

To the Tort Law Relating to Drones Committee:

As a Colorado licensed (non-practicing) attorney and ardent drone hobbyist, I am writing to you to express my strong opposition to the latest draft of the Tort Law Relating to Drones Act. While the latest draft is an improvement in some areas, there are still several major areas of concern.

First, while I appreciate the replacement of the per se aerial trespass rule with a rule prohibiting substantial interference with the use and enjoyment of the underlying property (thus echoing traditional aerial trespass law), the totality of the circumstances test used to determine what constitutes substantial interference remains highly vague and includes several problematic provisions. While the draft lists 10 factors to consider in determining substantial interference, it does not provide courts with any instructions on how to weigh these factors, how many factors must be satisfied to constitute substantial interference, or even expressly tell judges whether each factor counts for or against a finding of substantial interference (though most are implied to count in favor of such a finding).

In many ways, this factor test echoes the notoriously vague "fair use" test in copyright law, where one cannot be truly certain a use of copyrighted material is non-infringing until a judge has decided it is fair use. This vague factor test makes it impossible for drone operators to know whether a given flight over private property is legal until it has been litigated. As a result, it will encourage nuisance lawsuits against drone operators hoping to secure easy settlements, similar to copyright trolling lawsuits, where mounting a vigorous defense is more costly than simply settling. This test will also encourage Strategic Lawsuits Against Public Participation (SLAPP lawsuits), with landowners suing over what is fundamentally expressive activity (drone photography), when that expressive activity may reveal some wrongdoing by the landowner or portray them in an unfavorable light.

This leads me to my second concern, that one of the factors in the totality of circumstances test is "*Whether the unmanned aircraft recorded or captured audio, video or photographs while in operation over the property*". Photography from public spaces (including public airspace) is First Amendment protected expressive activity. Numerous court decisions around the country have time and again affirmed a public right to engage in aerial photography of private property. One of the more famous examples is the case that gave rise to the term "Streisand Effect", in which actress Barbara Streisand sued (and lost to) a photographer for publishing an aerial photograph of her house, and in so doing, brought far greater publicity to the photograph than it would have otherwise received.

Aerial photography, whether from a drone or manned aircraft, is a fundamental First Amendment right that is crucial to freedom of speech and the press. In recent years, drone aerial photography has been used for important public purposes such as revealing industrial pollution or filming acts police brutality at protests. There are numerous perfectly legitimate reasons for why a drone might be used to photograph private property, and all of those would be protected under the First Amendment. It is

therefore utterly inappropriate that simply engaging in protected First Amendment activity with a drone is considered a factor that is to be held against a drone operator in determining whether he or she caused a substantial interference with an underlying property.

The same concern about First Amendment expression applies to the section of the draft on privacy violations, where simply filming people on private property is considered a privacy violation. Unlike a number of state laws that have already been passed on this subject, the draft makes no reference to the concept of reasonable expectation of privacy, which traditionally only applies if a person is inside a private building. Under the draft, there is no requirement that the person photographed have a reasonable expectation of privacy or that they be in a private area at all. They could be fully visible from a public street, yet this act would make it a privacy violation to film them with a drone.

This act therefore greatly broadens the traditional confines of invasion of privacy, but only when a drone is involved. If the same images were taken from a manned aircraft, or for that matter a cellphone camera on a selfie-stick extended over a fence, they would be perfectly legal. In doing so, this act once again risks criminalizing First Amendment protected expression.

Finally, while I appreciate that a section has been included in the draft on landowner responsibilities, I fear this section is too vague as to provide meaningful protection to drone operators against interference with their operations by landowners. Section 7(a) states: "*A landowner shall act with reasonable care in relation to known unmanned aircraft operating in the navigable airspace over the landowner's property.*" Reasonable care is not defined in the draft, rendering this provision more or less meaningless as to what is actually expected of landowners.

The same can be said of section 6(d), "*A landowner shall not unreasonably refuse a request to return the unmanned aircraft or to permit the unmanned aircraft's operator to recover the unmanned aircraft from the property.*" Because there is no elaboration as to what constitutes an unreasonable refusal to return, this section is also largely meaningless. It will be easy for landowners to avoid liability for refusing to return a downed drone on their land as long as they can come up with any excuse for doing so.

Likewise, section 7(b) states: "*A landowner shall not take any action intended to interfere with the flight of unmanned aircraft over the landowner's property.*" What actions would constitute interference is left completely undefined here, as are the remedies (if any) that would be available to a drone operator whose operation is interfered with. This is not an insignificant problem. There have been numerous reports of other drone operators throughout the country having drones shot down by landowners and being personally threatened with bodily harm or assaulted.

In my own personal experience in the past year, I have been verbally harassed by several landowners while flying and had the police called on me twice. In one incident

where I was flying from a public road over private property containing a famous historical landmark that is considered one of the most photographed structures in Colorado, I was harassed by the landowner to the point of being caused to crash my drone because I was unable to concentrate on flying it. After this, another landowner stole my cellphone and drone controller out of my hand, and then physically assaulted and beat me when I tried to grab them back. Throughout this incident, the landowners' excuse was that I was "trespassing", and it was this excuse that allowed them to avoid prosecution for assault by the local district attorney. When I pointed out that I had never left the public roadway, one of the landowners went so far as to grab my drone accessory bag and throw it off the road, daring me to trespass to retrieve it.

These are only some examples of the harassment and abuse drone operators face almost daily because of paranoid members of the public engaging in so-called "self-help" against what they see as "trespassing" by drones. I fear this act if adopted, would only exacerbate that problem. If there is to be any balance in this legislation, section 7 must be significantly expanded to offer drone operators genuine protections against harassment, theft and destruction of their property, threats of violence, and assault.

For these reasons, I ask that you either drop this flawed draft altogether, or else make significant amendments to address the concerns I and others have expressed regarding it. Thank you for your consideration.

Sincerely,

Patrick McKay  
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