

CYBERSECURITY

Laws Seek to Catch Up to the Soaring Development of Recreational Drones

Tiny unmanned aircraft could be invading private and public property

Andrew P. Bolson and Michael A. Austin, New Jersey Law Journal

March 4, 2015

As drones become cheaper, smaller and equipped with better technology, their use will become more ubiquitous. In fact, the Federal Aviation Administration (FAA) has estimated that within five years there could be 7,500 hobby drones operating within the United States. These drones will be used for a variety of purposes, ranging from the innocuous to the malicious. Already individuals are using drones for such purposes as monitoring police DUI checkpoints for abuse of power, to take photos at national parks, to check crop yields and to spy on unsuspecting neighbors and bystanders. Drone technology is still in its infancy, but it is quickly becoming apparent that additional laws and regulations may be needed to protect individual privacy against recreational drone use.

In September 2014, a New Jersey man was arrested after he shot down a neighbor's drone that was taking aerial photographs of his home's construction project. The shooter was arrested and charged with possession of a weapon for an unlawful purpose and criminal mischief. While incidents of drone shootings are isolated, across the country, documented incidents of drone-fueled frustration is on the rise. For example, in the spring of 2014, a Connecticut woman confronted and shoved a drone pilot who was filming sunbathers on a beach. The woman who shoved the drone pilot was arrested and charged with assault. These two events garnered attention in part because the drone pilots themselves were not charged with any crime. Instead, the people charged with crimes were those who felt that their privacy had been invaded.

Since the FAA released an advisory circular on model airplanes in 1981, the FAA has not been regulating most civilian drones flying at altitudes below 400 feet, except in areas around airports. The advisory circular provided voluntary standards for hobbyists to follow, including suggesting that model aircraft pilots stay away from populated areas and from noise-sensitive areas, such as parks and schools. However, the FAA is intent on revising its policies based upon the advent of drone technology. In October 2014, the FAA released a memo that requested cancellation of the 1981 circular and advised that it was in the process of drafting a new advisory circular. While the contents of a new circular have yet to be released, the FAA is constrained by the FAA Modernization and Reform Act of 2012. Under the act, the FAA cannot regulate "model aircraft" if they are: (1) flown for hobby or recreational purposes; (2) operated within safety guidelines; (3) not more than 55 pounds; (4) operated in a way to not interfere with manned aircraft; and (5) not flown within five miles of an airport.

Although the FAA has exclusive jurisdiction to regulate flight operations within navigable space, states can also regulate the airspace at lower altitudes. Armed with this power, states have been active in legislating against drones to ensure privacy protections. According to the ACLU, at least 43 states have proposed legislation to regulate drone use. While the FAA is primarily concerned with flight safety, much of the discussion in state legislatures has to do with privacy and nuisance concerns. California, for example, recently passed a law prohibiting recording images or voices of people using a drone without permission.

New Jersey's own legislature has also been wrestling with the need to regulate drone use. In 2014, Gov. Chris Christie pocket-vetoed legislation regulating law enforcement use of unmanned aerial vehicles. Among other things, the legislation would have generally prohibited the use of drones for police surveillance in the absence of a search warrant, except in emergency situations. The proposed legislation

would have also provided exemptions for situations such as for fire operations and efforts to locate missing persons. If states fail to address the privacy concerns created by drones, municipalities may be pressured to regulate drones through municipal ordinances. While there are no known such ordinances yet in New Jersey, ordinances have been proposed in cities, such as Phoenix, Ariz. Proposed ordinances typically provide for the imposition of fines for using drones to film or photograph individuals on private property.

Until Congress, the FAA, the state legislatures or local municipalities address the issue of drones, current laws will be utilized to provide privacy protections. For example, the common-law prohibition against intrusion upon seclusion may provide protection against intrusive drone surveillance, which can include collection of not only photographic images, but other electronic data. It must be noted that drones can easily be equipped to harvest electronic signals from cellular phones, radio frequency identification data or RFID (a technology becoming commonplace in consumer credit cards), garage-door opener signals and other radio and electronic data broadcast over the air. In addition to civil statutes, criminal laws for harassment, stalking and trespass may be used to prevent privacy invasions. However, being that recreational drones have only recently entered the daily lexicon, as of yet there are no known cases that address whether existing civil or criminal statutes and common-law rights will be sufficient to quell privacy concerns over malicious drone use.

Historically, land owners had exclusive possessory rights not only to their land, but also to the vertical column extending from the depths to the heavens. The advent of commercial aviation challenged this common-law principle. In *U.S. v. Causby*, 328 U.S. 256 (1946), the United States Supreme Court rejected the principle that a property owner was entitled to air rights above his property, commenting that "this doctrine has no place in the modern world." In *Causby*, a land owner sued the government, claiming that military aircraft flying at altitudes often below 100 feet were trespassing upon his land. The Supreme Court determined that the FAA has rights to navigable airspace, but that the low-level flight across Causby's property was considered to be an easement. As a result of this determination, the Supreme Court held that Causby was entitled to compensation. The low-altitude flight capabilities of both recreational and commercial/government drone use will certainly challenge the FAA's definition of navigable airspace, making it almost certain that cases similar to *Causby* will require judicial interpretation.

Drones are seemingly straight out of a science-fiction novel. The thought that tiny unmanned aircraft could be invading private and public property is somewhat creepy and unnerving. Until the technology and industry matures, it is unknown how drones will be fully utilized. However, as the drone industry evolves, privacy concerns over the use of drones will persist. In the future, it will be up to the federal government, states and local municipalities to ensure that there are adequate privacy protections against the malicious use of drones, while at the same time not creating so much regulation as to stifle drone innovation. •

Bolson is an associate with Rubenstein, Meyerson, Fox, Mancinelli, Conte & Bern in Montvale, New Jersey. Austin is an associate with Herold Law in Warren, New Jersey.