



10 March 2023

SUBMISSION ON THE COPYRIGHT AMENDMENT BILL (“CAB”) AND PERFORMERS’ PROTECTION AMENDMENT BILL (PPAB”) - collectively, “the Bill”s

Netflix would like to thank the Standing Committee on Finance, Economic Opportunities and Tourism for the opportunity to submit our written comments on the Bills. We take this opportunity to thank the Committee for the opportunity to participate in the oral hearing conducted on 07 March 2023.

What is Netflix? Netflix is a leading streaming entertainment service with more than 231 Million members in 190 countries enjoying TV series, documentaries and feature films across a wide variety of genres, languages and devices. Members can choose what they want to watch and watch as much as they want, anytime, anywhere, on any internet-connected device, and can change their plans at any time.

Netflix in South Africa: Netflix launched in South Africa in 2016. Netflix invests directly in the development and production of South African content for local and global audiences, including through partnering with local producers. There are currently over 100 South African titles available on Netflix.

Our investment: Netflix has invested more than R2 Billion in South Africa since 2016¹ and created 1900 jobs.² In 2020 and 2021, we disbursed individual grants totalling more than R15 million to South Africans in the audiovisual sector to ease the financial hardship caused by the Covid-19 pandemic. At the 2022 4th Annual South African Investment Conference, we committed to investing more than R900 million into the local audiovisual (“AV”) sector.³ We have continuously invested in the development of *“behind the camera”* talent, such as

¹ Through the filming of *One Piece* (our biggest African production to date in terms of scale and budget) in Cape Town, the local production spend has been approximately US\$70 Million, of which over \$45 Million has been spent on procuring services from local service providers.

² The filming of *One Piece* alone has created employment opportunities for more than 50 cast members and 1000 crew members. 67% of the beneficiaries of these employment opportunities are previously disadvantaged individuals.

³ Four productions came from this commitment, three local and one international. These productions were filmed in South Africa during the course of 2022-23.

launching the Black Creatives Empowerment Fund to support black representation in the Film and TV industry of South Africa. As of May 2022, eighteen (18) scholarships were awarded and fifty-four (54) recipients received debt relief under the Graduate Assistance Programme.⁴

Growing opportunities for local creators: Our investment in local stories means partnering with local producers, storytellers and creators, which in turn helps grow the sector and the economy more broadly in a sustainable way. We consider the future success of the sector to be tied closely with the possibility of Netflix's own success, and we therefore have strong incentives to continue to support that growth, provided the policy framework allows for it. South Africa is a regional leader in the creative sector and has a robust audiovisual industry. Netflix creates positive visibility for South Africa and contributes to the global promotion of the country by making local content available in 190 countries. The Netflix originals from Mzansi we launched earlier this past year will help our members around the world to discover their next favourite South African show.

To date, Netflix has showcased South African stories and talent through a diverse slate of content across different genres including series like How To Ruin Christmas which displayed the beauty of Gauteng and Kwa-Zulu Natal, Blood & Water which has put Cape Town firmly on the world's must-visit map, Tripping with the Kandasamys which took viewers on a road-trip through KZN, the Oscar-nominated nature documentary My Octopus Teacher which gave viewers a deep-dive into SA's marine life alongside many other stories that inspired many of our viewers to visit the country.

Through these stories, we are able to transcend borders, on- and off-screen and provide local talent and entrepreneurs with the opportunity to showcase their art on a global stage. With each production we support local businesses (the full supply chain of creating a show - African stylists, make-up artists, etc) and have a positive economic impact. Through this investment we are able to use local talent from South Africa's various provinces to tell local stories that will give Africans the opportunity to see themselves on screen - instilling local pride. Against this background, we are excited about our future in South Africa and the future of South Africa's audiovisual sector, provided the policy framework remains flexible and conducive to sector growth.

⁴ Part of the Fund was allocated towards fully funded scholarships in film and TV disciplines at select South African universities and covered debt relief through the Graduate Assistance Programme for excellent Film and TV graduates.

Executive Summary of Concerns

Netflix supports the goals of updating the Copyright and Performers Protection Acts to protect the interests of authors and performers, but believes that the Bills will hinder this objective. A golden age of global production is poised to deliver benefits to South African creators through increased investment in South African stories and other content, but the Bills will hinder these opportunities and growth. For the local industry to continue benefiting from increased investment by Netflix and other market players, a conducive and enabling regulatory framework which balances the interests of all material stakeholders is necessary. In this submission we focus on the provisions we consider most harmful and relevant to the AV sector in particular.⁵

The Bills are at odds with the fundamental characteristics and investment drivers for the development and production of audiovisual works and should be rejected. The Bills will impose unworkable and globally unprecedented obligations that will impede investment, shrink the audiovisual sector and harm the interests of the stakeholders the Bills intend to promote and protect. Importantly, the Bills remain unsupported by meaningful and appropriate economic impact assessments.

Audiovisual Sector Fundamentals	Unintended Consequences of the Bills
Audiovisual works are the result of contributions from many authors and performers, which requires the consolidation of rights in the producer to enable commercialization of the resulting work. This is a global legal norm.	By limiting assignments to 25 years for certain works, the Bills prevent consolidation of rights in the producer, jeopardizing long term commercial investment in SA content. This limitation would prevent the use of the work once this 25 year period expires rendering the entire production unusable to the detriment of all parties who contributed their efforts and financing.
Contractual flexibility enables producers and authors/performers to choose the most	Forcing performers (and certain authors) to be paid through royalties (as a percentage of

⁵ We therefore do not address all areas of concern which have been highlighted by other stakeholders, including the South African Institute of Intellectual Property Lawyers (SAIIPL) and the joint submission of the Independent Producers Organizations, the Independent Black Filmmakers Collective (IBFC) and AnimationSA.

<p>appropriate terms. Each production is different, and producers and authors/performers should have the flexibility to negotiate terms that are best suited to them provided that remuneration is fair and reasonable.</p>	<p>revenues) is unworkable and unprecedented in the global audiovisual sector. It places substantial risk on producers who rely on the ability to work from a fixed budget. It also deprives performers/authors/creators from choosing amongst remuneration options such as an upfront lump sum payment. Flexibility is also eviscerated by granting the Minister the power to set terms of trade.</p>
<p>Productions are always high risk. To attract investment, legal certainty is essential, to set clear terms, without the fear of later-arising obligations or indeterminable liability.</p>	<p>All of the above undermine legal certainty, but particularly the Minister’s broad powers to impose terms of trade. The Bills further impose an obligation to report every use of a copyright work which imposes a virtually infinite obligation on distributors and/or producers.</p>

There are alternative approaches to achieve the policy goals. It is possible to improve the interests of creators without impeding investment or sector growth by taking into account the specificities of the creative sector, and contractual freedom. Specific suggestions are set forth below:

Authors, Performers and Royalties⁶:

1. Replace the unworkable and constrictive “royalty” obligation with an entitlement to “equitable remuneration”⁷. This approach would be consistent with global norms and international treaty obligations. The AV sector is predicated on enabling flexible approaches to remuneration that can take a number of forms - including lump sum, upfront payments and collective agreements. The notion of “royalties” is alien and would impose substantial burdens on producers, limiting the number of productions and the viability of many small businesses.

⁶ Sections 6A and 8A of the CAB.

⁷ A definition of equitable remuneration would ensure the creator receives consideration for their rights which takes into account the economic value of their contribution to the overall work, as well as factors such as market practices and the overall commercialization of the work.

2. The definition of “performer” should exclude “extras”, in line with the Beijing Audiovisual Performances Treaty and international standard practice.
3. Section 8A (performers) should be deleted from the CAB and exclusively dealt with in the PPAB to avoid overlap and confusion.

The 25 year limitation for assignment of rights⁸

4. This limitation should be deleted as it will do much more harm than good. In theory, it will limit the commercial availability of works, and require any such rights to be re-cleared after 25 years - which in many instances will not be possible. This limitation will likely reduce any upfront remuneration, and materially diminish incentives for producers to invest in content given the heightened risk of losing the ability to commercialize it after 25 years. Many films and TV shows will have to be withdrawn because the rights to continue to distribute them to the public will simply disappear, leading to massive prejudice to other stakeholders and the public. There are other (less harmful) legal mechanisms to achieve the goal of ensuring creators retain an ability to reap benefits from long term success of their works.⁹

The broad ministerial power¹⁰

5. This provision should be deleted, as it will have a chilling effect on investment. It is an extreme form of regulation, and creates great uncertainty for existing and prospective productions. The specter of government intervention in contractual arrangements would make it virtually impossible to forecast and plan investments, and substantially increase risk of investing in South African content. Alternative avenues include dispute resolution procedures or sector-led best practice codes/forums to agree on core principles.

The registration/reporting obligation¹¹

6. Imposing registration and comprehensive reporting would create material administrative burdens and costs on distributors, diverting investment from content, and be practically impossible to comply with. The possibility of a punitive sanction for non-compliance could chill the market. There are more reasonable approaches to encouraging transparency which recognize the substantial amount of information

⁸ Sections 23b CAB and 3A PPAB

⁹ One example is the so-called “best seller” provision in the EU, which affords creators the chance of additional remuneration when what they were paid turns out to be disproportionately low compared to the benefits derived from commercialization of the work.

¹⁰ 39(c) CAB and 8D(3) and (4) PPAB

¹¹ 8A.6 CAB and 4c PPAB

already publicly available, and can be calibrated to avoid unreasonable burdens on producers and distributors.

Executive Summary Conclusion: In line with the above, we believe it is possible to promote the interests of creators and transformation, while taking into account the specific investment drivers for the sector competing in a global market. We urge the Committee to recommend the conduct of a full economic impact assessment, as well as an objective expert study of alternative legislative approaches with reference to other jurisdictions. Netflix would be pleased to participate in and support this, however is appropriate.

More detail on concerns and proposed alternative approaches:

1. The Bills will disrupt the fundamental legal and economic foundations of film and TV production.

There are three essential elements required to support and sustain production of audiovisual works:

- Producers must **consolidate the necessary rights** to enable the commercialization of audiovisual works. A film or TV series consists of contributions from anywhere between dozens to thousands of creators, and it is the function of the producer to obtain licenses or assignments of rights from all of these parties to create a product that can then be publicly distributed.
- Parties require **legal and economic certainty** to ensure that the grant of rights is reliable, and costs can be forecast and ascertained.
- It is impossible to predict which films and TV series will succeed, and unfortunately many will never be profitable. To manage this risk, parties need **contractual flexibility** to determine how best to allocate benefits and balance risks.

Producers shoulder the legal and financial risks of bringing a film or TV show to fruition, which is the product of multiple steps along a value chain, each step of which is uncertain, and requires the investment of resources, finances, faith and creativity. As most producers know, there are more misses than hits. However, the hits (when they happen) are what enable producers to keep taking further risks, which is what gets a production off the ground.

The Bills pose obstacles to the consolidation of rights, prevent contractual flexibility and impose legal and economic uncertainty of producers and other stakeholders. The specific ways in which the Bills undermine these foundational elements is explained in further detail below.

2. The royalty obligation undermines contractual flexibility and will harm the interests of authors and performers.¹²

The CAB proposes that authors of literary works and performers in audiovisual works are entitled to share in royalties received by the copyright owner. While authors can “opt out” of

¹² Sections 6A and 8A of the CAB

this and decide to receive payment in other ways, performers are subject to a mandatory restriction and have no choice regarding their preferred mode of remuneration. Netflix supports fair remuneration for authors and performers, but a “one-size fits all” royalty obligation will instead tie the hands of the parties and restrict upfront lump sum payments which many creators depend on to ensure they receive remuneration without waiting for future commercialization or even the chance that no profits will ever be realized. Upfront payments are a way to ensure stable income, and not have to defer payment until such time as there is a profit or revenue - which can be months or years after production (if at all). Prof Malebakeng Forere notes the impact of this restriction in her article entitled “ Reforming the Right to Remuneration in the South African Copyright Amendment Bill” against the background of approaches other jurisdictions (our emphasis):¹³

“The current Bill takes away the option for lump sum, which might be necessary to the South African authors who are treated by the services industry as free lancers or independent contractors and therefore not eligible for certain finance agreements that normal full time employees are entitled to. Thus, instead of getting periodic royalties, it might be appropriate to receive a lump sum to buy property because the banks would not be willing to finance property over a period of 20 years for an independent contractor, and even if they eventually do, the conditions become harsh thus entrenching South African authors deeper into poverty. **Therefore, this provision has taken away freedom to contract available to all the parties involved.**”

By removing this flexibility, the wishes of the creator are ignored, and the parties cannot do what is most feasible for the particular production given the size of its budget, the number of contributors and the levels of their participation. Strangely, the Bills don’t even differentiate between principle performers and so-called “extras” whose roles are extremely minor, and would appear to apply the same remuneration framework to all. This is globally unprecedented.

The royalty model is common in the music sector, but not for production of audiovisual works. The royalty approach would be even more unworkable for subscription video on demand services - such as Netflix - which do not monetize individual films and TV series, but rather

¹³ See Reforming the Right to Remuneration in the South African Copyright Amendment Bill by Malebakeng Agnes Forere available at:

<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1070&context=research>

earn revenue through a subscription fee that provides access to a broad catalogue of content. A specific amount of revenue cannot be attributed to any individual films and TV series since it is not possible to know why (or for which specific title) a subscriber decided to join or stay subscribed to Netflix. Therefore it is not possible to calculate “royalties” attributable to any specific title. This illustrates that the Bills have not considered the practical implications for stakeholders, and have proposed an approach that may be impossible to comply with.

3. Under international copyright law, the interests of South African creators may be diluted.

Another unintended consequence of a royalty obligation would be to invite foreign creators to request the same rights for the commercialization of their works in South Africa, which arises from the principle of “national treatment” under international copyright treaties. Essentially, this would mean that any royalties would need to be split and shared with non-South African creators, which would shrink the share of the local stakeholders. This consequence is a direct result of the mandatory nature of the provision, which then triggers the obligation to treat foreign creators the same as local creators.

4. Alternative approaches can achieve the same goals without such harm.

Netflix submits that the optimal way of achieving fair remuneration is for the legal framework to support flexible solutions that enable producers, authors and performers to determine the appropriate remuneration models, depending on a variety of factors, ranging from the size of the budget, assessment of risks, the nature/value of the contribution of the author/performer to the overall project, as well as the type of work and the nature of the overall project. All of these elements need to be considered in determining how to best structure remuneration in order to give a project the best chance of success - and to pave the way for subsequent productions. Recently enacted legislation in the EU on this subject recognizes that there are flexibilities dictated by the relevant sector, and that it should be possible to contractually agree on different modes of remuneration, including upfront/lump sum remuneration.¹⁴ While we do not suggest that the EU approach is necessarily suitable for implementation in South Africa, its recency affords important insights into how to craft a legal framework that can support the interests of authors and performers, while recognizing the complimentary and enabling interests of those who finance, produce and distribute audiovisual content. As Prof Forere

¹⁴ See Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market

notes:

This EU provision is particularly important for South Africa in that while the intention is to ensure that authors and performers are duly remunerated, the manner in which they are remunerated should not be cast in stone so much that it can undermine freedom of contract.¹⁵

Quite recently, the government in Sweden conducted an impact assessment of mandatory remuneration rights which are similar to the notion of a “royalty” in the Bills, and concluded that this approach would lead to market distortion and unintended consequences, acting as a disincentive to invest in the local market¹⁶. The report also notes the risk of creators upfront payment being reduced to take into account the obligation to make additional payments later. This would undermine the wishes of those right holders who prefer a higher initial upfront payment.

We therefore suggest replacing the constrictive “royalty” obligation with a standard that preserves contractual freedom of the parties to determine what is feasible and favorable.

This would be in line with recent approaches in other jurisdictions, and would avoid placing South African producers and creators at a disadvantage in the global market.¹⁷

2. The Bills impose onerous, unworkable registration and reporting requirements:¹⁸

The Bills require registration and reporting of all commercial uses of every work which is practically unworkable, nor would it provide a corresponding proportional benefit for creators. This obligation will divert millions of Rand from investment in content to establish new systems, based on recent studies:

- In the Netherlands, the relevant ministry conducted an [impact assessment](#) (relevant part on page 17) to establish the cost related to reporting for each of the creative industries. The assessment concluded that “For the audiovisual sector, reporting

¹⁵ See Forere, Supra at p14.

¹⁶ Report available [here](#).

¹⁷ See Forere, supra at p15, recommending the substitution of the royalty obligation with the approach taken in the EU directive which requires remuneration be “proportionate... to the actual or potential economic value of the licensed or transferred rights, taking into account the author’s or performer’s contribution to the overall work...and all other circumstances of the case, such as market practices or the actual exploitation of the work.” (Recital 73 of the 2019 EU Copyright Directive)

¹⁸ Section 8A(6) - (7) of the CAB

would take up one or two hours for simple cases and up to 10 hours for complicated cases”. The explanatory memorandum reaches a very rough estimate of the annual costs involved of **€1,250,000.00** (5 hours x 5000 agreements for an hourly wage of € 50.00).

- A similar conclusion was drawn in Germany, where the [National Regulatory Council](#) (NKR) [found](#) (from page 175) that *“in the media industry that the new disclosure and accountability obligations alone could generate one-time costs in the low double-digit millions and **ongoing costs in the single-digit millions in individual companies**. Given these orders of magnitude and the cross-industry binding nature of the new requirements, it is essential that decision-makers are provided with a realistic and complete picture of the cost implications.”*

The scope of such an obligation would be a substantial barrier for both small and larger producers, and fails to consider actual marketplace impacts and how such an obligation can be more reasonably tailored. The fact that non-compliance may lead to potential fines and criminal liability for producers, broadcasters and distributors could have a chilling effect on the market. These risks of liability may outweigh the benefits of licensing or acquiring the relevant content.

There are more proportionate means of improving access to information about the commercialization of content - for example through agreements, which are industry-driven and take into account the nature of the use, and the cost/benefit of imposing this obligation.¹⁹

4. Limiting assignments and reversion of performers' rights in sound recordings will result in lower remuneration and abandonment of works.²⁰

The Bills prevent certain authors and performers from licensing or assigning their rights for longer than 25 years. This means that creators are prevented from realizing the value of the full term of the rights under copyright. Producers will pay less because they are obtaining less than full value, and after 25 years, the ability to continue to make a film or TV program available will require the producer or distributor to go and find each right holder and obtain a further license/assignment. In many (even most) instances, this will not be feasible or

¹⁹ As Prof Forere notes about the EU approach: “the different dispensations for different sectors, the reporting and transparency obligations shall be proportionate to the revenue expected or generated such that where the obligations are burdensome in comparison to the revenue generated, they may be relaxed” Supra at p16.

²⁰ Section 22(3) of the CAB and Section 3A(3) of the PPAB

worthwhile, which means the film or TV series will likely be abandoned and removed from public distribution. That is an alarming but realistic future risk, and one which would plunge the future of the creative sector into an unfortunate legal limbo which would devastate the ability of producers and other stakeholders to benefit from the continued commercialization of their works.

Other countries which appear to be the inspiration for this actually take narrower approaches. For example in the US, there is a termination right - but it applies only after 35 years, is subject to various formalities to protect the interests of others, and it does not apply to commissioned works (“work for hire”). It is also accompanied by other exceptions, which are not present here in the SA Bills. In Europe, the so-called revocation right does not apply to audiovisual and underlying works in a number of countries and the overarching Directive suggests that EU member states ensure it does not apply to works that are made up of the contributions of many authors and performers (such as AV works).

This provision was never subjected to an impact study, and was historically only considered in the context of music works. So the impact on the film and TV sector has not been fully considered.

We suggest deleting the 25 year limitation for assignment of rights. There are other legal mechanisms to achieve the goal of ensuring creators retain an ability to reap benefits from long term success of their works. One example is the so-called “best seller” entitlement, which enables creators to request additional remuneration from the party to which they granted rights, only when the remuneration originally agreed upon turns out to be *disproportionately low* compared to the direct benefits derived from commercialization of the work. Countries which apply this tend also to provide exceptions where remuneration is governed by collective agreements.

5. The ministerial power to prescribe contractual terms will have a chilling effect:²¹

By enabling the Minister to prescribe compulsory and standard contractual terms will create a cloud of legal and economic uncertainty, and may deter investment in new projects. Frameworks for ensuring fair and equitable terms for the licensing and assignment of copyright works should ensure industry specificities are accounted for, through direct contractual negotiations or industry-driven solutions tailored to specific production types,

²¹ Section 39(c) CAB and 8D(3) and (4) PPAB

which recognizes the distinctions between different productions depending on genre, format, budget and other factors. Permitting government intervention into the contractual relationships between creators and producers is an extremely blunt and destabilizing power, and would eviscerate the notion of legal certainty and contractual freedom. This provision should be deleted.

In summary:

There are many reasons to be excited and optimistic for the future of the audiovisual sector, and Netflix is excited to help bring authentic and compelling local stories to South African and global audiences. But these opportunities are predicated on a legal and policy framework that helps propel and does not harm the growth of the sector. This includes ensuring that creators are able to reap the rewards of their contributions. It is essential that the law is in sync with economic realities and requirements of the audiovisual sector, compatible with international norms and best practices. The Bills are material flawed in that regard.

Netflix hopes to play a constructive role in the process of industry growth and economic transformation, including through offering support in finding workable legal and practical solutions to meet the goals that Bills seek to achieve. Netflix thanks the Committee for its consideration of this submission.

Respectfully submitted,

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