

FACEBOOK TERMS OF USE: THINGS YOU NEED TO KNOW

Category: Commercial Law, Media and OTT, Privacy Law, Infosec, and POPIA
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Introduction

Facebook. One does not need to define that 'word' if I may call it that. It's new speak. If you are not on it where have you been, and where are you going? So many of us are on the 'social utility that connects you with people around you'. Yet how many of us actually read those terms of use before we clicked 'accept'? Well, in this article I hope to demystify them, although not all but pertinent ones, and hopefully help you see what you may have gotten yourself into. Maybe like many other online facilities we simply clicked 'accept' out of sheer laziness to read the fine print. The devil is in the detail.

Key Issues

Let me start with the very first page of the Facebook Terms of Use[1]. Firstly Facebook is defined as 'a social utility that connects you with the people around you'. It is very crucial that you know that Facebook reserves the right at its sole discretion, to change, modify, add or delete portions of the Terms of Use at any time without further notice. Anyone with grey matter between their ears should already be worried by this. The responsibility to check whether these Terms of Use have been so modified or amended in any way lies with the users. So that means we are not going to get any notification in our news feeds from Facebook should there be such amendments. Continued use of Facebook means we accept and are bound by their Terms of Use. At this stage this probably does not mean much to you.

Setting up an account with Facebook requires one to click in a box signifying acceptance of the relevant Terms of Use. Whether or not one has read these Terms of Use is of no importance. Once you have clicked that you accept that you have read the Terms of Use and agree to be bound by them, a contract is formed. This is termed a "click-wrap" agreement which applies only in electronic agreements.

There are various implications to this, and I will endeavour to deal with the intricate issues as simply as possible.

Copyright Issues

Facebook allows its users to upload photographs, and even videos. Under its user conduct it is stated that "you represent, warrant and agree that no material of any kind submitted through your account or otherwise posted, transmitted, or shared by you on or through the Service will violate or infringe upon the rights of any third party, including copyright, trademark, privacy, publicity or other personal or proprietary rights;". Copyright laws offer protection over 'creative' works such as literature, music, painting, etc. These works cannot be used, especially with a commercial intent, without the express written consent of the owner of such copyright, who need not be the creator of such work. Facebook requires, every time a user uploads a picture, that such user 'indemnify' Facebook by confirming that the user is authorised to use / upload such picture. This indemnification is made by clicking in a box similar to the box one is required to click when accepting Terms of Use. This means you indemnify Facebook against any possible action that may be taken against it, and put yourself out to be liable

for this act.

So to all those who use celebrity pictures as their profile pictures this is food for thought. The Terms of Use continue to state that “you may not post, transmit, or share User Content on the Site or Service that you did not create or that you do not have permission to post”.

The following one should be of concern to the “creatives” on Facebook who post their originally created work. It states “By posting User Content to any part of the Site, you automatically grant, and you represent and warrant that you have the right to grant, to the Company an irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide licence (with the right to sub-licence) to use, copy, publicly perform, publicly display, reformat, translate, excerpt (in whole or in part) and distribute such User Content for any purpose, commercial, advertising, or otherwise, on or in connection with the Site or the promotion thereof, to prepare derivative works of, or incorporate into other works, such User Content, and to grant and authorize sub-licences of the foregoing”. As much as that is a very long sentence, it should concern you seeing words like licence and sub-licence. Basically this means that you, as the copyright owner, give Facebook the consent to use your work, change it, and even use it for commercial gain. That is food for thought. You can remove the content, but Facebook will retain archived copies of your User Content.

Privacy

This is probably the most crucial aspect of Facebook to many hence some Users make their profiles inaccessible to people who are not in their networks. Others don't use their real names or even their pictures. “By using Facebook, you are consenting to have your personal data transferred to and processed in the United States”. You should know that at the outset. “Your name, network names, and profile thumbnail will be available in search results across the Facebook network and those limited pieces of information may be made available to third party search engines”.

Not so long ago I was involved in a litigation matter where we could not locate the defendant in order to serve her with our summons. Even the tracer we appointed could not locate her. Finally I decided to ‘google’ her name. Perhaps I finished off with the step I should have started with, but nonetheless her name came up under a social network for professionals, LinkedIn. From there I gathered her place of employment, and called to confirm if it was the same person I was looking for. Needless to say I have obtained judgment against her now.

Now if the following does not send shivers down your spine nothing will. “We share your information with third parties only in limited circumstances where we believe such sharing is 1) reasonably necessary to offer the service, 2) legally required or, 3) permitted by you.” Notice how vague the first point is. What is “reasonably necessary to offer the service”? I don't know. I understand the “legally required” element. America post 911 saw the introduction of a piece of legislation called the USA Patriot Act of 2001, which is an acronym for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act. Do yourself a favour and check this Act out because it does not only impact on citizens and residents of the United States. Amongst many other things, this Act allows the US government to intercept communications, whether they are telephonic, electronic or written mail, where national security is at stake. The internet is known or suspected to be infested with people using it as a platform to plan their mischievous deeds. From sex offenders to terrorists. My opinion is that in instances where such acts are suspected US Authorities can obtain court orders and subpoenas ordering Facebook to disclose certain confidential information of its Users. Do not make the mistake of limiting this to the most serious of acts such as I have mentioned because the post 911 era has seen even the most petty acts being brought under suspicion.

Conclusion

The more we live apart and live different lifestyles, the more we remain the same. The more things change the more they remain the same. Technology is both a divider and a unifying tool for different people from different parts of the world. However this comes at a high price, a price that one needs to pay attention to because the devil is in the detail.

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[1] Disclaimer: Please note that Facebook regularly updates its Terms of Use. This article is based on the Terms of Use as they were updated on 07th June 2008. It is, therefore, your responsibility to regularly check these Terms of Use.