

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON
CIVIL ACTION NO. 02-571-KSF

LEXMARK INTERNATIONAL, INC

PLAINTIFF

vs.

AFFIDAVIT OF MARC PERKEL

STATIC CONTROL COMPONENTS, INC.

DEFENDANT

I, Marc Perkel, hereby state as follows

- 1 I am the systems administrator for the Electronic Frontier Foundation (EFF). The facts contained herein are known to me of my own personal knowledge and if called upon to testify thereto, I could and would competently do so.
- 2 As part of my job duties for EFF, I am responsible for the purchase and installation of new hardware including printers and computers.
- 3 On or about mid-January, I ordered a Lexmark Optra 622 printer for the EFF. I ordered the printer from a website retailer. The printer arrived on or about January 24, 2003.
- 4 When I unpacked the printer, I discovered a sheet of paper purporting to be a "license/agreement." A true and correct copy of the paper is included as Exhibit A hereto and incorporated herein by this reference. This was the first reference I had seen to any license/agreement for printer cartridges as part of the purchase of the printer. It was not visible on any of the outer packaging on the printer nor referenced in the web pages describing the printer when I ordered it.
- 5 The English language portion of the document states: "Please read before opening. Using the patented cartridge inside confirms your acceptance of the following license/agreement. This all new cartridge is sold subject to a restriction that it may be used only once. Following this initial use you agree to return the empty cartridge only to Lexmark for remanufacturing and recycling. If you don't accept these terms, in the US contact Lexmark at 800-292-5885, ext. 83363. In

other countries contact your local Lexmark representative. A regular priced cartridge without these terms is available."

6. The document repeated what I assume to be the same message in five other languages.
7. On January 24, 2003 I attempted to call the listed number, 800-292-5885 ext. 83363 to state that I did not accept the terms contained in the document.
8. I attempted to call the 4 times and each time received a message indicating that the extension did not exist.
9. After the four unsuccessful attempts to contact Lexmark at the number listed on the document, I called the Lexmark sales department and spoke to a woman named Deshawn Gordon. Ms. Gordon confirmed that the extension did not work.
10. I asked Ms. Gordon about the license/agreement. She also said that she had never heard of this license/agreement and asked me to fax it to her. I did. A true and correct copy of my fax to Ms. Gordon is attached hereto as Exhibit B and incorporated herein by this reference.
1. On the fax cover sheet, I asked Ms. Gordon the following questions: 1) what do we need to do to get this (printer cartridge) without the agreement? 2) Is there an option to get a refund on the printer if the customer doesn't accept the terms? 3) Am I limited to only running license free cartridges in the future?
12. On Monday, January 27, 2003, Ms. Gordon called me back and said that the license/agreement was not binding. She said that the license/agreement does not prevent the end user from purchasing another print cartridge in the future or require them to return the cartridge. She said that there is no penalty for failure to return the package or tracking to see if the customer returns the cartridge.
13. Ms. Gordon called the arrangement a "prebate," meaning pre-rebate. She gave me the part numbers for the non-prebate cartridges. She said that the goal of the prebate was to ensure that cartridges are disposed of in a way that is "environmentally friendly." She discussed Lexmark's process of destroying the returned spent cartridges and made it clear that the cartridges were not refilled and resold. She assured me that what I was getting when I returned a cartridge was a "new" cartridge and not a refill.

14. I told Ms. Gordon that the EFF lawyers were concerned that by using the cartridge we were entering into some sort of contract. Ms. Gordon replied that this was not the case and that there was nothing to be concerned about.
15. I declare under penalty of perjury that the foregoing is true and correct and this document was executed on February 6, 2003 in San Francisco, California.

Further the Affiant saith not.

Marc Perkel
Marc Perkel

STATE OF CA)
COUNTY OF San Francisco : ss

The foregoing instrument was subscribed, sworn to, and acknowledged before me this day of February, 2003, by Marc Perkel.

My commission expires: 01-15-2004

Conny Prado
Notary Public



Exhibit A



RETURN EMPTY CARTRIDGE TO LEXMARK FOR REMANUFACTURING AND RECYCLING

Please read before opening. Using the patented cartridge inside confirms your acceptance of the following license/agreement. This all new cartridge is sold subject to a restriction that it may be used only once. Following this initial use you agree to return the empty cartridge only to Lexmark for remanufacturing and recycling. If you don't accept these terms, in US contact Lexmark at 1-800-292-5885, ext 83363. In other countries contact your local Lexmark representative. A regular priced cartridge without these terms is available.

DEVOLVA O CARTUCHO VAZIO À LEXMARK PARA RECONDICIONAMENTO E RECICLAGEM

Leia antes de abrir. A utilização do cartucho patenteado contido nesta embalagem confirma que aceita os termos do seguinte contrato/licença. Este cartucho inteiramente novo é vendido com a restrição de só poder ser utilizado uma vez. Após esse uso inicial, você concorda em devolver o cartucho vazio somente à Lexmark para recondicionamento e reciclagem. Se não aceitar esses termos (nos EUA), entre em contato com a Lexmark pelo número 1-800-292-5885, ext 83363. Para outros países, entre em contato com o seu representante local da Lexmark. Cartuchos a um preço normal, sem estes termos, estão também disponíveis.

RETOURNEZ VOTRE CARTOUCHE VIDE A LEXMARK POUR RECONDITIONNEMENT ET RECYCLAGE

Veillez lire les instructions avant de procéder à l'ouverture. L'utilisation de la cartouche brevetée fournie implique que vous acceptez l'accord de licence suivant. Cette cartouche entièrement neuve est commercialisée pour ne servir qu'une seule fois. Une fois la cartouche vide, retournez-la uniquement à Lexmark pour reconditionnement et recyclage. Si vous n'acceptez pas les termes de ce contrat, aux Etats-Unis, contactez Lexmark au numéro suivant 1-800-292-5885, ext 83363. Pour les autres pays, contactez votre revendeur Lexmark habituel. Une cartouche à prix normal, non soumise à ces conditions, est également disponible.

SENDEN SIE DIE LEERE TONERKASSETTE ZUR WIEDERVERWENDUNG UND ZUM RECYCLING AN LEXMARK ZURÜCK

Bitte lesen Sie diese Vereinbarung, bevor Sie die Verpackung öffnen! Wenn Sie die darin enthaltene patentierte Tonerkassette verwenden, erklären Sie sich mit der folgenden Lizenzvereinbarung einverstanden: Diese fabrikneue Tonerkassette wird vorbehaltlich der Einschränkung verkauft, daß sie nur einmal verwendet wird. Sie erklären sich einverstanden, die leere Tonerkassette nach dieser erstmaligen Verwendung zur Wiederverwendung und zum Recycling an Lexmark zurückzusenden. Wenn Sie diese Bedingungen nicht akzeptieren möchten, wenden Sie sich bitte an einen Lexmark-Händler in Ihrer Nähe. Dieser hält Standard-Tonerkassetten zum regulären Preis für Sie bereit, für die diese Bedingungen nicht gelten.

RESTITUIRE LA CARTUCCIA VUOTA ALLA LEXMARK PER LA RILAVORAZIONE E IL RICICLO

Leggere queste istruzioni prima di aprire la confezione. L'uso della cartuccia brevettata contenuta all'interno della confezione implica l'accettazione della seguente licenza o accordo. La presente cartuccia, totalmente nuova, viene venduta per essere utilizzata una sola volta. L'utente si impegna a restituire la cartuccia vuota solo alla Lexmark per la rilavorazione e il riciclo. Se l'utente non accetta i presenti termini, negli Stati Uniti è possibile rivolgersi alla Lexmark al numero 1-800-292-5885, ext 83363. Negli altri paesi, è possibile rivolgersi al vostro Rivenditore Lexmark. Sono disponibili cartucce non soggette ai termini riportati sopra.

DEVUELVA EL CARTUCHO VACÍO A LEXMARK PARA SU RECICLAJE Y REUTILIZACIÓN

Lea la siguiente información antes de utilizar el producto. La utilización del cartucho patentado que se encuentra en el interior confirma la aceptación de la siguiente licencia/acuerdo. El cartucho completamente nuevo se vende sujeto a la restricción de que puede utilizarse sólo una vez. Tras utilizar el producto por primera vez, se compromete a devolver el cartucho vacío a Lexmark para su reciclaje y reutilización. Si no acepta estos términos y se encuentra en Estados Unidos, póngase en contacto con Lexmark en el número 1-800-292-5885, ext 83363. En otros países póngase en contacto con el representante local de Lexmark. También se encuentra disponible un cartucho de precio y condiciones estándares que no está sujeto a estos términos.



Exhibit B

ROB - SANC PENCE

VORCE 415 987 6272
LINA MARG@PENCE.COM

TO DESHAWN GORDON

AX 859 232 1766

DATE
01 4 2003

2 PAGES AGREEMENT ATTACHED

THIS IS THE AGREEMENT WE TALKED
ABOUT ON THE PHONE WHAT DO I NEED TO
DO TO GET THIS WITH THE AGREEMENT?
IS THERE A OPTION TO GET A REFUND OF THE
MONEY IF THE CUSTOMER DOES NOT ACCEPT THE
TERMS AND I AM OBLIGED TO UNLOAD THE
LICENSE AND RETURN THE FUTURE

PLEASE RESPONSE BY THE LEAST DATE
A A WORK



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TRANSMISSION VERIFICATION REF

TIME : 01/24/2003 12:22

DATE, TIME	01/24 12:21
FAX NO./NAME	18592321766
DURATION	00:00:49
PAGE(S)	02
RESULT	OK
MODE	STANDARD ECM