

1 TRICIA JUDGE
2 International Imaging Technology Council
3 2501 Cove Rd.
4 Las Vegas, Nevada 89128
5 Telephone: (702) 838-4279
6 Facsimile: (702) 838-3695
7 E-mail address: tricia@i-itc.org
8
9

10 IN THE UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF KENTUCKY
12 LEXINGTON DIVISION
13

15		*	
16	LEXMARK INTERNATIONAL, INC.	*	
17		*	
18	Plaintiff,	*	BRIEF OF <i>AMICUS CURIAE</i>
19		*	AND REQUEST FOR LEAVE
20	v.	*	TO FILE SAME
21		*	
22	STATIC CONTROL COMPONENTS, INC.	*	Case No. 02-571-KSF
23		*	
24	Defendant.	*	Judge KARL FORESTER

25
26
27 REQUEST FOR LEAVE

28 The **International Imaging Technology Council** (Int'l ITC) hereby files this Request
29 for Leave to File the accompanying Brief of *Amicus Curiae* in support of the defendant, Static
30 Control Components, Inc. in this matter.

31 INTEREST OF THE AMICUS

32 The printer cartridge remanufacturing industry began in the mid- to late-eighties as small
33 businesses grew from the idea that all-in-one toner cartridges used in printers could be
34 disassembled after use, repaired and reused again. Printer cartridges are remanufactured when

1 worn or exhausted parts are restored or replaced; and the final product performs like the original
2 new one.

3 Toner and ink jet cartridge remanufacturing grew as a trade and now represents an \$8
4 billion industry. This case is vital to the interests of that industry, as its outcome determines
5 whether the industry will continue to thrive or will be decimated.

6 The International Imaging Technology Council represents those businesses as a
7 § 501(c)(6) trade organization with members around the world. The International Imaging
8 Technology Council seeks to promote the benefits of using remanufactured cartridges and to
9 defend these small businesses from unfair trade practices often employed by large corporations
10 to stop aftermarket competitors. Because the interests of those small businesses will almost
11 certainly be directly implicated by the Court's ruling on the pending motion, and because theirs
12 is a unique perspective on the issues presented, Int'l ITC seeks to be heard on their behalf.

13 ARGUMENT

14 **Remanufactured cartridges are good for** 15 **the environment, the consumer and the economy**

16
17 This is an attractive industry, because it is good for the environment. The industry reuses
18 existing plastic and metals, diverting them from the waste stream. Remanufacturing is the
19 highest form of recycling, as it affords reuse. Recycling of a cartridge involves shredding and
20 melting, the latter requires the burning of fossil fuel. Toner cartridges are comprised of
21 industrial grade, thermo-set plastic, which once disposed of into a landfill, will not even begin to
22 degrade for a thousand years.

1 The average remanufacturer restores 338 cartridges per month, and is therefore saving
2 264 gallons of oil and 845 pounds of solid waste from landfills each month. Stacked one on top
3 of the other, a tower of cartridges produced annually by just one average remanufacturer would
4 exceed the height of the Empire State Building.

5 Remanufactured cartridges are also good for consumers. As the only alternative to new
6 cartridges, remanufactured printer cartridges keep manufacturers from holding a monopoly on
7 the supplies for their printers. Without an aftermarket with which to compete, the OEMs will
8 own a monopoly on the printer supplies marketplace and the prices of printer cartridges would
9 soar.

10 Cartridge remanufacturers are service-driven, locally based small businesses and
11 therefore good for the economy. Cartridge remanufacturing is a technical craft that is not easily
12 automated and is labor intensive, so these companies employ more workers, pay more taxes and
13 create more economic multiplier effects than out-of-state or other-country corporations. Many
14 empty cartridge collection programs work with charities so that empties are delivered to
15 remanufacturers in exchange for money that goes to buy band uniforms, sports equipment of
16 Boys & Girls Clubs and other goods and services for the community.

17 **Chip technology is being abused by Lexmark**
18 **for anti-competitive purposes**

19
20 Chip technology may be beneficial to consumers as it affords more function. However,
21 chip technology can also be abused. Some chips used to monitor supply usage in Lexmark T
22 series printers actually shut off the printer when it detects that a remanufactured printer cartridge
23 is in use. Dubbed the “killer chip,” it also displays the error message “invalid refill” on the

1 printer to further confuse the customer into believing that he did something wrong by buying a
2 remanufactured cartridge.

3 This all began when Lexmark first announced its *Prebate* cartridge program for Optra S
4 printers. Consumers were offered an up-front discount of \$30 or more if they agreed not to
5 reuse, recycle or remanufacture the cartridge, and to either return it to Lexmark or throw it away.
6 The offer came using a shrink-wrap licensing restriction that the customer purportedly agrees to
7 by buying the cartridge at the discounted price. Lexmark also sent out letters to all
8 remanufacturers saying that it would sue anyone that violated these restrictions by
9 remanufacturing a Prebate cartridge.

10 It claimed that this “marketing program” was not anti-competitive because
11 “remanufacturable” cartridges were readily available for purchase.

12 However, remanufacturable cartridges started to quickly disappear as a customer choice,
13 as the following happened:

14 a) Lexmark’s retailers like Office Depot and other office products superstores
15 stopped providing shelf space to two identical products when one cost more
16 than the other.

17 b) Upon calling any office catalog retailer, such as Corporate Express, to reorder
18 the cartridge, the order taker does not know the difference and proclaims it
19 merely as a “discount,” so the customer would be foolish not to order the less
20 expensive alternative.

- 1 c) Lexmark confused customers by making the most apparent reorder number on
2 the remanufacturable cartridge the one that is designated for Prebate
3 cartridges.
- 4 d) Lexmark began revoking service authorization for any service provider that
5 sells remanufactured supplies, and therefore could offer an alternative to
6 expensive new supplies or explain the Prebate program.
- 7 e) New printers came equipped with a Prebate cartridge and the reorder number
8 for the same emblazoned thereon. Allegedly it also comes with a tag that
9 claims that those seeking unrestricted cartridges may request one by calling a
10 phone number – one that is disconnected.

11 It is no surprise that the supply of remanufacturable cartridges began drying up quickly,
12 even though the demand for them within the industry was very high. Left with only *Prebate*
13 cartridges to remanufacture, brave suppliers like Static Control began to produce components,
14 toner and cartridge parts for remanufacturing, including the Smartek chip.

15 In a patent case involving similar single-use, shrink-wrap licensing restrictions, *Jazz*
16 *Photo Corporation et al. v. U.S. International Trade Commission*, 264 F.3d 1094 (Fed.
17 Cir.2001), the Court of Appeals for the Federal Circuit held such agreements invalid unless there
18 is a “meeting of the minds” between manufacturer and buyer, and places the onus of such proof
19 on the manufacturer. Under the requirements of that decision, Lexmark’s *Prebate* would
20 likewise be rendered indefensible.

21 **The remanufacturing industry has**
22 **worked to stop “killer chips”**
23

1 The chips have long been the target of aftermarket ire, and the “dark side” of similar
2 technology bundling was at the core in the recent legal battle between Microsoft and U.S.
3 antitrust officials.

4 Other government officials don’t care much for improper use of chip technology and are
5 taking steps to stop it. The cartridge remanufacturing industry has successfully enacted pro-
6 remanufacturing laws in New York, Connecticut, Texas, California and in the European Union.
7 The latter law enacted just this past October is particularly compelling. The WEEE directive,
8 which is an acronym for the Waste Electrical and Electronic Equipment, outlaws the sale in
9 member countries of any electronics product that employs killer chips. Article 4, entitled
10 Product Design, addresses in particular the matter of anti-recycling devices and chips:

11 “Member States shall encourage the design and production of electrical and electronic
12 equipment which take into account and facilitate dismantling and recovery, in particular
13 the re-use and recycling of WEEE, their components and materials. In this context,
14 Member States shall take appropriate measures so that producers do not prevent, through
15 specific design features or manufacturing processes, WEEE from being re-used, unless
16 such specific design features or manufacturing processes present overriding advantages,
17 for example, with regard to the protection of the environment and/or safety
18 requirements.”

19 The U.S. has enacted rules regarding the use and purchase of remanufactured products.
20 One example is Executive Order 13101, Greening the Government Through Waste Prevention,
21 Recycling And Federal Acquisition, Section 601 a and b (September 1998). This says that

1 government agencies should incorporate into their recycling programs efforts to recycle, reuse,
2 or refurbish pallets and collect toner cartridges for remanufacturing.

3
4 Although employed to various degrees by Hewlett-Packard, Epson, Xerox and other
5 OEMs, Lexmark has been singled-out by industry supporters for its inappropriate use of killer
6 chips to keep the public from having a choice when it comes to supplies.

7 Printer manufacturers have changed their business models so that the printers themselves
8 are priced very low, but the cartridges are very expensive. This model allows the manufacturers
9 to build the profits into the supplies. Purchasers and consumers are soon paying much more for a
10 printer's supplies than they do for the printer. And the manufacturers are using a variety of
11 marketing and technological schemes to protect their supplies markets.

12 CONCLUSION

13 Smartek chips and their progeny are the only hope that the cartridge remanufacturing
14 industry has to continue to compete and provide consumers with choice (and relief from the
15 OEM monopoly). Remanufacturing is a noble profession with a long and recognized legal
16 history, grounded in the intellectual property doctrine of permissible repair. Lexmark's victory
17 in this suit – and its use of the Digital Millennium Copyright Act to those ends in particular –
18 could extinguish this benevolent industry.

19 DATED: January 30, 2003

20 INTERNATIONAL IMAGING TECHNOLOGY

21 COUNCIL

1
2
3
4
5
6

A handwritten signature in black ink that reads "Tricia Judge". The signature is fluid and cursive, with a large, sweeping initial "T" and a stylized "J".

TRICIA JUDGE
International Imaging Technology Council
2501 Cove Road
Las Vegas, Nevada 89128
Telephone: (702) 838-4279