

**Before the
FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
Magnuson-Moss Warranty Act Rule Review,)	FTC Matter No. P114406
16 CFR Part 700)	

**COMMENTS OF THE
INTERNATIONAL IMAGING TECHNOLOGY ASSOCIATION**

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SUMMARY

The International Imaging Technology Council (INT’L ITC) supports the Comments of the Uniform Standards in Automotive Products Coalition (the “Coalition”). It wishes to provide additional information about its organization and the effects of certain practices in the printer industry on its members and consumers. INT’L ITC joins the Coalition in urging the FTC to make two simple clarifications to its Interpretations to better provide consumers with the protections discussed in the Consumer Alert and to bring the Act in line with the federal law that served as the source of the Act’s anti-tying provision:

- Amend Section 700.10(c) of Interpretations to include “indirect” conditioning practices, as is currently required under the Clean Air Act;
- Require warranties to include a plain English anti-tying disclosure, similar to the disclosure already required of automotive warranties under the Clean Air Act, and modeled directly upon language approved by the FTC in its recent Consumer Alert on Automotive Warranties; and

By making these modifications, the FTC will be providing consumers with more effective notice of their rights and the assurance that warranty coverage will not be denied improperly, in a manner consistent with the original intent of the Act.

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UNIFORM STANDARDS IN AUTOMOTIVE PRODUCTS COALITION COMMENTS

As a member-based nonprofit, the International Imaging Technology Council (“INT’L ITC”) appreciates this opportunity to provide comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) request for comment released on August 23, 2011 (“Request for Comment”). In the Request for Comment the FTC sought comment on its warranty-related Interpretations, Rules, and Guides (“Interpretations”) under the Magnuson-Moss Warranty Act (the “Act”). Specifically, the FTC asked whether Rule 700.10 should be revised to improve the effectiveness of the Act’s tying prohibition. INT’L ITC agrees with the Coalition that several minor modifications to 700.10 would greatly improve the effectiveness of the Act’s anti-tying prohibition. INT’L ITC further agrees with the Coalition that the FTC should update and clarify 700.10 in order to account for the emergence of *de facto* warranty tying practices that have evolved over the past decades that threaten to roll back the original protections of the Act.

First, INT’L ITC urges the FTC to revise its Section 700.10 of its Interpretations under the Act in order to clarify that warrantors may not directly *or indirectly* condition product’s warranty coverage on the use of a branded parts or services, unless that article or service is provided without charge under the terms of the warranty. While the use of “direct” tying provisions in warranties is clearly prohibited by the Act, the FTC needs to make clear that warranty language that creates the impression that the use of a branded product or service is required in order to maintain warranty coverage is equally impermissible. The *in terrorem* effect of these ambiguous warranty provisions works to create a *de facto* tie in a manner recognized,

and prohibited, under Clean Air Act's anti-tying provision, which was the model for the Act's similar provision. The FTC should clarify its Interpretations to more expressly indicate that indirect tying arrangements are also prohibited by the Act.

Second, INT'L ITC urges the Commission to implement measures designed to provide consumers with knowledge of their rights under the Act. Simple and minimal disclosure language in warranties, drawn from the FTC's recent Consumer Alert on Auto Warranties, would ensure consumers will enjoy the full protections afforded under the Act without imposing an undue burden on warrantors or service providers.

I. BACKGROUND OF INT'L ITC

Toner and ink jet cartridges have a useful life after their first use. Printer cartridges are remanufactured when worn or exhausted parts are restored or replaced; and the final product performs like the original new one. Formed in 2001, The INT'L ITC is a § 501 (c) (6) trade organization that represents the 2500 North American companies in the industry that make their living remanufacturing imaging supplies, sometimes referred to as the aftermarket imaging supplies industry. The ten-year-old, nonprofit association represents its members' common business objectives, particularly the right to conduct business freely and fairly.

Toner and ink jet cartridge remanufacturing began in the mid 1980s shortly after mainstream laser printers were introduced to the public. Entrepreneurs discovered that the all-in-one cartridges in these printers could be replenished with toner and reused. Early "refilled" cartridges were of limited and varying quality. However, as the industry matured, so did its technical resources. Cartridge remanufacturing now produces high-quality products that are sold alongside new ones in stores like Office Depot, Office Max and in catalogs and shops around the

world. It also grew in market share and size. At its peak, the industry had garnered one-third of the cartridge business and accounted for as much as \$8 billion in sales.

Remanufacturers, and the products they sell, are good for three key reasons:

- The products are good for the environment. Reuse is the highest form of recycling. By reusing and refurbishing a toner cartridge, the remanufacturer is withholding approximately 2.5 pounds of industrial plastic from landfills. Moreover, he is conserving oil, as several quarts would go into the production of a new cartridge.
- The businesses are chiefly local and labor-intensive, and therefore good for the local economy. Most of these businesses are small local businesses, such as the 663 Cartridge World franchises, which employ on average three people. Many local companies employ many more. And these jobs cannot be outsourced or replaced with machines. Cartridges must be remanufactured on a product-by-product basis by people.
- Remanufactured products are good for consumers by providing a lower-price alternative to new cartridges. Because of the intellectual property rights of the manufacturers, they are the only ones allowed to produce new cartridges legally. Without remanufactured cartridges, the manufacturers would have no competition.

Original Equipment Manufacturers (OEMs), like Hewlett-Packard, Canon and Lexmark, make a great deal of revenue from the sale of their new supplies. And often sell the printers at little or no profit in order to capture the more lucrative supplies business. Therefore, for years the competition between the OEMs and the aftermarket has been fierce.

II. FUNCTIONS OF INT'L ITC

The International Imaging Technology Council (Int'l ITC) is a non-profit trade association that represents all factions of the imaging supplies industry, including

reseller/dealers, remanufacturers, and distributors as members of one association with common objectives, particularly the right to conduct business in an open marketplace.

The INT'L ITC defends the industry through grassroots lobbying efforts and other industry-government programs that assist in fighting unfair competitive practices.

The INT'L ITC promotes the industry and its products through education of institutional buyers, government purchasers and, ultimately, consumers. It also enhances the business of imaging supplies dealers by promoting standardized test methods and other performance-proving programs.

III. THE REASONS THE INT'L ITC SUPPORTS THE PROPOSED CHANGES

The INT'L ITC routinely receive complaints from members of customers lost to original equipment manufacturers (OEMs) printer dealers claiming that the use of aftermarket cartridges will void the printer warranty. <http://consumerchoice.info/warranty.htm>.

“I did this year lose a long time customer that had been buying our remanufactured toners for many, many years,” said Jeff Bendix of Bendix Imaging of Watertown South Dakota. “They routinely purchase extended warranties on their HP printers when they purchase them. They had a HP 3600 that was still under an extended warranty that broke down. The HP service technician saw our toners in the office and told the customer remanufactured toners would void all their warranties and they would not fix any of their machines when they called for service. They then stopped buying from us at all, even though they had used our cartridges for years with no issues.

“The customer is very unhappy with the new replacement printer HP gave them and has come to realize this was not our fault, their costs are dramatically higher, they need to spend more time and handle more things themselves to keep their machines running and service is worse. So they contacted us and want to work with us again and replace several of their printing devices. But I think pretty much ALL OEM service technicians or representatives still use this scare tactic because it works.”

In addition to the routine voided-warranty scenario, Lexmark International introduced an indirect tying arrangement in 1997 called “prebate.” Lexmark first announced its Prebate cartridge program for Optra S printers, customers were purportedly offered two “identical” cartridge choices. The Prebate cartridge could be purchased for an up-front discount of \$30 or more. Non-prebate cartridges were not generally available, but could be special ordered directly from Lexmark.

Prebate cartridges came with a label stating that the customer must not reuse, recycle or remanufacture the cartridge, and must either return it to Lexmark or throw it away. Its identical twin, the non-Prebate cartridge, came with a label with no such restrictions.

The cartridges for these printers are often purchased online or by telephone from office supplies stores or catalog houses where the order taker had no idea that the “discounted” cartridges came with the prebate “strings” attached. So often the customers bought the prebate cartridges without ever agreeing to the prebate terms.

Lexmark argues that its labels are a patent license, and that Lexmark’s patents on the cartridge allowed it to restrict the use of its cartridges after the initial sale. Lexmark claimed that the program was not anti-competitive because “remanufacturable” cartridges were “readily available

for any customer to purchase.” However, remanufacturable cartridges started to quickly disappear as customers opted for a discounted cartridge.

The Supreme Court has ruled in a similar situation that the sale of a patented item exhausts the patent owner’s rights in the sold item. *Quanta Computer, Inc. v. Lg Electronics, Inc.*, 553 U.S. 617, 128 S.Ct. 2109. In a case Lexmark filed in its home state of Kentucky a district court has ruled that the Prebate program does not create a valid patent license, but may create a valid contract between the cartridge buyer and Lexmark. Lexmark has appealed that decision. *Lexmark International Inc. v. Static Control Components, Inc.*, 749 F. Supp. 2d 542. The program is now called the “return” program.

Printer manufacturers make most of their profits from the supplies rather than the printers. They have great incentives to recapture lost sales lost to aftermarket imaging supplies dealers, and they are always looking for innovative, *indirect* ways to steer the customers back to OEM supplies purchases. These types of programs and procedures by the OEMs are very confusing to the consumer, who doesn’t understand his rights.

CONCLUSION

INT’L ITC agrees with the Coalition believes that the time has come for the FTC to update its Interpretations of the Act to account for the evolution of warrantor practices. The recommendations set forth by the Coalition would protect consumers from warrantors who seek to impose a *de facto* tying arrangement that would otherwise be impermissible under the Act as well as under similar federal law. The FTC should implement these suggested clarifications in order to remedy the inequality in bargaining power between consumers and warrantors that has re-emerged since the Interpretations were originally promulgated. By making these modifications, the FTC will be providing consumers with a better understanding of their rights

and assurance that warranty coverage will not be denied improperly, in a manner originally contemplated by the Act.

Respectfully submitted,

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