

Client Alert

Privacy & Information Security Practice Group

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Unmanned Aircraft and Privacy Law: A Technological Leap Into A Legal Gap

The future for domestic drones is tantalizingly close and unquestionably promising. With their ability to hover, occupy uncommon vantage points, and transport a wide range of payloads, drones (also called unmanned aerial vehicles, or UAVs) can perform a vast variety of tasks, ranging from law-enforcement reconnaissance to take-out food delivery. To name but a few: drones have been used to inspect pipelines and dams, sell real estate, analyze crop and livestock conditions, fertilize farm fields, spot forest fires, rescue lost hikers, deliver medical supplies to remote regions, help predict storms, and provide traffic reports. In the future, the fruit you eat may well be inspected by a drone. Famously, the online retailer Amazon.com recently announced plans to start shipping packages by drone in the next five years.¹ And according to a study by the Association for Unmanned Vehicle Systems International (AUVSI), the drone industry in the United States could produce up to 100,000 new jobs and add \$82 billion in economic activity between 2015 and 2025.²

While that may seem like the stuff of science fiction, it is not. Drones are a normal part of life in many countries. In China, drones deliver boxes and birthday cakes.³ Farmers in Japan have used drones in agriculture for many years,⁴ and farmers in Australia appear poised to do the same.⁵ In South Africa, drones have even delivered beer at a music festival.⁶ And although the United States prohibits the routine use of drones over densely populated areas,⁷ the Federal Aviation Administration has nonetheless issued more than 1000 limited-use exceptions for drones in the last five years. In so doing, the FAA has allowed drones to be used for university research, firefighting, disaster relief, search and rescue, law enforcement, border patrol, and military training.⁸

Balanced against the future of domestic drone use are privacy concerns. Drones pose unique privacy issues for several reasons. For one thing, they can carry sophisticated camera and thermal imaging equipment and remain in flight for hours.⁹ And while some drones are large aircraft weighing 30,000 pounds, others are tiny aerial vehicles measuring mere inches and weighing only ounces.¹⁰ Drones can be used to peer into places and record events from vantage points that previously have been inaccessible. They can follow a person's movements from place to place throughout the day, waiting outside buildings as the person goes about his or her daily business. At a recent hearing of the Senate Committee on Commerce, Science, and Transportation,

For more information, contact:

Phyllis B. Sumner
+1 404 572 4799
psumner@kslaw.com

John A. Drennan
+1 202 626 9605
jdrennan@kslaw.com

Alexander K. Haas
+1 202 626 5502
ahaas@kslaw.com

King & Spalding

Atlanta

1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521
Tel: +1 404 572 4600
Fax: +1 404 572 5100

Washington, D.C.

1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 202 737 0500
Fax: +1 202 626 3737

www.kslaw.com

Senator Diane Feinstein testified that she was surprised one day to find a small drone inches from the window of her home when she drew the curtains back to see a protest march out front. The drone operator was apparently as startled as she was, Senator Feinstein said, because the drone suddenly whirled around and crashed when she discovered it.¹¹

The FAA's response to these privacy concerns has been less than robust, perhaps because the FAA's mission involves the safety and efficiency of the nation's airspace, not personal privacy.¹² Under the FAA Modernization and Reform Act of 2012, Pub. L. 112-95, Congress charged the FAA with integrating drones into the national airspace system by September 2015. The statute requires the FAA to create a comprehensive plan and undertake rulemaking to address the integration of drones into the domestic airspace, and mandates the creation of drone test sites.¹³ The FAA released a Unmanned Aircraft Systems (UAS) Comprehensive Plan and Roadmap for the Integration of Civil Unmanned Aircraft Systems in November 2013,¹⁴ and in December 2013, designated six test sites across the country to conduct research into the certification and operational requirements for integrating drones safely into the national airspace.¹⁵

The FAA's privacy rules for testing drones at these six sites are very general, requiring only that the state or local agencies overseeing the test sites must have publicly available plans for privacy, data use, and data retention, and that their privacy practices must be annually reviewed and open to public comment.¹⁶ The FAA does not specify what those privacy practices should be; nor does it take a position on how the government or private entities may use images or other potential private data from drones, how long the data may be stored, or whether or in what circumstances it may be shared. The FAA apparently sees these issues as matters of state and local law.

For their parts, the states have shown considerable interest in the privacy issues surrounding drone use. According to the ACLU, in 2013, 43 states considered 96 bills related to domestic drones,¹⁷ and nine states have enacted drone-related legislation.¹⁸ The vast majority of the proposed legislation relates to law enforcement use of drones; North Carolina and Virginia have simply enacted temporary moratoriums on such uses.¹⁹ The bills largely address the collection of images by law enforcement agencies through drones, not the storage or sharing of the data. And, in fact, the first U.S. citizen to be arrested on U.S. soil with the assistance of information collected by a drone was sentenced recently in state court in North Dakota.²⁰

Some states have enacted laws that address the private use of drones. For example, Idaho has established a civil cause of action against persons who "use an unmanned aircraft system to photograph or otherwise record an individual, without such individual's written consent, for the purpose of publishing or otherwise publicly disseminating such photograph or recording."²¹ And Texas law makes it a criminal offense for a person to "use[] an unmanned aircraft to capture an image of an individual or privately owned real property . . . with the intent to conduct surveillance on the individual or property captured in the image."²² Whether such laws can withstand First Amendment scrutiny has yet to be tested in court.

Congress is also considering legislation on privacy law and drones. For example, the Drone Aircraft Privacy and Transparency Act, or DAPTA, offered by Sen. Ed Markey (D-MA),²³ would amend the Federal Aviation Administration Modernization and Reform Act to bar the FAA from providing drone permits unless the license application "includes a data collection statement that explains who will operate the drone, where the drone will be flown, what kind of data will be collected, how that data will be used, whether the information will be sold to third parties, and the period for which the information will be retained."²⁴ The DAPTA would additionally require the "FAA [to] create a publicly available website that lists all approved licenses and includes the data collection and data minimization statements, any data security breaches suffered by a licensee, and the times and locations of drone flights."²⁵

The DAPTA would also restrict the use of drones by law enforcement, requiring law enforcement organizations to "include an additional data minimization statement that explains how they will minimize the collection and retention of data unrelated to the investigation of a crime."²⁶ The DAPTA would require law enforcement officers to obtain a warrant before using surveillance drones, except in emergencies. Exceptions to this warrant requirement would include

cases where officers believe there is imminent risk of death or serious physical injury, and where the U.S. Department of Homeland Security has determined that there is “credible” evidence of a terror attack.²⁷

Recommendations

Companies in industries where drones are expected to be used widely (for example, agriculture, delivery services, energy, and real estate, among others) should be aware that the domestic privacy-law picture is shifting in complex ways. Compliance issues and even litigation will likely follow, and for that reason alone this is an area that bears watching. At the same time the FAA is seeking to change its basic paradigm for drone-use authorization from an exception-based model to a more regularized rule-based model, the states and Congress are actively debating legislation that would restrict the collection, use, and sharing of drone data. Some states, as noted, have already enacted legislation. And although drone-specific privacy laws have not yet been subject to constitutional challenges in court (for example, on First Amendment or preemption grounds), it is reasonable to anticipate that lawmakers will continue to seek to enact bills that limit the use of drones to protect personal privacy.²⁸ Indeed, at this point, the question is not *whether* new privacy laws will emerge to address new uses of drones (including commercial uses), but *when*, before drones are integrated into the national airspace or after.

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With more than 30 Privacy & Information Security lawyers in offices across the United States, Europe and the Middle East, King & Spalding is able to provide substantive expertise and collaborative support to clients across a wide spectrum of industries and jurisdictions facing privacy-based legal concerns. We apply a multidisciplinary approach to such issues, bringing together attorneys with backgrounds in corporate governance and transactions, healthcare, intellectual property rights, complex civil litigation, e-discovery, government investigations, government advocacy, insurance recovery, and public policy.

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered “Attorney Advertising.”

¹ See Brian Fung, *Everything you need to know about Amazon’s new delivery drones*, WASHINGTON POST (Dec. 2, 2013), available at <http://www.washingtonpost.com/blogs/the-switch/wp/2013/12/02/everything-you-need-to-know-about-amazons-new-delivery-drones>; Brian Fung, *It was illegal for Amazon to shoot that drone video in the U.S., so it went abroad*, WASHINGTON POST (Dec. 10, 2013), available at <http://www.washingtonpost.com/blogs/the-switch/wp/2013/12/10/it-was-illegal-for-amazon-to-shoot-that-drone-video-in-the-united-states-so-it-went-abroad>.

² See Letter from Sec. Anthony R. Foxx to Congress (Nov. 6, 2013) (“Sec. Foxx Letter”), including comprehensive report, available at http://www.faa.gov/about/office_org/headquarters_offices/agi/reports/media/UAS_Comprehensive_Plan.pdf; see also Editorial Board, *Balancing safety, privacy in use of drones*, STARTRIBUNE (Jan 7, 2014), available at <http://www.startribune.com/opinion/editorials/239169671.html>.

³ See Nick Statt, *Drones in China deliver packages, even a birthday cake*, CNET.COM (Sept. 5, 2013), available at http://news.cnet.com/8301-11386_3-57601531-76/drones-in-china-deliver-packages-even-a-birthday-cake.

⁴ See Mary Shinn, *Experts See Farming as Next Big Use for Drones*, CRONKITE NEWS (May 8, 2013), available at <http://cronkitenewsonline.com/2013/05/swords-to-plowshares-experts-see-farming-as-next-big-use-for-drones>.

⁵ See Gavin Coote, *Grower seeing the good in drones for precision agriculture*, ABC RURAL (Oct. 11, 2013), available at <http://www.abc.net.au/news/2013-10-11/grain-farmer-seeing-the-good-in-drones/5016072>.

⁶ Abby Haglage, *Does Your Drone Deliver?*, THE DAILY BEAST.COM (Aug. 20, 2013) available at <http://www.thedailybeast.com/articles/2013/08/20/does-your-drone-deliver.html?url=/articles/2013/08/20/does-your-drone-deliver.html>. By way of contrast, the Federal Aviation Administration has recently halted a commercial operation’s of drones to deliver beer to ice fisherman in Minnesota. See Alexandra Petri, *No beer delivery drones, FAA? This is why we can’t have nice things!*, WASHINGTON POST (Jan. 31, 2014), available at <http://www.washingtonpost.com/blogs/compost/wp/2014/01/31/no-beer-delivery-drones-faa-this-is-why-we-cant-have-nice-things>.

⁷ See Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 6,689, 6,690 (Feb. 13, 2007) (FAA policy notice stating that “no person may operate a UAS in the National Airspace System without specific authority”).

⁸ Federal Aviation Administration, *Fact Sheet – Unmanned Aircraft Systems (UAS)* (Jan. 6, 2014), available at http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153.

⁹ Craig Whitlock & Craig Timberg, *Border-patrol drones being borrowed by other agencies more often than previously known*, WASHINGTON POST (Jan. 14, 2014) (“Whitlock”), available at http://www.washingtonpost.com/world/national-security/border-patrol-drones-being-borrowed-by-other-agencies-more-often-than-previously-known/2014/01/14/5f987af0-7d49-11e3-9556-4a4bf7bcbd84_story.html?hpid=z3; Congressional Research Service, *Integration of Drones into Domestic Airspace: Selected Legal Issues* (Apr. 4, 2013), available at <http://www.fas.org/sgp/crs/natsec/R42940.pdf>.

¹⁰ Whitlock, *supra*.

¹¹ See The Future of Unmanned Aviation in the U.S. Economy: Safety and Privacy Consideration, Before the U.S. Senate Committee on Commerce, Science, and Transportation, 113th Cong. (Jan. 15, 2014), available at http://www.commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=a4f35af1-be81-454f-9fa5-5bae600dd474&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a&MonthDisplay=1&YearDisplay=2014.

¹² See Federal Aviation Administration, *Integration of Civil Unmanned Aircraft Systems (UAS) in the National Airspace (NAS) Roadmap* (1st ed. 2013), available at http://www.faa.gov/about/initiatives/uas/media/UAS_Roadmap_2013.pdf (section 1.4.4 at 11).

¹³ Federal Aviation Administration Modernization and Reform Act of 2012, Pub. L. 112-95, § 332(a) & (b) (2012).

¹⁴ Sec. Foxx Letter, *supra*.

¹⁵ Press Release, FAA Selects Unmanned Aircraft Systems Research and Test Sites (Dec. 30, 2013), available at http://www.faa.gov/news/press_releases/news_story.cfm?newsId=15576. The six sites, selected from 25 applicants, are the University of Alaska, the State of Nevada, Griffiss International Airport in New York, the North Dakota Commerce Department, Texas A&M University, and Virginia Polytechnic Institute and State University (Virginia Tech).

¹⁶ Press Release, FAA Releases Unmanned Aircraft Systems Integration Roadmap (Nov. 7, 2013), available at http://www.faa.gov/news/press_releases/news_story.cfm?newsId=15334.

¹⁷ See Allie Bohn, *The Year of the Drone: An Analysis if State Legislation Passed This Year*, AMERICAN CIVIL LIBERTIES UNION (Nov. 7, 2013), available at <https://www.aclu.org/blog/technology-and-liberty/year-drone-roundup-legislation-passed-year>.

¹⁸ These states include Florida, Idaho, Illinois, Montana, North Carolina, Oregon, Tennessee, Texas, and Virginia. *Legislation in the States*, AMERICAN CIVIL LIBERTIES UNION (Jan. 22, 2014), available at <https://www.aclu.org/blog/technology-and-liberty/status-domestic-drone-legislation-states>.

¹⁹ An Act to place a moratorium on the use of unmanned aircraft systems, Virginia HB 2012 (2013), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?131+ful+CHAP0755>; Emery P. Dalesio, *N.C. law grounds surveillance drone, but not all*, ASSOCIATED PRESS (Aug. 4, 2013), available at <http://hamptonroads.com/2013/08/nc-law-grounds-surveillance-drones-not-all>; National Conference of State Legislatures, *2013 Unmanned Aircraft Systems (UAS) Legislation*, available at <http://www.ncsl.org/research/civil-and-criminal-justice/unmanned-aerial-vehicles.aspx>.

²⁰ Jason Koebler, *North Dakota Man Sentences to Jail in Controversial Drone-Arrest Case*, U.S. NEWS & REPORT (Jan. 15 2014), available at <http://www.usnews.com/news/articles/2014/01/15/north-dakota-man-sentenced-to-jail-in-controversial-drone-arrest-case>.

²¹ An Act Relating to Aeronautics, Idaho Senate Bill No. 1134, Sixty-second Legislature (2013), *available at* <http://www.legislature.idaho.gov/legislation/2013/S1134E2.pdf>. The Idaho law does not apply to private uses of drone-captured images that are not intended for dissemination. Such uses, however, may raise substantial privacy concerns.

²² Texas Privacy Act, H.B. No. 912 (2013), *available at* <http://www.legis.state.tx.us/tlodocs/83R/billtext/html/HB00912F.htm>.

²³ Press Release, Markey Drone Privacy Legislation to Prevent Flying Robots from Becoming Spying Robots (Mar. 19, 2013) (“Markey”), *available at* <http://www.markey.senate.gov/news/press-releases/markey-drone-privacy-legislation-to-prevent-flying-robots-from-becoming-spying-robots>. Senator Markey introduced similar legislation in late 2012 as a member of the U.S. House of Representatives. Drone Aircraft Privacy and Transparency Act of 2012, H.R. 6676, 112th Cong. (2012), *available at* http://www.markey.senate.gov/imo/media/doc/3.19.13_DroneAircraftPrivacyTransparencyAct2013.pdf.

²⁴ Markey, *supra*.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ In New Hampshire and California, lawmakers introduced bills in 2014 to limit the use of drones to protect privacy. *See* Norma Love, *NH to try again to regulate drones, ensure privacy*, ASSOCIATED PRESS (Jan. 18, 2014), *available at* <http://www.boston.com/news/local/new-hampshire/2014/01/18/try-again-regulate-drones-ensure-privacy/6or56oFeNy7R9mtjTls9MP/story.html>; and Erin Coe, *Calif. Assembly Oks Drone Limits For Law Enforcement*, LAW360 (Jan. 30, 2014), *available at*

http://www.law360.com/aerospace/articles/505630?nl_pk=3f6be51b-701c-4869-a08f-c8951c0dc1f1&utm_source=newsletter&utm_medium=email&utm_campaign=aerospace.