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Client Alert

Data, Privacy & Security Practice Group

November 19, 2014

NTSB Finds That Drones Are "Aircraft" Under Federal Law

Order reverses an earlier ruling by an Administrative Law Judge in a closely watched case that challenged the FAA's authority to regulate drones

On November 18, 2014, the National Transportation Safety Board (NTSB) reversed an earlier decision by an NTSB Administrative Law Judge (ALJ), and held that unmanned aerial systems (UAS) are properly considered "aircraft" and subject to Federal regulations that prohibit operation of "an aircraft in a careless or reckless manner so as to endanger the life or property of another." *See Michael P. Huerta, Administrator, Federal Aviation Administration v. Raphael Pirker*, NTSB Order No. EA-5730, Docket CP-217 (Nov. 18, 2014). A copy of the NTSB's Opinion and Order is available **here**.

This agency proceeding arose after Raphael Pirker, a professional photographer, remotely piloted an unmanned aerial vehicle (UAV) around the University of Virginia's campus "to supply aerial photographs and video of the UVA campus and medical center." NTSB Order No. EA-5730 at 2. On June 27, 2013, the Federal Aviation Administration (FAA) issued an assessment order and fined Pirker $10,000 for violating an FAA regulation, 14 C.F.R. § 91.13(a), by carelessly or recklessly operating an UAS. *See id.*

Pirker appealed to an NTSB ALJ, who vacated the civil penalty and concluded that "there was no enforceable FAA rule or FAR Regulation applicable to" careless or reckless operation of a model aircraft "or for classifying model aircraft as a UAS." The FAA then appealed the decision to the full NTSB.

In its decision, the full NTSB framed the issue as whether Pirker's UAS is "an 'aircraft' for purposes of section 91.13(a), which prohibits any 'person' from 'operat[ing] an aircraft in a careless or reckless manner so as to endanger the life or property of another[.]" NTSB Order No. EA-5730 at 2.

The NTSB held that Pirker's UAV was indeed governed by the FAA's regulations, finding that the regulations regarding "aircraft" (model or otherwise) are "clear on their face" and "draw no distinction between

For more information, contact:

Christopher C. Burris
+1 404 572 4708
cburris@kslaw.com

John A. Drennan
+1 202 626 9605
jdrennan@kslaw.com

Patrick J. Togni
+1 202 626 2958
ptogni@kslaw.com

King & Spalding
Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 202 737 0500
Fax: +1 202 626 3737

Atlanta
1180 Peachtree Street, N.E.
Atlanta, GA 30309-3521
Tel: +1 404 572 4600
Fax: +1 404 572 5100

www.kslaw.com

whether a device is manned or unmanned." *Id.* at 5-6. The NTSB explained that an "aircraft is 'any' 'device' that is 'used for flight," and acknowledged that while "the definitions are as broad as they are clear . . . they are clear nonetheless." *Id.* at 6.

The NTSB rejected Pirker's claims that "the term 'aircraft' means a device that sustains one or more individuals in flight, thus excluding unmanned aircraft from this definition." *Id.* at 6. The NTSB considered the legislative history of the FAA's regulatory framework and highlighted what it termed congressional "prescience" in defining "aircraft" as "any airborne contrivance 'now known *or hereafter* invented, used, or designed for navigation of or flight in the air." *Id.*at 6 (emphasis in original).

The NTSB also rejected Pirker's claims that Congress intended "aircraft" to mean manned aircraft and that "use" of aircraft could only contemplate manned aircraft. In the NTSB's words, "[i]f the operator of an unmanned aircraft is not 'using the aircraft for flight and some derivative purpose—be it aerial photography or purely recreational pleasure—there would be little point in buying such a device." *Id.* The NTSB therefore concluded that "the plain language of the statutory and regulatory definitions is clear: an 'aircraft' is any device used for flight in the air," and that the FAA's interpretation that section 91.13(a) applies to UAS is reasonable. *Id.* at 5, 8.

The NTSB also affirmed the FAA's decision to apply section 91.13(a)'s prohibition of careless or reckless operations to UAS "via the adjudicative process" instead of through formal agency rulemaking, and explained that "Courts have deferred to such interpretations as long as the interpretation is grounded in a reasonable reading of the regulation's text and purpose." *Id.* Finally, the NTSB also rejected arguments by Pirker and "numerous stakeholders" who "submitted *amici* briefs" challenging the FAA's application of the "careless and reckless operation" rule to UAS as a "'new' interpretation" of section 91.13(a) "that conflicts with prior agency practice and policy and, thus, does not warrant deference." *Id.* at 10. In doing so, the NTSB declined to place weight on certain FAA advisory documents and statements by FAA personnel regarding UAS. The NTSB concluded that none of those materials "state [that] § 91.13(a) only applies to manned aircraft." *Id.* at 11.

As a result of its decision, the NTSB granted the FAA's appeal, reversed the ALJ's decisional order, and remanded to the ALJ "for further proceedings consistent with this Opinion and Order." *Id.*at 12. The NTSB instructed the ALJ to convene "a full factual hearing to determine whether" Pirker "operated the aircraft 'in a careless or reckless manner so as to endanger the life or property of another,' contrary to § 91.13(a)." *Id.* at 12.

In sum, the NTSB's decision in *Michael P. Huerta, Administrator, Federal Aviation Administration v. Raphael Pirker* highlights the contentious legal landscape surrounding the FAA's authority to regulate UAS under the agency's current regulatory framework. This case is just one example of how the FAA continues to balance its regulatory authority over UAS against its yet-to-be-initiated UAS rulemaking process.

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