

iWitness

LIGHTS, CAMERAS, DRONES!

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I wonder if photographer Trappy Pirker knew, when he launched his drone above the grounds of the University of Virginia, that he was about to ignite the policy debate now playing out in the courts, on Capitol Hill, and in federal regulatory agencies.

What he did was certainly cool. And on the cutting edge. But as with the advent of all new technology, not everyone welcomes life on the edge. Unfortunately, cool sometimes just frightens folks—especially folks in the government, the least cool and most easily frightened institution we have.

A year earlier, Pirker had flown a drone around the Statue of Liberty's crown, creating unique and beautiful images that earned him a cult-like following in the photography community. The video also put him squarely on the radar of the Federal Aviation Administration (FAA).

So in 2011, when Pirker strapped a GoPro camera to a RiteWingRC Zephyr II

model glider and buzzed the University of Virginia, the FAA was watching. After the video went viral on his YouTube channel—and despite the fact that he had notified the university and the nearby airport of his flight plan in advance—the FAA slapped Pirker with a \$10,000 fine.

The agency charged him with the “careless and reckless” operation of a regulated “aircraft.” From a purely administrative law standpoint, the charge made little sense. Thanks to intense lobbying from hobbyists, the FAA for years expressly disclaimed any regulation of model airplanes. To most of us, Pirker's device would look like a toy—it weighed all of five pounds and was made of Styrofoam. The FAA, however, brought the same charge against Pirker that it might bring against recreational pilots who fly too close to the tower when practicing touch-and-goes in their single-engine Piper Cherokee airplanes.

Sensing the historic dogfight he now

found himself in, Pirker retained expert counsel and challenged the fine. At first, he was victorious. In early 2014, an administrative law judge swatted down the fine. If the model Pirker flew was subject to the FAA's murky regulatory structure, the judge held, then operating “a paper aircraft, or a toy balsa wood glider, could [also] subject the ‘operator’ to” stiff fines if viewed as “reckless” in the FAA's eyes. *Huerta v. Pirker*, No. CP-217, Decisional Order, slip op. at 3 (NTSB ALJ Mar. 6, 2104), www.nts.gov/legal/alj/Documents/Pirker-CP-217.pdf.

But the Red Baron ultimately reversed Snoopy's win. Later that year, in an administrative appeal, the National Transportation Safety Board (NTSB) overruled the judge. In sweeping deference to the agency, the NTSB held that FAA regulations apply to “any device used for flight in the air.” *Huerta v. Pirker*, No. CP-217, Opinion and Order (NTSB Nov. 18, 2014), www.nts.gov/legal/alj/Documents/5730.pdf. Pirker and the FAA settled after that; he paid \$1,100 and agreed to attend a flight-training course.

News Coverage

Pirker's case became a *cause célèbre* for photographers, journalists, and any number of industries that see the public benefits of drones, or “unmanned aircraft systems” (UAS)—the term insiders and lawmakers prefer because “drone” conjures up images of Middle East warfare.

For example, my law firm filed an amicus brief supporting Pirker in the FAA's appeal to the NTSB. We represented 22 digital, print, cable, and broadcast news networks, and ownership groups, all looking at drones as a means to bring you newer and better coverage. We argued that the news media's and the public's First Amendment interest required the government to take special care to restrict drone photography only with narrowly tailored rules that accomplish compelling safety goals.

While the NTSB sidestepped that issue in its ruling, the *Pirker* case helped the news media climb into the regulatory cockpit at just the right time. Since then, the news media coalition has remained a vibrant voice in the discussions with Congress and the FAA over developing UAS policy. With our help, many members of our client group even set up a training school for drone journalism at an FAA test site. Ravi Somaiya, *Times and Other News Organizations to Test Use of Drones*, N.Y. TIMES, Jan. 15, 2015, www.nytimes.com/2015/01/16/business/media/10-companies-join-effort-to-test-drones-for-newsgathering.html.

Another member of the news media also gave a Connecticut judge the first chance to define public and private spaces in the context of drone litigation, though

she drew the wrong boundary. In 2014, a TV photographer who later told the court he was operating on his own time as a hobbyist was grounded forcibly by police after capturing pictures above a Hartford highway accident scene. *Rivera v. Foley*, 2015 U.S. Dist. LEXIS 35639 (D. Conn. 2015). Suspended by his station after the incident, he sued the police officers under 42 U.S.C. § 1983 for ordering him to stop flying, detaining him, and calling his employer to complain.

Last year, the trial judge threw out part of the claim on grounds of qualified immunity, finding there was no clearly established right in that circuit to film the police scene at all. *Id.* at *26. In language we'll likely see when the first drone-based civil privacy litigation hits the dockets, she characterized the photographer's

conduct as "direct[ing] a flying object into a police-restricted area, where it proceeded to hover over the site of a major motor vehicle accident and the responding officers within it, effectively trespassing onto an active crime scene." *Id.* at *25.

That language is unfortunate because "trespass" typically involves interference with the use and enjoyment of private property. Here, there was no evidence the photographer actually interfered with anything, let alone prevented use of the public highway.

Indeed, overblown fears about drones and privacy risk scuttling our time-tested American notions of openness. Nearly a century and a half ago, in 1888, the Eastman Kodak Company's introduction of the Brownie camera—the first mass-produced, easily portable

Illustration by Darren Thompson

model—launched the debate over where our shared sense of community ends and privacy begins. As the device quickly became popular, many decried the rise of “camera fiends” and “shutterbugs” who brought their Brownies to all manner of public gatherings. Municipal beaches and even the Washington Monument began to ban cameras.

Remember the Warren and Brandeis article we all learned about in law school? It was Brownie-inspired. In words that echo in congressional hearings about drone regulation today, the authors worried that “modern devices afford abundant opportunities for the perpetration” of invasive wrongs, and they questioned “whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual[.]” Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197, 211 (1890).

Those of us who represent journalists worry that modern fearmongering by privacy advocates will have a chilling effect on the news media, preventing it from performing its critical watchdog function. The law is currently settled in the United States that, “[o]n the public street, or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there.” *Mark v. Seattle Times*, 635 P.2d 1081, 1094 (Wash. 1981). Can anyone doubt the critical role photography in public places will play in helping us shape the limits of police use of force following the shootings in Ferguson and Baltimore? Or in our search for ways to prevent recurrences of the jihadist-inspired carnage in San Bernardino and the crazed massacre of schoolkids in Sandy Hook?

To be sure, criminal codes and the common law already punish unlawful recordings by journalists and everyone else. Technology-agnostic statutes currently on the books can send any peeping Tom who uses a drone to jail. *See, e.g.,*

D.C. CODE § 22-3531 *et seq.*; FLA. STAT. § 810.14 *et seq.* Appellate rulings upholding damages awards against journalists who, in the view of the courts, used intrusive technologies would apply equally to unlawful aerial newsgathering. *See, e.g., Shulman v. Grp. W Prods.*, 955 P.2d 469, 490 (Cal. 1998).

Anti-Drone Legislation

Yet, we are seeing waves of anti-drone legislation being introduced in Congress, state houses, and city halls, all in panicked efforts to placate the technology fearmongers. Some of the legislation, such as Iowa’s, reflects legitimate restrictions on the police, such as requiring warrants before UAS evidence will be admitted in court. IOWA CODE ANN. § 808.15. Most of the measures, however, are pretty nonsensical. Michigan’s new drone law only

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prohibits uses that interfere with hunting and fishing. MICH. COMP. LAWS SERV. §§ 324.40111c (2), 324.40112 (2)(c). Florida’s provides for a cause of action if a drone flies higher than the wall around the property—whether or not anyone is even home. FLA. STAT. § 934.50 (3)(b). Try explaining that to insurers looking to survey damage after the next big hurricane hits the Florida coast.

The governing council of Deer Trail, Colorado, even floated an ordinance

to permit residents to fire guns at any drone wandering over the town’s skies. Fortunately, voters shot the measure down.

Drones are not, by and large, even permissible yet, outside the playtime of grandparents and grandkids or the hobby time of serious model enthusiasts. While recreational users and modelists don’t need permits, commercial users can fly drones only under specific FAA exemptions, which take months to have granted and come with very tight restrictions. So you’ll have to wait a little longer, at least until the FAA issues permanent regulations, currently expected some time later this year or in early 2017, to learn whether your pizza and beer can be airlifted to your doorstep.

In the meanwhile, what you are more likely to see are the deployments of this wonderful new technology for the everyone’s benefit, such as the following:

- emergency workers airlifting medicines to more needy people in more remote regions;
- universities and environmental groups harvesting higher-resolution evidence of global warming;
- energy companies better detecting trouble spots along Arctic pipelines;
- real estate agents posting three-dimensional views of the retirement property you are looking to buy;
- conservationists helping us feel what it’s really like to roam among a herd of endangered wildlife;
- the Golf Channel providing a whole new perspective with hole-by-hole drone coverage.

Drones are already on their way to joining laptops, Bluetooth speakers, flat-screen TVs, and iPhones as the latest devices that make all of our lives a little easier and a lot cooler. Let’s not let fear of the cutting edge limit their potential or redefine the boundaries between public and private spaces. ■