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FOR DISCUSSION ONLY

## **TORT LAW RELATING TO DRONES ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SEVENTH YEAR  
LOUISVILLE, KENTUCKY  
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## **TORT LAW RELATING TO DRONES ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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June 19, 2018

## **TORT LAW RELATING TO DRONES ACT**

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1 **TORT LAW RELATING TO DRONES ACT**

2 **PREFATORY NOTE**

3 **I. Background regarding why a change from existing law is needed**

4  
5 In *U.S. v. Causby* the Supreme Court stated:

6  
7 We have said that the airspace is a public highway. Yet it is obvious that if  
8 the landowner is to have full enjoyment of the land, he must have  
9 exclusive control of the immediate reaches of the enveloping atmosphere.  
10 Otherwise buildings could not be erected, trees could not be planted, and  
11 even fences could not be run. The principle is recognized when the law  
12 gives a remedy in case overhanging structures are erected on adjoining  
13 land. The landowner owns at least as much of the space above the ground  
14 as the can occupy or use in connection with the land (*U.S. v. Causby*, 328  
15 U.S. 256, 264 (1946)).  
16

17 The Supreme Court established the principle that landowners must have control of the  
18 “immediate reaches” of the land, stating that “the flight of airplanes, which skim the surface but  
19 do not touch it, is as much an appropriation of the use of the land as a more conventional entry  
20 upon it.” (*Id.*)  
21

22 The Court further noted

23 “[w]hile the owner does not in any physical manner occupy that stratum of  
24 airspace or make use of it in the conventional sense, he does use it in  
25 somewhat the same sense that space left between buildings for the purpose  
26 of light and air is used. The superadjacent airspace at this low altitude is so  
27 close to the land that continuous invasions of it affect the use of the  
28 surface of the land itself. We think that the landowner, as an incident to his  
29 ownership, has a claim to it and that invasions of it are in the same  
30 category as invasions of the surface.” (*Id.* at 265)  
31

32 What the Court left largely unresolved was what constitutes the “immediate reaches” or  
33 “superadjacent airspace” where property rights exist, the opinion acknowledged as much, stating  
34 “The airspace, apart from the immediate reaches above the land, is part of the public domain. We  
35 need not determine at this time what those precise limits are.” (*Id.* at, 266). Subsequent courts  
36 have failed to set a clear line, which has historically not proven problematic in an era of manned  
37 aircraft operating at higher altitudes and in lower numbers than unmanned aircraft. However, the  
38 emergence of unmanned aircraft, which operate in greater numbers and much closer to the  
39 ground than manned aircraft, necessitates a reevaluation of these concepts.  
40

41 To understand the limits existing doctrine imposes, it is necessary to understand  
42 traditional trespass to land doctrine, and how special categories of devices in the air have been  
43 treated in tort. The evaluation demonstrates that existing law will fail to protect landowners and  
44 will fail to clearly define what conduct by drone operators is and is not acceptable.

1 **II. Traditional Trespass to Land Doctrine**

2  
3 According to the Restatement (Second) of Torts:

4  
5 “One is subject to liability to another for trespass, irrespective of whether  
6 he thereby causes harm to any legally protected interest of the other, if he  
7 intentionally

8 (a) enters land in the possession of the other, or causes a thing or a third  
9 person to do so, or

10 (b) remains on the land, or

11 (c) fails to remove from the land a thing which he is under a duty to

12 remove.” (Restatement (Second) of Torts § 158 (1965).  
13

14 Thus, trespass to land is actionable based upon entry, without regard to harm, and the  
15 plaintiff need not prove damages because the law infers some damage from the act of intrusion  
16 itself. (AMERICAN LAW OF TORTS § 23:34, “There is substantial authority for the proposition that  
17 from every direct invasion of the person or property of another, the law infers some damage  
18 without proof of actual injury.” citing *Longenecker v. Zimmerman*, 267 P.2d 543 (Kan. 1954);  
19 *Pearl v. Pic Walsh Freight Co.*, 168 N.E.2d 571 (1st Dist. Hamilton County 1960); *Hawkins v.*  
20 *Schroeter*, 212 S.W.2d 843 (Tex. Civ. App. San Antonio 1948) and further noting, “[i]n a trespass  
21 case, a jury verdict finding that there was a trespass but finding no damages, either nominal or  
22 compensatory, is invalid and incomplete so that the judgment based thereon must be considered a  
23 nullity. *Costerisan v. Tejon Ranch Co.*, 255 Cal. App. 2d 57 (5th Dist. 1967).  
24

25 Thus, in a trespass to land case, a plaintiff must only prove the intentional entry into land in  
26 another’s possession, or the intentional causing of a thing to so enter or remain. This is so  
27 because the right protected under a trespass cause of action is the plaintiff’s interest in the land  
28 itself and “the airspace above it.” (RESTATEMENT (SECOND) OF TORTS § 157 et seq. (1965) and  
29 RESTATEMENT (SECOND) § 158 cmt. i. *See also*, John L. Diamond, Lawrence C. Levine and  
30 Anita Bernstein, UNDERSTANDING TORTS 5th edition, Ch. 18.). While trespass to land is  
31 actionable without proof of damages, common experience reveals very few lawsuits for minimal  
32 intrusions like an accidental step upon a lawn, or the brief running of a child through a backyard.  
33

34 This Act creates a similar rule for aerial trespass (set forth in Section 301), referred to here as  
35 a *per se* rule. (*See* BLACK’S LAW DICTIONARY (10th ed. 2014), (Defining *per se* as “1. Of, in, or  
36 by itself; standing alone, without reference to additional facts. This phrase denotes that  
37 something is being considered alone, not with other collected things.”)). This Act follows as  
38 closely as possible the existing precedents which have traditionally governed trespass to land.  
39

40 **III. Kites, balloons, and projectiles**

41  
42 Trespass to land is not the only *per se* trespass rule in trespass torts, some devices that  
43 operate in the low altitude airspace are also subject to a *per se* rule like that advanced in Section  
44 301.  
45

1 Specifically, the Restatement (Second) of Torts notes in a comment that it is a trespass to  
2 “fire projectiles or to fly an advertising kite or balloon through the air above [another’s land],  
3 even though no harm is done to the land or the possessor’s enjoyment of it.” (RESTATEMENT  
4 (SECOND) § 158 cmt. i.). While logic would suggest that unmanned aircraft could fit into this *per*  
5 *se* rule for projectiles, kites, and balloons, a special rule for aircraft exists, specifically the aerial  
6 trespass doctrine.

#### 7 8 **IV. Aerial Trespass** 9

10 The aerial trespass doctrine was crafted before the advent of unmanned aircraft. The  
11 doctrine was created against the backdrop of laws and regulations that have traditionally ensured  
12 that most manned aircraft would fly at set distances from people and property. Given its legacy  
13 and historical development, the aerial trespass doctrine will likely prove inadequate to address  
14 trespass concerns especially as unmanned aircraft grow in popularity.

15  
16 Importantly, the backdrop of regulations designed to keep manned aircraft away from  
17 people and property does not exist for unmanned aircraft as FAA regulations specifically confine  
18 unmanned aircraft to airspace within 400 feet of the ground and structures.

19  
20 “Operating limitations for small unmanned aircraft... The altitude of the  
21 small unmanned aircraft cannot be higher than 400 feet above ground  
22 level, unless the small unmanned aircraft: (1) Is flown within a 400-foot  
23 radius of a structure; and (2) Does not fly higher than 400 feet above the  
24 structure's immediate uppermost limit.”. (14 CFR 107.519(b))

25  
26 The Restatement (Second) of Torts defines an aerial trespass as follows:

27  
28 “Flight by an aircraft in the air space above the land of another is a  
29 trespass if, but only if,  
30 (a) it enters into the immediate reaches of the air space next to the land,  
31 and  
32 (b) it interferes substantially with the other’s use and enjoyment of his  
33 land.” (RESTATEMENT (SECOND) OF TORTS § 159(2)).

34  
35 Notably, unlike the *per se* right of action in trespass to land and the rule for kites,  
36 balloons, and projectiles, aerial trespass as presently understood does not afford such an  
37 automatic exclusionary right against non-consensual entries. “This rule superimposes a  
38 requirement of actual harm, thus conflating the normal strict-liability rule of trespass with the  
39 rule of nuisance.” (A. Michael Froomkin & P. Zak Colangelo, *Self-Defense Against Robots and*  
40 *Drones*, 48 CONN. L. REV. 1, 28 (2015)).

41  
42 The existing aerial trespass doctrine, by conflating the rule of trespass with the rule of  
43 nuisance will likely lead to many low altitude drone flights that are not excludable and not  
44 actionable. As Professor A. Michael Froomkin and P. Zak Colangelo note:  
45

1 By importing requirements from a nuisance claim, this departure from the  
2 trespass rule effectively swallows the aerial trespass action. The courts'  
3 detour into aerial nuisance may be based on a misreading of the U.S.  
4 Supreme Court's decision in *United States v. Causby*, 328 U.S. 256, 258,  
5 264, 266-67 (1946) (holding that “frequent and regular flights of army and  
6 navy aircraft over respondents' land at low altitudes” below those “within  
7 the navigable airspace which Congress placed within the public domain”  
8 sufficiently diminished value of property to allow Takings claim under the  
9 Fifth Amendment).

10  
11 Courts have read *Causby* to require actual interference with the owner's  
12 use or enjoyment of her land for the overflight to be an actionable trespass.  
13 See, e.g., *Pueblo of Sandia ex rel. Chaves v. Smith*, 497 F.2d 1043, 1045-  
14 46 (10th Cir. 1974) (affirming grant of summary judgment in favor of  
15 defendant where plaintiff in trespass action failed to allege interference  
16 with actual use); see also RESTATEMENT (SECOND) OF TORTS § 159 cmt. k  
17 (1965) (noting that federal cases have read *Causby* this way in the trespass  
18 context).

19  
20 This reading seems anomalous: in *Causby*, the Supreme Court held that  
21 for there to be a taking under the Fifth Amendment—that is, for the  
22 government to have appropriated private property under circumstances  
23 which require payment of just compensation—there must be substantial  
24 interference with the owner's use or enjoyment of their property. See  
25 *Causby*, 328 U.S. at 266 (“Flights over private land are not a taking,  
26 unless they are so low and so frequent as to be a direct and immediate  
27 interference with the enjoyment and use of the land.”).

28  
29 There is no obvious reason why the interference requirement should be as  
30 strict in a trespass claim. If aerial trespass genuinely is to be treated like  
31 terrestrial trespass, then all that should be required is entrance into that  
32 part of the airspace that remains fully private. *Causby* expressly holds that  
33 a landowner's nonuse of airspace does not affect ownership... Properly  
34 understood, then, *Causby* makes actual interference with use relevant only  
35 as a matter of substantive constitutional Takings law, not as a matter of  
36 property law on ownership of airspace. (A. Michael Froomkin & P. Zak  
37 Colangelo, *Self-Defense Against Robots and Drones*, 48 CONN. L. REV. 1,  
38 69 (2015)(emphasis added)).

39  
40 In an era of drones, maintaining the existing aerial trespass doctrine will likely result in a  
41 substantial increase in litigation as “[c]ourts applying this rule cannot simply focus on  
42 determining whether the defendant truly and intentionally flew an aircraft within some well-  
43 defined column of airspace. Instead, they must engage in costly, *ad hoc*, fact-specific inquiries  
44 into what constitutes the ‘immediate reaches’ of the airspace above the plaintiff's parcel and  
45 whether the defendant's flight ‘interfere[d]’ substantially with the plaintiff's ‘use and enjoyment’  
46 of its land.” (Troy A. Rule, *Airspace in an Age of Drones*, 95 B.U. L. REV. 155, 184 (2015)).

1           **A. Immediate reaches**  
2

3           Landowners and lessees likely do not physically occupy the airspace 200 feet above their  
4 land or structures, and it is presently unclear whether an intrusion into this area would be found  
5 to be an entry into the immediate reaches of the land owner’s airspace.  
6

7           “The Causby decision left several principal issues unresolved. One  
8 possible rule for the extent of airspace ownership over private property,  
9 directly stemming from the federal legislation, allocates to the landowner  
10 all airspace up to the lower limit of navigable airspace. However, while  
11 Douglas [writing in Causby] appears to rely on the federal statute, his  
12 definition of airspace ownership, encompassing the immediate reaches  
13 above the land, has no direct relationship with the federal navigable  
14 airspace defined by Congress. Under certain circumstances, navigable  
15 airspace and privately owned airspace could overlap... Causby never  
16 squarely identified the genesis of the plaintiffs' right to compensation. It  
17 was not clear whether the Court ordered compensation based on a trespass  
18 theory—because the overflights penetrated the Causbys' airspace—or  
19 based on a nuisance theory—because the flights substantially interfered  
20 with the Causbys' use and enjoyment of their land. (James Charles Smith,  
21 NEIGHBORING PROPERTY OWNERS § 5:3).  
22

23           Under existing aerial trespass doctrine, determining whether an aerial intrusion is an  
24 entry into the immediate reaches requires a fact-specific inquiry which has historically caused  
25 uncertainty and a lack of uniformity.  
26

27           For example, in Nevada, a court adopted a trespass approach awarding compensation  
28 merely because overflights penetrated the owner's airspace. (*Id.* citing, *McCarran Intern.*  
29 *Airport v. Sisolak*, 137 P.3d 1110 (Nev. 2006) (owner did not have to prove low and frequent  
30 overflights, or nuisance characteristics, because the airport ordinances authorized the permanent  
31 physical invasion of the landowner's airspace, below the elevation of 500 feet)). A Wisconsin  
32 case followed this interpretation of *Causby*, but added a requirement (for government actors) that  
33 flights be of “sufficient frequency to have a direct and immediate effect on the use and  
34 enjoyment of the property.” (*Id.*, Citing *Brenner v. New Richmond Regional Airport Com'n*, 816  
35 N.W.2d 291, 294 (Wisc.2012)).  
36

37           Even *Causby* itself is not clear. The Court on the facts of that case (adjudicating a takings  
38 claim) found that the flight of a government operated aircraft at an altitude of 83 feet interfered  
39 with the landowner’s property rights and the landowner was entitled to compensation. On those  
40 facts the court explained the importance of the immediate reaches concept and the property  
41 interest in the superadjacent airspace. The Court noted that intrusions into this area are “in the  
42 same category as invasions of the surface.” (*Causby*, at 265), citing Bouve, *Private Ownership*  
43 *of Navigable Airspace Under the Commerce Clause*, 21 A.B.A.J. 416, 421—422; Hise,  
44 *Ownership and Sovereignty of the Air*, 16 I.A.L.REV. 169; Eubank, *The Doctrine of the Airspace*  
45 *Zone of Effective Possession*, 12 B.U.L.REV. 414.). The court went on to state:  
46



1 “We would not doubt that, if the United States erected an elevated railway  
2 over respondents' land at the precise altitude where its planes now fly,  
3 there would be a partial taking, even though none of the supports of the  
4 structure rested on the land. The reason is that there would be an intrusion  
5 so immediate and direct as to subtract from the owner's full enjoyment of  
6 the property and to limit his exploitation of it. While the owner does not in  
7 any physical manner occupy that stratum of airspace or make use of it in  
8 the conventional sense, he does use it in somewhat the same sense that  
9 space left between buildings for the purpose of light and air is used. The  
10 superadjacent airspace at this low altitude is so close to the land that  
11 continuous invasions of it affect the use of the surface of the land itself.  
12 We think that the landowner, as an incident to his ownership, has a claim  
13 to it, and that invasions of it are in the same category as invasions of the  
14 surface.” (*Causby* at 264).

15  
16 The “low altitude” that was seen as akin to the surface by the *Causby* Court was an  
17 altitude of 83 feet. However, the *Causby* case did not end there because the Supreme Court  
18 remanded for further fact finding. Setting up the procedural history, the Court of Federal Claims  
19 wrote:

20  
21 “[w]e held that the United States had taken an easement of flight over plaintiffs'  
22 property, resulting in the destruction of some of plaintiffs' property and damage to  
23 the rest. We awarded judgment. The Supreme Court agreed there had been a  
24 taking but remanded the case for findings describing the precise nature of the  
25 easement taken...” (*Causby v. U.S.*, 75 F. Supp. 262, 263 (Ct. Cl. 1948) (internal  
26 citations omitted).

27  
28 The Court of Federal Claims found “the United States took an easement over plaintiffs'  
29 property...for the flight of its airplanes ... at an altitude varying from 83 feet above the surface of  
30 the land to an altitude of 365 feet.” (*Causby v. U.S.*, 75 F. Supp. 262, 263 (Ct. Cl. 1948) and the  
31 court decreed that the landowners were entitled to compensation for their loss of property and the  
32 decrease in rental value of their property.

33  
34 Thus, in *Causby*, the immediate reaches ranged from 83 feet to 365 feet. Other cases have  
35 come out differently, but most subsequent aerial trespass cases involving manned aircraft have  
36 relied on *Causby*.

### 37 38 **B. Substantial interference.**

39  
40 The aerial trespass doctrine does not end with a mere analysis of where the immediate  
41 reaches are. Another complication is that existing precedents from manned aviation, because, as  
42 Froomkin explains, states have incorrectly imported concepts from takings law and nuisance law,  
43 sometimes requiring substantial interference with one’s use and enjoyment of land.

44  
45 As noted above, the habit of state courts to conflate takings law with aerial trespass law  
46 has made aerial trespass claims more difficult to prove, and it has done so in a way that was

1 likely not intended by *Causby*. Specifically, the *Causby* Court noted with regard to invasions of  
2 airspace that substantiality was a factor for determining the question of whether there was a  
3 taking. (*Causby*, at 266 (1946). “It is the character of the invasion, not the amount of damage  
4 resulting from it, so long as the damage is substantial, that determines the question whether it is a  
5 taking.” citing *United States v. Cress*, 243 U.S. 316, 328).

6  
7 Irrespective of the origins of the possible misapplication of the *Causby* rule in instances  
8 of aerial trespass, continuing to apply it to unmanned aircraft makes little sense, is impractical,  
9 and will have unintended consequences. The doctrine as it presently exists looks for interference  
10 of a type that when applied to unmanned aircraft will likely not allow for a right of exclusion of  
11 unmanned aircraft at nearly any altitude.

12  
13 For example, Courts have found that noise alone is not an interference with use of land,  
14 overflight of uninhabited land is not an interference, and overflights of inhabited land when the  
15 land was not being used at the time of the overflight was not interference. (See, Hillary B.  
16 Farber, *Keep Out! The Efficacy of Trespass, Nuisance and Privacy Torts As Applied to Drones*,  
17 33 GA. ST. U. L. REV. 359, 409 (2017) citing *Smart v. City of Los Angeles*, 112 Cal. App. 3d 232,  
18 237 (1980) (finding that the noise of overhead aircraft did not interfere with plaintiffs use and  
19 enjoyment until he attempted to sell the land); *Drennen v. County of Ventura*, 38 Cal. App. 3d 84,  
20 87-88 (1974) (declining to find trespass where the plaintiff did not actually use the land during  
21 the time that aircraft was flying over the property); *Pueblo of Sandia ex rel. Chaves v. Smith*, 497  
22 F.2d 1043, 1046 (10th Cir. 1974) (holding no substantial interference took place because the  
23 plaintiff’s land was uninhabited and put to no use whatsoever)).

24  
25 These precedents were adopted in response to the specific facts and flight characteristics  
26 of manned aircraft. Applying these precedents to unmanned aircraft would raise entirely new  
27 questions regarding whether it will be acceptable for drones to surreptitiously fly at low altitudes  
28 in close proximity to homes so long as the unmanned aircraft is very quiet, or the residents are  
29 not home. These precedents would also raise questions about whether an unmanned aircraft  
30 take-off and landing facility may be built adjacent to uninhabited land, using the airspace above  
31 that land at any altitude until such time as the landowner chooses to make use of the land.

32  
33 Consider an unmanned aircraft hovering at 55 feet above a landowner’s property (note  
34 that the average two-story home is 35 feet tall). (Gregory S. McNeal, *Drones and the Future of*  
35 *Aerial Surveillance*, 84 GEO. WASH. L. REV. 354, 373 (2016)). This aircraft would be visible to  
36 the landowner, perhaps audible to the land owner, and likely troubling to the land owner to the  
37 point where he or she may want to exclude this aircraft but based on existing precedents would  
38 not necessarily constitute substantial interference with the use of land, and therefore would likely  
39 not be actionable (or excludable from that airspace). Compare this example with Justice  
40 Brennan’s dissenting opinion in *Ciraolo*, in which he predicted a future with devices capable of  
41 quiet hovering close to homes, in compliance with FAA regulations:

42  
43 ‘Imagine a helicopter capable of hovering just above an enclosed  
44 courtyard or patio without generating any noise, wind, or dust at all -- and,  
45 for good measure, without posing any threat of injury. Suppose the police  
46 employed this miraculous tool to discover not only what crops people

1 were growing in their greenhouses, but also what books they were reading  
2 and who their dinner guests were. Suppose, finally, that the FAA  
3 regulations remained unchanged, so that the police were undeniably  
4 “where they had a right to be.” Would today's plurality continue to assert  
5 that “[t]he right of the people to be secure in their persons, houses, papers,  
6 and effects, against unreasonable searches and seizures” was not infringed  
7 by such surveillance? Yet that is the logical consequence of the plurality's  
8 rule . . . .’ Analyzing this passage, Professor Troy Rule notes “[t]wenty-  
9 five years after Riley, law enforcement agencies can now easily purchase  
10 the very hypothetical ‘miraculous tool’ that Justice Brennan forebodingly  
11 described.”). (*Id.* at 382)  
12

13 The example illustrates the point regarding why reference to interference or FAA  
14 regulations when defining the trespass right makes little sense. Rather, given their low altitude  
15 operations, drone intrusions are best treated as akin to trespasses to land. A trespasser walking  
16 upon land is liable for trespass “irrespective of whether he thereby causes harm to any legally  
17 protected interest of the other” (RESTATEMENT (SECOND) OF TORTS § 158 (1965)). An aerial  
18 trespass by a drone under traditional aerial trespass law would trigger no such liability absent  
19 proof of harm (despite proving that the aerial intrusion was within the immediate reaches). In  
20 this respect, aerial trespass operates more like a nuisance suit than a right to exclude, and it is one  
21 that will be very difficult to prove when it comes to unmanned aircraft. This Act seeks to remedy  
22 this gap in the law.  
23

24 The original aerial trespass doctrine made sense in an era when aircraft were rarely  
25 operating close to the ground, people, and structures. This act is premised upon a conclusion that  
26 the doctrine no longer makes sense in an era in which drones already number in the millions and  
27 operate closer to the ground than manned aircraft have traditionally operated.  
28

29 Requiring proof of both the immediate reaches concept and substantial interference in the  
30 context of unmanned aircraft would result in the inability of landowners to exclude most  
31 unmanned aircraft flights from even very low altitudes adjacent to land and buildings. It would  
32 also force plaintiffs and defendants to enter litigation to determine whether flights actually  
33 interfered with a landowner’s use and enjoyment of his or her land. Stated simply, unlike the *per*  
34 *se* right that exists in trespass to land, which establishes an easily understandable bright line rule  
35 prohibiting certain intrusions, there is no existing right to exclude aircraft from flying above  
36 one’s land without showing the flight took place within the immediate reaches and that it  
37 substantially interfered with the use and enjoyment of the land.  
38

## 39 **V. A New Bright Line Per Se Doctrine Is Needed**

40

41 The existing aerial trespass laws fail to adequately protect both landowners/lessees and  
42 unmanned aircraft pilots. Without changes, the inadequacy of the law is likely to engender  
43 significant public backlash against unmanned aircraft technology as most landowners and lessees  
44 understand their right to exclude traditional trespassers and likely assume the rules in the very  
45 low altitude airspace similarly allow them to exclude unmanned aircraft without any need to  
46 litigate the substantiality of interference with their use and enjoyment of land.

1 Similarly, unmanned aircraft pilots will likely believe themselves to be protected by the  
2 fact-specific inquiry of the traditional aerial trespass doctrine and may find themselves the  
3 subject of a lawsuit in which they must mount a defense that will rely on ambiguous definitions  
4 of immediate reaches and substantial interference. (See e.g., *Victory For 'Drone Slayer' Puts*  
5 *State Laws In Spotlight*, Law 360, April 20, 2017,  
6 <https://www.law360.com/articles/915222/victory-for-drone-slayer-puts-state-laws-in-spotlight>  
7 (describes self-help measure taken by a landowner who used a shotgun to resolve a dispute  
8 regarding a drone flown over his property). Both potential plaintiffs and defendants would be  
9 well served by bright line rules. (Cf. Robert A. Hazel, *Privacy and Trade Secret Law Applied to*  
10 *Drones: An Economic Analysis*, 19 COLUM. SCI. & TECH. L. REV. 340, 372 (2018) (discussing  
11 benefits of bright line rules).  
12

13 Just as *de minimis* trespasses to land are rarely litigated, creating a *per se* doctrine that is  
14 akin to trespass to land will likely not engender a rash of new litigation. As former aviation  
15 lawyer and airline executive Robert A. Hazel notes in discussing inadvertent trespasses,  
16

17 “there will be inadvertent trespasses and intrusions by drones, just as there  
18 are inadvertent trespasses and intrusions by people, bicycles, cars, and  
19 trucks at ground level today. Assuming that a drone public highway is  
20 established, probably at the 200- to 400-foot level, there will be airspace  
21 that belongs to the landowner somewhere below that. Drones will  
22 occasionally trespass in that airspace. For example, drones making  
23 package deliveries may slice into a nonconsenting landowner's airspace as  
24 they descend from the drone public highway. There is no reason to treat  
25 these incidents differently from other inadvertent trespasses, such as the  
26 trespass of children retrieving their errant soccer ball from a neighbor's  
27 lawn. Someday, the exact flight paths of all commercial drones will be  
28 easily tracked, but currently, the same evidentiary problems exist for drone  
29 trespassers as for ground-level trespassers. At least in the short term, most  
30 drone trespasses will be undetected unless they cause visible damage.” (*Id.*  
31 at 372).  
32

33 In other words, daily life is filled with technical trespasses such as the one time crossing  
34 of the front yard by a neighbor's child retrieving a ball, or a neighbor briefly stepping upon  
35 another's property while mowing a lawn. This is an expected and understood aspect of life and  
36 is rarely litigated. Similarly, most landowners expect that structures will not be built over their  
37 property without their permission, and they understand that when the branch of a neighbor's tree  
38 extends over their property line forty feet above the ground, they can trim the branch back to the  
39 property line.

40 “The courts have generally recognized that vegetation penetrating adjacent  
41 property presents a type of legal problem for which the remedy of self-  
42 help can be invoked. This remedy can be generally defined as the  
43 adjoining owner's removal of branches or roots, to the extent that they  
44 protrude into his property. In addition, one court has indicated that, where  
45 a tree's base divides, the divided portion overhanging adjacent premises  
46 can be subject to abatement by self-help, as would a branch or any other

1 portion of the tree. A number of courts have indicated that, in certain  
2 circumstances, self-help would be the only remedy available to the  
3 adjoining owner complaining of the encroachment (§§ 8- 15). The  
4 common judicial concern has been that neighbors should resolve their  
5 disputes among themselves, and that allowing judicially imposed remedies  
6 would result in clogging the courts with needless and vexatious  
7 litigation.”). (65 A.L.R.4th 603)  
8

9 Disputes in society are commonly resolved without resort to litigation in property and  
10 trespass disputes because the concepts underlying property and trespass law are commonly  
11 understood. Those same landowners who understand their rights in land in this common-sense  
12 way, would be perplexed if they were told they could not exclude a drone above their property in  
13 the same location as an offending branch, wire, or other intrusion. People in society have  
14 typically minimized their intrusions onto the property of others because they understand property  
15 boundaries and seek to not intrude upon another’s rights. Section 301 is drafted to make it easier  
16 for parties to respect one another’s rights by creating bright line rules.  
17

18 While Section 301 benefits landowner’s and drone operators, it also may ensure the  
19 success of the unmanned aircraft industry by helping to resolve issues related to public  
20 acceptance of this technology. For example, a poll conducted by Pew indicates that most  
21 Americans want the benefits of drones, but also want the ability to exclude unmanned aircraft  
22 from operating in certain areas, specifically “[w]hen it comes to what rules should apply to drone  
23 use, roughly half the public (54%) thinks drones should not be allowed to fly near people’s  
24 homes. Just 11% think this should be allowed, while 34% think it is OK in certain circumstances  
25 but not others.” ([http://www.pewresearch.org/fact-tank/2017/12/19/8-of-americans-say-they-  
26 own-a-drone-while-more-than-half-have-seen-one-in-operation/](http://www.pewresearch.org/fact-tank/2017/12/19/8-of-americans-say-they-own-a-drone-while-more-than-half-have-seen-one-in-operation/)).  
27

28 Similarly, a Danish study found that the ability to have spatial separation from unmanned  
29 aircraft was a key factor related to people’s concerns with drones. (Domen Bajde, et.al., General  
30 Public’s Privacy Concerns Regarding Drone Use In Residential And Public Areas, Empirical  
31 Research Report, May 2017, available at: [https://www.sdu.dk/-  
32 /media/files/om\\_sdu/fakulteterne/samfundsvidenskab/samf\\_kommunikation/general+publics+pri  
33 vacy+concerns+\(full+report\).pdf?la=en&hash=FDD15CD1FD4974D21EB01549ECC7AC7100  
34 19E99D](https://www.sdu.dk/-/media/files/om_sdu/fakulteterne/samfundsvidenskab/samf_kommunikation/general+publics+privacy+concerns+(full+report).pdf?la=en&hash=FDD15CD1FD4974D21EB01549ECC7AC710019E99D) (noting, “there is a concern that drones will intrude into one’s private space, and disrupt  
35 what we could call ‘spatial privacy’ via an unwarranted physical presence or noise.”)).  
36

37 Furthermore, in comments accompanying the FAA’s most recent regulations for  
38 unmanned aircraft, several entities noted their concerns regarding private property rights.  
39

40 Several commenters, including the Illinois Farm Bureau, Colorado  
41 Cattlemen's Association, and the IAAPA, raised concerns regarding small  
42 UAS operations over private property and asserted that UAS operations  
43 should not be permitted over private property without advance  
44 authorization given by the business or property owner. In addition, the  
45 IAAPA asserted that UAS could pose a threat to intellectual property and  
46 other business interests of amusement parks, and other commenters raised

1 concerns regarding the use of UAS to collect proprietary data over  
2 privately owned farms and businesses. However, the Wisconsin Society of  
3 Land Surveyors commented that aerial geospatial data acquisition  
4 practices using UAS provide significant societal benefit, are not a threat to  
5 individual citizen privacy and therefore Federal efforts to impose limits on  
6 UAS should exempt surveying and aerial mapping. As indicated in the  
7 NPRM and by some commenters, State law and other legal protections  
8 may already provide recourse for a person whose individual privacy, data  
9 privacy, private property rights, or intellectual property rights may be  
10 impacted by a remote pilot's civil or public use of a UAS.” (See Federal  
11 Register Notice accompanying Operation and Certification of Small  
12 Unmanned Aircraft Systems, 81 CFR 42063).

13  
14 Other studies globally have come to the same conclusion. (See also, *CDT Proposes*  
15 *Privacy Best Practices for Drones*, available at: [https://cdt.org/blog/cdt-proposes-privacy-best-](https://cdt.org/blog/cdt-proposes-privacy-best-practices-for-drones/)  
16 [practices-for-drones/](https://cdt.org/blog/cdt-proposes-privacy-best-practices-for-drones/), (stating “Private drone operators should not intentionally use a drone to  
17 enter private property without the landowner’s consent.”); Reece A. Clothier, et.al., *Risk*  
18 *Perception and the Public Acceptance of Drones*, Risk Analysis,  
19 <https://onlinelibrary.wiley.com/doi/pdf/10.1111/risa.12330>; See also, European Drones Outlook  
20 Study Unlocking the value for Europe,  
21 [https://www.sesarju.eu/sites/default/files/documents/reports/European\\_Drones\\_Outlook\\_Study\\_2](https://www.sesarju.eu/sites/default/files/documents/reports/European_Drones_Outlook_Study_2016.pdf)  
22 [016.pdf](https://www.sesarju.eu/sites/default/files/documents/reports/European_Drones_Outlook_Study_2016.pdf);

23  
24 In many instances, drones provide their greatest benefits in close proximity to people and  
25 property. This is a new challenge for existing law because, despite over 100 years of aviation  
26 history, the number of traditional aircraft operating in the very low altitude airspace and in close  
27 proximity to people and property has remained relatively steady and minimal as compared to  
28 unmanned aircraft. ([https://www.aopa.org/about/general-aviation-statistics/active-general-](https://www.aopa.org/about/general-aviation-statistics/active-general-aviation-aircraft-in-the-u-s)  
29 [aviation-aircraft-in-the-u-s](https://www.aopa.org/about/general-aviation-statistics/active-general-aviation-aircraft-in-the-u-s)).

30  
31 Manned aircraft (other than helicopters) must adhere to FAA-established minimum safe  
32 altitudes, below which those manned aircraft may not fly. (14 CFR 91.119). FAA Regulations  
33 require that manned aircraft, with the exception of take-off landing, not operate below 500 feet in  
34 unpopulated areas, 1000 feet in populated areas and must stay 500 feet laterally from people and  
35 structures in unpopulated areas and 2,000 feet in populated areas. (14 CFR 91.119) While  
36 helicopters are exempt from the rule for minimum safe altitudes, there are presently only 10,577  
37 active general aviation helicopters registered in the entire United States. (See, 2017 General  
38 Aviation Manufacturers Association Annual Report, [https://gama.aero/wp-](https://gama.aero/wp-content/uploads/GAMA_2017_AnnualReport_ForWeb.pdf)  
39 [content/uploads/GAMA\\_2017\\_AnnualReport\\_ForWeb.pdf](https://gama.aero/wp-content/uploads/GAMA_2017_AnnualReport_ForWeb.pdf)).

40  
41 Compare the relatively low numbers of manned aircraft, operated at great distances from  
42 people and property, to unmanned aircraft for which there are over 878,000 registered hobbyists  
43 (who may have multiple drones) and over 122,000 commercial drones, almost all of those  
44 unmanned aircraft are required to operate within 400 feet of structures or the ground. (See 14  
45 CFR 107.51(b) above).

1           “Given the large number of drones, it would likely reduce litigation costs if the courts  
2 adopted simple rules that establish a presumption of intrusion, for example, when drones are  
3 operated below a certain height when within a certain distance of the property line. A simple rule  
4 would make it easy for drone operators to predict when their activities would be presumed to be  
5 intrusive.” (See Hazel article, *supra*, at 365 (2018)). The ease of access to unmanned aircraft  
6 technology, the scale at which drones are already operating, and the low altitude airspace in  
7 which these aircraft must operate, all suggest that a uniform law for *per se* aerial trespass is  
8 necessary.

1 **TORT LAW RELATING TO DRONES ACT**

2 **ARTICLE 1**

3 **SHORT TITLE AND DEFINITIONS**

4 **SECTION 101. SHORT TITLE.** This [Act] may be cited as the Tort Law Relating to  
5 Drones Act.

6 **SECTION 102. DEFINITIONS.**

7 (a) [General definitions.]. In this [Act]:

8 (1) “Person” means an individual, firm, partnership, corporation, company,  
9 association, joint-stock association, or governmental entity. It includes a trustee, receiver,  
10 assignee, or similar representative of any of them.

11 (2) “Unmanned aircraft” means an aircraft operated without the possibility of  
12 direct human intervention from within or on the aircraft. For the purposes of this act, this term is  
13 synonymous with the term “drone.”

14 **Comment**

15 The definition of person in Subsection (1) is drawn from the FAA’s definition, and  
16 includes corporations and governmental entities both of which are covered by this Act.

17  
18 The term drone is an undefined colloquial term typically used to refer to devices that are  
19 technically known as “unmanned aircraft.” To resolve any confusion as to the scope of the Act,  
20 Subsection (2) adopts the FAA definition of unmanned aircraft and makes clear that the term  
21 “drone” is synonymous with the term “unmanned aircraft.”  
22

23 **ARTICLE 2**

24 **GENERAL SCOPE AND TERMS**

25 **SECTION 201. SCOPE.** This [Act] applies to unmanned aircraft operations.

26 **SECTION 202. RELATION TO FEDERAL LAW.** A provision of this [Act] which is  
27 expressly preempted by federal law is unenforceable to the extent of the preemption.



1 **Comment**

2 The Uniform Law Commission has worked in consultation with the FAA since 2015,  
3 informing the agency of the ULC’s work, and worked with the FAA during the formation of the  
4 committee and the determination of the scope of the Committee’s work. Multiple telephone  
5 conversations were held with the FAA’s Office of the Chief Counsel and attorneys from the  
6 Office of Regulation and Enforcement at the Department of Transportation.  
7

8 The subject of federal preemption was discussed, the ULC took note of the FAA’s  
9 comments as well as the agency’s December 17, 2015 document entitled “*State and Local*  
10 *Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet*” which states “[l]aws traditionally  
11 related to state and local police power – including land use, zoning, privacy, trespass, and law  
12 enforcement operations...generally are not subject to federal regulation.”  
13 ([https://www.faa.gov/uas/resources/uas\\_regulations\\_policy/media/uas\\_fact\\_sheet\\_final.pdf](https://www.faa.gov/uas/resources/uas_regulations_policy/media/uas_fact_sheet_final.pdf) ).  
14

15 Importantly, the areas of property rights, land use, and zoning are not in conflict with  
16 federal regulations. As the Supreme Court has noted “[t]he United States does not “own” the  
17 airspace above its territorial boundaries, although it undoubtedly has considerable authority to  
18 regulate the use of that airspace.” (*Massachusetts v. U. S.*, 435 U.S. 444, 473 (1978)).  
19 Consistent with this review of existing law and consultation with the FAA, the ULC decided the  
20 scope of the drafting committee’s work should initially focus upon tort law.  
21

22 **ARTICLE 3**

23 **SUBSTANTIVE PROVISIONS**

24 **SECTION 301. PER SE AERIAL TRESPASS.**

25 (a) A person operating an unmanned aircraft is liable to a land owner or lessee for *per se*  
26 aerial trespass, when the person, without consent, intentionally causes the unmanned aircraft to  
27 enter into the airspace below [200] feet above the surface of land or below [200] feet above  
28 improvements built upon the surface of land.

29 (b) This section shall not apply to:

30 (1) conduct protected by the First Amendment;

31 (2) conduct that conforms to the requirements of the Fourth Amendment, or is  
32 conducted pursuant to a warrant or other order issued by a judge;

1                   (3) conduct by public employees engaged in the performance of their duties,  
2 including firefighters, emergency medical personnel, or public utility employees while engaged  
3 in addressing an emergency that presents an imminent danger to health, safety, or the  
4 environment;

5                   (4) conduct by persons acting as part of government organized recovery efforts  
6 following an accident or natural disaster;

7                   (5) conduct by employees or contractors of a holder of a valid easement, right of  
8 way or license while acting in the scope of their employment and acting consistently with the  
9 easement, right of way, or license.

10                  (6) conduct that occurred only because the person operating or responsible for the  
11 operation of the unmanned aircraft took or was in the process of taking immediate action caused  
12 by an in-flight emergency.

13                  (7) conduct that amounts to a privileged entry [under the laws of this state.]

14                  (c) Consent to enter the airspace described in subsection (a) may be given verbally, in  
15 writing or through electronic consent. Electronic consent must include a clear affirmative action  
16 that signifies specific agreement to entry into the airspace described in subsection (a). Such  
17 consent must be given by a person authorized to grant entry to the airspace above the land.  
18 Consent must be freely given, specific and informed and must unambiguously indicate the  
19 wishes of the party granting consent. The consenting party shall have the right to withdraw  
20 consent at any time. Verbal and written consent may be withdrawn through a clear statement  
21 indicating the withdrawal of consent. The method of withdrawal for electronic consent should, at  
22 a minimum, include a method that is identical to that used to grant consent. The person causing

1 an unmanned aircraft to enter the airspace described in subsection (a) has the burden of proving  
2 consent.

3 (d) Above the altitude set forth in Subsection (a), any existing aerial trespass law of this  
4 state applies.

5 **Comment**

6 Section 301’s *per se* trespass rule primarily protects property interests, a right of quiet  
7 solitude, and a right to be left alone. Privacy interests are not directly addressed by this Section  
8 (*but see* Section 302). However, a collateral benefit of a right to exclude nonconsensual entry of  
9 unmanned aircraft into the immediate reaches of airspace is an incremental gain to privacy. As  
10 James C. Smith notes, “The right to exclude others from one’s airspace serves a number of  
11 purposes. One purpose it has always served is to protect privacy interests of possessors of land.  
12 With modern technology that makes overhead photography and surveillance relatively easy and  
13 inexpensive to accomplish, the interest in privacy has taken on heightened importance.  
14 Legislation is one response. California has extended its statutory cause of action for the physical  
15 invasion of privacy to include airspace invasions that capture an image, recording, or impression  
16 of a person’s private activity “in a manner that is offensive to a reasonable person. *Cal. Civ.*  
17 *Code § 1708.8* (effective 2016).” (James C. Smith, NEIGHBORING PROPERTY OWNERS § 5:3).

18  
19 Subsection (a) is intended to promote clarity and uniformity by establishing that the low  
20 altitude intrusion of an unmanned aircraft into the “superadjacent airspace” or “immediate  
21 reaches” above land, defined here by an altitude of 200 feet above ground level or 200 feet above  
22 structures, is akin to a trespass upon the land, and is therefore a *per se* trespass.

23  
24 Subsection (a) provides a landowner may exclude a non-consensual entry by drone into  
25 the airspace within 200 feet above their land and surface improvements on the land. This ensures  
26 that the unmanned aircraft always remains 200 feet above ground level or 200 feet above surface  
27 improvements unless consent is given, or an exception applies. Such a rule will protect  
28 backyards, rooftop pools, decks, patios and other uses in urban areas. It also will protect  
29 commercial facilities, hotels and resorts, and other areas where persons may desire a right to  
30 exclude low altitude overflights. The altitude ceiling for this exclusion is low enough that  
31 unmanned aircraft will still have a right to transit above property and surface improvements.  
32 (See e.g., *Amazon Whitepaper: Revising the Airspace Model for the Safe Integration of Small*  
33 *Unmanned Aircraft Systems*, available through NASA at:

34 [https://utm.arc.nasa.gov/docs/Amazon\\_Revising%20the%20Airspace%20Model%20for](https://utm.arc.nasa.gov/docs/Amazon_Revising%20the%20Airspace%20Model%20for%20the%20Safe%20Integration%20of%20sUAS[6].pdf)  
35 [%20the%20Safe%20Integration%20of%20sUAS\[6\].pdf](https://utm.arc.nasa.gov/docs/Amazon_Revising%20the%20Airspace%20Model%20for%20the%20Safe%20Integration%20of%20sUAS[6].pdf); *see also* Forbes, “*Amazon Proposes*  
36 *Drone Highway As It Readies For Flying Package Delivery*”  
37 [https://www.forbes.com/sites/ryanmac/2015/07/28/amazon-proposes-drone-highway-as-it-](https://www.forbes.com/sites/ryanmac/2015/07/28/amazon-proposes-drone-highway-as-it-readies-for-flying-package-delivery/#6b230ce62fe8)  
38 [readies-for-flying-package-delivery/#6b230ce62fe8](https://www.forbes.com/sites/ryanmac/2015/07/28/amazon-proposes-drone-highway-as-it-readies-for-flying-package-delivery/#6b230ce62fe8) (noting Amazon’s proposal that “areas  
39 between 200 and 400 feet would be reserved for a sort of drone highway. UAVs in this 200-foot  
40 range would likely be traveling autonomously at high-speeds and out of the line-of-sight of any  
41 operator.”).

1 The altitude limit of 200 feet was selected by the Drafting Committee because the FAA  
2 has historically not been concerned with most obstacles and other structures below 200 feet  
3 (except near airports), whereas obstacles extending above that altitude have typically appeared  
4 on FAA navigational charts and have required safety lighting. Also, in 2017, the White House  
5 issued an Executive Order specifying that state, local and tribal officials, operating under the  
6 auspices of the Drone Integration Pilot Program could make reasonable time, manner, and place  
7 restrictions regarding the use of unmanned aircraft. That executive order mirrored the language  
8 of bipartisan legislation introduced in the House and Senate in 2017 and re-introduced as a  
9 codification of the Pilot Program in the FAA Reauthorization Bill introduced in the House in  
10 2018. In May of 2018, ten state, local and tribal entities were selected by the U.S. Department of  
11 Transportation to participate in advanced unmanned aircraft operations, part of the selection  
12 criteria used by the federal government was an assessment of the willingness of these entities to  
13 craft reasonable time, manner, and place restrictions below 200 feet (and above that when a case  
14 could be made for such restrictions). Practical reasons for selecting this altitude include the fact  
15 that at least three states have adopted altitude limits higher than that adopted in this Act,  
16 including one state (Nevada) where a leading drone package delivery company testified in  
17 support of legislation that featured a 250 foot altitude limitation. (*Testimony of John Griffin of*  
18 *Amazon Inc.*, <https://www.leg.state.nv.us/Session/78th2015/Minutes/Senate/JUD/Final/1124.pdf>).  
19 Finally, the altitude selected divides the airspace in half between unmanned aircraft which need a  
20 right to transit over private property, and landowners who, per the Supreme Court in *Causby*,  
21 have rights in the airspace.

22  
23 Subsection (b)(2) is drafted in this manner to allow for conduct permitted by the Fourth  
24 Amendment to the U.S. Constitution or provisions of state constitutions or other state statutes.

25  
26 Subsection (b)(6) ensures that actions taken to avoid an in-flight emergency do not trigger  
27 trespass liability. Specifically, by using the terms “immediate action caused by an in-flight  
28 emergency” this subsection allows for reference to existing and future FAA regulations regarding  
29 in-flight emergencies. For example, federal aviation regulations in 14 CFR 107.21 which deals  
30 with small unmanned aircraft state:

31  
32 “In-flight emergency. (a) In an in-flight emergency requiring immediate  
33 action, the remote pilot in command may deviate from any rule of this part  
34 to the extent necessary to meet that emergency. (b) Each remote pilot in  
35 command who deviates from a rule under paragraph (a) of this section  
36 must, upon request of the Administrator, send a written report of that  
37 deviation to the Administrator. (14 CFR 107.21).  
38

39 Similarly, 14 CFR 91.3 which deals with aircraft other than small unmanned aircraft states:

40  
41 “Responsibility and authority of the pilot in command.  
42 (a) The pilot in command of an aircraft is directly responsible for, and is  
43 the final authority as to, the operation of that aircraft.  
44 (b) In an in-flight emergency requiring immediate action, the pilot in  
45 command may deviate from any rule of this part to the extent required to  
46 meet that emergency.

1 (c) Each pilot in command who deviates from a rule under paragraph  
2 (b) of this section shall, upon the request of the Administrator, send a  
3 written report of that deviation to the Administrator. (14 CFR 91.3  
4 (important as future unmanned aircraft may not fall under Part 107)).  
5

6 Subsection (b)(7) creates an exception for privileged entry if one exists in the state. This  
7 exception, in its most common form, appears in the Restatement (Second) of Torts § 198 (1965):  
8

- 9 (1) One is privileged to enter land in the possession of another, at a reasonable  
10 time and in a reasonable manner, for the purpose of removing a chattel to the  
11 immediate possession of which the actor is entitled, and which has come upon  
12 the land otherwise than with the actor's consent or by his tortious conduct or  
13 contributory negligence.  
14
- 15 (2) The actor is subject to liability for any harm done in the exercise of the  
16 privilege stated in Subsection (1) to any legally protected interest of the  
17 possessor in the land or connected with it, except where the chattel is on the  
18 land through the tortious conduct or contributory negligence of the possessor.  
19 (§ 198 (1965)).  
20

21 Typically, this exception is limited by a requirement that an owner seeking to recover a  
22 chattel first seek permission to enter from the landowner, and only if this permission cannot be  
23 obtained, may the property owner enter under the privileged-entry exception. The remaining  
24 exceptions in subsection (b) are self-explanatory and are mostly intended to bring Section 301 in  
25 line with existing trespass to land doctrine.  
26

27 Subsection (c) is adapted in part from standard data protection practices and is intended  
28 to ensure that consent can be easily given and easily withdrawn, and that there is parity between  
29 granting and withdrawing consent. For example, the provision seeks to avoid a circumstance  
30 where one can unknowingly provide consent (through silence, pre-ticked boxes, or inactivity). It  
31 also seeks to avoid a circumstance where an individual can easily provide consent yet cannot  
32 easily withdraw it as in situations where ticking a box when visiting an internet website can  
33 provide consent, but withdrawal of consent requires a writing through certified mail.  
34

35 **SECTION 302. TORTIOUS ACQUISITION OF IMAGES, RECORDINGS OR**  
36 **PHYSICAL OR ELECTRONIC IMPRESSIONS USING AN UNMANNED AIRCRAFT.**

37 (a) A person commits tortious acquisition of images, recordings or physical or electronic  
38 impressions using an unmanned aircraft when the person operates an unmanned aircraft and:

- 39 (1) acquires a visual image, sound recording, or other physical or electronic  
40 impression of another person depicting private facts or a trade secret;

1 (2) the image, sound recording or other physical or electronic impression is  
2 acquired in a manner that is highly offensive to a reasonable person; and

3 (3) such acquisition is not otherwise protected by the First Amendment or does  
4 not conform to the requirements of the Fourth Amendment, a warrant, or other order issued by a  
5 judge.

6 (b) For purposes of Subsection (a)(1), a visual image, sound recording, or other physical  
7 or electronic impression using an unmanned aircraft is subject to a rebuttable presumption that it  
8 is “depicting private facts” if that visual image, sound recording, or other physical or electronic  
9 impression would not be capable of being acquired from ground level or from structures where  
10 an observer has a legal right to be.

11 (c) For purposes of Subsection (a)(2), there exists a rebuttable presumption that an image  
12 is acquired in a manner that is highly offensive to a reasonable person if the acquisition occurs in  
13 the course of or following a “per se aerial trespass,” [as defined in Section 301] or an aerial  
14 trespass [as defined elsewhere in the existing law of this state].

15 (d) A visual image, sound recording, or other physical or electronic impression acquired  
16 solely for navigation and aviation safety purposes is exempt from this section, so long as such  
17 visual image, sound recording, or other physical or electronic impression is not used for purposes  
18 other than navigation and aviation safety and is not disclosed to other persons other than for the  
19 purpose of navigation and aviation safety.

20 **Comment**

21 Subsection (a) seeks to protect against intentional non-trespassory privacy invasions from  
22 adjacent airspace (for example an observation into a private area from airspace above a public  
23 street or above neighboring private property) and trespassory privacy invasions. Subsection  
24 (a)(3) protects against overbreadth by mandating proof that the acquisition was offensive to a  
25 reasonable person, and is not otherwise protected by the 1<sup>st</sup> Amendment. (Cf.  
26 [19](https://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/what-types-</a></p></div><div data-bbox=)

1 conduct-are-considered-offen-0). This approach is similar to the approach taken in cases  
2 involving publication of private facts.  
3 (Cf., [https://cases.justia.com/michigan/court-of-appeals-unpublished/2014-313738-](https://cases.justia.com/michigan/court-of-appeals-unpublished/2014-313738-0.pdf?ts=1400004850)  
4 [0.pdf?ts=1400004850](https://cases.justia.com/michigan/court-of-appeals-unpublished/2014-313738-0.pdf?ts=1400004850)).

5  
6 Subsection (b) presumes that the acquired information depicts “private facts” where the  
7 acquisition of information could not otherwise be accomplished from the ground. It is modeled  
8 on an approach followed by *Fla. Stat. §934.50(3)(b)* which defines a reasonable expectation of  
9 privacy by reference to what could be observed from the ground. The subsection is intended to  
10 allow individuals to protect their privacy by focusing upon taking measures to protect their  
11 privacy against ground observations and observations from structures built upon the ground. By  
12 creating a form of legal protection from aerial observations, it ensures that individuals need not  
13 go to extreme measures to shield their activity from aerial observations. These provisions  
14 protect not only persons, but also trade secrets which are not presently protected from overflight  
15 in some jurisdictions. This Act remedies this gap in the law as it relates to aerial observations.

16  
17 The exemption created by Subsection (d) is necessary because many unmanned aircraft  
18 operations will use cameras and other sensors for navigational purposes, this exemption helps  
19 narrowly tailor the application of the Act to ensure it does not interfere with aviation safety.

20  
21 **SECTION 303. NUISANCE.** A drone, a group of drones acting in concert, or a group  
22 of drones operated by the same person over a continuous period of time may be instrumentalities  
23 of a public or private nuisance as defined by [other law of this state].

24 **SECTION 304. INTENTIONAL TORTS.** A drone may be the instrumentality of an  
25 intentional tort as defined by [other law of this state].

26 **SECTION 305. TRESPASS TO CHATTELS.** A drone may be the instrumentality of  
27 a trespass to chattels as defined by [other law of this state].

#### 28 **Comment**

29  
30 [Reserved for a comment outlining hypotheticals where a drone would be understood as  
31 committing a trespass to chattel.]

#### 32 **SECTION 306. EXISTING PRODUCTS LIABILITY LAW UNDISTURBED.**

33  
34 Nothing in this Act is intended to alter the scope or applicability of products liability law under  
35 [other law of this state].





1           **SECTION 309. REMEDIES.**

2           (a) In an action for *per se* trespass under Section 301, remedies and damages are identical  
3           to those for trespass to land [under other law of this state].

4           (b) In an action for tortious acquisition of images, recordings or other physical or  
5           electronic impressions using an unmanned aircraft under Section 302, a plaintiff may be entitled  
6           to recover from the defendant:

7                   (1) general damages [under other law of this state]

8                   (2) special damages [under other law of this state]

9                   (3) punitive damages [under other law of this state]

10                  (4) the value of any payment or benefit received as a result of conduct in violation  
11           of Section 302.

12                   [(5) equitable relief [under other law of this state].]

13           (c) Any third parties that use a visual image, sound recording, or other physical or  
14           electronic impression made in violation of Section 302 are subject to the damage provisions in  
15           Subsections (b)(1-3), but only if that third party:

16                   (1) knew or should have known that the acquisition or use of the visual image,  
17           sound recording, or other physical or electronic impression would be offensive to a reasonable  
18           person;

19                   (2) provided consideration to the acquirer or the acquirers agent for acquisition of  
20           the visual image, sound recording or other physical or electronic impression or provided  
21           consideration for the rights to use the visual image, sound recording or other physical or  
22           electronic impression; and

23                   (3) the visual image, sound recording, or other physical or electronic impression

1 depicted information, or a circumstance that was not of legitimate concern to the public.

2 **Comment**

3 Subsection (b)(1-3) provisions mirror the Restatement’s recognition of damages for  
4 privacy harms. By allowing recovery of damages for harm to privacy interests these provisions,  
5 like the Restatement, ensure privacy laws can be enforced despite the intangible nature of harm  
6 flowing from a breach of privacy. Privacy harms are difficult to quantify, and the value of a  
7 person’s private information may vary based upon their notoriety or celebrity status. A punitive  
8 damages provision allows for a means to deter privacy harms even where the economic damage  
9 associated with the privacy harm is difficult to calculate.

10  
11 Subsection (b)(4) makes clear that privacy harms are deemed more wrongful when the  
12 tortfeasor profits from the tort. This subsection acts as a disgorgement provision and is a means  
13 to prevent unjust enrichment. For example, the actual damages suffered by a person whose  
14 picture is taken by a drone may be minimal, perhaps \$100, but if the person who wrongfully  
15 takes the image is able to sell that same image for \$1,000 they will benefit from the wrongful act.  
16 This remedy provides a means to ensure the tortfeasor is not unjustly enriched by the wrongful  
17 act.

18  
19 [Subsection (b)(5) provides a tentative conclusion on the availability of equitable relief.  
20 The Drafting Committee is continuing its discussion of the merits of this provision. Preliminary  
21 discussions indicate that equitable relief may be appropriate in at least some situations. An  
22 injunction may be the best way to stop certain conduct when legal remedies or monetary  
23 compensation cannot adequately resolve the wrongdoing. For example, the benefits to a drone  
24 operator that flow from gathering certain images may far exceed an award of monetary  
25 compensation that would otherwise deter the operator’s conduct.]

26  
27 Subsection (c) is drawn from the Restatement (Second) of Torts approach to public  
28 disclosure of private facts and is intended to narrow the scope of the third party liability  
29 provision. It is drafted to prevent those in receipt of information gathered in violation of  
30 another’s privacy rights from further disseminating the improperly gathered information. The  
31 Constitutional issues, especially First Amendment concerns, raised by third party liability and  
32 limits on publication require all three elements be proven before a third party can be held liable.

33  
34 Subsection (c)(2) specifically addresses two separate situations. First, it covers  
35 circumstances where an individual is hired to engage in the act of acquiring a visual image,  
36 sound recording, or other physical or electronic impression. Additionally, it covers the scenario  
37 where a third party doesn’t pay for the acquisition itself, but instead purchases the rights to use  
38 the already-gathered wrongful visual image, sound recording, or other physical or electronic  
39 impression, even if not from the party who originally acquired the image.

40  
41 **SECTION 310. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

42 applying and construing this uniform act, consideration must be given to the need to promote

1 uniformity of the law with respect to its subject matter among the states that enact it.

2           **SECTION 311. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**  
3 **AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the  
4 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but  
5 does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or  
6 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15  
7 U.S.C. Section 7003(b).

8           **SECTION 312. EFFECTIVE DATE.** This [act] takes effect . . . .