

Renewed security concerns over Facebook Places

Facebook always seems to be pushing boundaries in terms of what is acceptable for privacy or advertising practices. 'Facebook Places', which allows users to pinpoint their exact geographical location to others, could also raise data protection issues. Richard Dickinson and Alexander Watt, of Arnold & Porter LLP, examine to what extent Facebook Places raises regulatory concerns.

In September of this year, Facebook launched its new 'Places' functionality which allows the site's users to advertise their accurate GPS location on the social network. In this way, users are able to let all of the contacts within their network know precisely where they are at any given time. Additionally, users of the Facebook network may also, if they are permitted, 'tag' another user within their network at that location, should they see them, or claim to have seen them.

For users that use or are affected by this functionality, Facebook will become a record. Not only because of the information about themselves that they wish to share with other users, but also precisely where they have been and at what time. Obviously, as with much of the information that Facebook's users share, this information is sensitive personal information. Questions about whether or not there are any privacy issues regarding it are therefore not so much about the subject matter itself, which is certainly private, as the means by which it is revealed to the rest of the world. If it is the case that this personal information is being shared in a manner that users are not aware of - or to an audience that the users were not aware of - then there will certainly be privacy concerns.

The only way Facebook is able to avoid such privacy concerns is to ensure that it manages either to obtain users explicit consent to this additional functionality, or that it is made very easy for users to avoid the ambit of this functionality. The question then is whether or not Facebook does this? If it does not, then we may also ask what users may do in order to avoid it and look at some of the consequences.

Facebook makes significant amounts of money by selling advertisements on its pages. Advertisers see value in advertising with Facebook, because Facebook is able to target very specific groups of its users using the personal information that the users provide upon their page, in order to ensure that the adverts that they see when they view the site are relevant to them. The adverts are shown in the margins of the pages that are viewed by its users. Every layer of personal information added by a user allows Facebook to tailor its advertisements a layer further. Adding location-specific information about users, means that in addition to knowing the gender, the interests, the sexuality and the great many other things that are given away by a user's status updates, Facebook will now also know that user's location. This means that it will be able to target its advertising still further.

What is Facebook Places?

Of the online social networks that have appeared over the course of the past few years, Facebook is a relatively late arrival at the geo-tagging party. Various other websites, and mobile 'apps', have made this functionality fashionable to create networks of people connected by their ability to tell each other where they are. Foursquare was probably the first of these to offer users the ability to 'check-in', that is, to allow users to

make a note of every time they reached a particular destination. Facebook Places now offers the same functionality. With Facebook's Places, users 'check-in' to a location, and an update providing their location is sent to the friends that they have connected to them. In addition to this, a friend may also check-in and then tag another person.

The law of privacy and confidence in the UK

It is only over the course of the last decade or so that the courts of England and Wales have significantly expanded the concept of a right to privacy. Before this time, people were only able to rely on the doctrine of 'breach of confidence' to protect their personal information. This is because before the Human Rights Act (HRA) was brought into force within the UK in 1998, giving local effect to the European Convention on Human Rights, there was no similar legislation already existing within the UK.

It is following this EU legislation that the slew of recent cases concerning privacy markedly changed the approach that the courts in the UK took to issues of privacy. Much of that case law was summarised by Mr Justice Eady in *Mosley v News Group Newspapers Ltd*¹ in which he held that personal information qualified for protection once it was established that there was a reasonable expectation of privacy, balanced against the need to bear in mind the right to a freedom of expression (Article 10 HRA).

In this instance, however, there is little need to consider that there should be a balancing exercise with regard to the right to the freedom of expression. Facebook would be unlikely to sustain an argument that the publication of the information that is provided by

users in confidence should provide Facebook any reason to break that confidence and infringe their right to privacy for any purported 'expression'. Perhaps, therefore, any claim brought against Facebook as a result of the new Facebook Places functionality would be better framed by reference to the more traditional claim to a breach of confidence.

What complaint, if any, might be made against Facebook?

If Facebook were to reveal user information in a manner beyond which the user properly intended - since a user might argue that they had believed that Facebook would hold such information in confidence - this might be perceived as a breach of confidence. Any user sufficiently aggrieved by such a breach of confidence could bring a claim against Facebook for the damages suffered.

Facebook's defence, no doubt, would be by reference to their terms and conditions, which it would say limited their duty of confidence and made their position regarding privacy clear. Facebook might also argue that there are sufficient controls in place to allow a user to change what is or is not seen and which it is their responsibility to control through the privacy settings made available to each user. Additionally, it might argue that anyone using a social networking site, the main purpose of which is to reveal information about yourself to people that you know, would mean that you were entitled to a lower reasonable expectation of privacy, or confidence, than you might otherwise. A user uses the site to see the information provided about other people, and to provide information themselves so that they may form a part of this community. In such circumstances,

Facebook's defence, no doubt, would be by reference to their terms & conditions, which it would say limited their duty of confidence and made their position regarding privacy clear

the reasonable expectation of privacy or confidence must be commensurately lowered.

However, Facebook had over 500 million users before the Facebook Places functionality was brought into effect, and, as such, this extension of the information that has been provided by Facebook about its users, is an extension that was not comprehended or foreseen by users when they initially took part. The question then is whether or not these users have been adequately informed of the additional functionality and have consented to it, or have been provided the opportunity to avoid being subject to this functionality in a simple and easy fashion.

Is it easy for a user to know how this new functionality affects them? There are essentially three ways in which it might affect a user. Firstly, where they have opted into using Facebook Places, then they have explicitly given their consent and, subject to those users truly understanding what they are consenting to (which we shall come back to), there is no further issue. Secondly, a user has worked out by going into the privacy settings how to turn off the Places functionality - if this is not straightforward, and any users that have attempted to turn off this functionality and have failed, may well be aggrieved. Finally, there are all of those users - the majority in all probability - that have neither made an active effort to turn off the functionality nor actively consented to it. This will mean that a user may still have their location tagged at a specific location by another user and, though they should have received an email notifying them of that, they may not know about it.

Even those users that do actually consent to using Facebook Places may not understand all of the consequences of doing so. One of

the consequences of putting any information up upon Facebook is that it will have an impact upon the advertisements that a user sees when they use the site. If a user were to use Places and had stated that they were 'interested in' members of the opposite sex on their profile, then it is entirely reasonable that they may be shown advertising for local bars and or clubs, near where they lived or worked, that reflected their sexual preference. This sort of detail might be something that they had not anticipated when they originally decided to use Places, and may be considered an intrusive step too far?

Of course, whether or not the new functionality does in fact raise such issues - is yet to be seen, but Facebook continues to push boundaries, often simply by making its bold changes and then clearing up any issues after the event. Thus far, it has been an approach that has worked incredibly well² - whether it continues to in the future will depend upon whether users remain comfortable with Facebook's approach to privacy.

Richard Dickinson Partner
Alexander Watt Associate
 Arnold & Porter LLP
 Richard.Dickinson@aporter.com
 alex.watt@aporter.com

1. Mosley v News Group Newspapers Ltd. [2008] EWHC 1777 (QB).
 2. In fact, this is an approach that is positively encouraged by the E-Commerce Directive. The US Digital Millennium Copyright Act's approach to infringement online is by way of the notice and take down procedures, which precludes culpability until such time as Facebook is notified of a problem and fails to deal with it within a reasonable period of time. In this way, it is in an entity such as Facebook's interest to make sweeping changes and merely rationalise its approach when notified of issues by users.