Case No. 02-CV-571-KSF

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

LEXMARK INTERNATIONAL, INC.

v.

STATIC CONTROL COMPONENTS, INC.

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# BRIEF AMICUS CURIAE OF SILICON VALLEY TOXICS COALITION IN SUPPORT OF STATIC CONTROL COMPONENTS, INC.

Dated: February 6, 2003

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## INTEREST OF AMICUS

Silicon Valley Toxics Coalition hereby files this Brief of *Amicus Curiae* in support of the defendant, Static Control Components, Inc. ("Static Control").

Silicon Valley Toxics Coalition (SVTC) is a diverse coalition that was formed in 1982 to address the rapid growth of high tech waste. We are particularly concerned about the export of hazardous waste as it relates to the High Tech revolution. Information about SVTC may be found at www.svtc.org.

SVTC has no direct financial interest in the outcome of this litigation. However, a decision that would allow Lexmark to use either copyright law or an improper interpretation of the Digital Millennium Copyright Act ("DMCA") reverse engineering exception to prevent businesses such as Static Control from engaging in reverse engineering to generate a chip required for the remanufacture of toner cartridges would have significant adverse environmental consequences in the United States and around the world.

## ARGUMENT

### A. LEXMARK IS ATTEMPTING TO PREVENT THE REMANUFACTURING OF LEXMARK CARTRIDGES

As Lexmark's complaint makes apparent, through this action Lexmark is attempting to use the DMCA to restrict the remanufacturing of Lexmark cartridges. According to the complaint, a cartridge placed in a Lexmark printer must undergo "a secret handshake" before the printer will recognize the cartridge as an "authorized Lexmark cartridge." If this secret handshake is not completed, then the cartridge will not be allowed to print. Ordinarily, in a new Lexmark cartridge this secret handshake is accomplished

through the use of a chip that becomes unusable when the user attempts to refill the cartridge with toner. Once the chip is disabled, the cartridge no longer will print.

Static Control, according to Lexmark, has developed a chip that allows used Lexmark cartridges to be remanufactured and reused in a Lexmark printer. Specifically, with the chip developed by Static Control, remanufacturers are able to acquire used printer toner cartridges, recondition their parts, replace the expended Lexmark chip, and refill them with toner. As a result the majority of the cartridge is saved from disposal. In other words, remanufactured cartridges give consumers a less-expensive environmentally beneficial alternative to buying an all new toner cartridge.

Lexmark seeks to prohibit this remanufacturing process, a result that could have dire environmental consequences. We respectfully urge the Court to take these potential effects into consideration in rendering its decision.

B. PROHIBITING THE LEGAL REVERSE ENGINEERING OF LEXMARK CHIPS WILL INCREASE THE LANDFILL DISPOSAL OF TONER CARTRIDGES IN THE UNITED STATES AND ABROAD

If Lexmark is successful in applying the DMCA to prohibit the sale of chips which allow remanufacturing of Lexmark cartridges, significantly more Lexmark cartridges will inevitably end up in municipal landfills across this country or abroad. Moreover, if Lexmark is allowed to prevent others from reverse engineering its chips in this way, other manufacturers will seek to do the same, thereby compounding the environmental impact.

The United States Environmental Protection Agency ("EPA") has ranked the various strategies for managing the huge quantities of municipal solid waste ("MSW") generated in this country in accordance with their potential adverse effects on the

Disposing of MSW in combustion facilities and landfills are least desirable because of the potential direct negative effect the release of pollutants from those facilities have on our air and waters.[1]

The amount of landfill space remaining in this country is finite and must be conserved for future generations. According to EPA, in 1999, 2,300 landfills remained in the United States, down from 8,000, in 1988.[2] In some states, such as Minnesota, Wisconsin, Missouri, Tennessee, Mississippi, North Carolina, Tennessee, Alabama, the remaining landfill capacity will last less than 10 years.[3]

In an effort to grapple with the explosion in the volume of waste generated in the U.S. and disposed of in landfills, the federal government has undertaken an exerted effort to increase recycling over the last 20 years, with significant success. In 2000, the amount of waste recycled, 74 million tons, was double the amount recycled in 1990.[4] In 1999, U.S. residents, businesses and institutions produced more than 230 million tons of MSW; 28 percent of that waste was recycled. EPA's goal is to achieve a national recycling rate of 35 percent by 2005. A decision that would impede the remanufacture of toner cartridges would significantly erode our ability to meet that objective, and is contrary to national environmental policy.

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1 <www.epa.gov/epaoswer/non-hw/muncpl/facts.htm> (last visited Feb. 3, 2003).

2 <www.epa.gov/epaoswer/non-hw/muncpl/facts.htm> (last visited Feb. 3, 2003).

3 <www.epa.gov/epaoswer/non-hw/nuncpl/mswdata.htm> (last visited Feb. 3, 2003)(citing Biocycle Magazine, April 1999).

4 <www.epa.gov/epaoswer/non-hw/muncpl/faq.htm> (last visited Feb. 3, 2003).

The U.S. government specifically has recognized the important role that the remanufacturing of toner cartridges plays in these efforts. Executive Order 13101, issued in 1998, requires each executive agency of the federal government to implement an affirmative program to procure specified items composed of the highest percentage of recovered materials practicable pursuant to Section 6002 of the Resource Conservation and Recovery Act ("RCRA"). 42 U.S.C. § 6962. The executive order requires that agencies set short and long term goals for solid waste prevention and recycling or diversion and specifies that agencies "should incorporate into their recycling programs efforts to...collect toner cartridges for remanufacturing." Exec. Order No. 13101§ 601, 63 Fed. Reg. 49643 (Sept. 16, 1998).

Likewise, EPA's Recommended Materials Advisory Notice recommends that agencies establish procedures and policies that give priority to remanufacturing the agencies' expended toner cartridges.[5] EPA also recommends that, under such policies and procedures, agencies procure remanufacturing services for expended cartridges and, when such services are unavailable or not practicable, obtain remanufactured toner cartridges or new toner cartridges made with recovered materials from product vendors.[6]

According to the International Imaging Technology Council for Dealers of Remanufactured Toner and Ink Jet Products, 5,000 remanufacturers in the U.S. alone remanufacture 27 million toner cartridges each year. According to the Council, as a result

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[5] <www.epa.gov/epaoswer/non-hw/procure/products/toner.htm> (last visited Feb. 3, 2003). See also 40 C.F.R. Part 247(containing EPA's comprehensive guideline for products containing recovered materials).

[6] <www.epa.gov/epaoswer/non-hw/procure/products/toner.htm> (last visited Feb. 3, 2003).

27 million pounds of plastic are reused and 73 million quarts of oil are conserved each year. The environmental benefits of remanufacturing toning cartridges are thus significant.

A decision to prohibit the reverse engineering of chips necessary to remanufacture toner cartridges manufactured by Lexmark or other manufacturers of these types of cartridges, would virtually eliminate the ability to remanufacture these cartridges. To put this in context, we understand that Lexmark currently produces approximately 10 million new cartridges each year, and that remanufacturers currently refurbish approximately 1.8 million toner cartridges each year for use in Lexmark printers. Without the option to supply used Lexmark cartridges to entities other than Lexmark for remanufacturing, many businesses and the government would dispose of these 1.8 million cartridges (annually) in landfills instead. Toner cartridges would become a noticeable percentage of MSW disposed of.

In the absence of available landfill space in the United States, we are also concerned that such cartridges ultimately would be exported for disposal in third world countries -- countries whose citizens are not protected by the same environmental regulatory programs as we are. These results, detrimental to both the environmental and our relationships with other countries, are not in our national or global interest. As can be seen at our website, www.svtc.org, high tech waste, including toner cartridges is a significant environmental hazard. Lexmark cartridges are a part of this waste stream. Remanufacturing reduces this hazard.

Indeed, in recognition of the potential environmental threat posed by manufacturers efforts to restrict product reuse, the European Union already has undertaken action to directly prohibit what Lexmark seeks to accomplish in this action. See Draft

Directive of the European Parliament and of the Council on waste electrical and electronic equipment (WEEE), approved by the Conciliation Committee on November 8, 2002.[7] Article 4 of the WEEE Directive specifically directs member states to:

> take appropriate measures so that producers do not prevent, through specific design features or manufacturing processes, WEEE from being re-used, unless such specific design features for manufacturing processes present overriding advantages, for example, with regard to the protection of the environment and/or safety requirements.

Lexmark should not prevail in its efforts to prevent remanufacturers from refurbishing Lexmark cartridges so they may be reused. We believe the court should take into account the potential adverse environmental impacts of a decision in favor of Lexmark and urge the Court to deny Lexmark's Motion for Preliminary Injunction.

RESPECTFULLY SUBMITTED,

Ted Smith
Executive Director

[7] According to European Commission personnel, this directive has been finalized containing the same language as in Article 4 of the November 8, 2002 draft. The final directive has not yet been published. (Telephone Interview with Aaron McLoughlin, Desk Officer, DG Environment, Unit A-2, European Commission (Feb. 4, 2003).