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Civilian uses of unmanned aerial vehicles and the threat to the right to privacy – An Israeli case study[☆]

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ABSTRACT

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In recent years we have witnessed a growing demand for the use of Unmanned Aerial Vehicles (“UAVs”) in civilian contexts. Government authorities (such as law enforcement agencies), corporations and private individuals have identified the advantages inherent in the use of UAVs. At the same time, corporations marketing and manufacturing UAVs for civilian purposes, and the industries that support these manufacturers, have identified the enormous economic potential which may be derived from the sale and maintenance of UAVs (and the cameras and other equipment assembled into them). Hence, in the coming years, we will undoubtedly witness a rapid expansion of the civilian use of UAVs.

Given the assumption that the entry of UAVs into the civilian market is a certainty, what are the possible implications for the fundamental right to privacy, and does the issue of permits for civilian uses of UAVs indicate that privacy protection laws are now irrelevant? In answering these questions, the article deals with *five* problems. The *first* problem relates to the fact that, although it is a fundamental right, the right to privacy is vague; there is an essential difficulty in defining privacy and the situations in which it applies, including situations that involve the use of UAVs. The *second* problem focuses on finding a balance between the advantages inherent in the civilian use of UAVs and possible harm to the right to privacy and other fundamental rights such as freedom of expression. As the article will describe in detail, it is not possible to determine, *a priori*, whether the advantages of using UAVs outweigh their disadvantages, or vice versa. The *third* problem arises from the possibility of restricting the use of UAVs, either at the data collection stage, or, alternatively, at the stage at which the data is used. As shall be explained, this is a moral question, the answer to which varies from one legal system to another. The *fourth* problem concerns the choice of Israeli law as the basis for examining whether the law can provide suitable tools to deal with the risks involved in the use of UAVs. In this context, it should be noted that although Israel is considered a leading manufacturer of UAVs, Israeli law is unique, *inter alia*, in light of the fact that the Israeli legal system combines elements of both common law and continental law, and the fact that regulation of the use of UAVs in Israel is in its infancy. The *fifth* problem arises from the element of uncertainty. Given that the existing system of laws does not provide a sufficient response to a possible threat to

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fundamental rights (in the instance discussed in the article, the threat which UAVs pose to the right to privacy), how should the legislature regulate the use of UAVs, without harming the delicate balance between the advantages and disadvantages inherent in their use.

The article focuses on Israel as a case study and also comprehensively examines the solutions to the problems described above, as adopted in the United States and Europe.

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1. Introduction

Was it permissible for paparazzi to use an Unmanned Aerial Vehicle (“UAV”)¹ to photograph Tina Turner’s wedding?² Should Barbra Streisand have been allowed to suppress free speech protection when an incriminating picture was collected with the aid of a UAV?³ By what criteria should we judge a person who flies a UAV near the window of a female resident living on the fourth floor of an apartment building?⁴ Should UAVs be used for the purpose of monitoring class exams?⁵ Bearing in mind the extensive use made by the United States administration of technological means for surveillance purposes, should the police or other governmental authorities be given permits to operate UAVs equipped with cameras, wiretapping equipment, and facial recognition

¹ A UAV, also known as Unmanned Aircraft System or a drone, is defined as: “A powered, aerial vehicle that does not carry a human operator, uses aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or nonlethal payload”. DEPT OF DEFENSE, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 494 (2001, amended, April 2010).

² Martin U. Müller & Andreas Ulrich, *Snapping Tina’s Wedding: Paparazzi Turn to UAVs*, SPIEGEL ONLINE INT’L (Aug. 1, 2013) <http://www.spiegel.de/international/europe/paparazzi-use-UAVs-to-photograph-tina-turner-wedding-in-switzerland-a-914179.html>. See also the discussion regarding the increased use of UAVs in Australia in Renee Viellaris, *Unmanned aircraft bought online being deployed to monitor private and public property*, COURIERMAIL (Aug. 31, 2013) <http://www.couriermail.com.au/news/queensland/unmanned-aircraft-bought-online-being-deployed-to-monitor-private-and-public-property/story-fnihsrf2-1226707858451>.

³ Admin, *Streisand Seeks Court Help to Remove Aerial Photographs*, ATLAS GEOMATICS DOWN TO EARTH INFORMATION (Dec. 21, 2012) <http://www.atlisgeo.com/2012/12/21/streisand-seeks-court-help-to-remove-aerial-photographs/>. Kenneth Adelman, founder of the California Coastal Records Project, a scientific photographic database documenting the California coast was hit with a SLAPP suit from Barbara Streisand arguing that a picture taken by a UAV had invaded her privacy. The lawsuit was dismissed. For a comprehensive analysis of SLAPP suits see Tamar Gidron, *World Map of Libel Tourism and Defamation Law in Israel*, 15(2) HAMISPAT L. REV. 385 (2010).

⁴ Rebecca J. Rosen, *So This Is How It Begins: Guy Refuses to Stop UAV-Spying on Seattle Woman*, THE ATLANTIC (May 13, 2013).

⁵ Lee Moran, *Drones monitor test-taking students to catch cheating*, NEW YORK DAILY NEWS (Jan. 13, 2014) <http://www.nydailynews.com/news/world/drones-monitor-test-taking-students-article-1.1577723>.

⁶ James Ball, Julian Borger & Glenn Greenwald, *Revealed: how US and UK spy agencies defeat internet privacy and security*. THE GUARDIAN (Sep. 6, 2013) <http://www.theguardian.com/world/2013/sep/05/nsa-gchq-encryption-codes-security>.

software, for the purpose of policing and law enforcement?⁶ If so, under what conditions should such use be permitted? Is it appropriate for commercial corporations, operating on the basis of profit considerations, to obtain a permit to operate UAVs equipped with cameras, knowing that the photographs and images will be sold to the highest bidder?⁷ What importance should be given, from the point of view of the right to privacy, to a possible decision by Google to use photographic UAVs, as part of its Google Street View service?⁸ Are there legal and/or technological means that would allow the preservation of anonymity when such UAVs are used? And, more broadly speaking, will the use of UAVs for civilian purposes (both by a country’s legally constituted authorities and private entities) make privacy protection laws irrelevant?⁹

The questions presented above become even more meaningful if we take into account the fact that there is a growing worldwide trend to increase the number of permits issued for civilian uses of UAVs and at the same time they are becoming less expensive to purchase and operate.¹⁰

The aviation authorities in various countries are the regulatory authorities responsible for granting permits and regulating the operation of UAVs.¹¹ In the United States, the Federal Aviation Administration (“FAA”) first authorized the use of UAVs in 1990¹² and since then has granted permits for the operation of approximately 1500 UAVs (of these, 327 permits are still active). These permits were issued to law enforcement agencies, such as the Department of Homeland

⁷ Matthew Gryczan, *UAV Industry Set to Soar when FAA Gives Nod*, CRAIN’S DETROIT BUSINESS (July 7, 2013) <http://www.crainsdetroit.com/article/20130707/NEWS/307079980/UAV-industry-set-to-soar-when-faa-gives-nod#>.

⁸ In Europe, Google is subject to strict conditions regarding the use of its Street View service. See Mark Hachman, *EU Asks Google for More Privacy in Street View*, PC MAGAZINE (Feb. 26, 2010) <http://www.pcmag.com/article2/0,2817,2360725,00.asp>; In the United States, Google was subject to claims on the basis of breach of privacy. See Jonathan Stempel, *Google Loses Appeal in Street View Privacy Case*, REUTERS (Sep. 10, 2013).

⁹ Michael D. Birnhack, *Control and Consent: The Theoretical Basis of the Right to Privacy*, 11 MISHPAT UMIMSHAL – LAW AND GOVERNMENT IN ISRAEL 11 (2007).

¹⁰ For example, the new pocket drone developed and market by Airdroids is equipped with a camera and operated through the operator’s personal tablet; it is sold online for only USD 75. See also Damon Poeter, *Is That a Pocket Drone or Are You Just Happy to Spy on Me?* (Jan 10, 2014) PC MAGAZINE <http://www.pcmag.com/article2/0,2817,2429406,00.asp>.

¹¹ For an analysis of the problems accompanying the regulation of the aviation authorities’ use of UAVs for civilian purposes, see Part 4 below.

¹² FEDERAL AVIATION ADMINISTRATION OFFICIAL WEBSITE http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153.

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