

## CORPORATE COUNSEL

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*Lem Montgomery, with the Butler Snow LLP law firm, reviews recent developments in FAA drone regulation and the major civil liability issues expected to result from drone use in American airspace.*

## Drone Law and Drone Regulation: A Primer

### ABOUT THE AUTHOR

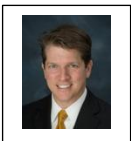


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On August 29, 2016, the Federal Aviation Administration's (FAA) new rule governing non-recreational use of small unmanned aircraft systems or "drones" became effective. The new rule – formally known as Part 107<sup>1</sup> – is designed to allow for routine business use of drones while "minimiz[ing] risks to other aircraft and people and property on the ground."<sup>2</sup> What follows is a short review of recent developments in FAA drone regulation and the major civil liability issues expected to result from drone use in American airspace.

## Introduction

A drone<sup>3</sup> is simply a powered aircraft with no human operator on board. Referred to by the FAA as unmanned aerial vehicles (UAVs) or unmanned aerial systems (UASs), drones "come in a variety of shapes and sizes and serve diverse purposes."<sup>4</sup> "They may have a wingspan as large as a jet airliner or smaller than a radio controlled model airplane."<sup>5</sup>

Drone or "UAS" technology is no longer the wave of the future; the technology is already here. Potential advantageous applications range from surveillance, to firefighting, to agriculture, to delivery systems and more. Some experts predict the global market for commercial drone applications may reach \$127 billion by the year 2020<sup>6</sup>; up from \$552 million in 2014.<sup>7</sup> But despite its promise, drone technology also presents opportunities for misuse, accident, tortious activity, and even intentional or illegal misconduct. Drone technology is expected to raise new civil liability issues not only in the area of traditional aircraft liability, i.e., negligence and product liability claims arising from crash incidents and other events, but also invasion of privacy, nuisance, trespass, and even malicious acts with weaponized drones. Because they are inherently different from manned aircraft, integrating drones into the nation's airspace presents a significant challenge for the aviation and legal communities.

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<sup>1</sup> 14 C.F.R. § 107.

<sup>2</sup> *The FAA's New Drone Rules Are Effective Today*, FED. AVIATION ADMIN., <https://www.faa.gov/news/updates/?newsId=86305> (last modified Aug. 29, 2016, 12:07 PM EDT).

<sup>3</sup> DRONE is an acronym for Dynamic Remotely Operated Navigation Equipment. See Edwin M. Howard & John D. Robideaux, VESSEL MAP SYNCHRONIZATION USING DYNAMIC VESSEL MAP SYNCHRONIZATION USING DYNAMIC REMOTELY OPERATED NAVIGATION SYSTEMS 1331-38 (1999) (published in the *Proceedings of the 12th International Technical Meeting of the Satellite Division of The Institute of Navigation*).

<sup>4</sup> Fact Sheet – Unmanned Aircraft Systems (UAS), FED. AVIATION ADMIN. (Feb. 15, 2015), [https://www.faa.gov/news/fact\\_sheets/news\\_story.cfm?newsId=18297](https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=18297).

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

<sup>6</sup> Wojciech Moskwa, *World Drone Market Seen Nearing \$127 Billion in 2020, PwC Says*, BLOOMBERG (May 9, 2016, 11:38 AM EDT), <http://www.bloomberg.com/news/articles/2016-05-09/world-drone-market-seen-nearing-127-billion-in-2020-pwc-says>.

<sup>7</sup> *Commercial Drone Market Analysis By Product*, GRANDVIEW RESEARCH (Jan. 2016), <http://www.grandviewresearch.com/industry-analysis/global-commercial-drones-market>.

## Drone Regulation: From Model Airplanes to Modern Drones

Drones are considered “aircraft” and are regulated by the FAA.<sup>8</sup> All “aircraft,” from jet airliners to small model airplanes, must comply with the rules and regulations of the FAA. However, understanding drone regulation requires an understanding of the FAA’s historical stance on small remote operated aircraft or “model” aircraft.

While model airplanes and aircraft have been around for almost a century, the FAA has not heavily regulated toy planes flown for recreation. The FAA maintains a “hobbyist” or “recreational use” exclusion that exempts small model aircraft from the normal licensing requirements and allows, subject to certain rules of flight, the operation of small model aircraft (55 pounds and under) for *recreational purposes* in legal airspace without permission from the government.<sup>9</sup> Thus, small remote or

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<sup>8</sup> See 14 C.F.R. § 1.1 (2016) (defining “aircraft” broadly as “a device that is used or intended to be used for flight in the air”); see also *Huerta v. Haughwout*, No. 3:16-cv-358, 2016 WL 3919799 at \*4 (D. Conn. July 18, 2016) (quoting *Huerta v. Pirker*, Order No. EA-5730, 2014 WL 8095629 (N.T.S.B. 2014) (“‘Aircraft’ encompasses drones owned for personal use.”)).

<sup>9</sup> FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 336, 126 Stat. 11, 77-78 (2012): SPECIAL RULE FOR MODEL AIRCRAFT

(a) IN GENERAL.—Notwithstanding any other provision of law relating to the incorporation of unmanned aircraft systems into Federal Aviation Administration plans and policies, including this subtitle, the Administrator of the Federal Aviation Administration may not promulgate any rule or regulation regarding a model aircraft, or an aircraft being developed as a model aircraft, if—

- (1) the aircraft is flown strictly for hobby or recreational use;
- (2) the aircraft is operated in accordance with a community-based set of safety guidelines and within the programming of a nationwide community-based organization;
- (3) the aircraft is limited to not more than 55 pounds unless otherwise certified through a design, construction, inspection, flight test, and operational safety program

administered by a community-based organization;

- (4) the aircraft is operated in a manner that does not interfere with and gives way to any manned aircraft; and
- (5) when flown within 5 miles of an airport, the operator of the aircraft provides the airport operator and the airport air traffic control tower (when an air traffic facility is located at the airport) with prior notice of the operation (model aircraft operators flying from a permanent location within 5 miles of an airport should establish a mutually-agreed upon operating procedure with the airport operator and the airport air traffic control tower (when an air traffic facility is located at the airport)).

(b) STATUTORY CONSTRUCTION.—Nothing in this section shall be construed to limit the authority of the Administrator to pursue enforcement action against persons operating model aircraft who endanger the safety of the national airspace system.

(c) MODEL AIRCRAFT DEFINED.—In this section, the term “model

“model” aircraft are regulated primarily according to *how they are used*, i.e., recreational versus commercial use. While the recent proliferation of drone technology has created more opportunity for business use of small remote aircraft, the regulatory framework has remained largely the same.

Recent regulatory focus has been on commercial use of drone technology. The FAA seems to interpret “commercial use” of drones to mean, “use in exchange for value.” This seemingly simple definition is deceiving; one can easily cross unintentionally into commercial drone use. Recent news reports provide examples of wedding photographers who took aerial photos for remuneration or pay, kids demonstrating aerobatics for pay

(i.e., a neighborhood “wing show”), or even individuals or small businesses posting videos obtained with a drone to ad-based social media. Examples like these have led to FAA investigations<sup>10</sup> and, in some cases, severe penalties ranging from \$27,500 in civil cases to \$250,000 and three years in prison in criminal cases.<sup>11</sup>

In recent years, licensed commercial use of drones has been cost prohibitive.<sup>12</sup> Commercial operation of aircraft, including drones, traditionally required compliance with all FAA licensing and certification standards, i.e., a commercial pilot’s license, certificate of airworthiness, proper FAA registration, etc.<sup>13</sup> These requirements are expensive and can take years to satisfy, and

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aircraft” means an unmanned aircraft that is—

- (1) capable of sustained flight in the atmosphere;
- (2) flown within visual line of sight of the person operating the aircraft; and
- (3) flown for hobby or recreational purposes.

<sup>10</sup> Dan Friedman, *FAA Investigating Use of Drone to Shoot New York Congressman’s Wedding*, NY DAILY NEWS (July 17, 2014, 1:14 PM), <http://www.nydailynews.com/news/politics/faa-investigates-drone-congressman-wedding-article-1.1870603>.

<sup>11</sup> Keith Wagstaff, *Fail to Register Your Drone? You Could Be Hit With \$27K Fine*, NBC NEWS (Dec. 21, 2015), <http://www.nbcnews.com/tech/innovation/fail-register-your-drone-you-could-be-hit-27k-fine-n481856>.

<sup>12</sup> Miriam McNabb, *The Black Market in Drones: Why Commercial Operators Need the FAA*, DRONELIFE (Sept. 15, 2016), <http://dronelife.com/2016/09/15/black-market-drones-unofficial-commercial-operators/> (“Prior to

the recent enactment of Part 107, commercial drone operations were prohibited under FAA Regulation, commonly referred to as ‘Section 333,’ and the only way to fly legally was to apply for a Section 333 Exemption. This was an onerous – and sometimes expensive – process that required the drone operator to hold a pilot’s license. Even with a pilot’s license, exemptions, especially in the beginning, took months: forcing many drone operators underground, as they realized that they couldn’t begin to meet the requirements to operate legally.”)

<sup>13</sup>The FAA has in recent years allowed for commercial drone use through a Section 333 Exemption which allows for commercial use of small UAS without full commercial licensing and certification. Obtaining the exemption requires an application process, a 120-day waiting period, and vetting of the drone and operator by the FAA. Further, the applicant is required to describe the specific manner of use and remain within the scope of the exemption. As of August 2015, about 1200 Section 333 exemptions had been granted in the United States. As of time of publication, this number has grown to 5,552. Section 333, FED. AVIATION ADMIN. (Sept. 23, 2016, 9:46 AM EDT), [https://www.faa.gov/uas/beyond\\_the\\_basics/sectio](https://www.faa.gov/uas/beyond_the_basics/sectio)

the cost outweighs any profit or benefit commercial drone use may provide. The problem, though, is that companies desperately want to use drones for business. Potential commercial applications for drone technology include, but are not limited to:

- survey and inspection of remote power lines and pipelines,
- traffic and accident surveillance,
- emergency and disaster monitoring,
- cartography and mapping,
- search, rescue and recovery,
- agricultural spraying,
- aerial photography and videography,
- promotion and advertising,
- product delivery,
- weather and pollution reconnaissance,
- flight research,
- fire fighting, monitoring and management,
- atmospheric research,
- scientific research,
- oceanographic research,
- geophysical research,
- mineral exploration,
- imaging spectrometry,
- telecommunications relay platforms,
- film and cinematography,
- police surveillance, and

- border patrol and reconnaissance.<sup>14</sup>

The FAA's new small UAS rule, FAA Part 107, now exempts small commercial aircraft from the normal "commercial aircraft" licensing and certification requirements. Since Part 107 took effect on August 29, 2016, commercial use of small drones has been open for business in America, and commercial drones will soon be integrated into the public airspace. The major provisions of Part 107 are:

- Drone weight is limited to 55 pounds.
- Drone must remain in operator's visual line of sight.
- Drone use is limited to daylight-only operation.
- Drone must yield to other aircraft.
- Maximum air speed of drone is 100 miles per hour; maximum altitude is 400 feet.
- Drone may not be operated unless there is a minimum weather visibility of 3 miles.
- No one may act as pilot or observer for more than one drone aircraft at a time.
- Pre-flight inspections are required.

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[n 333/](https://www.faa.gov/uas/media/Part_107_Summary.pdf). See also Summary of Small Unmanned Aircraft Rule, FED. AVIATION ADMIN. (June 21, 2016), available at [https://www.faa.gov/uas/media/Part\\_107\\_Summary.pdf](https://www.faa.gov/uas/media/Part_107_Summary.pdf).

<sup>14</sup> The possibilities of using drones for commercial purposes are truly unique and nearly limitless. See, e.g., Richard Feloni & Aaron Taube, *These Drone-*

*Based Advertisements were Super Cool and Only a Little Creepy*, BUSINESS INSIDER (Sept. 29, 2014, 4:49 PM), <http://www.businessinsider.com/drones-in-advertising-2014-9> (exploring the many uses of drones for commercial advertising, including using a drone to display menus outside high rise office building windows just before the lunch hour – which resulted in an increase in sales for one establishment to the tune of forty percent).

- Certain aircraft markings are required.
- Drones may not be operated by those with a physical or mental condition that would interfere with safe operation of the aircraft.
- Operator must be at least 16 years old.
- Operator is required to obtain an Unmanned Aircraft Operator Certificate.
- Operator is required to pass a recurrent aeronautical test every two years.
- Operator must be vetted by the Transportation and Safety Administration (TSA).

A comprehensive summary of Part 107 and the full text of the rule can be found at the FAA's website.<sup>15</sup>

### **Some Legal Implications of Drone Use**

While the use of drones will affect our laws and our courts in a variety of ways, some of the immediate areas expected to be impacted will be nuisance and trespass, invasion of privacy, and malicious use of weaponized drone technology.

#### *Nuisance and Trespass*

Integration of drones into the lower airspace, as contemplated by Part 107, raises

new questions about the rights of landowners to the immediate atmosphere above their property. The FAA regulations currently limit all drones to an operational ceiling of 400 feet; this could certainly interfere with the landowner's traditional and well-established property right to the immediate useful airspace above the land:

We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere . . . Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.<sup>16</sup>

The law is currently imprecise about how high a landowner's above-ground property rights might extend. Thus, drone operation in the lower airspace over private property could bring new focus to the intersection between current FAA regulations and the rights of landowners. Trespass claims against drone operators are imminent. The viability of such claims will likely depend upon the type and level of intrusion caused by the drone under the circumstances of each case.

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<sup>15</sup> See Summary of Small Unmanned Aircraft Rule, *supra* note 9; see also 14 C.F.R. § 107 (full rule).

<sup>16</sup> *U.S. v. Causby*, 328 U.S. 256, 264-66 (1946); see also RESTATEMENT (SECOND) OF TORTS § 159 (1977)

(recognizing landowner's right to the immediate useful airspace above the ground).

### *Invasion of Privacy*

Increased drone operation also threatens the privacy rights of individuals on the ground. Due to advancements in camera and drone technology, almost any surveillance tool can be attached to a drone, and prior practical restrictions on video surveillance are few. The general American rule guiding the right to photography in public has been that if you can lawfully be somewhere, you can lawfully take a photograph from there. Drones, however, raise new implications about public photography and individual privacy. With contemporary camera technology that can surveil entire city blocks from hundreds of feet above the ground, drone technology now threatens individuals with life under an eye-in-the-sky. Of course, general rules of public photography and video are subject to reasonable expectations of individual privacy, especially for those on private property.<sup>17</sup> Still, states like Arkansas,<sup>18</sup> California,<sup>19</sup> Florida,<sup>20</sup> Mississippi,<sup>21</sup> and Texas<sup>22</sup> have already passed anti-voyeurism criminal legislation targeting drone use that

interferes with individual privacy rights. In other states, however, plaintiffs who have suffered an invasion of privacy via drone surveillance may be left to seek recourse through traditional civil claims for common law invasion of privacy.<sup>23</sup>

### *Drone Weaponization*

Perhaps the most serious consideration of all may be the issue of drone weaponization. Currently, there are no FAA regulations that directly address the issue. Certain FAA regulations do state that “[n]o pilot in command of a civil aircraft may allow any object to be dropped from that aircraft in flight that creates a hazard to persons or property.”<sup>24</sup> FAA regulations also prohibit the use of any aircraft “in a careless or reckless manner so as to endanger the life or property of another.”<sup>25</sup> In addition, the FAA heavily regulates the locations where drones are permitted to be operated, prohibiting operations over crowds of people and in certain protected airspace. Thus, the government is taking some steps to deal with drone security issues but not as many

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<sup>17</sup> RESTATEMENT (SECOND) OF TORTS § 652B (1977) (“One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”).

<sup>18</sup> H.B.1349 (Ark. Laws Act 293), 90<sup>th</sup> Gen. Assemb., Reg. Sess. (Ark. 2015), now codified as ARK. CODE ANN. §§ 5-16-101, 102 (West 2015).

<sup>19</sup> A.B. 856, 2015 Portion of 2015-16 Leg. Session (Cal.), now codified as CAL. CIVIL CODE § 1708.8 (West 2016).

<sup>20</sup> S.B. 766, 24<sup>th</sup> Leg., 1<sup>st</sup> Reg. Sess. (Fla. 2015), now codified as FLA. STAT. ANN. § 934.50 (West 2015).

<sup>21</sup> S.B. 2022, 2015 Reg. Sess. (Miss.), now codified as MISS. CODE ANN. § 97-29-61 (West 2015).

<sup>22</sup> H.B. 2167, 84<sup>th</sup> Leg., Reg. Sess. (Tex. 2015), now codified as TEX. GOV'T CODE ANN. § 423.002 (West 2015).

<sup>23</sup> For an overview of recent state and federal legislative action (and inaction) concerning unmanned aircraft, visit the National Conference of State Legislatures website at <http://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx>.

<sup>24</sup> 14 C.F.R. § 91.15 (2015).

<sup>25</sup> 14 C.F.R. § 91.13 (2015).

as might be expected or necessitated in the future. Restrictions on airspace and on drone size and speed, along with registration and certain licensing and vetting requirements, are all of the restrictions that have been enacted to date to combat the threat. Further, the FAA's jurisdiction to investigate and regulate civilian weaponization of drones is being met with legal challenges.<sup>26</sup> Some states have passed criminal legislation prohibiting weapons on drones.<sup>27</sup> However, improvements in drone technology and changing trends in the common or available uses of drones are sure to develop at a faster pace than the laws designed to address them.

## Conclusion

Drone technology is here. It is a short matter of time before drones will be fully integrated into our airspace for commercial use and will be part of our daily lives. Drones present new issues of security, privacy, trespass, nuisance, and property rights, to name a few. In order to safely and securely integrate drones into the airspace, it is imperative that courts, policymakers, legal professionals and members of the aviation community stay informed about changes in drone technology, trends in the use of drones, and about the legal principles that apply – or should apply – to these new aircraft.

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<sup>26</sup> See generally, *Huerta*, 2016 WL 3919799 (D. Conn. July 18, 2016) (addressing FAA's authority to investigate use of weaponized drones by civilians on private property).

<sup>27</sup> See, e.g., A.B. 239, 78th Leg., Reg. Sess. (Nev. 2015), now codified as NEV. REV. STAT. ANN. § 493.106 ("A person shall not weaponize an unmanned aerial

vehicle or operate a weaponized unmanned aerial vehicle. A person who violates this section is guilty of a category D felony . . . .").



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