

Beware of Lawsuits:

Lexmark and the Little Label You Probably Didn't Read

Imagine if products were wrapped with “stealth” contracts. Imagine that these often-unnoticed contracts allowed manufacturers to limit your use of the product after you purchased it. Imagine a manufacturer that wanted the ability to sue its own customers if the customers didn't use and then discard the product in exactly the manner the manufacturer demanded. Imagine if the manufacturer offered a discount or upfront rebate, but the “discounted” price still left the product at one of the highest rates for competitive products.

Consider what would happen if a car manufacturer claimed to give you a discount or rebate on your car but, in return, required you to return your car to the dealer when you were finished driving it — even though you had bought and paid for the car, and the claimed discount placed the car price slightly higher than average.

The manufacturer could say that by opening the car's door, you agreed to this condition.

That would mean you couldn't sell it to someone else, or even donate it to a charity or turn it in for scrap metal. If you didn't return the car to the manufacturer, the manufacturer would be allowed to sue you.

Feel betrayed? Misled? Sound outlandish? That's essentially what certain licensing attempts by claiming to require you to return a product that you paid for and own. This type of agreement, often known as a shrink-wrap agreement (i.e., “By breaking the seal, you agree to the conditions”), is used most often to protect



copyrighted work from unauthorized duplication. Consumers of toner cartridges would easily be unaware and unsuspecting of such conditions. It is likely that the majority of consumers pay very little attention to the small print on such labels in general, and even fewer actually read the warning word for word. This means many consumers may not know that Lexmark wants the right to sue them if they don't return their cartridges to Lexmark.

Ever notice a little label as you opened a Lexmark printer cartridge? Even if you saw it, chances are that you didn't give it a second thought. And you probably also assume that once you buy a cartridge, it is yours to do with as you wish. But if you have a Lexmark printer and buy Lexmark-

brand cartridges, you might be in for an unpleasant surprise.

Lexmark recently tried to misuse another copyright protection, the DMCA, and lost. In that case, Lexmark alleged that Static Control Components' T520/620 chip technology violated the DMCA by providing access to a copyrighted work. In February 2005, a preliminary injunction was overturned, and the U.S. Supreme Court upheld Static's position.

In a recent California case, a judge recently sided with Lexmark to allow the company to try to control what you do with your printer cartridge — even after you have bought and used it. It sounds strange, but that is what is stated on that little label on the box — the one you probably didn't even notice as you opened the cartridge box. Lex-

mark states that the cartridge must be disposed of in a manner Lexmark desires — or the company can sue you.

Lexmark says that an upfront discount is given for returning the cartridge to Lexmark. The company doesn't want you to recycle the cartridge, give it to a remanufacturer or even throw it out. If you don't give the cartridge back to Lexmark — even though you paid for and own the cartridge — Lexmark wants the right to sue you. Believe it or not, Lexmark says that just by opening the box with the cartridge that you agreed to this.

David vs. Goliath

So who would dare take on Lexmark on behalf of consumers? In 2002, Lexmark

was sued for unfair and deceptive business practices and deceptive advertising by the nonprofit Arizona Cartridge Remanufacturers Association (ACRA) on behalf of the general public.

ACRA pointed out that Lexmark's Prebate agreement is made with its distributors, not with the consumer who purchases the product, so the agreement is not enforceable.

Ron Katz, ACRA's attorney in the case, explained ACRA's position in more detail in a 2004 *Recharger Magazine* article.

"Lexmark claims that Prebate creates an enforceable contract by virtue of the customer opening the box containing the Prebate cartridge. In the majority of cases, however, Lexmark did not sell the cartridge to the consumer. It sold the cartridge to a distributor who then sold it to a dealer who then sold it to a consumer," Katz said. "Lexmark also did not give the consumer any discount. Lexmark can set only the prices that it charges distributors. The distributor then decides at what price it will sell the cartridges to dealers, who decide at what price they will sell the cartridges to consumers.

"This means that in the typical transaction through which a Prebate cartridge is purchased, there is no relationship between Lexmark and the cartridge user. With no relationship, Lexmark has no right to enforce any contract, let alone the Prebate 'terms.'"

The lawsuit, which stretched on for four years, has been a David vs. Goliath-type of competition. ACRA stood up for consumers' rights, but unfortunately, in the end, Lexmark, with its greater resources and larger legal team, prevailed.

And that means that Lexmark printer owners need to be careful — or they could be the next targets of Lexmark's legal action.

The appeal ruling said, "The contract permits Lexmark to restrict the use of its

patented item and gives Lexmark a legal basis for asserting its ability to enforce its restriction."

This means Lexmark can control what you do with the cartridge after you buy it — and if you don't return it to Lexmark, the company has the right to sue you.

While Lexmark claims it hasn't yet sued consumers, the company spent a lot of time and money arguing that this contract — which allows such suits — was enforceable.

Lexmark claims that the cartridge is a single-use item. But Lexmark itself wants the cartridge back to remanufacture it.

Thwarting Competition

So what does the small print actually say?

According to the court ruling, the label for the discount agreement — a program that Lexmark formerly called Prebate, but which is now known as the Return Cartridge Program — contains the following language: "Opening of this package or using the patented cartridge inside confirms your acceptance of the following license agreement. The patented cartridge is sold at a special price 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 cartridge recycling."

Printer cartridges can be easily and successfully remanufactured (that is, the worn parts are replaced and the cartridge refilled with toner or ink), saving the environment by reducing plastic in the waste stream and saving the consumer money. Despite this, Lexmark claims that the car-

tridge is a single-use item. But Lexmark itself wants the cartridge back to remanufacture it. Thus, Lexmark is admitting the cartridge isn't single use — Lexmark just doesn't want anyone else to use it!

The Ninth District Court of Appeals ruling said, "Before 1997, Lexmark did not compete against ACRA's members because it sold only new replacement printer cartridges. In 1997, however, Lexmark began to remanufacture its own cartridges and launched an aggressive new strategy to improve its position in the market for remanufacturing the used cartridges. Most notably, the company introduced its 'Prebate' program"

It doesn't take much to figure out that what the court is admitting — that a main goal of the Prebate program was to reduce competition. Unfortunately, reduced competition is pretty much never in the best interest of consumers.

Support Your Right to Choose

As a consumer, you should have the right to own the product that you have paid for — without fear of a lawsuit should you decide not to return it to the manufacturer.

So what can you do? Say no to anti-competitive practices by purchasing products from companies that do not restrict your use of your cartridge.

If you are choosing a printer, choose one from a company that supports consumer choice. (For more information, see the Marketing Solution "Avoid Hidden Costs When Purchasing a Printer," at www.rechargermag.com.)

If you are buying a replacement cartridge, consider remanufactured cartridges for your next purchase. Of course, it is environmentally preferable to return your cartridge for remanufacturing once again, but you can rest assured that you are free to return it to whomever you wish — or do whatever else you may desire with it — without threat of legal action. And that's something that can leave consumers resting easier — and saving money! 