October 17, 2018

Anita Ramasastry
President, Uniform Law Commission
111 N. Wabash Avenue, Suite 1010
Chicago, IL 60602

Dear President Ramasastry,

As associations and companies involved in the unmanned aircraft industry, we write to express our significant concerns with the draft "Tort Law Relating to Drones Act" ("Act") produced by the Uniform Law Commission's ("ULC") Tort Law Relating to Drones Drafting Committee ("Committee"). The draft in question is under consideration for the October 26-28, 2018 ULC meeting in Detroit.

As discussed in more detail below, the Act is flawed and should not be adopted as it is currently drafted. First, the underlying premise that a new, uniform state tort is needed to provide property owners recourse for intrusive drone operations is incorrect. Second, if the ULC nevertheless desires to adopt an aerial trespass tort for drones despite the flawed premise, the proposed tort should not create a "per se violation." Third, although the Act correctly recognizes the potential for federal preemption, certain changes are necessary to properly apply preemption principles. Fourth, Section 302 of the Act should not place the burden of proof on drone operators defending against suits alleging the tortious acquisition of images. Finally, if the ULC determines that state legislation on drones is necessary, the legislation should make clear that localities cannot regulate the ownership or operation of drones unless such regulation (i) is expressly authorized by state statute and (ii) is not preempted by federal law. A redlined version of the Act addressing these concerns is attached for your convenience.

The Proposed Per Se Aerial Trespass Tort is Unnecessary and Preempted

The draft Act mistakenly starts from the proposition that a new aerial trespass doctrine is necessary to protect landowners and lessees from drone operations that would otherwise interfere with their use and enjoyment of land.[1] As proposed Section 303 of the Act demonstrates, existing state nuisance laws already exist and give landowners the ability to prevent such drone operations. We support the Act's clarification that these existing nuisance laws apply to drone operations and believe that, with this clarification, the proposed Per Se Aerial Trespass Tort is unnecessary.

Rather than rely on existing state nuisance laws, however, Section 301 proposes to grant property owners "an automatic exclusionary right" to prevent drone operations below 200 feet, even though they concededly do not interfere with the use and enjoyment of land. Specifically, Section 301 establishes drone "no-fly zones" below 200 feet above private property absent the consent of the property owner, and the justification for this per se rule is that drone operations have such a minimal impact that it would be difficult or impossible for the landowner to demonstrate injury under traditional tort law. Nearly 20 parties already have expressed concern that such an approach is preempted by federal law.[2] Importantly, although the Committee implied that the proposed Per Se Aerial Trespass Tort was reviewed and approved by the United States Department of Transportation ("DOT") and the Federal Aviation Administration ("FAA"), the DOT and FAA jointly filed a letter objecting to this characterization and noting that adoption of a per se aerial trespass tort "would be in tension

[1] *Act at 8 (Prefatory Note) and 16 (Comment).*

[2] *Letter from Mickey H. Osterreicher, General Counsel, National Press Photographers Association, to Anita Ramasastry, President, Uniform Law Commission at 2 (July 24, 2018) ("NPPA Letter"), http://www.uniformlaws.org/shared/docs/drones,%20tort%20law%20relating%20to/2018jul24_TLRDA_Comments_Osterreicher.pdf; Letter from Carl Szabo, Vice President and General Counsel, NetChoice, to Anita Ramasastry, President, Uniform Law Commission at 1-2 (July 9, 2018) ("NetChoice Letter"), http://www.uniformlaws.org/shared/docs/drones,%20tort%20law%20relating%20to/2018Jul09_TLRDA_Comments_Szabo.pdf; Letter from Various Associations Representing the Unmanned Aircraft Industry, to Anita Ramasastry, President, Uniform Law Commission at 2 (July 5, 2018) ("Drone Industry Letter"), http://www.uniformlaws.org/shared/docs/drones,%20tort%20law%20relating%20to/2018jul5_TLRDA_Comments_Industry.pdf; Letter from Lisa Ellman and Gretchen West, Co-Executive Directors, Commercial Drone Alliance, to Anita Ramasastry, President, Uniform Law Commission at 2 (July 23, 2018) ("Alliance Letter"), http://www.uniformlaws.org/shared/docs/drones,%20tort%20law%20relating%20to/2018jul5_TLRDA_Comments_Industry.pdf.*

with decades of established precedent in the Federal courts, which have rejected the notion of applying the traditional elements of trespass law to aircraft overflight of private property."[3] Indeed, federal law in this area continues to develop: for instance, Section 373 of the recently enacted FAA Reauthorization Act of 2018 directs the Comptroller General to "conduct a study on the relative roles of the Federal Government, State, local and Tribal governments in the regulation of low-altitude operations of unmanned aircraft systems," and to address in that study — inter alia — the current state of the law, the degree of consistency needed among these levels of government, and the interests of the various government entities.[4] Others also raised concerns with the draft, including one company that noted that the draft Act creates "the misleading impression" that the company had endorsed the proposal, when in fact it had not.[5]

The Act also is premised on the flawed notion that the proposed Per Se Aerial Trespass tort will eliminate the need for "a fact-specific inquiry which has historically caused uncertainty and a lack of uniformity."[6] As various commenters have suggested, the proposed tort will in fact foster endless litigation between landowners and drone operators, rather than avoiding these disputes.[7] And any certainty provided by a "line in the sky" at 200 feet or otherwise is illusory. Claims under the proposed tort still will require a fact-specific inquiry into, at the very least, (i) whether a drone operation crossed into private property without consent and, if so, (ii) whether the operations were at an altitude below 200 feet.

Any Proposed Aerial Trespass Tort Should Not Establish Per Se Violations

If the ULC nevertheless decides to move forward with consideration of aerial trespass legislation for drones, it should remove the per se nature of the tort. The Act expressly acknowledges that small unmanned aircraft simply do not cause the kind of injury that the traditional tort of aerial trespass recognizes—i.e., a substantial interference with the use or enjoyment of property, particularly from noise.[8] But rather than acknowledge the implications of this lack of injury—that there is no need for legal restrictions on drone operations, because they do not cause cognizable harm--the Committee has adopted the counter-intuitive position that the tort should be redefined so that no impact or interference is required. Under the proposed draft, the mere presence of an unmanned aircraft of any size for any period within 200 feet over private property (or any structure on it) causes a per se injury. The proper response to conduct that does not cause injury is not to change the law so that no injury need be shown. A landowner should always be required to demonstrate some injury in order to proceed with litigation.

Any Drone Act Should Properly Apply Preemption Principles

Section 202 of the Act incorrectly attempts to limit the scope of federal preemption by stating that a federal law must "expressly" preempt a provision before said provision is preempted. Preemption is not limited, however, to situations where a federal law expressly displaces a state law. There are three types of preemption: express preemption (when Congress specifically preempts a state law);[9] field preemption (when a federal framework of regulation is "so pervasive . . . that Congress left no room for the States to supplement it" or where a "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject");[10] and conflict preemption ("pre-empting state law that '. . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'").[11] Moreover, because preemption springs from the Supremacy Clause of the federal Constitution, state law cannot redefine or change the scope of federal preemption, or alter the primacy of federal law where there is a conflict with state law. Any suggestion to the contrary will just lead to confusion. To properly capture the scope of federal preemption, we urge the ULC to eliminate the word "expressly" from Section 202. In addition, and in a similar vein, the ULC should modify Sections 301(c) and 311 consistent with the attached redline to avoid any potential conflicts with federal law.

[3] *Letter from Steven G. Bradbury, General Counsel, United States Department of Transportation, and Charles M. Trippe, Jr., Chief Counsel, Federal Aviation Administration, to Paul M. Kurtz, Chair, and Mark F. Glaser, Vice Chair, Tort Law Relating to Drones Committee at 1-2 (July 11, 2018), http://www.uniformlaws.org/shared/docs/drones,%20tort%20law%20relating%20to/2018jul11_TLRDA_Comments_DOT%20and%20FAA.pdf.*

[4] *FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 373 (2018). In addition, Section 358 of the Reauthorization Act establishes a mandatory review of privacy issues associated with the use of unmanned aircraft, which requires the Comptroller General to examine existing privacy law and identify "specific issues and concerns that may limit the availability of civil or criminal legal remedies regarding the inappropriate operation of unmanned aircraft systems," among other requirements.*

[5] *Letter from Blair Anderson, Director, Public Policy, Amazon, to Anita Ramasastry, President, Uniform Law Commission at 1 (July 16, 2018), http://www.uniformlaws.org/shared/docs/drones,%20tort%20law%20relating%20to/2018jul16_TLRDA_Comments_Amazon.pdf.*

[6] *Act at 5 (Prefatory Note).*

[7] *NPPA Letter at 1; NetChoice Letter at 1-2; Drone Industry Letter at 2.*

[8] *Act at 7-8.*

[9] *See Geier v. American Honda Motor Co., 529 U.S. 861 (2000).*

[10] *Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (internal quotation omitted).*

[11] *Geier, 529 U.S. at 873 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).*

Section 302 of the Act Should Not Place the Burden of Proof on Drone Operators
Proposed Section 302 would establish rebuttable presumptions that certain images captured using drones involve "private facts" and are "acquired in a manner that is highly offensive to a reasonable person."[12] In civil actions, however, the burden of proof should be on the party bringing a case. The drafters claim that the approach is modeled after Fla. Stat. §934.50(3)(b),[13] but that statute does not establish a similar rebuttable presumption. Instead, Fla. Stat. §934.50(3)(b) merely establishes a presumption that a person has a "reasonable expectation of privacy on his or her privately owned real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone." While we have no objection to such a presumption, proposed Section 302 simply goes too far. It would establish a unique standard for images captured by drones that does not apply to images captured by other aircraft.

Any "Uniform" Drone Act for States Should Address the Role of Localities
One of the chief objectives of the ULC is to promote adoption of "uniform" laws that "reduce the need for individuals and businesses to deal with different laws as they move and do business in different states."[14] Consistent with this objective, any uniform drone act should make clear that localities cannot regulate the ownership or operation of drones unless such regulation (i) is expressly authorized by state statute and (ii) is not preempted by federal law. Absent language limiting the ability of localities to regulate the ownership or operation of drones, a uniform drone act will not reduce the patchwork of different laws as intended.

* * *

The attached redline proposes revisions that we believe would address the points that we have made above. We respectfully request that the ULC make this letter and the redline available to all ULC members prior to the October meeting, and that it be posted on the website for the public to view. The industry remains eager to collaborate with the ULC to develop a uniform statute that all stakeholders can support. Such a draft will have more success at being enacted in a critical mass of states, in protecting property owners, and in ensuring the unmanned aircraft industry can continue to flourish.

Sincerely,

[12] *The "highly offensive" presumption is not limited to images taken during an aerial trespass, but includes any images captured "following a 'per se aerial trespass.'"*
[13] *Act at 20.*
[14] *See Uniform Law Commission, About the ULC, http://www.uniformlaws.org/Narrative.aspx?title=About the ULC.*

TORT LAW RELATING TO DRONES ACT

ARTICLE 1

SHORT TITLE AND DEFINITIONS

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

SECTION 102. DEFINITIONS.

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

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

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

ARTICLE 2

GENERAL SCOPE AND TERMS

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

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

[Change # 1—Corrects references to preemption, consistent with federal law.]

ARTICLE 3

SUBSTANTIVE PROVISIONS

SECTION 301. ~~PER SE~~ UNMANNED AIRCRAFT AERIAL TRESPASS.

(a) A person operating an unmanned aircraft is liable to a land owner or lessee for ~~per se~~ aerial trespass, when the person, without consent, intentionally causes the unmanned aircraft to repeatedly fly low enough over the property of the land owner or lessee to cause a direct, immediate, and substantial interference with the use or enjoyment of the land~~enter into the airspace below [200] feet above the surface of land or below [200] feet above improvements built upon the surface of land~~.

[Change # 2—Revises definition of trespass, consistent with aerial trespass, Restatement (Second) of Torts, Section 159(2) and *Causby*.]

(b) This section shall not apply to:

(1) conduct protected by the First Amendment;

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

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

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

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

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

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

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

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

[Related to Change #1—State law should be consistent with federal law on electronic consent]

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

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

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

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

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

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

[Change #3—This language would apply a markedly different standard to recordings obtained by unmanned aircraft versus those obtained by manned aircraft, which does not seem justified.]

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

[Related to Change #2—This is necessary given the proposed change to the definition of unmanned aircraft aerial trespass, above.]

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

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

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

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

SECTION 306. EXISTING PRODUCTS LIABILITY LAW UNDISTURBED.

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

SECTION 307. LIMITATION OF LIABILITY.

(a) An owner, lessee, or occupant of land:

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

(2) is not liable for any injury to an ~~per se~~ unmanned aircraft aerial trespasser [as defined in Section 301] except for criminal or willful or wanton acts or gross negligence by the owner, lessee, or other occupant of land.

(b) Subsection (a) shall not limit the liability of an owner, lessee, or occupant of real property who has been grossly negligent or has acted with malicious intent or in bad faith.

SECTION 308. DEFENSES.

(a) In an action for unmanned aircraft aerial ~~per se~~ trespass under Section 301, a defendant may raise the same defenses that may be raised in any other aerial trespass claim ~~trespass to land action~~ [under the law of the state].

[(b) In an action for tortious acquisition of images, recordings, or other physical or electronic impressions using an unmanned aircraft under Section 302, it shall be a defense to a cause of action that upon discovering the acquisition of information protected by that Section the acquiring person ~~immediately~~ deleted, rendered unreadable [~~and~~ or rendered inaccessible to all persons] the images, recordings, or electronic impressions and any copies of the same within a reasonable amount of time and to the best of their ability.]

Change #4—requiring immediate deletion imposes an impossible standard, and reference solely to "deletion" misunderstands how electronic deletion works in practice.

SECTION 309. REMEDIES.

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

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

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

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

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

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

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

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

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

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

(3) the visual image, sound recording, or other physical or electronic impression depicted information, or a circumstance that was not of legitimate concern to the public.

SECTION 310. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

A person that is authorized by federal law to operate unmanned aircraft systems may operate an unmanned aircraft system in this state for any lawful purpose if the unmanned aircraft system is operated in a manner consistent with federal law.

(1) The authority to regulate the ownership or operation of unmanned aircraft is vested solely in the state.

(2) Except as expressly authorized by statute, a political subdivision shall not enact or enforce an ordinance or resolution that regulates the ownership or operation of unmanned aircraft or otherwise engage in the regulation of the ownership or operation of unmanned aircraft.

(3) Notwithstanding subsection (1) and (2), a subdivision may promulgate rules, regulations, and ordinances for the use of unmanned aircraft systems by the political subdivision within the boundaries of the political subdivision.

(4) This act does not affect federal preemption of state law concerning aviation.

[Change #5—Imposes uniform requirements statewide.]

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

[Related to Change #1—Revises reference to federal law in accordance with law of preemption.]

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