Airspace Ownership Controversies in the United States: A Concise History

Trevor Simoneau
Department of Aeronautical Science, Embry-Riddle Aeronautical University

EMBRY-RIDDLE Aeronautical University

Abstract

Ownership and control of airspace has long been a controversial, confusing, and difficult area of study within aviation law. Throughout the twentieth century, there was copious debate about the rights of property owners and the authority of aviation regulatory agencies to govern airspace. The invention of the airplane and a burgeoning concern about aerial trespass vigorously fueled that debate. Today, airspace ownership questions center primarily on debates over low-altitude airspace and subsequent legal remedies available for improper use, illegal entrance, or unwanted occupation of that airspace. This project examines the history of airspace ownership controversies in the United States through an analysis of legal cases, scholarly debate, journal articles, and primary sources. The purpose of this project is to assist aviation scholarly and industry personnel in forming a better understanding of the historic and contemporary debates that have surrounded the question of airspace rights.

The Ancient Doctrine & Early Cases

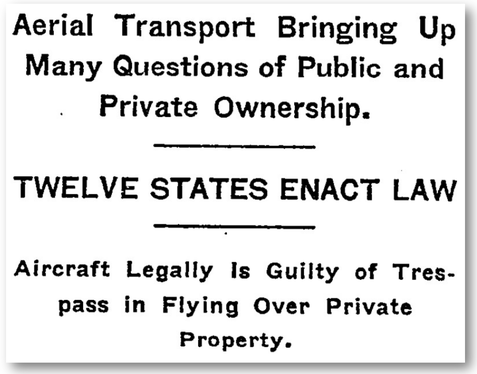
"Cujus est solum eius est usque ad coelum et ad inferos"

Or in other words:

"He who owns the soil owns everything above and below, from heaven to hell"

(Rhyne, 1944, p. 94).

- The *ad coelum* doctrine was integrated to English and American common law throughout the 17th, 18th, and 19th centuries (Banner, 2008; Rule, 2012).
- If applied in the literal sense, an aircraft intruding into a private landowner's airspace would be a trespass (Cummings, 1953).
- A series of lawsuits commenced. Some courts found that aircraft *were* trespassing, others found aircraft were *not* trespassing.



Aerial Transport Bringing Up Many Questions of Public and Private Ownership.

TWELVE STATES ENACT LAW

Aircraft Legally Is Guilty of Trespass in Flying Over Private Property.

(*New York Times*, 1929)

The Supreme Court's Opinion

- In *United States v. Causby* (1946), the U.S. Supreme Court addressed the issue of airspace ownership in a Fifth Amendment case involving low-flying military aircraft over a chicken farm.
- The Court struck down the *ad coelum* doctrine declaring it had "no place in the modern world" (*U.S. v. Causby*, 1946, p. 261).
- Simply put, the Court found a landowner "must have exclusive control of the immediate reaches of the enveloping atmosphere" and that "[f]lights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." (*U.S. v. Causby*, 1946, p. 264; 266).
- The *Causby* opinion left many questions unanswered, and its various ambiguities have been the subject of much debate.

CHICKENS UPHELD IN PLANE DECISION

(*New York Times*, 1946)

Contemporary Controversies

- Today, there remains fiery debate about low-altitude airspace ownership. In particular, the advent of drones and eVTOLs (or flying cars) is fueling that debate. A preponderance of recent academic literature supports this notion and perspectives diverge on the issue.
- Congress has also caught wind of the low-altitude airspace issue. Even still, it remains unclear whether legislation will be enacted to direct the FAA to clarify various airspace definitions.

(Microsoft Stock Image)

References

Banner, S. (2008). *Who owns the sky? The struggle to control airspace from the Wright Brothers on*. Harvard University Press.

Cummings, J. J. (1953). Ownership and control of airspace. *Marquette Law Review 37*(2), 176-184.

Rhyne, C. S. (1944). *Airports and the courts*. National Institute of Municipal Law Officers.

Rule, T. A. (2012). Airspace and the takings clause. *Washington University Law Review 90*, 421-472.

United States v. Causby et ux., 328 U.S. 256 (1946).