

# Dude, where's my privacy?

Terms of use fine print in social networking sites puts the onus mainly on users

**Rob Batty and Nicola McCarthy**

Social networking online is a growing phenomenon but lurking behind Facebook's promise to "help you connect and share" are pages of fine print that many users simply accept without reading.

Facebook, along with other sites such as Bebo and My Space, allow users to share a raft of information and photos with their online friends.

Earlier this month, disgruntled internet user Nic Fletcher was angered to find that a photo he had loaded on his profile was being used to promote a website promising to test IQ for \$3.

This dispute highlights the uneasy balance between sharing information and retaining control over that information. Is it a wake-up call for people who use social networking websites? Or is it a lot of fuss about nothing?

## Posting material

Facebook allows users to upload various material such as photos and videos and also to "tag" their friends in the photos. Whether it be an old high school photo or material about how someone is feeling, it is usually material that is of limited interest to the public at large.

Facebook also allows users to select the privacy settings for their photographs such as "friends," "friends of friends" or the general public.

## Who owns your face?

In New Zealand, you generally have few rights to control use of your name or appearance. However, you (or your family or friends) may have some ownership

rights under the law of copyright in photographs taken, including for those that reproduce your image.

The law of copyright would allow you to stop another person reproducing these photos without your permission.

Whenever a user posts material on a website, the terms of use of that website will dictate ownership and future use of that content. According to Facebook's terms of use, it does not claim ownership of the user's posted material.

However, when a user posts content on the site, the user also grants Facebook Inc a permanent worldwide licence to use and distribute that material, including the right to display the material in public for any purpose in connection with Facebook's services.

The licence will expire once the content has been removed, although Facebook Inc may retain archived copies of your material. While it is possible in theory for the site to use the image of a user in the promotion of the site, this seems unlikely to be a real concern in practice for most users.

## Hey! Is that me?

The real problem is third parties copying content posted on your social networking page for commercial use, especially those that also convey a message at odds with the individual's personal beliefs or practices.

For example, what if New Zealand Beef and Lamb used a photograph of a vegetarian to advertise beef without consent? This is the kind of problem that Mr Fletcher faced when he found that a photo loaded on his Facebook profile was being used to promote a commercial website.

Mr Fletcher can have no claim against Facebook as it is not Facebook that reproduced his image, and the site's terms and conditions do not govern subsequent use by third parties.

There are some limited forms of protection available for people in Mr Fletcher's position. If you own copyright in the photograph, you have rights to prevent others reproducing your photo.

If the person in the photograph is well known, they may have a claim under the Fair Trading Act, if the photograph falsely suggests that the person has endorsed a good or service.

There may also be a legal cause of action for invasion of privacy, if there is a reasonable expectation of privacy for the content of the photograph, although any such expectation may be lost once the photograph is uploaded on a public social networking sites.

## What's the big deal?

Some would argue the majority of users of social networking sites are unlikely to be concerned with controlling the public use of their image. "Generation exhibition" uses these services for the very purpose of creating a public (albeit, "aspirational") image of themselves.

However, this is clearly not the case where a user has sought to retain a degree of privacy in their content by deliberately limiting the privacy settings relating to the uploaded content.

Further, uploading content on Facebook does not give third parties the right to copy your content for other purposes.

The simple message for users, though, is to only post content that is intended to be published to a wide audience, or at least use the privacy settings to limit the extent of publication. Ultimately, once content is uploaded, the ability to control subsequent use is inevitably diminished and further use can in practice be very difficult to stop.

*Rob Batty is an associate in Simpson Grierson's intellectual property team. rob.batty@simpsongrierson.com Nicola McCarthy is a year two solicitor at Simpson Grierson. nicola.mccarthy@simpsongrierson.com*