LEGAL EASE
AVIATION LAW MADE SIMPLE

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2008: An Export Odyssey

Recently, several AEA members expressed some concerns regarding U.S. export laws and the manner in which they have been used to prevent certain avionics and other articles from being exported. I've been working with U.S. export laws for many years; however, I did not realize what a complicated web of international intrigue I would be entering into following up on their inquiries.

The subject of their inquiries is the C-12 gyro. Barry Aylward, president of Kitchener Aero in Canada and vice chairman of the AEA board of directors, was good enough to educate me about this gyro. Here is what he had to share with me:

- "The C-12 was designed to work accurately over more of the earth than any other system, specifically polar operations. It has been the (first-choice gyro) for survey operators globally as well as operators in the polar regions for a very long time."
- "I have an old C-12 brochure dated 1972. If they were marketing this system in 1972, it was literally designed in the 1960s. And I honestly suspect that this was designed as a civilian system, or at least a dual-purpose (civilian/military) system from the outset."
- "It is legacy spinning mass technology, and is not a 'strapdown,' or AHRS, or inertial reference system."

Armed with this information, we were faced with the task of determining how to export this gyro. Unfortunately, the gyros appeared to be trapped in the United States like Odysseus trapped by Calypso on the island of Ogygia.

Aircraft parts exported from the U.S. generally fall into one of two categories: items subject to State Department export controls because they are considered defense-related items; or items subject to Commerce Department export controls because they are not considered defense-related items.

An export is considered to fall under the jurisdiction of the State Department if it is found in the United States Munitions List (USML), a list of types of articles found in the International Traffic in Arms Regulations (ITARs).

Most exporters would prefer Commerce Department jurisdiction under the Export Administration Act rather than State Department jurisdiction because nearly everything subject to State Department export jurisdiction requires an export license; whereas, the Commerce Department requires licenses for a relatively small percentage of the items under its export jurisdiction.

Furthermore, where a license is needed, the Commerce Department issues licenses more expeditiously than the State Department and it has a number of useful license exceptions, which can ease the process of exporting an aircraft component.

The Commerce Department, with its more export-friendly approach, is truly the Hermes of our "Export Odyssey." Unfortunately, while Hermes was able to persuade Calypso to release Odysseus in the "Odyssey," the Commerce Department has been less successful in its persuasive efforts aimed at the State Department.

Aylward's description suggests the C-12 does not fall under certain categories of the USML — but clearly, someone thought it fit into one of the USML because Honeywell lists it as a USML item subject to State Department export jurisdiction.

Gyros often are classified under USML provisions. In fact, just a few years ago, a number of large aerospace companies faced enforcement action for exporting certain solid-state gyros used in civilian aircraft installations but which had been designated as defense-related articles by the State Department. One reason gyros may be classified as USML items is because the USML includes various inertial systems designed, modified or configured for military use, as well as the parts of such systems.

This lead to an important question: Was the C-12 used in any avionics offered as original (production) equipment in aircraft, such that the C-12 might be included in the type design?

The reason for seeking this information was because there is a provision of law stating any product "which

is standard equipment, certified by the Federal Aviation Administration, in civil aircraft and is an integral part of such aircraft" falls exclusively within the export control of the Export Administration Act (EAA).

The Civil Aircraft Exception under the EAA means most civil aircraft parts could not be subject to control under the Arms Export Control Act (the act authorizing the issuance of the ITARs), and instead are subject to the jurisdiction of the Commerce Department.

Confused yet? It gets worse.

The EAA provision concerning civil aircraft parts carries with it quite a bit of controversy, and some State Department personnel do not like it. Technically, the State Department is powerless to do anything about it because it is a matter of statutory (not regulatory) law, but it has been exploiting the vagueness and lack of precision in the statutory language to exert jurisdiction over items that are part of civil aircraft technology.

For example, the State Department has exerted jurisdiction over QRS-11 gyros ("micro-machined angular rate sensor") found in civilian avionics. While it allows QRS-11 gyros specifically destined for commercial standby instrument systems to be subject to Commerce Department export jurisdiction, the exception is narrowly drawn.

In response to the QRS-11 issue, on Sept. 24, 2007, Congressman Don Manzullo (R-Ill.) introduced the Defense Trade Controls Performance Improvement Act of 2007 (H.R. 4246). In this bill, Manzullo seeks to increase the number of State Department staff devoted to reviewing and granting license applications to speed up the export licensing process for USML/ITAR items.

This bill includes a detailed plan for handling civil aircraft parts:

a) Export Controls Under Jurisdiction of Department of Commerce — Subject to subsections (b), (c) and (d), any civil aircraft product that was included in the type design of a type certificate for a civil aircraft issued by the Federal Aviation Administration under Part 21 of Title 14, Code of Federal Regulations, on or before the date of the enactment of this Act, shall be subject to the exclusive jurisdiction of the Department of Commerce and shall not be subject to controls under section 38 of the Arms Export Control Act (22 U.S.C. 2778).

b) Revision To Export Controls — Not later than 180 days after the date of the enactment of this Act, the Secretary of State and the Secretary of Commerce shall promulgate regulations and publish in the Federal Register amendments, as appropriate, to the Commerce Control List or the United States Munitions List, or both, specifying any civil aircraft product described in subsection (a) that requires additional or different export controls than the export controls described in such subsection.

c) Export Controls Under Jurisdiction of Department of State — Any civil aircraft product that has a lethal military end-use, is currently subject to a license issued by the Department of State, is determined to be subject to the jurisdiction of the Department of State as a result of a commodity jurisdiction determination, or is an anti-missile defense item, including a special mission system installed on United States commercial aircraft for anti-missile defense, shall be subject to the jurisdiction of the Department of State unless determined otherwise by the Secretary of State.

d) Waiver — The President shall waive the application of any provision of this section with respect to any civil aircraft product for which the President determines that exercising such waiver is in the national security interests of the United States.

e) Civil Aircraft Product Defined — In this section, the term "civil aircraft product" means:

1) a Class I product, Class II product or Class III product, as defined in Section 21.321(b) of Title 14, Code of Federal Regulations (as in effect on June 1, 2007); and

2) any part, component or related technical data of a product described in paragraph (1).

This change would help clarify the ambiguities in the current law, but it still includes a specific limitation that might be too broad. It is limited only to items included in the type design of a type certificate for a civil aircraft on or before the date of the enactment of the law. This means future items included in TCs issued after the date of enactment would not be covered — which could be a real long-term problem for U.S. aviation exports.

Another important problem is the fact there is some history of limited reading of laws such as this. Under U.S. law, a supplemental type certificate consists of the FAA's approval of a change to type design and also the original TC itself. (See 14 C.F.R. section 21.117(b).)

There is a real threat the export laws will continue to be read in such a way as to ignore STCs as a potential basis for finding the FAA has issued design approval for the articles installed under the approved data of the STCs.

What lessons do we learn from this odyssey?

Well, for one, it is important to examine your avionics article and their parts to make sure you comply with the appropriate export laws when you export these items.

We also have an opportunity to examine the progress of legislation, which clearly will affect the avionics

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industry; although, whether it helps the industry depends ultimately on the final language that makes it through the House of Representatives.

The good news is, there are a few members of Congress who are paying attention to this issue. Congressman Manzullo could well play the role of Zeus in our odyssey, rallying the remainder of Olympus to the aid of our exports. However, he also could play the role of the Neptune, if he is not careful, promoting statutory language that still remains imprecise and whose imprecision threatens to dash our exports against the rocks of the ITARs.

The bad news is, the proposed language does not adequately permit export under Commerce Department standards of certain parts that are normal components of civilian avionics.

The even worse news is, without a gentle (or not so gentle) push from citizens with an interest in aviation, the Manzullo legislation is unlikely to go anywhere. Unless the bill begins to receive more support, it threatens to be nothing more than a siren call, distracting us from our goal of achieving a reasonable export regime. ❑

If you have comments or questions about this article, send e-mails to avionicsnews@aea.net.