Ohio Food, Ag, & Environmental Law Webinar Series

Big Data and Unmanned Aerial Vehicles: Legal Issues for Agriculture

John Dillard
Olsson Frank Weeda Terman Matz PC, Washington, D.C.

Welcome!
The webinar will begin at 1 PM.
For evaluation purposes and notices of future webinars, please provide your name and email address in the box located in the upper right hand corner.

Disclaimer
• This presentation is for general informational purposes only. It is not intended to and does not constitute legal advice.
This presentation does not necessarily reflect the views of:
• Ohio State University Extension
• Olsson Frank Weeda Terman Matz (OFW Law) or
• any other OFW Law client.

Big Data and Unmanned Aerial Vehicles: Legal Issues for Agriculture

Ohio Food, Agriculture and Environmental Law Webinar Series
Ohio State University Extension
December 12, 2014

John G. Dillard
Olsson Frank Weeda Terman Matz PC
www.ofwlaw.com
(202) 789-2312
dillard@ofwlaw.com
Twitter: @DCAgLawyer

Ohio State University Extension
(OSU Agricultural & Resource Law Program)
aglaw.osu.edu

Welcome!
The webinar will begin at 1 PM.
For evaluation purposes and notices of future webinars, please provide your name and email address in the box located in the upper right hand corner.

Disclaimer
• This presentation is for general informational purposes only. It is not intended to and does not constitute legal advice.
This presentation does not necessarily reflect the views of:
• Ohio State University Extension
• Olsson Frank Weeda Terman Matz (OFW Law) or
• any other OFW Law client.

Welcome!
The webinar will begin at 1 PM.
For evaluation purposes and notices of future webinars, please provide your name and email address in the box located in the upper right hand corner.

Disclaimer
• This presentation is for general informational purposes only. It is not intended to and does not constitute legal advice.
This presentation does not necessarily reflect the views of:
• Ohio State University Extension
• Olsson Frank Weeda Terman Matz (OFW Law) or
• any other OFW Law client.
Drones and the Law

A rose by any other name . . .

- Drones
- sUAS
  - Small unmanned aerial systems (FAA’s favorite)
- UAV
  - Unmanned aerial vehicle

Types of Drones – Rotary/Propeller-Based

- Operation
  - Remote control
  - GPS
- Flight time
  - 10-30 minutes
- Pros
  - Costs
  - Ease of operation
- Cons
  - Less flight time
  - You will crash at least one
Types of Drones –
Fixed Wing

- Operation
  - GPS (for most)
- Flight time
  - 20-50 minutes
- Pros
  - Flight time
  - Reduced operator error
- Cons
  - Costs
  - Not useful for spot checking

Agricultural Applications

- Crop Scouting
  - Plant health
  - Insect damage
- Precision Agriculture
- Irrigation Monitoring
- Future applications
  - Animal health monitoring
  - Farm appraisals

Drones and the Law

- Are drones legal?
- Property laws
  - Trespass
  - Nuisance
- State Privacy Laws
- Negligence
- Criminal penalties
- Can I shoot them?
Are drones legal?

- It depends...
  - Recreational uses – YES
  - Commercial (farm) uses – UNCLEAR, but it will be

Model/Recreational Aircraft

- 2012 FAA Reauthorization Act definition
  - Flown within visual line of sight
  - Flown for hobby or recreational purposes
    - No connection to a commercial enterprise
  - Operated within recognized safety guidelines
  - 55 pounds or less (unless certified)
  - Yields to and does not interfere with manned aircraft
  - Prior notice if flown within 5 miles of an airport

Aircraft meeting this definition are exempt from further FAA regulations
Are drones legal?

- It depends . . .
  - Recreational uses – YES
  - Commercial (farm) uses – UNCLEAR, but it will be

Upcoming Commercial Drone Regulations

- Congress (2012)
  - FAA to integrate commercial drones into the national airspace by Sept. 30, 2015
- FAA plans to propose rules for small commercial drones (<55 lbs., under 400 ft.)
  - Focus on agriculture, aerial photography, film industry
- FAA will miss 2015 deadline for larger drones
  - May never finalize regulations
  - Instead, require case-by-case approval

Legality of Commercial Drone Operation (Today)
  - FAA’s Position

- Commercial operations are only authorized on a case-by-case basis
  - There is no “gray area”
- Requirements same as manned aircraft
  - Certified aircraft
  - Licensed operator
  - Operating approval
- Approved uses
  - Pipeline operations in Arctic Ocean, Alaska’s North Slope

Big Data and Unmanned Aerial Vehicles: Legal Issues for Agriculture
Legality of Commercial Drone Operation (Today)  
– FAA’s Position

Section 333 Exemptions
- Petition FAA for permission to operate sUAS
  - Exempt “airworthiness” certificate
- Considerations
  - Do the proposed uses of the small drones, if flown in line of sight, present hazard to airspace or national security?
  - Is certificate of waiver, certificate of authorization or airworthiness certification required?
- Current exemptions
  - Film studios
  - Aerial photography

Legality of Commercial Drone Operation (Today)  
– not FAA’s side

*Huerta v. Pirker (NTSB Dkt. # CP-217)*
- Professional photographer used drone to capture images for UVA Medical School promotional video
  - Flew near people, buildings, traffic, statues, railroads
- FAA issued $10,000 fine for reckless operation of an aircraft
  - FAA defines “aircraft” as “any contrivance invented, used, or designed to navigate or fly in the air”

Legality of Commercial Drone Operation (Today)  
– not FAA’s side

*Huerta v. Pirker*
- Photographer’s position:
  - Small drone is “model aircraft,” not “aircraft”
  - Only subject to voluntary safety guidelines
  - FAA’s position that commercial drones are illegal is only supported by “guidance” documents, not regulation
  - No Act of Congress or public rulemaking
  - If not “aircraft,” not subject to FAA aircraft regulations
Legality of Commercial Drone Operation (Today) – not FAA’s side

**Huerta v. Pirker**
- NTSB Appellate Board:
  - Small drones are still aircraft
  - FAA has the authority to regulate drones
- Still unclear whether FAA’s has outlawed commercial use of drones

You can be held liable for reckless flight.

Where do we stand today?
- Despite FAA’s insistence, there may be some “gray area”
- Increased use of 333 exemptions
- Still awaiting regulatory proposals for small drones (finalized in either 2016 or 2017)
  - Flight restrictions
  - Operator qualifications
  - Aircraft requirements

Commercial drone regulations will clear the air.

**COMMON LAW TORTS**
Respecting Private Property - Trespass

• Causing or committing an unlicensed entry on real property
  – Liable for property damages
• Difficult to determine trespass into airspace
  – Can only trespass into airspace that a property owner actually controls
  • Below tree line, roofline, etc.
• Simply flying over a property does not incur trespass liability
  – U.S. v. Causby, 328 U.S. 256 (1946)

Respecting Private Property - Nuisance

• Causing a “substantial and unreasonable interference” with the “quiet use and enjoyment” of real property
  – Harassment
    • Residents
    • Livestock
• Liable for difference in rental value of property

STATE PRIVACY LAWS
State Anti-Surveillance Laws

- State laws
  - Illinois & Iowa (and others)
    - State and local governments must obtain warrants for surveillance
  - Idaho
    - Prohibits private surveillance of farms, dairies, and ranches without written consent
  - Virginia
    - 2-year moratorium for use by state & local law enforcement
- More states are considering restrictions that would apply to government, activist surveillance

NEGLIGENCE

- Failure to exercise reasonable care, resulting in damages to either property or people
  - Can also result in punitive damages
- If you operate a drone, you accept responsibility for your actions
  - Also employees acting within course of their employment

John G. Dillard – jdillard@ofwlaw.com

12/12/14
Negligence

Examples of Reasonable Care
- Training
- Equipment maintenance
- Manufacturer’s instructions
- Compliance with safety regulations, guidelines
- Avoid potential for collisions with people, property
- Avoid manned aircraft
  - Including aerial applicators

Employ Common Sense!

John G. Dillard – jdillard@ofwlaw.com

CRIMINAL LIABILITY

Criminal Liability
- Improper drone use can lead to arrest, fines
- Examples of arrests
  - Flying near aircraft
  - Flying near pedestrians
  - Obstructing emergency personnel
  - Low-flying surveillance over cattle feedlot

Employ Common Sense!

John G. Dillard – jdillard@ofwlaw.com
Big Data

What is “Big Data”?

• Aggregated data gathered from numerous farming operations
  – Shared with agriculture technology provider (ATP) through cloud-based systems
• Assists in developing prescriptive planting programs
  – Customized fertilizer, pesticide application
  – Hybrid seed selection, seed population

“Big Data” Risks

• Data breaches
  – Contains geospatial data that can identify farms
• Sales to third-parties
  – Potential competition for leased acres
  – Will owner receive compensation for data?
• Market manipulation
“Big Data” – Legal Issue

• Contract law

  • Farmer’s rights
    • Data privacy
      – How will it be anonymized?
      – Time limitations
    • Compensation (if any) for sharing with third-parties
  • ATP’s rights
    • How can data be used?
    • Who can it be shared with?

What to look for in a contract

• What data will be collected?
  – Limited to data useful for prescriptive planning?
• How will that data be used?
  – Shared with third parties?
  – Used beyond purposes of prescriptive planting?
• What control will the farmer have over the data?
• Is the data portable?
  – Can the farmer share the data if switching to another ATP?
• How will it be aggregated, anonymized?
  – Can it later be deleted?
What to look for in a contract

- Does contract require affirmative consent before data is shared with ATP?
- What data will be collected?
  - Limited to data useful for prescriptive planning?
- How will that data be used?
  - Shared with third parties?
    - Can farmer opt out?
  - Used beyond purposes of prescriptive planting?
- What control will the farmer have over the data?

What to look for in a contract

- Is the data portable?
  - Can the farmer share the data if switching to another ATP?
- How will it be aggregated, anonymized?
  - Can it later be deleted?
- Will farmer be notified of changes to ATP’s privacy policies?
- Does agreement prohibit ATP from using data for speculation in commodities markets?

Privacy and Security Principles for Farm Data

- American Farm Bureau Federation-facilitated agreement on November 13, 2014

Signatories

- AFBF
- American Soybean Assoc.
- Beul’s Hybrids
- Dow AgroSciences LLC
- DuPont Pioneer
- John Deere
- Nat’l Ass’n Wheat Growers
- Nat’l Corn Growers Assoc.
- National Farmers Union
- Raven Industries
- The Climate Corp. (Monsanto)
- USA Rice Federation
Privacy and Security Principles for Farm Data

• Education
  – Growers should understand their rights and responsibilities

• Ownership
  – Farmers own the data
  – Farmers control how they share data with others
  – Farmers are responsible for ensuring only data they own is provided to account with ATP

• Consent Prior to Data Collection
  – Affirmative consent should be required

Privacy and Security Principles for Farm Data

• Notice
  – Growers should have notice when data is collected
  – How it is used

• Transparency and Consistency
  – ATPs shall notify farmers about purposes of data collection
  – Farmers should have options to limit uses of data

Privacy and Security Principles for Farm Data

• Choices
  – ATPs should explain effects and abilities of a farmer’s decision to opt in, opt out, disable ATP services

• Portability
  – Farmers should be able to retrieve that data for storage or use in other systems

• Terms and Definitions
  – ATPs should clearly explain substantive terms of their contracts
Privacy and Security Principles for Farm Data

• Disclosure, Use and Sale Limitation
  → ATPs will not sell data to third-parties unless third-party is bound to same limitations as ATP
  → Farmers must be notified prior to data sales and be able to opt out
• Data Retention and Availability
  → Each ATP should provide for removal, secure destruction and return of original farm data
  * Upon farmer’s request
  * Pre-agreed period of time
• Contract Termination
  → Procedures for contract termination should be clearly stated to growers

Privacy and Security Principles for Farm Data

• Unlawful or Anti-Competitive Activities
  → Data should not be used for unlawful activity, antitrust violations
  * Market manipulation
• Liability & Security Safeguards
  → ATP should clearly define terms of liability
  → Farm data should be protected with reasonable security safeguards
  → Growers should be notified if there is a data breach

Big Data and Unmanned Aerial Vehicles: Legal Issues for Agriculture

Ohio Food, Agriculture and Environmental Law Webinar Series
Ohio State University Extension
December 12, 2014

John G. Dillard
Olsson Frank Weeda Terman Matz PC
www.ofwlaw.com
(202) 789-1212
jdillard@ofwlaw.com
Twitter: @DCAgLawyer
Please join us for our next webinar on Friday, January 9, from 1-2 pm EST:

The 2014 Farm Bill: Guiding a Client through the New Law

Presented by: Bill Bridgforth
Ramsay, Bridgforth, Robinson & Raley LLP, Pine Bluff, Arkansas