

D R A F T  
FOR APPROVAL

# UNIFORM 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-EIGHTH YEAR  
ANCHORAGE, ALASKA  
JULY 12 – 18, 2019



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ON UNIFORM STATE LAWS

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May 30, 2019

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

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1 **UNIFORM TORT LAW RELATING TO DRONES ACT**

2 **PREFATORY NOTE**

3 The development and adoption of new technologies often pose challenges to law, culture  
4 and society. These challenges are likely to be exacerbated where those technological  
5 developments implicate the jurisdiction and authority of multiple levels and branches of  
6 government. Unmanned aircraft, commonly referred to as “drones,” are one such technology.  
7 The Federal Aviation Administration (FAA) predicts that by 2022 there will be between 1.96  
8 million and 3.17 million small unmanned aircraft operating in the national airspace.<sup>1</sup> With the  
9 United States Congress and the FAA asserting jurisdiction over many aspects of unmanned  
10 aircraft operations, and states and local governments asserting jurisdiction over others, a  
11 patchwork quilt of regulatory and legal requirements is developing. In an area involving the need  
12 to integrate unmanned aircraft into an already heavily regulated national airspace system, a legal  
13 and regulatory system that results in significant variance in requirements and controls across the  
14 country promises to inhibit the appropriate and beneficial development of unmanned aircraft  
15 systems for the variety of uses to which such technologies are suited.

16 The Uniform Tort Law Relating to Drones Act provides a uniform state-level response to  
17 the development and utilization of unmanned aircraft in a variety of circumstances within the  
18 context of federal control over aviation as well as the importance of the advances promised by  
19 unmanned aircraft use. The Act is premised on the idea that not all technological developments  
20 require the development of technology-specific legislative or even significant changes to  
21 common law doctrines. In other words, just because something is new does not mean that  
22 existing law cannot apply to it.<sup>2</sup> Rather than treating all aspects of unmanned aircraft operations  
23 as “new” and thus requiring specific changes to existing tort law, the Uniform Tort Law Relating  
24 to Drones Act first focuses on those aspects of unmanned aircraft that allow legal analysis of  
25 their use under existing law.<sup>3</sup> For example, unmanned aircraft tend to fly lower than manned  
26 aircraft; they are likely to capture images or other data as an aspect of their operation; and there  
27 is a perceived element of anonymity to their operation (in other words, it is not always easy to  
28 identify who is operating a particular unmanned aircraft). Where existing law is sufficient to  
29 address the challenges unmanned aircraft are likely to pose to individuals and society, the Act  
30 makes clear that existing rules apply to unmanned aircraft operations. However, where there is  
31 uncertainty as to the law’s ability to address the salient aspects of unmanned aircraft, the Act  
32 seeks to clarify the law’s application and effect.

33 That the federal government has exclusive authority over aircraft operations in the  
34 national air space, as well as other attendant operational concerns, is well settled law.<sup>4</sup> The

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<sup>1</sup> FAA Aerospace Forecast: Fiscal Years 2018-2038, p. 41 (March 2018).

<sup>2</sup> See, Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 3-4 (2004) (arguing that when considering technological change we should seek to identify how the technology brings new aspects of human interaction into the foreground of legal analysis, rather than simply trying to identify new technologies, as such).

<sup>3</sup> See, Jack Balkin, *The Path of Robotics Law*, 6 Ca. L. Rev. Circuit 45, 46 (2015).

<sup>4</sup> See, *Braniff v. Nebraska State Bd. of Equalization and Assessment*, 347 U.S. 590 (1954) (federal law preempts area of aviation regulation based on Congress’s Commerce Clause authority); see also, *U.S. Airways v.*

1 Federal Aviation Administration is the primary regulatory agency that addresses aviation in the  
2 United States, but it does so primarily in relation to the operational aspects of flight, as well as  
3 safety, crew and pilot training, and related matters. States retain authority in a number of areas  
4 that do not directly regulate unmanned aircraft flight operations but may still have an effect on  
5 aircraft and their operations, including areas such as zoning of airports and helipads, privacy law,  
6 and product liability law.<sup>5</sup> Preemption may arise in relation to these areas where state or local  
7 laws or regulations directly conflict with existing federal aviation controls.

8 The application of state tort law, however, is not wholly preempted in relation to  
9 airplanes and certain characteristics of unmanned aircraft raise more issues than others in relation  
10 to specific areas of tort law. Three aspects of unmanned aircraft enable human activity in ways  
11 that are qualitatively different from existing aircraft technologies such that the activity brings to  
12 the foreground new tensions between people and unmanned aircraft. First, unmanned aircraft can  
13 fly lower with less noise and disruption on the ground than existing aircraft; second, unmanned  
14 aircraft can remain aloft in a stationary position in ways not commonly problematic with existing  
15 aircraft; and, third, unmanned aircraft regularly use cameras and other sensors to live stream the  
16 view from the unmanned aircraft to the operator, to record what they see, hear and sense, or to  
17 record additional data as they fly. The combination of these capabilities raises questions in  
18 relation to specific areas of tort law.

19 The two most contentious areas of Tort Law Relating to Drones are trespass to land and  
20 privacy. The Act clarifies the application of tort law in each of these areas while also making  
21 certain that less contentious tort-related questions are addressed. Specifically, the Tort Law  
22 Relating to Drones Act provides for efficient determination of rights and liabilities in relation to  
23 the operation of unmanned aircraft:

- 24 • It clarifies that the state’s tort law applies to those who use or are responsible for  
25 unmanned aircraft operations to the extent not otherwise provided in the Act;
- 26 • It clearly adopts the “aerial trespass” doctrine in relation to unmanned aircraft in  
27 the airspace above private land, protecting land possessor interests from intrusive  
28 unmanned aircraft incursions while not inhibiting the ability of unmanned aircraft  
29 to operate in unmanned aircraft-navigable airspace;
- 30 • It clarifies that intentional unmanned aircraft intrusions on land are trespasses to  
31 land;
- 32 • It clarifies the application of land possessor duties to unmanned aircraft operating  
33 above or having crashed or landed on the land possessor’s property; and,

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*O’Donnell*, 627 F.3d 1318 (10<sup>th</sup> Cir. 2010) (application of state alcohol laws to aircraft preempted by federal regulation of airline safety).

<sup>5</sup> See, Troy Rule, *Drone Zoning*, 95 N.C. L. REV. 133 (2016); Robert Heverly, *The State of Drones: State Authority to Regulate Drones*, 8 Alb. Govt. L. Rev. 29 (2015) FAA Office of the Chief Counsel, *State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet* (2015).

- 1                   • It applies existing state tort law privacy protections to unmanned aircraft  
2                   operations, recognizing the variety of statutes and case law on privacy among the  
3                   states.

4                   Because the frequency of unmanned aircraft operations is likely to continue to increase, it  
5 is useful to provide answers to questions of unmanned aircraft owner and operator liability in the  
6 clearest way possible. The Tort Law Relating to Drones Act does this through the careful  
7 consideration of the ways in which unmanned aircraft operations are important to the application  
8 and development of state tort law while respecting federal and state roles related to the various  
9 aspects of unmanned aircraft operations.

1 **UNIFORM TORT LAW RELATING TO DRONES ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Tort Law

3 Relating to Drones Act.

4 **Comment**

5  
6 The title of the act uses the commonly used word “drone” to refer to the technologies that  
7 are defined and referred to throughout the act as “unmanned aircraft.” *See*, §2(2), *supra*. This  
8 choice reflects the position that while it is important to retain the federal terminology for the  
9 operative provisions of the act, it is also important to refer to the lay terminology for unmanned  
10 aircraft. As an example, while the word “drone” does not appear in the relevant Federal Aviation  
11 Administration (FAA) regulations applicable to small Unmanned Aircraft Systems, 14 C.F.R.  
12 Part 107, it does appear on the FAA’s web page that describes those regulations.  
13 [https://www.faa.gov/news/fact\\_sheets/news\\_story.cfm?newsId=22615](https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=22615). The term “drone”  
14 appears three times in the FAA Reauthorization Act of 2018 (Public Law 115-254 (2018),  
15 §§351, 360 & 379), but that same act does not define the term “drone” nor is that term otherwise  
16 defined in federal statutes in relation to unmanned aircraft. States have used both terms in  
17 legislation, *see*, Va. St. § 19.2-60.1 (Use of unmanned aircraft systems by public bodies; search  
18 warrant required); S.D. St. 22-21-1 (Trespassing to eavesdrop--Installation or use of  
19 unauthorized eavesdropping device—Drones), and some states have used both in the same  
20 legislation. *See*, Fl. St. § 330.41 (Unmanned Aircraft Systems Act) (§ 330.41(c): “‘Unmanned  
21 aircraft system’ means a drone and its associated elements . . .”). By retaining the technical  
22 aviation term within the text of the act but referencing the popular term in the title, the act is both  
23 transparent as to its subject matter and precise in its effect.  
24

25 **SECTION 2. DEFINITIONS.** In this [act],

26 (1) “Land Possessor” means a person who owns, rents, leases, or otherwise is in lawful  
27 possession of real property.

28 (2) “Person” means an individual, firm, partnership, corporation, company, association,  
29 joint-stock association, or governmental entity. The term includes a trustee, receiver, assignee, or  
30 similar representative of any of them.

31 (3) “State” means a state of the United States, the District of Columbia, Puerto Rico, the  
32 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of  
33 the United States.

34 (4) “Tort” means a civil wrong, other than breach of contract, for which a claim may be



1 made and a remedy obtained in the form of damages and, under appropriate circumstances,  
2 injunctive relief.

3 (5) “Unmanned aircraft” means an aircraft operated without the possibility of direct  
4 human intervention from within or on the aircraft.

5 **Comment**

6 “Land Possessor” is adapted from the definition provided by Black’s Law Dictionary  
7 (10<sup>th</sup> Edition, 2014), and is used rather than the simpler “possessor” terminology that may be  
8 found in property law to avoid any ambiguity between a person who is entitled to possession of  
9 the real property in question and a person who might possess, own, or operate an unmanned  
10 aircraft.

11  
12 “Person” is defined as in FAA Regulations, 14 C.F.R. § 1.1, and includes various forms  
13 of legal entities as well as individuals. While this is not identical to the standard ULC definition,  
14 its adoption allows consistency with federal regulations in this area.

15  
16 “Tort” is adapted from the definition provided by Black’s Law Dictionary (10<sup>th</sup> Edition,  
17 2014).

18  
19 “Unmanned aircraft” is defined in the same way that the FAA has defined the term. 14  
20 C.F.R. § 1.1.

21  
22 **SECTION 3. SCOPE.** This [Act] applies to unmanned aircraft operations and the acts of  
23 those who own or operate, and are affected by, such operations.

24 **Comment**

25 This section makes clear that this act applies only to unmanned aircraft operations and  
26 should not be read to imply changes to any other area of the tort law of any state that adopts it.

27  
28 **SECTION 4. UNMANNED AIRCRAFT AND STATE TORT LAW.**

29 (a) An unmanned aircraft is an instrumentality by which a tort can be committed under  
30 the law of this state.

31 (b) Except as provided for in this [act], and subject to any Constitutional rights or  
32 privileges, the common law and statutory tort law of this state shall apply to a person who owns  
33 or operates unmanned aircraft within this state, or to any other person liable under the law of this

1 state, including common law and statutory defenses, immunities, and presumptions applicable in  
2 tort actions.

3 (c) In an action brought under this [act], the same remedies are available as in a tort  
4 action in this state.

### 5 **Comment**

6 This section is intended to make clear that unmanned aircraft are subject to state tort law  
7 to the extent such laws are not preempted by federal law.

8  
9 Subsection (a) provides the general statement of applicability, while subsection (b)  
10 further makes clear that the application of tort law should be consistent with the entirety of the  
11 state’s tort doctrine to the extent not otherwise provided in the Act, and (c) clarifies that existing  
12 remedies within the state are available for tort violations under the Act. The section thus makes  
13 clear that state tort actions in areas such as negligence, battery, and other intentional torts may be  
14 brought based on unmanned aircraft operations. A person would be liable for battery if that  
15 person intended to fly an unmanned aircraft so as to make contact with a person and contact  
16 occurred. Likewise, while the standard of care for aircraft operation is set by the federal law, *see*,  
17 *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367 (3<sup>rd</sup> Cir. 1999)(“federal law establishes  
18 the applicable standards of care in the field of air safety, generally, thus preempting the entire  
19 field from state and territorial regulation”), tort actions in negligence for breach of those  
20 standards is permitted under this section in relation to unmanned aircraft. *See, Id.*

### 21 22 **SECTION 5. AERIAL TRESPASS BY UNMANNED AIRCRAFT.**

23 (a) A person is liable for aerial trespass if the person intentionally and without the  
24 consent of the land possessor operates an unmanned aircraft in the airspace over the land  
25 possessor’s real property and causes substantial interference with the use and enjoyment of the  
26 property.

27 (b) Factors that may be considered in determining whether operation of an unmanned  
28 aircraft caused substantial interference with the use and enjoyment of the property under  
29 subsection (a) of this section include:

- 30 (1) the nature of the use and enjoyment of the property;  
31 (2) the operator’s purpose in operating the unmanned aircraft over the property;

- 1                   (3) the altitude of the unmanned aircraft;
- 2                   (4) the amount of time the unmanned aircraft was operated over the property;
- 3                   (5) the frequency with which unmanned aircraft have operated over the property
- 4 during the relevant time period;
- 5                   (6) the type of unmanned aircraft and the nature of its operation over the property;
- 6                   (7) whether the operation of the unmanned aircraft over the property directly
- 7 caused physical or emotional injury to persons or damage to real or personal property on the
- 8 property;
- 9                   (8) whether the operation of the unmanned aircraft over the property directly
- 10 caused economic damage;
- 11                   (9) the time of day the unmanned aircraft was operated over the property;
- 12                   (10) whether an individual on the property saw or heard the unmanned aircraft
- 13 while it was over the property;
- 14                   (11) whether and the extent to which the operation of the unmanned aircraft
- 15 exceeded any consent given by the land possessor;
- 16                   (12) regardless of the operator's purpose in operating an unmanned aircraft,
- 17 whether the unmanned aircraft harassed persons, livestock, or wildlife on the property; and,
- 18                   (13) Any other factor relevant to the determination of substantial interference with
- 19 the use and enjoyment of land.

20           (c) Any claims for trespass to land involving aerial intrusion by unmanned aircraft must

21 be brought under this section.

22           (d) Repeated or continual operation of unmanned aircraft over a land possessor's property

23 does not create a prescriptive right in the airspace.

1 (e) There shall be a rebuttable presumption that the operation of an unmanned aircraft  
2 does not substantially interfere with the use and enjoyment of property under subsection (a) of  
3 this section if the unmanned aircraft was being operated for:

4 (1) law enforcement purposes in conformance with the requirements of the Fourth  
5 Amendment to the United States Constitution or the state constitution, including operation  
6 pursuant to a warrant or other order issued by a court of competent jurisdiction;

7 (2) purposes protected by the First Amendment; or,

8 (3) purposes of protecting public safety by authorized personnel in emergency  
9 situations.

#### 10 **Comment**

11 This section establishes the cause of action for aerial trespass as the exclusive cause of  
12 action for intrusions of unmanned aircraft into the airspace over land. This is a contentious but  
13 principled position adopted in the Act following significant debate and consideration of a wide  
14 variety of positions. The background for the approach taken here, along with its implications,  
15 follows.

16  
17 A common law maxim held that a landowner owned the surface of the land and the  
18 ground below it and sky above it, up to the heavens and down to the center of the earth. Known  
19 as the *ad coelum* doctrine, it was restated time and again by such experts as Lord Coke and  
20 Blackstone. As aviation began to take hold, however, from the start of the twentieth century it  
21 became quite apparent that the *ad coelum* doctrine was incompatible with air travel. As early as  
22 the development of balloons and zeppelins, commentators began discussing how airspace rights  
23 granted to landowners could hinder the development of air travel. In the 1946 case of *United*  
24 *States v. Causby*, the U.S. Supreme Court held that the *ad coelum* doctrine was incompatible  
25 with the modern world: “It is ancient doctrine that at common law ownership of the land  
26 extended to the periphery of the universe - *Cujus est solum ejus est usque ad coelum*. But that  
27 doctrine has no place in the modern world.” *United States v. Causby*, 328 U.S. 256, 260-261  
28 (1946).

29 The *Causby* Court then held that to establish a cause of action for a taking based on the  
30 use of airspace over property, the property’s owner must show that the flights substantially  
31 interfere with the use and enjoyment of the land. *Id.*, at 262. This test has been adopted by many  
32 state and lower federal courts since *Causby* was decided, and was eventually included in the  
33 Restatement (Second) of Torts, which formulated it as follows: “Flight by an aircraft in the air  
34 space above the land of another is trespass if, but only if, (1) it enters into the immediate reaches  
35 of the air space next to the land, and (2) it interferes substantially with the other's use and  
36 enjoyment of the land.” Restatement (Second) of Torts §159(2).

1 This section adopts the *Causby* and Restatement conceptions of aerial trespass, but adds  
2 additional clarity to it in light of the unique attributes of unmanned aircraft, namely that  
3 unmanned aircraft fly lower than manned aircraft but are generally quieter and less obtrusive  
4 even at those lower heights. The additional clarity comes from the explicit identification of a  
5 non-exclusive list of potential factors for courts to consider when it is necessary to decide  
6 whether a trespass by unmanned aircraft has occurred. This approach is contrasted with one in  
7 which landowners hold title to some either undetermined or predetermined amount of airspace  
8 over their land. *See, e.g., Troy Rule, Airspace in an Age of Drones*, 95 Bos. U. L. Rev. 155  
9 (2015) (arguing in favor of “new laws expressly entitling landowners to exclude drones from the  
10 airspace above the surface of their land to a height of 500 feet in most locations.” *Id.*, at 159).

11 Subsection (a) lays out the general test and is based on the *Causby* and Restatement  
12 formulations.

13 Subsection (b) then provides an illustrative and non-exclusive list of factors that might be  
14 considered in any particular case. The list is extensive, but not exhaustive, and only those factors  
15 that are potentially relevant in any particular case need be addressed.

16 Subsection (b)(1) is a consideration of the how the property is used and by whom. A  
17 large, unoccupied tract of land would be viewed differently under this subsection than would a  
18 small, urban plot of land on which stands an inhabited single-family home.

19 Subsection (b)(2) allows consideration of why an unmanned aircraft was being operated  
20 over the property. If the operator’s purpose was to harass or annoy, that would counsel in favor  
21 of finding an aerial trespass, whereas one who is only transiting over the property would counsel  
22 in favor of finding no aerial trespass on this factor. As unmanned aircraft use cameras and  
23 sensors to fly, and many of these sensors can record the data they receive, the purpose or activity  
24 of recording visual, audio or other data neither favors nor disfavors finding aerial trespass in any  
25 particular situation. If the purpose of the flight was to observe private behavior of the occupants,  
26 the addition of a recording of that activity would support a finding of aerial trespass. Where the  
27 unmanned aircraft was simply transiting the property, capturing data from the property would  
28 support a finding that no aerial trespass had occurred.

29 Subsection (b)(3) takes the height of the flight into account. A lower flight may, in  
30 appropriate circumstances, favor the land possessor, while a higher altitude flight would likely  
31 favor the operator.

32 Subsection (b)(4) focuses the analysis on the amount of time the unmanned aircraft  
33 operated over the property and should be considered in light of the size of the property and speed  
34 of the unmanned aircraft. A quicker transit over property, in light of the size of the property and  
35 the unmanned aircraft’s speed, would favor the operator, while a longer transit, especially with  
36 time spent hovering over the property, would favor the land possessor.

37 Subsection (b)(5) encourages the court to consider how frequently unmanned aircraft  
38 have operated over the property. The frequency of flights alone does not *per se* favor either the  
39 land possessor or the operator but may be relevant in considering additional factors. The time-  
40 period during which flights took place is also likely to be relevant to this inquiry. An unmanned

1 aircraft that has been operated over land frequently over a short period of time is more likely to  
2 favor a finding of intrusion upon use and enjoyment of the land, while operations that have more  
3 time between them is less likely to support such a conclusion, though even a single flight for an  
4 inappropriate purpose would support a claim of substantial interference.

5 Subsection (b)(6) relates to the kind of unmanned aircraft that was involved in the alleged  
6 aerial trespass, including its size and capabilities.

7 Subsection (b)(7) includes consideration of injury to the property or its owners or guests  
8 in the analysis. Operation of the unmanned aircraft that caused damage or physical or emotional  
9 injury, regardless of whether the injury was intentional or the result of negligence, would favor a  
10 finding of aerial trespass. In contrast, a lack of damage or physical or emotional injury may  
11 support the conclusion that no aerial trespass has occurred. This subsection does not create a  
12 separate or separable cause of action for emotional distress caused by unmanned aircraft  
13 operations. The inclusion of emotional distress within this subsection is intended solely to  
14 provide for consideration of this type of injury within the determination of whether the  
15 unmanned aircraft's operation substantially interfered with the land possessor's use and  
16 enjoyment of the property. In other words, where unmanned aircraft operations have a negative  
17 effect on the land possessor's emotional state, it is relevant to consider those effects within the  
18 totality of the circumstances. Where the emotional reaction is unreasonable, or not sufficiently  
19 severe, a court may choose to find that this factor does not support a finding of substantial  
20 interference with use and enjoyment of property. Where a court finds that emotional distress was  
21 not unreasonable, this factor may weigh in favor of a finding of substantial interference with use  
22 and enjoyment of property but may still be outweighed by other factors in the inquiry.

23 Subsection (b)(8) adds economic damages to the considerations that are relevant to the  
24 inquiry. Operations that cause economic damage, as the flights in *Causby* did to the petitioner's  
25 farming operation, are likely to support a finding of aerial trespass. As with subsection (b)(7), a  
26 lack of provable economic damage favors a finding that no aerial trespass has occurred.

27 Subsection (b)(9) authorizes consideration of the time of day of the unmanned aircraft's  
28 operation over the land, and subsection (b)(10) makes clear that the extent of awareness of a  
29 person on the property of the operation of the unmanned aircraft may also be relevant.

30 Subsection (b)(11), following the common law and Restatement rule that exceeding  
31 consent to enter land is a trespass, asks whether the operator remained within any consent given  
32 by the land possessor. Where an operator remained within the consented boundaries of the land  
33 possessor's permission, whether those boundaries were physical or operational, this factor is  
34 likely to favor a finding of no aerial trespass. Where consent was exceeded, this factor would  
35 support a finding of aerial trespass.

36 Subsection (b)(12) asks whether the unmanned aircraft was used to harass livestock or  
37 wildlife on the property, and, where it was, would favor a finding of aerial trespass, while no  
38 harassment would favor a finding of no aerial trespass.

39 Subsection (b)(13) emphasizes the non-exclusive nature of the factors and encourages  
40 litigants and courts to consider any factors relevant to the finding whether a substantial intrusion

1 into the use and enjoyment of the property had occurred in a particular case.

2 None of the factors listed should be viewed as determinative. Instead, they should be  
3 weighed and evaluated holistically. A factor that might weigh heavily in one case might be only  
4 tangentially relevant in another. In addition, many of the factors may be appropriately viewed as  
5 neutral in any particular case. For example, the lack of damage to property or injury to persons  
6 may counsel against a finding of substantial interference with the use and enjoyment of property,  
7 but may also favor neither party if the potential for such damage or injury was not particularly  
8 likely on a specific set of facts. Illustrative of this scenario might be where repeated flights over  
9 residential property are made at low altitude but are made at a time of day when people are not  
10 outside the residence and over an area of the property with no improvements. There is little  
11 likelihood for injury to persons or damage to property in such a scenario, but the lack thereof  
12 does not necessarily lead to the conclusion that this factor favors a finding that substantial  
13 interference with the use and enjoyment of property has not occurred. Instead, many of the listed  
14 factors may simply be irrelevant within a particular factual scenario, and in such a case a court  
15 should consider only those factors that are relevant, ignoring those that are not.

16 Subsection (c) requires that all actions for trespass to land based on the operation of an  
17 unmanned aircraft over a land possessor’s land must be brought under this provision.

18 Subsection (d) precludes unmanned aircraft operators from claiming a right by  
19 prescription to the airspace above a land possessor’s property, either as a result of the flight(s) of  
20 a single owner or operator’s unmanned aircraft or as a result of the combined flights of more  
21 than one owner or operator’s unmanned aircraft. While the ability to gain such prescriptive rights  
22 exists in many states in terms of land, it is the intent of this act to preclude the possibility of  
23 unmanned aircraft operators gaining such prescriptive rights in airspace, and this section  
24 prohibits such an outcome regardless of the state’s otherwise existing right to gain rights or title  
25 to property by prescription.

26 Subsection (e) creates three rebuttable presumptions applicable to the determination of  
27 substantial intrusion on the use and enjoyment of property. The first presumption contained in  
28 subsection (e)(1) provides that unmanned aircraft are presumed not to substantially interfere with  
29 the use and enjoyment of property if the operation is part of law enforcement activity that is  
30 carried out in conformance with the requirements of the Fourth Amendment to the U.S.  
31 Constitution or corollary state constitutional provisions. The second presumption, contained in  
32 subsection (e)(2), provides that unmanned aircraft are presumed not to substantially intrude on  
33 the use and enjoyment of property if the operation is for purposes that are protected by the First  
34 Amendment to the U.S. Constitution or corollary state constitutional provisions. The second  
35 presumption, however, is not intended to create or imply the existence of a journalistic or First  
36 Amendment privilege to trespass. Just as reporters can be found liable for trespass on land in  
37 non-unmanned aircraft situations, *see, e.g., J.H. Desnick v. American Broadcasting Companies*,  
38 44 F.3d 1345 (7<sup>th</sup> Cir. 1995) (noting, “To enter upon another's land without consent is a trespass.  
39 The force of this rule has, it is true, been diluted somewhat by concepts of privilege and of  
40 implied consent. But there is no journalists' privilege to trespass.” *Id.*, at 1351); *see, also, Wilson*  
41 *v. Layne*, 526 U.S. 603 (1999) (Where police brought photographer to private home when  
42 seeking to make an arrest, Justice Breyer noted: “In my view, however, the homeowner's right to  
43 protection against this type of trespass was clearly established long before [*Wilson*] (Breyer, J.,

1 concurring in part and dissenting in part), this section does not sanction trespass by reporters  
2 under the guise of the First Amendment’s Free Speech and Press clause. Where a land possessor  
3 makes appropriate allegations tending to show that the operation of an unmanned aircraft  
4 intruded into the use and enjoyment of the land through the pleading of facts sufficient to satisfy  
5 relevant factors listed in § 5, a court should allow the action to proceed. Without strong  
6 allegations of this kind, however, cases involving activity protected by the First Amendment  
7 should not be allowed to proceed. The third presumption, found in subsection (e)(3), protects  
8 authorized persons who operate unmanned aircraft for public safety purposes.

9 **SECTION 6. TRESSPASS TO LAND BY UNMANNED AIRCRAFT.**

10 (a) Except as otherwise provided in subsection (b), a person is liable for trespass to land  
11 by an unmanned aircraft if the person intentionally

12 (1) lands an unmanned aircraft on a land possessor’s real property, or

13 (2) causes an unmanned aircraft to come into physical contact with a structure or  
14 plant on a land possessor’s real property.

15 (b) A person is not liable under subsection (a) if:

16 (1) the unmanned aircraft operator is forced to land the unmanned aircraft because  
17 of unexpected circumstances that reasonably justify the landing; or

18 (2) the unmanned aircraft touches down due to a malfunction or because of  
19 weather or any other factor beyond the operator’s control.

20 (c) An operator or owner asserting the privileges provided in subsection (b) is liable for  
21 any damage caused by the unmanned aircraft’s operation.

22 (d) If an unmanned aircraft comes to rest on the real property of another, the unmanned  
23 aircraft’s owner or operator has the same right to recover it from the other’s real property as state  
24 law provides to owners of other chattels that are on the land of another.

25 **Comment**

26 Section 6 makes clear that the traditional common law rules for trespass to land apply  
27 when there is an intentional physical invasion of the land of another without the consent of the  
28 owner or possessor of the land.  
29



1 Subsection (a) provides the general rule, which is consistent with the rule as delineated in  
2 the Restatement (Second) of Torts §158, which requires only intentional entering of land  
3 belonging to another. No intent to harm or intent to trespass is required and proof of damage is  
4 not required to make out a *prima facie* claim for trespass to land. Damages for injury, including  
5 injury to animals or individuals on the land possessor’s land, caused by any trespass under this  
6 subsection are addressed in §4, which provides for the applicability of, and remedies provided  
7 under the tort law of the state in question.  
8

9 Subsection (b) incorporates the privilege of private necessity into the Act in a way  
10 intended to be consistent with the formulation of the privilege contained in Restatement (Second)  
11 of Torts §197, and subsection (c) also follows the Restatement in holding the trespasser liable  
12 only for actual damages caused by the exercise of the privilege.  
13

14 Subsection (d) applies principles of property and tort law to unmanned aircraft that have  
15 come to rest on someone else’s property. While many states follow the Restatement’s rule for  
16 recovery of property that has come to rest on another’s land, *see*, Restatement (Second) Torts  
17 §198 (providing a privilege to enter another’s land at a reasonable time and in a reasonable  
18 manner to recover a chattel that has come upon the land “otherwise than with the actor’s consent  
19 or by his tortious conduct or contributory negligence,” but holding the chattel’s owner liable for  
20 damages caused by the entry) and *see also*, Restatement (Second) Torts §200 (“If a chattel is  
21 where it is by reason of the tortious conduct or contributory negligence of the actor, he is not  
22 privileged, except in case of public or private necessity, to enter land in the possession of another  
23 for the purpose of ... removing the chattel from such land”), there are sufficient variations in  
24 state law to allow for continued state provisions to control on this issue.  
25

## 26 SECTION 7. DUTY AND LIABILITY OF LAND POSSESSORS.

27 (a) A landowner or land possessor shall act with reasonable care in relation to known  
28 unmanned aircraft operating in the airspace over the landowner’s or land possessor’s property.

29 (b) A land possessor who is not otherwise authorized by federal law and who initiates any  
30 active counter-measures in response to the operation of unmanned aircraft over the land  
31 possessor’s land is liable in tort for damage caused to unmanned aircraft by the counter-measures  
32 taken.

33 (c) A land possessor does not have a duty to ensure that the airspace above the land  
34 possessor’s property is free from obstructions.

1 **Comment**

2 This section makes clear that a land possessor owes the same duties to unmanned aircraft  
3 operating over his or her property as are owed to persons who are on their property. The modern  
4 trend in tort law has been to adopt a “reasonableness” standard in relation to individuals who are  
5 on a property, replacing the common law distinctions based on status of the person on the  
6 property as an invitee, licensee or trespasser. In other words, even if a land possessor believes an  
7 unmanned aircraft is being operated such that its presence over the property constitutes aerial  
8 trespass, the land possessor may not act in an unreasonable manner in relation to that unmanned  
9 aircraft.

10 Federal law prohibits destroying or otherwise interfering with an aircraft. 18 U.S.C. § 32;  
11 *see also*, 49 U.S.C. § 46501 (which brings all aircraft into the “special aircraft jurisdiction of the  
12 United States”). As the FAA has categorized unmanned aircraft as aircraft, intentional actions  
13 taken to shoot down, disable or capture an unmanned aircraft would violate federal law and are  
14 prohibited by subdivision (b) of this section. Subsection (b) thus provides a private cause of  
15 action to the owner of an unmanned aircraft damaged by active counter-measures initiated by a  
16 land possessor, including such measures as the shooting down of an unmanned aircraft or the use  
17 of radio frequency jammers or other technologies to damage, destroy or interfere with the  
18 operation of an unmanned aircraft. This subsection should be read to apply only to direct active  
19 counter-measures that are aimed at an unmanned aircraft, such as would occur with the firing of  
20 projectile weapons or the use of radio frequency devices. Indirect actions taken by a land  
21 possessor, such as attempting to locate the unmanned aircraft’s operator or contacting  
22 appropriate legal authorities, should not be considered active-countermeasures, even if the  
23 landowner was incorrect in assessing the intentions of the operator of the unmanned aircraft,  
24 because while they are active measures, they are not “counter-measures” as that term is  
25 understood within the aviation field.

26 Subdivision (c) acknowledges the right of land possessors to build upon and otherwise  
27 use their properties, while also acknowledging that land possessors owe no duty to unmanned  
28 aircraft operators to make the airspace over their properties obstruction free such that unmanned  
29 aircraft can more easily operate over the property. This subsection is not intended to create any  
30 right for land possessors to build structures on the property apart from or in addition to those  
31 provided for in local, state and federal building, zoning or related development laws, regulations  
32 and ordinances.

33 **SECTION 8. UNMANNED AIRCRAFT AND VIOLATIONS OF PRIVACY.** An  
34 unmanned aircraft is an instrumentality by which a tort in violation of privacy rights may be  
35 committed under federal or state law.

36 **Comment**  
37

38 Unmanned aircraft have a number of characteristics that ostensibly raise concerns  
39 regarding the privacy of those who can be observed by them. In addition to any actual  
40 surveillance, the operation of unmanned aircraft may raise concerns among those who can see

1 the unmanned aircraft but who cannot or do not see its operator. Yet, many states already have in  
2 place laws that would apply privacy principles to the operation of unmanned aircraft, though the  
3 doctrines and their applications vary – sometimes significantly – from state to state. *See, e.g.,*  
4 Hillary Farber, "Keep Out! The Efficacy of Trespass, Nuisance, and Privacy Torts as Applied to  
5 Drones," 33 Ga. St. L. Rev. 396 (2017). The potential for introducing duplicative or conflicting  
6 provisions into state law is thus avoided by making clear that existing state law should be applied  
7 to actions taken using unmanned aircraft.

8  
9 This does not diminish concerns raised by specific characteristics of unmanned aircraft  
10 operation, namely the low-level flights of unmanned aircraft, the ability to acquire and record  
11 images and other data that would otherwise be unavailable, and the perceived anonymity of their  
12 operation. This explicit clarification of the application of privacy principles to the operation of  
13 unmanned aircraft thus serves a signaling function for the public and the industry and makes  
14 clear that the state takes privacy concerns seriously, a reassurance citizens may seek in relation to  
15 the act.

16  
17 The provision should thus apply similarly to unmanned aircraft technology as it does to  
18 other technology. If it would be a violation of privacy rights to observe a person through the  
19 windows in their bedroom using a telescope or a camera with a telephoto lens, then observing  
20 that person using an unmanned aircraft hovering outside the window should likewise be a  
21 violation of privacy rights. If it would be a privacy violation to climb a tree near someone's  
22 house and observe that person in a yard behind a privacy fence, then it would likewise be a  
23 privacy violation to fly an unmanned aircraft above the level of the fence and do the same.

24  
25 **[SECTION 9. SEVERABILITY.** If any provision of this [act] or its application to any  
26 person or circumstance is held invalid, the invalidity does not affect other provisions or  
27 applications of this [act] which can be given effect without the invalid provision or application,  
28 and to this end the provisions of this [act] are severable.]

29 **Legislative Note:** Include this section only if this state lacks a general severability statute or a  
30 decision by the highest court of this state stating a general rule of severability.

31  
32 **SECTION 10. EFFECTIVE DATE.** This [act] takes effect . . . .