

Bereskin & Parr LLP

Privacy concerns in Canada could force changes to Facebook brand promotion

Facebook is bringing in new privacy measures in response to criticism in Canada over its handling of personal data. The new approach looks likely to have an impact on mark owners' advertising strategies

The social networking site Facebook provides a forum for viral marketing and online advertising. Facebook is the most popular social networking site in the world, boasting a reach of over 300 million active users, with nearly 12 million in Canada alone. Facebook offers several tools to help businesses maximize brand visibility, including the use of interactive third-party applications.

Privacy complaint

On May 30 2008 a consumer advocacy group called the Canadian Internet Policy and Public Interest Clinic filed a multi-faceted complaint against Facebook with the Office of the Privacy Commissioner of Canada under Canada's federal Personal Information Protection and Electronic Documents Act. One of the act's foundations is the notion that an individual should have control over the collection, use and disclosure of his or her personal information by an organization for commercial purposes. A cornerstone of the act is "knowledge and consent". Many complaints to the office concern whether consent in a given situation is meaningful. The office generally considers consent to be meaningful if the individual is informed, in a clear and understandable manner, of the purposes of collecting, using or disclosing personal information, at or prior to any such collection, use or disclosure. Another principle enshrined in the act is that an organization should not require an individual to consent to the collection, use or disclosure of information beyond that required to fulfil specified and legitimate purposes.

The Internet Policy and Public Interest Clinic alleged that, contrary to the act, Facebook did not adequately notify users of how their personal information was being used and disclosed for the purpose of generating revenue from third-party

marketers, advertisers and applications. It also alleged that Facebook was unnecessarily requiring users to agree to certain ads since they could not opt out of them, and was improperly using opt-out consent for other ads. It made various other allegations related to disclosing information to third-party applications, and collecting and using information of non-users.

In July 2009 the Office of the Privacy Commissioner issued a report on Facebook's privacy practices. The office acknowledged that Facebook users actively and voluntarily upload their personal information to Facebook for the express purposes of sharing it with others. The office also recognized that advertising is essential to Facebook providing its services to users, who receive them for free, and that users must be willing to receive a certain amount of advertising. With that said, and with the acknowledgement that social networking privacy rules are still being written, the office concluded that some of Facebook's privacy practices contravened the Personal Information Protection and Electronic Documents Act, including the way Facebook shared users' personal information with third parties. The office thus recommended that Facebook close "serious privacy gaps" on its site. Subsequently, Facebook agreed to change its operations to meet the office's recommendations and promised to implement stronger privacy safeguards over the next year.

Facebook ads and social ads

The complaint concerned two different types of ads: 'Facebook ads' and 'social ads'. Facebook ads are targeted to users based on information found in their profiles such as their interests, activities and favourite books. All users must consent to Facebook ads, and there is no way to opt out. Advertisers who purchase Facebook ads specify the characteristics of users to whom they want their ads served with the guarantee that the ads will target those users.

Social ads are triggered by 'social actions' taken by users. Social ads appear in NewsFeeds as sponsored content or in ad space along the left side of the site. Social ads use an individual's actions, thumbnail profile photo and name to promote a certain product or service.

The Office of the Privacy Commissioner was content that advertisers who purchase either Facebook ads or social ads receive only aggregate data. Therefore, Facebook was not *disclosing* users' personal information to advertisers. However, the office was of the view that accessing users' attributes from their profiles and monitoring social actions, rendering the data to aggregate form, and serving ads to users based on the aggregate data, constituted *use* of personal information under the Personal Information Protection and Electronic Documents Act.

While the office found it reasonable that users be required to consent to Facebook

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ads as a condition of free service, it described social ads as “inherently intrusive in nature” since they take on the appearance of an endorsement of the product or service by the user to his or her Facebook friends. The office argued that users would not reasonably expect their information to be used in this manner and therefore should be able to opt out of such use.

Although Facebook users could opt out of social ads, the office found that Facebook’s Privacy Policy lacked sufficient detail. It described the advertising in very general terms, did not explain the differences between Facebook ads and social ads, and did not indicate that users could opt out of social ads but not Facebook ads. As a result, the office found that, for ease of reference, all privacy-related information should be gathered in its Privacy Policy, including information from Facebook’s Help Section and Statement of Rights and Responsibilities. Likewise, it found that Facebook was not providing users with sufficient notice at the time of data collection of its use of advertising.

In response, Facebook said it would describe the differences between the types of ads, and that a description of the overall Facebook advertising system was still under development. It remains to be seen whether more users will opt out of social ads after Facebook provides a clearer description.

Third-party applications

Since May 2007 Facebook has provided third parties with a platform that enables them to create applications that Facebook users can add to their accounts such as games, quizzes and horoscopes. There are over 350,000 active applications with 100 of those applications attracting more than 1 million monthly users. Applications have generally been successful in driving traffic to other websites and raising brand awareness, which has resulted in increased revenues.

The Office of the Privacy Commissioner expressed concern that Facebook gives developers potentially unlimited access to users’ information but does not monitor developers to ensure that they obtain only the information they need for the purpose of providing the applications. It was concerned that users are not adequately informed of what personal information would be exposed and for what purpose. Further, it found troubling the fact that Facebook was not using the appropriate form of consent for its disclosure of personal information to developers. Given the potential sensitivity of users’ information, the office found that express opt-in consent should be sought in each case.



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In August 2009 Facebook issued a press release announcing that it would retrofit its platform in a manner that would prevent

applications from accessing information until the application developer obtains express consent for each category of personal information it wishes to access. This new permissions-based model will advise users that the developer wants access to specific categories of user information and the user will then be able to control the categories of information the application is permitted to access. Facebook also agreed to add links to statements by developers explaining how they will use the specific categories of personal information. This permissions-based model will permit a user to choose if he or she wants to share their friend’s data with a particular application.

This change will require marketers to meet new requirements when developing their own applications to promote brand awareness and drive traffic to their websites. Likewise, developers already using the Facebook platform will need to adapt existing popular applications to conform to Facebook’s privacy changes.

Personal information of non-users

The Office of the Privacy Commissioner asked Facebook to consider and implement measures to improve its invitation feature to address and protect the personal data and email addresses of non-users who are invited to join. It expressed concern that Facebook was collecting, using and retaining non-user information for the purpose of tracking user invitations and the success of referral systems.

Facebook has agreed to add appropriate language to its Statement of Rights and Responsibilities, informing users of their obligations to obtain the consent of non-users before providing their email addresses to Facebook. Facebook also confirmed that it will follow up on any complaints it receives from non-users in this regard. Finally, Facebook has reported that it does not retain non-users’ email addresses to track the success of its invitation feature and does not keep a specific list of such addresses for its own use.

The timeline

Facebook has indicated that it will take approximately 12 months to implement all the technological updates in response to the report. The changes should provide an interesting case study on the impact of greater privacy disclosure and permission-based marketing on advertising revenue. [WTR](#)