

From: Harley Geiger, Center for Democracy & Technology
To: NTIA Unmanned Aircraft Systems Privacy Working Group
Date: Nov. 22, 2015
Re: Comparison of CDT and Hogan 11/19 draft drone privacy best practices

Colleagues:

Thank you for your feedback during the Nov. 20th NTIA multistakeholder meeting on drone privacy. We agree with the decision made during that meeting to attempt to reconcile outstanding concerns with both the CDT and Hogan drafts. We look forward to helping review a reconciled draft once it is produced.

Below is a summary of key differences between the Hogan Lovells¹ (Hogan) and the Center for Democracy & Technology² (CDT) draft best practices for drone/UAS privacy – both versions are dated Nov. 19th. It is CDT's hope that most or all of the below items can somehow be addressed in one reconciled draft. CDT is not wedded to the language we've suggested in our draft best practices, and we've made important concessions from our original draft. However, CDT will not be in a position to support a final draft that is not both credibly protective of individual privacy and sufficiently flexible for a wide range of private drone uses. Achieving that complex balance was the goal of CDT's draft best practices for UAS privacy.

Please keep in mind that the CDT draft has a fair degree of consensus around it. Amazon, Google, Access, New America's Open Technology Institute, the Georgetown Center for Privacy & Technology, as well as other stakeholders, preferred to move ahead with the CDT draft rather than the Hogan Lovells draft. We urge coordination with all stakeholders in your work to reconcile the drafts so that the final version has as much support as possible.

Summary of differences between 11/19 CDT and Hogan drafts:

The Hogan best practices do not apply to "UAS activities protected by the First Amendment." [Hogan, pg. 3] CDT believes that the First Amendment generally protects virtually all photography and data gathering in public. The First Amendment protects against government interference with speech, but the activity itself is protected even if the government does not interfere. As written, this suggests that the Hogan best practices (which are voluntary and not enforced by government) do not apply to outdoor photography or data-gathering in general.

By contrast, the CDT draft makes clear that the best practices do not take precedence over the Constitution, thereby preserving First Amendment protection, but without exempting all protected speech from the best practices - which, to reiterate, are voluntary and not enforced by government. [CDT, pg. 2]

The subheads in the Hogan best practices suggest that the best practices are more privacy-protective than they actually are. This may confuse individuals that just review the subheads.

¹ http://www.ntia.doc.gov/files/ntia/publications/bestpracticesdraft11_19_hogan_lovellis.pdf

² http://www.ntia.doc.gov/files/ntia/publications/cdt_uas_best_practices_draft_v2_111615_clean.pdf

For example, subhead 1 says “Inform others of your use of UAS,” [Hogan, pg. 4] but the actual best practices create broad carve-outs to this principle. By contrast, the CDT subheads give readers more precise detail regarding the actual scope of coverage.

1) Inform others of your use of UAS

The Hogan best practice on transparency does not apply to a landowner that uses UAS to collect personal data about individuals on the property. This specifically includes circumstances where the landowner and the UAS operator are the same entity. [Hogan, pg. 4] Under the Hogan best practices, property owners - such as Disneyland or a football stadium - would have no responsibility to notify individuals of the use of UAS to monitor attendees. Likewise, the Hogan best practice on transparency would explicitly permit employers to monitor employees with UAS without notifying the employees. [Hogan, pg. 4]

By contrast, the CDT best practices encourage UAS operators (including landowners and employers) to make a reasonable effort to provide prior notice to individuals of the collection of personal data, where practicable. [CDT, (1)(b), pg. 4]

The Hogan best practice on transparency does not apply if the operator assigns transparency responsibilities to a third party via contract. [Hogan, pg. 4] There is no indication that the assigned transparency responsibilities should meet the best practices.

By contrast, the CDT best practices note that the practices do not take precedence over contractual obligations or representations, but that contracting parties should take the best practices into account when setting or agreeing to contract terms. [CDT, pg. 2]

2) Minimize collection of personal or private data

The Hogan best practices place weak limits on physical intrusion of UAS onto private property. Under the Hogan draft, if the UAS is not collecting personal data, or if the UAS does not substantially interfere with the use and enjoyment of the property, then the UAS can freely enter private property without the consent of the property owner. The Hogan draft is unclear whether it creates an exemption from this best practice for contractual obligations. [Hogan, 2(a), pg. 5]

[Note: The Restatement of Torts on trespass includes the “substantially interferes with the owner’s use and enjoyment of the property” element. However, many states do not include this element in their trespass laws. For example: New York Pen. Law 140.05; Texas Pen. Code Title 7, Sec. 30.05; California Civ. Code 1708.8. As a result, the Hogan best practice is weaker than existing trespass law in several jurisdictions. It was generally agreed in prior NTIA meetings that best practices should go beyond mere legal compliance.]

By contrast, the CDT best practices encourage UAS operators to avoid – in the absence of compelling circumstances – entering private property without consent regardless of whether the UAS is collecting personal data or whether the UAS substantially interferes with the owner’s use and enjoyment of the property. We agree with the suggestion raised at the Nov. 20th NTIA meeting that the word “intentionally” should be inserted in this best practice. [CDT,

(2)(d), pg. 6] The CDT draft also takes care to note that the best practices are not creating any new boundary or property right to airspace beyond existing law. [CDT, (2)(d) note, pg. 7]

The CDT best practices also encourage UAS operators to use – where practicable – airspace over public property instead of private property when doing so will not impede the purpose of UAS use. [CDT, (2)(e), pg. 7] The Hogan best practices do not include this item.

The CDT best practices discourage UAS operators from collecting personal data where the operator knows the individual has a reasonable expectation of privacy. [CDT, (2)(b)(i), pg. 6] The Hogan best practices do not include this item.

[Please note that the CDT best practices place only three restrictions on the purpose for UAS use: 1) Where the operator knows the data subject has an expectation of privacy, 2) For eligibility for employment, credit, or health care treatment, and 3) Persistent and continuous collection of personal data about individuals. [CDT, (2)(b)-(c), pg. 6] The CDT best practices explicitly permit the use of UAS for intentional collection of personal data in public places. [CDT, (2)(b) note, pg. 6] Under the CDT best practices, acceptable purposes of UAS use could be quite broad, such as “This UAS will be used for the purpose general news-gathering, which includes the public disclosure of un-obscured features of individuals and vehicles in public places.”]

3. Limit the use and sharing of personal or private data

The Hogan best practices authorize UAS operators to collect personal data for employment, credit, and health care treatment whenever the data was collected pursuant to a contract with some other party (not necessarily the data subject). [Hogan, 3(b), pg. 5] By contrast, CDT’s best practice discourages UAS operators from collecting personal data for these purposes regardless of whether a contract is in place. [CDT, (2)(b)(ii), pg. 6]

The CDT best practices encourage *commercial* UAS operators to avoid intentionally using or sharing data for a purpose not specified in the UAS data collection policy. [CDT, (3)(d), pg. 8] The Hogan best practices do not include this item, though the Hogan draft encourages UAS operators to note the purposes of UAS use in a data collection policy. [Hogan, 1(b)(1), pg. 4]

The Hogan best practices authorize UAS to use and share personal data for targeted marketing without the consent of the data subject in most circumstances. The only restriction is where the operator knows the data subject has an expectation of privacy – which will be very few places outside of the data subject’s home, thereby making this a very weak restriction. [Hogan, 3(c), pg. 5] By contrast, CDT’s best practices encourage *commercial* UAS operators to avoid using or sharing personal data for marketing without consent unless the data has been de-identified. [CDT, (3)(f), pg. 9]

The CDT best practices encourage UAS operators to avoid – where practicable – retaining personal data unrelated to the purpose for which the UAS is used, or for longer than necessary to fulfill the purpose for which the data were collected. [CDT, (3)(c)-(d), pg. 8] The Hogan best practices say nothing about data retention.

The CDT best practices encourage *commercial* UAS operators to obfuscate or de-identify unnecessary personal data before public disclosure without consent of the data subject. [CDT, (3)(e), pg. 8] The Hogan best practices do not include this item.

The CDT best practices encourage UAS operators to – where practicable – correct, obfuscate, de-identify, or destroy unnecessary personal data upon request of the data subject. [CDT, (4)(a), pg. 10] The Hogan best practices do not include any encouragement to operators to de-identify or destroy information on request, only to review or correct the accuracy information. [Hogan, 3(e), pg. 5]

4. Secure personal or private data

The Hogan best practices encourage reasonable administrative, physical, and technical safeguards of personal data. [Hogan, 4(a), pg. 6] The Hogan best practices have no roadmap regarding what these safeguards might include, leaving the best practice vague. By contrast, the CDT best practices encourage *commercial* UAS operators to take fundamental but specific data security measures: create a written policy, monitor the system for risks, provide employee training, restrict access to personal data, and encrypt or hash personal data. [CDT, (5)(a)-(3), pg. 11]

[Note, Hogan’s language - “reasonable administrative, physical, and technical safeguards” - appears to echo the HIPAA security rule for personal health information. However, the HIPAA security rule goes into considerable detail regarding what “administrative, physical, and technical safeguards” means. See 45 CFR 164.]

The CDT best practices encourage *commercial* UAS operators to periodically review compliance with the UAS privacy and security policies. [CDT, (6)(a), pg. 12] The Hogan best practices contain no best practices on accountability.

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