

Instant Law for MMMC

Five Minute Surveys of Hot Issues

Welcome

- We will not cover every detail:
 - We will move through each topic quickly
 - The aim is to provide an overview of several areas of law that affect MMMC's members
 - You will be able to find this presentation on the internet at <http://www.washingtonaviation.com>
 - The notes pages for the slides are more detailed than the oral presentation, so that you can go back and fill in some of the gaps
 - These pages are meant to highlight issues, but they are not legal advice
- we also might take more than five minutes per topic

Outline

- Hazardous Materials Regulations—What Do I Need to Know?
- Export Controls on Aircraft Parts—Six Steps for Compliance
- Intellectual Property—Legal Applications Applying to Data, and to Manuals
- Sales/Supply Contract Tips—'Magic' Phrases That Protect Your Rights

Hazmat

A brief look at hazmat training
requirements

HazMat Penalties are Very Serious

- Civil penalties
 - up to \$32,500 per violation (RSPA)
 - up to \$30,000 per violation (FAA)
- Criminal penalties
 - up to \$500,000/day - corporation
 - up to \$250,000/day - individual
 - up to 5 years in addition to fines

Are You a Hazmat Employer?

- FAA guidance states that
 - “With very rare exceptions, all air agencies are ‘hazmat employers’”

Air Agency Control and Handling of Aircraft Components or Consumable Materials that Contain Hazardous Materials, HBAW 99-10 (July 7, 1999).

- This language has since been incorporated into FAA Order 8300.10
- Repair Stations are generally hazmat employers

Training Can Help Avoid Enforcement

- Training is required by law!
 - All hazmat employers must ensure their hazmat employees are trained and tested
- Minimum standards:
 - Once every three years for hazmat employees
 - ICAO recommends once every two years
 - Air carrier hazmat employees are required to be trained every year (Part 121)
- One-year recurrent training standard for repair stations (and 135 operator) has been proposed
 - final rule expected later this year

Testing and Certification

- As a part of the training, hazmat employees must also be tested
- The hazmat employer is responsible for certifying that the employee was trained
 - If you attend one of our training classes, we provide a certificate that the employer can sign for retention in the employer's records

Upcoming Hazmat Training

- May 5-6 Los Angeles, CA
- June 29-30 South FL (MIA/FLL)
- Sept 15-16 Dallas, TX
- Oct. 11-12 Reno, NV

For more information, see

<http://www.washingtonaviation.com/hazmat>

Six Steps for Exporters

- STEP 1: Check forbidden countries and persons
- STEP 2: Identify other 'red flags'
- STEP 3: Disposition all 'red flags'
- STEP 4: Review applicable agency regulations
- STEP 5: Do you need a license?
- STEP 6: Check exceptions to license requirements

Step 1: Forbidden Persons or Countries

- Use the existing on-line databases to confirm that your potential customer is not
 - A forbidden party
 - A red-flagged party
 - From a forbidden country
- There are 7 databases (up from 4, pre-9/11)
- For URLs, check the presentation note pages at:
<http://www.WashingtonAviation.Com>

STEP 2: IDENTIFY OTHER “RED FLAGS”

- ‘Red flags’ have been designated by the BIS to illustrate the types of circumstances that should cause reasonable suspicion that a transaction will violate export administration regulations (EAR)
- Example: The customer is reluctant to offer information about the intended end-use of the item

Step 3: What to Do if there is a Red Flag

- If you encounter a piece of information in the course of your dealings with the customer that raises a red flag:
 - Refrain from the transaction, OR,
 - Contact your regional BIS office. Office addresses & phone #s provided at:
<http://www.bxa.doc.gov/Enforcement/report.htm>

Step 4: Check The Relevant Regulations

- **Federal Aviation Administration**
 - Check bilaterals agreements between the United States and the importer
 - Several nations have additional requirements for PMAs
 - “Critical parts” may need to be disclosed – but critical parts made under PC holder license may receive favorable treatment
 - Check U.S. policies
 - Common practice may be more or less strict than regulations suggest
 - Check Importer’s regulations and policies
 - EASA 145.A.42 requires parts to be marked and accompanied by airworthiness approval documentation

Step 5: Do You Need a License?

- Licenses permit activities otherwise restricted or forbidden
 - ODTC
 - BIS
 - OFAC
- ODTC has a small shipment exception for components /spare parts, total value \leq \$500
 - Exported to support a defense article previously authorized for export
 - Destined for previously approved end-user (not a distributor)
 - May not enhance the capability of the defense article
 - Exporters not permitted to split orders to fall below \$500
 - Not more than 24 shipments per year per end user
 - Exporter must certify “22 CFR 123.16(b)(2) applicable”

Even if a ODTC license exception applies...

- All exports of defense articles must be accompanied by a Shippers Export Declaration

Step 6: Is there a License Exception?

- There are many license exceptions
- Major BIS exceptions include:
 - One-for one replacement of parts or servicing and replacement of equipment
 - Exports of equipment and spare parts for permanent use on a vessel or aircraft except an aircraft registered in, owned or controlled by or under charter or lease to a forbidden country (aircraft must be identified!)
 - Exports to aircraft of U.S. or Canadian registry and U.S. or Canadian airlines' installations or agents
(NOTE: These are BIS Exceptions ONLY)

Where Can I Learn More?

- There will be a full workshop devoted to export control at the **ASA Annual Conference**
 - Many other sessions answering your commercial and regulatory questions
 - Boca Raton Resort & Club (room rate: \$149)
 - June 27-28, 2005 [Golf on the 26th]
 - <http://www.aviationsuppliers.org>
- Also see the ASA website for Update Report articles written on export control

Intellectual Property Outline

- Respecting Trade Secrets and Understanding their limits
- Limiting Distribution of Repair Manuals
- Choosing an Appropriate Part Number

Using Trade Secret Law

- It is a violation of state law to misappropriate a trade secret
 - AVOID MISUSING TRADE SECRETS OF OTHERS
 - PROTECT YOUR OWN TRADE SECRETS
- The alleged trade secret must be an economically valuable **SECRET**
 - Unprotected designs are not secret
 - Available through FOIA or other public domain source means it is not secret

Practical Considerations Under Trade Secret Law

Using Information Developed By Others

- Check to make sure you can use the data
 - Is it a trade secret?
 - Do you need to make a copy in violation of copyright law?
 - Is the information/invention protected by a patent?
- One may NOT use trade secret law to prevent *reverse engineering* of products currently in the marketplace (e.g. to develop major repair data or to support a PMA application)

Secrecy Must be Protected

Protecting Your Own Data

- Employees should maintain confidentiality
 - Contracts should address confidentiality, and confidentiality clauses should survive the end of the relationship
 - Procedures should assure secrets cannot reasonably be leaked by accident, e.g. who has access to the data and under what circumstances?

Secrecy Must be Protected

Protecting Your Own Data

- Companies should maintain confidentiality
 - Mark secret data with a proprietary data stamp
 - Insist that business partners assure confidentiality (e.g. through your contracts)
 - Provide information to FAA under condition of confidentiality
 - Ask for return of proprietary data from FAA when they are finished reviewing it

Manual Developments

- Some manufacturers are taking steps to limit distribution of manuals
 - Copyright notices on manuals
 - Prevent copying/sharing
 - Restrictive licensing of the manuals, with a clear licensing/restriction warning on front (that prevents the original buyer from reselling or sharing the manual)

Distribution of Manuals

- But remember that manuals sometimes must be disseminated!
 - 14 CFR 21.50(b)
 - Antitrust considerations
 - Ninth Circuit v. Federal Circuit
 - Third party contracts and agreements
 - The FAA has been *considering* limiting §21.50
 - Would only apply to TCed products
 - *Would not apply to components manuals*

Trademarks and Production

- Some OEMs have trademarked elements of the part number
 - Bell, for example, has trademarked its model numbers, and these are all made an element of the part numbers (e.g. 206-040-530)
 - Use of the OEM's trademark in commerce may be a violation
 - MAJOR EXCEPTION: "Use in Commerce" in the course of a repair (e.g. leaving the OEM markings on the part) is NOT a violation

Limits of Trademark Law

- One OEM sued a repair station
 - Claimed that the repair station's repairs violate the OEM trademark
 - Alleges that the repair station should be removing the OEM mark and replacing it with a repair-station trademark
- Case decided for the repair station on summary judgment

Trademark Don'ts

- Don't adopt a confusing or deceptive trademark
 - E.g. Airbuss parts for installation on Airbus aircraft
- If you plan to make a major change to the design of a product
 - Get an STC
 - If using someone else's STC data, get written authorization
 - Clearly describe the modification on the approval for return to service (and possibly mark the article, if feasible)

Protecting Your Technical Data

- Know the law
- Have a system
- Control your data
- Understand your competitors rights and have a policy for respecting their proprietary rights

More Business Practices

- There will be several workshops devoted to business practices at the **ASA Annual Conference**
- Many other sessions answering your commercial and regulatory questions
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- June 27-28, 2005
- <http://www.aviationsuppliers.org>

Using the Right Magic Words

To Protect Your Rights

Write Clear Documents

- Keep sentences simple and short
- If you must include modifiers, like adjectives or adverbs, use only one per sentence
- Multiple modifiers raise the ambiguity of whether the second modifier modifies the entire sentence or just the first modifier
 - Ambiguous sentences may not be enforceable!
 - *Contra Proferentem* – the document will be interpreted against the drafter

Incorporation by Reference

“Subject to terms stated on General Conditions of Sale, enclosed”

- Parties to a contract are free to incorporate by reference, and bind themselves to, terms that may be found in other agreements
- The other agreement *should* be readily available to both parties

Risk of Loss

- Risk of loss traditionally happens when delivery is made to buyer
- This may be modified by contract, establishing transfer of risk of loss at any point
 - *“The risk of loss shall pass to the buyer when the goods are duly delivered to the carrier”*
 - This language passes risk at seller’s facility

Assurance of Solvency

“Buyer hereby confirms that he is solvent”

- Ordinarily, one may retrieve goods shipped on credit from an insolvent buyer within ten days of buyer's receipt
- Fraudulent confirmation of solvency within 90 days prior to delivery eliminates the ten day limit on retrieving goods from the estate because the Seller relied on this representation

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Thank You for Your Time!

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