

MEMORANDUM

TO: Uniform Law Commission

FROM: Paul M. Kurtz, Chair,
Mark Glaser, Vice Chair
Robert A. Heverly, Reporter

Date: June 10, 2019

RE: Uniform Tort Law Relating to Drones Act, Final Reading

The Uniform Tort Law Relating to Drones Act is scheduled for a final reading at the 2019 Annual Meeting. This issues memorandum sets out changes in the Act that have been made following the July 2018 Annual Meeting, including additions, amendments and deletions to that memorandum.

I. Justification for the Act

As a new and still developing technology, drones – also known by various other names, such as Unmanned Aviation Systems (UAS), Unmanned Aerial Vehicles (UAVs), or Unmanned Aircraft, or Remote Piloted Vehicles (RPV) – inspire reactions ranging from admiration, to respect, to frustration to fear.

That drones demand state attention is shown by the number of news reports detailing both citizen and industry complaints and discussing state and municipal actions to address perceived concerns raised by drones. In 2017, for example, 38 states considered drone specific legislation and 18 states passed 24 drone-related enactments. *See*, Current Unmanned Aircraft State Law Landscape, National Conference of State Legislatures (September 17, 2018) [<http://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx>] (last visited, June 7, 2019). Prior years showed similar efforts. State actions include resolutions ranging from those designed to encourage and support the drone industry's development in the state (Delaware State Senate, Senate Concurrent Resolution No. 85, 2017) to those that prohibit unauthorized drone operations or interference with first responders (Arizona Revised Statutes §13-3729), to those that prohibit stalking using drones (K.S.A. §60-31a02).

With the variety of level approaches being taken at the state level, a uniform approach to tort law is justified and important.

II. The General Approach

As with any new technology, reactions can lead to calls for legal action from legislators, regulators and judges. Even where the application of existing law can arguably address the perceived or predicted issues arising from a new technology, legal reactions often follow. A technology that is viewed as “new” often engenders these responses to industry and citizen reactions, but “newness” is not the best metric by which to judge the importance of new legal and regulatory approaches to a technology. While drones are “new” to the cultural, social and

legal landscape – as well as new to the geographical landscape – that newness alone should not drive responses to them.

Instead, Jack Balkin cautions us to look for the salience of the new technology to social, cultural and legal relations. *See, See, Jack M. Balkin, Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 3-4 (2004); Jack Balkin, *The Path of Robotics Law*, 6 Ca. L. Rev. Circuit 45, 46 (2015). The question to ask is not whether a particular technology is new but rather what about that technology changes the way people interact with each other and their surroundings. In other words, we must ask what about the technology changes social relations and how law should react to those changes. Where existing law clearly can address potential identified harms arising from these changes, understanding of them is sufficient and the law itself need not be changed. Where, however, the law is uncertain in its application given the new social constructs, new law should be made or existing law clarified. It is with this understanding that the Uniform Tort Law Relating to Drones Act is presented for consideration.

There are two primary aspects of drones that may change how people interact with each other and their environment, especially when compared with existing non-flying technologies and with manned aircraft: First, drones fly lower to the ground and with less noise and disturbance than do manned aircraft, and, second, drones are able to and regularly do capture images and other data from positions it is otherwise difficult to get to without the drone technology.

The philosophy of the Drafting Committee was to consider these aspects of drones – that they are new but also that they fly lower, more quietly and record their surroundings – and both clarify and extend the law that applies in similar situations. These aspects of drones may challenge the application of existing law, or existing law may be sufficient to prevent the perceived harms that flow from them. In considering which is true for various tort law concepts, the Drafting Committee looked at and made decisions regarding a host of tort law concepts, clarifying that existing law of a state applies in some cases, expressly setting out what was perceived to be the existing law and applying it to drones in other cases, and developing alternative approaches in still other cases.

Section 4 of the Act follows directly from this philosophy and provides that state tort law applies to drones and the acts taken using them. While this may appear on its face to simply be a restating of the law, the Drafting Committee felt that it important to avoid the “drones are new” reaction to drone development and deployment, and this explicit statement of tort law’s application provides a clear statement that drones are not so different in many cases from existing technologies that they always require the development of separate doctrines. Civil claims for battery, assault, and even negligent operation of a drone can likely be addressed within existing state tort law frameworks (with the caveat that the standard of care for drone operators in negligence cases is likely to be based on federal standards, as is the case with manned aircraft). Immunities, defenses, and constitutional protections likewise apply. That “someone did it with a drone” neither automatically makes out a tort case nor automatically defends against one. Where drones raise issues that appear to be more difficult to analyze or result in less clarity in relation to the application of existing law, those are addressed in the Act’s remaining provisions.

III. The Approach to Aerial Trespass

In contrast to the draft presented at the July 2018 Annual Meeting, the Drafting Committee in this draft has adopted the reasoning and test provided by the Supreme Court in *United States v. Causby*, 328 U.S. 256 (1946) and adopted in the Restatement (Second) of Torts relating to aerial trespass. As set out in the Restatement, an aerial trespass – unlike a trespass on the land outside of the aircraft arena – occurs when an aircraft in flight interferes substantially with the use and enjoyment of the land when entering into the immediate reaches of the land. Restatement (Second) of Torts, §159(2). This approach contrasts with one taken in much of the scholarly literature that prioritizes landowner rights and seeks to differentiate drones from manned aircraft. See, e.g., Troy Rule, *Airspace in an Age of Drones*, 95 Bos. U. L. Rev. 155 (2015) (arguing in favor of “new laws expressly entitling landowners to exclude drones from the airspace above the surface of their land to a height of 500 feet in most locations.” *Id.*, at 159); see also, Troy Rule, *Drone Zoning*, 95 N.C. L. REV. 133 (2016). The property rights perspective, which was seen as supportive of the earlier draft’s protection from intrusion by drones of the airspace 200 feet above private property, relies on the lower flight levels of drones to distinguish them from manned aircraft, and thus to disavow the application of *Causby* and the Restatement’s aerial trespass provisions.

The Drafting Committee rejected the property rights approach in favor of the *Causby* approach, reasoning that because drones are aircraft, the airspace in which drones can fly is navigable airspace of the kind described in *Causby* and the Restatement. As such, hard limits on the ability of operators to fly in that space are preempted by federal law and regulation. To offset some of the practical difficulties potentially raised by this provision, the Drafting Committee developed a series of non-exclusive factors to be taken into account in determining whether a particular flight or series of flights constitutes an aerial trespass. The factors provide a framework for considering what is “substantial interference” in the drone setting and allow potential litigants to build cases and defenses within an established multifactor context. Those factors were chosen based primarily on the ways in which drones differ from manned aircraft yet still may substantially interfere with the use and enjoyment of land and each reflects a choice made by the Drafting Committee of the potential relevance of the factor in a variety of drone operation scenarios involving private property.

While the Drafting Committee concluded that the airspace through which drones fly is navigable airspace, it was not prepared to allow property rights to be created in drone operators who operate their drones over private property. Subsection (d) of this section thus precludes the development of easements by prescription or similar rights adverse to the owners of the land through the operation of drones within navigable airspace. Subsection (c) also precludes the institution of other trespass-based actions due to the flight of a drone over private property, meaning that enacting states will be making a clear demarcation between a trespass to land and an aerial trespass claim in a uniform manner. Finally, subsection (e) explicitly identifies a number of presumptions intended to shield activities protected by the U.S. and state constitutions or related to law enforcement or public safety.

IV. The Approach to Privacy and Surveillance

While trespass law created unique opportunities to create uniformity in state approaches to drone flights over private property, privacy and surveillance presented a significantly different challenge. Some states have developed new laws relating to privacy or inappropriate surveillance that apply primarily or only to drones and actions taken using drones, while other states have not done so, relying instead on the state's general privacy laws to protect citizens from the kinds of privacy harms that can flow from inappropriate drone use. Still other states arguably have no privacy laws that would clearly apply to the kinds of acts that can be taken with drones.

Any provision that the Drafting Committee included in the Uniform Act that would have created substantive privacy rights specifically related to drones would thus have had to weave a path between superseding existing privacy laws applicable in non-drone contexts and providing privacy rights in states that otherwise do not have them, meaning that only drone-related privacy rights would have been recognized in those states. Uniformity thus may have been achieved in relation to drones, but uniformity within states would have been destroyed in the process.

Rather than take this tack, the Drafting Committee instead adopted §8 (which replaces the 2018 draft's §302), to explicitly apply existing state privacy and surveillance law to activities undertaken using drones. A privacy violation would be no less a privacy violation simply because a drone is involved. Arguments that drones are not regulated under existing privacy law are thus precluded, while at the same time the continuing development of an enacting state's privacy law is permitted.

V. Additional Changes Since the July 2018 Annual Meeting

Other sections of the proposed Draft Act relate to landowner duties to drone operators (§7, formerly §307), and again reinforce the application of existing state law to drone operators operating above private property. This avoids the need to distinguish or offer alternatives based on whether states continue to recognize the common law categories of persons on land – trespassers, licensees, and invitees – or have joined the modern trend of applying a reasonable person standard to all landowner interactions with those on the land.

The new §6 makes clear the application of the traditional rules of trespass – a physical invasion of the land or the things attached to it – to drone related acts. If a drone lands without permission on land owned by another, trespass to land has occurred (but not necessarily an aerial trespass). The traditional defense of necessity also applies, privileging invasions of the land when an emergency occurs, for example, though holding the operator liable for any damages that result from the exercise of the privilege.

Finally, a number of definitions were added, including “tort” and “land possessor” in place of the formerly used “land owner” throughout the draft Act. The Act's scope was also broadened to make clear that the law applies to drones and the people who operate or are affected by them, something intended in the original draft but made more explicit in §2 of the proposed draft.