

Posting Recording of Earnings Call Is Fair Use

The posting by a news service of a recording and transcript of a call with financial analysts is a “fair use” and not copyright infringement, the Second Circuit found.

Bloomberg L.P., a financial news and data reporting service, posted a recording and transcript of an earnings call minutes after the call conducted by Swatch Group Management Services Ltd. concluded. No news reporters were invited to participate in the call and Swatch told participants that the call was not to be recorded. Upon learning that the recording was posted, Swatch sent a cease-and-desist letter to Bloomberg, which refused to take down the posting. Swatch then obtained a copyright registration for the portions of the call where its executives spoke.

The trial court granted Bloomberg’s motion to dismiss, finding their use of the recording was a “fair use” and denied Swatch’s request for discovery to determine if Bloomberg knew when it published the post of Swatch’s directive not to record the conversation.

“To begin with, whether one describes Bloomberg’s activities as ‘news reporting,’ ‘data delivery,’ or any other turn of phrase, there can be no doubt that Bloomberg’s purpose in obtaining and disseminating the recording at issue was to make important financial information about Swatch Group available to American investors and analysts. That kind of information is of critical importance to American securities markets,” the appellate court wrote. “At a minimum, a use of copyrighted material that serves this public purpose is very closely analogous to ‘news reporting,’ which is indicative of fair use.”

The trial and appellate court agreed that it was not relevant whether Bloomberg was aware that obtaining the recording violated Swatch’s request not to record the conference call because “Bloomberg’s overriding purpose here was not to ‘scoop[]’ Swatch or ‘supplant the copyright holder’s commercially valuable right of first publication’ but rather simply to deliver newsworthy financial information to American investors and analysts. That kind of activity, whose protection lies at the core of the First Amendment, would be crippled if the news media and similar organizations were limited to authorized sources of information.”

The Swatch Group Management Services, Ltd. v. Bloomberg L.P., Second Cir. No. 12-2412-cv, issued January 27, 2014.