16 July 2021

SUBMISSION ON THE COPYRIGHT AMENDMENT BILL AND PERFORMERS' PROTECTION AMENDMENT BILL

Netflix would like to thank the the Portfolio Committee on Trade and Industry (the "Committee") for the opportunity to submit comments on the Copyright Amendment Bill (B13B-2017) (the "CAB") and the Performers' Protection Amendment Bill [B24B-2016] (the "PPAB", and collectively, "the Bills"). Netflix respectfully requests the opportunity to participate in the relevant public hearings currently scheduled for 4-5 August, 2021.

About Netflix

Netflix is a leading streaming entertainment service with more than 200 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, commercial-free, anytime, anywhere, on any internet-connected device, without commitments. Netflix launched in South Africa in 2016. Since our launch, Netflix has been working with South African creators and distributors to bring high-quality series and films that showcase the best of South Africa's creativity and talent to our global audience.

Investment by Netflix in South Africa's audiovisual sector

Netflix is committed to investing in South Africa's audiovisual sector to bring the best stories from South Africa to our more than 200 Million members around the world. Unlocking growth in the local audiovisual sector is key for Netflix. Investing in local stories means investing in local producers, storytellers and creators to help grow the sector in a sustainable way which benefits local stakeholders and contributes to the ongoing development of South Africa's economy, fuelling the process of ongoing transformation.

Over the last four years, Netflix has invested well over ZAR 1 Billion in South African content, creating 2,800+ jobs in the process. Each Netflix production in South Africa supports local businesses, providing opportunities for writers, directors, actors, stylists, and make-up artists, as well as a long list of industries and trades that make the production of a complex series or

film possible. There's also a multiplier effect with any investment: the economic impact of each of our projects in South Africa is several times greater than the actual dollars invested.[1]

South African producers contribute fresh ideas and new perspectives in addition to local expertise in creative and production. Expanding and deepening our engagement with local producers is part of our approach, which is very different to the traditional Hollywood studio model. We partner with South African producers, and each project is a collaboration from different perspectives, depending on the project and the legal and economic environment in which the project exists. We place a lot of value on what our producer partners bring to the table, particularly creatively. Netflix is known for leaving a huge degree of artistic freedom to our partners to ensure authenticity of our locally produced content.

To date Netflix has invested in 100+ licensed titles, and commissioned multiple original South African series, such as Jiva, How To Ruin Christmas: The Wedding, and Blood & Water. As of June 2021, there are 80+ South African films and television series available on Netflix, including the first local Netflix Film on the South African service, *Catching Feelings*, which was acquired and launched globally in May 2018. We also invested in multiple new and library licensed titles that are beloved by South Africans - including *Seriously Single, I Am All Girls, Riding with Sugar, Tsotsi, iNumber Number, The Forgotten Kingdom, Paradise Stop, Blood Lions, Liefling, Pretville, Die Ontwaking, The Assignment, Seun, How to Steal 2 Million, Copposites, Blitz Patrollie, A Lucky Man, Love by Chance, Skeem, French Toast; Eintlik Nogal Baie and 8*, with more to be added in coming months. In 2021, our investment in South African content will continue to grow with Season 2 of Blood & Water, Happiness Ever After, and Season 2 of How to Ruin Christmas. We have been honored by 21 SAFTA wins in 2020, and the Oscar win for *My Octopus Teacher* (Best Documentary Feature) which has enthralled and delighted our members around the world. We look forward to more international successes driven by local performance: local impact and local authenticity is a key ingredient.

With our global distribution, the multiple languages available on our service globally, as well as subtitles, dubbing and personalisation, we aim to offer South African creators the opportunity to benefit from exposure to the diverse array of Netflix Members from all around the world. For example, in December 2020, South African content appeared on our members' homepage globally 1.2 billion times. In seeking to connect powerful and uniquely South African content with our members, we are hoping to ignite deeper levels of connection with South Africa, its beauty and culture - and similarly for our South African members, through access to universally accessible, uniquely local content from other countries. This ignites a passion to connect, explore and travel. Watching local content on Netflix builds an affinity for South Africa, its people and culture with audiences abroad. In March 2021 Netflix

[1] https://www.nfvf.co.za/home/22/files/2017%20files/Final%20NFVF%20Economic%20Impact%20Study%20Report_21_06_2017.pdf

announced a collaboration with SA Tourism to work on various fronts to convert the affinity for South African culture and stories viewed by our members in different parts of the world to inbound tourism traffic for South Africa. Under the partnership, Netflix and South Africa Tourism will roll out a series of public campaigns which will showcase the different sides of South African culture and heritage, promoting cultural cohesion locally and expanding the sphere of South Africa's cultural influence abroad - all the while elevating the country's profile as an attractive destination both for domestic as well as international tourism.

Netflix support for updating the Copyright Act

There is a strong synergy between the interests that the Bills are intended to enhance and protect and our investment in compelling, authentic South African content.[2] We believe both initiatives seek to create broad, sustainable opportunities for South African authors, performers and others who devote their craft and earn a living in the audiovisual sector. The Bills provide many important advancements, including protections for new forms of interactive digital distribution, as well as exceptions promoting access to content for people with disabilities. The broader objectives of the Bills will not be achieved if the creative sector fails to thrive. Unfortunately, a number of provisions in the Bills will create obstacles to investment and financial support for production and licensing of content which would stymie the growth of the sector.

Investment in audiovisual productions requires advance assessment of risks, costs and requires the consolidation of rights in producers to facilitate commercialization of the content. The fundamental pillars rely on the ability of producers, authors and performers to find sustainable models, and to achieve the consolidation of rights through legal presumptions and contracts. Imposing rigid restrictions on producers which limit that flexibility or prevent the consolidation of rights by constraining contractual freedom threaten to undermine these legal and economic pillars. It is essential that legislative changes take into account the specific characteristics of the audiovisual industry (which are key to its survival and success), and not place obstacles to attracting greater investment and achieving much needed growth. Netflix wishes to play a constructive role in crafting legislative and market solutions that will stand the industry in good stead, paving the road for more opportunities for multiple players to bring authentic South African stories to life on the screen.

---

[2] "The purpose of the proposed amendments to the Act is to protect the economic interests of authors and creators of copyright works against infringement and to promote the progress of science, innovation, and useful creative activities. It is envisaged that the proposed legislation will reward and incentivise authors of knowledge and art." (Memorandum of the Objects of the Copyright Amendment Bill)

In this submission, we highlight and draw linkages between the concerns raised by the Bills and misalignment between certain provisions of the Bills with international treaties. We specifically reference the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the WIPO Copyright Treaty (WCT), and the Beijing Treaty on Audiovisual Performances (Beijing Treaty) as the most relevant in the field of audiovisual works.

Executive summary of concerns:

Sections 6A and 8A of the CAB: Entitlement to royalties in audiovisual works by authors of literary and artistic works (6A) and audiovisual performers (8A): These provisions would limit the ability of producers, authors and performers to choose from amongst different types of remuneration - such as up-front/lump sum payments. A legal obligation to pay royalties will require producers to take on broader economic and legal burdens, which will limit investment and opportunities for producers, leading to lower overall remuneration for authors and performers. By unreasonably limiting the exercise of exclusive rights of authors and performers in a way that constrains how they commercialize their rights, these provisions fail to meet standards set by the international treaties. Section 8A appears to extend performers a right to share in the commercial use of the audiovisual work itself, which is a further area of treaty misalignment. There is also a threat of lowering remuneration for South African authors and performers by raising the risk of claims by foreign rights holders seeking a share of royalties on the basis of national treatment. The objectives of the Bills could be better achieved through a framework that preserves contractual flexibility, does not limit the exclusive rights of authors and performers, taking into account the distinctive nature of the audiovisual sector, including the multiplicity of production models and genres.

Section 8A(6) - (7) of the CAB: registration and reporting requirements: These provisions introduce strict reporting requirements which are likely to increase costs and risks for producers, broadcasters and distributors, which are disproportionate to potential benefits for authors and performers. This approach departs from international norms and is at odds with the general functioning of the audiovisual industry, also running counter to the spirit and the framework of international treaties. Greater transparency could be achieved through market-driven solutions, agreements to achieve a more balanced framework.

Section 21 of the CAB: Authorship of audiovisual works: This provision weakens the unification of rights in the producer, and is at odds with the operation of Art 14*bis*(2) of the Berne Convention. The proposed change would complicate the essential task of producers to clear and obtain rights, giving rise to higher risks of disputes and possible litigation. Such risks and complexity means greater difficulty to secure financing and insurance - particularly

for smaller producers. We suggest retaining the presumption of ownership in the producer as per the existing language of Section 21.

Section 22(3) of the CAB and Section 3A(3) of the PPAB: Limitations on assignments of literary and musical works and reversion of performers' rights in sound recordings: These sections run counter to international treaties by unreasonably limiting how authors and performers assign and licence rights to producers, which is counter to the normal commercialization of such works. Unlike in other countries with reversion rights, there are no exclusions or safeguards to protect third party licensees and assignees who have invested in and have relied on a previous grant/assignment. We suggest the deletion of this provision.

Section 39(c) CAB and 8D(3) and (4) PPAB: Ministerial power to prescribe contractual terms in agreements: The provision dilutes Parliamentary oversight and would allow the Minister to effectively legislate all industry contracts for copyright. The broad Ministerial power would enable prescriptive provisions that derogate from international treaties, limiting how authors and performers license and assign exclusive rights. We propose exploring other means to ensure fairness and equitable terms for the licensing and assignment of copyright works, through direct contractual negotiations or industry-driven solutions, which can better account for how the industry operates.

Specific comments:

1. **Sections 6A and 8A of the CAB: Entitlement to royalties in audiovisual works by authors of literary and artistic works (6A) and audiovisual performers (8A)**

The proposed amendment to Section 6A of the Copyright Act entitles the author of a literary or artistic work to a "fair share of the royalty received for the execution of acts contemplated by Section 6", subject to any agreement to the contrary. The proposed amendment of Section 8A of the Copyright Act entitles performers in an audiovisual work to share in "the royalty received by the copyright owner for any of the acts contemplated by Section 8".

We note that Sections 6A and 8A did not appear in the 2017 version of the CAB, and subsequent supplementary consultations only addressed limited aspects of these provisions.[3]

[3] See: https://pmg.org.za/call-for-comment/687/ (July 2018 - Call for comments only on proposed Sections 6A(4), 6AA(5) and Sections 8A(4) and 8A(5) - each respectively addressing the the minimum content of the agreement related to royalty percentages, and retrospective application) and https://pmg.org.za/call-for-comment/752/ (October 2018 - Call for comments on the proposed offenses relating to the reporting requirements). We note the decision to delete the retrospective provisions from the Bill, as per paragraph 3.3 of the Report of the Portfolio Committee on Trade and Industry on the President's reservations regarding the Copyright Amendment Bill and the Performers' Protection Amendment Bill, dated 14 May 2021.

Stakeholders were therefore not fully consulted on the complete proposal to introduce what is essentially a mandatory royalty obligation. We do not address the potential constitutional implications of this, but note the lack of consultation as a further reason for close review of these provisions, separate and apart from the international treaty implications.

Failure to comply with the three step test

As envisaged, it appears that the entitlement to a royalty may be exercised as against the initial assignee, as well as any subsequent assignee. In other words, this entitlement "travels" with the copyright work and can be enforced against third parties, who would be obliged to enter into an agreement in the prescribed form regarding payment of royalties to the author/performer. While Section 6A is "subject to any agreement to the contrary", when read with sections 39A and 39B, which provide for the imposition of standard terms, and prohibit contractual derogation from the rights afforded by the CAB, it is not clear how this would operate in practice. The proviso is not included in Section 8A. The obligation to pay royalties therefore appears in effect to be akin to an unwaivable remuneration right, and constitutes a limitation as to the form of how such rights may be licensed, constraining how authors and performers exercise their exclusive rights. As such, the limitation must pass the three step test (as per Berne, TRIPS, Beijing Treaty and WCT):

- The first step concerns whether the limitation is a "certain special case" – does it apply to all existing works and affect all uses of both existing and new works – are there conditions – is there a specific public policy goal;
- The second step relates to the impact on "normal exploitation" of existing works – does the limitation enter into economic competition with the way in which right holders normally derive value from the works; and,
- The third step relates to whether the exception "unreasonably prejudice[s] the legitimate interests" of the rightholders.

The test is cumulative, and therefore the conditions of each step must be met. If the requirements of the first step are not met, there is no need to go further. Section 6A is broadly framed and arguably, would apply well beyond "a certain special case". With regard to the question of whether the limitations are justified in terms of achieving a specific policy goal, we believe that by failing to consider the specific characteristics of the audiovisual sector, Section 6A and 8A would not promote the objective of enlarging opportunities and remuneration for authors and performers. We offer a few practical examples of how this obligation may in fact hinder the underlying policy objective:

- Where resources are limited, the mandatory payment of future royalties is likely to lead to a lowering of upfront compensation to ensure the project remains economically feasible.

- Audiovisual works consist of a multiplicity of contributing authors, such that administration of payment of royalties would place a disproportionate burden on producers (and further add to their costs - which could be prohibitive for smaller producers), which may lead to less investment in productions, shrinking the opportunities for licensing/assigning works.
- The proposed language (wrongly) assumes that all remuneration is (or can be) in the form of royalties. Compensation differs from project to project, and in many instances royalties are not contemplated - rather, payment is not connected to the future revenue of a production (given that many productions do not attain profitability). If a royalty model is imposed, not only does this remove the author/performers' choice to choose a certain payment, but it may cast a shadow of legal uncertainty over how productions which are not compatible with the royalty model should comply with the law. This limitation of flexibility will make decisions to acquire rights and invest in productions more complex and risky.
- While Section 6A is subject to "any agreement to the contrary", this proviso does not address the hurdles producers will face when incorporating pre-existing works into a movie or TV show. The producer does not have the ability to directly define terms with the author or performer, and may therefore be subject to the royalty obligation if the underlying assignment/license does not stipulate otherwise. This may dissuade some producers from incorporating particular literary works or performances in an audiovisual work, to avoid the risk of future claims and litigation, and at the least will complicate efforts to secure the necessary rights without future unknown encumbrances.

It is particularly clear that Section 6A will fail the second step of the three-step-test, by creating a system that effectively enters into economic competition with the way that authors normally license their works to audiovisual producers. This is because as mentioned above, authors will not be able to determine the nature of the remuneration they would prefer to receive. For example, imposing a royalty-based remuneration is likely to preclude (or lessen) the ability to obtain an upfront lump-sum payment. For many productions, there is a strong possibility that no profit will be made, and as a result, authors may prefer to receive a guaranteed upfront lump sum payment rather than risk not being paid should costs not be recouped. This would prevent that choice. While the legislator may intervene under international copyright norms to protect authors and ensure that they are fairly remunerated, it must do so in a way that respects their exclusive rights and takes into account the impact on their contractual counterparts (such as producers), which is lacking here.

Section 8A appears even more problematic for the audiovisual sector as it seems even less flexible and more onerous than Section 6A (it is not "subject to any agreement to the contrary"). Article 12 of the Beijing Treaty provides that "national laws or individual, collective

or other agreements may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance, as provided for under this Treaty including as regards Articles 10 [communication to the public] and 11 [making available]". Article 12 refers to the "right" to receive royalties or equitable remuneration via national law, individual or collective agreements in connection with the communication to the public and making available rights. While signatory countries have a broad measure of discretion under this provision, Section 8A creates a right to royalties in connection with a more extensive list of rights than is listed in the Beijing Treaty, and proscribes the manner in which that right should operate, by limiting the contractual freedom of performers. In this regard, it is clear that Section 8A will not pass the three-step test under Article 13 of the Beijing Treaty. The analysis above relating to the application of the test to Section 6A is pertinent. Indeed, Section 8A represents a broader limitation than Section 6A (in particular due to the lack of the important subject to an agreement to the contrary language) which makes its compliance with international norms even more dubious. As noted above, there are certainly other legal systems (mostly civil law countries) which provide for statutory remuneration rights and other protections for authors and performers. However, they do so in a more balanced manner which takes into account the specificities of the audiovisual sector and that provide safeguards for producers as well. For example, recent EU legislation establishes a right for authors and performers to "appropriate and proportionate remuneration", but does not prohibit derogation by contract, permits lump sum payments, and does not mandate that the remuneration be proportional to revenues.

Limitations and lack of clarity regarding exercise of rights in audiovisual works

The Beijing Treaty further does not specify a right for performers to enjoy remuneration which attaches to commercialization of the audiovisual work itself. Section 8A specifically provides for this, placing Section 8A at odds with both the WCT and the Beijing Treaty, in that it interferes with the rights of the producer as copyright owner in the audiovisual work by extending the right of the audiovisual performer to participate in the economic rights arising from use of the audiovisual work. We submit that the interplay between the PPAB and CAB is confusing, and contributes to a further lack of clarity as to what rights are afforded to performers which would implicate the exercise of rights by the owner of the audiovisual work. For example, the PPAB refers to a right to equitable remuneration, while the CAB refers only to a right to share in royalties.

Definition of "performers" is overbroad

There is broad consensus that the Beijing Treaty does not apply to performers whose contributions are de minimis, such as extras.[4] But the definition of performers and the application of Section 8A does not reflect this. The Department of Trade and Industry has itself acknowledged that the Beijing Treaty does not extend to extras, but this issue has not been remedied, posing a risk of liability to producers and misalignment with the Beijing Treaty.[5]

The possibility of claims by foreign rights holders may dilute South Africans' share of remuneration

The apparent intent behind Section 6A and 8A is to provide South African right holders with an entitlement to share directly in remuneration received from the commercial use of an audiovisual work. We have pointed out above how this objective would not be served by these specific provisions, but in addition to this, we also wish to note that under the principle of national treatment[6], foreign nationals may try to claim a share of those royalties, thereby substantially diluting the benefit for South African authors and performers. Foreign right holders may also seek to invoke sections 6A(3)(a) and 8A(2)(a) and demand South African producers negotiate agreements with them to pay royalties for the use of their work in South Africa, which would further add to the legal and financial burdens on producers. We do not believe it was the intention of the drafters of the Bill to open the door to such claims, adding further burdens to the legal and economic risks of producers, while at the same time diluting the remuneration interests of South African authors and performers. However, the approach taken raises the risk of this occurring.

Flexibility is key

Netflix supports fair remuneration for authors and audiovisual performers. While the drafters of Sections 6A and 8A may intend to achieve this, we believe the proposed changes would not only increase legal and economic risks for producers, but also diminish opportunities for improving authors' and performers' remuneration. Contrary to what has been stated in media campaigns, legally mandating compensation for authors and performers via royalties is not the norm - indeed, it is highly unusual in the audiovisual sector. This type of inflexible mechanism would prevent producers of audiovisual works from obtaining the necessary

---

[4] See Page 9, International Federation of Actors, Guide to the Beijing Treaty, https://beijingtreaty.com/fileadmin/user_upload/Pages/Beijing_Treaty/Documents/BTAP_Manual_spread_EN.pdf

[5] See: https://pmg.org.za/files/190306Performers_Protection_A_Bill.pptx - Slide 4

[6] See Articles 5(3) Berne, 3(1) TRIPS, 4(1) Beijing Treaty.

rights to commercialize the work on sustainable and reasonable terms. It would also limit the rights of authors and performers to choose from amongst different means of remuneration. Such a one-size-fits-all approach to remuneration will inhibit growth in the sector, and curtail the benefits for the authors and performers that this provision is intended to support.

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. As referred to above, 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. 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.

2. **Section 8A(6) - (7) of the CAB: registration and reporting requirements:**

Section 8A(6) of the CAB requires the registration of any act of commercial use of a copyright work "in the prescribed manner and form" and submission of "*a complete, true and accurate report to the performer, copyright owner, the indigenous community or collecting society, as the case may be, in the prescribed manner for purposes that include the calculation of royalties due and payable by that person*." Intentional failure to comply with this obligation is a criminal offense which is potentially subject to fine or to imprisonment or to both. Section 4(c) of the PPAB articulates a corresponding obligation and penalties.

These provisions lack alignment with international norms and are at odds with how the audiovisual sector operates

Section 8A(6)-(7) is a significant departure from the international norm and finds no basis in international treaties. In fact, the approach appears to ignore the actual functioning of the audiovisual sector and is out of step with international best practice and norms by imposing the possibility of criminal sanction.

We are concerned that these obligations extend far beyond the intended purpose of providing performers, copyright owners or their representatives with greater transparency into the use of their works. Taken at face value, the requirement would substantially burden the resources of any party which uses a work for commercial purposes. This appears to be without exception, which seems to imply that the obligation would be triggered every time a work is broadcast, performed, communicated or reproduced for a commercial purpose - regardless of whether there may be any remuneration due, or the structure of the underlying assignments, and even if administrative burden is clearly disproportionate to the copyright interest implicated by the use.

Coupling such a broad obligation with disproportionate penalties would introduce potential fines and criminal liability for producers and licensed broadcasters and distributors for administrative failures to report and account for every use. These risks of liability may outweigh the benefits of licensing or acquiring the relevant content. Greater transparency should not be imposed at the expense of the opportunity to disseminate a work, and we assume this was not the intention of the drafters.

The approach here is totally disproportionate, out of alignment with international law and practice. The same arguments apply to the proposed amendments to Section 5 of PPAB (see subsection (1A)(h) and (1B)).

Proportionality and industry-driven solutions are key

We believe there are more proportionate means of improving access to information about commercialization of content which can also achieve better alignment with international treaties - including through agreements, which are industry-driven and take into account the nature of the use, and the cost/benefit of imposing this obligation. Rather than imposing a blanket, onerous set of obligations that extend to any commercial use, an impact assessment should be conducted to understand where the gaps are, what type of mechanisms already exist, and where the benefit of transparency of such information could be achieved without a disproportionate burden on producers, broadcasters and other distributors.

3. **Section 21 of the CAB: Authorship of audiovisual works:**

The proposed amendment provides that ownership of a commissioned audiovisual work would be determined by written agreement. In terms of existing section 21(1)(c), the commissioning party is the owner. The CAB further grants to the author of an audiovisual work the right to approach the Copyright Tribunal for an order to licence the work if the commissioning party does not use the work for the purpose commissioned or where it is used for a purpose other than that for which it was commissioned.

Lack of alignment with Berne Convention

The amendment to Section 21 is incompatible with Art. 14bis(2) of the Berne Convention, which creates a framework for the ability of the party commissioning the audiovisual work to enjoy the economic rights of ownership, without prejudice to the underlying rights of authors in any works incorporated in the audiovisual work.

We refer further to the advice of the experts appointed by the Portfolio Committee under the previous Parliament to advise it on certain aspects of the CAB, including international treaty compliance. In particular, the input of Ms. Michelle Woods of WIPO underscores this misalignment. Ms. Woods notes that in "countries following the common law tradition, normally the producer of an audiovisual work is considered the author of that work, without prejudice to the rights regarding other exploitation of pre-existing works that are included in the audiovisual work."

The amendments as to ownership of audiovisual works as well as the possibility of the Tribunal altering the terms of the original agreement, substantially raise the risk for producers of audiovisual works, by enabling contributing authors to challenge ownership and use of the resulting audiovisual work on the basis of any difference in interpretation of the underlying agreement that would now be required by the Bill.

By raising this risk, the producer may find it difficult (or impossible) to secure the requisite financing and insurance that would be required for a particular production, and/or would also effectively prevent them from recouping their investment by licensing the work for distribution by a third party based on the possibility of such a future claim arising. It is for this reason why a crystal-clear consolidation of economic rights in the producer is so fundamental to facilitating the viability of audiovisual production. Section 21(1)(c) should be retained in its existing form.

4. **Section 22(3) of the CAB and Section 3A(3) of the PPAB: Limitations on assignments of literary and musical works and reversion of performers' rights in sound recordings:**

The proposed amendments to Section 22(3) of the Copyright Act limit the term of an assignment in a literary or musical work to a period of 25 years from the date of such assignment, whilst the proposed amendment to introduce Section 3A(3) of the PPAB provides that an assignment by a performer in respect of copyright in sound recordings reverts back to the performer after 25 years.

Failure to comply with the three step test

We wish to underscore the central importance of a producer's ability to consolidate rights in an audiovisual work. The financing, production and distribution of audiovisual works is predicated on the unification of rights in the producer. Any measure which inhibits such unification will deter investment in audiovisual production and distribution because of the risk of infringement or later-arising clearance hurdles. Therefore, as regards the audiovisual sector, particularly given the potentially high number of pre-existing works which may be incorporated into films and TV programmes, this provision is totally unworkable. This provision coupled with the other limitations on contractual freedom above would create an incredibly burdensome regime for the sector. Such an approach flies in the face of international practices and norms and fails to take into account the functioning of the sector. Although both US and EU law provide for possible rights reversion scenarios, either audiovisual works are excluded completely or other safeguards and conditions are put in place to mitigate the impact.[7] Imposing a ceiling on the term of commercialization for South African performances and literary works would place authors and performers at a competitive disadvantage, compared to other countries which do not impose such limitations. There will also be less incentive to license older works in the future, for which the underlying rights have expired and may be difficult (or even impossible) to clear. This would be a significant lost opportunity for works which are older than 25 years. Proposed amendments would likely result in lowering remuneration for South Africa's authors and performers to account for the potential re-negotiation of rights clearances for a further term.

Laws which prevent or limit consolidation are a departure from international norms, and hinder opportunities to license and commercialize the resulting work. Obtaining the underlying

[7] For example, in the US, the right to terminate an assignment after 35 years from the date of the original grant only applies to rights arising under US law, does not include "works made for hire" (i.e. commissioned works) and also permits the continued use of derivative works which means that any adaptations of music, scripts from literary works can continue to be used, such that their use in a television program or film does not have to suddenly stop, amongst other limitations.

rights for the life of the copyright is essential, because once an audiovisual work is created, the life span of its potential for commercialization depends on the term of the underlying rights - and if this is limited by law, the opportunities will also be limited.

Correspondingly, at the international treaty level, this limitation on the exercise of exclusive rights appears at odds with the three-step test. The broad scope of the limitation raises questions under the first step but it would certainly fail to meet the second step. By removing the author's freedom to license his works to audiovisual producers to such a degree and without any real safeguards or proportionality, Section 22(3) would conflict with the normal exploitation in the audiovisual sector by entering into economic competition with way in which authors usually derive value from content that they license to audiovisual producers. Similar concerns arise with regard to the limitations of performers rights under the three-step-test as articulated in the Beijing Treaty, for the same reasons.

This provision read together with the proposed unenforceability of contractual terms which "purport to renounce a right or protection afforded by" the Copyright Act, would unfairly tie the hands of South African creators to determine how best to license or assign their works, which may also constitute an unconstitutional restriction of an author's rights to trade, contract, and choose a profession.

Exclusion of audiovisual works

We note that this proposal arose from concerns expressed by the Copyright Review Commission regarding the interests of musicians, and would submit that the basis for a broadly applicable reversion right is therefore unwarranted. The audiovisual sector should be excluded from this provision.

5. **Section 39(c) CAB and 8D(3) and (4) PPAB: Ministerial power to prescribe contractual terms in agreements entered into under the CAB and the PPAB:**

The proposed amendments to Section 39(c) of the CAB and Section 8D(3) and (4) of the PPAB allow the Minister to make regulations that would prescribe compulsory and standard contractual terms to be included in agreements to be entered into under these Bills. When read in conjunction with Sections 3A(3)(B) of the PPAB and Section 8A(4)(b) of the CAB - provisions which mandate that any agreement between the performer and the copyright owner must include royalties, or in the case of the PPAB, "royalties or equitable remuneration".

Lack of clarity for authors, producers, performers and uncertainty as to future alignment with international treaties

The proposed amendments would essentially mandate that the Minister prescribe contractual terms that may, despite best intentions, run counter to the provisions of international treaties. Section 8A of the CAB allows the Minister to prescribe "the rights and obligations of the performer and the copyright owner" (Section 8A(4)(a)) and "the performer's share of the royalty agreed on, or ordered by the Tribunal, as the case may be" (Section 8A(4)(b)). The broad scope of what the Minister is able to prescribe leaves the door open for prescriptive provisions that could derogate from international treaties - the scope appears to be boundless.

These provisions create a cloud of legal and economic uncertainty, and may complicate decisions to invest in new projects. To the extent that the Minister introduces limitations on the exercise of exclusive rights protected by international treaties, a specific justification is required, or the measure must pass the three-step test. Unlike the other provisions referenced above, which have been subject to debate and scrutiny by Parliament and stakeholders, the delegation of executive legislative authority to the Minister provides for the ability to effectively legislate what all industry contracts affecting copyright should look like, what tariffs for usages, etc. would be, and Parliamentary approval or consideration would not be required.

Industry driven solutions

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, which recognizes the distinctions between different productions depending on genre, format, budget and other factors.

In summary:

Netflix is excited to be working with South African creators to bring authentic and compelling stories to South Africa and the world. In doing so, we recognize the importance of investing in growth for the long term, and that when the local sector grows, so do the opportunities for Netflix and other market players. This ultimately is what will bring sustainable benefits to stakeholders, and our interest is in ensuring that the optimal conditions exist for doing so. There are many factors that will determine the speed at which this growth can occur, and we are mindful of the need to ensure that such growth includes a broad and diverse cross section of stakeholders. We are committed to contributing to this on a number of fronts, and are

already putting substantial resources behind those endeavors. However, these efforts will not reach their full potential without an enabling copyright framework. 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 audiovisual sector, like other copyright intensive industries has distinctive characteristics, and within the sector, each production is distinctive too. Each production is a high risk endeavor to begin with, and amongst different productions there are many considerations that need to be weighed and balanced. It is for this reason that the production models for feature films will differ from TV series, which will differ from live-action content, animation, stand-up and more. The contractual terms between the many contributors who work together to create the finished project will differ from one to the other, but enabling this flexibility is lacking in the Bills, which seek to apply rules in a one-size-fits-all manner.

We support preserving contractual flexibilities, and industry self-regulation as a means to achieve equitable solutions would be a big leap forward to removing the obstacles that the Bills impose on the growth of the sector.

There is more work to be done to recognize and support the growth potential of the sector and its broader impact on economic recovery, and Netflix hopes to play a constructive role in that process as we continue to work closely with South African storytellers, producers, performers and other creators to bring the best South African stories to our members in South Africa and beyond.

Netflix thanks the Committee for its consideration of this submission.

Respectfully submitted,

Bradley Silver
Head of IP Policy
[redacted]