FAA Treats "Commercial" Newsgatherers and Citizen Journalists Differently

By Justin S. Wales and Jorge A. Pérez Santiago

More than 1 million small, unmanned aerial vehicles (UAVs) (also known as "Unmanned Aircraft Systems (UAS) or "drones") have been sold during the 2015 holiday season. Most of these commercially available UAVs weigh less than seven pounds and have built-in cameras that allow their operators to take high-definition aerial photographs and videos. The most popular models sell for less than $1,000, and starter UAVs can be purchased for just a few hundred dollars. Given the growing popularity of UAVs, the Federal Aviation Administration (FAA) has adopted or proposed regulations that ensure the safety of U.S. airspace. Unfortunately, in doing so, the agency has crafted a regulatory scheme that distinguishes between commercial and non-commercial UAV operators in a way that may run afoul of the U.S. Constitution and chill newsgathering activities.

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The impact of UAVs can be seen across multiple industries, including the domestic real estate, energy, and insurance markets. However, the anticipated ubiquity of UAVs may have the greatest consequence on the gathering and dissemination of news by both traditional media organizations and unaffiliated citizen journalists. In much the same way that advances in mobile technology have decreased the cost of newsgathering by arming every citizen and reporter with a pocket camera, and social media platforms and inexpensive webhosting have provided a venue for anyone to publish newsworthy content, UAVs further democratize newsgathering by providing a low-cost and more versatile alternative to the traditional piloted news helicopter.

The FAA's initial attempts to regulate UAVs and integrate small aerial vehicles into the national airspace have led the agency to adopt a hardline and perhaps untenable distinction between UAVs operated for a "hobby or recreational use" and those flown for a "commercial" purpose. Under the agency's rules, non-commercial UAV operations are unregulated, while all UAV uses that benefit, in any form, a business, no matter how remotely, are deemed commercial and subject to FAA regulations. The distinction is a consequence of the Federal

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Aviation Administration Modernization and Reform Act of 2012 ("the Act"), which the U.S. Congress enacted to require the FAA to implement regulations regarding commercial drone use. However, the Act expressly prevents the agency from promulgating any rule or regulation regarding "model aircrafts," defined as any aircraft under 55 pounds flown for hobby or recreational purposes. PUB. L. NO. 112-95, §§ 333, 336 (Feb. 14, 2012).

The Act requires "commercial" UAV operators to apply for an exemption under Section 333 of the Act and to demonstrate to the Secretary of Transportation that they can operate their UAVs "safely in the national airspace system." Commercial operators that receive a Section 333 exemption are then required to follow strict operating and registration requirements, which include obtaining an airworthiness certification or certificate of authorization, before piloting their vehicle. In March 2015, the FAA announced it would grant "blanket" authorization to Section 333 exemption holders that would allow commercial UAV operations below 200 feet, subject to operational restrictions such as daytime only flights and visual line of sight requirements. As a practical matter, however, these regulations, and the continued need to seek a Section 333 exemption prevents "commercial" newsgatherers from using UAVs to gather newsworthy information. (*See* https://www.faa.gov/news/updates/?newsId=82245)

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Despite a concerted effort by media organizations, the FAA has refused to recognize a "newsgathering" exception to its regulations or to consider newsgathering by freelance reporters or media entities as anything other than "commercial." As a result, the FAA has crafted a system whereby UAV newsgathering by a freelance reporter or photojournalist, or on behalf of a media organization, is subject to strict regulations while the exact same act remains unregulated when committed with a "non-commercial" intention. For example, suppose two drone operators happen on a fire in a wooded area after nightfall. Neither has previously applied for or received a Section 333 exemption. The first operator flies his drone over the fire for the intended purpose of taking an aerial photo of the scene to send to his local newspaper either because he is employed by the paper or a freelance photojournalist. The second operator, standing feet away and operating the same type of aerial vehicle, flies her drone over the fire simply to take a picture of the scene for her own personal collection, but upon seeing the photo decides to sell it to her local newspaper.

Under FAA regulations, the first operator has violated the law because he failed to apply for and obtain a Section 333 exemption prior to flight. He is subject to a significant fine. Even had

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he obtained an exemption, he would still be in violation of FAA regulations because he operated his UAV at night with a "commercial" intent. The second operator, on the other hand, has violated no FAA regulation.

From a Constitutional perspective, the FAA's regulations and their differential treatment of commercial and non-commercial speech are concerning for at least two fundamental reasons. First, because the act of gathering news, by whatever instrumentality, is at least partially protected by the First Amendment, *see Branzburg v. Hayes*, 92 S. Ct. 2646 (1972), and the mere fact that a newsgatherer or distributor charges for content does not turn the act of gathering or distributing news into a commercial act, *see New York Times v. Sullivan*, 84 S. Ct. 710 (1964), the FAA's attempt to regulate UAV activity, specifically as applied to newsgathering, likely implicates the First Amendment rights of both traditional media and unaffiliated citizen journalists to gather information.

A second issue arises due to the U.S. Supreme Court's decisions striking down regulations that treat disseminated commercial speech differently from distributed non-commercial expression when the form of expression produces identical harms. *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1994). For example, do recreational "model aircrafts" produce a lesser threat to the security of our national airspace than commercially used UAVs? Assuming newsgathering on behalf of a corporation or for a fee were constitutionally distinguishable from what the FAA recognizes as recreational information gathering, which is questionable, recent Supreme Court decisions, including *Sorrell v. IMS Health*, 131 S. Ct. 2653 (2011), which struck regulations that treat commercial speakers differently from non-commercial speakers, suggest that the distinction the agency draws may no longer be constitutionally defensible. Under *dicta* by some of the Justices in *Discovery Network*, a more constitutionally defensible (although not necessarily preferable) regulation may be to enact a total ban on drones instead of trying to distinguish between commercially and non-commercially used UAVs where, as here, commercially used UAVs do not produce different or more significant harms than those used for non-commercial reasons.

The FAA's regulation and its commercial and non-commercial distinction is also vague in that it fails to give any practical guidance to the droves of people that take videos or photographs with UAVs and publish them to their personal blogs or YouTube accounts, which are, to some degree, supported by ad revenue. In a memorandum entitled "*Media Use of UAS,*" the FAA punted such questions concerning the rights of individuals to use model aircrafts to gather news, stating only that the agency's operative concern was the operator's "true intentions in conducting the operation" and that it "would have to consider each case on its own merit." The ambiguous nature of the FAA's standard may have the effect of chilling

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individual newsgatherers from gathering or self-publishing their content for fear of being investigated and fined by the Agency.

In February 2015, the FAA published a Notice of Proposed Rulemaking which, if enacted, would permit "non-hobby or non-recreational" operators of small unmanned aircrafts weighing less than 55 pounds to operate UAVs without obtaining a Section 333 exemption or other requirements such as an airworthiness certification or certificate of authorization, as required under current law. 14 C.F.R. 21, 43, 45, et al. (Feb. 23, 2015). While in many ways the proposed rule streamlines the registration process for commercial UAV operators, it once again fails to provide a "newsgathering" exception and subjects non-hobby or non-recreational newsgatherers to strict operational guidelines that prohibit them from, among other things, operating their aircraft outside of their visual line of sight, operating their aircraft above the head of any persons not directly involved in the operation; and operating their aircraft after sundown.

The proposed regulation also requires non-hobby and non-recreational UAV operators to pass a battery of tests, including an aeronautical knowledge test at an FAA-approved knowledge testing center and recurrent aeronautical knowledge test every 24 months, and to register with the Transportation Security Administration and obtain an unmanned aircraft operator certificate with a small UAS rating. The FAA estimates the registration costs associated with lawfully operating a drone for non-hobby and non-recreational purposes under its proposed rule at $6,803.10, an amount that will likely preclude freelance citizen journalists from participating in "commercial" newsgathering activities.

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The proposed regulation retains the Act's commercial/non-commercial distinction and continues to treat identical behavior differently based solely on the actor's identity and intent. It provides no added clarity as to the classification of citizen journalists such as those described above, and requires those wishing to engage in an act of freelance reporting to bear a high and, in many instances, preclusive upfront cost or risk a large fine.

Following publication of its proposed rule, the FAA entered into a public comment period during which it received nearly 4,500 comments, including calls to relax its regulations on newsgathering activities and to eliminate or revise its prohibitions on nighttime UAV operations and piloting vehicles outside the operator's visual line of sight. The FAA also announced that it has partnered with various industry groups and businesses, including CNN, to

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prepare to draft a final rule to explore how UAVs might be safely used for newsgathering in populated areas. A final rule is not expected before late 2016.

In December 2015, the FAA enacted an interim final rule regarding the registration and marking requirements for small unmanned aircrafts, which differ depending on the drone's use. (*See* Registration and Marking Requirements for Small Unmanned Aircrafts, *available at* http://www.faa.gov/news/updates/media/20151213_IFR.pdf.) The interim final rule provides an alternative process that drone owners may use to comply with the statutory requirements for aircraft operations under 49 U.S.C. § 44102, which requires aircrafts to be registered prior to operation. All drones weighing between 0.55 and 55 pounds must register. *See* 14 C.F.R. § 48.15. As a practical matter, this forces all operators of unmanned aerial vehicles outside of the "spy" class of UAVs, to register with the FAA.

The interim rule regulates both commercially used and non-commercially used UAVs, purportedly under the FAA's authority to promulgate regulations and rules to promote safe flight of civil aircraft in air commerce. The rule has been criticized by UAV hobbyist groups and will likely face a challenge, since it is unclear whether the interim rule conflicts with the 2012 FAA Modernization and Reform Act's express prohibition on the promulgation of rules related to non-commercial model aircrafts. Further, despite applying broadly to both commercial and non-commercial UAVs, the interim rule once again distinguishes between those individuals and corporations intending to use the drones for commercial purposes, subjecting commercial use operators to a registration fee per UAV, while allowing recreational users to pay a flat fee for their entire fleet. *See* 14 C.F.R. § 48.30.

The FAA is charged with ensuring our national airspace remains safe, and it is evident from the sudden increase in the number of UAVs sold over the last few years and the sales projections of UAVs over the next several, that hordes of unmanned vehicles pose an actual danger to air travel, necessitating reasonable regulations. Due to the FAA's inability to practically regulate UAVs used non-commercially**,** the current and proposed regulations employ an illogical and potentially unconstitutional distinction between commercial and non-commercial acts that does not effectively make our skies safer and threatens to chill newsgathering activities and expressive rights.

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