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EXPERT ANALYSIS

California's Paparazzi Drones and the Evolving Privacy Landscape Under AB 2306

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With the Federal Aviation Administration making steady progress on its integration of unmanned aircraft systems into U.S. airspace, the industry's focus has now shifted to state and local regulators who are flexing their muscles in efforts to impose a more stringent layer of UAS operating parameters. Although serious questions remain regarding the validity and efficacy of subfederal drone laws in light of the FAA's sweeping preemptive powers, California continues to lead the pack of state and local jurisdictions seeking to regulate this burgeoning technology.

Two bills that recently originated from the California Legislature may serve as a glimpse of things to come for future attempts to regulate UAS at the state and local level.

The first bill, AB 1327, sought to place several privacy- and safety-based limitations on public and private UAS operations by extending existing wiretapping and electronic eavesdropping restrictions to UAS operations.

The bill underscored the public's call for transparency in domestic UAS operations carried out by government agencies by making "images, footage, or data obtained through the use of an unmanned aircraft system or any record, including but not limited to, usage logs or logs that identify any person or entity that subsequently obtains or requests records of that system" presumptively subject to disclosure under the California Public Records Act.

Although AB 1327 passed with strong support in the Legislature, Democratic Gov. Jerry Brown vetoed the bill Sept. 28 amid strong opposition from law enforcement groups and from the press. Brown expressed in his veto message that the bill sought to impose restrictions that go beyond what is required by the Fourth Amendment and the privacy protections in the California Constitution.

The second UAS bill, now nicknamed California's "paparazzi drone law," received Brown's signature Sept. 30 after passing through the Legislature with solid bipartisan support.

Authored by California State Assembly Member Ed Chau, AB 2306 will amend Cal. Civ. Code § 1708.8 to create a private right of action for constructive invasion of privacy against any person who "attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of any device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the device was used."

The key to this new law is that it expands the technologies to which invasion-of-privacy claims apply by imposing liability for using "any device" in an infringing manner, rather than the California Civil Code's previous limitation to use of "a visual or auditory enhancing device."

The new law will take effect Jan. 1, 2015, and will undoubtedly be used by celebrities to ward off tech-savvy paparazzi. Compared with previous attempts to regulate UAS on the local level, UAS operators may find that AB 2306 has sharper teeth.

Combined with the FAA's strict guidelines preventing unauthorized UAS operations in populated areas, this new law could prove to be a significant barrier for paparazzi attempting to use aerial devices to photograph celebrities and also a strong shield for celebrities seeking privacy.

After the law takes effect, it will be an actionable offense to operate camera-mounted UAS to capture footage of any person, including a celebrity, in any place where the person has a reasonable expectation of privacy. Operating an unmanned aircraft system near the celebrity's house to snap pictures of the celebrity eating dinner, for example, will be off limits.

Moreover, although the celebrity's reasonable expectation of privacy is arguably diminished once the celebrity steps outside into public areas, such as to visit the beach, using UAS to film celebrities in public places will implicate federal aviation regulations, which currently prohibit commercial UAS operations without an express regulatory exemption.

Thus, without an exemption from the FAA expressly authorizing UAS operations in public, populated areas, California's new law will supplement federal safety regulations to prevent paparazzi from using UAS in almost any conceivable way to capture celebrity images.

Although the FAA has previously granted regulatory exemptions for commercial UAS operations under Section 333 of the FAA Modernization and Reform Act of 2012, the exemptions granted in September for the purpose of aerial filming have expressly limited operations to "closed sets." This includes a requirement that everyone involved in the filming has been briefed on the intended UAS operation and has consented to participating as an actor or crew member. Celebrities are unlikely to offer up such consent to drone-wielding paparazzi in the foreseeable future.

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In the past, UAS operators seeking to carry out commercial operations in U.S. airspace, and lacking a Section 333 exemption from the FAA, have challenged the FAA's jurisdiction to regulate UAS.

This was the scenario in the famous *Pirker* case, in which a man was fined $10,000 by the FAA after flying a camera-mounted unmanned aircraft system over the University of Virginia to create a video of the campus. *Huerta v. Pirker,* No. CP-217, *decision issued* (N.T.S.B. Mar. 6, 2014). In that case, an administrative law judge with the National Transportation Safety Board found that there were no enforceable FAA rules applying to the unmanned aircraft system that had been used in the operation.

In November the NTSB unanimously reversed the *Pirker* decision on appeal, holding unmanned aircraft systems fall squarely within the definition of "aircraft" and are therefore within the FAA's jurisdiction. *Huerta v. Pirker,* No. CP-217, *opinion issued* (N.T.S.B. Nov. 18, 2014).

As the FAA moves toward the launch of its highly anticipated set of comprehensive regulations governing commercial UAS operations, California's paparazzi will not likely challenge the FAA's jurisdiction. Instead, look for UAS operators sued under the new Cal. Civ. Code § 1708.8 to do the exact opposite. By invoking the FAA's comprehensive regulatory powers, UAS operators can challenge state laws governing UAS on preemption grounds.

It is axiomatic that in the event of a conflict between federal and state law, the Supremacy Clause of the U.S. Constitution preempts operation of state law. *Howlett v. Rose,* 496 U.S. 356, 371 (1990). Under the Supremacy Clause, "[t]he relative importance to the state of its own law is not material when there is a conflict with a valid federal law." *Felder v. Casey,* 487 U.S. 131, 138 (1988).

More importantly for UAS operators, the U.S. Supreme Court has stated, "There is no doubt that Congress may withdraw specified powers from the states by enacting a statute containing an express preemption provision ... [and that] the states are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *See Arizona v. United States*, 132 S. Ct. 2492, 2500-02 (2012) (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 115 (1992)).

In *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 638-39 (1973), the Supreme Court held that the Federal Aviation Act created a uniform and exclusive system of federal regulation in the field of air safety.

In that case, the operator of an airport terminal and an air carrier sought an injunction against the enforcement of an ordinance adopted by the Burbank, Calif., City Council that made it unlawful for a so-called pure jet aircraft to take off from the Hollywood-Burbank Airport between certain times. Lockheed, the air terminal operator, claimed the city was preempted from deviating from FAA standards.

The Supreme Court explained:

> [T]he Federal Aviation Act, 49 U.S.C. § 1508(a), provides in part, "The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States." By [subsection] 307(a), (c) of the act, 49 U.S.C. §§ 1348(a), (c), the administrator of the [FAA] has been given broad authority to regulate the use of the navigable airspace, "in order to insure the safety of aircraft and the efficient utilization of such airspace" and "for the protection of persons and property on the ground."

See City of Burbank, 411 U.S. at 626-27.

Thus, in an opinion penned by Justice William Douglas, the Supreme Court held the city was not permitted to deviate from federal aviation standards, stating: "We are not at liberty to diffuse the powers given by Congress to FAA ... by letting the states or municipalities in on the planning. If that change is to be made, Congress alone must do it."

By pointing to the FAA's "complete and exclusive national sovereignty in the airspace of the United States," UAS operators seeking to defeat enforcement actions brought under state laws such as AB 2306 may argue that the states, including California, are without power to regulate UAS. Such challenges are likely to rely not only on the FAA's traditional sovereignty over U.S. airspace but also on the FAA Modernization and Reform Act of 2012 and the comprehensive set of regulations the FAA will soon promulgate under the authority of that act.

Thus, 2015's promise of an expansive set of federal UAS regulations also brings with it the promise of future federal court litigation in which UAS operators will challenge the states' powers to regulate this increasingly important technology.

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