

Before the  
United States Department of Commerce  
National Telecommunications and Information Administration  
Washington, D.C.

In the Matter of )  
 )  
 ) Docket No. 150224183-5183-01  
Privacy, Transparency, and Accountability )  
Regarding Commercial and Private Use )  
of Unmanned Aircraft Systems )  
 )

**COMMENTS OF THE NEWSPAPER ASSOCIATION OF AMERICA**

The Newspaper Association of America (“NAA”)<sup>1</sup> appreciates the opportunity to comment regarding privacy, transparency, and accountability issues surrounding the commercial and private use of unmanned aircraft systems (“UAS”). We also look forward to constructive participation in the multistakeholder engagement process envisioned by the Request for Public Comment published by the National Telecommunications and Information Administration (“NTIA”) in this docket.

**Summary**

UAS are an important tool for media organizations that allow journalists to cover news stories such as natural disasters and important public events in a safe and cost-effective manner. Newsgathering is subject to important First Amendment protections, of course, and these principles apply with full force to the media’s use of drones for newsgathering. As the NTIA studies these issues, then, we suggest that it be mindful of these rights and ensure that any

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<sup>1</sup> The Newspaper Association of America is a nonprofit organization representing the interests of the news publishing industry. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers, and publish more than 2,000 newspapers in the United States and Canada in print, on the Web, and on thousands of mobile applications. The NAA focuses on the major issues that affect today’s news publishing industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

best practices protect the news media's right to use drones for newsgathering and the right to publish or broadcast the images obtained from UAS.

In light of long-existing state laws that prohibit invasions of privacy, it is NAA's view that additional guidelines specific to UAS are unnecessary. State law already prohibits invasive photography and videography, such as highly offensive intrusions upon a person's seclusion and electronic eavesdropping. These laws reflect well-established state priorities on privacy that have developed over decades of lawmaking and reasoned judicial opinions, and the common law has evolved to consider the impact of emerging technologies on privacy issues. Moreover, courts already are experienced in interpreting these privacy laws to respect journalists' constitutional rights as they consider privacy causes of action. Accordingly, these laws protect the right to publish newsworthy information and to capture images or video in public places. Although these laws make drone-specific best practices unnecessary, at minimum, any guidelines for UAS should be crafted to provide the same protections for newsgathering. Furthermore, any privacy-related best practices should not restrict the publication or broadcast of images obtained from UAS, as such measures would be unconstitutional prior restraints.

Additionally, the NTIA has requested comments on what information UAS operators should be required to disclose. News organizations should not be required to reveal details of their planned uses for UAS because such forced disclosures could chill the newsgathering process by requiring journalists to prematurely reveal their editorial thinking to the public. However, we believe that voluntary disclosures by UAS users, including journalists, will provide sufficient data for any proceeding that is appropriate.

#### **I. Drones Allow the Media Cover a Wide Variety of News Stories.**

UAS have the potential to revolutionize newsgathering by providing greater access to newsworthy events. Media organizations could use drones to cover events such as

natural disasters, riots, and protests. Compared to alternatives such as helicopters, drones often can capture higher-quality images and video at a lower cost. These efficiencies are crucial for smaller news organizations with limited resources. UAS also allow the media to cover events such as forest fires more safely.

Journalists' use of drones so far has demonstrated the vast potential for UAS as a newsgathering tool. News organizations have used drone images to illustrate the scope of large natural disasters and the aftermath of gas explosions and typhoons.<sup>2</sup> Student journalists have used drones to report on diverse stories about hydrolic fracturing (“fracking”), drought, and controlled burns.<sup>3</sup> A BBC documentary used a drone to capture images of large flocks of birds that would have been scared off by louder helicopter noise.<sup>4</sup> The innovative uses of drones as a journalistic tool will only grow as more news organizations are able to utilize them.

Prematurely regulating such a promising new technology poses a very real threat of stifling such innovative newsgathering techniques. Even voluntary “best practices” can

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<sup>2</sup> Ravi Somaiya, *Times and Other News Organizations to Test Use of Drones*, N.Y. Times, Jan. 15, 2015, at B7, available at <http://www.nytimes.com/2015/01/16/business/media/10-companies-join-effort-to-test-drones-for-newsgathering.html>; Leslie Kaufman & Ravi Somaiya, *Drones Offer Journalists a Wider View*, N.Y. Times, Nov. 24, 2013, at B1, available at <http://www.nytimes.com/2013/11/25/business/media/drones-offer-journalists-a-wider-view.html>; Matt Waite, *Could NBC News shoot the same video from Vanuatu in Florida under the NPRM?*, Drone Journalism Lab (Mar. 20, 2015), <http://www.dronejournalismlab.org/post/114140178067/could-nbc-news-shoot-the-same-video-from-vanuatu>.

<sup>3</sup> Scott Pham, *New story: Northern states enjoy an oil boom with free Missouri River water*, The Missouri Drone Journalism Project (Aug. 5, 2013), <http://www.missouridronejournalism.com/2013/08/northern-states-enjoy-an-oil-boom-with-free-missouri-river-water/>; Matthew Waite, *How we used a drone to cover drought*, Drone Journalism Lab (Oct. 26, 2012), <http://www.dronejournalismlab.org/post/34363827984/how-we-used-a-drone-to-cover-drought>; Robert Partyka, *Program Reports on Prairie Fire*, The Missouri Drone Journalism Project (Apr. 10, 2013), <http://www.missouridronejournalism.com/2013/04/program-reports-on-prairie-fire/>.

<sup>4</sup> Leslie Kaufman & Ravi Somaiya, *Drones Offer Journalists a Wider View*, N.Y. Times, Nov. 24, 2013, at B1, available at <http://www.nytimes.com/2013/11/25/business/media/drones-offer-journalists-a-wider-view.html>.

quickly become de facto regulations. Accordingly, the NAA urges the NTIA to consider the very real public benefits of drones *before* adopting any best practices or guidelines.

## **II. Existing State Laws Address Any Privacy Concerns Related to the Use of UAS.**

The NAA believes that longstanding state privacy laws, including both statutory law and common law, already provide sufficient privacy protections by prohibiting trespass and certain intrusive photography and recording. A new set of national guidelines specific to drones could conflict with these laws. If the NTIA nonetheless chooses to proceed with the development of guidelines for UAS, the NAA urges the NTIA to develop privacy-related best practices that ensure protection of journalists' First Amendment rights to use UAS for newsgathering purposes.

Courts have recognized that the First Amendment protects the right of the media and others to capture photographs and videos, particularly when the subject matter concerns an issue of public interest.<sup>5</sup> Additionally, the Supreme Court has long recognized that prior restraints on publication or broadcast almost always are unconstitutional, and that the First Amendment protects the right to publish lawfully obtained truthful information.<sup>6</sup> Accordingly, restrictions on the use of drones for newsgathering—and limitations on the broadcast or publication of the resulting images—could infringe the constitutional rights of journalists. Task force members should be mindful of these rights in formulating best practices related to privacy. Thus, any guidelines should not attempt to prohibit the publication or broadcast of images and

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<sup>5</sup> *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595-601 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Connell v. Town of Hudson*, 733 F. Supp. 465, 471-72 (D.N.H.1990).

<sup>6</sup> *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

videos obtained by UAS, as any prohibition on publication would be an unconstitutional prior restraint.

Moreover, it is unnecessary to adopt drone-specific privacy best practices that would apply to UAS because existing state laws already prohibit invasive practices, including photography and videography. Thus, UAS operators can be held liable for intrusive practices such as using a drone to look into a person’s bedroom window. Some of the most relevant torts include “intrusion upon seclusion,” which applies when a person intrudes, “physically or otherwise,” into the solitude or seclusion of another in a manner “highly offensive to a reasonable person.”<sup>7</sup> The tort of “publication of private facts” imposes civil liability for highly offensive disclosures.<sup>8</sup> State trespass laws may also subject a violator to both civil and criminal liability.<sup>9</sup> Some states also have restrictions governing the use of hidden cameras,<sup>10</sup> or that prohibit using technology to commit a “constructive” trespass in order to photograph or record people engaging in “private, personal, or familial activity.”<sup>11</sup>

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<sup>7</sup> J. Thomas McCarthy, 1 *The Rights of Publicity and Privacy* (2d ed.) § 5.87.

<sup>8</sup> *Id.* § 5.68.

<sup>9</sup> *See, e.g.*, Ariz. Rev. Stat. §§ 13-1502, 13-1503, 13-1504; Fla. Stat. §§ 810.08, 810.09; N.Y. Penal Law § 140.05; Restatement (Second) of Torts § 158 (1965) (“One is subject to liability to another for trespass...if he intentionally (a) enters land in the possession of the other...”).

<sup>10</sup> *See, e.g.*, Me. Rev. Stat. § 511 (criminalizing the installation or use “in a private place without the consent of the person or persons entitled to privacy in that place, [of] any device for observing, photographing, recording, amplifying or broadcasting sounds or events in that place”); Mich. Comp. Laws § 750.539d(1)(a) (prohibiting the installation, placement, or use “in any private place, without the consent of the person or persons entitled to privacy in that place, [of] any device for observing, recording, transmitting, photographing, or eavesdropping upon the sounds or events in that place”).

<sup>11</sup> Cal. Civil Code § 1708.8(b) (“A person is liable for a constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity, through the use of any device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the device was used.”).

There are several reasons to leave privacy regulation to the states rather than adopt nationwide UAS privacy guidelines. First, imposing a dual set of privacy restrictions (even voluntary best practices) could foster confusion and make compliance impossible when the federal and state rules conflict. Second, state privacy torts are already calculated to capture variances in state laws—for instance, the fact that one state might afford greater legal protections to newsgathering, while another might impose more stringent restrictions on electronic recording.<sup>12</sup> A set of nationwide UAS guidelines would not capture these nuances of state law that have developed over more than a century of reasoned lawmaking.

Moreover, courts interpreting state privacy laws have already established a developed body of case law that prohibits invasive practices without punishing constitutionally protected newsgathering activity. Thus, these state laws do not impose liability on newsworthy uses of images and video.<sup>13</sup> These laws also protect photographs or videos taken in public places or other locations where the subject has no reasonable expectation of privacy.<sup>14</sup> Thus, courts are already experienced in interpreting these privacy torts in light of the constitutional protections for newsgathering, broadcast, and publication. There is no reason to start anew in developing a new set of guidelines for drones.

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<sup>12</sup> See, e.g., *Med. Lab. Mgmt. Consultants v. Am. Broad. Companies, Inc.*, 306 F.3d 806, 815-16 (9th Cir. 2002) (concluding that Arizona courts would not recognize as great an expectation of privacy as California because of the states' differing wiretap laws).

<sup>13</sup> E.g., *Shulman v. Group W Prods., Inc.*, 18 Cal. 4th 200, 215 (1998) (“dissemination of truthful, newsworthy material is not actionable as a publication of private facts”); *Gilbert v. Med. Economics Co.*, 665 F.2d 305, 307-09 (10th Cir. 1981) (First Amendment protected newsworthy disclosures about plaintiff who brought state claim for public disclosure or private facts).

<sup>14</sup> E.g., *Munson v. Milwaukee Bd. of Sch. Dirs.*, 969 F.2d 266, 271 (7th Cir. 1992); *Wehling v. Columbia Broad. Sys.*, 721 F.2d 506, 509 (5th Cir. 1983); *Wilkins v. Nat'l Broad. Co.*, 71 Cal. App. 4th 1066, 1075-78 (1999).

If, however, the NTIA does establish best practices for drone photography and videography, these guidelines should adopt the same protections for journalists' rights as the existing state privacy torts. Namely, such guidelines should recognize that drones can be used to cover newsworthy topics and to capture images and video of people in public settings.

### **III. The Media Should Not be Forced to Disclose Details of Their Planned Use of Drones**

Additionally, the NAA urges the NTIA to avoid adopting any best practices that would purport to require news organizations to make intrusive disclosures about their reasons for using drones.<sup>15</sup> The NTIA has requested comments regarding the type of information that UAS operators should make public about their flights. The NAA recommends that any disclosures not instruct news organizations to reveal their plans for coverage every time they use a drone. News outlets may use drones early in the process of reporting a story, at times when public disclosure of their plans could chill the editorial process. For instance, a newspaper might wish to use drones to investigate whether a company is engaging in environmental destruction. Requiring the newspaper to disclose this reasoning early in its reporting could hamper newsgathering efforts by alerting the company to the newspaper's plans. Such disclosures are also unnecessary given that companies are not required to make them when using helicopters or similar technology. Therefore, news organizations and journalists should not be required to disclose their editorial thinking simply because they want to use UAS in the reporting process.

Similarly, the NAA urges the NTIA to avoid overly burdensome registration and certification requirements. The NAA agrees that accountability is essential to responsible UAS

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<sup>15</sup> See Request for Comment ¶ 10.

operation.<sup>16</sup> However, the NTIA should consider the costs and time involved with certification, training, registration, and other administrative requirements.

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Drones are an important tool for journalists that will allow the media to cover a variety of events in groundbreaking, cost-effective, and safe ways. The NAA asks the NTIA to be mindful of this potential to use this new technology for journalistic innovation as it studies privacy, transparency, and accountability issues related to UAS. In light of existing state laws, drone-specific privacy guidelines are unnecessary and potentially confusing. Moreover, any recommendations or best practices should respect journalists' First Amendment rights to use UAS for newsgathering, broadcast, and publication. To the extent that the NTIA chooses to proceed with a multistakeholder process, the NAA stands ready to participate and help the NTIA craft guidelines that do not impinge upon the newsgathering potential of drones.

Respectfully submitted,



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April 20, 2015

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<sup>16</sup> *Id.* at ¶¶ 14-16.