

BRITISH
SCREEN
FORUM

FRAME THE DEBATE

CONSULTATION SUBMISSION

To IPO

The UK's Future Regime for
Exhaustion of IP Rights

FRAME THE DEBATE

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A. INTRODUCTION

About British Screen Forum

This submission is being made by British Screen Forum, a membership organisation through which many of the best informed and most influential people in the UK screen sectors convene to interrogate issues of importance and influence policy and the thinking around policy.

We provide a unique and trusted space for key players from the screen sectors to come together to debate the implications of the evolving landscape and the policy and regulatory environment, and to gain unrivalled insight into emerging themes and innovative technologies.

Members are senior figures drawn from a wide range of businesses and organisations operating in the film, TV, video game and/or online sectors. We aim to cover the whole value chain as well as the full range of means of distribution, so include members who can speak for writers, technicians, independent producers, directors, studio operators, distributors, exhibitors, broadcasters, games publishers, games developers, pay TV platforms and online platforms. It is a unique cross-sectoral mix, with a balance of creative, policy and business specialists. Further details are available on our website¹.

About this response

This response has been prepared in consultation with our Members, many of whom have a direct or indirect interest in the sale of home entertainment goods such as DVDs, Blu-ray discs and videogame discs (referred to in this submission as “packaged goods” or “physical formats”). The submission argues, in particular, in favour of Option 1 and strongly against Option 3. In doing so, it highlights the ongoing value of the global market for home entertainment goods, the fundamental importance of IP rights to this market, and the strength of the UK in creating such underlying IP. Our primary concern is that a move to international exhaustion would run counter to the UK’s economic interests as it would both undermine investment in the development of intellectual property and inhibit the development of overseas markets for home entertainment goods. Given the lack of compelling evidence for any gains from a move to international exhaustion, this response submits that the status quo should be maintained.

¹ <https://britishscreenforum.co.uk/>

B. ECONOMIC CONTRIBUTION OF THE SCREEN SECTORS

The screen sectors are a key part of the Creative Industries which represent a global economic success story for the UK. The ability of the screen sectors to play such an important part in that success has been founded on, and supported by, an effective intellectual property rights (IPR) regime, including for copyright.

The Creative Industries contributed £115.9bn to the UK economy in 2019, accounting for 5.9% of UK GVA. The GVA of the Creative Industries increased by 5.6% between 2018 and 2019 and by 43.6% between 2010 and 2019 in real terms², significantly outperforming the economy as a whole.



Much of this growth is export led, with exports growing to £37.9bn in 2019³, more than doubling in value since 2010 and accelerating particularly strongly since 2015.⁴ During the most recent four years for which figures are available, Creative Industries exports increased by 78%.

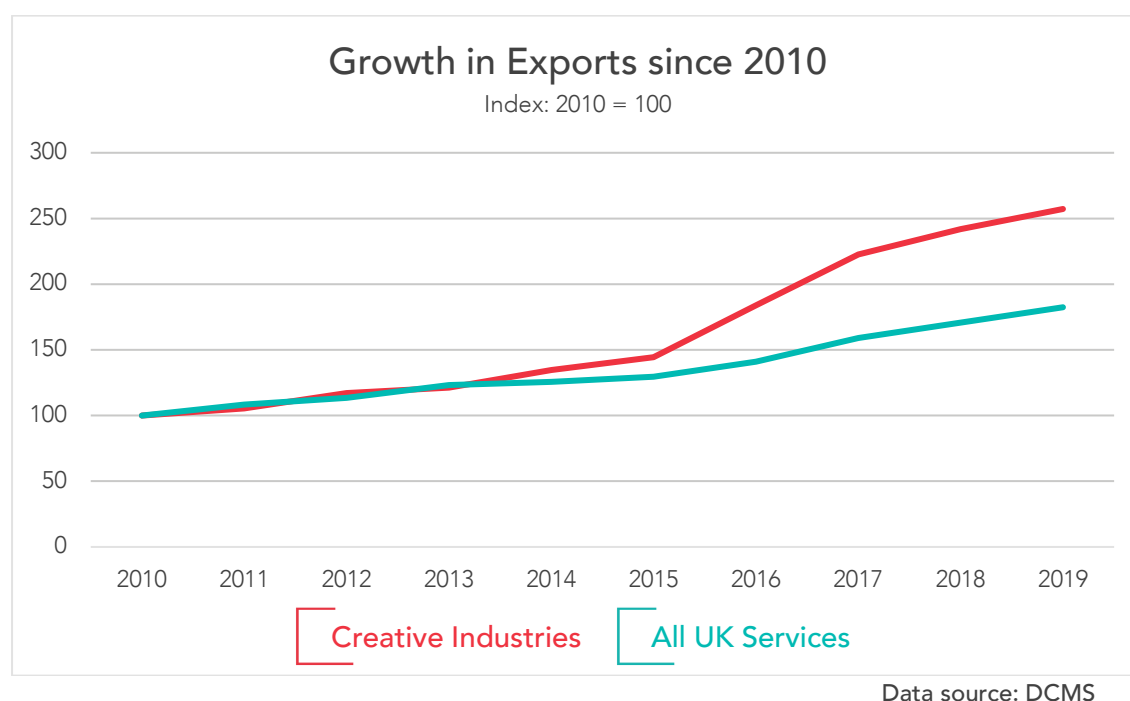
² Source: [DCMS Sectors Economic Estimates 2019 \(Provisional\): GVA](#), December 2020

³ Source: [DCMS Sectors Economic Estimates 2019 Trade In Services](#), page 7

⁴ Creative Industries exports were worth £14.7bn in 2010 and had grown by 158% by 2019. Over the same period the total value of services exported by the UK rose by 82% (from £174.1bn to £317.7bn). Source: [DCMS Sectors Economic Estimates 2017 Trade In Services, Table 1](#) and [DCMS Sectors Economic Estimates 2019 Trade in Services, Table 10](#)

Continuing international demand for screen sector content and services is not in doubt and the UK is very well placed to supply it, boasting an exceptional record of success in creating screen content for audiences right around the world:

- The UK is the world's second most successful exporter of TV content after the USA, and therefore punches well above its weight⁵ with TV exports alone worth £1.48bn in 2019/20, up 6% year on year and a record high.
- UK films earned a record worldwide gross of \$10.3 billion in 2019, a 25% share of the global box office, which also hit a new record of \$41.7 billion.⁶
- There are more than 2,200 active games companies in the UK, including the creator of Grand Theft Auto V, the best-selling entertainment product of all time, selling 140 million units worldwide and generating over \$6 billion in global revenue⁷.
- For UK YouTube creators, 85% of viewership comes from outside of their home country⁸.



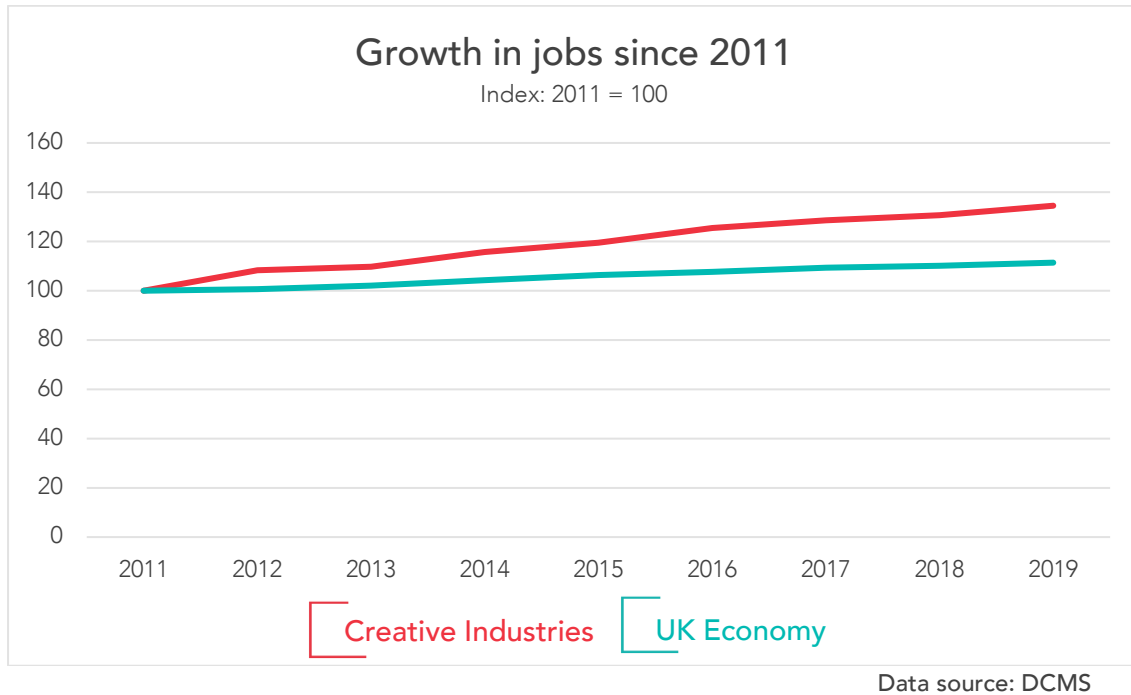
⁵ Source: EURODATA TV / MEDIAMETRIE. Figures relate to the period: 1 March 2015 to 28 February 2016

⁶ Source: [BFI – UK Films and British Talent Worldwide](#), page 4

⁷ Source: Data provided by Ukie

⁸ Source: Data provided by Google

The Creative Industries have also delivered strong jobs growth over recent years, including for UK nationals. They employed 2.1m people in the UK in 2019, up 34.51% since 2011⁹ – a growth rate more than three times the rate seen in the economy as a whole. This success has included employing 156,000 more UK nationals in 2019 than in 2015, an increase of 9.5% in the number of UK nationals employed compared with a national growth rate of 3.1% over the same period¹⁰.



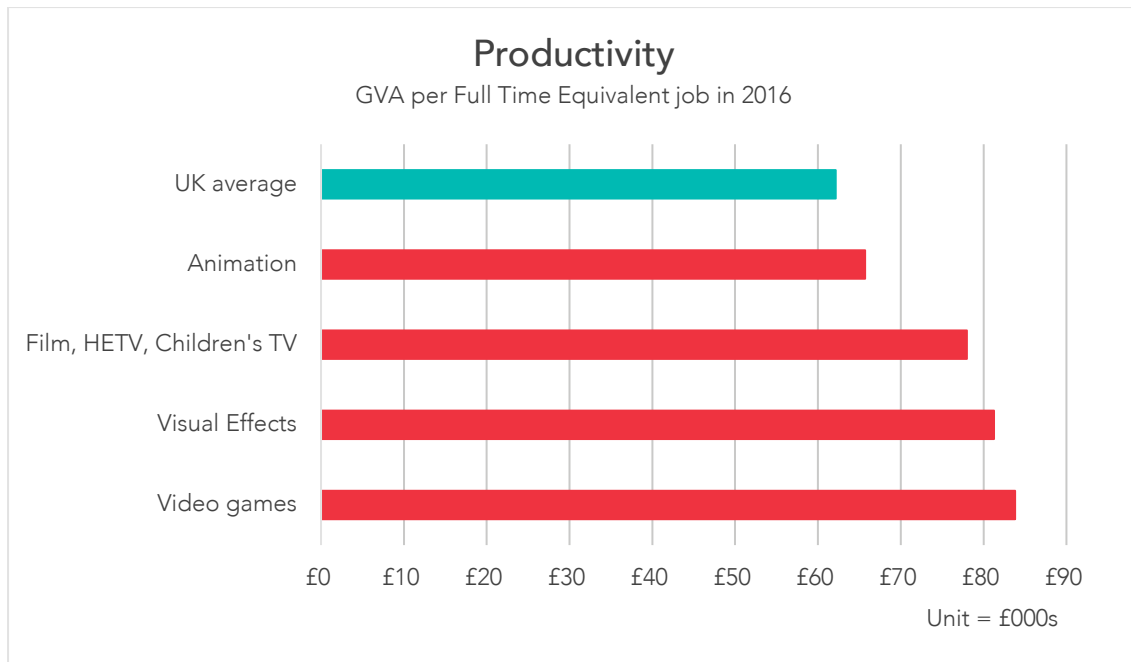
Within the Creative Industries, jobs in the screen sectors have significantly higher than average rates of productivity, as demonstrated in *Screen Business* - an analysis of various constituent parts of the screen sectors by Olsberg•SPI with Nordicity on behalf of the British Film Institute¹¹, the results of which are illustrated in the table below. Productivity in the video game sector is 35% higher than the UK average, for visual effects productivity is 31% higher than the UK average, and for film, High-End TV and children's TV productivity is 25% higher than the UK average.

⁹ Creative Industries jobs grew by 34.51% between 2011-19, jobs in the wider economy by 11.36%.

Source: [DCMS Sectors Economic Estimates Employment 2018 and DCMS Sectors Economic Estimates Employment 2019](#)

¹⁰ Source: [DCMS Sectors Economic Estimates Employment 2015 and DCMS Sectors Economic Estimates Employment 2019](#)

¹¹ Source: '[Screen Business – how screen sector tax reliefs power economic growth across the UK](#)', Olsberg•SPI with Nordicity, October 2018



Data source: Olsberg•SPI / Nordicity

Given the creative nature of the work, which is rooted in the development of IP, these high productivity jobs in the screen sectors are considered to be less vulnerable to technological change than in many other industries.

The screen sectors also deliver public value in terms of cultural and social benefits in addition to their economic contribution. By creating stories serving and reflecting the diversity of the UK and the uniqueness of the UK experience, made specifically for UK audiences, they provide socially cohesive and inclusive experiences which are widely shared and help to foster and strengthen common bonds. The values of impartiality, accuracy and trust represented by the main UK news broadcasters are more important than ever and are likely to remain so in the years ahead. UK screen sector exports are also a key driver of soft power abroad – as a House of Lords report on soft power notes:

“The UK’s creative industries boost the UK’s profile everywhere, especially among the global middle class with its discretionary spending power, appetite for media and cultural content, and increasing social influence.”¹²

¹² Source: [“Persuasion and Power in the Modern World”, House of Lords Select Committee on Soft Power and the UK’s Influence”, March 2014](#)

C. THE MARKET FOR HOME ENTERTAINMENT GOODS

The UK screen sectors are one of the most successful and fastest growing parts of the economy. Over recent years, consumers have increasingly accessed screen sector content via digital services, such as video-on-demand or online gaming platforms, rather than via physical formats such as DVD, Blu-ray or videogame disc. The same is true for music, with streaming services now the primary means of access for consumers, in place of packaged goods such as CDs. However, the market for packaged home entertainment goods remains significant both in the UK and in territories around the world and is likely to do so for the foreseeable future.

In the UK, sales of full video games in physical formats actually rose by 7.2% in 2020 to £646m¹³. While some of this growth was driven by increased consumer demand for games during the Covid-19 lockdowns, a further boost occurred in the final quarter in response to the launch of Sony's PS5 and Microsoft's Xbox Series consoles in December, suggesting strong ongoing demand for the physical format. Indeed, physical disc sales in the UK for the Nintendo Switch approached 7m units in 2020, with a value of £248m, up 37.4% compared with 2019¹⁴, and continuing a pre-pandemic trend which has seen the value of UK sales of Nintendo Switch discs increase by over 73% since 2018¹⁵.

Away from video games, the pandemic had a markedly negative effect on UK sales of film and TV content on DVD and Blu-ray in 2020 as specialist retailers were closed and supermarkets gave up shelf space to food and other household essentials, but the market was still worth £373m¹⁶ and, on average, each person in the UK still spends 60 minutes a month watching video content on a DVD¹⁷. UK sales of physical format video and video game content therefore exceeded £1b last year. When physical format music sales (e.g., CD, vinyl) are included, UK sales of physical format home entertainment reached £1.29bn in 2020¹⁸.

The physical format for video content remains popular for gifting and for collecting, despite the availability of non-physical alternatives. For the top twenty sell-through titles, 55% of sales were in physical format. Sales of catalogue titles on Blu-ray increased by 14.3% in 2020 and sales of 4K UHD discs were up 20% year on year, indicating the continuing attraction of those formats for those who place a very high value on picture quality¹⁹. A similar dynamic is at play in relation to music, with UK sales of vinyl albums continuing the strong growth over

¹³ Source: ERA Yearbook 2021, page 24. See: <https://eraltd.org/media/50996/2021-era-yrbk-complete-pdf-version-2.pdf>

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid. Page 14

¹⁷ Source: Ofcom, Media Nations: UK 2021, page 6. See https://www.ofcom.org.uk/_data/assets/pdf_file/0023/222890/media-nations-report-2021.pdf

¹⁸ Source: ERA Yearbook 2021, page 14. See: <https://eraltd.org/media/50996/2021-era-yrbk-complete-pdf-version-2.pdf>

¹⁹ Ibid. Page 48

the past decade which has seen the market increase from £3.6m in 2010 to £110.1m in 2020, with growth of 13.3% in the most recent year²⁰.

Physical formats remain a significant factor in the UK home entertainment market, especially for video game and video content, with some categories demonstrating strong growth. Any policy change which depressed the value of the domestic market for physical home entertainment goods would cause significant damage to an increasingly important industrial sector.

Global market trends for screen sector content in physical formats follow a similar pattern to the UK: a long term trend for consumer spending to switch to video-on-demand services, but with physical formats retaining a significant proportion of the market. In 2020, the global consumer spend on physical formats of film and TV content alone was \$7bn, which represents 9% of the total global spend on viewing film and TV content at home and in cinemas²¹, figures which exclude videogame discs and music CDs/vinyl. In the USA a majority of adults still watch a film or TV programme on a disc at least 2-3 times a month with at least 20% watching on a disc at least once a week²², with younger viewers (18-39) overrepresented in the view via disc category, especially among those viewing daily²³.

As noted in Section B, the UK screen sectors, based, as they are, on the creation and exploitation of IP, have an excellent track record of growth in recent years and are well placed to benefit from the substantial domestic and international markets that still exist for physical format home entertainment goods. That success has been built on a supportive copyright regime which helps to ensure that content creators can re-invest profits in the creation and distribution of the content that consumers value and enjoy.

Ours is predominantly a high-risk, hit-based sector with extremely high fixed production costs, products with a short life cycle in the primary window (necessitating substantial marketing expenditure), and very low marginal costs of production and distribution. Secondary revenue streams from international and ancillary markets are also important, especially for independent or specialist content. The risk profile calls for a portfolio approach for content creation businesses, in which 'hits' must be sufficiently rewarded in order to counterbalance losses from less successful projects and provide funds for re-investment. The UK's IP regime plays a foundational part in that ecology.

²⁰ Ibid. Page 70

²¹ Source: Motion Picture Association Theme Report 2020, page 8. See <https://www.motionpictures.org/wp-content/uploads/2021/03/MPA-2020-THEME-Report.pdf>

²² Ibid, page 23

²³ Ibid, pages 25 and 27

D. OPTIONS FOR UK'S FUTURE REGIME FOR EXHAUSTION OF IP RIGHTS

As set out above, the success of the UK screen sectors depends on a supportive IP regime, including in relation to exhaustion.

We note that the consultation sets out four options for the UK's future regime for exhaustion of IP rights and do not challenge its assessment that a national regime (Option 2) would not be *"reconcilable with the Northern Ireland Protocol which preserves the position that parallel goods may move from the Republic of Ireland and other EU member states into Northern Ireland without restriction."*

With regard to Option 4, we note the assessment that *"A mixed regime may be complex and may present challenges for businesses and consumers to understand"* and the observation that *"any formulation of a mixed regime would need to be in line with the provisions of the Northern Ireland Protocol."* While a mixed regime might be possible, and could, in theory, be constructed in a manner which was not necessarily detrimental to the screen sectors, we could not support this option without seeing a more detailed proposal, including compelling evidence of potential benefit and clarity on how the inherent complexities of such a regime could be managed in a satisfactory manner. In relation to the evidence base, we note that the countries cited with regard to mixed regimes are not good comparators for the UK. For example, the UK copyright market is larger than Australia's, and the UK is a net exporter of copyright protected goods whereas Australia is a net importer.

British Screen Forum has very serious concerns with regard to international exhaustion (Option 3). We believe it would run counter to the UK's economic interests as it would both undermine investment in the development of intellectual property and inhibit the development of overseas markets for home entertainment goods, acting as a brake on the sector's ability to help drive the 'Global Britain' export agenda. We regard this as the most important reason to reject Option 3.

In particular, an international exhaustion regime would damage the ability of UK rights holders to exploit markets in lower value territories, i.e., territories in which the average retail price of, for example, a DVD or 4K UHD disc was lower than in the UK. Under an international exhaustion regime, a UK rights holder choosing to exploit in a lower value territory would risk undermining the revenues from the (higher value) domestic market through parallel imports. The only way to protect the value of the primary domestic market would be to forgo revenues from lower value territories.

This creates a lose-lose situation. A rights holder pursuing a strategy of developing export markets finds domestic margins are undercut, reducing the revenue available for reinvestment in new IP and for developing international markets. At the same time, a rights holder who prioritises protecting domestic revenues by not selling in other territories misses out on the revenues that could otherwise have been generated from outside the UK whilst also denying consumers in that lower value territory the opportunity to enjoy legitimate

physical copies of home entertainment content. Such a situation may then also encourage the distribution of unauthorised copies of that content.

In addition to its negative impact on the Global Britain agenda, Option 3 would bring significant uncertainty with no firm evidence of potential gain. The lack of a firm evidence base – as noted in the consultation – is a powerful argument for rejecting such a radical change of regime.

What is certain, is that an international exhaustion regime would diminish income for authors, producers and distributors while increasing the cost of regulation and enforcement against counterfeit goods. This latter point is particularly true in relation to customs based enforcement, as goods arriving at the UK from certain territories could no longer be assumed to be counterfeit. Trade in counterfeit home entertainment goods, such as DVDs, remains a significant problem for the screen sectors and is part of a much wider problem with counterfeit goods across all sectors. We note that the European Union Intellectual Property Office (EUIPO) has reported that international trade in counterfeit and pirated products is worth up to €460 billion²⁴. A move to a regime which makes fighting that trade more difficult and expensive would be a retrograde step.

Option 3 would also place an additional burden on consumers in the form of increased search costs, particularly where a home entertainment product is produced in different versions for different territories. Consumers will need to spend additional time to establish whether the version being sold is the version they are expecting, rather than one tailored to a different market. As screen sector content is cultural in nature, re-versioning for different territories is not unusual.

Assuming the EU does not reciprocate (an assumption which is entirely reasonable in our view, given the established position of the EU), it is also the case that if the UK were to adopt Option 3 it would create an asymmetrical exhaustion relationship with the EU, to the disadvantage of UK rights holders. International exhaustion would mean that, for the UK, any copy of a home entertainment good that has entered the market anywhere in the world (including the EU) “by or with consent of the right owner” can be reimported back to the UK - potentially at a cheaper price. However, because the EU will continue to apply regional (EU-wide) exhaustion, copies first put on the market in the UK or anywhere else cannot enter the EU market if the right holder objects. In practical terms, for example, a UK DVD distributor left with excess stock in their domestic market could be prevented from selling on that stock in the EU, while an EU distributor with the same problem would not face the same restriction on selling on that stock in the UK.

We strongly oppose Option 3.

The problems identified above would be avoided through the adoption of Option 1. In particular maintaining the status quo would provide continuing support for the Global Britain agenda, allowing rights holders to pursue international revenues without

²⁴ Source: FACT, see <https://www.fact-uk.org.uk/consumer-advice/counterfeit-goods/>

undermining domestic revenues and helping to ensure that rights holders can fund the creation of further IP to support future growth. This option would support the ongoing battle against counterfeit goods, while avoiding an increase in search costs for consumers and a decrease in income for authors, producers and distributors. It would also avoid creating a disadvantage for UK rights holders compared with their counterparts within the EU.

As we have evidenced in Section B, the screen sectors are making a very significant contribution to export-led growth and the creation of high productivity jobs. They can continue to do so, provided they are supported by an appropriate IP regime. In relation to exhaustion, Option 1 is an appropriate regime and is supported by British Screen Forum.

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