Bird & Bird

ROYAL AERONAUTICAL SOCIETY

SOCIETAL IMPLICATIONS OF UNMANNED AERIAL SYSTEMS

"In order for the RPAS and small drone industry to be successful, more work will have to be done to reassure the general public about the non-safety issues such as security, privacy and data-protection.[1]"

This year has seen considerable development in the technical regulation of UAS, with ICAO launching its Manual on RPAS, the FAA Notice of Proposed Rule Making and EASA consulting on its Concept of Operations for Drones. These processes are designed to secure an acceptable level of safety – both in terms of the threat to other aircraft and to people and property on the ground – but many take the view that successful development of the technology depends on broader acceptance of UAS in general use. In any event, other legal principles will come into play. These issues were the subject of a workshop held at 4 Hamilton Place on 11 June under the heading "*Civil UAVs – Societal Implications and Issues*".

We were pleased to have Baroness O'Cathain, who chaired the House of Lords Inquiry into the civil use of drones in the EU, and which reported in March 2015, to introduce the event. Tony Henley, Chairman of the Society's UAS Specialist Group, was special adviser to the Inquiry. She emphasised how much the Committee had learnt of the opportunities created by the technology. However the volume and range of activity poses serious implications and there is a challenge to achieve the right balance between managing the risk and supporting a growing industry. The Committee was greatly encouraged by the supportive nature of the Industry and regulators such as the CAA. The Government's response welcomes the moves to strengthen the governance of the industry around the JARUS[2] proposals and emphasises the desire for industry to contribute; and indeed industry has a key role in development of the technology to address safety concerns especially in relation to such matters as detect and avoid technology for operations below 500 ft. However, the Government is committed to more research. The Committee's Report, which was praised by the European Commission as "an important reference for all policy makers, including the Commission", was debated on the floor of the House on 8 September and endorsed without objection.

Privacy and Data Protection

The first panel Session of the afternoon was led by Gabriel Voisin with Paul Rigby, UK and EU Regulations Representative of ARPAS-UK, the UK trade association for small UAS. This is a subject which, given the availability of UAVs equipped with cameras and other data gathering devices, is understandably cited as a concern on a number of levels. Legislation has been introduced in many states within the US dealing specifically with privacy. There is

[1] The Government's Response to the House of Lords European Union Committee's Seventh Report of Session 2014/15: Civilian Use of Drones in the EU
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417464/drones-9054-web.pdf

[2] Joint Authorities for Rulemaking on Unmanned Systems

already extensive European law, albeit variation across the EU, because of the different ways in which Member States interpret the Data Protection Directive.

It is difficult, in practical terms, for a business undertaking photography or another form of aerial data gathering to avoid capturing "personal data" in the course of its activity, because of the breadth of the definition. Any recognisable photograph of an individual may be included. In that situation the operator would ordinarily need to inform individuals that they are conducting the activity in order to obtain consent. However, the apparent intrusion of UAS is not necessarily very different from other methods of technology such as CCTV, with which, broadly speaking, society is quite tolerant.

The "domestic use" exemption enables certain private capture of personal data to fall outside the restrictions of the Data Protection Directive. However a decision of the European Court of Justice suggests there are limits to its application. The recent *Rynes* case[3] decided that film of the outside of a private house, which was taken by CCTV installed because the owner had suffered a series of burglaries, which also captured the public highway, did not fall within the domestic use exemption. In the absence of registration as a data processor, the footage was unlawfully obtained. The extreme interpretation would be that the domestic use exemption can only be used wholly on private land or within a private dwelling house. Contrast this interpretation with the general right to privacy under English law, where the right to privacy is based on a reasonable expectation of privacy: this is something which focusses on the expectation of all passers by, rather than on whether steps are reasonable for a householder to protect the security of his property. On the other hand the more extreme interpretation of the *Rynes* decision can be contrasted with the decision in *Haldimann*[4] in which journalists published material obtained by using a hidden camera. The European Court of Human Rights overturned convictions under Swiss law for infringement of privacy: while there had been an infringement, in certain circumstances the public interest could justify such filming. This principle could be of assistance to UAV operators.

The critical factor in Paul Rigby's view is the need to tackle any public perceptions that UAS are unduly invasive and by demonstration of the steps that the industry is taking to protect privacy. Education and awareness among the industry – not only commercial suppliers and users, but also leisure users - is the way forward.

Noise, Nuisance and Trespass

Many current UAS operations take place over private land or buildings without the need to cross land owned by a third party. However, disputes have already arisen from overflight of public land such as parks. If transport services are to be developed, it seems inconceivable that that the maximum capability can be delivered whilst limiting operations to airspace above existing public highways. Already confusion – and sometimes conflicting instructions

[3] *František Ryneš v Úřad pro ochranu osobních údajů*, Case C-212/13, 11 December 2014
[4] *Haldimann and Others v. Switzerland,* application no. 21830/09, 24 February 2015

by different authorities – exist in relation to operations over waterways, which in legal terms qualify as a public highway.

Manned aviation has been used – in the UK at least – to an exemption from the tort of trespass, so long as aircraft fly over at a reasonable height. But for that provision, the trespass would be an absolute tort to fly through airspace which, up to the height of "ordinary use", belongs to the landowner below.

Among the panellists, Angus Benson-Blair, Chairman of ARPAS-UK considered that successful deployment of the technology again depends on educating operators to behave with sensitivity and consideration, and on creating awareness among the public that responsible operators are aware of that need, operate accordingly and UAVs are so operated and comply with safety requirements. Philip Church of Helios favoured the general consensus of those present that the legal framework was generally adequate. Professor Maria Lee of the Law Faculty at University College, London emphasised the benefit of developing industry standards; definitive figures for all purposes would be unlikely to be practical and indeed operations at a given height may be reasonable in one instance but not in another. Given existing low flying regulations which, broadly speaking, permit general aviation operations above 500 ft above ground level there is in fact a relatively narrow band within which UAV operations could take place and even here there will remain interaction with GA activity.

As a general rule, technical regulations do not usually address overflight of land except in the context of low flying over congested areas such as towns and cities. However since the workshop, new regulations have come into force in New Zealand which impose specific obligations on certain UAS operators to ensure they have landowner permission before flying, with suggestions of how to get it. This is a practical measure which may appear elsewhere.

Drone Crime

The final panel session, with Chief Inspector Nick Aldworth of the Metropolitan Police and Michael Kheng of ARPAS-UK, was moderated by Dr David Goldberg. It focused on the existing provisions of the criminal law governing UAV use rather than, perhaps to the disappointment of any delegates who were hoping for an insight into how UAVs might be used to carry out criminal activity! As an aside, since the event, the UK Ministry of Justice has reported on nine attempts to use UAVs to infiltrate prisons in 2015, though we doubt the need for UAV-specific legislation to manage that threat.

CI Aldworth emphasised how the rank and file of police officers struggle to judge separation distances and are certainly not in a position to determine whether a given operation is being conducted for leisure or commercial activity or whether it is equipped with surveillance equipment, and therefore which category of height or separation requirements apply. On the other hand, similar difficulties arise in the use of the existing UK prohibitions on reckless

endangerment of or by an aircraft, which apply to all aircraft whether manned or not, and which are available to prosecute dangerous UAV use. Furthermore, there are already limitations on how much the police can achieve given the resources available; this applies to enforcement against UAV operators as much as any other antisocial or criminal activity affecting other members of society. However, the priority task is to reassure the public that operational standards are in place and are enforced by the aviation regulator.

Michael Kheng agreed that the priority is to focus on ensuring that the operator community are aware of applicable regulations and to discourage rogue behaviour by ensuring that existing regulations are enforced and that the public knows this. Again, standards of acceptable use are important and it is equally important to ensure that leisure users are fully informed. One possibility is that a user completes an online test before their UAV is activated.

Future enforcement is likely to be a mixture of enforcement by the police and aviation authorities, with the latter concentrating on threats to the rest of the aviation community and the police on misuse that affects the general public. Since the event the EASA consultation on future European safety regulation confirmed the intent of an "open" category of lightweight, short range, low risk operations with minimal aviation licensing and most enforcement being carried out by the police. CI Aldworth described some of the challenges the police and CPS had faced in bringing the *Wilson* case arising from a series of flights over football grounds and London landmarks: at the time of writing this case had just resulted in a guilty plea, a fine of £1,800 and costs of £600, and a Criminal Behaviour Order prohibiting him from buying, owning or flying any UAVs for two years.

Conclusion

Tony Henley, Chairman of the Society's UAS Specialist Group, summed up the workshop and identified the likely future activity as:

- Production of a paper on "reasonable expectations" in the privacy context;
- Further analysis of cooperation among the regulatory and law enforcement agencies;
- Development of standards by the operator community on operational practices such as height restrictions, nuisance and safety; and
- Demonstration of the sector's recognition that the public expects privacy and explanation of the impact that UAVs have.

Nevertheless, in general new law is not generally considered necessary: this is consistent with the Government's response to the House of Lords report quoted at the start of this article. The more appropriate way forward is to develop guidance for all involved, to provide education and raise awareness across those involved in the sector, leisure users and the general public.

Simon Phippard FRAeS, Of Counsel, Bird & Bird and RAeS UAS Committee