

Lexmark invokes DMCA in toner suit

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Printer maker Lexmark has found an unusual weapon to thwart rivals from selling replacement toner cartridges: the Digital Millennium Copyright Act.

A federal judge in Kentucky has scheduled a hearing for Thursday in the case, which [Lexmark](#) filed against [Static Control Components](#) in an effort to slam the brakes on the toner cartridge remanufacturing industry. Lexmark is the [No. 2](#) printer maker in the United States, behind Hewlett-Packard, and manufactures printers under the Dell Computer brand.

This lawsuit is the latest of several recent DMCA cases--both civil and criminal--that have tested the limits of the 1998 copyright law, in which Congress intended to limit Internet piracy. Eight movie studios [wielded](#) it to force 2600 magazine to delete a DVD-descrambling utility from its Web site, but the Justice Department [lost](#) a case last month against a Russian company that created a program that cracked Adobe's electronic books.

Lexmark claims that Static Control violated the DMCA by selling its [Smartek](#) chips to companies that refill toner cartridges and undercut Lexmark's prices.

The legal action escalates what has been a technological cold war, pitting the aftermarket ink and toner industry against printer manufacturers who try to prevent customers from buying products from third parties. In an [essay](#) titled "OEM Warfare," Static Control CEO Ed Swartz says: "The OEMs (original equipment manufacturers) will continue to escalate their technologies to erect barrier after barrier to our industry. Each barrier will require an ever growing amount of time, money, talent and effort to overcome."

Under section 1201 of the [DMCA](#), it is generally unlawful to circumvent technology that restricts access to a copyrighted work.

In a 17-page [complaint](#) filed on Dec. 30, 2002, the company claims the Smartek chip mimics the authentication sequence used by Lexmark chips and unlawfully tricks the printer into accepting an aftermarket cartridge. That "circumvents the technological measure that controls access to the

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Toner Loading Program and the Printer Engine Program," the complaint says. The Toner Loading Program checks toner levels in the cartridge, and the Printer Engine Program controls operations such as paper feed and the actual transfer of the dry ink to paper.

Lexmark is asking U.S. District Judge [Karl Forester](#) to order Static Control to "deliver up for destruction" all Smartek chips and to cease selling them. Static Control could not be reached Wednesday for comment.

[Jessica Litman](#), a professor at Wayne State University who specializes in copyright law, said it's likely that Lexmark would not have been able to succeed in its lawsuit without the DMCA, but stands a good chance with it.

Pre-DMCA cases involving video game consoles concluded that it was legal to copy code for the purposes of interoperability, Litman said. In *Sony v. Connectix*, the 9th U.S. Circuit Court of Appeals [concluded](#) that it was legal for Connectix to copy the Sony PlayStation's BIOS for the purpose of interoperability.

"I think they almost certainly would have skated were it not for the existence of the DMCA," Litman said of Static Control. "I would have expected the eastern district of Kentucky to follow the 9th Circuit to say that reverse engineering and copying of the code was fair use because it was enabling interoperability."

Cindy Cohn, an attorney at the [Electronic Frontier Foundation](#), a civil liberties group in San Francisco that's one of the chief critics of section 1201 of the DMCA, said she expected more cases like the one brought by Lexmark.

"We have long said that the DMCA's potential use as an anticompetitive tool has been great," Cohn said. "Now we're seeing it happen."

Lexmark's complaint also alleges traditional copyright infringement, saying the Smartek chips contain "unauthorized, identical copies of Lexmark's copyrighted Toner Loading Programs."

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