



**“SO, YOU WANT
TO LEGALLY
FLY A DRONE?”**

**— HOW TO —
COUNSEL A CLIENT**

BY RICHARD C. BALOUGH

A good client calls you to ask if they should worry about the legal aspects of using a drone for photography. What do you say?

First, appreciate your client's perspective. Drones can take dramatic videos and digital images that could be used for selling real estate, inspecting construction sites, filmmaking, and finding missing persons.

However, unless the business has obtained special permission from the Federal Aviation Administration (FAA), all of these commercial uses currently are illegal in the United States.

The FAA currently prohibits using drones for any commercial purpose without a special permit, and only a few purposes have been approved. As described in more detail in the article by Lois Mermelstein on page 14 in this issue, the restrictions will continue for the remainder of 2015 as the FAA reviews comments on proposed rules to permit limited commercial use of drones. These proposed rules apply only to drones weighing less than 55 pounds. FAA rules for larger drones still are being developed.

Despite the legal obstacles, the desire to use drones will only increase. The cost of drones, technically unmanned aircraft systems (UASs), has decreased dramatically, and the quality of the onboard cameras continues to increase. Drones range from the very small (less than several ounces) to the size of a small airplane. Most personal drones weigh well under 55 pounds. They can fly several thousand feet in the air and out-of-sight of the operator.

Business Insider reports that over the next decade 12 percent of an estimated \$98 billion in global spending on drones will be for commercial

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purposes.¹ Another report, from the Association for Unmanned Vehicle Systems International, claims that the industry will create more than 100,000 jobs in the United States in the next 10 years.²

With a camera attached, a small drone costing \$1,000 or less provides a wide range of commercial functions. As functionality increases (such as more sophisticated cameras, infrared devices and the like), the price increases as well. Actual and announced uses for drones include:

- Photographing bridges to detect faults or areas where maintenance is required. Drones can do a more thorough job than an on-the-ground crew.
- Surveying and assessing damage caused by tornados or hurricanes by insurance carriers. Drones give the insurance adjusters access to the damage almost immediately without interfering with search, recovery, and clean-up operations.
- Inspecting oil and gas pipelines, electric transmission lines, and solar panels by flying closer to the pipelines, transmission lines, and solar panels at lower speeds.
- Providing journalists with overhead images of fires, disasters, and other news events.
- Managing crops. Not only can drones take photographs of crops to monitor crop health and development, but drones also may apply fertilizers, insecticides, and other treatments, reducing the need for large, manned crop duster planes.
- Searching for missing persons, especially where the terrain makes it difficult to cover on foot. A drone can cover far more territory in a shorter time.
- Mapping archaeological sites that are not easily surveyed by airplane.
- Photographing homes for real estate agents.
- Delivering packages, as has been announced by Amazon.com.

However, the increased amount and variety of uses raise both safety and legal issues. Although drones are small and lightweight, a collision with an aircraft might cause extensive damage to the aircraft. If a drone is sucked into a jet engine, it could cause engine failure. A drone flying into a helicopter tail rotor could cause the helicopter to go out of control and crash. As one pilot told the FAA, "If one of those things hits us, we're coming down."³

Incidents involving drones are increasing. Early this year, a wayward drone made headlines when it crashed on the White House lawn. In a response to a Freedom of Information Act request by the *Washington Post*, the FAA reported that in a five-month period, pilots and air traffic controllers reported 25 instances where drones came within a few seconds or feet of crashing into much larger aircraft, with many of the near misses occurring near large airports.⁴

Recently, the FAA sent cease-and-desist letters to:

- a commercial photographer who used a drone to take aerial photographs of a house for a real estate company.⁵
- a photographer who posted and offered to sell aerial shots taken with a drone of a concert in Chicago's Grant Park.⁶
- a search and rescue organization that used drones to help find missing persons when ground and horseback searches were not successful or the terrain was too difficult for other methods.⁷ The FAA argued that, because the organization took donations, it was involved in a commercial operation.
- two journalism schools that were using drones to take pictures for class stories.

According to the FAA, each of the above uses is a *commercial* use subject to FAA regulation. However, if the commercial aspect of the transaction could be eliminated, these actions would be unregulated by the FAA,

although the potential hazard might remain the same. The regulatory category of *commercial* may no longer work.

The ban against commercial drones dates back to a 2007 FAA order, which allows the commercial use of drones only if the operator obtains special FAA permission. In 2012 Congress passed the FAA Modernization and Reform Act, requiring the FAA to integrate drones into the National Airspace System (NAS). The Act directed the FAA to develop a five-year road map for introducing drones into the NAS, to initiate a rulemaking on small unmanned aircraft, and to establish pilot projects.

Some proponents of commercial drones argue that the small craft should be given the same treatment as model aircraft, which are covered by FAA Advisory Circular 91-57, issued in 1981. This circular generally limits operations for hobby and recreational use to below 400 feet, away from airports and air traffic, and within sight of the operator. Some argue that the 2012 Modernization Act confirms drones are model aircraft exempt from regulation if they are flown strictly for hobby or recreational use, weigh less than 55 pounds, are operated in a manner that does not interfere with any manned aircraft, and are flown within visual line of sight of the person operating the aircraft.⁸ The distinction between hobby and commercial drones was recognized by the FAA in its initial proposed rules for drones published in February 2015. However, the FAA maintains the right to take enforcement action against model aircraft to protect people and property on the ground. The FAA argues that the model aircraft rules do not apply to commercial uses of drones, regardless of how low they are flying. In other words, *hobby/recreational* and *commercial* may now be overlapping regulatory categories, creating confusion.

In the proposed rules,⁹ the FAA attempts to allow the commercial use of drones under 55 pounds while protecting the public and aircraft. The

proposed rules limit small UAS to daytime flights, require visual-line-of-sight operations, and restrict altitude to lower than 500 feet.

Because on one hand the FAA does not assert any jurisdiction over the noncommercial use of drones, but on the other hand asserts total jurisdiction over commercial drones, it raises the interesting dichotomy where, if an individual flies a drone to take pictures of her house, her action is not regulated. At the same time, if the same photographs were taken by a commercial photographer for use by a real estate agent selling the house, the activity would be regulated, and—under today's FAA regulations—it would be illegal unless an FAA permit had been obtained. Yet the hazards would be the same.

Until the formal rules on commercial use are finally adopted, businesses may apply to the FAA for special use exemptions, which are subject to public notice and public comment. The FAA has granted authority to several aerial photo and video production companies in the film and television industry to use drones, which weigh about 50 pounds, for their filming. The certificates require that the operators hold private pilot certificates, keep the drones within line of sight at all times, restrict the flights to the “sterile area” on the set, conduct an inspection of the aircraft before each flight, and prohibit operations at night. There are scores of other requests pending.

The ban on commercial drones also grounds drones for news gathering. This has drawn the ire of the media, which argue that the ban violates the First Amendment because news gathering is not a “commercial” use. Rather, the media argue, use of drones benefits the public because the lower-cost aerial photography would help newsrooms bring more accurate and useful information to the public.

Journalists also are concerned about some state laws on drones. For example, Utah criminalizes interference with agriculture operations, which includes “knowingly or intentionally”

recording an image of an agriculture operation.¹⁰ This could prevent investigative journalists from photographing a farm as part of an investigative story on agribusiness. Texas prohibits taking photographs of private property “with the intent to conduct surveillance,” which might prohibit investigative journalists from using drones over private property.¹¹

Several states have enacted legislation regarding the private use of drones. In an interesting twist, Illinois has made it a crime to use a drone “that interferes with another person’s lawful taking of wildlife or aquatic life.”¹² (For other examples of state regulation of UAVs, see Hillary Farber’s article on page 6.) When the FAA does allow commercial use for drones, the use will be subject to laws governing right of privacy, intrusion upon seclusion, and right of publicity for images captured by the drones.

What, then, should a lawyer tell a client who wants to use drones for a commercial use?

The client should be told that the FAA currently bans commercial use of drones in the United States. The client may apply to the FAA for an exception by obtaining a special airworthiness certificate or for a certificate of waiver and authorization. Either process requires a detailed filing, public input, and time. If client does not want to file for a waiver, it could develop the commercial use outside the United States in countries that allow commercial use of drones. Or the client could wait until the FAA’s rules on commercial drones are adopted and hope that no one develops and pre-empts the client’s use in the interim. ♦

Endnotes

1. Marcelo Ballve, *Drones: Commercial Drones Are Becoming a Reality, With Huge Impacts for Many Industries*, BUS. INSIDER, <http://www.businessinsider.com/drones-navigating-toward-commercial-applications-2-2014-1>.

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s3.amazonaws.com/AUVSI/958c920a-7f9b-4ad2-9807-f9a4e95d1ef1/UploadedImages/New_Economic%20Report%202013%20Full.pdf.

3. Craig Whitlock, *Near Mid-Air Collisions with Drones*, WASH. POST, Nov. 26, 2014, <http://www.washingtonpost.com/wp-srv/special/national/faa-drones>.

4. Craig Whitlock, *Near-Collisions Between Drones, Airlines Surge, New FAA Reports Show*, WASH. POST, Nov. 26, 2014, <http://www.washingtonpost.com/world/national-security/near-collisions-between-drones-airliners-surge>

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5. Dennis Rodkin, *FAA to Drone Photographer: Cease and Perhaps Desist*, CRAIN'S CHICAGO BUS., May 29, 2014, <http://www.chicagobusiness.com/article/20140529/NEWS07/140529748/faa-to-drone-photographer-cease-and-perhaps-desist>.

6. *FAA Reviewing Drone Flying Over Lollapalooza*, CHICAGO TRIB., Aug. 8, 2014, <http://www.chicagotribune.com/news/local/breaking/chi-faa-reviewing-drone-flying-over-lollapalooza-20140807-htm1story.html>.

7. *Gene Robinson Drone*, <https://www.youtube.com/watch?v=UTcWo4OAwTA>.

8. FAA Modernization and Reform Act of 2012, §§ 336 and 337.

9. 80 Fed Reg. 9544 (Feb. 23, 2015).

10. UTAH CODE TIT. 76, Ch. 6 § 112(2)(a).

11. TEX. REV. CIV. STAT. 423.001. Titled the Texas Privacy Act, the act deals with use of unmanned aircraft. It allows many uses for drones including research, agriculture, gas and electric inspections, which currently are not allowed by the FCC.

12. 720 ILCS 5/48-3(b)(10).