

CHARTING THE COURSE FOR USE OF SMALL UNMANNED AERIAL SYSTEMS IN NEWSGATHERING

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News organizations and individual journalists eagerly anticipate safely utilizing Small Unmanned Aerial Systems (sUAS) for newsgathering purposes as lawmakers integrate sUAS into the National Air Space (NAS). For now these potential users may be flying over an “unchartered” regulatory landscape while the FAA struggles to complete its administrative rulemaking.

In order to better understand how media organizations and individual journalists intend to use sUAS for newsgathering purposes; the National Press Photographers Association (NPPA) developed a survey consisting of twenty-one (21) multiple choice questions, with space for elaboration and three (3) questions seeking a narrative responses.

The survey was distributed via email to approximately fifty (50) news organizations and media associations. There were 680 responses, mostly from those identifying themselves as “journalists,” with the next largest group being news managers. Others responding to the survey include: attorneys, academicians and students. The survey began on February 3, 2014 and remained open until March 13, 2014. The survey answers provide a first-of-its-kind study of this subject.

This paper introduces the reader to a brief history of manned flight and photography, leading in the natural progression of the two technologies, to sUAS use for newsgathering. The paper explores the ups and downs of current and proposed FAA policies and regulations regarding sUAS use. Other issues addressed include: state legislation as well as some recent incidents and cases involving sUAS. Also examined are some of the proposed requirements found in the FAA’s *UAS Comprehensive Plan* and the *FAA Roadmap for Integration of Civil UAS in the NAS*.

Past privacy debates may be prologue to the present discussion when pondering new rules and legislation. The historical debates between privacy concerns on the one hand and newsgatherers’ use of emerging technologies on the other are also examined.

The paper also explores how journalists may better understand and participate in the rulemaking process as well as proposals for striking an appropriate and acceptable balance between First Amendment protected newsgathering activities and privacy concerns.

INTRODUCTION

In 1783 an untethered hot-air balloon rose into the skies over Paris carrying two passengers in the first successful manned flight.¹ Another invention took a little longer to develop when in 1826 the first permanent photograph was taken in France.² More than 30 years later the two technologies came together in the world's first known aerial photograph, also shot over France in 1858 from a tethered hot-air balloon.³ Given the state of the art at that time, the enterprising photographer also required a complete darkroom be taken aloft in the basket of the balloon to accomplish that feat.⁴ Since then citizens and journalists have used all sorts of devices in order to capture a birds-eye-view of the ground below.

Two years later James Black, an aspiring photographer, accomplished a similar achievement over Boston when he took to the air in Samuel King's hot-air balloon the "Queen of the Air" to capture the first aerial photographs made in America.⁵

A Harvard professor by the name of Oliver Wendell Holmes, Sr. wrote about the photo in the 1863 edition of the *Atlantic Monthly*, proclaiming, "Boston, as the eagle and wild goose see it [later to become the title of the photo], is a very different object from the same place as the solid citizen looks up at its eaves and chimneys. As a first attempt it is on the whole a remarkable success; but its greatest interest is in showing what we may hope to see accomplished in the same direction."⁶

That "direction" has far exceeded what anyone could have envisioned. Aerial vehicles as well as photographic technology have experienced nothing short of a revolution. What has not changed is man's desire to see the world below from above. With the confluence of flight and photography the law was relegated the Sisyphean task of trying to keep pace with technological advancements and evolving standards of privacy.

Misgivings by the public over new technology are nothing new. Camera-equipped Small (weighing less than 55 pounds) Unmanned Aerial Systems (sUAS) may well be considered the great prodigy of the Kodak Brownie, which in 1888 spawned its own form of public hysteria. For the first time in recorded history this camera's portability and flexible film (celluloid) with greater sensitivity to light allowed anyone to take photographs in public places rather than requiring the controlled seclusion and long exposures previously only found in a photography studio. The sudden appearance and widespread use of the Brownie caused the public to react with fear. Many places posted signs banning the use of cameras, and newspapers ran stories about the dangers of public photography.⁷

¹ "The First Hot-Air Balloon, The Greatest Moments in Flight," Space.com <http://www.space.com/16595-montgolfiers-first-balloon-flight.html>

² "World's First Photograph," National Geographic <http://photography.nationalgeographic.com/wallpaper/photography/photos/milestones-photography/niepce-first-photo/>

³ "The History of Aerial Photography" Professional Aerial Photographers Association, <http://www.papainternational.org/history.asp>

⁴ Id.

⁵ "Collections," The Metropolitan Museum of Art, <http://www.metmuseum.org/Collections/search-the-collections/283189>

⁶ Oliver Wendell Holmes, "Doings of the Sunbeam" *The Atlantic Monthly*, Vol. XII, Issue 69 (1863) <http://www.gutenberg.org/files/15016/15016-h/15016-h.htm#sunbeam>

⁷ "The Kodak Camera Starts a Craze," *The Wizard of Photography*, WNED <http://www.pbs.org/wgbh/amex/eastman/peopleevents/pande13.html>

Adverse reaction to these new devices caught the attention of Louis D. Brandeis and Samuel D. Warren, who expressed the fear that the “sensationalistic press” would use this new-fangled device to wreak havoc on the “Right to Privacy” (the title of their 1890 Harvard Law Review article).⁸ Their paper helped advance an “invasion of privacy” doctrine, which they explained as occurring when “political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.”⁹ This became the foundation of modern-day privacy tort law.

In what could be construed as a prophetic comment on today’s sUAS debate Brandeis and Warren recognized “that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation.”¹⁰ Similarly they inquired “whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is [?]”¹¹

Flash forward 120 years to find the same public and government apprehension over the exponential proliferation of sUAS-borne cameras. President Obama signed H.R. 658 titled: FAA Modernization and Reform Act of 2012 (FMRA)¹² into law requiring the Transportation Secretary to develop a plan to safely accelerate the integration of civil UAS into the National Airspace System (NAS) by September 30, 2015. The bill was expected to expedite the development and use of sUAS for use by news media as well as individual photographers.

Unfortunately, that has not been the case. Not only has the FAA been delayed in its rulemaking timetable, it has chosen to enforce its stated policy prohibiting the use of sUAS for any commercial purposes, which the FAA has determined includes newsgathering.

In light of recent incidents involving the use of sUAS and legal challenges to attempted FAA enforcement, the National Press Photographers Association (NPPA) launched a first-of-its-kind survey designed to gather information about the “Use of Remotely Controlled Aircraft or Drones in Newsgathering.”¹³

This paper presents data in the form of anecdotal evidence from that survey in an effort to provide a more informed discussion of how such sUAS use may be safely accomplished while also addressing privacy concerns. The resulting analysis also provides a glimpse of the attitudes of 680 respondents regarding the use of sUAS for newsgathering purposes.

THE EVOLVING NATURE OF TECHNOLOGY

The self-evident nature of compelling news photos and video can be seen in the Pulitzer-Prize and Emmy-Award winning images published and broadcast every year. Photographers using both mediums strive to tell stories that inform and sometimes even bring about social change. The technology has steadily evolved from Matthew Brady’s cumbersome camera equipment and horse-wagon-drawn darkroom which provided the first visual coverage of the Civil War to the small and sophisticated digital cameras employed to provide live high definition images from almost anywhere in the world.

⁸ Samuel Warren and Louis D. Brandeis, “The Right to Privacy,” 4 Harvard Law Review 193 (1890)

<http://www.louisville.edu/library/collections/brandeis/node/225>

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² See: <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.658.ENR>:

¹³ See: <https://nppa.org/news/nppa-survey-use-remotely-controlled-aircraft-drones-newsgathering>

Images shot from sUAS are but the natural progression of aerial flight and photography. Just as James Black provided a unique and never-seen-before view of Boston (although the city had been in existence for 230 years¹⁴) so too have others yearned to capture images from a higher perspective. Aerial photography was experimented with and accomplished using many devices. The overall devastation in the aftermath of the 1906 San Francisco earthquake and fire was shot by a resourceful photographer using 17 kites to lift his specially designed, but very heavy camera 2,000 feet over the city.¹⁵ Other more well-known inventors also brought their creative talents to bear on advancing this expanding world view. Although better known for the Nobel Prize, Swedish inventor, Alfred Nobel made the first successful aerial photograph from a rocket-mounted camera in 1897.¹⁶ And in 1909 Wilbur Wright flew the airplane from which the first aerial photograph was taken.¹⁷

With the advent of smaller and more advanced aerial platforms which are simple to operate and inexpensive to purchase, it is logical that innovative visual journalists seek to report the news by using these devices to capture images with which to better inform the public.

As of this writing, the FAA ban on the commercial use of drones in the U.S. remains the subject of an administrative appeal after a judge found that the agency had violated procedural rules in enforcing it. But the ban has not stopped some photographers and news organizations throughout the world from experimenting with the capabilities of these devices. Here in the U.S., after a catastrophic building explosion in New York City an sUAS was seen flying over the still burning rubble. Aerial photos from that flight appeared in the *New York Daily News* and other publications.¹⁸ Less than a week later, video shot from another sUAS augmented footage of a roaring blaze in Brooklyn.¹⁹ Those images were broadcast around the country.

Internationally, sUAS have been used for a variety of journalistic purposes. For example, during the recent unrest in the Ukraine an sUAS recorded aerial views of clashes between police and demonstrators even as authorities tried to interfere with its operation using a laser beam.²⁰ Other countries have permitted use of sUAS for newsgathering as well.²¹

sUAS and the FAA

After an investigation of a 2011 sUAS flight over the University of Virginia's Charlottesville campus, the FAA levied a \$10,000 fine against "Team BlackSheep"²² lead pilot Raphael "Trappy" Pirker.²³ The FAA alleged that the Pirker was paid for his flight over the school in violation of the FAA's 2007 ban on use of UAS for commercial purposes. The FAA enforcement action also claimed

¹⁴ See: <http://en.wikipedia.org/wiki/Boston>

¹⁵ "The History of Aerial Photography" Professional Aerial Photographers Association, <http://www.papainternational.org/history.asp>

¹⁶ Id.

¹⁷ Id.

¹⁸ Bill Hutchinson, "Drone captures scene at East Harlem explosion that flattened two buildings," *New York Daily News*, (March 13, 2014) <http://www.nydailynews.com/new-york/uptown/drone-captures-e-harlem-explosion-scene-video-article-1.1719988>

¹⁹ WNBC, "Fire Rips Through Brooklyn Recycling Plant; Drone Captures Flames on Video" <http://www.nbcnewyork.com/news/local/Brooklyn-Warehouse-Fire-Greenpoint-250886721.html>

²⁰ See: http://www.youtube.com/watch?v=VKp67SrSLIM&feature=player_embedded

²¹ See: <http://www.cbc.ca/thecurrent/episode/2014/02/25/drone-journalism-is-canada-ready/>

²² See: <http://team-blacksheep.com/>

²³ Chris Welch, "Remote aircraft pilot fights \$10,000 FAA fine, could change drone rules," *The Verge* (Oct. 9, 2013) <http://www.theverge.com/2013/10/9/4821094/remote-aircraft-pilot-fights-faa-fine-could-change-drone-rules>

that Pirker operated the 4.5 pound Styrofoam sUAS “in a careless or reckless manner so as to endanger the life or property of another.”²⁴

On September 27, 2013, Pirker’s attorney, Brendan Schulman, filed a motion to dismiss²⁵ and on March 6, 2014 an National Transportation Safety Board (NTSB)²⁶ administrative law judge granted that motion by vacating and setting aside the FAA assessment (fine) and terminating the proceedings against Pirker with prejudice (meaning they may not be refiled). In the eight page decision Administrative Law Judge Patrick G. Geraghty wrote that none “of the definitions the FAA used for ‘aircraft’ are applicable to, or include a model aircraft within their respective definition” and Pirker was “subject only to the FAA’s requested voluntary compliance” with rules for hobbyists. The judge went further to say that the policy the FAA relied upon for its rules were “intended for internal guidance” and “not a jurisdictional basis for asserting . . . enforcement authority on model aircraft operations.”²⁷ The court also found that the FAA “policy” was either non-binding or an invalid attempt at legislative rulemaking by the FAA.²⁸

Many welcomed that decision as a green light for wider use of sUAS, but less than a day later the FAA filed an appeal which immediately stayed the court’s decision²⁹ and also left enforcement of the FAA ban on commercial use of sUAS up-in-the-air.

There has also been pushback from other sUAS operators. In February, Pedro Rivera, a photojournalist for WFSB, a Hartford Connecticut TV station filed a federal lawsuit against police alleging violations of his civil rights.³⁰ According to reports, on his day off from work, Rivera flew his sUAS over the scene of a fatal accident. Police ordered him to cease operating the device and leave the scene. They also contacted his employer claiming he had interfered with their investigation resulting in Rivera’s suspension for at least one week without pay. Rivera claimed he “did not take aerial video for compensation by WFSB” but acknowledged “passing on drone-gathered video to the commercial television station.”³¹

In March the Texas EquuSearch Mounted Search and Recovery, RPSearch Services Inc. and Mr. Eugene Robinson challenged³² the wording in an FAA letter, which directed them to cease all use of radio-control model aircraft used in its life-saving volunteer search-and-rescue efforts. The FAA official had decreed in no uncertain terms that such operations are “illegal” and demanded that the Texas EquuSearch Team “stop immediately.”

In response to what it deemed “misconceptions and misinformation” regarding sUAS regulations the FAA posted an update on its official website meant to bust “Myths about the FAA and

²⁴ See: <http://www.kramerlevin.com/files/upload/PirkerDecision.pdf>

²⁵ See: <http://blogs.scientificamerican.com/observations/files/2013/11/MotionToDismiss.pdf>

²⁶ For distinct roles of FAA and NTSB see: <http://testimony.ost.dot.gov/test/pasttest/93test/Broderick3.pdf>

²⁷ See: <http://www.nts.gov/legal/Pirker-CP-217.pdf>

²⁸ Id.

²⁹ 49 CFR 821.43- Effect of law judge’s initial decision or appealable order and appeal therefrom
<http://www.law.cornell.edu/cfr/text/49/821.43>

³⁰ See: <http://dronelawjournal.com/the-complaint-in-the-hartford-drone-incident/>

³¹ Id.

³² See: <http://www.kramerlevin.com/files/upload/TES-Letter.pdf> and
<http://www.kramerlevin.com/files/upload/TES-Exhibits.pdf>

Unmanned Aircraft.”³³ But many still question whether the FAA has the authority to turn what appear to be voluntary policies into mandatory compliance.³⁴

FAA: POLICY VS. REGULATION

Last November the FAA produced three documents³⁵ which when read together were to provide a “roadmap” and expected timetable regarding possible future regulations of sUAS. The revised Notice of Proposed Rulemaking (NPRM) for sUAS which was “expected to be released in early 2014”³⁶ has once again been delayed until November 2014 at the earliest.³⁷

Regardless of when that notice is issued there is still much speculation as to what it may contain. A belief exists that in spite of requests from the sUAS community calling for expedited and commonsense regulations, providing operational guidance and regulatory certainty, the regulations finally proposed by the FAA may actually be arbitrary and overly burdensome. Some have expressed concerns that in its quest to ensure safety the FAA may just “copy and paste” its existing regulations requiring “pilot and crew certification,” which could also include meeting medical, training and security/vetting requirements as well as passing written and physical exams.³⁸

Because breaking news stories are inherently unpredictable, language contained in the FAA *Roadmap* regarding operation of sUAS in “approved airspace” and under specified “procedures”³⁹ is seen by some as a cause for concern. Proposals in its *Comprehensive Plan* restricting initial sUAS flights to “daytime”⁴⁰ operations “not over populated areas”⁴¹ create further apprehension on the part of those wishing to use these devices for newsgathering. There is also fear that vague and undefined references to “performance constraints” and “approved procedures” may also lead to arbitrary and capricious operational restrictions upon sUAS operations.

Requiring that any sUAS be operated within the “visual line-of-sight (LOS) of the flight crew”⁴² or be subject to other compulsory procedures such as filing a flight plan and using a transponder may also be problematic, by putting regulatory compliance beyond the means of most sUAS operators. There is also unease about possible requirements for vehicle registration and regulations regarding the recording and reporting of safety data.

Along with any safety rules is the issue of privacy. As part of an Explanatory Statement to the Consolidated Appropriations Act, 2014⁴³ Congress directed the FAA “to conduct a study on the

³³ See: <http://www.faa.gov/news/updates/?newsId=76240> (Feb. 2014)

³⁴ See: Patrick McKay, “FOIA Response Reveals FAA Routinely Misrepresents the Law Regarding Unmanned Aircraft,” DIY Drones (Feb. 2014) <http://diydrone.com/profiles/blogs/foia-response-reveals-faa-routinely-misrepresents-the-law>

³⁵ See: *Integration of Civil Unmanned Aircraft Systems (UAS) in the National Airspace System (NAS) Roadmap; Notice of Final Privacy Requirements for UAS Test Sites; UAS Comprehensive Plan* which may be found at http://www.faa.gov/news/press_releases/news_story.cfm?newsId=15334

³⁶ Roadmap http://www.faa.gov/about/initiatives/uas/media/UAS_Roadmap_2013.pdf at 58

³⁷ Ben Gielow, “Small UAS Rule Release Delayed Until November 2014,” AUVSI (Jan. 2014) <http://www.auvsi.org/1312014/1412014DOTSUASDelay>

³⁸ Id. at 52

³⁹ Id. at 35

⁴⁰ Id. at 58

⁴¹ See Plan:

http://www.faa.gov/about/office_org/headquarters_offices/agi/reports/media/UAS_Comprehensive_Plan.pdf

⁴² Id. at 33

⁴³ See: <http://docs.house.gov/billsthisweek/20140113/113-HR3547-JSOM-FM-B.pdf>

implications of UAS integration into national airspace on individual privacy”⁴⁴ within a year and “address the application of existing privacy law to UAS integration; identify gaps in existing law, especially with regard to the use and retention of personally identifiable information and imagery; and recommend next steps for how the FAA can address the impact of widespread use of UAS on individual privacy”⁴⁵ The Act also mandates such report “be completed well in advance of the FAA’s schedule for developing final regulations on the integration of UAS into the national airspace.”⁴⁶

STATE PRIVACY CONCERNS

Virginia became the first state to regulate UAS use in April 2013 followed closely by Idaho, Florida and Texas. In the past year a total of 44 states have proposed or enacted similar measures. As of this writing, bills are also being considered in Washington, Georgia, Iowa, Oregon, Pennsylvania and Maryland that would directly impact if or how sUAS could be used for newsgathering.⁴⁷ For the most part, such legislative measures appear to address concerns regarding UAS operation by law enforcement but some also seek to either criminalize or provide civil penalties for photographing a person in a location “where they would have a reasonable expectation of privacy” or to photograph private property without prior consent of the property owner.

For example Texas law⁴⁸ makes it a misdemeanor to capture images of a person or private property using an unmanned aircraft flying higher than eight feet in the air without permission of the person or property owner. It also provides civil penalties for “disclosure, display, distribution, or other use of any images captured” in violation of the law. There are 19 exceptions under which such use is permitted.⁴⁹ Newsgathering, expressly included in the proposed legislation was struck as an exception in the amended final bill.

THE SURVEY

In order to better understand how media organizations and individual journalists intend to use sUAS for newsgathering purposes; the NPPA developed a survey (the Survey) consisting of twenty-one (21) multiple choice questions, with space for elaboration and three (3) questions seeking a narrative responses.

A hyperlink to the survey was distributed via email to approximately fifty (50) news organizations and media associations. The survey was also promoted on the NPPA website as well as on the NPPA Facebook page and through other social media such as Twitter to members and employees of those groups. There were 680 responses during the survey period which began on February 3, 2014 and remained open until March 13, 2014. Questions included professional experience, job classification and market size.

Methodology

The Survey is far from purely scientific. The responses are valuable, but the dataset has limitations. Questions were formulated to gauge initial interest and experience with sUAS along with first impressions of early adopters. Although there were a statistically valid number of responses those answers should not be inferred to the industry at large; but while respondents were self-selected their anecdotal answers are very instructive.

⁴⁴ Id. at 6

⁴⁵ Id. at 6-7

⁴⁶ Id. at 7

⁴⁷ See: <https://www.aclu.org/blog/technology-and-liberty/status-domestic-drone-legislation-states>

⁴⁸ See: <http://www.legis.state.tx.us/tlodocs/83R/billtext/html/HB00912F.htm>

⁴⁹ *Id.*

Respondents

These answers provide a snapshot of what respondents are doing with sUAS along with their attitudes and expectations for the field. It is also worth noting a few characteristics of those who responded. They were mostly journalists, with the next largest group being newsroom managers.

Question 1. How would you describe yourself?

Answer Options	Response Percent	Response Count
Senior Management	18.0%	122
Middle Management	12.7%	86
Staff Journalist	28.4%	192
Independent Journalist	23.8%	161
Student	4.1%	28
Attorney	1.6%	11
Other (please specify)	11.2%	76
	<i>answered question</i>	676
	<i>skipped question</i>	4

Organizations Represented

Respondents working for newspapers of all sizes including non-daily and online publications accounted for almost 38 percent of those responding. The next largest group at 21 percent considered themselves to be independent journalists, while slightly more than 20 percent work in various market size TV stations. Of the 15.4 percent who chose “other” most considered themselves to be photographers, journalists, students or educators.

It is useful to note that 434 of respondents stated they worked outside the TV industry which has traditionally been the only sub-sector that could afford helicopters. The non-TV cohorts’ interest in sUAS simultaneously suggests that the competitive advantage of some larger broadcasters may be challenged as small communities, located far from those cosmopolitan TV markets, benefit from increased reporting capabilities provided by sUAS.

Question 2. What size news organization do you work for?

Answer Options	Response Percent	Response Count
TV - News Network	3.4%	23
TV - Top 20 Local market	5.0%	34
TV - 21-50 Local market	4.5%	30
TV - 51-100 Local market	4.3%	29
TV - 100+ Local market	3.0%	20
Daily Newspaper and Online - 500,000+ circulation	4.2%	28
Daily Newspaper and Online - 250,000-499,999 circulation	3.3%	22
Daily Newspaper and Online - 100,000-249,999 circulation	4.7%	32
Daily Newspaper and Online - 50,000-99,999 circulation	6.5%	44
Daily Newspaper and Online - fewer than 50,000 circulation daily	13.4%	90
Non-daily Newspaper and Online	5.8%	39
Digital only publication - 1 million+ uniques per month	1.3%	9
Digital only publication - 500,000-999,999 uniques per month	0.6%	4
Digital only publication - 100,000-499,999 uniques per month	1.2%	8
Digital only publication - fewer than 100,000 uniques per month	2.4%	16
Independent Journalist	21.1%	142
Other (please specify)	15.4%	104
<i>answered question</i>		674
<i>skipped question</i>		6

Professional Experience

Seventy percent of the 675 respondents to this question claimed more than 10 years news experience, helping to dispel the belief by some that sUAS use is merely the fleeting interest of youthful or inexperienced journalists.

Question 3. What level of experience do you have in your profession?

Answer Options	Response Percent	Response Count
0-5 Years	16.0%	108
6-10 Years	12.9%	87
11-20 Years	22.4%	151
20 Years or more	48.7%	329
<i>answered question</i>		675
<i>skipped question</i>		5

sUAS Knowledge

Approximately 33 percent of those who answered indicated they had little to no knowledge regarding sUAS use while slightly more than 63 percent knew a moderate to a great amount about such use, but also stated they needed to learn more. Less than 4 percent believed they knew everything there is to know about this subject. This might reflect the inquisitive nature of journalists, particularly in embracing new technology

Question 4. How knowledgeable are you when it comes to the use of remotely controlled aircraft (aka drones) for newsgathering?

Answer Options	Response Percent	Response Count
I know nothing	4.6%	30
I know very little	28.3%	183
I know a moderate amount	38.9%	251
I know quite a lot, but need to learn more	24.5%	158
I know everything there is to know	3.7%	24
Elaborate if you need to		32
<i>answered question</i>		646
<i>skipped question</i>		34

sUAS Operational Skill

It appears that when comparing answers to Question 5 regarding skill in using an sUAS for aerial photography or videography with those in Question 19 about FAA restrictions: those with higher levels of skill were also the most concerned about the FAA limiting their use. Of respondents who were most unskilled, 39 percent expressed the concern about FAA limits on journalistic use of sUAS, while 44 percent of those with some skill felt that way. Half of respondents who were somewhat confident in their abilities had a 56 percent concern rate, whereas 69 percent of those most confident in their skill level were most concerned about FAA restrictions.

Question 5. How skilled do you consider yourself to be when it comes to using a drone for aerial photography or videography?

Answer Options	Response Percent	Response Count
I'm totally unskilled	54.5%	350
I have some skills, but I'm not confident	22.1%	142
I am somewhat confident of controlling the craft and getting the content I need	8.9%	57
I can often safely control the craft and get the content I need in simple conditions	7.0%	45
I can safely control the craft in adverse situations, and get the content I need with complex moves	7.5%	48
Elaborate if you need to		21
<i>answered question</i>		642
<i>skipped question</i>		38

sUAS as a Useful Tool in Newsroom

Slightly more than 70 percent were confident or very confident that sUAS could be a useful journalistic tool. Fifteen percent were skeptical or not confident at all and 14 percent were undecided.

Question 6. How confident are you that remotely controlled aircraft or drones can be a useful journalistic tool for YOUR newsroom?

Answer Options	Response Percent	Response Count
Not confident at all	4.2%	27
Skeptical	11.4%	73
Undecided	14.0%	90
Somewhat confident	26.2%	168
Very Confident	44.1%	283
Elaborate if you need to		42
<i>answered question</i>		641
<i>skipped question</i>		39

sUAS Operation & Ownership

Of the 640 responding to the question whether they had ever flown a UAV, the answers were evenly divided between yes and no. Sixty-six percent stated their news department did not own an sUAS, 14 percent that they did and almost 20 percent replied the question was not applicable.

Question 7. Have you ever flown a remotely controlled aircraft or drone?

Answer Options	Response Percent	Response Count
Yes	50.0%	320
No	50.0%	320
<i>answered question</i>		640
<i>skipped question</i>		40

Question 8. Does your news department own a remotely controlled aircraft or drone?

Answer Options	Response Percent	Response Count
Yes	14.4%	93
No	66.1%	427
Not Applicable	19.5%	126
<i>answered question</i>		646
<i>skipped question</i>		34

sUAS Use for Newsgathering

Given concerns over the stated FAA policy regarding commercial use of sUAS it may not be surprising that although half of those answering claim have flown an sUAS, approximately 73 percent denied ever using one for newsgathering purposes.

Question 9. Have you, your news department or any colleagues ever used a remotely controlled aircraft or drone for newsgathering purposes?

Answer Options	Response Percent	Response Count
Yes	26.8%	172
No	73.2%	470
<i>answered question</i>		642
<i>skipped question</i>		38

Of the 172 respondent who claim to have used an sUAS for newsgathering purposes 161 described those uses. Seventy-two percent used sUAS to capture moving images while 55.9 percent stated they used them to take still images. Twenty-nine percent claimed to have used sUAS on breaking news stories versus 54.7 percent for non-breaking news. Respondents were divided almost evenly as to whether or not such sUAS use for newsgathering captured images that included people. In the “other” category 21 respondents specified such things as acquiring third party video and inclusion of people in images only from a distance so as to make them personally unidentifiable.

Question 10. You answered [Q9] to having used a drone for newsgathering. How was the remotely controlled aircraft or drone used? (Please check all that apply)

Answer Options	Response Percent	Response Count
Capture Still Images	55.9%	90
Capture Moving Images	72.0%	116
Breaking news	28.6%	46
Non-breaking news	54.7%	88
Capture images that included people	50.3%	81
Capture images that did not include people	52.8%	85
Other (please specify)	13.0%	21
<i>answered question</i>		161
<i>skipped question</i>		519

Of 172 respondents who claim to have used an sUAS for newsgathering, 81 percent of the 155 who answered the question as to whether or not the images captured were published or broadcast said yes.

Question 11. Was this content published, and/or broadcast and/or posted online?

Answer Options	Response Percent	Response Count
Yes	81.3%	126
No	18.7%	29
<i>answered question</i>		155
<i>skipped question</i>		525

Only 119 respondents described the story and use, which ranged from images of fires, accidents, weather conditions and natural disasters to construction sites and landscape panoramas.

Question 12. Please briefly describe the story and use:

Answer Options	Response Count
	119
<i>answered question</i>	119
<i>skipped question</i>	561

Of the 149 who responded to question 13, 58 percent stated they received no comments or ramifications from the use of sUAS, 35.6 percent received favorable comments and only 6 percent received negative comments. Of those, 37 respondents elaborated on the question. Many of those indicated they had received positive comments about the use of sUAS images from their audience. A few others wrote they received criticism from some viewers, police and inside legal counsel.

Question 13. Were there any comments or ramifications from the use?

Answer Options	Response Percent	Response Count
Yes - Positive comments	35.6%	53
Yes - Negative comments	6.0%	9
No	58.4%	87
If there were comments, please elaborate.		37
	answered question	149
	skipped question	531

Reasons for Not Using sUAS for Newsgathering

Of the 470 respondents who answered question 9 by indicating they had never used sUAS for newsgathering purposes, 394 answered question 14 by providing a number of reasons for their decision. Fifty-one percent considered such use but were concerned about violating state or federal regulations; 35 percent were concerned about the expense; approximately 24 percent were evenly divided between safety and insurance liability concerns; 20 percent were concerned about damaging or losing equipment; 16 percent had considered the matter but did not do so because there was no corporate policy on sUAS use; 15 percent never considered using an sUAS because they believed it would not help tell news stories in their market; as compared with almost 8 percent who did consider such use but could not see a journalistic justification for it. There were 89 comments regarding legal or financial concerns and cost/benefit evaluations.

Question 14. You answered [Q9] to never having used a remotely controlled aircraft or drone for newsgathering purposes. What is the reason? (Please check all that apply):

Answer Options	Response Percent	Response Count
Never considered use because would not help tell news stories in this market	15.0%	59
Considered use, but concerned about violating state or federal regulations	51.3%	202
Considered use, but no corporate policy	16.0%	63
Considered use, but concerned about insurance liability	23.9%	94
Considered use, but concerned about expense	35.8%	141
Considered use, but concerned about safety	24.1%	95
Considered use, but concerned about damaging/losing equipment	20.6%	81
Considered use, but could not see journalistic justification	7.6%	30
Please elaborate if you need to:		89
	answered question	394
	skipped question	286

Pooling

Respondents appeared to have a high level of interest in pooling. Seventy-seven percent of those who had never used an sUAS for newsgathering purposes claimed they would consider doing so under a pooling arrangement. However, in the comments for that section, a number of those answering no stated their concerns that pooling would remove any competitive advantage in using an sUAS.

Question 15. You answered [Q9] to never having used a remotely controlled aircraft or drone for newsgathering purposes. Would you consider it if you could participate in a pooling arrangement?

Answer Options	Response Percent	Response Count
Yes	77.3%	326
No	22.7%	96
Elaborate if you need to		45
	answered question	422
	skipped question	258

sUAS Use for Newsgathering (continued)

Question 16 asked about the potential and anticipated applications in using sUAS in newsgathering. The 302 individual responses were very similar to those in answer to question 12. Many wrote it was a better way to cover major news events such as accidents, fires, natural disasters, and sports. Some referenced access to difficult terrain combined with the ability to provide overall views and unique perspectives not normally seen. Others cited cost compared to a helicopter as well as the safety factor in using and unmanned aircraft. One saying, “For my helo costs, I could probably have a dozen HD live capable drones in the air.” Another respondent said “the cost of using a helicopter or fixed wing aircraft is high, anywhere from \$400 to \$1,800 per hour. A drone, such as the DJI Phantom, costs less than \$23.00 per hour, making aerial news photography cost effective for daily use.” Some other direct quotes include:

- “Drone aircraft could have given us better perspective on a story we are covering right now: Ice jams in a river and the threat of flooding. We cannot safely get closeups of the problem with a news crew. A drone could fly, give us a better angle and safer.”
- “Major news events where access is limited and roadblocks prevent us from getting close enough to get the shots needed. Our competitors have helicopters and are doing this everyday. Although they are paying an expense my company won't cover.”

Question 16. If you do see potential for use of remotely controlled aircraft or drones in newsgathering, please describe anticipated applications.

Answer Options	Response Count
	302
	answered question
	skipped question
	302
	378

When asked about whether respondents were being prevented from telling stories because of a lack of aerial coverage, 70 percent of the 424 who answered wrote no. Of the 29 percent who indicated they were being prevented, 110 of them supplied explanations ranging from access restrictions by law enforcement to loss of the ability to convey the size of events with large crowds. Once again disaster coverage such as ice jam flooding was a recurring theme as was wildfires. There were many references to the fact that all stories could be improved with some sort of aerial coverage.

Acquiring video appears to be the main objective along with still images. Potential stories tend to be about landscapes and environmental concerns, showing previously unavailable vantage points and overall images of large areas and structures. A number of respondents (those who had previously used sUAS, as well as those who had not because of current FAA policies) also wished to document crowd events using sUAS.

A number of respondents indicated a preference for sUAS use to navigate around obstructions; either for reasons of personal safety, police restrictions or hazardous environments. A few vivid examples:

- “Recently we had authorities burn down a house filled with explosives. A drone would have helped us get images of action going on at the scene and the fire itself.”
- “We did a video about the 5th anniversary of the closure of a GM plant. It would have been nice to go on an adjoining property and do a fly by to see the sprawling facility at more than eye level. Instead, we just drove by the fence and shot video.”

Question 17. Are there any stories you are being prevented from telling entirely, or substantially, because you don't have the capacity for aerial coverage?

Answer Options	Response Percent	Response Count
Yes	29.2%	124
No	70.8%	300
If yes, what were the stories?		110
<i>answered question</i>		424
<i>skipped question</i>		256

Privacy Concerns

In response to concerns about the media’s use of sUAS having the potential to invade someone’s privacy, there were 506 individually written narratives. Many stated it was no different than situations involving manned aircraft or use of telephoto lenses on the ground. Some believe that current privacy laws and professional ethical standards more than adequately address the issue while others think that updated laws may be needed.

When assessing privacy concerns with sUAS use, the answers were diverse. One respondent wrote, “The media has legally, ethically and respectfully used wireless microphones, tiny cameras and super-telephoto cameras without invasions of privacy for decades. It is not in the interest of legitimate news organizations to alienate our audience by invading, or being perceived to invade, privacy. We will conduct ourselves with the same level of professional integrity with drones.” Another believed, “you have no reasonable expectation of privacy when out in the open or in a public place.”

Two responses articulated risks to safety associated with sUAS operating in a competitive environment:

- “There is a safety aspect. Police helicopters fly between 400-600 feet; media fly between 700-900 feet. I don't trust that person flying a drone not to interfere with a manned aircraft. Today, we waited to the last minute to cancel a live shot due to lightning. We could see the storm on radar, but the reporter didn't want to disappoint the producer and kill the live shot. I finally did. Safety first. By the way, I was a flight medic in the army, and now operate a Flir gyro-cam in our helicopter. I have over 2000 flight hours.
- I think drone use in a newsroom should be strictly regulated much like satellite truck operations. Only one or two people in the newsroom should be authorized to fly a drone and I think the drone and the operators need to be licensed.”

Question 18. How would you respond to concerns about the media use of drones having the potential to invade privacy?

Answer Options	Response Count
	506
<i>answered question</i>	506
<i>skipped question</i>	174

SURVEY ANALYSIS

FAA Concerns vs Job Titles

Analyzing some of the answers, 45 percent of the 576 respondents were most concerned that the FAA would restrict journalists’ abilities to use sUAS. But that concern is not uniformly felt. Independent journalists and “others” were at 50 percent or more on the most concerned scale. Students had the least concern regarding the FAA followed by staff journalists, at 40 percent. Attorneys were less concerned than senior managers who were less concerned than middle managers.

Question 19. On a scale of 1-5, with 1 being the least concerned and 5 being the most concerned – How concerned are you that the forthcoming regulations from the FAA may restrict journalists' use of remotely controlled aircraft or drones for newsgathering purposes?

Answer Options	Response Percent	Response Count
1	6.9%	40
2	7.5%	43
3	18.2%	105
4	22.2%	128
5	45.1%	260
	<i>answered question</i>	576
	<i>skipped question</i>	104

FAA Regulations

The responses to Question 19 regarding concerns over FAA regulations are interesting when compared with answers to Question 20 of how likely respondents are to comply with those regulations. Only 43 percent of attorneys were concerned the FAA would restrict journalists, and 71 percent -- the highest percentage -- said they would comply. On the flip side, Independent journalists, who may lack the backing of a major organization, were most concerned about FAA regulations, but were least likely to say they would absolutely comply (Half said they were most concerned, 41 percent said they would definitely comply with regulations). Also ranking low on the list of expected compliance: staff journalists.

Question 20. On a scale of 1-5, with 1 being the least likely and 5 being the most likely - Once the FAA allows use of remotely controlled aircraft or drones for newsgathering purposes how likely would you or your organization be to comply with FAA regulations such as pilot and crew certification, registration and recording/reporting of safety data?

Answer Options	Response Percent	Response Count
1	8.8%	50
2	6.7%	38
3	17.4%	99
4	18.4%	105
5	48.8%	278
<i>answered question</i>		570
<i>skipped question</i>		110

State Laws

Respondents do not appear to be as worried about their state’s legislature taking action -- with only 27 percent being most concerned, compared with 45 percent concerned about FAA restrictions. Surprisingly, the attorneys were far more concerned about the states than about the FAA. Respondents listed as “Other” and senior managers rank high on the concern scale at 37 and 33 percent respectively.

Question 21. On a scale of 1-5, with one being the most concerned and 5 being without any concern - How concerned are you that the your state’s legislature may restrict journalists' use of remotely controlled aircraft or drones for newsgathering purposes?

Answer Options	Response Percent	Response Count
1	21.6%	121
2	18.4%	103
3	15.9%	89
4	17.6%	99
5	26.6%	149
<i>answered question</i>		561
<i>skipped question</i>		119

Interest in sUAS Use

Of the 559 who responded to question 22, 62 percent said they were most interested in making use of sUAS for newsgathering purposes if it were legally permissible and within a reasonable budget. While those identified as staff journalists accounted for 57 percent most in favor, surprisingly attorneys registered 86 percent of those most interested in such use.

Question 22. On a scale of 1-5, with one being the least interested and 5 most interested – If legally permissible and within a reasonable budget, would you be interested in making use of remotely controlled aircraft or drones for newsgathering purposes?

Answer Options	Response Percent	Response Count
1	6.3%	35
2	4.5%	25
3	9.1%	51
4	18.6%	104
5	61.5%	344
<i>answered question</i>		559
<i>skipped question</i>		121

First Amendment Protection

Eighty-six percent of respondents believe journalists have a First Amendment right to use sUAS, but only 30 percent of them think that right is absolute. Thirty-six percent of senior managers think that right is absolute, while only 23 percent of their middle managers think that way. Six of the seven attorneys who answered believe there is a limited First Amendment right.

Respondents' attitudes towards regulations were on-the-whole quite fearful, but more of that is directed towards federal regulators than the states. The vast majority expects that the FAA will restrict journalists' use of sUAS. Surprisingly the expectation that states will restrict journalistic sUAS use was more balanced; only a small majority anticipated problems.

It should be once again noted that that these findings are not predictive of the industry as a whole but rather what this self-selected group believes.

Question 23. Do you believe the First Amendment provides journalists a right to use a remotely controlled aircraft or drones for newsgathering purposes?

Answer Options	Response Percent	Response Count
Yes, categorically	30.2%	172
Yes, but there are limits	56.1%	320
No	5.8%	33
Not sure	7.9%	45
<i>answered question</i>		570
<i>skipped question</i>		110

Personal Information

While the respondents to this survey could remain anonymous, 284 of the 680 chose to give their name and contact information for further follow-up which should be very helpful in doing further studies and analysis.

Question 24. If you would be willing to speak with us, please provide your name and email address here:

Answer Options	Response Percent	Response Count
Name	98.9%	281
Email Address	99.3%	282
<i>answered question</i>		284
<i>skipped question</i>		396

RECOMMENDATIONS

Increasing attempts by states to prohibit sUAS use compounded by delayed FAA rulemaking underscore the need for comprehensive and commonsense regulations that will strike an equitable balance between privacy; air safety concerns; and the constitutional rights of citizens and journalists to use these devices for newsgathering. FAA enforcement threats and demands to “cease and desist” operational activities pursuant to its 2007 “policies” regarding commercial use of sUAS and the 1981 Advisory Circular for Model Aircraft, both mischaracterized as requiring “mandatory” compliance do nothing to further a constructive discussion of the issues and will only produce more litigation and confusion.

In any field there will always be bad actors. In any human endeavor there will always be accidents. Neither of these should be used as a pretext to ban any commercial uses of these evolving technologies. NPPA has a strict code of ethics promoting “the highest standards in visual journalism.”⁵⁰ The Professional Society of Drone Journalists (PSDJ) also has also formulated an ethical code for journalists using sUAS. Its elements are newsworthiness; safety; sanctity of law and public spaces; privacy; and traditional journalism ethics.⁵¹ The principles contained in these codes should also be considered when formulating the rules regulating sUAS use in newsgathering.

Additionally, some sUAS organizations have proven that community-based safety codes such as the one created by the Academy of Model Aeronautics (AMA)⁵² are effective in self-regulating operations. The AMA also lists a number of liability and accident insurance plans that could satisfy basic indemnification prerequisites. The consensus is that those using sUAS for newsgathering will be expected to obtain some level of certification and the same amount of liability coverage as commercial and recreational UAS operators.

A potential solution to future FAA requirements was recently announced by one company producing a popular sUAS. DJI is now offering updated software and automatic safety controls that will prevent the vehicle from flying into restricted airspace, like an airport and allow preset height and distance limitations to keep comply with possible restrictions.⁵³

But promulgating reasonable regulations for the use of sUAS for newsgathering is the key. Requiring proof of flight proficiency, a vehicle registration scheme and minimum insurance, similar to motor vehicle operation make sense. A pilot certification course for sUAS that is far more costly than the devices themselves, along with burdensome reporting processes and onerous requirements for filing flight plans are counter-intuitive and will be counter-productive.

As signatory to a joint letter to FAA Administrator Michael Huerta, the NPPA agrees that the delayed Notice of Proposed Rulemaking for sUAS continues a regulatory void which “has

⁵⁰ See: https://nppa.org/code_of_ethics

⁵¹ See: <http://www.dronejournalism.org/code-of-ethics>

⁵² Academy of Model Aeronautics National Model Aircraft Safety Code, Effective January 1, 2014
<http://www.modelaircraft.org/files/105.PDF>
<http://www.modelaircraft.org/files/105.PDF>

⁵³ See: <http://www.theverge.com/2014/4/6/5587852/dji-phantom-2-vision-plus-drone-quadrocopter-announced-price>

left American entrepreneurs, journalists and others either sitting on the sidelines or operating in the absence of appropriate safety guidelines.”⁵⁴

Therefore, the FAA should consider incorporating sUAS regulations (including for editorial use) already adopted in Canada and Australia as a means of implementing expedited U.S. rules with full input from media representatives. The reality is that sUAS use for newsgathering is occurring on a daily basis and the longer sUAS integration into the US National Airspace is delayed, the farther behind we become globally.

It is incumbent that the FAA chart a pragmatic and expedited course in its administrative rulemaking. There is neither room nor time for complacency or hubris in addressing this matter, lest, flying too low or too high it end up failing like Icarus⁵⁵ in an attempt to rule the sky.

CONCLUSION

Results of the Study show that many people and organizations in the journalism community and elsewhere wish to use sUAS for newsgathering, but are afraid to do so for a number of reasons, especially fear of regulatory, tort and in some cases criminal liability.

Society relies upon laws and regulations to provide certainty about what actions are and are not permissible. While the law has historically played catch-up with technology, the exponential rate of such advancements when compared to the tortuous administrative rulemaking process only exacerbates that gap.

The advent of the first handheld camera created concerns regarding the right to privacy. Those early fears were properly addressed through legislation and caselaw, where the laws regarding invasion of privacy, trespass, harassment and stalking are now well-settled.

With the proliferation of cellphone cameras and the ease with which images of all types (still & video) may be disseminated many legislatures have attempted to criminalize traditionally protected First Amendment activities with new laws. Despite the fact that most privacy concerns are already allayed by common law tort principles, those constitutionally suspect measures continue to be proposed and adopted in an attempt to “shoot the messenger” by prohibiting the use of sUAS for various purposes including newsgathering.

It will be important to see how the full NTSB will rule in *Pirker* given its mission to independently advance transportation safety⁵⁶ and how the FAA reacts to a potentially unfavorable ruling. Also on the horizon will be increased legal challenges to state laws prohibiting use of sUAS, especially where the prohibitions are unconstitutional because they are not content neutral, overly broad and vague; and in the case of newsgathering, limit more speech than is necessary to achieve a significant governmental purpose. Restrictions on this type of Electronic News Gathering (ENG) might also be susceptible to challenge as an unconstitutional prior restraint.

The question of federal preemption also must be considered in relation to the patchwork of current and future state legislation. While the FAA Modernization and Reform Act of 2012 does not contain an express preemption clause, the courts have held in certain instances that FAA regulations preempt state air safety and aviation noise rules;⁵⁷ but in other cases, such as between property owners, the

⁵⁴ See: www.auvsi.org/AUVSI-AMA-Sign-On-Letter-To-FAA

⁵⁵ See: <http://en.wikipedia.org/wiki/Icarus>

⁵⁶ See: <https://www.nts.gov/about/index.html>

⁵⁷ *City of Burbank v. Lockheed Air Terminal, Inc.* (1973) 411 U.S. 624, 639
<http://supreme.justia.com/cases/federal/us/411/624/case.html>

FAA does not possess adjudicatory power.⁵⁸ Of course none of this can even begin to be decided until the FAA files its notice of proposed rulemaking.

As was written of the 1860 Boston aerial photo – “its greatest interest is in showing what we may hope to see accomplished in the same direction” – must one wonder when the expressed desire for legally approved sUAS use will come to fruition? In the meantime the concern is not so much *when* the FAA will be able to promulgate new rules regarding sUAS operation but *whether* those regulations will be so outmoded and burdensome as to cause their widespread disregard, resulting in a situation that is no better than it is today.

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As a lawyer, Mr. Osterreicher has been actively involved in such issues as: cameras in the courtroom, the federal shield law, media access, public photography and copyright infringement. He writes regularly for JPG, the NPPA and the MLRC as well as other online publications and has been quoted in the news nationally on many of these issues.

The National Press Photographers Association (NPPA) is a non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's almost 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has been the “Voice of Visual Journalists,” by vigorously promoting and defending the rights of photographers and journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

⁵⁸ *Greater Westchester Homeowners Assoc. v. L.A.* (Cal. Supreme Court 1979) 26 Cal. 3d 86, 100 <http://scocal.stanford.edu/opinion/greater-westchester-homeowners-assn-v-city-los-angeles-28168>