

California Litigation

THE JOURNAL OF THE LITIGATION SECTION, STATE BAR OF CALIFORNIA



Privacy Expectations in an Era of Drones

By Kristopher Kokotaylo



Kristopher Kokotaylo

As unmanned aerial systems, or “drones,” proliferate, what expectation of privacy does an individual have related to images that might be captured with these devices? Although the Federal Aviation Administration is tasked with ensuring that drones are operated safely within navigable airspace, the FAA will not be addressing the privacy rights of citizens on the ground. (Notice of Proposed Rulemaking, Operation and Certification of Small

Unmanned Aircraft Systems, 80 Fed. Reg. 9544, 9552 (Feb. 23, 2015).) State and local governments, however, are moving forward to address privacy concerns. What are the boundaries and limitations for state and local regulation of drone use by private citizens and possible protections against potential invasive drone use?

.....

California Litigation Vol. 29 • No. 1 • 2016

— Existing Federal Regulations —

The FAA currently has three classifications for drone use: public, civil, and model. (See *Unmanned Aircraft Systems*, www.faa.gov/uas/.) Public aircraft are operated by governmental agencies, civil aircraft are generally operated by non-governmental entities or individuals, and model aircraft are used for hobby or recreational purposes only.

Public drone operators must obtain a Certificate of Authorization, issued on a case-by-case basis, which places conditions on drone use. (See *Public Operations (Governmental)*, www.faa.gov/uas/public_operations/.) Conditions typically include restricted use in populated areas and line of sight by the operator or another individual on the ground.

Currently, civil drone operators must obtain a “Section 333 Exemption” or a “special airworthiness certificate.” (See *Civil Operations (Non-Governmental)*, www.faa.gov/uas/civil_operations/.) A Section 333 Exemption may be obtained to use drones to perform commercial operations, while special airworthiness certificates are generally obtained for experimental purposes. The FAA is currently considering comments on a proposal that would allow civilian commercial use of small drones. (See *Small UAS Notice of Proposed Rulemaking (NPRM)*, www.faa.gov/uas/nprm/.)

Unlike public and civil aircraft operators, model aircraft operators are not required to obtain a certificate or other approval from the FAA. As of December 21, 2015, however, anyone who owns and operates a model aircraft is required to register with the FAA. (www.registermyuas.faa.gov/.) The statutory guidelines for model aircraft operators appear in Section 336 of Public Law 112-95. (www.faa.gov/uas/media/Sec_331_336_UAS.pdf.) The FAA encourages model aircraft operators to follow safety guidelines, including:

- Flying below 400 feet and remaining clear of surrounding obstacles
- Keeping the aircraft within visual line of sight at all times

- Remaining clear of and not interfering with manned aircraft operations
- Not flying within 5 miles of an airport
- Not flying near people or stadiums
- Not flying an aircraft that weighs more than 55 pounds.

— Federal Preemption on State and Local Laws —

Congress tasked the FAA with prescribing air traffic regulations regarding aircraft flight. (49 U.S.C. § 40103(b)(2).) This includes regulations for “(A) navigating, protecting, and identifying aircraft; (B) protecting individuals and property on the ground; (C) using the navigable airspace efficiently; and (D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.” (Id.)

State and local governments already have adopted, or are considering adopting, regulations on private drone use. Thus, in considering the extent to which state and local laws may limit private drone use, it is necessary to consider the possibility that federal law may preempt any local regulations.

The most likely basis for preemption is implied field preemption, given that federal law has no express preemption clause regarding aircraft. Case law makes it clear that air safety regulations and aviation noise regulations are preempted by the FAA. The Ninth Circuit held that FAA safety standards cannot be further regulated by state laws. (*Montalvo v. Spirit Airlines* (9th Cir. 2007) 508 F.3d 464, 468.) Additionally, the United States Supreme Court held that federal law preempted a local ordinance restricting the time frame during which planes could take off. (*City of Burbank v. Lockheed Air Terminal, Inc.* (1973) 411 U.S. 624, 639.) However, the California Supreme Court held that federal law does not preempt tort claims based on nuisance due to aircraft use because the FAA does not have adjudicatory power over noise disputes between airport owners and property owners. (*Greater Westchester Home-*

owners Assoc. v. Los Angeles (1979) 26 Cal. 3d 86, 100.)

In December 2015, the FAA released a fact sheet addressing state and local regulations on drone use. (*See State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet*, www.faa.gov/uas/regulations_policies/media/UAS_Fact_Sheet_Final.pdf.) The Fact Sheet outlines areas the FAA considers preempted by federal law and areas where state and local governments may enact additional laws and regulations, consistent with existing case law. The FAA contends that operational restrictions related to flight altitude, flight paths, operations or regarding the navigable airspace may be preempted. However, the FAA concedes that laws traditionally associated with police power such as land use, zoning, privacy and trespass are not subject to federal preemption. This includes prohibiting citizens from using drones for voyeurism. Thus federal law does not preempt all state and local drone regulations. State and local laws that attempt to regulate safety in the navigable airspace are likely to be preempted, while laws related to traditional torts are not likely to be preempted.

**California:
Regulating Drone Use**

Although the California Legislature passed a number of bills that would have regulated drone use — including restrictions on drone flight over public schools and prisons, drone flights that interfere with emergency responders, and drone flights at less than 350 feet above private property — most of these bills were vetoed by Governor Brown. However, Governor Brown did sign Assembly Bill 856 into law, amending the Civil Code to expand the definition of “physical invasion of privacy” to include knowingly entering “into the airspace above the land of another person without permission...in order to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity in a

manner that is offensive to a reasonable person.” (*See* Civ. Code, § 1708.8.) AB 856 creates a private right of action where drones are used in specific circumstances to capture

‘Expectations of privacy evolve as technology advances. The expectation of privacy generally depends on what is “reasonable” under societal standards. Society is unlikely to consider that a citizen has an expectation of privacy if observed by a drone on a public street.’

private individuals engaged in personal activity on their own property.

The City of Beverly Hills adopted an ordinance in 2014 that prohibits using drones to

record or transmit a visual image or audio recording of a person on private property in which the person has a reasonable expectation of privacy. The ordinance includes exceptions for law enforcement or public agencies under certain specific circumstances, and does not prohibit the use of model aircraft in compliance with federal law, provided that the model aircraft does not transmit or record a visual image or audio.

Drone Laws Addressing Privacy

Expectations of privacy evolve as technology advances. The expectation of privacy generally depends on what is “reasonable” under societal standards. Society is unlikely to consider that a citizen has an expectation of privacy if observed by a drone on a public street. However, society may consider an expectation of privacy reasonable where citizens are observed by a drone in their own backyards completely surrounded by high fencing. While the same observations could occur from a tall individual walking on the street along the fence or from a helicopter overhead, such means of observation are not as covert or as likely to go undetected as a drone.

Legislation designed to protect citizens from drone observations rests on the expectation of privacy in one’s home. However, if drones continue to be unregulated and have enhanced technological capabilities, citizens are less likely to be able to claim that they have a reasonable expectation of privacy from such observations. It is more likely that citizens will demand, through their elected officials, laws that protect their privacy from this new technology.

Societal expectations of privacy are informed and shaped by federal, state and local laws. To the extent drone use goes unchecked, individual citizens will not be able to successfully claim that they have a reasonable expectation of privacy from drone observations. However, if states and local governments pass laws impacting the ability to use a



drone to obtain images or audio, the expectation of privacy is likely to be greater.

In this rapidly advancing area of technology, citizens seek protection against surveillance and voyeurism. As the proliferation of private drone use continues, citizens are uncomfortable with the possibility that drones could fly through their neighborhoods, above their property, observing their every action. New laws restricting drone use would strengthen reasonable expectations of privacy. Such laws will not be adopted at the federal level, but at the state and local levels, in response to citizen concerns.

.....
Kristopher Kokotaylo focuses his practice at Meyers Nave on serving the unique legal and regulatory needs of public entities throughout California. kkokotaylo@meyersnave.com.