MARCH 18, 2010, 9:55 P.M. ET

5th UPDATE: Web Site Barred From Quick Release Of New Ratings

(Updates with Bloomberg declining comment.)

By Chad Bray
Of DOW JONES NEWSWIRES

NEW YORK (Dow Jones)--A federal judge on Thursday ruled that the Web site Theflyonthewall.com misappropriated the "time-sensitive recommendations" of several banks by immediately publishing news of analyst rating changes often before those recommendations are fully shared with clients.

In an order Thursday, U.S. District Judge Denise Cote in Manhattan ruled in favor of Barclays Capital Inc. (BCS), Morgan Stanley Inc. (MS) and Bank of America Corp.'s (BAC) Merrill Lynch & Co.

As part of her decision, the judge placed time restrictions on how quickly Theflyonthewall.com could publish ratings after they're released to clients by the investment banks--namely enjoining the Web site from publishing new premarket analyst recommendations until 30 minutes after the U.S. markets open.

The banks demonstrated that "the misappropriation of their recommendations by Fly and others has also had a profound effect on their business model," the judge said.

The judge also found the Web site infringed the copyrights of Barclays and Morgan Stanley, ordering $6,750 and $6,000 in damages, respectively.

The firms have objected to the systematic publication of their recommendations and have taken steps in recent years to limit access to their research beyond their clients, and have asked their clients not to distribute their research reports to others.

In a note to clients in 2007, Merrill Lynch's head of research expressed concern that the company's rating change turned up on Theflyonthewall.com within 60 seconds of that change being released to clients.

It's unclear if the ruling will have a broader impact on larger, more traditional financial-news outlets who consider ratings changes news that can impact stock prices.

"It bears noting that it does not matter to the firms whether the unauthorized distribution is through a small Internet company like Fly or through media giants like Bloomberg, Thomson Reuters or Dow Jones," the judge said. "The damage is caused not by the identity of the publisher, but by the timely and systematic unauthorized redistribution of the firms' recommendations, whatever the medium."

Dow Jones & Co. is a unit of News Corp. (NWS, NWSA) and the publisher of this newswire.

Spokeswomen at Dow Jones, Reuters and Bloomberg all declined comment late Thursday.

In her order, the judge noted at least one mainstream publisher of financial news has said it is watching the litigation closely and will adjust its practices based on its evaluation of the outcome of the litigation.

Eugene Volokh, a University of California-Los Angeles law professor, said the decision was based on a narrow area of the law known as the "hot news" tort, which relates to a party "free riding" on the time-sensitive work of others.

"There's always a danger something that is narrow to start with will get broader," Volokh said. However, Volokh said he doubts the decision will have an effect on "normal journalistic practice."

He said the judge's decision was narrowly crafted and only imposed limited time restrictions on the Web site's ability to publish the ratings.

"Most news organizations would be fine with a half-hour delay, even in the 24-7 news cycle," he said.

As part of her decision, the judge ordered that Theflyonthewall.com be enjoined from disseminating premarket analyst recommendations in the U.S. for up to a half hour after the opening of the New York Stock Exchange or 10 a.m. EDT, whichever is later.

The Web site also has to wait two hours to publish recommendations released during the trading day, the judge ruled.

Theflyonthewall.com can seek to have the publishing restrictions lifted in a year's time, the judge said.

"It would be unjust to restrain Fly from publishing the firm's recommendations if the firms were to acquiesce in the unauthorized publication of their recommendations by others, be they small Internet news services or global news empires," the judge said.

"As Fly acknowledged at trial, it will not be disadvantaged relative to its competitors by not being able to publish the firms' recommendations if its competitors are restrained as well," the judge said.

Marc Randazza, a First Amendment lawyer at the Miami-based Randazza Legal Group, noted there have been several court cases involving news organizations in which the "hot news" tort has been upheld, most notably in a dispute between International News Service and the Associated Press that reached the U.S Supreme Court in 1918.

Randazza noted, however, that this was the first time he has seen it extended to investment banking sector.

Unlike other First Amendment cases, in which the arguments are often clear cut to experts on either side, legal scholars tend to see validity in both sides of the "hot news" tort argument, Randazza said.

The "hot news" tort is "not copyright, its something different," he said. "This theory is a very strange wormhole in the First Amendment."

Glenn Ostrager, a lawyer for Theflyonthewall.com, said the Web site plans to appeal.

"We believe that the decision is at variance with existing case law, and will appeal the decision to the Second Circuit Court of Appeals. We fully expect that the financial press will vigorously support Theflyonthewall.com with amici briefs to the Circuit Court on the grounds that the recommendations are news that the financial press regularly reports."

Spokespersons for Morgan Stanley, Barclays and Merrill Lynch said they were pleased with the decision and said it was important protection of their intellectual property.

"We are pleased with Judge Cote's ruling and believe it marks an important milestone in regaining control over the distribution of our proprietary research and preserving the value of our investment ideas for our clients," a Merrill Lynch spokesman said.

(Scott Morrison in San Francisco contributed to this story.)

-By Chad Bray, Dow Jones Newswires; 212-227-2017; chad.bray@dowjones.com

Editors' Picks

Fence Frustrates Minutemen, Too

Local Businesses Sue Review Site Yelp

East Timor Sees Growth Opportunities

Shanghai Aims to Attract the World

Wal-Mart Fires Up 'Dragon' Marketing

BACK TO TOP

WSJ.com Account:
- My Account
- Subscriber Billing Info

Create an Account:
- Register for Free
- Subscribe Now

Help & Information Center:
- Help
- Customer Service
- Contact Us
- New on WSJ.com
- Tour the new Journal

About:
- News Licensing
- Advertising
- Advertise Locally
- Conferences
- About Dow Jones
- Privacy Policy - Updated
- Subscriber Agreement & Terms of Use - Updated
- Copyright Policy
- Jobs at WSJ.com

WSJ.com:
- Site Map
- Home
- World
- U.S.
- Business
- Markets
- Market Data
- Tech
- Personal Finance
- Life & Style
- Opinion
- Autos
- Careers
- Real Estate
- Small Business
- Corrections

Tools & Formats:
- Today's Paper
- Video Center
- Graphics
- Columns
- Blogs
- Topics
- Guides
- Alerts
- Newsletters
- Mobile
- Podcasts
  - RSS Feeds
- Journal Community
  - WSJ on Twitter
  - WSJ on Facebook
- My Journal

Digital Network
- WSJ.com
- Marketwatch.com
- Barrons.com
- SmartMoney.com
- AllThingsD.com
- FINS.com
- FiLife.com
- BigCharts.com
- Virtual Stock Exchange
- WSJ U.S. Edition
- WSJ Asia Edition
- WSJ Europe Edition
- WSJ India Page

Foreign Language Editions:
- WSJ Chinese
- WSJ Japanese
- WSJ Portuguese
- WSJ Spanish