

# Thwarting of secondary printer market challenged

BY HENRY C. DINGER

The printer market is like the shaving products market. Razor manufacturers make money on the blades and printer manufacturers make money on ink and toner cartridges. Because cartridges are expensive, entrepreneurs have seized the opportunity to offer replacement cartridges for a fraction of the cost and kits so that consumers can refill their cartridges themselves. These businesses don't have to cover narrow to non-existent margins on printers.



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These diversions of demand for the printer manufacturers' most profitable products naturally frustrates those manufacturers. As a result, they do their darndest to impede the development of secondary markets in these consumables. They stress the value, such as it is, of buying "genuine" Epson/HP/Canon/Brother/Lexmark consumables, a claim on

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which I am an agnostic. They tout their commitment to recycling by making it easy for their customers to turn in used cartridges, sometimes by paying the postage to return the empty to the manufacturer, sometimes by a disposal bin in office supply stores. No doubt this reflects a "green" sensibility in more than one sense, since the cartridges that are turned in cannot fall into the hands of remanufacturers and cannot be refilled by the consumer.

Despite these efforts, the secondary market for printer consumables is huge.

Printer manufacturers have begun to employ more creative means to discourage their customers from straying into the secondary market. A recent case filed by Lexmark illustrates one such approach.

According to a complaint filed in a Kentucky federal court, Lexmark offers a "prebate" program whereby it sells certain laser toner cartridges at a discount so long as the customer agrees to use the cartridge only once and return the empty cartridge back to Lexmark. Recognizing that some customers might cheat, Lexmark places on each cartridge a microchip that is programmed to control certain printer functions. If such a prebate cartridge is refilled, the microchip knows it, lets the printer know it and the printer just won't print. If a non-prebate cartridge is refilled, Lexmark says that the test page printed after a new cartridge is inserted will inform the customer that the cartridge has been refilled. (The complaint does not say whether the test page also badmouths refilled cartridges.) If a cartridge lacking a microchip is inserted, the printer won't work.

Lexmark sued a company, Static Control, that developed a replacement microchip so that used Lexmark cartridges, even the prebate cartridges, can be refilled and reused, and non-Lexmark cartridges can be used as well. Lexmark claims that Static Control made an unauthorized copy of the program in the cartridge's microchip and thereby circumvented the technological limits imposed by Lexmark on access to the operating software in the printer itself.

Lexmark says that the software on the cartridge is a technological "key" to access the software in the printer and Static Control has forged a duplicate key. This, according to Lexmark, is a violation of the Digital Millennium Copyright Act.

It's actually a pretty clever scheme that Lexmark has devised. By turning a piece of hardware (i.e. the cartridge) into a software key to the control systems of the

printer, Lexmark has attempted to wrap around its technology legal rights created to protect information (particularly digitized information) from unauthorized duplication in violation of the copyright laws.

If it works — and it's a big if — it is a strategy that many companies far removed from the content industries might employ to great advantage. As a group of copyright law professors suggested to the Kentucky court in an amicus brief, General Motors might put a microchip on its OEM oil filters with software that controls some automated operation of the car itself and thus try to inhibit the development of a secondary market in such items.

But will it work? Historically, the law has not looked with favor on intellectual property owners using their rights under the patent or copyright laws to extend the limited monopolies they get under those laws to other products. In general, the development of secondary markets for printer consumables, razor blades and oil filters has been a good thing for consumers, even though it makes the life of printer, razor and automobile manufacturers considerably more challenging.

I expect that many courts would question the legitimacy of the efforts of Lexmark to squelch the secondary market in toner cartridges.

Lexmark will argue that while its program may inhibit competition in the market for Lexmark compatible consumables, Lexmark itself is a relatively small player in the printer market that is dominated by Hewlett-Packard, and Lexmark undoubtedly believes that keeping the major chunk of its consumables market is essential for its successfully competing in the larger printer market.

On the other hand, maybe we would all be better off with more expensive printers and cheaper consumables.

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