

# DRONE LAW:

FAA REGULATION—  
WHEN HOBBY USE ENDS &  
COMMERCIAL USE BEGINS  
AND WHAT TO DO WHEN  
THE FAA COMES A KNOCKIN’

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## SHOT DOWN IN FLAMES: KENTUCKY AT THE FOREFRONT OF THE NATIONAL DEBATE OVER DRONES VS. PERSONAL PRIVACY

On July 26, 2015, Kentucky made national and international headlines when William “The Drone Slayer” Meredith took a shotgun and blasted an \$1,800 hobbyist drone out of the sky because it was spying on his sunbathing daughter.<sup>1</sup> Meredith was arrested, jailed, and charged with a Class D Felony, punishable by up to a year in prison and a \$10,000 fine.<sup>2</sup> On Oct. 26, 2015, Kentucky again made national and international headlines when—*after listening to the evidence presented from both the prosecution and the defense*—Bullitt County Judge Rebecca Ward told the media-packed courtroom that the drone pilot John Boggs used his remotely piloted drone to invade the privacy of Meredith and his daughter, thus giving Meredith the right to shoot down (and destroy) the spying drone.<sup>3</sup> In dismissing all criminal claims against Meredith, Judge Ward set what is now known as “the Kentuckian precedent”<sup>4</sup> in the national debate over drone laws regarding hobbyist use, misuse, privacy, and available self-help.

With over 5,000 hobbyist drones registered in Kentucky since Dec. 21, 2015,<sup>5</sup> the intersection of recreational, high-technology, remote flight and centuries old law is slowly coming into focus for both the public and the lawyers that serve them. Client questions, problems, sought-after solutions, and unique legal challenges are beginning to appear everywhere. While certainly not all-inclusive, this article introduces laws, concepts, issues, and recurring problems that hobbyist drone usage presents. Just knowing the basics is often enough to help your clients “fly safe.”

“Owning a drone does not a pilot make.”

ALEX MORRITT, IMPROMPTU SCRIBE

And to answer the number one question everyone seems to ask: “NO! It is not OK to shoot a drone out of the sky ... even if the Drone Slayer did it.”

## THE SAME OLD SONG WITH A FEW NEW LINES: CURRENT FAA LEGISLATION CONCERNING HOBBYIST AND COMMERCIAL DRONES

Within the Department of Transportation’s Federal Aviation Administration (“FAA”), there is no such thing as either drones or “drone law.” Instead, what the public recognizes as drones are known federally as unmanned aircraft vehicles (“UAV”). The system of a remote operator and a UAV is known as an unmanned aircraft system (“UAS”). To everyone else, those things with four or more motor rotors, that are cool and fun to operate, and that often end-up stuck in trees or on rooftops are known as drones.

Despite its exclusive and sole responsibility for national air safety, the FAA has taken a long and circuitous route in its exercise of control over drones. Perhaps because it was absolutely blind-sided by the explosion of consumer use drone technology, it was not until 2012 that the FAA was charged with analyzing the rise in drone use, and devising rules designed to keep our national airspace safe. Accordingly, the FAA Modernization and Reform Act (“FMRA”) of 2012 required the FAA to address the growing popularity of all drones, both hobbyist and commercial. Bowing to pressure from

remote control model aircraft enthusiasts, the FMRA carved-out an exception for “model aircraft” flown for “hobby or recreational use.”<sup>6</sup> The term “model aircraft,” however, was defined so broadly that any drone could qualify as a “model aircraft,” depending upon how it was flown.<sup>7</sup> With hobbyist drones specifically excluded from any FAA oversight, two drones flying the same exact routes, at the same exact time, but by two different people, may have been statutorily viewed as either flying for hobby purposes (and totally unregulated) or flying for commercial purposes (and totally regulated, *i.e.*, registration, exemption, pilot requirements).<sup>8</sup> This distinction without a difference caused much confusion as: (1) hobbyist drones exploded in sales; (2) businesses found more envelope pushing uses for commercial drones; and (3) the troubling hybrid of hobbyist/commercial drone usage confounded both users and the FAA. Finally, after years of struggling with the impact of drones on both the economy and national airspace safety, on Aug. 29, 2016, the FAA published *Small UAS Rule (Part 107)*, which resolved many uncertainties in the laws regarding commercial drones, and mostly maintained the “model aircraft” exemption for unregulated hobbyist drone use.<sup>9</sup>

Consequently, per *Small UAS Rule (Part 107)*, hobbyists looking to fly drones have two courses of action; either get a remote pilot certificate (as all commercial drone pilots must obtain) or at a minimum:

- (1) limit drone flying to hobby or recreational purposes only;
- (2) comply a community-based set of safety guidelines;
- (3) fly the UAS within visual line-of-sight;
- (4) fly during daylight hours;
- (5) stay under 40 miles per hour and 400 feet;
- (6) fly for no longer than 30 minutes, uninterrupted;
- (7) give way to manned aircraft;
- (8) not fly within five miles of an airport without prior written notice and approval;
- (9) limit the UAV’s weight to 55 pounds; and
- (10) register the UAV with the FAA.

If all the aforementioned minimum rules are met *during the entirety of the flight*, the pilot may fly their drone as an unregulated hobbyist. Any deviations, however, and the FAA obtains jurisdiction to issue civil fines and penalties, on top of any local criminal penalties that may arise.

For pilots of hobbyist drones, the same old “model aircraft” regulations, with a few new caveats, remain in effect and still allow individuals the right to enjoy the mostly unregulated, safe, and

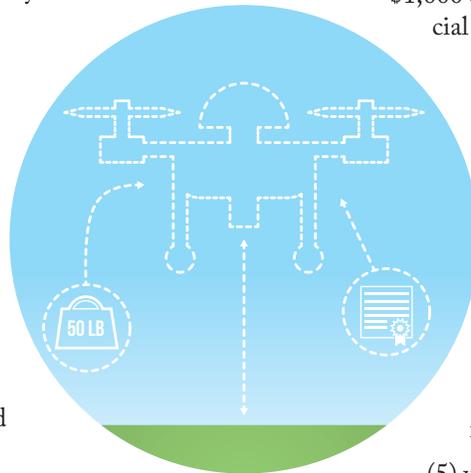
non-commercial enjoyment of technically advanced, remote controlled flying vehicles. The grey area differentiating hobby use and highly regulated commercial use, however, is now razor thin.

## TWO ROADS DIVERGED IN A WOOD: WHEN HOBBYIST USE ENDS AND COMMERCIAL USE BEGINS

United States aviation officials expect another 2.7 million commercial drones in the sky by 2020.<sup>10</sup> Furthermore, industry experts predict the use of these commercial drones could generate more than \$82 billion for the U.S. economy and create more than 100,000 jobs, in the next 10 years.<sup>11</sup> Not surprisingly, for safety and accountability reasons, the commercial use of drones is highly regulated. Commercial drone pilots are required to meet numerous FAA certification and flight requirements, and commercial routes are likewise restricted.<sup>12</sup> More importantly to drone hobbyists who may inadvertently and unintentionally undertake commercial ventures, FAA fines for improper or unlawful commercial use by an unlicensed hobbyist pilot are both substantial (*i.e.*, they start at \$1,100) and real (*i.e.*, one commercial operator paid a \$1.9 million FAA fine). Accordingly, it is very important for the hobbyist pilot to know that fine line distinction.

With the physical differences between hobbyist drones and commercial drones basically non-existent, the difference in use is solely that of the pilot’s intent. Simply put, the FAA views all drones used in any *potentially* revenue-deriving endeavor as commercial drones subject to commercial pilot regulations and fines. Period.

The following innocuous uses by hobbyist pilots flying sub-\$1,000 drones were found by the FAA to be commercial in nature:



- (1) real estate agents using drones to photograph and video homes for online and print advertising;
- (2) private investigators using drones to photograph and film accident/injury sites;
- (3) contractors and sub-contractors using drones for building inspection work via photographs and videos;
- (4) farmers using drones to check their fields;
- (5) wedding caterers and photographers using drones to record event festivities for the bride and groom;
- (6) hunting guides using drones to find and track game;
- (7) a hobby/recreational flight where a crime is captured and the video footage is later sold to a news station;
- (8) posting any photograph or video on Facebook or YouTube, if that photograph or video is linked to an advertisement potentially benefitting anyone.

If improper thoughts are the basis of all sin, then improper purpose is the basis of all hobbyist-to-commercial drone use crossover. Unless the hobbyist drone is used for anything but recre-

ational purposes for the entire time of the flight, the pilot is on the hook for all civil and criminal penalties associated with improper or unlawful commercial use. Such commercial use may seem trivial to the hobbyist pilot, but, that view may quickly change when a competitor who has expended the time and resources to obtain a commercial use certification files an improper use complaint with the FAA, and the hobbyist pilot receives an *Order of Assessment* and \$5,500 fine. So, when choosing a diverging road, it is best to choose wisely. Contrary to 1970s popular belief, it is not at all true that there's still time to change the road you drone.

### **IF YOU HAVE 99 PROBLEMS, DON'T LET THE FAA BE ONE: RESPONDING TO FAA ENFORCEMENT/SANCTION ACTIONS**

With less upfront investment required, and increased regulation giving way to more freedom, drone hobbyists have come out of the woodwork to experiment with this new technology—but not without their fair share of mishaps and crossover into the world of highly regulated commercial drone use. It is these two areas that comprise the focus of FAA enforcement actions against drone pilots.

### **SAFETY IS PRIORITY ONE FOR THE FAA**

Safety is the FAA's top mission.<sup>13</sup> This includes overseeing the safe and responsible use of the estimated 4 million drones presently in the hands of hobbyists and businesses. As such, 49 USC § 40103 "*Sovereignty and Use of Airspace*," FAA v. *Raphael Pirker*, NTSB ORDER No. EA-5739, 10 (November 18, 2014), FMRA §333 and §336, and *Small UAS Rule (Part 107)* act in conjunction to give the FAA authority over all manned and unmanned aircraft, including hobbyist drones flying under the mostly unregulated "model aircraft" exception. The FAA may assess civil penalties of up to \$10,000 per violation. While the FAA has no authority to criminally prosecute drone pilots, the FAA has recently started actively seeking local law enforcement assistance in pursuing both original and ancillary actions against drone pilots who are in alleged violation of federal law, state law, or community based safety guidelines.<sup>14</sup> Accordingly, whenever there is an FAA investigation, there may also be an ancillary or forthcoming criminal investigation, as well.

### **CONSIDERATIONS FOR FAA ENFORCEMENT OF DRONE USE VIOLATIONS**

The FAA has five enforcement teams spread across nine regions. Kentucky is in the Southern Region. In reviewing drone use for possible enforcement action, the FAA considers the following factors:

- (1) whether the violation is a first time and inadvertent violation;
- (2) whether the violation involves repeated or intentional violations; and
- (3) whether the safety risk resulting from the operation is low, medium, or high.<sup>15</sup>

If the FAA determines the drone pilot's action necessitates a sanction, the following factors provide general guidance as to both a

monetary fine and referral for criminal prosecution:

- (1) is further education enough to prevent future infractions;
- (2) is this a first-time inadvertent violation that poses a low risk, but compliance cannot be achieved through further education;
- (3) does this violation pose a medium or high risk of danger to the national airspace;
- (4) is this an egregious violation by a certified drone pilot who should already know better; and
- (5) is this a repeat violation from an already reeducated and certified drone pilot?<sup>16</sup>

Depending upon how the FAA views the specific drone infraction, the action taken ranges from nothing, to a slight reprimand, to a substantial fine and revocation of pilot's certificates.

### **FAA DRONE ENFORCEMENT/SANCTION PROCEDURES**

If a drone enforcement sanction is deemed necessary, the FAA has many hammers in its regulatory toolbox. Generally, these enforcement/sanction actions fall into five categories:

- (1) Warning Notices, i.e., "Hey, how about you note what you did wrong and not do this again. OK?"
- (2) Letters of Correction, i.e., "Hey, what were you thinking when you did this? That was really dumb. How about you not do this again or we will fine you. Thanks."
- (3) Order of Assessment: Unlawful Use, i.e., "Hey, the FAA rules are pretty clear about hobbyist using their drones for commercial purposes. Here is a *de minimis* fine. How about you not do this again without obtaining your certification, or we will have to take harsher actions against you. Thanks."
- (4) Order of Assessment: Personal Safety, i.e., "Hey moron, it doesn't really matter what you were thinking when you did this, because this is really stupid AND someone could have gotten hurt. Do not do this again. Ever. Here is your fine, too. Jeez."
- (5) Certificate Actions, i.e., "This is beyond explanation or comprehension. Not only did you violate numerous FAA rules and regulations, you also put lives in danger. As a certified drone pilot you know better. Your actions are unconscionable. Not only are we issuing a hefty fine, we are also suspending your certificate. We know your lawyer will be calling us, so here is our number."

No matter what type of letter is sent to the drone pilot, all letters have teeth. But, history shows the FAA does not really want to expend limited resources to get into a protracted battle over drone use. From the FAA's perspective, money is better spent trying to avert an airline disaster than it is enforcing a sanction against a wedding photographer. Accordingly, the best course of action is almost always to work with the FAA to remedy the "misunderstanding."

## HOW TO RESPOND TO FAA DRONE ENFORCEMENT/SANCTION ACTIONS

Properly responding to an FAA enforcement/sanction letter (even if it is to acknowledge a simple Warning Notice) is a fourfold course of action that seeks to limit any present, ancillary, or future action; while at the same time guarding against any possible admissions against interest that may be used in other proceedings. Accordingly, any FAA enforcement/sanction actions should be responded to with: identification, cooperation, acknowledgment, and a plan of action.

First, identify yourself as counsel for the drone pilot. Let the FAA know you look forward to discussing the matter and resolving any concerns or issues. Do not make any statement wherein the phrase “not a big deal” or the word “toy” are ever used. To the FAA, national airspace safety is a big deal and drones are not toys.

Second, profess your cooperation in addressing the subject matter of the letter, and specifically recognize your (and your client’s) shared belief in the safety of the nation’s airspace. In short, recognize what the FAA does and offer your cooperation in working towards achieving the FAA’s top mission: *safety*. Be nice, present your cooperation in a non-confrontational manner, and remember again to be nice.

Third, acknowledge the content of the letter and the allegations contained therein. But, recognize the big caveat that this acknowledgment of the alleged violations, however, should be tempered. Obviously, saying too much can be used against the targeted drone pilot. But, in FAA enforcement/sanction proceedings, saying nothing at all may be used as an admission. So, the best course of action is a carefully worded response that acknowledges the FAA’s allegations and concerns, but says little—if *anything*—about the drone pilot’s actual conduct.

Fourth, respond with a plan of action. Your plan of action response needs to be sooner rather than later, humble, and supported by both facts and your already acknowledged shared belief in safety. Your ultimate goal is to diminish/reduce any enforcement/sanction. If there is a Warning Notice, you would prefer that not be made part of any permanent record for later use against the pilot. If there is a Letter of Correction you want to convince the FAA that a Warning Notice will suffice. If there is an Order of Assessment, you need to show that a fine is not necessary to accomplish the shared goals of national airspace safety, and that a Letter of Correction or Warning Notice will suffice. And if there is a Certificate Action, you hope to show that pulling the pilot’s certificate of

operation is not necessary, as the FAA’s goals of safety and enforcement can be achieved via a less onerous sanction. If you cannot resolve the enforcement/sanction via a lesser level of letter, you should be able to negotiate down any fine.

Of the 23 monetary fine seeking FAA drone pilot enforcement/sanction actions undertaken between Sept. 13, 2012 and Dec. 31, 2015, all seven drone pilots who retained counsel had their fines greatly reduced or extinguished. And again, always be nice.<sup>17</sup> FAA enforcement officers are just trying to do their job of keeping our nation’s airspace safe. Aside from violations that could have been catastrophic (i.e., repeated unlawful drone flights endangering the lives of thousands of air passengers or ground spectators), the FAA is not trying to drive in a tack with a sledgehammer. But, if you are not nice and give the FAA a reason to get the sledgehammer out, they will.

Recognizing the role of the FAA and being nice goes a long way. The FAA just wants to maintain airspace safety. In its mission of providing such safety, the FAA has even gone as far as creating a free app for drone pilots to use to ensure they are in FAA compliance and flying lawfully.<sup>18</sup> In dealing with the FAA, recognize the FAA’s guiding mission, take an objective look at the drone pilot’s conduct, and meet in the middle (or perhaps even a little closer to your end). If litigation and a protracted fight is a must to protect your client’s right to fly a drone with a machine gun or



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flamethrower attached, be forewarned that sledgehammer is coming down, and probably on your client. Your client might have 99 problems, but don't let the FAA be one.

## ANTICIPATED AREAS OF FUTURE FAA DRONE ENFORCEMENT

To date, FAA drone enforcement has been limited to what may be accurately called “incredibly stupid piloting decisions” that do not require a lot of investigation to confirm a violation necessitating a monetary fine. To wit:

- (1) flying a machinegun shooting drone, and shooting stuff (Youtube);
- (2) flying a flamethrower drone, and flame throwing (Youtube);
- (3) crashing a drone onto the White House lawn (national news and call from the Secret Service);
- (4) flying over or crashing into sports stadiums (national news);
- (5) flying in commercial aircraft traffic (air traffic control and pilot complaints);
- (6) flying in restricted airspace (air traffic control, pilot, and citizen complaints);
- (7) unlawful commercial use (competitor complaints, Facebook, Youtube, and online advertisements); and
- (8) crashing into and injuring people (national news when it happens to rock stars).<sup>19</sup>

The FAA does not seem to proactively seek out drone violations; it just acts upon conduct and complaints that go against its stated mission of maintaining the safety of national airspace. As the public becomes more aware of drone issues and drone law, however, it is just a matter of time until the FAA begins reacting to and enforcing/sanctioning lesser violations such as damage to property over \$500, any physical injury, unlawful flying within five miles of an airport, and general non-compliance of community-based safety guidelines. Enforcement/sanctioning of unlawful and unauthorized drone use is a rapidly evolving area of the law. Based upon the FAA's obligation and mission to protect the national airspace, it is clear the FAA will continue to regulate and initiate enforcement actions against drone pilots who fly in violation of FAA law. While the FAA's present enforcement actions are significantly limited because of its inability to monitor all drone activity—both safe and unsafe—the FAA has actively begun partnering with local law enforcement agencies to arrest and prosecute drone pilots who cause property damage and personal injuries. Accordingly, in the coming months and years, we can expect to see significant litigation concerning civil and criminal drone enforcement/sanction actions.

## CONCLUSION

Federal and state laws governing the use of drones are in flux, but a few things are already clear: First, hobbyist drone operators who neither carefully comply with FAA regulations for hobbyists nor get a remote pilot certificate must be prepared to pay the price.

Second, be it increased FAA/local law enforcement oversight or addressing privacy issues, increased litigation involving drone use is a certainty. And third, it bears repeating: “NO! It is not OK to shoot a drone out of the sky ... even if the Drone Slayer did it.” **BB**

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