

SECOND CIRCUIT REVIEW

Expert Analysis

Fair Use Found in Distribution of Investor Conference Call Recording

This month, we discuss *Swatch Group Management Services Ltd. v. Bloomberg L.P.*,¹ in which the U.S. Court of Appeals for the Second Circuit examined the scope of copyright protection accorded a sound recording of a public company's conference call with investment analysts. More specifically, the court considered whether Bloomberg L.P. (Bloomberg), a financial news and data reporting service that obtained an unauthorized copy of that sound recording and disseminated it to its paying subscribers, could avoid liability for copyright infringement based on the affirmative defense of "fair use."² In an opinion by Chief Judge Robert A. Katzmann, joined by Judge Amalya L. Kearse and Judge Richard C. Wesley, the court held that Bloomberg's distribution qualified as fair use, notwithstanding its commercial nature, because it served the important public purpose of ensuring widespread dissemination of financial information.

Background

On Feb. 8, 2011, The Swatch Group Ltd. released its 2010 earnings report



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containing relevant financial information and a narrative overview of the company's financial performance during 2010. Swatch Group, a Swiss corporation whose shares are publicly traded on the Swiss Stock Exchange, filed its earnings report with the Exchange pursuant to Swiss securities laws and subsequently posted the report in multiple languages on its website.

After publishing the earnings report, Swatch Group held an invitation-only conference call with 132 financial analysts who were registered with its Investor Relations Department. Swatch Group's Chief Executive Officer, Chief Financial Officer, and three other senior executives participated in the call to provide commentary about the company's financial performance and answer questions from analysts. Neither Bloomberg nor any other financial news organization was invited to participate in the call.

At Swatch Group's request, an audio conferencing vendor recorded the call as it occurred. An operator affiliated

with the vendor advised participants that Swatch Group was recording the call, and that it "must not be recorded for publication or broadcast."

Shortly after the call ended, Bloomberg obtained a sound recording and written transcript of the call from a "third party transcript service,"³ both of which it made available online, without alteration or commentary, to its financial research service subscribers. On Feb. 10, 2011, Swatch Group, upon discovering that the recording and transcript had been made available to Bloomberg subscribers, sent Bloomberg a cease-and-desist letter demanding that they be removed, but Bloomberg refused.

The court held that Bloomberg's unauthorized distribution of a sound recording of a public company's conference call qualified as fair use.

On Feb. 14, 2011, the Swatch Group Management Services Ltd. (Swatch), an American subsidiary of Swatch Group, filed a complaint against Bloomberg in the U.S. District Court for the Southern District of New York, claiming copyright infringement of its copyright in the sound recording. Two weeks later, Swatch filed an application with the U.S. Copyright Office to register a copyright

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in the sound recording of the earnings call. Following some back and forth with the Copyright Office, Swatch agreed to narrow the copyright's scope to cover only statements made by Swatch Group executives, and not those made by the operator or analysts. On April 27, 2011, the Copyright Office issued a registration to Swatch.

Prior Proceedings

In its Second Amended Complaint, filed on May 10, 2011, Swatch alleged that Bloomberg infringed its exclusive right to "reproduce" the sound recording of the earnings call and to "distribute copies or phonorecords of the work to the public"⁴ when it recorded the call and made it available to its subscribers.⁵ Swatch did not challenge Bloomberg's distribution of the written transcript of the call.⁶

Bloomberg moved to dismiss the Second Amended Complaint under Rule 12(b)(6) for failure to state a claim, arguing that the earnings call was not subject to the protection of the Copyright Act and that its distribution of the sound recording constituted fair use. U.S. District Judge Alvin K. Hellerstein of the Southern District of New York denied that motion, finding that the recording of the earnings call was "fixed" in a tangible medium of expression sufficient to warrant copyright protection, but declined to address the "fact-intensive" questions implicated by Bloomberg's fair use defense at the motion to dismiss stage.⁷ Bloomberg then answered the Second Amended Complaint, alleging fair use as an affirmative defense.

At a conference held on Sept. 16, 2011, the district court directed Swatch to file a motion for judgment on the pleadings. Swatch made that motion on Oct. 21, 2011, and oral argument was held on Dec. 12, 2011. At argument, the district court denied Swatch's motion on the grounds that "defendant's use qualifies as fair use."

It issued a summary order granting judgment to Bloomberg and directing Swatch to submit a brief "regarding the existence of any triable issues of material fact with respect to [Bloomberg's] fair use affirmative defense." Swatch briefed the issue as directed.

On May 17, 2012, the district court granted summary judgment to Bloomberg sua sponte on the grounds that Bloomberg's copying and distribution of the recording qualifies as fair use.⁸ The court concluded that, "at best," Swatch held a "thin" copyright in the recording of the earnings call given that its objective was to present Swatch Group's financial performance in 2010 to a select group of analysts, the basis for which was purely factual and publicly available. The court further reasoned that, while Bloomberg "lacked good faith" in acquiring and distributing the recording, the purpose and character of that use "advanced the public interest of furthering full, prompt and accurate dissemination of business and financial news."⁹ The clerk of the district court entered judgment for Bloomberg the next day.

Swatch filed a timely notice of appeal from the judgment on June 14, 2012. Bloomberg filed a notice of cross-appeal on June 28, 2012, seeking, *inter alia*, a declaration that Swatch's copyright was invalid, which Swatch moved to dismiss on July 24, 2012.

Second Circuit's Decision

Reviewing the district court's grant of summary judgment *de novo*, the court considered each of the following statutory fair use factors to determine whether Bloomberg's use of the sound recording was fair: (1) the purpose and character of the use, including whether the use was of a commercial nature for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use

upon the potential market for or value of the copyrighted work.¹⁰

The court began its analysis by considering the first statutory factor. It found that Bloomberg's purpose in obtaining and disseminating the recording—like that of analogous news and data reporting services—was to make financial information about Swatch Group available to investors and analysts, a purpose it deemed to be "of critical importance to American securities markets." Indeed, the court noted that the Securities and Exchange Commission (SEC) mandates the disclosure of such financial information to the public under Regulation FD.¹¹

The court acknowledged that Bloomberg's use was commercial in nature, but assigned that consideration "reduced weight," given the necessarily commercial nature of newspapers and other news-reporting services and the fact that Bloomberg's use no more than trivially affected the value of Swatch Group's earnings call. It also assigned little weight to the non-transformative nature of Bloomberg's use, observing that in the context of news-reporting and analogous activities, the need to convey information to the public accurately may make it desirable for a defendant to reproduce an original work rather than transform it.¹² Thus, because the important public purpose underlying Bloomberg's use outweighed its otherwise unauthorized and non-transformative nature, the court concluded that the first statutory factor favored fair use.

The court next assessed the nature of the copyrighted sound recording. Swatch argued that this factor counseled against fair use because it had not yet "published" a fixed or tangible recording of the call when Bloomberg made its recording available. While the court agreed that Swatch's recording was not technically "published" within the Copyright Act's technical definition of that term, it noted that the fair use analysis entitled it to employ a broader definition of publication. Accordingly, the court found it relevant that Swatch Group

had invited hundreds of participants to join the call, and therefore was not deprived of its ability to “control the first public appearance of [the] expression, including when, where, and in what form it appeared.” The court further agreed with the district court that Swatch’s copyright in the recording was “at best...thin” because the earnings call was entirely factual in nature, and its sole purpose was to convey financial information about the company to investors and analysts.¹³ As a result, the court concluded that the second factor counseled in favor of fair use as well.

With respect to the third statutory factor, which asks whether the quantity and value of the materials used are reasonable in relation to the purpose of the use, it was undisputed that Bloomberg had distributed the sound recording in its entirety. While use of an entire copyrighted work generally counsels against fair use, the court found that Bloomberg’s use was reasonable in light of the important public purpose it served, particularly given the “independent informational value” of dissemination of the recording of the earnings call in its entirety.¹⁴ As a result, it found the third factor neutral.

Finally, the court considered the effect of Bloomberg’s use on the potential market for or value of the sound recording. To do so, it balanced the benefit to the public if the use is permitted against the personal gain to the copyright owner if the use is denied.¹⁵ Since Swatch did not seek to profit from the publication of the earnings call, the court concluded that any potential market, as yet untapped by Swatch, for recordings of earnings calls would need to be defined too narrowly to merit recognition under the fourth statutory factor. For example, Swatch anticipated no potential licensing royalties when it held the earnings call; thus, the only purpose underlying the call was to disseminate the financial information conveyed, a purpose that

only was furthered by Bloomberg’s dissemination of the recording to a wider audience.¹⁶ Accordingly, the court found that the fourth factor counseled in favor of fair use.

The decision in ‘Swatch Group’ is noteworthy for its holding that the unauthorized distribution of a copyrighted recording of an investor conference call constitutes fair use...The decision recognizes the independent informational value in the widespread dissemination of a corporation’s financial information to the investing public.

Weighing these factors together in light of the purposes of Swatch’s copyright, the court concluded that Bloomberg’s dissemination of the sound recording qualified as fair use and affirmed the district court’s grant of summary judgment to Bloomberg on those grounds. It further granted Swatch’s motion to dismiss Bloomberg’s cross-appeal.¹⁷ Notably, the court declined to address Bloomberg’s challenge to the district court’s dismissal of its counterclaim seeking a declaration that Swatch’s copyright is invalid, because the May 17, 2012, opinion and order incorporated into the judgment from which Bloomberg cross-appealed did not resolve that counterclaim.¹⁸

Implications

The decision in *Swatch Group* is noteworthy for its holding that the unauthorized distribution of a copyrighted recording of an investor conference call constitutes fair use. Under the court’s reasoning, that is true even where a news reporting service uses the copyrighted material for a commercial purpose, and where it does not transform the material through analysis or editorial com-

mentary. The decision thus recognizes the independent informational value in the widespread dissemination of a corporation’s financial information to the investing public.

However, the Swatch Group decision is equally notable for what it did not hold. By declining to reach Bloomberg’s cross-appeal on jurisdictional grounds, the Second Circuit left open the question of whether the recording of a corporate conference call with analysts is entitled to copyright protection. In so doing, it avoided ruling on an issue with potentially widespread implications for copyright law and the news reporting industry.

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1. 742 F.3d 17 (2d Cir. 2014) (*Swatch Group*).
2. 17 U.S.C. §107.
3. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P. (Swatch II)*, 861 F.Supp.2d 336, 338 (S.D.N.Y. 2012).
4. 17 U.S.C. §106(1) (3).
5. 742 F.3d at 23.
6. *Id.*
7. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P. (Swatch I)*, 808 F.Supp.2d 634, 637, 641 (S.D.N.Y. 2011).
8. *Swatch II*, 861 F.Supp.2d at 343.
9. *Id.* at 340–42.
10. 742 F.3d at 25 (citing 17 U.S.C. §107).
11. *Id.* at 26 (citing Regulation FD, 17 C.F.R. §243.100). Swatch Group argued that the court’s consideration of Regulation FD was misplaced, given that it expressly exempted “foreign private issuer[s]” like Swatch Group that are incorporated or organized under the laws of a foreign country. *Id.* at 27. The court disagreed, clarifying that Regulation FD provided limited additional support for a proposition that was otherwise clear, namely, that American investors and analysts have an interest in “obtaining important financial information about companies whose securities are traded in American markets.” *Id.*
12. *Id.* at 27–28.
13. *Id.* at 31 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985)) (internal quotation marks omitted).
14. *Id.* at 33.
15. *Id.* at 34 (quoting *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006)).
16. *Id.* at 35.
17. *Id.* at 36.
18. *Id.* (citing Federal Rule of Appellate Procedure 3(c)(1)(B)).