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# Dronalism: Journalism, Remotely Piloted Aircraft, Law and Regulation

*David Goldberg\**

## ABSTRACT

The use of “drones,” or, technically, “remotely piloted aircraft” (RPAs), is evolving from military to increasingly civil, commercial applications. This Article focuses exclusively on using RPAs for journalism, a.k.a. “drone journalism” or “dronalism.” Cheap to purchase, light in weight, and portable, RPAs can be moved easily to locations where reporting needs to take place, or where production is most desirable. In this context, RPAs are simply twenty-first century flying cameras. However, this usage by mainstream media and citizen journalists alike is being frustrated by regulatory, legal, as well as so-called “ethical” gaps and issues. The Article argues that the public’s right to receive information from journalists exercising the rights involved in carrying out the profession of reporting, coupled with the concomitant right to access and utilize communication technologies, including RPAs to do so, should permit the use of RPAs in this context in principle. Further, this use should trump absolutist counterclaims, not least those advanced by the pro-privacy lobby.

## INTRODUCTION

*“We are not using it as a drone. That is completely the wrong terminology to use to describe it. We see it as a flying camera.”<sup>1</sup>*

Newer technologies generate hustle and bustle for policymakers and legislators, who are often driven by techno-panics whipped up by “concerned citizens,” NGOs, activists, and academics.<sup>2</sup>

A moral panic occurs when a segment of society believes that the behavior or moral choices of others within that society poses a significant risk to the society as a whole. By extension, a “techno-panic” is simply a moral panic that centers around societal fears about

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<sup>1</sup> Katie Collins, *Behind the Mind-Boggling Shots Captured by BBC Drones*, WIRED.CO.UK (Feb. 12, 2014), <http://www.wired.co.uk/news/archive/2014-02/12/bbc-drone-journalism/viewgallery/ytKr2kd tZOFW0> (quoting Thomas Hannen, Global Video Unit, BBC WORLD SERVICE).

<sup>2</sup> *Navigating the Dataverse: Privacy Technology, Human Rights*, INT’L COUNCIL ON HUMAN RIGHTS POL’Y (Jun. 2011), available at [http://www.ichrp.org/files/reports/64/132\\_report\\_en.pdf](http://www.ichrp.org/files/reports/64/132_report_en.pdf).

a specific contemporary technology (or technological activity) instead of merely the content flowing over that technology or medium.<sup>3</sup>

For example, the invention of hot-air aerial balloons in the eighteenth century hugely alarmed those who, being under the flight path, feared for their safety, lest the craft come down, or something it was carrying fall overboard. And, thus, on April 23, 1784, aviation law became established when “a French police directive was issued aimed directly and exclusively at the balloons of the Montgolfier Brothers: in order to protect the population, flights were not to take place without prior authorization.”<sup>4</sup>

The response to the development of non-military applications of drones is no exception to this “sociological rule.” Also, to account for some of the anxiety concerning drones so evident in certain quarters, it is suggested that one additional, specific, reason is owing to the way images of drones are represented in the media. These media representations make them resemble scary flying creatures from the dinosaur era or tiny insects, thus, playing into fear of dinosaurs (ornithoscelidaphobia) or fear of insects (entomophobia). An interesting recent twist is the publication in Singapore’s STRAIT TIMES of an illustration of the drone as the Angel of Death.<sup>5</sup>

In this article, the term “remotely piloted aircraft” (hereafter RPA), will be used interchangeably for the word “drone.”<sup>6</sup> It is technically precise and corresponds to contemporary usage.<sup>7</sup> It also pays homage to a little-

<sup>3</sup> *Ongoing Series: Moral Panics/Techno-Panics*, THE TECH. LIBERATION FRONT, <http://techliberation.com/ongoing-series/ongoing-series-moral-panics-techno-panics/> (last visited Dec. 3, 2014).

<sup>4</sup> ELMAR GIEMULLA & LUDWIG WEBER, INT’L & EU AVIATION LAW: SELECTED ISSUES 6 (Kluwer L. Int’l 2011). For the Montgolfier brothers, see Ian Ellis, *The Montgolfiers Brothers: Pioneer Balloonists*, TODAY IN SCI. HIST., [http://todayinsci.com/M/Montgolfier\\_Brothers/Montgolfier\\_Brothers.htm](http://todayinsci.com/M/Montgolfier_Brothers/Montgolfier_Brothers.htm) (last visited Dec. 3, 2014); see also Letter from Sen. Dianne Feinstein to FAA Adm’r Michael P. Huerta (Dec. 3, 2014), available at [http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File\\_id=a26f5de2-b5f6-4f6c-85fc-86414a24c1f2](http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=a26f5de2-b5f6-4f6c-85fc-86414a24c1f2) (proposal to the FAA for restricting drone usage in the USA). Whilst the “safety” issue is, in principle, unassailable, it can, nevertheless, be used as a political football and statistics may be misrepresented. See Timothy M. Ravich, *Drone Collisions: Hot Air?*, DRONING LAW.: UAV L. BLOG (Dec. 2014), <http://droninglawyer.com/2014/12/>.

<sup>5</sup> See Jonathan Eyal, *Drones Posing Global Security Issues*, THE STRAIT TIMES ASIA REPORT (Oct. 27, 2014), <http://www.straitstimes.com/the-big-story/asia-report/opinion/story/drones-posing-global-security-issues-20141027>.

<sup>6</sup> Widely so-called, the origin of the word “drones” is less well known. It seems that, in 1931 “the British developed the Fairey ‘Queen’ radio-controlled target from the Fairey IIF floatplane, building a batch of three, and in 1935 followed-up this experiment by producing larger numbers of another RC target, the ‘DH.82B Queen Bee,’ derived from the de Havilland Tiger Moth biplane trainer. The name ‘Queen Bee’ is said to have led to the use of the word ‘drone’ for remote-controlled aircraft.” Greg Goebel, *Unmanned Aerial Vehicles*, THE WIZARD WAR: WORLD WAR II & THE ORIGINS OF RADAR, ¶ 1.1, [http://www.vectorsite.net/twdrn\\_01.html](http://www.vectorsite.net/twdrn_01.html) (last visited Sept. 16, 2014); see also Ben Zimmer, *How “Drone” Got off the Ground*, THINKMAP VISUAL THESAURUS (Aug. 2, 2013), <http://www.visualthesaurus.com/cm/wordroutes/how-drone-got-off-the-ground/>.

<sup>7</sup> INT’L CIVIL AVIATION ORG., *Unmanned Aircraft Systems*, at X (2011), available at <http://>

known historical fact: present day *remotely* piloted aircrafts owe their technology to the brainchild of Serbian American Nikola Tesla. He patented the so-called “teleautomaton,” albeit it was with reference to a boat—thus, underscoring the point that unmanned, remote control is applicable to aerial, road, and sea vehicles. Tesla presented his invention at Madison Square Garden’s first electrical Exhibition in September 1898.

On a rainy September day in 1898, Nikola Tesla presented at Madison Square Garden’s first Electrical Exhibition a new invention that he called a “teleautomaton.” The invention was the first even radio controlled device in the form of a miniature boat. He had two devices one that could be remote controlled above water and another that had a hidden loop antenna and could be controlled under water.<sup>8</sup>

Further, the phrase highlights two crucial aspects of this type of vehicle. First, it is often imagined that RPAs are “unmanned” because there is no human being on board. However, the RPA is not literally “unmanned.” There is a human operator, the pilot-in-command, who is operating and (hopefully) controlling/monitoring it, ideally, in conjunction with an observer too. There might even be another human being involved, operating the payload, e.g., video camera or data sensors. In that typical situation, the RPA is part of a human-machine system, or Remotely Piloted Aircraft System (RPAS). “[T]he unmanned aircraft (UA) [sic] and all of the associated support equipment, control station, data links, telemetry, communications and navigation equipment, etc., necessary to operate the unmanned aircraft.”<sup>9</sup>

Second, from a legal and regulatory perspective, the remotely piloted vehicle is an aircraft. Understanding that RPAs are “aircraft” produces a novel situation when deployed for the purpose of newsgathering.<sup>10</sup> It is a

[www.icao.int/Meetings/UAS/Documents/Circular%20328\\_en.pdf](http://www.icao.int/Meetings/UAS/Documents/Circular%20328_en.pdf); CIVIL AVIATION AUTH., *CAP 722: Unmanned Aircraft System Operations in UK Airspace—Guidance*, at 4 (Aug. 10, 2012), available at <http://www.caa.co.uk/docs/33/cap722.pdf>. For an excellent overview of terminology and issues, see the UK House of Lords Report, *Civilian Use of Drones in the EU*, Mar. 2015, <http://www.parliament.uk/pa/ld201415/ldselect/lddeucom/122/12202.htm>.

<sup>8</sup> Sun Sachs, *How Tesla’s 1898 Patent Changed the World*, TELEAUTOMATON (Oct. 22, 2010), <http://teleautomaton.com/post/1373803033/how-teslas-1898-patent-changed-the-world>; see also, Austin Weber, *Nikola Tesla: Father of Unmanned Vehicle Technology*, ASSEMBLY (Apr. 26, 2010), <http://www.assemblymag.com/articles/87689-nikola-tesla-father-of-unmanned-vehicle-technology>; TESLA MEM’L SOC’Y OF N.Y., <http://www.teslasociety.com/> (last visited Dec. 3, 2014); NIKOLA TESLA MUSEUM, <http://www.tesla-museum.org> (last visited Dec. 3, 2004); GOOGLE, *Patents: Method of and Apparatus for Controlling Mechanism of Moving Vessels or Vehicles*, <http://www.google.com/patents/US613809> (last visited Dec. 3 2014).

<sup>9</sup> FED. AVIATION ADMIN., *Unmanned Aircraft Systems (UAS) Frequently Asked Questions*, <http://www.faa.gov/uas/faq/#qn1> (last modified July 23, 2014, 10:50 AM).

<sup>10</sup> An RPA is an “aircraft” because it falls within the International Civil Aviation Organization definition of an aircraft: “Any machine that can derive support in the atmosphere from the reactions of

truism that media organizations and media lawyers currently engage with a range of media regulators and laws. For example, there are laws protecting the reputation of subjects of media reporting; states jealously guard their national security by punishing disclosure of official secrets; the revenue of the media is affected by advertising rules; broadcasting is subject to being granted a national regulator's licence; and community standards are upheld by laws criminalizing obscene speech, etc. However, one regulatory and legal regime that tends to be far removed from the consciousness of media companies, citizen journalists, and their advisers, is the national aviation regulator and air law and rules, whether national, regional, or international. This is set to change. The safety dividend, small size, portability, and low cost of RPAs will mean that the media companies etc. will themselves own and operate the vehicles directly. Such users will not only be more aware of the rules and regulations governing such activities, they will *have* to be so because they will be directly legally liable when things go wrong—as they inevitably will do.<sup>11</sup> Conversely, national aviation regulators will have to understand that their decisions—in this context, who, if anyone, to permit to fly and under what conditions—might be met by a challenge using human rights law and jurisprudence concerning freedom of expression. In a nutshell, when media companies, citizen journalists, and content producers deploy RPAs, the new tool in the newsgathering toolbox in particular for the professional media lawyer becomes aviation regulation and law.

However, in order not to become embroiled in what Mark Corcoran calls a “definition dogfight,” the term “drone” is acceptable (and corresponds to conventional usage) when referring to the use of RPAs by mainstream media enterprises and journalists as well as citizen journalists in the pursuit of journalism.<sup>12</sup> It may be used interchangeably with RPA in this article. Unlike military applications, almost all drone journalism deploys small, meaning, under 7kg remotely-controlled quod—or hexa/

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the air other than the reactions of the air against the Earth's surface.” CIVIL AVIATION AUTH., (2012), op. cit. Further, as regards the ICAO: In 2007, ICAO set up the Unmanned Aircraft Systems Study Group (UASSG), which developed Unmanned Aircraft Systems (UAS) (Cir 328 AN/190). Now, 328 has been superseded by the recently published Manual on Remotely Piloted Aircraft Systems (Doc 10019) under the authorship of the successor to the UASSG, the Remotely Piloted Aircraft Systems Panel (RPASP); see Int'l Civil Aviation Org., Manual on Remotely Piloted Aircraft Systems (RPAS), Doc. 10019 (2015), available at [http://www.dronezone.it/wp-content/uploads/2015/03/10019\\_cons\\_en-Secured-1.pdf](http://www.dronezone.it/wp-content/uploads/2015/03/10019_cons_en-Secured-1.pdf). On August 3 2015, the European Aviation Safety Agency published its legislative consultation document for drones regulation. See <http://www.easa.europa.eu/system/files/dfu/A-NPA%202015-10.pdf>.

<sup>11</sup> See Peter W. Merlin, *Crash Course: Lessons Learned from Accidents Involving Remotely Piloted and Autonomous Aircraft*, NASA (2013), available at [http://www.nasa.gov/pdf/732725main\\_crash\\_course-ebook.pdf](http://www.nasa.gov/pdf/732725main_crash_course-ebook.pdf).

<sup>12</sup> See Mark Corcoran, *Drone Journalism: Newsgathering Applications of Unmanned Aerial Vehicles (UAVs) in Covering Conflict, Civil Unrest and Disaster*, AUSTL. BROAD. CORP. (Jan. 2014), <http://bit.ly/1yARB6S>.

octo—‘copter with an on-board camera attached.<sup>13</sup> Without that type of payload (or others) the drone is simply a “flying donkey” and quite pointless in the context of dronalism, or, indeed, any other commercial application. Without a payload, it is, basically a toy, a recreational, model aircraft.

#### KEY CLAIM

The key claim of the article is that deploying drones in the context of dronalism engages a fundamental human right, namely, the right to receive ideas and information (as well as the component rights needed to make it a reality), itself an element of the general right to freedom of expression. Thus, the use of RPAs by media companies and/or citizen journalists and, crucially, any restrictions thereon, raises unique concerns because such use engages elements of the right to freedom of expression. Actually, the threshold right is, arguably, the right to access the communications technology that an RPA is in such situations.<sup>14</sup> By implication, any *general* restriction(s) on using RPAs, which, *a fortiori* would include newsgathering, would amount to a *prima facie* infringement of this right. Only if, *in casu*, extremely strong compelling overriding considerations defending and promoting another protected interest, would the right to use an RPA in that specific, fact-limited context be trumped. And, at the very least, in the absence of carrying out an explicit exercise balancing the competing interest involved, any restriction would be challengeable as procedurally flawed.

In the context of the First Amendment, a set of arguments to this effect has been advanced by newspaper and magazine publishers, broadcast and cable television companies, wire services, website operators, and non-profit journalists’ associations in the amici brief written in support of Raphael Pirker (basically, the FAA was appealing a decision made by a NTSB Administrative Law judge).<sup>15</sup> Earlier, the United States Congressional

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<sup>13</sup> David Goldberg, Mark Corcoran & Robert Picard, *Remotely Piloted Aircraft and Journalism*, REUTERS INST. FOR THE STUDY OF JOURNALISM (June 2013), available at <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Remotely%20Piloted%20Aircraft%20and%20Journalism.pdf>; see also BBC NEWS, “Hexacopter” Drone Flying Camera, YOUTUBE (Oct. 29, 2013), <https://www.youtube.com/watch?v=ZTWHP80hei0>. A tweak to the phrase “drone journalism” is “sensor journalism.” See Fergus Pitt, *Sensors and Journalism*, TOW CTR FOR DIGITAL JOURNALISM (May 2014), available at <http://towcenter.org/wp-content/uploads/2014/05/Tow-Center-Sensors-and-Journalism.pdf>.

<sup>14</sup> Robin Elizabeth Herr, *Can Human Rights Law Support Access to Communication Technology?*, 22 INFO. & COMM’NS TECH. LAW 1 (2013), available at <http://www.tandfonline.com/doi/full/10.1080/13600834.2013.774517>.

<sup>15</sup> See Brief of News Media Amici in Support of Respondent Raphael Pirker, Huerta et. al. v. Pirker, Docket No. CP-217 (N.T.S.B. May 6, 2014), available at <http://www.hklaw.com/files/Uploads/Documents/CaseBriefs/MediaLaw/Drones.pdf>.

Research Service (CRS) published a report, *Integration of Drones into Domestic Airspace: Selected Legal Issues*, which contains a section entitled “First Amendment and Newsgathering Activities.”<sup>16</sup> Having considered other interests, such as privacy, the CRS advises giving proper regard to “the public’s countervailing concern in securing the free flow of information that inevitably feeds the ‘free trade of ideas.’”<sup>17</sup>

The case before the NTSB involved Raphael Pirker, an aerial photographer who was fined \$10,000 for flying a camera-equipped model aircraft around the University of Virginia. He successfully challenged the fine before an administrative law judge, who ruled that the FAA’s stringent regulation of commercial drones was unenforceable because the agency had failed to adopt it through appropriate procedures . . . . In the brief . . . the coalition argued that the judge’s ruling was correct. They also contended that, because newsgathering is protected by the First Amendment, the federal government should not consider journalism to be a commercial use of the technology. Furthermore, they made a case for including the media in policy discussions that accompany the drafting of future government UAS-related regulations.<sup>18</sup>

The amici are of the opinion that the FAA had applied (through ad hoc administrative actions rather than through properly promulgated rules) an unnecessarily overbroad and inadequately based policy restricting the use of unmanned aircraft for “business purposes” in which it included—improperly, in the amicus’ opinion—that the First Amendment protected activities of gathering and disseminating news and information. This has resulted in “an impermissible chilling effect on the First Amendment newsgathering rights of journalists.”<sup>19</sup> The brief argues that using drones for

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<sup>16</sup> UNITED STATES CONGRESSIONAL RESEARCH SERVICE, INTEGRATION OF DRONES INTO DOMESTIC AIRSPACE: SELECTED LEGAL ISSUES, *First Amendment and News Gathering Activities* (Apr. 2013).

<sup>17</sup> Alissa M. Dolan & Richard M. Thompson II, *Integration of Drones into Domestic Airspace: Selected Legal Issues*, Congressional Research Service (Apr. 4, 2013), available at [https://www.academia.edu/13298432/CRS\\_Report\\_for\\_Congress\\_Integration\\_of\\_Drones\\_into\\_Domestic\\_Airspace\\_Selected\\_Legal\\_Issues](https://www.academia.edu/13298432/CRS_Report_for_Congress_Integration_of_Drones_into_Domestic_Airspace_Selected_Legal_Issues).

<sup>18</sup> Holland & Knight, *Out in Front on Drone Litigation*, <http://www.hklaw.com/casestudies/Out-in-Front-on-Drone-Litigation/> (last visited Dec. 8, 2014).

<sup>19</sup> Op. cit. 6. The FAA has won its appeal, and the matter has been sent back to the judge to determine if the aircraft was being flown carelessly or recklessly. See Office of Pub. Affairs, *NTSB Remands Administrator v. Pirker Case Back to ALJ for Further Review*, Nat’l Transp. Safety Bd. (Nov. 18, 2014), <http://www.nts.gov/news/press-releases/Pages/PR20141118.aspx>. However, subsequently it has been reported that the parties have reached a settlement: “Raphael Pirker agreed . . . to pay the FAA \$1,100 to settle the agency’s \$10,000 fine for allegedly flying a drone recklessly to film the University of Virginia in 2011. Under the settlement terms, Mr. Pirker doesn’t admit to guilt and the FAA agreed to drop some of its accusations against Mr. Pirker.” See Jack Nicas, *U.S. Federal Aviation Administration*

dronalism is not conducting a business, but rather a protected First Amendment activity. Regarding the FAA's general ban on "business" uses by RPAs, it states that

[t]he FAA's position is untenable as it rests on a fundamental misunderstanding about journalism. News gathering is not a "business purpose." It is a First Amendment right. Indeed, contrary to the FAA's complete shutdown of an entirely new means to gather the news, the remainder of the federal government, in legislation, regulation and adjudication, has recognized that, in the eyes of the law, journalism is not like other businesses. The government in a myriad of measures has long accommodated the bedrock First Amendment principle that "without some protection for seeking out the news, freedom of the press could be eviscerated."<sup>20</sup>

In conclusion, what primarily differentiates dronalism from any other drone application is that it engages the rights to freedom of expression, speech, the press, and specific elements thereof.<sup>21</sup> Thus, any ban must take into account and weigh in the balance this countervailing consideration of principle. This is not, in the present author's opinion, about justifying "speaker's right(s)," but rather, the right(s) of the reader, viewer, and audience to receive video or data information. The core right also engages a threshold right, namely, the right to access and use any communication technology as a condition precedent for newsgathering without which the right to receive information and ideas is meaningless. Just because drone journalism is neither a military nor state nor recreational use of an RPA, it is simply wrong to claim it is a commercial or "business" use of an RPA. It is a conceptual confusion to conflate them. Deploying an RPA for the purpose of drone journalism *prima facie* engages the (human) right to freedom of expression and the constitutional right to free speech and, in particular, the right to pursue activities precedent to facilitating peoples' right to receive ideas and information. As has been said,

a complete ban misunderstands journalism as a purely commercial activity rather than a constitutionally-protected right to gather and

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*Settles with Videographer Over Drones* (Jan. 22, 2015, 6:32 pm), <http://www.wsj.com/articles/u-s-federal-aviation-administration-settles-with-videographer-over-drones-1421960972>.

<sup>20</sup> See Brief of News Media *Amici* in Support of Respondent Raphael Pirker, *supra* note 15; see also *Branzburg v. Hayes*, 408 U.S. 665, 702 (1972).

<sup>21</sup> See Margot Kaminski, *Up in the Air: The Free-Speech Problems Raised by Regulating Drones*, SLATE (Nov. 25, 2014), [http://www.slate.com/articles/technology/future\\_tense/2014/11/faa\\_s\\_attempts\\_to\\_regulate\\_drones\\_could\\_have\\_first\\_amendment\\_problems.html](http://www.slate.com/articles/technology/future_tense/2014/11/faa_s_attempts_to_regulate_drones_could_have_first_amendment_problems.html); see also, Avery E. Holton, Sean Lawson & Cynthia Love, *Unmanned Aerial Vehicles: Opportunities, Barriers, and the Future of "Drone Journalism"*, JOURNALISM PRACTICE, (Routledge Taylor & Francis Group 2014), available at <http://www.tandfonline.com/doi/abs/10.1080/17512786.2014.980596#.VIWgjk3KHmg>.



disseminate news, covered in the First Amendment . . . . This overly broad policy [sic], implemented through a patchwork of regulatory and policy statements and an ad hoc cease-and-desist enforcement process, has an impermissible chilling effect on the First Amendment newsgathering rights of journalists.<sup>22</sup>

Further, even if the regulator permits deployment of RPAs for drone journalism on an ad hoc, case-by-case decision-making process, authorizing (or otherwise) X to fly an RPA, the question arises: has the public authority explicitly conducted the necessary balancing exercise, weighing freedom of expression considerations, e.g., is any ban “necessary in a democratic society” in coming to its determination? Has there been consistency between the agency’s decisions? Is there an independent appeal process from an agency decision? For example, in mid-2014, the FAA announced that it was to consider requests from seven aerial photo and video production companies that have asked for regulatory exemptions that would allow the film and television industry to use unmanned aircraft systems with FAA approval for the first time.<sup>23</sup>

Commenting, Timothy Ravich notes,

In any event, while this is a step in the right direction—rewarding credentialed, safety-conscience “drone” users—this seems out of sorts with the First Amendment guarantee of free speech. Isn’t a movie a form of expression (yes, the Supreme Court of the United States said in 1952)? *Will the FAA exempt certain movie studios and not others?*<sup>24</sup>

The key claim of the chapter requires understanding that, as the CRS Report notes, what is protected is not only *forms* of speech or content, but also “conduct that is ‘necessary for, or integrally tied to, acts of expression’ . . . other conduct that is not expressive in itself, but is ‘necessary to accord full meaning and substance to those guarantees.’”

In like manner, the European Court of Human Rights has been supportive of activities which underpin not only publication, but also newsgathering activities required to obtain material on which to base subsequent publication. *A fortiori* it is argued here that this support would

<sup>22</sup> Diego Cruz, *U.S. Media Defend Drone Journalism from Federal Government, Arguing Freedom of the Press*, JOURNALISM IN THE AMERICAS BLOG (May 7, 2014), <https://knightcenter.utexas.edu/blog/00-15587-us-media-defend-drone-journalism-federal-government-arguing-freedom-press>.

<sup>23</sup> FED. AVIATION ADMIN., *Press Release—FAA to Consider Exemptions for Commercial UAS Movie and TV Production* (Jun. 2, 2014), [http://www.faa.gov/news/press\\_releases/news\\_story.cfm?newsId=16294](http://www.faa.gov/news/press_releases/news_story.cfm?newsId=16294). (Seven companies petition to fly unmanned aircraft before rulemaking is complete.)

<sup>24</sup> Timothy Ravich, *And the Drone Goes to . . .*, DRONINGLAWYER.COM (June 3, 2014), <http://droninglawyer.com/2014/06/03/and-the-drone-goes-to/> (emphasis added).

extend to the use of RPAs to do this work.<sup>25</sup> Key has been the Court's jurisprudence regarding protecting the identity of journalists' sources and the protection from unjustified search and seizures of journalistic material.

The "leading case," decided by the Grand Chamber of the Court, is *Sanoma Uitgevers B.V. v. the Netherlands*.<sup>26</sup> The case concerned photographs to be used for an article on illegal car racing, which a Dutch magazine publishing company was compelled to hand over to police investigating another crime, despite the journalists' strong objections to being forced to divulge material capable of identifying confidential sources. The Court found that the interference with the applicant company's freedom of expression had not been "prescribed by law," there having been no procedure with adequate legal safeguards available to the applicant company to enable an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources. The Court reaffirmed its position in *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*.<sup>27</sup> The Court stated,

Freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance. Whilst the press must not overstep the bounds set, not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (*Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59, Series A, no. 216). The right of journalists to protect their sources is part of the freedom to "receive and impart information and ideas without interference by public authorities" protected by Article 10 of the Convention and serves as one of its important safeguards. It is a cornerstone of freedom of the press, without which sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information to the public may be adversely affected.

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<sup>25</sup> See Dirk Voorhoof, *The Right to Freedom of Expression and Information Under the European Human Rights System: Towards a More Transparent Democratic Society*, <http://cadmus.eui.eu/handle/1814/29871> (last visited Dec. 18, 2014).

<sup>26</sup> *Case of Sanoma Uitgevers B.V. v. Netherlands*, Eur. Ct. H.R. (2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100448> (last visited Dec. 18, 2014).

<sup>27</sup> *Case of Telegraaf Media Nederland Landelijke Media B.V. and Others v. Netherlands*, Eur. Ct. H.R. (2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114439> (last visited Dec. 18, 2014).

The Court has always subjected the safeguards for respect of freedom of expression in cases under Article 10 of the Convention to special scrutiny. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society, an interference cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.<sup>28</sup>

One last argument: RPAs deployed with payloads such as electro-optic cameras to relay video data to journalists or media organizations should be understood as indirectly “communications technologies.”<sup>29</sup> The RPA is simply, as noted, the “donkey”/platform facilitating the carriage of a camera (or other sensors)<sup>30</sup> which records and relays images to a ground receiver/station. Robin Elizabeth Herr has argued, in another situation, that “[h]uman rights scrutiny is a necessary component of any effort to ensure that communication technology can be effectively adopted and used.”

Herr has identified

a potential model to prevent undemocratic interferences of uses of communication technology such as Internet and mobile [sic] . . . based on the case law of the European Court of Human Rights . . . *Khurshid Mustafa and Tarzibachi v. Sweden* supports the adoption of that [sic] technology without unjustified restriction by the state or private individuals . . . no matter what type of communication technology is used, there exists a general right of access to all forms of information.<sup>31</sup>

#### APPLICATIONS

There are already many civilian, commercial, i.e., non-military/non-state applications for RPAs, and these are only set to increase. The future range of applications will be limited only by human imagination.<sup>32</sup> Given the focus of this article—on using RPAs in the context of freedom of

<sup>28</sup> *Id.* (emphasis added).

<sup>29</sup> RPAs are part of what has been called ENG—“electronic news gathering.” See Jane McGrath, *What Is Electronic News Gathering?*, <http://people.howstuffworks.com/electronic-news-gathering.htm> (last visited Dec. 18, 2014).

<sup>30</sup> Alyssa Mesich, *How Sensor Reporting Helps Journalists Find Data Where None Exist*, <http://ijnet.org/blog/how-sensor-reporting-helps-journalists-find-data-where-none-exist> (last visited Dec. 18, 2014).

<sup>31</sup> Robin Elizabeth Herr, *Can Human Rights Law Support Access to Communication Technology? A Case Study Under Article 10 of the Right to Receive Information* (Apr. 18, 2013) <http://www.tandfonline.com/doi/abs/10.1080/13600834.2013.774517?journalCode=cict20> (emphasis added).

<sup>32</sup> See INCREASING HUMAN POTENTIAL, <http://increasinghumanpotential.org/> (last visited Dec. 3, 2014).

speech and the press—it is worth highlighting the recent development in the USA regarding permissions being granted to deploy drones for a few movie production houses. In the face of the FAA’s general ban on civil, commercial uses of drones, efforts to be legally allowed to use them for this purpose has been lobbied for several years.<sup>33</sup> Unsurprisingly, there are reports of drones being used illegally, i.e., in the face of the FAA’s general ban on civilian commercial use.<sup>34</sup> Speaking for the US film industry, MPAA spokesperson Howard Gantman urged,<sup>35</sup> “[W]hat we are looking for is line-of-sight things [sic] that can be utilized in innovative ways . . . These could be used much more safely than going up a tree and much more cheaply than renting a helicopter.”<sup>36</sup> However, companies, such as Flying Cam-Cam, have already been developing and utilizing remotely piloted vehicles (e.g., copters) for years for big budget movies, particularly locations outside of the United States, and winning two Oscars in the process.<sup>37</sup> On September 25, 2014, after special petitions were lodged, United States Transportation Secretary Anthony Foxx announced that the Federal Aviation Administration had granted regulatory exemptions to six aerial photo and video production companies, the “first step to allowing the film and television industry the use of unmanned aircraft systems in the National Airspace System.”<sup>38</sup> In a significant comment on this development, Timothy Ravich wrote,

In any event, while this is a step in the right direction—rewarding credentialed, safety-conscience “drone” users—this seems out of sorts with the First Amendment guarantee of free speech. Isn’t a movie a form of expression (yes, the Supreme Court of the United States said in 1952)? Will the FAA exempt certain movie studios and not

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<sup>33</sup> See Gary Susman, *Drones and the Future of Movies* (Oct. 28, 2013), <http://www.rollingstone.com/movies/news/drones-and-the-future-of-movies-20131028>. The same seems to be the case in South Africa. See Zara Nicholson, *Film Industry Concerned About Camera Drone Ban* (May 16, 2014, 8:33 AM), <http://www.iol.co.za/capetimes/film-industry-concerned-about-camera-drone-ban-1.1689174#U3YcqPldWSp>.

<sup>34</sup> See Aarti Shahani, *Are Filmmakers Using Drones Illegally? Looks Like It* (May 16, 2014, 3:41 AM), <http://www.npr.org/blogs/alltechconsidered/2014/05/16/312487924/are-filmmakers-using-drones-illegally-looks-like-it>.

<sup>35</sup> See Ira Teinowitz, *Hollywood to the FAA: Let Us Use Drones* (Feb. 5, 2013) <https://www.yahoo.com/movies/s/hollywood-faa-let-us-drones-201337451.html>.

<sup>36</sup> Colloquially, “drone cinematography.” See Gary Susman, *supra* note 33; see also Aarti Shahani, *supra* note 32; Zara Nicholson, *supra* note 33; <http://www.npr.org/blogs/alltechconsidered/2014/05/16/312487924/are-filmmakers-using-drones-illegally-looks-like-it>.

<sup>37</sup> See FLYING-CAM, <http://flying-cam.com/en/news.php?id=130> (last visited Dec. 3, 2013).

<sup>38</sup> See *Six Companies Can Now Fly Small UAS Following FAA-approved Safety Procedures*, PRESS RELEASE (Sept. 25, 2014), [http://www.faa.gov/news/press\\_releases/news\\_story.cfm?newsId=17194&cid=TW251announcement](http://www.faa.gov/news/press_releases/news_story.cfm?newsId=17194&cid=TW251announcement). For the Summary Grants of Exemption, see *Section 333*, [http://www.faa.gov/uas/legislative\\_programs/section\\_333/](http://www.faa.gov/uas/legislative_programs/section_333/) (last visited Dec. 3, 2014).

others?<sup>39</sup>

The present author also is concerned that regulators, in granting and denying specific petitions for permission to fly drones for cinematography or dronalism, are, in effect, acting as expression gatekeepers, as kind of indirect, constructive censors determining who may use flying cameras to facilitate expressive work. And, in terms of due process, are their decisions adequately transparent and challengeable, open to an independent review mechanism?<sup>40</sup>

Other major applications are slated to be:

- (i) Carrying goods or packages of various types:

This is tipped to become a stellar application, with major couriers eventually deploying large drones to carry cargoes over long distances, (e.g., over oceans), and books, medicines, and other consumer products over shorter distances, particularly where the terrain is inhospitable to road delivery. Frontrunners in R+D include Matternet, Amazon, DHL, UPS, and Google.<sup>41</sup>

- (ii) Some believe that the biggest sector using drones will be agribusiness:

A variety of uses are anticipated, e.g., crop inspection, management as well as surveying.<sup>42</sup> In 2014, shocking testimony was given to a U.S. Senate Committee hearing. Henio Arcangeli (Vice President, Corporate Planning & New Business Development, Yamaha Motor Corporation, USA) may not have instant “name recognition.” But, his testimony before the U.S. Senate was, to almost everyone, jaw-dropping.

<sup>39</sup> See Timothy Ravich, *supra* note 24. Ravich is referring to *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), see Timothy Ravich, *And the Drone Goes to . . .*, DRONINGLAWYER.COM (June 3, 2014), <http://droninglawyer.com/2014/06/03/and-the-drone-goes-to/343> U.S. 495.

<sup>40</sup> See Katie Collins, *Police, Paps and Privacy: The Challenges of Drone Journalism* (Feb. 12, 2014), <http://www.wired.co.uk/news/archive/2014-02/12/drone-journalism-legal-and-privacy>.

<sup>41</sup> See, e.g., MATTERNET, <http://matternet.us/> (last visited Dec. 3, 2014); *Boxes, Not Packages, People! Sheesh*, <http://droninglawyer.com/2014/06/25/boxes-not-packages-people-sheesh/> (last visited Dec. 8, 2014); Danielle Elliot, *DHL Testing Delivery Drones* (Dec. 9, 2013), <http://www.cbsnews.com/news/dhl-testing-delivery-drones/>; Ben Popper, *UPS Researching Delivery Drones That Could Compete With Amazon's Prime Air* (Dec. 3, 2013), <http://www.theverge.com/2013/12/3/5169878/ups-is-researching-its-own-delivery-drones-to-compete-with-amazons>; James Eng, *Google's 'Project Wing' is Testing Delivery Drones in Australia* (Aug. 28, 2014, 7:15 pm), <http://www.nbcnews.com/tech/innovation/googles-project-wing-testing-delivery-drones-australia-n191536>; Adi Robertson, *Here Are the Three Things Amazon Needs to Get Its Delivery Drones off the Ground* (Dec. 2, 2013, 2:36 PM), <http://www.theverge.com/2013/12/2/5166948/here-are-the-things-amazon-needs-to-get-its-delivery-drones-off-the-ground>.

<sup>42</sup> See Miranda Green, *Unmanned Drones May Have Their Greatest Impact on Agriculture* (Mar. 26, 2013), <http://www.thedailybeast.com/articles/2013/03/26/unmanned-drones-may-have-their-greatest-impact-on-agriculture.html> (“You can take a simple UAV and repurpose imagery for a farmer’s field for cents on the dollar compared to using traditional aircraft. The biggest potential for Unmanned Aerial Vehicles is aerial images and data acquisition.”).

For over 20 years, remotely piloted RMAX have been safely used for precision crop dusting, “spot spraying,” weed and pest control, and fertilization in Japan and, more recently, Australia and South Korea . . . Over 2,600 remotely-piloted RMAX are in operation today, treating more than 2.4 million acres of farmland each year in Japan alone . . . . During its more than two decades of use, the RMAX has safely logged over 1.8 million total flight hours without, to our knowledge, a single privacy complaint.<sup>43</sup>

(iii) Multifarious other applications:

Wildfire detection and management<sup>44</sup>; monitoring threats to vulnerable animals and birds—as well as drone-assisted hunting; pollution monitoring; property selling by local estate agents;<sup>45</sup> event security; traffic and road accident monitoring; disaster relief;<sup>46</sup> search and rescue; post-natural disaster services; first responder assistance—e.g., fire services; fisheries management; pipeline monitoring and oil and gas security; meteorology—storm tracking, tornado & hurricane research; airplane safety checking; remote aerial mapping;<sup>47</sup> tree-mapping;<sup>48</sup> transmission line inspection; infrastructure security monitoring, e.g., ports;<sup>49</sup> and sports analytics.<sup>50</sup> There will be quirky uses too, e.g., the Archdiocese of Washington purchased a “hubcap size” RPA which was deployed to

videotape crowds participating in a procession marking the canonizations of popes John Paul II and John the 23rd (now called St. John Paul II and St. John the 23rd). The video images captured by the drone-mounted camera were used in a YouTube mashup the archdiocese made, mixing soaring classical music and scenes from an

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<sup>43</sup> *The Future of Unmanned Aviation in the U.S. Economy: Safety and Privacy Considerations*, UNITED STATES SENATE COMMITTEE ON COMMERCE, SCIENCE & TRANSPORTATION (Jan. 15, 2014), <https://www.hsdl.org/?view&did=748453>. For the RMAX, see RMAX, <http://rmax.yamaha-motor.com.au/>.

<sup>44</sup> See Diana Campbell, *UAF Unmanned Aircraft Joins Funny River Firefighting Efforts* (May 30, 2014), [http://uafcornerstone.net/acuasi\\_funnyriver/2014](http://uafcornerstone.net/acuasi_funnyriver/2014).

<sup>45</sup> See *Real Estate Agent Using Drones to Sell Property* (Apr. 28, 2014), <http://sourceable.net/real-estate-agent-using-drones-sell-property/#>.

<sup>46</sup> See, e.g., THE HUMANITARIAN UAV NETWORK, UVIATORS, <http://uaviators.org/> (last visited Dec. 4, 2014).

<sup>47</sup> See, e.g., DRONE ADVENTURERS, <http://droneadventures.org/> (last visited Dec. 4, 2014).

<sup>48</sup> See Mark Bosworth, *Tree-Mapping Drone Start-up Has Sky-high Ambitions*, BBC NEWS (May 27, 2014, 7:52 pm), <http://www.bbc.com/news/technology-27485418>.

<sup>49</sup> See THE NATIONAL, <http://www.thenational.ae/business/industry-insights/shipping/eye-in-the-sky-abu-dhabis-ports-now-protected-by-drones> (last visited Dec. 4, 2014).

<sup>50</sup> See *ESPN: Eyes in the Sports Sky: UAS are Coming to a Sports Field Near You, and Not Just for Pretty Video*, INCREASING HUMAN POTENTIAL (May 27, 2014), <http://increasinghumanpotential.org/espn-eyes-in-the-sports-sky-uas-are-coming-to-a-sports-field-near-you-and-not-just-for-pretty-video/>.

earlier indoor mass.<sup>51</sup>

However, to emphasize, the only civilian, commercial application dealt with specifically in this article is using RPAs to gather information for journalism (and by extension other First Amendment protected activities)<sup>52</sup>—as noted, colloquially called “dronalism” or “drone journalism”<sup>53</sup>—by media companies, journalists, and any citizen journalist engaged in newsgathering.<sup>54</sup>

#### RPAS AND DRONALISM: 21ST CENTURY PHOTOJOURNALISM

As noted, this article is concerned with one and only one specific RPA application, namely, the pursuit of newsworthy information whether by mainstream news media or citizen journalists, using RPAs as one tool in the journalistic toolbox. Admittedly, it is difficult to differentiate types of “journalism.” However, the argument here concerns only what has become known as “responsible journalism” and does not extend to “papparazism.”<sup>55</sup> Those who argue that it is difficult to know “where to draw the line” fail to see that that point implies there are clear cases on either side of the line.

Recently, the Australian Law Reform Commission addressed this distinction. In its Report, *Serious Invasions of Privacy in the Digital Era*, “responsible journalism” is characterized as “journalistic activities [offering] significant public benefit,” to be distinguished from activities which are “not journalistic in nature, where the public interest in a matter is trivial, or where the matter is merely of interest to the public or for the purposes of gossip.”<sup>56</sup>

<sup>51</sup> *Washington Archdiocese Takes to the Heavens, With a UAS*, INCREASING HUMAN POTENTIAL (May 20, 2014), <http://increasinghumanpotential.org/washington-archdiocese-takes-to-the-heavens-with-a-uas/>; see also Zeke J. Miller, *What You Need to Know About Flying Drones in Washington, DC* (May 6, 2014), <http://time.com/88772/drones-washington-dc/> (Potentially problematic was the use of the RPA within a prohibited radius of Reagan National Airport—the “Flight Restricted Zone (FRZ), a roughly 10-nautical-mile area centered around Reagan National Airport in Virginia”).

<sup>52</sup> FrontlineClubLondon, *Drone Journalism: The Future of Newsgathering?*, YOUTUBE (Nov. 20, 2013), [https://www.youtube.com/watch?v=gu\\_0fh2lJms](https://www.youtube.com/watch?v=gu_0fh2lJms); Katie Collins, *supra* note 40.

<sup>53</sup> See DRONE JOURNALISM LAB, <http://www.dronejournalismlab.org/> (last visited Dec. 4, 2014); PROFESSIONAL SOCIETY OF DRONE JOURNALISTS, <http://www.dronejournalism.org/> (last visited Dec. 4, 2014).

<sup>54</sup> See *Using Drones in the News and Entertainment Industries: The Legal and Regulatory Issues*, BIEDERMAN INSTITUTE, SOUTHWESTERN LAW SCHOOL CONFERENCE (Feb. 7, 2014), <http://www.swlaw.edu/academics/entertainmentlaw/instevents/droneconf2014/#schedule>; see also Mickey Osterreicher, *Charting the Course for Use of Small Unmanned Aerial Systems in Newsgathering*, [http://www.auvsishow.org/auvsis2014/Custom/Handout/Speaker0\\_Session773\\_1.pdf](http://www.auvsishow.org/auvsis2014/Custom/Handout/Speaker0_Session773_1.pdf) (last visited Dec. 7, 2014).

<sup>55</sup> See PAPPARAZZI REFORM INITIATIVE, <http://papparazzi-reform.org> (last visited Dec. 7, 2014).

<sup>56</sup> See *Serious Invasions of Privacy in the Digital Era (ALRC Report 123)*, AUSTRALIAN LAW REFORM COMMISSION, <http://www.alrc.gov.au/publications/serious-invasions-privacy-digital-era-alrc-report-123> (last visited Dec. 7, 2014); see also *id.* at ¶ 14.65 (“Historically, ‘responsible journalism’ was

For the purpose of this article, “journalism” is to be understood to mean public interest reporting and publishing and all that it entails and not simply anything and everything that appears in a publication whether that publication is self-described or perceived as a “newspaper” or not. In the present author’s opinion, it is not difficult to assert that images of the Duchess of Cambridge’s breast(s) and/or Prince Harry’s penis fail, even if there is surrounding (con)text to qualify as responsible journalism.

Dronalism, as understood, is nothing but the contemporary manifestation of the urge that has animated photojournalism since its earliest days: to deploy the latest technologies when perceived benefits to telling the story warrant doing so.<sup>57</sup> For example, in 1906,

the devastation of San Francisco after the . . . earthquake and fire was captured by George R. Lawrence, using a camera attached to a string of kites high above the city. His specially designed large-format camera had a curved film plate to provide panoramic images, which remain some of the largest aerial exposures ever taken. The camera, which was large and extremely heavy, took as many as 17 kites to lift it 2,000 feet into the air. Lawrence also used ladders and high towers to capture lower level “aerial” photographs.<sup>58</sup>

“Photojournalism,” as such,

emerged as a distinctive form of photography in the late 1920s and early 1930s. The term denoted picture making that was spontaneous, topical and rapid. This was facilitated by the introduction of small, hand-held cameras such as the Ermanox and the Leica, which enabled photographers to record fast-moving events and catch their subjects unawares.<sup>59</sup>

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developed as a defence to defamation in *Reynolds v. Times Newspapers Ltd.* Despite being crafted in the context of defamation, several of the matters listed by Nicholls LJ are relevant in the context of surveillance. For example, the seriousness of the conduct being investigated by a journalist, the likely strength of the individual under surveillance as a source of information, the likely nature of the information obtained, and the urgency of the matter may be relevant considerations.”).

<sup>57</sup> “The first known aerial photograph was taken in 1858 by French photographer and balloonist, Gaspar Felix Tournachon, known as ‘Nadar.’ In 1855 he had patented the idea of using aerial photographs in mapmaking and surveying, but it took him 3 years of experimenting before he successfully produced the very first aerial photograph.” See PAPA INTERNATIONAL, HISTORY OF AERIAL PHOTOGRAPHY, [http://professionalaerialphotographers.com/content.aspx?page\\_id=22&club\\_id=808138&module\\_id=158950](http://professionalaerialphotographers.com/content.aspx?page_id=22&club_id=808138&module_id=158950) (last visited Dec. 7, 2014); see also PAPA INTERNATIONAL, <http://www.papainternational.org/uas.asp> (PAPA has a page about RPAs, asking members to respect local laws and regulations).

<sup>58</sup> See Ravich, *supra* note 39.

<sup>59</sup> *Photojournalism*, VICTORIA AND ALBERT MUSEUM, <http://www.vam.ac.uk/content/articles/p/photojournalism/> (last visited Dec. 7, 2014).



Another noteworthy milestone in the development of *aerial* photojournalism is the invention of the “newscopter”. In 1958, American John Silva, the “father of helicopter journalism,”

converted a small helicopter into the first airborne virtual television studio. The KTLA “Telecopter,” as it was called by the Los Angeles station where Mr. Silva was the chief engineer, became the basic tool of live television traffic reporting, disaster coverage, and that most famous glued-to-the-tube moment in the modern era of celebrity-gawking, the 1994 broadcast of O. J. Simpson leading a motorcade of pursuers on Los Angeles freeways after his former wife and a friend of hers were killed.<sup>60</sup>

There were numerous technical challenges to overcome.

For one, the standard camera equipment literally weighed a ton. Keeping the project closely guarded, lest competing stations get wind of it, Silva designed and machined lighter equipment using aluminum parts to bring the weight below the 368-pound FAA limit. He also added a shock absorbing stabilization system and a helical antenna that extended below the body of the helicopter.<sup>61</sup>

In conformity with the sociological rule described in the Introduction, social reactions to LA area copters were analogous to the current reaction to RPAs.

Lots of homeowners and a few orchestra conductors (who’ve walked off the Hollywood Bowl stage in protest) are tired of the noisy company of tourist, paparazzo, news, and police helicopters, their jet engines roaring and blades thwacking the night air . . . The imagery of a circling bird is appropriate. When a police helicopter works a crime scene, it follows a tight orbit, generally at three or four hundred feet for better observation, aided at night by million-candlepower searchlights. The lights, the engine noise, and the staccato of rotor blades biting into the air can feel menacing to anyone on the ground, law-abiding or not.<sup>62</sup>

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<sup>60</sup> Bob Pool, *John D. Silva Dies at 92; Introduced New Helicopter*, LOS ANGELES TIMES (Dec. 7, 2012), <http://articles.latimes.com/2012/dec/07/local/la-me-john-silva-20121207>.

<sup>61</sup> Ryan Eshoff, *Telecopter Inventor* (Mar./Apr. 2013), [https://alumni.stanford.edu/get/page/magazine/article/?article\\_id=60245](https://alumni.stanford.edu/get/page/magazine/article/?article_id=60245).

<sup>62</sup> D.J. Waldie, *A Short History of the Intrusive Helicopter*, KCRW WHICH WAY, L.A.? (Sept. 18, 2013), <http://blogs.kcrw.com/whichwayla/2013/09/a-short-history-of-the-intrusive-helicopter>. The ACLU does think there is a difference between helicopters and drones. See Jay Stanley, *We Already Have Police Helicopters, So What’s the Big Deal Over Drones?* (Mar. 8, 2013, 11:26 am), <https://www.aclu.org/blog/technology-and-liberty-criminal-law-reform/we-already-have-police-helicopters-so-whats-big-deal>.

For dronalism, 2011 was a seminal year. It was reported that the U.S. Federal Aviation Authority was “looking into” a NewsCorp publication called *The Daily* (now defunct) because it used a small RPA to monitor storm damage in Alabama and flooding in North Dakota.<sup>63</sup> In November, Matt Waite launched the *Drone Journalism Lab* at the College of Journalism and Mass Communications, University of Nebraska-Lincoln “as part of a broad digital journalism and innovation strategy” and has since received a \$50,000 grant from the Knight Foundation.<sup>64</sup> In another 2011 development, the Professional Society of Drone Journalists was created by Matthew Schroyer.<sup>65</sup> It now boasts more than 300 members in thirty-five countries. Another major U.S. player is the Missouri Drone Journalism Program, a partnership between students at the Missouri School of Journalism, the University of Missouri Information Technology Program, and NPR member station KBIA.<sup>66</sup>

In many countries around the world there are reports of the use of RPAs for newsgathering.<sup>67</sup>

- Russia

Russians went to Bolotnaya Square in Moscow to protest election fraud; AirPano sent up a remote-controlled Hexacopter to take pictures showing the scale of the crowd.<sup>68</sup>

- Italy

The Milan leg of the tour Tsunami Beppe Grillo was picked up by over 100 meters high; CBS commissioned an Italian company to film the wreck of the *Costa Concordia* with a

<sup>63</sup> Kashmir Hill, *FAA Looks Into News Corp's Daily Drone, Raising Questions About Who Gets to Fly Drones in the U.S.*, FORBES (Aug. 2, 2011, 3:52 PM), <http://www.forbes.com/sites/kashmirhill/2011/08/02/faa-looks-into-news-corps-daily-drone-raising-questions-about-who-gets-to-fly-drones-in-the-u-s/>.

<sup>64</sup> See DRONE JOURNALISM LAB, <http://www.dronejournalism.org/> (last updated Dec. 3, 2014, 2:40 PM); see also Matt Waite, *The Drone Age is Here, and So Are the Lawyers*, NIEMAN LAB (Dec. 16, 2013, 3:35 PM), <http://www.niemanlab.org/2013/12/the-drone-age-is-here-and-so-are-the-lawyers/>.

<sup>65</sup> See PROFESSIONAL SOCIETY OF DRONE JOURNALISTS, <http://www.dronejournalism.org> (last visited Dec. 7, 2014); *Code of Ethics for Drone Journalists*, PROFESSIONAL SOCIETY OF DRONE JOURNALISTS, <http://www.dronejournalism.org/code-of-ethics> (last visited Dec. 7, 2014).

<sup>66</sup> THE MISSOURI DRONE JOURNALISM PROGRAM, <http://www.missouridronejournalism.com> (last visited Dec. 8, 2014).

<sup>67</sup> Barry Levine, *Flocks of Airborne Camera Drones Will Change Journalism—& Spying*, VENTURE BEAT (May 23, 2014, 9:12 AM), <http://venturebeat.com/2014/05/23/flocks-of-airborne-camera-drones-will-change-journalism-spying>.

<sup>68</sup> Nurilda Nurlybayeva, *The Story Behind Those Russian Drone Protest Images*, INTERNATIONAL JOURNALISTS' NETWORK (Jan. 4, 2012), <http://ijnet.org/stories/story-behind-those-russian-drone-protest-images>.

drone.<sup>69</sup>

- Poland

A civilian-operated RC copter filmed riots in Warsaw<sup>70</sup>

- Argentina

One group of citizen journalists took matters into their own hands by flying a drone over the crowds to show the large scale of a rally.<sup>71</sup>

- Ukraine

“Drone Covers the Chaos in Ukraine”<sup>72</sup>

Dramatic drone footage captures battle for central Kiev square.<sup>73</sup>

- Balkans

Aerial drone footage shows scale of flooding.<sup>74</sup>

- Turkey

“Police Clash at Taksim Gezi Park”<sup>75</sup>

- Philippines

Ten days after Super Typhoon Haiyan ripped through the Philippines, CNN used an aerial drone to get a bird’s-eye view of what was left standing in Tacloban.<sup>76</sup>

<sup>69</sup> Luigi Caputo, *Drone Journalism, uno sguardo inedito sugli eventi*, CORRIERE DELLA SERA (Mar. 4, 2013), <http://piazzadigitale.corriere.it/2013/03/04/drone-journalism-uno-sguardo-inedito-sugli-eventi/>.

<sup>70</sup> John Reed, *Civilian UAV Films Polish Riots From Above*, DEFENSE TECH (Nov. 16, 2011), <http://defensetech.org/2011/11/16/video-civilian-uav-films-polish-riots-from-above/#ixzz2DhTJQx2D>.

<sup>71</sup> *Drone Camera Captures Argentina’s #8N Protests*, AL JAZEERA (Nov. 10, 2012), <http://stream.aljazeera.com/story/201211100124-0022394>.

<sup>72</sup> Chris Ariens, *Drone Covers the Chaos in Ukraine*, CNN (Feb. 22, 2014, 12:05 PM), [http://www.mediabistro.com/tvnewser/drone-covers-the-chaos-in-ukraine\\_b214311](http://www.mediabistro.com/tvnewser/drone-covers-the-chaos-in-ukraine_b214311).

<sup>73</sup> Globally C, *Ukraine Dramatic Drone Footage Captures Battle for Central Kiev Square*, YOUTUBE (Feb. 20, 2014), <https://www.youtube.com/watch?v=jR6N3Lo1Qs0>.

<sup>74</sup> *Aerial Drone Footage Shows Scale of Balkan Floods*, THE TELEGRAPH (May 18, 2014, 11:28 AM), <http://www.telegraph.co.uk/news/worldnews/europe/serbia/10839004/Aerial-drone-footage-shows-scale-of-Balkan-floods.html>.

<sup>75</sup> Drone Journalist, *Police Clash at Taksim Gezi Park*, YOUTUBE (June 25, 2013), [https://www.youtube.com/watch?v=MQcW9gij5\\_0](https://www.youtube.com/watch?v=MQcW9gij5_0); *Footage From Drone Flying Over Taksim Square*, ABC (Apr. 14, 2014, 4:08 AM), <http://www.abc.net.au/news/2014-04-14/footage-from-drone-flying-over-taksim-square/5389438>.

<sup>76</sup> Karl Penhaul, *CNN Uses Drone Camera for Aerial View of Tacloban*, CNN PRESS ROOM (Nov. 18, 2013, 3:38 PM), <http://cnnpressroom.blogs.cnn.com/2013/11/18/cnn-uses-drone-camera-for-aerial-view-of-tacloban/>. CNN actually has a webpage that requests people to submit their drone images, saying, “We’ll feature the best on CNN.com/Tech.” Daphne Sashin, *Remote Aerial Photography*, CNN (Feb. 27, 2014), <http://ireport.cnn.com/topics/1098143>.

- Thailand  
“Drones capture dramatic views of Bangkok protests”<sup>77</sup>
- Hong Kong  
“Dramatic aerial drone footage of Hong Kong protests”<sup>78</sup>
- Pakistan

Geo News, Pakistan’s most popular news channel, is in the process of experimenting with two DJI Phantoms, plans for which call for assisting in gathering footage for the network.<sup>79</sup>

In Latin America, RPAs have been deployed for drone journalism to quite some extent.

El Salvador newspaper La Prensa Gráfica became one of the nation’s first outlets to gather news with drones after purchasing three unmanned aerial vehicles, a pattern that other news media in Latin America are following, according to news website GlobalPost. The Salvadoran outlet uses its drones primarily to shoot aerial video or photographs of big crowds gathered for events, long traffic jams, or even simply natural and artificial landmarks around the nation’s capital of San Salvador . . . . This is one of a growing roster of Latin American nations, including Brazil, Mexico and Peru, where news outlets are deploying the aircraft in reporting. Lima’s major daily El Comercio dispatched a drone to cover a massive downtown fire in December, and Mexico’s Grupo Reforma flew one over student protests in Mexico City. Vladimir Lara, chief of photography at El Salvador’s La Prensa Grafica, said pictures taken from the sky garner up to seventy percent more views than traditional photographs on the newspaper’s website.<sup>80</sup>

However, ironically, on one occasion, a gossip news company *denied* it was planning to use RPAs for its business.

<sup>77</sup> Tim Hornyak, *Drones Capture Dramatic Views of Bangkok Protests*, CNET (Dec. 2, 2013, 3:11 PM), <http://www.cnet.com/uk/news/drones-capture-dramatic-views-of-bangkok-protests/>.

<sup>78</sup> Nero Chan, *Dramatic Aerial Drone Footage of Hong Kong Protests*, GUARDIAN (Sept. 30, 2014), <http://www.theguardian.com/world/video/2014/sep/30/dramatic-aerial-drone-footage-hong-kong-protests-video>.

<sup>79</sup> Basim Usmani, *How Drones Might Save Pakistan’s Embattled News Media*, MOTHERBOARD (May 10, 2014, 2:39 PM), <http://motherboard.vice.com/blog/how-drones-might-save-p>.

<sup>80</sup> Jamie Stark, *News Drones Over El Salvador*, GLOBAL POST (May 5, 2014), <http://www.globalpost.com/dispatch/news/regions/americas/140502/news-drones-over-el-salvador>. See generally W. Alejandro Sánchez, *COHA Report: Drones in Latin America*, Council on Hemispheric Affairs (Dec. 1, 2014), [http://www.coha.org/wp-content/uploads/2014/01/COHA\\_Sanchez\\_LATAM\\_Drones\\_Final\\_Jan\\_122014.pdf](http://www.coha.org/wp-content/uploads/2014/01/COHA_Sanchez_LATAM_Drones_Final_Jan_122014.pdf) (providing a general discussion of drone usage in that region).

TMZ is NOT getting in the DRONE business . . . we don't have a drone . . . we don't want a drone . . . we never applied for a drone . . . despite a bogus report to the contrary.<sup>81</sup>

Finally, it is also worth pointing out that not all arguments made for accelerating the regulatory conditions favouring the legal deployment of RPAs for drone journalism is predicated on freedom of expression grounds. A wholly different argument concerns enhancing the safety of and protection for human lives. This consideration is urged by news broadcasting services' correspondents and citizen journalists who see significant benefits in being able to witness and report *indirectly* on happenings in potentially hazardous trouble-spots, without risking, possibly unnecessarily or recklessly, the life and limb of the reporter.

Small drones offer considerable advantages for news staff deployed on high-risk assignments such as wars, civil unrest and natural disasters. . . . Drone technology offers great potential for newsgatherers . . . but there are some important qualifications. Journalism is about people and personal contact and UAVs should not be seen as an easy substitute for the journalist or news team on the ground. The drone is a camera platform, a tool to be incorporated among all the other newsgathering technology and professional skills a journalist uses on hazardous assignments . . . .<sup>82</sup>

#### FACILITATING MAXIMUM FEASIBLE USE OF RPAS FOR DRONE JOURNALISM

In the face of significant anti-drone deployment lobbying by the pro-privacy/anti-surveillance groups, this section of the article sets out two scenarios—and corresponding counterarguments—that drone journalists should make most assertively to facilitate the maximum feasible use of RPAs for drone journalism.

However, any such use is fully acknowledged to be without prejudice to the duty of the aviation regulator to order the use of the national airspace in the paramount interest of safety, the key normative and operational challenge being to integrate the use of RPAs in the domestic airspace.<sup>83</sup>

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<sup>81</sup> TMZ Staff, *We're NOT Keeping Up with the DRONESES*, TMZ (Nov. 27, 2012, 12:59 PM), <http://www.tMZ.com/2012/11/27/tMZ-drone-faa-bogus-report/>.

<sup>82</sup> Mark Corcoran, *Drone Journalism: Newsgathering applications of Unmanned Aerial Vehicles (UAVs) in covering conflict, civil unrest and disaster*, FLINDERS UNIVERSITY (Jan. 2014), <http://www.flinders.edu.au/ehl/ccpr/articles-of-interest.cfm>.

<sup>83</sup> See Alissa M. Dolan & Richard M. Thomson II, *Integration of Drones into Domestic Airspace: Selected Legal Issues*, CONGRESSIONAL RESEARCH SERVICE (Apr. 4, 2013), <http://www.fas.org/sgp/crs/natsec/R42940.pdf>; see also NATIONAL RESEARCH COUNCIL, *AUTONOMY RESEARCH FOR CIVIL AVIATION: TOWARD A NEW ERA OF FLIGHT* (2014); *Perth Airport Near Miss Prompts ATSB Drone*

Actually, a degree of safety may be achieved with a technological fix. In the context of avoiding certain air spaces, e.g., around airports, one manufacturer's RPAs can be programmed with a so-called "geo-fence" software that provides satellite GPS guidance to steer the RPA away from a danger zone.<sup>84</sup>

The drones will be blocked from operating near 350 airports around the world by creating an electronic "geo-fence" around airports to reduce the risk of collision between drones and manned aircraft.

With that caveat, the two scenarios are as follows:

### Scenario One

Using RPAs for drone journalism is legal either generally or on an ad hoc basis, but is opposed by the claim that to do so will likely seriously infringe on civil liberties/human rights—in particular, someone's "right to privacy."<sup>85</sup>

### Scenario Two

A specific problem with drone journalism using a nano or micro RPA is alleged to be that the subjects of investigation might not realise that they are being surveilled, or being surveilled in an RPA-specific manner, because of the smallness of the RPAs and/or other technical capacities, e.g., silence, mobility, and endurance.

With regard to each scenario, "pro-deployment" arguments can be identified as follows:

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*Safety Warning*, ABC NEWS (May 27, 2014, 3:46 AM), <http://www.abc.net.au/news/2014-05-27/atsb-says-drones-pose-risk-to-aviation-following-near-collision/5480156>. However, not every reported "near miss" is as clear-cut. See Armin Rosen, *A Bizarre Near-Miss Between A Drone And A Passenger Plane Is Shrouded In Mystery*, BUSINESS INSIDER (May 14, 2014, 5:30 PM), <http://www.businessinsider.com/the-mystery-of-a-near-miss-between-a-drone-and-a-passenger-plane-2014-5#ixzz33ZJ7bVwM>.

<sup>84</sup> Mark Corcoran made the following statement:

DJI's No Fly Zone system creates a curious technological and sovereignty precedent. The initiative will effectively give a Chinese company indirect control over the movement of unmanned aircraft in Australian airspace—and in the skies of dozens of other nations. While DJI says its initiative is solely motivated by safety, there are concerns that drone flying restrictions could be easily exploited for political censorship.

Mark Corcoran, *Chinese Manufacturer Programs Phantom Drones With No-Fly Zones to Protect Australian Airports*, ABC NEWS (Apr. 14, 2014, 7:49 am), <http://www.abc.net.au/news/2014-04-14/chinese-made-drones-programmed-with-no-fly-zones/5388356>.

<sup>85</sup> This phrase conveniently ignores the legal fact that there is no "right to privacy" *simpliciter* in the European Convention on Human Rights or in the U.S. Constitution.

Re: Scenario One, Privacy Rights (Actually, Do Not) Trump  
Dronalism

Using RPAs for drone journalism is legal either generally or on an ad-hoc basis—but is opposed by the claim that to do so is, or is likely to, seriously infringe civil liberties/human rights—most frequently stated to be someone’s “right to privacy”.<sup>86</sup>

Even if RPAs are legally permitted to fly for the purpose of drone journalism—whether on an ad-hoc, case-by-case basis or in virtue of a general or sectoral permission—opposition and challenges are expressed in the name of civil liberties, most usually the so-called “right to privacy.” The paradigmatic tone is more often than not of the “what if” variety. For example,

the next privacy scandal in waiting is the story of drones. Not military drones, but increasingly widespread use of drones for agriculture, disaster areas and emergencies, archaeology, forestry and property management, among others.

Drones are banned in London and can’t be used below a certain height in residential areas. But how many uses could there be for a small, silent, fast, remote-controlled drone? How long before the first sunbathing politician is snapped on holiday? If the public is banned from a venue, or refused access to private land, or if a property is under siege from journalists, how long before a drone is used for high-quality aerial video?<sup>87</sup>

Yet, at best, the interests asserted by these anti-RPAs lobbies are simply *competing* or *conflicting* interests. Competing values or interests are just that—competing. The U.K. House of Lords (now the U.K. Supreme Court) identified the correct approach when rights compete, e.g., the right to gather information to facilitate the public’s right to receive information on the one hand and a right to respect for another right, *in casu*, someone’s private and family life on the other.

First, neither . . . has *as such* precedence over the other. Secondly, where the values . . . are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the

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<sup>86</sup> Because this article focuses on dronalism by civil operators, it will not enter the discussion around the Fourth Amendment, warrant(less) searches, etc., by police and authorities using RPAs.

<sup>87</sup> Jemima Kiss, *Worried About Your Privacy? Wait Until the Drones Start Stalking You*, GUARDIAN (Feb. 9, 2014), <http://www.theguardian.com/technology/2014/feb/09/privacy-concerns-google-streetview-facebook-drones>.

proportionality test must be applied to each.<sup>88</sup>

Thus, in any given fact pattern or situation there may well be an infringement of X's privacy. But, *in casu*, it may well be justifiable because the appropriate balancing exercise would give pre-eminence to the right to, e.g., the public interest in freedom of expression. Simply asserting that some activity constitutes an infringement of privacy is not *per se* a conclusive, knockdown argument. It is but the beginning of a complex exercise weighing competing interests and values. What needs to be foregrounded in the standoff between pro-privacy restrictionists and pro-drone journalism RPAs deployers is the relevance of the exemption, or defense, for activities in pursuit of newsgathering. The matter is well set out in the recent report by the Australian Law Reform Commission (ALRC). The issue is not whether, in the circumstances, someone's putative right to respect for their privacy may have been infringed. The question is: in those circumstances is it defensible, i.e., does it come within the scope of legal defense or exemption? The ALRC states,

Some legitimate uses of surveillance devices by journalists may place journalists at risk of committing an offence under existing surveillance device laws. Responsible journalism is an important public interest and should be protected. Journalists and media organisations should not be placed at risk of committing a criminal offence in carrying out legitimate journalistic activities. *The ALRC has therefore proposed a "responsible journalism" defence to surveillance device laws.* This defence should be confined to responsible journalism involving the investigation of matters of public concern and importance, such as the exposure of corruption.<sup>89</sup>

In sum, there are a number of problems with the claim that RPAs deployment is *inherently* or *essentially* problematic because it constitutes an intrusion on civil liberties, a threat to privacy or generally are "spies in the sky."<sup>90</sup> In the context of pursuing responsible journalism deploying RPAs, any right to respect for private and family life should give way to the public interest in the public's right to be informed. In any case, no general privacy protecting regulation could be useful as it will inevitably be overbroad and general, basing regulations on hypothetical or imaginary "threats" or "harms." Indeed, much of the RPAs discourse contesting their deployment

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<sup>88</sup> In Re S (a child), [2004] UKHL 47; [2005] AC 593, ¶ 17.

<sup>89</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, SUMMARY REPORT (June 30, 2014), [http://www.alrc.gov.au/sites/default/files/pdfs/publications/summary\\_report\\_whole\\_pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/summary_report_whole_pdf) (emphasis added).

<sup>90</sup> See, e.g., Bing Videos, *Spies in the Sky Drones*, BING (last visited Jan. 15, 2015), <http://www.bing.com/videos/search?q=spies+in+the+sky+drones&qvt=spies+in+the+sky+drones&FORM=VDRE>.



is fueled by the so-called precautionary principle. This approach simply ignores or discounts those who do not think RPAs constitute (much of) a threat. One might ask, who is the “we” who objects? There are significant socio-economic discontinuities between the discourse communities. For instance, low rental and less well-off communities welcome the protection that low-flying RPAs could afford to stem the incidence of petty crime and vandalism (widely acknowledged to be of real moment and concern to the victim—often elderly). If there is a “problem” it is not RPAs *per se* or even the nature/technical capacity of the payload, but only if there is any intentional, systematic *misuse* of personal information/data constituting “serious” invasions of privacy. Any accidental, incidental, or inadvertent acquisition of personal data quickly disposed (it would just clutter up an operator’s system) cannot seriously be said to give rise to any intrusion of privacy concern. Finally, prioritizing privacy is a soft and easy concern, and does not in principle raise any issues not already covered in general and human rights law or in the context of manned aircraft. Privacy freaks get freaked out about everything’s potential for infringing “privacy,” not just RPAs.<sup>91</sup> More seriously, such an obsessional focus loftily ignores the grown-up, serious issues involved in deployment of RPAs, namely, how to safely integrate them into the national non-segregated airspace; certification; airworthiness, pilot training, sense and avoid, spectrum allocation, command and control processes, security of data links, liability, and third-party insurance.

#### Re: Scenario Two, Snooping/Surveillance Actually Might be Legitimate Subterfuge

A specific problem with drone journalism using, for example, a nano- or micro-RPA, is alleged to be that the subjects of investigation might not realize that they are being surveyed in a RPA-specific manner, owing to the smallness of the RPAs and/or other technical capacities, e.g., silence, mobility, and endurance. The issue here is the concern that micro-RPAs may not be noticed by those who are being surveyed, either because they are extremely small and/or are very quiet.

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<sup>91</sup> “Privacy” is itself a notoriously slippery concept and Judge Eric Posner has recently opined at a conference at Georgetown Law that

Much of what passes for the name of privacy is really just trying to conceal the disreputable parts of your conduct. Privacy is mainly about trying to improve your social and business opportunities by concealing the sorts of bad activities that would cause other people not to want to deal with you.

Glenn Greenwald, *What Bad, Shameful, Dirty Behavior Is U.S. Judge Richard Posner Hiding? Demand to Know*, INTERCEPT (Dec. 8, 2014), <https://firstlook.org/theintercept/2014/12/08/bad-shameful-dirty-secrets-u-s-judge-richard-posner-hiding-demand-know/>.

However, even if the pro-privacy/anti-surveillance lobbies may have a weak argument in this specific situation, *the putative infringement may well engage an exercise of legitimate subterfuge* and, therefore, a balancing exercise needs to be conducted.

The classic statement is contained in a report published by the (now defunct) U.K. Press Complaints Commission (PCC).<sup>92</sup> The report was an inquiry into interception/tapping of phone messages at the then existing *News of the World*. On the one hand, illegitimate “snooping” was definitely ruled out as a journalistic practice.

It is essential that the type of snooping revealed by the phone message tapping incidents at the *News of the World* is not repeated at any other newspaper or magazine. Such events threaten public confidence in the industry, despite the considerable change in culture and practice that has undoubtedly occurred over the last decade and a half, leading to greater accountability and respect by the press for the privacy of individuals.<sup>93</sup>

But, on the other hand, the PCC warned against “overreaction,” stating,

[I]t is similarly important that the industry guards against overreaction. There is a legitimate place for the use of subterfuge when there are grounds in the public interest to use it and it is not possible to obtain information through other means. It would not be in the broader public interest for journalists to restrain themselves unnecessarily from using undercover means because of a false assumption that it is never acceptable.<sup>94</sup>

A concrete illustration is the recent PCC adjudication regarding the complaint by the *Bell Pottinger Group* concerning reports carried in the *Independent* newspaper.

A number of Bell Pottinger executives had been secretly recorded by journalists from the Bureau of Investigative Journalism (BIJ) who were posing as “clients” seeking advice on a public relations strategy for the Uzbekistan government . . . . The Commission noted that the newspaper’s actions were a clear prima facie breach of Clause 10 of the Code [sic] which states that “the press must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices.” The test was whether a sufficient public interest

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<sup>92</sup> See Press Complaints Comm’n, *PCC Report on Subterfuge and Newsgathering*, PCC.ORG.UK, [http://www.pcc.org.uk/assets/218/PCC\\_subterfuge\\_report.pdf](http://www.pcc.org.uk/assets/218/PCC_subterfuge_report.pdf) (last visited Dec. 18, 2014).

<sup>93</sup> *Id.* at ¶ 10.1.

<sup>94</sup> *Id.* at ¶ 10.2.

defense could be established.<sup>95</sup>

### The Commission

noted that the journalists had been investigating various claims that had been made about the activities of Bell Pottinger and other public relations firms, rather than as a means of confirming a specific hypothesis about Bell Pottinger in particular, but ruled that “the means employed by the journalists had been appropriately tailored to explore the allegations made by confidential sources about the firm’s activities, which raised issues of significant public interest.” It acknowledged the firm’s position that no “serious impropriety” had been exposed but decided that the public interest was served by subjecting the complainants’ methods to “wider scrutiny and comment, particularly at a time when the possibility of imposing greater regulation on the [lobbying] industry was being debated.”<sup>96</sup>

The PCC therefore did not uphold Bell Pottinger’s complaint. Thus, using RPAs for drone journalism even in a manner which raises concerns about “surveillance” should acknowledge that, although there may be a *prima facie* infringement of any ban on using clandestine or subterfuge methods for acquiring information nonetheless, *in casu* the test is (per, the PCC) whether the public interest in exploring suspicions or allegations entails that “the means employed by the journalists had been appropriately tailored to explore the allegations made by confidential sources about the firm’s activities, which raised issues of significant public interest.”<sup>97</sup>

Subterfuge *is* justifiable, albeit “only when there are grounds in the public interest for using it. Undercover investigative work has an honourable tradition and plays a vital role in exposing wrongdoing. It is part of an open society. But it risks being devalued if its use cannot be justified in the public interest.”<sup>98</sup>

But what the privacy/anti-subterfuge lobby need to understand is—it can be justifiable.

### ENDNOTE

The desire and, as is asserted in this article, the right of drone journalists to use RPAs as part of their professional toolkit (just as “regular” photojournalists use “conventional” cameras with long-range telephoto lenses capable of extraordinary and usually unrealized data capture or

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<sup>95</sup> Press Complaints Comm’n, *Bell Pottinger Group*, PCC.ORG.UK, <http://www.pcc.org.uk/cases/adjudicated.html?article=NzkkNQ> (July 26, 2012).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at ¶ 6.1.

media organizations deploy manned helicopters which can capture detailed images from 1 kilometer) is currently experiencing robust resistance and pushback by counter-lobbies, concerns, fears, anxieties, opposition, and downright hostility towards RPAs *in toto* and that a not inconsiderable proportion of this is of the “what if” variety, more formally known as the “precautionary principle.”<sup>99</sup>

As is well known, the resistance functions around three main axes: (1) military and weaponized use of RPAs, in particular when civilian deaths ensue (see, e.g., the U.K. All Party Parliamentary Group on Drones and DroneWars UK<sup>100</sup>); (2) the perceived threat to individual privacy (see, e.g., the Australian House of Representatives Standing Committee on Social Policy and Legal Affairs, round table on drones and privacy<sup>101</sup>); and (3) the technical capacity of the new-generation of RPAs (actually, not the RPA so much as the *payload*) to conduct wide-ranging and intense surveillance (see, e.g., the EGE Opinion<sup>102</sup>). Indeed, having the temerity to oppose the self-proclaimed “anti-drone consensus” meets the riposte that efforts to counter RPAs deployment

are being impeded by those who mock the idea that domestic drones pose unique dangers (often the same people who mock concern over their usage on foreign soil). This dismissive posture is grounded not only in soft authoritarianism (a religious-type faith in the Goodness of U.S. political leaders [sic] and state power generally) but also ignorance over current drone capabilities.<sup>103</sup>

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<sup>99</sup> “If steps must be taken to address these concerns, education and empowerment-based solutions represent superior approaches to dealing with them compared to a precautionary principle approach, which would limit beneficial learning opportunities and retard technological process.” Adam Thierer, *Technopanics, Threat Inflation, and the Danger of an Information Technology Precautionary Principle*, 14 Minn. J.L. Sci. & Tech. 309, 311 (2013); see also Bob Cesca, *The Most Terrifying Drone Ever! Run Away!*, THE DAILY BANTER.COM (Mar. 13, 2013), <http://thedailybanter.com/2013/03/the-most-terrifying-drone-ever-run-away/>; Adam Thierer, *Technopanics, Threat Inflation, and the Danger of an Information Technology Precautionary Principle*, PAPERS.SSRN.COM, (Feb. 28, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2012494](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012494).

<sup>100</sup> See All Party Parliamentary Grp. on Drones, *Welcome to the APPG on Drones*, APPGDROONES.ORG.UK, <http://appgdrones.wordpress.com/> (last visited Dec. 18, 2014); see also C. Christine Fair, Karl Kaltenthaler & William J. Miller, *The Foreign Policy Essay: What Pakistanis Think About U.S. Drone Strikes and Why*, LAWFAREBLOG.COM (June 1, 2014, 10:00 AM), <http://www.lawfareblog.com/2014/06/the-foreign-policy-essay-what-pakistanis-think-about-u-s-drone-strikes-and-why/#more-35099>.

<sup>101</sup> See CTH, Parliamentary Debates, House of Representatives, 17 Mar. 2014, 1983 (George Robert Christensen, Deputy Whip) (Austl.).

<sup>102</sup> See The Eur. Grp. on Ethics in Sci. and New Techs., *Ethics of Security and Surveillance Technologies*, SLIDESHARE.NET (May 20, 2014), <http://www.slideshare.net/karlossvoboda16/ethics-of-security-surveillance-technologies-opinion-28>.

<sup>103</sup> Glenn Greenwald, *Domestic Drones and Their Unique Dangers*, Guardian.co.uk, (Mar. 29, 2013, 10:48 AM), <http://www.guardian.co.uk/commentisfree/2013/mar/29/domestic-drones-unique->

Such concerns have led, at least in the USA, to an anti-drone lawfare strategy, i.e., introducing and/or adopting state-level legislation to either curtail the use of RPAs or to delay their introduction.<sup>104</sup> On the other hand, in the USA, the FAA is holding discussions with various sectors about licensing RPA applications where the stereotypical grounds of opposition to using them, (e.g., intrusion into personal privacy), hardly apply. These include, namely: precision agriculture; film-making on closed sets; pipeline and power-line inspection; and oil-and-gas flue stack inspection industries. The FAA, as of the summer of 2014, had “granted approval 500 different times to more than 150 different government agencies, first responders, universities, civil organizations and limited commercial endeavors.”<sup>105</sup>

Against any *carte-blanche* opposition is the claim made in this article that dronism engages a significant human right and/or constitutionally or legally protected value or interest, whether established through the instrumentality of the European Convention on Human Rights or any functionally equivalent regime, e.g., the U.S. First Amendment.<sup>106</sup> As such, RPAs deployment cannot, it is asserted, *prima facie* be generally prohibited. Of course, not every drone journalism use of RPAs will be absolutely protected, any more than is the current use of other technologies and techniques. It is sanguine to remember that in the UK, nearly 100 journalists have been arrested in connection with the so-called “phone hacking scandal, computer misuse and . . . not all means justify the end pursued.”<sup>107</sup>

What is argued though in this article is that a general measure(s) restricting RPA use and a *fortiori* by the media would only be justifiable in specific circumstances when it was, as the European Court of Human Rights would put it, (1) prescribed by law, (2) for a legitimate aim, (3) necessary in a democratic society, and (4) proportionate. The damage to the public’s right to receive information and ideas that any such a restriction would entail means that such a restriction would be highly exceptional and

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dangers.

<sup>104</sup> See Nat’l Ass’n of Criminal Defense Lawyers, *Domestic Drone Information Center*, NACDL.org, <http://www.nacdl.org/domesticdrones/> (last visited Dec. 18, 2014).

<sup>105</sup> Apart from, additionally, the permissions granted to the six video companies in September, already mentioned, the FAA granted licenses in December 2014 to “four companies to fly UAS for aerial surveying, construction site monitoring and oil rig flare stack inspections.” Ass’n for Unmanned Vehicle Sys. Int’l., *AUVSI Statement on the FAA Granting Five Section 333 Exemptions for the Use of UAS*, AUVSI.org (Dec. 11, 2014, 8:43 AM), <http://www.auvsi.org/blogs/auvsi-membership/2014/12/11/auvsi-statement-on-the-faa-granting-five-section-333-exemptions-for-the-use-of-uas>.

<sup>106</sup> See Mickey Osterreicher, *Mickey Osterreicher Discusses Whether There Is a Constitutional Right to Use Drones to Collect Aerial Imagery*, DRONEU.ORG, <http://droneu.org/mickey-osterreicher> (last visited Dec. 18, 2014).

<sup>107</sup> See BBC News, *Phone Hacking*, BBC.COM, <http://www.bbc.co.uk/news/uk-14045952> (last visited Dec. 18, 2014).

could only be justified in the most extreme situations.

Equally, where there is no general permission, but only a case-by-case decision on the part of an aviation regulator to allow a drone journalism flight(s) to take place (a la FAA), these should be subject to strict scrutiny and possible judicial review in circumstances where the requisite weighing of the public's right to receive information had not been done explicitly or could be challenged as having been done improperly.

Echoing the point made by Tom Hannen, *supra*, “[w]e see it as a flying camera,” dronalism should simply be understood as a technological evolution of photography in public places.<sup>108</sup> As such, what points can be deployed by media lawyers to counter anti-RPAs lawfare? In the U.K., for example, according to Dr. Michael Pritchard, Director-General, The Royal Photographic Society, stated,

[T]he [U.K.] law is very clear in that there is no restriction on photography in public places. The Terrorism Acts do not really affect this general principle . . . . Sometimes defining what is public and what is private space can be problematic and there are a few spaces such as the Royal parks and Trafalgar Square which have bylaws restricting photography . . . . There are some restrictions on photographing certain designated buildings, e.g., military bases, which predate the Terrorism Acts. Such buildings would be signed. It is not unlawful to photograph a police officer except where it is done to support the commissioning of terrorism.<sup>109</sup>

In 2008, the U.K. Government was asked to state “what plans they have for reviewing the rules on street photography.” Replying for the Government, Lord Bassam of Brighton stated,

My Lords, the freedom of the press and media is one of the bedrocks of democracy in this country. Although police officers have the discretion to ask people not to take photographs for public safety or security reasons, *the taking of photographs in a public place is not subject to any rules or statute*. There are no legal restrictions on photography in a public place and no presumption of privacy for individuals in a public place. There are no current plans to review this policy.<sup>110</sup>

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<sup>108</sup> See, e.g., *Photography Is Not a Crime*, PHOTOGRAPHYISNOTACRIME.COM (last visited Dec. 18, 2014); see also Kimberly Chow, *Ferguson and the Right to Photograph the Police*, RCFP.ORG, <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2014/ferguson-and-right-photograph> (last visited Dec. 18, 2014).

<sup>109</sup> Michael Pritchard, Personal email to the author, Feb. 13, 2013 (emphasis added).

<sup>110</sup> Lord Bassam, *Photography: Public Places*, 2008, H.L. (U.K.) (July 16, 2008), <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80716-0001.htm> (emphasis added).

It is suggested here that the core demands of freedom of expression in a democratic society and in particular the public's right to receive information, means that the default position warrants the use of RPAs as "flying cameras" in the pursuit of dronalism and that any restriction(s) must be for a proper, legitimate aim pursued through a very narrowly and precisely crafted exception. Such is the fundamental role of a free and responsible press in a democratic society that any challenge not only to publishing information but also to *exercising the means to realize it* must necessarily overcome a very high—and judicially tested—threshold.

In conclusion: using RPAs for newsgathering, aka dronalism, raises unique normative concerns as compared with other RPAs applications:

- It engages the public's right to receive information and ideas and hence is part of the right to freedom of expression, speech and the press;
- It engages the right to access communications technologies for the above purpose and thus is an extension of the rights and arguments for general photojournalism used in the context of newsgathering;
- Aviation regulators will have to take account of the concerns, rights and principles advanced by media lawyers and the right(s) bundled within the rubric of the right of freedom of expression. The mandate of the aviation regulator should not overstep measures in the interests of ordering the national airspace in the interests of safety, certification, airworthiness.