

January 2016

Newsgathering and Drones: A Year in Review

PUBLISHED IN: [MLRC Bulletin 2015 Issue 3](#)

TOPICS: [Newsgathering](#)

By Charles D. Tobin and Christine N. Walz[1]

In 2015, despite a number of obstacles—including continued turbulence in Congress, delays with federal regulation, and proposals by overprotective privacy advocates—the news media made significant progress in efforts to deploy unmanned aerial systems (“UAS”), or drones, as vehicles for everyday newsgathering.

During this past year:

- The Federal Aviation Administration (“FAA”) released a notice of proposed rulemaking that, if adopted, will alleviate a number of obstacles for journalists’ use of drones.
- The FAA clarified what most media lawyers already knew as a matter of First Amendment law: journalists cannot be prohibited from using drone footage that their newsrooms lawfully obtain from sources.
- President Obama referred all discussion of privacy concerns to a federal agency tasked with developing, not regulation, but voluntary industry “best practices.”
- A coalition of 17 news agencies participated in the first-ever training program, in an FAA-sanctioned session, that put journalists at the controls of UAS.
- Several news agencies have now received special FAA exemptions allowing them to use UAS, operated by licensed pilots, for limited news purposes.

So while the year began with essentially a complete ban on UAS use for newsgathering, these developments have moved the regulatory environment in a more First Amendment-friendly direction.

FAA’s Proposed Regulations

In February 2015, the FAA released a [notice of proposed rulemaking](#), introducing proposed regulation to address the use of UAS for commercial purposes, which has been banned in the United States, and seeking public comment. In April, a coalition of two dozen news media entities [offered extensive comments](#) on the rule.

These comments recognized the FAA’s attempts—reflected in the proposed rule—to balance the public interest in safety with the public interest in receiving timely news and information through emerging UAS technologies. At the same time, the coalition urged the FAA to eliminate or modify portions of the proposed rule that would needlessly inhibit the First Amendment use of UAS with no appreciable benefit to public safety.

Specifically, the news media coalition:

- Welcomed the FAA’s suggestion of individual testing or training to qualify a journalist to fly a UAS for newsgathering, rather than the current requirement that all commercial UAS operators hold private pilot’s licenses and medical certifications.

- Advocated for more flexibility to fly UAS 500 feet above buildings so long as the drone did not encroach on airspace for manned airplanes, rather than the FAA’s proposal to limit all flights to 500 feet above ground level.
- Agreed with the FAA’s decision to not address privacy issues in the proposed rule. The coalition’s comments reinforced that privacy concerns are best addressed by existing, technology-agnostic state privacy laws.
- Strongly supported the creation of a “micro UAS” subcategory for UAS weighing 4.4 lbs. or less with more relaxed restrictions on operations.
- Expressed concerns with the proposal to require the operator or an assistant to maintain visual line of sight of the UAS. The coalition wrote that this condition will unduly inhibit newsgathering, which may require operation beyond visual line of sight, and that technologies currently exist that would safely permit operations beyond line of sight.
- Advocated for authorization to fly UAS at night, with acceptable safety mitigations, rather than the proposed rule that would limit UAS to daylight flights only.
- Suggested that the FAA not completely ban flights over people, as proposed, and instead permit a distance that would reasonably maintain the safety of people on the ground.

The FAA is currently considering these and other public comments submitted in response to the proposed rule. The agency is expected to issue a final rule sometime in summer of 2016.

FAA Guidance on Use of Drone Footage

In 2014 and 2015, in a few reported instances, the FAA had warned journalists against broadcasting, printing, posting or linking any footage filmed by drones, given the flat ban on commercial use. In several meetings and in correspondence, lawyers for the news media advised the FAA that this warning, when the news media entity did not commission the UAS flight or operate the drone, misinterpreted the law and constituted an impermissible chill on First Amendment rights.

Finally, this past April, the FAA agreed and acknowledged that its inspectors cannot “direct or suggest” the takedown of drone-recorded videos. In a directive titled “[Aviation-Related Videos or Other Electronic Media on the Internet](#),” the FAA acknowledged that UAS-recorded video postings do “not automatically constitute a commercial operation or commercial purpose, or other non-hobby or non-recreational use” of a UAV in violation of federal regulations.

The directive reinforces for FAA inspectors that “electronic media posted on the Internet is ordinarily not sufficient evidence alone to determine that” someone has unlawfully flown a UAS. It instructs inspectors, before taking any enforcement action, to gather other evidence that the person posting the video actually flew a UAS unlawfully. The directive also makes clear that hobbyists operating drones in compliance with safety regulations—and not otherwise violating the law—will not run afoul of federal regulation by posting videos on YouTube.

The FAA’s modified position provides assurances to journalists that they will not face enforcement actions for posting pictures, video or other information obtained from a UAS operated by a person not affiliated with that media outlet, so long as they do not “exercise authority over initiating, conducting or terminating” the drone flight where the images are captured.

News Media Coalition Testing

Over the course of this year, a coalition of 17 news media companies made substantial progress in their [testing program in partnership with Virginia Tech](#), one of the FAA-designated test sites for drone research.

Participants include American Broadcasting Companies, Inc.; Advance Publications, Inc.; A. H. Belo Corporation; The Associated Press; Capitol Broadcasting Co.; The E.W. Scripps Company; Fusion; Gannett Co., Inc.; Getty Images (US), Inc.; National Press Photographers Association; NBCUniversal; The New York Times Company; Reuters; Sinclair Broadcast Group, Inc.; TEGNA; Univision; and The Washington Post.

The two-phased research approach has allowed journalists to participate in a series of controlled tests of real-life scenarios, designed to simulate news events that the media can safely report on using small UAS technology. The testing program, which included phases in the summer and fall of 2015, was the first time that reporters and photographers were at the controls of the aircraft to test news gathering.

The final report outlining the results of the testing program will be presented to the FAA to provide evidence for the news media’s efforts to pave the way forward for safe UAS newsgathering. Virginia Tech will also propose that the protocols used in the testing program form the basis for the UAS training and testing program called for

in the FAA's notice of proposed rulemaking.

Separately, [CNN announced](#) that it will participate in the FAA's "Pathfinder" program in conjunction with its own research and testing program underway in partnership with Georgia Tech. The Pathfinder program is one initiative to help the FAA determine if and how drone operations can be expanded in the United States. Through the program, CNN will be researching how visual line-of-sight operations might be used for newsgathering in urban areas.

Section 333 Exemptions

In Section 333 of the FAA Modernization and Reform Act of 2012, the FAA was granted the authority "to determine if certain unmanned aircraft systems may operate safely in the national airspace system before completion of the [small UAS rule.]" The first exemptions under this provision were granted in September 2014.

Initially, the FAA used its authority to consider each Section 333 application separately over a period of months. But, on March 24, 2015, the FAA testified before the Senate Commerce Committee that it used its Section 333 authority for the first time to make "summary grants" for 10 applications that were substantially similar to an application that had already been granted.

To date, the FAA has granted nearly 2,500 exemptions under Section 333. News organizations, including NBC, CNN, Cox Media, and Media General have been granted exemptions that allow for the use of UAS for newsgathering under specific, stringent conditions, and only when the UAS is operated by a licensed pilot. A number of other news organizations have requested exemptions, which are awaiting approval by the FAA.

Registration

In late October, the FAA announced the creation of a UAS registration task force to develop recommendations to streamline the registration process for UAS. The Task Force was charged with developing and recommending the type of UAS requiring registration, a registration process, and methods for showing registration and marking.

One month later, the UAS Registration Task Force Aviation Rulemaking Committee [released its report and recommendations](#) for implementing UAS registration requirements.

The Task Force recommended that the FAA:

- Adopt a simple owner-based registration process that directs UAS owners to fill out an electronic registration via the web or an app;
- Require minimal personal information—specifically, a name and address—to register, with an option to include email address, UAS serial number and telephone number.
- Require transmittal of basic safety information to registrants during the registration process and require an acknowledgement of receipt before registration can be completed.
- Establish a clear and proportionate penalty framework for failure to comply with registration requirements. The current penalties, which can be up to \$25,000, were developed to deter purchasing manned aircraft as a part of tax evasion or drug trafficking schemes.

The FAA will consider this recommendation, along with the more than 4,500 public comments (including [those submitted by the coalition of news media entities](#)) in developing a registration rulemaking.

Multistakeholder Negotiations on Privacy

On February 15, President Obama issued a [Presidential Memorandum](#) that directed the National Telecommunications and Information Administration ("NTIA"), housed within the Department of Commerce, to establish "a multistakeholder engagement process to develop and communicate best practices for privacy, accountability, and transparency issues regarding commercial and private UAS use." As part of that process, four public meetings and discussions were held in from August-November.

The news media coalition submitted comments [urging essential First Amendment principles](#) that must be incorporated into privacy best practices:

- Images and sounds gathered in public places are not private and should not be entitled to protection
- Editorial decisions, including decisions about data collection and retention, must be left to journalists

- Given the unique First Amendment concerns journalism reflects, an industry-specific approach to privacy issues and drone use is preferable to a one-size-fits-all approach.

Participants in the NTIA discussions are considering these comments, as well as a number of proposals attempting to establish best practices addressing privacy and UAS use.

What's Up Next?

As the regulatory environment has improved over the last year, we have begun to see the wide range of important stories that journalists have enhanced with UAS footage. For example, UAS have been used to improve:

- Coverage of infrastructure improvement projects, including WDRB's story on [the Ohio Bridge Project](#) and KGO-TV's story on the [demolition of Candlestick Park](#) in San Francisco;
- Stories providing a historical retrospective, like CNN's [coverage](#) of the 50th anniversary of the "Bloody Sunday" civil rights march across the Edmund Pettus Bridge in Selma, AL; and
- Features about changing weather patterns and coastal wetlands, including the Washington Post's [feature story](#) on New Orleans and the gulf region ten years after Hurricane Katrina.

With the solid foundation established this past year, UAS use for newsgathering is poised to take off. More Section 333 exemptions will be granted to news organizations in the coming year; the final rule on commercial UAS use is expected; and, hopefully, any privacy best practices will acknowledge as an essential framework issue the First Amendment right to gather news from above in public places.

Notes

[1] Charles D. Tobin is a partner and Christine N. Walz is an associate with Holland & Knight LLP in Washington D.C. Holland & Knight represents the coalition of news media entities working on drone regulation and policy issues.

PUBLICATIONS

COMMITTEES

EVENTS

ABOUT

JOIN

LOGIN

[Privacy Policy](#). [Terms of Use](#).

© 2024 Media Law Resource Center. All Rights Reserved.