

CANNES 2016

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I. NEWS AND ISSUES OF THE FIGHT AGAINST PIRACY

NEWS AND JURISPRUDENCE

○ Reform of the HADOPI

In 2009, France introduced the HADOPI law. It aimed to provide graduated response as means to encourage compliance with copyright laws. However, during the last 7 years, the implementation of this law revealed its limits (notably financial) and the French government is now thinking of completely abrogating this law.

And indeed, a law was passed on the **28th of April 2016** that will close down the HADOPI in February 2022. However, its prerogatives, including the “graduated response” will continue, and will only be transmitted to another authority, the CSA, the ARCEP or a new administrative authority. This law still need to be confirmed by the Senate.¹

At last, according to the last study of Médiamétrie published by ALPA on the **29th of April 2016**, 14,1 millions of French people have consulted, visited or used an illegal website to download or stream cultural contents, which is much more than last year.² This figure shows that the pedagogy implemented by the Hadopi did not work at all.

○ Play TV Case and catchup TV regulation

- In an important decision on the **2nd of February 2016**, the Court of Appeal of Paris has confirmed the primary decision of the TGI of Paris which has condemned Playmedia, the publisher of Playtv.fr, to pay one million euros to France Television for having broadcasted its programs without any authorization and in violation of its copyrights, its neighbor rights and its trademarks. Playmedia was broadcasting France Television programs by using deep links to the website of France Tv Pluzz.³
- Concerning catchup TV services, they are now considered as a TV publisher as defined in the article 115 of the law of the 29 of December 2015, and need to pay the tax due by publishers and broadcaster of TV programs.⁴

¹ http://www.lemonde.fr/pixels/article/2016/04/29/les-deputes-votent-la-suppression-de-la-hadopi-pour-2022_4910946_4408996.html

² <http://www.economiamatin.fr/news-piratage-illegal-etude-2015-augmentation-telechargement-france>

³ http://www.legalis.net/spip.php?page=brevues-article&id_article=4895

⁴ <http://www.legipresse.com/011-48501-Extension-du-dispositif-de-la-taxe-due-par-les-editeurs-et-les-distributeurs-de-services-de-televisi.html>

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- **Pressure on Google over piracy measures**

A lot of right-holders and companies in the music industry (RIAA), the film industry (MPA) or the photo industry (lately, Getty Image), are urging Google to implement more efficiently its “notice and take down” tools, in order to remove from its search engine any counterfeiting links. In 2014, Google had 345 million requests, it is 560 million in 2015...⁵

But if the rightholders are addressing a lot of requests, they are not followed all the time by Google.⁶

- **Decisions Allostreaming, Piratebay (2013 / 2014) and Full-stream case (2016)**

It is important to note that French jurisdictions are increasingly involved in the fight against online piracy, notably through decisions aiming to de-list foreign websites that were offering streaming services on movies for which they didn't have the right to present them online.

In November 2013, a Paris court compelled French telecommunications firms and internet search engines to cut off access to 16 websites (among them **Allostreaming**) offering access to illegal copies of copyrighted videos. While courts have previously ordered internet access providers to blacklist targeted websites before, this was the first time search engines were ordered to de-list pirate websites and it is a crucial step towards respecting the law on the internet.

More recently, **The Pirate Bay** sentence pronounced by the TGI of Paris on **December 4th, 2014**, reminds about the severity of the French jurisdictions about counterfeiting. Indeed, by application of the article 332-6 of the Intellectual Property Code, the judges ordered to the Internet service Providers to block the access to the website in virtue of this article which allows ordering all necessary measures to prevent or to stop a violation of copyright against anybody who is likely to contribute to this violation.

This decision underlines the fact that French judges are willing to make more responsible all internet actors and to create a cooperation between internet actors and rightholders.

At last, fighting against pirating can also pass by the condemnation of creators of illegal software permitting to download movies illegally.

Indeed, last **march 2016**, the two administrators of the website **“Full-stream”** have been arrested, and one of them had to remain in custody. For now, the Sacem and Alpa have pressed charges against them.⁷

5 Article in “Ecran Total”, may 2016, “Google encore dans la tourmente”

6 <http://www.numerama.com/tech/136828-google-recoit-un-nombre-record-de-requetes-anti-piratage.html>

7 <http://www.numerama.com/pop-culture/149048-un-administrateur-du-site-de-streaming-full-stream-place-sous-les-verrous.html>

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- **Decision of the “Conseil d’Etat” on the cost of the fight against piracy and the graduated answer**

Nowadays, in France, the fight against piracy is organized by the HADOPI (High Authority of Diffusion on the Art Works and Protection of Rights on the Internet). As part of the graduated response, the Internet service providers have to transfer to the HADOPI their subscribers’ identity spotted on the P2P network.

However, this identification represents an important cost that the operators would like to invoice. The French State should take it over by paying back the operators for their work. The problem is, since 2010, the French State refuses to do it so the Internet service providers assume the full cost of the identification.

This is why Bouygues Telecom submitted the matter to the Conseil d’Etat (Council of State) whose decision was given on **December 23rd, 2015**. By its decision, the Conseil d’Etat orders the Government to issue a decree for the Internet Service Providers’ indemnity, within the next six months.

This decree will have to provide for the modalities for compensating over costs from services provided by the operators. By the verdict, the judges cancel the Prime minister’s implicit decision refusing to take the necessary measure pursuant to Law of 12 June 2009 about broadcasting and protection of the creation on the Internet.

Today, the question to know if the government will respect this injunction remains. In a context where the HADOPI is more and more disputed regarding its relative effectiveness in the fight against piracy, it will be interesting to carefully follow the government’s reaction in order to assess the durability of this regulation.

- **Negotiation at the European level over Piracy: financial resources and liability of internet intermediaries**

- Among the several propositions of reform of copyright in Europe, the European Commission wants to sign a transversal agreement in the next few months of 2016 to improve the fight against piracy. This agreement, according to the approach « follow the money », wants to focus on the financial resources of the websites proposing infringing contents, by giving responsibilities to advertising intermediaries.⁸

⁸ <https://www.actualitte.com/article/monde-edition/droit-d-auteur-les-plans-de-la-commission-europeenne-pour-2016-reveles/61981>

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In France, following the Mireille Imbert-Quarreta's report of 2014, Fleur Pellerin announced that a best practice convention was voted with the publicists to dry out incomes earned by the pirating websites. The first measure voted on March 23rd 2015, consisted in drying out the financial resources of illegal websites in order to avoid that they could enrich themselves thanks to the advertising resources.

- At a European level, the European Commission is expected to reform the e-commerce directive (2000) defining the legal status of internet intermediaries. Many right holders or collecting societies want internet intermediaries to be considered as editors or to be submitted to a third class of responsibility, with the intention to make them more responsible for the contents they distribute. Actually, this directive establishes the diminished responsibility of technical intermediaries. But the European Commission has affirmed that they will finally reformed this Directive, most probably in 2016, among the reforms of the Digital Single market.⁹

One of the 16 initiatives of the Digital Single Market strategy, adopted on 6 May 2015, aims to define an appropriate e-commerce framework and preventing unfair discrimination against consumers and businesses when they try to access content or buy goods and services online within the EU.

The Commission launched two Public Consultations on **24 September 2015**¹⁰ as part of the review of the e-Commerce Directive:

- Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy
- Public consultation on Geo-Blocking and Other geographically based restrictions when shopping and accessing information in the EU

In France, a recent amendment to the "Loi Lemaire sur le numérique" has been adopted by the Senate at the end of **April 2016**, which could lead to a stronger liability of internet intermediaries concerning illegal contents on their platforms.¹¹

⁹ <http://www.nextinpact.com/news/94032-la-commission-europeenne-va-se-pencher-sur-statut-intermediaires.htm>

¹⁰ <https://ec.europa.eu/digital-single-market/en/e-commerce-directive#Article>

¹¹ <http://www.nextinpact.com/news/99764-loi-numerique-colere-acteurs-web-face-aux-menaces-visant-statut-intermediaire.htm>

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INCOPRO / IDENTIFY: new tools against piracy online

Incopro is a legal network of several international law firms, which have developed a monitoring technology to prevent copyright and trade mark infringement online.

This technology is based on two systems: the first one is called **Identify** and tracks websites that are making available copyrighted contents online (Films, music, etc) without authorization.

The other one is called **Talisman**, and is built to find potential brand infringements across the web, scanning global marketplaces, social media, domain names or mobile apps.

These two technologies, but also the legal network which allows these technologies to be legally implemented in many jurisdictions, are the future of the fight against piracy online. It is a necessary and efficient tool for all right holders who want to protect their intellectual property rights in the new Digital world.

The English Law Firm Wiggin LLP, which developed Incopro, has been recognized as **the most innovative law firm in Intellectual Property Law in 2015 by the Financial Times**.¹²

Find information on this new technology and about the network here: <http://www.incopro.co.uk/>

¹² <http://www.incopro.co.uk/news/>

**PIRACY: A PLAGUE FOR ALL MOVIE PRODUCERS AROUND THE WORLD,
EXAMPLE OF NIGERIA AND NOLLYWOOD**

Nigeria's film market, called Nollywood, is the world's second biggest movie industry in terms of films produced but loses billions of dollars annually to piracy.¹³

Indeed, with an average production of 50 movies per week and about 590\$ millions of dollars of revenue, Nigeria's film market ranks second after India's Bollywood.

However, the Nigerian film market is overwhelmed by piracy. And although Nigeria has laws against piracy, it remains a thriving business partly due to poor implementation of copyright laws, a near-lack of prosecution of offenders, and corruption in governance agencies.

The Nigerian film industry loses an estimated 2\$ billion to piracy every year.

The marketing bosses are often the one who pull the strings. They are sometimes major financiers of films in the Nigerian film industry. The big money that they possess and the "underground structure" they maintain make them indispensable to copyright owners and in the marketing of films. By working with pirates to illegally distribute the very films which they finance, they are able to secure income from both legal and illegal streams.

¹³ <http://europe.newsweek.com/who-and-how-pirates-threatening-nollywood-film-industry-449994?rm=eu>

II. VIEW OF THE MARKET FROM FRANCE

NEW MARKETS: GROWING IMPORTANCE OF TV SHOWS

1. French International Festival for TV shows

The French Minister of Culture Audrey Azoulay has announced on the **15th of April 2016** that next year there will be an International Festival for TV Shows, equivalent to the Cannes Film Festival for movies.¹⁴ This festival would be a reunion of two former festivals, « Series mania » and « Series Series ». It will be held in Paris and its suburbs in 2017.

This festival aims at contributing to a strong European market of TV shows, but also promoting French TV shows and facilitating international co-productions.

The specificity of this festival would be that it will be focus on the international dimension of the market. For now, there is no such international festivals only focused on TV shows, therefore it would be a good opportunity for France.

2. French TV shows market (Emergence of Showrunners; Production of Original TV shows, etc)

- Emergence of showrunners:

« Showrunner » is a term coming from the US, and that has no direct translation in French for now. A Showrunner designates the person in charge of directing a program. Most of the time, a showrunner is the creator, the author, the producer. He is choosing the directors, the casting, the costumes, etc.¹⁵

Often behind the biggest TV shows in the US, the showrunner starts to appear in France. For instance, Frederic Krivine, the creator of « Un Village Français » appears like a « showrunner », being the author and co-producer of the show. He was also the first to import the « writing room » in France, which regroups several authors under the authority of the main scenarist.

For the showrunner to develop in France, the TV shows need to have more importance and financing. The creation of an international Festival of TV shows goes in this direction.

- French production of Original TV shows:

According to the last figure of the CNC, French TV shows are doing really well on the French TV.

¹⁴ <http://www.lesechos.fr/tech-medias/medias/021845418507-un-festival-international-des-series-verra-le-jour-en-france-en-2017-1214316.php>

¹⁵ Article papier du Figaro du 14/04/2016 « Profession showrunner »

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Some US TV shows broadcasted are now getting old (“Les experts”, “NCIS”, etc). But the main reason is that there is a revolution going on in the production of French original TV shows: “Une chance de trop”, “Versailles”, “Dix pour cent”, “Spiral”, “Chefs”, “Baron Noir”...

However, the figures concerning the exportation of these TV shows remain low (39 million of benefits abroad). This is far less than other countries, like the Nordic countries or Israel which have a smaller internal market but have much more exportation of TV shows.

Therefore, there is also work to do on helping French TV shows on exportation. According to the CNC, they are working on this matter, and will start a specific project on exportation of French TV shows during the summer 2016.¹⁶

CCL: It is a good thing that public institutions are taking into consideration the importance taken by TV shows, in particular by the creation of this new International Festival of TV shows. However, it would be necessary to increase this attention toward TV shows, especially by redirecting public subventions from Cinema to the production and export of TV shows¹⁷, as it appears that this new market would push forward all the audiovisual sector (production, distribution, TV channels, etc).

¹⁶ « Malgré leur succès, les séries françaises peinent à s'exporter », Le Figaro papier, 9 mai 2016

¹⁷ <http://www.lesechos.fr/tech-medias/medias/021912364310-les-series-tv-meriteraient-detre-plus-aidees-1220189.php>

MEDIA CHRONOLOGY, CULTURAL EXCEPTION AND NEW ACTORS

FRANCE'S MEDIA CHRONOLOGY AND CULTURAL EXCEPTION

In early 2014, Netflix announced its intention to expand its services in France. Netflix' announcement gave rise to a large questioning in France concerning the way movies are financed, produced and broadcast. France fears that Netflix' European affiliate, based in the Netherlands, will damage its home-grown audiovisual industry essentially based on media chronology **(a)** and the French cultural exception **(b)**.

a. Media chronology

The so-called "French Media Chronology" is a rule setting the schedule of the release of a movie. According to French law, media chronology should only be applicable to cinematographic works, *i.e.*, movies that are first released in theatres.

Within years, media chronology has become one of the pillars of the French movie industry. The purposes and benefits of French media chronology are numerous:

- it favors and protects the exploitation of movies in theatres;
- it improves the allocation of revenues to all players of the film industry: cinema owners, editors, publishers, tv channels, producers;
- it helps French producers and authors negotiate in the most effective way the assignment of their rights;
- it protects the French film financing model notably based on the French cultural exception.

According to the last revision of the French inter-sectorial media chronology agreement (2009), the following calendar must be respected when a movie is first released in theatres:

Time frame	Releases
0 to 4 th month	Theatrical release
4 th month	Video release (DVD, Blu-Ray and VOD but not with subscription to a platform)
10 th month	Pay TV & Premium (Canal+, Cine +, Orange)
12 th month	Other pay TV that have not signed an agreement with cinematographic organizations

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22 nd month	Release in co-producing channels
30 th month	Release on non co-producing channels
36 th month	SVoD
48 th month	Free VoD

Therefore, a film can only be distributed on SVoD 36 months after its theatrical release. This delay, which is only applicable to cinematographic works, widely restricts possibilities for companies operating SVoD services to offer attractive services to French consumers: all of the movies they are offering might be considered as outdated.

The European liberal approach is totally different from the French approach which sets much more constraining rules. France may fear that one day the European Union will consider that French media chronology constitutes a barrier to free movement in the European Union. Due to the 36 month-period applicable to SVoD, French regulation has created a distortion in competition notably because all other broadcasters (theatres, DVD, pay TV, co-producing channels) have a much better waiting period before they can broadcast cinematographic works.

b. French cultural exception and film financing

According to a French decree dated November 12, 2010, relating to on demand audiovisual media services (the so-called “SMAD decree”, n°2010-1379), SVoD services based in France with annual earnings of more than 10 million Euros are required to hand over 15% of their revenues to the European film industry and 12% to French filmmakers. Furthermore, this French decree requires that 40% of mainstream broadcasters’ content must be in French and that 60% of mainstream broadcasters’ content must content European movies. Thanks to this system the financing and the promotion of French movies is highly protected.

French financial contributions for the audiovisual sector are much higher than those of its European neighbors. France and the French-speaking part of Belgium are the only EU member states that put in place a thorough version of the European directive. They impose both financial obligations and the obligation to promote national works onto VoD providers, when the EU directive only requests one or the other.

With the arrival of new foreign players in France, such as Netflix, this economic model may be challenged.

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UPDATE: As Netflix is established in the Netherlands, the US company does not have to respect the SMAD decree. **Therefore, while Netflix had 200 French movies over the 1200 of its catalog in 2015, now there are only 84 French movies in march 2016!**¹⁸

In its biggest Press conference ever organized, held in Paris at the « Cité du Cinema » in St Denis **mid-April 2016**, Netflix's CEO Reed Hastings reaffirmed its vision of the audiovisual market. For him, TV must become an individual product, allowing the subscriber to choose the program and the time of diffusion. Moreover, Hastings want to produce national TV shows, which are supposed to be broadcasted internationally afterwards where Netflix is accessible, according to the strategy « Think globally, act locally ». Netflix does not want to impose US programs to the all-world. Ex: Marseille TV Show.

As we have seen, this strategy could raise a lot of questions concerning the normal system of broadcasting rights which are negotiated country by country, but also, concerning the French market, in terms of media chronology and cultural exception.

¹⁸ <http://ecran-total.fr/netflix-naime-plus-le-cinema-francais/>

NETFLIX NEWS

- Netflix in Europe

The French SACD (French Society of Dramatic Authors and Composers), pointed out that the European directive 2010/13/UE needed to be reviewed as soon as possible because its dispositions related to the promotion of European productions and works were not consistent with the reality of the European market. Indeed, this directive implements the principle of “*country of origin*” according to which, for audiovisual media services, the laws of the State where the service provider has its headquarters shall be applicable. This principle is opposed to the Bern Convention which affirmed the “*principle of destination*”: the scope and rules of protection are determined according to the law of the country where the protection is claimed (Art 5.2 Bern Convention).

For Guillaume Prieur, head of international and European affairs at the French SACD, “*it is a form of cultural dumping: providers like Netflix will set up their headquarters in countries where the laws are more beneficial, to then emit to other European countries*”. Consequently, French rivals will still have to pay substantially higher French tax and French financial contributions while foreign SVoD players will benefit lighter obligations on the same market by setting their headquarters in countries with more favorable legislations. Even though the EU Commission said that the directive will be reviewed in 2015, with Netflix’s launch on the horizon, Brussels’ slowness to react might have disappointed many. According to Guillaume Prieur “*if we do not change the rules faster, countries that have the lowest audiovisual financial demands will prevail over other EU member states*”.

Furthermore, even if Netflix managed to evade certain dispositions of French law, notably concerning the financial contribution of 12% of their profits to French filmmakers, it will still have to contribute to the European film industry accordingly to article 13 of the European Directive 2010/13/UE. Therefore, regardless where Netflix sets its headquarters in Europe, it will still have to contribute to European cinematographic productions (and France represents nowadays one of the largest share). Consequently, we can hope that Netflix’ arrival in Europe will also support French audiovisual productions.

In terms of number of subscriber, Netflix has today around 75 million of subscribers, there were 40 million in September 2014. In the 6 countries where Netflix was introduced in 2014 (France, Germany, Belgium, Austria, Switzerland, Luxembourg), there are 2 million subscribers.

- Netflix in France

Marseille is the first French TV show produced by Netflix. But moreover, the channel TF1 has acquired the rights over the two first episodes of the TV shows. That’s the first time in France that such an agreement is concluded between a TV channel and a platform of Svod, illustrating the changes brought by Netflix in the audiovisual market. As the two first episodes have been

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broadcasted on the 12th of May 2016, the all season was already on the Netflix platform on the 5th of May.¹⁹

Depending on the success of the series broadcast by Netflix, an evolution of the consumption mode of movies (series and motion pictures) may arise in France. Indeed, for the moment French consumers are still fairly attached to motion pictures and theatrical releases, however younger generations are more and more attracted to new series and willing to watch them compulsively. The so-called "binge viewing", where full series can be directly entirely watched online, is having a very large success. Therefore, it would be no big surprise if the arrival of Netflix in France with its new economic model brings changes to French movie production. Perhaps, this will also incite a review of the way local TV Channels and SVoD players have to contribute to the production of motion pictures.

Furthermore, and according to this strategy, it seems that Netflix has a long-term objective: it intends to generate an evolution in the way marketing is used in the film industry in order to reorient TV advertisers towards SVoD services. If this were the case, it could lead to an even more profound remodeling of the movie industry than what France is currently dealing with.

- Netflix and competition

Last news: As Netflix is developing fast, traditional TV channels, but also internet platforms, are trying to find new ways to face this new threat in the audio-visual market.

For instance, **Vivendi** has announced a partnership with Mediaset in order to develop a strong European media platform specialized in SVOD.²⁰ Indeed, **Canal +**, the main TV channel of Vivendi, wants to develop a platform like Netflix, according to some medias. Furthermore, instead of spending its money in acquiring broadcasting rights of movies, Canal + is thinking on spending this money more efficiently by becoming co-producer of the movies it broadcasts.²¹

At the same time, **France Televisions** is going to launch in **February 2017** a platform of SVOD which will propose other contents than what is on its TV channel, regrouping documentaries, TV shows, movies, etc.²²

At last, **Amazon** has also launched a new platform of SVOD, and like Netflix, is producing a new original TV Show which will be directed by Woody Allen. Amazon is therefore in Cannes 2016 to present its new projects, but also because it has acquired the distribution rights of the new movie of Woody Allen, *Café Society*.²³

19 Article « TF1 fait bouger les lignes avec « Marseille », Ecran total n°1090 du 27 avril 2016

20 <http://variety.com/2016/tv/global/vivendi-mediaset-merger-1201765868/>

21 <http://www.lefigaro.fr/medias/2016/05/10/20004-20160510ARTFIG00349-financement-du-cinema-francais-dernier-festival-de-cannes-avant-inventaire.php>

22 <http://www.lesechos.fr/tech-medias/medias/021899067944-france-televisions-va-marcher-sur-les-terres-de-netflix-et-de-canal-1219306.php>

23 <http://www.challenges.fr/challenges-soir/20160511.CHA8966/amazon-s-invite-a-cannes-face-a-netflix.html>

DEVELOPMENT OF NEW TECHNOLOGIES TO WATCH MOVIES ("SCREENING ROOM", VIRTUAL REALITY, ETC)

a. Screening room

Sean Parker, the founder of Napster, has developed a new project called « The Screening Room », **announced in 2016**. This service will offer movies in VOD as soon as they are released in Cinemas.²⁴

This project goes against the French media chronology, which was last reformed in 2009. In the US, they have a similar system to the French one, the movies being released first in Cinemas, and then accessible in VOD, DVD and on TV. In the US, wide-release films are typically in theaters for 90 days before hitting home entertainment platforms.

The "Screening Room" company offers secure anti-piracy technology that will offer new releases in the home on the same day they hit theaters.

According to Variety which revealed this information, Screening Room would charge about \$150 for access to the set-top box that transmits the movies and charge \$50 per view. Consumers have a 48-hour window to view the film.²⁵

To get exhibitors on board, the company proposes cutting them in on a significant percentage of the revenue, as much as \$20 of the fee. As an added incentive to theater owners, Screening Room is also offering customers who pay the \$50 two free tickets to see the movie at a cinema of their choice. That way, exhibitors would get the added benefit of profiting from concession sales to those moviegoers.

Participating distributors would also get a cut of the \$50-per-view proceeds, also believed to be 20%, before Screening Room took its own fee of 10%.

There is serious interest from several of the major studios, including Universal, Fox and Sony.

On the other hand, the company's anti-piracy technology could be appealing to studios who struggle with global content theft. Major films can be widely available illegally online in file-sharing sites within hours of their release.

The idea is to capture an audience older than teens and young adults, who might have responsibilities such as children that prevent them from going to the theater.

Several famous directors like Steven Spielberg, Martin Scorsese, Peter Jackson or JJ Abrams are supporting this initiative. *"Screening Room, however, is very carefully designed to capture an*

24 <http://www.numerama.com/pop-culture/151252-avec-the-screening-room-le-createur-de-napster-veut-mettre-le-cinema-a-la-maison.html>

25 <http://variety.com/2016/film/news/studios-exhibitors-consider-revolutionary-plan-for-day-and-date-movies-at-home-exclusive-1201725168/>

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audience that does not currently go to the cinema. "Screening Room will expand the audience for a movie — not shift it from cinema to living room," Jackson said in a statement.²⁶

However, other famous directors like James Cameron or Christopher Nolan strongly opposed this project, considering that from an artistic and financial point of view, it is paramount that movies should be initially watched in Cinemas.²⁷

Moreover, the International Union of Cinemas (UNIC), which has many French and German cinemas as members, is also strongly opposed to the project.

But exhibitors have long resisted any moves to shorten the amount of time between a film's theatrical release and its debut on home entertainment platforms. Many believe that any effort to shrink that window undermines the health of their business and encourages people to stay home.

b. Virtual reality

2016 will see the democratization of the virtual reality, with the commercialization of different systems for the general public.

In this new audiovisual markets, everything, from the technology, to the production of contents and the distribution, need to be developed.

But there are already some companies that are developing virtual reality technologies. For instance, Oculus Rift, has released virtual reality glasses for the general public.

Also, In France, the company PickUpVRcinema has developed the first theater where it is possible to watch contents on VR glasses. Indeed, they invested in SamsungGear helmets and rotating seats. However, the rights holders are not yet paid and the tickets sold are not taken into account by the CNC.²⁸

In Europe, the first movie theatre only dedicated to Virtual Reality has opened in Amsterdam in **March, 2016**. The theatres are equipped with rotating seats at 360° and VR helmets. But for now, the main problem is that just a few studios are producing contents for this technology²⁹.

²⁶ <http://www.numerama.com/pop-culture/152549-screening-room-spielberg-scorsese-abrams-jackson-et-howard-sont-pour.html>

²⁷ Article papier « Le monde », « Cinema : la plateforme Screening Room divise les réalisateurs américains »

²⁸ <http://ecran-total.fr/realite-virtuelle-de-lecriture-a-la-distribution/>

²⁹ <http://ecran-total.fr/ouverture-dun-cinema-en-realite-virtuelle/>

CHINESE AUDIO-VISUAL MARKET

The positive evolution of China's motion picture industry

The cultural development of China's movie industry (SIPO)

The People's Republic of China (PRC) film industry is flourishing: it is the second-largest movie market in the world, following the United States. In the next few years, it can even overtake it.

By emphasizing core values of Chinese society, films locally produced seem to be more and more favoured by Chinese audience over American blockbusters.³⁰ For instance, domestic movies such as *Monster Hunt* or *Monkey King: the Hero is back* broke through in terms of box office. Indeed, *Monster Hunt* was ranked second of China's 2015 box office, right after the American Film *Furious 7*. Western producers should therefore take into account the cultural needs of Chinese consumers if they want to successfully implement their business in China.

Cracking down on piracy helps China to promote its economic and social progress

If a few years ago, Chinese movie theatres weren't that popular, nowadays this is changing. Tickets are becoming more affordable so that going to the cinema is becoming a trendy hobby.

Impunity is no longer the watchword for online piracy! Indeed, criminal and administrative penalties are more deterrent so that downloading movies illegally isn't as attractive as it was before. Many clarifications over the legal terms helped PRC's judges to make consistent decisions in order to fight copyright infringements on a regular basis.³¹

Not only does it help the government to "maintain order in the audiovisual market"³² but it also promotes social progress as Chinese consumers are more aware of the rule of Law. This also appears as a good incentive for producers whose rights are better guaranteed. Chinese consumers are therefore gaining access to a greater number of movies, which helps to meet their spiritual needs but also to develop urban culture.

³⁰ State Intellectual Property Office of the P.R.C (SIPO), "Why do Chinese Domestic films catch up from behind in terms of ticket-office", 19/08/2015

³¹ National Copyright Administration (NCA), comments sought for revising implementing measures for the copyright administrative penalties, 2015.

³² China Daily, Chinese Intellectual Property, Notice of the cracking down on the piracy of New Years's film, 22/03/2011, www.ipr.chinadaily.com.cn/2011-03/22/content_12207503.htm

The positive impact of China's upcoming Film Promotion Law (*China Film Insider*)

While China's box office is booming with receipts jumping to 49 % in 2015, reaching US\$6.78 billion with a growth of 34% compared to the previous year, the global box office has grown slowly with an increase of less than 2 billion US\$ from 2014 to 2015. Moreover, since 2016 began, theatrical box office revenues in China had already grown up by 50%. Though a big part of China's box office growth is due to the increasing demand for Chinese-speaking films, English-speaking movies are also benefitting from that growth.

Many international film companies, such as Warner Bros, Universal Studios, Walt Disney, Paramount Pictures and DreamWorks Animation, have already entered Chinese market, and more will certainly follow thanks to the upcoming Film Promotion Law. The first draft of the so called law was issued by China's National People's Congress (the NPC) on November 6, 2015. Some explanatory notes were issued in 2011 by the Legislative Affairs Office of the State Council stating that this law will facilitate producers' entry into China's motion picture industry by erasing some restrictions such as those concerning "investment by social capital into film production".

Moreover, the approval procedures will be diminished in order to fight administrative burden that is slowing down the entry into Chinese market. The censorship procedure will also be facilitated as general themes movies will no longer be submitted to it.³³ This should give incentives to foreign producers in order to invest into Chinese market as an emerging, promising and more accessible Hollywood.

33 China Film Insider, "China's Film Industry Promotion Law: the new draft » by Mathew Alderson and Grace Yang, 10/11/2015, www.chinafilm insider.com/chinas-film-industry-promotion-law-the-new-draft/

CHINA WANTS TO COMPETE WITH HOLLYWOOD

China's Movie Industry is the New Hollywood, some Top Filmmakers Say (*The Wall Street Journal*)

According to Yu Dong, the CEO of Bona Film Group (a leading Chinese film studio and distributor), Hollywood producers lack innovation while China's film investors have innovative teams. Hollywood market seems to be saturated and little place is left for new directors. Therefore, Chinese film industry appeals more and more to young directors from both Hollywood and Asian movie industry because they need a better capital support. For instance, some companies won investments from Chinese Internet giants including Alibaba Group and Tencent Holdings.

Joe Russo, the director of Marvel's "Captain America" franchise said that "a growing number of Hollywood producers are coming to China for both "economic and artistic reasons". It appears to be the right time for Western filmmakers to bring their know-how to Chinese movie industry if they don't want to miss a chance to enter Chinese prosperous market.

China's attempt to boost the production of Local Films with tax break (*Variety*)

China tries to boost its film industry over Hollywood by introducing a tax break reward scheme for cinema operators. Currently, movie theatres collect a 5% tax on all ticket sales, which is transferred to the Central Movie Special Funds. However, if 2/3 of a Chinese theatre's revenue comes from distributing Chinese films, then the theatre will be able to keep half of the tax, according to the Xinhua news agency. This is equivalent to a 2.5% incentive.

The National Film Industry Development Special Fund Management Commission will only allow the rebate to those cinemas which have a clean record and have not participated in box office rigging. Also, the PRC created a financial incentive for those films which do well abroad. It is said that it would reward those films which score more than \$153,000 at the overseas box office. The impact of this new measure is not clear as local films are already performing strongly in China. However, this new tax incentive may have an impact on box office reporting.

Evolution of censorship in Chinese audio-visual market (*China Film Insider*)³⁴

In 2004, the predecessor to the State Administration of Press, Publication, Radio, Film and Television (known as SARFT at that time) recommendation anti-corruption dramas should not be shown in prime-time in order to "protect teenagers."

However, in the midst of a nationwide anti-corruption drive led by President Xi Jinping, China's media regulators have lifted a long-standing ban on the production and primetime broadcast of

³⁴ <http://chinafilm insider.com/china-anti-corruption-drive-moves-television-dramas/>

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television dramas featuring high-level corruption, clearing the way for harder-hitting content not seen since 2004.

Since Xi Jinping came to power in late 2012, his anti-corruption campaign, led by the CCDI, has brought down thousands of corrupted officials, including several top officials such as Zhou Yongkang, Bo Xilai, and military officers such as Xu Caihou and Guo Boxiong.

The movie "In the name of the People" is set to be the first major production with an anti-corruption theme since China's media watchdog banished such programs from prime time 12 years ago.

Chinese producers have long complained about onerous censorship that requires scripts to be Government approved. Indeed, movie producers are forbidden from jeopardizing "public interests when exercising their copyright" so that every work is first controlled by the State.³⁵

However, foreign TV dramas such as House of Cards, which includes Chinese cyberwar with the U.S. and a corrupted Chinese Communist Party insider, are available for legal streaming on SohuTV, and don't fall under the same censorship.

French-Chinese international coproductions (*Ina Global*)³⁶

Nowadays, China is the most promising market for French coproduction. With a limited quota of 34 international movies per year, the coproduction would be a way for French movies to enter the Chinese market. The agreement on coproductions signed between France and China in 2010 goes towards this direction, though it remains difficult to fulfill all conditions.

The French motion picture industry is the second foreign movie industry represented in China, right after the US industry. 8 French movies were distributed in China in 2014. However, following the quotas imposed by China concerning foreign movies, French films' distribution is limited. Moreover, Chinese distributors and movie-theatre managers are often stopping the distribution of French movies that don't make enough money, in order to grant a greater visibility to big Chinese and American blockbusters. However, in 2014, with only 8 French movies released, China was still the second foreign market to distribute French movies (with 17,4 million entries).

According to UniFrance, 7 out of 10 French movies distributed in China since 2000 are Europacorp's productions. Lately, Europacorp signed an agreement with Chinese producer Fundamental Films in order to extend the coproduction and distribution of Europacorp's movies in China (Fundamental invested 50 million euros in the new Europacorp's movie "Valerian", to be released in 2017).

³⁵ Copyright Law of the PRC, Article 4.

³⁶ <http://www.inaglobal.fr/cinema/article/le-cinema-francais-t-il-une-chance-en-chine-8742>

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In 2010, France and China signed a coproduction agreement after 7 years of negotiations. This agreement provides that coproduced movies will have the nationality of both producers in order for them to benefit from both national subventions systems. This will therefore exclude coproduced movies from Chinese quotas on foreign movies.

To develop this strategy of coproduction, Wild Bunch has created in 2015 an investment fund with China Film and TV Capital in order to develop and finance French-Chinese coproductions.

At last, for the sake of the development of these coproductions, distributors and public institutions (CNC, Unifrance) are using Chinese Film festivals to present French movies, because it also excludes them from the quotas (Shanghai and Beijing film festivals being the two biggest movie festivals in China).

REVISION OF CRITERIA RELATING TO MOVIES BEING PROHIBITED UNDER 18

Criteria on which is based the prohibition of movies under the age of 18 are going to be amended in order to strengthen the opinion of the Commission in charge with the classification establishment and to avoid legal actions. French Government, specifically the Minister of Culture, made this decision after Promouvoir association's recent victories. Indeed, this association multiplied the legal actions and obtained a lot of favourable decisions in cases in which it argued for the prohibition under the age of 18 of movies like "Antichrist", "Love", or "La Vie d'Adèle" for instance. However, it may be noted that this classification which prohibits movies to minors under 18 is prejudicial to access not only to cinema screening but also to TV broadcasting.

Indeed, to be screened in cinemas, a film has to obtain a screen certificate issued after different steps. Thus, any French or foreign film, with a view to being released publicly has to be presented in a first step to the classification committee then to the Commission which watch the film in full and collectively.

The classification committee conducts an initial review and submits a report to the Commission's president who decides if it is necessary to schedule the cinematographic work in question in Commission. The classification Committee acts as a filter. When Committee decides unanimously that the film can be watched by everyone, the cinematographic work is not referred back to Commission.

However, when at least two members of Committee pronounce themselves in favour of a restrictive measure, the cinematographic work is watched in full by Commission. Commission of classification is the only one able to propose a restrictive measure to the Minister of Culture. In order to determine the age category, there is no methodology, nor evaluation grid, nor specific criteria. Indeed, this classification implies a major part of subjectivity and the Commission's opinion is based on protection of minors and respect for human dignity.

At last, in the light of the Commission opinion, the Minister of Culture decides classification to give to the film.

Following the Promouvoir association actions and the administrative courts decisions which considers that the screen certificates do not respect texts which provide for youth protection. The Ministry of Culture considered that texts are inadequate nowadays and required Jean-François Mary, President of the classification Commission, to make proposals to improve texts relating to these prohibitions. This report has been presented on 29th February, 2016.

The Ministry of Culture wishes particularly to amend an article of the Cinema code which leads nowadays to an automatic prohibition of a movie to minors under the age of 18 when it "includes not simulated sexual scenes or scenes with high levels of violence". In this respect, the Mary's report suggests to relax the article by providing that films must be prohibited to minors under the age of 18 when works include, without justification of aesthetic character, not simulated sexual

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scenes or scenes with high levels of violence which could, notably about their accumulation, seriously disturb the minors' sensibility, present violence in a favourable light or trivialize it.

This measure would allow the Commission to have expanded powers in terms of appreciation. Thus, the Commission would assess the possible effects of the film on the young audience. Nevertheless, these proposals are criticised, in particular by the INA, which considers that it will not be easy to distinguish between films with an aesthetic character and the others. In addition, the goal of screen certificates is child protection against inappropriate images and it can be difficult to understand why the aesthetic character of an image or a scene implies that the minor will not be shocked by what he saw.

Moreover, French Government wants to think about a simplification of legal actions procedures and notably to reduce time limits for procedures before the administrative courts. Thus, the Mary's report took into consideration the legitimate claims of the sector professionals who consider that procedure before administrative courts are too long and not adapted to the films exploitations. Indeed, the duration of procedures, between first instance and appeal, leads to the fact that some movies may be subject to different classifications when it is released in cinemas and during its later exploitation in DVD or VOD. A simplified and faster procedure would ensure consistency during the work's life.

To address this issue, Mary's report proposes to delete the appeal in the framework of the main proceedings to allow only a cassation before the Conseil d'Etat.

The issue of this reform is very important since when a film is prohibited to minors under 18, it has very little chance of being released in cinema and is subject to strict regulations for being watched on TV or VOD.

PERSONAL DATA

NEW ISSUE: COLLECTION OF DATA

NEWS: On April 14th, 2016, the European Parliament adopted the European regulation on data protection. According to the CNIL, it means a big step for data protection in Europe. This regulation will be applicable from 2018 in all members states of the European Union. The final texts will be applicable to all companies collecting, processing and storing personal data.

From the citizens' point of view: the strengthening of existing rights, by allowing the citizens to have additional information about their data processing and to obtain it in a clear, accessible and understandable form. The right to be forgotten is strengthened which makes more effective the citizens' control over their data.

From online marketing perspective:³⁷ Online audio-visual marketing and data collecting: the new challenge for the European Commission

Beyond their primary goal of launching new audio-visual digital services inside the European Union, new players, like Netflix, have a long-term objective: to generate an evolution in the way marketing is used in the audio-visual industry in order to reorient traditional television advertisers towards SVoD services. Indeed, even if up to this date audio-visual services are not generating the same level of revenue as traditional players, they are in a position to collect data on their users (strategic for ad targeting, personalisation of content, commissioning and buying of new content), which may highly impact audio-visual marketing. Thus, audio-visual services are able to propose content which is adapted to consumers' taste, mood, localisation, to the period of the day. This is in this respect that Netflix succeeded in meeting all the criteria to launch the successful TV series "House of Cards".

The European Commission is already aware of this concern, and is currently discussing the positives of data sharing despite the increasing fear of online data breaches. Even if, as Matthew Fell, director for competitive markets at CBI, said: "Data does enable all the fantastic things we enjoy about the internet and the digital age", data needs to be carefully looked after, especially when there are big international corporations that become victims of data hacking.

To conclude, it is obvious, that data collecting will play a key role in audio-visual financing through marketing. Certain players such as Apple, Facebook, Google and Netflix are already dominating their respective markets. In this respect, traditional European players may fear those dominant players and will certainly need to find successful strategies in order to exist in the digital world. Players who will deliver quality content, taking advantage of the distribution enabled by the internet, and at the same time know how to attract the attention of the fragmented audiences will continue to thrive in the future. Resisting the inevitable change in media distribution and consumption habits in order to secure still existing revenue streams will certainly be detrimental in this new competitive landscape.

³⁷ Extract from « French and European Audiovisual financing facing new challenges" : <http://medialawinternational.com/page162.html>

Read our complete analysis published in the annual book of the International Association of Entertainment Lawyer 2016: **“How New Technologies are Changing the European Upstream and Downstream Music Industry”**, by Anne-Marie Pecoraro and Marianne Lecron.

SAFE HARBOUR / PRIVACY SHIELD

NEWS: European Commission published on February 29th 2016 the text of the “Privacy shield” agreement. The pan-European data regulator group, Article 29, met on April 12th and 13th 2016 in order to pronounce itself on the text. As a result, the G29 has criticised the Privacy Shield safe harbour revamp proposed by the European commission notably over its lack of surveillance protection from the US government for EU citizens’ data.

A major event occurred in our area of practice last October 6, 2015: Europe highest court invalidated the international agreement that allowed companies to transfer personal data (like people’s web search histories and social media updates) between the European Union and the United States.

This decision is major as it impacts international operations of companies such as Google and Facebook, leaving them in a sort of legal limbo while waiting for a solution to allow such transfers. However, despite this invalidation, it seems that these major companies decided to continue their services working as usual, which endangers European personal data transferred to the USA.

The European Court of Justice considered that the Safe Harbor agreement was flawed because it allowed American government authorities to gain routine access to Europeans’ online information. This was notably evidenced by the leaks from Edward J. Snowden, which made it clear that American intelligence agencies had almost direct access to incoming personal data of European origin.

While data protection advocates hailed the ruling, industry executives and trade groups said the decision left a huge amount of uncertainty for companies and called on the European commission to complete a new safe harbor agreement with the United States as soon as possible.

Frans Timmermans, the first vice president for the European Commission, who will be charged with carrying out the ruling, said businesses could still transfer European data to the United States through other existing treaties.

Indeed, data transfer between the European Union and the USA can still be legally made by companies which have implemented binding corporate rules. The so-called “BCR” are rules which allow multinational corporations, international organizations and groups of

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companies to make intra-organizational transfers of personal data across borders in compliance with EU Data Protection Law.

Furthermore, the European Union has already crafted “model clauses” to include in contracts with partners and customers enabling them to arrange data transfers between the European Union and foreign countries.

Nevertheless, while waiting for the negotiation of a new international agreement, many companies will have a lot of work ahead, deciding whether they intend to implement BCR, add model clauses to their contracts, or selecting precisely which kinds of data transfer are critical and address those first for the wellness of their business.

On October 6th 2015, the European Court of Justice invalidated the 2000 decision of the Commission providing for what is commonly known as the Safe Harbour scheme.

The Court followed a two steps analysis in order to demonstrate the incompatibility of the scheme and the privacy protection rules applicable in the EU.

First of all, the Court held that a decision from the Commission could not prevent national supervisory authorities from dealing with a claim regarding personal data protection. This means that even when the Safe Harbour decision was valid, national authorities should have been able to examine independently whether the transfer of personal data to a third country complies with requirements of the Data Protection Directive. The Irish authorities should have proceeded to investigating the claim notwithstanding the Commission’s decision instating the Safe Harbour scheme.

Thus, the Court concluded that the Commission did not have the competence to restrict the powers of national supervisory authorities, in a way which prevented them from analysing a claim calling into question the compatibility of the decision with the protection of privacy and other fundamental rights.

Secondly, the Court specified that it was the only competent authority for invalidating a decision of the Commission. To revoke the Safe Harbour decision, the Court proceeded to demonstrate that the United States did not ensure a level of protection of fundamental rights essentially equivalent to that guaranteed within the European Union under the Data Protection Directive.

Indeed, the Safe Harbour scheme was applicable to the United States but not to its public authorities. This means that national security, public interest and law enforcement requirements prevailed over the scheme, allowing the United States to disregard de Safe Harbour protective rules when in conflict with national requirements.

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Two Commission communications of November 2013 detailed examples where the United States public authorities disregarded the data protection rules for national security reasons.

U.S legislation also allows public authorities to have access to electronic communications. The Court of Justice considered this as 'compromising the essence of the fundamental right to respect for private life'.

Adding to this, U.S legislation does not provide remedies for individuals who wish to have access to the personal data concerning them which 'compromises the essence of the fundamental right to effective judicial protection'.

To conclude, given the previous assertions, the Safe Harbour scheme could no longer fulfill its purpose of providing a safe data transfer towards the USA, seeing as the multiple means of disregarding the scheme meant that the protective rules of the Directive would not be applied in many cases.

The Irish supervisory authority is therefore held to examine a claim alleging an infringement of the Directive measures when it comes to data transfers from a European subsidiary firm to its headquarters based in a third country.

In the meantime, the European Commission and the American authorities have said that data transfers will be able to continue on the basis of a new agreement. European citizens will also be able to file complaints to national supervisory authorities in order to insure transfers to third countries comply with the Data Protection Directive.

Read our complete analysis published in the annual book of the International Association of Entertainment Lawyer 2016: **"How New Technologies are Changing the European Upstream and Downstream Music Industry"**, by Anne-Marie Pecoraro and Marianne Lecron.

III. NEWS ABOUT INTERNATIONAL COPRODUCTIONS

NEWS ABOUT FRENCH-INTERNATIONAL COPRODUCTIONS AND FOCUS ON US-FRENCH COPRODUCTIONS³⁸

International co-productions allow movie producers to access new sources of financing, coming from the co-producer itself but also from the countries where these co-producers are from. However, international co-productions can have an impact on the nationality of the film, but also on the repartition of the benefits, or on the applicable law and the competent jurisdictions.

1. Advantages and drawbacks of international coproductions

→ In 2014, the French Cinema had more than 100 million of spectators internationally, and has invested more than 394 million of euros in 106 international coproductions. The main countries of coproductions with France are Belgium, Germany, Switzerland and Canada.

A movie producer can have various and combined ways of financing: presales of rights, minima garantis, subventions, financial participations, or coproductions. Concerning coproductions, the main consequence is that the co-producers will have to share the profits, but also the material and immaterial rights over the movie.

Therefore, international coproductions, if they can be justified by an artistic approach (casting, directors, ect), are often justified by a financial approach, as they allow the producer to benefit from the investment of the coproducer, but also from the subventions of the country where the co-producer is from.

However, to be able to have a double nationality and benefit from a coproduction, the countries where the movie is made must have signed a coproduction agreement. Ex: Canada or Germany with France, and in 2010 a coproduction agreement has been signed with China.

Important: Italy has announced a profound reform of its film financing system by passing a law in **January 2016**, inspired by the French system: creation of an auto financed system based on the taxes taken on the sector, tax incentives, support of independent movies, etc.

→ Drawbacks of international coproductions:

In a coproduction contract, each party keep its own exploitation rights and profits in their own countries, but the other rights and benefits from other countries are negotiated according to their own contribution to the movie.

³⁸ Source : Jurisart n°34, avril 2016 : dossier « Production audiovisuelle, l'union fait la force »

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→ Impact of the recent reform of the tax rebate in France:

A lot of French movies were produced abroad where tax systems or working conditions were more interesting, like Belgium or Hungary.

But with the recent reform of the tax rebate in France, France is now more competitive, which would maybe reduce the number of international coproductions with France, and push producers to produce their movie only in France in order to benefit from the tax rebate.

→ At the moment, the most interesting market for French coproduction is China. With a limited quota of 34 international movies each year, the coproduction is a way of getting into the Chinese market for French movies. The agreement on coproductions signed between France and China in 2010 goes in this direction.

2. French-American coproductions

France is the 2nd countries to export movies abroad, after the US. However, French-American coproductions are very rare.

France is the country which has the most international coproductions agreements signed. However, France and the US never signed a bilateral coproduction agreement. The main reason is that the US never signed any coproduction agreements with any countries. Indeed, the domination of the US cinema in the world makes it not interesting for American studios to share the rights over a movie.

Signing a coproduction with the US is usually done according to 3 hypotheses: a coproducer is investing in the main production in return of an equity stake, or exclusive distribution rights over a territory or when there is a creative collaboration between the parties.

Another explanation of the few number of French American coproductions is that it is necessary to preserve the French cultural exception, which could be overridden in case of the development of coproductions with the US. Also, the difference between the two intellectual property systems, and the fact that the French law give the moral right to authors, but most importantly give the final cut to the director, could be an explanation. On the contrary, it is the producer who has the final cut in the US.

Finally, when the movie industry is backed up in France by the State through the CNC, the State intervention is very limited in the US.

All these reasons could explain the few number of French-American coproductions.

LEGISLATIVE AND REGULATORY NEWS

INCREASE IN TAX REBATE FOR INTERNATIONAL PRODUCTION (TRIP)

Since a few years, France has motivational tax mechanism allowing producers of audiovisual content to get favourable treatment regarding production expenditure. The goal is to encourage locating the shootings in the French territory. Two alternative tax rebates mechanisms exist in France: the tax rebate for national production, and the tax rebate for international production (TRIP). They are tax rebates granted to producers on the basis of a percentage of the expenses generated by the shooting.

A reform was contemplated to enhance attractiveness of the French tax rebate for international production.

A few months ago, France revamped tax rebate scheme to boost domestic and international shoots again. This measure, which increased the TRIP's rate of 10% and its ceiling in absolute value of 10 million of euros, enables France to enjoy a privileged position in the European ranking by providing one of the Europe's highest levels of tax incentives.

In this respect, France expects major growth in international shoots in the country. Indeed, this is a good news for international productions which could risk to choose less expensive locations abroad. For instance, "Dunkirk" by Christopher Nolan and "Riviera" by Neil Jordan, whose action happens in France, should initially to be shot in other countries for economic reasons. The strengthening of TRIP shows its first effects: during the first quarter of 2016, 19 foreign projects (films, audiovisual, animation) have already obtained a provisional approval with a view to making a film in France this year. Among these 19 foreign projects, United States and United Kingdom are still the two main countries of origin, with 14 projects and 89% of expenses.

For what kind of companies?

The TRIP is selectively granted by the CNC to the line producer of the work in France.

The company which wants to file a TRIP application has to:

- Be subject to corporate income tax in France,
- Act as the production services company for the sequences filmed or produced in France.

The production services company is defined as *"the company in charge, in compliance with a contract entered into with a non-French production company, of both supplying the artistic and technical means for walking the cinematographic or audiovisual production on one hand, and of servicing the material operations and monitoring its achievement on the other hand"*.

For what kind of works?

The Tax Rebate for International Productions is about foreign initiative movies whose all or part of manufacturing takes place in France. The concerned work has to be approved by the CNC. Thus, the TRIP is granted to a film or audiovisual production which meets all of the following criteria:

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- **It must be a fictional cinematographic or audiovisual project of live action or animation (whether singular or a series), except advertising, pornographic works or works promoting violence.**
- **It must include elements relating to French culture, heritage or territory.** It is agreed selectively to the company which realizes in France the Executive Production of the work, on the basis of a scoring scale which rewards notably the French, francophone or European dramatic content (shooting location, subject, story, characters), the French or European nationality of the actors and collaborators, the number of days shot in France, purchases from technical services providers established in France.
- **It must not receive any French State traditional financial support from the CNC, excluding official co-productions with France.**

For what kind of expenses?

- It must have a minimum spending of €1 million of qualifying expenditures in France or incur at least 50% of the production budget, when the world budget is below €2 million.
- For live action, production must shoot at least 5 days in France.
- The tax rebate is calculated on the basis of several categories which corresponds to operations or services conducted in France by the executive producer, up to the limit of 80% of work's production budget, among:
 - o Salaries and wages of writers and actors,
 - o Salaries paid to French or EU direction and production staff (wages and incidentals) including the related social contributions (with French payslips),
 - o Expenditures incurred to specialized companies for technical goods and services (expenses incurred for hiring technical companies and other providers of cinematographic and audiovisual creation services)

Transportation, travel and catering expenditures (incurred strictly for the needs of producing the work)

- o Accommodation expenditures
- o Depreciation expenses

For which amount?

Since January 2016, the TRIP represents 30% of the expenditures mentioned above and can reach the maximum of 30 million Euros.

Since the same date, it is now available for productions, even if they represent more than 4 million dollars. This extension excludes almost any budgets cap and is part of an attractive tax approach.

The TRIP has the objective to reinforce France attractiveness. It is essential at the time when competition is international and it enables to create and maintain employment in France. Indeed, it is a tool against delocalization of shootings and studios faced with the harder and harder

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international competition by attracting shootings of foreign works in France to value skill and local resources.

Thanks to the increase of the TRIP, France wishes to become the place of very lucrative futures superproductions in order to give the envy to people to come to see that landscapes and create an impact on the local economy. Indeed, France has many assets including its universally recognizable decorations, for instance the Parisians areas.

Moreover, France wants to become a European challenger and to avoid the relocation of its talents. Prestigious universities like Les Gobelins generates a lot of talents each year, notably in the digital sector. Unfortunately, they have to leave the country to find a job since there is very little shooting in France. By these measures, the government wishes increasing the country's activity and create jobs for the new generation newly graduated and which is the heir of an internationally recognized know-how.

The new 30% rates contribute to making France one of the most attractive shooting locations in the world, thanks to competitive tax incentives and the quality of French infrastructures and crews.

Hollywood has been the prime user of the TRIP to date. In 2015, US productions were responsible for 87% of total Trip investment, followed by 11% from the UK. France has also been actively courting productions from Asia. In 2014, 22% of total foreign shoots in France came from China, Japan, India and South Korea.

BONUS: INCREASE IN NATIONAL TAX CREDIT

Cinema: In France in 2015, 36% of shootings (in weeks of shooting) have been relocated to another country. Relocation of visual effects exploded from 15,4% to 60%. This is in this respect that the increase of national tax credit intervened from January 1st, 2016.

- Thus, the national tax credit has been increased too from 20% to 30%. With this measure, France hopes to reduce considerably relocation of films with high budget.

Moreover, to fight against relocation of French films shootings, French government decided to generalize the national tax credit of 30%, until now reserved for films representing less than 4 million euros.

According to Frédérique Bredin, president of CNC, this substantial increase allowed about 15 shootings to be relocated in France like "Au revoir là-haut" by Albert Dupontel or "Dreyfus" by Polansky.

- Among the main other changes, it may be noted that some French films in foreign language can now benefit from this tax rebate. The condition relating to the French language is deleted if the film is in foreign language because the scenario requires it or if the film is composed visual effects. For Instance, Valerian by Luc Besson, Mustang by Deniz Gamze Ergüven and Dheepan by Jacques Audiard took advantage of it.

TV series: French Parliament decided to increase the tax rebate relating to TV series from 10% to 25%. In this respect, the French TV series "Versailles", which should have been delocalized, will be shot in France.

DRAFT LAW ON CREATIVE FREEDOM, ARCHITECTURE AND CULTURAL HERITAGE

BROADCASTERS AND INDEPENDENT PRODUCTION

In 2015, 234 films were produced in France. Most of these works was made possible through the support of Canal + which is linked to producers by an agreement relating to pre-purchase of French films amounting to 200 million euro per year to support about hundred works. Indeed, Canal + must invest 12,5% of its turnover in purchasing European films, including 10% of French feature-length. Faced with this obligation which is specific to France, Canal + wishes it could be co-producer in order to be able to use works it produced as it wants.

On this subject, on May 24th, 2016, the French Senate is going to examine in second reading the draft law, amended by the National Assembly in second reading on March 22th, on creative freedom, architecture and cultural heritage. This text contains several provisions in relation with the audiovisual field.

Law n°86-1067 of 30 September 1986 on Freedom of communication provides that production in which broadcasters have to invest is, in whole or in part, independent from them.

The problem is the text does not define the independence of production nor the importance of this obligation of independence. It is in this regard the French legislator showed its willingness to take action to put an end to this legal uncertainty.

Quota of independent production: Among contributions made in first reading, the Senate confirmed the proposal to decrease from 75 to 60% the level of quota of independent production for the public and private broadcasters.

This proposal refers to the regulation of independent production funding by television broadcaster services. Indeed, they have to respect financing quotas relating to independent production. By this proposal, the French legislator wishes to relax the obligation on the television broadcaster services. However, this disposition is contested, notably by the SPI (independent producers' union) which considers that the legislator, through this measure, decreases drastically the broadcasters investment in favour of the independent production. It would mean that production companies should cease their activities. Moreover, according to the SPI, this concentration of production in the hands of a few broadcasting groups would damage creative freedom.

Definition of independence: Moreover, the draft law provides for promoting the restructuring of the audiovisual production industry with a modification of the independence definition. It proposes to make reference to common law criterion as defined in the Commercial Code to appreciate the effectiveness of control of a company by another one. Thus, the sole capitalistic criteria would be used.

It may be noted that a work which is produced by an independent producer but on which a broadcaster, a TV channel, holds production shares is included in the quota of dependent works.

Thus, in the framework of the quota of independent production, the TV channel participates in funding works. Nevertheless, the broadcaster is just a tenant for a determined period (3 or 4 years)

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and a limited number of broadcasting, by which time it has to give the work back to its owner, who is the producer, who may then sell it as he wants.

However, the law enforcement is based on decrees which refers to professional agreements between broadcasters and producers.

Relating to these professional agreements, Mr Jean-Pierre Leleux, who is co-rapporteur on the law on creative freedom, architecture and cultural heritage invited producers and broadcasters to complete negotiations before the second reading by the Senate.

Agreement between France TV and the main representatives of producers:

In this sense, a very important agreement has been reached between France TV and the main producers representatives organizing a new balance between independent production and France TV.

This new alliance is part of the context of profound change in the audiovisual area and rapid transformation of technologies. This agreement meets the need for the public sector to better protect and better value its programs.

The agreement provides for:

- An investment by France TV in creation representing 20% of its turnover: at the minimum 400 million euros.
- An independent share of production of 75% of investments in creation and a dependent share of production of 25% maximum (instead of 5%).
- France TV and the independent production negotiated mutual commitments about duration of rights, exploitation on digital platforms, circulation of works, share of the value, in both independent and dependent parts of the obligation.

Thus, relating to the independent part, France TV was given the opportunity to better circulate works within its channel package.

This agreement is intended to encourage the exportation of French fictions, notably, and hence stimulating French audiovisual creation.

Moreover, this agreement enables France TV to produce more internally or in the dependent part and to benefit from more rights on the works and so more income.

AGREEMENT ON PRODUCTION ACCOUNTS TRANSPARENCY

The first professional agreement on production accounts and paid back revenues transparency was signed on February 19th, 2016 between representative organisations of producers and broadcasters, and all the public and private television services. The aim of this agreement is to harmonise contractual practices between different players of this sector (producers and broadcasters) and to enable a transparent and effective implementation of revenue sharing.

This agreement shows how producers and broadcasters are willing to collaborate in order to improve together the sector financing. It is applicable to production of audiovisual works of fiction, of documentary, of animation, of live shows audiovisual adaption.

Thus, this agreement is part of the draft law on creative freedom, architecture and cultural heritage which refers to the responsibility of the sector players to define a common base in order to standardize their practices.

- The agreement provides for the definition of cost of production work which is common to all broadcasters, by the establishment of different flat rates applicable to direct expenses.
- It establishes conditions for amortization of works cost, by taking into account the tax rebate.
- It specifies calculation methods of the possible coproduction share of broadcasters and of the revenues right related to it.

More specifically, this first agreement describes rules to respect for the elaboration of the production accounts: work cost, work financing. It establishes a rule relating to the amortization of work cost intended to determine the outbreak of revenue sharing between the different right holders. Moreover, it provides for principles such as:

- Recognition of the possibility for production companies to achieve a profit margin, like any other company.
- The outbreak of broadcasters' revenues right cannot be granted from the first euro, it intervenes after hedging of the possible producer's contribution at the time of rendering of final accounts.
- Affirmation that tax rebate is not a method of financing work, nor an income to be shared between right holders.

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BONUS: EUROPE

MODERNIZATION OF COPYRIGHT

PORTABILITY

Read our complete analysis published in the annual book of the International Association of Entertainment Lawyer 2016: **“How New Technologies are Changing the European Upstream and Downstream Music Industry”**, by Anne-Marie Pecoraro and Marianne Lecron.

GEOBLOCKING

To fight against piracy and make easier the streaming, wishes are growing in Europe about the abolishment of the technical geo-blocking which is considered as a reason of piracy. This method enables to make a video legible only in the countries defined. For instance, the Internet users will not be able to watch a movie in the UK if the exploitation licence is limited to France. Indeed, for commercial reasons, some sellers use geo-blocking practices to prevent the access to websites located in others European States Members. Geo-blocking is a tool used by companies to divide markets depending on national frontiers, we can talk about territorial restrictions. This method restrains possibilities and the choice offered to the consumers.

The most of these practises are unjustified and European Commission thinks that they should be clearly forbidden to enable consumers and EU companies to take advantage of the single market.

In the Digital Agenda, European commission promised to make legislative proposals in 2016 to put an end to the unjustified geo-blocking.

About copyright more specifically, the Digital Agenda foresees to improve the digital content access by modernizing copyright. Brussels would like to make more accessible the online contents between the EU Member States by overcoming geoblocking or making the "portability" of the subscription to audiovisual services possible.

Indeed, European Commission underlines the fact that 45% of companies which want to create online sales platforms think that copyright restrictions precluding to sell abroad is a problem. Moreover, less than 4% of the European videos-on-demand enjoy the cross-border accessibility. However, digital content is one of the lever of the digital economic growth and more than the half of the Europeans citizens use the Internet with cultural purpose.

To the European Commission opinion, audiovisual programs still encounter a lot of problems about the cross-border and portability. Indeed, when a consumer wants to go to an other EU Member State, he can't, because of copyright, use the contents services he bought in his country.

Moreover, currently the principle of territoriality prevents to accede to copyright content of an other EU Member state because this rule makes it unavailable or inaccessible in his country.

Because digital economy is the future of Europe and the continent has a wealthy cultural diversity, it is necessary to create a unified system to encourage creation and investment by making possible contents transmission and consumption beyond the national borders. With this in mind, European commission promised to propose solutions before the end of the year about an expanded online access to works thanks to:

- portability of legal acquired contents,
- the cross-border access to services bought on-line lawfully.

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If European Commission considers it is important to act to remove geo-blocking measures, Net Giants like Netflix have the same position. Indeed, lately the Netflix director indicated that he was against geo-blocking and thought restrictions had to be abolished to give way to a unique works catalogue destined to all the countries.

One of the reasons Internet users use pirating is the fact that some of works aren't legally available everywhere. That's why they take alternative ways (download, streaming, P2P...) to accede to what they want. According to Netflix, it could be possible for these Internet users to come back in the legal offer field only if measures are taken to remove restrictions ordered by agreement, which restrict exploitation licence to specific geographic areas.

TERRITORIALITY ISSUES

On 09 December 2015, the European Commission presented its action plan to modernise EU copyright rules as well as a proposal on the cross-border portability of online content services aiming to allow Europeans to travel inside the European Union with their online content. Cross-border portability might be implemented in all European countries by the end of 2017.³⁹

However, there is no certainty that the European Commission's plan to modernise EU copyright will be completed in the near future. This "political preview" will have to be translated into legislative proposals and policy initiatives in the coming months, taking into account all inputs from several consultations.

Currently, EU copyright is governed by the principle of territoriality, which is an exception to the freedom to provide services uniformly across the EU. Indeed, each European country has its own system to ensure copyright protection and the level of protection can be very different from one country to another. France copyright protection is known to be one of the most favorable to authors and a consequent part of the French cultural economy is based on this system. Even if we can only admit that copyright protection needs to evolve in order to provide appropriate answers to new technologies, it is important to highlight that an alignment of French copyright to European requirements may seriously overturn the French cultural economy.

Audio-visual consumption challenging the principle of territoriality

The principle of territoriality plays a key role in the financing of audio-visual works (A), however, this principle is being challenged by European measures aiming to improve consumers conditions for viewing online audio-visual contents across the European Union (B).

Territorial pre-sales have a key role in audio-visual financing

Because films are risky investments, they require the intervention of numerous players of different sizes and expertise and it is often difficult for producers to obtain financing at the very early stages of development. In this respect, the territorial sale of rights and exclusivities play an important role in the financing and distribution of European films. Indeed, film production and distribution are generally part of the same business model. It is common, at the development stage of a film, to set the pre-sale of rights to major television broadcasters, distributors and publishers. In the European Union, such pre-sales are generally organised by platform, language and/or territory. This allows producers to cover high up-front production costs and often forms the collateral for a production loan from a bank.

³⁹ Extract from « French and European Audiovisual financing facing new challenges » : <http://medialawinternational.com/page162.html>

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In comparison with the United States, territorial pre-sales in the European Union are key to financing. Indeed, because of the wide diversity of languages, cultures and regulations, producers are able to identify many different distributors from different countries who can contribute to the financing of the film. Furthermore, the diversity of distributors and publishers of different origins fosters the distribution of European films across national boundaries, as it gives them the expertise on how to make films reach foreign audiences.

After hearing the European Commission action plan to modernise copyright rules, rights holders raised their concerns regarding cross-border portability and underlined that only less than 3 per cent of EU population resides in a Member State other than their country of origin. Furthermore, rights holders highlight that territorial licensing with exclusive distributors per territory helps them secure adequate financing at the pre-production stage. They fear that removing territoriality would only benefit major global players who could be the only ones able to close pan-European licensing deals against lump-sum payment, instead of territory-by-territory licenses. In this respect, French rights holders' defenders indicate that a better solution would be to make major online actors such as Google, Amazon, Facebook and Apple aware of their responsibilities in order to get them involved in the collecting and payment of royalties to authors.

Principle of country of origin challenged by French regulation

Audio-visual financing sources can result from investment obligations deriving from European member states regulation in application of the AVMSD. According to this directive, each member state can adopt specific regulation requiring broadcasters to reserve a majority proportion of their transmission time for European works and /or at least 10 per cent of their programming budget for European works. This directive also implements the principle of "country of origin" according to which, for audio-visual media services, the laws of the state where the service provider has its headquarters shall be applicable.

As a result, audio-visual players are subject to more or less stringent rules depending on their country of establishment and many international online operators are tempted to base their server and headquarters in certain countries only for fiscal reasons not connected to the location of the economic activity. As a result, like stated in the JRC report on Models of ICT Innovation: "the new digital environment is jeopardizing a funding system based on box office revenues collected on the domestic market structure (...) with the growth of alternative distribution channels and services provided by suppliers located outside the national territories or even outside the EU".

Nevertheless, it is interesting to underline that France is willing to fight these practices notably by taxing the revenues of foreign video retailers. Indeed, the French 2013 budget law aims to have the same taxes applicable to all VOD providers offering their services in France regardless of their country of origin. However, such provision will only become applicable once the European Commission has approved it. Since then, no official text was published in this respect and in an

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answer from the French culture minister dating from 16 December 2014, the latter explained that it initiated discussions at the European level to have the principle of country of origin replaced by the principle of country of destination.

NET NEUTRALITY

NEWS: On April 30th 2016, the European regulation on the Internet entered into force. For the first time on a European scale, a text provides for basic principles relating to net neutrality, such as:

- Treatment equality and non-discrimination of Internet traffic,
- Users' right to consult and disseminate contents and information of their choice.

This text is a very important step to Net neutrality. However, this European regulation does not solve all problems and suggests loopholes that Internet providers could exploit.

Net neutrality is the principle that Internet service providers and governments should treat all data on the Internet equally, not discriminating or charging differentially by user, content, site, platform, application, type of attached equipment, or mode of communication.

This is an important principle, especially for the streaming platforms like Netflix which use a lot of bandwidth. Therefore, net neutrality is actually the object of a very important debate. Indeed, Internet service providers point out the fact that videos and companies which take advantage of it on their websites need infrastructures even more important. Thus, Internet service providers would like to charge a part of their investments in cables installations in giants American like Youtube.

It's important to note the fact that American and Europeans regulators worked or are working on the possibility to create a regulatory framework to protect the internet neutrality to guarantee an equal access of the contents suppliers and to forbid to the Internet service providers to favour some of them with paid agreement.

- **Net Neutrality in the USA**

Lately, the Federal Communications Commission (**FCC**), the American regulator of the telecommunications market, decided to order strict rules to the Internet service providers to insure this neutrality. Indeed, the 26th February has been approved the proposition about a new regulatory framework. This is the result of an intense work of lobbying by citizen associations and influent actors of the Internet, like Netflix. The Federal Communications Commission forbids clearly blocking illegal contents, applications, services or damaging devices. Moreover, a degradation of the connexion by the operators is forbidden, it is not possible to differ or to restrain data flowing. At last, the FCC underlined the fact that it is not allowed to create a priority between the users. In fact, the operators cannot favour a content according to whether its editor paid more than his competitors: paying agreements to favour some of contents are forbidden. This rule is applied for their own contents, services or applications.

This position of the FCC guarantees a better equality of treatment between big and small web actors and insures the Internet is "free, open and fast".

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But, it could translate into a rise of the subscription prices by transmitting increasing costs of data delivery on the consumers. Moreover, it could bring about a decline of the investments in the grids/networks.

While with this measure the Internet became a public utility, several complaints had been registered by the American operator which regret that the American regulator resorted to legislation about telecoms (1934) totally inappropriate to the present state of the Internet.

- **Net Neutrality in Europe**

The decision made by the American regulator consecrating the Net neutrality as a fundamental principle put pressure on the European Union which has difficulties to insure an obvious position. Two positions exist at Brussels. On one hand the European Parliament which affirmed last year a similar position to the one of the FCC, against the possibility for the Internet Service Providers to keep the right to offer different speed to the Internet. On the other hand, Members States and Internet Service Providers which consider it would be necessary to put nuances to this principle.

Last year, the 3rd April of 2014, EU Parliament approved a consolidation of the net neutrality rules. The goal was to avoid creating two speeds to The Internet, with companies which can offer themselves some decent broadband and the others which only can use a cheap network.

But today, representatives of **Members States** are proposing to reduce the neutrality rules. Particularly France and Germany insist to obtain a regulation of platforms as Google. They would like charging very guzzler services of bandwidth in exchange for a high speed. They want that specialized services, which are growing and promised to rise exponentially, to be the subject of a particular treatment.

Moreover, the **UE operators** are trying to convince the European regulators to be pragmatic and flexible in the Internet traffic regulation project to have the possibility to give priority to some data on the network.

On March, at the European Council, Members States considered that if the Internet has to be open, without blockage or reduction in speed, this doesn't mean that operators can't manage their traffic. Indeed, the European Council decision enables explicitly the fact to give a preferential right to "specialized services" if it doesn't damage the entry-level Internet. Consequently, it is considered the possibility to proceed to an overbilling for the services which consume a lot of bandwidth in exchange to a high speed, for Netflix for instance. The European Council proposed that the Internet Service Providers shall not be authorized to suspend or to slow down the traffic but it foresees exception, for instance to prevent cyber-attacks.

- **Bandwidth**

Conversely to the Net Neutrality principle, twenty-six European moviemakers cried out for a solution to the tax optimization of the Net giants. As a matter of fact, they would like to order a tax

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on the bandwidth to enable the financing of independent cinema by American giants and favour the diffusion of their works in whole Europe. They think it is important to create a cultural tax law with urgency for the global actors of the diffusion.

The Minister for Culture proposed the same idea lately while France is trying to tax New Technologies Multinational companies. Actually, Internet Giants like "Netflix" or "Youtube", which use a lot of bandwidth, would be subject to pay a tax according to the volume of data they generate. This tax would be a way to favour the French companies and to support the audiovisual creation but it is in conflict with the net neutrality principle.

BONUS: TAFTA

French President Hollande said on **the 3rd of May 2016**, that France would reject the TTIP “at this stage”, threatening to block the deal under discussion. The French Government is opposed to unregulated free trade.

The French Foreign Trade Junior Minister, Matthias FEKL, regretted that the agreement in its current form was a “bad deal”. He said that “Europe is offering a lot and we are getting very little in return. That is unacceptable”.

These declarations could impact the agenda of the expected TTIP final agreement. As a reminder, last week EU and US officials hoped to reach a deal in mid 2016.

According to the documents revealed by Greenpeace on the 3rd of May 2016⁴⁰, the US and the EU did not reach an agreement for now. France was fighting to maintain the French cultural exception⁴¹, and therefore to exclude the audio-visual services from the Treaty. However, the US did not accept for now to exclude them from the Treaty, creating a dead-end.

⁴⁰ <http://transatlantique.blog.lemonde.fr/2016/05/03/les-13-choses-que-nous-apprend-la-fuite-du-tafta-sur-letat-des-negociations/>

⁴¹ http://www.lemonde.fr/economie/article/2013/06/15/paris-impose-l-exception-culturelle-a-bruxelles_3430716_3234.html#JRIH2RqxXY104ic.99