The Court will face some unusual juxtapositions on the second day of the December calendar, when it hears oral argument in *Lexmark International, Inc. v. Static Control Components, Inc.* You could think of this as an IP case (applying the Lanham Act), but it's not from the Federal Circuit. Or as a standing case, but it's not from the D.C. Circuit. Rather, it's from the Sixth Circuit, and it doesn't involve a state-on-top criminal matter in which the court of appeals has gone off (what five of the Justices would regard as) the deep end. Moreover, this is a case in which the Sixth Circuit's judgment (though probably not its analysis) is likely to appeal to several of the Justices.

The case is the most recent in the many chapters of Lexmark's continuing effort to use contracts, technology, and litigation to stamp out the efforts of third parties to manufacture and sell print cartridges compatible with Lexmark printers. Static Control manufactures toner and microchips to fill those third-party cartridges. Lexmark instituted this suit, claiming that features of Static Control's products which made them compatible with its printers violated its patent and copyright protections. Static Control counterclaimed, charging Lexmark with false advertising under the Lanham Act. Specifically, Static Control contended that Lexmark had disseminated false information about the legality of selling printer cartridges that used Static Control's products.

Applying the prudential standing rules that the Supreme Court has developed in the antitrust context, the district court dismissed the case. On appeal, the Sixth Circuit reversed, reasoning that Static Control's complaint alleged a "cognizable interest" in its business and facts suggesting that Lexmark's statements harmed the business of Static Control. Presumably responding to deep disarray in the courts of appeals on the question of Lanham Act standing, the Court granted review.

Lexmark's brief is straightforward, supporting application of the so-called "*AGC*" test, from the Supreme Court's 1983 decision in *Associated General Contractors v. California State Council of Carpenters*. One of the principal questions under that test is whether the plaintiff is a direct competitor of the defendant. If not, the plaintiff typically cannot pursue an antitrust action; the premise is that direct competitors provide a more suitable context for assessing the lawfulness of restraints on competition and also a more straightforward assessment of damages. Lexmark has the luxury of emphasizing, on almost every page, then-Judge Alito's Third Circuit opinion in *Conte Brothers Automotive, Inc. v. Quaker State-Slick 50, Inc*. That decision, one of the first to consider this problem at the appellate level, held the AGC test suitable for Lanham Act claims.

Against that backdrop, Lexmark's argument is straightforward. The broad general language of the Lanham Act is indeed reminiscent of the notoriously open-ended language of the antitrust laws. The Court traditionally has been reluctant to assume that open-ended language evinces a congressional intent to open the courthouse doors to all who might experience some indirect or ancillary injury from conduct covered by a federal statute. Because the market for printers is highly competitive, and because Static Control does not compete in that market – or even in the closely related market for printer cartridges – it is hardly the ideal plaintiff for assessing the lawfulness of Lexmark's competitive strategy.

Although Lexmark's brief has a powerful logic, compelling at first glance, Static Control's response is devastating. For Static Control, the central relevant fact is the allegation in its complaint that Lexmark's statements were directed at Static Control's products. Starting from the beachhead of that factual allegation, the brief calls for resolution of the case under a "straightforward and modest principle," that "[a] company whose products are targeted with false advertising falls within the zone of interests of a statute whose text gives a remedy for false advertising about 'another's goods.'"

Static Control persuasively argues that the antitrust statutes and the Lanham Act differ in material ways: the antitrust concern relates to the structure of market competition, while the Lanham Act relates to a specific type of malignant competition (false statements about the goods of another). There is a satisfying logic to the contention that Lexmark's view that Static Control was a sufficient competitive threat to justify false advertising makes Static Control sufficiently involved to justify Lanham Act standing.

Whatever the concerns of the parties, it seems almost certain that the Justices will situate the case within the general (and murky) problem of statutory standing doctrine. Thus, although Lexmark suggests the Court should import antitrust standing principles, a powerful *amicus* brief from Paul Smith on behalf of the American Intellectual Property Law Association (filed topside, on behalf of neither party) argues that the Court should adopt the "reasonable interest" test, originally developed by the Second Circuit and applied by the Sixth Circuit in this case. Static Control rejects both of those approaches, arguing that the Court should use the "zone of interest" test developed in the context of the Administrative Procedure Act, but more recently applied by the Court to statutes as diverse as the Endangered Species Act and Title VII.

Although any prediction in this area is difficult, my guess is that the Court is unlikely to accept any of the analytical frameworks existing in the courts of appeals. I would expect it to use the "zone of interests" test as a tool for ascertaining congressional intent under the Lanham Act, and from that perspective to assess whether the allegations of Static Control's complaint suggest an injury sufficiently near the heart of the statute's concerns. One thing is for certain – the Justices (like Ginsburg and Scalia) with long D.C. Circuit experience will have powerful predispositions in a case like this one, which will be exposed incisively at the argument next week.