

# Journo-Drones: A Flight over the Legal Landscape

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**A**erial newsgathering has long captured the public's imagination. In 1906—just three years after Orville Wright made the first sustained, powered flight—George Lawrence used 17 kites and steel wire to suspend a 46-pound camera into the air and capture panoramic photos of San Francisco following the epic earthquake and ensuing fires that ravaged the city. Fifty-two years later, John Silva changed the landscape of television news reporting through the KTLA5 “Telecopter,” ensuring that news helicopters could deliver live traffic updates and car chases alike to the masses. Drones represent the latest technological advance in the storied history of bird’s-eye newsgathering. As journo-drones begin to fly on the scene, journalists will need to navigate through existing state and federal laws and a rapidly growing thicket of new regulations and statutes. In this article, we seek to explain the emerging legal framework for journo-drones and examine areas in which further regulation and rule-making may develop.

## Why Journo-Drones?

Like the Telecopters of yesteryear, journalists today are eager to put drones to work. Those drones, known in the technology industry and among regulators as small unmanned aircraft systems (sUAS), come in many shapes and sizes. Some look like model airplanes or helicopters. Others look nothing like the manned aircraft that we have seen in the past, taking the form of futuristic minispaceships with multiple rotors. The drones that most journalists would like to use span less



than two feet in diameter and weigh just a few pounds. And they are inexpensive. Today, a small Parrot AR drone, which can fly a few hundred feet in the air for about fifteen minutes, costs only \$300.<sup>1</sup> The cost of a more sophisticated drone can range from roughly \$1,000 to \$40,000, depending on its size, the distance it can travel, and the time it can stay in the air.<sup>2</sup>

Drones offer journalists many benefits for newsgathering. First, and most obviously, drones have the ability to capture incredible images, offering vantage points that previously could only be captured by helicopters at far greater cost.<sup>3</sup> In addition, drones offer viewpoints that helicopters cannot capture. Drones’ small size permits accessibility into otherwise hard-to-reach areas, allowing versatility in vantage points that range seamlessly from up above to up close, into tight spots, and in between obstacles. They also are much less noisy than helicopters, allowing them to record much less obtrusively. Because drones are unmanned, they also eradicate the need for human safety considerations that restrict manned aircraft. For example, drones can easily fly over forest fires, into dangerous conflict zones, and even into erupting volcanoes, all without risking human life.<sup>4</sup> In addition, drones can be equipped with a wide array of

sensors to gather data about weather, temperature, radiation, and other environmental information that can be used to supplement video recording.

In the United States, *The Daily*, News Corporation’s now-defunct tablet newspaper, was the first news outlet to use a drone for newsgathering. In 2011, *The Daily* flew camera-equipped drones to survey the flood-ravaged landscape of North Dakota and the devastation wrought by tornadoes in Alabama.<sup>5</sup> Although on-the-ground reporting might have given a close-up of destroyed buildings, and helicopter imagery could have displayed the destroyed horizon, *The Daily*’s news drones were able to switch between these vantage points effectively, offering people perspectives that otherwise could never have been seen. The Federal Aviation Administration (FAA) was not impressed. The agency quickly investigated whether *The Daily*’s use of drones violated FAA regulations. Although the FAA did not take any action against *The Daily*, the news of legal scrutiny was enough to chill many journalists from experimenting with using drones for newsgathering.

*The Daily*’s early experience with drones gave a hint at their value as a new reporting tool. That experience does not stand alone. For example, in 2012 a hobbyist flying his drone over

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the Trinity River in Texas noticed a nearby creek with red rivulets, which, upon closer inspection, were streams of pig blood flowing from a local slaughterhouse. After the “hobbyist reported his findings to [local officials], . . . a lengthy investigation ensued.”<sup>6</sup> Likewise, in 2013, while Colorado was in the midst of horrific rains and flooding, a private company used drones to map the floods in an effort to educate the public and assist authorities.<sup>7</sup>

Internationally, drones have been used to capture dramatic footage of protests in Kiev, typhoon damage in Thailand, cricket games in Australia, and Olympic events in Sochi.<sup>8</sup> Reporters in other countries also have used drones to circumvent traditional limits on access: in Australia, one media company used a drone to observe refugee encampments on Christmas Island after being denied permission to view the area.<sup>9</sup>

Just as drones have their advantages, they also pose risks. Those risks have made headlines over the past year. For instance, last fall, a drone in Manhattan caromed off a building, falling hundreds of feet and landing at the feet of pedestrians on the sidewalk below.<sup>10</sup> In Brooklyn, a man was killed when his own drone hit him in the head.<sup>11</sup> And a wedding photographer’s drone accidentally flew into a groom who was posing for romantic images with his bride-to-be.<sup>12</sup>

Perhaps the biggest news about the risks posed by drones involved Senator Dianne Feinstein’s claim that her privacy had been invaded by one. Senator Feinstein spoke to *Politico* and *60 Minutes* about an incident in which she believes a drone was flown outside the window of her house during a protest.<sup>13</sup>

Given these safety and privacy concerns, and in light of *The Daily’s* early experience, journalism drones in the United States largely have been grounded. Yet, the technology continues to develop rapidly, and the demand to use drones has grown exponentially. The law has moved more slowly.

### Early Legal Landscape

In 1958, Congress enacted the Federal Aviation Act, which established the FAA and directed it to “develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary

to ensure the safety of aircraft and the efficient use of airspace.”<sup>14</sup> Safety is at the heart of the FAA, as the 1958 act was passed in the aftermath of a tragic midair collision between a Trans World Airlines Super Constellation and a United Air Lines DC-7 over the Grand Canyon, which killed all 128 people on board the planes.<sup>15</sup>

In the years that followed, the FAA began to implement rules to allow aircraft to safely navigate the skies. At the same time, people began to build and use model airplanes as a hobby. In 1981, the FAA issued Advisory Circular 91-57, which asks hobbyists to avoid flying their model airplanes above 400 feet; within three miles of airports; and near full-scale aircraft, populated areas, or noise-sensitive areas such as parks, schools, hospitals, and churches.<sup>16</sup> The Advisory Circular, which was not promulgated as a formal FAA rule, called for hobbyists’ voluntary compliance as a means to ensure public safety. For nearly a quarter century, it stood as the FAA’s only administrative guidance on small unmanned aircraft.

Then, in 2005, as drone technology developed and began to enter the domestic marketplace, the FAA issued a memorandum outlining an interim policy for approving drones for domestic use.<sup>17</sup> That memorandum stated that drone operators would “be held accountable for controlling [their] aircraft to the same responsible standard as the pilot of a manned aircraft” and explained that the FAA’s regulation concerning careless and reckless operation of an aircraft applied to drones.

The 2005 memorandum was supplemented two years later by a new FAA policy statement on drones.<sup>18</sup> That statement allows hobbyists to fly drones under the Advisory Circular issued in 1981 but stresses that the circular “only applies to modelers and thus specifically excludes its use by persons or companies for business purposes.”<sup>19</sup>

The 2007 policy statement further provides that, except for hobbyists, “no person may operate a UAS in the National Airspace without specific authority.”<sup>20</sup> The 2007 policy statement explains that the FAA will authorize two types of entities to use drones, and those entities operate under different regimes. Public

entities (i.e., federal, state, and local government agencies) can obtain a “certificate of authorization” to use drones.<sup>21</sup> For example, U.S. Customs and Border Protection holds a certificate of authorization and maintains a large cache of drones that serves as a “lending library” for other public entities.<sup>22</sup> Civil entities (i.e., private companies) can seek a “special airworthiness certificate.”<sup>23</sup> Very few of these certificates have been issued, with nearly all of them going to defense companies like Honeywell and Raytheon and one going to ConocoPhillips to monitor oil drilling in Alaska.<sup>24</sup> Obtaining a special airworthiness certificate requires an especially rigorous showing of how the drone system is designed and constructed, including software development, control, and quality-assurance procedures.<sup>25</sup> No media entity has received a special airworthiness certificate. In general, neither the certificates of authorization nor the special airworthiness certificates are broad grants of permission: almost all are granted narrowly for specific times, locations, and operations.<sup>26</sup> Although the 2007 policy statement indicated that it would undertake a safety review of drones and possibly provide new rules as a result, no rules were ever proposed.

### FAA “Enforcement” in a No-Rule Regime

Recognizing the growing demand by companies, journalists, government agencies, and others to use drones, and frustrated by the FAA’s delay in promulgating regulations addressing drone technology, in 2012 Congress enacted the FAA Modernization and Reform Act (“FMRA”).<sup>27</sup> The act requires the FAA to devise a “comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace” by September 2015.<sup>28</sup> This plan must address public, civil, and commercial use of drones of all sizes, including those drones that are of the greatest interest to journalists—the category of “small” drones (i.e., any drone under 55 pounds).<sup>29</sup>

### Cease-and-Desist Letters

In the absence of formal rules regulating drones, the FAA has relied

on its 2007 policy statement to issue cease-and-desist letters to people flying drones without FAA authorization. In many instances, the agency has sent cease-and-desist letters to people and companies flying drones for commercial purposes, whether those purposes are to take photos of houses for real estate promotions, to deliver dry cleaning, or to record images of baseball players at spring training.<sup>30</sup> The FAA also has construed newsgathering to be a “commercial use,” sending cease-and-desist letters to media companies that have used drones in their reporting.<sup>31</sup> In addition, in 2013, the FAA sent cease-and-desist letters to two public universities with drone journalism programs, one at the University of Missouri and the other at the University of Nebraska-Lincoln.<sup>32</sup> The FAA required both programs to halt their operations and apply for certificates of authorization before continuing.

#### **Huerta v. Pirker**

The FAA has—just once—taken action to punish someone for flying a drone. Raphael “Trappy” Pirker, a well-known drone enthusiast and operator, was hired to obtain aerial photos and video of the University of Virginia campus. On October 17, 2011, Pirker operated his 4.5-pound Ritewing Zephyr powered glider to snap a variety of shots. The FAA alleged that he flew the drone at extremely low altitudes, through tunnels with moving cars below, and in close proximity to railway tracks and individuals, all in violation of an FAA regulation stating that “no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.”<sup>33</sup> In light of this alleged violation, the FAA levied a \$10,000 civil penalty against Pirker. (The private company that had hired Pirker to operate the drone faced no fine, nor did it receive a cease-and-desist letter.)

Pirker fought the enforcement action in front of the National Transportation and Safety Board (NTSB), arguing that the FAA did not have any authority to fine someone operating a drone because it had not issued any formal rules governing their use. Although the FAA’s 2005 memorandum and 2007 policy statement claimed that drone operators

were subject to FAA regulation and purported to ban commercial use of drones, Pirker argued that these pronouncements were unenforceable because they had not been issued as formal rules consistent with the Administrative Procedure Act. Thus, Pirker contended, the pronouncements could not bind him, and the fine was unenforceable.<sup>34</sup>

On March 6, 2014, an NTSB administrative law judge agreed. According to the judge, if the FAA’s contention concerning the scope of its existing regulations were correct, its position “would then result in the risible argument that a flight in the air of, *e.g.*, a paper aircraft, or a toy balsa wood glider, could subject the ‘operator’ to” FAA’s existing regulations.<sup>35</sup> Moreover, that judge held that at the time of Pirker’s flight, “there was no enforceable FAA rule” that governed Pirker’s drone.<sup>36</sup> As the judge explained, Congress enacted the FMRA because “there were no effective rules or regulations” in place.<sup>37</sup>

Not surprisingly, the FAA appealed the *Huerta v. Pirker* ruling almost immediately. That appeal is pending. In announcing its decision to appeal the ruling, the FAA expressed concern that the administrative law judge’s decision would impact the safety of national airspace and emphasized its view that the appeal stayed the ruling.<sup>38</sup>

Following the judge’s decision, however, some have questioned whether the FAA has the authority to send cease-and-desist orders in the absence of an enforceable law.<sup>39</sup> Indeed, after the *Pirker* decision was issued, a federal lawsuit was filed directly challenging the FAA’s authority. In April 2014, Texas Equusearch, a non-profit search-and-rescue organization that uses drones to find missing persons, filed a petition for review in the federal district court in Washington, D.C. alleging that it received a cease-and-desist letter from the FAA ordering it to “stop immediately” its rescue efforts because they are “illegal.”<sup>40</sup> Equusearch claims that it has no commercial purpose and is asking the court to set aside the FAA’s order. In its filings, Equusearch argues that the FAA has no power to issue cease-and-desist letters in the absence of formal rules. Regardless of the merits of this legal argument

and the FAA’s view on the viability of the *Pirker* ruling, prospective drone operators would be well advised to remain cautious given the FAA’s position on its enforcement power and the political risks of drawing the ire of regulators and politicians as they contemplate how to govern drones’ domestic use.

#### **Philosophical Approaches to Regulation**

As the *Pirker* case and appeal have proceeded, the FAA, Congress, state legislatures, and local governments have wrestled with how to regulate drones and how to address the safety and privacy issues that they raise. The possible fields of regulation fall into at least six categories that could implicate newsgathering: operators, flight, property, devices, behavior, and consent. Some of these categories may be impractical, while others pose grave constitutional issues. Nevertheless, these six categories offer a framework to make sense of the flurry of federal, state, and local legislation and regulation emerging around the use of drones.

#### **Regulating Drone Operators**

Governments might permit only certain people or entities to fly drones. For instance, regulations might provide that only government entities can use drones. They might provide that only people with a valid, government-issued certificate or license can fly drones. Alternatively, they might say that drones can only be flown for certain purposes.

#### **Regulating Flight**

Governments might regulate the flight of drones, specifically when, where, and how drones can be flown. For example, some governments might consider allowing private drone use only during daylight hours, in places with few people, and within the operator’s line of sight (*i.e.*, the operator must be able to see the drone at all times). Alternatively, they might say that drones can only be flown for certain purposes.

#### **Regulating Property Involved**

Governments might regulate drones’ ability to record images based on the property involved, treating public and

private property differently or distinguishing between congested areas and open spaces. Likewise, the regulations could restrict or prohibit recording in places where people have a reasonable expectation of privacy.

### ***Regulating Devices***

Governments might regulate the recording devices on drones, for example, by restricting drones' use of telephoto lenses or night-vision technology. As drones are increasingly seen as platforms for other types of data journalism, including air quality sensors or barometers, this kind of regulation may be of particular note.

### ***Regulating Behavior***

Governments might regulate recording people engaged in certain behavior. For instance, following California's anti-paparazzi laws, legislators might attempt to limit drones recording people engaged in personal or familial activities.

### ***Regulating Consent***

Finally, governments might regulate the surreptitious use of drones. This objective might be accomplished by requiring drone operators to obtain consent before flying over private property or filming someone. Alternatively, drone operators might be required to provide notice of where they are flying or filming, or governments might require drones to be made more visible by requiring them to be certain colors or sizes.

### **The FAA Takes Action—Roadmap**

As the *Pirker* case was progressing before NTSB, the FAA moved closer toward fulfilling its congressional mandate under the FMRA. In November 2013, the FAA released its first annual Integration of Civil Unmanned Aircraft Systems in National Airspace System Roadmap (Roadmap).<sup>41</sup> The Roadmap is not a set of regulations; rather, it is a guide for the type of regulations that the FAA hopes to eventually implement. Notably, the Roadmap distinguishes between the integration of larger commercial drones and small drones, whose proposed rule making is now scheduled for late 2014; the integration will happen quite slowly, over a period involving technical testing and rule making that may span a

decade.<sup>42</sup> Although the Roadmap does not elaborate on what rules will ultimately bind small drones, the 72-page document does flag several categories of possible regulation that should be of interest to any drone operator interested in newsgathering: pilot certification, line-of-sight requirements, time limitations, technological constraints, and other constraints. One category not addressed is privacy.

### ***Pilot Certification***

The Roadmap made clear that the FAA wants to ensure that each aircraft is "flown by a pilot in accordance with required procedures and practices."<sup>43</sup> Thus, some form of drone pilot certification seems likely. At this point, it is not clear whether any licensing process would be as involved as the process for obtaining certification to fly a manned aircraft or whether some more easily attainable process will be proposed. Should a pilot's license be required for the use of small drones, fewer people will be qualified to fly them. If the licensing process is akin to the process needed to become certified to pilot a manned aircraft, the barrier to entry will be high, and media companies likely will need to work closely with other companies to produce and license content for drone use—not dissimilar from how helicopter footage is obtained. In any case, some baseline level of training and licensing is likely to be required, particularly given the variant environmental factors that can affect the flight of drones and thereby increase the physical danger that they can pose.

### ***Line-of-Sight Requirements***

The Roadmap indicates that small drones will have to be operated within visual line of sight; that is, operators must always be able to see their drones as they fly.<sup>44</sup> Should the FAA ultimately require that a drone remain in visual line of sight as opposed to radio line of sight (that is, remotely controllable), then certain types of reporting (such as flying over forest fires, natural disasters, or even large protests) might be impossible. This kind of regulation thus would reduce some of the "access" benefits of drone journalism, i.e., a drone can quickly retrieve content from locations that are too remote or unsafe for an individual or team of journalists.

### ***Time Limitations***

The Roadmap states that small-drone nighttime operations will be reviewed with a goal of "increased night operations for public entities by 2015."<sup>45</sup> This statement might suggest that the FAA will not permit private citizens to fly drones at night.

### ***Technological Constraints***

There are a number of technological means of ensuring safety and accountability of drones, such as detect-and-avoid technology to prevent crashing; return-to-base functionality to prevent lost drones; information-assurance mechanisms to prevent hacking; and possible tools to allow for identification of drones, such as radio-frequency identification (RFID) tags or registration numbers. The Roadmap alludes to each of these technologies.<sup>46</sup> Should the FAA require any of these systems for drone flight, the market and cost of drones could change considerably. One of the reasons that drones are so appealing at the moment is that they are low in cost and easy to purchase. Mandating that drones contain sophisticated technology will drive up their cost and likely will affect media outlets' ability to use them for newsgathering.

### ***Other Constraints***

The Roadmap declares that the forthcoming small-drone regulations "may have operational, airspace, and performance constraints."<sup>47</sup> The Roadmap itself does not address what these constraints might be, but if, for example, the forthcoming regulations prohibit flying over populated areas, that prohibition effectively would ban drones from many metropolitan areas and greatly constrain the type of reporting that can be undertaken. Similarly, if the FAA continues to follow a regime similar to the existing certificates of authorization and special airworthiness certifications, then small drones may not be able to fly until gaining specific authority per flight to do so—severely hampering the use of drones for breaking news but likely not affecting closed-set filming or preplanned events. Preregistration of a flight plan (submitting intent-to-fly and location information but no requirement to receive approval) may strike a balance between documentation and newsgathering.

### Test Sites

In December 2013, one month after releasing the Roadmap, the FAA announced the establishment of six test sites.<sup>48</sup> The sites are designed to be laboratories where policy makers and developers can assess various issues with drones and observe how they operate in different settings. To that end, the six sites are geographically and climactically diverse, and each will focus on different technology and operational issues.<sup>49</sup>

The FAA, through its test sites, offered an indication of how it might approach the privacy question. In announcing the test sites, the FAA stated that it was “not . . . taking specific views on whether or how the federal government should regulate privacy or the scope of data that can be collected by” drones.<sup>50</sup> Instead, it instructed each test site to create its own privacy rules, explaining that test sites and the drones that fly in them must comply with federal, state, and other laws protecting an individual’s right to privacy. The FAA also has required each site to have publicly available privacy policies as well as a written plan for data use and retention. Finally, the FAA requires that the test sites implement an annual review of privacy practices and allow for public comment.<sup>51</sup>

### Legislation Looms

Commercial drone use has not escaped the attention of federal and state legislators. Unsurprisingly, privacy is a central concern, and that concern could impact journalists’ ability to use drones for newsgathering.

In Congress, legislators have proposed three major bills focusing on the privacy implications of both data collection and data storage. For example, the Preserving American Privacy Act of 2013, proposed by Rep. Ted Poe (R-Tex.) and Rep. Zoe Lofgren (D-Cal.), would prohibit private drone operators from capturing “highly offensive” data involving “personal or familial activity . . . in which the [person] ha[s] a reasonable expectation of privacy.”<sup>52</sup> Meanwhile, the Drone Aircraft Privacy and Transparency Act, offered by Sen. Ed Markey (D-Mass.), would require that drone users obtain a license and submit a “data collection

statement” detailing who will operate the drone, where the drone will be flown, what kind of data will be collected, how that data will be used, whether the information will be sold to third parties, and the period of time for which the information could be retained.<sup>53</sup> The Markey bill also requires that the FAA “create a publicly available website that lists all approved licenses and includes the data collection and data minimization statements, any data security breaches suffered by a licensee, and the times and locations of drone flights.”<sup>54</sup> Similarly, the Safeguarding Privacy and Fostering Aerospace Innovation Act of 2013, proposed by Sen. Mark Udall (D-Utah), would prohibit any business or individual from “willfully conduct[ing] surveillance of another person” using drones and would require drones to be clearly marked “with the name, address, and telephone number of the owner.”<sup>55</sup> Though none has passed, these bills suggest how privacy concerns may be addressed at the federal level.

In the absence of federal legislation and regulation, a number of states have leaped into the legal quagmire.<sup>56</sup> To date, 43 different states have considered drone legislation, with nine passing laws regulating the use of drones.<sup>57</sup> All nine of those states have placed restrictions on the government’s use of drones. Almost all of these laws revolve around protecting citizens’ privacy, particularly from intrusion by law enforcement.<sup>58</sup> Two states have placed moratoriums on government agencies’ ability to use drones until the summer of 2015.<sup>59</sup>

Three states—Oregon, Texas, and Idaho—have passed laws regulating private use of drones, which could have an impact on journalists in those states.<sup>60</sup> Each state has taken a different tack.

Oregon centers its rule on private property. In doing so, it has created a private cause of action that a private property owner can assert against a drone operator if (1) a drone has flown less than 400 feet above the owner’s property at least one time, (2) the property owner has notified the drone operator that he does not consent to the drone flying over his property, and (3) the operator subsequently flies the drone less than 400 feet above the property again.<sup>61</sup>

Some exceptions exist for taking off and landing.<sup>62</sup> Under Oregon’s law, the property owner can seek injunctive relief, “treble damages for any injury to the person or the property,” and attorney fees if the amount of damages is under \$10,000.<sup>63</sup> Oregon’s drone law also criminalizes certain types of conduct, such as crashing into an aircraft or firing bullets from drones, to enhance safety.<sup>64</sup>

Texas’s drone law, tellingly named the Texas Privacy Act, permits drones to capture images only under enumerated circumstances.<sup>65</sup> For example, it allows images to be captured by electric and natural gas utilities for some purposes and by real estate brokers looking to sell property, as long as no person is identifiable in the image.<sup>66</sup> The law also permits drones to capture images of people on “public real property,” of people “on real property that is within 25 miles of the United States border,” and “with the consent of the individual who owns or lawfully occupies the real property captured in the image.”<sup>67</sup> Texas, however, has outlawed using drones to capture images of people or privately owned property “with the intent to conduct surveillance on the individual or property.”<sup>68</sup> Significantly, the law does not define *surveillance*. This offense is a misdemeanor, and the law states that a person can defend against the law by showing that she has destroyed the image as soon as she realizes it was captured and has not disclosed it to anyone else.<sup>69</sup> The law likewise makes it a misdemeanor to possess, disclose, distribute, or otherwise use an image after capturing it in violation of the law.<sup>70</sup>

In addition to these criminal provisions, Texas has created a private cause of action for owners and tenants of private property. That action allows them to enjoin an “imminent violation” of the criminal provisions and to seek civil penalties, including \$5,000 for “images captured in a single episode” and \$10,000 for the disclosure or distribution of “any images captured in a single episode.”<sup>71</sup> An owner and tenant also can recover actual damages if she can show that the images were disclosed or distributed with “malice.”<sup>72</sup> Furthermore, the prevailing party can collect reasonable attorney fees.<sup>73</sup>

Finally, Idaho has passed the most sweeping legislation on private drone use. Its law prohibits people from using drones “to photograph or otherwise record an individual, without such individual’s written consent, for the purpose of publishing or otherwise publicly disseminating such photograph or recording.”<sup>74</sup> The law, which would undoubtedly face constitutional challenges if enforced, allows a person to assert a private cause of action and recover either \$1,000, or “actual and general damages,” whichever is greater, plus attorney fees, and “other litigation costs reasonably incurred.”<sup>75</sup>

Local governments have also jumped into the fray. For example, Conoy Township, Pennsylvania, has passed an ordinance prohibiting remote-controlled aircraft from being flown above another person’s property without the property owner’s permission.<sup>76</sup> A violation of that ordinance can be punished by a fine of up to \$300.<sup>77</sup>

Among the many states considering legislation to restrict private drone use, two states that are home to many media companies, California and New York, are considering bills that could impact journalists’ ability to use drones for newsgathering. Last year, the California Senate passed a bill that would extend California’s antipaparazzi, wiretap, and Peeping Tom laws to cover audio, video, and images obtained by drones.<sup>78</sup> In addition, that bill provides that information obtained by government-agency drones would be accessible under California’s Public Records Act.<sup>79</sup>

Several drone-related bills also are pending in New York. Two proposals underscore the threat that new legislation might pose to the press. One bill would create a felony for “surreptitiously view[ing], broadcast[ing], or record[ing] another person . . . at a place and time when a person has a reasonable expectation of privacy.”<sup>80</sup> The second provides that a person would commit a misdemeanor by using a drone “to conduct surveillance of or to monitor any individual inside his or her home or place of worship or within the closed confines of their property or other locations where a person would have a reasonable expectation of privacy,” unless the person is doing so for “lawful purposes.”<sup>81</sup> Although the New York legislature

has not acted on any of the drone bills yet, bills pending in that state should be watched closely because its courts do not recognize any torts remedying alleged invasions of privacy and because the state contains an FAA test site location.

All of these legislative efforts can be seen as measures to prevent the rapid expansion of drone use in the absence of clear guidance from the FAA. It remains to be seen whether more states will rush to pass drone laws in the aftermath of the *Pirker* decision or if they will wait to see the FAA’s proposed small-drone rules anticipated later in 2014. Either way, journalists and their counsel should keep a close eye on state legislators in the coming months and years.

### Tort Law

Amidst this thicket of legislation, reporters and media attorneys should not forget that existing state tort law and statutes of general applicability serve to regulate drones and provide many avenues of potential liability. Some of the possible legal pitfalls are the same ones that pose risks for more traditional methods of newsgathering and reporting. Others raise new concerns.

As with all newsgathering that involves audio and video recording, journalists who use drones must be aware of common-law torts and statutes addressing their subjects’ privacy. In the common-law context, drone operators must consider the tort of intrusion upon seclusion. As newsroom counsel know all too well, the intrusion tort has two necessary elements: (1) a person “intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns,” and (2) “the intrusion would be highly offensive to a reasonable person.”<sup>82</sup> As the comments in the *Restatement (Second) of Torts* section addressing intrusion explain, the tort can be committed through “the use of the defendant’s senses, with or without mechanical aids, to oversee or overhear the plaintiff’s private affairs, as by looking into his upstairs windows with binoculars.”<sup>83</sup> Critically, the intrusion tort requires the defendant to pry into a private place or “otherwise invade[] a private

seclusion that the plaintiff has thrown about his person or affairs.”<sup>84</sup>

Given small drones’ dexterity in flight and ability to film inconspicuously, it is conceivable that drone operators might intrude in a plaintiff’s private affairs in their attempt to gather information.<sup>85</sup> Although journalists generally cannot be held liable for intrusion when the subject being recorded is in a public place, even that kind of newsgathering might pose some risk of an intrusion claim when it involves drones.<sup>86</sup> Indeed, under certain limited circumstances, drone-assisted recording may come close to the type of stakeout that one federal court has admonished. In *Wolfson v. Lewis*, the court considered a plaintiff’s claims against a television station whose camera crew camped outside of his home to obtain footage for a report on the high salaries paid to executives in the health-care industry.<sup>87</sup> The court entered a preliminary injunction prohibiting the camera crew from invading the plaintiff’s privacy, as well as stalking and harassment, finding that the continued surveillance “display[ed] a cavalier disregard for the right of ordinary citizens to enjoy the solitude and tranquility of their lives” and their “right to be let alone.”<sup>88</sup> The court reasoned that such an injunction would be narrow so as not to impair legal newsgathering activities. Given this ruling and similar decisions finding intrusions in other contexts, sustained recording of a space or continually tracking someone with a drone, even if done from a public place, may be actionable under certain circumstances in some jurisdictions.<sup>89</sup>

The flip side of the intrusion tort, which addresses gathering information in a manner that invades someone’s privacy, is the publication of private facts tort. A person commits that tort if he publishes or broadcasts private information about someone else if the disclosure of that information would be highly offensive to the reasonable person and the information is not a matter of legitimate public concern. In general, media companies only publish information if it is newsworthy. Nevertheless, it is conceivable that drone operators might capture images of people’s private affairs that are then

broadcast and give rise to potential liability.<sup>90</sup>

State tort law also protects people against physical harm that drones might cause. For instance, if a drone crashes into a person, that person can assert claims for battery or negligence, just as she could pursue a claim if she were hit by a ball or other flying object.<sup>91</sup>

In addition to these common-law tort claims, drone operators who record audio need to be aware of their states' wiretap statutes. Those statutes create crimes and private causes of action that can be asserted against people who intentionally intercept audio communications if the speakers have a reasonable expectation of privacy.<sup>92</sup> Drone operators also should be aware of stalking, harassment, Peeping Tom, and other statutes that circumscribe conduct involving recording or following individuals.<sup>93</sup>

Some states might have other statutes that drone operators should know. For instance, in California, drone operators need to understand that state's antipaparazzi law. That law creates a cause of action for "constructive invasion of privacy," which is committed when someone "attempts to capture, in a manner that is offensive to a reasonable person," an image or recording of a person "engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device" if the image or recording "could not have been achieved without a trespass unless the visual or auditory enhancing device was used."<sup>94</sup>

Existing state law also protects people's interest against having drones flying over their property, most notably through the law of trespass. At common law, "ownership of the land extended to the periphery of the universe."<sup>95</sup> The potentially sweeping nature of that rule, however, was abrogated following the advent of airplanes and the Supreme Court's 1946 decision in *United States v. Causby*, which involved a Fifth Amendment takings claim by a chicken farmer who lived near a runway.<sup>96</sup> The government used the runway for Army and Navy aircraft, which would fly over the farm "close enough . . . to

appear barely to miss the tops of the trees."<sup>97</sup> The noise literally frightened dozens of the farmers' chickens to death and destroyed his ability to use the property as a chicken farm. The Court sympathized with the farmer's plight but placed limits on a property owner's ability to state a takings claim based on airplanes' flight over his property. It held that a landowner "must have exclusive control of the immediate reaches of the enveloping atmosphere" and that a taking occurs only when the government engages in activity that has a "direct and immediate interference with the enjoyment and use of the land."<sup>98</sup> In light of the *Causby* decision, the *Restatement* provides that "flight by an aircraft" constitutes a trespass if "it enters into the immediate reaches of the air space next to the land" and "interferes substantially with the [owner's] use and enjoyment of his land."<sup>99</sup>

Nevertheless, the *Restatement* also states that a trespass can be committed "above the surface of the earth."<sup>100</sup> And the comments to the *Restatement* explain that "it is an actionable trespass . . . to fire projectiles or to fly an advertising kite or balloon through the air above [land], even though no harm is done to the land or to the possessor's enjoyment of it."<sup>101</sup> Indeed, the *Restatement* includes the following illustration: "A, while hunting birds on a public pond, fires shot across B's land close to the surface. The shot do not come to rest on B's land, but fall into another public body of water on the other side of it. A is a trespasser."<sup>102</sup> This illustration highlights that flying drones above a person's property, even for just a moment, might constitute a trespass. Given these conflicting *Restatement* provisions, it is not clear how courts will treat drone flight over private property and what drone activity might constitute a substantial interference with a property owner's enjoyment of his land. Drone operators, however, must understand their state trespass laws before flying and remain current about the state of the law in this area as it evolves.

A property owner over whose land drones routinely fly also might be able to assert a claim for nuisance. A nuisance claim requires a showing that the defendant has committed an

intentional and unreasonable invasion that interferes with a person's enjoyment of his land.<sup>103</sup> Courts have allowed nuisance claims when a property owner is regularly subjected to flying objects, such as golf balls flying onto his property because an adjoining driving range fails to repair the net that was supposed to block them.<sup>104</sup> These kinds of claims proceed because there is a continuing possibility that a ball could be hit onto the private property.<sup>105</sup> The same theory could be applied to drone operators. If a drone is flown across someone's property on several occasions, the property owner might use the law of nuisance to seek an injunction preventing the operator from flying his drone over the property in the future.<sup>106</sup>

## Conclusion

As drones begin to take flight in the United States, their operators must navigate a patchwork of property, safety, and privacy laws. Legislators and government officials appear poised to pile on new statutes and rules. Although some regulatory guidance is necessary, the public should remember that today's drone enthusiasts are not so different from George Lawrence and his early experiments with kites, wires, and cameras to explore the world through a new vantage point. To protect this period of exploration and the nascent drone industry, journalists and press advocates should remain engaged in the political process and speak out against proposed legislation and regulation that might unnecessarily restrict the use of drones or thwart the development of this emerging technology. Instead, we should see how drones evolve, observe how they are used, allow existing state laws to perform their remedial function, and look to journalistic ethics to guide the use of drones for newsgathering. In the meantime, any reporter thinking about using a drone must understand the existing legal landscape and closely follow this rapidly changing area of the law. ■

## Endnotes

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46. *Id.* at 29.

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50. As FAA Administrator Michael Huerta has explained, the privacy policy will "apply by contract" to the test sites. *Hearing, supra* note 48. A copy of the *Federal Register* notice detailing the final test site privacy requirements is printed at 78 Fed. Reg. 68,360 (2013), [available at http://www.regulations.gov/contentStream?objectID=090000648147d799&disposition=attachment&contentType=pdf](http://www.regulations.gov/contentStream?objectID=090000648147d799&disposition=attachment&contentType=pdf).

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59. See Current Operations and Capital Improvements Appropriations Act of 2013, S.B. 402, § 7.16 (N.C. 2013), available at <http://www.ncleg.net/sessions/2013/bills/senate/pdf/s402v7.pdf>; Drones; Moratorium on Use of Unmanned Aircraft Systems by State or Local Government Department, S.B. 1331 (Va. 2013).

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62. *Id.*

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76. Conoy Twp., Pa., Ordinance No. 1-3-14, § 2(f) (Mar. 14, 2013).

77. *Id.* § 4.

78. See S.B. 15, §§ 2, 3, 4, 2013–2014 Senate, Reg. Sess. (Cal. 2013).

79. See *id.* § 5. Earlier this year, the California Assembly passed a separate bill regulating the government’s use of drones. See A.B. 1327, 2013–2014 State Assemb., Reg. Sess. (Cal. 2013). That bill provides that, subject to limited exceptions, “images, footage, or data” obtained by government-agency drones “shall not be disseminated outside the collecting agency.” *Id.* § 2. The bill further provides that in most instances the government must destroy the information obtained through drones within six months. See *id.*; cf. S.B. 15 (providing that information must be destroyed within one year).

80. A.8091, 2013–2014 State Assemb., Reg. Sess. (N.Y. 2013).

81. A6370, 2013–2014 State Assemb., Reg. Sess. (N.Y. 2013).

82. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

83. *Id.* cmt. b.

84. *Id.* cmt. c.

85. See, e.g., *Biondich v. NBC Subsidiary (WMAQ-TV), Inc.*, 2011 WL 9717470 (Ill. App. Ct. Jan. 21, 2011) (plaintiff stated a claim for intrusion upon seclusion where reporter continued to film plaintiff in her home after she objected); *Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 233, 955 P.2d 469, 491 (1998) (intrusion claim stated based on a recording of injured woman in helicopter receiving medical care).

86. Generally, “no right to privacy attaches to material in the public view.” E.g., *Jaubert v. Crowley Post-Signal, Inc.*, 375 So. 2d 1386 (La. 1979); accord *Marcus Garvey Charter Sch. v. Wash. Times Corp.*, 27 Media L. Rep. (BNA) 1225, 1229–30 (D.C. Super. Oct. 29, 1998) (“Taking a photograph of an individual in a public place does not subject the photographer to liability for invasion of privacy by intrusion.”). The *Restatement* notes, however, that “there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze.” RESTATEMENT § 652B, cmt. c. Consequently, to be safe, drone operators must be vigilant to ensure that what they are filming, even in public places, is not intrusive.

87. 924 F. Supp. 1413 (E.D. Pa. 1996).

88. *Id.* at 1433–34.

89. See, e.g., *Bauer v. Ford Motor Credit Co.*, 149 F. Supp. 2d 1106 (D. Minn. 2001) (upholding claim for intrusion based on debt collectors’ repeated attempts to collect from plaintiffs); *Desmond v. Phillips & Cohen Assocs., Ltd.*, 724 F. Supp. 2d 562, 569 (W.D. Pa. 2010) (genuine issue of material fact regarding whether repeated communications from debt collector constitute substantial intrusion upon solitude).

90. See, e.g., *Shulman*, 18 Cal. 4th at 200 (no publication of private facts claim for recording accident scene on public thoroughfare). But see, e.g., *Green v. Chi. Tribune*, 675 N.E.2d 249 (Ill. App. Ct. 1996) (stating claim for publication of private facts based on published photograph of man killed in gang violence); *Multimedia WMAZ, Inc. v. Kubach*, 212 Ga. App. 707, 443 S.E.2d

491 (1994) (stating claim for broadcast of patient’s identifiable image during live call-in show on AIDS).

91. See, e.g., *Neumann v. Shlansky*, 36 A.D.2d 540, 318 N.Y.S.2d 925 (N.Y. App. Div. 1971) (awarding damages for personal injuries resulting from negligent golfing on golf course); *Bartlett v. Chebuhar*, 479 N.W.2d 321 (Iowa 1992) (same).

92. See, e.g., ARIZ. REV. STAT. ANN. §§ 13-3005, 13-3012(9) (2014), 18 PA. CONS. STAT. ANN. § 5703 (West 2014).

93. See, e.g., ARIZ. REV. STAT. ANN. § 13-2923 (2014) (stalking statute); GA. CODE ANN. § 16-11-61 (West 2014) (“Peeping Tom” statute); N.Y. PENAL LAW § 240.25 (McKinney 2014) (harassment statute).

94. CAL. CIVIL CODE § 1708.8(b) (West 2014).

95. *United States v. Causby*, 328 U.S. 256, 260 (1946).

96. *Id.* at 258.

97. *Id.* at 266, 268.

98. *Id.*

99. RESTATEMENT, *supra* note 81, § 159(2).

100. See *id.* § 159(1).

101. *Id.* § 158 cmt. i.

102. *Id.* illus. 4.

103. *Id.* § 822.

104. See, e.g., *Gellman v. Seawane Golf & Country Club, Inc.*, 24 A.D.3d 415, 805 N.Y.S.2d 411 (N.Y. App. Div. 2005).

105. *Id.*

106. Drone operators should proceed with caution when flying over private property. *Restatement* § 260 provides that “[o]ne is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion if the act is, or is reasonably believed to be, necessary to protect the actor’s land or chattels or his possession of them, and the harm inflicted is not unreasonable as compared with the harm threatened.” RESTATEMENT, *supra* note 81, § 260. It is possible that land owners might attempt to justify taking actions against drones flying over their property under this section of the *Restatement*. See *id.* cmt. b (noting that “when it is necessary to avoid or terminate a trespass upon land by a chattel in the possession of another,” a land owner “may employ reasonable force to remove the chattel, and he is not liable to the possessor of the chattel, nor to one entitled to its immediate or future possession, for any harm to the chattel necessarily or accidentally resulting”).