

## DRONE JOURNALISM, TRYING TO FLY IN A LEGAL LANDSCAPE

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### ANALYSIS

Unmanned aerial systems, more commonly known as drones, have been increasing in popularity for recreational and journalistic uses. Drones are particularly useful for visual storytelling. Many journalistic outlets are looking to incorporate the use of drone footage or have already taken steps to utilize this technology. However, even such recreational or storytelling use of drones may have its dangers. In 2014, a man was arrested for “flying a drone too close to a hospital window.” The following year, a police officer was “charged with eavesdropping after flying a drone over his neighbor’s property” and lost his job as a result. Then, in 2016, two men were arrested for “flying a drone over security officers at the Dakota Access Pipeline protests.” Some of these cases are still active, and although the man in 2014 was found not guilty, he still had to undergo the trial process. These cases cover issues regarding the right to privacy and the threat posed by drone use to such privacy.

The use of drones for surveillance, or simply for gathering visual data, brushes up against the right of privacy and people’s desire to maintain their privacy. Some individuals have taken protecting their privacy to the point of shooting down drones they view to be invading that privacy. One such individual

in Kentucky is now known as the Drone Slayer after shooting down his neighbor's drone as it flew over his property. The self-proclaimed Drone Slayer, William H. Merideth, was arrested after the incident, but cleared of charges in 2015 when Bullitt County Judge Rebecca Ward found that the drone hovering over his property "was an invasion of their privacy and that they had the right to shoot this drone." David Boggs, the drone pilot in this case, brought another case against the Drone Slayer in federal court in an attempt to recover damages to repair or replace the drone. In 2017, that second case was dismissed due to improper venue, and the pilot was again left with a destroyed drone and no legal answer as to whether his flight constituted trespassing.

One of the most important concerns surrounding the use of drones is the potential impact into an individual's privacy. Many of the laws that may come into play when flying a drone relate to this privacy concern. The tort of intrusion upon seclusion is a privacy-related tort that will likely play an important role in drone-related privacy cases. This tort occurs when an individual "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another." Such individual becomes liable for the invasion of privacy if "the intrusion would be highly offensive to a reasonable person." This tort is applicable to drone flights; however, the elements must be met for a drone operator to be found liable under the tort. First, a drone flight that invades another's privacy must be intentional rather than accidental. It is still a question of "whether the intentional act of flying a drone is sufficient" to meet the intentional intrusion element of this tort. Second, the intrusion must be into a private space, and "observation of a person in public

generally does not amount to liability” for this tort. Finally, the flight must qualify as “highly offensive,” which arguably does not occur with a single instance. Such a claim has not yet been tried in court regarding a drone flight, so it is not clear what use of drone surveillance or gathering of footage would constitute as being highly offensive. However, knowledge of the elements of this tort can help journalists plan drone flights that will not create an actionable invasion of privacy through intrusion upon seclusion.

Publication of private facts is another form of common-law invasion of privacy which journalists should be familiar with when utilizing drones. This tort covers the “public dissemination of private information” rather than the act of gathering that information. This tort only applies if the information gathered is publicized. The act of gathering the private information does not lead to liability under this tort if the information is never shared. Journalists should be aware of this privacy tort when disseminating information related to a story. If the information is relevant to the story being told, it is likely this tort will not apply. However, drones can be equipped with features that allow for additional information to be collected beyond what may be necessary to adequately tell a given story. Some features allow drones to capture heat signatures and other detailed information that may introduce private information about a subject that should remain private if not relevant to the newsworthiness of the story.

Another privacy issue, rooted in property law, is the privacy rights of individual landowners. The airspace above private land has long been a privacy buffer for landowners, and drones are a potential threat to that privacy. Flying

drones over private land may implicate landowners' rights to the low-altitude space above their property. Current laws do not provide a "definite ceiling on the three-dimensional columns of airspace controlled by landowners," so there is a lot of uncertainty as to "where drones may and may not fly" based on laws regarding personal property. Without clear designation, a private property owner could bring an arguable claim of aerial trespass against an individual or organization that flies a drone over personal property. There is the "open access 'commons' resource" of airspace at altitudes above 500 feet, but that is also the area specifically controlled by the FAA and where commercial planes fly. Current drone regulations "strongly encourage" drone pilots to "fly at or below 400 feet," below the open access airspace. Furthermore, some landowners believe they have the right to shoot down drones flying above their personal property. The Drone Slayer case discussed above showed that a judge was willing to hold the privacy rights of such an individual over the resulting property damage suffered by the drone pilot. Thus, journalists should limit any drone flights to space over public property to limit the risk of a resulting charge of trespass over private property or even loss of a drone shot down by a landowner.

It is important for journalists working with drones in the field to know and consider privacy related laws. It should also be noted that the legal precedent in this area is still "based solely on manned aviation and somewhat analogous cases" involving technologies similar to drone technology. The torts that may be relevant to drone operators "have not kept pace with contemporary privacy problems" involved with advancing technology, and the "unique intrusiveness" of drone

technology. For example, courts will have to decide what constitutes intent in an intrusion upon seclusion claim, as noted above. Will the intentional act of flying a drone suffice, or will it depend on whether the drone pilot intended to fly the drone where it would invade another's privacy? There is also no determination yet as to "the height at which drone flights remain privileged as an exercise of the right to travel in public airspace" or exactly how far a landowner's "property rights extend into the sky." Furthermore, the current federal regulations are focused "on safety rather than protecting privacy" and do not help drone pilots navigate the additional privacy considerations that should occur when operating a drone.

While the federal regulations do not currently address privacy concerns, different levels of governments are starting to address those issues. Several states have passed laws addressing the use of drones and upholding the privacy rights of individuals. Under a Florida statute, "a person is presumed to have a reasonable expectation of privacy ... if he or she is not observable by persons located at ground level where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone." Additionally, some states, such as California, have stalking statutes that will most likely apply to instances of "drone-stalking." Federal legislation is also being introduced that will specifically address privacy protections related to the use of drones. In March 2017, Senator Ed Markey and House Representative Peter Welch introduced the Drone Aircraft Privacy and Transparency Act, legislation designed "to put in place more privacy protections against drones." This legislation will "ensure standards for informing

the public” about drone flights, as well as require “privacy protection provisions” for data collected by drone operators, drone licensing enforcement measures, and other aspects. Thus, journalists must remain aware of the changes happening at the state and federal levels that may affect where drones may be utilized in the future. Journalists should also become a part of the discussion surrounding the professional use of drones and the privacy issues that may arise from drone flights.

Even with all the current regulations, new regulations being put in place at different levels of governments, and the possibility of facing other legal ramifications (such as tort claims), there are journalists who want to take advantage of this new technology to tell better news stories. The Professional Society of Drone Journalists has formed and “adopted a code of ethics that ... acknowledg[es] the sanctity of law and public spaces.” Additionally, journalists “have already incorporated drones into their reporting” in other countries, including England and Australia. As the use of drone journalism, and the drone industry in general, develops, “journalists and press advocates should remain engaged in the political process and speak out against” proposals that may “unnecessarily restrict the use of drones” in journalism. Journalists themselves, through news organizations and other agents of policy change, are in some of the best positions “to provide improved pathways to creation and dissemination” of drone journalism. Advocates for drone journalism have already helped lead to changes in federal regulations to make those regulations more accommodating to the use of drones in journalism.

There are numerous areas of journalism and photography that would benefit from the use of drones. Forerunners are already looking to use drones in American media and take advantage of this innovation. However, the development of legal regulations and application of existing laws to drone use may have a significant impact on how drones can be used for journalistic purposes. If journalists don't join the conversation on drone laws and regulations, it is likely the voice of the media will not be heard, and journalists may only have limited options to use drones in news coverage. If journalists want to make use of drones, they need to be aware of the changing legal landscape regarding drone use and be a part of the changes being made. They must also be responsible drone operators and become knowledgeable about the laws beyond federal regulations that may impact journalistic use of drones either before or after flight. Professional journalists have the opportunity to embrace this new technology to tell more engaging and informative stories, while upholding the privacy rights of individuals.

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