

# Bird & Bird

## Data Protection News Alert – March 2017

### The Spanish Supreme Court rules that posting someone's picture from an open Facebook public profile requires the user's express consent.

In a recent judgment the Spanish Supreme Court has ruled that posting photographs collected from a Facebook public profile in a newspaper requires the express consent of the user that owns such profile. Otherwise, publishing said photographs would imply an unlawful interference with the rights to Honor and Self-Image of the affected individual.

The involved parties were a regional Spanish newspaper, called La opinion de Zamora, and an individual whose photographs were collected from his Facebook profile by the aforementioned newspaper without obtaining the user's authorization. The user's Facebook profile could be accessed by any user as the owner of the profile had not protected his profile by using Facebook privacy settings and it was therefore open to the public.

This controversy was initially seen in a previous instance by a Spanish regional court in 2013. In said first trial, the newspaper was sanctioned for violating the user's right to privacy (due to the fact that his personal data, such as his photographs, had been processed and disclosed by the newspaper without his consent, breaching the Spanish data protection legislation) and his rights of honor and self-image (as his image had been used without his prior authorization, breaching the Spanish legislation related to honor).

Now, 4 years later, after the newspaper appealed both sanctions, the Spanish Supreme Court has modified the ruling made in the first trial.

On the one hand, the Spanish Supreme Court has confirmed that "The purpose pursued by an Internet's social network account opened to the public is to allow the communication of the owner with third parties, and the possibility that those third parties may access the contents of that account and interact with its owner, but not the publication of the owners image in the media".

According to the judgment, having a public profile does not imply that the profile user is automatically authorizing the publication or release of the information included in such profile in different media. Said publication or release would require collecting the user's prior express consent, as laid down by Article 2.2 of the Right to Honor and Self-Image Spanish Organic Act, which requires an unambiguous consent from the owner for the use of his images. In other words, the judgment makes clear that is lawful to access the pictures of an open profile as it is tacitly permitted by the owner, but the persons accessing the information are not entitled to publish or disclose the pictures without the express consent of such owner.

However, on the other hand, in relation to the breach of the individual's right to privacy, the Supreme Court partially admitted the newspaper appeal, because it deemed that all the information published in the article - such as the nickname, address and other personal and sensitive information published, like the medical condition of the individual's mother- was not disproportionate as it was relevant for the article and the publishing was covered by the protection of the Spanish constitutional right of information. Moreover,

according to the Supreme Court "the article suits the social behaviors and more specifically, the events chronicle". Therefore, even though the Supreme Court confirmed that the newspaper had violated the user's right to Honor and Self-Image, it did not understand that the privacy rights of the individual had been breached, as the right to information takes precedence over the right to privacy in this case. For this reason the Supreme Court reduced the compensation to the data subject to 15.000€.

As short, these are the judgment's most important conclusions:

- The Spanish legislation limits the use of the information published in social networks' open profiles: Even if a person allows the public to access the images and contents published in his open social network profile, such access does not imply an authorization to use the information accessed or publish it in different media without the express consent of the owner of that data.
- The right of information prevails over the right to the protection of the personal data: Although both rights have to be weighed for each specific situation, where the publisher of the personal data is a newspaper or information media and the information published is not considered disproportionate in order to make the information known to the public, the right of information prevails over the data subject's right to the protection of his personal data.

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