



**Policy Statement, PS-AIR-21.50-01: Inappropriate DAH
Restrictions on the Use and Availability of ICA**

Comments on the Draft Policy Statement
Announced at 76 Fed. Reg. 61999 (October 6, 2011)
And published online for public comment

Submitted to the FAA via email at john.cerra@faa.gov
and via the comment function at regulations.gov
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**Submitted by the
Modification and Replacement Parts Association
2233 Wisconsin Ave, NW, Suite 503
Washington, DC 20007**

**For more information, please contact:
Jason Dickstein
MARPA President
(202) 628-6777**



MODIFICATION AND REPLACEMENT PARTS ASSOCIATION

2233 Wisconsin Avenue, NW, Suite 503
Washington, DC 20007

Tel: (202) 628-6777
Fax: (202) 628-8948
<http://www.pmarpa.com>

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December 5, 2011

John Cerra, AIR-110
Federal Aviation Administration
Mike Monroney Aeronautical Center
6500 S. MacArthur Blvd.
ARB--Room 308
Oklahoma City, OK 73169

Dear Mr. Cerra:

The Modification and Replacement Parts Association would like to commend the FAA for its work in developing and drafting this Policy. Our specific comments follow.

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What is MARPA?

The Modification and Replacement Parts Association was founded to support PMA manufacturers and their customers. Aircraft parts are a vital sector of the aviation industry, and MARPA acts to represent the interests of the manufacturers of this vital resource before the FAA and other government agencies.

MARPA is a Washington, D.C.-based, non-profit association that supports its members' business efforts by promoting excellence in production standards for PMA parts. The Association represents its members before aviation policy makers, giving them a voice in Washington D.C. to prevent unnecessary or unfair regulatory burden while at the same time working with aviation authorities to help improve the aviation industry's already-impressive safety record.

MARPA represents a diverse group of manufacturing interests – from the smallest companies to the largest - all dedicated to excellence in producing aircraft parts.

MARPA members are committed to supporting airlines with safe aircraft components. MARPA members manufacture and sell aircraft components that provide equal or better levels of reliability when compared to their original equipment manufacturer competitors.

MARPA supports efforts to produce guidance that increase safety. MARPA applauds the FAA's efforts to establish fair and reasonable guidelines for reasonable ICA distribution methods.

Comments

The Modification and Replacement Parts Association would like to commend the FAA for its work in developing and drafting this Policy. This Policy appears to begin addressing some of the issues that have threatened to undermine safety by promulgating a reasonable interpretation of existing regulations that is consistent with the Administration's stated goals at the time those regulations were promulgated.

The industry has been discussing some of the problems with the ICA system for at least twenty years. Many of these issues relate to companies that misuse the practical monopolies associated with the ICA system to obtain unintended competitive advantage.

While the Draft Policy does not solve all of the issues, the Association believes that this Policy takes an important first step to restoring some reasonableness to the ICA system.

History and Background

The industry has always relied on product-level maintenance manuals published by the manufacturers of the products. These manuals were intended to provide certain baseline procedures for accomplishing maintenance and the maintenance industry relied on them for the purpose of accomplishing maintenance.¹

In 1980, the FAA recognized that some product manufacturers were not publishing adequate manuals.² In response, the FAA published three sets of important regulations.

First, in each of the airworthiness standards, the FAA published a requirement to publish Instructions for Continued Airworthiness (ICAs).³

Second, in each of the airworthiness standards, the FAA published appendices that explained what must be included (at a minimum), in these ICAs.⁴ These appendices also permitted the product manufacturers to rely on component maintenance manuals by incorporating them by reference.⁵ These appendices also required the product manufacturers to have a method for distributing the ICAs (and any amendments).⁶ The method for distributing the ICAs must be acceptable to the Administrator.⁷

¹ See Airworthiness Review Program—Amendment No. 8A: Aircraft, Engine and Propeller Airworthiness, and Procedural Amendments, 45 FR 60154 (Sept. 11, 1980) (finding recommended maintenance procedures made available under then-current regulations were frequently inadequate, and that lack of such recommended maintenance procedures could best be remedied by requiring they be made available to owners and operators.)

² *Id.*

³ See, e.g., Airworthiness Standards: Normal, Utility, Acrobatic, and Commuter Category, Instructions for Continued Airworthiness, 14 C.F.R. § 23.1529 (as amended, Sept. 11, 1980) (“The applicant must prepare Instructions for Continued Airworthiness in accordance with appendix G to this part that are acceptable to the Administrator.”). See also 14 C.F.R. § 25.1529 (Requiring instructions acceptable to administrator for transport category airplanes); 14 C.F.R. § 25.1729 (Requiring instructions acceptable to administrator for transport category airplanes with Electrical Wiring Interconnection Systems); 14 C.F.R. § 27.1527 (Requiring instructions acceptable to administrator for normal category rotorcraft); 14 C.F.R. § 29.1529 (Requiring instructions acceptable to administrator for transport category rotorcraft); 14 C.F.R. § 31.82 (Requiring instructions acceptable to administrator for manned free balloons); 14 C.F.R. § 33.4 (Requiring instructions acceptable to administrator for aircraft engines); 14 C.F.R. § 35.4 (Requiring instructions acceptable to administrator for propellers).

⁴ See, e.g., 14 C.F.R. Part 23, Appx. G, G23.3 (“The Instructions for Continued Airworthiness must contain the following manuals or sections, as appropriate, and information” and listing minimum requirements.) See also 14 C.F.R. Part 25 Appx. H; 14 C.F.R. Part 27 Appx. A; 14 C.F.R. Part 29 Appx. A; 14 C.F.R. Part 31 Appx. A; 14 C.F.R. Part 33 Appx. A; 14 C.F.R. Part 35 Appx. A.

⁵ See, e.g., 14 C.F.R. Part 25 Appx. H, H25.3(b) (“[T]he applicant may refer to an accessory, instrument, or equipment manufacturer as the source of this information if the applicant shows that the item has an exceptionally high degree of complexity requiring specialized maintenance techniques, test equipment, or expertise”).

⁶ See, e.g., 14 C.F.R. Part 25 Appx. H, H25.1(c) (“The applicant must submit to the FAA a program to show how changes to the Instructions for Continued Airworthiness made by the applicant or by the manufacturers of products and appliances installed in the airplane will be distributed”).

⁷ See *id.*

The third major element of this ICA regulatory system is a regulation requiring the manufacturer producing the ICA to make the ICA available to certain parties who are required to comply with the ICA.⁸ This complements the FAA-acceptable ICA distribution system by clarifying that certain parties are entitled to be beneficiaries of the distribution system.

The FAA has also published complimentary regulations requiring reference to these ICAs, like 14 C.F.R. 145.109, which requires repair stations to have these ICAs.⁹

The industry ran into an issue when certain manufacturers began to deny entitled parties the privilege of access to the manuals, unless the entitled parties agreed to forbear from doing business with certain competitors, or agreed to forbear from using certain types of FAA approved articles (like FAA-PMA approved parts) or FAA approved data (like FAA-DER approved repairs).¹⁰

This has had the effect of stifling competition, inhibiting innovation, and undermining safety advances. In some cases, where such pledges were unreasonable, it has put maintainers in the difficult position of having to find alternative sources for such ICA data, even though those maintainers were entitled to the ICAs. This undermines safety by creating an opportunity for the use of outdated maintenance practices and by undermining uniformity.

Intellectual Property and Recent Court Decisions

Manufacturers are required to make ICAs available.¹¹

MARPA has heard certain manufactures argue that anti-competitive licensing agreements restricting the use or distribution of the manuals are somehow justified as legitimate licensing of copyrighted material. This intellectual property argument appears to lack support under the law.

Where ICAs are protected by a valid copyright, the courts have concluded that the Fair Use Doctrine permits copying for certain maintenance purposes.¹² One reason for this is because once an idea or method is set down on paper, the copyright laws

⁸ 14 C.F.R. § 21.50(b) (“[T]he holder of a design approval must make those instructions [for continued airworthiness] available to any other person required by this chapter to comply with any of the terms of those instructions.”).

⁹ 14 C.F.R. § 145.109 (d) (“A certificated repair station must maintain, in a format acceptable to the FAA, the documents and data required for the performance of maintenance, preventive maintenance, or alterations under its repair station certificate and operations specifications in accordance with part 43. The following documents and data must be current and accessible when the relevant work is being done: . . . (2) Instructions for continued airworthiness . . .”).

¹⁰ See generally, FAA Policy Statement PS-AIR-21.50-1: Inappropriate DAH Restrictions on the Use and Availability of ICA (Oct. 6, 2011).

¹¹ E.g. 14 C.F.R. § 21.50(b).

¹² See Gulfstream Aero. Corp. v. Camp Sys. Int'l, 428 F. Supp. 2d 1369, 1377-78 (S.D. Ga. 2006).

protect the text used to express the idea or method but they do not confer any exclusive rights with respect to the use of those ideas or methods.¹³

The copyright laws protect the author's ability to profit from the sale of the published work (the ICA).¹⁴ They do not protect the author's ability to profit from sale of another related product (like the products or articles that may be maintained under those instructions).

In recent cases, courts have explained that an attempt to use a copyright to secure a competitive advantage in the market for a good other than the copyrighted work is considered to be copyright misuse.¹⁵ Anti-competitive licensing agreements may reflect "copyright misuse."¹⁶ Copyright misuse may reflect a defense to claims of breach of licensing agreement related to a license for a copyrightable work.¹⁷

The FAA's Policy against misuse of ICA for competitive gain in contravention of safety policy is consistent with the decisions suggesting copyright misuse in similar situations.

The FAA Policy

The FAA imposes an obligation on the publishers of ICAs to create a mechanism for distribution of those ICAs.¹⁸

¹³ Santilli v. Cardone, 88 U.S.P.Q.2D (BNA) 1685, 2008 U.S. Dist. LEXIS 88668 at *8 (M.D.FL. 2008) ("The Copyright Act contains no prohibition against the use of another's ideas"); Boyle v. United States, 44 Fed. Cl. 60, 63 (1999) ("a copyright does not preclude others from using ideas found in a copyrighted work").

¹⁴ SAFT may argue that they can control "performance." One of the rights enjoyed by a copyright holder is the right to exclude others from performing the copyrighted work publicly; however that right only applies to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works." 17 U.S.C. § 106(4). This "performance" right is explicitly limited and it does not apply to other types of works, like maintenance manuals. Controlling the use of the maintenance manuals is not one of the privileges conferred by copyright.

¹⁵ Lasercomb America, Inc. v. Reynolds, 911 F.2d 970, 979 (4th Cir. 1990) (finding copyright misuse where a software licensing agreement attempted to use a software copyright to control competition in an area outside the scope of the copyright); see Vernor v. Autodesk, 621 F.3d 1102, 1115-16 (9th Cir. 2010) (explaining that copyright misuse is an equitable defense to copyright infringement).

¹⁶ Lasercomb America, Inc. v. Reynolds, 911 F.2d 970, 979 (4th Cir. 1990) (explaining the rationale for copyright misuse and finding copyright misuse where a software licensing agreement attempted to use a software copyright to control competition in an area outside the scope of the copyright); see Vernor v. Autodesk, 621 F.3d 1102, 1115-16 (9th Cir. 2010) (explaining that copyright misuse is an equitable defense to copyright infringement and remanding for review of the copyright misuse defense in the context of a claim of licensing agreement breach).

¹⁷ Id.

¹⁸ See, e.g., 14 C.F.R. Part 25 Appx. H, H25.1(c) ("The applicant must submit to the FAA a program to show how changes to the Instructions for Continued Airworthiness made by the applicant or by the manufacturers of products and appliances installed in the airplane will be distributed").

The FAA has retained the power to influence the mechanisms for distribution of ICAs, by insisting that such mechanisms must be submitted to the FAA, thus providing a mechanism for assessing the acceptability of the distribution mechanisms.¹⁹

The Draft FAA Policy provides guidance for what will be considered acceptable and what will be considered unacceptable when the ICA distribution mechanism is submitted to the FAA.

The Draft FAA Policy remedies past impediments to reasonable distribution of ICAs by making it clear that the publishers of such ICAs may not impose conditions on the distribution of those ICAs that contradict FAA approvals or undermine aviation safety.

MARPA Supports the FAA Policy

MARPA believes that the Policy Statement issued by the FAA for comment reflects past industry practices, and that it further reflects the FAA's clear expectations at the time that the ICA regulations were updated, thirty years ago.

The intent of the regulations has always been that manufacturers will publish ICAs that are then used by the industry, and such manuals cannot be used unless they are reasonably distributed. This was intended to support safety. This was never intended to provide manufacturers with a monopoly right that could be leveraged in order to gain anti-competitive advantage in other fields.

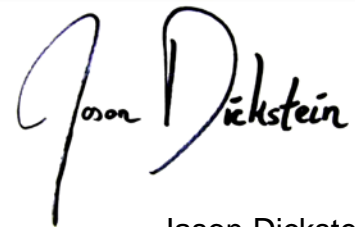
MARPA has strongly urged its members to make their ICAs readily available to the industry, and MARPA appreciates the FAA's efforts to support this same recommendation through the regulations and interpretations.

¹⁹ *Id.*

Conclusion

Thank you again for publishing this important policy guidance. Your attention to this issue is greatly appreciated.

Respectfully Submitted,

A handwritten signature in black ink that reads "Jason Dickstein". The signature is written in a cursive style with a large, looped initial "J" and "D".

Jason Dickstein
President
Modification and Replacement Parts Association