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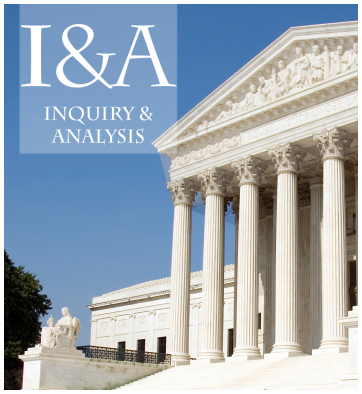

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Legal Considerations Regarding Drone Regulation and Use in Public Schools

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It is no surprise that questions have arisen from schools across the nation regarding drone regulation by and use in public schools. Referred to by the Federal Aviation Administration (FAA) as part of a large class of unmanned aircraft systems (UAS), drone sales have risen 167% over the last two years to become a $1.7-billion-dollar market, with the U.S. in the lead worldwide for most drone sales.[2] The trend was remarkably evident this past holiday season, with seemingly every store selling one or more models for personal recreational use, ranging in price from under twenty dollars to several thousand dollars.[3] In the commercial arena, the now-iconic images of package-laden drones bearing the Amazon.com logo sparked a national conversation about commercial drone use when it announced its package-delivery-by-drone initiative, but many other industries are also considering or already using drone technology for commercial activities, including: pizza delivery; inspection of pipelines and railways; delivery of medical supplies to remote areas; damage estimates for insurance carriers; construction and building design; and photography/videography for commercial and marketing purposes.[4]

Recent Incidents Justify Safety and Privacy Concerns

Numerous recent events, several of which occurred at international sporting events, have raised legitimate public safety concerns about widespread use of drones. These highly-publicized events include incidents involving a drone falling into a populated grandstand at the Virginia Motorsports Park;[5] crashing inches from a champion skier in the 2015 World Cup slalom;[6] cutting the face of a customer of a popular restaurant with its blades;[7] dropping from atop a high rise onto the street during rush hour near Grand Central Station in Manhattan;[8] injuring a triathlete in Australia;[9] bursting into flames, damaging a nearby building;[10] and slamming into the stands during a match at the 2015 U.S. Open.[11]

In addition to safety concerns, the recent surge in drone use also poses significant privacy and security concerns. In July of 2015, a man was arrested in New York for flying a small, camera-equipped consumer drone outside of the windows of the examination rooms of a medical office building.[12] In 2013, a drone flew over the fence of the White House in Washington D.C. and landed in the yard, causing a security frenzy. [13] With an increase in drone consumer use and ever-evolving technology that often includes the use of high-tech cameras and recording devices, privacy concerns continue to grow, and for schools bound by privacy laws, the issue is paramount.

Banning or Restricting Drone Flight over School Property: A Question of Regulatory Authority

The issue of whether and to what extent schools have the right and/or authority to regulate drone use is complex and currently not well-defined, legally. In the absence of federal regulation, states have been conducting a flurry of regulatory activity with regards to drones. According to the National Conference of State Legislatures, 45 states have already introduced 168 bills related to drones, and 20 states have actually passed 26 pieces of legislation.[14] Legislation ranges from restricting the rights of use of drones by paparazzi in California[15] to the imposition of a 2-year moratorium on all use of Drones in Virginia[16] to an intricate system of laws addressing drone flight and property rights in Idaho.[17]

In an attempt to rein in this flood of regulatory action by the states, the FAA, on December 17, 2015, issued a "State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet," which advises state and local governments to be cautious in regulating UAS in navigable airspace.[18] The Fact Sheet declares all regulation related to airspace use, management and efficiency, or safety to be the exclusive jurisdiction of the FAA. While the document does not have the force of law, it clearly establishes the FAA's position with regard to the jurisdictional issues.

The FAA claims complete jurisdiction over all flights, not just flights above 500 feet, the height at which FAA has historically regulated. Federal law states that "[t]he United States Government has exclusive sovereignty of airspace of the United States."[19] In addition, in 2012, Congress passed the FAA Modernization and Reform Act (hereinafter, "FMRA"), which directed the FAA "to develop a plan for the safe integration of civil unmanned aircraft systems into the National Airspace." [20] This begs the question as to whether the states (or property owners, for that matter), have *any* interest in or ability to regulate low-flying airborne activity. The answer is surprisingly befuddling. In 1954, the U.S. Supreme Court held that, while the Air Commerce Act of 1926 was "an assertion of exclusive national sovereignty" over navigable airspace, it "did not expressly exclude the sovereign powers of the states."[21] A review of relevant case law,[22] however, reveals a murky mire of unclear tests and very subjective standards.

A comprehensive legal analysis could fill the pages of a hefty law review article,[23] but, while the FAA's current position of authority appears to be an overreach with respect to its actual regulatory jurisdiction, it is likely that any attempt by a public school to regulate the actual flight of drones above school grounds would not survive a legal challenge, especially if the regulation called for a complete ban. Thus, schools looking to restrict drone flight over school grounds will need to look to alternative measures to achieve their goals.

FAA Claims Exclusive Authority over Right to Register

Some schools have taken the approach of requiring potential drone users to first register with the school district.[24] This approach, while it can provide the opportunity for schools to require potential drone operators to sign a hold-harmless and/or indemnification agreement and provide assurances of insurance,[25] poses legal risks. First and foremost, in its December 17 Fact Sheet, the FAA unequivocally claims that it has exclusive authority with regard to registration and that "no state or local government may impose an additional registration requirement on the operation of UAS in navigable airspace without first obtaining FAA approval."[26] On December 21, 2015, the FAA issued a new final regulation that requires all drone operators, even those operating "model aircraft," to register with the FAA.[27] Because of this, schools considering the implementation of any type of registration requirement should first consider seeking the express permission from the FAA, as indicated in the December 17 Fact Sheet, or they run the risk of having their entire contract invalidated due to lack of consideration.

Even if the FAA grants permission for the school's registration process, the registration process, itself, poses potential liability by placing the school in the position of having formally authorized the use of a drone that may ultimately have led to harm and/or damage, inserting the school into a situation in which it otherwise may not have had direct involvement. In addition, if the school-imposed registration is not done with express FAA permission, and a court rules that the school doesn't have the authority to regulate drone activity, as discussed above, the school's consideration becomes invalid, and the indemnification and/or hold-harmless provisions would, likewise, likely be held to be invalid due to lack of consideration. Either way, this type of registration-based solution to the drone problem could very easily result in substantial liability for the school.

Property Rights and Trespass Violations as a Prevention Mechanism

A more viable option for schools may be taking a property law-based approach. In the infamous property law case, *United States v. Causby*,[28] the Supreme Court held that, despite the fact that the FAA does, indeed, have the right to control the airspace, the property owner's land rights extended to "at least as much of the space above the ground as he can occupy or use in connection with the land."[29] Thus, traditional property-law causes of action and other tort claims, such as trespass, trespass to chattels, intentional infliction of emotional distress, etc., may be one of the few viable options for addressing drone flight issues.

Some states already have laws in place governing the availability of trespass and other civil claims for drone activity above private property, many of which deal with privacy rights of property owners. States may, by law, establish how far above the ground an owner's property rights extend.[30] It is unclear whether these laws will withstand a challenge by the FAA as constituting an improper regulation of airspace, due to the fact that it governs much more than the minimal height at issue in *Causby*, however, pursuant to *Causby*, property owners do have rights in at least a limited amount of airspace.

It is clear that schools can (and should) regulate the use of their property by prohibiting individuals from launching drones on school property. In addition, until an alternative remedy becomes available, schools should also consider taking a hard line approach with regard to publicizing and following through with threats of civil litigation for property rights violations. Schools should put the public on notice, through posted signage, policy language, written notices to parents, etc., that they will take legal action, to the fullest extent of the law, against those whose drones trespass onto school property, including the airspace directly above, and/or those whose drones cause damage to the school's property. Then, at least for the first year or two, schools should be diligent about actually prosecuting offenders. This type of warning, followed by swift, determined enforcement action, will likely go far in deterring a large portion of the offending traffic.

Regulating the Conduct of Students, Faculty and Staff

Schools can also regulate the specific actions of their students and employees without infringing upon the FAA's general airspace authority and without being required to engage in litigation for the purposes of enforcement. In most, if not all, states, schools have the authority to establish necessary rules and restrictions of students and employees to maintain the safety and order of the school.[31] Depending upon state law, most schools could also extend this requirement to those who participate in extracurricular activities.

Regulation of Drone Use in Athletics

Drones used to take aerial photos and videos are commonly used in a large number of professional sporting events.[32] In addition, increasing numbers of high school and college coaches use drone technology in both their games and practices, extolling the benefits of the aerial perspective for obtaining comprehensive information about specific plays and strategies.[33] However, several sports have reconsidered drone use, and the FAA has stepped in on at least one instance, sending a cease-and-desist letter to Green Hope High School in North Carolina, advising the school of the requirements for operating unmanned aircraft, "which are prohibited above large gatherings of people."[34]

A number of state high school athletic associations have banned drones at their events, including Kentucky, Delaware, Ohio, Washington State and North Carolina.[35] Some international events, where media has a very heavy presence, have even become wary of allowing media drones after several high-profile incidents at a triathlon in Australia and the U.S. Open. In December of 2015, the day after a drone carrying a camera crashed just inches from a champion skier in a World Cup slalom in Italy, the international ski

federation declared that drones would be banned from all World Cup skiing races.[36]

Schools should scrutinize their practices regarding drone use to ensure that, if utilized, they are not running afoul of FAA requirements. In addition, they should review the requirements of their state's athletic associations to determine whether a statewide ban or other restriction has been made. Finally, schools should adopt policies regarding the use of drones by school district employees, if not banning the practice, then regulating it so as to ensure safety and compliance with FAA rules.

Drones in the Curriculum

Consistent with the national drone trends, many schools are integrating drone use into their formal curricular programming, and any school seeking to ban drone flight on school grounds should be cognizant of the fact that drones can be a promising educational opportunity[37] and are likely already used in many high schools. Drone use in schools as an educational tool, however, is problematic in that it is unclear whether the FMRA's "model aircraft" exception to the otherwise extensive drone regulations would apply to school use. If the "model aircraft" exception does not apply, schools would be required to comply with the same regulations that are applicable to operators of commercial drones.[38] Under the FMRA, a "model aircraft" is one that is flown for "hobby or recreational purposes."[39] All other unmanned aircraft fall under the general regulatory requirements, which are substantially more burdensome and potentially cost-prohibitive for student use. In January of 2014, the FAA issued an interpretation document, which defines "hobby" as "pursuit outside one's regular occupation engaged in especially for relaxation," and "recreation" as ""refreshment of strength and spirits after work; a means of refreshment or diversion."[40] Because of this interpretation, it is possible that the FAA would not find that the educational use of drones meets the standard for the hobby/recreation exception. Still, schools should make a concerted effort to utilize the term "model aircraft" to refer to their programs and devices in order to preserve the argument that their programs are closer to hobby/recreational use than commercial use.

In addition to using the correct terminology, school administrators should carefully review their applicable insurance policies to make sure that they are covered for any damages that may occur due to the drone operation (see discussion, below). It is quite possible that the school will need supplemental insurance. Additionally, administrators should check their board policies and administrative procedures to ensure that drone practices would not violate a policy restricting photographing/videoing school grounds and/or students on school grounds. Administrators should also be aware of whether the school has adopted a policy regarding drone operations on school grounds. Finally, and very importantly, the FAA has imposed rules requiring all drone owners to be registered,[41] even if the drone qualifies as a "model aircraft"[42] (see discussion, above). Only the owner, not the users, needs to register.

Insurance Issues

Most general liability policies have aviation exclusions.[43] The insurance industry is wary of providing coverage for drone-related incidents, due to the uncertainty of the law. As Tom Karol, General Counsel of the National Association of Mutual Insurance Companies, points out in a recent white paper on the topic:

> Providing policyholder protection for UAS-related issues is an important and valid role for property/casualty insurance that NAMIC members would like to meet, but major law and regulatory gaps exist in federal/state/local jurisdictions, privacy, trespass, negligence, reckless endangerment, assault, and cyber-related issues.[44]

The issue for insurance companies is clear: with so much legal uncertainty and ambiguity, it is impossible to assess the risks. Thus, insurance companies have little ability to price their

products appropriately. Because of this, schools should not presume that their general liability policies offer protection for drone-related claims, and schools with policies that do have some coverage can expect that carriers may limit or completely eliminate coverage for drone-related incidents. Schools should carefully review their policies carefully to determine whether additional, specific coverage is necessary to provide comprehensive protection.

Conclusion

Public schools have good reason to be concerned about drone use on school property. However, schools need to be deliberate and cautious with regards to how they attempt to establish and enforce rules designed to restrict drone flight. With the FAA asserting nearly complete authority over all flight-related activity, including registration of drone owners, schools may need to get creative in determining the best ways to limit exposure to drone-related damage and/or injuries. By imposing at least a minimum standard of prohibiting drone use above crowds, such as at school events, and by students and employees on school grounds during the school day, schools can use property and tort laws to effectuate a more widespread ban. Schools also need to be careful not to inadvertently prohibit legitimate educational uses of the technology through that process, but they also need to ensure that such educational use adheres to applicable regulatory and safety standards. School attorneys will be invaluable resources to schools as their clients seek to untangle the web of laws, regulations, best practices, and federal guidance in order to establish rules that place student safety above all else.

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[2] Paul Bedard, *Drone sales surge 167% to 4.3 million, U.S. leads, but China catching up*, WASH. EXAMINER (May 29, 2015), http://www.washingtonexaminer.com/drone-sales-surge-167-to-4.3-million-u.s.-leads-but-china-catching-up/article/2565240.

[3] So much so that the FAA blamed an emergency bypass of the regularly-required notice and comment period for the most recent federal drone regulations on the anticipated exceptionally robust sales of hobby drones. *See also* Registration and Marking Requirements for Small Unmanned Aircraft, 80 Fed. Reg. 78,594 (Dec. 16, 2015) (amending 14 CFR Parts 1, 45, 47).

[4] *See* Tom Karol, *Unmanned Arial Systems/Drones – Regulation, Liability and Insurance Requirements*, Nat'l Ass'n of Mutual Ins. Cos. (Feb. 26, 2015), http://www.agrip.org/files/Cybrary/150226_drones.pdf.

[5] Martin Weil, *Drone crashes into Virginia bull run crowd*, WASH. POST (Aug. 26, 2013), https://www.washingtonpost.com/local/drone-crashes-into-virginia-bull-run-crowd/2013/08/26/424e0b9e-0e00-11e3-85b6-d27422650fd5_story.html.

[6] Associated Press, *Drones banned from World Cup skiing after one nearly falls on racer*, CHI. TRIB. (Dec. 23, 2015), http://www.chicagotribune.com/sports/international/ct-skiing-drone-crash-20151223-story.html.

[7] Conner Forrest, *12 drone disasters that show why the FAA hates drones*, Techrepublic.com (Mar. 20, 2015), http://www.techrepublic.com/article/12-drone-disasters-that-show-why-the-faa-hates-drones/.

[8] Jim Hoffer, *Small helicopter drone crash lands on New York city street* (Oct. 3, 2013), *available at* http://abc7ny.com/archive/9270668/.

[9] *Id.*

[10] Stephen J. Kotz, *Drone Crashes on Sag Harbor Main Street*, SagHarborOnline.com (Oct. 6, 2015), http://sagharboronline.com/drone-crashes-on-sag-harbor-main-street/. The article reports that the same

photographer had been previously involved in another incident where his drone caused damage to the sail of a boat in the harbor.

[11] Yaron Steinbuch & Natalie Musumeci, *City teacher charged in 'scary' US Open drone crash*" N.Y. POST (Sept. 3, 2003), http://nypost.com/1215/09/03/crashing-drone-briefly-causes-scary-scene-in-us-open-stands/. Of course, it is not only lawmakers and government officials whose attention has been captured by these high profile incidents. No new potential liability trend would be complete without a gaggle of personal injury plaintiff's attorneys following closely behind. Immediately after the 2015 holiday season, during which the sale of Drones for personal use soared, one personal injury lawyer stated in a local news article: "[w]e are committed to helping injured people [...] I know a lot of firms are off this week for the holidays, but I wanted to make sure that people who have been injured by a drone, or any other holiday mishap, have somewhere to turn for help."

[12] Michael B. Marois, *Creeps Embrace a New Tool: Peeping Drones*, BLOOMBERG BUS. (May 5, 2015), http://www.bloomberg.com/news/articles/2015-05-05/creeps-embrace-a-new-tool-peeping-drones.

[13] Kristin Donnelly, *Drone Crash at White House Apparently Accidental: Officials*, NBC News (Jan. 26, 2016), *available at* http://www.nbcnews.com/politics/white-house/drone-crash-white-house-apparently-accidental-officials-n293466.

[14] *Id.*

[15] AB 856.

[16] The full text of the law is available at http://leg1.state.va.us/cgi-bin/legp504.exe?131+ful+CHAP0755.

[17] For an in-depth discussion on the Idaho laws, see Arthur B. Macomber, *Trespass, Privacy and Drones in Idaho: No Snooping Allowed*, THE ADVOCATE, Vol. 58, No. 3/4 (Mar./Apr. 2015).

[18] OFFICE OF CHIEF COUNSEL, FED. AVIATION ADMIN., *State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet* (Dec. 17, 2015) [hereinafter *FAA Fact Sheet*]. The FAA, in that document, argues that a "patchwork quilt" of differing restrictions could significantly limit the FAA's flexibility in performing its statutory duties of controlling airspace and flight patterns and ensuring safety and an efficient air traffic flow.

[19] 49 U.S.C. § 40103(a)(1).

[20] Pub. L. No. 112-095.

[21] *Braniff Airways, Inc. v. Neb. State Bd. of Equalization and Assessment*, 374 U.S. 590, 595 (1954).

[22] *See Schneidwind v. ANR Pipeline Co.,* 485 U.S. 293 (1988); *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645 (1995); *Hines v. Davidowitz,* 312 U.S. 52, 66-67 (1941); *Geier v. Am. Honda Motor Co., Inc.,* 529 U.S. 861, 863 (200); and *U.S. v. Berkley,* 735 F. Supp. 937, 940 (E.D. Mo. 1990).

[23] And, indeed, has in at least one case. For a comprehensive analysis (albeit one that was issued prior to the most recent FAA regulations), see Ray Carver, *State Drone Laws: A Legitimate Answer to State Concerns or a Violation of Federal Sovereignty*, GA. STATE UNIV. L. REV., Vol. 31, Issue, 2, Article 4 (2014), *available at* http://readingroom.law.gsu.edu/gsult/vol31/iss2/4.

[24] The Elkhorn School District, in Elkhorn, WI, has adopted such a policy. *See* http://www.elkhorn.k12.wi.us/common/pages/DisplayFile.aspx?itemId=15230169.

[25] In the Elkhorn policy, drone users are required to have a minimum of $1 million in coverage.

[26] *FAA Fact Sheet*, *supra* note 18 at p. 2.

[27] 14 C.F.R. Part 48; *see also* Registration and Marking Requirements for Small Unmanned Aircraft, 80 Fed. Reg. 78,594 (Dec. 16, 2015) (Interim final rule amending 14 CFR Parts 1, 45, & 47). Legal challenges to this rule are a certainty, particularly with regard to hobby drones that meet the FMRA's "model aircraft" standard, as the regulations appear to overstep the FAA's authority in light of the specific exclusionary mandates of the FMRA for "model aircraft," as discussed in this article. In addition, the regulations were issued without a notice and comment period as required by the Administrative Procedures Act. Pursuant to

that law, this type of immediate adoption is permitted only where full compliance with the notice and comment requirements are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). In the Interim Final Rule, the FAA cites the recent increase in popularity of drones, especially in fourth quarter sales, as well as seven specific instances of drone misconduct. 80 Fed. Reg. at 78,596. Essentially, the FAA issued the rule on December 21, 2015, citing the Christmas season as the reason for the need for such haste.

[28] *U.S. v. Causby*, 328 U.S. 256 (1946).

[29] *Id.* The Court valued the easement in that case at $2,000.

[30] For example, in Oregon, a civil action for trespass may be brought against individuals who operate drones within 400 feet above the ground of private property. OR. REV. STAT. § 837.380. However, this law is particularly vulnerable due to the fact that it appears to directly contradict current FAA safety guidelines for model aircraft. Those safety guidelines suggest that drones maintain an altitude of no more than 400 feet. *See* FAA's website regarding "Model Aircraft Operations," *available at* http://www.faa.gov/uas/model_aircraft/.

[31] In Pennsylvania, this authority is established through state statute at 24 P.S. § 5-510.

[32] LEE GREEN, NAT'L FED'N OF STATE HIGH SCH. ASS'NS, *Legal Issues Related to the Use of Drones in High School Sports* (Nov. 21, 2014), *available at* https://www.nfhs.org/articles/legal-issues-related-to-use-of-drones-in-high-school-sports/.

[33] *Id.*

[34] Nick Stevens, *No-Fly Zone: Drones Banned from NCHSAA Events*, HighSchoolOT.com (May 6, 2015), http://www.highschoolot.com/no-fly-zone-drones-banned-from-nchsaa-events/14627410/#tuZs5P0ytIpZqdyY.99.

[35] Bob Cook, *North Carolina Joins Movement to Ban Drones at High School Games,* FORBES (May 6, 2015), http://www.forbes.com/sites/bobcook/2015/05/06/north-carolina-joins-movement-to-ban-drones-at-high-school-games/#cd2f44b48bf3.

[36] Associated Press, *Drones banned from World Cup skiing after one nearly falls on racer*, CHI. TRIB. (Dec. 23, 2015), http://www.chicagotribune.com/sports/international/ct-skiing-drone-crash-20151223-story.html.

[37] *See* Linda Odet, "*Next Hour, I'm Flying a Drone... Students Study with a New Tool*," School News Network (Dec. 11, 2015), http://www.schoolnewsnetwork.org/index.php/2015-16/next-hour-i-m-flying-drone/.

[38] The lengthy regulations for commercial drones were proposed in February 2015, but have yet to be finalized. The FAA's Interim Rule is available at https://www.faa.gov/news/press_releases/news_story.cfm?newsId=18295.

[39] Pub. L. No. 112-095, sec. 336.

[40] That document, "Interpretation of the Special Rule for Model Aircraft," is available at http://www.faa.gov/uas/media/model_aircraft_spec_rule.pdf.

[41] Registration costs $5 and can be done online through the FAA's website: http://www.faa.gov/uas/registration/.

[42] Note: If the drone does not qualify as a "model aircraft," additional steps need to be taken with regard to marking and identifying the aircraft.

[43] Pat Murphy, *Liability, insurance issues abound as drone use soars*, MASS. LAW. WKLY. (Nov. 4, 2015), http://masslawyersweekly.com/2015/11/04/liability-insurance-issues-abound-as-drone-use-soars/.

[44] Tom Karol, *Unmanned Arial Systems/Drones – Regulation, Liability, and Insurance Requirements,* Nat'l Ass'n of Mutual Ins. Cos. (Feb. 26, 2015), http://www.namic.org/pdf/15memberadvisory/150226_drones.pdf.