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## The Cultural Exception VS TTIP

On March 13 the Commission issued a draft negotiation mandate for the Transatlantic Trade and Investment Partnership (TTIP) that the Commission will negotiate with the United States on behalf of the EU Member states.

A major point of disagreement and discussion regarding the TTIP was the audiovisual sector, and the Member State's corresponding legislation and funding programs.

Both through international commitments (UNESCO) and through the European Union's very own treaties (TEU & TFEU), the Commission is obliged to assist the Member States in protecting and promoting Europe's diverse cultural heritage. The possible removal through negotiation, of the tools in place to achieve these goals,

would be in violation of legally binding commitments.

Many felt that this sector should have been excluded from the mandate from the very beginning, in order to properly protect it. If not, the fear was that the US side would represent strong film and technology interests.

In response to Trade Commissioner Karel de Gucht's initial stance that all relevant areas must be included in the mandate, many of the most prominent European filmmakers co-signed a [petition](#) to take the so-called "cultural exception" into consideration, which to date has been signed by more than 7000 professionals.

Since the Commission represents a variety of interests and responsibilities, it was not necessarily unexpected that there would also be disagreeeme

within the institution. The Commissioner for Culture, Androulla Vassiliou, had early on voiced her support for the audiovisual sector. In various speeches she proclaimed that "culture is not a commodity", and that the cultural exception must be shielded from being treated as such.

Commissioner De Gucht, and Commission President, José Manuel Barroso, both opposed this position to a varying extent. The general objection was that the EU must avoid any "red lines" in its mandate, to have everything on the table. At the same time Barroso claimed that the cultural exception would remain untouched. This guarantee would of course not keep the US from attempting to negotiate on the sector.

**When the European Parliament** had its plenary meeting in Strasbourg on the 23<sup>rd</sup> of May, it echoed the view of FERA and other audiovisual sector organizations. A majority of the representatives voted in favor of a resolution that called for the exclusion of audiovisual services from the Commission's negotiating mandate.

In the lead up to the decision day for the mandate, the Parliament's non-binding resolution, was still considered a political embarrassment to the Commission. On the 13<sup>th</sup> of June the President of the European Parliament, Martin Schulz, reaffirmed the majority position: "The European Parliament is clear that cultural and audiovisual services, including those provided online, should be excluded and this should be clearly stated in the negotiating mandate."

### A Greek Broadcasting Tragedy

On June 11 the Greek government made a sudden decision to shut down the public Hellenic Broadcasting Corporation (ERT), and to cut its signal. The apparent motive was to maintain austerity as prescribed by the Troika (the European Commission and Central Bank, and the IMF).

ERT employee demonstrations at the broadcaster's headquarters started almost immediately after the decision. Meanwhile, just a few days later, the Greek Council of State swiftly ruled that Prime Minister Antonis Samaras had broken the law when cutting the ERT's signal, and that the government immediately reestablish it. But as of now both the signal and the ERT remain closed.

**Before the European governments** had to come to an agreement, the French Minister of Culture, Aurélie Filippetti, had gathered the support from 14 other cultural ministers. However in the decisive meeting of trade ministers, only France entered with an official stance against the inclusion of the audiovisual sector. Some governments still voiced sympathy, but only France was prepared to veto the final amendment over this issue.

On June 14, after twelve hours of intensive discussion, and well beyond the deadline, the trade ministers finally reached a compromise. The mandate will include a paragraph that excludes the audiovisual sector, but the Commission will retain its ability to recommend changes to the mandate if deemed necessary. Consequently the French trade minister Nicole Bricq, declared

that she was satisfied with the result, but was reluctant to call it a victory.

Our worry now is that, although the individual national funding mechanisms for the audiovisual sector may remain intact, so called new technologies may still become fair game. If for example new distribution technologies were to be negotiated, it can result in restriction of content requirements at the national level, reduction of European technological competitiveness, and a diminishing space for future policy-making.

FERA will continue to monitor the progress of the trade talks and, in close collaboration with other audiovisual sector representatives, remains vigilant vis-à-vis the European institutions.



Demonstration outside the ERT office

In response to the Greek government's actions, FERA quickly issued a press statement urging Mr. Samaras to seek other solutions to preserve the economy and fight corruption, than to close the public broadcaster and displace thousands of employees. While there might indeed be a need for reform or restructuring of the public broadcaster, there is little

doubt that depriving the Greek people of information, education and entertainment is not the ideal way to achieve it. Particularly in these difficult times Greece needs its public broadcaster more than ever, if consensus and hope are to be found.

To read FERA's press statement in full please click [HERE](#).



Photo: Morten Espeland

## The Pirate Bay: screening and debate

A documentary called “The Pirate Bay Away From Keyboard” (TBP AFK) was featured at the International Short Film Festival in Grimstad, Norway in June.

The film is about the multi-million dollar lawsuit against the Swedish founders of the file sharing site The Pirate Bay, and served as an introduction to a broader debate on digital activism and the conflict between free flow of information and rights holder’s economic interests. FERA was represented on the debate panel by CEO Elisabeth Sjaastad, and debated with Håkon Wium Lie, technology director in Opera Software (creators of a popular web browser) and secretary of the newly established Norwegian Pirate Party, among others.

The film’s director, Simon Klose, and other likeminded panelists, held that their stance as TBP sympathizers was to some degree an ideological one; the free file sharing system democratizes the information on the web, and guarantees the right of expression and privacy from state surveillance and powerful corporate/commercial interests. It was further argued that other media, or artistic forms, had to various degrees successfully adapted to new distributive methods, and that even free unauthorized file sharing could in many cases

be seen as a publicity enhancer. For the creation of this documentary the director had experimented with new methods of financing (crowd funding) and publishing (freely available on torrent sites and Youtube).

Sjaastad presented several persuasive reflections on these claims. First and foremost she agreed that there was nothing wrong with free file sharing, but that *it has to depend on the approval of the creator or rightful owner of the work*. Furthermore, it is a misconception that file sharing sites, such as TPB, are non-commercial, “Robin Hood” activities. The fact is, as proven by the documentary itself that these sites have actually just moved the commercial element away from creators and traditional distributors to technological/IT enterprises, rather than removing it altogether; meaning that TPB and similar actors indeed are operating out of self- interest.

She further reminded us that all cultural disciplines do not have equal requirements for sustainability. Film distinguishes itself from other cultural expressions in that it usually requires a lot more resources and financing. The contractual and funding arrangements that are in place in Europe provide security for the stakeholders, and removing this security may

prove damaging to the continued creation of films. So the interest in seeing economic returns from artistic creation is not necessarily a hunt for profits, but the only means to carry on producing audiovisual material. Additionally, streaming services for other less capital intensive forms of cultural creation have not satisfactorily replaced traditional forms of distribution. The opposing panelists had to concede this point, as they could not suggest any suitable new methods for the film industry.

Conclusively, Sjaastad assured that her claim was not that film creators shouldn't experiment with different methods of distribution, publicity and financing. but that the liberty of

experimentation must remain in the hands of the creator. The solutions that work for network giants like HBO, do not necessarily work for an independent documentary film maker. While there is luckily still a demand for professionals in the field, to remove the rights and sources of income from film creators could endanger the recruitment of future talent.

## FOCUS ON FERA MEMBERS: ITALY

### Italian Questions

There is considerable excitement amongst Italian authors at the moment, and the issue is 'online rights'.

Italy has unfortunately become a 'buyout country'. Theoretically, we have some of the strongest authors' rights in Europe, including a legal right to fair payment (*equo compenso*), but this has been made meaningless by the failure of our collecting society SIAE to enforce it, leading to the *de facto* enforced cession of all rights by authors.

However, the Italian producers association ANICA recently organized a meeting with Google Italy that is finally producing some results, a two year old deal between SIAE and Google having brought us nothing at all.

Google/YouTube wants to negotiate with the producers for rights in what it shows on the platform. The percentages are not large, but the principle is new - and disruptive! Google is proposing contracts providing rights holders with an income of

earnings from advertising. It will also undertake to immediately take down material reported as pirated.

Italian authors are traditionally obliged to cede their rights to producers, but the new situation means they can now ask producers to give them specific rights payments on each individual platform, including Google. In the long run could this possibly mean, as the Cavada report suggested, "No more buyouts"?

The other interesting development here is that the Culture Ministry's cinema department has attacked the longstanding RAI and Mediaset monopoly of TV rights, which means that they fund productions but also control every aspect of them, including sales, leaving producers with no rights. Ministerial interventions are now expected in favour of producers being permitted to retain rights and exploit them, as happens in some other countries, for example the UK.

If that happens, will we finally be able to talk about having some 'independent' producers in Italian television? The picture is changing!

100autori is now developing a strategy of assignment of all its members' rights to a 'trust', a legal body which would hold these rights on behalf of authors in order to negotiate better rates and contract conditions while protecting the individual. So far, some producers seem to be willing to talk to us on these terms.

In the background is the digital challenge. Can we really thank the digital revolution for a rebalancing of contractual positions between authors and producers? And above all, are we looking at the possibility of authors finally having appropriate contracts for different platforms and distribution models, after decades of dictatorship by the RAI-Mediaset duopoly?

Maurizio Sciarra, 100Autori

### CMO Directive

The Legal affairs committee (JURI) of the European Parliament voted on the proposal for a directive “on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market,” otherwise referred to as the CMO directive, on the 9<sup>th</sup> of July.

Four other relevant parliamentary committees have also made recommendations to the proposal, to which MEP Marielle Gallo has been assigned as a rapporteur. Two amendments were added to the bill before the vote.

Two of the three central topics in this directive proposal concerns **transparency** and **governance standards** for collective management organizations (CMOs), and are of considerable significance for the audiovisual sector.

The proposal will now move on to a plenary reading in the Parliament, which has set an indicative voting date for the 19<sup>th</sup> of November, 2013. In the event that a Parliamentary majority approves of it, the subsequent phase will involve a “trialogue” negotiation of the final text between the Commission, the Council and Parliament, before its final approval and conversion into law.

FERA has been actively following the parliamentary work on this directive, which is of great importance to our members. FERA Chief Executive Elisabeth Sjaastad has attended several meetings and hearings and has been invited to present the FERA view on two occasions. To read our position paper on the CMO Directive click [HERE](#) (PDF).

### Audiovisual Convergence

On the 24<sup>th</sup> of April the Commission published a Green paper called “Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values,” perhaps more adequately named “Internet on TV, TV on Internet,” as their press release states.

Convergence is therefore to be understood as “the progressive merger of traditional broadcast services and the internet.” Clearly it encompasses many fundamental topics of great concern to the audiovisual sector. Stakeholders are invited to submit their opinion to the Commission until the **31<sup>st</sup> of August**.

In the Green Paper the Commission asks for the public’s opinion on questions such as:

*What are the factors that enable US companies to succeed in the fragmented EU market despite language and cultural barriers, while many EU companies struggle?*

*Do the Current AVMSD (Audiovisual Media Services Directive) requirements provide*

*the best way to promote the creation, distribution, availability and market appeal of European works?*

*Given convergence between media, is there evidence of market distortion caused by the regulatory differentiation between linear (traditional TV) and non-linear (TV on Demand) services?*

*What regulatory instruments would be most appropriate to address the rapidly changing advertising techniques? Is there more scope for self/co-regulation?*

These are only a few of the questions from the Commission. To read the official documents, click on the following links:

[Press release](#)  
[FAQ Memo](#)  
[Green Paper](#) (PDF)

The Commission asks that any interested parties send their responses to:

[CNECT-CONVERGENCE-AV@ec.europa.eu](mailto:CNECT-CONVERGENCE-AV@ec.europa.eu)



# Cinema Communication

The European Commission has once again proposed changes to the rules governing state funding of film projects, commonly referred to as Cinema Communication, in a new revised draft published on April 30. This is the last in a long process of consultation and revision.

The revised Cinema Communication proposes several changes to the version that has been in place since 2001. Under the previous rule the state financing a film project could set territorial spending requirements as a percentage of the project's total budget. The revised draft intends to reduce these territorial spending requirements considerably, because the Commission perceives them as restrictions on the competitiveness of the industry, and limiting internal market competition within this sector.

The Commission has however failed to present any proof that this is the case, and has come under heavy criticism from the industry and several Member States who are all satisfied with the 2001 Cinema Communication.

Through the rounds of consultations and recommendations many parties have provided counterarguments to the Commission's stance. Member States have argued that their funding mechanisms may lose legitimacy, as they are financed by tax payer money. FERA and our colleagues, have further reasoned that diminishing territorial requirements (and its political legitimacy), may have the opposite impact on competition and competitiveness than intended.

If the requirements are removed it may lead to some States diminishing, or completely

removing, their funding programs, while others might increase them. Both of these outcomes would have a clear negative impact on the competitiveness of national industries, and the competition among them. Furthermore it would infringe upon a State's right, and the Commission's duty, to protect and promote the European cultural diversity.

Although we do agree with some of the content in the revised draft, other organizations have presented stronger opposition. The European Film Agency Directors stated in May that "the EFADs are unable to endorse the draft Cinema Communication as it stands now as it would put the European audiovisual sector in danger."

The revised draft is scheduled to be adopted during the third quarter of 2013. To read the comments jointly submitted to the Commission by FERA, FIAPF (film producers), FIA (actors) IVF (video distributors), and UNI MEI (film workers) click [HERE](#) (PDF).

## The Vitorino Recommendations

In November 2011, the Commission entrusted António Vitorino with the task of mediating a stakeholder dialogue on private copying levies. In January 2013 he presented his recommendations.

There were many critical reactions from many of the stakeholders; many groups and associations, like FERA and the Society of Audiovisual Authors (SAA), saw that the recommendations could deprive creators of a legitimate compensation, under the assumption that private copies from licensed services do not cause any harm.

On May 29 the European Parliament invited Mr. Vitorino to present his recommendations to the Legal Affairs committee (JURI).

Vitorino acknowledged that several of his recommendations were highly controversial among the stakeholders. The most contentious proposition was to shift the liability of the private copying levies to the retailers, but several, if not most, of the Member States opposed this, including France and Germany. Another point of disagreement was whether or not private copying levies hamper the development of new business models; the industry had failed to provide any evidence of this. According to Vitorino only two points were agreed upon by the stakeholders: that the levies should be collected in the Member State of the consumer, and that the levies should be visible to the final consumer.

MEP Françoise Castex, has been appointed rapporteur for the JURI committee and she will start work on her report in September.

At this stage the Commission seems to have no immediate plans to act on Vitorino's recommendations. This may give additional weight to the Castex report, which could aim to provide some additional recommendations to the Commission.

FERA is not pleased with the recommendations thus far. The private copying levies are an important source of income, and it is only fair that technology manufacturers continue to contribute a small percentage of their huge profits to the creators – even in the digital age. Vitorino's recommendations do not provide any satisfactory solutions to this problem.

The two countries that have replacement hardware levy collection with a compensation over the state budget, Norway and Spain, experience a massive drop in the amount of money available to creators, and thus a weakening of their ability to continue their creative work.

In the last edition of the FERA Newsletter the editorial raised this issue by asking "The Trillion Euro Question" (click [HERE](#) to read it). We are still waiting for the answer.



## A Thin Red Line

On July 10 the first round of negotiations on the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US got underway in Washington DC.

And much to our relief, the audiovisual sector is not on the table.

The process that got audiovisual services excluded from the negotiating mandate proved messy and high tempered with emotions running high on all sides.

Ever since the European Commission published its proposal for a draft mandate back in March, the initial inclusion of the audiovisual sector was met with anxiety and disbelief. This was after all a battle we thought we had won in 1993 with the GATT (General Agreement on Trade and Tariffs). And since then the EU's own Treaty as well as the Unesco Convention on cultural diversity should surely provide further safeguards for keeping culture out of trade agreements.

But the Commission kept stubbornly to their strategy of not excluding any sector, however sensitive, but tried to offer assurances that they had no intention of making any concessions in this area.

To the film community this was Chekhov's gun. Why introduce it if you don't plan to use it? Considering that Hollywood products are the US' second largest export after weapons, it seemed likely that their side would want to obtain something in this area. And in a document dated October 2010, the Motion Picture Association of America (MPAA), which represents the big studios, did point to the Audiovisual Media Services Directive (AVMS) as a trade barrier to US export of filmed entertainment. But the Brussels office of the Motion Picture Association, on the other hand, ensured their European colleagues that they had "made their peace" with our quotas and subsidies and did not ask the US

government to include audiovisual, but nor did they ask for its exclusion.

It was all a bit of a mystery. But if the true motives seemed unclear on both sides, the European audiovisual community still felt that the Commission was prepared to use our sector as collateral in order to obtain other important things in the negotiations. So the protests continued and gained momentum.

In a meeting between Commission President José Manuel Barroso and French President François Hollande on May 15, 3 so-called "red lines" were set out in order to lay down certain parameters to safeguard Europe's audiovisual sector. In the weeks that followed, Commissioners Vassiliou and De Gucht spoke in public and gave diverging versions of these red lines. The Commission was communicating conflicting messages.

## EDITORIAL

But as discussions on the wording of red lines overshadowed the initial issue of quotas and subsidies, the real question finally came to the surface: What happens to our audiovisual works online? What space will Europe have to make its own policy regarding online operators?

What was really at stake was more than the current legislation on investment in and promotion of independent European works, but also how the audiovisual sector can be equipped to straddle the transition to the digital economy and an online market place which today is completely dominated by American giants such as Google, Amazon, Apple iTunes.

At a time when Google has 95% market share in many European countries and face investigation on both sides of the Atlantic on the possible abuse of dominant position, why did the European Commission seem so eager to hand over the remaining 5 % ?

A new wave of American services such as Netflix and HBO are sweeping across Europe. From what I understand they operate under an editorial policy of 80 – 10 – 10: 80% American content, 10 % local (national) and 10% regional (European).

These services would presumably not want to comply with AVMS Directive article 13 on the contribution of online services to the production and promotion of European audiovisual works, which also still lacks proper implementation by most Member States.

On May 14 French Minister of Culture Aurélie Filippetti enlisted 13 of her European colleagues to call for the exclusion of audiovisual services from the negotiation mandate, and on May 23 the European Parliament embarrassed the Commission by voting a non-binding resolution with the same crystal clear message: Culture is non-negotiable.

And finally, on June 14, with the weight of a looming veto and 12 hours of intense debate, French minister of Ecology, Sustainable Development and Energy, Nicole Bricq won the support of the Council in favour of the exclusion of audiovisual services – at least for now. The Commission has made it clear that it has the right to come back and ask for a revised mandate at a later stage if it so wishes.

A few days later, FERA was part of a delegation of audiovisual organisations who met with the top bureaucrats at DG Trade. Both sides explained the thinking behind our respective positions. Our side feels reassured that the Commission will respect that audiovisual is now not part of the mandate, and given the current public consultation on a possible revision of the AVMS Directive (the Green Paper on Convergence in the AV World) any demand to reopen this issue in the context of the trade talks is not going to be put forward anytime soon.

The message from DG Trade was: "There is no plot". This does not mean that the European audiovisual sector should not remain vigilant in this process. There are still issues on the table that can affect us both positively and negatively, such as e-commerce and telecommunications and intellectual property rights.

The lesson to be learned from this ordeal is that no battle is won once and for all. At a time when the European Commission seems to be challenging our sector on many fundamental issues such as state aid rules and now the AVMS Directive, we must all try to protect the thin red line between the cultural exception and the onslaught of dogmatic market liberalism.

Elisabeth O. Sjaastad



## AGENDA



**29 July – 28 August**

The FERA Office is closed

**27 September – 29 September**

FERA General Assembly in London hosted by Directors UK

*We wish everyone a  
pleasant summer holiday!*

**FERA President**  
Sir Alan Parker

**FERA Creative Council**  
Marco Bellocchio  
Claire Denis  
Agnieszka Holland  
Neil Jordan  
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