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The First Amendment and "Virtual" Child Pornography

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Using Drones in the News and Entertainment Industries:
Legal and Regulatory Issues

The First Amendment and RPAS

Drones/RPAS used for newsgathering and media production are tools that engage First Amendment-protected activities. What are the legal arguments facilitating their deployment and protecting their editorial and creative use? Are there any countervailing interests? If so, how should the newsgathering/media production interests prevail?

Moderator: Nabiha Syed, attorney, Levine Sullivan Koch & Schulz, LLP; creator of Drone U and the Drone List

Panelists:

- Donna Dulo, senior systems engineer, US Department of Defense; adjunct professor, Embry-Riddle Aeronautical University
- Caren Morrison, assistant professor, Georgia State University College of Law
- Steven Morrison, assistant professor, University of North Dakota School of Law
- Mickey Osterreicher, general counsel, National Press Photographers Association; of counsel, Hiscock & Barclay LLP

Nabiha Syed: So our first panel of the day—we'll get it kicked off—it's about First Amendment and UAVs (not "drones,"). One of the reasons that it's such a fascinating issue is that when proponents of UAV use talk about how to interpret the really messy lay of the land that the FAA has kind of set into play and interplay with existing constitutional precedent, they bring up the First Amendment right to record and other First Amendment explanations of why this shouldn't be permissible. And so we have a wonderful all-star panel today to talk about that. So, if I can have Caren, Steven, and Mickey, who is in Florida right now but here with us via Skype, and Donna come up, that would be wonderful, and as they come up I will introduce them because I will be the moderator for the panel today. I'll wait for them to get up here . . .

With us today, we have Steven Morrison, who is a professor who teaches Criminal Procedure, Criminal Sentencing, and Constitutional Law at the University of North Dakota, which I believe is a test site for UAVs for the entire state. Before being a professor there, he was a criminal defense attorney in Boston, Massachusetts, at Boston College Law School, so we have a legal expert here. Next to him, we have Caren Morrison, who is an assistant professor at the Georgia State University College of Law. Before that, she served as an assistant US attorney at the Eastern District of New York from 2001 to 2006, where she prosecuted international narcotics traffickers and organized crime. So, we have a lot of criminal law expertise here at the table. Joining us from Florida, we have Mickey Osterreicher, who is general counsel for the National Press Photographers Association. He is an award-winning photojournalist with almost forty years of experience. He's also a lecturer of photojournalism at SUNY Buffalo and an adjunct law professor of Media and the Law at SUNY Buffalo Law School. The last expert we have today at the panel is Donna Dulo, who is a senior mathematician, computer scientist, and software systems engineer for the US Department of Defense, where she's worked for twenty-four years in both military and civilian capacities, and she is a consultant and speaker for the NASA Ames Research Center. And I, as I mentioned before, am Nabiha Syed, and I am a media and First Amendment attorney at Levine Sullivan Koch & Schulz, and I'm also a fellow at the Yale Law School Information Society Project, and I run Drone U, an educational platform for understanding drones. So, I will kick it off with Caren and Steve, who will do a joint presentation. Thank you.

Caren Morrison: Okay, so I was just going to give you a brief legal framework. This is going to be familiar to a lot of people, but since I'm not entirely sure of the makeup of the audience, those who know it will just have to bear with me.

Usually, when there is a new technology, especially when it's going to greatly enhance the ability to gather information or news, there is going to be anxiety and a push for greater regulation. Naturally, the main concern is going to be one related to privacy and state intrusion on that privacy. And the daddy of privacy protection in US law is the Fourth Amendment, and its framework has also been imported into the civil privacy context. So, back in the day, in the '60s, *US v. Katz* established that if the police intruded on a person's reasonable expectation of privacy, that police action was a Fourth Amendment search,

and typically, it's going to need a warrant. A reasonable expectation of privacy has two elements: first, a person has to exhibit an actual subjective expectation of privacy—that is, they have to believe that they are in private—and second, that expectation has to be one that society is prepared to recognize as reasonable. There has been a lot of case law about that since then making weird distinctions, for example, saying that you don't have a reasonable expectation of privacy in your greenhouse if the police fly over in a plane and can see inside, nor do you have reasonable expectation of privacy in your garbage if you leave it on your curb to be picked up by the trash collector. On the other hand, you have a very strong expectation of privacy in your house, so there is, pretty much, no situation where the police can enter your house without a warrant unless there are exigent circumstances or something like that.

So, what we have is a continuum of privacy protection, at least in the Fourth Amendment context, which regulates action by police, with homes being the most protected and public areas, public streets being least protected. This is the same standard used in tort law used to define invasions of privacy, specifically, intrusion upon seclusion. As you probably know, California is actually one of the most protective states, for privacy, in the country. First of all, there is no right to privacy in the federal Constitution, but there is such a right in the California Constitution. In addition, California is the only state that I know of that recognizes a constructive invasion of privacy. Normally, an invasion of privacy involves some tangible intrusion—if I'm sitting in my backyard, and a reporter jumps over the fence and takes a picture of me, they've trespassed on my land, they have invaded my privacy. California has added a, sort of, constructive idea of trespass. By "constructive," I mean not actually happening in the physical world but virtually. California law says that if someone uses technology in a way that enables them to see or hear something that they would not have been able to do without physical trespass, that would be an invasion of privacy.

In other words, California law says there is a constructive invasion of privacy if an individual—it's usually a reporter or somebody like that—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 engaged in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of the visual or auditory enhancing device. It would seem to me, in my legal opinion, that that would cover

drones. So, if you're going to use drones for, let's say, getting pictures of celebrities relaxing by their pools or something, I think it is likely that courts would find that this would be a constructive invasion of privacy. If you were not able to get a picture of said celebrity relaxing by their pool without breaking into their garden (a clear trespass), sending a drone over the fence is going to be a similar problem.

I think Steve is going to talk about the concomitant First Amendment rights of the press—there is a limited First Amendment right to gather news—but you should be aware that there are limitations. Tort law is as good as the courts and juries interpreting it. But there are some limitations on how much drones can be used, and I think, ultimately, that drones—I'm sorry to use the word “drones,” but it's snappier, so I like it better; it's a single syllable—are not really that much different from a photographer in a tree with a telephoto lens. I don't think that it's that enormous a shift, from a legal perspective. What drones do have, is they have the ability to get people very anxious and rally public opinion. They are kind of a hot-button topic, and I think that because of that, people have to be very careful in the entertainment and the news industries in how they use them so as not to provoke too big a backlash. Steven . . .

Steven Morrison: Well, thank you all for having me. The only other time I've been to LA was a layover in the airport, so it's great to actually get to know the city for twenty-four hours. It's really cool, and it plays into something that I am going to talk about in a second. So, yeah, from North Dakota, we just became one of the six FAA test sites, so with the FAA Reauthorization Act a year or two ago, President Obama required that the FAA made plans to integrate drones into the national airspace by 2015, and selecting ten jurisdictions or sorry, six jurisdictions around the country was part of that plan to integrate drones. North Dakota became one; we've got the University, which has one of the best flight schools in the nation (aerospace program), and we're involved in developing and training people how to use drones and that sort of thing. We are also very flat and very cold, so it's a unique environment to test these things to see what the safety issues are, to what extent they can be used, to what extent when they can't be used.

So, currently, if you want to use a drone, and you're not like the Drone Dudes—that sounds very questionable, scary thought—you have to get a certificate of authorization from the FAA. It's kind of a detailed thing. People have gotten certificates of authorization; the

FAA has issued hundreds of them. So, the landscape now is if you want to buy a drone, you have to get one of these certificates, tell them when you're going to fly, the flight ceiling, who is going to be operating it, and this sort of thing, all to ensure safety. The FAA has not been interested in privacy. They hadn't been interested in tort law or First Amendment law, media law, or entertainment. Their purview up till now has been safety; they don't care about anything else.

There have been some calls for the FAA to start considering privacy issues, and in selecting test sites, the FAA sent out sort of a Power-Point saying well, we are going to look at privacy issues. So, the University of North Dakota set up a UAS research compliance committee. So, whenever somebody in the University wants to test a drone, fly a drone, whatever, they have to go through our committee, and I was chair of that committee. The drone missions that we've looked at were taking a look at accident sites, taking a look at how you could use a drone to pursue fleeing criminals, or look for a lost child, and probably the most contentious issue we had is taking a look at traffic, which I guess is something that is near and dear to everybody who lives in LA. Taking a look at traffic leaving a major event to see the most efficient way to guide traffic. So, those were the sort of things we were looking at.

One issue that came up in North Dakota was a farmer on a three-thousand-acre ranch was accused of stealing his neighbor's cows two years ago—this still happens. And the cops came out to look and said, "Look, you've got to return the cows," and this guy cites some 1850 statute and says, "Well, actually, I don't have to 'cause they wandered onto my land, and by the way, officer, if you take one step further I'll take this gun and shoot you," and the cops retreated. They came back with a SWAT team, and a Predator drone that was being used to patrol the open border was on it's way back to the Air Force base and was rerouted to take a look at situation cause the cops that wanted to arrest these people didn't know where they were on their land and whether they were armed and so forth, and the drone was able to find these folks and basically ensure everybody's safety. So, there is a lot of good stuff drones can do. And Caren and I have been talking about this for a year or so—we both do Fourth Amendment Law—and we find ourselves concerned about the intrusiveness of the technology, but also largely at a loss to figure out why drones are really any different than airplane and overflights and so forth.

In large part, they probably aren't that different, but there are some minor details that could make them different. When you're talking about small drones like the Nano Hummingbird, you might not know they're there—you might not know they're sort of under the seat in the café where you're talking. That presents a privacy issue. Now in the context of media, in the context of investigative reporting or paparazzi reporting, which are two different things when it comes to the First Amendment, that's a concern. There could be an invasion of privacy there as Caren mentioned, but, there could also be a counter-vailing First Amendment interest.

There was a case in the 1990s, where I think it was ABC, surreptitiously imported video cameras into the bathrooms of a grocery store to check out alleged health violations, and they found some. The court said, what you did was a bad thing—you trespassed. But, there was also a First Amendment issue here because it's the media, and they have a role in uncovering things like this. Drones can play the very same role. Even the Nano Hummingbird can fly into that grocery store film things, record things, and that covers some really important stuff that you may need to know about, and so, there's a First Amendment issue there.

There may be a lesser First Amendment issue when we talk about the paparazzi. What famous people do I guess is a matter of public interest, but there may be a lower First Amendment role there because I have a really big interest in the health of my food, but less of an interest what Brad and Angelina did in the privacy of their own backyard. So, there are some details and a number of federal statutes have been proposed to limit drone use. Sort of overall, these bills, which have failed so far, talk about data collection, so that people could go back and take a look at how drones have been used, and also imposing a warrant requirement for law enforcement, which wouldn't really touch the entertainment or media folks who want to use drones. North Dakota and a couple other states had similar bills, which failed. One, which Caren just told me about from Georgia is quite interesting. It seems to allow law enforcement to use drones sort of eight feet off the ground. What that means is that if you want to protect the privacy of your backyard, if you're Brad and Angelina and you want your backyard to be private, well just erect a fence eight feet high, and drones can't overfly and look into your backyard.

Now, that's actually really important because there are three Fourth Amendment cases where law enforcement did airplane and helicopter overflights of peoples' backyards, and the court in those cases said

that's perfectly fine, the law enforcement agents were where they are legally able to be, they viewed things in plain view, and that's it—there is no Fourth Amendment violation. The concern with drones is that they are so inexpensive, that law enforcement agents, and the press, can use these things in a ways that they can't use helicopters and airplanes.

And in a recent case said which dealt with attaching GPS device to cars, Justice Scalia said look historically—the cost of technology has been cost-prohibitive, for law enforcement agents, so we haven't really worried about cops using technology because it was so expensive that when law enforcement agents used technology it was always for a good reason, and it was limited, so we never really cared about it. With GPS, that's so cheap, that's . . . there's a constitutional concern, and I think in terms of privacy, drones are cheap, too, so you're going to see an expanded use of them by law enforcement. But by media as well, we're going to see small drones, a greater use of drones, which could entail some additional privacy issues. But, it certainly opens the door for media to exercise its First Amendment right to report. And I think I'll hand it off back to Caren?

Caren Morrison: Actually, I think we should go to the other panelists.

Nabiha Syed: Speaking about opening the door for media and photographers, we will have Mickey Osterreicher talking about his experiences with the right to record as photographers have currently faced them and what he thinks is coming down the pike with drone-regulating use. Mickey?

Mickey Osterreicher: Thank you for having me. Sorry I can't be there in person, but it's really interesting. Nabiha really got me involved in this question a few years ago when she asked me some questions about use of UAVs in newsgathering, for the Harvard Law and Policy Review. But one thing for some of you listening: I dislike the word "paparazzi" as much as the UAV community dislikes the word "drones." It just has this negative connotation and unfortunately just as all UAVs are seemed to be described as "drones," all photographers seem to be described as "paparazzi" when they're out actually trying to cover news. So, that's something to think about. We were actually just talking this morning. I'm at an ABA conference of a communication's law forum, and one of the things this morning was hot

topics and newsgathering, and of course the first topic was the use of UAVs, the use of drones in newsgathering. It's a question that keeps coming up time and time again. I get calls from other attorneys that represent large news organizations, and they keep getting questions from their news directors—can we use them, can we not use them? As we all know the FAA has basically said no commercial use of UAVs, and they will not, at least at this point, consider newsgathering as an exception to commercial use.

It's interesting in terms of the law, this is not the first time that people have been concerned about privacy rights, at least when it comes to public photography. Back in the late 1800s, with the Brownie, people thought the world as they knew it in terms of privacy was going to come to an end. Back in the 1800s you wanted to have your picture taken, you had to sit in a chair with your neck in a brace and hold still for four or five minutes for an exposure to be made. And all of a sudden, here was this Brownie camera, and people were going to be able to take it out on the street and take pictures of people, and there was not going to be any right to privacy, as they knew it. A Harvard Law student, by the name of Louis Brandeis, with the help of somebody else, wrote an article about the right to privacy, and if you read it—and you can find it online—you would think they are talking about drones today. It's really the same concerns in terms of newsgathering, and it's just something that the law obviously needs to catch up to and come to terms with. I think the big problem is going to be getting a voice at the table, and the FAA, which has really been mandated with dealing with safety issues now, has to come to terms with, at least it's my understanding, that Congress, in terms of their transportation appropriation, has mandated them to also address the privacy issue. So, that's going to slow things down. We already see the rulemaking just keeps getting pushed back further and further, so the likelihood of them coming out with their suggested regulations will probably not meet the deadline that they have. That said, we think it's really important as newsgatherers to have a voice at that table, and so, kind of to that end, and I don't know if you can put it up, but working with Charlie Naftalin, who's there [at the conference], from Holland & Knight, and Charlie Tobin, who's actually here with me at this conference, working with Matt at the University of Nebraska, and Fergus, we just pushed out a survey on Survey Monkey, and it's only been out for a few days. We've got over three hundred responses, so if people there would like to participate on the survey, I'm not sure if you have it to put up on the screen. Should I just say the link or?

Nabiha Syed: We'll be able to put it up afterwards.

Mickey Osterreicher: Okay. But I think one of the real issues seems to be the fact that there are many misconceptions about the use of UAVs for newsgathering. I think a lot of people think that okay you got a photographer out in the field who runs into a situation where it would be really great if we could have some aerial footage, whether a still or video of a news incident, breaking news, a flood, a forest fire, whatever, and a photographer can go to his trunk and open it up, batteries charged, whip out the UAV, launch it and we're good to go. As I tried to point out, that even if the FAA were to wave its magic wand today and say, you know what, do whatever you want with newsgathering, but you're going to have to comply with the same regulations, the same safety, the same insurance, you're going to have to have a COA, you're going to have to have a pilot in command, you're going to have to have an observer, you're going to have to keep the UAV in line of sight, you're going to make sure that there are a number of you there that your FCC frequency spectrums, you're not stepping on each other because we've got multiple UAVs flying in an area, and there's a small likelihood that somebody's frequency is going to be the same. You can only imagine what that would be like when you think you're controlling your UAV, but you're actually interfering with somebody else's. So all of those issues, it's not as simple as just open the trunk and launch it. That's something that we are all going to have to think about going forward. There really needs to be a standard operating procedure and for people who want to use these things, they are going to have to abide by those. But really the biggest thing for us is first to see if we can find a newsgathering exception to the no commercial use. You know, in terms of the First Amendment, it's not absolute; it's subject to reasonable time, place, and manner restrictions. Certainly, public safety concerns by the government would be increased above reasonable time, place, and manner consideration when they're worried about these things, especially flying over somebody's head.

Just today—breaking news—somebody sent me a link that the FAA is looking into the use of a UAV. It was reported on Fox; they sent me the link. If you have a chance, you can put it up later. There was a fatal traffic accident—I believe it was in New Haven—and the police and other people looked up, and there is a UAV hovering over the scene, nobody knows who's flying it, nobody knows what they were doing, but they're looking into it. The problem with the FAA, as

with any organization, is they barely have enough inspectors to keep track of the serious plane crashes that they have to look into. But, when you certainly call attention to something, you call attention to yourself, and using a UAV in this way, you're going to obviously get some scrutiny by the FAA. And for the most part, major news organizations do not want to be the poster child for the FAA making an example of somebody using a UAV for newsgathering when it's still prohibited. I'll wait for other questions—obviously I can go on for a while. We'll try to get you back on track here in terms of time, and so, hopefully, that gives you a better overview, but the one last thing in terms of the survey, the reason for it, is AUVSI put out technical papers for their meeting in May in Orlando, and I sent out the proposal. They accepted it, so hopefully we'll get these survey results in a timely manner and put together a paper to have those results in them. So, I would appreciate any help from the community out there.

Nabiha Syed: Thanks, Mickey. Donna we'll wrap-up with you, and you have a PowerPoint.

Donna Dulo: Good morning everyone. When I like to talk about the news media and talk about the First Amendment, I don't just like to talk about the single issue. I like to talk about the entire sub-legal issues with drones in general, and it's not just the First Amendment—we have many issues of constitutionality, we have many issues of safety, we have issues with privacy, we have issues of risks, we have administrative issues—so, I'd like to talk about the entire set of issues. We don't just talk about the First Amendment as an isolated set of circumstances, we talk about the entire set of issues. And, also, we talk about the First Amendment in terms of a set of compound issues. We have the balance between First Amendment and privacy. We also have the balance between First Amendment and data privacy as well as the data security because it's vital to see the First Amendment, not just in terms of speech, but the counterbalance of speech and data because in the news, when we generate news, we're not just generating news we're generating the data that is encompassing the news. So, this is a just technical-use case of a UAV looking at the news, and when we're looking at this, we see the very complicated technical aspects of the news. And when we look at this we see that we're not just looking at the aircraft, but we're looking at the technology that is generated by the aircraft. The cameras, the communications systems—and all of these need to be taken into account when we're talking about First

Amendment issues. And so when we approach First Amendment issues, we don't have a lot of case law to deal with at this point, so we need to approach it from other areas, we need to look at other different areas of case law. So, I like to have this kind of a framework to look at drone issues from other areas of law.

First, would be from a Fourth Amendment standpoint, from Fourth Amendment cases that we've had in the past, one from a First Amendment . . . from First Amendment cases we've had in the past and also by adjacent areas, including a case of a man named [Raphael Pirker], who was the very first man who was fined by the FAA for the use of a drone. This was a very serious case in 2011, where the gentleman was flying a drone over the University of Virginia and he was fined ten thousand dollars for the "reckless" use of technology. So, this is the kind of framework I like to put everything into because we do not have a lot of drone-specific cases yet. So, we need to kind of put everything into perspective from the Fourth Amendment, from the First Amendment and from adjacent cases. So, when we look at cases here, I like to kind of look at things from kind of two different vantage points—one from an aerial vantage point, the cases where we're looking at the airframe, and the second area, where we're looking at the actual technology.

The first case we're looking at was *California v. Ciraolo* in 1986, where a fixed-wing aircraft was flying one thousand feet above the structure, and the police were looking at the marijuana plants from one thousand feet. Now, if you may know, the FAA requires that fixed-wing aircraft fly at a minimum of one thousand feet above the highest obstacle. So, in this case, the aircraft was above the structures—which, in this case, were the marijuana plants on the ground—legally, in navigable airspace. In the *Dow Chemical* case in 1986, once again, the helicopter was in navigable airspace. The government was legally, well actually, it was a commercial vendor taking pictures in legally navigable airspace. In *Florida v. Riley* in 1989, this was a helicopter, and a helicopter has different regulations than a fixed-wing aircraft. A helicopter may fly at lower altitudes as long as it navigates safely and effectively around hazards. In this case, the helicopter navigated around the structure and was able to see the marijuana plants inside the structure, and law enforcement was able to view those marijuana plants, and there was no violation of the Fourth Amendment.

And then there was a case of *Streisand v. Adelman*, where Adelman was taking pictures along the California coast in the early 2000s, and one of the pictures involved Barbara Streisand's estate, and she was

very unhappy about this photograph because the photographs were made public, and she sued Mr. Adelman, and the court basically threw out the case and awarded Mr. Adelman legal fees by Miss Streisand because he had a free-speech right to take these photographs. He was taking the photographs in a helicopter in navigable airspace, and one of the things that the judge said was that Mr. Adelman's helicopter was not hovering above Miss Streisand's estate. This was a big part of the case, and this was one of the first, one of the major First Amendment photographic cases that really directly relates to drones. So, here, what we're seeing is we're looking at navigable airspace. We're seeing, generally, a pro-First Amendment stance by the courts.

But then, we look at the technology-based cases, and we have *US v. Jones*, in 2012, where the police had planted a GPS inside the vehicle, and as you know, the GPS is a persistent technological device where it persistently gathers and projects data to a law enforcement. Here, the court said no, this is not acceptable because the police are continually monitoring this vehicle, so there was a Fourth Amendment violation.

In *Kyllo v. US* in 2001, the law enforcement used a thermal imaging device against a house, and this, again, was viewed by the courts as a penetrating technology, and this penetrating technology, again, was viewed as an intrusive violation of Fourth Amendment rights. And also, the court's opinion was that this technology was not in general public use and therefore, was a violation of the defendant's Fourth Amendment rights. So, you see here that persistent technology and penetrating technology are being cited against law enforcement. So with news agencies, if you are using these types of technology, there is a high probability that the cases will be against you in a First Amendment case. Now the case against Raphael Pirker, he was using a drone at the University of Virginia, and the FAA happened to be in the area, and he was deemed to be using the technology "carelessly and recklessly" by the FAA. He was fined ten thousand dollars, and he is taking the case to court because he feels that the FAA regulations are vague and nebulous, therefore a violation of his rights including his First Amendment rights. [Editor's note: Shortly after this conference, a federal administrative judge dismissed the case and vacated the proposed fine, holding that no FAA rule was applicable to model aircraft, which was what Pirker piloted in the incident. The judge also ruled that there was no regulation for classifying model aircraft as UAS. On appeal, the full NTSB reversed the administrative law judge's decision and remanded the case for further proceedings. Shortly thereafter, the parties settled.]

So, you see, when we have an aerial vantage point, First Amendment rights were more likely to be easily upheld in cases dealing with navigable airspace; however, hovering and aerial persistence may be a challenge for news media, especially with hovercraft and lighter-than-air vehicles. However, breaking the plane of a property may be an issue, especially if the private property is intruded upon by the vehicle—especially breaking the plane of the actual structures. And the issue now is how low in Class G airspace will the media be able to go before there will be a privacy invasion. Now, technology—technology is the other issue. Technology and the use of technology is where we need to watch for the news media because technology is where the major invasions of privacy will be taking place. So, privacy torts may prevail in this area. The rapidly advancing technology in the areas of unmanned aircrafts and especially the payloads of these aircraft may be the determining factor whether there will be privacy violations because we do have an exponential growth in technology. Once we make technological discoveries, those technological discoveries grow exponentially rather than linearly, so we need to watch these growths of technology. Especially [in the] *Kyllo* court, the quote was “not in public use,” but as you know, technology that is not in public use today may be in use tomorrow because technology becomes cheaper day-by-day as technology becomes more advanced. And also the issues of persistence with technology needs to be watched very carefully.

So, as you can see in this graphic, technology is going to be very pervasive in the use of aircraft. We’re going to be seeing new uses of technology for news, we’re going to be seeing new uses of GPS technology, new uses of halo technology, new uses of anti-collision systems, and we’re going to be able to get in closer, we’re going to be able to get in faster with our unmanned aircraft, and therefore, technology needs to be what we need to look at in terms of our First Amendment cases.

And finally, we need to look at our information assurance because confidentiality and privacy go hand-in-hand, and the triad of confidentiality, availability, and integrity are integral with privacy, and if we do not watch these issues carefully, the news media may get into issues with privacy, which may intrude upon their First Amendment rights with their use of unmanned aircrafts. Okay, thank you very much.

Nabiha Syed: Thank you. So we’re going to start off with asking questions. And there’s a couple of themes that you see here. Clearly,

we see the theme of the issue of privacy and how that butts up against First Amendment rights. We also have this idea of the limited First Amendment right, not only vis-à-vis privacy, but also vis-à-vis safety, which is, in fact, the FAA's main bread and butter—what they're tasked to do. We also see a conceptual distinction between what Tom was discussing this morning—the idea of expressive works that are First Amendment-protected, that are in the entertainment/closed setting. News gathering, which has issues of being breaking news, going to places that might possibly be dangerous, and might also have other safety considerations. And then an idea that lurks in the minds of many people who are first being introduced to the topic, which is, oh, my God, Mickey's most-hated word, paparazzi—right?—which implicates a different concern about privacy. So we have these different strands of First Amendment questions and First Amendment analysis, and I want to get to the privacy stuff deeply, but I want to ask a couple of safety-oriented questions first. I want to go to the Raphael Pirker (also known as “Trappy” to people in the UAV community) questions because you raised that case. What I think is so interesting about that case and a point that Brendan Schulman, his attorney, makes often, is that Trappy is known, and you can go to his UAV team, called Team BlackSheep, on YouTube, and you can see a bunch of these visually arresting, stunning clips of him doing daredevil things with his drone. But, he was approached by a marketing company on behalf of the UVA [the University of Virginia] to film this footage of the UVA for promotional marketing materials. The UVA didn't get a fine; it was just Trappy who got it. So, for a lot of folks in this room, I wonder if that issue of licensing has come up. You may not be doing this for yourself, but you want to hire the Drone Dudes or Trappy or someone—is there or should there be a liability for these people being hired or for the people who are doing the hiring—like, how does that landscape emerge? Because I think we'll see a lot of, you know, outsourcing, trying to get licensed drones. But, I wanted to hear from the panel—what you guys think about that?

Donna Dulo: Well I think as far as safety, in manned aviation, obviously the pilot in command is always the one that is ultimately responsible for the safety. And with unmanned aircraft, “unmanned” is always a misnomer because there is always somebody that is responsible. Either somebody at the control or, if it's an autonomous system, somebody has programmed that software. So, somebody—there is a human in the loop at some point. The question is, on the autonomy spectrum,

is it the person physically controlling the unmanned aircraft, or, if you have a lost link and the aircraft is flying aimlessly, is it the software that's programmed into the system that is supposed to take control of the aircraft to land it safely? So, is it the manufacturer of that aircraft that's responsible. And that's a big question that we have right now: Is it the pilot in command? Or is it the manufacturer who controls the software? And that's a big issue right now, that hasn't been resolved in the legislature, it hasn't been resolved in the courts, and that's one we really have to discuss in the future.

Mickey Osterreicher: Can you hear me?

Nabiha Syed: Yeah, we can hear you.

Mickey Osterreicher: It was interesting before you were, I believe, reading from section 1256, AB 1256 the anti-paparazzi statute for California. One of the things that's in that statute is, obviously, a number of news organizations are thinking, well we may not be able to fly them ourselves, but if we get somebody else to fly them, do we get exempted from that, or, in this case, let's just say somebody flew something and got some video or got some footage and then dropped it off at a television station. And I think there is actually language in California, that says if you induce somebody to get one of these visual images, or audio, or any of that, you're just as liable as the person that took it, at least in California. So, I mean, all of that is going to have to be sorted out at some point.

Steven Morrison: I mean, it seems to me it's a typical principal agency law. If the UVA hires a person and if UVA knows what this guy is going to do, you know, if what Trappy did was in course of his employment, it would seem to me that both Trappy and UVA should be liable.

Nabiha Syed: That's what I think I found so fascinating about the fine, because, I think, for years people have been getting cease-and-desist letters, and I've seen a couple that freelancers have received, but Trappy's the first that got a ten-thousand-dollar fine, it's not nothing, it's not peanuts, but the UVA is not mentioned anywhere.

Audience: If you don't mind I just want to point out in the Trappy case, the FAA assessed a ten-thousand-dollar civil penalty, but that

isn't what ends up getting paid. It has to go through the NTSB courts, and ultimately decided, it could be a lot less, it could be nothing. We don't know yet, it's only been assessed. The particular regulation he's accused of violating is—it seems is the only one the FAA can come with to try and prosecute UAV operators—and that's careless and reckless operation of an aircraft. So, in this particular case, the FAA, well not in this case—in all cases—the FAA is claiming that it has jurisdiction of any kind of aircraft operating in US airspace from the ground to, I guess, sixty thousand feet or whatever. In any case, UAVs, it considers them as aircraft, so I'd be curious if as lawyers and companies that want to operate UAVs, what does the FAA say when you say to them show me the regulation? Because if the only regulation is careless and reckless operation, well any good operator can prove that they aren't being careless or reckless, so what else do they have?

Nabiha Syed: Well it's kind of, and I'll get to all the questions and all the raised hands, I think, so, in being in the business of asking the FAA, point me to the regulations, I think what's interesting is they point to the idea where they're kind of hamstrung at the moment. There will be regulations coming, but they have to first propose them and there will be some comment period and then all of this reportedly is supposed to be done by 2015, is going to take much longer, so they're kind of scrambling in the interim, which I think as Tom mentioned, is creating this strange incentive system, that there are no clear regulations. People operate in the absence of them anyway, as they will be want to do, and then the FAA, concerned about safety, is trying to do something, and it's a very messy and sloppy situation. But, we have some hands in the back?

Audience: FAR 91.13 is the one that's the careless and reckless statute, and you got to understand, the FAA is administrative. They work under administrative law, so whether it's a notice in a closed community act against a pilot or imposed assessment, that's a person that does have a license. But, in this case, Trappy does not have license. So, the FAA had no other recourse to try to get the money out of him. Now, so, the issue becomes, they use 91.13 all the time. That's a very large [inaudible] against pilots [inaudible], we've got attorneys in here, so that's the issue there. The agency issue, the FAA can't fine against an agency person who's hiring because there's no FAR that they have violated, and so that becomes an issue for the person flying the

aircraft and not whoever they're getting paid by or however the person [inaudible], the FAA has no means to [inaudible] except for the person piloting the aircraft. And in this case, the reckless and careless thing was he [inaudible] flew near a heliport, he flew through the tunnel, he was within fifteen feet of the statue, he flew within x-amount of feet of a two-story building, so with all of that was where FAA said was careless and reckless. Now, [inaudible] therein lies the issues that [inaudible].

Nabiha Syed: Right. That's what creates a funny structure, with news organizations and other media entities that want to use this stuff, now have an out, that they can use it, but that, again, goes to the weird incentives. Now, we are having folks use it for newsgathering purposes, which are protected, but the usual people who go to court to articulate the newsgathering right aren't in fact the ones likely to be in court pushing it forward, being the voice of the table that Mickey mentioned. [To Steven] Did you want to respond?

Steven Morrison: Yeah. Just briefly, you mentioned administrative law, so if the FAA can pass regulations within reason to sort of oversee drone use without congressional approval, as long as it's within the purview of that administration agency. If it's not, then it starts to seem like they're making law—they can't do that. So, you're absolutely right, the FAA has taken some oversight over viewing this. It is a little, well, up in the air. All of those legal questions can be answered pretty quickly. By "pretty quickly," I mean in the next five years—once the test sites start getting up and running, once the integration plans, again, get, sort of, installed. In the meantime yeah, the FAA has, sort of, taken over drone regulation. One interesting issue is, well, what is a drone? Because when I was a kid, I used to fly a remote-controlled helicopter. That's not a drone. But at what point does that become a UAS? You guys might want to take a look at the Web site DIY-drones.com. Basically, it's where you can do fancy remote-controlled aircrafts that have some operability built-in, so you can, sort of, program coordinates where they fly, take-off and landing, that sort of thing. [Inaudible] talking about this flying thing being subject to regulation. So, it's a little [inaudible] and pretty quickly, it's going to be settled and maybe the FAA is going to overstep its bounds and maybe Congress steps in.

Audience: Yeah, my name is Mark Dombroff; I'm on one of the later panels. The FAA doesn't care about drones and doesn't care about UAVs. What the FAA cares about is controlled and navigable airspace in this country. And anything that enters the navigable airspace, whether it's big or it's small, or it's a fixed wing, or it's a helicopter, or it's a radio-controlled model, that's what they care about. And I think for any of us to believe that somehow the FAA, which has, through Supreme Court decision after Supreme Court decision, had the preemption of the navigable airspace upheld, for anybody to believe that the FAA has not almost used total control or the courts won't uphold them in the context of air safety, I think is kidding themselves. There is absolutely nothing new here, in my opinion. The airspace regulatory system, the oversight system, the pilot command authority, the Federal Aviation Regulations, the whole body and force of law—it all exists, it's all there. All they have to do is tinker and adjust it to cover this. And anybody thinks they're going play games with the FAA in this area, I think is seriously deluding themselves. I think the best observation that's made, and I don't know where he's sitting, but was the comment made by our first speaker who said he has real stuff at stake here in terms of people who work for him for real business, and he's not doing anything until he gets good guidance, is probably following the best course of action right now. And I understand somebody doesn't agree with the FAA's position regarding whatever the guy's name is—Trappy, whatever—the guy, in my opinion, ought to be thrown in jail.

Nabiha Syed: Well, thank you. We can get into that, and I actually would love to hear more about that, but just staying on the First Amendment topic, do you have a question about that, sir [to a different audience member]?

Audience: No. I want to go back to the speaker on Skype. We spoke a little bit about California third-party liability. We kind of get into that a little bit. The first time, I heard you say we might have some liability over that [inaudible] to go get beauty shots. Say you're hosting a golf tournament or something like that for a news segment, where we just hire a camera guy and he goes out and hires a [inaudible] UAV or helicopter or airplane, and it goes down, you said [inaudible] we would have some liability there?

Nabiha Syed: Mickey?

Mickey Osterreicher: Could you just repeat the question for me? I couldn't hear.

Audience: Can you just expound on the comment that you made regarding California third-party liability?

Nabiha Syed: Mickey, can you expand on what you referenced—the third-party liability in California? Can you expand a bit about that because we have someone in the audience who wants to hear more.

Mickey Osterreicher: Sure, you can Google it. It's AB 1256 and basically, they're looking at this as a constructive invasion of privacy, and then they talk about what constitutes a constructive invasion of privacy, and the language is so vague that it was said earlier that certainly the use of a UAV can fall under the advent of the law and then if you scroll down, can't remember whether it was C or D, there's another section and it talks about who would be liable aside from the person who actually did it.

Nabiha Syed: Then this transitions into another question I have, speaking of states getting active in this area. In 2013, we see a real flurry of legislation on the state level, and I know we have a panel about that a little later. We had forty-three states propose legislation, a number that's moving forward. In New York, just last week, a state senator proposed legislation that would criminalize taking photographs from using a drone and criminalize the possession and publication of those photographs, which is insane and can't possibly stand up to constitutional scrutiny, and yet, we have a number of state legislatures with this kind of horrific idea of pending drone future in mind, plowing forward this types of legislation. And I want to know if the panel thinks we're going see clashes, whether the FAA will come in, where do you see this going, the way states are moving forward with this?

Steven Morrison: Well, in North Dakota, a legislator proposed a bill, which I guess I advised him on, if you can say that, which essentially required law enforcement agents to get a warrant if they wanted to use a drone, but if there was some sort of exigent circumstance some sort of urgency, they didn't have to get one. [Inaudible] a very recent [inaudible] bill that was soundly defeated by the state, by the University. Well, the University didn't defeat it, but they came out against it

because they thought it would harm the test site, and harm all this money that's supposedly going to flow from [inaudible]. You know, I see first, drones coming [inaudible], and I see some bad things happening as a result of their use and technology, and then legislatures will follow up with focused, limited bills that limit drone use, if necessary. That's how I see it.

Nabiha Syed: I guess my question is more towards—sorry to cut you off—is that it doesn't seem like it's been focused or limited at all, right? There seems to be a sort of hysteria behind at least some of them, and I understand many states have, in fact, put forth rules restricting the law enforcement use of drones. A couple in Texas have restrictions on the private use of drones, which I think a lot of folks are concerned about because that's where you see a lot of the [infringement] of First Amendment rights when you see the limitation on the private use as opposed to law enforcement use. So, I'm particularly curious about that restriction of the private use of drones.

Mickey Osterreicher: I think I heard you say something about the possession or distribution of images that were captured by UAV? I think that the Supreme Court already addressed that in *US v. Stevens*, where they had to deal with these “animal crush” videos—we actually were part of an amicus on that—where, even with the newsgathering exception to that, they still struck down the law as being overly broad and vague, and I think if somebody proposed a similar law—and we've seen those with [inaudible] bills and anti-paparazzi bills in terms of that whole possession and distribution—and I just don't think that would stand scrutiny.

Nabiha Syed: Sure. Caren, you have been cut off twice now.

Caren Morrison: I basically agree with that. It does sound extremely overbroad to criminalize the possession or distribution of an entire class of photos or images merely because of the technology with which they were obtained. I think what is going to happen is there is going to be a lot of legislative proposals. Some are going to overreach; they're going to be struck down in the courts. Eventually, I assume we'll get to some sort of equilibrium, but because of the kind of hysteria that drones generate—you know, it's impossible to pick up an article about drones without reading a reference to George Orwell, *1984*, and all this kind of stuff—there's something so viscerally frightening

to people about drones that it might take longer to get there than it should. The media, who, ironically, could easily find many good uses for drones, also like talking about about how scary they are. It's like you want your news story today about how we're becoming this surveillance society, and it's all so terrible, but if you also want to do cases like food law that Epstein was talking about where you find out about hideous, disgusting practices with spoiled meat, you may want to preserve this technology down the line for investigative journalism. I think there are going to be a lot of excesses on both sides for a while, until we reach a plateau, but I don't think you can criminalize taking pictures just because you don't like they type of camera. I mean, if you think about it, it's the same as saying you can't use a Polaroid—that doesn't make any sense.

Nabiha Syed: Right. Do we have any other questions from the audience? Yes, we do.

Audience: I have a question—it's specifically for Mickey. I'm with CNN, and I'm a lawyer, but I have a practical question. I'm just wondering how Mickey and his clients are thinking because I'm trying to consider, let's say that we get past all of these issues for newsgathering, drones are going to be allowed, etc., etc. We have a news event—it's within a city where people are milling about—it's not like a national disaster like a wildfire in Southern California or something like that, but it's more like within an urban community. Now, you have national news, you have local news, you have independent photographers, you have all of these people who are wanting to cover this, and I'm wondering how they're thinking of anticipating that situation and then how to deal with it because there can only be so many drones within a compact area.

Nabiha Syed: Sure. Mickey, do you want me to repeat it?

Mickey Osterreicher: That's obviously something that they're going to have to consider. When you think about the fact that even now, forget about the use of UAVs, but using rotary-wing aircraft, when you've got helicopters flying around, you've got police helicopters, you've got news helicopters. I mean somebody's got to coordinate that. Then you've got, for example, in California, you've got LAX, so you've got controlled space for the air traffic—those are all those issues. Now, just compound them by adding all of these little vehicles

buzzing around—it just adds almost an impossible situation, and the only thing I can analogize to is, for example, at the national conventions when all the media come in—and nowadays almost everybody has a wireless mic, with all these stations coming from all over the country and they have their wireless mics—they literally go through a whole process of determining who is on what frequency, just so people are not stepping on each other's [inaudible]. When you're in a group and you've got somebody that's in California, and you've got somebody that comes from New York, and normally they wouldn't interfere with each other, but they're now they're together in Tampa for the RNC, you can imagine, kind of, a tower of Babel with everybody talking over each other, and that's really the same situation you would have here, not only in the physical airspace, but with that frequency spectrum itself, because the UAVs are using uplinks to [inaudible], downlinks to see video, and there is only, again, a finite area that people can operate in on those frequencies without interfering with one another. So, that's all stuff they're going to have to address.

Audience: Wait a minute. Are you thinking of, it's a race to get permissions, and they're only going to let in so many? Or a required pool arrangement? I mean, what is the thinking by the clients? I've had these discussions, too—I'm just trying to figure out from a practical perspective what people are thinking.

Nabiha Syed: We have a couple hands.

Audience: I actually think you're right. The industry has handled frequency coordination in the broadcasting context for years, [inaudible] you guys will figure it out [inaudible] that's part of the [inaudible] value of stuff the FAA is going to have to figure out [inaudible] and kick it over to FCC to say, "Okay now, find some frequencies for these guys." So you're completely right, and I personally like to think industry rights that keeps the government out of it, but there's going to have to be an industry approach with a government umbrella over it—probably a FCC umbrella over it—about who has control over what frequencies, and it's probably up to the industry to figure that out. Now, when you compound it with UAVs, I'll try not to [inaudible] because you're going have a lot of private citizens out there who are going to have fun with toys and all that stuff. So, it's going to get exciting, but it's just even more complicated when it involves not

just some punk [inaudible] messing up a feed, deciding to go out and [inaudible] crash though, but yes, I think the model that we have is currently [inaudible] the wireless mics, the remote video feeds, the audio feeds go from, you know, the stadium or the convention, back to the studio, back to the satellite.

Nabiha Syed: Do you have something, Tom?

Audience: Your example is exactly the reason the FAA is locking it all down. They recognized really quickly that that's going to happen. Until they can figure out detect-and-avoid technology so that the Drone Dude doesn't crash his toy into an NBC news helicopter during a major event. Well, there is no easy way to do what you said. So, it's like, all right, everyone stop. No one can do it until we figure it out. It's a huge mess. There's a lot of stuff for them to figure out.

Audience: Just want Mickey to know, if there's going to be a voice at the table, those are the things that the voice needs to be articulating. So, the real easy answer for the FAA is, "No," like you said. So, we need to be able to tell them how to get to, "Yes," and so my question was really, sort of, what is the thinking as to the proposals of how to get the FAA to yes?

Nabiha Syed: You know, in their November roadmap, that the FAA put out, they have specifically flagged newsgathering as a recognized interest of drones, so the Media Law Resource Center, which organizes a lot of media folks, is actually convening a working group—we talk about later—what proposals we should come up with, and then go to the FAA as soon as they do propose their rules—which was supposed to be March, and now is November of this year (when it actually is, who knows?)—when they put out their proposed rules, there is that notice and comment period in which we can jump in and say on behalf of newsgatherers or other people involved in expressive works, "Here are the things you need to be thinking about." Detect-and-avoid technology is something that the New York test site is specifically tasked with sussing out. How does this work? I was talking to some folks working on that, and one idea of how technology [inaudible] question, is creating essentially an in-the-sky compound surrounded by a no-fly zone. Like, yeah, you can have your news drone up there when there's a breaking event or some news event you want cover or parade or what have you, but there's a specific

place you can be, you have to have a license ahead of time, like, that's how it's going to work. Now, that curtails a bit the breaking-news use of it because if you have to put in a request ahead of time, well, how are you going to get there? In the UK, they have a system, which the BBC is the primary user of drones for news gathering, where you just have to enter in a data collection statement, where you're going, your location, what you hope to receive, whose flying it, who's your person on the ground, and it's an iPad app that you just enter your info into. You don't have to wait for preapproval; you just have to upload it as a necessary requirement for being there, so on the off-chance it falls out of the sky, they know who to go to. And there's also proposals about drone license plates, having RF ID tags on them, so you can track what's going on. But you're totally right—huge, huge questions. [To an audience member] I think you had your hand?

Audience: Just a quick note on spectrum. We'll talk about it later, but there has been a lot of activity with World Radio Conference and the ITU and Geneva getting spectrum allocated for [inaudible].

Nabiha Syed: Did we have a question back there?

Audience: I just have a question regarding line of sight and invasion of privacy. Can someone address that please?

Steven Morrison: Well, line of sight is currently one of the requirements for flying a drone, generally. So, if you want to get a certificate of authorization from the FAA, basically, you have to show that you'll be able to see the drone by your pilot. That's different than the military because they're out flying thousands of miles from the site. The pilots . . . it's just a safety thing, so if you can imagine, I'm here, in an open field flying a drone that I see a quarter-mile away, and that drone might be looking down onto the backyard of, you know, whoever I'm looking at. So, line of sight and privacy are sort of two different things. Line of sight is kind of a safety requirement; I need to be able to see what the drone I'm operating. But, where that drone is, that could be taking pictures of anything, really, and that's where the privacy issue might come about.

Nabiha Syed: Isn't there a difference in, and someone in the audience correct me if I'm wrong, between a radio line of sight and visual line

of sight? So, visual line of sight requirements, which are in the November road map, say no, you have to look at it, you have to see where it is.

Audience: Yes. You have to be able to see [inaudible] the aircraft into the airspace you're flying, 'cause that's an issue [inaudible].

Nabiha Syed: And, so—sorry, one second Mickey—so in the UK, the requirements [inaudible] already has is that when the BBC takes theirs out for newsgathering, there are two spotters who are there to maintain that visual line of sight in a way that's both expansive enough to get the shot they want, but complying with safety regulations, so you can actually make sure you maintain it. Radio rights get to go a lot further than visual line of sight, and so it could, theoretically, impinge upon privacy rights 'cause you don't even know where it's going, even what information it's collecting, or what is happening, right? So, it's just, I think, maybe, possibly it expands the universe of collection?

Steven Morrison: I would think that if you don't know where your drone is, you've got a big problem.

Nabiha Syed: Yeah, fair. That's fair, but I mean if you're Drone Dudes or random people who are using this stuff, I mean . . .

Steven Morrison: Yeah, they might be uncomfortable with that.

Nabiha Syed: Right. If anyone can buy it off Amazon, I mean there are going to be people who have problems. Mickey, didn't mean to cut you off. I'm sorry.

Mickey Osterreicher: No, I think, you know, an example of one of the problems would be, you know, we think of the military use of drones as being highly sophisticated. They're large aircrafts, they're multimillion-dollar. My son is a fighter pilot, and when he was in Afghanistan, and those drones were flying and they were looking down, they were looking down but they weren't looking forward. I can't tell you how many times they would have to duck and move out of the way because there was this drone looking down but nobody was seeing where it was going, and that became a problem. So, think about that. You don't have an observer; you're not keeping an eye on

where this vehicle is in the air compared to where other vehicles are, except, of course, they're interested in what they're looking at down on the ground, and that's all they're seeing. You know, you can see where we're going with that.

Nabiha Syed: Sure. There's some questions.

Audience: You all raise great points. I'm going to try to take some of that right to our front door. From a privacy point of view, what would be the difference between this gentleman who was here before from a news crew, and he had a camera, and he hovered back there, and he was filming all this—I didn't consent to it. I'm in here, not out on the street. So, what's the difference between that and a UAV? Instead of saying, you know, box, opens up a little, takes a Hummingbird UAV and sets it back there and films, and there's not a difference between that from a privacy point of view, why would the FAA be involved in regulating what takes place inside this room if they just use a Hummingbird UAV?

Caren Morrison: I think you're right. I don't think there's a privacy difference between the guy that you can see taking a video, unless there's, maybe, trickery or stealth involved and a Nano Hummingbird. But, if the Nano Hummingbird is under your desk, taking a video of your knee, that is probably going to seem offensive to the reasonable person. So, that would be too much. But, yeah, I was wondering actually about airspace and what counts as airspace. If there's a drone flying through the subway system in New York City, does the FAA have anything to say about that, or is that a completely separate issue? What about drones flying through private buildings?

Audience: [Inaudible] private space.

Caren Morrison: It's an unknown.

[Inaudible]

Audience: The Trappy case—a few feet off the ground in a private university.

Audience: Airspace—populated or not populated, the FAA doesn't care if you fly in a building or in a subway because they're focused on airspace and avoiding collisions.

Audience: Does the FAA have any say over regulating the device if it's capable of being used in the airspace? So, if you have a model airplane that, for example, could go over two thousand feet, would they have any interest in that?

Steven Morrison: I think you put it well. The FAA doesn't care about drones.

Audience: I realize it's almost counterintuitive for what we're all here for, but the FAA doesn't care about drones. They are just congressionally charged for setting up the structure for integrating drones into the civil airspace system. It's as if, and I was going to say this later, but it's as if all of us this morning read that Igor Sikorsky invented something called the "helicopter," and the FAA was charged with integrating the helicopter in with aircraft, other aircraft. It's the same exact thing. The FAA, frankly, they don't care, except that it's a much more daunting task.

Audience: I'm not sure that's true!

Nabiha Syed: And that is something we can discuss at coffee! Thank you very much.