

# Drone On!

Emerging Legal Issues for Commercial Use  
of Unmanned Aerial Vehicles (UAVs): Will  
You and Your Clients Be Ready for the  
Invasion of American Airspace?





# What is all the fuss about?

- Near miss collisions with airplanes (241 reported to FAA—90 involved commercial jets)
- Two drones have landed on White House grounds
- Drone landed on roof of Japanese Prime Minister carrying radioactive material
- Amazon and others set to deliver packages as soon as FAA issues rules on commercial use.
- FAA expects 1 million drones given as Christmas presents this holiday season



- Drone flew into fireworks display in Tennessee over large crowd
- Realtor fined for filming over downtown Chicago without permission
- California EMT workers hindered because so many drones showed up to film accidents
- Drones used to locate refugee boats in Mediterranean
- Kentucky man shot down a drone over his yard, prompting stores to sell “drone shot” shotgun shells



**g.** for ages 12 and up

**h.** for ages 10 and up

*Built-in camera records the whole flight.*

*Fits in the palm of your hand.*

**g. Neutron Mini Quadcopter with Camera\***  
Indoor/outdoor drone with built-in HD camera. In Black or Red. Rechargeable battery. 5" w x 5" l x 1.5" h. 911516 **\$89.99**

**h. Quark Micro Quadcopter\***  
Super-fun indoor/outdoor mini quad with 6-axis gyro for incredible stability, 3 speeds, 360° aerial stunts. In Black or Red. 3" w x 3" l x 0.75" h. 911518 **\$39.99**

**i.** for ages 14 and up

*Fly over a mile away with the Skycontroller!*

# drones & droids

invading Brookstone stores and online

**i. Parrot® BeBop Drone Quadcopter**  
Take to the skies and capture incredible HD video and photos. Freeflight 3 App makes flying easy. Optional Skycontroller lets you fly further and with more control. 14.4" w x 13.2" l x 3.8" h. Blue in stores. Red is *Cat/Web only*. BeBop Drone only 939960 **\$499.99**  
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**j. Parrot® AR.Drone® 2.0 Quadcopter Power Edition—stay in the air longer!**  
Two high-density lithium-polymer batteries deliver up to 36 minutes of total flying time. Captures HD videos and images in flight! 22.5" w x 23.5" l x 5.5" h. 856004 **\$369.99**

**k. new HD Video Drone**  
Capture HD video and perform 360° aerial stunts. Altitude Lock allows for more stable flight and easier landings. 650' range. 990455 **\$159.99**



*Altitude Lock keeps the drone steady.*

**l. new Parrot® MiniDrone Rolling Spider**  
Its ultra-compact, lightweight design and autopilot capabilities make this our easiest-to-fly quad. Attach the wheels and watch it climb along a wall or move across the ceiling before taking to the air again! In Red or White. 904177 **\$99.99**



See all footnotes on page 21.

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## Perception Problems?

- In the absence of concrete federal or state law, perception is now a driving force on how the public is interacting with this technology and how rules are being crafted
- What are some of the audience's perceptions of drone technology?



**NYPD**

**DRONES**  
INTEGRATING THE SKY REPORTER





# Overview

## Regulation of UAV

- FMRA
- NPRM
- Section 333 Exemptions
- FAA Enforcement

## State Law Concerns

- State law themes
- FAA preemption?

## Tort Issues

- Liability for physical damage
- Other sources of liability
- Insurance



# Legal Framework



Regulatory



State  
Statutes



Decisional  
Law



Public  
Perception/  
Influence



## Regulatory Framework: FMRA

- The FAA is currently tasked with ensuring the safe and efficient use of the U.S. airspace which includes regulating drone operations under the FAA Modernization and Reform Act of 2012 (the “FMRA”)
- Creates the Section 333 exemption process



# Regulatory Framework: Exemption Process

- Section 333 of the FMRA permits the Secretary of Transportation to grant exemptions from existing ban on UAS commercial use for operators who provide a showing that they can operate at an equivalent level of safety to existing rules
- In order to make showing, must establish:
  - Operational safety characteristics of UAS
  - Safety procedures to be implemented
  - Qualifications of Pilot-In-Charge (“PIC”)
  - Description of intended operation
  - Identify applicable regulations



# Regulatory Framework: Guidance under the NPRM

- Notice of Proposed Rule Making (“NPRM”) which substantially defines the operational restrictions which will be permitted under the 333 exemption process for commercial operations
- Notable requirements:
  - Must be 55 pounds and under
  - Must be operated in daylight and within visual-line-of-sight of operator
  - May not operate over persons not directly involved in the operation
  - Maximum speed of 100 miles/hour
  - Maximum altitude of 500 feet above the ground
  - Must conduct preflight inspections
  - Aircraft must be registered and marked



# Regulatory Framework: FAA Enforcement

- Prior to 2015, while it was clear that unauthorized commercial use was prohibited, it was generally believed that the FAA simply did not have the man-power or capabilities to effectively police the skies and ensure conformity with the legal requirements. Until...



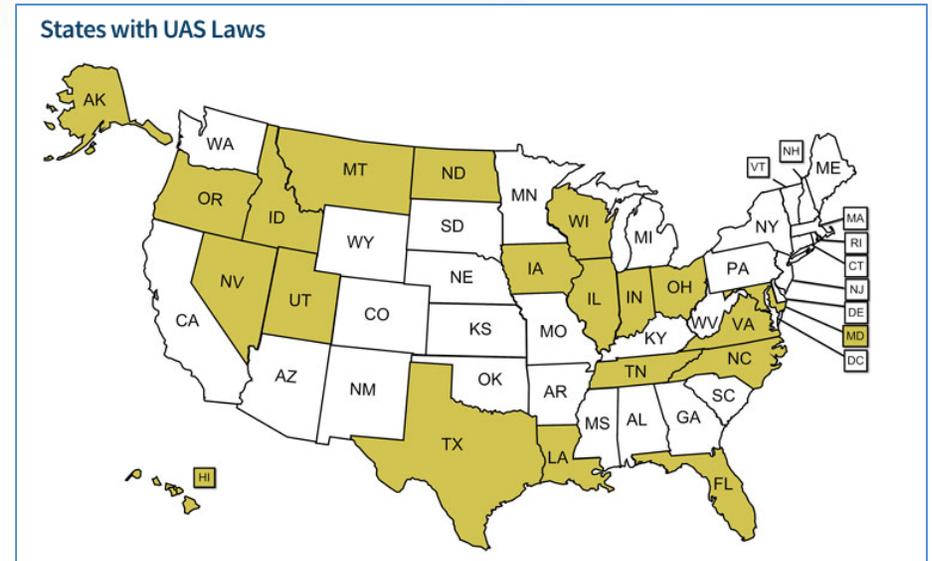
# Regulatory Framework: FAA Enforcement

- We now know that the FAA can and will pursue enforcement of the UAS rules and regulations and has the capabilities to monitor and track UAS use in NAS.
- In deciding whether to enforce its rules via administrative action or civil penalty, the FAA considers:
  - Whether the violation was first time or inadvertent with a relatively low risk to the NAS
  - Whether the violation poses a medium or high risk (i.e. possible collision with another aircraft in the NAS).
  - See FAA Order 2150.3B, Chapter 5, Paragraph 3



# State Laws

- 45 states have considered or enacted 166 bills defining permissible use of UAS
- The result is what many warn to be a “patchwork quilt” of differing local, state, and federal rules and requirements





# State Laws

- State and local government have adopted rules and regulations affecting UAS use by:
  - prohibiting UAS from entering certain airspace (i.e. near airports, correctional facilities, public gatherings, or public facilities);
  - prohibiting UAS from electronically recording information about “critical infrastructure”;
  - making it a felony to use UAS for “peeping tom” activities; or
  - creating civil liability for capturing an image or other information of a person or privately owned property without consent.



# FAA Preemption of State Laws?

- In December of 2015, the FAA gave it's first indication that state and local regulation may conflict with federal regulation.
- The FAA expressed concern that differing state and local laws
  - “could severely limit the flexibility of FAA in controlling the airspace and flight patterns,” and highlighted the necessity of “[a] navigable airspace free from inconsistent state and local restrictions.”
  - Cautions against any “city ordinance banning anyone from operating UAS within the city limits, within the airspace of the city, or within certain distances of landmarks;”
  - makes clear that “no state or local government may impose an additional registration requirement on the operations of UAS in the national airspace without first obtaining FAA approval.”



# Liability and Insurance

## Personal or Property Damage

- Operator Error
- Damage to Drone
- Product Liability

## Privacy

- Invasion of Privacy
- Trespass and Property Rights
- Strict Liability

## Insurance

- General Trends
- Specifics of Underwriting



# Liability: Personal and Property Damage

- Theory of negligence most likely claim for personal or property damage via UAS use.
- Reasonable Care in the operation of drone possibly defined by reference to applicable federal, state or local guidance to establish negligence per se.
- Hypothetical to audience: Store-front property owner engages commercial operator to perform aerial photography. UAS launched with low battery power which results in crash injuring pedestrians and damaging store-front property.
- Issues?



## Liability: Damage to UAS

- Converse situation where a UAS is damaged by a pedestrian – when does self-defense come into play?
- Case law substantially undeveloped with notable exceptions:
  - Suit by drone operator against neighbor who shot down UAS hovering over residence. Resulted in \$850 dollar fine.
  - Kentucky homeowner arrested for shooting down drone flying over residence while homeowner's daughters were sunbathing. Felony charges dismissed.
- Note: drones are defined as “aircraft” by the FAA and it is illegal to shoot at an aircraft under FAA regulations.



## Liability: Manufacturers

- **Drone manufacturers:** assume that traditional product liability theories including negligence, strict liability, and breach of warranty
- **Component parts:** liability will only extend to the extent the component is the cause of the injury (i.e. camera manufacturers likely safe)
- **Assemblers:** if the assembly results in a dangerous condition
- **Installers:** if damage results from improper installation.



# Liability: Invasion of Privacy

- Most likely to give rise to a claim for intrusion upon seclusion: 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. *Restatement (Second) of Torts §652B (1977)*.
- Specific UAS nuances:
  - Does the act of simply flying the UAS satisfy intent?
  - Is the Plaintiff in a space where one can reasonably expect privacy?
  - Is the flying of a UAS enough to highly offend a reasonable person?



# Liability: Invasion of Privacy

- Multiple states across the United States have enacted statutes addressing these issues with many more expected in the months to come.
  - For example, the Texas Privacy Act sets forth examples of illegal drone usage. Under Texas law, liability arises when a drone operator uses a drone “with the intent to conduct surveillance on the individual or property captured in the image.” Tex. Gov’t Code Ann. §423.003(a) (West 2013).
  - In response to drone use by paparazzi, the State of California has also recently enacted legislation design to curb use of drones over private property. See California Civil Code, §1708,
  - In Florida, a person has a claim against a drone operator who took images of a person or property “with an intent to conduct surveillance.” See Fla. Stat. § 934.50 *et. seq.*



# Liability: Trespass and Property Rights

- Courts will extend trespass liability for items flying or extending over property.
- Low level UAS flights could trigger trespass liability.
- Plaintiff will need to prove **actual interference** with actual use of, or substantial damage to person's property.
- A person's property rights in the UAS context are currently undefined.
- Issue will be addressed in forthcoming federal decision pending in the District Court for Western District of Kentucky.



## Insurance Issues

- Not currently a legal requirement for commercial operation
- Drone operation would likely be
- Standard in most UAV service contracts
- UAV specific insurance currently being offered by a number of underwriters