

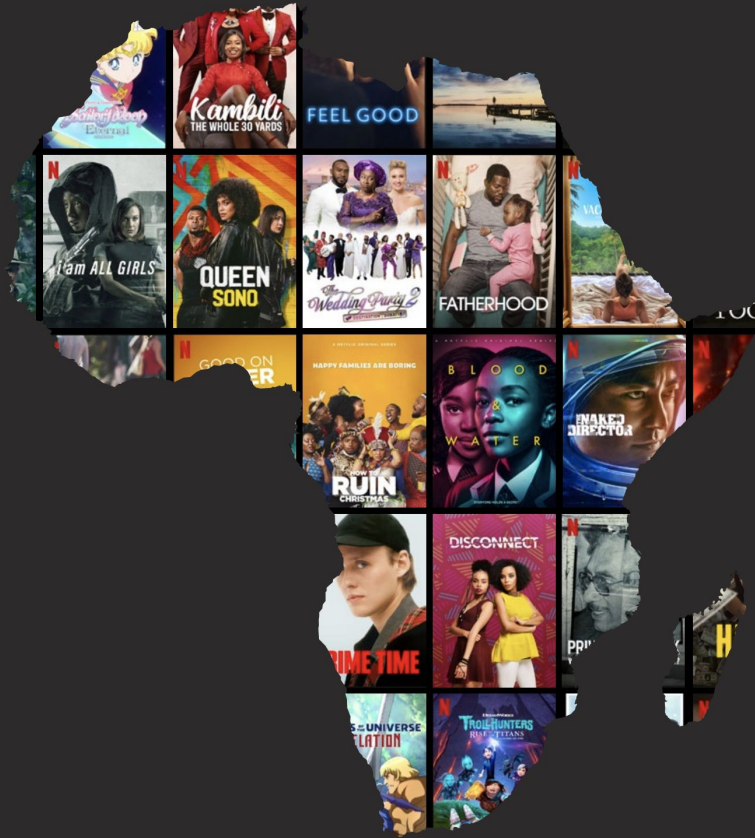
Netflix

Presentation to the Portfolio Committee on Trade and Industry

11 August 2021



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Overview:

1. Introduction
2. Netflix and the South African audiovisual sector
3. Objectives of treaty alignment
4. Specific treaty alignment issues

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Members can watch as much as they want. Anytime, anywhere, on any internet-connected screen. They can play, pause and resume watching, all without commercials or commitments, as they can cancel anytime.



**Unlimited
viewing**



**Anytime, anywhere,
any Internet
connected device**



**Personalized
Controls**



No Ads



**Start, pause,
continue where
you left off**



**Cancel
anytime**

ZAR 1+ Billion

Netflix's investments in South African content over the last four years

2,800 Jobs

Created in the process of creating South African content

100+ Licensed Titles

Netflix has invested in to date and commissioned multiple original South African series

80+ Film and TV Series

From South Africa available on Netflix as of June 2021



Top 50 countries where South African titles are watched globally:

*** 1: ~30**

For every member that chose to watch a South African title during its first 28 days on Netflix in South Africa, about 30 members chose to watch it internationally.

I Am All Girls - 1: 100+

For every member that chose to watch I Am All Girls Water in South Africa, more than 100 members chose to watch it internationally.

My Octopus Teacher - 1: 30+

For every member that chose to watch My Octopus Teacher in South Africa, more than 30 members chose to watch it internationally.

Santana - 1: 90+

For every member that chose to watch Santana in South Africa, more than 90 members chose to watch it internationally.

Seriously Single - 1: 55+

For every member that chose to watch Seriously Single in South Africa, more than 55 members chose to watch it outside of South Africa.

Blood and Water S1 - 1: 35+

For every member that chose to watch Blood and Water (Season 1) in South Africa, more than 35 members chose to watch it internationally.



ALIGNMENT OF THE WIPO TREATIES WITH THE NDP



- Strategically aligned with the priorities outlined in the National Development Plan specifically **Chapter 15, page 473** which recognises that the creative sector should be supported by government and by the private sector as a sector that has great potential for growth and job creation over and above its role of facilitating dialogue for nation building.

DTI presentation to the Select Committee on Trade and International Relations

26 March 2019

RECOMMENDATION



The Select Committee is requested to approve accession to the:

1. Beijing Treaty on Audiovisual Performances (Beijing Treaty);
2. WIPO Performances and Phonographs Treaty (WPPT); and
3. WIPO Copyright Treaty (WCT).

BENEFITS OF THE WIPO TREATIES

- Beijing Treaty will attract more people coming into the creative industry, especially showcase industry, promote the development of related industries and enhance the level of national economy development.

Treaties promote foundational legal and economic principles for production of audiovisual works:

- **Consolidation of rights** in the producer essential to the commercialization of audiovisual works.
- **Legal certainty** ensures clarity for granting and exercising rights.
- **Contractual flexibility** enables allocation of rights/obligations (benefits and risks), given specific circumstances of each production.

Royalties: Sections 6A and 8A

Provision

Section 6A (CAB) entitles the author of a literary or artistic work to a fair share of the royalty received, *subject to any agreement to the contrary*.

Section 8A (CAB) entitles audiovisual performers to share in the royalty received by the copyright owner (no ability to waive by contract).

Treaty Implications

Limitation of exclusive rights:
These provisions prevent right holders from choosing between different forms of payment - 8A is akin to mandatory remuneration.

Conflicts with normal exploitation of the work - fails to meet the three step test (Berne/WCT/Beijing)

Foreign right holders may attempt to share in royalties, claiming under national treatment provisions.

Adverse Impact

Locks parties into revenue sharing (limits upfront payments).

Reduces overall remuneration if foreign right holders demand a share.

Adds legal and economic risks to producing/distributing SA content.

Fails to account for different levels of contribution, specific modes of distribution, etc.

Alternative Approach

Netflix supports fair remuneration for authors and performers.
Requires stakeholder consultation and impact assessment.
Recognition of flexible multiple remuneration models.
Take account of recent legal developments: eg. EU Copyright Directive (2019).

25-year limitation on assignment/reversion of rights

Provision

Section 22(3) of CAB would limit the term of an assignment in a literary or musical work to a period of 25 years (including where they have been incorporated into audiovisual works).

Section 3A(3) of PPAB provides for reversion of rights to performer in sound recording after 25 years.

Treaty Implications

Limits exclusive rights of authors/performers by preventing assignment or licensing for the full term of copyright (without safeguards/proportional measures).

Conflicts with three step test - unreasonably limits the normal commercialization of such works.

Adverse Impact

Prevents consolidation of rights in producer, limiting scope of commercialization.

May reduce payments to creators given the shorter window for commercialization.

Older SA works may disappear from circulation given failure to obtain clearances after 25 years.

Alternative Approach

Consider exclusion of application to audiovisual works - rationale for application in the audiovisual sector is unclear (given this arose from proposal for music from the Copyright Review Commission).

Ownership of audiovisual works

Provision

Section 21 - proposed change from ownership automatically vesting in the commissioning party (producer), to being “determined under an agreement”.

Adds possibility to remove exclusive grant of rights if rights are not used for commissioned purpose.

Treaty Implications

As already advised by WIPO - this provision is at odds with Art 14 bis(2) of the Berne Convention which provides a framework for presumption of the producer’s ability to commercialize the work - unless stipulated otherwise by agreement.

Adverse Impact

Prevents the seamless consolidation of rights in the producer, giving rise to higher risks of disputes and possible litigation over scope of what was granted.

Greater difficulty for producers to secure financing and insurance given heightened risks.

Alternative Approach

Retain Section 21 in its current form - already compliant with treaties and consistent with international practice for common law countries where producer of audiovisual work is presumed the author.

Onerous reporting obligations

Provision

Section 8A(6) of the CAB and Section 4(c) of the PPAB impose extensive registration and reporting requirements of “any act of commercial use of a copyright work” subject to criminal penalty for intentional failure to do so.

Treaty Implications

A significant departure from international norms without basis in international treaties, ignoring the actual functioning of the audiovisual sector.

Adverse Impact

Impossibility of compliance.

Significant administrative costs for producers given multiplicity of works.

Would override existing contractual arrangements and would apply even if no remuneration is due, or if use of work insignificant.

Alternative Approach

Need for impact assessment to identify gaps, proportional solutions - input from industry given types of exploitation and identification of what info is needed.

Ministerial power to set contractual terms

Provision

Section 39(c) of CAB and **Section 8D(3) and (4) of PPAB** allow the Minister to make regulations that would prescribe compulsory and standard contractual terms in agreements for licensing and assignment of rights.

Treaty Implications

Gives boundless scope to Minister to prescribe standard terms, opening possibility for further limitation of rights and derogation from international treaties.

Contrary to goal of harmonization of rights and norms.

Adverse Impact

Far out of step with international norms and practices.

Creates a cloud of legal and economic uncertainty, and may complicate decisions to invest in new projects.

Would make it impossible to set terms that are appropriate for the unique circumstances of each production.

Alternative Approach

Need to ensure that any standards set for fairness and equity also take into account industry specificities, permit contractual freedom and/or industry-driven approaches tailored to specific production types, depending on genre, format, budget etc.



Thank You