



Litigation and Federal Regulations Under Part 107 in the Coming Era of Drones

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A drone crashed into Seattle's iconic Space Needle on New Year's Eve. The accident — which was recorded in dramatic fashion on the onboard camera — is likely a sign of things to come in 2017 and beyond as the Federal Aviation Administration (FAA) and state governments move into a new era of drone operation, regulation and litigation.

New Regulations for Small Drones Under Part 107

In June 2016, the U.S. Department of Transportation and the FAA finalized the first operational rule for the commercial use of small unmanned aircraft systems (UAS) — known commonly as drones — in the United States. This new rule launched the process for integrating drones into the nation's airspace on a standardized basis, and is intended both to kick-start innovation and job growth, and to advance scientific research and life-saving strategies. In promulgating the rule, the FAA noted industry estimates suggesting that the rule could generate billions of dollars for the U.S. economy and create more than 100,000 jobs over the next 10 years.

The provisions of the new rule are set forth as Part 107 of Title 14 of the Code of Federal Regulations, entitled "Small Unmanned Aircraft Systems." Part 107 went into effect on August 29, 2016. Part 107 covers the type of "small" civil drones weighing less than 55 lbs., including everything on board. The various provisions of Part 107 govern the registration, remote pilot certification and operating rules for drones.

In looking ahead to potential future drone lawsuits regarding personal injuries and property damage, there are a number of regulations under Part 107 that will likely be of particular relevance, including the following highlights:

- No person may manipulate a drone's flight controls unless she or he has a remote pilot certificate with a small UAS rating, or is under the direct supervision of a certified remote pilot.

- A remote pilot in command must be designated for each flight. He or she is directly responsible for the drone.
- The remote pilot in command must ensure that the drone “will pose no undue hazard to other people, other aircraft, or other property in the event of a loss of control of the aircraft for any reason.”
- Drones may not be operated over a human being, unless she or he is participating in the operation or located under a covered structure or inside a stationary vehicle that can provide reasonable protection.
- No person may operate a drone in a “careless or reckless manner so as to endanger the life or property of another” or to allow an object to be dropped in a manner that creates an undue hazard to people or property.
- No person may operate a drone unless it is in “a condition for safe operation,” which requires the remote pilot to check the drone prior to each flight.
- Drones must yield the right of way to all aircraft, airborne vehicles, and launch and reentry vehicles. This means they must not pass over, under or ahead of it unless “well clear.”
- No person may operate a drone so close to another aircraft as to create a collision hazard.

The contours of these operational regulations and safety standards will no doubt be litigated fiercely in future drone accident cases involving injuries or property damage. It is easy to imagine potential lawsuits arising from drone strikes causing aircraft or automobile accidents, head injuries or house fires. To date, no major published court decisions have interpreted or applied the new drone regulations, but it is only a matter of time before courts are asked to do so.

Drone Privacy Considerations and Best Practices

Part 107 does not address one of the largest elephants in the room: privacy in an era of drones. The FAA does not currently regulate how drones gather data about people or property, and did not focus on privacy as part of its rule making. Indeed, the U.S. Court of Appeals for the D.C. Circuit dismissed a privacy group’s appeal of the FAA’s decision not to include privacy-specific drone regulations as part of the rule-making process. See *Elec. Privacy Info. Ctr. v. Fed. Aviation Admin.*, 821 F.3d 39 (D.C. Cir. 2016).

Traditionally, privacy concerns and most privacy-based causes of action are governed by state law, and it would be challenging for the FAA to promulgate regulations on all the myriad privacy considerations that might crop up in the years to come. Some courts have also expressed doubts about how far the federal government can actually regulate drones within those zones of private property most likely to trigger privacy concerns: “Although the Commerce Clause allows for broad federal authority over interstate and foreign commerce, it is far from clear that Congress intends — or could constitutionally intend — to regulate all that is airborne on one’s own property and that poses no plausible threat to or substantial effect on air transport

or interstate commerce in general.” *Huerta v. Haughwout*, 2016 WL 3919799, at *4 (D. Conn. July 18, 2016).

Nevertheless, the FAA initiated a privacy education campaign that encourages drone pilots to check their local laws before gathering information, and will educate pilots about privacy considerations during the certification process. This builds on a set of nonmandatory guidelines provided by the National Telecommunications and Information Administration entitled “Voluntary Best Practices for UAS Privacy, Transparency, and Accountability.” At their core, these Best Practices encourage peaceful issue resolution of drone privacy disputes through better communication. They include the following commonsense suggestions:

- Operators should tell other people they will be taking pictures or video before they do so if possible.
- If an operator thinks someone has a reasonable expectation of privacy, she or he should not violate it.
- Operators should not fly over others’ private property without permission if they can easily avoid it.
- Operators should not gather personal data for no reason, and should not keep it longer than necessary.
- Operators should not harass others with a drone.

The Best Practices expressly note that they often go beyond existing law and that “they do not—and are not meant to—create a legal standard of care by which the activities of any particular UAS operator should be judged.” It is also clear that news organizations have unique First Amendment protections as part of their special role gathering and reporting the news, which may increasingly involve the use of drones. Regardless, judges and juries will increasingly be asked to weigh in on the intersection between privacy rights and drone usage in the coming years and may look to the Best Practices for guidance. It is almost inevitable that the public will have strong feelings about drone use and operations — and individuals may not hesitate to impose strict ideas about privacy if given the opportunity to do so as jurors.

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