

Financial Research Service's Distribution of Copyrighted Recording of Earnings Call Was Fair Use, Says Second Circuit

In a significant decision addressing copyright fair use, the Second Circuit held that a financial research service's dissemination of a copyrighted recording of a company's earnings call with investors was fair use. In addition to its expansive view of fair use, the court's decision is noteworthy in that it affirmed the district court's *sua sponte* grant of summary judgment before the plaintiff had the opportunity to take any discovery.

Swatch is a foreign publicly held company that is traded on a foreign stock exchange. After releasing its 2010 earnings report, Swatch held an invitation-only conference call with a select group of financial analysts. Swatch paid a vendor to record the call. Bloomberg, a news organization that also provides a financial research subscription service, obtained an unauthorized copy of the recording and made it available through its service. After Bloomberg refused to take the recording down, Swatch sued Bloomberg for copyright infringement.

After issue was joined, but before any discovery had been taken, the district court *sua sponte* ordered the parties to brief whether there were issues of material fact regarding Bloomberg's fair use defense. Concluding that there were none, the court granted summary judgment in Bloomberg's favor. This week, the Second Circuit affirmed.

The Second Circuit agreed with the district court that the first statutory fair use factor—"the purpose and character of the use"—favored Bloomberg. The court rejected Swatch's argument that it needed discovery regarding, among other things, whether Bloomberg's service was truly "news" reporting and whether Bloomberg acted in good faith. Acknowledging that Bloomberg was a "commercial enterprise," that its "subscription service [is] available to paying users" and that Bloomberg had used "clandestine methods" to obtain access to the copyrighted work, the court held that, regardless of whether Bloomberg's service is properly characterized as "news" or something else, Bloomberg's dissemination of the earnings call furthered an important public purpose, namely, making "newsworthy financial information" about Swatch available to the public. Although the use was not transformative, there was "informational value" in providing the exact recording to the public, so that investors could hear not only what was said but *how* it was said. In other words, the recording itself was financial news. As for the allegation that Bloomberg had accessed the material without authorization, the court held that the dissemination of such information "would be crippled if the news media and similar organizations were limited to authorized sources of information."

As for the second factor—"the nature of the copyrighted work"—the court held that Swatch's rights in the earnings call recording were "thin" at best, given the "manifestly factual character" of the recording. The court gave little weight to the fact that the recording was technically unpublished, since Swatch was not deprived of the ability to control the first public appearance of its expression. It had, after all, invited hundreds of financial analysts to listen to the call.

The third factor—“the amount and substantiality of the portion used”—was neutral. Although Bloomberg used the entire recording, such use “was reasonable in light of its purpose of disseminating important financial information to American investors and analysts” and because “[t]he recording has independent informational value over and above the value of a written transcript or article, regardless of how many Bloomberg subscribers took advantage of that value.”

The fourth factor—“the effect of the use upon the potential market for or value of the copyrighted work”—favored Bloomberg. Swatch was not deprived of any licensing royalties, only the ability to control precisely who heard the call, and “Bloomberg simply widened the audience of the call, which is consistent with Swatch Group’s initial purpose.” Given the important public nature of the information in the recording, the Second Circuit gave little weight to any impairment in Swatch’s ability to control the news.

Balancing all four factors, the Second Circuit concluded that Bloomberg’s use of the recording was fair use. By reaching this result and affirming the grant of summary judgment without giving the plaintiff the opportunity to take discovery, the court indicated that it would not permit copyright litigation to be used to impinge on the “deliver[y of] newsworthy financial information to American investors and analysts”—a “kind of activity, whose protection lies at the core of the First Amendment.” Whether the court’s embracing view of fair use will be applied to situations outside of newsgathering and the media only time can tell.

The case is *Swatch Group Mgmt. Servs. Ltd. v. Bloomberg L.P.*, No. 12-cv-2412, ___ F.3d ___, 2014 WL 274407, 2014 U.S. App. LEXIS 1528 (2d Cir. Jan. 27, 2014). The slip opinion is available [here](#).

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