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## Principles for a second century of film legislation

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## **Principles for a second century of film legislation**

**Dr. Daithí Mac Síthigh (University of Edinburgh)**

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### **Part 1. Introduction<sup>1</sup>**

From time to time, governments in the UK have tried to articulate or promulgate a national ‘film policy’.<sup>2</sup> While film policy has been defined as ‘a network of practices and institutions intended to sustain and regenerate production, distribution and exhibition’,<sup>3</sup> using what a House of Lords Committee called a ‘variety of tools’,<sup>4</sup> legal measures underpin many (although far from all) of those practices and institutions. Some factors cited in relation to film policy, such as exchange rates are, in practice, beyond normal and direct legislative control.<sup>5</sup> In other cases, policy objectives and legislative provisions can be at odds with one another, as shown in Stubbs’ recent reassessment of the role of the Board of Trade in policing the support for ‘British films’ in 1960s.<sup>6</sup>

The law of film is a wide-ranging set of provisions and practices, spread across statutes and court decisions but capable of being studied as a system. Law affects all three of the historic divisions drawn by film historians<sup>7</sup> between the sectors of production, distribution and exhibition. Legal scholars have tended to focus on the (undoubtedly important) issue of film censorship, with tax relief also providing popular in later years. Work with a wider scope is less prevalent. Although Barron has explored the links between law and film theory,<sup>8</sup> and Greenfield et al’s collection considers a range of problems in ‘film and the law’,<sup>9</sup> their concerns are intellectual property and the *representation* of law in film respectively. The author of this article sets out instead to consider the role of law in UK film policy, making recommendations for a more coherent legal approach that should be adopted in conjunction with the existing processes of policy review and development.

The *scope* of this research is broad. Different forms of UK statutory control of film (current and past, including the Video Recordings Act 1984, Cinemas Act 1985, Films Act

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<sup>2</sup> For a review of 20<sup>th</sup> century film policy proposals and reports, see J Hill, ‘British film policy’ in A Moran (ed), *Film policy: international, national and regional perspectives* (London: Routledge, 1996).

<sup>3</sup> T Miller ‘The film industry and the Government: “endless Mr Beans and Mr Bonds”?’ in R Murphy (ed) *British Cinema of the 90s* (London: BFI, 2000) p 37 (setting out a long list that includes copyright, censorship, tax relief, treaties on co-production and even ‘ambassadorial services’).

<sup>4</sup> House of Lords Select Committee on Communications ‘The British film and television industries—decline or opportunity?’ (2010) HL Paper 37-I [‘Communications Committee’] p 6.

<sup>5</sup> For example, the chair of the UK Film Council told a House of Lords Committee that there were three factors affecting the willingness of Hollywood studios to work outside the US, namely tax relief, the quality of the workforce, and the exchange rate: Communications Committee, above n 4 at [35].

<sup>6</sup> J Stubbs ‘The Eady Levy: A Runaway Bribe? Hollywood production and British subsidy in the early 1960s’ (2009) 6 *Journal of British Cinema & Television* 1 at 11-13.

<sup>7</sup> Street suggests that considering the three sectors in film history has been the case as far back as 1914: S Street *British National Cinema* (London: Routledge, 2<sup>nd</sup> edn, 2008) p 7.

<sup>8</sup> A Barron ‘The legal properties of film’ (2004) 67 *MLR* 177.

<sup>9</sup> S Greenfield, G Osborn and P Robson *Film and the law: the cinema of justice* (Oxford: Hart, 2<sup>nd</sup> edn, 2010).

1985 – each dealing with different aspects of film regulation) are presented here, alongside significant non-statutory measures of control and influence, such as the virtually non-legislative UK Film Council (recently abolished). Work by scholars in British film history is referred to, setting these insights alongside a careful assessment of relevant legal provisions, highlighting differences between the approaches of law and of film history, and indeed the consequences that flow from differences between diverse legal definitions.

The *objective* is to craft an agenda for a ‘second century’ of film legislation. This century has recently begun, following the 100<sup>th</sup> anniversary of the first Cinematograph Act 1909 (which is no longer in force). Additionally, the Film Policy Review Panel (chaired by former Labour minister Chris Smith) was established in 2011,<sup>10</sup> with a mandate to consider issues such as Lottery funding, market failures, skills development and audience demand; its report of January 2012 set out a range of policy proposals, but does not appear to have prompted legislative change.

As such, the *purpose* of the article is to give further attention to the role of statute in the field of film policy. While a wide range of issues could have been considered in the present exercise, the author has chosen to identify one core issue and one related, further issue as ripe for analysis. These issues are chosen because of the importance (or potential importance) of legal definitions for the film industry. In part 2, the core issue of the definition of ‘film’ is discussed, based on detailed consideration of the regulation of ‘alternative content’ (‘livecast cinema’) and of tax relief for film production. In part 3, the further question of institutions is considered, regarding the existence, governance and accountability of a number of bodies involved in UK film policy: the UK Film Council, the British Film Institute (BFI), and the British Board of Film Classification (BBFC).

## **Part 2. Defining ‘film’**

### *The problem*

Different definitions of ‘film’ are found in statute. Two particular questions, considered in this Part, are whether a work requires classification for the purposes of public exhibition under the Licensing Act 2003 (further subdivided into the standard and as-live regimes), and (based on the intended form of exhibition) whether its production attracts tax relief. (There are other tests, considered in passing, regarding a work being culturally British and/or specialized). The content and format of the work will also affect whether its sale or supply as a video work is subject to the Video Recordings Act (which is discussed in part 3).

These definitions must be read both as a source of possibly contradictory legal approaches to the nature of film and as subject to challenge from technological, social and economic changes in how audiences engage with film. Although a report for the UK Film Council argues that ‘over 2 in 5 of the general public agree that the cinema remains the best place to enjoy watching films’,<sup>11</sup> this can be simply and reasonably recast as *a majority of the general public do not agree that the cinema is the best place to enjoy watching films* - setting aside for now the definition of ‘best’. This demonstrates how far we have come since the British Film Institute’s 1985 Film Year campaign ‘Cinema – the best place to see a film’,

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<sup>10</sup> ‘Film Policy Review opens’ (24 June 2011), available at <https://www.gov.uk/government/news/film-policy-review-opens>; Film Policy Review Panel *A future for British film: it begins with the audience* (16 January 2012), available at [http://www.culture.gov.uk/images/publications/DCMS\\_film\\_policy\\_review\\_report-2012\\_update.pdf](http://www.culture.gov.uk/images/publications/DCMS_film_policy_review_report-2012_update.pdf).

<sup>11</sup> Harris Interactive ‘Portrayal v Betrayal: An investigation of diverse and mainstream UK film audiences’ (report for UK Film Council, April 2011).

dedicated to ‘celebrating film in its first and natural home – the cinema’.<sup>12</sup> As such, the detailed exploration of the definitions in this part explore the significance of the lines drawn in legislation and reinterprets them in the light of research in media and film studies.

### *Alternative content / livecasts*

In the case of cinema, the formal responsibility for regulating admission to cinemas (i.e. exhibition) is and has since 1909 been vested in local authorities.<sup>13</sup> This was confirmed in the consolidating Cinemas Act 1985 and is now found in the Licensing Act 2003. When a licence for a premise in which films will be exhibited (defined as ‘any exhibition of moving pictures’) is issued, section 20 of the 2003 Act requires a mandatory condition to be included in the licence restricting the admission of children in accordance with the recommendation of the ‘film classification body’ (i.e. the BBFC)<sup>14</sup> or the local authority.

The recent emergence of ‘alternative content’ (or what Martin Barker calls, more appropriately, ‘livecasts’)<sup>15</sup> in UK cinemas has highlighted a different weakness in the current legislative system for regulating exhibition in cinemas. Alternative content typically includes performances, e.g. relays of concerts and plays from venues like the Royal Opera House and the National Theatre; ‘all of the arts, it seems, want to go to the movies today’<sup>16</sup> with the Metropolitan Opera in New York given particular credit as the first provider.<sup>17</sup> Cinemas are moving to digital screens; the 10,000 such screens across Europe in 2010 were double the number of 2009, and over half of the of screens in the UK are now digital.<sup>18</sup> Although there has been some criticism of this diversion of the cinema towards a ‘broadcast’ or ‘amusement’ model,<sup>19</sup> it is now an important part of the exhibition industry, particularly for smaller ‘arthouse’ cinemas,<sup>20</sup> and is described as an effective way of attracting new audiences to opera and classical music.<sup>21</sup>

This is not the first attempt to use cinema premises in conjunction with live broadcasting and relays. During the 1940s, film studios worked to promote ‘theatre television’ and subscription television, so as to ‘bring the direct-sale economics of film exhibition to the broadcasting business’.<sup>22</sup> Theatre television was not a success,<sup>23</sup> although it did raise issues

<sup>12</sup> The history of this campaign is set out in S Hanson *From silent screen to multi-screen: a history of cinema exhibition in Britain since 1896* (Manchester: Manchester University Press, 2007) p 123.

<sup>13</sup> And subject to limited judicial oversight: it is not for nothing that the key decision of the 20<sup>th</sup> century on unreasonableness in English administrative law is about admission to cinemas (*Associated Provincial Picture Houses v Wednesbury* [1948] 1 KB 223, and that it was itself based on a series of cases also about cinema licensing (e.g. *Theatre de Luxe v Gledhill* [1915] 2 KB 49).

<sup>14</sup> Discussed in part 3.

<sup>15</sup> M Barker, *Live to your local cinema: the remarkable rise of livecasting* (Palgrave Macmillan 2012).

<sup>16</sup> H Canning, ‘Moving pictures’ *Sunday Times* 28 August 2011, p 27 (culture supplement).

<sup>17</sup> E Guider & I Mohr, ‘Pop goes the opera: Met brings classics to the masses at plexes’ *Variety* 2 April 2007, p 5.

<sup>18</sup> ‘Digital cinema over the tipping point’ *Screen Digest* April 2011, p 109; D Lodderhouse, ‘Live feeds fatten exhibs’ *Variety* 8 August 2011, p 5.

<sup>19</sup> C Tryon *Reinventing Cinema: movies in the age of media convergence* (Piscataway: Rutgers University Press, 2009) p 74.

<sup>20</sup> Olswang *Does it add up? Convergence Survey 2011* p 76; Lodderhouse, above n 18 (12.4% of the box office receipts in the arthouse chain City Screen/Picturehouse are attributed to alternative content for the first six months of 2011 – up from 5.8% in 2010).

<sup>21</sup> V Thorpe, ‘Cinemas open screens to opera and ballet’ *Observer* 4 March 2012, p. 22. See also praise in Film Policy Review Panel, above n 10, p 29.

<sup>22</sup> M Hilmes *Hollywood and broadcasting: from radio to cable* (Chicago: University of Illinois Press, 1990) p 117.

<sup>23</sup> D Gomery, ‘Theatre television: the missing link of technological change in the US motion picture industry’ (1985) 21 *Velvet Light Trap* 54; P Kramer, ‘The lure of the big picture: film, television and Hollywood’ in J Hill

regarding the role of regulation in supporting or opposing initiatives of this nature. Today, the new business model is not easily managed within the current legal framework for cinema exhibition, as in legal terms there are three types of alternative content: live, 'as live' (or 'delayed'), and recorded. Live events fall outside of both the Licensing Act and the regulation of broadcasting, and as-live events fall in between. The main task of this section is therefore to consider live and as-live events in some detail; recorded events are less challenging and are considered in brief at the end.

The reasons for offering an exemption to live relays are unclear, and it is difficult to identify a deliberate decision to do so. The simultaneous reception and playing of part of a 'programme service' falls outside of the definition of 'regulated entertainment' under Schedule 1 of the Licensing Act 2003, along with an incredibly diverse range of other exemptions, ranging from religion to morris dancing.<sup>24</sup> For a cinema this means that although a premises license may be required for other reasons (e.g. for the sale of alcohol) there is no requirement to restrict admission on BBFC grounds. But what is a programme service? There are two separate definitions: (a) section 201 of the Broadcasting Act 1990 (as amended by section 360 of the Communications Act 2003) and (b) services regulated and licensed by Ofcom under sections 362(1) and 405(1) of the Communications Act, such as a radio service or a digital television service). Definition (a) includes definition (b)<sup>25</sup> as well as other services, such as sounds or images sent through a communications system and intended 'for reception at a place in the United Kingdom for the purpose of being presented there to members of the public or to any group of persons'.<sup>26</sup> This would probably include live relays in a cinema – although such transmissions would not be caught by the narrower definition under the Communications Act, i.e. definition (b). There are a number of other statutes where definition (a) is used, such as regarding incitement to hatred.<sup>27</sup> However, the result is an unusual situation where certain material – including live transmissions for showing in a cinema – is neither subject to the Licensing Act nor the Communications Act. Indeed, the Communications Act (schedule 17, paragraph 74) amended the Cinemas Act 1985 to provide that the latter act did not regulate Communications Act programme services (i.e. definition (b)), but when the Licensing Act 2003 replaced the Cinemas Act shortly afterwards it, without explanation, exempted programme services under the Broadcasting Act (i.e. definition (a)). As the explanatory notes to the Communications Act show an awareness of the two definitions, it is difficult to say whether the Licensing Act's effective reversal was a deliberate reversal, a correction of an error, or an accidental one (i.e. without having noticed the change)

Furthermore, while an event been shown in a cinema may itself may be regulated in its own right, what remains of theatre legislation in the Theatres Act 1968 (part of which has been incorporated into the Licensing Act 2003) makes this difficult. As part of the liberalisation of the theatre, licensing authorities are strictly limited in the exercise of their licensing powers. In particular, authorities may only impose conditions in regard to public safety, and are explicitly prohibited from regulating the content of plays; 'no condition may be attached to the licence as to the nature of the plays which may be performed, or the manner

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& M McLoore (eds), *Big picture, small screen: the relations between film and television* (Bedford: University of Luton Press, 1994) pp. 32-35.

<sup>24</sup> Sch 1, Pt 2. Programme services are exempted in para 8.

<sup>25</sup> Through s 201(1)(aa).

<sup>26</sup> S 201(1)(c)(ii)

<sup>27</sup> Public Order Act 1986, s 22. The need to maintain this wider definition is mentioned in the explanatory notes to the Communications Act.

of performing plays.<sup>28</sup> Restrictions as to the age of attendees, then, are generally a matter for a given theatre than for local authorities.

A non-live showing of an event remains however an exhibition subject to the Licensing Act. This will include an unedited version with a short delay – e.g. where a play is performed at 1pm but shown ‘as live’ in a cinema at 6pm. The BBFC therefore created a new system for as-live materials, so that cinemas could ‘fully pursue this new business model and remain within the law’.<sup>29</sup> While not lacking in creativity, and recognising the logistical problems in classifying a live event in what could be a short period between its appearance on the National Theatre’s stage and its delayed showing on a cinema screen, this solution raises questions about the regulatory approach for other films shown in a cinema. According to the BBFC, ‘the public will accept a slightly lighter-touch regulatory regime’ for events reshowed within seven days of the live event’.<sup>30</sup> The so-called light touch (which one could call no-touch) is that the distributor supplies information to the BBFC, which in turn makes a recommendation without viewing the work. This system is also less expensive than usual – a flat fee of £100 rather than the £100 + £7/minute for normal theatrical classification. As of 1 January 2013, 38 as-live exhibitions have been classified under this scheme. The BBFC declares that this is ‘based on existing legislation’, i.e. its power to make recommendations, applies a default classification of 12A, and notes that it will incorporate restrictions on access to the live event into classification of the as-live exhibition.<sup>31</sup> While the BBFC’s approach is legally sound, the ease with which it was done suggests that major changes could be made to the current system of classifying films more generally without fear of contradicting the Licensing Act.

Recorded events are less complicated from a legal point of view. However, there is one issue. That is the way in which certain events (e.g. concerts) would be exempted from the Video Recordings Act (as discussed in part 3) in terms of sale or supply of the recording, but not from the exhibition of the recording for the purposes of the Licensing Act. This is because the VRA provides for certain exemptions, but there is no parallel provision in the text of the Licensing Act.

The *creation* of an effective exemption for classes of exhibition seems to be at cross purposes with Parliament’s concern to *reduce* the scope for exemptions under the Video Recordings Act, as also discussed in part 3. If the new scheme is a successful one, it may encourage the distributors of other films to wonder why their output is subject to a greater degree of regulation than the National Theatre’s *Frankenstein*,<sup>32</sup> or even encourage circumvention of BBFC requirements through doing in front of a camera connected to a live relay what could not be done on celluloid or disc. There are implications for content regulation more broadly in that the degree of scrutiny applied to one genre over another (and it is hard to deny that particular genres are associated with alternative content, i.e. the ‘high’

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<sup>28</sup> Theatres Act 1968 s 1(2); Licensing Act 2003 s 22(1). The limits of this provision are discussed by N de Jongh, *Politics, prudery and perversions: the censoring of the English stage 1901-1968* (London: Methuen, 2011) p 250-252.

<sup>29</sup> BBFC, ‘As Live’ (available at <http://www.bbfc.co.uk/industry-services/theatrical-ratings/as-live>).

<sup>30</sup> Ibid.

<sup>31</sup> BBFC, ‘Guidance for distributors’ (available at <http://www.bbfc.co.uk/sites/default/files/attachments/As%20Live%20-%20Guidance%20for%20Distributors.pdf>).

<sup>32</sup> Classified at 15 (the only one of the 44 as of 31 March 2013); reference AFF277625. On the theatrical production, see also C Bennett, ‘Teenagers won't be shocked by a naked man on the stage’ (*Observer* 27 February 2011) <http://www.guardian.co.uk/commentisfree/2011/feb/27/catherine-bennett-frankenstein-children>

culture of the opera house and London theatre) makes a statement around harm and legitimacy that will have ramifications for cinema censorship as a whole.

### *Taxation*

The issues discussed so far raise questions about the impact of the law in light of technological advances. At a time when other areas of regulation are being expressed in a technologically neutral fashion (such as the application of broadcasting law to over-the-air and Internet television in the same way in accordance with the Audiovisual Media Services Directive),<sup>33</sup> it is not without importance that the treatment of film production in a further area - taxation law – also relies so heavily on categories relating to distribution and exhibition.

The original basis for the special tax treatment of film production (dating from 1992 and 1997)<sup>34</sup> was a recognition that production expenditure is often incurred long before income is likely to be available, due to the nature of the process. However, Government (particularly the Treasury and HMRC) expressed frequent concerns about the appropriateness of its use, responding with a series of changes in an attempt to close ‘loopholes’. Chapter 3 of the Finance Act 2006 replaced the earlier provisions with a 20% credit which is paid directly to a film production company (normally a special purpose vehicle), considered to be a more direct form of support less susceptible to use in tax planning for wealthy individuals. Although the funding of film institutions is a controversial issue (and is discussed in part 3, below), the tax credit is actually responsible for 40% (in 2008/9, £110m) of the £250m in public funding enjoyed by film, so the way in which it defines film has wide ramifications.<sup>35</sup> As such, the purpose of this section is to assess the way in which provisions of tax law engage with definitions of films. These provisions must also comply with EU law,<sup>36</sup> which required the test to be stated in avowedly cultural terms (i.e. as opposed to industrial).<sup>37</sup> Films require

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<sup>33</sup> Such as the wide definition (which will include terrestrial broadcast, cable, satellite, mobile and Internet services) in Directive 2010/13 article 1(1)(a)(i) of an ‘audiovisual media service’ as *inter alia* as ‘the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC’.

<sup>34</sup> Section 42 of the Finance (No 2) Act 1992, primarily supporting major productions, and the more extensive section 48 of the Finance (No 2) Act 1997. The latter also addressed the recommendation of the Select Committee on National Heritage to allow full write-off of production expenses (House of Commons Select Committee on National Heritage, ‘The British Film Industry’ (1994) Paper 57-I, p 44) (note criticism by A Walker *Icons in the fire: the rise and fall of practically everyone in the British film industry 1984-2000* (London: Orion, 2004), p 260), as compared with the 1992 Act’s permitting of such over three years. In a further indication of how film history repeats itself, an earlier tax scheme for capital allowances ran between 1979 and 1984, a subject of great interest and indeed criticism at the time (M Dickinson and S Street *Cinema and state: the film industry and the Government 1927-1984* (London: BFI, 1985), p 247; Walker, p 14) that was particularly popular with the film industry (Street, above n 7, p 24).

<sup>35</sup> Figures from Communications Committee, above n 4 at [68] and UK Film Council Statistical Yearbook 2010, table 17.1.

<sup>36</sup> Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works, COM(2001) 534; providing guidance on how the Commission will carry out its functions in relation to article 107 TFEU, which makes it possible for State aid to promote culture (where it does not ‘affect trading conditions and competition in the Union to an extent that is contrary to the common interest’). The criteria are set out in Films Act 1985, Schedule 1, as amended by the Films (Definition of “British Film”) (No. 2) Order 2006, SI 2006/3430.

<sup>37</sup> See for example the Regulatory Impact Assessment for SI 2006/3430: "In this regard culturally British films can be regarded as merit goods that the market often fails to provide at the optimum level ... the aim of support is to address the market failure in the supply of culturally British films by way of an incentive for specific behaviour – the production of culturally British films".

certification by a designated authority (before 2011, the UK Film Council; now the British Film Institute),<sup>38</sup> which includes a points-based assessment of its ‘British’ nature.

In 2002, the scheme for tax relief was amended so as to confine its application to films ‘genuinely intended’ for theatrical release.<sup>39</sup> This is a step not without wider significance, as it reintroduces a distinction between cinema films (indeed, the definition of theatrical release is particularly narrow: ‘exhibition to the paying public at the commercial cinema’) and ‘straight to video’ or ‘made for TV’ films which many in film and media studies rightly think antiquated. Reasons cited in this academic debate include that direct-to-video release is a particular opportunity for independent films and new directors, as film festivals become less open to emerging work,<sup>40</sup> and the established profile of movies deliberately made for television.<sup>41</sup> When mainstream work neglects direct-to-video works, this can mean that work favoured by marginalised social groups is further marginalised.<sup>42</sup> With this in mind, the legal question will be considered (through analysis of a case interpreting the existing statute, and of proposed Finance Act changes), before going to consider critically the favourable treatment of theatrical exhibition against other forms of dissemination, in relation to both content and financing.

The decisions of the High Court and Court of Appeal in *Peakviewing*<sup>43</sup> indicates just how important the text of Schedule 1 and the Finance Act provisions are. As Collins J sets out, Peakviewing’s approach to film production was the creation of 26-part series (the maximum parts permitted by the then-applicable provisions) of 5-minute tourist information films, never ‘commercially shown or exploited’ but the subject of sale and leaseback arrangements and apparently intended for the then-emerging technology of broadband Internet video. A single series was claimed to cost £700,000, and over 300 series had been made. After lengthy correspondence, the Secretary of State refused certification as a British film on the grounds that the costs set out on the application for certification were not true costs. The High Court found that the Secretary of State had not acted beyond the powers set out in the Films Act. As pointed out subsequently in the Court of Appeal, Schedule 1 also makes the decision of the High Court final.<sup>44</sup>

However, it is difficult to say for certain how influential the non-exploitation of the films was in the overall decision, as Peakviewing appears to have been involved in various other practices criticised by the Secretary of State’s legal representatives (which indeed led to subsequent criminal proceedings and a five-year prison sentence for the key person involved in 2007).<sup>45</sup> Of particular interest to the present analysis is the apparently successful submission of the Secretary of State that the only purpose of Schedule 1 is to serve in a step towards obtaining tax relief,<sup>46</sup> and also the then-unproblematic assumption by all concerned

<sup>38</sup> The two institutions are discussed in part 3, below.

<sup>39</sup> Finance Act 2002, s 99. The problem with the open-ended application appears to have been its use for a range of television productions and short video clips (the latter also being an issue in the *Peakviewing* case, discussed below), meaning greater relief being granted than anticipated. See e.g. A Davis ‘A kick in the fiscals’ (*Financial Times* 30 April 2002) p 16.

<sup>40</sup> A Barlow *The DVD revolution: movies, culture and technology* (New York: Praeger, 2005)

<sup>41</sup> K Segrave *Movies at home: how Hollywood came to television* (New York: McFarland, 1999) ch 6

<sup>42</sup> J Walters ‘A taste for leeches: DVDs, cultural hierarchies and queer consumption’ in J Bennett and T Brown (eds) *Film & Television After DVD* (London: Routledge, 2008).

<sup>43</sup> [2002] EWHC 1531 (Admin)

<sup>44</sup> *Peakviewing (Interactive) v Secretary of State for Culture, Media & Sport* [2002] EWCA Civ 1864.

<sup>45</sup> BBC News, ‘Film-maker jailed for £4m fraud’ (*BBC News* 15 June 2007)

<http://news.bbc.co.uk/1/hi/england/gloucestershire/6757675.stm>

<sup>46</sup> [2002] EWHC 1531 (Admin) [62]



that non-theatrical distribution was the only issue.<sup>47</sup> Indeed, paragraph 1 of Schedule 1 of the 1985 Act defines film as a ‘sequence of visual images that is capable of being used as a means of showing that sequence as a moving picture’, but as explained above, the specific provisions of the Finance Act now restrict the application of tax relief to films intended for theatrical release.

New schemes are being introduced for other areas of production: video games, animation, and ‘high end television’.<sup>48</sup> Although changes were not made to the film scheme, three things can be observed. The first is that the overall use of the scheme to promote ‘quality’ production; this is particularly clear in the case of the television relief. (Whether this is compatible with the EU-influenced reframing of tax relief as supporting British culture will be interesting to see; the video games scheme is under European Commission review). This reinforces the unstated assumption of the film scheme. The second point is to compare the way in which the film and non-film schemes are defined. The film scheme, as argued above, uses intention to exhibit as a threshold. On the contrary, the animation scheme includes works intended for *broadcast* to the general public (much broader than the film relief, although not a particularly future-proof definition either).<sup>49</sup> The television scheme also (and more understandably) requires intention to broadcast,<sup>50</sup> but also translates the concept of high end into direct production expenditure of £1m per hour and a definition of dramatic productions (including comedy), and, after consultation, documentaries. In summary: a non-animated one-off drama made for DVD release does not qualify for relief as a film, but would if it were intended for TV broadcast and animated, or so intended and cost over £1m to make. These changes therefore highlight the significance of distribution and exhibition to what is supposed to be a relief regarding production, and reinforces the argument made in this paper that the narrow approach to defining film is unsustainable.

### *The special status of exhibition*

The conventional system of film distribution is one of ‘windows’: cinema, video and TV in that order, with set intervals between each and further separation as between different types of TV, e.g. subscription movie channels vs free-to-air TV. But this is being challenged, by simultaneous release across a number of outlets,<sup>51</sup> disputes over early DVD release<sup>52</sup> and the development of new non-theatrical services by exhibitors themselves.<sup>53</sup> Thus, the role of theatrical release itself becomes less clear. Meanwhile, intention may be difficult to establish;

<sup>47</sup> [2002] EWHC 1531 (Admin) [87].

<sup>48</sup> HM Treasury, ‘Consultation on creative sector tax reliefs’ (June 2012) [http://www.hm-treasury.gov.uk/d/consult\\_creative\\_sector\\_tax\\_reliefs\\_180612.pdf](http://www.hm-treasury.gov.uk/d/consult_creative_sector_tax_reliefs_180612.pdf); HM Treasury, ‘Creative sector tax reliefs: response to consultation’ (December 2012) [http://www.hm-treasury.gov.uk/d/creative\\_sector\\_tax\\_reliefs\\_response111212.pdf](http://www.hm-treasury.gov.uk/d/creative_sector_tax_reliefs_response111212.pdf). See also A Darnley, ‘Treasury consults on creative sector tax reliefs’ (2012) 23 Ent LR 214; A Darnley, ‘Treasury proposals elicit detailed responses as DCMS consults on cultural tests’ (2013) 24 Ent LR 6.

<sup>49</sup> See discussion in HM Treasury (December 2012), above n 48, at [2.18] and [2.21]. The response has included a quixotic provision that ‘television includes the Internet’: Corporation Tax Act 2009, s 1216AA(3), inserted by Finance Act 2013, Sch 16.

<sup>50</sup> Corporation Tax Act 2009, s 1216CA(1), inserted by Finance Act 2013, Sch 16.

<sup>51</sup> Tryon presents Steven Soderberg’s *Bubble* as an example; the film was released on DVD and cable VOD on the same day as it was released in cinema, above n 19, pp 105-7.

<sup>52</sup> A Dawtrey ‘An Alice in Wonderland nightmare as Disney battles the cinemas’ (*Guardian* 24 February 2010) p 22. A cinema chain threatened to boycott the release of *Alice in Wonderland* as an objection to Disney’s intentions to shorten the 4-month window between cinema and DVD to 3 months. However, all major UK exhibition chains ultimately agreed to show the film and accept Disney’s actions.

<sup>53</sup> C Gant ‘Video on demand: kill or cure for arthouse cinemas’ (*Guardian* 5 April 2012) p 14, available at <http://www.guardian.co.uk/film/2012/apr/05/video-on-demand-arthouse-cinemas>.

it has been suggested that a film intended for wide theatrical release that ends up going straight to DVD may qualify, while one intended for television that ultimately receives a theatrical release may not be.<sup>54</sup>

Changes in technological offers and audience behaviour are easily observed. While the VHS sector was dominated by feature films, the DVD market saw both films and ‘TV box sets’ being popular. The technological feasibility of making a whole TV series available in a small size at a reasonable cost of production is an example of a key factor. This has been argued to blur the distinctions between the film and TV industries.<sup>55</sup> The VHS and in particular DVD market offers the individual ‘unparalleled physical access to the cinema’<sup>56</sup> – in this case, ‘the cinema’ meaning the works rather than the premises! Approaches to production – traditionally separate in terms of technology as well as style and method – are similarly converging.<sup>57</sup> The domestic viewer can watch a work distributed via DVD, broadcasting or the Internet on a large screen with high-quality surround sound.<sup>58</sup> While some still highlight the ‘anticipation, the dark, the majesty of the big screen and the devotion of unbroken time to the viewing experience’<sup>59</sup> in the cinema - as compared with clips on YouTube - there is little sign of a slowing down in the promotion of home and Internet-based forms of dissemination.

Theatrical release is just one part of a multifaceted map of distribution and exhibition, ‘a life-cycle that often sees the title, Phoenix-like, rise up repeatedly from the ashes, appearing in venues as diverse as museums, airplanes, cable television, and laptops’.<sup>60</sup> The Review Panel noted how ‘crowded’ the theatrical sector is (in terms of films seeking exhibition),<sup>61</sup> encouraging the exploration of a wider range of business models<sup>62</sup> and noting that ‘an increasing number of works ... will never reach a cinema screen or for which the cinema might not be the preferred or most ideal destination’.<sup>63</sup> Does the UK tax scheme offer unnecessary and inappropriate protection to a particular type of exhibition, in spite of the ostensible aims of the provision in supporting domestic production? It is not illegitimate for targeted action to be taken in respect of a particular part of the film industries. For example, the UK Film Council provided limited support through the Digital Screen Network for the exhibition of ‘specialised’ films.<sup>64</sup> The definition includes films ‘that do not sit easily within a mainstream and highly commercial genre’ which ‘might appeal to a more narrow audience segment’; examples include subtitled films, documentaries, and particular cinematic styles. This can be debated and measured on its own terms and the justification is easy to ascertain.

<sup>54</sup> A Shipwright ‘Finance Act notes: films and sound recordings’ (2006) 5 British Tax Review 517, at 523.

<sup>55</sup> D Kompare ‘Publishing Flow : DVD Box Sets and the Reconceptation of Television’ (2006) 7 Television & New Media 335, at 338.

<sup>56</sup> B Klinger, *Beyond the multiplex* (University of California Press, 2006) p 57.

<sup>57</sup> P Kiwitt, ‘What Is Cinema in a Digital Age? Divergent Definitions from a Production Perspective’ (2012) 64 J Film & Video 3.

<sup>58</sup> For discussion of the various stages in technological and presentational change, see B Gunter, *Television versus the Internet* (Witney: Chandos, 2010) p 40-46.

<sup>59</sup> N Rombes, *Cinema in the digital age* (London: Wallflower, 2010) p 24.

<sup>60</sup> B Klinger ‘Cinema's shadow: reconsidering non-theatrical exhibition’ in R Maltby, M Stokes and R Allen (eds) *Going to the movies: Hollywood and the social experience of cinema* (Exeter: University of Exeter Press, 2007) p 275.

<sup>61</sup> Film Policy Review Panel, above n 10, p 12.

<sup>62</sup> Ibid, p 27.

<sup>63</sup> Ibid, p 30.

<sup>64</sup> UK Film Council ‘Definition of specialised film’ (April 2008), available at [http://industry.bfi.org.uk/media/pdf/r/2/Defining\\_Specialised\\_Film\\_Update\\_20\\_04\\_08\\_.pdf](http://industry.bfi.org.uk/media/pdf/r/2/Defining_Specialised_Film_Update_20_04_08_.pdf). The funding programme in question was found to be compatible with article 107 (then 87) TFEU: *UK Film Council Distribution and Exhibition Initiatives Case N-477/04*.

The privileged status of exhibition (which is also relevant for VAT purposes)<sup>65</sup> makes a clear claim in favour of an understanding of film audiences as engaged in unique ‘communal’ activity rather than individual, small-scale watching. The imprecise overlap between legal categories and consumer perception demonstrates the weakness in assigning a statutory privilege to one form of exhibition over others, particularly at a time when a range of forms of both distribution and exhibition are available for the same underlying creative works.

Just as demonstrated in the discussion of the no-touch regulatory system for as-live showings in cinema, an unacknowledged cultural hierarchy appears to be in place in the area of tax relief. A particular type of exhibition (and audience) attracts special legal treatment. These distinctions are perpetuated (or perhaps muddled further) by the new ‘creative sector’ reliefs. Klinger’s observation that within film studies, ‘the big-screen performance is marked as authentic, as representing bona fide cinema, while the small screen by comparison is characterized as inauthentic and ersatz’<sup>66</sup> is therefore an appropriate description of the legal approach too. Indeed, the legal approach may affect the way in which those involved in funding and making films approach the question of exhibition – without admitting or freely discussing as much.

### *Summary*

The current position of the statutory definition of film is far from satisfactory. It is reported that of the volume of films watched in the UK (using a measure of the ‘last 10 films you saw’), cinema accounts for 11%, and a wider range of films are available on DVD than in cinemas.<sup>67</sup> The ‘straight to video’ sector continues to exist in the UK (and indeed is disproportionately British-produced).<sup>68</sup> So why should tax relief be confined to productions intended for theatrical release? Is the role of exhibition in cinemas as contributing to promoting subsequent distribution on DVD and television enough to justify it, and if so, for how much longer?

Changes in the modes of distribution and exhibition also challenge content regulation. Even if statutory regulation of film is justified under article 10(2) of the ECHR (and perhaps section 10(1) too), the same work could face content regulation under a wide range of statutory regimes. The key question introduced by this Part was the basis for treating as-live exhibitions differently to live or recorded transmissions of the same performance and to that performance before an audience. This joins the existing division between the regulation of DVD (Video Recordings Act), broadcasting (Communications Act) and video-on-demand (Communications Act, amended to implement the Audiovisual Media Services Directive).<sup>69</sup> As the general laws of copyright, defamation, obscenity, and privacy continue to apply, justifying so many layers of regulation may raise serious questions of Convention ‘necessity’.

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<sup>65</sup> Cinema is grouped for VAT purposes alongside theatres, zoos and even museums. The Court of Justice of the EU referred to this category as having a common feature of being ‘available to the public on prior payment of an admission fee giving all those who pay it the right collectively to enjoy the cultural and entertainment services characteristic of those events and facilities’ in finding that a coin-operated ‘cubicle’ for private viewing of adult films was not covered by a reduced rate under EU law: *C-3/09, Erotic Center v Belgium* [17], interpreting Directive 77/388/EC as amended by 2001/4/EC, Annex H, Category 7.

<sup>66</sup> Klinger, above n 60, p 284.

<sup>67</sup> A Higson, *Film England* (London: IB Tauris, 2011), p 23.

<sup>68</sup> Oxford Economics, ‘More than a support act: the true value of video entertainment in the UK’ (June 2011) <http://www.bva.org.uk/files/u1/Oxford-Economics-Value-of-video.pdf>.

<sup>69</sup> The issue of the distinction between DVD and video-on-demand is discussed in D Mac Síthigh ‘Co-regulation, video-on-demand, and the legal status of audio-visual media’ (2011) 2 *International Journal of Digital Television* 51.

### Part 3. Institutions, governance and accountability

#### *The problem*

The purpose of this Part is to discuss the legislative and parliamentary control of film with specific reference to matters of governance and accountability. The means for doing so will be the analysis of various bodies exercising control over film in the UK. Successive Governments have used the legislative and fiscal powers of the State to provide support for the development of film in the UK, placing the state in the position of both promoting and restricting film through its fiscal and censorship functions. This is linked with the preceding section because even in the absence of a clear set of objectives in legislation, such could conceivably be found instead in the form of administrative arrangements.

#### *UK Film Council*

The long-established BBFC will be discussed in due course, but it is appropriate to start with the UK Film Council, the subject of some recent controversy due to its abolition in 2010/11. In considering the state of British cinema in 2009, film scholar Robert Murphy wondered in an introduction to a core film studies textbook whether ‘the artificial edifice of New British Cinema’ might collapse if the Treasury ‘pulled the plug’ on the Film Council, a ‘seemingly safe little sinecure’.<sup>70</sup> This highlights the important role of the State in supporting British film, but also the way in which the appropriateness of this role continues to be debated.

The UK Film Council (initially, just the ‘Film Council’) was an initiative to ‘join up’ film policy. The Council was established in 2000, following the Department of Culture, Media & Sport (DCMS) report ‘A Bigger Picture’, although various proposals for a single body had been made over a long period,<sup>71</sup> and the 1998 Film Policy Review Group had also been vocal on related questions. The new body was said to have brought together ‘the various standards of government film policy and practice’, across industrial, social and cultural issues.<sup>72</sup> The credit for such has been argued to be due to the DCMS<sup>73</sup> now the lead department for censorship issues, and so finally unifying a number of areas of film law and policy; the same department had been active more generally in relation to ‘creative industries’ policy.

Yet there is one remarkable difference between the Film Council and earlier public bodies charged with similar or related functions. This is the degree to which it is affected by statute. Bodies such as the National Film Finance Corporation<sup>74</sup> and the British Film Fund Agency<sup>75</sup> operated in the light of clear ‘parent’ statutes. However, the Film Council was established as a limited company with the Secretary of State as its sole member,<sup>76</sup> and given a range of responsibilities, including the funding of the British Film Institute (a charitable body

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<sup>70</sup> R Murphy ‘Introduction’ in R Murphy (ed) *The British Cinema Book* (London: BFI, 3rd edn, 2009).

<sup>71</sup> For example, the 1936 Moyne Committee had proposed a ‘body responsible specifically for film matters’; this was addressed in part (for other reasons) during the Second World War, but not in full, and was ultimately not pursued (Dickinson & Street, above n 34, pp 107-8) and a British Film Authority was proposed in 1979 (ibid, p 245).

<sup>72</sup> Higson, above n 67, p 41.

<sup>73</sup> M Magor and P Schlesinger ‘“For this relief much thanks” Taxation, film policy and the UK government’ (2009) 50 *Screen* 299, 305.

<sup>74</sup> Established by the Cinematograph Film Production (Special Loans) Act 1949, dissolved by the Films Act 1985.

<sup>75</sup> Established by the Cinematograph Films Act 1957 and dissolved by the British Film Fund Agency (Dissolution) Order 1988 as provided for in the Films Act 1985.

<sup>76</sup> Registration no. 3815052.

with a Royal Charter),<sup>77</sup> the distribution of lottery funds (formerly the job of the Arts Council);<sup>78</sup> it also absorbed both British Screen Finance and the British Film Commissioner.<sup>79</sup> The allocation of lottery monies to the Film Council was the subject of an amendment to the 1993 lottery legislation (by way of statutory instrument), providing one of the very few mentions of the Council in statute.<sup>80</sup> Its activities are influenced by financial and policy directions issued (pursuant to the National Lottery etc Act 1993) by the Secretary of State. The former are general requirements on matters such as conflicts of interest and ministerial oversight,<sup>81</sup> but the latter are specific instructions pertaining to the work of the Film Council. The first policy direction, issued in 2001,<sup>82</sup> contained 17 separate instructions, but a revised direction issued in 2007 instead contains 13 general instructions (also used for other distributors of Lottery funding) and 2 instructions covering film-specific matters, with much less detail than the 2001 direction. In practice, the UKFC played multiple roles, including acting as a type of representative of the film industry as well as providing visible public support of various forms of film – with divided views on what its priorities should be.<sup>83</sup> The use of a very general power that was authorised by Parliament long before the Council came into being is not ideal a better way (for the BFI rather than the Film Council) would be to set some of these criteria out through statute, thus making clear where priorities should lie.

However, at no point was the Film Council the only public body active in the area, even as narrowly defined. Consider in particular the role of broadcasters. The 1994 Government report on the British film industry highlighted the dependence of film production on TV rights,<sup>84</sup> and a 2003 parliamentary committee report reported criticism (including by the Film Council) of the levels of investment by broadcasters in film production.<sup>85</sup> Hill suggests that the role of broadcasters has been beneficial and should not be pathologised as a problem or failure.<sup>86</sup> Two recent changes demonstrate the ongoing significance of this relationship and the need to put it on a proper legal basis: the amendment of the Communications Act 2003 to specify Channel 4's film functions (a new function of 'making of high quality films intended

<sup>77</sup> <http://www.bfi.org.uk/about-bfi>

<sup>78</sup> The British Film Institute had lobbied (without success) for to be responsible for Lottery spending on film: Walker, above n 34, pp 164-5.

<sup>79</sup> The British Film Commission was established in 1991, with a mission to attract non-British producers to film in the UK (e.g. Walker, above n 34, p 129). Its later role continued in that vein, with a particular responsibility for promoting Britain as a destination in non-UK locations (especially the US) and in assisting potential producers with the various steps necessary to do so.

<sup>80</sup> National Lottery etc Act 1993 (Amendment of Section 23) (No 2) Order 1999, SI 1999/2090, amending the National Lottery etc Act 1993. Subsequently varied by National Lottery etc Act 1993 (Amendment of Section 23) Order 2007, SI 2007/743, amending the name of the Film Council to the UK Film Council, and latterly the National Lottery etc Act 1993 (Amendment of Section 23) Order 2011, SI 2011/685 (replacing the UKFC with the British Film Institute).

<sup>81</sup> As revised in 2007, and available by way of the National Archives at <http://webarchive.nationalarchives.gov.uk/20110118191652/http://www.culture.gov.uk/images/publications/UKFCFinancialDirections.pdf>.

<sup>82</sup> Available by way of the National Archives at <http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/images/consultations/ukfilmcouncil.pdf>

<sup>83</sup> Communications Committee, above n 4, at [98] (policy development role highlighted); M Mansfield 'Report on the British film industry for shadow DCMS' (November 2009), available at <http://www.mansfieldwb.com/filmreportnov09.pdf> p 18 (priority of funding role according to industry).

<sup>84</sup> Department of Natural Heritage 'The British Film Industry' (1994) Cm 2884 p 9.

<sup>85</sup> House of Commons Select Committee on Culture, Media & Sport 'The British Film Industry' (2003) HC 667 pp 41-2.

<sup>86</sup> J Hill, 'British television and film: the making of a relationship' in J Hill & M McLoore (eds), *Big picture, small screen: the relations between film and television* (Bedford: University of Luton Press, 1994), p 153, p 171. See also Higson, above n 67, p 52 (importance of Channel 4 as a significant source of funding for film in the UK).

to be shown to the general public at the cinema in the UK')<sup>87</sup> and the Film Policy Review Panel's recommendation for memoranda of agreement with major broadcasters.<sup>88</sup> These approaches are at one with that of this article, although the decision to adopt yet another description of film and exhibition is less deserving of applause.

An alternative model, relevant on the basis of the grounds of the similarities in legal system and the duties of the bodies, is that of the New Zealand Film Commission, which is governed by a dedicated statute, the New Zealand Film Act 1978. At one point this act was a comprehensive statement of all aspects of the Commission, although those matters relating to accountability, Board membership and general questions of governance are now found in a general statute on public bodies, the Crown Entities Act 2004. The 1978 Act continues to set out in a clear fashion both the functions and powers of the Commission and the specific criteria for a 'New Zealand film'. Although the Commission was first characterised by a nationalist or cultural ethos, it also has a role in relation to the economic aspects of the film industry.<sup>89</sup> Thus, it is a very appropriate counterpoint to the more opaque arrangements which supported the Film Council in the UK, which performed many similar functions.

The closure of the UK Film Council was announced in July 2010. The House of Commons Culture, Media & Sport Committee, while noting the legitimacy of some criticisms regarding administrative costs of the UKFC, was very critical of this *process* of abolition, particularly the lack of notice.<sup>90</sup> Certain functions are inherited by the British Film Institute, most notably the distribution of Lottery funding, the continuation of the process of certifying films as British for the tax purposes discussed in part 2.<sup>91</sup> The former Government had contemplated but rejected a UKFC-BFI merger.<sup>92</sup> The Film Policy Review Panel subsequently argued that the institutional changes were an opportunity 'for the sole, focused leadership of British film – cultural, creative, commercial, educational and representative – to be brought together in the single entity of the BFI'.<sup>93</sup> While this is not unreasonable, it begs the question why that leadership should be exercised without a clearer legislative basis.

It remains difficult to pinpoint the approach of the current Government to film. If Street was right to say that the establishment of the Film Council in 2000 represented a 'renewed State commitment' to film,<sup>94</sup> what does its closure represent? The UKFC was clearly a body designed to work on the business or industrial aspects of film in the UK, perhaps capable of being compared with the more 'cultural' remit of the BFI. As the *Guardian* put it when a merger was being contemplated, would a single body be 'a cultural organisation with a film-enterprise arm, or a film-enterprise organisation with a cultural arm'?<sup>95</sup> Hence, in the absence

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<sup>87</sup> Digital Economy Act 2010, s 22.

<sup>88</sup> Film Policy Review Panel, above n 10, pp 52-55.

<sup>89</sup> B King 'The New Zealand Film Commission as a Government-Sponsored Film Producer' (2010) 40 *Journal of Arts Management, Law & Society* 157, at 158-9.

<sup>90</sup> The Committee found that '(the) abolition of the UK Film Council was handled very badly by the Government. We would not expect a decision with such significant implications for the film industry to be sprung on the UK Film Council with little discussion or consultation': 'Funding of the arts and heritage' (2010-11) HC 464 [126].

<sup>91</sup> E Vaizey 'The Future of the UK Film Industry' (speech, BAFTA, 29 November 2010), available at <https://www.gov.uk/government/speeches/the-future-of-the-uk-film-industry>.

<sup>92</sup> Department for Culture, Media & Sport 'Merger proposed for flagship film bodies' (press release 117/09, 20 August 2009). The view of the new Government (not to merge the two bodies) is found in Hansard HC vol 512 col 15W (21 June 2010).

<sup>93</sup> Film Policy Review Panel, above n 10, p 3.

<sup>94</sup> Street, above n 7, p 26.

<sup>95</sup> C Higgins 'BFI and UK Film Council plan merger' (*Guardian* 27 January 2010).

of the UKFC, is this a victory for culture over business, or a retreat from film per se? The Review Panel suggests that the BFI now speaks for British film. This means that the governance of relations between Government and the BFI, particularly as regards the prioritisation of different functions, will require further attention.

As an example, consider the question of impartiality. This is an area of some difficulty, as demonstrated in the early days of Lottery funding (when it was still the responsibility of the Arts Council), when support for a biographical film about Francis Bacon in 1996 was initially vetoed.<sup>96</sup> This type of problem is not unique to the UK; to the apparent surprise of the Canadian government, major controversy followed an attempt to add a condition to the popular Canadian film tax credit scheme that ‘public financial support of the production would not be contrary to public policy’. That particular proposal was ultimately abandoned.<sup>97</sup> It is therefore plausible that the survival of the Film Council functions in respect of certification is compatible with the test set out<sup>98</sup> by the Minister for the Cabinet Office that functions requiring political impartiality and the independent establishing of facts could justify an arms-length body. Indeed, the Government now proposes to distinguish between different types of legal content in granting tax relief under the new non-film schemes (discussed in Part 2). The idea of linking relief to classification (i.e. by the BBFC or Games Rating Authority or similar) has been rejected.<sup>99</sup> However, it is still proposed to require self-certification that ‘pornographic or other extreme material’ is not included as a condition, in respect of games only<sup>100</sup> - despite a statement in another consultation document that it is not the Government’s intention ‘to dictate the content, or style, of video games’.<sup>101</sup>

#### *The BBFC and the Video Recordings Act*

Meanwhile, as this debate continued, the oldest body exercising control over film in the UK continued in existence. Film censorship is a fundamental part of film law, and although the days of widespread unaccountable ‘cuts’ may be gone in the UK, the legal and institutional features of censorship remain significant. The British Board of Film Classification (BBFC) remains an important body in the system of film law in the UK, despite its status as a private organization. Since its creation as an industry body in 1912 (as the British Board of Film Censors),<sup>102</sup> responding to the Cinematograph Act 1909 (the original source of local authority powers to regulate cinemas on fire safety grounds)<sup>103</sup> and the judicial gloss that local authorities could impose conditions more generally that are not unreasonable,<sup>104</sup> it has influenced the content of films seen by UK audiences, with the

<sup>96</sup> Walker, above n 34, p 231.

<sup>97</sup> G MacDonald ‘Harper scraps censorship clause in Bill C-10’ (*Globe and Mail* 7 October 2008) <http://www.theglobeandmail.com/news/politics/harper-scraps-censorship-clause-in-bill-c-10/article1057937/>

<sup>98</sup> Hansard HC vol 511 col 313 (9 June 2010), discussed and criticised in Public Administration Select Committee, ‘Smaller government: shrinking the quango state’ (2010-12) HC 537 (7 January 2011) [11]-[19].

<sup>99</sup> Originally proposed in HM Treasury (June 2012), above n48, at [5.17] in respect of games and [3.11] in respect of animation (not at all in respect of television); determined as unnecessary in HM Treasury (December 2012), above n 48, at [2.22] in respect of animation and unworkable [2.60] in respect of games.

<sup>100</sup> HM Treasury (December 2012), above n 48, at 2.63.

<sup>101</sup> DCMS, ‘Creative Sectors Tax Reliefs: Cultural Test for British Video Games: Consultation’ (October 2012) <https://www.gov.uk/government/consultations/creative-sectors-tax-reliefs-cultural-test-for-british-video-games-consultation>.

<sup>102</sup> T Mathews, *Censored: the story of film censorship in Britain* (London: Chatto & Windus, 1994), pp 21-25.

<sup>103</sup> On the fire safety powers and facilitating other conditions, see Hanson, above n 12, 17-19 and 36.

<sup>104</sup> *London CC v Bermondsey Bioscope* [1911] 1 KB 445.

ongoing acquiescence and tacit support of Government through the Home Office.<sup>105</sup> The current work of the BBFC is based on a range of statutory provisions, along with additional documents adopted by the BBFC itself that add significant detail. The focus of this section is the relationship between the BBFC, Parliament and the courts.

The Video Recordings Act (VRA) 1984 governs (through the criminal law) the sale and supply of video recordings. The Act establishes various offences and a requirement for classification of video works, and provides for the designation of an authority; the BBFC has been this authority since shortly after the Act came into force. There is no procedure for formal regular scrutiny of BBFC policy- or decision-making; the VRA provides for designation of an authority but no more. The VRA is also silent on the *criteria* for classification, as opposed to the existence of these criteria. This means that, for example, the boundary between two age categories is determined by the BBFC.<sup>106</sup> However, the Act does provide some guidance, for example through the requirement that ‘special regard’ be had by the classification authority to harm;<sup>107</sup> indeed, the definition of harm has been the subject of the High Court’s major contribution to film law.<sup>108</sup>

Incorporated into the working criteria of the BBFC are a number of further questions of criminal law, which the BBFC will consider when making its decisions. The relevant provisions include the Obscene Publications Acts and the Protection of Children Act 1978; these are acts of general application which affect films as well as other media. Although the objective of regulation is generally the video audience (i.e. the ‘exhibition’ sector), it is the distributor who is subject to legal control (through the criminal offence of sale or supply of an unclassified video recording), but awareness of the BBFC’s approach is crucial to the production process too. In one specific (and anomalous) case, that of cruelty to animals, statute law is even used to influence the *method* of production, through what is ostensibly a restriction on exhibition.<sup>109</sup> The result of all this is a series of different, overlapping statutory powers exercised by a non-statutory body.

The VRA sensibly requires that there be an appeals process regarding classification decisions made under the Act. This is the function of the Video Appeals Committee.<sup>110</sup> The BBFC did have a practice in the past of publishing VAC decisions in annual reports, but this appears to have fallen into desuetude. A number of VAC decisions have been challenged in

<sup>105</sup> On the relationship between the Home Office and the BBFC, see J Richards and J Robertson ‘British film censorship’ in R Murphy *The British Cinema Book* (London: BFI, 3rd edn, 2009) pp 68-9; J Robertson *The hidden cinema: British film censorship in action, 1913-1975* (London: Routledge, 1993).

<sup>106</sup> BBFC, ‘Classification Guidelines 2009’

[http://www.bbfc.co.uk/sites/default/files/attachments/BBFC%20Classification%20Guidelines%202009\\_6.pdf](http://www.bbfc.co.uk/sites/default/files/attachments/BBFC%20Classification%20Guidelines%202009_6.pdf)

<sup>107</sup> Amendments made in the Criminal Justice & Public Order Act 1994; these provisions have discussed by a number of authors in both law and film studies. See for example C Manchester ‘Criminal Justice and Public Order Act 1994’ [1995] Crim LR 123; G Robertson & A Nicol *Media law* (5<sup>th</sup> ed Penguin, 2008); P McDonald *Video & DVD Industries* (London: BFI, 2007) p 90; and various contributions in M Barker & J Petley (eds) *Ill effects: the media/violence debate* (London: Routledge, 2<sup>nd</sup> edn, 2001).

<sup>108</sup> *R (BBFC) v Video Appeals Committee* [2008] EWHC 203 (Admin); *R v Video Appeals Committee ex parte BBFC* [2000] EMLR 850.

<sup>109</sup> Cinematograph Films (Animals) Act 1937 protects animals in the production process, by creating a criminal offence of *exhibiting* a film (produced anywhere in the world) where a scene in its *production* was ‘organised or directed in such a way as to involve the cruel infliction of pain or terror on any animal’. S 8(3) of the Animal Welfare Act 2006 also creates a new offence of supplying, publishing, showing or possessing for supply a video recording of an animal fight - although in this case, where the fight has taken place outside of the UK, no offence is committed.

<sup>110</sup> ‘Video Appeals Committee Provisions’, available at

[http://www.bbfc.co.uk/sites/default/files/attachments/VAC%20Provisions%202012\\_1.pdf](http://www.bbfc.co.uk/sites/default/files/attachments/VAC%20Provisions%202012_1.pdf)



the High Court, in some cases by the BBFC itself (i.e. where the BBFC asks the High Court to review a VAC decision, after a distributor's successful appeal of a BBFC decision to the VAC).<sup>111</sup> On these occasions, the VAC's findings and procedures are considered and made publicly available. Yet the VAC is still far from a well-known body, and incorporating it into the recently reformed tribunals system might be one option; although its decisions are significant for freedom of expression, so are decisions in areas like freedom of information which are dealt with by a First-tier tribunal with little difficulty.

There are other areas where the BBFC may be out of step with similarly situated bodies. For example, it is not subject to the Freedom of Information Act. The problem here is that while the BBFC is presumed to be and acts as if it is bound by the Human Rights Act (through the statutory test in section 6 of the Act on 'functions of a public nature'), the FOI Act only applies to public bodies designated under the Act itself, with virtually no scope for a court to consider the matter.<sup>112</sup> Although its designation has been suggested by respondents to a consultation exercise, only a few bodies have been designated (academy schools, university admissions body UCAS, and the Association of Chief Police Officers).<sup>113</sup> As the current Government proposes to 'extend the scope of the Freedom of Information Act to promote greater transparency', the position of the minority of bodies exercising functions of a public nature without FOI obligations could soon be regularised.

The position of the BBFC, in terms of its status as well as its powers, resembles that of the UKFC in that it exists in a cloud of legislation but is not the direct subject of legislation. One must therefore consider a range of different sources in order to figure out what the body does and how it relates to the State. Therefore, the next section will consider a number of ways in which this situation has been changed in recent years – and how further changes could be approached.

### *Realignment through legislation*

An example of a move towards legislative clarity is how the Licensing Act 2003 now specifically mentions a 'film classification body', being the authority designated under the VRA – i.e. the BBFC. This can be compared with the Cinemas Act 1985, which also required the local authority to impose conditions on the admission of children, but merely referred to decisions of the local authority or 'such other body as may be specified in the licence'. In practice, before and after the 2003 Act, the vast majority of films seen in cinemas are the subject of BBFC certification. What has not been revisited, but should be, is whether local authorities should continue to play a role in regulating cinemas and films. Certainly, the historical origins of regulation are in the control of the physical safety of cinema patrons, but it is also the case that the system gave crucial statutory support to the idea of film censorship in the UK. In the present day, though, the role of the local authority is different, particularly as the Licensing Act approach to entertainment is one of combining a diverse range of licensed premises, and the BBFC is functioning without difficulty as a national authority in the more direct case of video recordings. Again, the issue of including a production-relevant restriction in a statute purporting to regulate exhibition is present. A better approach may be a statute or chapter of a statute dealing with the BBFC (or any other authority) and all of its

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<sup>111</sup> E.g. *R v Video Appeals Committee ex parte BBFC* [2000] EMLR 850

<sup>112</sup> The one emerging exception to this principle - environmental information, where duties apply to certain undesignated bodies as a consequence of the Directive on which the environmental information regulations are based - is of little relevance to a body such as the BBFC, as compared with other non-designated bodies like Network Rail.

<sup>113</sup> 'Freedom of Information Act 2000: Designation of additional public authorities' Consultation Paper 27/07 (25 October 2007).

functions. The proper role of local and regional authorities is surely promoting and regulating film production through the use of the highway<sup>114</sup> and regional industrial development.<sup>115</sup> In light of principles of subsidiarity, expertise and effectiveness, this would be a much more appropriate role for local authorities than determining the content of films.

Legislative change has not always favoured clarity and accountability. The Video Recordings Act has also been revisited in recent years (as well as being reenacted without change for reasons of compliance with EU law),<sup>116</sup> with questions on what it does and does not affect at the core of the debate. The VRA was amended by the Digital Economy Act 2010 so as to establish a parallel system (and separate classification authority) for video games.<sup>117</sup> Of relevance to the present study is a new provision (added at a late stage in debate, and responding also to a Private Members Bill)<sup>118</sup> that authorises the future amendment of the VRA (through secondary legislation) to vary the criteria for exemption from classification requirements.<sup>119</sup>

The current position is that there are two types of video work (other than video games) exempted from classification, those ‘designed to inform, educate or instruct’ or ‘concerned with sport, religion or music’. However, this position was criticised on the grounds that it was a ‘loophole’ which allowed children to access harmful material that was not so extreme as to fall within the non-exempt category, but would (if not exempt) have been the subject of a classification decision at a particular age. Examples provided by MPs and Lords tended to be certain music DVDs (on the grounds of violent or sexual imagery and themes), and also ‘ultimate fighting’ sporting works. While some sought the removal of the exemption without replacement, the new provision allows any of the existing exemptions to be removed, added to or amended by statutory instrument. This method of legislating is far from unheard of, and is considered legitimate in the British constitutional tradition. However, the result is that the extent of prior censorship (backed by criminal sanctions) is defined by a Ministerial decision subject to limited Parliamentary scrutiny, by way of the ‘positive assent’ requirement of section 22A(3) of the VRA. This requirement replaces in relation to certain regulations including this matter the normal principle of regulations only being subject to annulment under section 22A(4). It would be more appropriate if decisions with such an impact on freedom of expression (and its exceptions) were debated and decided upon in as public and as democratic a fashion as possible. The scope of prior restraint should be at the core of the Act rather than a matter of detail or implementation. Section 22A(3) is a step in the right

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<sup>114</sup> E.g. the Kent County Council (Filming on Highways) Act 2010 (amending the application of the Road Traffic Regulation Act 1984), following the earlier example of the London Local Authorities and Transport for London Act 1998 in addressing this matter. One point noted by Irish authorities as part of the success of its industry in the 1990s was what the responsible Department termed ‘proactive flexibility’ by agencies and local authorities in facilitating access for the purposes of filming (Select Committee on National Heritage, above n 34, p 87).

<sup>115</sup> E.g. N Redfern ‘Connecting the regional and the global in the UK film industry’ (2010) 1 *Transnational Cinemas* 145.

<sup>116</sup> Resulting from a failure to notify the VRA to the European Commission under the Technical Standards Directive (then 83/189/EEC; now replaced by 98/34/EC). The result was the (properly notified) Video Recordings Act 2010. For a brief period, no prosecutions for VRA offences could be brought, although a wide level of voluntary co-operation was noted by the BBFC. However, an attempt to challenge earlier convictions as unsafe, on the basis that the 1984 Act was not in compliance with EU law and thus invalid, was unsuccessful: *R v Budimir & Rainbird* [2010] EWCA Crim 1486, joined with *Interfact v Liverpool City Council (no 2)* [2010] EWHC 1604 (Admin)

<sup>117</sup> D Mac Síthigh ‘The regulation of video games: past, present and future’ (2010) 21 *Ent LR* 298.

<sup>118</sup> Video Recordings (Exemption from Classification) Bill: Hansard HC vol 503 cols 560-562 (12 January 2010).

<sup>119</sup> Digital Economy Act 2010, s 40(3A), adding new s 2(4) to the Video Recordings Act.

direction, but still a departure from the original, statute-led scheme of the VRA. Indeed, in its 2012 consultation paper,<sup>120</sup> the DCMS distinguished between removing exemptions entirely (which would require primary legislation) and reducing the scope of exemptions (which would not). The impact on freedom of expression for those moved from ‘exempt’ to ‘regulated’ is the same in either case.

### *Summary*

Given the importance of the decisions made by the BBFC, the BFI and others, the increasing significance attached to governance and accountability across the public sector, and the more thorough provisions for what is now often called ‘co-regulation’,<sup>121</sup> this Part has shown that the various bodies regulating film now need a clearer and more accountable relationship with the state and with one another.

It can be concluded that the institutional arrangements for the UKFC (and now the BFI) and the BBFC are (a) difficult to identify and understand and (b) operate with the most tenuous of statutory control. This does not mean that they are doing a bad job, nor that they are resistant to change on their own accord; the present-day BBFC has an admirable strategy of explaining its functions and decisions that would put many public bodies to shame. The temporary solution of transferring UKFC functions to the BFI has avoided disruption to the important business of certifying British films and ensuring ongoing financial support to industry. The Review Panel has noted the new role of the BFI and suggested that ‘accountability to Parliament for spending’ could be supplemented by the procedure used for non-departmental public bodies so as to ensure that the progress of the BFI is monitored by Government.<sup>122</sup> However, there is no discussion of the role of statute here, making it difficult to be confident about future institutional arrangements, particularly in the light of the various criticisms of the UKFC discussed above.

### **Conclusion**

The intention of the author is not simply to suggest that ideal legislation would be tidier and neater than what we have at the moment. The various points advanced regarding the status of ‘film’, particularly where specific reference is made to theatrical exhibition, could represent a serious threat to the efficient operation of the regulatory schemes in which the definitions are found – and to their credibility. While other areas of regulation have seen a significant rethink as regards technological convergence and changes to business models, little progress has been made in the case of film. This is all the more surprising, given how much attention has been paid to ‘policy’.

The various measures considered in this article are not all at the same level; some may be short-term policy objectives or indeed matters that are likely to be the subject of frequent

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<sup>120</sup> Department for Culture, Media & Sport ‘Consultation on exemptions to the Video Recordings Act and on advertising in cinemas’ (9 May 2012) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/73028/VRACinemaads\\_consultation\\_May2012.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/73028/VRACinemaads_consultation_May2012.pdf) [2.14-2.15]; see also Department for Culture, Media & Sport ‘Consultation on exemptions to the Video Recordings Act and on advertising in cinemas: Government response’ (May 2013), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/202904/Government\\_response\\_VRA\\_and\\_Cinema\\_Ads\\_FINAL\\_approved\\_version.docx](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/202904/Government_response_VRA_and_Cinema_Ads_FINAL_approved_version.docx) (noting the Government’s intention to exercise the power granted by the Digital Economy Act).

<sup>121</sup> See for example s 368B Communications Act (inserted by Audiovisual Media Services Regulations, SI 2979/2009), under which the Authority for Television on Demand (ATVOD) has been designated as the regulatory authority for on-demand audiovisual media services.

<sup>122</sup> Film Policy Review Panel, above n 10, p 89.

change for technical or practical reasons. However, this article demonstrates how non-legislative the regulation of film in the UK has become. Significant areas of the regulatory mix, such as the actual criteria for classification by the BBFC and almost everything about the UK Film Council are not found in legislation. Paradoxically, the legislation that does exist makes significant assumptions about the industry and relevant markets, through complex definitions which, as part 2 has shown, have unintended consequences. There is no sign that the new Government's 'bonfire of the quangos' will address this situation, although the abolition of the Film Council could have been an opportunity to go 'back to basics'. This state of affairs raises questions about the coherence of the law and also its accessibility.

The promulgation of clear high-level principles through legislation (perhaps along the lines of the New Zealand film legislation discussed above, or section 3 of the Broadcasting Act in Canada) would be a major improvement. If considered properly, the engagement between cultural and economic matters, and the differing roles of production, distribution and exhibition, could all be addressed. To some extent (with some caution due to lack of judicial treatment), the approach of the Communications Act 2003 (in setting general and specific duties for Ofcom) could be a template. This would also mean that the division of powers between central, local and co-regulatory bodies could be implemented with these principles in mind, rather than as accidents of history.

The Cinematograph Act 1909 and the Video Recordings Act 1984 have both been criticised<sup>123</sup> for being driven by short-term panic rather than the sensible making of legislation for the long term. However, both Acts do represent an attempt to take film seriously, in a legal and parliamentary sense. The financial measures supporting film and the judicial pronouncements on such may be less widely known, but they have obviously played a significant role in shaping the content as well as the fiscal health of British film in recent decades. New film legislation may not have been on the agenda of Lord Smith's new review group, but if serious consideration were now given to a programme of statutory reform culminating in a number of new and clearer instruments, along the lines set out in this article, the second century of film legislation could be one of transparency, accountable and stability – for audiences as well as the industries concerned.

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<sup>123</sup> Mathews, above n 102, pp. 17-19 (1909), pp 241-6 (1984).