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Submitted on Behalf of
the News Media Coalition Comprising:

Advance Publications, Inc.
A.H. Belo Corporation
American Broadcasting Companies, Inc.
American Society of Media Photographers
The Associated Press
Capitol Broadcasting Co.
The Dallas Morning News
Fusion Media Network, LLC
Gannett Co., Inc.
Getty Images (US), Inc.
Gray Television, Inc.
Media Law Resource Center
National Association of Broadcasters
The News Media Alliance
National Press Photographers Association
NBCUniversal Media, LLC
The New York Times Company
Radio Television Digital News Association
Reporters Committee for Freedom of the Press
The E.W. Scripps Company
Sinclair Broadcast Group, Inc.
TEGNA, Inc.
WP Company LLC

October 7, 2016

Via Regulations.gov

To: Jamie Hine
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: FTC Fall Seminar Series on Emerging Consumer Technology Issues: Drones

Introduction

The News Media Coalition, comprising 23 news media organizations, submits this Comment on behalf of the news executives, journalists, viewers, readers and web and

social media users in the United States. The News Media Coalition includes:

- The nation's leading television and cable networks;
- The leading national newspapers;
- 322 television stations serving local U.S. markets;
- 94 regional and local U.S. newspapers;
- 38 U.S. radio stations;
- Content providers for hundreds of online and mobile platforms and devices;
- The leading wire services in the U.S. and abroad;
- The largest stock film and photo agencies worldwide;
- The leading professional association of visual journalists;
- The country's premier trade association representing commercial television and radio broadcasters;
- A nonprofit organization representing the interests of online, mobile and print news publishers in the United States and Canada and focusing on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern;
- The country's premier trade association representing independent photographers;
- The leading membership association for content providers in all media, supported by over 115 media members and 200 law firms worldwide;
- A Washington D.C.-based nonprofit that, for more than 40 years, has provided free legal resources, support and advocacy to protect the First Amendment and freedom of information rights of journalists.

Representing a wide cross-section of the news professionals who provide Americans each day with the news they need, the companies in the News Media Coalition compete in many different markets. But they have come together for this Comment, as with other recent efforts regarding small unmanned aircraft systems ("UAS")—or "drones"—in the unified belief that preserving the right to gather news in public spaces, from the ground or from the air, is not a competitive issue.

For the past two years, the News Media Coalition has worked cooperatively with the federal government toward development of statutes, regulations, industry training, and professional best practices for the safe gathering of news by UAS, while at the same time encouraging that the existing legal framework for privacy protection be maintained as it affects the ability to gather news and information for the public benefit. As part of those efforts, the News Media Coalition actively participated in the National Telecommunications and Information Administration ("NTIA")'s multistakeholder process on drones and privacy, which culminated in May, 2016, in a set of sensible, voluntary "best practices".

The News Media Coalition continues to firmly believe that the current statutory and regulatory environment allows for safe UAS newsgathering that furthers the First Amendment interest in the timely receipt of information of public concern and the First

Amendment rights of journalists to gather news, while at the same time protects privacy interests.

With these compelling public interests in mind, the News Media Coalition respectfully offers this Comment to contribute to the FTC's discussion and consideration of privacy issues pertaining to drone use.

Comment

The current privacy discussion in many ways echoes the concerns expressed more than 125 years ago, when Kodak introduced its Brownie camera, the first affordable portable camera.[1] Just as those concerns have become quaint history over the passage of time, the News Media Coalition is confident that—as the public becomes acclimated to evolving forms of visual journalism and the public benefit of those new technologies—drone photography will become familiar and benign to most people.

Moreover, state tort laws, which govern civil privacy issues, and state criminal statutes, which criminally punish invasive physical and electronic intrusions, have progressed over time to encompass and address arising forms of technology. Robust, extensive and well-established state privacy laws already protect privacy concerns. These laws apply to drone photography as they do to other forms of conduct, while, at the same time, safeguarding the public's right to receive information and journalists' First Amendment rights to report the news.

Like state tort laws, the consensus-based Voluntary Best Practices for UAS Privacy, Transparency, and Accountability, developed through the NTIA multistakeholder process and adopted following nine months of careful discussion, explicitly recognize that "newsgatherers and news reporting organizations may use UAS in the same manner as any other comparable technology to capture, store, retain and use data or images in public spaces."

No further technology-specific regulations are needed to adequately protect privacy rights.

Historical Development of Privacy Laws and Photography

When Kodak introduced the Brownie, many places posted signs banning the use of cameras.[2] One newspaper warned "Beware the Kodak. . . . The sedate citizen can't indulge in any hilariousness without incurring the risk of being caught in the act and having his photography passed among his Sunday School children."[3] "In Britain, young men reportedly formed a 'Vigilance Association'—'for the purpose of thrashing the cads

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[1] *See* David Lindsay, *The Kodak Camera Starts a Craze*, The Wizard of Photography, http://www.pbs.org/wgbh/amex/eastman/peopleevents/pande13.html

[2] *Id.*

[3] Clive Thompson, *The Invention of the "Snapshot" Changed the Way We Viewed the World*, Smithsonian Magazine, September 2014, available at http://www.smithsonianmag.com/innovation/invention-snapshot-changed-way-we-viewed-world-180952435/?no-ist=&page=2.

with cameras who go about at seaside places taking snapshots of ladies emerging from the deep.'"[4]

The early development of the privacy law began to address the public fear that the "sensationalistic press" would use cameras to eviscerate privacy. At the same time, the law continued to preserve the quintessentially open nature of society in the United States. Most famously, in 1890 Louis D. Brandeis (later a U.S. Supreme Court Justice), along with Samuel D. Warren, wrote the watershed *Harvard Law Review* article titled "The Right to Privacy."[5] This article formed the basis for modern tort law related to privacy, and even from this early time, recognized that certain public conduct was not "private," and capturing it on film therefore should not be protected by privacy law.[6]

Robust State Laws Sufficiently Remedy Privacy Concerns While Protecting the First Amendment Right to Gather News

In the century and a quarter since Warren and Brandeis wrote, civil and criminal law has carefully developed to balance the openness our First Amendment reflects with the right of the people to their reasonable expectations of privacy.

In the context of civil actions, common law privacy remedies, chiefly, the torts of "intrusion upon seclusion"[7] and the "public disclosure of private facts,"[8] provide appropriate remedies to redress any concerns for either the manner of the newsgathering or the content of any publication of photography, whether by traditional cameras, camera phones, telephoto lenses or UAS photography:

- The tort of ***intrusion upon seclusion*** provides for civil damages when a person "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns," in a manner in which "the intrusion would be highly offensive to a reasonable person."[9]

- The tort of ***public disclosure of private facts*** addresses the publication of a private fact, without consent, that would be highly offensive to the reasonable person and that is not a matter of legitimate public concern.[10]

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[4] *Id.*

[5] Samuel Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), available at http://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/the-right-to-privacy; *see also* Leah Burrows, *To be let alone: Brandeis foresaw privacy problems*, BrandeisNOW, July 24, 2013, http://www.brandeis.edu/now/2013/july/privacy.html.

[6] *See Right to Privacy* at 214-18.

[7] Restatement (Second) of Torts § 652B, cmt. B (1977) ("The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires.")

[8] Restatement (Second) of Torts § 652D (1977); *see also Shulman v. Group W Productions, Inc.*, 955 P.2d 469 (Cal. 1998).

[9] *Supra* note 7.

[10] *Shulman*, 955 P.2d at 478.

- These torts have been applied to technological intrusions such as use of cameras in a private location,[11] photographing and videotaping from a distance,[12] search of computer files on a work computer and use of spyware to intercept electronic communication[13] search of personal email,[14] tapping telephones,[15] and making harassing phone calls,[16] as well as content gathered from a distance by a vehicle to obtain an otherwise unavailable perspective, such as by helicopter[17] and by boat.[18]

- State criminal laws, prohibiting unlawful wiretaps, trespassing, stalking, harassment, and Peeping Toms[19] are vigorously applied by prosecutors and courts to punish people abusing technologies to invade people's reasonable

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[11] *Benitez v. KFC Nat'l Mgmt. Co.*, 714 N.E.2d 1002 (Ill. App. Ct. 1999) (camera placed in restroom).

[12] *Souder v. Pendleton Detectives*, 88 So. 2d 716 (La. App. 1956) (using camera with telescopic lens to photograph bedroom from neighboring house).

[13] *Muick v. Glenayre Electronics*, 280 F.3d 741, 743 (7th Cir. 2002) ("Not that there can't be a right of privacy . . . in employer-owned equipment furnished to an employee for use in his place of employment. . . . But Glenayre had announced that it could inspect the laptops that it furnished for the use of its employees, and this destroyed any reasonable expectation of privacy that Muick might have had and so scotches his claim."); *see also Shefts v. Petrakis*, 758 F. Supp. 2d 620, 633 (C.D. Ill. 2010) ("whether Plaintiff had a reasonable expectation of privacy in the communications he sent and received on the Access2Go network depends upon whether Access2Go had a policy in place regarding the monitoring of such communications, as well as whether Plaintiff was aware that Petrakis or others at Access2Go may be monitoring his activities.")

[14] *Mintz v. Mark Bartelstein & Assocs. Inc.*, 906 F. Supp. 2d 1017, 1034 (C.D. Cal. 2012) ("Ames deliberately accessed Plaintiff's Gmail account without permission, opened several emails, and even read their contents, including the CAA agreement. Indeed, this conduct is so serious and offensive that the California legislature subjects the perpetrator to criminal liability under California Penal Code § 502. Faced with the foregoing, no reasonable jury could find that the invasion was not an egregious breach of social norms.")

[15] *Rhodes v. Graham*, 238 Ky. 225, 37 S.W.2d 46 (1931) ("The evil incident to the invasion of the privacy of the telephone is as great as that occasioned by unwarranted publicity in newspapers and by other means of a man's private affairs for which courts have granted the injured person redress. . . . Wire tapping is akin to eavesdropping, which was an indictable offense at common law, and while it has not been made a punishable offense by statute in this state . . . .")

[16] *Housh v. Peth*, 165 Ohio St. 35, 41 133 N.E.2d 340, 344 (1956) ("[T]he conduct of the defendant falls outside the bounds of reasonable methods which may be pursued in an effort to collect a debt, and is actionable as an invasion of plaintiff's right of privacy.")

[17] *See e.g. Nat'l Org. For Reform of Marijuana Laws (NORML) v. Mullen,* 608 F. Supp. 945 (N.D. Cal. 1985) (enjoining warrantless surveillance by helicopter); *see also State v. Davis*, 2014-NMCA-042, 321 P.3d 955, 962 cert. granted, 324 P.3d 376 (N.M. 2014) (in criminal context, holding that aerial survey by helicopter was a search which required a warrant under New Mexico law); *but see California v. Ciraolo*, 476 U.S. 207, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986) and *Dow Chemical Co. v. U.S.*, 476 U.S. 227, 106 S. Ct. 1819, 90 L. Ed. 2d 226 (1986) (both interpreting limits of a permissible search under the Fourth Amendment).

[18] *Wolfson v. Lewis*, 924 F. Supp. 1413, 1428 (E.D. Pa. 1996) (Defendants anchored motor boat 50-60 yards from home with a "'shotgun mike', a television camera equipped with zoom lenses and a mounted microphone, a sound mixer, headsets, and binoculars.").

[19] *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.

expectations of privacy.[20] Punishment for egregious violations can be severe.[21]

State laws also safeguard the First Amendment rights of journalists to gather the news, and the public's right to receive the news, by firmly protecting visual journalism in public places.[22] Federal and state courts applying these state laws have thus developed, through decades of fact-specific litigation, a robust body of case law balancing the right to privacy against the constitutional protections for a free press.

Any Regulation of Drones Cannot Infringe on the First Amendment Right to Gather and Disseminate News

In order to ensure that the constitutionally-protected right to gather and disseminate news is not infringed, the following principles must guide any regulation of privacy issues arising from journalists' operation of drones:

- **Public Faces, Public Spaces, Public Right:** People have no legitimate expectation of privacy in public. Any legal regime must recognize this and not restrict or otherwise regulate the use of images, sounds or other data gathered in public spaces. No regulations should restrict the collection, use or retention of images, sounds or data recorded in public spaces, regardless of who is operating the camera or drone.

- **No New Privacy Expectations:** No new regulations should create a reasonable expectation of privacy where one does not currently exist, as recognized by federal and state courts.

- **Data Practices Should Not Be Different For UAS:** Data gathered by drones is no different than data gathered by other means. Therefore, restrictions on the storing and retention of data should not be imposed based upon the technology used to gather the data.

- **Editorial Decisions Must Be Left To Newsrooms:** The government must allow journalists to control images and recordings gathered in news reporting. Regulations must not infringe upon that constitutionally protected autonomy to

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[20] *See e.g.* Deb Belt, *$20M Illegal Taping Lawsuit Filed Against Rams Head Group, Owner*, Apr. 1, 2015, available at http://patch.com/maryland/elkridge/20m-illegal-taping-lawsuit-filed-against-rams-head-group-owner-0 (recent "peeping tom" criminal prosecution and a $20,000,000 claim in civil class action).

[21] Brooks Barnes, *Pellicano Sentenced to 15 Years in Prison*, N.Y. TIMES, Dec. 15, 2008, available at http://www.nytimes.com/2008/12/16/business/media/16pellicano.html?_r=0.

[22] State constitutional protections are similar to the First Amendment to U.S. Constitution; *see e.g.* Cal. Const. art. I, § 2 ("A law may not restrain or abridge liberty of speech or press.") (California); N.Y. Const. art. I, § 8 ("[N]o law shall be passed to restrain or abridge the liberty of speech or of the press.") (New York); Tex. Const. art. I, § 8 ("[N]o law shall ever be passed curtailing the liberty of speech or of the press.") (Texas); *see also Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939) (addressing political demonstrations, but broad public right to public access provides reporters with equal access to gather news in public).

gather and disseminate that information. Any regulatory scheme that imposes a prior restraint on newsgathering would be antithetical to the First Amendment.

- **Professional Standards Protect The Public:** Voluntary guidelines that establish a broad framework for balancing First Amendment interests with privacy interests are preferable to new regulations that would attempt to establish new privacy rights and a standard of care for drone use.

The Voluntary Best Practices Developed Through the NTIA Multistakeholder Process Appropriately Protects the Use of Drones for Newsgathering

Over the course of nine months last year and earlier this year, representatives of the news media, privacy advocates, manufacturers and other industry groups developed a set of privacy best practices for drone use. Those best practices explicitly recognize that the First Amendment protects the use of UAS for newsgathering.

Certain early proposals considered in the NTIA discussion process would have disfavored most journalists' uses of drones. These drafts would have limited drone photography of people in public places; would have untenably required that drone operators provide prior notice to everyone on the ground for most drone use; and would have permitted people to demand that newsrooms everywhere in the United States remove their drone-captured images from news archives.

After extensive deliberation, participants in the NTIA process—including privacy advocates: the Center for Democracy and Technology, New America, and Future of Privacy Forum—recognized that certain of the best practices applicable to general commercial drone use would substantially infringe on the First Amendment right to newsgathering. Therefore, the stakeholders agreed to exempt newsgathering from the agreed-upon best practices that may be more suited to drone use by other industries.

As a result, the NTIA best practices prefatory language about applicability explicitly states that the recommended restrictions do not apply to *"newsgatherers and news reporting organizations" "considering that their activity is strongly protected by the First Amendment to the Constitution of the United States."*

The document then addresses drone use for newsgathering in a separate section, which provides that:

> *BEST PRACTICES FOR NEWSGATHERERS*
> *AND NEWS REPORTING ORGANIZATIONS*
>
> *Newsgathering and news reporting are strongly protected by United States law, including the First Amendment to the Constitution. The public relies on an independent press to gather and report the news and ensure an informed public.*

For this reason, these Best Practices do not apply to newsgatherers and news reporting organizations. Newsgatherers and news reporting organizations may use UAS in the same manner as any other comparable technology to capture, store, retain and use data or images in public spaces. Newsgatherers and news reporting organizations should operate under the ethics rules and standards of their organization, and according to existing federal and state laws

The FTC should avoid regulation of drone use for newsgathering, as any further privacy-related regulation of newsgathering drones would unduly burden the First Amendment right to gather and disseminate news.

Conclusion

Technology-agnostic privacy laws and the Voluntary Best Practices for UAS Privacy, Transparency, and Accountability are sufficient to address any privacy concerns related to drone use. Unsubstantiated fears about this developing technology should not be exploited to establish a new, constitutionally suspect, and overly burdensome federal privacy bureaucracy.

Accordingly, the News Media Coalition strongly urges the FTC to limit its involvement to enforcing privacy policies already adopted by companies, rather than imposing any new privacy regulations on drone use for newsgathering. Regulations that would impinge on the First Amendment rights of journalists would be fraught with constitutional peril.

Representatives of the News Media Coalition will attend the October 13, 2016 Seminar, and the News Media Coalition may supplement this Comment based on those discussions.

Very truly yours,

Charles D. Tobin
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