

## **A Comparative Analysis of Multichoice's Contract Terms for Nollywood and South African Film Industries**

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### **Abstract**

This article is a comparative study of Multichoice contract terms in Nigerian and South African film industries. Stemming from a critical media industry study, the article analyses the contract document issued to movie makers in Nigeria and South Africa by the South African owned media corporation, Multichoice, in order to study the contract terms and investigate if there are signs of exploitation. This is significant because most media corporations apply confidentiality clause to shield their contracts from public view and analysis thus restricting availability of such discourses within academic fields. Dissecting the contract based on its sub-divisions, and examining the concept of exploitation, the paper argues that the terms of Multichoice contracts to Nollywood exhibit copious evidence of exploitation equivalent to erecting a flag to claim a continent, in various aspects of Multichoice-Nollywood transactions.

**Keywords:** Nollywood, Contract, Multichoice, Exploitation, Nigeria, South Africa.

### **Introduction**

Most scholars link multinational media establishments with capitalist tendencies (see Harvey, 2003; Gershon: 2005), which exploit local industries. Multichoice, the first transnational media to broadcast Nollywood

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films to the world through its Africa Magic channels (Teer-Tomaselli *et al*, 2009; Adejunmobi, 2011; Haynes, 2009, 2011; 2014), is inadvertently connected to Nollywood following its more than two decades business relationship with the Nigerian film industry. From a business experiment that commenced with an Africa Magic channel which transmitted only the English language Nollywood films at its inception in 2003, Multichoice has expanded to operating eight channels showing various types of Nigerian entertainment content,<sup>2</sup> most of which were introduced during Multichoice's programme re-engineering agenda in April, 2015. Initially, Nollywood practitioners saw the introduction of the channels as having the potential to generate additional revenue for industry practitioners via royalty from the content, and promoting accessibility of the films to diasporic audience. However, Multichoice's twenty years operation in the film industry with eight Africa Magic channels exposes unprecedented fall-outs. Consequently, most Nollywood practitioners seem disenchanted, and describe the royalty paid by Multichoice as 'peanut'; they claim that Multichoice's contract agreement is highly exploitative (see Ernest-Samuel, 2017). Incidentally, corporate media organizations are secretive about the fees they pay for licensing and royalty (Ulin, 2014: 142). Multichoice's contract has confidentiality clauses which make it difficult for the corporation and its content suppliers to release its contract document for academic studies or analysis. As a result, there is no prior study of Multichoice contract terms issued to the Nigerian and South African film industries. This paper is an attempt to fill this gap and make an original contribution in the field of African media industry study. Some filmmakers who appreciate the need for this study provided the contract documents on the condition that it be used strictly for academic purpose, and that their identity be redacted from public view due to the confidentiality clause.

This paper analyses Multichoice contract documents issued to individual filmmakers to dissect the stipulations of the Multichoice-Nollywood contract terms, in order to decide its true nature and bring a new and unique insight into African media industry practices and operations. As a transnational media organization, Multichoice's strategic "decision-making and the allocation of resources are predicated on economic goals and efficiencies with little regard to national boundary" (Gershon,

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<sup>2</sup> The channels include Africa Magic Hausa, Yoruba, and Igbo channels devoted to the three major local languages in Nigeria; and, Africa Magic Showcase, Africa Magic Epic, Africa Magic Urban, and Africa Magic Movies.

2005: 17). Therefore, Multichoice is not only a transnational media corporation, but also a profit-making business. In a similar vein, Nollywood is an informal private sector driven economy. This means that economic productions and exchange occurring within the industry occur outside the purview of the state. Therefore, business transactions in the industry are largely “unmeasured, untaxed and unregulated” (Lobato, 2012:40). These facts are considered in analysing and interpreting the contract.

The South African contract was chosen for comparison from among other film industries for two reasons: first, it is Multichoice’s home country, and second, “the video films emerging from South Africa share an affinity with Nollywood video films in terms of production and modes of distribution” (Mistry and Ellapen, 2013:56). Therefore, the terms of disposing the content are deemed to be similar. The paper investigates the terms of the Multichoice’s contract to South African and Nigerian filmmakers, to see whether the terms are exploitative and the nature of exploitation, if it exists. Thus, document analysis is the major method adopted in this study. The paper is divided into four parts; outside this introductory part, the next sub-section provides a definition of exploitation (an important concept which frames this study) in order to allow for a proper conversation with the research question and locate it within media industry study. The third part focuses on critically analysing and interpreting the contract based on operational entertainment industry studies literature, while the fourth and last part provides a brief conclusion.

### **What is Exploitation?**

A critical discourse on exploitation was initiated in the field of economics by Karl Marx in his work, *Capital Vol. III: The Process of Capital Production (1887)*, before it extended to other fields like sociology, political science and law. Marx defined exploitation as the “unequal exchange of labour for goods: the exchange is unequal when the amount of labour embodied in the goods which the worker can purchase with his income ...is less than the amount of labour he expended to earn that income” (Roemer, 1997:127). The idea of inequality plays a role in the belief that exploitation is an injustice. Marx’s definition of exploitation is linked to the relevance between the words, “exploit”, “exploiter”, and “*ausbeuten*” in Harrap’s *German-English Dictionary*, and his writing in *The German Ideology*, which suggests that exploitation is morally deplorable, and involves taking unfair advantage of a person. This informs why exploitation is defined as “the generation of economic injustice through free market transaction” (Elster, 1983; 227). Elster argues, however, that in competitive markets,

exploitation differs from other forms of surplus labour extraction because, "there cannot be mutual exploitation, but there can be mutually beneficial exploitation" (1983:279). His socialist definition emphasises the issue of class involvement in exploitation. This perpetually fixes exploiters as rich people who are wealthy in economic terms, while the exploited are the poor and explains why in capitalist society or organisations, the capitalist owns the means of production including, factories, machinery and other material resources; and thus hires the workers who work for wages; whereas the exploited are the workers or working class who rely on the wage paid by the capitalist to survive. Under capitalist exploitation, there is no law compelling the worker to work for the capitalist, nor is there any law on how much the capitalist or the worker will get paid (see Eaton, 1952). Investigating exploitation involves probing into hidden laws and operations of the capitalist economy to find out the secret of the capitalist's success and surplus profit. This definition is relevant in the study of the Multichoice- Nollywood relationship. One of the reasons for analysing the Multichoice contract to Nollywood, outside of providing information on the nature of their business relationship and interaction will be to investigate if there is evidence of hidden exploitations on the part of the media corporation.

Valdam (2009) identified two important views of analysing exploitation, namely: the beneficial view, which points to exploitation as being harmful to the exploited and beneficial to the exploiter (Buchanan, 1985). The second is the vulnerability view, which involves exploiting someone who is vulnerable which usually entails some form of deception (Valdam, 2009). Valdam's view of exploitation being harmful also defines the position of this study, and points to an ethical angle in the definition of exploitation (serious breach of professional ethics or practice) which is important in this study. In analysing the contracts, this study examines if the contracts are harmful to Nollywood and/or South African filmmaker, and beneficial to Multichoice as the case may be. It will equally investigate if there is any indication of exploitation due to vulnerability. Thus, Valdam's views frame the definition of exploitation in this study.

### **A Comparative Analysis of Multichoice's Contract terms to Nollywood and South African Filmmakers**

In contemporary societies, contract is part of the law governing professionals and businesses transacted within the entertainment industry

(Legal Dictionary).<sup>3</sup> Multichoice's contract for content producers who supply the media organization with entertainment content shown on its Africa Magic and Msanzi Magic channels, cover various areas of interest in the transaction like ownership rights, exclusivity, terms of payment, territory, number of channels among other aspects. On the surface, the contracts issued to practitioners in the Nollywood and the South African film industries are identical. However, while the Nollywood contract is proposed in a document bearing M-Net logo on the top-left corner, the South African contract bears the logo of the consulting agency which helps them with content supplies. This implies that while in South Africa, Multichoice has officially recognised representatives who issue contracts on its behalf to local filmmakers, Multichoice does not permit such mediation in Nigeria. Each of the documents acknowledges "Electronic Media Network Proprietary Limited (M-Net)" as the licensee. The terms of the contracts are listed in various sub-headings like Rights, Exclusivity, Pay-Tv Duration time, among many others. This section will conduct a comparative analysis based on the sub-headings. Discussed below are the basic discernible differences between the two contracts.

## **Rights**

The South African contract document stipulates that the rights of the licensee to the licensed programme(s), covers pay television, and on-Demand rights however delivered now or in the future, to any device<sup>4</sup> and in-between any devices during the pay television license period. However, while the Nollywood contract contains the above mentioned clauses, it also expands the basic pay television service to include Subscription Video on demand (SVOD), Video on demand (VOD), Free video on demand (FVOD), Ad-based video on demand (ADVOD) and Near video on demand (NVOD) or Pay per view (PPV). SVOD covers services involving subscription agreement such as the regular Multichoice/DSTV services (Ulin, 2014). VOD is the service wherein viewers are allowed to select or watch their choice video content; a good example being in-flight entertainment enjoyed by most flight passengers (Beriot, 2008). This clause implies that by signing a contract with Multichoice, a content owner or licensor authorizes Multichoice to sell the content to third parties

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<sup>3</sup> See <http://legal-dictionary.thefreedictionary.com/Entertainment+Law>.

<sup>4</sup> Note that "any devices" imply television, computer, or even mobile phones.

such as airlines for their in-flight programming for passengers. ADVOD is an online service anchored on adverts, wherein users do not pay, but are expected to watch adverts as part of their viewing experience. An example of ADVOD is YouTube. FVOD is a system of programming offered by a broadcasting operator free of charge to users. An example is the Dish channel on DSTV, where some programs and adverts are made available free of charge to users. NVOD/PPV are short programmes slated at regular intervals and pre-scheduled and used for pay-per-view services, which involves a subscriber purchasing events to view through private telecast.

Given the overly extensive and virtually exhaustive scope of rights acquired by the licensee under the Nollywood contracts, arguably, many Nollywood practitioners do not understand the agreement they signed with Multichoice, especially given that they fail to consult intellectual property lawyers for proper interpretation of the contract terms (Ernest-Samuel, 2017).<sup>5</sup> Beatson *et al* (2010) observe that, “a person who signs a document which contains contractual terms is actually bound by them even though that person is ignorant of their precise legal effect” (2010:173). This is not absolute, though. The common law system provides accommodation for principles that mitigate inequitable and unfair contracts, especially where the parties are in unequal power relations. On the basis of some of those principles, stronger parties or corporate entities like Multichoice have an obligation to exercise due diligence to ensure that the weaker parties have the benefit of professional advice pursuant to the old English case of *Lloyds Bank Ltd. v. Bundy*, [1974] 1 *Queens Bench* 326<sup>6</sup> in order to avoid undue pressure that can vitiate a contract. This case is relevant to Multichoice-Nollywood case because Nigerian law and constitution is derived from English law.

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<sup>5</sup> Ernest-Samuel (2017) in a PhD dissertation captures the evidence supporting this view in interviews with Nollywood filmmakers, particularly in Chapter five of the study.

<sup>6</sup> See: <http://www.diprist.unimi.it/fonti/1031.pdf>, and <http://e-lawresources.co.uk/Lloyds-Bank-v-Bundy.php>

## Exclusivity

The Nollywood contract document specifies that rights are granted exclusively to M-Net, explaining further that exclusivity means that the Licensor shall neither:

exhibit nor authorize the exhibition of the programme or *any interactively altered, customized or any other version of the programme* (e.g. Made for Mobile) on *any existing or future* Television service/channels (e.g. Pay Television, Basic Television and On Demand), however delivered now or in the future *to any device receivable in the Territory*, nor via the internet, targeted at the territory, in any and all languages prior to or during the license period (document extract, italics emphasis, mine).

Within the period of this exclusivity, the licensor is not authorized to promote or allow the promotion of the programme in any media or the exhibition of the programme, including any interactive, altered, or customised or any other versions of the programme (e.g. made for Mobile). The stipulations of the South African contract document are similarly worded, although not in uniformity with that of Nollywood. Critical issues of concern in the document include, as follows:

(a) The restriction of exhibition of altered, customised or any other version of a programme, which suggests that if a filmmaker licenses a film to Multichoice, he or she cannot extract the now very common short video skits of between one to five minutes from such production and sell it as fresh production, although the filmmaker is the original copyright owner. In effect, it would appear that the discriminatory and disadvantageous effect of this onerous exclusivity provision is that the licensor's ability for derivative creativity based on the licensed movie is completely frozen and the licensor's potential for other creative opportunities to optimise the value of his/her creation remains in abeyance during the term of the contract.

(b) A filmmaker does not have the right to show such a programme in any existing or future channels. There is no clause for educational productions, whereas the Nigerian copyright law [Second Schedule, article K] exempts copyright control on productions which are educational and which encourage learning as far as such programmes are screened for educational purposes and not to generate revenue, or produced for commercial purpose. Multichoice's restrictive control on such copyright amounts to a "misuse of copyright" (Patterson, 1993:17) because such agreement will "inhibit rather than promote learning, which copyright history has revealed to be a real danger"(p.4).

(c) Depending on the area covered by Multichoice's "territory," a filmmaker cannot authorise the exhibition of a programme within such an area. The area covered by the "territory" outside the immediate locality of the industry should be streamlined, or a filmmaker will expect too much from the external broadcaster. So far, standard broadcasting agreements show that whereas the territory of "distribution contracts" *may or may not* cover "universe" or the world,<sup>7</sup> broadcasting contracts are streamlined to nations within a continent unlike the Multichoice agreement which covers the African continent and Asia (for South African film-makers), and including a worldwide internet broadcasting right (for Nollywood). The potential to use a private contract to undermine the public interests legitimately protected under statute, in this case copyright law, is worrisome. Beyond the licensor, it is tenable that other stakeholders in the copyrighted work can successfully challenge any arrangement that short-changes rights recognised and protected under copyright law. In advanced countries such as Canada and the United States, Australia, even in South Africa<sup>8</sup>, there has been a progressive interpretation of statutorily allowable copyright exemptions to accommodate the conduct of research, private study, criticism, review, and news reporting under the doctrine of fair dealing (Canada) or fair use (US).<sup>9</sup> Canada has even elaborated on the public interest accommodations of copyright law under the novel doctrine of user's right.

### **Pay Television License Period**

While the Nollywood contract places the license period at 24 months with 12 months exclusive, and 12 months non-exclusive, the South African contract places the license period at 36 months. It includes a proviso that if the license period will be annulled, the licensee must notify the licensor of the commencement date no later than 90 days prior to that date. It also points out that the dates can only be changed based on a mutual agree-

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<sup>7</sup> See: [www.imsa-online.com/files/Distribution\\_Agreement.pdf](http://www.imsa-online.com/files/Distribution_Agreement.pdf)

<sup>8</sup> (See Tobias Schonwetter, *The 'fair use' doctrine and the implications of digitising for the doctrine from a South African perspective* ... <http://reference.sabinet.co.za/document/EJC135577>)

<sup>9</sup> Barry Sookman, *"Does Canada already have Fair Use?"* <http://www.barrysookman.com/2010/03/22/bloggeddoes-canada-already-have-fair-use/>

ment between the two parties. The relevance of this proviso in the South Africa contract and not in Nollywood contract is not clear. However, without being quick to speculate on the benefit, if any, of shorter term for Nollywood right owners, it may be a reflection of the prolific pattern of churning out new movies by the industry in quick succession.

### **Number of Exhibitions**

The Multichoice-Nollywood contract approves a total of 40 exhibitions of the programme per channel including a proviso that “any repeat exhibition within 24 hours of the original exhibition shall not be counted as a separate exhibition” (document extract). This may explain why Nollywood films are often shown twice in a day perhaps to leverage on this lucrative vacuum. This is questionable and may inform why Nollywood films are often repeated within 24hours. The contract also states that for “on-demand,” the exhibition is unlimited. This seems logical on the surface; given that the licensee has no control over when on-demand patrons would order a programme. However, the South African contract document authorises “an average of 15 exhibitions per programme or channel but no more than 20 runs per channel” (document extract). This is about 100 -150 per cent increase in the exploitation of Nollywood productions. Yet, for the most part, Nollywood contracts are not as lucrative as those of its South African counterpart. This discrepancy is a clear evidence of exploitation intent, where exploitation is seen as not only involving taking advantage of someone, but also capitalising on the person’s vulnerability because he/she has no other option.

### **Services and Channels**

As stipulated in the standard Nollywood contract, the programme is to be shown on “all existing and future M-Net and/or DSTV services channels” (document extract), while the South African contract is streamlined for the content to be shown on all existing or future *Mzansi channels* (or any other successive name(s) by which Mzansi channel may be known thereafter. By broadly classifying the services channels to be all DSTV services channels, Multichoice and M-Net officially legalised decisions to show Nollywood films in other channels outside the Africa Magic channels, while properly limiting the broadcasting of South African films to only Mzansi channels. The broad reservation of all M-Net and/or DSTV services channels explain why Nollywood films are also shown in Multichoice’s GO-Tv channels without new contract agreement. Yet, the remunerative value of licensed programmes from Nollywood filmmakers

under contract is for the most part, less than those of their South African counterparts.

## **Territory**

The Multichoice 'territory' for the use of licences content covers the African continent and the adjacent Ocean Islands in both contracts. However, there is an additional clause to the Nollywood contract which indicates that Multichoice territory covers the continent of Africa, Asia and adjacent Ocean Island in respect of all rights, and worldwide in respect of Internet rights. This provision appears as ludicrous as it unequivocally affirms the exploitative nature of the contract and the unequal power relations that undergird them. It raises questions as to how much would be worthy to pay for a content circulated around this whole territory. Without equivocation, given the paltry license fee of the Nollywood contract, what the licensee does here is a case of erecting a flag and claiming a continent. With such expansive territory, no amount will be too much to pay for a content broadcasted in such vast area. However, some of these classical legal principles are vitiated where there is glaring inequality in power relations whereof the law does not allow the strong to prey on the weak. For corporations and industries whose successes are mutually tied, it behoves Multichoice to not use its corporate power and leverage to their optimal weight which may be counterproductive.

## **Language**

The agreement stipulates that the programme will come in original version with English and, in addition, dubbed, subtitled and/or voice-over in other local language versions. The Nollywood copy ends with the fact that the "Licensee shall have the right to create local language version(s)." However, the South African contract document states that "if created, Licensor may access such local version(s) at 50% cost at the end of the Pay Television License Period." A critical issue arising from the term is that it is not appropriate for a licensee to be authorised to exhibit an intellectual property of an original copyright owner, to have the right to create the local language version(s) of the intellectual property (Ulin, 2014; 174). This state of affair compromises the residual proprietary rights of the licensor. It amounts to abuse or unfair use of copyright material which is not permissible under copyright law. It also undermines the right holder's moral right (see Kidd and Daughtrey, 1999:242), which in law is not a right that can be licensed or assigned. Given the limited term of these contracts, one wonders what the licensee's interest is, in creating a local language

version. Already, many Nollywood movies are being dubbed, adapted and transcribed in places like Tanzania and elsewhere, which is in flagrant breach of copyright where no permission is obtained from the original creators (see Krings, 2013 on *Karishka*). As a leading corporate organisation in the creative industries, the licensee should not be seen to be in a position that creates an appearance of insensitivity to copyright laws and the rights of creators. The agreement does not recognise that the licensor is a stakeholder on subsequent transformation of his/her original creation. Multichoice is aware of this fact. Evidently, this explains why the South Africa contract includes the proviso: "if created, Licensor may access such local version(s) at 50% cost at the end of the Pay Television Period"(document extract). Moreover, the pay television period protecting the newly created local language version is not defined. And so, the original content owner would not know such period when he will access the 50% cost. With the absence of this clause in Nollywood document, one is compelled to assume that Multichoice did not include the clause because it presumes it does not need to bargain for the right of the newly created local language versions, since its exclusivity right of claim on altered or customised programme legalises its rights on such programmes. Such stipulations obviously smack of exploitation of unsuspecting Nollywood producers, particularly given that Multichoice excluded it from South African filmmakers who also have similar statement in their contract.

### **Payment Terms**

The Nollywood document affirms that "for each programme 100% of the license fee [is] payable" once M-Net receives the agreement between M-Net and the Licensor, delivery of a technically acceptable master and additional materials and documents in support of the copyright ownership of the programme. Incidentally, the South African document has a clearly defined breakdown of payment terms and stages of payment as follows:

25%- on payment of Pay Television License Period commencement date;  
25% -3 months after Pay Television License Period commencement date;  
25%- 6 months after Pay Television License Period commencement date;  
25% -9 months after Pay Television License Period commencement date  
(document extract).

The non-inclusion of this breakdown in the Nollywood agreement leaves one curious about Multichoice's motive. The Nollywood contract provides for a one-off payment, although some of the filmmakers claim to

be paid in instalments. Indeed, it raises questions on its level of trustworthiness and mutual confidence which is fundamental for sustainable goodwill and business relations. Although there are advantages and disadvantages to being paid in instalment, or in bulk, however, stipulating in the contract that it will pay in bulk, but paying in instalment demonstrates a lack of trust on the part of Multichoice.<sup>10</sup> Such development demonstrates inequality in the bargaining powers; because if the equities were equal, Multichoice will be cautious of its treatise of the contract they give to content suppliers. One wonders why Multichoice's agreement with Nollywood did not stipulate that the money would be paid in instalments, while it is stated clearly in the South African agreement. The conduct of Multichoice reflects the willingness of a stronger party to dominate and/ or control the weaker party and to use its industry monopoly at will. It suggests that because of Nollywood's informality and weaker bargaining power, Multichoice exploits the industry and individual licensors without any fear of litigation from the exploited practitioners or fear of government interference. This attitude smacks of impunity. It also suggests that knowing that even with uneven handed scenario, Multichoice remains at least the highest paying media; it was able to leverage on that to draft contracts the practitioners are not able to contest because they do not have much of an option, at least for the time being. It would, however, be shortsighted for Multichoice to think that the status quo would remain without change. In a highly creative and competitive business environment, it is those corporations that practise fairness and equity that stand the chance of continuing domination.

### **Other Terms**

The South African document stipulates that, "M-Net shall be entitled to provide services for hearing impaired viewers of any programme (e.g. teletext and voice over audio tracks) in order to comply with local regulatory requirements." But the Nollywood contract stipulates that, "Licensor (that is intellectual property owner) is to supply, free of charge, dialogue transcripts (supplied by e-mail) synopses, standard teletext disc files for the hearing impaired." This stipulation suggests that because the Nigerian Broadcasting Corporation did not mandate Multichoice to provide services for hearing impaired viewers as part of their broadcasting

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<sup>10</sup> The idea of bulk payment may be related to Nollywood's initial agreement at the inception of Nollywood video boom.

regulatory requirements, Multichoice compels the intellectual property owners to provide such services even when they know that such provision is outside the purview of a creative artiste. As a responsible corporate organisation, Multichoice has again missed the opportunity to use its influence and goodwill to encourage positive and progressive industry regulatory environment on the continent. Many African countries recognise the leadership role of South Africa in many respects and sectors on the continent. To adopt a pattern of exploiting loopholes in the municipal law of its individual partner artistes rather than contribute to the development of those laws at least to help bring it close to the South African standard is myopic to say the least. There is little doubt that Multichoice is intent on exploiting regulatory loopholes in Nigeria to shirk its responsibility and pass the buck to industry practitioners. It is common for broadcasting media to provide necessary technical support required in cases like this. For instance, in the broadcast agreement between Trinity Broadcasting Network (TBN) and Boat Angel Outreach Centre in California, although Boat Angel is the producer of the programme, *Donkey Ollie*—a children’s programme, TBN provides all other technical requirements necessary for the broadcasting of the programme.<sup>11</sup>

The contracts have provisions for the property right owner to endorse the agreement. However, the Nollywood document has two extra pages where the copyright owner is expected to make a Withholding Tax payment on Royalty (WTR) declaration, which is expected of every non-South African. The declaration is made to or for the benefit of the license fee (otherwise known as royalty for the content). The WTR covers the taxation of the content for doing a business with a South African company. By completing the form, a content supplier will be taxed 7.5% of the Royalty to be remitted to South Africa, while a content supplier who does not complete the form will be taxed 15% of the entire royalty. 7.5% will be reserved to fulfil the South African Income Tax Act of 1962, while the remaining 7.5% will go to the country of residence, which in Nollywood case is Nigerian government. Critical issues centring on copious exploitation arise:

(a) It is illegal for a businessman who transacts business with a company registered in Nigeria, to be compelled to pay tax to the foreign

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<sup>11</sup> See link: [www.carangel.com/.../donkeyolliesixbooks%20finals3/Revised\\_DonkeyOllie\\_Internati...](http://www.carangel.com/.../donkeyolliesixbooks%20finals3/Revised_DonkeyOllie_Internati...) The technical equipments includes teletext audio files among others.

country when the business was not transacted in the foreign country.<sup>12</sup> An investigation reveals that in Romania, member states of the European Union have autonomy of direct taxation. However, in 2004, the European Commission considered such practice illegal, due to incidences of double taxation. They therefore introduced “common consolidated corporate tax base” which “involves establishing a single tax base for activities of a transnational company” (see Pirvu *et al*, 2011: 323) with cross-border activity income. The tax regime was to help control issues of double taxation of business clients of such companies. In America, withholding tax on royalty is legal and depends on a couple of issues. Ernest and Young (2013) note that, “the location of income-producing” activities can impact how and where the income is taxed under source-of-income and permanent establishment principles” (Ernest and Young, 2013:13). Other factors include factoring the machine roles, in other words, finding out if the “place of the performance of the service is the same as the server location,” deciding how to allocate income to machine and human in the supply chain; and determining the impact of outsourced services on place of performance. Furthermore, Ernest and Young note that, “a change in the type of transaction and entity earning income may affect the withholding taxes earning” (p.3). In America where Ernest and Young investigate, content supplies and distribution are done by corporate organisations and distribution firms, unlike Nollywood which is largely an informal sector operated by independent and small-time businesses. This, therefore, suggests that the withholding tax regime introduced by Multichoice on Nollywood content is illegal.

(b) If South Africa has an Income Tax Act for businesses transacted in a South African company, then, it is worrisome that this was not reflected in the contract document given to South African filmmakers.<sup>13</sup>

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<sup>12</sup> The former Director General of the National Broadcasting Corporation denied knowledge of this development and a Director at the Censor's Board and a legal consultant with one of the regulation agencies did not know about this tax, and confirmed it was illegal because it will amount to double taxation. However, the former DG notes that Nollywood practitioners should sue Multichoice contesting the tax, instead of taking it up as a director of the highest regulatory agency in Nigeria which licensed Multichoice. His suggestion is a clear sign of compromise on the part of a government regulatory agency.

<sup>13</sup> The Nollywood filmmakers reveal that this tax was introduced in early 2015, but South Africa was not known to have introduced a new taxation law re-  
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(c) It is remarkable to observe that the South African tax is non-negotiable, whereas the content supplier can appeal for exemption for the tax to be paid to the host country, Nigeria. These issues are evidence on exploitation designed to cost Nigerian filmmakers financially, for the benefit of Multichoice.

### **Significant Omissions or Commission on the Contract**

The absence of a request for Censor's Board approval certificate is a critical oversight on the part of Multichoice. The National Film and Video Censors Board enabling law (2008), Section 33, subsection 1 states that, "As from the commencement of this Act, no person shall exhibit, cause or allow to be exhibited a film without a censorship certificate issued by the Board for such exhibition". The law recognises a breach as "an offence and liable on conviction to a fine of N5,000 or to imprisonment for a term of one year." By not requesting for the NFVCB approval certificate from content producers, Multichoice contract terms to Nollywood filmmakers violate the NFVCB law. The fact that this violation is also not taken cognizance of by the government suggests one of four things: (a) Multichoice is comfortable with violating Nigerian law (b) Multichoice is protected by the leadership of the regulatory agencies (c) The Nigerian regulatory agencies are corrupt, and (d) All of the above.<sup>14</sup>

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cently. Again, it shows a gap in leadership and perhaps compromise and corruption on the part of Nigerian government agencies. Multichoice should have notified the Nigerian regulatory agencies and Nollywood before the sudden introduction of Withholding Tax on Royalty Declaration. These issues are necessary because even the directors of the regulatory agencies claim they have no knowledge of the development.

<sup>14</sup> The censorship certificate is proof that a film has met with all the requirements of the NFVCB and is important because it is one of the ways of getting rid of poor quality productions in the film industry. As public products, films have both cultural and entertainment values (Albarran et al, 1999), and they require censorship so that the intrinsic worth are not jeopardised. A request for censorship certificates would challenge and compel the filmmakers to go through the rigours of censorship, considering that Africa Magic is one of the major windows of showcasing Nollywood films. The filmmakers, who initially avoid censorship because of the open market sales, would be compelled to go through censorship. The absence of the request for proof of censorship in Multichoice contract agreement indicts Multichoice of not conforming to

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Secondly, there was no provision for the position of the third-party in its agreement, although Multichoice legalised its deals with third parties as well as with the original intellectual property owners. Exclusive rights are designed to empower the intellectual property owner to profit from their work (Patterson, 1993; Lawal-Arowolo, 2014; Ginsburg, 2002). Its absence in the agreement and implementation in its transaction logically suggests it is an illegality. Therefore, Multichoice's indifference to third-party existence, while dealing with third parties, exchanging contents with its accredited suppliers who supply contents on behalf of new or unknown filmmakers; instead of the original intellectual property owners could be deemed as being illegal.

Without any documentation between Multichoice and the intellectual property owners, the owners of the intellectual property lack the rights to fight infringement or violation of their rights in a court of law. Arguably, Nollywood's informality negates the legal processing of the rights of intellectual property owners, and neither does it specify the role or commissions of the third party acting as content supplier for copyright owners. It may thus be argued that Multichoice exploits the lacuna to create illegal provisions for its partners in exploitation.

The contracts are just 4-5 pages and do not have recitals or preambles that clarify (in the case of third party agents) how the licensors come to be the legitimate copyright holders to the subject programme. This is important even for the licensee to ensure that each party to the contract has fundamental legitimate basis to contract.

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the directives of NFVCB and NBC, and equally shows its disinterest in encouraging quality production. More so, as the purveyor of Nollywood contents, Africa Magic channels are the windows through which a majority of Africans access Nollywood films. Multichoice owes Nigeria the civic duty of ensuring that only censored films are transmitted on their channels. This lacuna goes to the observation above on the need for Multichoice as an influential continental corporate player to punch its weight into supporting responsible industry practices and regulatory developments, rather than capitalizing on bureaucratic loopholes that undermine accountability and progressive development of the industry. A strict conformity with the Censorship directive would have ensured that Nollywood films, which are to be broadcast to the world, undergo a certain level of scrutiny which will improve the quality of the films. Again, such gesture would be an evidence of their co-operation with regulators of the industry. Unfortunately, this was obviously omitted or ignored.

In addition, Multichoice contract agreement was silent on the place and benefits of the creative talents who are parts of the productions they purchase. Especially given that an entertainment product such as film is a collective product belonging to many creative talents in the production (Ulin, 2014: 59).

To celebrate a film star on a weekly basis as is obtainable on the channels, it is necessary that such actors be paid royalty as their fans are drawn to the channel throughout the period of showcasing the actor's films. Multichoice's silence over such critical issues may appear to Nollywood artistes that Multichoice has keen interest on profit acquisition without proper attention to critical development issues which could motivate, encourage and empower the industry practitioners to greater height (see Neu, 2006; Desai, 2005). Thus, it could be read as a media company having a nonchalant attitude to formal ethical practice and portrays it as one of the formal organisations which thrives on informality for profiteering.<sup>15</sup> Through its broadcasting and programming, Multichoice endeavours to promote individual Nollywood artistes through corporate endorsements and promotional activities as part of its contribution to the development of the industry. However, for such contributions not to be counterproductive, the contract has to specify the copyright owner so that this may not be misunderstood by the artistes or the trade unions.

### **Additional Observations:**

a) While the South African contract has provision for the licensor to agree with the terms and await a confirmation from Multichoice, the Nollywood contract is a one directional offer by the licensee, specifying the terms under which it is willing to contract with the licensor. It is a form of what is called take-it-or-leave-it kind of contract. It does not seem that there is an accommodation for the licensor to make an input (Browsword, 2006; Beatson et al, 2010). The impression is that the contract is bereft of any bargaining whatsoever, a fact that glaringly underscores the inequality and inequity in the parties' bargaining powers.

b) The worldwide Internet rights are perhaps the most egregious and onerous provisions of the Nigerian contracts. The Internet as an unlimited platform for creative opportunities and transformation of existing works without necessarily undermining the licensee's ability to exploit

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<sup>15</sup> Ramon Lobato (2012) did a detailed study on corporate organizations' profiteering from informality.

the programme (see Ulin, 2014). In fact, licensor activism with the work on the Internet at various fluid scales, characteristic of the Internet platform could enhance the ability of the licensee to optimise the benefit of the program under contract. The idea of vesting the licensee unlimited Internet rights is a sledgehammer approach that may be counterproductive.

c) The contract is silent over the role of licensee at the end of the term.

d) There is no provision for arbitration, or alternative forms of dispute resolution, and the contract is silent on jurisdiction.

## **Conclusion**

The analysis above shows that there is no uniformity between Multichoice's contract to South African and Nigerian filmmakers. There is copious evidence of ethical misconduct and economic exploitation in the contractual relationship between Multichoice and Nollywood. The contracts are designed to enforce Multichoice's structural and perceptual domination of the Nigerian film industry, and the idea is political: designed to enable the South African media corporation to wield power in the industry. Before Multichoice's advent into Nigeria, Nollywood was basically an informal economy where business was based on oral agreements and handshake deals (McCall, 2012). The use of contract agreement in Nollywood was officially introduced by Multichoice. However, the content of the contract documents as analysed above indicates that the welfare of Nollywood practitioners was not protected like those of their South African counterparts. Whereas it is arguable that having an exploitative contract is better than not having a contract at all, it is also important to note that exploitation is effected in two ways: either through structural domination or/and perceptual domination. Structural domination is an intra-firm domination which creates a structure for a group to dominate another group. Thus, the existence of take-it-or-leave-it contract is a structure which Multichoice designed to exploit the film producers who rely on its channels to broadcast their productions. Perceptual domination, according to Dymski, exists when employers or owners of means of production believe that the production of a group is poorer in quality than that of another group, particularly a group in which the owner of means of production belongs. This is evident in the treatment and appreciation of South African films as opposed to Nollywood. For instance, South African films are better appreciated by Multichoice in terms of royalty, although Nollywood films are more popular globally. South African filmmakers are not exploited as much as Nollywood filmmakers, neither are the terms of their contract as sweeping as those of Nollywood. Nollywood practitioners need to collaborate with intellectual property

lawyers in order to tap into intellectual property consultancy in their future business endeavours to prevent exploitation and economic leakages.

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