



**THE PRESIDENCY**

**REPUBLIC OF SOUTH AFRICA**

**DEPARTMENT OF PLANNING, MONITORING AND EVALUATION**

**SOCIO-ECONOMIC IMPACT ASSESSMENT SYSTEM (SEIAS)**

**FINAL IMPACT ASSESSMENT TEMPLATE (PHASE 2)**

**PERFORMERS PROTECTION AMENDMENT BILL**

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## **1 BACKGROUND**

### **1.1 Introduction**

The Socio-Economic Impact Assessment System (SEIAS) was adopted by Cabinet in February 2015 and introduced for implementation by government departments in July 2015. The SEIAS aims to improve policy and legislative processes so as to reduce the cost and optimise the benefits of regulation. The SEIAS also ensures that policy and legislation are aligned to government's national priorities such as inclusive economic growth, employment creation, social cohesion, etc. The risks associated with the implementation of the policy or legislative proposals are also a key feature in the SEIAS process.

The SEIAS is undertaken in two phases, wherein phase 1 is referred to as the initial impact assessment and is about problem identification, analysis of the possible options for addressing the problem and adoption of the most preferred option or intervention. Phase 2 is considered to be the final impact assessment and it provides details of the proposed intervention in terms of impact and risks likely to result from implementation, dispute resolution mechanisms, consultation and monitoring and evaluation.

This report is the final impact assessment in terms of the SEIAS process, undertaken on the Performers Protection legislative review process.

## **2 PROBLEM STATEMENT / THEORY OF CHANGE**

The Performers Protection legislation aims to reward and incentivise performers in terms of their creations and works. The current legislative review aims to amend the Performers' Protection Act 11 of 1967. It addresses issues relating to the payment of royalties to performers, safeguarding the rights of contracting parties, promotes performers moral and economic rights for performances in audio-visual fixations.

Local performers and composers have voiced their dissatisfaction with the current legislation in that it has not offered them adequate protection. The legislative review seeks to ensure that artists do not die as paupers due to ineffective protection.

The Performers Protection Bill seeks to address the challenges facing the creative industry from non-payment of royalties; lack of formalisation of the creative industry which exposes it to abuse.

Problems	Root Causes
Inadequate protection of the moral and economic rights of performers	<ul style="list-style-type: none"> <li>• No legislative provision to grant performers economic and moral rights for live performances or performances fixed in audio-visual fixations.</li> <li>• No legislative provision to award performers the exclusive rights of authorising the utilisation of their protected performances.</li> <li>• No legislative provision for how persons intending to utilise protected performances should inform and pay the performer.</li> <li>• No provision for prohibited conduct in respect of copyright management information.</li> </ul>
Inadequate protection of performers where their work is produced	Lack of regulation of how royalties should be shared between performers and producers of performances or phonograms.
Inadequate protection of digital and electronic works	No provision on prohibited conduct in respect of technological protection measures.
Lack of access to protected performances for fair use and dealings provided for in terms of the Copyright Act, 1978 (Act 98 of 1978)	Lack of provision to allow for protected performances to be accessed for fair use and dealings purposes.

### 3 INTENDED OUTCOMES OF THE PROPOSED AMENDMENTS

The current copyright legislative review aims to achieve the following outcomes:

- Improved protection of performers moral and economic rights
- Improved welfare and economic opportunities for performers
- Improved administration of royalties
- Improved access to dispute resolution mechanisms.

#### 4 DESIGNATED GROUPS AND THE BENEFITS

Groups that will benefit	How will they benefit?
<p>Performers</p> <p>Indigenous communities</p>	<ul style="list-style-type: none"> <li>• Improved management and distribution of royalties by regulating how persons who intend to make use of performances should notify and pay royalties to performers, collecting societies or indigenous communities.</li>   <li>• More protection of performers' moral and economic rights.</li>   <li>• More protection by making provision for prohibited conduct that tampers with copyright management information that is attached to or embodied in a copy of a work.</li>   <li>• Improved protection of performers of phonograms.</li> </ul>
<p>Producers and performers of digital and electronic works</p>	<p>Making provision for prohibited conduct in respect of technological protection measures will protect the rights of producers and performers of digital works.</p>
<p>The public</p>	<p>Incorporation of the fair use provision will afford the public access to protected performances for fair use and dealings such as education, reporting of current events, personal use, research, etc.</p>
<p>Collecting Societies</p>	<p>The revenue generated for the administration of performers royalties.</p>

<b>Groups that will bear the cost</b>	<b>How will they bear the cost?</b>
the dti	<ul style="list-style-type: none"> <li>• Education and awareness.</li> </ul>
CIPC (Companies and Intellectual Property Commission)	<ul style="list-style-type: none"> <li>• Administration of the applications for fair use and dealings for protected performances.</li> <li>• Management of Collecting Societies that will be administering royalties.</li> <li>• Education and awareness</li> </ul>
Collecting Societies	Administration costs in terms of the requirements for persons intending to make use of protected performances.
Performers	Making accessible their protected performances for fair use and dealings.
Producers	Producers of performances will have to equally share the royalties from their productions with performers.
The public	Payment of royalties for the use of protected performances.
Broadcasters	Payment of royalties for the use of protected performances.

## 5 BEHAVIOUR AND MECHANISMS FOR CHANGE

<b>Groups inside government whose behaviour will have to change</b>	<b>Behaviour that must be changed</b>	<b>Main mechanisms to achieve the necessary change</b>
the dti CIPC	Outdated legislation that made no provision for the protection of performers' moral and economic rights.	<p>Amendment of the Performers Protection legislation to make provision for protection of performers' moral and economic rights.</p> <p>Amendment of the Performers Protection legislation to make provision for contractual</p>

		<p>agreements between performers and producers whenever there is a production of a performance, where royalties will be equally shared.</p> <p>.</p> <p>Amendment of the Performers Protection legislation to make provision for how persons who intend to use protected performances should notify and pay royalties to the performer.</p> <p>Amendment of the Performers Protection legislation to make provision for prohibited conduct in respect of technological protection measures.</p> <p>Amendment of the Performers Protection legislation to make provision for prohibited conduct in respect of copyright management information.</p>
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Groups outside government whose behaviour will have to change	Behaviour that must be changed	Main mechanisms to achieve the necessary change
Producers and broadcasters of performances	Contractual terms that do not offer performers their due benefits.	Legislative requirements that contractual agreements be entered into between producers and performers.
The public	Ignorance and contravention of performers' protected rights.	Education and awareness by the <b>the dti</b> and CIPC on the rights of performers, payment of royalties, the use of performances for fair use or dealings and prohibited conduct in respect of technological protection measures and copyright management information.
Performers	Exclusive rights with no exceptions.	Incorporation of the fair use and dealings into the Performers Protection legislation.



## 6 CONSULTATIONS

Affected stakeholders	What do they see as main benefits, costs and risks	Do they support or oppose the proposal	What amendments do they propose	Have these amendments been incorporated in your proposal
Department of Communications	The incorporation of World Intellectual Property Organisation WIPO treaties will protect authors of digital works. However, broadcasters should only own signals and not content	They support the proposal	It must be made clear that broadcasters only own the signals and not the content	The proposal will be incorporated in the regulations
Performers	The collective management of copyright will facilitate royalty payments to performers	They support the proposal for the collection of royalties by Collecting Societies	None	Not applicable
Collecting Societies	The regulation of the collective management of copyright will ensure standardization of practices among Collecting Societies	They support the proposal	None	Not applicable
Broadcasters	The prescription of minimum contractual terms by the Minister will infringe the rights to freedom to contract	They oppose the proposal	Contractual terms should be left to the contracting parties for determination	The proposal is not incorporated as the lack of minimum contractual terms will perpetuate the unlevelled playing field between performers and recording companies / broadcasters
Producers	Performers will be given an opportunity to own copyright on their work through contractual arrangements.	They support the proposal	They propose that the contract has to explicitly state that the performer and the person who commissioned the work will	Yes, it has been incorporated.

Affected stakeholders	What do they see as main benefits, costs and risks	Do they support or oppose the proposal	What amendments do they propose	Have these amendments been incorporated in your proposal
			own the work or elements of the work or licence the work under specific conditions.	

## 7 IMPACT ASSESSMENT

### 7.1 Implementation costs and benefits

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
<p><b>Proposal 1.</b> A performer shall as regard his or her live performances or performances fixed in audio-visual fixations, have the right -</p> <p>(a) to claim to be identified as the performer of his or her performances, except where omission is dictated by the manner of the use of the performance; and</p> <p>(b) to object to any distortion, mutilation or other modification of his or her performances that would be prejudicial to his or her reputation, taking due account of the nature of audio-visual fixations</p>				
Performers Producers The public CIPC (Companies and Intellectual Property Commission) <b>the dti</b> (Department of Trade and Industry)	None	The costs of enforcing the moral rights will be embedded in the costs for the application for use of the protected performance.  Education and awareness by CIPC and <b>the dti</b> to performers, producers and the public on the moral rights of performers.	Improved protection of the moral rights of performers as regards use of their works.	The moral rights should be included in the copyright management information; so that every user is aware of such rights.
<p><b>Proposal 2.</b> A performer shall enjoy the exclusive right of authorizing, as regards his or her performances -</p>				

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
<p>(a) the broadcasting and communication to the public of his or her unfixed performances except where the performance is already a broadcast performance;</p> <p>(b) the fixation of his or her unfixed performances;</p> <p>(c) the direct or indirect reproduction of his or her performances fixed in audio-visual fixations, in any manner or form;</p> <p>(d) the making available to the public of the original and copies of his or her performances fixed in audio-visual fixations through sale or other transfer of ownership;</p> <p>(e) the commercial rental to the public of the original and copies of his or her performances fixed in audio-visual fixations, even after distribution of such copies by, or pursuant to, authorization by the performer;</p> <p>(f) the making available to the public of his or her performances fixed in audio-visual fixations, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them;</p> <p>(g) the broadcasting and communication to the public of his or her performances fixed in audio-visual fixations.</p>				
<p>The public</p> <p>CIPC</p> <p><b>the dti</b></p> <p>Collecting Societies</p>	<p>Administration costs for the CIPC in the management of Collecting Societies that will be authorising the use of protected performances.</p>	<p>Education and awareness by CIPC and <b>the dti</b> to performers, producers and the public on the economic rights of performers.</p> <p>Collecting Societies would also incur administration costs in terms of the process to authorise the use of protected performances.</p>	<p>Improved protection of the economic rights of performers as regards use of their works.</p>	<p>None</p>

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
<p><b>Proposal 3.</b> A performer and the producer of a performance (including phonograms) shall enjoy the right to a single equitable remuneration for the direct or indirect use of the performance published for commercial purposes for broadcasting or for any communication to the public, which remuneration shall be shared equally between the producer on the one hand, who shall receive half thereof, and a performer on the other, who shall receive the other half, as provided for in this Act.</p>				
Performers Producers CIPC <b>the dti</b>	CIPC would incur costs of managing Collecting Societies who would be collecting royalties from productions.	The producers and performers will incur the costs of entering into a contractual agreement.  Education and awareness by CIPC and <b>the dti</b> to performers and producers on the legislative requirement for equitable share of benefits or royalties.	Increased protection of performers where their performances are produced and used for commercial purposes.	None
<p><b>Proposal 4.</b> A person who intends to -</p> <p><u>(a)</u> broadcast or communicate to the public an unfixed performance or performance that will be fixed in an audio or audio-visual fixation of a performer;</p> <p><u>(b)</u> make a fixation of the unfixed performance or performance fixed in an audio or audio-visual fixation of a performer;</p> <p><u>(c)</u> make a reproduction of a fixation of a performance or performance fixed in an audio or audio-visual fixation of a performer;</p> <p><u>(d)</u> make available to the public the original or copies of performance fixed in an audio or audio or audio-visual fixation through sale or otherwise of a performer;</p> <p><u>(e)</u> commercially rent out to the public the original or copies of performance fixed in audio or audio-visual fixation of such a performer;</p> <p><u>(f)</u> make available to the public, performance fixed in an audio or audio-visual fixation of a performer, by wire or wireless, in such a way that members of the public may access them from a place and at a time individually chosen by them interactively or non-interactively must –</p>				

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
<p>(i) give the performer, Collecting Society or indigenous community, a notice in the prescribed manner of his or her intention to perform such acts, indicating where practical, the date of the proposed performance, proposed terms and conditions for the payment of royalty and ask the copyright owner, Collecting Society or indigenous community to sign the proposal attached thereto.</p> <p>If the performer, Collecting Society or indigenous community rejects or proposes different terms and conditions to such proposal and the performer, Collecting society or indigenous community proposal is rejected after negotiations, either party may in the prescribed manner refer the matter to the Tribunal.</p>				
Performers Producers The public Broadcasters Sellers of protected performances Collecting Societies Indigenous communities IP Tribunal CIPC <b>the dti</b>	The Tribunal will bear the costs of adjudicating on cases referred to it where there is no agreement on the terms and conditions of the royalty payments.	Education and awareness by the CIPC and <b>the dti</b> for performers, broadcasters, producers, the public, dealers of performances fixed in audio or audio-visual fixations, Collecting Societies and indigenous communities about the process to be followed when one intends to make use of protected performances.	Improved collection of royalties by Collecting Societies and indigenous communities.  Improved livelihoods and welfare of performers from payment of royalties.  Improved resolution of disputes over royalty payments.	There will need to be clear processes for the submission of notices and payment of royalties to indigenous communities.

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
<p><b>Proposal 5.</b> The prohibited conduct in respect of the technological protection measure works, the use of a technological protection measure circumvention device and the exceptions related to technological protection measure contemplated in the Copyright Act, 1978 (Act 98 of 1978), shall mutatis mutandis apply in respect of performances fixed or fixed in an audio or audio-visual fixations.</p> <p>Contravention of the technological protection measure provisions shall be an offence and a person convicted thereof shall be liable in terms of the provisions of this Act.</p>				
<p>The public Tribunal SAPS (South African Police Services) The Courts CIPC <b>the dti</b> Performers Producers</p>	<p>Assistance to enable circumvention as provided for in the Copyright Act 98 of 1978.</p>	<p>The Tribunal, SAPS and the courts would need to put in place mechanisms to establish whether the circumvention of the technological protection measure by the accused or alleged trespasser was deliberate or not.</p> <p>The public or would-be users of protected performances would incur costs of applying to the performer for</p> <p>The applicant will incur costs of engaging the services of another person for assistance, where the applicant did not receive a response or the request was refused as provided for in</p>	<p>Improved protection of performances that are subject to technological protection measures.</p> <p>Improved payment of royalties and benefits for performers.</p> <p>Reduced cases of circumvention of technological protection measures.</p> <p>Increased use of technological protection measures to make performances available in digital or electronic form for the benefit of the public.</p>	<p>Enforcement of this provision may be difficult since it depends on whether the person knew or had reason to believe that the technological protection measure circumvention device made, imported, sold, distributed, let for hire would or was likely to be used to infringe copyright in technological protection measure work.</p>

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
		<p>the Copyright Act 98 of 1978.</p> <p>Education and awareness by the CIPC and <b>the dti</b> for performers, producers, the public, digital and electronic content providers so that they are aware of the provision to prohibit conduct that seeks to circumvent technological protection measures and the consequences for the contravention of the provision.</p>		
<p><b>Proposal 6.</b> A performance, a fixation or audio-visual fixation of a performance or a reproduction of such a fixation or audio-visual fixation may be used without the consent of the performer if it is for purposes that are acceptable and exempted in terms of the fair use and dealings as well as the general exceptions from protection of copyright provided for in terms of Copyright Act,1978 (Act 98 of 1978).</p> <p>For the purposes of this Act and of Section 86 of the Electronic Communications and Transactions Act No. 25 of 2002, nothing in this Act shall prevent any person from using a technological protection measure circumvention device to perform -</p> <p>(a) a permitted act that falls within fair use and dealings provisions and general exceptions in this Act and the Copyright Act; or</p>				



Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
<p>(b) the sale, offer to sell, procurement for use, design, adaptation for use, distribution or possession of any device or data, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data, in order to enable the performance of any act permitted in terms of paragraph (a) of this section is not unlawful.</p>				
Performers Producers The public CIPC <b>the dti</b>	CIPC bear administration costs in terms of applications for the use of protected performances for fair use and dealing purposes.	<p>The public or users of protected performances to incur costs of applying to the CIPC to be granted permission to use the works for fair use and dealings.</p> <p>Education and awareness by the CIPC and <b>the dti</b> for the performers, producers, the public to be aware of the provision for fair use and dealings.</p>	<p>The public and users of protected works will benefit from access to performances for fair use and dealings without any payment of royalties.</p> <p>Access to such works for fair use and dealings will foster learning and development as well as improve information sharing.</p>	<p>CIPC would need to be adequately resourced in order to administrate the fair use and dealings provision.</p> <p>Possible loss of revenue for performers and producers from work used for fair use and dealings.</p>
<p><b>Proposal 7.</b> The prohibited conduct in respect of the removal or modification of copyright management information attached to, or embodied in, a copy of work and the exceptions relating to such removal or modification contemplated in the Copyright Act, 1978, shall mutatis mutandis apply in respect of performances that are fixed or fixed in audio-visual fixations.</p> <p>Contravention of the copyright management information provisions contemplated in subsection (1) shall be an offence and a person convicted thereof shall be liable in terms of the provisions of section of this Act.</p>				
Performers Producers The public	None	The Tribunal, SAPS and the courts would need to put in place mechanisms to establish whether the removal or modification of	Increased protection of performers' and producers rights and economic benefits because this provision seeks to ensure	This provision may be difficult to enforce since its enforcement depends on whether one knew or had

Groups	Implementation costs	Costs of changing behaviour	Benefits from achieving desired outcomes	Comments
<p>Sellers/dealers in copyright works</p> <p>Tribunal</p> <p>SAPS (South African Police Services)</p> <p>The Courts</p> <p>CIPC</p> <p><b>the dti</b></p>		<p>the copyright management information was done deliberately to infringe on the performer's rights or not.</p> <p>The public or users of copyright works would incur costs of requesting authorisation of the performer to remove or modify the copyright management information as provided for in the Copyright Act 98 of 1978.</p>	<p>that the copyright management information is kept intact and not tampered with for all users of the works to be aware of and treat the works according to the indicated terms and conditions.</p>	<p>reason to believe that the removal or modification will induce, enable, facilitate or conceal an infringement of the copyright in the work.</p> <p>Enforcement also depends on whether one knew or had reason to believe that the copyright management information has been removed or modified without the authority of the copyright author or owner.</p>

## **8 BUDGETS AND STAFFING REQUIREMENTS**

The CIPC would need to allocate resources for the registration and reporting requirements for Collecting Societies and for the administration of applications for fair use and dealings.

## **9 HOW THE PROPOSALS MINIMISE IMPLEMENTATION AND COMPLIANCE COSTS**

The proposed amendments seek to protect the rights of performers whilst balancing this with the promotion of access to such works for fair use and dealings. Most of the proposals would come with increased implementation costs for CIPC in terms of the management of Collecting Societies. The CIPC and **the dti** would need to embark on education and awareness so as to realise the intended outcomes of the legislation. These implementation costs are deemed to be outweighed by the economic benefits that will accrue to the protected performers.

## **10. DISPUTE RESOLUTION**

The Copyright legislative review recommends the establishment of an Intellectual Property (IP) Tribunal that will preside over disputes lodged on IP matters, including those related to performers' protection.<sup>1</sup>

The established Tribunal will deal with potential disputes from performers, producers, broadcasters and the public that may arise from the implementation of the proposed amendments to the Performers Protection Act. For example, there could be disputes arising from the proposal on the equal sharing of royalties between producers and performers.

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<sup>1</sup> The assessment of the establishment of the Tribunal in terms of SEIAS has been done in the SEIAS report for the Copyright Amendment Bill Since the Tribunal will be established in terms of the Copyright Amendment Act and not the Performers Protection Amendment Act,

## 11. RISK MANAGEMENT

Identified risk	Mitigation measures
<p>Lack of capacity by Companies and Intellectual Property Commission (CIPC) to manage Collecting Societies and to administrate the fair use and dealings provision.</p> <p>Lack of capacity by the Tribunal to timeously adjudicate on cases brought before it</p>	<p>Capacity issues within the CIPC and the Tribunal would be addressed prior to the implementation of the new proposals to avoid unintended consequences.</p>
<p>Abuse of the fair use provision</p>	<p>The Copyright Amendment Bill outlines what the CIPC would need to consider in determining whether the intended use by the applicant constitutes fair use or dealing.</p>
<p>Infringements of performers rights</p>	<p>Education and awareness and information dissemination campaigns to the public, producers and sellers of protected performances so that they are aware of the new provisions.</p>

## 12. MONITORING AND EVALUATION

Implementation monitoring of the proposed amendments to the Performers Protection legislation will be a continuous process that will inform decision making on the manner in which resources are employed and activities undertaken during implementation. The information acquired through the monitoring process will also inform the short, medium and long term evaluation of the Performers Protection legislation.

There exists a Monitoring and Evaluation Unit within the Consumer and Corporate Regulation Division of the Department of Trade and Industry (**the dti**), which is responsible for the monitoring and evaluation of policies and legislation under the custodianship of the Division. The Unit will develop an M&E plan to guide the monitoring and evaluation of the implementation of the Performers Protection legislation. Monitoring will be done on a continuous basis while evaluations will be undertaken within a period of 3 to 5 years. Monitoring and evaluation results will be assessed against the legislative objectives or outcomes and appropriate measures will be undertaken to ensure that the intended outcomes are realised.

### 13. IMPACT ON NATIONAL PRIORITIES

Priority	Impact
Social cohesion	<p>The collective management of copyrights will ensure that performers are duly rewarded for their efforts and this would eliminate any disharmony between users and performers, thereby contributing to social cohesion.</p> <p>Facilitating access to protected performances for fair use and dealings will provide the public or communities with the knowledge and information required to build and develop sustainable communities.</p>
Security	The fair use provisions will provide legal certainty to those who use protected works and curb the infringement of copyright and security over the used works.
Economic growth and investment	Rewarding performers offers economic benefits in the form of royalties and encourages innovation and investment in the creative industry.
Economic inclusion (employment creation and equity)	The collective management of copyright will offer a platform for both big and small scale performers to get recognition for their work by registering with Collecting Societies to receive royalties for their works. Collecting Societies would serve as an incentive for performers (especially small players) to enter the mainstream economy and reap economic benefits for their efforts.
Environmental sustainability	None.

### 14. SOCIAL AND ECONOMIC GROUPS TO BENEFIT AND BEAR THE COST THE MOST

Main beneficiaries	Main cost bearers
Performers	CIPC (implementation of the new provisions and education and awareness)
Producers	<b>the dti</b> (Education and awareness)
The public	The public (payment of royalties)
Collecting Societies	Tribunal (adjudication of cases)
Indigenous communities	

## 15. CONCLUSION

In conclusion, the proposed legislative amendments will achieve the intended outcomes if enforcement and education and awareness are intensified.

## 16. AREAS FOR ADDITIONAL RESEARCH

No areas of further research have been identified.

## 17. COMPILATION OF SEIAS

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