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With Graph Search, Facebook Discovers Fresh Privacy Woes

By **Allison Grande**

Law360, New York (January 25, 2013, 9:53 PM ET) -- While Facebook Inc. has been quick to say its new Graph Search will reveal only already-public information, the company may still draw legal challenges from users and regulators who view the feature as an expanded and unauthorized use of member's personal data, experts say.

The social networking giant on Jan. 15 unveiled its new Graph Search feature, which will allow users to make new connections by scouring information that other members publicly post in order to reveal shared interests, recommended places, related photos and people who live and work nearby.

Learning from backlash over previous product launches, Facebook made clear in introducing Graph Search that the tool was built "with privacy in mind," stressing that users only can search for content that has been shared with them and that the tool "respects the privacy and audience of each piece of content on Facebook."

While the pledge not to divulge private information will most likely protect the company from breach of privacy claims, the tool's ability to make obscure data easily discoverable could land the company in hot water, according to attorneys.

"The dilemma faced by privacy enthusiasts is that Facebook is not reaching further into the private lives of its users; the data used by the Graph Search feature already exists in some form or another on Facebook and has been made available by the users themselves," Pryor Cashman LLP digital media group co-chair Robert J. deBrauwere told Law360 on Friday.

But the use of this information in a way the company's privacy policy didn't clearly lay out could give rise to claims by private litigants and regulators that the company deceived users about how their personal information would be handled.

"Facebook has indicated that Graph Search will respect the members' current privacy settings. However, ultimately that may not be sufficient," said Torin A. Dorros, a member of Michelman & Robinson LLP's advertising, marketing and media department. "It's unlikely that members contemplated having their 'likes', links, posts or photos — or those of their friends — used to allow others, including advertisers and ... identity thieves, to actively search for them."

Facebook already is facing heightened scrutiny from the Federal Trade Commission.

In August, it finalized a settlement with the regulator over its claims that the site misled users about the privacy and security of their personal information. Under the terms of that deal, the company is barred from misrepresenting the extent to which it uses, collects and

shares data for the next 20 years.

While the tool is currently only available to users chosen off of a waiting list to join a "very limited beta program," glimpses of how this information can be connected are already raising concerns that the tool exceeds the scope of how users intended their data to be presented.

One of these early users of Graph Search, Tom Scott, started a blog Wednesday displaying real searches that could create false or unwanted associations, such as "Current employers of people who like racism," "Mothers of Jews who like bacon," and "Married people who like prostitutes."

"Increasing the social search functions within social media networks, both via internal search and by enabling such searches by external search engines like Bing and Google, is becoming a new trend," Edwards Wildman Palmer LLP partner Alan Friel said. "There is both obvious utility to that, which some will love, and an intrusion into the personal sphere that some will find offensive."

One obvious benefit for Facebook is that repurposing the data allows the company to maximize its value and create new targeted advertising opportunities. This upside could lessen the blow of any backlash the company may face.

"Facebook has made it very clear that this is data mining at a whole new level of granularity and specificity," Snell & Wilmer LLP attorney Ryan Ricks said. "This demonstrates the immense value companies can derive from how people use services and products, and Facebook is doing a good job at monetizing that value."

Even if regulators or consumers choose to bring claims over this new feature, some experts believe Facebook is well-equipped to defend against them.

"While there may be lawsuits from Facebook users who claim they were unwitting participants and did not anticipate and thus authorize Facebook to have access to their personal information for such purposes, Facebook will likely be able to avoid liability in court because it allows users to control their privacy settings, enabling information they post to be made private and thus inaccessible to Graph Search," deBrauwere said.

The company's increasingly aggressive lobbying drive could also help its case, added Jonathan Rick, the president of Washington-based digital communications firm The Jonathan Rick Group. The company spent \$4 million trying to influence lawmakers and regulators on privacy and data security issues in 2012, including a record \$1.4 million in the fourth quarter alone, according to Rick.

"The takeaway for Silicon Valley is the importance of continuous lobbying," he said. "Engage regulators beforehand so that when you make a big announcement, no one with the power to sanction you is surprised."

Although Facebook might escape potential legal action, user backlash could still cause Facebook to alter its policies without formal legal action, as has been the case with other contested changes in the past, attorneys noted.

"To date, the generation that uses Facebook most is delighted to share its information, but Facebook must be wary of a backlash as its user base matures and becomes increasingly concerned about how its information is used and sold," said Jason Maloni, senior vice president for public relations firm Levick Strategic Communications. "A large movement could be formed by users who, in a mass demonstration of frustration, shift their behavior to send a signal to Facebook about its collective desires."

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