

By Richard C. Balough

FAA Draws Clear Legal Distinction

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# Under Current Law, There's No Place for Commercial Drones



## IF ONE OF YOUR CLIENTS WANTS

to use a drone for business, you should tell him to take a deep breath. Although drones can take high-quality pictures and videos for a variety of commercial uses, such use is not generally permitted.

Although there are no significant technical difference between a recreational drone and a commercial drone, the Federal Aviation Administration (FAA) has drawn a clear legal distinction. The FAA prohibits using drones for any commercial purpose without a special permit. Only recently have some businesses been able to obtain these permits.

This ban against commercial drones goes back to a 2007 FAA order, which allows the commercial use of drones only if the operator has obtained special FAA permission. In an attempt to resolve the roadblock created by this order, in 2012 Congress passed the FAA Modernization and Reform Act, which requires the FAA to integrate drones into the National Airspace System (NAS). The Act directs the FAA to develop a five-year “roadmap” for introducing drones into the NAS, to initiate a rulemaking on small unmanned aircraft, and to establish pilot projects. To date, the FAA has not issued any rules to allow commercial use except via its special permit process.

The cost of drones, technically Unmanned Aircraft Systems (UAS), has decreased dramatically and the quality of the on-board 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 50 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 purposes. Another report, from the Association for Unmanned Vehicle Systems International, found the industry will create more than 100,000 jobs in the United States in the first decade alone.

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 with the images reviewed to detect faults or areas where maintenance is required. Drones can do a more thorough job than an on-the-ground crew and without having to use scaffolds.
- Surveying and assessing damage caused by tornados or hurricanes by insurance carriers. By using drones, the insurance adjusters would have access to the damage almost immediately and would not interfere with search, recovery, and clean-up operations. This would speed up issuance of checks to their policy holders.
- Inspecting oil and gas pipelines, electric transmission lines, and solar panels. Drones can fly closer to the pipelines, transmission lines, and solar panels at lower speeds and send images back for an in-depth review.
- 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, drones may apply fertilizers, insecticides, and other treatments, reducing the need for large, manned crop duster planes.
- Searching for missing persons. This is especially beneficial where the terrain makes it difficult to do a walking search. A drone can cover far more territory in a short period of time than search parties walking the area.
- Mapping archaeological sites. Some archeological sites are not easily surveyed by airplane and using drones is far less costly.
- Photographing homes for real estate agents.
- Delivering packages, as has been announced by Amazon.com.

### Collisions Possible

However, these uses and others also raise both safety and legal issues. While drones are small and lightweight, a collision with an airplane might cause extensive damage. 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.”

A drone inspecting a farm field for one farmer could collide with a crop duster. Or an out-of-control drone could crash into people or things, which is what happened when a tourist’s drone crashed into a hot spring at Yellowstone National Park, causing damage to the spring itself. In another reported drone incident, a Northern California wildfire crew had to stop its aerial firefighting efforts when a private drone was spotted, raising the possibility of a

mid-air collision.

Some proponents of commercial drones argue that the small craft should be given the same treatment as model aircraft, which is covered by FAA Advisory Circular 91-57. 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. The 2012 Modernization Act confirms drones are “model aircraft” exempt from regulation if they are flown strictly for hobby or recreational use, the aircraft 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. However, the FAA maintains the right to take enforcement action against model aircraft operators who operate their aircraft in a manner that endangers the safety of the NAS as well as to protect people and

Incidents involving drones are increasing. In a recent 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. The FOIA report noted:

- A drone came within 800 feet of a New York Police Department helicopter, resulting in the arrest of two men operating the drone who were charged with reckless endangerment.
- The pilot of an Airbus landing at LaGuardia Airport reported that a drone flew “under the nose of the aircraft” at 1,500 feet.
- Air traffic controllers reported a drone “almost hit” an airline inbound into LaGuardia at 4,000 feet.
- The pilot of a small plane reported that a drone came within 20 feet of the aircraft at 1,500 feet near Dulles Airport.
- A pilot of a commercial aircraft arriving at Charlotte reported “We were nearly hit by a drone” while on approach at 3,100 feet.
- The nurse in a life flight helicopter descending in Pottsville, Pa. reported seeing a drone flying toward the aircraft “at a high rate of closure,” requiring the pilot to make an evasive turn, missing the drone by 50 to 100 feet.

The FAA report did not determine if these drones were being operated for recreational or commercial purposes.

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.

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; a photographer who posted and offered to sell aerial shots taken with a drone of a concert in Chicago’s Grant Park; a search and rescue organization that used drones to help find missing persons when ground and horseback searches are not successful or the terrain is too difficult for other methods (<https://www.youtube.com/watch?v=UTcWo4OAwTA>). The FAA argued that, because the organization took donations, it was involved in a commercial operation); and two journalism schools, which were using drones to take pictures for class stories.

### Commercial Use

According to the FAA, each of the above uses is a commercial use. However, if the “commercial” aspect of the transaction were eliminated, these actions would be unregulated by the FAA.

Because, on one hand, the FAA does not assert any jurisdiction over the non-commercial use of drones, but on the other 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.

In 2013, the FAA issued its first “road-map” under the 2012 Modernization Act.

In early 2014, the FAA approved six test sites for the commercial operation of drones at the University of Alaska, State of Nevada, New York’s Griffiss International Airport, North Dakota Department of Commerce, Texas A&M University, and Virginia Polytechnic Institute and State University. The test sites are to continue until 2017. The FAA has yet to issue any proposed rules regarding commercial drone use.

### Special Use Exemptions

Even though there are no proposed or adopted regulations on commercial use, businesses can apply to the FAA for special use exemptions, which are subject to public notice and public comment. In September 2014, the FAA granted authority to six 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 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.

More recently, the FAA granted exemptions to four other entities, including two in the Chicago area. The two companies will use the drones to do topographic surveys, environmental site assessments, and take aerial photos for construction projects. There are at least 40 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

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## WHAT'S YOUR OPINION?

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holding, the Illinois Supreme Court also stated that under the express language of the statute, “it is the nature of the act or omission, rather than the identity of the plaintiff, that determines whether the statute of repose applies to a claim brought against an attorney.”

#### Commentary

*Evanston Insurance* re-emphasized two important thoughts for practitioners: First, the statute of repose is unforgiving; second, unsettled questions of law are hazardous. *Evanston Insurance* knew or should have known that Section 13-214.3 of the Code of Civil Procedure applied to its claim against Riseborough and that it was ambiguous, thus unsettled. It should have protected itself. Initially it did protect itself but then apparently failed to protect itself. The opinion provides a reminder to practitioners that they must exercise caution in unforgiving and unsettled areas of the law. ■

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

Several states have enacted legislation regarding the private use of drones. In an interesting twist, Illinois makes it a crime to use a drone “that interferes with another person’s lawful taking of wildlife or aquatic life.” In addition, at least 26 states have laws requiring law enforcement to obtain a warrant before using drones, such use by law enforcement being beyond the scope of this article.

When the FAA does allow commercial use for drones, the use will be subject to right of privacy claims, 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

bans commercial use of drones in the United States. The client could 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, she could develop the commercial use outside the United States in countries that allow commercial use of drones. Or the client could wait until the picture becomes clearer, watch others announce their plans to use commercial drones, and hope that no one develops and pre-empts the client’s use before the FAA announces its proposed rules and the rules are adopted. ■

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worth testing to see how easy it is to open, edit, and save a document in the browser edition on a mobile device without a native app. NetDocuments offers a work-around for Android users with a third party tool called FolderSync™ by Tacit Dynamics.

More and more accounting systems are going to the cloud, so Freshbooks, the venerable QuickBooks, and the up-and-coming Xero are now available through a browser and have native apps. All of the above have apps for iOS and Android. ■



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