

## **Living with Hollywood: British film policy and the definition of 'nationality'**

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Focusing upon how a 'national' film has been historically defined in Britain, this article traces the history of legal definitions of a 'British' film and identifies some of the issues around nationality that these have raised. The article begins with a discussion of the introduction of quotas for 'British' films in the 1920s and the adoption of the Eady levy as a means of providing production finance to 'British' films in the post-war period. It then goes on to examine the introduction, in response to EU regulations governing the film industry, of a 'Cultural Test' for 'British film' in 2007 and to consider the way in which eligibility for tax reliefs has depended upon a film qualifying as 'British'. In assessing whether the Cultural Test may be regarded as constituting a 'break' in British film policy in terms of a shift from economic to cultural objectives, the article not only indicates the manner in which cultural and economic objectives have been brought into alignment but also identifies how the definition of the 'national' for the purposes of tax relief has been designed to encourage 'transnational' Hollywood production within the UK. In doing so, the article also indicates how 'national' discourses and practices have continued to inform and structure the economic and cultural dynamics of contemporary 'British' cinema as well as engaging with, rather than necessarily standing in opposition to, 'transnational' and globalising trends.

**Keywords:** Britain; European Union; film policy; British film; national cinema; transnational cinema; tax policy; the Cultural Test; Hollywood.

### **Introduction**

The idea of the 'national' in film studies has been subject to considerable discussion in the last two decades (Crofts 1998, Vitali and Willemsen 2006, Hjort 2010). This debate has arisen partly in response to the changing economic, political and cultural attributes of nations in an era of globalisation and partly in response to the various ways in which cinema – from funding, production and distribution to modes of cultural representation and address – has acquired an increasingly 'transnational' character. However, while these debates have encouraged the development of new frameworks for the conceptualisation and analysis of varying groups of films, they have also tended to under-estimate the persistence of the 'national' in the face of globalisation and transnational flows. This has partly been a matter of conceptualisation whereby critical accounts of 'national cinema' have defined it in such a restrictive and one-dimensional way that the term has inevitably been stripped of any potential use-value as an analytical tool. However, in many cases, it has also involved an

element of downplaying, or even ignoring, certain kinds of empirical evidence. For, despite the pronouncement of the death of the 'national' by a number of writers, discourses of the 'national' do, nevertheless, continue to structure and inform how films of various kinds are categorised, funded, promoted and made sense of by a range of social actors ranging from politicians and civil servants to filmmakers, critics and audiences.

The survival of discourses of the national might be said to be particularly evident in film policy which has continued to fall within the ambit of national governments (if not exclusively so) and to be based upon objectives that are often conceived of in 'national' terms. Definitions of nationality, for example, have always been central to the implementation of film quotas. Indeed, the General Agreement on Tariffs and Trade, that first came into force in 1948, explicitly exempted 'films of national origin' from the general principles of free trade to which the agreement was otherwise devoted (GATT 1986). Although quotas no longer enjoy the popularity that they once did, the expansion of the range of policy instruments employed in support of the production of films – such as loans, grants and tax incentives - has nonetheless ensured that the classification of films as in some way 'national' has remained an important political and legal matter. In their discussion of 'the nationality of culture', for example, Grant and Wood consider a range of definitions adopted by the governments of various countries, including Australia, Canada, Italy, the Netherlands, Norway and South Africa, that have been employed to determine the 'national' status of film and television output within their territories (2004, pp. 153-64). Although efforts such as these may appear to be at odds with the ways in which so much film financing and production traverses national boundaries, they do, nonetheless, play an important role not only in framing how the nationality of a film is initially defined and understood but also in influencing how film projects are put together and funded in the first place. It is, therefore, this question of how a 'national' film has been historically defined in Britain that provides the focus of this paper.

It will begin by charting the history of legal definitions of a 'British' film since the 1920s and identifying some of the issues around nationality that these have raised.<sup>1</sup> Following a consideration of the introduction of quotas for 'British' films in the 1920s and the adoption of the Eady levy as a means of providing production finance to 'British' films in the post-war period, the article goes on to examine the introduction of a 'Cultural Test' for 'British film' in

2007 (in response to EU regulations governing the film industry) and to consider how eligibility for tax reliefs has depended upon the qualification of films as 'British'. In assessing whether the Cultural Test may be regarded as constituting a 'break' in British film policy in terms of a shift from economic to cultural objectives, the article not only indicates the manner in which cultural and economic objectives have been brought into alignment but also identifies how the definition of the 'national' for the purposes of tax relief has been designed to encourage 'transnational' Hollywood production within the UK. Thus, while the UK's film policies might be regarded as providing an example of what Diane Crane refers to as 'national... cultural policies' offering 'a form of resistance to American dominance', they turn out not only to be less 'cultural' than they initially appear but also to have been designed in such a way as to encourage, as much as resist, Hollywood's involvement in 'local' production (Crane 2014, p. 379). Although this has become much more evident in recent years, a degree of meshing of the economic and the cultural, and the national and the international, may be seen to have been a feature of the relevant legislation since quotas for British films were introduced in the 1920s.

### **Defining a 'British' Film**

The task of defining a 'British' film for legal purposes arose in the 1920s as a result of the introduction of a quota for British films in response to the domination of British cinema screens by films made in Hollywood (Hartog 1983). Under the 1927 Cinematograph Films Act, a film, in order to qualify as 'British', had to meet a number of requirements relating to the nationality of those making it, the use of studios (within Britain and the British Empire more generally) and the payment of salaries and wages. The original Cinematograph Films Bill had indicated that, in order to be deemed a 'British film', a film must be made by 'a person who was a British subject... or by a British controlled company' (p. 14).<sup>2</sup> This was in line with the earlier Report of the Joint Trade Committee that had also argued for a quota that would increase the number of British films, encourage employment of British labour and 'establish an industry under British control' (quoted in PEP 1952, p. 43.) During the Bill's passage through the House of Commons, however, the wording was changed from 'British controlled company' simply to 'British company' which, as a report in the *Times* indicated, meant 'no more than a company with British registration (15 November 1927, p. 17). Although the original definition of a 'British controlled' company had itself been conceived quite narrowly in terms of 'voting power', the change in terminology was

perceived by critics to constitute a 'loophole' that left the door open for 'non-British interests' - in effect US companies - to establish, or acquire control of, British-registered companies involved in the making of 'British' films. There were also complaints that the requirement for expenditure on British labour excluded the salary or payments to one foreign actor or producer. This, it was claimed, not only made it possible for Hollywood stars to appear in quota films with a 'non-British bias' but would also significantly reduce the amounts required to be paid to British personnel (Sandon, p. 10).

Although the quota legislation led to an increase in British film production and encouraged vertical integration within the industry, it was also regarded as leading to the growth of American interests. As PEP (1952, p. 51) indicates, American companies were not only encouraged to undertake the production of films in the UK but also to strengthen their position within distribution and make moves into exhibition given the UK's importance as an overseas market. This outcome has commonly been understood to be a failure of the quota policy to strengthen the domestic industry in the manner envisaged, particularly as a result of rise of the low-budget 'quota quickie' and the lack of attention to Hollywood's role within distribution which continued to be the key to its dominance of the UK market. Betts (1973), for example, suggests that what occurred was 'the reverse' of what had been intended with the British film industry coming 'more and more under American dominion' and losing its 'independence' (p.83). However, as the initial loosening of the definition of a 'British film' indicates, it is not at all clear that the legislation was straightforwardly designed to protect a British film industry independent of Hollywood involvement. Indeed, in his revisiting of the quota legislation and the debates surrounding the 'quality' of the 'quota quickie', Glancy (1998) argues that US involvement in British film production was hardly an 'unforeseen development' but the result of a deliberately chosen policy by 'a government that did not want to grant state support to its own film industry, but sought some means of ensuring that the industry received funding' (p. 60). In this respect, it may be argued that, from the very beginning, the definition of a 'national' film was constructed in a way that would allow 'transnational' involvement and investment. This would seem to be confirmed by the revisions to the 1927 legislation contained in the 1938 Cinematograph Films Act. In response to concerns about the 'quota quickie', the new Act fixed a minimum labour cost and introduced double and triple quota provision for more expensive films. As Glancy observes,

these measures helped to concentrate investment in fewer, more expensive films but also 'ensured that British films would be controlled increasingly by American companies' (p. 65).

The Janus-faced character of British film policy - of looking both inwards and outwards for financial investment – may also be seen to have been a feature of one of the planks of post-war film policy, the Eady levy. This was originally devised by the Treasury official Sir Wilfred Eady and was introduced on a voluntary basis in 1950 before being made compulsory under the Cinematograph Films Act of 1957. Designed to return a proportion of box-office takings back to production, it consisted of a levy upon exhibitors' earnings that contributed to the British Film Production Fund administered by the British Film Fund Agency. However, the definition of a British film remained substantially the same as in the 1930s and, if anything, became a little looser by virtue of the growth of location, rather than studio, filming. Given the rise of mobile production, the size of the British market and the relative generosity of the funds provided through the Eady levy, Britain was destined to prove a favoured location for Hollywood filmmaking during the 1950s and 1960s. Indeed, according to the National Film Finance Corporation (1968), the percentage of British quota films wholly or partly financed by Hollywood had risen to 72 per cent by 1967 (and to 90 per cent in terms of the actual volume of finance) (pp. 3-4). As early as 1956, John Davis, the Managing Director of the Rank Organisation and President of the British Film Producers Association, had argued that the Government had surely not intended that the levy should be used 'to support films made in this country by American subsidiaries' (quoted in Guback 1969, p. 155). However, although the precise levels of support accruing to US subsidiaries may not have been entirely anticipated, there was also little appetite for bringing it to an end. Thus, despite its concern for 'the extent of the dependence of British film production on US finance', the NFFC believed that without US financial support there would scarcely be a British film industry at all and that, as a result, 'nothing should be done to discourage the continuance of US investment' (1967, p. 4). Indeed, in his discussion of the Eady levy (which he refers to as a 'bribe') in the early 1960s, Jonathan Stubbs indicates the lengths to which the Board of Trade were prepared to go in order to register a Hollywood film such as *Lawrence of Arabia*, shot largely outside of Britain, as a 'British' quota film (2009, pp. 8-13). The publication of the details of the distribution of the Eady levy from 1979 onwards also revealed the extent to which the biggest payments were made to commercially successful

Hollywood productions – such as the *Superman* films – that may well have been shot in British studios but were, nevertheless, scarcely recognisable as films that might be taken to be ‘culturally British’.

In his discussion of post-war measures to support the film industries of Europe, Guback laments the way in which these policies were apparently hijacked by US interests:

Production subsidies quite openly were instituted to aid *domestic* film makers in European countries at a time when capital was short and American pictures dominated the screens. Subsidization laws, to ensure that aid would go to those who needed it, incorporated definitions of “national” producer and “national” film. However, incredible as it seems, these laws did nothing to prevent foreign subsidiaries of American companies from conforming to the decrees so as to become “national” producers of “national” films (Guback 1976, p. 400).

While Guback’s diagnosis of how Hollywood was able to take advantage of European incentives is certainly apt, his findings are not, perhaps, quite as ‘incredible’ as he suggests. In the case of the UK, there was clearly a willingness to maintain relatively elastic definitions of a ‘national’ film that would help to sustain a domestic film industry while simultaneously permitting, and even encouraging, US investment in a ‘domestic’ film industry that might be regarded as depending upon it. This, as will be seen, continued to be the case even when definitions of a British film appeared to become less obviously based upon economic and industrial criteria and more overtly ‘cultural’ than they had been before.

### **The ‘Cultural Test’ and tax policy**

In their account of the ways in which states categorise cultural products as ‘national’, Grant and Wood suggest how – under the 1985 Films Act (and the subsequent amendments to it passed by the Labour government in 1999) - the system for assessing the ‘Britishness’ of a film had been ‘almost entirely divorced from notions of culture’ (2004, p. 160). Although the 1985 Films Act was, in a number of respects, a radical one, ending the Eady levy and closing the National Film Finance Corporation, its definition of a British film remained largely the same as those contained in previous Acts, stretching back to the 1920s. As such, a British film continued to be defined in terms of the nationality of the film’s maker (be it a person or

company), the location of the studio in which filming occurred and the amount of labour costs accruing to British or Commonwealth citizens. The 1999 amendments placed a new emphasis upon production spend rather than the use of a studio but did not fundamentally alter the emphasis upon what might be regarded as economic factors. Indeed, the adoption of the criterion of production expenditure had previously been recommended by the Middleton Report on Film Finance which had explicitly called for the definition of a British film to be confined to 'a straightforward economic test' (Advisory Committee on Film Finance 1996, p. 5). It had made this recommendation on the basis of an argument that competition for production finance was increasingly global and that the UK government should therefore increase the tax incentives made available to the film industry as a means of attracting financial investment in British film production (ibid. p.31). Insofar as tax incentives did, from the 1990s onwards, become the preferred instrument of government film policy this meant that the definition of a 'British' film acquired a growing political significance as well.

Following the election of the Conservatives, under Margaret Thatcher in 1979, both the quota for British film and the Eady levy were abolished in line with the new government's more general policies of 'rolling back the state' and promoting market forces (Hill 1993). Following the production crisis that beset the industry at the end of the 1980s, however, there was considerable lobbying for government action, including a meeting with Thatcher at Downing Street in June 1990. This led to the establishment of a Tax Incentives Working Group, chaired by BFI Director Wilf Stevenson, which, in turn, helped to pave the way for the introduction of a tax relief (in the form of an accelerated write-off of production expenditure) under Section 42 of the 1992 Finance (No. 2) Act. Following the election of a new Labour government in 1997, under Tony Blair, a further tax relief was introduced under Section 48 of the 1997 Finance Act (which further extended the reliefs available). Although film production had benefited from the use of capital allowances in the early 1980s, the provision of tax incentives constituted a relatively new policy instrument for the UK government. This may be seen to be in line with the neo-liberal turn in economic policy inaugurated in the 1980s insofar as tax incentives for film production came to be regarded as a more 'market-friendly' alternative to quotas and levies. They were also understood to provide the most appropriate response to the increasing 'globalisation' of the international

film industry and the growing mobility of Hollywood production in particular. In the face of increasing rivalry amongst states around the world to attract 'runaway' and globally dispersed productions, tax incentives were, therefore, held to be necessary in order to 'level the playing field' and enhance the attractiveness of the UK as a filming location (Perelli 1991, Prescott 1991). In comparison with earlier forms of state film policy such as the Eady levy, this also meant that the rhetoric surrounding tax reliefs became much more explicit in acknowledging that a 'national' film policy in support of 'British films' was also, in effect, an 'international' one geared mainly – if not exclusively - towards the encouragement of inward economic investment. Accordingly, the evaluation of the effectiveness of tax policy, and the enthusiasm of successive governments for continuing with it, have in large part rested upon its perceived success in attracting Hollywood productions to the UK. This is evident, for example, in the report of the Film Policy Review Panel, established by the Conservative-Liberal Democrat coalition government in 2011 following the abolition of the UK Film Council, in which the chapter on 'international' film strategy simply welcomes tax reliefs for their capacity to attract 'high budget films to the UK in the teeth of fierce competition' (FPRP 2012, p. 77).

However, while tax policy in support of 'British' film may be seen to have been driven by the economic goals of attracting inward investment and encouraging the production of films in the UK, it has also been underpinned by a 'cultural' rhetoric due to the introduction of a 'Cultural Test' for 'British' film in 2007 (Magor and Schlesinger 2009; Hill 2012). The Film Policy Review Group, established by the Labour government in 1997, had, in fact, recommended the introduction of a new points-based definition of a 'culturally-British film', that would take account of subject-matter, but this was not pursued when the definition of a British film was revised in 1999 (FPRG 1998, p. 54). However, as a result of an obligation to comply with European Union legislation governing the single market, the UK, which had joined what was then the European Economic Community in 1973, was eventually required to revise the definition of a 'British' film along more explicitly cultural lines. Under the Treaty of Rome (1957), and subsequent revisions to it, the EU's commitment to free trade has meant that 'any assistance given by the state which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods' is deemed to be 'incompatible with the common market' (Johnson and

Turner, p. 108). State aid 'to promote culture and heritage conservation' has, however, been held to be an exception but only where such aid does 'not affect trading conditions and competition in the Community' (European Commission 1997). In its Cinema Communication of 2001, the European Commission sought to clarify the implications of this 'cultural derogation' for film by laying out new rules that would permit governments to assist film and television production provided that they had adopted measures that did not lead to the distortion of economic competition and had ensured that 'the cultural content of the works supported' was established 'on the basis of verifiable national criteria' (European Commission 2001). This had a consequence for the use of tax incentives in support of film production by member-states insofar as they are held by the EC to be a form of 'state aid' with a capacity to distort competition and which, therefore, have to be justified on cultural rather than purely economic grounds (European Commission 2006, p. 9). As Magor and Schlesinger point out, when the Conservative government introduced Section 42 tax relief in 1992, they had failed to notify the Commission (which should have been called upon to approve it) on the grounds that they had regarded it as 'an investor relief system' rather than a form of 'state aid' (Magor and Schlesinger, p. 314). However, when the Labour government, in the face of evidence of widespread tax avoidance, decided to replace Section 42 and Section 48 with a new form of tax credit (whereby film production companies could claim a payable cash rebate of a percentage of UK qualifying film production expenditure) there was no question that it was obliged to demonstrate how the films benefiting from the new arrangements could be seen to exhibit the 'cultural content', based on 'verifiable national criteria', that would warrant an exemption from EU competition law (HMRC 2006). It was for this reason that the Treasury, when laying out the new tax proposals, felt it important to explain that 'the core aim' of film tax reliefs was 'to promote the sustainable production of culturally British films, across the spectrum of indigenous and inward investment' (HM Treasury 2005, p. 2). It also explains the emergence of a new Cultural Test that films would be required to pass in order to qualify as 'British'. However, given that only British-qualifying films would then be eligible for tax relief, the precise character of the Cultural Test (and its definition of 'Britishness') were also destined to become a matter of political debate.

The initial version of the Cultural Test, developed in consultation with representatives of the industry including the Hollywood studios, consisted of three main sections concerned with 'Cultural Content' (setting, characters, subject matter/underlying material, language), 'Cultural Hubs' ( the use of locations, studios and postproduction) and 'Cultural Practitioners' (the nationality of those involved in making the film). In terms of previous definitions of a British film, the novelty of the Test was the awarding of points for 'content' but this amounted to a relatively minor element. Out of 32 points available, 16 points were required to pass the Test. However, in line with the economic imperatives governing the policy of tax credits, nearly half of the points available (15 out of 32) could be achieved under 'Cultural Hubs' (a set of predominantly economic criteria) whereas only 4 points were available under 'Cultural Content' (DCMS 2005, p. 5). This lack of emphasis upon 'cultural content' was noted by the European Commission when it came to review the 'Cultural Test'. It questioned whether the 'Cultural Hubs' and 'Cultural Practitioners' sections could be regarded as referring to the 'cultural content aspects' of filmmaking at all and, given the low level of points available for 'cultural content', concluded that the Test failed to 'ensure that the aid would be directed towards a cultural product as defined by the UK authorities' (European Commission 2006, pp. 11-12).

This decision led the UK government to submit a revised version of the Test in which the 'cultural' aspects were considerably strengthened. Under this version, the number of points available was reduced to 31 but the number of points for 'Cultural Content' was increased to 16. The points for Cultural Hubs were also reduced to 3 while those for Cultural Practitioners were reduced from 13 to 8. At the same time, a new section – 'Cultural Contribution' – was added which took into account the representation or reflection of British 'culture', 'heritage' and 'creativity' which, taken together, provided a possible total of 4 points (see Fig. 1 below).

#### **CULTURAL TEST (2007)**

##### **A Cultural Content**

- |    |   |   |
|----|---|---|
| A1 | Film set in the UK  | 4 |
| A2 | Lead characters British citizens or residents               | 4 |
| A3 | Film based on British subject matter or underlying material | 4 |

A4	Original dialogue recorded mainly in English language	4
<b>B Cultural Contribution</b>		
	Film represents/reflects a diverse British culture, British heritage or British creativity	4
<b>C Cultural Hubs</b>		
C1	Studio and/or location shooting/ Visual Effects/ Special Effects	2
C2	Music Recording/Audio Post Production/Picture Post Production	1
<b>D Cultural Practitioners</b>		
D1	Director	1
D2	Scriptwriter	1
D3	Producer	1
D4	Composer	1
D5	Lead Actors	1
D6	Majority of Cast	1
D7	Key Staff (lead cinematographer, lead production designer, lead costume designer, lead editor, lead sound designer, lead visual effects supervisor, lead hair and make-up supervisor)	1
D8	Majority of Crew	1 (Total: 8)
<b>TOTAL ALL SECTIONS (pass mark 16) 31</b>		

Fig. 1.

This version was approved by the European Commission but led to some criticism in the UK where there were not only complaints about EC interference in ‘national’ issues but also concerns that the added emphasis upon cultural factors might prove a disincentive to the kind of big-budget Hollywood films that tax incentives had been partly designed to attract.<sup>3</sup>

This was evident, for example, in the House of Commons when the new definition of a ‘British film’ was discussed by the First Delegated Legislation Committee. The Tory MP, Ed Vaizey, subsequently to become Minister for Culture, Communications and the Creative Industries at the Department for Culture, Media and Sport, complained of ‘the danger of altering the weighting so strongly in favour of a cultural test’ rather than sticking with ‘a straightforward test about where the film was made’. He then went on to warn of the increasingly ‘stiff competition from accession states such as the Czech Republic, Romania and Hungary’ which, he argued, now offered ‘tax relief for foreign films made in their countries in a way which Britain cannot’ (House of Commons 2006). The future Conservative Secretary of State for Culture, Media and Sport (and staunch Euro-sceptic), John Whittingdale, also stressed the ‘economic contribution’ to ‘the British film industry’ of ‘big budget films which are internationally mobile’ before going on to argue that the added emphasis upon cultural subject-matter might mean that big Hollywood films such as *Judge Dredd*, *Gladiator* and *Troy* which had previously qualified as ‘British’, on the basis of economic spend, might now fail the Cultural Test (ibid.).

In the event such fears proved to be unjustified. In his contribution to the same debate, the Conservative MP, Tony Baldry, suggested that the proposal might be better described as 'Support the UK film industry (getting round the EU state aid provisions) order' (ibid.) and there was certainly evidence to support this view. Although the new Cultural Test did prove slightly more difficult for some Hollywood films to pass than would previously have been the case, it could hardly be said to have acted as a deterrent to inward investment films. As an article in the US trade paper, *Variety*, entitled 'Snaring the big Hollywood pictures', indicated in 2010, 'big-budget Hollywood projects', such as *John Carter*, *Captain America* and *X-Men*, accounted for the lion's share of 'foreign production in the UK' largely due to the attractiveness of the UK's system of tax credits (which now had no ceiling and applied to all UK expenditure, including the salaries of American personnel) (Dawtre 2010). However, although, in this piece, such films are regarded as 'foreign' productions, they do, of course, refer to films that, in order to prove eligible for tax relief, have had to pass the 'Cultural Test' and thus qualify as 'culturally British' films. Establishing precisely how those Hollywood films, that appear to possess relatively little 'British' content, have been able to pass the Cultural Test is not, however, a straightforward matter. This is particularly so given that the Certification Unit (previously attached to the DCMS but subsequently located at the UKFC and then at the BFI) responsible for certifying films as 'British' has refused to reveal how the Test is applied to individual films (on the - highly questionable - grounds that, despite the levels of public subsidy involved, to do so may lead to the disclosure of 'commercially sensitive' information). Inspection of the guidelines does, nevertheless, provide some indicators as to how the Cultural Test will have been applied.

Points, for example, may be acquired for characters who are British even if the story of the film is not itself set in Britain. Non-British subject-matter may also accumulate 4 points as long as the 'underlying material' (e.g. a book or story) was written by a British citizen or resident. The use of the English language, irrespective of the nationality of the setting or characters, also earns up to 4 points. And, although the Test may involve a 'Golden Rule' that prevents a film from passing the test solely on the basis of points accumulated on the basis of Cultural Hubs, Cultural Practitioners and the use of the English language, there is no requirement that a film obtain any points under Cultural Contribution, which might be regarded as the most culturally specific part of the Test. It was, of course,

the Cultural Contribution section that was specifically added to the Test following its rejection by the European Commission. However, in application, it appears to be largely redundant as the majority of 'indigenous' British films are unlikely to need the points from this section in order to pass the test while inward investment films would be unlikely to achieve points in this section without having already acquired the requisite points under setting, characters or subject-matter ('Cultural Content'). Thus, while the largest number of films passing the Cultural Test would generally be perceived to be in some way 'British', the Cultural Test has remained of sufficient flexibility to permit Hollywood films that might not immediately be recognised as British – such as the *Batman* films - to pass the Test and gain access to tax reliefs.

However, while the European Commission may have sought to regulate the systems of support for film across the EU and verify the various 'national' criteria employed by different EU states, questions also began to arise as to whether these rules were, in fact, proving sufficiently rigorous in restricting state aid to cultural goods of a 'European' character. These issues were aired in 2009 following the EC's decision to extend the 2001 Cinema Communication until the end of 2012 (partly as a means of winning more time for a proper consultation on possible changes). In the questions and answers accompanying the announcement, the Commission stressed the importance of cultural conditions in exempting film from the rules governing state aid and indicated how these might be undermined by competition for inward investment. As the document explained:

In recent years, there has been increasing global competition between countries to attract large (generally US or US-financed) film productions. This development... could turn into a subsidy war between Member States, which would not be compatible with the EC competition rules. The Cinema Communication was tailored to European film support schemes with a primary focus on supporting national and European culture(s). It is therefore fundamental that national subsidies comply with the cultural conditions established in the Cinema Communication and do not lead to subsidy wars to attract foreign movies unrelated to national and European culture(s), as this could be highly detrimental to the entire European film sector. In fact, the only winners of such wars would be the US majors, and the greatest losers the national film industries across Europe (European Commission 2009).

As a result of these concerns, the Commission, following a consultation on an 'Issues paper', returned to the matter in its draft Cinema Communication in 2012 in which it reflected upon how 'the competition between Member States to use State aid to attract inward investment from major productions' might be controlled (European Commission 2012, p. 3). In doing so, it proposed to set a cap on the state aid available to big-budget productions and introduce a new definition of a 'European audiovisual work' that would potentially restrict the aid then available to Hollywood films shooting within the EU. Given that these changes were likely to have more of an impact upon the UK than other EU states, there was strong resistance to them from the UK government, the BFI, the British Screen Advisory Council and Creative England. The idea of a 'subsidy race' within Europe was challenged and changes to the rules governing 'inward investment productions' were regarded as putting the UK's global competitiveness in jeopardy. The argument made, in this regard, was that European states were not so much in competition with each other as with non-European territories, such as Australia, Canada, New Zealand and even US states such as Louisiana, which would be in a position to offer more incentives than were available in Europe (BSAC 2012). The definition of a 'European work' was also questioned and claimed to be in breach of the principle of 'subsidiarity' governing the adoption of state aid systems. The Commission might be said to have scored something of an 'own goal' in this regard by proposing, in the context of a review of support for supposedly 'cultural' activity, a definition of a European audiovisual work that was primarily industrial in character. This definition was based on criteria relating to the nationality of the producer and other creative personnel that the EC, in its initial assessment of the UK Cultural Test, had held to be insufficient to identify a film as a 'cultural product' (European Commission 2006). As a result, the UK government was able to argue that it might become possible for a film to qualify as 'culturally British under the UK film tax relief cultural test' but, nonetheless, fail the test for a 'European work' (United Kingdom Government 2012).<sup>4</sup>

Given the hostility to many of the Communication's proposals, not just in the UK but elsewhere in Europe, the final version of the document marked a significant retreat from the positions that had previously been adopted. Even though the Communication maintained some anxiety about the high level of aid provided to 'major international productions', it also accepted that it might be possible for 'aid to attract major foreign film

projects' to be capable of promoting culture 'under the same conditions as aid for European production' (European Commission 2013). The proposed definition of a 'European audiovisual work' was also abandoned and, with it, the ending of the proposal to lower the level of aid (or 'aid intensity') available to works that might have been regarded as 'non-European'. The Communication also conceded that its 'detailed scrutiny of cultural criteria in film support schemes' had proved 'controversial' with Member States and indicated that, in future, its role would be limited to ensuring that each country had 'an effective verification mechanism' in place (ibid). Understandably, the new Cinema Communication was welcomed by the UK government which, now that the uncertainty over the issue of inward investment films had been settled, proceeded to change both the tax credit and Cultural Test in ways that made them yet more attractive to Hollywood productions. In the case of the tax credit, the rate of relief was raised from 20% to 25% of the first £20 million of qualifying expenditure (HM Revenue 2013). This meant that an additional £1 million of tax relief would be available to qualifying films (that would also continue to obtain tax relief of 20% on expenditure over £20 million). As a way of encouraging the undertaking of visual effects and postproduction work in the UK, the government also lowered the minimum UK expenditure requirement from 25% to 10%. This was partly made possible by the Cinema Communication's widening of the scope of the activities that it now covered which, in turn, led to changes in the Cultural Test. Under the new Test, approved in 2014, additional points became available for special effects and visual effects and the overall points available under Cultural Hubs rose to 5 (from 3). At the same time, the number of points available for the use of the English (or a European) language was raised to 6 (from 4). As a qualifying film now required 18 out of 35 points (rather than 16 out of 31), the availability of an additional 4 points for postproduction and the use of English might be said to have further diluted the more specifically 'cultural' aspects of the Test (although a Golden Points rule did still apply).

### **Assessing 'national' film policy**

As this account of the changing definitions, and assessment criteria, for a 'British' film indicates, the idea of a British film has proved a fluid one in which 'cultural' and 'economic' and 'national' and 'transnational' elements have become entwined. This, in turn, may be understood as a product of various factors, including the complex character of international

film financing and production, the multiple - and sometimes competing - aims of UK film policy and the tensions between European Union and UK political and economic objectives. Although, historically, British film policy may be seen to have been predominantly economic in character (and geared towards the support of commercial filmmaking) , the British film industry has also benefited from a degree of recognition that film production possesses a cultural – and national – significance that has made it something of a ‘special case’ that has distinguished it from other kinds of industrial activity (Hill 2004). While this appears to have become much more explicit with the introduction of a Cultural Test for British film, it would, as has been indicated, be difficult to interpret this in terms of a decisive break in the direction of ‘cultural policy’ given the way in which it has been used to pursue economic as well as cultural objectives. In its review of film support issues in 2011, the European Commission asked the question of whether the same policy and funding approaches could be applied to ‘attracting/redirecting major film productions’ and supporting what it refers to as ‘truly European (even national) “culture-intensive” content’ (European Commission 2011). In the case of the Cultural Test, the answer has appeared to be ‘yes’ and it is the mixing of strategies with which it is associated that has helped to generate the relatively elastic conceptions of both ‘culture’ and ‘nationality’ to be found in the Test.

In doing so, it has also demonstrated the complicated way in which national and transnational elements have sustained each other. While noting how the Cultural Test arose in response to pressure from a ‘transnational body’ in the form of the European Commission, Higson has nonetheless argued that the introduction of the test represents a ‘renationalisation of British film policy’ (2011, p. 63). Higson, however, over-estimates the stringency of the test’s requirements and fails to identify how Hollywood films with ostensibly little British ‘content’ – such as *The Dark Knight* – might nonetheless qualify as a ‘British’ film. In this respect, what on the face of it might appear to constitute ‘renationalisation’ may also be understood as a form of ‘denationalisation’. Saskia Sassen, for example, has argued how globalisation may be understood as both a form of external imposition and an internal process of ‘de-nationalisation’ whereby national governments negotiate ‘the intersection of national law and the activities of foreign actors in its territory’ by issuing ‘legislative measures, executive orders, and court decisions enabling foreign firms to operate in their territory and their markets to become international’ (2006, p. 230). In the

case of the film industry, this agenda of 'denationalisation' may take a variety of forms - such as the abolition of quotas and the funding of screen commissions - but may be seen to apply to tax policy as well. In some respects, the employment of tax incentives has entailed a degree of external imposition in the way in which 'national' film policy has been required to adjust to global competition for inward investment and to respond to the demands of mobile Hollywood productions, and the corporations responsible for them, for state support. On the other hand, this development has also relied upon internal processes of 'denationalisation' whereby the government has established the means by which 'state aid' may be provided to international productions on the basis of a Cultural Test, and a definition of the 'national', that, in application, demands very little by way of national-cultural specificity.

As such, the policy has both economic and cultural implications. Although tax incentives do not constitute the only instrument of film policy, they do account for substantial sums of money. Indeed, according to BFI figures, tax relief accounted for 57% of public funding for film in 2012-13 whereas grant-in-aid provided by the Department of Culture, Media and Sport amounted to only 8% (BFI 2014a, p.204). And while the majority of films to benefit from tax relief may have been 'independent' productions, the largest pay-outs, as would be anticipated, have gone to big-budget Hollywood productions. According to HM Revenue and Customs, the tax-credit payments for the period from 2007-8 to 2013-14 made to large-budget films (i.e. those with a budget over £20 million) amounted to £890 million, representing 67% of all payments but only 11% of claims (HMRC 2014). The use of tax credits to support Hollywood productions, however, has generally commanded a degree of political consensus and even an element of national pride. This was evident, for example, in the way in which the Conservative Chancellor of the Exchequer, George Osborne, associated himself with the production of *Star Wars: The Force Awakens*, a film that was not only classified as 'culturally British' but also awarded one the largest individual pay-outs under the tax-credit scheme (reportedly over £31 million) (Spence 2016).<sup>5</sup> Revelations of this kind have led to some questioning of the propriety of providing taxpayer subsidies of this magnitude to wealthy Hollywood studios.<sup>6</sup> This, in turn, may be seen to be linked to a more general public debate concerning the declining proportion of tax being paid by large transnational corporations (compared to individual citizens) and the levels of 'corporate

welfare' provided to them at a time of government-imposed austerity and cuts in state benefits (Hutton 2014, Farnsworth 2015). While such debates have tended to be motivated by concerns for fairness and social justice, there have also been arguments from traditional conservatives that such subsidies appear to be at odds with the non-interventionist, 'free market' policies that governments otherwise claim to be pursuing. It was certainly in this spirit that Conservative MP, Steve Baker, asked his own government minister, in the debate in the House of Commons on the *Draft Films (Definition of 'British Film') Order 2015*, whether he was arguing 'that it is necessary for us to bribe these companies with taxpayers' money in order for them to stay in our country, rather than go somewhere else to accept bribes from other governments' (House of Commons 2015). However, despite expressions of concern such as these, tax reliefs have generally been perceived to be of net benefit to the national economy and were, indeed, extended by the Conservative government in 2014 to include high-end television, animation and video games in addition to film (Oxford Economics 2012, Olsberg SPI and Nordicity 2015).

However, although tax incentives for film production may be regarded as a strategy for achieving 'competitiveness' in the short-run, it has also led the UK government to engage in the very 'subsidy war' that the EU warned against. As Dicken explains, the pressure upon states to compete for 'a bigger slice of the global economic pie' has encouraged an 'intense involvement in.... "locational tournaments"... to entice investment projects into their own national territories' as well as 'an enormous escalation in the extent of *competitive bidding*..... to attract the relatively limited amount of geographically mobile investment' (Dicken 2015, p.183). The implications of this for tax policy in support of film are explained by Morawetz who indicates how countries such as the UK and Canada are 'forced to maintain and increase tax incentives' not only in order 'to *stay competitive*' but also to avoid losing existing levels of investment and production to new competitors (2008, p.142). This is a diagnosis that would appear to be confirmed by the Conservative government's decision to make increasingly generous tax reliefs available to both film and other creative industries. However, while such a strategy conforms to the aspiration to make the UK a 'creative hub' providing services to the global film industry, it has, as David Steele (2015) suggests, much less to offer the UK independent sector which, even with the benefit of tax relief, continues to occupy a structurally disadvantaged position within the international film industry - particularly in terms of access to distribution - and which, therefore, struggles to achieve

long-term economic viability. The relative fragility of the independent sector also has consequences for the diversity and range of British filmmaking and the ways in which 'nationality' is addressed. For although the Cultural Test may allocate points for the 'significant representation' of 'British cultural heritage' and 'British cultural diversity', these are not, as has been seen, necessary to pass the test and do not demand much by way of complexity or even specificity in what comes to be classified as 'culturally British' films (BFI 2014b). As a result, the films that benefit the most from the system of tax reliefs are those which, due to their relationship with the Hollywood studios, commonly offer the most conventional signifiers of 'cultural Britishness' rather than those that are engaged in challenging and refashioning them.

## **Conclusion**

This article has looked at different stages of film policy in the UK concerned with support for the production of 'British' films. In some respects, these appear to represent fairly distinct phases. Initially, UK government film policy was regarded as protectionist in character, defending a national film industry through the adoption of quotas for British films. In the post-war period, film policy assumed a more social-democratic interventionist form through the provision of public subsidies and loans (such as the Eady levy). With the ascent of economic neo-liberalism and globalising market forces, film policy, from the 1990s onwards, placed an increasing emphasis upon the provision of 'market-friendly' incentives (such as tax reliefs) designed to attract investment in an industry increasingly oriented towards 'global' production. Viewed in this way, film policy objectives may be seen to have undergone a shift away from the protection, or support, of British cinema in the face of overwhelming Hollywood dominance towards a strategy of making the UK as welcoming a destination as possible for 'offshore' or 'local' Hollywood production. However, by focusing on the changing legal definitions of a 'British' film, and the ways in which they have been implemented, this article also suggests how, from the 1920s onwards, there has been a degree of acceptance of the British film industry's dependence upon Hollywood involvement and thus a degree of ambiguity in the way in which a 'British' film has been defined (and how 'national' film policies have been pursued).

This ambiguity has, however, become most evident since the introduction of a 'Cultural Test' for 'British' film. Although this may seem to mark a significant break with earlier industrial conceptions of a British film by introducing more specifically cultural criteria, it has, in its application, been relatively easy to pass and has proved to be highly 'Hollywood-friendly'. In this regard, the Cultural Test may be seen to have rested upon a degree of blurring of the apparent boundaries between the 'economic' and the 'cultural' as well as the 'national' and the 'transnational'. In highlighting some of these issues, the article also indicates how 'national' discourses and practices have continued to inform and structure the economic and cultural dynamics of contemporary 'British' cinema as well as engaging with, rather than necessarily standing in opposition to, 'transnational' and globalising trends.

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<sup>1</sup> The issue of nationality and, indeed, nationalities within the United Kingdom of Great Britain and Northern Ireland is, of course, a highly complex one that cannot be adequately addressed in this particular context. However, although there are specific dimensions to film policy in England, Scotland, Wales and Northern Ireland, the same legal definition of a 'British' film has applied across all parts of the UK.

<sup>2</sup> As Harry Goulbourne points out, British 'nationality' did not, strictly speaking, exist prior to the British Nationality Act of 1948 insofar as inhabitants of Britain and the British Empire were up until then conceived to be 'subjects' of the Crown (1991, pp.90-91).

<sup>3</sup> In this respect, such debates reflected a broader political division, most evident within the Conservative party, between a commitment to a deregulated 'free' European market and a disdain for European legislation that has been perceived to undermine national sovereignty. The continuation of this fault-line in British politics has since led, in June 2016, to a Referendum on the UK's membership of the European Union that has pitted members of the Conservative Party against each other and resulted in a vote narrowly in favour of UK withdrawal.

<sup>4</sup> It is worth noting in this context that the Cultural Test had, in fact, abandoned the reference to the role of British companies in the production of British films that had been a feature of films legislation since the 1920s. It will be recalled that it was the vagueness about the definition of a 'British' company that had been regarded as something of a Trojan Horse for Hollywood interests in the run-up to the Cinematograph Films Act of 1927 and, clearly, the omission of any reference to British production companies in the Cultural Test has also made it easier for Hollywood productions to pass it. This lack of emphasis upon the ownership and control of companies may, of course, be related to more general patterns of foreign direct investment and ownership in the UK encouraged by the 'liberalisation' of the UK economy which has, in turn, generated considerable public debate regarding its economic and political consequences (see, for example, Brummer 2013; Meek 2014; Hutton 2015).

<sup>5</sup> As the figures for individual films are not made publicly available by HMRC, journalists have generally drawn on company accounts for information. In 2014, Christian Sylt reported that Disney had received nearly £170 million from the UK taxman since 2007 (Sylt 2014). In an earlier article, he also indicated that this included payments of £10.8m for *Thor 2* and £5.3m for *Guardians of the Galaxy* (Sylt, 2013).

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<sup>6</sup> Miller and Maxwell (2011) identify how Hollywood corporations have benefited from a variety of forms of 'state subvention'. The power of transnational corporations more generally to take advantage of competition amongst states for inward investment is discussed by O'Brien and Williams (2007, chap. 6).