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Newsworthiness Prevails in Second Circuit Fair Use Analysis

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On January 27, 2014, the Second Circuit held in *Swatch v. Bloomberg*[1] that the unauthorized publication of a surreptitiously obtained recording of an earnings call was fair use in view of the factual, newsworthy nature of the information and its lack of independent market value. The case presented an interesting issue as to the copyrightability of the plaintiff's recording of the call (an issue the Second Circuit declined to address on appeal), but we focus here on the court's treatment of the fair use defense. The decision indicates the force of newsworthiness as a rationale for fair use, even where the use lacks transformative value, in circumstances where the thinness of the work's copyright protection, coupled with the absence of exploitation of the work by the plaintiff through licensing or otherwise, argues for according greater weight to the public interest in timely financial news than to the plaintiff's right to control dissemination of the work.

The ruling, which affirmed a grant of summary judgment for Bloomberg, L.P. (Bloomberg), should not be read as a broad validation of the public interest in access to information as a decisive rationale for a finding of fair use. The court of appeals was careful to distinguish prior cases, involving more expressive financial news products, in which it rejected similar fair use arguments. However, the ruling may bode well for Google, whose fair use defense of its Google Books project, now on appeal to the Second Circuit, relies in part on the public interest served by its facilitation of access to copyrighted books by means of a searchable database.

Background

On February 8, 2011, Swatch Group Management Services (Swatch), a subsidiary of Swatch Group, Ltd., the Swiss watch distributor, released its 2010 earnings report, detailing the company's financial performance during the prior year. Later that day, Swatch held a conference call with 132 selected analysts from around the world in which Swatch executives discussed the facts contained in the earnings report. This kind of financial information typically is of great importance to the American securities markets. Indeed, the Securities and Exchange Commission (SEC) requires that when American companies disclose this kind of material, nonpublic information, they make it available to the public immediately.[2] Foreign corporations like Swatch, however, are expressly exempted from these disclosure

requirements. Thus, when Swatch released its 2010 earnings in February 2011, it did not invite any news outlets to join the call.

For its records, Swatch authorized an audio conferencing vendor to record the entire earnings call.[3] An operator affiliated with the vendor stated on the call that it "must not be recorded for publication or broadcast."[4] Yet Bloomberg tapped into the call, recorded it, and made a transcript from the recording. It then made the complete transcript and recording available to its subscribers.

After Bloomberg refused to take down the recording, Swatch sued Bloomberg in the Southern District of New York for infringement of its copyright in the sound recording of the earnings call. The Copyright Office subsequently issued a registration certificate covering the statements by Swatch executives during the call. Bloomberg moved to dismiss Swatch's Second Amended Complaint, arguing that Swatch's recording was not copyrightable and that its publication of its own recording was, in any event, fair use.[5] The court denied the motion, holding that Swatch's recording was a copyrightable fixation of a live transmission under section 101 of the Copyright Act and that fair use could not be resolved on a Rule 12(b)(6) motion.[6] Two weeks later, however, the court directed Swatch to move for judgment on the pleadings. The court denied Swatch's motion and issued a summary order indicating it was considering granting judgment in Bloomberg's favor and inviting Swatch to identify triable issues of material fact with respect to Bloomberg's fair use defense.[7] Swatch argued that it had not yet been able to obtain relevant discovery, but on May 18, 2012, the court (Judge Alvin K. Hellerstein) *sua sponte* granted summary judgment in Bloomberg's favor.[8]

The District Court's Ruling

The court analyzed each of the statutory fair use factors and concluded that Bloomberg was entitled to summary judgment on its fair use defense. The court found that the first factor – the "purpose and character of the use" – favored Bloomberg because the company's work as a publisher of business and financial information "serves an important public interest."[9] Even though Swatch was expressly exempted from the requirement to publicly disclose material, nonpublic information,[10] the court found that Bloomberg's use "advanced the public interest of furthering full, prompt and accurate dissemination of business and financial news."[11]

The court found that the second factor – "the nature of the copyrighted work" – also favored fair use because Swatch's copyright was "at best … 'thin.'" The court opined that little of the content of the call was "consistent with the core and purpose of copyright protection,"[12] and it noted that Swatch had not been deprived of exclusive control over the first dissemination of its expression, which had occurred prior to the Bloomberg publication.[13]

With respect to the amount and substantiality of the portion used, the court found that although Bloomberg had copied the entire recording of the conference call, the public interest in the information contained in the recording was still "better served by the dissemination of that information in its entirety."[14]

Finally, as for the fourth factor, the court found nothing in the record to indicate any possible adverse market effect from Bloomberg's use of the limited amount of original expression of Swatch executives, again noting the public benefit from dissemination of the call.[15]

Swatch timely appealed, and Bloomberg filed a notice of cross-appeal, which Swatch moved to dismiss.

The Second Circuit Affirms

The Second Circuit affirmed in an opinion by Chief Judge Robert A. Katzmann that generally tracked the district court's reasoning.

Nature and purpose of the use. In addressing the first factor, the court considered and rejected several objections Swatch raised to the district court's analysis. The first argument was that the "newsworthiness" defense failed because the recording constituted the delivery of data, not news.[16] The court explained, however, that even though Bloomberg provides both news and data, the distinction was of no moment since its purpose "was to make important financial information about the Swatch Group available to American investors and

analysts."[17] The court found that using copyrighted material to serve this public purpose was "very closely analogous to news reporting,"[18] a traditional category of fair use recognized in the preamble to section 107.[19] Fulfilling this "important public purpose" overcame "the countervailing weight [the court] would otherwise give to Bloomberg's clandestine methods and the commercial, nontransformative nature of its use."[20]

Swatch argued that giving weight to the public's interest in the financial information disclosed in the recording would allow news organizations to enforce SEC regulations on exempted foreign issuers. The court explained, however, that the SEC regulation merely provided support for the proposition that this sort of information is important to American securities markets[21] and that "where a financial research service obtains and disseminates important financial information about a foreign company in order to make that information available to American investors and analysts," that purpose supports a finding of fair use.[22]

The court gave little weight to the commercial nature of Bloomberg's use, finding the link between Bloomberg's commercial gain and its copying "attenuated."[23] The recording only "trivially" affected the value of Bloomberg's service.[24] Moreover, despite Bloomberg's lack of good faith, its purpose – to "deliver newsworthy financial information to American investors and analysts"[25] – nevertheless supported a finding of fair use.[26]

As for the lack of transformative value, the court explained that although a transformative use "generally is more likely to qualify as fair use,"[27] it is not absolutely necessary. Indeed, "[i]n the context of news reporting and analogous activities … the need to convey information to the public accurately may in some instances make it desirable and consonant with copyright law for a defendant to faithfully reproduce an original work rather than transform it."[28] By disseminating the entire recording without alteration, Bloomberg "was able to convey with precision not only *what* Swatch Group's executives said, but also *how* they said it."[29]

Finally, the court rejected Swatch's reliance on three prior Second Circuit cases in which the court rejected a "newsworthiness" defense to claimed infringement of a financial publication: *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc*. *(Nihon Keizai Shimbun)*,[30] *Wainwright Securities, Inc. v. Wall Street Transcript Corp*. *(Wainwright)*,[31] and *Financial Information, Inc. v. Moody's Investors Service, Inc. (FII)*.[32] In *Nihon Keizai Shimbun*, the defendant translated Japanese business articles into English and published abstracts of the articles using the translated information.[33] In *Wainwright*, a news publication republished the conclusions from the plaintiff's financial reports.[34] And in *FII,* a ratings agency lifted information about municipal bond redemptions from a competing financial publisher's reports.[35] In that decision, the court stated that excusing an infringer simply because the public benefited from exposure to the information would "distort" proper fair use analysis.[36]

The court of appeals distinguished these precedents on the ground that in those cases the defendants had "appropriated works in which the original copyright owner had *transformed* raw financial information by compiling it from multiple sources or by mixing it with their own commentary and analysis."[37] In contrast, the court observed, the statements of the Swatch executives were "themselves pieces of financial information,"[38] a distinction the court found "significant."[39]

The court held that the first factor favored Bloomberg.

Nature of the copyrighted work. With respect to factor two, the court was not persuaded by Swatch's argument that the district court failed to account properly for the fact that Swatch's recording was technically unpublished.[40] The court reasoned that although the call did not meet the statutory definition of "publication,"[41] Swatch nevertheless had been able to "control the first public appearance of [its] expression," including "when, where, and in what form" it appeared.[42] Given this, and the public interest served by Bloomberg's publication, the court found that factor two favored fair use.[43]

Amount and substantiality of the portion used. Turning to factor three, the court found Bloomberg's use of the entire recording reasonable "in light of its purpose of disseminating important financial information to American investors and analysts."[44] The recording had "independent informational value over and above the value of a written transcript or article,"[45] as "a speaker's demeanor, tone, and cadence can often elucidate his or her true beliefs far beyond what a stale transcript or summary can show."[46] In the court's view, this justified use of the recording in its entirety. The court concluded that the third factor was neutral.[47]

Market harm. As to the fourth factor, Swatch argued that it was wrongfully denied discovery into the effect on the potential market for audio recordings of earnings calls conducted by foreign companies, even though it had not itself intended to enter such a market or even to seek to profit from publication of the recording.[48] The court held that while the loss of a potential market can be cognizable under the fourth fair use factor, the potential market here was defined so narrowly that it "begins to partake of circular reasoning."[49] The court stated that a *hypothesized* market for voice recordings is not a market that should be taken into account in assessing potential market harm. Instead, only "traditional, reasonable, or likely to be developed" markets are cognizable under factor four.[50] Here, the potential private gain of the copyright owner was "far outweighed by the public interest in the dissemination of important financial information."[51]

Overall fair use assessment. The court concluded that copyright law was better served by allowing Bloomberg's use than by preventing it. The court was persuaded that Bloomberg served an important public purpose of disseminating "important financial information"[52] to American investors; that using the entire recording was "reasonably necessary"[53] to fulfill Bloomberg's purpose; that although the recording was technically unpublished, Swatch was able to control the "first dissemination of its executives' expression to the public";[54] that the "thoroughly factual" nature of the underlying work weighed against affording it protection;[55] and that its holding would not alter the future value of, or incentive to make, such earnings calls.[56]

Discussion

Swatch illustrates the effectiveness of a "newsworthiness" defense to copyright infringement in appropriate circumstances, namely, where the underlying work is primarily factual (*i.e.*, contains minimal original expression); is of legitimate public interest; and has no current or likely market value to the plaintiff. The Second Circuit's ruling is reminiscent of its 2011 decision in *Barclays Capital Inc. v. Theflyonthewall.com (Barclays Capital)*[57] (which it cites) where, in addressing "hot news" misappropriation claims based on systematic unauthorized republication of "headlines" from equity research reports, the court held that in issuing equity research recommendations the plaintiff firms were "making news" and did not have a right to "control who breaks that news and how."[58] That is, the court characterized the defendant's republication of the headlines as dissemination of the newsworthy fact that the firms had made the recommendations rather than as misappropriation of the firms' work product (the underlying recommendations). The court did not, however, disturb the district court's determination that verbatim and near-verbatim copying of portions of the equity research reports constituted copyright infringement (which was not appealed).

As the Second Circuit's prior decisions in *Nihon Keizai Shimbun, Wainwright*, and *FII* indicate, public interest in the information contained in the plaintiff's work does not by itself outweigh the interest in enforcing copyright rights. As the court explained in *FII*, such a rule would "distort" fair use analysis.[59] Consistent with these prior rulings, in *Swatch* the court adhered to a line drawn by the Supreme Court nearly thirty years ago in *Harper & Row Publishers, Inc. v. Nation Enters (Harper & Row)*.[60] There, the Supreme Court – citing *Wainwright* – rejected defendant The Nation's argument that the newsworthiness of President Ford's forthcoming memoir made the magazine's verbatim quoting of key portions of the manuscript fair use. The Nation argued that "the public's interest in learning this news as fast as possible outweigh[ed] the right of the author to control its first publication."[61] But the Court opined that this theory "would expand fair use to effectively destroy any expectation of copyright protection in the work of a public figure."[62] The Nation

"went beyond simply reporting uncopyrightable information" and sought to exploit "a noted figure's copyrighted expression."[63] The "promise of copyright," the Court observed, "would be an empty one if it could be avoided merely by dubbing the infringement a fair use 'news report' of the book."[64] The Court also pointed out that "[a]ny copyright infringer may claim to benefit the public by increasing public access to the copyrighted work."[65]

The Court in *Harper & Row* thus made clear the limited extent to which newsworthiness trumps copyright enforcement as a means of promoting the spread of knowledge. In this regard, the Court cautioned that "[i]n our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression" by "supply[ing] the economic incentive to create and disseminate ideas."[66]

The extent to which the plaintiff seeks to protect copyrightable expression, as opposed to factual information, is a key factor in this line of cases. In *Harper & Row*, for example, the Court pointed out that the issue was "not what constitutes 'news,' but whether a claim of news reporting is a valid fair use defense to an infringement of *copyrightable expression*."[67] Similarly, in *Wainwright* the Second Circuit noted that "the essence or purpose of legitimate journalism is the reporting of objective facts or developments, not the appropriation of the form of expression used by the news source."[68] And in *Barclays Capital*, the defendant was permitted to continue republishing equity research "headlines" but barred from the more extensive copying the district court had found to be infringing.

In the same vein, the Second Circuit in *Swatch* placed great weight on the primarily nonexpressive, factual nature and newsworthy value of Swatch's earnings call, which, coupled with the lack of a market for audio recordings of earnings calls and the public interest in the information, led the court to find Bloomberg's copying to be fair use. The court underscored, however – as it and the Supreme Court had before – that newsworthiness alone will not necessarily carry the day when the defendant's conduct undermines the plaintiff's exclusive right to control its copyrightable expression.

1. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P*. No. 12-2412-cv (2d Cir. Jan. 27, 2014) *("Swatch III")*.
2. *See* Regulation FD, 17 CFR § 243.100.
3. *Swatch III*, No. 12-2412-cv, at *2.
4. *Id*.
5. *Id*. at *9.
6. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P*., 808 F. Supp. 2d 634, 638-39, 641 (S.D.N.Y. 2011) *("Swatch I")*.
7. *Swatch III*, No. 12-2412-cv, at *10 (citing J.A. 584).
8. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 861 F. Supp. 2d 336 (S.D.N.Y. 2012) *("Swatch II")*.
9. *Swatch II*, 861 F. Supp. 2d at 340.
10. *See* Regulation FD, 17 CFR § 243.101(b), 230.405 ("An 'issuer' subject to this regulation is one that has a class of securities registered under Section 12 of the Securities Exchange Act of 1934 . . . but not including any . . . foreign private issuer[s]" like Swatch Group that are "incorporated or organized under the laws of [a] foreign country").
11. *See Swatch II*, 861 F. Supp. 2d at 341.
12. *Id*.
13. *Id*.
14. *Id*. at 342.
15. *Id*.
16. *Swatch III*, No. 12-2412-cv, at *16-17 (internal citations omitted).
17. *Id*. at *18.
18. *Id*.
19. *See* 17 U.S.C. § 107 (stating that "the fair use of a copyrighted work, including such use … as … news reporting … is not an infringement of copyright.").
20. *Swatch III*, No. 12-2412-cv, at *19.
21. *Id*. at *20.
22. *Id*. at *20-21.
23. *Swatch III*, No. 12-2412-cv, at *21 (citing *Am. Geophysical Union v. Texaco Inc*., 60 F.3d 913, 922 (2d Cir. 1994).
24. *Id*.
25. *Id*. at *23.
26. *Id*. at *22-23, 27-28.
27. *Id*. at *23.
28. *Id*. at *24.
29. *Id* (emphasis in original).

30. 166 F.3d 65 (2d Cir. 1999).
31. 558 F.2d 91 (2d Cir. 1977).
32. 751 F.2d 501 (2d Cir. 1984).
33. *Nihon Keizai Shimbun*, 166 F.3d at 69.
34. *Wainwright*, 558 F.2d at 94.
35. *FII*, 751 F.2d at 502-03.
36. *Id*. at 509.
37. *Swatch III*, No. 12-2412-cv, at *26 (emphasis added).
38. *Id*. at *27.
39. *Id*.
40. *Id*. at *29-30.
41. *See* 17 U.S.C. § 101.
42. *Swatch III*, No. 12-2412-cv, at *30 (quoting *Harper & Row*, 471 U.S. 539, 564 (1985)).
43. *Id*. at *33.
44. *Id*.at *37.
45. *Id*.
46. *Id*. at *24.
47. *Id*. at *37-38.
48. *Id*. at *39.
49. *Id*. at *40.
50. *Id*. (quoting *Am. Geophysical Union*, 60 F.3d at 930-31).
51. *Id*. at *42.
52. *Id*. at *43.
53. *Id*.
54. *Id*.
55. *Id*.
56. *Id*. at *43-44.
57. 650 F.3d 876 (2d Cir. 2011).
58. *Id*. at 907.
59. *FII*, 751 F.2d at 509.
60. 471 U.S. 539, 569 (1985).
61. *Id*. at 556.
62. *Id*. at 557.
63. *Id*. at 561.
64. *Id*. at 557 (citing *Wainwright*).
65. *Id*. at 569.
66. *Id*. at 558.
67. *Id*. at 561 (citation omitted) (emphasis in original).
68. 558 F.3d at 96.

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