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The Legal Issues Flying Around The Evolving Drone Market

By **Marialuisa Gallozzi, Weston Coward and Krista Stapleford** (July 20, 2023, 6:01 PM EDT)

Marialuisa Gallozzi

Weston Coward

Krista Stapleford

It has become increasingly common for drones to fly in to solve any number of problems.

For example, the U.K. will soon begin testing on a 164-mile drone superhighway project that provides, among other things, funding for drones to deliver medication across Scotland, potentially allowing Scottish cancer patients to receive treatment in their local communities.[1]

Drones, however, cannot fly by the legal issues and litigation catching up to them.

With new tech comes new risks.

For example, some states are restricting government agencies' use of drones manufactured in certain countries, citing fears that these drones are being used to transmit data to various foreign governments. These measures have serious implications for the drone industry and first responders because nearly 90% of the drones used by police and emergency service agencies are manufactured by a Chinese company.[2]

Drones are also changing aerial warfare as we speak.[3] For example, just last month, Russia attacked Ukraine, specifically the cities of Kyiv and Lviv — which are far from the front lines — with dozens of drones.[4] One day later Russia claimed that it downed three Ukrainian drones outside of Moscow.[5]

The complexity and importance of these risks will only increase as the drone market grows.

As of June, over 500,000 recreational drones and almost 350,000 commercial drones were registered with the Federal Aviation Administration.[6] The FAA forecasts that these numbers will more than double over the next three years.[7] The commercial drone market alone is predicted to pass $54 billion by 2030.[8]

These new risks will continue to generate new litigation. This article will discuss privacy, Fourth Amendment, criminal, evidentiary, First Amendment, and insurance litigation.

Privacy Litigation

Drones provoke people's deep-seated fears that drones will be used by individuals and governments to spy on them in their own homes.

An early example of this was the "drone slayer" case.

In Boggs v. Merideth, Boggs filed suit in the U.S. District Court for the Western District of Kentucky in 2017 after his neighbor, Merideth, shot down Boggs' drone when the drone flew over Merideth's property.[9] Boggs argued that his drone was in federal airspace, not on Merideth's property. In response, Merideth argued that flying a drone over his property was: (1) trespassing, and (2) violated his "reasonable expectation of privacy."

The court dismissed Boggs' complaint.

More recently, some state statutes and cases have characterized the use of drones for surveillance as stalking.

In Rosaly v. Konecny, the Fourth District Court of Appeal of the State of Florida upheld an injunction in 2022 against Rosaly under a Florida statute creating a cause of action for injunctive relief "for protection against stalking."[10] Rosaly drove by an individual's house on multiple occasions, once threatening to hurt her, and operated a drone over her house on at least three occasions.[11] Emphasizing the surveillance capacity of drones, the court found that "use of a drone is conduct that could contribute to substantial emotional distress" under the statute.[12]

Stationary camera cases provide some insight into how courts may address private individuals' use of drones to record one another's homes.

In Jackman v. Cebrink-Swartz, after the plaintiffs erected a privacy fence, the defendants positioned a rooftop recording camera to view the plaintiffs' yard.[13] In 2021, the Second District Court of Appeal of the State of Florida found that repeated surveillance such as this can constitute the tort of invasion of privacy.

The court commented: "[D]ue to the proliferation of home surveillance cameras and drones, there is some uncertainty about what surveillance activities may be maintained without resulting in an invasion of privacy of another person."[14]

Fourth Amendment

Drones are capable of surveillance and thus implicate Fourth Amendment concerns.

Take Long Lake Township v. Maxon as an example.

There, the issue was whether aerial photos taken by a camera mounted on a drone were admissible for determining that the plaintiffs' property was an illegal junkyard. The township relied on the drone photos when it concluded that the plaintiffs violated a civil zoning ordinance.

In 2022, the Michigan Court of Appeals held that the exclusionary rule did not apply because of the unlikelihood of any penalty being exacted and the fact that the zoning action was not coupled with a criminal prosecution of any sort.[15] This issue is currently on appeal to the Supreme Court of Michigan.[16]

Long Lake Township was favorably cited recently in the U.S. District Court for the Southern District of Indiana in Dircks v. Indiana Department of Child Services.[17] Dircks involved law enforcement use of a drone over a home and property which violated federal regulations and Indiana state law.

The court rejected the argument that the drone flight was "nonintrusive surveillance" from public airspace and held that the plaintiffs alleged a plausible Fourth Amendment violation. Although the court noted that noncompliance with regulations is not by itself a Fourth Amendment violation, the court concluded that this noncompliance was relevant to its analysis.

The court also determined that there are "no bright-line rules about drone use under the Fourth Amendment."

Long Lake Township was also cited favorably in Matter of United States.

There, the federal government sought authority under the All Writs Act to use a drone to surveil two properties the government believed to be involved in a drug operation.[18]

The U.S. District Court for the Eastern District of North Carolina denied the application, finding that the government needed to apply for a search warrant.[19]

The court reasoned: (1) "at some altitude below navigable airspace," flying a drone over someone's property constitutes trespass, and (2) the government sought to surveil areas of the home traditionally protected by the Fourth Amendment, such as the entrance of homes.[20]

Thus, in 2022, the court found that it was at least "questionable" under Fourth Amendment doctrine that law enforcement could use a drone to search for people entering a home without a warrant.[21] In so holding, the court emphasized "the significant constitutional ambiguity surrounding the nascent use of drones in law enforcement."[22]

In contrast, in State v. Stevens, the Ohio Court of Appeals concluded in March that the government did not violate the Fourth Amendment when it used a drone to search open fields behind someone's house.[23] Under Fourth Amendment doctrine, an individual's reasonable expectation of privacy does not extend beyond their home's immediate surroundings.

Criminal Litigation

Law enforcement agencies aren't the only ones who have put drones to use.

Innovative criminal enterprises can also capitalize on the evolving technology. In some cases, drones facilitate crime, e.g., by transporting banned substances.

In other cases, the use of the drone itself is the crime.

In U.S. v. Brown, decided in the U.S. District Court for the Eastern District of California in 2022, Brown was charged with an attempt to use an unregistered drone in furtherance of marijuana possession with intent to distribute, in addition to other drug-related charges.[24] Brown pled guilty to the drone offense rather than the drug offenses and was sentenced to 48 months in prison and three years of supervised release.

Evidentiary Disputes

Expert witnesses at trial are increasingly relying on drone footage to help formulate their opinions.

In United States v. Sutton, a police officer was on trial for second-degree murder arising out of an alleged vehicle pursuit that caused death.[25] The officer filed pretrial Daubert motions in 2022 to exclude the testimony of an accident reconstructionist who was prepared to testify on vehicle speeds. The officer argued the testimony was unreliable because the speeds were calculated by importing drone video footage into a software that creates diagrams of scenes.

The U.S. District Court for the District of Columbia denied the motion, finding that the use of the software was reliable because the scenes it generated were based on photographs and the drone scene video footage.

Drones also present evidentiary issues in civil contexts.

In Midwest Operating Engineers Welfare Fund v. Davis & Sons Excavation, the U.S. District Court for the Northern District of Illinois denied a motion in 2021 in limine to exclude video footage collected by drone.[26]

In this case, the Fund wanted to present video recordings of Davis' employees and construction sites to prove that Davis owed contributions under the collective bargaining agreement based on the number of individuals performing work at the sites.

The court reasoned: (1) there was no showing that FAA regulations were violated; (2) even if FAA regulations had been violated, those regulations are not rules of evidence; and (3) because the drone did not record audio, it was not an illegal interception of communications.

First Amendment Litigation

Journalists also use drones in their newsgathering efforts, presenting First Amendment issues.

In National Press Photographers Association v. McCraw, journalists and media organizations challenged a Texas statute prohibiting use of drones to photograph individuals and property. The statute exempted certain uses of drones for "surveillance" and had "no fly" provisions over certain facilities, e.g., correctional facilities, but did not exempt newsgathering.[27]

The statute potentially chilled speech by imposing civil and criminal penalties for violations.

The U.S. District Court for the Western District of Texas found in 2022 that the First Amendment protects the use of drones to document the news by journalists, that strict scrutiny applies because the provisions are content-based restrictions, and that the provisions failed that scrutiny. The court stated: "[A]s a matter of law, use of drones to document the news by journalists is protected expression" under the First Amendment.

Insurance Litigation

Insurance use and coverage of drones have also spawned disputes.

In Philadelphia Indemnity Insurance Co. v. Hollycal Production, a drone photographing a wedding allegedly hit a wedding guest and made contact with her eye.[28] The wedding guest claimed she lost vision in that eye as a result of the accident.

The plaintiff, an insurance company, declined coverage.

In 2018, the U.S. District Court for the Central District of California granted the insurer's unopposed motion for summary judgment. The insurance company argued in its motion that the drone was not covered because the policy excluded: (1) "Aircraft, Auto, or Watercraft," (2) "miscellaneous recreational exposure," (3) coverage for bodily injury "[a]rising out of the ownership, operation, maintenance, [or] use ... of any flying craft or vehicle," and (4) "any object propelled, whether intentionally or unintentionally, into a crowd by or at the direction of a participant or insured."

Because the motion for summary judgment was unopposed, the court did not have the benefit of counterarguments, including that a historical aircraft exclusion (possibly predating drones) did not encompass the new technology.

Insurers also rely on drone footage in handling claims.

In Williams v. State Farm Fire and Casualty Co., an insurance company filed a Daubert motion in May in the U.S. District Court for the Southern District of Alabama to exclude the insured's expert, who sought to testify on the causation between the property damage and a hurricane.[29]

The insurance company argued the expert relied solely on drone photographs of the insured's roof thus his methodology was insufficient. The court disagreed. It found the expert's reliance on the photographs was permissible because he also reviewed prior inspection reports, weather reports from the event, and other information such as material data on shingles, and relied on decades of experience to reach his conclusion.

Hartmann v. QBE Specialty Insurance Co. involved a similar dispute in 2021, except the insured alleged that the insurer conducted a cursory investigation by drone and no physical inspection at all.[30]
The U.S. District Court for the District of Connecticut denied the insurer's motion to dismiss, finding that the policyholder plausibly alleged that the insurer issued a wrongful denial under the policy.

Insurance Coverage Options

As the varying litigation demonstrates, the insurance industry must evolve and adapt to keep up with drone technology.

The industry can respond to a new risk by excluding the new risk from traditional policies, offering sublimited coverage for that risk under existing policies or creating dedicated products or modules for that risk.

A policyholder may be exposed to drone-related risks whether it operates drones or not; consequently, policyholders need to understand how their insurance addresses this risk. A policyholder also should consider whether "other people's insurance" might protect it.

For example, when a vendor is providing drone services, the vendor might indemnify the customer for

that loss or damage and the customer expects that vendor to be insured for its liabilities to the customer.

The customer might also ask to be an "additional insured" on the vendor's policies that cover that loss or damage. In practice, this means the customer will have to keep track of another insurance asset and satisfy notice and other obligations to that other insurer if the customer wants the benefit of that coverage.

It will be particularly important for individuals and companies to be proactive as the insurance industry adapts both to cover and exclude drones under new and existing policies.

Marialuisa Gallozzi is a partner, Weston Coward is an associate and Krista Stapleford is a summer associate at Covington & Burling LLP.

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[11] Id. at 633–34.

[12] Id. at 634.

[13] Jackman v. Cebrink-Swartz, 334 So. 3d 653 (Fla. Dist. Ct. App. 2021).

[14] Id. at 657–58.

[15] Long Lake Twp. v. Maxon, No. 349230, 2022 WL 4281509, at *6 (Mich. Ct. App. Sept. 15, 2022).

[16] Long Lake Twp. v. Maxon, No. 164948, 2023 WL 3631900, at *1 (Mich. May 24, 2023).

[17] Dircks v. Indiana Dep't of Child Servs., No. 1:21-cv-00451, 2022 WL 742435 (S.D. Ind. Mar. 11, 2022).

[18] Matter of United States, No. 5:22-mj-02005, 2022 WL 16757941, at *1 (E.D.N.C. Oct. 26, 2022).

[19] Id. at *1.

[20] Id. at *7–8.

[21] Id. at *8.

[22] Id.

[23] State v. Stevens, 2023-Ohio-889, 2023 WL 2567637, ¶ 21-27.

[24] United States v. Brown, 855 F. App'x 659 (11th Cir. 2021), cert. denied, 142 S. Ct. 758 (2022).

[25] United States v. Sutton, No. 21-cr-0598, 2022 WL 16960338 (D.D.C. Nov. 16, 2022).

[26] Midwest Operating Engineers Welfare Fund v. Davis & Son Excavation, LLC, No. 19-cv-1153, 2021 WL 5564872 (N.D. Ill. Nov. 29, 2021).

[27] Nat'l Press Photographers Ass'n v. McCraw, 594 F. Supp. 3d 789, 805 (W.D. Tex. 2022).

[28] Philadelphia Indem. Ins. Co. v. Hollycal Prod., Inc., No. 18-cv-768, 2018 WL 6520412 (C.D. Cal. Dec. 7, 2018).

[29] Williams v. State Farm Fire & Cas. Co., No. 1:22-cv-00112, 2023 WL 3296156 (S.D. Ala. May 5, 2023). See also Labudde v. Phoenix Ins. Co., No. 7:21-cv-197, 2022 WL 2651846 (E.D.N.C. July 8, 2022) (insurer use of drone not challenged in coverage dispute); Bellina v. Liberty Mut. Ins. Co., No. 19-cv-13711, 2021 WL 1295018 (E.D. La. Apr. 7, 2021).

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