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Bogus Aircraft: Offenses and Defenses

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BOGUS AIRCRAFT: OFFENSES AND DEFENSES

JAMES L. BURT, III*

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I. INTRODUCTION

FOR MANY YEARS, the aircraft industry¹ and the Federal Aviation Administration (FAA)² have acknowledged that counterfeit, or "bogus," aircraft are a serious problem for both the industry and the flying public.³ The problem manifests itself not merely in reduced sales of new aircraft but also in higher insurance costs, criminal conduct, death, bodily injury, and

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¹ See John J. Lord, Jr., Use of Data Plates in Rebuilding Aircraft, Address at the Organization of Flying Adjusters Conference (1985) (unpublished manuscript, on file with Bell Helicopter Textron Inc.); Robert L. Parrish, *The Dataplate Swindle*, AVIATION CONSUMER, Nov. 1, 1984; Robert L. Parrish, *The Burgeoning Bogus Aircraft Business*, BUS. & COM. AVIATION, Jan. 1985, at 64.

² See 14 C.F.R. § 45.13(b-e) (1995) [hereinafter Prohibition on Removal of Identification Data]; FAA Order No. 8050.4, ¶ 3 (Nov. 21, 1984).

³ See HOTLINE (newsletter of the Aeronautical Repair Station Association), Nov. 1995 (citing *Bogus Parts Racket Grows*, AVIATION NEWS, 1961) ("As a result of the continuing appearance of bogus aircraft and engine parts in trade channels, the Federal Aviation Administration suggests that aircraft owners and operators be doubly sure of their source of supply.") (on file with author).

property damage. This Article will describe the problem and what some manufacturers are attempting to do to address it.

II. WHAT IS MEANT BY "BOGUS" AIRCRAFT?

A "bogus" or "counterfeit" aircraft is one in which the owner, maker, or seller of the aircraft intends "to cause confusion, or to cause mistake, or to deceive."⁴ This type of counterfeiting is accomplished through the use of trademarks, data plates, configuration, or other means of documentation. Counterfeit aircraft may be fabricated from military surplus hulls, parts salvaged from accidents, or new, used, and spare parts. Such aircraft may be distinguished as counterfeit by the maker's effort to deceive the government, the buyer, the service customer, or the original manufacturer. As one court observed regarding counterfeit non-aviation parts, "In other words, after your Mustang has been squashed into a metal cube by the wrecker, you cannot rebuild a Mustang from the scrap and sell it as a 'used Ford Mustang', even though it was once a Mustang."⁵

Although the counterfeiting of aircraft is not a problem unique to Bell Helicopter Textron Inc. and its helicopter designs and models, the problem may be disproportionately manifested in Bell helicopters as a result of the large number of Bell commercial and military—especially military surplus—helicopters. This author has, however, seen or heard reports of counterfeiting of McDonnell-Douglas, Sikorsky, Beech,⁶ Lear,⁷ and Eurocopter⁸ products.

The susceptibility of aircraft to counterfeiting stems primarily from the following three circumstances: First, all aircraft certified in the normal, utility, acrobatic, commuter, or transport categories in the United States⁹ are required by Federal Aviation Regulations to be identified by means of a fireproof identification plate, affixed to the aircraft in such a way that it cannot be

⁴ 15 U.S.C. § 1114(1)(b) (1995).

⁵ *In re Circuit Breaker Litig.*, 852 F. Supp. 883, 892 (C.D. Cal. 1994).

⁶ A Beech *Musketeer* that had broken up in flight was found to have been the structural test article used for certification.

⁷ Two different Lear Jet models that crashed had apparently been stitched into one aircraft. The certificate of airworthiness was eventually withdrawn.

⁸ For example, one Eurocopter, labelled BO105S, serial number S895, was reported as destroyed on January 6, 1994, after striking power lines and crashing inverted. The aircraft was later reported to have been involved in another power line incident on November 29, 1995.

⁹ Airworthiness Certificates, 14 C.F.R. § 21.175 (1995).

readily defaced or removed during normal service.¹⁰ Second, military surplus, crash damaged, salvaged, and other used parts are widely and cheaply available.¹¹ Third, insurers that have paid total losses on hulls have routinely sold the data plates and historical records of the destroyed aircraft.¹² Examples of circumstances two and three, above, include the following:

BEST PRICE FOR YOUR RUNOUT or crash damaged Enstrom or parts. Call Spitfire Helicopter Co., Jack Fetsko, (610)565-2986, (610)869-2484, FAX (610)566-3621, (610)869-7764.¹³

AS350 BII, DATA PLATE with airframe log book, 1100 hrs TSN. (919)255-0000; FAX (919)255-0001.¹⁴

\$\$ WANTED DEAD OR alive, cash for your damaged and surplus helicopters, parts, wreckages, turbine engines, anywhere. Call anytime (716)384-5333 or write Dennis Clarcq, RD 1, Cohocton, New York 14826. FAX (716)384-5080.¹⁵

Some case histories of specific helicopters may be instructive:

Example 1: A Bell commercial helicopter, Model 204B, serial number 2057, was delivered on April 20, 1967, and crashed four months later on August 18, 1967, near Seldovia, Alaska. The owner advised the FAA that the aircraft was completely destroyed by fire and requested its deregistration. In January 1968 a salvage buyer applied for registration of the helicopter. The FAA advised the buyer that the prior owner had reported the ship as wrecked and burned beyond repair, but "if the helicopter has been rebuilt and you wish to have [the same number] assigned," please send \$10.00.¹⁶ The helicopter was remanufactured using a heavily modified military cabin structure before crashing twice more. A bystander injured by the debris from the second crash sued Bell and the operator. In the subsequent law-

¹⁰ Identification and Registration Marking, 14 C.F.R. § 45.11(a) (1995).

¹¹ See, e.g., any issue of TRADE-A-PLANE which provides examples of used parts offered for sale.

¹² FAA Order No. 8050.4, ¶ 3.b. (Nov. 21, 1984). For another example, consider this entry in the FAA title file: "Aircraft destroyed/scrapped. Insurance company sold salvage." FAA Title File (Dec. 20, 1985) (referencing Bell Model 204B, serial number 2025). As will be discussed in more substantial detail below, this was the second reported destruction of this same aircraft.

¹³ TRADE-A-PLANE, Jan. 3, 1995, at 99 (on file with author). As this and the following examples suggest, the problem is not specific to one manufacturer. Neither the author nor Bell Helicopter Textron is aware of any fact which suggests any impropriety on the part of the advertiser.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ This example is taken from a case file in the author's possession.

suit, the jury exonerated Bell after lengthy deliberations.¹⁷ The jurors later reported that they were troubled over why Bell did not inform the operator that he had purchased a helicopter that had been previously destroyed.¹⁸

Example 2: A Bell commercial helicopter, Model 204B, serial number 2025, was delivered on July 15, 1965, and destroyed by fire fifteen years later near Detour Lake, Ontario. The ownership of the data plate was transferred from Canada to the United States on May 5, 1981, at which time the logbook reflected a total aircraft time of 9805.9 hours. An FAA inspector out of the Northwest Flight Standards District Office (FSDO) signed a normal category airworthiness certificate for the aircraft. In September 1985 the helicopter was destroyed in an accident near Clovis, California which was never officially reported. The aircraft was subsequently deregistered with the notation, "Aircraft destroyed/scrapped. Insurance company sold salvage."¹⁹ In this example, although not unusual in these types of matters, the insurer obtained a signed, but otherwise blank, bill of sale from its insured so that the insured would not appear in the chain of title.²⁰ The FAA title file reflects that the data plate subsequently passed through the hands of at least four other owners before crashing on May 27, 1994, near Libby, Montana. Subsequently, the data plate was sold for \$75,000 to yet another owner who stated an intention to remanufacture it again.²¹ A suit was filed as a result of the 1994 accident and is still pending. It should be noted that a military surplus helicopter can be operated commercially for special purpose operations under a restricted category certification.²² The only reason to

¹⁷ *Id.*

¹⁸ Of anecdotal interest is that the referenced aircraft was subsequently destroyed on two additional occasions: on June 14, 1981, near Ketchikan, Alaska, and on October 24, 1985, near Gerlos Platte, Austria. Bell obtained the data plate from the Austrian authorities and destroyed it.

¹⁹ FAA Title File, *supra* note 12.

²⁰ Interview by the author with the former owner and insurer. *See also* Lord, *supra* note 1.

²¹ Interview between the author and current owner. This owner has subsequently reported that he has experienced a change of heart as a result of seeing an advance copy of this Article and intends to return the data plate to Bell for retirement.

²² Issue of Type of Certificate: Restricted Category Aircraft, 14 C.F.R. § 21.25 (1995). Under this provision, the owner must establish that no feature or characteristic of the aircraft makes it unsafe when it is operated under the limitations prescribed for its intended use. *Id.* The requirements for a standard category type certificate are much more stringent, essentially requiring the owner to estab-

recycle a commercial data plate is to expand the range of permitted uses, thereby increasing the resale value of the hull to which it is attached.

Example 3: Bell Helicopter Textron ceased manufacture of its Model 47 series helicopters in 1974, but has continued to support them with spare parts, revisions to maintenance instructions, and safety bulletins. In 1977 Bell issued an Alert Service Bulletin for installation of a retrofit kit providing for fiberglass-wrapped fuel tanks and breakaway fuel lines to enhance the fire crashworthiness of Model 47. No airworthiness directive was issued. After that event, but prior to July 1982, an entity calling itself "Olympic Helicopters" assembled a helicopter to the specifications of a Bell Model 47 from spare, new, and surplus parts acquired from various sources. Olympic did not install the fuel system kit. It did, however, obtain certification for this aircraft under the provisions of FAA Advisory Circular 45-2A.²³ This helicopter crashed and burned. In the resulting product liability lawsuit, the trial court granted a directed verdict in favor of Bell, which was upheld by the Sixth Circuit on the grounds that Bell was not the manufacturer of the aircraft.²⁴ Although the manufacture of this helicopter was not in itself an act of counterfeiting, this example illustrates some of the legal challenges associated with counterfeit aircraft.

III. SAFETY ISSUES

Counterfeit practices concern original manufacturers of aircraft because of the threat to sales of new commercial aircraft and the potential risk of increased litigation. One might well ask why anyone else should be concerned. The most significant consideration is safety. There are also obvious arguments to be made that this practice damages the nation's industrial base by reducing the market for new helicopters. This drives up the cost of helicopters and spare parts and, thus, of operations for legitimate operators and their customers by increasing the costs

lish compliance with the original regulations applicable for type certification at the time the aircraft was accepted by the military. Issue of Type of Certificate: Surplus Aircraft of the Armed Forces, 14 C.F.R. § 21.27 (1995). The FAA has published a Notice of Proposed Rule Making for the abolition of this latter provision. 59 Fed. Reg. 19,114 (1994) (proposed Apr. 21, 1994).

²³ FED. AVIATION ADMIN, ADVISORY CIRCULAR 45-2A: IDENTIFICATION AND REGISTRATION MARKING (1992).

²⁴ Goldsmith v. Olon Andrews, Inc., 941 F.2d 423, 427 (6th Cir. 1991).

of insurance and other liability-associated expenses. These costs, however, are not the only considerations.

Example 3 illustrates one of many safety concerns. In the case of helicopters manufactured from scratch in someone's garage, there is a high likelihood of some nonconformity with the production certificate holder's quality or safety requirements. In cases where commercial data plates are placed on military surplus hulls built by the same manufacturer and the original tools, processes, and materials are probably the same, why should there be a discrepancy in safety? Why, in fact, should anyone bother to put the commercial data plate on the military hull if both can be operated commercially? Why is it that "[t]he FAA believes that the practice of rebuilding a wrecked aircraft by replacing almost the entire aircraft and affixing the identification plate which was recovered from the wreckage is not in the public interest?"²⁵

The usual commercial certification basis of military surplus aircraft permits only "special purpose operations"²⁶ such as logging, fire-fighting, and mineral exploration, but not the carriage of passengers for hire. As a result of this, along with other factors such as age, condition, and plentiful availability (compared to the superficially similar commercial models), military surplus helicopters typically are available at very low prices. This situation allows for such a minimal initial capital investment that an almost expendable class of helicopters is created. They are literally given away to local and state governments by the Department of Defense. Both military surplus helicopters and their counterfeit counterparts are found disproportionately in such duties, which are among the most dangerous mission profiles available for helicopters in commercial operation.²⁷ The contract and utilization rates for passenger-carrying helicopters available from the U.S. Forest Service and the Department of the Interior substantially exceed those for restricted category aircraft.

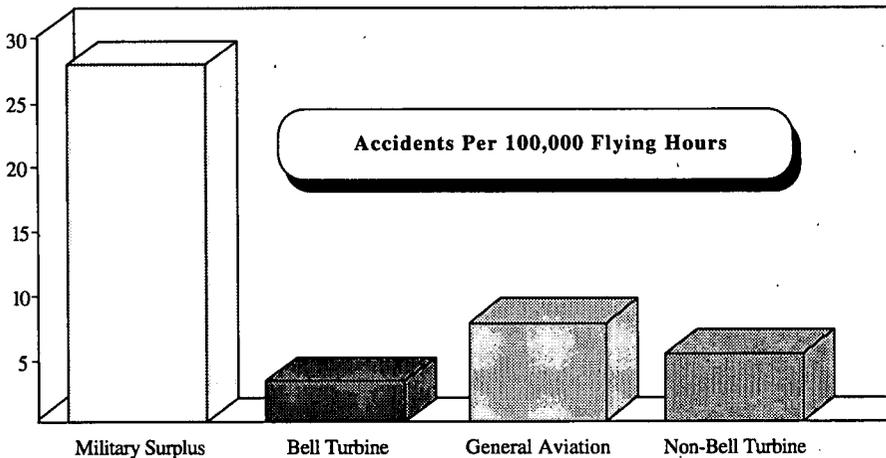
Canada, a major market for older medium helicopters, does not permit importation and commercial operation of military surplus helicopters due to the relative scarcity, higher earning power, and original purchase price. Consequently, commercial

²⁵ Prohibition on Removal of Identification Data, *supra* note 2, at 45,379.

²⁶ 14 C.F.R. § 21.25. See *supra* note 22 and accompanying text.

²⁷ See *Risk for Traumatic Injuries from Helicopter Crashes During Logging Operations—Southeastern Alaska, January 1992-June 1993*, 43 MORBIDITY & MORTALITY WKLY. REP. 472 (July 8, 1994).

helicopters have a higher market value than otherwise equivalent military surplus aircraft. Consequently, an instant profit is thereby created by the conversion of a military surplus to a commercial helicopter. At the same time, the available data suggests that there is a direct relationship between the amount of capital investment in a helicopter and the care with which it is maintained and operated, as can be seen from Figure 1.²⁸ As a result, military surplus machines create a very high risk not only to the flying public but also to their original manufacturers, which are the usual targets when lawsuits result from accidents.



IV. CRIMINAL AND REGULATORY SANCTIONS

The Federal Register states that “[t]he only person authorized to rebuild an aircraft is a person who manufactured it under a type or production certificate.”²⁹ Federal Aviation Regulations (FAR) provide that a licensed mechanic³⁰ or repair station³¹ can *repair* an aircraft, while only a manufacturer or production certificate holder may *rebuild* one.³² FAR part 45³³ was amended

²⁸ USA Accident Rates—Data Supplied by NTSB/FAA 1989-1992. The military surplus data was provided by Bell worldwide experience in the UH-1 series Jan. 1993-Sept. 1994.

²⁹ Prohibition on Removal of Identification Data, *supra* note 2, at 45,379; *see also* 14 C.F.R. § 43.3 (1995).

³⁰ 14 C.F.R. § 43.3(b).

³¹ *Id.* § 43.3(e).

³² *Id.* § 43.3(i) (emphasis added).

³³ Prohibition on Removal of Identification Data, *supra* note 2, at 45,379.

effective September 4, 1979, to "explicitly prohibit any person from removing, changing, or placing information on aircraft, aircraft engines, or propeller ID plates required by FAR section 45.11, and from installing or removing such ID plates without the approval of the Administrator" of the FAA.³⁴ Persons violating these sections are subject to a civil penalty not to exceed \$1000 for each such violation³⁵ and another penalty of up to \$10,000 for falsely representing their actions to the FAA.³⁶ There are also penalties for falsification of records and failure to file reports.³⁷ In addition, these actions carry criminal sanctions of title 18 fines and up to three years imprisonment.³⁸ These laws are not distinguished by their frequent enforcement. The only reported decision regarding a conviction for displaying false marks³⁹ is one involving a pilot and copilot who crudely altered the registration number on their airplane's exterior with tape and used the altered number in radio calls.⁴⁰

A person, firm, or corporation which violates either of those regulations and then falsely represents that the aircraft was manufactured by the original manufacturer as denoted by the data plate of the aircraft will violate one or more federal penal statutes, including the following:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.⁴¹

It is not a necessary element of this offense that the false statements and concealment of material facts be made to the FAA or any other federal agency, since the regulation and certification of aircraft is a matter "within the jurisdiction" of a federal

³⁴ FAA Order No. 8050.4, ¶ 3.a (Nov. 21, 1984).

³⁵ 49 U.S.C.A. § 46301(a) (West 1995).

³⁶ *Id.* § 46302(a).

³⁷ *Id.* § 46313.

³⁸ *Id.* § 46306(b).

³⁹ *Id.* § 46306(b)(3). *But see* Cutler-Hammer, Inc. v. Standard Relay Corp., 328 F. Supp. 868 (S.D.N.Y. 1970) (illustrating a successful civil action against persons who altered used military surplus relays to appear as new).

⁴⁰ United States v. Niver, 689 F.2d 520, 529-30 (5th Cir. 1982).

⁴¹ 18 U.S.C. § 1001 (1994).

agency.⁴² An almost inevitable corollary of any attempt to certify an aircraft remanufactured or altered in violation of the FAR is the creation and submission of papers containing false statements.⁴³ This action constitutes another violation.⁴⁴ Similarly, it is rare that a scheme using telephone, mail, or other media of communication would not render the perpetrator liable to prosecution for wire fraud⁴⁵ or mail fraud.⁴⁶

Offenses used by the Department of Transportation's (DOT) Office of the Inspector General (OIG) to prosecute bogus parts suppliers include the following: 1) aiding, abetting, or willfully causing an offense against the United States;⁴⁷ 2) endangering the safety of aircraft in flight;⁴⁸ 3) conspiring to commit an offense against the United States;⁴⁹ 4) interstate transportation of stolen property valued in excess of \$5000 with intent to defraud;⁵⁰ and 5) making a false declaration on U.S. Customs documents.⁵¹ This list of offenses is not exclusive. Rather, it indicates that in recent years the DOT's OIG has increased its focus on these types of problems.⁵²

There have been a number of instances in which a counterfeit commercial aircraft, created by placing a commercial data plate on a military surplus hull, enabled the counterfeiter to obtain insurance—either directly or as loss payee on a financing arrangement with the customer—for the counterfeit aircraft at an agreed hull value of four or more times the value of the military hull. This value is an even larger multiple of the counterfeiters' actual investment. When the counterfeit aircraft subsequently crashes, the insurance is collected at the inflated price. Under this scheme, it is not really necessary for the operators of counterfeit aircraft to make a profit on their operations because the profits of what the victims of this practice have called insurance

⁴² *Id.*; see, e.g., *United States v. Murphy*, 935 F.2d 899, 900 (7th Cir. 1991); *United States v. Brack*, 747 F.2d 1142, 1150-51 (7th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985).

⁴³ See, e.g., *Murphy*, 935 F.2d at 900; *Brack*, 747 F.2d at 1146-47.

⁴⁴ See 18 U.S.C. § 1002 (1994).

⁴⁵ *Id.* § 1343.

⁴⁶ *Id.* § 1341.

⁴⁷ *Id.* § 2.

⁴⁸ *Id.* § 32.

⁴⁹ *Id.* § 371.

⁵⁰ *Id.* § 2314.

⁵¹ *Id.* § 542.

⁵² A. Mary Schiavo, *Misfits in the Sky: The Bogus Parts Problem*, Address Before the American Bar Association in ABA TIPS National Institute on Litigation in Aviation (Oct. 6, 1995).

fraud are so enormous. At least one such occurrence is the subject of pending civil litigation in California.⁵³

Unlike such offenses as the fraudulent use of the 4-H Club emblem⁵⁴ or "Woodsy Owl,"⁵⁵ the fraudulent use of a specific aircraft manufacturer's data plate is not the subject of its own special federal criminal statute.⁵⁶ The trademark laws, however, provide civil penalties payable to the trademark owner for the use of registered marks in a manner likely to confuse or deceive,⁵⁷ or for a "false designation of origin."⁵⁸ The penalties include the payment of defendant's profits, plaintiff's damages, and the costs of the action.⁵⁹ Other persons injured by this deception may have a civil action for false description of goods,⁶⁰ and multiple, intentional violations of the trademark laws may subject the perpetrator to penalties of up to twenty years in prison and five million dollars in fines.⁶¹

Repeated offenses of this nature—and it is also clear that the counterfeiting of one helicopter can open a person to prosecution for multiple offenses—can give rise to prosecution under the anti-racketeering statute,⁶² commonly known as the Racketeering Influenced and Corrupt Organizations Act (RICO). To the extent that an insurance company has participated in the "pattern of racketeering activity," case law indicates that it may be held liable for all the actions of the "enterprise," including those of its employees.⁶³ Authority stating that an insurance company and its employees are not capable of civil conspiracy for purposes of RICO⁶⁴ stems not from any peculiar immunity of insurers generally, but from the principle that the corporation

⁵³ Insurance fraud is a criminal as well as civil offense under the laws of all 50 states and can serve as the predicate for wire or mail fraud prosecutions at the federal level.

⁵⁴ See 18 U.S.C. § 707 (1994).

⁵⁵ See *id.* § 711a.

⁵⁶ This conduct is addressed with reasonable specificity by 49 U.S.C.A. § 46306(b) (West 1995).

⁵⁷ See 15 U.S.C. § 1114(1) (1994).

⁵⁸ See *id.* § 1125(a)(1).

⁵⁹ *Id.* § 1117(a).

⁶⁰ See *id.* § 1125(a)(1).

⁶¹ 18 U.S.C. § 2320(a) (1994) (stating that a second offense by a corporate offender can result in a fine of up to \$15,000,000).

⁶² *Id.* § 1962.

⁶³ See *id.* § 1962(c); *Dooley v. United Technologies Corp.*, 803 F. Supp. 428, 437-38 (D.D.C. 1992).

⁶⁴ *Almon v. State Farm Fire & Casualty Co.*, 724 F. Supp. 765, 766 (S.D. Cal. 1989).

as a "person" is made up of its employees and cannot conspire with itself. The corporation can, however, conspire with outsiders,⁶⁵ such as the purchasers of data plates. The criminal penalties for a violation of RICO include imprisonment for up to twenty years (or life, under certain circumstances) and forfeiture of all proceeds and properties of the enterprise.⁶⁶

V. CIVIL REMEDIES

Civil prosecution of the counterfeiters of aircraft and aircraft parts has proven to be impractical, despite the panoply of various civil remedies normally available to victims of commercial injuries. This impracticability arises from the expense of such suits and their failure to obtain the desired results. To make matters worse, the current regulatory and litigation environment subjects a manufacturer who reports a known or suspected counterfeit to the FAA or other public agencies to claims against it by the counterfeiters and their holders in due course. The manufacturer that refrains from pursuing counterfeiters, however, may be held to have waived its rights.⁶⁷

The implements of the counterfeiting process are widely available and, unlike the specialized engraving tools and printing presses traditionally associated with the counterfeiting of currency, indistinguishable from the tools of a legitimate business. The principal perpetrators of these deeds typically carry on superficially legitimate helicopter repair or operations enterprises, which often serve to "launder" their bogus machines. In fact, the best known repeat offenders have erected labyrinthine corporate ziggurats⁶⁸ which serve to conceal assets and offer opportunities to bankrupt appendages, thus avoiding liability while leaving the core operations intact.

⁶⁵ See, e.g., *Georgia Gulf Corp. v. Ward*, 701 F. Supp. 1556, 1560 (N.D. Ga. 1987).

⁶⁶ 18 U.S.C. § 1963(a) (1994).

⁶⁷ *In re Circuit Breaker Litig.*, 852 F. Supp. 883, 895 (C.D. Cal. 1994). Although the court found that the defendants had committed trademark infringements, it held that the plaintiff had essentially waived its right to private action because it knew of the violations, but took no action. *Id.* at 895, 897.

⁶⁸ Steve Howell of the Fort Worth, Texas law firm of Brown, Herman, Scott, Dean & Miles coined this felicitous expression. One example of this type of operation involves a California operator that remanufactures aircraft under one corporate name and operates the aircraft in the name of a separate de facto corporation owned in the name of the majority individual shareholder. The aircraft is then sold in yet another name.

For the reasons stated, the civil remedies available are most often invoked in the defense of lawsuits arising out of accidents involving counterfeit aircraft. In such cases, a host of defenses are typically available in addition to the remedies available to the original airframe manufacturer against the counterfeiter. These include, *inter alia*, the government contractor defense,⁶⁹ the General Aviation Revitalization Act of 1994,⁷⁰ the substantial modification defense,⁷¹ and what may be called, for lack of a better term, the "counterfeit aircraft" defense. The basis of the "counterfeit aircraft" defense is that the company which originally issued the data plate is not the manufacturer of the assembly of parts to which it is now affixed (even though it may have manufactured all or most of the individual parts and components). The other defenses have been substantially elaborated in articles and programs dedicated to that purpose. The following discussion concentrates on the "counterfeit aircraft" defense.

The only decision expressly addressing the "counterfeit aircraft" defense is *Goldsmith v. Olon Andrews, Inc.*,⁷² briefly described in Example 3, above. In that case, plaintiffs, who had been injured in a crash and fire which consumed the aircraft, sued Bell Helicopter Textron under Ohio state law based on the allegedly defective and negligent design of the fuel system. The helicopter had been assembled from new and used spare parts manufactured by Bell Helicopter Textron. Plaintiffs contended that Bell had originated the design and thereafter supported it by making available its manuals and spare parts. The court observed that the fuel system assembled by Olympic did not include the retrofit kit, required by Bell since 1977 but not by the FAA, for fiberglass-wrapped fuel tanks and breakaway fittings for the fuel lines. The court found that had Bell resumed production of the Model 47 after 1977, the FAA would have required it to include the improvements in new helicopters, even though it did not require their inclusion in existing aircraft.⁷³

⁶⁹ See, e.g., *Boyle v. United Technologies Corp.*, 487 U.S. 500, 513-14 (1988).

⁷⁰ Pub. L. No. 103-298, 108 Stat. 1552 (1994), *reprinted in* 49 U.S.C.A. § 40,101 note, sec. 2 (West 1995).

⁷¹ RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (1965).

⁷² 941 F.2d 423 (6th Cir. 1991). It should again be observed that the creation of the aircraft involved in this case was not a criminal act. However, the defenses available to the original manufacturer of this type of aircraft in a civil action are identical to those which would be raised in a true counterfeit aircraft situation.

⁷³ *Id.* at 425.

The trial court refused to deem Bell a "seller" of the helicopter based solely on the fact that it created the design upon which Olympic relied in assembling the helicopter.⁷⁴ The court noted:

[T]here is no evidence that Bell was in the business of placing this design in commerce. Bell did not offer for sale any designs, plans, or blueprints for the Model 47 or its fuel system. In fact, Bell had made two improvements to the fuel system and issued an Alert Service Bulletin recommending installation of the new system.⁷⁵

The court reasoned that Bell should not be deemed a "seller" of the helicopter because "Bell did not control production of the helicopter, could not assure conformance with its improved designs, and was in no position to treat the risks of producing the helicopter as a cost of production, or obtain liability insurance."⁷⁶

The elements of the counterfeit aircraft defense, therefore, go to the heart of the theory⁷⁷ underlying the Restatement definition of strict product liability.⁷⁸ *Goldsmith* concerned an aircraft which had been built from scratch by a third party, as opposed to one which had been resurrected, literally, from the ashes like the legendary Phoenix. In either case, the responsibility for introducing the aircraft as then constituted into the stream of commerce is that of the re-builder.⁷⁹ Virtually every state focuses its version of strict product liability on the manufacturer, seller, or distributor who places a defective product into the stream of commerce.⁸⁰ This reasoning is the locution adopted to broaden the definition beyond "sale." Courts have reasoned that "[i]t is the defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product . . . which calls for imposition of strict liability."⁸¹

⁷⁴ *Id.* at 427.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *See, e.g.,* *Seely v. White Motor Co.*, 403 P.2d 145, 149-50 (Cal. 1965) (holding that strict liability in tort is limited to recovery for personal injuries).

⁷⁸ RESTATEMENT (SECOND) OF TORTS § 402A (1965).

⁷⁹ *See East Penn Mfg. Co. v. Pineda*, 578 A.2d 1113, 1127 (D.C. 1990).

⁸⁰ *See, e.g.,* *Koehring Mfg. Co. v. Earthmovers of Fairbanks, Inc.*, 763 P.2d 499, 504-05 (Alaska 1988); *Kasel v. Remington Arms Co.*, 101 Cal. Rptr. 314, 321 (Cal. Ct. App. 1972); *Smith v. Home Light & Power Co.*, 734 P.2d 1051, 1055-58 (Colo. 1987); *East Penn*, 578 A.2d at 1126-27.

⁸¹ *Kasel*, 101 Cal. Rptr. at 323.

Regardless of the theory which liability is predicated upon, whether negligence, breach of warranty, strict liability in tort, or other grounds, it is obvious that to hold a producer, manufacturer, or seller liable for injury caused by a particular product, there must first be proof that the defendant produced, manufactured, sold, or was in some way responsible for the product . . .⁸²

Another formulation, especially applicable to the counterfeit aircraft situation, is that "the imposition of liability depends upon a showing by the plaintiff that his or her injuries were caused by the act of the defendant or by an instrumentality under the defendant's control."⁸³

Used-product merchants who rebuild or recondition their merchandise, even when they do not misrepresent their goods, have been held to be subject to strict liability.⁸⁴ The remanufacturer of the product will probably be deprived of any defense under a statute of repose⁸⁵ on the grounds that its resurrection has made it a "new" product.⁸⁶ By its nature, such remanufacturing or resurrection may frequently constitute such an alteration or modification of the product as to avoid the application of the Restatement rule which states that the product must reach the user or consumer "without substantial change in the condition in which it [was] sold."⁸⁷ The general rule in this regard stems from the principle of superseding cause, stating that whether the modification is a superseding cause depends in part

⁸² *Garcia v. Joseph Vince Co.*, 148 Cal. Rptr. 843, 846 (Cal. Ct. App. 1978) (quoting Annotation, *Products Liability: Necessity and Sufficiency of Identification of Defendant as Manufacturer or Seller of Product Alleged to Have Caused Injury*, 51 A.L.R.3d 1344, 1349 (1973)).

⁸³ *Sindell v. Abbott Labs.*, 607 P.2d 924, 928 (Cal.), *cert. denied*, 449 U.S. 912 (1980); *see Powell v. Standard Brands Paint Co.*, 212 Cal. Rptr. 395, 397 (Cal. Ct. App. 1985) (specifically addressing the duty to warn); *Groll v. Shell Oil Co.*, 196 Cal. Rptr. 52, 54-55 (Cal. Ct. App. 1983); *Walker v. Stauffer Chem. Corp.*, 96 Cal. Rptr. 803, 808 (Cal. Ct. App. 1971).

⁸⁴ *See, e.g., Barrett v. Superior Ct.*, 272 Cal. Rptr. 304, 312 (Cal. Ct. App. 1990); *Anderson v. Olmsted Util. Equip., Inc.*, 573 N.E.2d 626, 629-31 (Ohio 1991); *Crandell v. Larkin & Jones Appliance Co.*, 334 N.W.2d 31, 34 (S.D. 1983).

⁸⁵ An example of such a defense is the General Aviation Revitalization Act, Pub. L. No. 103-272 § 1(e), 108 Stat. 1094 (1994) (to be codified at 49 U.S.C. § 40101).

⁸⁶ *See, e.g., Rollins v. Cherokee Warehouses, Inc.*, 635 F. Supp. 136, 139 (E.D. Tenn. 1986) (holding that Tennessee's ten-year statute of limitations does not bar an action if the defendant was engaged in the business of selling re-conditioned forklifts at the time it sold a forklift to the plaintiff).

⁸⁷ RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (1965).

on whether it was reasonably foreseeable.⁸⁸ Some states, however, preclude recovery against the original manufacturer even if the subsequent modification was foreseeable.⁸⁹ The lack of control by the original manufacturer over the subsequent modification of the product can also relieve the original manufacturer of the duty to warn of its dangers.⁹⁰

Another potentially liable party is one which the always creative plaintiffs' bar has not yet discovered: the insurer who sells the data plate following the destruction of the aircraft. The insurer has clearly put a defective (scorched, warped, and nonflyable) product in the stream of commerce. This situation has been the subject of discussions with insurers in the United States and abroad⁹¹ and may be the subject of litigation in the near future. One of the weapons potentially available against both the counterfeiter and the insurer which supplied the means of producing the counterfeit (the data plate) is civil RICO,⁹² which provides for recovery of treble damages and attorneys' fees.

The many defenses readily available to the original manufacturer against claims stemming from counterfeit aircraft are not without a price. The associated efforts can generate negative customer relations and inevitably result in substantial expense and exposure. Victories in such cases often come only after expending many hours, hundreds of thousands of dollars, and years of risk.

VI. NON-JUDICIAL APPROACHES

The insurers and the FAA are both weak links in the chain from which counterfeit aircraft is forged. Insurers sell data

⁸⁸ See *Stultz v. Benson Lumber Co.*, 59 P.2d 100, 103 (Cal. 1936); *Powell*, 212 Cal. Rptr. at 397.

⁸⁹ See, e.g., *Hines v. Joy Mfg. Co.*, 850 F.2d 1146, 1151 (6th Cir. 1988) (refusing to read the common law concept of foreseeability into the product liability doctrine); *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 403 N.E.2d 440, 443 (N.Y. 1980) (holding that principles of foreseeability do not apply where a third party affirmatively abuses a product).

⁹⁰ See, e.g., *Groll*, 196 Cal. Rptr. at 54-55 (holding that a flammable liquid manufacturer providing sufficient warnings to the distributor was *not* responsible for warning the ultimate consumer); *Walker*, 96 Cal. Rptr. at 806 (holding that a bulk manufacturer of sulfuric acid did not have a duty to protect the general public from harm).

⁹¹ James L. Burt & Roy Fox, *Bogus Parts, Bogus Aircraft: Legal Considerations*, Presentation at Lloyd's in London (Nov. 30, 1994); *Insurance: Technology, Training, Legal and Legislative*, Helicopter International Association Workshop (Nov. 1, 1995).

⁹² 18 U.S.C. § 1964(c) (1994).

plates and historical records as "salvage" even when there is no intact metal part other than the identification plate itself. The chain is further forged by the FAA airworthiness inspectors who issue airworthiness certificates for the resurrected aircraft, despite clear evidence in the FAA file of the prior destruction of the machine.⁹³ Accordingly, the major U.S. manufacturers of helicopters are taking or considering the following steps:

1. Attempting to educate insurers of aviation risks as to the undesirability of reselling data plates and historical records from destroyed aircraft.
2. Offering to provide insurers and purchasers of aircraft with accident history information prior to purchasing, insuring, or paying a loss on a used aircraft.
3. Petitioning the FAA to strike from the type certificate data sheets the serial numbers of aircraft known to be destroyed.
4. Petitioning the FAA to adopt a rule requiring the agency to confiscate the data plates of aircraft declared destroyed as a result of an official investigation.

For their part, several aviation insurers have begun to adopt policies and procedures which may help control this problem. For instance, United States Aviation Insurance Group (USAIG) has established a policy with regard to aircraft damaged beyond economical repair: USAIG will not resell the data plate, and USAIG inserts language enforcing this into salvage bid requests and settlement documents with its insured. Also USAIG stamps an endorsement into the logbooks of constructive total loss aircraft, informing future purchasers that the subject aircraft was involved in a specified incident, rendering it a constructive total loss, and thus, not repairable within the aircraft's insured value. The British Aviation Group, AAU, American Eagle, and AVEMCO are among those companies which have adopted similar policies.

These procedures, if heeded and adopted by the pertinent parties, should over a period of time go a long way toward ending the problems associated with the resurrection of destroyed aircraft. The threat from aircraft newly built from surplus parts will remain, but it is focused at the bottom end of the commer-

⁹³ There are happy exceptions. For example, *Morton v. Dow*, 525 F.2d 1302 (10th Cir. 1975), recounts the story of a Bell Model 205A helicopter which was totally destroyed in 1972, resurrected by adding numerous parts to the data plate, and granted an airworthiness certificate by an unsuspecting FSDO inspector. Bell complained, the FAA revoked the certificate, and the Court of Appeals for the Tenth Circuit upheld the revocation. *Id.* at 1307.

cial market and is a lesser risk both to the public and to manufacturers.

VII. CONCLUSION

The problem of counterfeit aircraft is a real one, with legal, commercial, and, especially, safety implications. The regulatory (FAA) and judicial systems, despite great promise, have in practice been of little value in addressing these concerns. Insurers can make the most significant non-judicial contributions, especially since the original manufacturers are eager to assist them in combatting this problem. Awareness of the issues and continued communication are the keys to success. In time, the regulatory and judicial functions may also contribute.

