

No Clarity On The Horizon For Anti-Drone Technology

By **Daniel Wilson**

Law360, Nashville (June 9, 2017, 6:06 PM EDT) -- With the rapid uptake of unmanned aircraft systems, both the drone industry and property owners — among others — want certainty on the legality of nascent “anti-drone” technology, but the state of related law is murky at best and is likely to remain so for at least the near future.

Over the past decade, since the Federal Aviation Administration first allowed the limited use of UAS, or drones, and particularly since 2012 when Congress directed the FAA to come up with a “comprehensive plan” for integrating drones into U.S. airspace, the use of drones for commercial and hobbyist purposes has grown substantially, with hundreds of thousands of hobby drones now currently in use, according to the FAA.

In parallel with that growth, concerns have also grown among lawmakers and regulators at both the state and federal level over issues such as privacy, contraband smuggling, clashes with manned aircraft, the safety of nearby people, and protecting national security, as well as among private property owners seeking to protect their interests, opening up a potential market for anti-drone technology.

But although a number of potential anti-drone systems have already been developed to help address those concerns, ranging from the sophisticated, such as jamming and control-override systems, to the more blunt, such as net launchers that physically capture aircraft, the state of the law has yet to catch up to the state of technology, leaving a nascent industry in legal limbo, attorneys say.

“This is one of those areas — and this is coming from a guy who’s been doing cyber for five years — that is really complex and super challenging on the regulatory side,” McCarter & English LLP partner Alexander Major said. “I’ve talked to at least three different clients with technology they need to get off the ground because they want to sell it to prisons, or stadium authorities, or even the federal government, and they can’t seem to get any traction because of the laws of the United States.”

Recently leaked draft legislation stemming from the White House provides a potential framework for the use of — and a market for — the technology on the government side, giving federal agencies broad authority to track, control, and potentially seize or even destroy drones operating within U.S. airspace if

deemed a security or safety threat to certain facilities or operations, such as law enforcement or border patrol operations, prisons, and military facilities.

But although several attorneys who spoke to Law360 maintain that the federal government has the authority to impose such a law, they noted that applying the law would likely lead to court battles, such as constitutional takings claims if and when a drone is seized.

Also, developing final regulations to put the law into practice will be difficult, given the broad range of federal agencies that would have to be involved, attorneys say.

This would include, among others, the FAA and its parent agency, the U.S. Department of Transportation; the U.S. departments of Homeland Security, Defense and Justice to address security and law enforcement issues; and the Federal Communications Commission to weigh in on radio frequency spectrum issues related to the use of jammer technology.

Agencies deemed responsible for critical infrastructure will also likely have to weigh in, as will NASA, which is responsible for the UTM project, a proposed air traffic control system for low-altitude drones. Even agencies like the National Park Service, which maintains no-fly zones across much of the land it manages, could be involved, attorneys say.

And another potential spanner in the works is the recently proposed spinoff of air traffic control operations, currently controlled by the FAA, into a private nonprofit, which could further complicate the issue, attorneys claim.

“I think almost every agency will have some interest in [the anti-drone law] either directly or indirectly ... I think there will have to be an inter-agency cooperation, whether it’s a task force or just less formal cooperation,” Morrison & Foerster LLP associate Andrew Barr said.

Other complications include whether any anti-drone authority will be delegated to, or authorized to be used by, state or local authorities for circumstances such as protecting state-managed airports and prisons, several attorneys said.

While states are often granted at least some limited shared authority over the use of airspace by the FAA, as needed, attorneys say the FCC is likely to be more reluctant to grant any shared authority over the use of RF spectrum, which could curb states’ ability to use jamming technology.

The FCC has refused several times over the past decade to allow state prisons to test or use cellphone jammers, attorneys noted, with James Insko, of counsel at K&L Gates LLP, saying the agency has taken the position that it is not authorized to approve jamming petitions even if it wanted to.

And the law around what private citizens and property owners can do to prevent the unwanted flight of drones over their property is even murkier, with significant overlap and clashes between state and federal laws, attorneys say.

State law generally covers real property issues such as trespassing or being able to trim neighbors' trees that overhang a property. But at the same time, the FAA takes an aggressive stance on its control of airspace, maintaining that although it is willing to share some authority with states regarding the use of low-altitude airspace — such as for law enforcement purposes — it has the ultimate control of airspace, down to the ground.

“The federal government has always maintained that it has exclusive sovereignty of the national airspace; that’s in the statutes [and] the FAA has repeated that several times,” Barr said.

The Drone Federalism Act, S. 1272, introduced by Sen. Dianne Feinstein, D-Calif., in May, could offer at least a partial solution, attorneys say. The bill would require drone operators to obtain the permission of property owners when flying at 200 feet or lower above ground level or above a structure, and would also grant state and local governments the authority to place “reasonable” restrictions on the use of drones in that low-altitude airspace that would not be able to be preempted by federal requirements.

But at the same time, it could also lead to a patchwork of state laws that only serve to make the overall legal situation less clear, and even with the anti-preemption clause, attorneys say the FAA is still likely to take a dim view of the use of any anti-drone technology by property owners even if that technology has a state’s blessing.

To the FAA, drones are legally considered aircraft, subject to laws preventing them from being destroyed or having control wrested away, a definition it is likely to want to protect, even if any anti-drone action is carried out on an undesired flyover in that 200-foot space, they said.

“The underpinning of the entire FAA policy toward drones is the presumption that they are ‘aircraft,’ and once you start from that premise, there are federal laws against shooting down or interfering with aircraft — it’s hijacking,” Insko said.

Attorneys, property rights advocates, and both the drone and anti-drone technologies industries had hoped to get some clarity on the ongoing clash between state trespassing law and federal airspace jurisdiction in a recent Kentucky federal court case, *Boggs v. Merideth*, sometimes referred to as the “drone slayer” case.

That dispute over a homeowner shooting down a drone that flew over his property was dismissed on jurisdictional grounds in March, however, without a ruling on the merits.

And there is little other relevant legal authority on the issue outside of some dicta — a judge’s nonlegally binding comments, not directly related to the issue at hand in a case — in *Huerta v. Haughwout*, a 2016 Connecticut federal court dispute over whether the FAA could subpoena a drone user related to use solely on that user’s own property, attorneys noted.

The judge in that case, while ruling in favor of the FAA, noted the potential clash between U.S. Supreme

Court precedent allowing property owners' the "full enjoyment" of their land and the space above it, the FAA's claim to control airspace down to the ground, Gibson Dunn & Crutcher LLP associate Jared Greenberg said.

But with no other obvious similar cases currently before the courts and related legislation still at an early stage, the legal status of that crossover and private property law is likely to remain uncertain for some time — potentially discouraging not only potential anti-drone technology makers, but some potential drone makers themselves, from entering into the industry, attorneys claimed.

"Any clarification, in some ways, will be better than none for a future, strong commercial drone industry, because a large corporation can't have a multibillion-dollar operation that exists purely in the gray area of law — some corporations would be hesitant to operate until it's hashed out," Greenberg said. "Hopefully it will be within the next few years."

--Additional reporting by Chuck Stanley and Linda Chiem. Editing by Rebecca Flanagan and Philip Shea.

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