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**Submitted on Behalf of the  
News Media Coalition Comprised Of:**

Advance Publications, Inc.  
A.H. Belo Corp.  
American Broadcasting Companies, Inc.  
American Society of Media Photographers  
The Associated Press  
Capitol Broadcasting Co.  
Cox Media Group, LLC  
Fusion Media Network, LLC  
Gannett Co., Inc.  
Getty Images (US), Inc.  
MPA - The Association of Magazine Media  
National Press Photographers Association  
NBCUniversal Media, LLC  
The New York Times Company  
Reporters Committee for Freedom of the Press  
Reuters  
The E.W. Scripps Company  
Sinclair Broadcast Group, Inc.  
Society of Professional Journalists  
Student Press Law Center  
TEGNA, Inc.  
WP Company LLC

November 18, 2015

**Via E-mail and Courier**

*UASrfc2015@ntia.doc.gov*  
National Telecommunications and Information Administration  
U.S. Department of Commerce  
1401 Constitution Avenue, N.W., Room 4725  
Attn: UAS RFC 2015  
Washington, D.C. 20230

**RE: Docket No. 150224183-5183-01  
Multi-stakeholder Process for Unmanned Aircraft Systems (UAS)  
"Best Practices" Discussion**

For nearly two years, the News Media Coalition has worked cooperatively with the federal government to promote the safe gathering of news by UAS through development of statutes, regulations, educational materials, aeronautical knowledge testing, flight training, flight safety manuals, and professional best practices. Throughout this cooperative effort, the News Media Coalition has stressed, and the government has acknowledged, that the First Amendment rights of the public in receiving news and information, and the media's rights in gathering that news and information, must be preserved in the regulation of any new technology, including UAS.

Our efforts have included participation in each meeting of the National Telecommunications and Information Administration ("NTIA") multi-stakeholder process for UAS best practices. This process was initiated at the direction of President Obama in a February 15, 2015 Presidential Memorandum. The President directed NTIA to establish "a multi-stakeholder engagement process to develop and communicate best practices for privacy, accountability, and transparency issues regarding commercial and private UAS use."

We are writing at this point to ensure that any system of best practices for UAS operations also safeguards the public's First Amendment rights. The News Media Coalition has reviewed the proposals for privacy best practices submitted by stakeholders, including the Center for Democracy and Technology and NetChoice, and revisions to those proposals. In response to NTIA's request for additional feedback on these proposals, the News Media Coalition offers the following principles that it believes should guide the stakeholders' deliberations of any potential privacy issues arising from journalists' operation of UAS.

- ***Best Practices Cannot Restrict the First Amendment.*** It is an established principle that the First Amendment provides a Constitutional right to gather, and the public's right to receive, the news. Courts have applied strict scrutiny in reviewing any attempt to abridge fundamental First Amendment rights. Consequently, any restriction on those rights requires the government to show that the regulation was a reasonable time, place and manner restriction, which was narrowly tailored to serve a compelling government interest, using the least restrictive means possible and leaving open alternate avenues of communication.

In recent NTIA multi-stakeholder discussions, others have asserted that a set of best practices incorporating the phrases "where practicable" or "where reasonable" would not actually limit anyone from collecting, using or retaining UAS images, because it leaves room for arguments to justify the use instance-by-instance. That analysis, however, shifts the presumption and burden under the First Amendment. Instead of requiring demonstration of a compelling interest in narrowly curtailing journalists' UAS use, the proposal would require that journalists demonstrate the best practices are not "practicable" or "reasonable" under the specific circumstances.<sup>1</sup> Concerns over

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<sup>1</sup> See, e.g. Center for Democracy & Technology, UAS Privacy Best Practices—Discussion Draft (Nov. 16, 2015), proposing as a best practice that:

privacy and the introduction of new technologies should not reverse centuries of precedent that provides the First Amendment news gatherer with a presumption that his or her behavior is lawful.

- **Existing State Laws Protect Privacy Interests:** Robust, extensive and well-established technology-agnostic state privacy laws already protect privacy interests. These laws apply as equally to UAS photography as they do to other forms of newsgathering. Over time they have developed to safeguard the public's First Amendment right to receive information and journalists' First Amendment rights to report the news. Privacy laws should be narrowly tailored to a specific, identified harm and not developed in reaction to hypothetical, potential concerns regarding a specific technology.

Privacy torts, including "intrusion upon seclusion" and the "public disclosure of private facts," adequately address concerns about the manner of the newsgathering or the content of any publication of photography, whether by traditional cameras, camera phones, telephoto lenses or UAS photography.<sup>2</sup> Likewise, state criminal laws, prohibiting unlawful wiretaps, trespassing, stalking, and harassment are vigorously applied by prosecutors and courts to punish people abusing technologies to invade people's reasonable expectations of privacy.<sup>3</sup>

These laws, rather than new UAS-specific laws either at the federal or state level, are the appropriate way of addressing privacy concerns.

- **Images and Sounds Gathered In Public Places Are Not Private:** Current privacy laws safeguard the First Amendment rights of journalists to gather the news, and the public's right to receive the news, by firmly protecting visual and audio recordings depicting activity in public places.

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"UAS operators should make a reasonable effort to avoid knowingly retaining personal data longer than reasonably necessary to fulfill the purpose for which the data were collected. With the informed consent of the data subject, or in extraordinary circumstances (such as legal disputes or safety incidents), such data may be held for a longer period."

<sup>2</sup> See, e.g. *Benitez v. KFC Nat'l Mgmt. Co.*, 714 N.E.2d 1002 (Ill. App. Ct. 1999) (upholding significant damages award based on camera placed in restroom); *Souder v. Pendleton Detectives*, 88 So. 2d 716 (La. App. 1956) (allowing damages claim to proceed based on use of camera with telescopic lens to photograph bedroom from neighboring house); *Wolfson v. Lewis*, 924 F. Supp. 1413, 1428 (E.D. Pa. 1996) (granting preliminary injunction prohibiting defendants from harassing plaintiffs after defendants used "'shotgun mike', a television camera equipped with zoom lenses and a mounted microphone, a sound mixer, headsets, and binoculars.").

<sup>3</sup> See e.g. Ariz. Rev. Stat. Ann. §§ 13-3005, 13-3012(9), 13-2923 (2014); 18 Pa. Cons. Stat. Ann. § 5703 (2014); Ga. Code Ann. § 16-11-61 (2014); N.Y. Penal Law § 240.25.

As one court has explained:

On the public street, or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more, than making a record, not differing essentially from a full written description, of a public sight which anyone would be free to see.<sup>4</sup>

This Constitutional principle has been repeatedly applied to protect images and footage recorded in public places.<sup>5</sup> The personal nature or even offensiveness of the image or footage captured does not minimize the protection afforded to the images and footage.

This Constitutional protection is of paramount importance. The News Media Coalition therefore remains particularly concerned about any privacy framework that would restrict a journalist's First Amendment rights in a public place. For instance, no set of best practices should restrict a journalist from collecting, using or retaining images of an individual's face or voice recording without regard to whether those images and sounds were collected in public or private.<sup>6</sup> Best practices also should not require a journalist to provide prior notice and a general timeframe for newsgathering in a public place. Further, requirements that journalists seek informed consent from individuals in public spaces before recording them is a significant, unjustifiable, and unworkable limitation on newsgathering. A privacy regime that includes these requirements would impermissibly infringe on the well-established First Amendment right to gather news in public spaces.

- ***An Industry-Specific Approach is Preferable to a One-Size-Fits-All Approach:*** Journalists already are guided by voluntary guidelines developed over time and through the experiences of generations of news gatherers. For example, the National Press Photographers Association Code of Ethics provides that visual journalists should: "Treat all subjects with respect and dignity. Give special consideration to vulnerable subjects and compassion to victims of crime or tragedy. Intrude on private

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<sup>4</sup> *Mark v. Seattle Times*, 96 Wash. 2d 473, 497, 635 P.2d 1081, 1094 (1981).

<sup>5</sup> See, e.g. *Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 231-32, 955 P.2d 469, 490 (1998) (accident scene along a public highway); *Dempsey v. National Enquirer*, 702 F. Supp. 927 (D. Me. 1988)(public restaurant); *Fogel v. Forbes, Inc.*, 500 F. Supp. 1081 (E.D. Pa. 1980)(municipal airport); *Hornberger v. American Broad. Cos.*, 351 N.J. Super. 577, 799 A.2d 566 (App. Div. 2002)(searching car on public street); *Harrison v. Washington Post Co.*, 391 A.2d 781 (D.C. 1978)(bank that had been robbed); *Hartman v. Meredith Corp.*, 638 F. Supp. 1015 (D. Kan. 1986) (courtroom); *Schifano v. Greene County Greyhound Park, Inc.*, 624 So. 2d 178 (Ala. 1993)(public park); *Salupo v. Fox, Inc.*, No. 82761, 2004 WL 64964 at \*3 (Ohio Ct. App. Jan. 15, 2004) (moving from house); *Neff v. Time, Inc.*, 406 F. Supp. 858 (W.D. Pa. 1976)(football game); *Creel v. I.C.E. & Assocs., Inc.*, 771 N.E.2d 1276 (Ind. Ct. App. 2002)(church).

<sup>6</sup> See Center for Democracy & Technology, UAS Privacy Best Practices—Discussion Draft (Nov. 16, 2015) (defining "personal data" as "imagery of an individual's face and voice recordings, that are linked or easily linkable to an identifiable person").

moments of grief only when the public has an overriding and justifiable need to see."<sup>7</sup> Similarly, the Getty Images Editorial Policy provides that: "We maintain the balance of an individual's right to privacy with our obligation to cover the story. Our commitment to integrity is reflected throughout our editorial workflow and our fair and unbiased coverage of the events and stories of today."<sup>8</sup> Likewise, TEGNA's Principles of Ethical Conduct instructs that: "We will use technological tools with skill and thoughtfulness, avoiding approaches that skew facts, distort reality, or sensationalize events."

These practices are not technology-specific and yet accommodate the situations where a UAS-mounted device could be used. Standards and practices like these have been an integral part of newsgathering for decades. They provide the optimal framework for best practices that accommodate the public's interest in privacy with the First Amendment rights to gather and receive news and information in the public interest. This industry-driven approach is preferable to a one-size-fits-all approach.

- **Editorial Decisions Must Be Left to Journalists:** A set of UAS privacy best practices cannot treat the collection, use and retention of Pulitzer Prize-winning photography as if it were "data" that should be purged at regular intervals. It is well accepted that editorial decisions belong to journalists—rather than to the government. As the Supreme Court said in *Miami Herald Pub. Co. v. Tornillo*:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.<sup>9</sup>

While many foreign governments control news reporting, in the United States journalistic independence is a core value all Americans learn from childhood.

Privacy best practices that require the deletion of photos or videos taken from UAS containing images of an individual's face or voice recordings—as some of the current proposals provide—would impermissibly infringe upon editorial control of content. It would be as inconsistent as it is unconstitutional for the government to defer to journalists to control images and recordings collected through all other available technology, while establishing limits on the collection, use and retention of the same content gathered by UAS. Even with a proposed exception for "extraordinary

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<sup>7</sup> Available at [https://nppa.org/code\\_of\\_ethics](https://nppa.org/code_of_ethics).

<sup>8</sup> Available at <http://www.gettyimages.com/company/editorial-policy>.

<sup>9</sup> 418 U.S. 241, 258, 94 S. Ct. 2831, 2840, 41 L. Ed. 2d 730 (1974). See also *Gaeta v. New York News, Inc.*, 62 N.Y.2d 340, 349, 465 N.E.2d 802, 805 (1984)("The press, acting responsibly, and not the courts must make the *ad hoc* decisions as to what are matters of genuine public concern, and while subject to review, editorial judgments as to news content will not be second-guessed so long as they are sustainable. These considerations apply with equal force to the determination of what is "reasonably related to matters warranting public exposition")

circumstances," newsrooms should not be guided by government-endorsed best practices in determining what content should be retained and for how long.

As a practical matter, it is not possible to determine whether images and video are newsworthy enough to justify the "extraordinary circumstances" necessary to retain images and video with sensitive personal information, as contemplated by some of the proposed best practices. The importance of a photograph may not be clear when it is initially taken, yet may become so years later. Archived photographs of any politician, celebrity, astronaut, or other notable figure are routinely relevant to the public any time that person becomes the subject of later news stories, including but not limited to stories about deaths, marriages, accidents, divorces, elections, wars, anniversaries, relocations, and disasters. Likewise, photos from investigations of crime and accident scenes may not be used until years later, depending on the scope and timing of the investigations.

To cite just a few important, newsworthy examples:

- Photos of Congressman Steve Scalise speaking at a 2002 gathering hosted by a group formed by Ku Klux Klan leader David Duke were the subject of news stories in early 2015 when the representative ran for Majority Whip of the U.S House of Representatives;
- Photos of O.J. Simpson taken in 1993 while he was reporting on the sidelines for NBC were later used during his civil trial in 1996-97 to show that he was wearing Bruno Magli shoes that he claimed he never owned;
- Photos of Monica Lewinsky hugging President Clinton became newsworthy years later when it became public that, as an intern, she had an affair with the president;
- Photos of Serbian Commander Ratko Mladić promising sanctuary to residents of Srebrenica, Bosnia later became critical evidence when the International Criminal Tribunal for the former Yugoslavia charged him with war crimes for the massacre of 8,000 Muslims;
- Video filming Tiger Woods as a child golf prodigy in 1978 resurfaced when he became a professional golfer in the late 1990s;
- A photo of a young Bill Clinton shaking hands with President Kennedy was of public interest only when Clinton was elected president decades later;
- Photos of Hillary Clinton as a congressional staffer working on the Watergate hearings were publicized decades later when Bill Clinton ran for office;
- A 1961 photo of The Beatles playing for 18 people in the Palais Ballroom in Aldershot, England became noteworthy only when they rose to worldwide

popularity a year and a half later and in comparison to the crowd of more than 55,000 people at Shea Stadium in 1965;

- Photos of a young Adolf Hitler cheering the start of World War I, among the crowd at a public square in Munich in 1914, provided important historical context when he rose to power in Germany decades later.

Almost daily, archived images of people photographed in public places have aided news reporting on important current and historical events. In the last month alone, images from prior years accompanied reporting in the United States and internationally on: the passing of actress Maureen O'Hara; the split between entertainers Blake Shelton and Miranda Lambert; feminist pioneer Gloria Steinem's current public efforts; the death of astronaut Charles "Pete" Conrad, Jr.; industry's response to climate change; and his father's views of President George W. Bush's election campaign.

As these examples amply illustrate, it is as unwise as it is impermissible under the First Amendment for the government to endorse, encourage or mandate that journalists discard news materials. Judgment calls about what images are to be retained should be made in America's newsrooms without government intrusion.

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For more than a century, state privacy laws and professional guidelines have evolved across all technologies and platforms to protect reasonable expectations of privacy while safeguarding First Amendment freedoms. The News Media Coalition strongly believes that the existing framework of privacy protections will apply equally well to UAS.

In light of this, a one-size-fits-all federal privacy bureaucracy, or a technology-specific set of federal privacy regulations, will not fit newsgathering if it deviates from the well-established protections of the First Amendment. In fact, the approaches other stakeholders have proposed risk upsetting the careful, existing balance our laws and practices recognize between individual privacy interests and the right to gather news without interference by the government.

Very truly yours,



Charles D. Tobin  
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cc (via email): John Verdi, Director of Privacy Initiatives, U.S. Department of Commerce  
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