Should You Be Allowed to Prevent Drones From Flying Over Your Property?

Two legal experts debate who has the right to decide when and where drones can fly

The increased use of personal and commercial drones is raising questions about where they should be permitted to fly, and who should make that decision. The FAA estimates drone sales will reach seven million by 2020. Photo: John Weber for The Wall Street Journal

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Drone use across the U.S. is soaring, and the skies may soon get even more crowded, as the Federal Aviation Administration expects sales of these unmanned aerial vehicles to jump to seven million in 2020 from about 2.5 million this year.

Interest in drones for both commercial and casual purposes is raising not only safety and privacy concerns, but also thorny legal questions about where and when drones should be allowed to fly—and who gets to decide.

On one side are those who say property owners' rights generally extend up about 500 feet, which gives them the right to prevent drones from flying or hovering over their land. They say drones pose a much bigger threat to security and privacy than jets and airplanes, which travel at higher altitudes, in airspace regulated by the FAA.

Others aren't so sure. They say drones represent the next frontier in aviation, and as such, decisions about where and when they can fly should be made collectively, not by landowners through tort law. Commercial air travel never would have flourished, they say, had individuals been allowed to sue anyone who flew over their property without permission.

A. Michael Froomkin, the Laurie Silvers and Mitchell Rubenstein distinguished professor of law at the University of Miami School of Law, says that drones pose a huge threat to security and privacy, and that property owners should be able to keep them from flying over their land. Ryan Calo, an assistant professor of law at the University of Washington, says decisions about where and when drones can fly should be made collectively, not by individual landowners.

YES: Our Privacy and Safety Are at Risk

By A. Michael Froomkin

Drones don't have, and shouldn't be given, a legal right to fly over private property in defiance of the wishes of the landowner. Such overflights threaten privacy and safety, and destroy Fourth Amendment rights.

Just as homeowners have a horizontal curtilage in which property rights extend to include the grounds and buildings that immediately surround a home, homeowners have—or ought to have—a vertical curtilage. Property rights in the curtilage include the right to sell the land and, crucially, the right to exclude others. Before airplanes, the right to exclude went up indefinitely; now it usually ends at 500 feet, where navigable airspace managed by the FAA begins. Lowering it any further, however, would be a big mistake.

What Twitter and Facebook Said

We asked readers on social networks if one should be allowed to prevent drones from flying over one's property. Here's what we heard.

Today, if someone flies a drone over your land below the FAA's reserved airspace, the drone operator is, quite simply, trespassing in the same way as if the operator ran through your backyard. That trespass matters because drones can carry surveillance gear, and can be operated from long distances or fly autonomously. Drones can film, record sounds or listen in on Wi-Fi and other signals, and no fence is high enough to keep them out.

Today, camera-wielding drones can peer in through windows and skylights even from great height; increasingly sophisticated sensors on the drawing board promise even greater surveillance power. In a country where there may be seven million drones flying by 2020, giving them free rein to fly or even hover over private property would be enormously destructive to everyone's privacy.

Limitless low-level overflights mean you could be spied on by anyone with a few hundred dollars and a voyeuristic streak. In this, drones differ radically from the jets and satellites for which we previously changed the property rules that once made high-altitude overflights a trespass; jets and satellites can take high-resolution photos, but they don't hover and are rare and expensive. Also, when we made that change—about 90 years ago—neither cameras nor aircraft could cause anything near the privacy risk drones pose today.

Removing or reducing the vertical curtilage would have another serious consequence: Police likely wouldn't need a warrant to run drone surveillance anywhere they want. Generally the government needs a warrant to intrude on private property but doesn't need one to conduct surveillance from public places—including what the Supreme Court has called "public navigable airspace." If we reclassify the airspace above property as accessible to private drones, that likely takes the warrant requirement along with it. Cheap, continuous drone surveillance might make the Fourth Amendment almost irrelevant.

We should ignore claims that the needs of progress require that we allow drone overflights so that Americans can enjoy home delivery via TacoCopter or, more likely, by the Amazon Prime Drone. If the delivery is to you, we'll treat that as implied consent, just as we do with United Parcel Service. UPS 0.31 % Otherwise, GPS-enabled drones can fly above public roads in regulated traffic layers. They don't need to fly over private property.

Delivery firms convinced their drones need shortcuts can buy the right: micropayments and mapping technology make putting together flight paths feasible (perhaps we can charge drones more when we are sunbathing?). Firms like Amazon might make allowing overflights a condition of their Prime service and turn their network of shortcuts into a competitive advantage. At least we'll know who is up there.

At this time, drone overflight rights aren't an open question. There is a relevant body of law that gives the power to property owners, and the case for changing the rule via legislation is weak.

If we give drones overflight rights, every time you see one in the air you will have reason to fear it may be spying on you or could crash. And let's not even talk about armed drones.

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NO: It Is the Way to Kill Innovation

By Ryan Calo

The year is 1910. Orville and Wilbur Wright are testing their plane and happen to fly hundreds of feet over a stretch of land you own. Could you sue them?

Technically, you could. In 1910, your property rights extended *od coelum et ad inferos*—up to heaven and down to hell. Anyone who flew over your property without permission was trespassing.

As the fledgling aviation industry began to take off, the U.S. had the foresight to adjust its laws and norms accordingly. Eventually, property owners' airspace rights were limited to what they could reasonably use, and the area above 500 feet or so became navigable airspace, regulated by the federal government. Today, pilots and airlines contend with the FAA, not individual property owners, in planning when and where to fly.

Drones represent the next frontier in aviation, and ultimately we may come to view the technology as an indispensable mode of transportation in much the same way we view commercial air travel today. For that reason, decisions about where and when drones can travel should be made collectively through thoughtful limits, not individually through tort law or self-help.

There will be no end to the uses Americans dream up for drones once we solve the difficult problems of energy storage and autonomous flight. Companies want to use drones to revolutionize the way they deliver goods to offices and homes. Journalists want to use drones to cover breaking news, or to access spaces denied to them by local officials. Activists want to use them to hold police accountable during a protest. Police have used them to locate a missing child.

While we could require today's pioneers to run every use by every property owner in town, there are several reasons why that is a bad idea.

First, it would be terribly inefficient. Even with innovative tools like AirMap, which provides an easy way for drone operators to determine if a particular airspace is legally navigable, few have the time or resources to secure every property owner's permission. Functionally, an opt-in system amounts to a permanent ban, foreclosing any young entrepreneur's plans to do something innovative and useful with a drone.

Second, there will be holdouts. No doubt there are property holders with sincere objections to drone delivery. But not all holdouts would be sympathetic ones. Why would an energy, pharmaceutical or agricultural company permit an activist or journalist to fly over its property in search of abuses?

Those who believe property owners have a right to prevent drone overflights often cite concerns about privacy and safety. I agree that privacy is a crucial issue when it comes to drones—and as I've testified before the U.S. Senate, we need to do more to ensure that privacy laws keep up with the technology. No one expects you to suffer a drone hovering over your backyard watching you sunbathe or waking you up at 3 a.m. on its way to deliver a six-pack to a graduate student. And if a drone damages your property or injures your person, there ought to be—and already is—legal recourse.

Indeed, government and industry already are starting to work through some of these issues. Companies such as Amazon.com Inc. and Google (a unit of Alphabet Inc.) are working with the National Aeronautics and Space Administration to create an air-traffic-control system for drones; they also have to demonstrate to the FAA that their technology is safe.

We can and should set sensible requirements and terms for drone use, with input from all stakeholders. We should be cognizant of the trade-offs.

But what makes sense is for us to act collectively. To leave the future of drones to individual homeowners is inefficient and unwise. "Keep off my lawn" is no way to manage what we may soon come to see as an integral component of our delivery infrastructure.

Sometimes the answer is the statute or the regulation, not the lawsuit or the shotgun.

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