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

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

February 28, 2019

Via Email and FedEx

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

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

Dear Ms. Ramasastry:

Ms. Anita Ramasastry
February 28, 2019

Page 2

The News Media Coalition, which is comprised of both individual news media companies as well as industry groups representing thousands of media organizations, all of which have significant interest in the development of drone law and policy in the United States, submits this Comment on behalf of all news executives, journalists, viewers, readers and social media users with respect to the proposed uniform “Tort Law Relating to Drones Act,” dated February 19, 2019 (the “draft Uniform Act”).

The News Media Coalition submitted comments in response to the prior version of the draft Uniform Act considered at your October meeting. While we believe that the removal of *per se* liability for aerial trespass below 200 feet in this most recent draft is an improvement, we nevertheless remain concerned that the draft Uniform Act, if adopted by the National Conference of Commissioners on Uniform State Laws, contravenes the First Amendment to the U.S. Constitution and would sow confusion in the community of journalists who are lawfully and safely using new aerial technologies for the public good. We set forth the bases for these concerns more specifically below.

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

The News Media Coalition includes:

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

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

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

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

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

Emerging News Use of Drones Already Provides Substantial Public Benefit

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

Ms. Anita Ramasastry
February 28, 2019

Page 4

Journalists in particular have been able to draw on drones' unique capabilities to better report the news.¹ For example, after Hurricane Florence struck North Carolina, drones proved themselves an essential tool for news coverage of widespread natural disasters by allowing journalists access and perspectives that previously would have been prohibitively expensive or simply unavailable.² Last year, drone journalists helped keep the public informed and safe during the volcanic eruption of Kilauea in Hawaii and the wildfires in California.³

Public agencies throughout the United States have come to rely on news organizations as part of the emergency response system, enlisting the help of journalists to provide vital, timely information to help ensure public safety in times of crises.⁴ No doubt, in the years to come, journalists will devise new innovations for the use of drones in impactful news reporting

¹ Editor, *NBC Connecticut Takes Flight with DroneRanger*, NBC Connecticut, Jul. 12, 2017 (available at <https://www.nbcconnecticut.com/news/local/NBC-Connecticut-Takes-Flight-with-DroneRanger-434086933.html>); James Estrin, *Democratizing the Sky: Drones in Visual Journalism*, NYTimes.com, Mar. 16, 2017 (available at <https://lens.blogs.nytimes.com/2017/03/16/democratizing-the-sky-drones-in-visual-journalism/>); Leslie Kaufman and Ravi Somaiya, *Drones Offer Journalists a Wider View*, NYTimes.com, Nov. 24, 2013 (available at <https://www.nytimes.com/2013/11/25/business/media/drones-offer-journalists-a-wider-view.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer>).

² Adam L. Neal, TCPalm, *Florida Today Drone Journalists Helping USA Today Network Cover Hurricane Florence*, TCPalm, Sept. 11, 2018 (available at <https://www.tcpalm.com/story/opinion/columnists/2018/09/11/local-drone-journalists-help-cover-hurricane-florence-impact/1265416002/>); Bob Gabordi, *How We Covered Killer Hurricane Florence and Other Big Storms that Threatened the Public*, FLORIDA TODAY, Sept. 17, 2018 (<https://www.floridatoday.com/story/opinion/columnists/bob-gabordi/2018/09/17/hurricane-florence-north-carolina-rescue/1333040002/>); *Hurricane Florence: Special Live Coverage Overnight Friday on Fox News Channel*, Fox News Insider, Sept. 13, 2018 (available at <http://insider.foxnews.com/2018/09/13/hurricane-florence-live-coverage-all-night-and-morning-fox-news-channel>).

³ See Meghan Miner Murray, Sabrina Tavernise, and Maya Salam, *Kilauea Volcano Erupts, Spewing Lava and Gases Near Homes in Hawaii*, May 5, 2018, at A14, available at <https://www.nytimes.com/2018/05/04/us/kilauea-volcano-eruption-hawaii.html>; Associated Press, *Beautiful Fury of Nature Revealed as Kilauea Lava Lake Continues to Erupt and Produces Biggest Overflow in 10 years*, The Daily Mail.com, Apr. 25, 2018, available at <https://www.dailymail.co.uk/video/news/video-1613070/Video-Amazing-drone-footage-lava-oozing-Kilauea-Volcano.html>; NBC Bay Area Staff, *Drone Video: Camp Fire Wipes Out Paradise*, Nov. 15, 2018, available at <https://www.nbcbayarea.com/news/local/Drone-Video-Camp-Fire-Butty-County-500619951.html>; Editors, *Drone Aerials Show California Wildfire Devastation from Above*, USA TODAY, August 3, 2018, available at <https://www.usatoday.com/in-depth/news/nation-now/2018/08/02/drone-aerials-california-wildfire-devastation/889885002/>;

⁴ See Bailey Schulz, *Drones Increasingly Being Used For Public Safety*, Las Vegas Review - Journal, September 5, 2018; Sharon Kennedy Wynne, *Despite Regulations, Drones Flying High*, Tampa Bay Times, December 24, 2016, pg. 1.

Ms. Anita Ramasastry
February 28, 2019

Page 5

that will further save lives and money, and continue to serve the public interest in new technologies.

**The Proposed Draft Uniform Act
Does Not Adequately Protect Journalist's Ability to Cover the News**

First, the current version of the draft Uniform Act is problematic because the Commission has removed a provision from Article 3, Section 301 of the prior version, which provided an express exemption for conduct protected by the First Amendment. Any new drone privacy law should exempt the First Amendment-protected activity of news media organizations and provide for the courts to expeditiously dismiss lawsuits brought under the draft Uniform Act that have the effect of improperly chilling freedom of expression.⁵

The current draft Uniform Act is also problematic as it would create a complicated, fact-based rubric for evaluating whether aerial trespass “substantially interferes” with a landowner’s use and enjoyment of her property. While the drafters may believe that a fact-laden matrix is preferable to the strict liability standard contemplated under the prior draft rule,

⁵ The federal government has included a carve-out for newsgatherers in an industry best practices document. The National Telecommunications and Information Administration (NTIA), a component of the U.S. Department of Commerce, in May 2016 concluded the multi-stakeholder process, convened at the direction of a Presidential Memorandum “to develop and communicate best practices for privacy, accountability, and transparency issues regarding commercial and private UAS use in” the national airspace. The News Media Coalition participated in that process, which resulted in an NTIA consensus document, “The National Voluntary Best Practices for UAS Privacy, Transparency, and Accountability”. See https://www.ntia.doc.gov/files/ntia/publications/uas_privacy_best_practices_6-21-16.pdf. These voluntary best practices contain the following carve-out in recognition of the First Amendment activities of journalists:

Best Practices for Newsgatherers and News Reporting Organizations

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

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

Ms. Anita Ramasastry
February 28, 2019

Page 6

this new proposed rule would introduce significant expense and uncertainty to drone journalism and would undoubtedly result in increased speech-chilling litigation.

Indeed, the Uniform Act's call for "totality of the circumstances" analysis, to be judged under a multiple of explicit factors, would inevitably require expensive litigation in almost every instance. Ultimately, members of the news media would be particularly attractive targets for nuisance litigation. For example, determining factors listed in the proposed rule, such as the precise height or lateral position of a moving drone, while standing on the ground, would be difficult to establish with certainty and likely would be the subject of conflicting testimony, leading to protracted court proceedings even with meritless claims. Additionally, to the extent that the proposed "totality of the circumstances" test includes a specific inquiry into whether the drone captures "audio, video or photographs," the draft law appears specifically to target newsgathering and would greatly chill journalism. To the contrary, as noted, the proposed law should include an express exemption for journalists engaged in newsgathering.

This new law is also unnecessary given current aerial trespass doctrine, existing privacy law and industry-developed best practices: Adopting it would overburden the courts and the inevitable proliferation of drone litigation against the news media under the Uniform Act would chill journalists' First Amendment rights.⁶

The Draft Uniform Act Conflicts with Federal Law

In addition, this rule would likely hinder drone integration into the national airspace, which would conflict with federal policy and chill technological innovation.

The federal government has made the development of UAS technology a public policy imperative: in 2012, Congress and the President directed the FAA to "develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system." FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 332, 126 Stat. 11, 73 (2012). Pursuant to this directive, in 2016 the FAA promulgated

⁶ Over the past century and a half, tort law developed to accommodate the legitimate interests in privacy and the public interest in a free and open society. See *Shulman v. Group W. Productions, Inc.*, 955 P.2d 469 (Cal. 1998) (filming accident victim at scene of accident was not intrusion of victim's seclusion, but victim would have reasonable expectation of privacy in rescue helicopter); *Eick v. Perk Dog Food Co.* 347 Ill. App. 293, 299 (Ill. App. 1952) (the right to privacy is a limited one in areas of legitimate public interest); *Tagouma v. Investigative Consultant Servs., Inc.*, 2010 PA Super 147, 4 A.3d 170, 174 (Pa. Super. 2010) ("there is no liability 'for observing [] or even taking [a] photograph while [a person] is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye."); *Martin v. Dorton*, 210 Miss. 668, 669, 50 So. 2d 391, 391 (Miss. 1951) (public officer cannot complain that his privacy has been invaded when his photograph is taken for publication in connection with a legitimate news story); *c.f. Souder v. Pendleton Detectives*, 88 So. 2d 716 (La. App. 1956) (using camera with telescopic lens to photograph bedroom from neighboring house).

Ms. Anita Ramasastry
February 28, 2019

Page 7

14 C.F.R. part 107, which regulates “the registration, airman certification, and operation of civil small unmanned aircraft systems within the United States.” While the rule recognizes that certain aspects of drone use may best be addressed at the state or local level, at least one federal court has found that an attempt by a local municipality to establish “no-fly” zones was preempted by Part 107. *See Singer v. City of Newton*, No. 17-10071, 2017 WL 4176477, at *5-6 (D. Mass. September 21, 2017)

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

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

* * *

Ultimately, the current aerial trespass doctrine, in conjunction with existing privacy tort law and industry-developed best practices, provides an adequate legal framework to satisfy any legitimate privacy or safety concerns, while at the same time fostering innovation, protecting the media’s First Amendment right to gather news, and furthering the federal mandate to promote the safe integration of UAS into the national airspace. While we are certain it is well-intended, the draft Uniform Act, in our view, is entirely unnecessary.

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

Very truly yours,



Charles D. Tobin

Ms. Anita Ramasastry
February 28, 2019

Page 8

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cc: Holland & Knight LLP