



7 of 45 DOCUMENTS

Copyright 2009 ALM Media Properties, LLC
All Rights Reserved
Further duplication without permission is prohibited

CORPORATE COUNSEL

In-House Counsel (Online)

This article also appears in the following ALM publications:
Corporate Counsel

March 10, 2009 Tuesday

LENGTH: 1488 words

HEADLINE: My Face in Your Book: Democratizing the Social Networks

BYLINE: Harry A. Valetk, Special to the special to law

BODY:

Social networking Web sites are hubs of information. Information about our daily activities, the people we know, and the people they know. But as these hubs become more than just a virtual place for the global community to link to friends and post "what you are doing right now," we are confronted with fascinating new questions about how we define personal space, disclosures, and express preferences about our own content.

A QUIET CHANGE IN TERMS

Last month, Facebook's senior management grappled with a nuance of the social network: user content. The story began with Facebook's Feb. 4 decision to amend its Terms of Use (those long streams of text that few of us ever read). Facebook's Terms of Use (last modified Sept. 23, 2008) generally gives it an "irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide license" to use user-posted content for any purpose, including advertising. But Facebook quietly deleted this provision:

"You may remove your User Content from the Site at any time."

That deletion went largely unnoticed for more than 10 days. Then bloggers caught wind of the change thanks to a Feb. 15 posting on the popular Consumerist Web site. That blog pointed out that by deleting this provision, Facebook could

My Face in Your Book: Democratizing the Social Networks In-House Counsel (Online) This article also appears in the following ALM publications: Corporate Counsel March 10, 2009 Tuesday

potentially claim eternal legal rights to user-posted content, even after the user deactivated an account or deleted that content from his or her own personal profile.

USERS REVOLT

Within two days, in the midst of a virtual revolution, and as hordes began protesting and signing online petitions (over 38,000 signatures), Facebook listened. It listened by announcing on Feb. 17 that it was going to revert to its original Terms of Use (Sept. 23, 2008 version). And on Feb. 26, it launched a campaign polling users over a new draft Terms of Use. The proposed new terms read,

"You own all of the content and information you post on Facebook, including information about you and the actions you take."

To its credit, Facebook reacted swiftly and appropriately to user concerns. But who can predict how another similarly-situated company will react? What if another company buys Facebook? Taking into account the broad social implications, should social networking sites -- the commercial repositories of intimate personal details -- continue to be treated as traditional Web services? Or should Town Halls and open debate about changes to governing materials be required? Should broader legal protections apply?

Let's examine both perspectives: Facebook's and its users.

THE FACEBOOK CASE

From the outset, Facebook explained that in making its Feb. 4 Terms of Use changes, it was simply looking to clarify the tension between technologies that enable sharing, and actually empowering users to control user-content. In a Feb. 16 blog, Facebook CEO Mark Zuckerberg asked, what happens when a person shares information (e.g., photograph) with a friend, and then decides to deactivate the Facebook account? Similar to e-mail services, even if a Facebook account is deactivated, other users may still have copies of content shared. Put another way, closing your account doesn't remove content you shared from someone else's profile. "One of the reasons we updated our terms was to make this more clear." And, on its face, this seemed like a valid point.

But, let's face it, Facebook could've chosen to legally defend its position. After all, Facebook's Terms of Use say:

"We reserve the right, at our sole discretion, to change, modify, add, or delete portions of these Terms of Use at any time without further notice."

And legal support exists for that position. Courts have consistently upheld the binding nature of a Web site's Terms of Use comparing them to contracts under the Uniform Commercial Code. In a 2004 opinion (**Register.com v. Verio, Inc.** (pdf)), for example, the 2nd U.S. Circuit Court of Appeals held that Register.com's Terms of Use likely created a contract between Register.com and Verio. It reasoned that Verio repeatedly used Register.com knowing that by using Register.com, Verio agreed to be bound by its terms. The court reached this result, even though Verio never clicked on an "I Agree to the Terms" icon.

In another case, a federal district court in California found that frequent use of a Web site may result in imputed knowledge of its Terms of Use. In **Cairo Inc. v. Crossmedia Services**, Cairo argued that it wasn't bound by a forum selection clause in Crossmedia's Terms of Use because it never explicitly agreed to those terms. But the district court dismissed Cairo's claims by relying on Cairo's repeated and automated use of Crossmedia's Web site.

Both cases cited, however, involved corporate litigants -- not consumers.

THE USER CASE

Facebook users had a different view. Instead of deleting a key provision in Facebook's Terms of Use, why not simply

My Face in Your Book: Democratizing the Social Networks In-House Counsel (Online) This article also appears in the following ALM publications: Corporate Counsel March 10, 2009 Tuesday

explain that deactivating an account will not necessarily eliminate user-content shared and stored in other profiles? The same goes for copies of user-content routinely archived on Facebook servers. By choosing, instead, to delete key language outlining the user's legal right to remove content from the site at any time, the company potentially sought a never-ending lease on user-content.

Privacy and civil liberties groups reacted. Among them, the Electronic Privacy Information Center threatened to file a 25-page complaint with the Federal Trade Commission arguing that Facebook's Terms created a fundamental shift in how the company could exercise control over what its users were posting.

Besides presenting a fundamental shift, why should something as material as how long a Web site can own your user-content be buried in the middle of a 6,800-word, 11-point font document? Is it reasonable for courts to adopt traditional repeated-use-equals-assent standards when deciding Internet-related cases? Is a Web site's Terms of Use really the same as a typical contract?

While many similarities exist, we cannot ignore important distinctions. Among them, paper is static; Web documents are dynamic. Web site operators find it impossible to control absolutely the way a page appears to every user because of unpredictable technological variables (e.g., browsers, monitor resolution, personal settings, operating systems). Yet, few, if any, legal standards exist for how Web-based Terms of Use must appear to the end-user.

Even if you are a frequent Web site user, one may argue, any material changes to the Terms of Use should be re-communicated and highlighted for user review. And any material changes should never apply retroactively without the user's consent. It would be unreasonable for courts to expect users to learn of material changes, and somehow impute consent, without reasonable notice and opportunity to opt-out before those changes take effect. Regrettably, courts so far haven't really articulated a clear understanding of these nuances.

Finally, what terms do other social networking sites impose on users? A quick glance reveals that other social networks offered users control over user-content. MySpace's terms of use note that once you delete something from its site, it "will cease distribution as soon as practicable, and at such time when distribution ceases, the license will terminate." Twitter's terms of service says it "claims no intellectual property rights over the material you provide" and that "you can remove your profile at any time by deleting your account." Even YouTube (owned by Google) limits its license by saying it will "terminate within a commercially reasonable time after you remove or delete your user videos."

CONCLUSION

With over 175 million registered users, Facebook today is the largest social networking site in the world. And, in our socially-networked Web culture, we may need to identify new rules to govern this crowded realm. Rules based on basic principles of fairness adequately designed to meet the needs of this borderless commonwealth.

Yet this much we know. We know that the social network democracy has officially arrived -- one that places user expectations before corporate legalities. In fact, Zuckerberg promised to build any new Terms of Use around how people share and control their information, using clear language everyone can understand, and giving users "a lot of input in crafting these terms." And we know now that Web users have unparalleled power to reach top management at online companies -- and be heard.

So, it seems, social networks remain a formidable force in testing our social, legal and personal boundaries. Where those boundaries ultimately land, only time will tell.

Harry A. Valetk is an Internet Safety and consumer privacy attorney in New York City. He has written extensively on privacy, identity theft, and Internet-related topics. He is also an adjunct assistant professor at the Bernard M. Baruch College, Zicklin School of Business, and a former trial attorney with the U.S. Department of Justice. Email: harry@valetk.com

My Face in Your Book: Democratizing the Social Networks In-House Counsel (Online) This article also appears in the following ALM publications: Corporate Counsel March 10, 2009 Tuesday

LOAD-DATE: October 13, 2011