



Fox Rothschild LLP
ATTORNEYS AT LAW

FEDERAL, STATE AND LOCAL REGULATION OF UNMANNED AIRCRAFT

Aviation Law CLE

May 11, 2022

Rights in the Airspace

- 49 U.S. Code § 40103
 - **(a) SOVEREIGNTY AND PUBLIC RIGHT OF TRANSIT.—**
 - **(1)** The United States Government has exclusive sovereignty of airspace of the United States.
 - **(2)** A citizen of the United States has a public right of transit through the navigable airspace.
- 49 USC § 40102(a)(32)
 - (32) “navigable airspace” means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft.
- Navigable Airspace for UAS?



United States v Causby

- Rights of property owners of the airspace
- The safe path of glide to one of the runways of the airport passed directly over respondents' property at 83 feet, which was 67 feet above the house, 63 feet above the barn and 18 feet above the highest tree. It was used 4% of the time in taking off and 7% of the time in landing.
- “It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe -- *cujus est solum ejus est usque and coelum*. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.”
- 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**. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run.



Regulations Governing UAS Operations

- Most operations governed by Part 107
 - UAS under 55 pounds
 - Simple pilot test
 - LOS operations
 - More advanced operations by waiver
- UAS over 55 pounds
 - Exemption required
 - Ops may require a manned aircraft pilot's license



New Remote ID Requirement

- All UAS Built in the United States
 - Rule is effective September 30, 2022
- All UAS Operated in the United States
 - Rule is effective September 30, 2023
- Excludes aircraft weighing less than .55 pounds so long as they are not being operated under part 91, 107, 135, or an exemption issued under 49 U.S.C. 44807



Air Carrier Certificates for Package Delivery

- Part 107 permits package delivery VLOS
- Part 107 does not permit BVLOS package delivery
- If you have to fly under Part 91, then a Part 119 certificate is required
- Part 121 or 135 air carrier certificate may be used, but Part 135 is the most flexible
- Air Carrier Certificates involve large amounts of FAA involvement
- Specific corporate structure necessary, with responsible managers identified in the Operations Specifications
- Process must be followed to add new types of aircraft to Operations Specification



Air Carrier Certificates for Package Delivery

- Parts 119, 121 and 135 have not been adapted to UAS operations
- Exemptions required to obtain certificates
- Goal is for aircraft to have type certificate (ties in with Category 4 aircraft)
 - Single Pilot
 - Single Pilot in Command (up to 3 Second in Command)
 - Basic
 - Maximum of five pilots, including SIC's,
 - Maximum of 5 aircraft can be used in their operation,
 - Maximum of 3 different types of aircraft can be used
 - Standard (UPSFF)
 - No limitations



Status of State UAS laws

- State legislative initiatives have slowed but are still ongoing
- In 2015, 20 states passed 26 new laws
- In 2016, 15 states passed 26 new laws
- In 2017, 17 states passed 23 new laws.
- In 2018, 19 states passed 31 new laws
- In 2019, 19 states passed 31 new laws.
- In 2020, 8 states passed 11 new laws
- In 2021, 18 states passed 25 new laws.



States With UAS Laws That Carry Criminal Penalties

- Twenty-seven states—Arizona, Arkansas, California, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, North Carolina, Oregon, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia and Wisconsin—have laws criminalizing certain uses of UAS.
- Flight near critical infrastructure
- Use of UAS by registered sex offender
- Peeping Tom
- Interference with First Responders
- Flying Under the Influence
- Intentionally Harming Livestock
- Flight Near a Prison
- Used to Take Wild Game



Privacy and Airspace Control

- Long Lake Township v. Maxon, 2021 WL 1097336 (Mich. App. Mar. 13, 2021)
- Township hired a company to do aerial surveillance over persons property as part of a longstanding land use dispute
- Court admitted no reasonable expectation of privacy in features visible from public place
- US Supreme Court has specifically permitted aerial surveillance
 - 1986 fixed wing aircraft at 1,000 feet
 - 1989 helicopter at 400'
- Court held that “The development of historically-novel ways to conduct unprecedented levels of surveillance at trivial expense does not per se reduce what society and the law will recognize as a reasonable expectation of privacy.” *Id.* at *4.
- Use of “low-altitude, unmanned, specifically targeted drone surveillance of a private individual’s property is qualitatively different from the kinds of human-operated aircraft overflights permitted” by the Supreme Court. As a result, drone surveillance “of this nature intrudes into persons’ reasonable expectations of privacy...”



Privacy and Airspace Control

- In determining reasonable expectation of privacy, the Court gave weight to a Michigan statute that prohibits the use of an unmanned aircraft to “otherwise capture photographs, video, or audio recordings of an individual in a manner that would invade the individual’s reasonable expectation of privacy.” MCL 259.322(3).
- The Court of Appeals noted, without deciding, that given the low-altitude at which UAS operate, at some point a drone flight may constitute a trespass when it invades the immediate reaches of the airspace over private property
- The Court declined, however, to set a permissible “altitude test” for such drone overflights on the grounds that it would be “unworkable and futile.” Instead, the Court of Appeals concluded that:
 - The Court is the first to draw a hard distinction between manned and unmanned aircraft with regard to privacy
 - The Court’s rationale would apply to commercial operators and claims based on the common law tort of invasion of privacy



Common Law Privacy Issues - Invasion of Privacy

- 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.
- One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
 - (a) would be highly offensive to a reasonable person, and
 - (b) is not of legitimate concern to the public.
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Common Law Privacy Issues - Invasion of Privacy

- One who has established a cause of action for invasion of his privacy is entitled to recover damages for:
 - (a) the harm to his interest in privacy resulting from the invasion;
 - (b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion

- First Amendment Defenses



Common Law Privacy Issues - Nuisance

- Nuisance is the unreasonable, unusual, or unnatural use of one's property so that it substantially impairs the right of another to peacefully enjoy his property.
- A nuisance claim recognizes two competing rights: the right of property owners to control their land and use it for their own benefit, and the right of the public and neighboring land owners to prevent unreasonable use that impairs the peaceful use and enjoyment of their own property
- The requirement that the use of land be unreasonable serves to balance the rights of adjoining property owners.
- Claim would be used by a property owner to stop otherwise permissible flights over an adjoining the property



Police Response to Legal UAS Operations



ANNE ARUNDEL COUNTY PUBLIC SCHOOLS

Solley Elementary School

7608 Solley Road | Glen Burnie, MD 21060 | 410-222-6473

September 14, 2017

Dear Parents and Guardians:

I am writing to let you know about an incident that occurred outside today so that you can talk about it with your child in a manner you deem most appropriate.

As our fourth-graders were outside at recess today, one of our neighbors began flying a drone over his house. Unsure of the reason for this, we brought our students inside as a precaution and called police. During this time, the school was put on Lock Out to ensure that all students and staff remained inside of the building.

Police arrived quickly and investigated the situation. They determined the man was flying the drone to get footage of the top of his house due to a problem on the roof. There is no evidence whatsoever that any footage exists of our students.

Police, however, advised the homeowner not to fly the drone near school property in the future.



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Local Regulations

- Currently 19 states restrict local governments from regulating drones
- However, over 180 localities in 32 states have enacted drone rules in recent years. These localities are home to over 40 million people.
- Privacy
- Data Collection and Use
- Airspace
- Operational Limitations
- Land Use and Permission
- Harassment
- Stalking



Singer v. Town of Newton

1. Local UAS operators register their aircraft with the city,
2. Prohibited flight over private property without permission of the owner, and
3. Prohibited flight beyond visual line of sight in certain areas without a permit form the town,
4. Prohibited surveillance of persons where they have a reasonable expectation of privacy.

No general field preemption for UAS, but extensive conflict preemption

Field Preemption for Aviation Safety



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