



# News from the Hill

BY JASON DICKSTEIN  
AEA GENERAL COUNSEL

## Manufacturer's Copyright Privileges: How Broad Are They?

**D**o you receive all the OEM manuals you need? Of course, you do. It is required by the regulations. But do you find it difficult to get your hands on them from time to time? If you are an average AEA member, the answer is probably, "Yes."

All AEA repair shops have their own issues with manuals. Independent shops have trouble getting manufacturers to sell them manuals. Some authorized dealers find they are signing onerous agreements they feel may give away too much of their business independence in exchange for the manuals, technical data, and parts and components they need.

No matter what your experience is with manuals, a new court case may open your eyes to some possibilities concerning the distribution of maintenance manuals.

### There is Hope

One option many repair stations

have pursued is to obtain manuals from their customers. The customers have a clear right to the manuals under the FAA's regulations — 14 C.F.R. § 21.50(b)<sup>1</sup> states a product manufacturer must provide a copy of the manuals to the owner/operator of the aircraft.<sup>2</sup>

What about avionics components? Many of these components are installed via an STC. Under the regulations, if the manufacturer has applied for one or more STCs related to the component, the STCs bring that manufacturer under the scope of the regulations and require the manufacturer to make the manuals available to the owner/operator. This provision actually applies to design approval holders (it includes, but is not limited to, type certificate and STC holders), so TSOA holders are covered as well.

What about components that are not produced under a separate FAA design approval, such as components only produced for sale to production certificate holders? Well, the first question

is, was the item original equipment on the aircraft?

Aircraft manufacturers have an obligation to make their own manuals available based on their own design approval. But they often rely on the component maintenance manuals as the source of information for servicing components. This is permitted under the regulations, which specifically state the type certificate applicant "may refer to an accessory, instrument or equipment manufacturer as the source of this information if the [type certificate] applicant shows that the item has an exceptionally high degree of complexity requiring specialized maintenance techniques, test equipment or expertise."<sup>3</sup>

Although the FAA does not currently enforce the regulations so as to require manufacturers to provide manuals to repair stations, the FAA has expressed it is appropriate for owners to provide their maintenance contractors with copies of the main-

<sup>1</sup> The holder of a design approval, including either the type certificate or supplemental type certificate for an aircraft, aircraft engine or propeller for which application was made after Jan. 28, 1981, shall furnish at least one set of complete Instructions for Continued Airworthiness, prepared in accordance with Sec. Sec. 23.1529, 25.1529, 27.1529, 29.1529, 31.82, 33.4, or 35.4 of this chapter, or as specified in the applicable airworthiness criteria for special classes of aircraft defined in Sec. 21.17(b), as applicable, to the owner of each type of aircraft, aircraft engine or propeller upon its delivery, or upon issuance of the first standard airworthiness certificate for the affected aircraft, whichever occurs later, and thereafter make those instructions available to any other person required by this chapter to comply with any of the terms of these instructions. In addition, changes to the Instructions for Continued Airworthiness shall be made available to any person required by this chapter to comply with any of those instructions.

<sup>2</sup> Manufacturer and repair stations have argued about whether that same regulation also requires manufacturers to make the manuals available to repair stations as well. But analyzing that debate is best left for another article.

<sup>3</sup> Part 23 App'x G23.2(b).

tenance manuals necessary for use on the owner's aircraft.

## The Empire Strikes Back

Recently, manufacturers have tried to limit customers' ability to share their manuals with their service providers.

Some manufacturers have asked their customers to sign license agreements as a condition of obtaining the manuals. Some of these license agreements have imposed severe limitations on the manuals, declaring the manual is licensed, rather than sold, and restricting the customer from sharing the manual with any other party.

These restrictive covenants can raise antitrust issues for the manufacturers and, in some cases, can be a disincentive to customers who are buying in a competitive marketplace.

More often, manufacturers seem to be asserting copyright as a protection against dissemination of their manuals. Many repair stations are taking these copyright claims at face value without performing the critical analysis necessary to determine if the claims have merit.

The basic copyright argument is that the manuals are subject to copyright, and therefore when the customer makes a copy of them (or part of them) to give to a repair station, this represents a duplication of a copyrighted work in violation of the copyright laws.

To understand the manufacturer's arguments, and the limits of their arguments, it is necessary to first understand the basics of copyright law.

All published works have an inherent copyright, even if there is no copy-

right notice on the face of the document.<sup>4</sup> This means any author (owner) of a work may sue an infringer seeking injunctive relief — which is a lawyer's way of saying, if you write a manual, you can use the copyright laws to prevent other people from duplicating that manual.<sup>5</sup>

The purpose of the copyright law is to ensure authors will be able to reap the benefits of their creative works. No one would be able to make a living writing novels, creating music CDs or producing artwork if their work could be copied by unscrupulous persons and sold to the masses.

In light of this purpose, there is an exception to the copyright laws known as the "fair use exception." Under the fair use exception, certain types of duplication of copyrighted works will be considered to represent "fair use" by the public and are authorized.

There are four elements to the fair use doctrine, and the courts weigh all four of them when considering a fair use argument.

The four elements to be considered are:

- The purpose and character of the use.
- The nature of the copyrighted work.
- The amount and substantiality of use.
- The effect of the use on the market for the work.

Although there is no strict formula as to how the four elements will be analyzed, the courts have agreed the most important element of the fair use test is the fourth element. The importance of this element flows from the purpose of the copyright laws — to foster creativity by protecting the rev-

enue stream of the author. If there is no impact on the author's revenue stream, the duplication often will be considered to fall within the scope of the fair use doctrine.

## Return of the Jedi

Recently, an aerospace manufacturer went so far as to actually sue a company for copyright infringement related to the OEM manuals. The defendant in the case was a logistics company that tracked maintenance status for the owner; however, the same basic analysis applied in this case would apply to a repair station accused of copyright infringement related to a maintenance manual.

In the case, Gulfstream Aerospace Corp. v. Camp Systems International, Gulfstream accused Camp of copyright violation with respect to the maintenance manuals Gulfstream had published.

Camp was in the business of maintenance tracking. It decided to add maintenance tracking for Gulfstream aircraft to its line of services and, with this in mind, sought to purchase the manuals from Gulfstream.

Gulfstream refused to sell the manuals to Camp. So, Camp went to its customers instead, asking them for copies of the manuals. Camp obtained the manuals from customers and copied parts of the manuals into its computers to facilitate its maintenance tracking operation.

The Gulfstream court examined the case under the fair use doctrine. The court found the purpose and character of the use of the manuals by Camp was commercial, and that the first factor

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<sup>4</sup> The requirement for a copyright notice as a prerequisite to asserting copyright protection was eliminated in 1989 after the United States signed the Berne Convention.

<sup>5</sup> By registering the copyright, you can obtain access to additional remedies, including statutory (money) damages and attorneys fees.

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weighed against Camp and in favor of Gulfstream.

The second element is important because it is the creative expression of the work the copyright law protects. Copyright law does not protect the underlying ideas. Under the second element, the court found the manuals were more factual than creative. In factual works, the structure is often driven more by the nature of the work than by the creativity of the author.<sup>6</sup>

Therefore, factual works fall further from the core of copyright protection than do other, more creative works, such as novels or films. Score one for Camp.

The amount and substantiality of use can be an important factor — if only a small amount of the work was duplicated, the impact on the commercial market for the work is correspondingly small. In this case, Camp

appeared to have copied 2,200 out of 12,000 pages from the Gulfstream manuals. While this weighed against Camp, the court noted even if Camp had used all 12,000 pages, it still would not necessarily swing the balance in Gulfstream's favor because the most important element was the fourth element.

In this case, the effect of the use on the market for the sale of manuals was clear. The owners had bought the copies — the “offending” copies were made for the benefit of Camp's business needs as a maintenance tracker. But Gulfstream already had made it clear it would not sell the manuals to Camp; thus, Gulfstream had signaled that Camp did not represent a potential customer for the sales of the manuals. Furthermore, Gulfstream conceded it would not have sold any more of the maintenance manuals but for Camp's infringement.

The court concluded, largely on the strength of the fourth element, that the fair use doctrine insulated Camp from liability for the apparent infringement of Gulfstream's copyright. The court noted, as an aside, that Gulfstream appeared to be using the copyright in the manuals as a means to secure elements of the maintenance aftermarket for itself. The court accused Gulfstream of seeking a judicially assisted monopoly, and the court expressed it would not support such an endeavor.

What does this mean for repair stations? First, it does not mean repair stations can duplicate copyrighted material with impunity. Copyrights are serious issues, and copyright infringement can be very expensive for the infringing company.

But the Gulfstream case does demonstrate that the courts will not sup-

port some assertions of copyright protection. It has become increasingly common for some companies in the aviation industry to assert intellectual property rights that may bear little or no relationship to the actual legal structure and scope of intellectual property law in the real world.

So, manufacturers need to be careful about recognizing the reasonable limits of intellectual property law, while repair stations need to be aware that intellectual property law does have its limits. If your business partner's intellectual property claims seem incredible, perhaps it is a good idea to get the opinion of an attorney with experience in intellectual property and aviation law.

Even AEA members with strong OEM relations occasionally must analyze their OEM contracts — at least at renewal time. Modern avionics dealer contracts tend to have a heavy emphasis on intellectual property rights. AEA members must be sure they are not giving up too many of the rights to which they are entitled. They also should be sure they are getting something in return from the dealer contract they couldn't otherwise obtain under the scope of the existing laws without a contract.

This sort of analysis benefits both the repair station and the manufacturer by providing them with an opportunity to form the best possible contract, one that allows both to grow and prosper together as partners.

I hope to see each and every one of you at the 50th Anniversary AEA International Convention & Trade Show from March 28-31, in Reno, Nev., where we will discuss the best ways to navigate the often turbulent tides of legal and regulatory compliance. □

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<sup>6</sup> In this case, the court recognized the structure of the manuals actually was dictated by the appendices to the regulations, and was further refined by the recommendations of ATA Spec. 100.