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**Submitted on Behalf of the
News Media Coalition Consisting Of:**

Advance Publications, Inc.
American Broadcasting Companies, Inc.
American Society of Media Photographers
The Associated Press
Capitol Broadcasting Co.
Fusion Media Network, LLC
Gannett Co., Inc.
GateHouse Media, LLC
Getty Images (US), Inc.
Gray Television, Inc.
Media Law Resource Center
MPA - The Association of Magazine Media
National Press Photographers Association
NBCUniversal Media, LLC
News Media Alliance
Nexstar Media Group, Inc.
The New York Times Company
Radio Television Digital News Association
Reporters Committee for Freedom of the Press
The E.W. Scripps Company
Sinclair Broadcast Group, Inc.
Society of Professional Journalists
TEGNA, Inc.
WP Company LLC

October 1, 2018

Via Email and FedEx

Ms. Anita Ramasastry
c/o Uniform Law Commission
111 N. Wabash Avenue, Suite 1010
Chicago, IL 60602

Re: Uniform Law Commission Tort Law Relating to Drones
Comment of News Media Coalition

Ms. Anita Ramasastry
October 1, 2018
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Dear Ms. Ramasastry:

The News Media Coalition, consisting of news media organizations with significant interest in the development of drone law and policy in the United States, submits this Comment on behalf of the news executives, journalists, viewers, readers and social media users with respect to the proposed uniform “Tort Law Relating to Drones Act”, dated June 19, 2018 (the “draft Uniform Act”).

We are concerned that, if adopted by the National Conference of Commissioners on Uniform State Laws, the draft Uniform Act would contradict generations of settled court rulings on privacy law, would be applied in contravention to the First Amendment to the U.S. Constitution, and would sow confusion in the community of journalists who are lawfully and safely using new aerial technologies for the public good. We set forth the bases for these concerns more specifically below.

The News Media Coalition Promotes Safe Drone Use in the Public Interest

The News Media Coalition includes:

- The nation’s leading television and cable networks;
- The leading national newspapers;
- More than 479 television stations serving local U.S markets;
- More than 545 regional and local U.S. newspapers;
- More than 35 U.S. radio stations;
- 20 print and digital magazines;
- More than 570 local market websites;
- Content providers for hundreds of online and mobile platforms and devices;
- The leading wire services in the U.S. and abroad;
- The largest stock film and photo agencies worldwide;
- The leading professional association of visual journalists;
- The country’s premier trade association representing commercial television and radio broadcasters;
- A nonprofit organization representing the interests of online, mobile and print news publishers in the United States and Canada and focusing on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern;
- The country’s premier trade association representing independent photographers;
- The leading membership association for content providers in all media, supported by over 115 media members and 200 law firms worldwide;

- A Washington D.C.-based nonprofit that, for more than 40 years, has provided free legal resources, support and advocacy to protect the First Amendment and freedom of information rights of journalists.

Representing a wide cross-section of the news professionals who provide Americans each day with the news they need, the companies in the News Media Coalition compete in many different markets. But they and the journalism nonprofit organizations in the coalition have come together for this Comment, as with other efforts during the past several years concerning the regulation of small unmanned aircraft systems (“UAS”)—or “drones”—in the unified belief that preserving the right to gather news, from the ground or from the air, is not a competitive issue.

For the past several years, the News Media Coalition has worked cooperatively with the federal government toward development of statutes, regulations, industry training, and professional best practices for the safe gathering of news by UAS, while at the same time strongly encouraging the maintenance of the existing legal framework for privacy protection, especially as it concerns the ability to gather news and information for the public benefit. As part of those efforts, the News Media Coalition actively participated in the rulemaking process that led to the June 2016 implementation of 14 C.F.R. part 107 (which authorizes the Federal Aviation Administration to certify drone operators), as well as the National Telecommunications and Information Administration multi-stakeholder process on drones and privacy, which culminated in May 2016 in a set of sensible, voluntary “best practices.”

For the reasons outlined below, the News Media Coalition firmly believes that the current statutory and regulatory environment allows for safe UAS newsgathering that furthers the First Amendment interest of the public in the timely receipt of information of public concern and the First Amendment rights of journalists to gather and disseminate news, while protecting the safety and privacy interests of individuals.

Strict Liability Standard in Proposed Draft Uniform Act Does Not Balance Public and Private Interests

The draft Uniform Act proposed by Commissioners is problematic as it would impose strict liability for drone flights over private property and reject the current “aerial trespass” doctrine. As Commissioners are aware, the aerial trespass doctrine requires a plaintiff to show the defendant intruded into the “immediate reaches,” and “substantially interfered” with their use and enjoyment, of the property. The draft Uniform Act would instead impose a “bright line” strict liability rule that, Commissioners believe, would better protect both private property rights and the interests of drone operators.

The News Media Coalition, however, believes that the existing aerial trespass standard appropriately balances the interests. The existing standard permits courts to take into account, on the one hand, the public interest in drone integration into the national airspace as well as

the First Amendment interests of journalists and the public, and, on the other hand, the rights of private property owners to use and enjoy their property. A “bright line” strict-liability rule in this context would not substantially lessen litigation, or better protect the safety and privacy of property owners. Indeed, the likely substantial impact of this rule would be to hinder drone integration into the national airspace, which would conflict with federal policy and chill technological innovation and journalists’ First Amendment right to report the news.

Emerging News Use of Drones Already Provides Substantial Public Benefit

The draft Uniform Act fails to acknowledge or account for the substantial benefits of commercial and private unmanned aircraft systems to the United States economy in general, and newsgathering in particular. Technology has moved forward rapidly in recent years, and drones quickly are becoming powerful commercial tools that provide enormous benefits in terms of safety and efficiency and the public interest. Whether UAS are performing search and rescue missions, gathering news and enhancing the public’s access to information, allowing farmers to be more efficient and environmentally friendly, inspecting power lines and cell towers, performing aerial photography to real estate and insurance service providers, surveying and mapping areas for public policy, delivering medicine to rural locations, providing wireless internet, enhancing construction site safety, or more—society is only just beginning to realize the full potential of UAS.

Just last month, after Hurricane Florence struck North Carolina, drones again proved themselves an essential tool for news coverage of widespread natural disasters by allowing journalists access and perspectives that previously would have been prohibitively expensive or simply unavailable.¹ Earlier this year, drone journalists helped keep the public informed and safe during the volcanic eruption of Kilauea in Hawaii and the wildfires in California.²

¹ Adam L. Neal, TCPalm, *Florida Today Drone Journalists Helping USA Today Network Cover Hurricane Florence*, TCPalm, September 11, 2018 (available at <https://www.tcpalm.com/story/opinion/columnists/2018/09/11/local-drone-journalists-help-cover-hurricane-florence-impact/1265416002/>); Bob Gabordi, *How We Covered Killer Hurricane Florence and Other Big Storms that Threatened the Public*, FLORIDA TODAY, September 17, 2018 (<https://www.floridatoday.com/story/opinion/columnists/bob-gabordi/2018/09/17/hurricane-florence-north-carolina-rescue/1333040002/>); *Hurricane Florence: Special Live Coverage Overnight Friday on Fox News Channel*, Fox News Insider, September 13, 2018 (available at <http://insider.foxnews.com/2018/09/13/hurricane-florence-live-coverage-all-night-and-morning-fox-news-channel>).

² See Meghan Miner Murray, Sabrina Tavernise, and Maya Salam, *Kilauea Volcano Erupts, Spewing Lava and Gases Near Homes in Hawaii*, May 5, 2018, at A14, available at <https://www.nytimes.com/2018/05/04/us/kilauea-volcano-eruption-hawaii.html>; Associated Press, *Beautiful Fury of Nature Revealed as Kilauea Lava Lake Continues to Erupt and Produces Biggest Overflow in 10 years*, The Daily Mail.com, April 25, 2018, available at <https://www.dailymail.co.uk/video/news/video-1613070/Video-Amazing-drone-footage-lava-oozing-Kilauea-Volcano.html>; Editors, *Drone Aerials Show California Wildfire Devastation from Above*, USA

Public agencies throughout the United States have come to rely on news organizations as part of the emergency response system, enlisting the help of journalists to provide vital, timely information to help ensure public safety in times of crises.³ No doubt, in the years to come, journalists will devise new innovations for the use of drones in impactful news reporting that will further save lives and money, and continue to serve the public interest in new technologies.

The Draft Uniform Act Conflicts with Federal Law

The federal government has made the development of UAS technology a public policy imperative: in 2012, Congress and the President directed the FAA to “develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system.” FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 332, 126 Stat. 11, 73 (2012). Pursuant to this directive, in 2016 the FAA promulgated 14 C.F.R. part 107, which regulates “the registration, airman certification, and operation of civil small unmanned aircraft systems within the United States.” While the rule recognizes that certain aspects of drone use may best be addressed at the state or local level, at least one federal court has found that an attempt by a local municipality to establish “no-fly” zones was preempted by Part 107. *See Singer v. City of Newton*, No. 17-10071, 2017 WL 4176477, at *5-6 (D. Mass. September 21, 2017)

The draft Uniform Act conflicts with both federal law and policy. The new “aerial trespass” doctrine that the Act contemplates would effectively encourage states to erect “no-fly” zones over any private property in the country. Under Part 107, UAS operation is allowed below 400 feet, in Class G airspace. *See* §107.41. Pursuant to the draft Uniform Act, states would restrict UAS operation to a corridor between 200 and 400 feet above private property. This therefore would restrict airspace under the regulatory control of the federal government. In much the same way the City of Newton’s regulation conflicted with federal law, the draft Uniform Act would likewise invade the province of federal regulation.

Moreover, the enactment of an entirely new area of tort liability would conflict with the federal government’s unequivocal pronouncement of federal policy in the FAA Modernization and Reform Act of 2012. Rather than encourage the integration of drone technologies into the national airspace, the added liability contemplated by the draft Uniform Act will surely chill the interests of industry, including the First Amendment interests of

TODAY, August 3, 2018, available at <https://www.usatoday.com/in-depth/news/nation-now/2018/08/02/drone-aerials-california-wildfire-devastation/889885002/>.

³ *See* Bailey Schulz, *Drones Increasingly Being Used For Public Safety*, Las Vegas Review - Journal, September 5, 2018; Sharon Kennedy Wynne, *Despite Regulations, Drones Flying High*, Tampa Bay Times, December 24, 2016, pg. 1.

journalists and the public, in expanding investment and innovation to meet the federal policy mandate.

**The Draft Uniform Act Relies on Outdated Doctrine and
Does Not Account for the First Amendment Interests in Newsgathering**

In addition to interfering with federal law, the justifications offered for the draft Uniform Act unnecessarily infringe on the First Amendment rights of journalists to gather, and of the public to receive, news and information in the public interest.⁴

In contrast to the Congress's forward-looking call for technological innovation, the prefatory note in the draft Uniform Act advocates for a return to rigid 19th century conceptions of trespass law. The rule completely ignores the benefits – discussed above – that increased integration of UAS into the national airspace will continue to provide, and the flexible applications of existing statutory law that courts have developed to adapt to each new generation of technology. Rather than a new code relying on outdated doctrine, the News Media Coalition would advocate for the continued application of existing laws by courts already used to balancing the public and private interests.

Indeed, the reaction of some to advances in drone technologies are remarkably similar to the public hysteria in 1888, when similar concerns were expressed regarding the introduction of the Kodak Brownie camera. This camera allowed, for the first time, anyone to take photographs in public places, as opposed to the controlled seclusion of photography studio. The sudden appearance and widespread use of the Brownie, however, caused the public to react with fear – many places posted signs banning the use of cameras, and newspapers ran stories about the dangers of public photography.⁵ Despite the hysteria surrounding this technological innovation, rather than prohibit the use of cameras outright, over the past century and a half tort law developed to accommodate the legitimate interests in privacy and the public interest in a free and open society.⁶ Additionally, states have developed codes to specifically

⁴ Article 3, Section 301 of the draft Act provides that the act “shall not apply to conduct protected by the First Amendment.” While this may offer an affirmative defense for journalists, the act as written would still serve to chill free speech. *See e.g. Laird v. Tatum*, 408 U.S. 1, 11 (1972) (the Supreme Court has held “that constitutional violations may arise from the deterrent, or ‘chilling,’ effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.”). As discussed in further detail below, adopting a “bright line” trespass rule, in the context of drone flight, will inevitably lead to a proliferation of litigation, including actions against drone journalists.

⁵ “The Kodak Camera Starts a Craze,” *The Wizard of Photography*, WNED <http://www.pbs.org/wgbh/amex/eastman/peoplevents/pande13.html>

⁶ *See Shulman v. Group W. Productions, Inc.*, 955 P.2d 469 (Cal. 1998) (filming accident victim at scene of accident was not intrusion of victim's seclusion, but victim would have reasonable expectation of privacy in rescue helicopter); *Eick v. Perk Dog Food Co.* 347 Ill. App. 293, 299 (Ill. App. 1952) (the right to privacy is a limited one in areas of legitimate public interest); *Tagouma v. Investigative Consultant Servs., Inc.*,

proscribe unlawful surveillance through use camera technologies in private spaces.⁷ Courts have had no trouble adapting both the common law and state codes to each wave of new technology. The News Media Coalition therefore firmly believes that a new tort doctrine specifically applicable to drones, such as the draft Uniform Act, is entirely unnecessary.

The draft Uniform Act also fails to meaningfully account for journalists' First Amendment right to gather news. In addition to punishing drone flights above private property without consent of the property owner, the draft Uniform Act would risk the rigid imposition of liability on journalists who gather the news on any adjacent property, public or private. We need look no further back than the recent, important drone coverage by journalists of the widespread flooding in North and South Carolina following Hurricane Florence, and the devastation in Puerto Rico following Hurricane Maria, to understand the importance of drone journalism and the unintended consequences that the draft Uniform Act would have on such journalism. The draft Uniform Act, had it been the law in those jurisdictions, would have exposed the journalists operating the drones, and the companies that employ them, to untold liability for drone operations adjacent to private property ravaged by natural disasters like these.

The "Bright Line" Rule Proposed will Proliferate, not Diminish, Litigation

Contrary to the position taken in the prefatory note, the draft Uniform Act will not reduce the necessity of fact-specific inquires in cases of alleged UAS trespass. Under the current formulation of the aerial trespass doctrine, a plaintiff must show that the aircraft in question entered the "immediate reaches" of air space next to the plaintiff's land and the aircraft "interfer[ed] substantially" with the plaintiff's use and enjoyment of the land. The prefatory note argues that the "immediate reaches" of the land should be extended to 200 feet. This is a completely arbitrary figure.

2010 PA Super 147, 4 A.3d 170, 174 (Pa. Super. 2010) ("there is no liability 'for observing [] or even taking [a] photograph while [a person] is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye."); *Martin v. Dorton*, 210 Miss. 668, 669, 50 So. 2d 391, 391 (Miss. 1951) (public officer cannot complain that his privacy has been invaded when his photograph is taken for publication in connection with a legitimate news story); *c.f. Souder v. Pendleton Detectives*, 88 So. 2d 716 (La. App. 1956) (using camera with telescopic lens to photograph bedroom from neighboring house).

⁷ See *e.g.* Cal Pen Code § 647(i) ("Who, while loitering, prowling, or wandering upon the private property of another, at any time, peeks in the door or window of any inhabited building or structure, without visible or lawful business with the owner or occupant" is guilty of a misdemeanor); 11 De. Code Ann. § 1335 ("A person is guilty of violation of privacy when he (1) trespasses on private property intending to subject anyone to eavesdropping or other surveillance"); TCA § 39-13-605 ("It is illegal to knowingly and without consent photograph another person or cause him to be photographed in a place where there is a reasonable expectation of privacy if the photograph (1) would offend or embarrass an ordinary person if such person appeared in the photo and (2) was taken to sexually arouse or gratify another.")

But even if states were to impose such a “bright line” restriction (in derogation to federal law), this would not reduce the need for fact finding or substantially reduce the prevalence of litigation. Any plaintiff seeking to bring a case would need to establish that a UAS crossed into the airspace over her property, at an altitude below 200 feet. Evaluating the precise height or lateral position of a moving drone, while standing on the ground, is extremely difficult. Nevertheless, because the position of such a drone would be difficult to establish – but quite easy to plead – a bright line rule would make asserting such claims far easier and therefore facilitate nuisance suits. This would overburden the courts and the inevitable proliferation of drone litigation against the news media would chill journalists’ First Amendment rights.

* * *

Ultimately, the current aerial trespass doctrine, in conjunction with existing privacy tort law and industry-developed best practices,⁸ provides an adequate legal framework to satisfy any legitimate privacy or safety concerns, while at the same time fostering innovation, protecting the media’s First Amendment right to gather news, and furthering the federal

⁸ At a minimum, any new drone privacy law should exempt news media operations. Indeed, the federal government included a carve-out for newsgatherers in an industry best practices document. The National Telecommunications and Information Administration (NTIA), a component of the U.S. Department of Commerce, in May 2016 concluded the multi-stakeholder process, convened at the direction of a Presidential Memorandum “to develop and communicate best practices for privacy, accountability, and transparency issues regarding commercial and private UAS use in” the national airspace. The News Media Coalition participated in that process, which resulted in an NTIA consensus document, “The National Voluntary Best Practices for UAS Privacy, Transparency, and Accountability”. See https://www.ntia.doc.gov/files/ntia/publications/uas_privacy_best_practices_6-21-16.pdf. These voluntary best practices contain the following carve-out in recognition of the First Amendment activities of journalists:

Best Practices for Newsgatherers and News Reporting Organizations

Newsgathering and news reporting are strongly protected by United States law, including the First Amendment to the Constitution. The public relies on an independent press to gather and report the news and ensure an informed public.

For this reason, these Best Practices do not apply to newsgatherers and news reporting organizations. Newsgatherers and news reporting organizations may use UAS in the same manner as any other comparable technology to capture, store, retain and use data or images in public spaces. Newsgatherers and news reporting organizations should operate under the ethics rules and standards of their organization, and according to existing federal and state laws.

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mandate to promote the safe integration of UAS into the national airspace. While we are certain it is well-intended, the draft Uniform Act, in our view, is entirely unnecessary.

The members of the News Media Coalition respectfully request that the Committee and the Commission consider our comments, reconsider the draft Uniform Act, and decline to adopt it. Our members appreciate your attention to their concerns, and we look forward to working with you on this issue in the future.

Very truly yours,



Charles D. Tobin

CDT/rtw

cc: Holland & Knight LLP