Can Your Client Legally Fly A Drone?

by Christopher B. Hopkins

Any reference to a "drone" likely conjures images of air strikes in distant places like Afghanistan or Yemen. But commercial and recreational drones are airborne in Florida. On July 4th, a man flew a drone over the West Palm Beach intracoastal to shoot video from inside the fireworks display. The City of Boynton Beach recently made headlines by simply declining to ban drone flights in city parks. And, in October, Lilly Pulitzer posted an Instagram drone video shot above the Brazilian Court in Palm Beach. Drones may be here but clear regulations for commercial or recreational use remain a distant spot on the horizon -- especially after a confusing court order in *Federal Aviation Administration v. Pirker*, which involved commercial video taken overhead at the University of Virginia. Can your client legally fly a drone?

Also known as unmanned aircraft systems (UAS), drones have far-reaching commercial applications: farmers in Belle Glade can survey or spray crops; realtors in Boca Raton can truly "show" a property; and Palm Beach resorts and golf courses can entice tourists with spectacular flyover video. Drones are also fun to fly. Broadly speaking, both a radio controlled plane or a small helicopter with four blades (known as a quadcopter) are drones. They can be controlled via line-of-sight flying or, better still, through a first person perspective transmitted from an onboard camera to goggles worn by the user. These UAS can lift off, hover, and even automatically return "home" using GPS if they stray out of range. While a combat UAS may cost millions of dollars and fly for more than three days straight, a commercially-available DJI Phantom 2 equipped with a GoPro Hero camera costs less than $1,500 and can be delivered to a home or business by Amazon in two days. Less expensive models run a few hundred dollars, fly for about 15 minutes, and can be operated by a controller or an iPad. As drone prices plummet, their popularity soars.

To get a sense of the commercial application of drone video, search for "Team Black Sheep" on YouTube to view their stunning aerial videos of New York, San Francisco, and even landing on the prone Costa Cordia cruise ship in Italy. Then do a search for "Black Sheep UVA" to see the video taken from a 4 lb. glider which launched *FAA v. Pirker*.

In October 2011, Raphael Pirker flew his drone as part of a commercial video shoot for a hospital near U.Va. Because he allegedly flew recklessly and carelessly, the FAA fined him $10,000. He fought back and, in March 2014, won a surprising order of dismissal on the grounds that the FAA lacked "regulatory authority over model aircraft."

In *Pirker*, the NTSB administrative law judge found that the FAA had a long history of not regulating "model aircraft" and thus the Administration could not rely upon recent policy statements about small drones as if they were fully-vetted regulations. Back in the 1980's, the FAA issued voluntary guidelines to "modelers" who flew radio controlled devices; those guidelines, according to Pirker, "distinguished and excluded model aircraft from…[regular] aircraft." In the mid-2000's, the FAA issued internal guidance and policy regarding small drones but stated that any exemption for "modelers" did not apply to commercial use. The Pirker court, however, found that the FAA had not undertaken "valid legislative rulemaking" and thus Pirker could not be subject to a civil fine based on mere guidance or policy.

Pirker, however, is misunderstood by many commentators and, apparently, ignored by some drone pilots. First, the events which led to Pirker predate the FAA Modernization and Reform Act of 2012. On one hand, the now-in-effect Act prevents the FAA from promulgating "any rule or regulation regarding model aircraft" but, on the other hand, the Act narrowly defines "model" use and pointedly holds that commercial use of drones is controlled (and largely prohibited) by the FAA. While *Pirker* references the Act, the order was not rendered pursuant to the Act. Thus, a *Pirker* defense would not necessarily protect against current FAA enforcement.

Second, the FAA maintains that *Pirker* is stayed pending appeal and reinforced its limited view of the "modeler" exemption in its June 2014 Interpretation of the Special Rule for Model Aircraft. This means that the FAA continues to issue cease-and-desist letters to drone pilots. Third, under current law, even if a "modeler" is flying a drone, the use of first person goggles is not permitted -- which cripples the newest advances in drone technology. Fourth, the FAA asserts that any "flights that are in furtherance of a business or incidental to a person's business would not be a hobby or recreational flight." Thus, per the FAA, it appears that test-flying by drone manufacturers; demonstrations by drone sellers; lessons by drone enthusiasts; or any drone flight which is "incidental" to a business could invite a cease-and-desist letter. As of August 2014, there were at least three suits which challenge the FAA's Interpretation. Despite its restrictive stance, the FAA is tasked with fully integrating drones into the national airspace by late 2015.

Clients who use drone video or otherwise rely upon drones should be clear on the current state of the law before proceeding with commercial drone flights. Even recreational users need to be aware of the current restrictions (e.g., under 400 ft; more than 5 miles away from an airport without permission; and no use of enhanced vision goggles) before publishing GoPro video to the internet which might invite federal scrutiny.

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