

Internet & New Media Industry Practice Team

To: Our Clients and Friends

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New York Judge Compels Access in a Personal Injury Suit to ‘Private’ Content on Facebook and MySpace

Users of social networking sites view their own sites as private spaces that are off limits to all but those to whom they grant access. Moreover, federal laws reinforce this attitude by limiting the liability of service providers and encouraging their ability to maintain the confidentiality of their users. This privacy model, however, runs counter to the current disclosure model in litigation.

In *Romano v. Steelcase Inc.*, 2010 NY Slip Op 20388, (N.Y. Sup. 2010), decided September 21, 2010, a state trial court judge confronted that privacy/disclosure conflict in the context of a personal injury case. In response to the defendant’s motion to compel discovery from the plaintiff, the court ordered the plaintiff to deliver a signed consent to the defendant for delivery to the two social networking sites, Facebook and MySpace, so that the defendant would thereby have access to the plaintiff’s current and historical pages and accounts, including ‘private’ postings and other information, from these sites. *Romano* should be yet another warning to individuals, businesses and providers that the disclosure and “litigation hold” rules governing the paper trail of written communications may apply with equal force to electronic data in cyberspace, including ‘private’ postings on social networking sites.

The plaintiff in *Romano* brought her personal injury lawsuit after falling off of an allegedly defective desk chair in 2003, which was manufactured by the defendant, Steelcase. Among other claims, Ms. Romano alleged that she had sustained “serious permanent personal injuries,” including herniated discs, restricted motion in her neck and back, and “pain and progressive deterioration with consequential loss of enjoyment of life.” Ms. Romano further claimed that, because of her injuries, she had been “largely confined to her house and bed” since the accident.

In seeking discovery of Ms. Romano’s private postings on social networking sites, Steelcase pointed to evidence from the public profiles on her Facebook and MySpace accounts, which showed inconsistencies with her claims. For example, Ms. Romano’s profile photo on Facebook showed her standing outside her house “smiling happily.” It also appeared from her publicly accessible content that

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Ms. Romano had recently taken a trip to Florida. Thus, Steelcase sought discovery from Ms. Romano, including full access to and copies of her “current and historical records/information on her Facebook and MySpace accounts.”

In granting Steelcase’s motion, the court first discussed the liberal discovery rules applicable to personal injury actions in New York: “Plaintiffs who place their physical condition in controversy, may not shield from disclosure material which is necessary to the defense of the action.” Based on Ms. Romano’s public profiles, the court determined that there was a reasonable likelihood that the private portions of her profiles contained further relevant evidence. The court explained that “[p]reventing Defendant from accessing to [sic] Plaintiff’s private postings on Facebook and MySpace would be in direct contravention to the liberal disclosure policy in New York State.” Also relying on a case from a federal district court in Colorado, as well as numerous Canadian decisions, all of which granted similar motions, the court stated that denying Steelcase’s request “would condone Plaintiff’s attempt to hide relevant information behind self-regulated privacy settings.”

Ms. Romano also argued that the release of her social networking information would violate her Fourth Amendment right to privacy. The court disagreed, holding that Ms. Romano had no reasonable expectation of privacy. The court relied, in part, on Second Circuit cases which found no expectation of privacy in connection with Internet postings and e-mails, as well as analogous cases from New Jersey, California and Ohio. In addition, the court observed that “neither Facebook nor MySpace guarantee complete privacy.” As the court noted, “when Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist. Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy.”

Interestingly, in *Crispin v. Christian Audigier Inc.*, 2010 U.S. Dist. Lexis 52832 (C.D. Calif. May 26, 2010), another court seemingly ruled to the contrary, namely that both private messages as well as comments visible to a restricted set of Facebook or MySpace users were protected under the Stored Communications Act. The Stored Communications Act (18 U.S.C. §§ 2701-11), enacted in 1986, was designed to protect the privacy of certain digital information and extends its protections to two specific types of network service providers - “electronic communication services” and “remote computing services.” The *Crispin* court found that both Facebook and MySpace were “electronic communication services” and that the content in question constituted “electronic storage” under the Act. Thus, the *Crispin* court ruled that the private and restricted content was protected by the Act and hence not discoverable. In *Crispin*, however, the defendants had served subpoenas on the social networking sites themselves. In contrast, the defendant in *Romano* sought relief directly from the plaintiff so that the court avoided any discussion of the Stored Communications Act by ordering Ms. Romano to deliver to Steelcase a properly executed consent, as required by Facebook and MySpace, so as to permit access to their records.

Internet users must be mindful of what they post on social networking websites. Moreover, providers of such sites would also be well-advised to review their privacy policies as well as their policies regarding the storage of electronic information. We would be pleased to discuss the impact of this matter on your organization. Feel free to contact a member of Bryan Cave’s [Internet & New Media Team](#).