

## Update: Social Network Privacy Settings Still Mean Nothing in New York

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October 4, 2010

This post is an update to our August 27th post where we reported that a District Court in California held that privacy settings on Facebook and MySpace do actually matter.

On September 21<sup>st</sup>, the Supreme Court of Suffolk County (New York) missed the opportunity to move social media jurisprudence forward, instead relying (incorrectly, in my opinion) on existing caselaw dealing with e-mail and internet postings in holding that information disclosed by a plaintiff on social networking sites, even information that is shielded by the sites' privacy settings, must be disclosed because the defendant's need for access to the information outweighs the plaintiff's privacy concerns. The case is *Romano v. Steelcase, Inc.*, 2006-2233, NYLJ 1202472439237, at \*1 (Sup. SU., Decided September 21, 2010).

In this case, Romano claimed that Steelcase caused her permanent injuries which had largely confined her to her house and bed. Romano's Facebook and MySpace profiles — her **public** profile pages, mind you — told a different story; showing her smiling happily in a photograph taken outside of her home. We've seen this script before, haven't we? When are plaintiffs going to wise up? Based on this evidence, Steelcase moved the court for an order granting it access to Romano's private portions of the social networking sites, including deleted pages, on the grounds that it believed the private portions would reveal evidence inconsistent with her claims.

In granting Steelcase's motion, the court noted that while New York courts had not ruled on this question previously, New York courts (and Canadian courts — relevance??) had ruled on whether an individual has a reasonable expectation of privacy under the Fourth Amendment for material included in e-mails or internet postings. Because these cases found no reasonable expectation of privacy, the Suffolk County court declined to find one under these new facts. In support of its decision, the court cited the terms and conditions of both Facebook and MySpace, the former of which, reads in pertinent part, "...[p]lease keep in mind that if you disclose personal information in your profile or when posting comments, messages, photos, videos, Marketplace listings or other items, this information may become publicly available."

In the author's view, the Suffolk County court has completely booted this one. First, the court failed to grasp the differences between internet postings (which are made without any privacy controls) and e-mails (which can be analogized to letters) and postings on social media sites made behind a privacy shield. The former is akin to erecting a billboard on the side of a highway and publishing an article in a newspaper, while the latter is akin to placing a photo in a safe and only giving your friends the combination. Second, the court seems to have read only a portion of the terms and conditions, and failed to recognize that a user can invoke the privacy settings to **prevent** his material from "becom[ing] publicly available." Finally, the court felt the need to ignore the fact that Steelcase had already obtained **some** evidence that contradicted plaintiff's case, and instead, in typical, discovery-happy, American fashion, felt that Steelcase necessarily needed access to **the rest** of this evidence, without articulating a coherent basis as to why.

And so, we are left to wait for the rest of the country to catch up to California...as usual.