

Case No. 02-CV-571-KSF

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION**

LEXMARK INTERNATIONAL, INC.

v.

STATIC CONTROL COMPONENTS, INC.

**BRIEF AMICUS CURIAE AND REQUEST FOR LEAVE
TO FILE SAME OF GRASSROOTS RECYCLING NETWORK
IN SUPPORT OF STATIC CONTROL COMPONENTS, INC.**

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Dated: February 6, 2003

The GrassRoots Recycling Network (GRRN) hereby files this Request for Leave to File the accompanying Brief of *Amicus Curiae* in support of the defendant, Static Control Components, Inc.

GRRN is an environmental organization dedicated to the goal of achieving zero waste. Our member organizations include a variety of national, regional and state environmental groups as well as individuals. Additional information concerning the nature of our membership may be found at www.GRRN.org. GRRN has no direct financial interest in the outcome of this litigation. However, an improper interpretation of the Digital Millennium Copyright Act's (DMCA) reverse engineering exception could have serious environmental consequences that impact the areas that we are concerned with. Our organization was founded in 1995 and was launched by leaders from the Sierra Club's solid waste committee, the California Resource Recovery Association and the Washington D.C.-based Institute for Local Self Reliance.

This brief is intended to address the environmental consequences of Lexmark's marketing strategy.

It is apparent from the complaint that Lexmark is attempting to use the Digital Millennium Copyright Act to restrict remanufacturing of their 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. Static Control, according to Lexmark, has developed a chip that engages in this secret handshake. Static Control does so in order that used Lexmark cartridges may be remanufactured and reused in a Lexmark printer. Lexmark seeks to prohibit unauthorized remanufacturing.

In the event Lexmark is successful in applying the Digital Millennium Copyright Act to prohibit the sale of chips which allow remanufacturing of their cartridges, then more Lexmark cartridges will inevitably end up in municipal landfills across this country. Even the most modern landfills merely delay rather than eliminate the transfer of pollutants to ground water. Discarded personal computers and consumer electronics – so called ‘e-waste’ – compose one of the fastest growing and most highly toxic waste streams in the industrialized world. Over two hundred million toner cartridges are used in the United States every year. When companies such as Lexmark encourage the one-way disposition of these cartridges, these materials are dumped in landfills. Tax-payers and local governments bear the cost and burden of managing these wastes. Remanufacturers, who take some of these toner cartridges and reuse them, keep waste toner cartridges from ending up in the landfills and in the waste streams.

Lexmark’s ‘killer chip’ is in direct opposition to common public policies aimed at reducing and eliminating waste. Far from designing *out* waste, Lexmark’s intentionally designs its products to *become* waste. This is definitely not in the public interest. GRRN awarded Lexmark our first WasteMaker Award in 1998 for Lexmark’s environmentally harmful Prebate program, which, like killer chips, has the effect of thwarting printer cartridge reuse.

GRRN promotes eliminating pollution and waste through extended producer responsibility (EPR) and product redesign. GRRN believes that the single greatest barrier to achieving zero waste in the United States is the absence of EPR, the principle that brand owners must take responsibility for the life cycle impacts of their products, from product design to end-of-life management. Assignment of full product responsibility, which is increasingly common in Europe and other OECD countries, provides a strong incentive for manufacturers like Lexmark to design products for reuse and recycling.

GRRN endorses the goals set forth in the recent WEEE directive from the European Union. The European Union requires producers to take responsibility for their own waste and ensure that their products are collected and properly recycled or remanufactured at end-of-life. We support such initiatives. Lexmark's Prebate and killer chip programs do not constitute taking responsibility for their waste. The WEEE directive also provides in pertinent part that strategies such as that used by Lexmark are outlawed. (See Article 4).

Reuse through remanufacturing is in the public interest because it saves energy and materials needed to make new products. Remanufacturers take used toner cartridges, replace worn out components, and add new toner, allowing the cartridge to be reused. Through remanufacturing, a cartridge can be used time and again in its original form.

Remanufacturing is more environmentally friendly than recycling. A remanufacturer takes the cartridge in its existing form, and reuses most of the components as they were originally constructed. Relatively little additional energy is needed to prepare a cartridge for additional use. Recycling, by contrast often results in the components of a cartridge being melted down into its constituent plastics and metals and then reused. Far more energy and resources are used in recycling a toner cartridge than in remanufacturing it. The U.S. Environmental Protection Agency has recognized this distinction, and the superiority of remanufacturing in its publication *WasteWise Update* from May of 1997.

While we support Lexmark's attempts to 'recycle' cartridges returned to them through third-parties, we note that the majority of these cartridges currently end up in Eastern Asia where primitive methods of extracting materials of value create appalling impacts on human health and local environments. We are equally dismayed that Lexmark actively discourages remanufacturing of the cartridges that are otherwise destined for the landfills.

GRRN thinks it is appropriate for the court to consider the public interest in evaluating whether Lexmark's novel use of the Digital Millennium Copyright Act to prevent remanufacturing is a use contemplated by Congress.

Respectfully submitted,



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