

Criminal Liability Arising from Drone Operations

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Ashley wants to be the very best at *Pokémon GO*, so she attaches her phone to her 30 pound drone that she controls using her iPad. She catches Forest *Pokémon* in the Cuyahoga Valley National Park. She then flies her drone, knowing it is low on battery, through Public Square in Cleveland after hearing about a mob of people gathered there to catch a rare Charmeleon *Pokémon*.

Ashley's seemingly innocuous, wholly-personal use of her drone could land her in more trouble than she ever imagined. Among her infractions are:

- Flying in a National Park, which the Federal Aviation Administration has declared a "No Drone Zone."
- Flying within 5 miles of Burke Lakefront Airport without prior notification and authorization.
- Recklessly operating her low-battery drone above a crowd of people.

She could very well end up in jail for any or all of these offenses.

As recreational and commercial use of unmanned aerial vehicles (UAVs) grows in popularity, health, privacy, and safety concerns remain at the forefront of regulators' concern. A UAV (or "drone") is an aircraft operated from the ground without an on-board pilot, often by handheld radio or tablet computer. Many UAVs come equipped with a camera or other data-gathering device.

In Ohio, UAVs are projected to contribute 2,700 new jobs and more than \$2 billion in economic gains in the next ten years. Recent reports cite real estate, agriculture, and insurance as some of the biggest potential commercial users of UAVs. But a UAV photographing a for-sale home can also violate the homeowner's privacy rights by capturing images of intimate activities inside the home or by recording someone entering the home alarm security code. And a UAV capable of delivering Chinese take-out or your latest Amazon Prime order can also

ferry drugs, weapons, or other contraband into a prison yard.

The FAA has promulgated regulations designed to ensure the safe operation of UAVs. Meanwhile, Congress, state legislatures, and many local communities have passed, or attempted to pass, laws designed to punish criminal misuse of UAVs. This patchwork series of laws and regulations creates the potential for UAV operators to commit a crime even with the exercise of due diligence.

Federal Criminal Liability Associated with UAVs

In 2012, Congress passed the FAA Modernization and Reform Act (FMRA), which required the FAA to integrate UAVs into the national airspace system (NAS). See H.R. 658, 112th Cong., 2d Sess. (2012). Although FMRA does not establish criminal penalties for violations of UAV regulations, other existing laws may. For example, anyone who knowingly or willfully violates an FAA regulation may be fined, imprisoned for up to one year, or both. See 49 U.S.C. § 46307.

FMRA requires the registration of all drones with the FAA. Failure to register can result in civil penalties of up to \$27,500, and criminal

penalties of up to \$250,000.00 and three years' imprisonment.

Pursuant to FMRA's mandate, the FAA finalized regulations regarding commercial operation of small UAVs on June 21, 2016, with an effective date of August 29, 2016. A commercial operator of a small UAV must acquire a remote pilot certificate, limit flights to daytime hours, and only fly as far as the operator's line of sight. Violations of those regulations could be deemed criminal conduct in violation of § 46307.

Commercial and recreational UAV users may face criminal penalties for violating FAA-issued temporary flight restrictions. For example, the FAA declared the entire city of Cleveland a "No Drone Zone" during the 2016 Republican National Convention. It warned in a pre-convention press release that "[a]nyone flying a drone within the designated restricted areas may be subject to civil and criminal charges."

Although the federal government maintains the authority to prosecute drone misuse, it has not actively pursued many notable instances of such. For example, no charges were brought against an individual who in January 2015 drunkenly crashed his quadcopter onto the White House lawn in violation the FAA's strict ban on flying UAVs in Washington, DC.

The lack of prosecutions may be due in part to inherent difficulty in identifying who is operating a renegade drone. In 2013, San Bernardino County offered a \$75,000 reward for identification of individual whose UAV's presence in NAS caused emergency water-dropping planes to turn around, preventing the planes from dousing the San Bernardino fire in California. (More recently, however, California authorities arrested a man for flying his UAV over a Sacramento-area forest fire in June 2016 and thereby interfering with aerial tankers called in to drop flame retardants on the fire.)

Federal Law Likely Preempts Many State UAV Laws

In a December 2015 memorandum, the FAA explicitly discouraged state and local governments from attempting to restrict UAV operations in the NAS, including attempts to ban UAV operation outright. The memo explained that the FAA maintains exclusive authority "to regulate the areas of airspace use, management and efficiency, air traffic control, safety, navigational facilities and aircraft noise." As a result, the FAA asserts that its rules preempt any state or local UAV regulations. However, the memo also explained that state and local governments can restrict UAV operators by relying on the

"police power" to regulate land use, zoning, privacy, trespass, and law enforcement operations.

Some state and local governments have thus criminalized certain types of UAV operations. For example, Michigan holds individuals criminally liable for using a UAV to hunt or interfere with hunting. Tennessee prohibits the use of a UAV to intentionally capture images of firework displays, as well as the use of UAVs over a correctional facility and attaching a weapon to a UAV. Drone harassment is a specific crime in Wisconsin, for which individuals may face penalties if they operate a UAV with the intent to intimidate, harass, annoy, or alarm another person without a legitimate purpose. Tennessee, Nevada, and Oregon have amended their criminal and civil trespass statutes to address specifically the concept of "trespass by UAV." Additionally, despite the FAA's suggestion otherwise, multiple cities, including Chicago and Los Angeles, have enacted laws restricting where operators may fly UAVs.

Notably, the FAA has stated that shooting down a UAV is a federal crime. In 2015, a Kentucky judge dismissed charges of criminal mischief and wanton endangerment against William Meredith, a self-proclaimed "drone hunter" who shot down a UAV he claimed was hovering above his property while his young daughters were outside playing. Despite the general public's apparent approval of UAV hunting, in April 2016, the FAA confirmed that gunning down a UAV is aircraft sabotage in violation of 18 U.S.C. § 32, subjecting the offender to substantial fines and up to 20 years in prison.

Ohio Laws Regarding UAV Operation

As yet, the Ohio General Assembly has not enacted any UAV-specific legislation. On May 15, 2015, Representative Robert Cupp introduced House Bill 228, which remains pending before the Judiciary Committee. If enacted, HB 228 would prohibit using a UAV to engage in a list of crimes, such as trespassing and voyeurism, and would establish a strict-liability offense for using a UAV as an instrumentality to commit a crime. Additionally, HB 228 subjects individuals who commit a crime with a UAV to mandatory fines and criminal forfeiture of the UAV to the State.

The application of existing Ohio law to operators who misuse UAVs remains unclear. For example, Ohio's criminal trespass law (RC 2911.21) applies when a person enters the property of another without permission. Thus, this law is unlikely to protect a property owner who is troubled by a drone hovering

overhead. Similarly, the State could charge an operator with criminally endangering the property of another with a UAV, but only if the operator does so knowingly. See RC 2909.06(A)(1). Reckless endangerment only applies to damage by means specifically enumerated in the statute, such as fire or other "inherently dangerous agency or substance." See RC 2909.06(A)(2). As "drones" are not listed in the statute, reckless endangering would not seem to apply to UAV activity.

The State could charge an individual for the following when associated with UAV operations:

- Shipping or delivering drugs in violation of Ohio's drug trafficking laws, see RC 2925.03.
- Delivering weapons or drugs to a correctional facility, see RC 2921.36.
- Surreptitiously capturing intimate images for sexual gratification, see RC 2907.08.

Additionally, in an effort to aid prosecution of drone misuse, the Cleveland City Council passed legislation on April 26, 2016 that purports to grant *local* police the authority to enforce *federal* UAV regulations. The efficacy and legality of this legislation remains to be seen.

UAV Criminal Legal Landscape Constantly Evolving and Likely to Change

Legislatures and municipal governments are likely to respond as crimes accomplished by UAVs increase, and as innocent drone use leads to injuries to third persons. As the UAV industry grows and matures, criminal laws must evolve to address health, privacy, and safety concerns spurred by their operation. And drone operators must remain especially vigilant to operate their UAVs in a safe and lawful manner at all times.



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