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How Current Law Might Apply to Drone Journalism

by Karen McIntyre

Abstract

This study finds that current FAA regulations do not permit private drone use for commercial purposes, including journalism. Privacy concerns about the use of drones in journalism may be addressed by existing law that finds reporters can legally record people who are in public or can be easily seen from a public place.

Keywords

drone journalism, privacy, newsgathering, aerial surveillance, intrusion, FAA regulation

In America, cutting-edge technology initially supported by the government commonly evolves into smaller, cheaper gadgets adopted by the public.[1] The latest buzz is the sound of a drone—the colloquial word for an unmanned aircraft. According to the Federal Aviation Administration, which regulates drone use, a drone is "a device that is used, or is intended to be used, for flight in the air with no onboard pilot."[2] U.S. journalists have started gathering news by collecting photos, video and other data using drones. However, the FAA has not approved this use.

The Daily—a former tablet and iPhone news application—mounted a camera on a small drone in 2011 and flew it over Tuscaloosa, Ala., capturing crisp aerial footage of damage caused by the second deadliest tornado outbreak in U.S. history.[3] Student journalists and faculty from the University of Nebraska-Lincoln used a drone in 2012 to cover a drought.[4] And independent blogger Tim Pool live-streamed footage of Occupy Wall Street protests by capturing video with a Parrot AR.Drone quadricopter.[5] In contrast to the 40,000-pound, multimillion-dollar drones used by the military, the aircraft Pool used is available at Toys "R" Us for $298.99 plus tax. The aircraft weighs less than a pound, has a 20-inch wingspan, and more closely resembles a miniature

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videogame spacecraft than a military plane. Drones like Pool's come with wireless Internet, allowing a "pilot" to remotely control the aircraft with a smartphone.

Journalists and educators at universities[6] and conferences[7] are excitedly discussing the use of drones to gather news. However, the legal implications of such use are not clear.[8] *The Daily*'s drone use prompted the FAA to investigate the former news outlet[9] because the use of drones for private commercial purposes like journalism is currently illegal. The FAA, under pressure from Congress, is developing a comprehensive plan for private drone use,[10] but in a society increasingly uneasy about ubiquitous surveillance,[11] information gathering by drones is likely to prompt privacy litigation.

Academic scholars have written very little about drones in newsgathering because the issue is new.[12] Few U.S. journalists have documented their use of unmanned aircraft, and no privacy cases surrounding this newsgathering technique have been heard. However, as early as 1890 scholars have recognized and often lamented the role technology plays in newsgathering.[13] Scholars have written extensively for more than a century about the heart of the issue—balancing the right to privacy and the right to gather news, particularly considering the impact of new technologies.[14] More recently, the impact of aerial surveillance on privacy in another context also has been discussed.[15] These discussions are likely to lay the groundwork for the privacy cases that undoubtedly will arise when drone journalism becomes common.

The purpose of this paper is to examine the present and future use of drones in journalism, to educate readers on drone regulation, and to identify and discuss privacy law concerns raised by using drones to collect news. By examining court cases involving technology-driven newsgathering and aerial surveillance, this paper will predict the potential ways a drone might violate privacy, serving as a guide to journalists considering adding a robotic aircraft to their backpack of gadgets.

Research Questions and Method

This paper will address the following research questions:

RQ1:

How are drones used, and how might journalists use them in the future?

RQ2:

What are the regulations governing who can use drones and how one obtains permission to do so?

RQ3:

What have courts said in privacy cases involving technology and aerial surveillance that could reasonably apply to drone journalism?

This paper examines congressional and regulatory agency documents and news reports to answer the first two questions. Examples include FAA notices and a

congressional report[16] requiring the FAA to allow more drones in the national airspace. To answer the third question, this paper cannot rely on court cases involving the use of drones to gather news because no such cases exist. Therefore, it draws on cases that raise similar issues. These cases involve two areas of law. First, cases are examined in which reporters used technology such as hidden cameras to gather news. These cases involve the common law privacy tort of intrusion.[17] They were found using the legal research system WestlawNext and searching for terms and combinations of terms including "intrusion," "newsgathering," "surreptitious newsgathering," "undercover newsgathering," "privacy" and "hidden camera." Second, cases were examined in which government officials used aerial surveillance to collect information. These cases involve the Fourth Amendment protection against unreasonable search and seizure.[18] Privacy concerns regarding journalists using drones do not involve the Fourth Amendment because they do not involve government surveillance. Yet, these cases are relevant because they deal with privacy concerns stemming from aerial surveillance. Courts may apply similar standards to common law intrusion involving surveillance with drones. These cases were also found using WestlawNext and searching for terms and combinations of terms including "aerial surveillance," "aircraft," "helicopter" and "privacy."

How are Drones Used and How Might Journalists Use Them?

The number of drones and ways they are used is growing substantially.[19] In 2012, about 50 U.S. companies, universities and government organizations developed and produced more than 155 drone designs.[20] The federal government uses far more drones than does any other entity, mostly for military and security operations overseas.[21] However, unmanned aircraft also are used in ways that don't include carrying missiles. Customs and Border Protection uses drones to spot illegal border crossers, law enforcement agencies use drones for other kinds of surveillance, researchers from public universities and organizations like NASA use drones for scientific research and environmental monitoring[22] and emergency personnel use drones in rescue missions.[23] Additionally, non-governmental entities are increasingly interested in operating drones for photography, aerial mapping, crop monitoring, advertising and journalism.[24]

Journalists' use of drones to collect photos, video and other data could benefit the industry. At an Online News Association conference in 2012, a Nebraska student who worked on his university's drone journalism project said drones could be better newsgathering tools than could helicopters because drones are significantly cheaper and quieter, don't require extensive pilot training and can be flown under 500 feet.[25] Drones also allow journalists access to places that are dangerous or unreachable, and they provide an aerial view that captures images in ways that photographs taken from the ground cannot.[26] A journalist could fly a drone above a fire without risking human lives. Drones also could be used to offer new perspectives on standard news stories, such as reports on traffic or protests.[27] Additionally, drones can use sensors to collect data such as temperature, water, motion and sound.[28]

How Are Drones Regulated?

Currently, it is technically illegal for journalists to operate drones, but a more rigorous evaluation of the issue suggests drone journalism could be interpreted as a regulatory grey area. According to the FAA, "no person may operate a UAS [drone] in the National Airspace System without specific authority."[29] However, that authority does not always require formal permission. The FAA's policy on drone use depends on whether the drone is used as a public aircraft, civil aircraft or model aircraft.[30]

Model aircraft operators fly model airplanes for recreational use. These hobbyists are allowed to operate drones without a license as long as they follow guidelines published by the FAA in 1981.[31] They must avoid flying near airports or in noise-sensitive areas, avoid flying in populated areas until they are confident pilots, and keep the aircraft within sight and below 400 feet.[32]

Public versus civil aircraft operators distinguish between those who use drones for government use or non-government use. People in either category must apply for a license from the FAA. Government agencies must apply for a "certificate of waiver or authorization," and non-government groups or individuals must apply for an "airworthiness certificate." The FAA is working on making the licensing process more efficient, both as a response to the growing interest in drone use and because Congress has required it to do so.[33]

The FAA is developing new policies regarding drone use by non-governmental entities, including media organizations. Non-governmental drone use currently requires an airworthiness certificate,[34] and these certificates are granted only for research and development purposes,[35] "not for compensation or hire."[36] Simply stated, non-government entities are not allowed to use drones if they make money from them. Whether the media could profit from using drones is debatable and depends on the nature of the news organization and how the drones are used. No journalists have reported receiving an FAA airworthiness certificate. Journalists who have used drones have done so without formal FAA approval.

The FAA is developing policies that are expected to permit the use of drones by more people and for more uses; however, this is a long process. The agency submitted its "'comprehensive plan' to integrate non-government drones" to Congress in 2012, and an initial roadmap was released in November 2013.[37] Final rules regarding private drone use aren't expected until at least the end of 2015.[38]

Meanwhile, in August 2011 the FAA investigated and issued a warning to *The Daily* for its use of an unmanned aircraft.[39] Some journalists felt they could operate a drone legally due to a possible loophole in the current regulations. The FAA has not developed a comprehensive definition of who is a modeler or hobbyist. Therefore an independent journalist who flew a model aircraft as a hobby and did not make money from its use might consider himself to be within his legal right to use a drone. At least that was the thinking of University of Nebraska-Lincoln instructor Matt Waite,[40] who founded the Drone Journalism Lab. He said in December 2012 that he complied with FAA regulations when he used a drone to cover a drought. He said he flew the aircraft away from people and houses, under 400 feet, and within sight – the requirements for

hobbyists.[41] The FAA said it recognized that "people and companies other than modelers might be flying UAS [drones] with the mistaken understanding that they are legally operating"[42] under the rules for hobbyists. The FAA said those rules apply only to hobbyists "and thus specifically exclude" the use of drones "by persons or companies for business purposes."[43] Still, Waite said he thought he fell into the hobbyists' category because he builds the drones himself and does not profit from them.[44] He said he recognized that his use of drones fell into this narrow loophole, and he was cautious in his use of unmanned aircraft.[45] He said his lab had budgeted to apply for an FAA certificate if and when it became necessary to do so.[46] In July of 2013, it became necessary to do so when the FAA informed Waite that he needed a permit to fly drones outdoors because he is a public employee.[47] The FAA sent a similar letter to the University of Missouri's Drone Journalism Program. It is still unclear, however, whether the FAA would require a certificate from an independent journalist who is not a public employee.

Courts Speak on Surreptitious Newsgathering and Aerial Surveillance

No court cases have been reported in which someone sued a journalist for violating his privacy by gathering information with a drone. But if and when that happens, courts may reasonably look to past cases regarding two similar situations, intrusive newsgathering with technologies such as cameras and aerial surveillance. In intrusion cases, courts have consistently held that it is not a common law privacy violation to observe, photograph or record someone or something in public view. This has held true even when reporters gathered information without consent or recorded someone who was in a private place, but still viewable from public. In regard to aerial surveillance cases, courts have consistently held that it is not a violation of a citizen's constitutional right to privacy for the government to conduct aerial surveillance without a search warrant, as long as the surveillance is being conducted from a space where the government agents have a right to be, such as open airspace.

Intrusive Newsgathering Cases

When courts have heard intrusive newsgathering cases, they primarily have considered the location (public versus private) of the plaintiff or information that was recorded and the location of the journalist while he gathered the information. Courts also have considered whether the plaintiff was a private person or public figure.

Courts generally have decided there is no reasonable expectation of privacy in places inside or outside homes that are easily viewable from a public place, as demonstrated in the following examples. In 1983, a man brought an intrusion suit because a television station filmed the outside of his home.[48] A federal appeals court ruled against the plaintiff in *Wehling v. Columbia Broadcasting System*, saying the broadcast was not intrusive because it "provided the public with nothing more than could have been seen from a public street."[49] This same reason was cited in a 1990 case, where the plaintiff's privacy was not intruded upon when a television station used an enhanced lens to videotape a judge walking down his driveway.[50] According to this California

appeals court decision in *Aisenson v. American Broadcasting Company*, the "appellant was in full public view from the street while he was videotaped."[51] The appellant claimed he could not have been seen without an enhanced lens, but that did not affect the court's opinion.[52] Even when a journalist recorded a woman who was inside her home, the reporter did not intrude because he took the photo from a public place and the plaintiff was in the public's view.[53] In *Solomon v. National Enquirer, Inc.*, a federal district court said the plaintiff "was photographed while standing at the window with the curtains open. There has been no allegation that she took steps to conceal herself from uninvited eyes."[54] These decisions, as applied to drone journalism, suggest that reporters legally operating a drone may record someone as long as the person who is being recorded is viewable from a public place.

In the *Aisenson* case, where ABC videotaped the judge walking to his car, the court considered who the plaintiff was in addition to considering whether he was located in a public place. The decision that ABC did not violate the judge's privacy was in part because the man was an elected official. As a voluntary public figure, he "should be subjected to the most thorough scrutiny."[55] The court added,

> *When the legitimate public interest in the published information is substantial, a much greater intrusion into an individual's private life will be sanctioned, especially if the individual willingly entered into the public sphere.*[56]

This suggests that journalists using drones may be awarded more freedom when recording public figures, especially if there is a legitimate public interest in the story.

Courts also generally have ruled that people do not have a reasonable expectation of privacy in businesses. In 1981, the Supreme Court of Washington decided in *Mark v. Seattle Times* that journalists did not intrude when they filmed a pharmacist inside his closed pharmacy from outside through the window.[57] Applying the same reasoning used in the private-home cases above, the court said, "the place from which the film was shot was open to the public and thus any passerby could have viewed the scene recorded by the camera."[58] For the same reason, a couple's privacy was not violated when a journalist snapped and published a photograph of a husband and wife sitting in a romantic position in their ice cream shop at a farmer's market in a 1953 California Supreme Court case.[59]

Courts have ruled in favor of the press in cases involving sneakier newsgathering as well. For example, broadcast journalists did not intrude when they went undercover into a medical lab and secretly recorded a conversation with the owner that was later published in a story about misread pap smear slides. The federal appeals court ruled in *Medical Laboratory Management Consultants v. American Broadcasting Companies* (2002)[60] that the journalists' actions were not offensive enough to constitute intrusion:

> *The covert videotaping of a business conversation among strangers in business offices does not rise to the level of an exceptional prying into another's private affairs.*[61]

Some courts that did not issue a final ruling on this matter have nevertheless suggested the reverse decision—that people *may* reasonably have a limited expectation of privacy inside a business. Filming a patron eating in a restaurant may be intrusive if the person objects to being filmed and is dining in a secluded section of the restaurant, according to the Supreme Court of Iowa in *Stessman v. American Black Hawk Broadcasting Company* (1997).[62] Also, journalists may have intruded when they went undercover working at a telepsychic company and recorded employee conversations. In this 1999 California Supreme Court case, *Sanders v. American Broadcasting Companies*, the court decided employees might have a limited expectation of privacy even when coworkers can hear their conversations.

The law on using technology to gather news inside a business is relevant to drone journalism, if drones are one day flown inside businesses or hover outside looking in. In past cases, courts have generally tolerated journalists recording inside workplaces. If drones can be compared to video cameras, journalists would likely be allowed to use a drone to peer into a business by looking through a window from a public place outside. However, it's less clear whether a reporter would be allowed to fly a drone inside a business. Although courts have more often decided people do not have an expectation of privacy in the workplace, a journalist working undercover with a hidden camera in a business is likely not as disruptive as a journalist flying a drone inside that business. Perhaps this more disruptive technology may prompt courts to rethink current law on newsgathering in workplaces.

In past cases, a person's reasonable expectation of privacy has been upheld inside a home or home office not viewable from a public place. Journalists intruded when they misrepresented themselves to gain access to a disabled veteran's home office and secretly recorded him practicing healing with clay, minerals and herbs.[63] In this same1971 case, *Dietemann v. Time Inc.*, a federal appeals court recognized a person's private space. The "plaintiff's den was a sphere from which he could reasonably expect to exclude eavesdropping newsmen."[64] Journalists should not expect to operate drones legally inside a home without consent.

In addition to considering how private a location is, courts have considered the actions of plaintiffs and intentions of journalists when deciding intrusive newsgathering cases. A woman's privacy was not protected when she willingly spoke to a reporter at her front door about a celebrity murder suspect, although the reporters secretly recorded the conversation.[65] In this 1997 case, *Deteresa v. American Broadcasting Companies*, a federal appeals court ruled against the intrusion claim partly because the plaintiff "spoke voluntarily and freely with an individual whom she knew was a reporter."[66] Additionally, the court acknowledged that "the reporter did not enter her home, let alone did he enter by deception or trespass."[67] How the journalists represented themselves was also considered in the case of the quack doctor, where journalists lied about their identities to gain access to a man's home office.[68] The reporters' deception contributed to the court's decision that the journalists intruded. These cases suggest journalists may receive more legal freedom to operate drones when they identify themselves and their drones as reporters. In practice, journalists should introduce themselves as reporters before operating a drone and also mark their drone with their news outlet's label.

Aerial Surveillance Cases

Other cases with facts that resemble drone journalism are cases involving aerial surveillance. These cases concern constitutional privacy as granted by the Fourth Amendment. As noted earlier, drone journalism cases would not involve the Fourth Amendment because they do not involve the government. However, discussion of Fourth Amendment cases is relevant because an officer conducting surveillance from a plane is comparable to a reporter conducting surveillance with a drone in terms of possible harm to individual privacy interests. Thus, courts may reasonably draw from these cases when deciding drone journalism litigation. In existing Fourth Amendment cases, courts have consistently held that government aerial surveillance, even without a search warrant, is not an "unreasonable search and seizure."[69] In these cases, courts considered the location of the defendant and of the person or object being observed or recorded, just as courts did in the common law privacy cases discussed above.

As in the common law privacy decisions, courts consistently have held that individual privacy was not violated when officers conducted aerial surveillance of areas outside private places such as homes or businesses. Law enforcement using a telescopic map-making camera in aerial surveillance of a chemical company did not conduct an unreasonable search in the 1986 U.S. Supreme Court case *Dow Chemical Company v. United States*.[70] The Court based its decision in part on the fact the aircraft was flying where it was legally allowed to fly. The Court said the industrial complex was

> *. . . comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras.*[71]

Likewise, in *California v. Ciraolo* (1986), the U.S. Supreme Court said law enforcement officials did not invade a man's privacy when they used a private plane to fly over a house and yard to see marijuana plants that could not be seen from ground level because of fences.[72] In both cases, courts considered the airspace above these homes and businesses to be public. These cases involve aerial surveillance of the outside of private places, however. Courts have not decided whether surveillance of the inside of private places is permissible.

Courts additionally have considered the altitude of the aircraft, concluding generally that altitude does not matter so long as the plane is in legal airspace. For example, the Supreme Court of Colorado decided in *Henderson v. People* that a police officer did not invade a man's privacy when he flew as low as 500 feet in a TV news helicopter over the defendant's property and spotted illegal marijuana plants.[73] In the *California v. Ciraolo* case mentioned above, the plane flew at 1,000 feet—well above the level needed to see over the fences. The Court said,

> *The mere fact that an individual has taken measures to restrict some views of his activities does not preclude an officer's observation from a public vantage point where he has a right to be.*[74]

Applying government aerial surveillance to journalism drone use, these cases suggest courts may consider whether the drone is flown in airspace it is legally allowed to occupy as one factor when considering intrusion cases.

Discussion and Conclusion

Commercial journalists cannot legally operate drones, but they are projected to have that right within a couple years. All ready, independent journalists and student journalists have experimented with drones, using them to capture storm damage, among other uses. But journalists will have the potential to send their drones on less honorable missions, and this has sparked a privacy debate on using unmanned aircraft to gather news. As a result, journalists are unclear about how they can legally use this technology, even after they have FAA approval.

Based on past litigation regarding intrusive newsgathering and aerial surveillance and the increasing interest in non-governmental drone use, it is reasonable to assume people will soon ask courts to decide the circumstances in which journalists can use drones to gather news. Past court decisions suggest that courts might consider the location of both the drone and the person or object under surveillance while they continue to define places in which a reasonable expectation to privacy exists.

Journalists who justify drone use by identifying as a hobbyist and operate under such rules should exercise extreme caution.

Courts have agreed that journalists do not intrude when they observe or record someone in public or in an area viewable from a public place. Based on court decisions that journalists may photograph or film the inside of a home or business so long as they capture "nothing more than could have been seen from a public street,"[75] it is reasonable to assume that using a drone to look through the window of a home that is viewable from the street would be allowed.

A more difficult question is whether it will be legal to fly a drone above someone's home and look through a skylight. Courts applying common law privacy decisions regarding surreptitious newsgathering might not allow journalists to do this because what can be seen through a skylight is not easily viewable from a public street. However, courts applying constitutional privacy decisions regarding aerial surveillance might allow this use, as long as journalists operate the drones in airspace where the aircraft is legally allowed to fly.[76] Once the FAA finishes developing regulations for governmental and non-governmental drone use, it should be easy for courts to determine whether a drone was flown in legal airspace.

Based on existing newsgathering cases, it is also reasonable to believe courts may consider whether the plaintiff was aware of the drone and whether the journalist misrepresented himself to gain access to the area where he operated the drone.[77] If a person can clearly see that a reporter is operating a drone, then that person may lose his

expectation to privacy because he can no longer assume his words and actions are private. If a journalist lies about his true identityto gain access to a private place, where he then employs a drone, this action would likely constitute an intrusion.

Based on this research into drone journalism and its associated privacy concerns, this paper recommends the following guidelines for journalists using drones:

Until the FAA develops updated standards on private drone use, journalists are not legally allowed to operate drones for business purposes. Journalists who justify drone use by identifying themselves as hobbyists and operate under such rules should exercise extreme caution. This is a regulatory grey area, and it is unclear whether the FAA condones such use. In cases where the journalist is a public employee, it has become clear that the FAA does not condone such use.

Journalists who operate drones should be aware of the privacy intrusions traditionally caused by surreptitious newsgathering, particularly in their state as common law varies among states. Generally, reporters can legally observe and record people and places that are in public or can be easily seen from a public place. That said, reporters should be cautious when gathering news in a business where customers may enjoy a limited expectation of privacy.

Journalists should ask for consent to record someone when possible and clearly identify themselves and their drones as news gatherers. Deception has been known to support intrusion cases.

Journalists should consider whether the person they record is a private person or public figure, as a private person enjoys a higher expectation of privacy.

Journalists who operate drones should stay within airspace that the FAA considers public. Until the FAA develops more regulations, the safest option is to follow the rules for hobbyists, keeping the drone under 400 feet and away from populated areas.

Notes

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19. *Supra* note 2, at 2.
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22. For example, researchers use drones to collect air samples and determine pollution levels.
23. *Supra* note 20, at 1; *supra* note 2, at 2.
24. *Supra* note 2, at 1.
25. *Id*.
26. *Id.*
27. *Id.*
28. *Id*.
29. *Supra* note 2, at 5.
30. *Id.* at 2.
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54. Solomon v. Nat'l Enquirer Inc., CIV. A. DKC 95-3327 (D. Md. June 21, 1996).
55. *Supra* note 50.
56. *Id*.
57. Mark v. Seattle Times, 635 P.2d 1081 (Wash. Sup. Ct. 1981).
58. *Id*. at 1095.
59. Gill v. Hearst Pub. Co., 253 P.2d 441 (Cal. Sup. Ct. 1953).
60. Med. Lab. Mgmt. Consultants v. Am. Broad. Companies, Inc., 306 F.3d 806 (9th Cir. 2002).
61. *Id*. at 819.
62. Stessman v. Am. Black Hawk Broad. Co., 416 N.W.2d 685 (Iowa 1987).
63. Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971).
64. *Id*. at 249.
65. Deteresa v. Am. Broad. Companies, Inc., 121 F.3d 460 (9th Cir. 1997).
66. *Id*. at 466.
67. *Id*.
68. *Supra* note 63.
69. *U.S. Const. amend. IV, § 1.*
70. Dow Chemical Co. v. United States, 476 U.S. 227 (1986).
71. *Id*. at 239.
72. California v. Ciraolo, 476 U.S. 207 (1986).
73. Henderson v. People, 879 P.2d 383 (Colo. 1994). (The news reporter who flew the helicopter also did not violate the man's privacy due to a statutory newsperson's privilege.)
74. *Supra* note 72, at 1810.
75. *Supra* note 48, at 509.
76. *Supra* note 72 (referring to an officer who could legally fly over somebody's yard because the view from the plane was a "public vantage point where he has a right to be").
77. *Supra* note 65 (referring to a woman whose privacy was not intruded upon in part because she spoke freely to a man she knew was a reporter); *supra* note 61 (referring to reporters who misrepresented themselves in order to gain entry to a man's home office, where they secretly recorded the conversation).