise provides would move from the regulatory arena to the courts of the 50 states. Manufacturers utilizing access controls would face the unpredictability and uncertainty of jurisdictional proclivities, impeding technological research, development, and innovation. The final losers would be those Congress ultimately intended to benefit — the general public, which rightfully has come to expect the continued availability and development of technologically sophisticated products.

In short, the entire copyright regulatory scheme is designed to balance the interests of rightsholders, potential competitors and the general public. In striking that balance, Congress expressly declared that certain conduct would be excepted from the DMCA's anti-circumvention provisions and in all other instances the Copyright Office and Librarian of Congress would determine the aptness of an exemption. Thus, if such an exemption is

appropriate for the class of products encompassing Lexmark's toner loading programs, the road to such an exemption lies first through the Copyright Office, not the courts.

In the end, the choice here is between respecting the public policies Congress has chosen to implement and substituting an entirely different construct espoused by SCC and its *amicus curiae*. This Court should follow the former course and affirm the district court's order granting a preliminary injunction.

### III ARGUMENT

#### A. **SCC's Restrictive Reading Of The DMCA's Anti-circumvention Provisions Would Require The Court To Assume A Role Expressly Committed To Regulatory Expertise**

Prior to Congress' enactment of the DMCA, the doctrine of contributory infringement afforded copyright owners some protection against those distributing circumvention devices. There are, however, a number of weaknesses in this doctrine that circumvention device manufacturers have readily exploited to avoid liability. Under the contributory infringement doctrine, copyright liability extends to providers of technical devices used to infringe a copyright that lack a substantial non-infringing use. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 434-42 (1984). To avoid liability, providers simply add a "substantial non-infringing use" to an unauthorized copy of a product intended specifically for access control

circumvention. The DMCA was enacted in part to close this loophole. The DMCA also plugs another gap in the contributory infringement doctrine by allowing a copyright owner to pursue those who distribute devices *intended* to circumvent — which in many cases result in direct copyright infringement — without requiring that direct infringement be shown.

Thus, in enacting the DMCA, Congress imposed preemptive prohibitions on circumvention of access control measures in order to lend further force to copyright protections that, while theoretically present, were difficult to implement under prior law. The need to buttress the ability of rightsholders to protect their works was far from illusory. In the case of the video game industry alone, numerous devices are marketed and used to circumvent the access controls for game consoles such as those produced by SCEA. These devices enable the play of unauthorized games downloaded from the Internet and/or burned from CDs or DVDs. Without them, the play of unauthorized games would be virtually impossible because of the effectiveness of the access control measures included in, for example, the PlayStation family of products. Circumvention technologies include the popular “mod chip,” which has facilitated the growth of a substantial black market for counterfeit and other unauthorized PlayStation games. Another such device is known generally as a “Game Enhancer,” although it also is sold under other names. A Game Enhancer externally connects via serial port to a PlayStation console and also circumvents the PlayStation access control system.

SCEA continually must undertake legal actions to address the thriving market for circumvention technologies aimed at the PlayStation and PlayStation 2 access control measures. Put differently, for each security measure installed by SCEA, there is a demand for a matched circumvention device. Such devices result in fewer copies of legitimate, authorized products being sold to the public.<sup>2</sup> This in turn reduces the legitimate rightsholder's investment in developing the product. If circumvention is curtailed consistent with Congressional goals in enacting the DMCA, the resulting sales of legitimate products permit a return on investment that translates into higher quality and lower prices for the honest end-user. Adequate and effective anti-circumvention measures also help ensure that legitimately produced video games are distributed only in the territories for which they are licensed.

Recognizing that the preemptive regulatory scheme embodied by the DMCA could lead to results that restrict not only copyright infringement but also more salutary pursuits, Congress provided in addition for the creation of classes of exempt products, and empowered the Copyright Office to

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<sup>2</sup> "Worldwide piracy is estimated to have cost the US entertainment software industry over \$3.0 billion in 2001, robbing game developers and the game industry of revenue that could be used to underwrite the creation and marketing of an even wider array of game titles." Entertainment Software Association Anti-Piracy Information: <<http://www.theesa.com/piracy.html>>. "The Digital Software Association ([www.idsa.com](http://www.idsa.com)) says that videogame piracy alone costs almost \$2 billion each year around the world." Jim Trageser, *Computer Edge Magazine*, September 20, 2002, "Hot on the Web:" <<http://www.computeredge.com/Archive/Editorial%20Archive/038/hot%20038.pdf>>.

conduct proceedings that could ultimately result in the Librarian of Congress exempting certain classes of works from the otherwise available prohibitions against the circumvention of access controls. *See* 17 USC §1201(a)(1)(c).

Although SCC and its *amicus curiae* never directly acknowledge it, a central prong of their assault on the preliminary injunction below demands a direct judicial review of the exemption analysis that Congress has assigned to the Copyright Office and Librarian of Congress as part of their regulatory decisionmaking. The issue posed, at its core, is whether Lexmark's toner loading programs should fall within the classes of works as to which access control measures may be circumvented with impunity. Yet, where the issue is the legitimacy of an action reserved to the regulatory arena, the law does not invite courts to wade in and interpose their own assessments to resolve questions that are the substance of regulatory decisionmaking processes. Proper respect for regulatory agencies and their roles demands more deference.

In cases involving direct challenges to a final administrative actions, for example, courts have only limited discretion to inquire whether an administrative agency's decision was "arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or contrary to law." 5 U.S.C. § 706(2)(A); *see also Hennepin County Med. Ctr. v. Shalala*, 81 F.3d 743, 748 (8th Cir. 1996) (describing standard for judicial review of administrative actions); *St. Luke's Methodist Hosp. v. Thompson*, 315 F.3d 984, 987 (8th Cir. 2003) (same). This narrow standard of review does not

allow the court to reweigh the evidence and issues, but is limited to consideration of whether the agency “has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or product of agency expertise.”<sup>3</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 19, 43 (1983).

On the record before this Court, moreover, the situation has not ripened into a final regulatory determination that conceivably could be subject to *any* form of judicial review.<sup>4</sup> As required under the DMCA, the Librarian of Congress must periodically advise Congress concerning what, if any, works should be exempt from the Act’s anti-circumvention provisions. The Copyright Office took comments through February, 2003, as part of the rulemaking now in process, and, in turn, will supply the Librarian of Congress with its recommendations such that the Librarian may comply with this Congressional mandate by October 28, 2003. *See* Notice of Inquiry, 67

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<sup>3</sup> And even when a court finds an abuse of discretion, the usual remedy is reconsideration by the administrative agency — not the court or a jury deciding the issue and awarding damages. *See* 5 U.S.C. § 706 (where administrative agency abuses its discretion, court sets aside decision, leaving agency to reach new determination).

<sup>4</sup> Nor is it clear such a situation ever will come to pass, given that the Copyright Office is limited to exempting classes of works with regard to 17 USC §1201(a)(1) and SCC’s exemption petition (discussed *infra*.) appears to be aimed at conduct that would fall under §1201(a)(2).

Fed. Reg. 63578 (2002).<sup>5</sup> SCC is participating in this process in direct response to this litigation, and contends Lexmark should not be able to use the DMCA to curtail circumvention technologies aimed at the access control measures protecting its toner loading programs. *See* Notice of Inquiry, 68 Fed. Reg. 6678 (2003).<sup>6</sup> The district court properly recognized that if indeed any exemption is available that would operate to shield SCC's conduct, SCC must await the outcome of these proceedings and may not shortcut the regulatory process by obtaining a judicial "exemption" in the matter pending below or by way of this appeal.

The balance of SCC's arguments about why the district court's injunction should be reversed suffer from the same sorts of problems. SCC's contention that a DMCA exception should apply teeters on the untenable premise that no infringement is involved in SCC's copying and use of the digital works at issue. *See* Appellant's Redacted Proof Brief, pp. 31-51; Appellee's Proof Brief, pp. 17-38, 50-53. While the briefs of SCC and its *amicus curiae* are rife as well with conclusory portrayals of Lexmark's access control measures as monopolistic and anti-competitive, the record is devoid of any evidence or claim that Lexmark is anything but an ordinary competitor in this market, and the market itself accordingly must determine whether this

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<sup>5</sup> Available online at <<http://www.copyright.gov/fedreg/2002/67fr63578.html>> .

<sup>6</sup> Available online at <<http://www.copyright.gov/fedreg/2003/68fr6678.html>> . SCC's Petition also is available online at <<http://www.copyright.gov/1201/2003/petitions/static.pdf>> .



business model for printers and printer cartridges is a viable one. In the final analysis, SCC and its *amicus curiae* are displeased with the scope of copyright protections the law affords Lexmark's toner loading programs, and with the fact the DMCA helps Lexmark enforce those protections. But even if the DMCA should be reexamined, the forum for such an action is the halls of Congress, not the courts.

**B. SCC's Suggestion That A Protected Work's Independent Economic Significance Should Play A Role In A Court's Anti-circumvention Analysis Is At Odds With Congressional Goals And Controlling Law**

In determining that Lexmark is entitled to protection under the DMCA, the district court relied in part on the similarities between this case and *Sony Computer Entertainment America Inc. v. GameMasters*, 87 F. Supp.2d 976 (N.D. Cal. 1999). In *GameMasters*, the district court issued a preliminary injunction to prevent the promotion, distribution, or sale of a "Game Enhancer" device that "circumvents the mechanism on the Sony PlayStation console that ensures the console operates only when encrypted data is read from an authorized CD-ROM." *Id.* at 987. SCC contends the district court here misapprehended the significance of *GameMasters*. On the contrary, the district correctly discerned there is no functional distinction between the Game Enhancer in *GameMasters* and the SMARTEK chip here.

In *GameMasters*, the Game Enhancer fed a code to the Sony hardware that "tricked" it into believing an authentic, authorized product had

been inserted, thereby enabling the user to play software that was not authorized for a particular geographic territory.<sup>7</sup> SCC cannot legitimately dispute that its SMARTEK chip performs an analogous function, thereby enabling printer users to use unauthorized ink cartridges, and in many instances violate the terms of sale applicable to Lexmark's discounted Prebate cartridges. Instead, SCC argues the DMCA was not intended to protect software that does not have "independent economic significance."

But this would throw the law into confusion. On what basis would a determination of "independent economic significance" be made? And even if such a standard were proposed, it could only give rise to a proliferation of disputes with conflicting results. For instance, because an authorized PlayStation game is commercially marketed specifically for use with a PlayStation console, and, under most circumstances, cannot be played absent a PlayStation console, it is uncertain under SCC's proposed standard whether the game software would have "independent economic significance." This would also be true for innumerable other software programs developed specifically for use with specific hardware and, thus, in some sense, have little value without that hardware. In short, SCC's formulation would give rise to

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<sup>7</sup> See also *Sony Computer Entertainment America Inc. v. Digital Stuff, Inc.*, (subject of the Request for Judicial Notice filed concurrently herewith), wherein the district court concluded a "Code Wizard" device allowed play of bootlegged video games. The DMCA was enacted in part in to address the fact that technologies circumventing access controls on copyrighted digital works promote, among other things, copyright infringement and gray market product use. See Appellee's Proof Brief, pp. 48-50, and authorities there cited.

conflicting and subjective rulings on the value of copyrighted works and contradict the low threshold for copyrightability prescribed by Congress. Nor is there any support in the *GameMasters* decision or elsewhere for a court to condition its anti-circumvention analysis on a qualitative assessment of the economic viability of the copyrighted material protected by the pertinent access control measures.

SCC further claims that technological measures that do not prevent “unfettered access to obtain, read and copy” the underlying protected work do not “effectively control access to a work” under the DMCA. (Appellant’s Redacted Proof Brief, p. 2) In other words, according to SCC, a “technological measure” that does not “prevent anyone from reading or copying” a protected work which is exposed in an unencrypted manner does not run afoul of the DMCA. (*Id.*, at p. 10) Or put differently, SCC asks the Court to rule that where the technological measure “only prevents the *use*” of the protected work, but does not “prevent entry to, viewing, or even copying of the allegedly-protected programs,” it does not fall within the boundaries of the Act. (*Id.*, at pp. 10, 16) Indeed, SCC argues the contrary would be “inconsistent with all prior cases, in which courts have found that a measure ‘effectively controls access’ if it prevents entry to systems on which the works are stored, or prevents the works from being read, displayed, or copied.” (*Id.*, at p. 16)

But to the extent that SCC relies on *GameMasters* to support its position, it misunderstands the facts of that case. As is true of Lexmark’s

access control measures, the technological measure that controls access to copyrighted PlayStation video games is in essence a “handshake” between the access control programming embedded on the hardware and the encrypted data on the software. If the “handshake” is completed, the software will run on the console and can be played by the consumer. If the correct encrypted data is not read by the hardware, the game will not function on the console.

As is also the case with Lexmark’s access control measures, the PlayStation access control system does not preclude reading or copying the copyrighted and protected computer program in question. To paraphrase SCC, “[u]sing standard inexpensive software analysis tools, anyone can access, read, and copy” the game program, “without circumvention.” (Appellant’s Redacted Proof Brief, p. 24) Indeed, it is precisely because the software on the game disks can be copied easily and inexpensively that the access control measure is required to ensure that any such unauthorized copies are not playable.

Thus, *GameMasters* is, indeed, pertinent authority and was properly part of the district court’s analysis in this case. It most assuredly does *not* support SCC’s quest to overturn the court’s preliminary injunction order.

## IV CONCLUSION

Use of access control technologies to ensure protection of copyrighted works is precisely what Congress intended in enacting the DMCA. In the console game industry, publishers of authorized software rely heavily on this technology. Access control measures promote the willingness of publishers, old and new alike, to create, develop, and publish new games, and to seek alternative methods of distributing those games to the public. They also protect against the economic and creative injury inflicted by copyright infringement. Thus, the position advocated by SCC carries a heavy price. If adopted, one of the end results would be increased infringement of video game copyrights, and the elimination of the return on investment necessary to foster continued research and development of new games, formats, and modes of delivery.

The district court, however, was right on target. It applied the DMCA in the only manner permitted by the plain language and relevant law. This Court should affirm the lower court's unremarkable conclusion that, absent an applicable statutory exception or an exemption granted through the

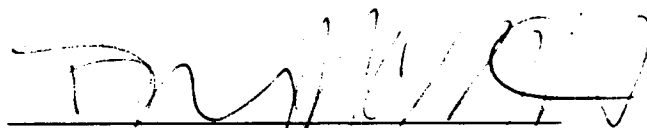
appropriate channels prescribed by Congress, the DMCA precludes the circumvention of access control measures protecting copyrighted digital works.

DATED: July 30, 2003.

Respectfully submitted,

REED SMITH CROSBY HEAFEY LLP

By



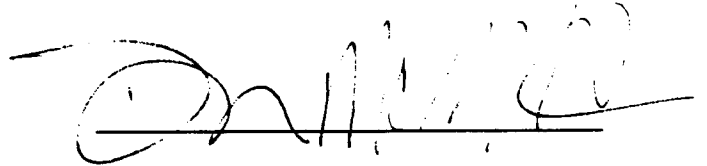
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V

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I certify that the attached brief uses a proportionally spaced typeface of 14 points and contains 3,375 words.

Dated: July 30, 2003

A handwritten signature in black ink, appearing to read "Denise M. Howell", is written over a horizontal line.

Denise M. Howell

**PROOF OF SERVICE**

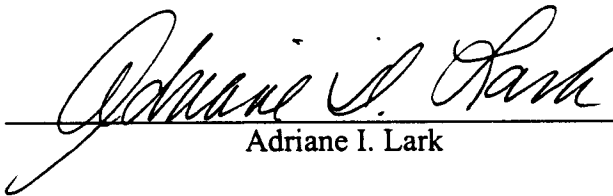
I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. I am employed in the office of a member of the bar of this court at whose direction the service was made. My business address is REED SMITH CROSBY HEAFEY LLP, 355 South Grand Avenue, Suite 2900, Los Angeles, CA 90071. On July 30, 2003, I served the following document(s) by the method indicated below:

**BRIEF OF AMICUS CURIAE SONY COMPUTER ENTERTAINMENT AMERICA INC. SUPPORTING LEXMARK INTERNATIONAL, INC. SEEKING AFFIRMANCE**

- by transmitting via facsimile on this date from fax number 213.457.8080 the document(s) listed above to the fax number(s) set forth below. The transmission was completed before 5:00 p.m. and was reported complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting fax machine. Service by fax was made by agreement of the parties, confirmed in writing.
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**PLEASE SEE ATTACHED SERVICE LIST**

I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on July 30, 2003, at Los Angeles, California.

  
\_\_\_\_\_  
Adriane I. Lark



1 *Lexmark International, Inc. v. Static Control Components, Inc.*  
2 *U.S. Court of Appeals Case No. 03-5400*

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