LOS ANGELES
Daily Journal
www.dailyjournal.com

THURSDAY, OCTOBER 15, 2015

PERSPECTIVE

Paparazzi lose, hobbyists win on drones

By Scott C. Hall

Last week, Gov. Jerry Brown signed into law Assembly Bill 856, which amends Civil Code Section 1708.8 to define a "physical invasion of privacy" as including knowingly entering "into the airspace above the land" of another person without permission in order to capture images, sounds, or other physical impressions of private activity. The law targets the increasingly aggressive efforts of paparazzi and other "peeping toms" in using drones to capture images of private conduct.

AB 856 passed unanimously and has been widely applauded, not only by celebrities, but by many others who value privacy and harbor reservations about the rapidly expanding uses of drones. The new law, however, was only one of five drone-specific bills to reach the governor's desk in recent weeks. The four other bills were vetoed by Brown, despite strong bipartisan support.

Less than a week earlier, the governor considered Senate Bills 168, 170 and 271. All three, like AB 856, passed with unanimous votes in the Legislature, but unlike AB 856, were met with a veto. According to Brown, he vetoed those bills because they sought to create "new crimes" that added complexity to California's voluminous criminal code "without commensurate benefit," given that much of the activity sought to be prohibited was already covered by other criminal provisions. His rejection of the bills comes as a disappointment to those who hoped the governor would embrace the opportunity to address some of the new and unique legal issues presented by the growing ranks of drones in California's skies.

SB 168, for example, would have made it unlawful (punishable by up to a $5,000 fine and/or 6 months imprisonment) to knowingly, intentionally or recklessly prevent or interfere with firefighters' efforts to control, contain or extinguish a fire. The bill also proposed to remove any liability of emergency responders for damage caused to private drones interfering with such operations. SB 168 was not aimed at merely hypothetical conduct. Just this past summer, drones interfering with firefighting efforts in the San Bernardino National Forest made national news when their presence in the skies above the forest fires temporarily grounded aerial firefighting efforts, resulting in damage and destruction that might have been avoided.

SB 170 sought to make it unlawful to knowingly or intentionally operate a drone above the grounds of a state prison or jail. This, again, was not aimed at purely imagined public safety concerns. In July, a drone dropped a package of illegal drugs into the prison yard of the Mansfield Correctional Institution in Ohio. A few weeks later, police intercepted another drone attempting to deliver drugs, tobacco and pornography to a prison in Maryland.

Drones flying over prison yards could be used for many purposes beyond delivering contraband. They might capture detailed images that could assist inmates with escape plans or jeopardize prison security. Or they could carry weapons, bombs or other dangerous materials that could incite fights or riots.

New York Times

Americans increasingly are using unmanned aircraft for all sorts of purposes, personal and commercial.

SB 271 would have made it illegal to knowingly or intentionally operate a drone less than 350 feet above a public school (kindergarten through grade 12), and/or to capture images of public school grounds from a drone, while school is in session and without permission of the principal or other higher authority. This bill sought to promote safety and privacy of children from potential harassment, stalking, kidnapping or other harm that might result from the improper use of image-capturing drones above public schools. SB 271 specifically excepted from its coverage news agencies, journalists and television or media networks engaged in the gathering and provision of information to the public, as well as law enforcement personnel and other drones authorized by the Federal Aviation Administration.

Brown also vetoed SB 142 in September, which proposed to make it an actionable trespass to operate a drone less than 350 feet above private property without the consent of the property owner. Unlike AB 856, which targeted deliberate invasions of privacy, SB 142 would have subjected even unintentional drone trespasses over private property to civil liability. Brown commented that, "while well-intentioned, [SB 142] could expose the occasional hobbyist and the FAA-approved commercial user alike to burdensome litigation and new causes of action."

The governor appears to be suggesting that, while he wants to promote privacy, he does not want to inhibit innovation. Many hobbyists strongly opposed SB 142 and other legislation they said might subject them to liability for inadvertent violations. But while SB 142 may have gone too far, the same cannot necessarily be said of SB 168, 170 and 271, which were narrowly tailored to restrict intentional drone use over specific and limited areas.

Moreover, Brown's justification for vetoing those bills could also apply to AB 856, given that the capturing of images or sounds from drones arguably already qualified as a "constructive" invasion of privacy under Section 1708.8(b). Under current law, a constructive invasion of privacy occurs where a person attempts to capture visual images, sound recordings, or other physical impressions of private activity "through the use of any device, regardless of whether there is a physical trespass," if this image, recording or other impression could not otherwise have been obtained. A drone would presumably constitute such a "device."

For the same reasons that a more specific prohibition on drone use was warranted to address paparazzi, new laws with specific provisions addressing the novel problems presented by other uses may also be appropriate. They should not be dismissed on the basis that "more laws are bad." Given the lack of a comprehensive federal regulatory regime, state and local governments must be the ones to step up to create a coherent legal framework for drone use.

Given the FAA's lack of jurisdiction over hobby drones, it is the hobbyists that may pose the most difficult challenges to state and local governments. Commercial drone use is already heavily regulated by the FAA, which requires either an airworthiness certificate or a Section 333 exemption for any non-recreational drone operation. The FAA's proposed rules for small drones, which should go into effect in 2016, are expected to provide a more relaxed and standardized framework for commercial drone use, but are still likely to place significant restrictions on use, including that commercial drones must be flown only during daytime hours, must maintain visual line of sight with the operator, and must be flown by an FAA-certified operator, among other rules.

Hobby drone users are not subject to all of these same restrictions, as they are specifically exempted from FAA regulations as long as their drone meets the definition of a "model aircraft." Moreover, even the proposed rules on commercial drone use lack the specificity that may ultimately be needed to properly control and regulate the predicted increase in drone use across the country.

Industry experts estimate that hobby drone sales in 2015 could exceed 700,000 drones. With such expansion, and the arguably limitless future potential applications for drones, additional laws specifically targeting drones are unavoidable. Thus, while hobby drone users may have avoided further regulation for the moment, drone-specific legislation is certain to return to the governor's desk. Rather than avoid the subject, Brown and legislators should work together to create a workable legal framework to deal with this challenging but exciting new frontier.

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