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**COMMITTEE ON AERONAUTICS NEWSLETTER**

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*The views and opinions expressed in these articles are those of the authors and do not necessarily reflect the views of the New York City Bar Association.*

## From the Committee Chair and Committee Secretary:



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Committee Chair



Sarah G. Passeri<sup>2</sup>  
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Committee Secretary

The Committee on Aeronautics is very pleased to present this seventh issue of our Newsletter. Prior issues are posted (by year) on the Committee's section of the New York City Bar's public website (click on the "News" button): <http://www.nycbar.org/member-and-career-services/committees/aeronautics-committee>. We hope that our Committee Members and alumni (and, of course, other readers accessing this Newsletter on the Bar's website) continue to find each issue of the Newsletter very interesting.

The Committee generally meets on a monthly basis from September through June and usually has one or more guest speakers at each meeting. After the publication of the Spring 2018 issue of the Newsletter, the Committee had two major achievements. The first is the submission of a report to U.S. Senator Mike Lee, which is discussed in Dan Agius' article on page 4 of this Newsletter. The second is that, on October 23rd, our Committee and the Aviation Law Committee of the International Bar Association co-sponsored a 3½ hour "Hot Topics in Aviation" event. The program included presentations on legal issues and historical events, including: a presentation on the Hindenburg disaster; a presentation (and book signing) by an aviation journalist on air disasters; a presentation on aviation treaty issues; a presentation, by the flying pilot, on the immediate aftermath of a general aviation accident; and a panel on Unmanned Aerial Vehicles. See <https://services.nycbar.org/EventDetail?EventKey=AER102318&WebsiteKey=f71e12f3-524e-4f8c-a5f7-0d16ce7b3314> Despite stiff competition from the first game of the World Series, the event was well attended and was well received by the attendees.

Please stay tuned for more information about upcoming Committee activities.

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<sup>1</sup> Before retiring in April, Alan Reitzfeld was a senior partner in Holland & Knight LLP's Litigation Practice Group, where he played a leading role for many years defending airlines in multi-district litigation arising out of numerous major domestic and foreign commercial jet airline crashes and other incidents. In addition to chairing this Committee, Alan is the Vice Chair (2019 incoming Chair) of the International Bar Association's Aviation Law Committee.

<sup>2</sup> Sarah Passeri is a partner in Holland & Knight LLP's Litigation Practice Group. Ms. Passeri's practice focuses on aviation and complex litigation matters, as well as asset-based financing, leasing, acquisitions, sales and securitizations, with a particular emphasis on aviation and equipment finance. She has experience flying single-engine aircraft.

## **SUBCOMMITTEE LIST**

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Aviation Insurance Subcommittee	Sophia L. Cahill
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International Aviation Treaties Subcommittee	Christopher B. Kende
Regulatory Subcommittee	Racquel H. Reinstein
Reports Subcommittee	Daniel G. Agius
Subcommittee on ICAO Developments	Maria C. Iannini
Technical Advances in Aviation Subcommittee	Jenny A. Urban

## The Fate of the Aviation Empowerment Act

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In July, the Aeronautics Committee issued a report regarding the Aviation Empowerment Act, a piece of legislation proposed by Senator Mike Lee which would broadly allow for the use of web-based applications to organize general aviation flights flown by non-professional pilots, in exchange for the passengers paying a share of the costs to operate the flight.<sup>2</sup> The Committee generally supports the Aviation Empowerment Act, but we cautioned that additional safety measures needed to be imposed on pilots who would solicit passengers using web-based applications, so as to protect the safety of the flying public.

Since the Committee report was published, the Aviation Empowerment Act has gained no traction in Congress. However a recent act of Congress addressed the very issue of flight cost-sharing: on October 5, 2018, the FAA Reauthorization Act of 2018 (the “Act”) was signed into law.<sup>3</sup> Pursuant to the Act, the FAA has 90 days to issue advisory guidelines that describe “how a pilot may share flight expenses with passengers in a manner consistent with Federal law, including regulations.”<sup>4</sup> The FAA guidance must include an explanation of whether or not pilots are allowed to solicit passengers for cost-shared flights through web-based applications.<sup>5</sup>

The Act further requires the FAA to issue a report analyzing federal policy with respect to flight cost-sharing, including explaining “(A) the rationale for such Federal policy; (B) safety and other concerns related to pilots sharing flight expenses with passengers; and (C) benefits related to pilots sharing flight expenses with passengers.”<sup>6</sup> These are the exact areas analyzed in our Committee Report.

While the Aviation Empowerment Act has lost traction, the Committee is excited to see that Congress is taking action with respect to flight cost-sharing. The Committee will keep readers updated on the reports and guidance issued in this area pursuant to the FAA Reauthorization Act of 2018.

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<sup>1</sup> Dan Agius is an associate in Cole Schotz P.C.’s Litigation Group. Mr. Agius’s practice focuses on all aspects of complex commercial litigation at both the federal and state levels. He has a degree in mechanical engineering and a passion for all things air and space.

<sup>2</sup> *Proposed Amendments to The Aviation Empowerment Act*, NEW YORK CITY BAR COMMITTEE REPORT (July 16, 2018), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/proposed-amendments-to-the-aviation-empowerment-act>.

<sup>3</sup> FAA Reauthorization Act of 2018, Pub. L. No. 115-254, 132 Stat 3186.

<sup>4</sup> *Id.* at § 515.

<sup>5</sup> *Id.* at § 515(a)(2).

<sup>6</sup> *Id.* at § 515(b).

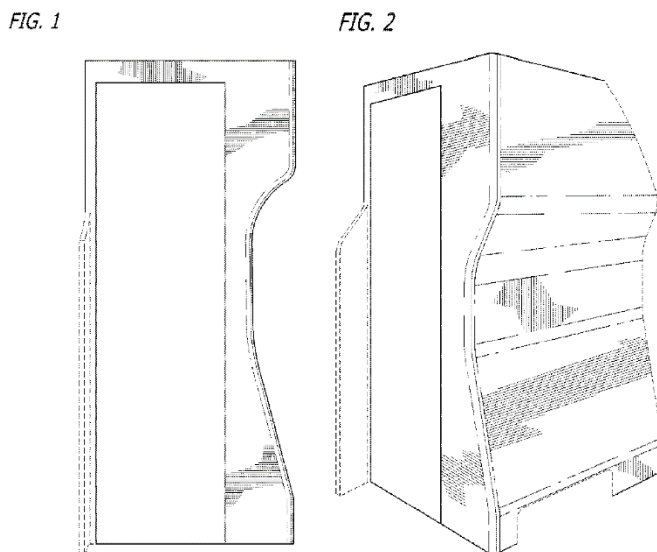
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## PTAB Wastes Aircraft Lav Patent

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On October 23, 2018, the Patent Trial and Appeal Board (the “PTAB”) invalidated a design patent over the shape of an aircraft lavatory, because it had been on-sale prior to the filing date. U.S. Design Patent No. D764,031 S (“the ‘031 patent”) concerned the ornamental design of an aircraft lavatory where the walls were slightly recessed.



Whereas a utility patent covers the way an invention is used and how it works, a design patent solely protects the ornamental appearance of an invention.

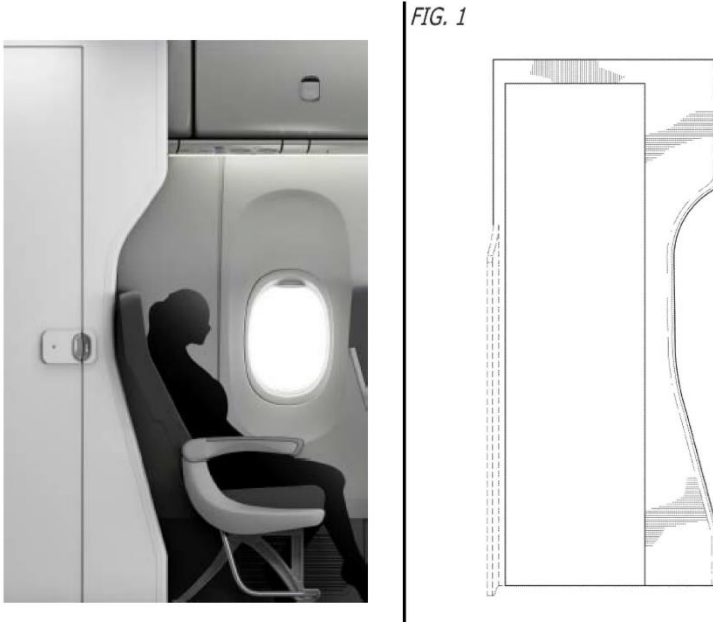
### The On-Sale Bar

Under 35 U.S.C.A. § 102(a)(1), an inventor is not entitled to a patent if the claimed invention was “described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention.” This is known as the “on-sale bar.” Here, the PTAB invalidated the ‘031 patent because the patent holder B/E Aerospace, Inc. (the “Patent Owner”) was selling the design prior to the filing date of the patent.

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<sup>1</sup> Dan Agius is an associate in Cole Schotz P.C.’s Litigation Group. Mr. Agius’s practice focuses on all aspects of complex commercial litigation at both the federal and state levels. He has a degree in mechanical engineering and a passion for all things air and space.

The patent challenger, C & D Zodiac, Inc., specifically pointed to a slide show presentation created by the Patent Owner, as evidence that the lavatory design was on sale and in public use prior to the date of filing. The Patent Owner's presentation noted that it had received an \$800 million contract to sell its lavatory design to Boeing. Photographic evidence showed the lavatory which was being sold to Boeing was *virtually identical* in design to the '031 patent.



Thus, the PTAB found, based on preponderance of the evidence, that the design claimed by the '031 patent was embodied by the product that the Patent Owner was already selling, prior to the filing date of the patent. Accordingly, the '031 patent was invalidated pursuant to the on-sale bar of 35 U.S.C.A. § 102(a)(1).

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## **Initial Report of the Subcommittee on ICAO Developments**

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Chair, Subcommittee on ICAO Developments



The Convention on International Civil Aviation, also known as the Chicago Convention, was created on April 4, 1947. It established the International Civil Aviation Organization (ICAO) to provide uniformity of standards across borders and facilitate safety, security and the environment.

ICAO is a United Nations specialized agency and serves as the global forum for 192 States for international civil aviation. It develops policies, Standards and Recommended Practices (SARPs), undertakes compliance audits, performs studies and analyses, provides assistance and builds aviation capacity through the cooperation of its Member States and stakeholders.

In future issues, the Subcommittee will report on interesting updates from ICAO.

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<sup>1</sup> Maria Iannini is a new member of the New York City Bar Association. She is a licensed attorney in Colombia and holds an LLM from the Institute of Air and Space Law at McGill University. She has previously practiced corporate law for Dentons and interned at the Legal Bureau of the International Civil Aviation Organization. She is passionate about all things related to air and space

## Federal Judge in San Francisco Dismisses Class Action Claims as Time Barred and Pre-Empted by the Airline Deregulation Act

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In an interesting decision that may have significant repercussions for air carriers, Magistrate Judge Jacqueline Scott Corley of the United States District Court for the Northern District of California issued an order on October 4<sup>th</sup> dismissing a putative class action brought against Air France based on a limitations provision set forth in Air France’s General Conditions of Carriage (“GCC”) and the pre-emption provisions of the Airline Deregulation Act.<sup>2</sup>

The putative class action contended that Air France breached its contract with the class representative, Abraham Hakimi, when it allegedly promised in advertising that a Premium Economy class seat offered 40% more space than a seat in economy. The complaint went on to contend that the Premium Economy seat was only two inches wider than a coach seat and only reclined six inches more. It further contended that Mr. Hakimi had relied on this claimed promise in paying an additional fare to purchase a Premium Economy seat and that, as a result of the misrepresentation in the advertising, he suffered damage. The putative class claim included numerous causes of action, including claims for breach of a self-imposed undertaking, breach of an express contract, breach of an implied contract, breach of contract under federal common law, breach of the covenant of good faith and fair dealing and unjust enrichment.

Apparently overlooked by counsel for Mr. Hakimi, Air France’s GCC provides for a two year period wherein which claims for liability can be brought, no doubt tracking the two year jurisdictional limitation set forth in the Montreal Convention with regard to passenger claims for personal injury or death.<sup>3</sup> Luckily for Air France, the GCC did not specify the nature of the liability subject to the two year limitation and, therefore, Air France argued that any claim for liability against Air France of whatever nature would be time barred after two years. Mr. Hakimi’s ticket was claimed to have been purchased sometime in June of 2014. Since the GCC provides that a ticket is only valid from one year of date of purchase, the latest Mr. Hakimi could have flown was June 2015. As a consequence, any window to file a claim closed on June 30, 2017, while Plaintiff only filed its complaint on March 2, 2018.

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<sup>1</sup> Mr. Kende is a Member of the law firm Cozen O’Connor. He is admitted to practice in the states of New York, Massachusetts, California and the District of Columbia and numerous federal courts around the country. He is Adjunct Professor of Transportation and Maritime Law at Brooklyn Law School.

<sup>2</sup> See *Hakimi v. Societe Air France , S.A., et al.*, case no. 18-cv-01387-JSC, U.S.D.C., N.D.CA., dec. Oct. 4 2018.

<sup>3</sup> The California statute of limitations for bringing a breach of contract action based upon a writing is four years. CCP Sec. 337.



Air France timely moved to dismiss on the basis of the time bar and also based on the contention that the claim was really one for disguised false advertising, even though framed as a breach of contract claim, and that therefore because the advertising related to “prices, routes, or services” (i.e., the level of comfort or space offered in Premium Economy) the complaint was pre-empted by the Airline Deregulation Act under *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) and its progeny.

As far as the time bar argument was concerned, plaintiff attempted to argue that the two year limitation was “harsh.” That claim fell on deaf ears since under California law, claims for breach of an implied contract are barred by an identical two year statute. Thus the Court enforced the two year limitation in the GCC, and held that the contract claims were time barred.

Interestingly, the plaintiff dropped its claims for breach of a self-imposed undertaking, breach of contract under federal law and breach of the covenant of good faith and fair dealing without even submitting an opposition to the motion with regard to those counts.

However, plaintiff persisted in contending that its claim for unjust enrichment was not pre-empted. The Court disagreed. Essentially the Court argued that notwithstanding the exemption for an express breach of contract claim carved out in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), the claim for unjust enrichment was actually extra-contractual since it looked outside of the four corners of any alleged agreement between the parties. Further the Court found that the comfort level of a seat in Premium Economy clearly related to a “service.” As a result, the Court determined that this claim was pre-empted by the ADA. This is a rather significant determination, even at the district court level, because it essentially means that any quasi-contract claim or claim for unjust enrichment which is extra-contractual in nature and is outside the four corners of any alleged contract running between a passenger and an airline will be pre-empted under the ADA if it relates to a “price, route or service of an air carrier,” and is therefore not cognizable.

The time in which to appeal this decision has run. However the door has been left open to reassert a breach of contract claim (albeit the Court expressed doubt that a mere advertisement constituted a contract) if such a claim is brought by a putative class member who travelled within the two year period between the purchase of the ticket and the date the complaint is filed.

The undersigned author was lead counsel for Air France in this matter.

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## Congress Criminalizes Drone Operation Near Airports

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On October 5, 2018, President Donald Trump signed the FAA Reauthorization Act of 2018. The law, which passed the Senate by a 93-6 vote, includes the Drone Operator Safety Act, which makes it a federal crime to operate a drone in any manner that interferes with a manned aircraft, including operating a drone in an airport's runway exclusion zone.<sup>2</sup>

The Drone Operator Safety Act was introduced by Senator Sheldon Whitehouse (D-RI) and Representative Jim Langevin (D-RI) in response to several publicized incidents, in which drones nearly collided with commercial passenger aircraft during takeoff or landing. The act imposes stiff penalties on violators who now face up to one year in prison or up to life in prison if they cause or intend to cause serious injury or death.<sup>3</sup>

Since operating a drone in a runway exclusion zone is now a federal crime, the FBI will likely join the FAA and NTSB in investigating aviation incidents and accidents at or near airports if a drone is involved or suspected of being involved.

A violator can only escape criminal liability by demonstrating that the drone entered the runway exclusion zone due to a technical malfunction beyond the operator's control.<sup>4</sup> Therefore, many prosecutions for violations of the act will likely hinge on expert testimony regarding whether or not such a malfunction occurred.

Since operating a drone in a runway exclusion zone is now a federal crime and the statute was enacted to prevent collisions between drones and manned aircraft, operators of drones that collide with manned aircraft in runway exclusion zones will almost certainly be held to a negligence per se standard in tort lawsuits. Insurance companies that offer drone insurance can minimize their exposure in such cases by including provisions in policies prohibiting insured

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<sup>1</sup> Bradford P. Meisel earned his J.D. from Georgetown University Law Center in May of 2018 and will be joining the New York City office of McElroy, Deutsch, Mulvaney & Carpenter, LLP after completing a clerkship with New Jersey Superior Court Judge Diane Pincus in September of 2019. Mr. Meisel analyzed drone, autonomous vehicle, and cybersecurity law and policy during his time as a law clerk for U.S. Senators Sheldon Whitehouse (D-RI) and Gary Peters (D-MI) and the U.S. Department of Justice and has logged numerous hours as a student pilot.

<sup>2</sup> FAA Reauthorization Act of 2018, P.L. 115-254, 115th Cong. (2018).

<sup>3</sup> Press Release, Office of Senator Sheldon Whitehouse, Langevin and Whitehouse Introduce Bill to Protect Aircraft from Drones, (Aug. 4, 2017), accessible at, <https://www.whitehouse.senate.gov/news/release/langevin-whitehouse-introduce-bill-to-protect-aircraft-from-drones>.

<sup>4</sup> *Id.*

parties from operating drones in violation of the statute and disclaiming coverage for any claims stemming from such violations.

The FAA Reauthorization Act also includes a provision known as the Preventing Emerging Threats Act introduced by Sen. Ron Johnson (R-WI). The statute gives any federal agency under the auspices of the Departments of Justice (DOJ) or Homeland Security (DHS)—such as the TSA, FBI, or Secret Service—the authority to shoot down, intercept, or seize any drone without a warrant or military approval if it poses a threat to a facility or asset designated by DOJ or DHS in consultation with the Department of Transportation.<sup>5</sup> Therefore, the TSA, or another federal agency under the auspices of DOJ or DHS, could potentially designate all airports servicing commercial flights and shoot down any drone spotted in their runway exclusion zones.

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<sup>5</sup> *Id.*

## A Rose by Any Other Name: *Airport Names and Criminal Connections*<sup>1</sup>

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Chair, Aviation Finance Subcommittee



The danger in naming any large public facility after an individual, even a long dead one, is that facts may one day publicly come to light that make the decision seem like a very, very bad idea. That is especially true of high-traffic transit hubs such as airports. There are, to be sure, a myriad of naming conventions for airports focusing on a variety of types of people – pilots (of course) (Dayton-Wright Brothers Airport (KMGY)), artists (Rome-Leonardo da Vinci-Fiumicino Airport (LIRF)), explorers (Venice Marco Polo Airport (LIPZ)), authors (Ian Fleming International Airport in Jamaica (MKBS)), musicians (Louis Armstrong New Orleans International Airport (KMSY)) and philanthropists (Tirana International Airport Nënë Tereza (LATI)).<sup>3</sup> What about criminals or those intimately connected with criminals? Laughable? So obvious that nobody would make that mistake? Don't be too quick to dismiss the possibility.

In order to have a meaningful examination of the question, we have to decide what constitutes a “criminal connection” for purposes of this paper. There are two types of criminals I intend to exclude from this discussion right off the bat – (i) military personnel convicted by court martial of serious breaches of the code of military conduct and (ii) airports named for political criminals (including war criminals) or persons who might be considered political criminals by one group or another. In the case of the former, an example of which is Billy Mitchell Airport (KHSE) in Hatteras, North Carolina, there is no exact parallel in civilian criminal practice to the charges (which certainly carried serious penalties) brought against General Mitchell at his court martial in 1925.<sup>4</sup> So including such airports in this discussion would not permit an apples-to-apples comparison with other airport honorees. And regarding political criminals, it's just too

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<sup>1</sup> Shakespeare, W., & Durband, A. (1985). *Romeo and Juliet*. Woodbury, N.Y: Barron's.

<sup>2</sup> Michael P. Peck is a retired partner from the New York office of Sidley Austin LLP, where he practiced for 36 years in the area of asset-backed finance (including aircraft finance). He is also an Adjunct Assistant Professor at Embry-Riddle Aeronautical University where he teaches courses in aviation law and is the Chair of the Aviation Finance Subcommittee of the Aeronautics Committee of the Association of the Bar of The City of New York. Mr. Peck is a graduate of the Institute of Air and Space Law at McGill University, has JD and MBA degrees from Vanderbilt University, an MA degree from Duke University and a BA degree from Washington & Lee University. He holds a commercial pilot's certificate with instrument rating and is a certified flight instructor, instrument instructor and advanced ground instructor.

<sup>3</sup> It could have been worse; they could have used Mother Teresa's Albanian name: Anjezë Gonxhe Bojaxhiu.

<sup>4</sup> General William Mitchell (no middle name) was charged with eight specifications under 96<sup>th</sup> Article of the Articles of War (prior to the modifications reflected in the modern-day Uniform Code of Military Justice). The 96<sup>th</sup> Article dealt with violations of “good order and discipline” and has no civilian parallel. See Correll, J.T. (2012, August). *The Billy Mitchell Court-Martial*. *Air Force Magazine*.

complicated -- one person's political criminal is another person's national hero. So enough said on that topic!

In this analysis one can't rely solely on familiar sounding words.<sup>5</sup> Take, for instance, Mafia Airport (HTMA) on Mafia Island in Tanzania. The word "mafia" in this case doesn't mean *la causa nostra* or anything of that nature. In fact, the origin of the term is a bit cloudy, but it might come from the Arabic *morfiyeh*, meaning "archipelago" such as the one containing Mafia Island, or perhaps from the Swahili word for "a healthy dwelling place". The fact that Portuguese maps and manuscripts from their earliest voyages at the end of the 15th century mark the island as "*Monfia*", indicates that the Portuguese referred to the island (or perhaps a group of islands) using more or less the same terminology as the local inhabitants.<sup>6</sup> In any event, no criminal connection suspected – *these aren't the droids we're looking for . . . move along.*<sup>7</sup>

What about airports named for upstanding citizens who had a distant criminal relative in their family history – would that qualify as a criminal connection for our purposes? Liverpool John Lennon Airport (EGGP) was renamed in 2001 for a prolific recording artist and very successful hometown boy.<sup>8</sup> But Lennon had a great uncle who in the late 19<sup>th</sup> century was also prolific – as a counterfeiter, a crime for which he was justly convicted.<sup>9</sup> Hardly seems fair to consider this a "criminal connection", does it? Something that distant and so utterly unconnected to the great man himself being used to taint the honor accorded him by the owner/manager of the Liverpool airport.<sup>10</sup> On the other hand, the world is a complicated place and . . . well . . . even a great man can occasionally forget, miscalculate or have lapses in judgement – which is how I would characterize Lennon's 1968 conviction<sup>11</sup> in the UK for possession of a little – you know – pot . . . Mary Jane . . . smoke . . . marihoochie, or whatever you prefer to call the plant. Okay, so should we now reconsider and argue that this is, in fact, an instance of an airport being named for an actual criminal? Well, maybe, but look, it's like this – I think it's pretty cold to call a conviction for being found with some herbs an actual "criminal connection". I mean, really? Weed? Nope, doesn't count in my book (or article, as the case may be).

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<sup>5</sup> This is what language teachers call "false friends". See Luu C. (2017). Friend or Faux? The Linguistic Trickery of False Friends. *Jstor Daily* (May 3, 2017). Retrieved from <https://daily.jstor.org/friend-or-faux-the-linguistic-trickery-of-false-friends/>.

<sup>6</sup> Mafia Island. (May 12, 2017). Where did the name come from? [Blog post]. Retrieved from <http://mafiaisland.com/en/about-mafia-island/where-did-the-name-came-from/>.

<sup>7</sup> 20th Century Fox; Lucasfilm Limited production; written and directed by George Lucas; produced by Gary Kurtz. (2013). *Star Wars. Episode IV, A New Hope*. Beverly Hills, Calif., 20th Century Fox Home Entertainment.

<sup>8</sup> The first airport in the United Kingdom to be named for an individual. See <http://www.theguideliverpool.com/10-things-never-knew-liverpool-john-lennon-airport/> retrieved September 27, 2018.

<sup>9</sup> Milmo, C. (June 29, 2015). John Lennon: The Beatle's great uncle revealed as a prolific criminal in newly-released records. *Independent Minds*. Retrieved from <https://www.independent.co.uk/arts-entertainment/music/news/john-lennon-the-beatles-great-uncle-revealed-as-a-prolific-criminal-in-newly-released-records-10351586.html>.

<sup>10</sup> Peel Holdings. See Saraceno, C. (2001, July). Liverpool Honors Lennon. *Rolling Stone*, July 2, 2001.

<sup>11</sup> Asregadoo, T. (January 15, 2015). The Beatles' Arrest History: Their Not-So-Fab Brushes with the Law. *Ultimate Classic Rock*. Retrieved from <http://ultimateclassicrock.com/beatles-arrest-history/>. By the way, the arresting officer was Sargent Norman Pilcher who was memorialized in The White Album.

Armed robbery might be closer to the mark. And that leads us to two airports named for the great aviator, Wiley Post. They are Wiley Post Airport in Oklahoma City (KPWA) and Wiley Post-Will Rogers Memorial Airport (PABR) in Barrow, Alaska. In 1921 the young Mr. Post committed armed robbery and served more than a year in prison.<sup>12</sup> That is indeed a crime, and no one would argue that Mr. Post was a pinnacle of moral rectitude. But, but, but – in Oklahoma a mere 14 years after statehood? Wasn't that still the Wild West? What about that “full pardon”<sup>13</sup> belatedly granted by the governor? And if we agreed that the airports named for Wiley Post were named for a person who had criminal connections, wouldn't we have to say the same thing about the aforementioned Louis Armstrong New Orleans International Airport (KMSY) because Satchmo took his stepfather's gun without permission, fired a blank into the air and, on December 31, 1912, was arrested, convicted<sup>14</sup> and ultimately sentenced to the Colored Waif's Home?<sup>15</sup> No, I'm having none of that.

In order to constitute criminal connections, I think the person whose name the airport bears must be someone, or be intimately connected to someone, who was involved in high profile, nationally recognized, cops-and-robbers type crime. Well, fine, but does such an airport exist in the United States? You betcha, and it's a doozy! Chicago O'Hare (KORD), the sixth largest airport in the world by passenger traffic.<sup>16</sup> (Chicago? – crime? – go figure). But wait! Everybody who has taken the time to read the prominently displayed memorial plaque in Terminal Two knows that Lieutenant Commander Edward “Butch” O'Hare, for whom the airport was named, was a World War II aviation hero and the first Navy pilot to receive the Congressional Medal of Honor (our country's highest military award for valor).<sup>17</sup> Commander O'Hare, a Naval Academy graduate, had a clean record prior to going into the service and unfortunately didn't survive the war, so where's the criminal connection? To find it you need look no further than his father, Edward “Easy Eddie” O'Hare. You see, Easy Eddie, a lawyer by training, had certain business dealings with none other than the notorious Chicago mobster, Al Capone. In fact, by some accounts Easy Eddie served as Capone's mouthpiece – in other words, his lawyer. As it happened, the feds “prevailed upon” Easy Eddie to testify against Capone and Easy Eddie swallowed the bait. Big mistake. Easy Eddie never got to take the stand, having been rubbed out (in the Chicago mobster parlance) by unknown assailants prior to having his day in court. Live by the sword, die by the sword I guess. But Butch went on to redeem the family name and ended up memorialized by the country's second busiest airport.<sup>18</sup> Way to go!

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<sup>12</sup> Maksel, R. (July 25, 2013). Wiley Post, Ex-Con. *Airspacemag.com*. Retrieved from <https://www.airspacemag.com/daily-planet/wiley-post-ex-con-17758200/>. He received a full pardon from then-Governor William “Alfalfa Bill” Murray in 1934 after completing an around-the-world flight.

<sup>13</sup> See note 12, *supra*.

<sup>14</sup> Karst, J. (March 18, 2018). Our Times: The Louis Armstrong childhood arrest that no one knew about. *The Times-Picayune*.

<sup>15</sup> The facility was run, at the time, by the reportedly unforgiving Captain Joseph Jones. See note 14, *supra*.

<sup>16</sup> The top 20 largest airports in the world by passenger number 2018. *International Airport Review*. (April 9, 2018).

<sup>17</sup> O'Hare Airport: The Man Behind the Name. Stratos Jet Charters, Inc. [Blog]. Retrieved from <https://www.stratosjets.com/blog/ohare-airport-man-behind-the-name>.

<sup>18</sup> Renzulli, M. (August 28, 2018). The 25 Busiest Airports in the United States. TripSavvy. Retrieved from <https://www.tripsavvy.com/busiest-airports-in-the-usa-3301020>.

At this point you might be saying “so what”, and to some extent I sympathize with you. What does a passing familiarity with the family history of a person for whom an airport is named add to an understanding of aviation finance? Or even aviation in general? Arguable, nothing, zilch, *nada*, zero, *nichts*. On the other hand, you have to admit it could provide for some interesting cocktail conversation. And there are those who believe that a knowledge of minutiae has medical benefits – playing trivia (or more accurately, winning at trivia) reportedly provides a dopamine rush similar to that elicited by more dangerous behaviors such as gambling.<sup>19</sup> So having a knowledge of trivia is sort of like the cognitive equivalent of an e-cigarette – it saves you from something worse. My personal perspective is that the kind of trivia presented in this article broadens the reader’s cultural horizons -- a grand claim to which I’m sure not everyone subscribes. In any event, if you’ve read this far you’re a real trooper, I hope you were entertained and I thank you for indulging my whim.

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<sup>19</sup> It’s Not Trivial – Knowing Obscure Facts Is Good For Our Mental Health. [Blog]. Retrieved from <https://www.healthline.com/health-news/obscure-facts-is-good-for-mental-health#1>.

## CRM = Teamwork

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On December 29, 1972, an Eastern Airlines L-1011 three-man cockpit crew became distracted over the failure of a light to confirm landing gear position. The aircraft entered a holding pattern, and while the crew focused on the landing gear warning light issue, the aircraft descended into the Everglades just several miles from their Miami airport destination killing 101 passengers and the flight crew. On December 28, 1978, a United Airlines DC-8 stayed in a holding pattern for over an hour while the three-man flight crew attended to a landing gear light failure during which the aircraft ran out of fuel and crashed onto the streets of Portland, Oregon, killing the crew and eight passengers. In that same decade, the deadliest of all aviation accidents occurred at Tenerife Airport in The Canary Islands. On March 27, 1977, a KLM Boeing 747 began its takeoff roll before a Pan Am Boeing 747, taxiing on the same runway in the opposite direction, had cleared the runway. The result: 583 people on the two aircraft died, including the KLM crew and many of the Pan Am crew. Tapes from the KLM and tower voice recordings made it clear that the KLM first officer questioned the lack of ATC clearance when the KLM captain advanced the throttles and then the flight engineer, listening to communications from the Pan Am 747, questioned whether or not the Pan Am jet had cleared the runway. But neither subordinate took any action to stop the captain's determined start down the runway. Much has been written about the first officer's and flight engineer's failure to be more assertive in questioning the captain (although other factors, such as use of non-standard phraseology by the captain and the tower also had a role in the accident) because of the captain's very senior position and reputation within the corporate structure.<sup>2</sup>

In response to the growing concern that many accidents were caused not by mechanical failure but by the lack of crew coordination, teamwork and open communication, in 1979 NASA

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<sup>2</sup> The use of the term "captain" for the pilot-in-command of an airliner traces back to Pan Am's flying boats, the Pan Am "Clippers", and the culture of the captain having unquestioned authority on the "ship" carried over to the airline industry generally in the ensuing years. Captain Van Zanten in command of the KLM 747 was the top pilot in KLM's management. He was the head of safety and KLM's chief flight instructor, with 11,700 flight hours, of which 1,545 hours were on the 747. Van Zanten was an individual whom everyone at that airline looked up to. He was the public symbol for KLM pilots: his face was on KLM's advertising around the world. Indeed, KLM's inflight magazine that month featured him in an ad headlined "KLM. From the people who make punctuality possible." Van Zanten spent most of his time training other pilots, including the co-pilot who was in the next seat, Klaas Meurs. In fact, Van Zanten issued to the first officer his 747 flight certification.



convened a “workshop” captioned “Resource Management on the Flightdeck.” From that conference, the concept of “cockpit resource management” or CRM emerged. By 1993 it became FAA policy mandated as an integral part of flight training for airline (Part 121) and charter (Part 135) operations and encouraged for general aviation (Part 91). CRM was later rephrased to “crew resource management” to include the entire flight crew – flight attendants as well as pilots and flight engineers. The present FAA policy on CRM is set forth in FAA Advisory Circular 120-51E and extends also to Part 91, Subpart K, fractional ownership programs and now also covers maintenance personnel, dispatchers and air traffic controllers.

The essence of CRM is summarized in FAA AC 120-51E:<sup>3</sup>

1. **Human Factors.** The multidisciplinary field of human factors is devoted to optimizing human performance and reducing human error. It incorporates the methods and principles of the behavioral and social sciences, engineering, and physiology. It is the applied science that studies people working together in concert with machines...
2. **CRM Training.** The application of team management concepts in the flight deck environment...[and] the effective use of all available resources: human resources, hardware, and information.

CRM focuses on interpersonal communication, leadership and decision-making in the cockpit of an airliner. While the captain is now expected to listen to other flight personnel and open communication is encouraged, CRM does not mean that the captain no longer exercises a leadership role. In the Advisory Circular, the FAA makes clear that CRM includes:

“**Leadership/Followership/Concern for Task.** Showing the benefits of the practice of effective leadership through coordinating activities and maintaining proper balance between respecting authority and practicing assertiveness. Staying centered on the goals of safe and efficient operations.”

The FAA emphasizes that the crew must adhere to Standard Operating Procedures (“SOPs”) and that leadership includes assuring such adherence.

There is so much more to CRM beyond what space allows here, and the reader is encouraged to look at AC 120-51E for a more complete understanding of the FAA’s use of crew training to get the most out of crew performance and to balance teamwork and leadership.

Sadly even since the promulgation of CRM by the FAA, there continue to be accidents arising from failures of leadership, assertiveness and failure to adhere to SOPs.

In discussing the failure of CRM in two relatively recent crashes: Asiana Flight 214 in 2013 and Air France Flight 447 in 2009, one author states:<sup>4</sup>

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<sup>3</sup> [https://www.faa.gov/documentLibrary/media/Advisory\\_Circular/AC\\_120-51E.pdf](https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_120-51E.pdf)

<sup>4</sup> “The Failure of Crew Resource Management (CRM)” by Vivek V. Jois, <https://vivekjois.wordpress.com/2014/12/04/the-failure-of-crew-resource-management-crm-part-i/>

“The planes involved in flights 447 and 214 – an Airbus A330 and a Boeing 777 respectively – were both introduced in the early 1990s. Both aircraft were products of the same technological expectations described above, and both crashes involved some failure of the pilots to communicate effectively and respond adequately to the plane’s autopilot.”

The same writer continues by citing, as many other experts have, the role that cultural norms may have played in the Asiana crash where the hierarchical social structure impedes open communication between non-peers.

Malcom Gladwell, author of “Outliers: The Story of Success,” included a chapter entitled “*The Ethnic Theory of Plane Crashes.*” Speaking about his thinking behind this chapter, Gladwell told CNN Money in 2008 that some cultures are hierarchical:<sup>5</sup>

“You are obliged to be deferential toward your elders and superiors in a way that would be unimaginable in the U.S.

But Boeing ... and Airbus design modern, complex airplanes to be flown by two equals. That works beautifully in low-power-distance cultures [like the U.S., where hierarchies aren't as relevant]. But in cultures that have high power distance, it's very difficult.”

In the current edition AOPA Pilot++, there appears the sad tale of a repositioning flight on May 15, 2017, a Part 91 operation in a Learjet 35A.<sup>6</sup> In this accident, it is clear from the flight track and the cockpit and tower recordings that the crew had an anti-authoritarian attitude toward ATC, did not follow SOPs and was not under the leadership of anyone. The recording of the 30-minute flight contains 131 expletives used by both crew members. On a runway 4 ILS approach, circle to land on runway 1, into Teterboro Airport in New Jersey, the crew missed a prescribed turning point at which to start circling to runway 1, and then compensated by making a steeply banked turn with a very gusty tailwind. The aircraft apparently stalled and crashed short of the airport killing both occupants.

While the machinery becomes more technologically advanced and may someday reduce the “human factor” in all flights, human interaction with the aircraft is very much still a major part of aviation. Building better aircraft is a given. The need for the best crew training possible is addressed in part by advanced simulators and in part by CRM where the less tangible attributes of coordination, leadership, assertiveness and open communication have been demonstrated to be essential.

November 19, 2018

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<sup>5</sup> [https://money.cnn.com/2008/11/11/news/companies/secretsofsuccess\\_gladwell.fortune/](https://money.cnn.com/2008/11/11/news/companies/secretsofsuccess_gladwell.fortune/)

<sup>6</sup> “Just a Short Flight” by Richard McSpadden, AOPA Pilot, December 2018, pp 72-76.

## So You Want to Build A Runway?

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Existing runway capacity consistently needs to be added to and updated, and airports are constantly building and improving upon their infrastructure. When an airport wants to build a new runway, it must jump through numerous regulatory hoops, as well as find ways to pay for the project. This article will briefly examine some of the main regulations and practices that an airport must contend with, with the understanding that this is not meant to be an exhaustive list:

1. Requirement to notify the Federal Aviation Administration (FAA) of an intent to build a new runway and follow FAA procedures
2. Noise regulations
3. Environmental regulations
4. Passenger Facility Charges (PFCs)
5. Grant assurance agreements

### FAA involvement from the beginning

Prior to building anything, the FAA must become involved from the start, as is required under the law. 14 C.F.R. § 157.5 requires that the airport performing construction file a “notice of intent” to build a new runway. Moreover, the FAA reviews all building plans, and linked herein is a checklist the FAA has created as to all the various forms and material that would be required upon the announcement of building plans.<sup>2</sup> The FAA has created a “Best practices” manual that it looks for airports to follow when designing and building new runways.<sup>3</sup> The FAA will look to ensure that an airport has notified all interested parties of construction (including the airport control tower and airlines), will be filing an Environmental Impact Statement (EIS), has a plan for navigational aids, and various safety measures in place, particularly to guard workers from aircraft jet propulsion.

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<sup>1</sup> Racquel Reinstein is an attorney working for the Port Authority of New York and New Jersey. She also is a new mom to an adorable infant named Zoe, and enjoys reading about aviation regulations in her spare time.

<sup>2</sup> See [https://www.faa.gov/airports/runway\\_safety/runway\\_construction/media/New\\_Runway\\_Const\\_Opening\\_Non-fillable.pdf](https://www.faa.gov/airports/runway_safety/runway_construction/media/New_Runway_Const_Opening_Non-fillable.pdf)

<sup>3</sup> See [https://www.faa.gov/airports/runway\\_safety/runway\\_construction/media/Rwy\\_Const\\_Lsn\\_Lrnd\\_Bst\\_Prc.pdf](https://www.faa.gov/airports/runway_safety/runway_construction/media/Rwy_Const_Lsn_Lrnd_Bst_Prc.pdf)

## Noise regulations

Congress passed the Aviation Safety and Noise Abatement Act (ASNA) and the Airport Noise and Capacity Act of 1990 (ANCA) to ensure that communities that surround airports will not be inundated with unpleasant noise. Part of these regulations include requirements on building aircraft that have quieter engines, and part of these regulations concern airports mitigating noise wherever possible. These noise regulations envision that airports will build sound barriers surrounding air fields, and if they are municipalities, zone the surrounding communities to not be residential in nature. The FAA also will look to see whether there are buffer lands between air fields and the airport. But overriding noise concerns is also a requirement to not discriminate against national and international commerce by overburdensome noise measures, such as closing an international airport at night to mitigate the noise on the surrounding communities.

The FAA explained ASNA as follows:

“In 1979, Congress enacted the Aviation Safety and Noise Abatement Act (ASNA). In ASNA, Congress directed the FAA to: (1) establish a single system of noise measurement to be uniformly applied in measuring noise at airports and in surrounding areas for which there is a highly reliable relationship between projected noise and surveyed reactions of people to noise; (2) establish a single system for determining the exposure of individuals to noise from airport operations; and (3) identify land uses that are normally compatible with various exposures of individuals to noise. (See Table 1 of Part 150 at the end of this chapter.). FAA promulgated 14 CFR Part 150 to implement ASNA. Part 150 established the “day-night average sound level” (DNL) as the noise metric for determining the exposure of individuals to aircraft noise. It identifies residential land uses as being normally compatible with noise levels below DNL 65 decibels (dB). ASNA also provided for federal funding and other incentives for airport operators to prepare noise exposure maps voluntarily and institute noise compatibility programs. Under ASNA, noise compatibility programs “shall state the measures the [airport] operator has taken or proposes to take to reduce existing noncompatible uses and prevent introducing additional noncompatible uses in the area covered by the [noise exposure] map.”<sup>4</sup>

The FAA also further explained ANCA as follows:

“ANCA requires that certain review and approval procedures be completed before a proposed restriction that impacts Stage 2 or Stage 3 aircraft is implemented. The FAA regulation that implements ANCA is 14 Code of Federal Regulations (CFR) Part 161, Notice and Approval of Airport Noise and Access Restrictions. An

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<sup>4</sup> See [https://www.faa.gov/airports/resources/publications/orders/compliance\\_5190\\_6/media/5190\\_6b\\_chap13.pdf](https://www.faa.gov/airports/resources/publications/orders/compliance_5190_6/media/5190_6b_chap13.pdf) at page 13-5.

airport sponsor may use an airport noise compatibility study pursuant to 14 CFR Part 150 to fulfill certain notice and comment requirements under ANCA.”<sup>5</sup>

Ultimately the EIS will include significant information about noise and noise mitigation tactics. An airport sponsor looking to build or expand a runway must consider the effect of noise from the very beginning.

### Environmental regulations

An airport is required to file an EIS with the FAA for every major construction project on-airport, including runway construction. The EIS is for public review, under the National Environmental Policy Act (NEPA). The EIS will look at the impact both of runway construction and also other alternatives considered, including not building a runway. Sometimes not building a runway would cause greater environmental problems than building a runway, including through the increased air pollution of planes expending fuel as they wait on the congested runway taxi line. The Port Authority of New York and New Jersey (the Port Authority) had to file an EIS when it rebuilt Runway 4R/22L at John F. Kennedy International Airport, clocking in at 430 pages.<sup>6</sup> The statement looked at noise, as mentioned *supra*, and the impact on Jamaica Bay and the surrounding communities stemming from building out the runway.

### Passenger Facility Charges (PFCs)

Airports pay for construction through a combination of revenue from airlines and other lessees on-airport, PFCs, and grants from the FAA under the Airport Improvement Program (AIP).

PFCs are charges that air passengers pay as part of their ticket prices to reimburse airports for certain FAA-approved delineated projects. The FAA described the PFC program thusly:

“The Passenger Facility Charge (PFC) Program allows the collection of PFC fees up to \$4.50 for every enplaned passenger at commercial airports controlled by public agencies. PFCs are capped at \$4.50 per flight segment with a maximum of two PFCs charged on a one-way trip or four PFCs on a round trip, for a maximum of \$18 total. Airports use these fees to fund FAA-approved projects that enhance safety, security, or capacity; reduce noise; or increase air carrier competition.”<sup>7</sup>

It should be noted that certain off-airport ground transportation programs may qualify for PFCs. For instance, projects such as trains to airports qualify for PFCs under certain circumstances. The Port Authority’s current PFC projects are linked here for review.<sup>8</sup> It is required under the law to involve the FAA in airport construction from the beginning, but airports also should involve the FAA early on to receive approval to collect PFC funds for various on-airport projects.

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<sup>5</sup> See *id.* at page 13-2.

<sup>6</sup> See <http://www.panynj.gov/about/pdf/JFK-Runway-4L-22R-EA.pdf>

<sup>7</sup> See <https://www.faa.gov/airports/pfc/>

<sup>8</sup> See <https://www.panynj.gov/airports/pdf/2017-PFC-Application-Public-Notice.pdf>

## Grant Assurance Agreements

Airports may additionally look to pay for their runway projects through FAA grants as part of the AIP. Once an airport accepts funds from the FAA, they must comply with “Grant Assurance Agreements.” These Grant Assurances include:

- A certification that the airport sponsor is following all federal law
- A certification that the airport sponsor has good title to the airport and will not encumber the title
- A certification that the airport sponsor has authority to enter into agreements with the FAA
- An assurance that the airport sponsor will not sell, lease, or otherwise encumber its title in such a way as to make it unable to have the powers necessary to operate
- Consideration of local plans/laws/citizens (including public hearings)
- An accounting system and minimum wage rates
- Veteran’s preference
- FAA construction inspection and approval
- Assurance that the project will be carried out in accordance with approved plans
- Safe operation of the facilities including adequate disposal of hazardous waste
- Economic non-discrimination at the airport, including a requirement that all airport users be charged reasonable and not unjustly discriminatory prices
- Revenue from the airport must go to airport purposes

A listing of all grant assurances is available online.<sup>9</sup> For large and medium primary hub airports, the AIP grant covers 75 percent of eligible costs (or 80 percent for noise program implementation). For small primary, reliever, and general aviation airports, the grant covers a range of 90-95 percent of eligible costs, based on statutory requirements.

### Final note

This article is meant to be a brief overview, so the listing prepared herein is non-exhaustive. Ultimately, when an airport sponsor wants to build a new runway, the FAA must be involved from the start, every step of the way. The FAA will determine whether the project meets their engineering and safety standards, environmental/noise standards, and whether the project qualifies for AIP or PFC funds.

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<sup>9</sup> See [https://www.faa.gov/airports/aip/grant\\_assurances/media/airport-sponsor-assurances-aip.pdf](https://www.faa.gov/airports/aip/grant_assurances/media/airport-sponsor-assurances-aip.pdf)

## The Risks of Using In-flight WiFi



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Imagine you are on a long flight. Urgent emails are calling your name. Luckily, the airline offers in-flight WiFi. However, as access to in-flight WiFi has increased exponentially, many airlines have not secured their WiFi networks with proper anti-hacking measures. In 2016, a USA TODAY journalist had his email hacked mid-flight while using the airplane's onboard WiFi network.<sup>3</sup> After the flight, the hacker admitted to hacking the journalist's email, as well as the emails of most people on the flight who were using the plane's WiFi network, purportedly to promote awareness of this security issue.

Some strategies to protect yourself and your data while using in-flight WiFi are:

- Make sure your mobile device has up-to-date security software to detect potential threats, including ad blockers.
- Purchase your own virtual private network (VPN), which creates a secure encrypted tunnel between you and a remote server.
- Avoid downloading or sending sensitive information while connected to in-flight WiFi.
- Only access sites with HTTPS encryption (https://).
- Disable file and print sharing on your device.

Victims of cyber-attacks can file a report with the Internet Crime Complaint Center (“IC3”), a partnership between the National White Collar Crime Center and the Federal Bureau of Investigation (FBI). The IC3 alerts law enforcement, as well as federal, state, and local regulatory agencies of suspected cybercrime, which may subject hackers to criminal or civil violations.

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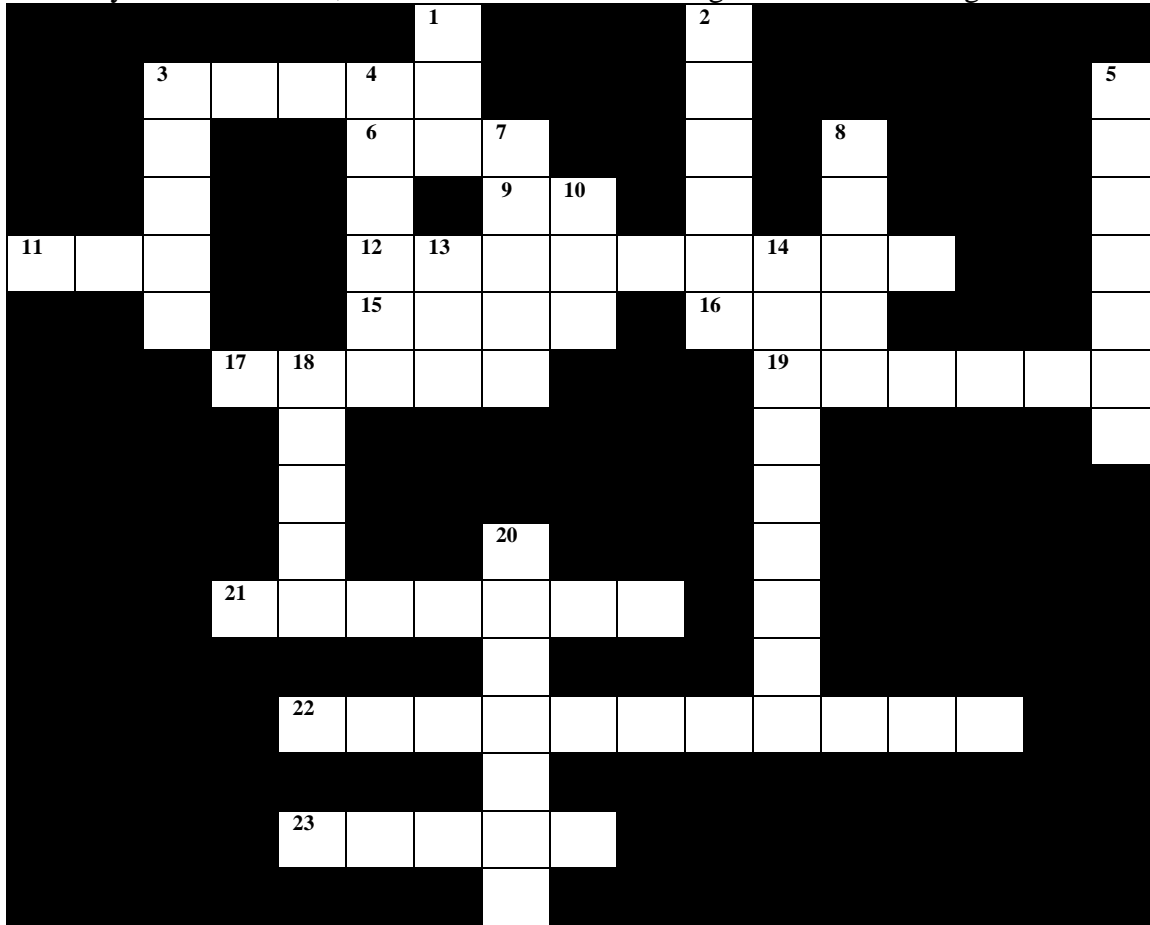
<sup>2</sup> Andreia Moura is an evening law student at New York Law School, expected graduation 2020.

<sup>3</sup> See <https://www.google.com/amp/s/amp.usatoday.com/amp/80844720>.

# FUN PAGES<sup>1</sup>

## Crossword Puzzle – “Gone But Not Forgotten”

By Michael Davies, Chair of the Drone/UAS Regulation & Licensing Subcommittee



### Across

3. Mrs. \_\_\_\_\_, nee Knavs
6. Plastic \_\_\_\_\_ Band
9. Addams' cousin
11. Number of existing airlines in this puzzle
12. Eastern US mountain range
15. It's legal in Canada
16. Spacewalk (abbr.)
17. Kareem or Kobe, once
19. Word on New York license plates
21. Opposite of 20 Down
22. \_\_\_\_\_ Divide, Belushi film
23. Linney/Bateman Netflix series

### Down

1. Defunct TV network
2. US military attack helicopter
3. Air traffic controller's workplace
4. Punk hairstyle
5. Number of defunct airlines in this puzzle
7. Gretzky was one, for a time
8. Name formerly on 200 Park Avenue
10. Late Mass. Senator
13. Spiderman creator
14. Fir or spruce
18. Kauai greeting
20. All Quiet on the \_\_\_\_\_ Front

<sup>1</sup> Please submit original aviation-related drawings, puzzles, pix, etc. for the Fun Pages to [areitzfeld@gmail.com](mailto:areitzfeld@gmail.com).



**June 29, 2018 Committee Summer Gathering**



**On Location at Construction of Hotel at John F. Kennedy International Airport<sup>2</sup>**



<sup>2</sup> Thanks go to Regulatory Subcommittee Chair Racquel H. Reinstein for this photo.

**October 23, 2018 “Hot Topics in Aviation” Event – First Panel**



**October 23, 2018 “Hot Topics in Aviation” Event – Second Panel**



**October 23, 2018 “Hot Topics in Aviation” Event – Networking**



**October 23, 2018 “Hot Topics in Aviation” Event – Networking**

