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**Swiss IP News** We provide you with updates on new decisions, the relevant legislative process and other trends in the fields of intellectual property and unfair competition law from a Swiss perspective.

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## Swiss Government Proposes Ancillary Copyright in Favour of Media Companies and Journalists

On 24 May 2023, the Swiss Federal Council launched a proposal for an amendment of the Federal Act on Copyright and Related Rights (“**Copyright Act**”) for consultation. In the center of the proposed amendment is the introduction of an ancillary copyright for journalistic products in favour of both media companies and journalists.

Under Swiss copyright law journalistic articles and other journalistic products published by media companies usually qualify for copyright protection according to art. 2 Copyright Act. Their use requires either consent from the right owner or the applicability of one of the fair use provisions in the Copyright Act. However, this does not necessarily always apply. In particular short extracts such as snippets and thumbnails may often not meet the threshold for copyright protection and can therefore be used without consent of the media houses or other right owners. On the other hand, online services such as search engines, social media and multimedia platforms generate substantial revenues and profits from the use of such extracts. It is against this background that the EU recently introduced with art. 15 of the DSM Directive a specific right for the protection of press publications concerning online uses.

The proposal of the Swiss government follows, in principle, this approach but with certain differences. Contrary to the approach of the EU, the proposed amendment of the Copyright Act does not provide for an exclusive right of the right owners but rather a mandatory right for compensation of both the media companies and the authors of the publications. According to the accompanying materials, this is a

consequence of negative experiences with an exclusive right particularly in Germany. According to the proposed amendment of the Copyright Act, the compensation can only be collected by a collective society that will then distribute the earnings to media companies and authors. This shall help smaller media companies to obtain parts of the cake.

This compulsory compensation shall be owed by “service providers of the information society” that make excerpts of media publications available to users if the excerpts either lack individuality in terms of art. 2 of the Copyright Act or fall under the fair use provision of art. 28 para. 2 of the Copyright Act, which allows the publication of certain excerpts for the purpose of reporting about current events. It is further required that the service providers are profit oriented and serve users that account for at least ten percent of the entire Swiss population. According to the governments explanatory notes, the provision will cover online services such as search engines, news aggregators or microblogging services (e.g., Google, LinkedIn, Tiktok, Twitter, Xing or YouTube).

As far as media companies are concerned, to be entitled to payments, it is in principle required that they are domiciled in Switzerland. Foreign media companies are only entitled if their home

country provides similar financial rights to Swiss media companies. The right for compensation shall end two years after the end of the year, in which the publication was made. The exact amount of the compensation will have to be negotiated between the collective societies and the users. It shall be calculated on the basis of the profits gained from the use but also based on the costs and expenses of both the media companies and the users.

Interested parties have now the opportunity to provide comments on the proposed amendment by 15 September 2023. It will be interesting to see what position the various stakeholders will take. Their initial reactions were mixed and discussions on this topic have been highly controversial in the past. We will provide further updates in this newsletter.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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