Halifax, NS

lukacs@AirPassengerRights.ca

May 27, 2013

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Attention: Ms. Sylvie Giroux, Analyst

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. United Airlines
Complaint about United Airlines' prohibition against onboard photography and audio or video recording
File No.: M 4120-3/13-01170
Reply

Please accept the following submissions in relation to the above-noted matter as a reply to United Airlines' answer of April 4, 2013.

OVERVIEW

Travel has been fascinating humankind since the dawn of times, and has been the inspiration of many literary works: Homer's *Odyssey* in the 8th century BC, James Boswell's *The Journal of a Tour to the Hebrides*, Johann Wolfgang von Goethe's *Italienische Reise*, and (perhaps more popular these days) Che Guevara's *The Motorcycle Diaries*, just to mention a few.

While in the past, travellers' only means of documenting their journeys were their pens, pencils, and diaries, this has dramatically changed in the 21st century due to the spread of advanced electronic devices that are capable of not only photography, but also recording substantial lengths of audio and video. These gadgets are so common in the Western world that not possessing one is increasingly becoming the exception.

The present complaint concerns United Airlines' attempt to restrict and/or ban and/or criminalize one of the most common and natural behaviours of travellers and tourists in the 21st century: to document one's travel experience through photography and video recording.

In the present complaint, the Applicant submits that United Airlines' Orwellian prohibition against onboard photography and audio or video recording is unreasonable and ought to be disallowed by the Agency.

ISSUES

I. Preliminary matters raised by United Airlines: standing and the Agency's jurisdiction . . 3

II. United Airlines' policy with respect to onboard photography and audio or video recording is a "term and condition of carriage" . . . 4
  (a) Meaning of "terms and conditions of carriage" in the *ATR* . . . 4
  (b) United Airlines' unique interpretation of Rule 21 is part of the "terms and conditions of carriage" . . . 5
  (c) United Airlines' choice to include the impugned policy in its *Hemisphere* magazine supports the finding that it is a "term and condition of carriage" . . . 6
  (d) United Airlines has been applying its policy with respect to onboard photography and audio or video recording as a "term and condition of carriage" . . . 6
  (e) Conclusion . . . 7

III. United Airlines' policy with respect to onboard photography and audio or video recording is unreasonable . . . 8
  (a) Preliminary matter: United Airlines' failure to profess a single complaint about onboard photography . . . 8
  (b) *FIPPA* does not apply to collection by individuals . . . 8
  (c) *PIPEDA* does not apply to collection by individuals, or for journalistic, artistic, or literary purposes . . . 9
  (d) The tort of breach of privacy requires expectation of privacy and seclusion . . . 9
  (e) United Airlines misstates the *Criminal Code* . . . 11
  (f) Unauthorized publication and not the photography itself is the invasion of privacy . . . 12
  (g) United Airlines has no standing to protect the privacy of passengers . . . 13
  (h) Passengers have a legitimate interest in documenting their interactions onboard and the service they receive . . . 13
  (i) The balancing test . . . 14

IV. Inclusion of the impugned policy in the *Hemisphere* magazine is contrary to s. 18(b) of the *ATR* . . . 15

V. Relief sought . . . 16

I. Preliminary matters raised by United Airlines: standing and the Agency's jurisdiction

On page 2 of its answer, United Airlines misstates the Applicant's position by suggesting that the Applicant is attempting to complain about a specific incident affecting another individual. This is clearly not the case. Indeed, on page 1 of the Applicant's February 24, 2013 complaint, the Applicant submitted that:

> Please accept the following submissions as a formal complaint against United Airlines for violations of ss. 18(b) and 111 of the *Air Transportation Regulations*, SOR/88-58 (the "*ATR*"), pursuant to Rule 40 of the *Canadian Transportation Agency General Rules*.
>
> ⋮
>
> The present complaint challenges United Airlines' publishing terms and conditions in its in-flight magazine that are not included in its Contract of Carriage (Exhibit "B") and/or tariff, as well as the reasonableness of this blanket prohibition.

Thus, it is plain and clear from the language of the complaint that the legal bases asserted by the Applicant in his complaint are ss. 18(b) and 111 of the *Air Transportation Regulations*. These provisions impose certain obligations upon United Airlines, and do not require the Applicant to be directly affected by United Airlines' failure to comply with these obligations in order to bring the present complaint to the Agency.

United Airlines seems to overlook an important difference between the Agency, which is a quasi-judicial regulatory body, and a court of law. While courts of law deal with specific complaints of aggrieved individuals, Parliament enacted s. 86(1)(h) of the *Canada Transportation Act* to entrust the Agency with a far broader regulatory role, which includes ensuring that the terms and conditions that passengers travelling to and from Canada are subjected to are reasonable. In other words, while courts of law can only deal with what happens *after* an incident involving a passenger and an airline, the Agency is equipped with powers to consider such matters *before* they happen (i.e., "on principle"), and thus prevent incidents altogether.

In light of the Agency's findings in *Black v. Air Canada*, 746-C-A-2005 (at paras. 7-8), there is no doubt that the Agency has jurisdiction to hear such policy-based complaints, and that the Applicant has standing to bring such a complaint. The Agency's decision in *Black* was cited with approval in *O'Toole v. Air Canada*, 215-C-A-2006, *Lukács v. Air Canada*, LET-C-A-155-2009, and most recently in *Lukács v. Air Canada*, LET-C-A-47-2012.

Therefore, the Applicant submits that he has standing to challenge the impugned policy based on ss. 18(b) and 111 of the *ATR*, and that the Agency has jurisdiction to determine the present complaint pursuant to s. 86(1)(h) of the *CTA* and s. 113 of the *ATR*.

II. United Airlines' policy with respect to onboard photography and audio or video recording is a "term and condition of carriage"

Although United Airlines admitted that its prohibition against onboard photography and audio and video recording is a "policy" (page 3 of United Airlines' answer), United Airlines attempts to evade the jurisdiction of the Agency and to circumvent the provisions of the *ATR* by claiming that it is not a "term and condition of carriage."

The Applicant respectfully disagrees with United Airlines' submissions, which amount to no more than a playing with words, and fail to address to the true nature and the pith and substance of the "policy" in question.

(a) Meaning of "terms and conditions of carriage" in the *ATR*

United Airlines incorrectly states on page 5 of its answer that the phrase "terms and conditions of carriage" is not defined in the *ATR*. On the contrary, s. 122(c) of the *ATR* is clear that "terms and conditions of carriage" is a collection of the air carrier's policies in respect of a wealth of issues, which must address, at the bare minimum, a list of enumerated issues:

> **122.** Every tariff shall contain
>
> ⋮
>
> (c) the terms and conditions of carriage, <u>clearly stating the air carrier's policy</u> in respect of at least the following matters, namely,
>
> ⋮
>
> (viii) refusal to transport passengers or goods,
>
> [Emphasis added.]

Passengers purchase airfares for the purpose of transportation. Consequently, the list of circumstances in which a passenger *may* be denied transportation, and thus the carrier may be relieved from the obligation to perform the contract of carriage, is one of the most vital portions of the contract of carriage. This fact is recognized by s. 122(c)(viii) of the *ATR*, which requires every carrier to clearly state its policy in respect of refusal to transport passengers in its tariff.

The Applicant never claimed that every policy of a carrier must be contained in the tariff. Instead, the Applicant's submission is that pursuant to s. 122(c)(viii) of the *ATR*, every policy of United Airlines that is related to and/or *may* lead to passengers being refused transportation or removed from the aircraft is part of the "terms and conditions of carriage" and must be clearly stated in United Airlines' tariff.

(b) United Airlines' unique interpretation of Rule 21 is part of the "terms and conditions of carriage"

United Airlines argues at the bottom of page 3 and the top of page 4 of its answer that it may remove passengers whose recording of other passengers creates disruption to the point that it endangers the safety of the flight. The Applicant submits that given that photography or video recording is not an illegal or disruptive activity (at least under the common and ordinary meaning of "disruptive"), it is not the photographer but rather the other passengers who may be causing disruption, and thus it is the other passengers whom United Airlines is entitled remove from the aircraft.

The Applicant would like to draw attention to Rule 21 of United Airlines, entitled "Refusal to Transport," which provides a lengthy list of circumstances in which passengers may be refused transportation or removed from the aircraft. Rule 21(H) specifically addresses the issue of safety of passengers and crew, and provides a list of 18 circumstances that United Airlines considers to be affecting the safety of the flight, none of which refer to photography or audio or video recording.

The provisions of Rule 21 do not appear to be, on their face, unreasonable, and as long as United Airlines interprets the phrases used in Rule 21 in their common and ordinary meaning, there is no need to provide an exhaustive list of all circumstances that may fall within the scope of Rule 21.

However, if United Airlines intends to attribute to the phrases used in Rule 21 a meaning other than their common and ordinary meaning, then these phrases must be defined, and these definitions are part of the "terms and conditions of carriage."

For example, Rule 21(H)(5) allows United Airlines to refuse transportation or remove "Passengers who are barefoot or not properly clothed." If United Airlines adopts a policy that it considers clothes made of pink fabric improper clothing and contrary to Rule 21(H)(5), then this unique interpretation of Rule 21(H)(5) is an inherent and inseparable part of the terms and conditions of carriage.

Similarly, given that the common and ordinary meaning of "disruptive behaviour" or "disorderly behaviour" does not encompass photography or audio or video recording, if United Airlines intends to interpret these phrases in its tariff to include these activities, then this non-standard and unique interpretation of the phrases forms an inherent and inseparable part of the terms and conditions of carriage.

Therefore, it is submitted that while United Airlines may choose (subject to the reasonableness requirement of s. 111 of the *ATR*) to interpret Rule 21 so broadly that it encompasses photography or audio or video recording, this interpretation will form an inherent and inseparable part of the terms and conditions of carriage.

(c) United Airlines' choice to include the impugned policy in its *Hemisphere* magazine supports the finding that it is a "term and condition of carriage"

The Applicant submits that United Airlines' choice to include the impugned policy in its *Hemisphere* magazine, while not determinative of the issue, supports the finding that the policy in question is a "term and condition of carriage."

As United Airlines conceded on page 6 of its answer, there are many forms of disruptive behaviour that are not explicitly spelled out in its tariff or its *Hemisphere* magazine. United Airlines mentions playing a musical instrument mid-flight or pointing a flashlight in the faces of sleeping passengers as examples.

The Applicant agrees that these activities are likely disruptive and/or disorderly. However, United Airlines does not need to explicitly prohibit these activities, because they already fall within the scope of the common and ordinary meaning of Rule 21(H)(1).

The Applicant submits that United Airlines chose to include the impugned policy in its *Hemisphere* magazine precisely because most passengers would not consider photography, and audio or video recording forms of disruptive behaviour, and thus in the absence of being informed about this prohibition, they would engage in these activities onboard, even though they do not intend to or consider themselves to be engaging in disruptive or disorderly behaviour.

(d) United Airlines has been applying its policy with respect to onboard photography and audio or video recording as a "term and condition of carriage"

Exhibit "A" to the Applicant's February 24, 2013 complaint is a newspaper article from NBC News, describing the story of Mr. Matthew Klint, who was removed by United Airlines from a flight for taking a photograph of his seat.

United Airlines argues that the newspaper article is hearsay, and as such the Agency ought not attribute any weight to it. The Applicant respectfully disagrees.

The doctrine of adverse inference is explained in *The Law of Evidence in Canada* by Sopinka, Lederman, and W. Bryant, 2nd ed. (Toronto: Butterworths, 1999) at paragraph 6.321:

> In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

Although the incident described in the newspaper article involved United Airlines and its employees over whom United Airlines has exclusive control, United Airlines chose not to lead any evidence with respect to the incident and its reasons for removing Mr. Klint from the flight, and it provided no explanation for its failure to lead any evidence on this point.

The Applicant submits that the Agency ought to draw adverse inference from United Airlines' failure to call evidence with respect to this incident, and ought to conclude, on balance of probabilities, that Mr. Klint was removed from the flight by United Airlines based on the impugned policy.

The Applicant further submits that the Agency, being an administrative tribunal and not a court of law, may rely in hearsay evidence in circumstances such as the present one, when it is the best evidence available, and the party who could provide more reliable evidence to contradict the hearsay fails to do so.

Hence, it is submitted that the Agency ought to conclude, on balance of probabilities, that in removing Mr. Klint from the aircraft, United Airlines applied the impugned policy as "terms and conditions of carriage."

(e) Conclusion

Every policy that is related to and/or *may* lead to passengers being refused transportation or removed from the aircraft is part of the "terms and conditions of carriage" and forms a fundamental part of the contract of carriage. Such policies must be set out in the carrier's tariff pursuant to s. 122(c)(viii) of the *ATR*.

United Airlines' prohibition against onboard photography and audio or video recording is a policy that, as admitted by United Airlines, *may* lead to removal of a passenger from the aircraft. Moreover, this policy is such a departure from the common and ordinary meaning of the phrases used in Rule 21 that this interpretation itself forms part of the "terms and conditions of carriage."

In at least one case, United Airlines did apply the impugned policy as a "term and condition of carriage" and removed a passenger from the aircraft for the breach of this policy.

Therefore, it is submitted that the impugned policy is a "term and condition of carriage" within the meaning of the *ATR*.

III. United Airlines' policy with respect to onboard photography and audio or video recording is unreasonable

(a) Preliminary matter: United Airlines' failure to profess a single complaint about onboard photography

On pages 2 and 3 of its answer, United Airlines presented a touching story of a passenger who allegedly complained about fellow passengers taking her/his photographs and extended video recordings, and subsequently disseminating same on the Internet.

While the Applicant is sympathetic to the individual passenger, if such a passenger did exist (who may well have a cause of action against those who disseminated her/his photographs and video without permission), it is important to observe that United Airlines failed to profess any evidence that such a complaint was indeed received.

Since the complaint in question is in the exclusive control of United Airlines, and United Airlines failed to explain its failure to produce the document in question, the Applicant submits that the Agency ought to draw adverse inference, and conclude that no such complaint was ever received by United Airlines.

(b) *FIPPA* does not apply to collection by individuals

The thrust of United Airlines' arguments for the reasonableness of the impugned policy are based on the value that Canadian society places on individuals' right to privacy.

However, United Airlines appears to overlook the scope of these statutes and the public policy objectives that these statutes are meant to promote, which is the protection of the individual against powerful organizations, governmental or private. This policy objective is clearly articulated, for example, in s. 1(b) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31:

> **1.** The purposes of this Act are, [...]
>
> (b) to protect the privacy of individuals with respect to personal information about themselves <u>held by institutions</u> and to provide individuals with a right of access to that information.
>
> [Emphasis added.]

The wording of the statute clearly expresses the legislative intent to protect individuals from institutions, and not from other individuals.

(c) *PIPEDA* does not apply to collection by individuals, or for journalistic, artistic, or literary purposes

Section 4(2) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 substantially limits the scope of the protection of personal information in the private sector:

> **4.** (2) This Part does not apply to
>
> ⋮
>
> (b) any individual in respect of personal information that the individual collects, uses or discloses for personal or domestic purposes and does not collect, use or disclose for any other purpose; or
>
> (c) any organization in respect of personal information that the organization collects, uses or discloses for journalistic, artistic or literary purposes and does not collect, use or disclose for any other purpose.
>
> [Emphasis added.]

The present complaint concerns the photography of one individual by another individual for personal purposes. Section 4(2)(b) of *PIPEDA* clearly reflects the legislative intent to carve out such interactions from the scope and applicability of the relevant provisions of *PIPEDA*. In other words, Parliament was of the opinion that the collection, use, or disclosure of personal information by an individual for personal or domestic purposes does not require protection by *PIPEDA*.

Similarly, Parliament chose to exclude from the scope of the act the collection, use, and disclosure of personal information for journalistic, artistic or literary purposes, which is a sound public policy. Indeed, it is a common practice for TV crews to record footage in privately owned but publicly used spaces, such as airports or sports arenas, and broadcasters have no obligation to seek permission from each and every individual whose face may appear in the footage.

The Applicant is struggling to see why United Airlines attempts to protect individuals from the collection of their personal information in situations and settings where Parliament explicitly chose to not have such protection in place.

(d) The tort of breach of privacy requires expectation of privacy and seclusion

United Airlines also refers to various provincial privacy statutes that render willful violation of a person's privacy an actionable tort. A common feature, however, of these statutes is that they refer to situations where there is a very high expectation of privacy, such as one's own home, vehicle, or a private telephone call to which the intruder is not a lawful party. For example, s. 3 of the *The Privacy Act*, C.C.S.M. c. P125 states that:

3. Without limiting the generality of section 2, privacy of a person may be violated

(a) by surveillance, auditory or visual, whether or not accomplished by trespass, of that person, his home or other place of residence, or of any vehicle, by any means including eavesdropping, watching, spying, besetting or following;

(b) by the listening to or recording of a conversation in which that person participates, or messages to or from that person, passing along, over or through any telephone lines, otherwise than as a lawful party thereto or under lawful authority conferred to that end;

(c) by the unauthorized use of the name or likeness or voice of that person for the purposes of advertising or promoting the sale of, or any other trading in, any property or services, or for any other purposes of gain to the user if, in the course of the use, that person is identified or identifiable and the user intended to exploit the name or likeness or voice of that person; or

(d) by the use of his letters, diaries and other personal documents without his consent or without the consent of any other person who is in possession of them with his consent.

[Emphasis added.]

It is very difficult to imagine how photography and audio or video recording on board an aircraft can fit into any of these examples. Indeed, if a passenger intends to observe another passenger on board an aircraft, there is no need for any camera or other device, because it can be done directly (and far more conspicuously).

At the same time, s. 3(b) of the statute clearly demonstrates the legislative intent to exclude recording of one's *own conversation* with another person from the examples of a violation of privacy. This aspect is particularly important in the present case, because the Applicant has argued in his complaint that passengers ought to be able to document and record *their own* interactions with the crew; and indeed, s. 3(b) confirms that such an action would not be violation of the crew's privacy.

The Applicant is grateful for United Airlines citing the decision of the Ontario Court of Appeal in *Jones v. Tsige*, 2013 ONCA 32, which explains the very substantial limitations of the tort of intrusion upon seclusion:

> [71] The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. [...]
>
> [72] These elements make it clear that recognizing this cause of action will not open the floodgates. A claim for intrusion upon seclusion will arise only for deliberate

> and significant invasions of personal privacy. Claims from individuals who are sensitive or unusually concerned about their privacy are excluded: it is only intrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive.
>
> [73] Finally, claims for the protection of privacy may give rise to competing claims. Foremost are claims for the protection of freedom of expression and freedom of the press. As we are not confronted with such a competing claim here, I need not consider the issue in detail. Suffice it to say, no right to privacy can be absolute and many claims for the protection of privacy will have to be reconciled with, and even yield to, such competing claims. [...]
>
> [Emphasis added.]

With utmost respect to United Airlines, the unfortunate reality is that the few secluded areas on board an aircraft are the washrooms and the cockpit, when the doors are closed. There is no doubt that there is an expectation of privacy and seclusion in these spaces, and the Applicant would not object to a policy that explicitly forbids photography of other passengers or crew in these spaces.

However, short of the washrooms and the cockpit, most aircrafts consist largely of a single space, and no reasonable passenger would expect to be secluded in that setting. Furthermore, the expectation of privacy is also very limited, because conversations of passengers may and frequently are overheard by other passengers sitting next to them, behind them, or in front of them, or by the crew.

(e) United Airlines misstates the *Criminal Code*

The *Criminal Code* defines "private communication" as follows:

> "private communication" means any oral communication, or any telecommunication, that is made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada and that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it, and includes any radio-based telephone communication that is treated electronically or otherwise for the purpose of preventing intelligible reception by any person other than the person intended by the originator to receive it;
>
> [Emphasis added.]

First, since United Airlines' aircrafts are registered in the United States of America, any conversation taking place on board its aircrafts is not one where the originator or the recipient are "in Canada."

Second, and more importantly, the expectation of privacy requires not only close proximity of two individuals, but also the absence of other individuals in close proximity to the two individuals

in question. This is impossible on board a crowded aircraft. It is absurd to claim that there is an expectation of privacy on board an aircraft, where every word is overheard by a number of fellow passengers.

Third, and finally, s. 184(2)(a) of the *Criminal Code* explicitly permits the recording of a person's *own* conversations:

> **184.** (2) Subsection (1) does not apply to
>
> (a) a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it;

Thus, in sharp contrast to certain states in the United States of America, in Canada, the consent of one of the parties to a conversation is sufficient for lawfully recording a conversation.

This exception to s. 184(1) is important in the case at bar, because the Applicant has argued in his complaint that passengers ought to be able to document and record *their own* interactions with the crew. Section 184(2)(a) of the *Criminal Code* confirms that passengers can lawfully do so.

(f) Unauthorized publication and not the photography itself is the invasion of privacy

United Airlines misstates the law of privacy with respect to photography in that it suggests that the act of taking a person's photograph in a public space without the person's consent is in and on its own an invasion of the person's privacy.

This distinction was considered by the Quebec Court of Appeal in *Éditions vice-versa inc. c. Aubry*, 1996 CanLII 5770 (QC CA). According to Justice LeBel, writing for the majority, since the plaintiff was in a public place when the photograph was taken, the act of taking the photograph could not be considered an invasion of the plaintiff's privacy. However, the unauthorized publication of the photograph did constitute such an invasion. In *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 SCR 591, the Supreme Court of Canada affirmed the decision.

Applying the same principles to the present case, what may violate passengers' privacy is the publication or public dissemination of their photograph by another passenger, in which case they can resort to the usual remedies offered by the civil justice system. However, the mere taking of a photograph (or video recording) of another passenger on board an aircraft does not violate the passenger's right to privacy, because when the aircraft is in use for transportation of passengers who purchased tickets, the aircraft cannot be considered a private space, even though the aircraft itself is privately owned.

(g) United Airlines has no standing to protect the privacy of passengers

A substantial portion of United Airlines' arguments in support of the reasonableness of its prohibition against the photography of fellow passengers is based on the alleged right to privacy of these passengers.

Even if such a right exists, the Applicant submits that United Airlines has no standing to protect these civil rights of the passengers, and it is up to the individual passengers to take legal actions against anyone who publishes their photographs without their authorization.

Decision No. 290-AT-A-2000, cited by United Airlines on page 16, is not relevant in the present case, because it concerned a passenger transported on a stretcher and the failure of United Airlines to follow its own standard procedures. Accommodation of disabilities is a truly exceptional and unique matter, which is not part of the present complaint in any way. (Indeed, United Airlines does not provide a privacy curtain to each and every passenger.)

There are many other civil torts that passengers may commit against each other on board an aircraft, such as fraud and defamation. Clearly, United Airlines is not responsible or liable in any way for these civil interactions between passengers, none of which is the business of United Airlines. Settling such disputes, even if they arise from an event on board an aircraft, is the responsibility of the courts of competent jurisdiction, and not United Airlines.

Thus, it is submitted that it is inappropriate and unreasonable for United Airlines to interfere with civil matters between passengers onboard its flights.

(h) Passengers have a legitimate interest in documenting their interactions onboard and the service they receive

Passengers travelling on a flight are also consumers and parties to a contract for which they paid, and thus they are entitled not only to receive the service as contracted, but also to document if they do not receive satisfactory service as required by their contract.

This is also the reason that in spite of United Airlines' detailed arguments about the right of passengers and crew to privacy, United Airlines does have the practice of recording conversations between its passengers and its agents at the call centers. Indeed, the recording can serve as a "silent witness" in the case of a dispute. While there is nothing untoward about United Airlines' practice, it appears to be at odds with United Airlines championing the cause of privacy.

On page 16 of its answer, United Airlines states that:

> Given the confines of an aircraft, events between passengers and/or crew usually occur in the presence of multiple witnesses. These witness accounts provide objective and credible evidence of the events.

This argument, however, is based on the false premise that the affected passenger will have access to the list of passengers and their contact information after the incident. Due to the applicable privacy legislation such as *PIPEDA*, which do apply to United Airlines, the names and contact information of potential witnesses are virtually inaccessible for passengers, and they are accessible only to United Airlines. This, in turn, provides a substantial unfair advantage to United Airlines in any dispute about what did or did not take place on board an aircraft.

Thus, recording interactions with the crew is practically the only avenue for passengers to protect themselves and their reputations in the case of any conflict with the crew. Indeed, in the absence of clear and convincing evidence such as a recording, authorities tend to believe the airline and its crew, and are inclined to discount passengers' accounts of the events.

As explained in the complaint, the Applicant himself was a victim of an incident of this nature in 2007, where United Airlines' agents accused the Applicant of yelling at them, and attempted to resolve the Applicant's legitimate complaint by calling airport police/security to complain about him and asking that he be removed. As documented in *Lukács v. United Airlines Inc., et al.*, 2009 MBQB 29, the audio recording of the Applicant's interactions with United Airlines' agents turned out to be a piece of crucial evidence in clearing the Applicant from these allegations.

As noted earlier, both s. 3 of *The Privacy Act* and s. 184(2)(a) of the *Criminal Code* recognize that it is perfectly lawful and legal to record one's own interactions and conversations with others.

Thus, it is submitted that United Airlines' impugned policy is unreasonable to the extent it purports to apply to a passenger's own interaction with the crew.

Similarly, under s. 184(2)(a) of the *Criminal Code*, a person may authorize a third person to record her/his communications. Consequently, passengers ought to also be permitted to record the interaction between the crew and a fellow passenger, if the latter requests them to do so.

(i) The balancing test

The reasonableness of terms and conditions is determined by the Agency by the so-called balancing test, where a balance is struck between the passengers' rights to be subject to reasonable terms and conditions and the airline's ability to meet is statutory, commercial, and operational obligations.

Statutory obligations. United Airlines presented neither arguments nor evidence to suggest that the impugned policy is related in any way to its ability to meet its statutory obligations. Indeed, no statute requires United Airlines to protect the civil rights of passengers onboard its aircraft.

Commercial obligations. United Airlines professed no evidence to suggest that the impugned policy is related in any way to its ability to meet its commercial obligations. As noted by the Agency in the context of the balancing test, simply stating that the current state of affairs is "preferable" (as United Airlines did) is not sufficient to meet the test.

Operational obligations. While United Airlines has provided some speculations about how on-board photography *may* affect its crew, it led no evidence to substantiate the adverse effect of onboard photography on its ability to meet its operational obligations. The methods used for the 9/11 attack are not relevant to the present case, because United Airlines has neither the expertise nor the capability of preventing passengers from covertly videotaping airline procedures if they wish to do so. Thus, the impugned policy affects only those law abiding passengers who attempt to photograph or record video overtly. In other words, the impugned policy is very unlikely to improve the safety of flights.

Finally, it is worth observating that while United Airlines did present evidence of another carrier having a similar prohibition against photography, such a policy is far from being an industry practice. Indeed, the vast majority of airlines do not restrict onboard photography and audio or video recording. Nevertheless, there is no sign that the absence of such a restriction or policy hinders these numerous other carriers in meeting their statutory, commercial, and operational obligations.

Therefore, it is submitted that, on balance of probabilities, the impugned policy does not affect United Airlines' ability to meet its statutory, commercial, and operational obligations in any way. However, at the same time, the policy purports to enjoin passengers from lawful activities, such as documenting their own interactions with the crew and/or misconduct of the crew, which may be of public interest, and thus it also affects passengers' freedom of speech and expression.

Hence, it is submitted that the impugned prohibition against onboard photography and audio and video recording is disproportionately restrictive, and unreasonable within the meaning of s. 111 of the *ATR*.

IV. Inclusion of the impugned policy in the *Hemisphere* magazine is contrary to s. 18(b) of the *ATR*

The purpose of the statutory requirement for carriers to publish their tariffs is to ensure that the travelling public is adequately informed about the terms and conditions of carriage. If carriers are allowed to publish additional information that is different than what is set out in their tariff, then this undermines the public policy objective that the requirement for publishing a tariff aims to achieve.

The purpose of s. 18(b) of *ATR* is to ensure that carriers do not provide misleading information about their services and tariffs to the travelling public. One of the ways of providing misleading information is by making statements that do not reflect United Airlines' rights and obligations set out in United Airlines' tariff, as in the present case. Indeed, no reasonable person reading Rule 21 (or any other tariff rule) of United Airlines would expect that United Airlines had anything against passengers photographing and recording audio or video on board. As explained earlier, there is no expectation of privacy on board an aircraft of a common carrier (with the exception of segregated areas, such as the washrooms and the cockpit), and no reasonable person would consider photography and audio or video recording in such a place a socially unacceptable or

disruptive behaviour.

Thus, it is submitted that the inclusion of the impugned policy in the *Hemisphere* magazine is an attempt to subject passengers to additional terms and conditions beyond what is set out in United Airlines' tariff, and as such it is misleading, contrary to s. 18(b) of the *ATR*.

V. Relief sought

The Applicant is asking the Agency to disallow the impugned policy as being unreasonable, and to direct United Airlines to cease and desist applying the policy.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Mr. Drew Tyler, Counsel for United Airlines

LIST OF AUTHORITIES

Legislation

1. *Air Transportation Regulations*, S.O.R./88-58.
2. *Canada Transportation Act*, S.C. 1996, c. 10.
3. *Canadian Transportation Agency General Rules*, S.O.R./2005-35.
4. *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.
5. *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.
6. *The Privacy Act*, C.C.S.M. c. P125.

Case law

7. *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 SCR 591.
8. *Black v. Air Canada*, Canadian Transportation Agency, 746-C-A-2005.
9. *Éditions vice-versa inc. c. Aubry*, 1996 CanLII 5770 (QC CA).
10. *Jones v. Tsige*, 2013 ONCA 32.
11. *Lukács v. Air Canada*, Canadian Transportation Agency, LET-C-A-155-2009.
12. *Lukács v. Air Canada*, Canadian Transportation Agency, LET-C-A-47-2012.
13. *Lukács v. United Airlines Inc., et al.*, 2009 MBQB 29.
14. *O'Toole v. Air Canada*, Canadian Transportation Agency, 215-C-A-2006.

Secondary sources

15. Sopinka, Lederman, and W. Bryant. *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999).