

## Appendix J

### **Lexmark Letter on Inkjet/Printer Cartridges**

(Letter dated March 17, 2009)

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Lexmark International, Inc.  
740 West New Circle Road  
Lexington, Kentucky 40550  
USA

March 17, 2009

Mr. Max Gray  
Department of Agriculture and Consumer Services  
Bureau of Weights & Measures  
3125 Connner Blvd. Lab 2  
Tallahassee, FL 32399-1650

Dear Mr. Gray:

Thank you for providing the inquiry from cartridge refiller Dr. Ink, Inc., as well as the link to Tom Coleman's newsletter article dated March 2005. As we discussed briefly, Lexmark does not believe that the packaging for inkjet print cartridges is required to display the volume of ink contained within those devices. Lexmark also believes that despite some superficial appeal, such labeling is more apt to be misleading than illuminating to consumers.

#### Background

An inkjet print cartridge is not remotely similar to a bottle of milk or a tube of toothpaste; rather, it is one of the most technologically advanced micro-machines in commerce today. In fact, most of the sophisticated technology that comprised a printer in prior technologies is now contained within the print cartridge itself. Not surprisingly, then, the cost of the ink associated with a cartridge is a very small fraction of the total cost of the print cartridge mechanism and much of the price the customer pays for the cartridge is attributable to the micro-machinery, not the ink. Moreover, the capabilities of various cartridge models vary drastically in terms of print speed, print quality, drop size and resolution, and yield so a comparison of those machines based upon the quantity of ink they contain is an apples to oranges comparison. And as explained below, such a comparison could well mislead consumers into buying cartridges that will cost them more, not less, per print. Treating these sophisticated machines as though they were mere containers for ink is inappropriate.

#### Ink Exemption

Ink is expressly exempt from labeling as provided by the U.S. Fair Packaging and Labeling Act. See 16 C.F.R. 50.3.2(a), attached hereto. The exemption for ink has been consistently observed and applied for decades by the State of Florida, as well as every other state in the union. This is clearly demonstrated by the fact that during this period literally billions of ink pens, markers and highlighters have been sold without any labeling whatsoever as to the quantity of ink these devices contain. It cannot plausibly be denied that during the nearly 40 years the exemption has been in effect, enforcement officials of the Bureau have personally purchased a multitude of such

products and cannot possibly have failed to notice that none of them disclosed the quantity of ink.<sup>1</sup>

Yet it does not appear that the Florida or any other state is currently considering requiring labeling of pens, markers and highlighters even though there is no principled way to treat them more leniently than print cartridges. Were the Bureau to abruptly change its longstanding policy regarding the ink, it would constitute a watershed change in Florida law that would encompass the entirety of two large industries that for decades have reasonably believed they were exempt. Any such unannounced deviation from established policy would create significant due process issues for the writing implement and printer companies affected.

#### Labeling Would Cause Confusion

As mentioned during our brief conversation, contrary to the objective of permitting meaningful comparisons of products, labeling ink volume of printing devices is more likely to cause confusion and in many cases, could cause consumers to make perfectly incorrect decisions. The ratio of the amount of ink contained in a cartridge versus the amount of printed pages a cartridge can produce is markedly different among various cartridge models. For example, a cartridge model that ejects relatively large drops of ink will consume far more ink to produce a given print than one with very fine drops and, ironically, the quality of the fine drop print will be better. Thus a consumer who chooses large-drop technology cartridge because it contains more ink than an equally priced fine-drop technology cartridge, will actually end up be paying more for each print, and obtain poorer print quality to boot.

In contrast, page yield estimates can provide a meaningful comparison of value to a consumer, at least if all manufacturers employ the same estimating assumptions and techniques. In this regard, the International Standards Organization (ISO), an independent, worldwide standard-setting body which is also interested in promoting accurate comparisons by consumers, has rejected reliance on ink volume or quantity. Instead, ISO, after studying for years the specific issue of inkjet cartridge performance and the consumer's need for meaningful comparative information, has developed a yield estimating and claiming methodology that permits cartridges to be compared using a consistent yardstick. Unlike ink volume measurements, these page yield measurements provide consumers a reliable way to compare the relative amount of printing that can be expected from competitive models of printers and their associated cartridges.

#### Coleman's Newsletter Article

Last, I would like to address Mr. Coleman's March 2005 newsletter article. To be honest, I am not entirely certain what this document is intended to be, but a non-regulatory agency employee's opinion set forth in a newsletter cannot possibly have the effect of countermanning the official Federal Trade Commission regulations that establish the exemption for ink. That regulation has the full force and effect of law and is recognized by all other states. Mr. Coleman's newsletter article simply is not an authoritative document that could formulate the basis for the sweeping regulatory change that Dr. Ink seeks.

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<sup>1</sup> Inkjet print cartridges have similarly been sold for in every state at least 25 years.

Moreover, Mr. Coleman's article does not address the ink exemption discussed above. Nor does it consider or discuss the lengthy and uniform custom and practice by the Federal government and every state government relating to ink products. It does not address the matter of whether billions of pens, markers and highlighters must, as a direct consequence of his position, must also be labeled. In this regard, there is not a single reason Mr. Coleman cites in support of his opinion that does not apply with equal force to the billions of pen, marker and highlighter packages that also do not display liquid volumes.

Although during our brief conversation you mentioned that the high cost of inkjet cartridges distinguishes them from pens, there is absolutely no provision in any packaging laws or regulations that exempts inexpensive items or provides a higher level of regulation for more highly priced items. If anything, pens, markers and highlighters are dramatically closer to being mere bottles of ink (like milk cartons) than the sophisticated micro-machines that comprise inkjet cartridges. There simply is no conscionable way for the Bureau to require the marking of high-tech ink delivery devices while permitting low-tech ink delivery devices such as pens and markers (which are purchased by more consumers and far more often) continue to be unmarked.

Conclusion

Lexmark very much hopes that based on the foregoing, the Bureau will deny Dr. Ink's request. However, if the Bureau is inclined to change its policy of nearly four decades upon which at least two huge industries have relied in good faith, Lexmark hereby requests that it do so only after giving Lexmark and all other members of the both affected industries notice and a formal opportunity to be heard regarding the complex set of regulatory and compliance issues presented by the change desired by Dr. Ink.

Very truly yours,



Charles S. Kratzer  
Associate General Counsel

L&R Committee 2010 Interim Agenda  
Appendix J – Lexmark Letter on Inkjet/Printer Cartridges

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16 CFR 503.2

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TITLE 16 -- COMMERCIAL PRACTICES  
CHAPTER I -- FEDERAL TRADE COMMISSION  
SUBCHAPTER E -- RULES, REGULATIONS, STATEMENT OF GENERAL POLICY OR INTERPRETATION AND EXEMPTIONS UNDER THE FAIR  
PACKAGING AND LABELING ACT  
PART 503 -- STATEMENTS OF GENERAL POLICY OR INTERPRETATION

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16 CFR 503.2

§ 503.2 Status of specific items under the Fair Packaging and Labeling Act.

Recent questions submitted to the Commission concerning whether certain articles, products or commodities are included under the definition of the term "consumer commodity", as contained in section 10(a) of the Fair Packaging and Labeling Act, have been considered in the light of the Commission's interpretation of that term as set forth in § 503.5 of this part as follows:

(a) The Commission is of the opinion that the following commodities or classes of commodities are not "consumer commodities" within the meaning of the Act.

Antifreeze.  
Artificial flowers and parts.  
Automotive accessories.  
Automotive chemical products.  
Automotive replacement parts.  
Bicycle tires and tubes.  
Books.  
Brushes (bristle, nylon, etc.).  
Brooms and mops.  
Cameras.  
Chinaware.  
Christmas light sets.  
Cigarette lighters.  
Clothespins (wooden, plastic).  
Compacts and mirrors.  
Diaries and calendars.  
Flower seeds.

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Footwear.  
Garden tools.  
Gift ties and tapes.  
Glasses and glassware.  
Gloves (work type).  
Greeting cards.  
Hand tools.  
Handicraft and sewing thread.  
Hardware.  
Household cooking utensils.  
Inks. ←  
Jewelry.  
Luggage.  
Magnetic recording tape.  
Metal pails.  
Motor oil (automobile).  
Mouse and rat traps.  
Musical instruments.  
Paintings and wall plaques.  
Photo albums.  
Pictures.  
Plastic table cloths, plastic placement and plastic shelf paper.  
Rubber gloves (household).  
Safety flares.  
Safety pins.  
School supplies.  
Sewing accessories.  
Silverware, stainless steelware and pewterware.  
Small arms ammunition.  
Smoking pipes.  
Souvenirs.  
Sporting goods.  
Toys.  
Typewriter ribbons.  
Woodenware.  
  
(b) The Commission is of the opinion that the following commodities or classes of commodities are "consumer commodities" within the meaning of the Act:  
  
Adhesives and sealants.  
  
Aluminum foil cooking utensils.

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