

D R A F T
FOR DISCUSSION ONLY

TORT LAW RELATING TO DRONES ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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ON UNIFORM STATE LAWS

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TORT LAW RELATING TO DRONES ACT

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1 **TORT LAW RELATING TO DRONES ACT**

2 **PART 1**

3 **GENERAL PROVISIONS**

4 **[SUBPART A. SHORT TITLE AND DEFINITIONS]**

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

7 **SECTION 102. DEFINITIONS.**

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

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

12 **OR**

13 (1*) “Person” means an individual, estate, business or nonprofit entity, or other
14 legal entity. The term does not include a public corporation, government or governmental
15 subdivision, agency, or instrumentality.” **(NOTE: ULC DEFINITION)**

16 (2) “Unmanned aircraft” means an aircraft operated without the possibility of
17 direct human intervention from within or on the aircraft.

18 **[SUBPART B. GENERAL SCOPE AND TERMS]**

19 **SECTION 201. SCOPE; EXCLUSIONS.**

20 **[Scope in general.]** This [Act] applies to unmanned aircraft systems.

21 **SECTION 202. RELATION TO FEDERAL LAW.**

22 **[Federal preemption.]** A provision of this [Act] which is expressly preempted by federal
23 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 during the formation of the committee and the
4 scoping of the work of the committee, the ULC held multiple meetings and telephone
5 conversations with the FAA’s Office of the Chief Counsel and attorneys from the Office of
6 Regulation and Enforcement at the Department of Transportation. The subject of federal
7 preemption was discussed, and the ULC, taking note of the FAA’s comments, decided the scope
8 of the committee’s work should initially focus upon tort law.
9

10 **[SUBSTANTIVE PROVISIONS]**

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

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

16 (b) This section shall not apply to:

17 (1) conduct protected by the First Amendment;

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

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

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

25 (5) conduct by employees or contractors of valid easement or license holders
26 while acting in the scope of their employment.

1 (c) Consent to enter the immediate reaches of the airspace above the land of another may
2 be proven through express verbal, written or electronic consent. Such consent must be given by
3 the person authorized to grant entry to the airspace above the land. Consent must be freely
4 given, specific, informed and must unambiguously indicate the wishes of the party granting
5 consent and the terms under which consent may be revoked. Electronic consent must also
6 include a clear affirmative action that signifies specific agreement to an overflight or overflights.
7 The person causing an unmanned aircraft to enter the immediate reaches of the airspace has the
8 burden to produce evidence of consent.

9 (c*) “Agreement” means the bargain of the parties in fact, as found in their language or
10 inferred from other circumstances and from rules, regulations, and procedures given the effect of
11 agreements under laws otherwise applicable to a particular transaction

12 **(*UETA language included per the request of the committee: At the committee’s last**
13 **meeting it was suggested that Agreement, under UETA might be a better substitute for**
14 **consent, it is provided here as an alternative (c) for consideration and discussion by the**
15 **committee).**

16
17 (d) Above the altitude set forth in (a), any existing aerial trespass law of this state applies.

18 (e) Remedies and damages for violations of this section are identical to those for trespass
19 to land [under the law of this state].

20 **Comment**

21 Paragraph b, subparagraph 2 is drafted in this manner to allow for conduct that satisfies
22 not only the Fourth Amendment to the U.S. Constitution, but also provisions of state
23 constitutions, or statutes to qualify as exempted activity.

24
25 This section is intended to promote clarity and uniformity by establishing that the low
26 altitude intrusion of an unmanned aircraft into the “superadjacent airspace” or “immediate
27 reaches” above land, defined here by an altitude of 200 feet above ground level or 200 feet above
28 structures, is akin to a trespass upon the land, and is therefore a *per se* trespass.

29
30 This section assumes a landowner may exclude a non-consensual entry by drone into the
31 airspace below 200 feet above their land and surface improvements on the land. This ensures that

1 the unmanned aircraft always remains 200 feet above ground level or 200 feet above surface
2 improvements unless consent is given, or an exception applies. Such a rule will protect rooftop
3 pools, decks, patios and other uses in urban areas, it will also protect commercial facilities, hotels
4 and resorts, and other areas where persons desire a right to exclude low altitude overflights. The
5 altitude ceiling for this exclusion is low enough that unmanned aircraft will still have a right to
6 transit above property and surface improvements.
7

8 The altitude limit of 200 feet was selected because the FAA has historically not been
9 concerned with obstacles and other structures below 200 feet, whereas obstacles extending above
10 that altitude have been charted and lighted. In 2017, the White House issued an Executive Order
11 specifying that state, local and tribal officials, operating under the auspices of the Drone Integration
12 Pilot Program could make reasonable time, manner, and place restrictions regarding the use of
13 unmanned aircraft. That executive order mirrored the language of bi-partisan pieces of legislation
14 introduced in the House and Senate. Other practical reasons include that at least three states have
15 adopted altitude limits higher than that adopted in this Act. Finally, the altitude selected divides
16 the airspace in half between unmanned aircraft which need a right to transit over private property,
17 and landowners who may have rights in the airspace.
18

19 Section 301 primarily protects property interests, a right of quiet solitude, and a right to be
20 left alone. Privacy interests are not directly addressed by this Section (see Section 302). However,
21 a collateral benefit of a right to exclude nonconsensual entry of unmanned aircraft into the
22 immediate reaches of airspace is an incremental gain to privacy.
23

24 **Background**

25 In *U.S. v. Causby* the Supreme Court stated:
26

27 *“We have said that the airspace is a public highway. Yet it is obvious that, if the landowner*
28 *is to have full enjoyment of the land, he must have exclusive control of the **immediate***
29 ***reaches** of the enveloping atmosphere. Otherwise buildings could not be erected, trees*
30 *could not be planted, and even fences could not be run.”*
31

32 While the Supreme Court established the principle that landowners must have control of
33 the “immediate reaches” the Court left the term undefined, and subsequent courts have failed to
34 set a clear line related to the minimum altitude at which a landowner’s rights begin. This is true
35 despite the fact that the Court noted *“the flight of airplanes, which skim the surface but do not*
36 *touch it, is as much an appropriation of the use of the land as a more conventional entry upon it.”*
37

38 To understand the limits of the aerial trespass doctrine, it is necessary to understand
39 traditional trespass to land doctrine, and how special categories of devices in the air have been
40 treated in tort.
41

42 **I. Traditional Trespass to Land Doctrine**

43 According to the Restatement (Second) of Torts § 158 (1965):

44 *“One is subject to liability to another for trespass, irrespective of whether he thereby causes*
45 *harm to any legally protected interest of the other, if he intentionally*
46

1 (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
2 (b) remains on the land, or
3 (c) fails to remove from the land a thing which he is under a duty to remove.”
4

5 Thus, trespass to land is *per se* actionable. A plaintiff must only prove the intentional entry
6 into land in the possession of another, or the intentional causing of a thing to so enter or remain.
7 While trespass to land is *per se* actionable, common experience has shown that there are very few
8 lawsuits for minimal intrusions like an accidental step upon a lawn, or the brief running of a child
9 through a backyard. In crafting a *per se* rule for aerial trespass as set forth in Section 301, the goal
10 is to ensure that the new doctrine follows as closely as possible the existing precedents which have
11 traditionally governed trespass to land.
12

13 **II. Kites, balloons, and projectiles**

14
15 Some devices are also subject to a *per se* rule like that advanced in Section 501.
16 Specifically, the Restatement (Second) of Torts notes in a comment that it is a trespass to “*fire*
17 *projectiles or to fly an advertising kite or balloon through the air above [another’s land], even*
18 *though no harm is done to the land or the possessor’s enjoyment of it.*” RESTATEMENT
19 (SECOND) OF TORTS § 158 cmt. i (1965). While this might suggest that unmanned aircraft
20 could fit into this *per se* rule, a special rule for aircraft exists that may prove problematic as
21 unmanned aircraft grow in popularity, specifically the aerial trespass doctrine.
22

23 **III. Aerial Trespass**

24
25 According to the Restatement (Second) of Torts § 159(2):
26

27 Flight by an aircraft in the air space above the land of another is trespass if
28 (1) “[the aircraft] enters into the immediate reaches of the air space next to the land, and
29 (2) [it] interferes substantially with the other’s use and enjoyment of the land.”:
30

31 Notably, unlike trespass to land which allows for a *per se* right to exclude non-consensual
32 entries, aerial trespass as presently understood does not afford such an automatic exclusionary
33 right. Aerial trespasses are wrongful only when they 1) enter the largely undefined “immediate
34 reaches” and 2) substantially interfere with a plaintiff’s use and enjoyment of land.
35

36 **Immediate reaches**

37
38 Landowners and lessees likely do not physically occupy the airspace 200 feet above their
39 land or structures, and it is presently unclear whether an intrusion into this area would constitute
40 an entry into the immediate reaches of the land owner’s airspace. Under existing aerial trespass
41 doctrine, determining whether an aerial intrusion is an entry into the immediate reaches requires a
42 fact specific inquiry which has historically caused uncertainty and a lack of uniformity.
43

44 As an example, in *Causby*, the Supreme Court on the facts of that case (adjudicating a
45 takings claim) found that the flight of a government operated aircraft at an altitude of 83 feet
46 interfered with the landowner’s property rights and the landowner was entitled to compensation.

1 On those facts the court explained the importance of the immediate reaches concept and the
2 property interest in the superadjacent airspace noting that intrusions into this area are “in the same
3 category as invasions of the surface” the court went on to state:
4

5 *“We would not doubt that, if the United States erected an elevated railway over*
6 *respondents' land at the precise altitude where its planes now fly, there would be a*
7 *partial taking, even though none of the supports of the structure rested on the land.*
8 *The reason is that there would be an intrusion so immediate and direct as to*
9 *subtract from the owner's full enjoyment of the property and to limit his exploitation*
10 *of it. While the owner does not in any physical manner occupy that stratum of*
11 *airspace or make use of it in the conventional sense, he does use it in somewhat the*
12 *same sense that space left between buildings for the purpose of light and air is used.*
13 *The superadjacent airspace at this low altitude is so close to the land that*
14 *continuous invasions of it affect the use of the surface of the land itself. We think*
15 *that the landowner, as an incident to his ownership, has a claim to it, and that*
16 *invasions of it are in the same category as invasions of the surface.”*
17

18 The “low altitude” that was seen as akin to the surface by the *Causby* Court was an altitude of 83
19 feet.
20

21 However, the *Causby* case did not end there because the Supreme Court remanded the case
22 to the Court of Federal Claims for further fact finding. Setting up the procedural history, the Court
23 of Federal Claims wrote
24

25 *“[w]e held that the United States had taken an easement of flight over plaintiffs'*
26 *property, resulting in the destruction of some of plaintiffs' property and damage to*
27 *the rest. We awarded judgment. The Supreme Court agreed there had been a taking*
28 *but remanded the case for findings describing the precise nature of the easement*
29 *taken...”* (*Causby v. U.S.*, 75 F. Supp. 262, 263 (Ct. Cl. 1948) (internal citations
30 omitted).
31

32 The Court of Federal Claims found *“the United States took an easement over plaintiffs'*
33 *property...for the flight of its airplanes ... at an altitude varying from 83 feet above the surface of*
34 *the land to an altitude of 365 feet.”* and the court decreed that the landowners were entitled to
35 compensation for their loss of property and the decrease in rental value of their property. Thus in
36 *Causby*, **the immediate reaches ranged from 83 feet to 365 feet.** Other cases have come out
37 differently, but most subsequent aerial trespass cases involving manned aircraft have relied on
38 *Causby*
39

40 **Substantial interference.** 41

42 The aerial trespass doctrine does not end with a mere analysis of where the immediate
43 reaches are, another complication is that existing precedents from manned aviation require
44 substantial interference with one’s use and enjoyment of land. These precedents look for
45 interference of a type that when applied to unmanned aircraft will likely not allow for a right of
46 exclusion. For example, Courts have found that noise alone is not an interference with use of land,

1 overflight of uninhabited land is not an interference, and overflights of inhabited land when the
2 land was not being used at the time of the overflight was not interference.

3
4 Applying these precedents to unmanned aircraft would raise the question of whether it will
5 be acceptable for drones fly at low altitudes in close proximity to homes, so long as the unmanned
6 aircraft is very quiet, or the residents are not home. These precedents would also raise questions
7 about whether an unmanned aircraft take-off and landing facility may be built adjacent to
8 uninhabited land, using the airspace above that land at any altitude until such time as the landowner
9 chooses to make use of the land. Consider an unmanned aircraft hovering at 55 feet above a
10 landowner’s property (note that the average two story home is 35 feet tall). This aircraft would be
11 visible to the landowner, perhaps audible to the land owner, and likely troubling to the land owner,
12 but based on existing precedents would not necessarily constitute interference with the use of land,
13 and therefore would likely not be actionable (or excludable from that airspace).

14
15 Thus while a trespasser walking upon land is liable for trespass “irrespective of whether he
16 thereby causes harm to any legally protected interest of the other” (Restatement (Second) of Torts
17 § 158 (1965)) an aerial trespass by a drone under traditional law would trigger no such liability
18 absent proof of harm. In this respect, aerial trespass operates more like a nuisance suit than a right
19 to exclude. The original aerial trespass doctrine made sense in an era when aircraft were rarely
20 operating close to the ground, people, and structures. This act is premised upon a conclusion that
21 the doctrine no longer make sense in an era in which drones already number in the millions and
22 operate closer to the ground than manned aircraft have traditionally operated.

23
24 Requiring proof of both the immediate reaches concept and substantial interference in the
25 context of unmanned aircraft would result in the inability of landowners to exclude most unmanned
26 aircraft flights from even very low altitudes adjacent to land and buildings. It would also force
27 plaintiffs and defendants to enter litigation to determine whether flights actually interfered with a
28 landowner’s use and enjoyment of their land. Stated simply, unlike the *per se* right that exists in
29 trespass to land, which establishes an easily understandable bright line rule prohibiting certain
30 intrusions, there is no existing right to exclude aircraft from flying above one’s land without
31 showing the flight took place within the immediate reaches and that it substantially interfered with
32 the use and enjoyment of the land.

33 34 **IV. A New Bright Line Per Se Doctrine Is Needed**

35
36 The existing aerial trespass laws fail to adequately protect both landowners/lessees and
37 unmanned aircraft pilots. It is likely to engender significant public backlash against unmanned
38 aircraft technology as most landowners and lessees understand their right to exclude traditional
39 trespassers and likely assume the rules in the very low altitude airspace similarly allow them to
40 exclude unmanned aircraft without any need to litigate the substantiality of interference with their
41 use and enjoyment of land.

42
43 On the other hand, unmanned aircraft pilots will likely believe themselves to be protected
44 by the fact specific inquiry of the traditional aerial trespass doctrine and may find themselves the
45 subject of a lawsuit in which they must mount a defense that will rely on ambiguous definitions of

1 immediate reaches and substantial interference. Both potential plaintiffs and defendants would be
2 well served by bright line rules.

3
4 In fact, the success of the unmanned aircraft industry likely rests upon resolving issues
5 related to public acceptance of this new technology. For example, a poll conducted by Pew
6 indicates that most Americans want the ability to exclude unmanned aircraft from operating in
7 certain areas. Similarly, a Danish study found that the ability to have spatial separation from
8 unmanned aircraft was a key determinant of people’s willingness to accept the technology.

9
10 Despite over 100 years of aviation history, the number of traditional aircraft operating in
11 the very low altitude airspace has remained both minimal and steady. This is attributable to two
12 factors. First, for manned aircraft other than helicopters the FAA has established minimum safe
13 altitudes below which manned aircraft may not fly. FAA Regulations require that manned aircraft,
14 with the exception of take-off landing, not operate below 500 feet in unpopulated areas, 1000 feet
15 in populated areas and must stay 500 feet laterally from people and structures in unpopulated areas
16 and 2,000 feet in populated areas. Second, while helicopters are exempt from the rule for minimum
17 safe altitudes there are presently only 10,577 general aviation helicopters registered in the entire
18 United States. Compare this to unmanned aircraft for which there are over 878,000 registered
19 hobbyists (who may have multiple drones) and over 122,000 commercial drones. The ease of
20 access to unmanned aircraft technology, the scale at which they are already operating, and the low
21 altitude airspace in which these aircraft will be operating all suggest that creating a uniform law
22 for *per se* aerial trespass is a necessity.

23
24 **SECTION 302. TORTIOUS ACQUISITION OF IMAGES, RECORDINGS OR**

25 **ELECTRONIC IMPRESSIONS USING AN UNMANNED AIRCRAFT.** A person commits
26 tortious acquisition of images, recordings or electronic impressions using an unmanned aircraft
27 when the person:

28 (a) operates an unmanned aircraft, in order to intentionally acquire:

29 (1) a visual image, sound recording, or electronic impression;

30 (2) of another person or a trade secret;

31 (3) in a manner that is highly offensive to a reasonable person; and

32 (4) such acquisition is not otherwise protected by the First Amendment or does

33 not conform to the requirements of the Fourth Amendment, a warrant, or other order issued by a
34 judge.

1 (b) for purposes of (a), there exists a rebuttable presumption that a person acted “in order
2 to intentionally acquire” if they commit a “per se aerial trespass,” [as defined in Section 301] or
3 if they commit an aerial trespass [as defined elsewhere in the existing law of this state].

4 (c) for purposes of (a)(3) a visual image, sound recording, or electronic impression using
5 an unmanned aircraft is subject to a rebuttable presumption that it is highly offensive to a
6 reasonable person if that visual image, sound recording, or other physical or electronic
7 impression would not be capable of being acquired from ground level or from structures where
8 an observer has a legal right to be.

9 (d) A visual image, sound recording, or electronic impression acquired solely for
10 navigational purposes is exempt from this section, so long as such visual image, sound recording,
11 or electronic impression is not used for purposes other than navigation and aviation safety and is
12 not disclosed to other persons other than for the purpose of navigation and aviation safety.

13 (e) It shall be a defense to a cause of action under subsection (a) or (b) that upon
14 discovering the acquisition of information protected by this section the acquiring person
15 immediately deleted and rendered inaccessible the information and any copies of the
16 information.

17 **Comment**

18 Subsection (a) seeks to protect against intentional non-trespassory privacy invasions from
19 adjacent airspace (for example an observation into a private area from airspace above a public
20 street or above neighboring private property) and (b) trespassory privacy invasions. The
21 subsection protects from overbreadth by mandating proof that the acquisition was intentional and
22 highly offensive to a reasonable person.

23
24 Subsection (c) presumes a key determinant of offensiveness is whether the acquisition of
25 information could not otherwise be accomplished from the ground. It thus reflects the approach
26 followed by Fla. Stat. §934.50(3)(b) which defined a reasonable expectation of privacy by
27 reference to what could be observed from the ground. The subsection is intended to allow
28 individuals to protect their privacy interests by taking measures to protect themselves from ground
29 observations and observations from structures built upon the ground and ensures that they need

1 not go to extreme measures to shield their activity from aerial observations. These provisions
2 protect not only persons, but also trade secrets which are not presently protected from overflights
3 as trade secrets law requires measures taken to render areas inaccessible which is not possible in
4 the context of drones overflying certain research and development facilities.

5
6 (d) Because many unmanned aircraft operations will use cameras and other sensors for
7 navigational purposes, this exemption is necessary to ensure aviation safety.

8
9 (e) This provision is intended to act as a safe harbor type defense. It reflects parts of the
10 U.S. Department of Commerce, National Telecommunications and Information
11 Administration's, consensus Privacy Best Practices document which received widespread
12 industry support. That document's best practices call for unmanned aircraft operators to create
13 procedures by which information that may violate a person's expectations of privacy would be
14 deleted.

15
16 **SECTION 303. NUISANCE.** A drone, a group of drones acting in concert, or a group
17 of drones operated by the same person over a continuous period of time may be instrumentalities
18 of a public or private nuisance as defined by [law of this state].

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

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

23 **Comment**

24
25 A comment will be added here to outline possible hypos where a drone would be
26 understood as committing a trespass to chattel.

27
28 **SECTION 306. EXISTING PRODUCTS LIABILITY LAW UNDISTURBED.**
29 Nothing in this Act is intended to alter the scope or applicability of products liability law under
30 [law of this state].

31 **SECTION 307. LIMITATION OF LIABILITY.**

32 An owner, lessee, or occupant of land:

1 (a) does not owe a duty of care to a *per se* aerial trespasser [as defined in Section
2 301]; and

3 (b) is not liable for any injury to a *per se* aerial trespasser [as defined in Section
4 301] except for willful or wanton acts of gross negligence, or acts committed by the owner,
5 lessee, or other occupant of land with malicious intent or in bad faith.

6 **QUESTION FOR COMMITTEE: We have not come to a decision on what to do with**
7 **licensees and invitees, where the licensee or invitee here will be the unmanned aircraft**
8 **and/or the unmanned aircraft operator.**

9 **SECTION 308. DEFENSES.** Should there be a right to retrieve the chattels in an
10 emergency landing situation? **[Question for Committee]**

11 **SECTION 309. REMEDIES.**

12 **[New section for discussion, per the request of the committee]**

13 (a) In an action for *per se* trespass under Section 301, a plaintiff may be entitled to
14 recover damages, although such damages may be nominal if no harm to a landowner/lessee is
15 shown. A plaintiff may also be entitled to injunctive relief, at the discretion of the court, to
16 prevent further acts of trespass.

17 (b) In an action for tortious acquisition of images, recordings or electronic impressions
18 using an unmanned aircraft under Section 302, a plaintiff may be entitled to recover

19 (1) general damages and special damages (collectively known as actual damages),
20 as well as punitive damages capped at three times the combined amount of the general and
21 special damages.

22 (2) “disgorgement” of any payment or benefit received as a result of conduct
23 forbidden by the law if (1) committed for a commercial purpose and (2) intended to be or

1 actually sold, published, or transmitted.

2 (3) Third party liability. Any third parties that used an image, recording, or
3 impression made in violation of Section 302 are subject to the damage provisions outlined here,
4 but only if that third party had

5 (A) actual knowledge that the image or recording was made in violation of
6 the law and

7 (B) provided compensation for the image or recording.

8 **Comment**

9 (b)(2) This disgorgement provision is drawn from a proposed Tennessee law, which
10 requires the person who gains from the prohibited conduct to pay the subject of the image,
11 recording, or impression whatever they gained, would likely benefit only those whose image,
12 recording, or impression could be published or sold for monetary gain.

13
14 (b)(3) Third party liability provisions are oftentimes drafted to prevent those in receipt of
15 information gathered in violation of another's privacy rights from further disseminating the
16 improperly gathered information, these provisions though oftentimes raise Constitutional issues.