

NetChoice *Promoting Convenience, Choice, and Commerce on The Net*

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

July 9, 2018

Dear Ms. Ramasastry,

While well intentioned, the document *Memo: Tort Law for Drones Act, First Reading* misses some key points on the current landscape of unmanned aviation as well as some of the pertinent Committee discussions.

This document clarifies and provides context for the Committee of the Whole on key aspects of the memo.

The memo fails to provide justification for the Act

Page 1 of the Memo:

The Tort Law for Drones Act is premised upon a conclusion that laws crafted specifically for manned aircraft do not adequately provide clarity or uniformity in an era in which drones already number in the millions and operate closer to the ground and closer to people than manned aircraft have traditionally operated.

Clarification:

Existing tort law, including the restatement which specifically addresses aircrafts, already addresses tortious use of drones. Consider existing battery, intrusion upon seclusion, and trespass torts. For example:

Flight by an aircraft in the air space above the land of another is a trespass if, but only if,

- (a) it enters into the immediate reaches of the air space next to the land, and
- (b) it interferes substantially with the other's use and enjoyment of his land.

Restatement (Second) of Torts § 159(2) (emphasis added).

Abandoning the Restatement in favor of strict liability standard will create a surge in otherwise unwarranted litigation

Page 5 of the Memo:

Requiring proof of both invasion of the "immediate reaches" and substantial interference in the context of unmanned aircraft would result in the inability of

landowners to exclude most unmanned aircraft flights from even very low altitudes adjacent to land and buildings.

Clarification:

The draft Act's movement to strict liability will create more litigation as neighbors no longer need to show actual harm or malicious intent for a civil action.

Moreover, the Restatement (Second) of Torts § 159(2)'s (above) existing tort law requires a finding of harm. This harm standard is carried forward into the *US v Causby* (*U.S. v. Causby*, 328 U.S. 256, 264 (1946)) decision on which much of the draft Act is based.

The draft Act is based on *US v Causby* but ignores the facts of the case and the conclusion of the court.

Page 1 of the Memo:

In 1946, the Supreme Court stated in U.S. v. Causby, "We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere... The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land." (U.S. v. Causby, 328 U.S. 256, 264 (1946))

Clarification:

Causby is a poor foundation for this act.

Causby was about constant flyovers by U.S. government-owned airplanes that harmed the plaintiff's livestock due to loud noise and vibration tens of feet above the property on approach to a military airport. Today's small electric-powered drones deviate from airplanes in the size, noise, and perniciousness on which the harm was found in *Causby*. Moreover, *Causby* was about government takings, not civil tort claims against a neighbor.

Of course, if the Committee wants to use *Causby* as the basis for the model then the model must, at a minimum, retain "substantial interference" as a standard rather than the current draft's "immediate reaches."

Height of 200ft is arbitrary, harmful to use and innovation of drones, and at-odds with aviation experts

Page 6 of the Memo:

After a thorough discussion the Committee decided that the altitude line should be set at 200 feet, not the 100 feet suggested in the original draft.

...

The decision was based upon future anticipated uses of unmanned aircraft, the volume of unmanned aircraft expected to operate over private property in the future, existing FAA regulations, an executive order, pending legislation, equitable division of the low

altitude airspace between landowners/lessees and unmanned aircraft operators, and some existing state legislation.

Clarification:

This memo's description of 200ft makes it seem as though the Committee was magnanimous in increasing the floor on drones. In reality, the decision was arbitrary, with one Commissioner becoming frustrated with the length of discussion and saying, let's just take 400ft and divide by 2.

This decision of 200ft was opposed by nearly every observer in the room as it would ground drones and actually make them interfere more with quiet-enjoyment of adjacent land. Aviation experts pointed out that a 200ft threshold would increase the dangers of drone operations by increasing the impact force in the event of a failing drone as well as increase potential risk of collision with passenger aircraft and helicopters.

Tortious Acquisition of Images (Section 302 of draft Act) is strict liability, not intentional

Page 7 of the Memo:

Section 302 protects against intentional non-trespassory privacy invasions from adjacent airspace (for example an observation into a private area from airspace above a public street or above neighboring private property) and trespassory privacy invasions.

Clarification:

This section lacks any significant mens rea such as intent to cause harm or intent to trespass. This draft act instead creates a strict liability on an operator and then allows for limited rebuttable presumptions. This is likely to result in a Constitutionality first-amendment challenge as well as grounding drones used for filmmaking and news purposes.

Moreover, the draft act again represents a significant deviation from existing tort law governing intrusion upon seclusion and misappropriation of images (see Restatement (Second) of Torts § 652 (emphasis added), "One who *intentionally* intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.").

Sincerely,



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