

Why South Africa's Copyright Amendment Bill Judgment Matters

Constitutional Court confirms fair use, limits education exceptions, and sends the Bill back to Parliament

In a significant decision, the Constitutional Court held section 12D(1)–(5) of the Copyright Amendment Bill [B13F-2017] unconstitutional, while upholding several other key provisions within the scope of the President's referral. The Court confirmed that copyright is a statutory property right that is not absolute and may be limited by properly framed exceptions. Because of the constitutional defect identified in section 12D(1)–(5), the Bill cannot be enacted in its current form and will require further parliamentary reconsideration.

AT A GLANCE: KEY TAKEAWAYS

- ✓ A landmark South African copyright decision with far-reaching implications.
- ✓ Fair use and several public-interest exceptions were upheld as constitutionally valid.
- ✓ The Court confirmed: copyright is not an absolute property right.
- ✓ Section 12D(1)–(5) (education exceptions) was found unconstitutional.
- ✓ The Copyright Amendment Bill cannot currently be enacted in its present form.
- ✓ Major implications for copyright reform, access to knowledge, and parallel importation.

LEGISLATIVE PATH TO THE CASE



2019 – Passed by Parliament

The Copyright Amendment Bill and the Performers' Protection Amendment Bill were passed by Parliament.



2020 – Referred back by the President

The President referred the Bills back to Parliament due to constitutional reservations.



Reconsidered by Parliament

Parliament reconsidered the Bills in light of the President's concerns.



Early 2024 – Resubmitted to the President

The Bills were resubmitted to the President in early 2024.



10 October 2024 – Referred to the Constitutional Court

The President referred certain provisions to the Constitutional Court for a ruling on their constitutionality under section 79(4)(b) of the Constitution.

Why South Africa's Copyright Amendment Bill Judgment Matters

The Constitutional Court's decision in *Ex parte President of the Republic of South Africa: In re Constitutionality of the Copyright Amendment Bill and the Performers' Protection Amendment Bill* [2026] ZACC 26 did not arise in isolation. It followed years of debate about whether the Copyright Act 98 of 1978 met the needs of a modern economy shaped by digital use, access to knowledge, education, preservation, and technological change.

The Bills sought to modernise South African copyright law through fair use, broader exceptions for education, libraries, archives, research, disability access, and provisions on royalties and performers' rights. Supporters viewed the reforms as necessary to align copyright law with constitutional values and contemporary patterns of use. Critics, including many rights holders and industry groups, argued that some provisions were too broad and created legal uncertainty.

The Bills were passed by Parliament in 2019, referred back by the President in 2020, reconsidered by Parliament, and resubmitted to the President in early 2024. On 10 October 2024, the President then referred certain provisions to the Constitutional Court for a ruling on their constitutionality under section 79(4)(b) of the Constitution. That referral set the stage for a major judgment on the constitutional limits and future direction of copyright reform in South Africa.

The Court confirmed that copyright is a statutory property right that is not absolute and may be limited by properly framed exceptions. It upheld the Bill's fair use provision in section 12A and several other new exceptions, including sections 12B and 12C. That is an important signal that South African law can accommodate a more modern, public-interest-oriented copyright framework.

Section 12B is especially important because it includes the Bill's proposed international exhaustion rule, which could permit parallel importation if enacted.

However, the Court held that section 12D(1)–(5), dealing with certain education-related exceptions, was unconstitutional. The Court also held that the President's referral in relation to sections 6A, 7A and 8A as a whole was incompetent, and therefore did not decide their constitutionality on the merits.

Because of those findings, the Bill cannot be enacted in its current form.

The practical result is that the Copyright Act 98 of 1978 remains the primary copyright statute in force for now, pending further legislative action. Even so, the judgment remains a landmark because it confirms that meaningful copyright reform is constitutionally possible in South Africa while new exceptions must be carefully tailored.

For anyone involved in publishing, broadcasting, education, technology, entertainment, or consumer goods, this is a case worth watching closely. It shapes the legal debate around fair use, access to copyrighted works, and parallel imports, and it will likely influence South African copyright policy for years to come.

What the Court Upheld

Fair use survives constitutional scrutiny

The Constitutional Court confirmed that copyright is a statutory property right that is not absolute and may be limited by properly framed exceptions. Parliament may therefore introduce exceptions where they advance important constitutional interests such as access to knowledge, research, preservation, freedom of expression, and transformative use.

Most significantly, the Court upheld the Bill's proposed fair use provision in section 12A. It also upheld section 12B and section 12C, confirming that South African copyright law may constitutionally accommodate a more flexible, public-interest-oriented framework. For businesses, rights holders, educators, and creators, section 12B is especially important because it includes the Bill's proposed international exhaustion approach, which could permit parallel importation if enacted.



KEY FINDINGS CONFIRMED BY THE COURT

- **Section 12A** – the Bill's proposed fair use provision was upheld.
- **Section 12B and section 12C** – several additional public-interest exceptions were also upheld.
- The Court accepted that copyright law may accommodate broader public policy concerns and constitutional values.
- The judgment supports the possibility of a more modern and flexible copyright framework in South Africa.
- **Section 12B** also carries major significance because it includes the Bill's proposed international exhaustion approach, opening the door to parallel importation if enacted.



WHY THIS IS SIGNIFICANT

For **rights holders**, businesses, educators, creators, libraries, archives, and technology-driven sectors, the decision signals that meaningful copyright reform remains constitutionally possible. It also confirms that a public-interest-oriented copyright regime is not inherently inconsistent with property protection.

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Copyright is a statutory property right that is not absolute and may be limited by properly framed exceptions.

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Key Constitutional Findings and Their Significance

The Court's judgment is anchored in several core findings that will shape the future of copyright law in South Africa.



1. COPYRIGHT IS NOT ABSOLUTE

The Court confirmed that copyright is a statutory property right that is not absolute and may be limited by properly framed exceptions. These limitations must be consistent with the Constitution, particularly the rights of access to knowledge, education, research, and freedom of expression.



2. PARALLEL IMPORTATION IS PERMISSIBLE

The Court upheld the constitutionality of section 12A (fair use) of the Bill, including the proposed international exhaustion rule. This means that copyright owners cannot control the first sale of a work once it has been lawfully sold in another country. Parallel importation of physical copies would therefore be allowed under the enacted Bill.



3. EDUCATION-RELATED EXCEPTIONS WERE TOO BROAD

The Court found section 12D(1)–(5) of the Bill unconstitutional because the exceptions were too wide, lacked sufficient safeguards, and did not adequately balance the rights of copyright owners with the public interest.



4. THE PRESIDENT'S REFERRAL IN RELATION TO SECTIONS 6A, 7A AND 8A WAS INCOMPETENT

The Court held that the President's referral in relation to sections 6A, 7A and 8A as a whole was incompetent, and therefore did not decide their constitutionality on the merits.



5. EXCEPTIONS MUST BE CAREFULLY TAILORED

The Court emphasised that any limitation on copyright must be narrowly tailored, proportionate, and subject to appropriate safeguards to prevent abuse and undue harm to authors and creators.

WHY THIS MATTERS



The decision reaffirms that the Constitution is the ultimate framework within which copyright law operates.



It validates Parliament's intent to update copyright law for the digital age—while setting clear limits on how far exceptions can go.



It provides certainty on parallel importation, a key issue for publishers, distributors, and consumers.



It signals that future copyright reform must balance the interests of creators with the public's constitutional rights to access knowledge and culture.



Copyright is not an end in itself. It exists to promote creativity and innovation in a manner that balances private rights with the public good.

CONSTITUTIONAL COURT



What the Judgment Means in Practice



For Businesses and Importers

Parallel importation of books, software, films, and other goods is constitutionally protected under the enacted Bill.



For Educators and Institutions

Education-related uses are allowed, but institutions must ensure that any use falls within narrowly tailored exceptions once the Bill is enacted.



For Creators and Rightsholders

The decision confirms the continued value of copyright, but also underscores the need to adapt to a more accessible and user-friendly legal environment.



For Policymakers

Any further exceptions must be precise, proportionate, and evidence-based to withstand constitutional scrutiny.



This is a landmark ruling that will influence copyright policy, business models, and access to knowledge in South Africa for years to come.

WHAT HAPPENS NEXT?

1

GOVERNMENT REVIEW

The Department of Trade, Industry and Competition (DTIC) is expected to review the judgment and consider options.

2

LEGISLATIVE RECONSIDERATION

Parliament may choose to amend and reintroduce certain provisions, especially those relating to education exceptions.

3

STAKEHOLDER ENGAGEMENT

Consultation with rights holders, civil society, educators, libraries, and industry will be critical to future reform.

4

ONGOING IMPACT

The judgment will guide courts, policymakers, and industry in interpreting and applying copyright law in the interim.

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Broader Context: International Alignments and Comparative Signals

The judgment reflects global trends and provides clarity on South Africa's copyright obligations and policy choices.



CONSISTENCY WITH INTERNATIONAL OBLIGATIONS

The Court was conscious of South Africa's obligations under the Berne Convention, the TRIPS Agreement, the WIPO Copyright Treaty (WCT), and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.



BALANCING RIGHTS IN THE DIGITAL ERA

The Court recognised the need for a copyright framework that works in the digital environment—promoting innovation, enabling new business models, and supporting access to knowledge—while safeguarding the legitimate interests of authors and rights holders.



PUBLIC INTEREST AS A GUIDING CONSIDERATION

The judgment confirms that copyright law must strike an appropriate balance between private rights and the public interest, including access to education, research, culture, information, and the free expression of ideas.

“Copyright law must evolve with technology and society, but always with fidelity to the Constitution and the public good.”

CONSTITUTIONAL COURT



EDUCATORS

Greater certainty for lawful uses in teaching, research, and institutions.



CREATORS & RIGHTS HOLDERS

Affirmation that copyright remains valuable, enforceable, and not absolute.



POLICYMAKERS

Clear direction on how to draft future exceptions that meet constitutional standards.



BUSINESSES & IMPORTERS

Legal certainty for parallel imports and cross-border access to legitimate goods and content.

IMPLICATIONS FOR KEY STAKEHOLDERS

Looking Ahead

The judgment does not close the chapter on reform—it opens the door to a more deliberate and constitutionally sound approach.



LEGISLATIVE REFORM WILL CONTINUE

Parliament retains the authority to amend copyright law and introduce new exceptions, provided they meet constitutional requirements.



DRAFTING MATTERS

Future exceptions must be narrowly tailored, evidence-based, and proportionate to promote legitimate objectives in the public interest.



ENGAGEMENT IS ESSENTIAL

Meaningful consultation with rights holders, civil society, industry, educators, libraries, and creators will be critical to building consensus.



THE LAW WILL EVOLVE

Courts, policymakers, and industry will continue to shape copyright law in light of technological change and societal needs.



This landmark judgment provides clarity, certainty, and direction. It confirms that copyright in South Africa must serve both creativity and the constitutional promise of an open and informed society.

REMAINING QUESTIONS



- How will Parliament redraft and reintroduce the education exceptions to meet constitutional standards?
- Will further limitations be introduced for digital uses such as text and data mining?
- How will access for persons with disabilities continue to be enhanced in practice?
- How will courts apply the parallel importation rule in future disputes?

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Technical Implications: What Changes, What Stays the Same

An expert breakdown of the Court's judgment and its practical impact.

The judgment clarifies the constitutional boundaries for copyright reform. It confirms that reform remains possible, but also makes clear that constitutional discipline, precision in drafting, and further legislative action are required.

KEY TECHNICAL IMPLICATIONS



1 THE BILL IS NOT YET LAW

The judgment does not itself enact the Bill. The provisions upheld by the Court cannot be applied until Parliament validly enacts them.



2 THE 1978 ACT REMAINS PRIMARY

The Copyright Act 98 of 1978 remains the primary copyright statute in force for now, pending further legislative action.



3 FAIR USE UPHELD IN PRINCIPLE

The Court upheld proposed section 12A as constitutionally valid. However, it is not yet operative and will only apply once enacted into law.



4 SECTIONS 12B AND 12C UPHELD

The Court upheld these proposed public-interest exceptions, confirming that properly framed exceptions are constitutionally permissible.



5 SECTIONS 6A, 7A AND 8A NOT DECIDED ON THE MERITS

The Court held that the President's referral in relation to sections 6A, 7A and 8A as a whole was incompetent, and therefore did not decide their constitutionality on the merits.



6 SECTION 12D(1)-(5)

The Court held proposed section 12D(1)-(5), dealing with certain education-related and academic-use exceptions, unconstitutional, and those provisions must be reconsidered before the Bill can proceed.



7 NATURE OF COPYRIGHT

The Court confirmed that copyright is a statutory property right that is not absolute and may be limited by properly framed exceptions.



Organisations should continue to apply the current statute (the Copyright Act 98 of 1978) while monitoring parliamentary redrafting and enactment of the upheld provisions.

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The judgment keeps copyright reform alive, but not on the current wording.

CONSTITUTIONAL COURT

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WHAT THIS MEANS IN PRACTICE



FOR CREATORS

Core copyright protections remain in place. Reform may expand fair use and access, but only once validly enacted.



FOR EDUCATORS & INSTITUTIONS

Existing limited exceptions continue to apply. Broader education exceptions must await careful redrafting and enactment.



FOR RIGHTS HOLDERS

The current legal framework remains in force. Stay engaged in the reform process to shape future outcomes.



FOR BUSINESSES

Continue to apply the existing statute when licensing, importing, and using copyrighted content and goods.



FOR POLICYMAKERS

Redrafting and legislative steps are required. Constitutional precision and stakeholder consultation remain essential.

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Looking Ahead: The Next Phase of Copyright Reform

What Parliament, rights holders and users of copyright works should watch next

The Constitutional Court's judgment does not end the reform process. It confirms that meaningful copyright reform is constitutionally possible, while requiring Parliament to correct the defects identified by the Court and to complete the legislative process with greater precision.

THE ROAD AHEAD

1



CORRECT THE CONSTITUTIONAL DEFECT

Parliament must reconsider and redraft section 12D(1)–(5) so that any education-related exceptions are sufficiently tailored and constitutionally defensible.

2



DETERMINE HOW THE REMAINING PROVISIONS PROCEED

The legislative process must cure the constitutional defect in section 12D(1)–(5) and determine how the remaining provisions, including sections 6A, 7A and 8A, will proceed before the Bill can be validly enacted.

3



RE-ENGAGE AFFECTED STAKEHOLDERS

Further legislative consideration and stakeholder engagement are likely as Parliament addresses the constitutional defect and considers the remaining provisions.

4



PREPARE FOR IMPLEMENTATION

If a revised Bill is enacted, organisations will need to update policies, licensing practices, compliance guidance and commercial risk assessments.

ISSUES TO MONITOR

A

FAIR USE AND IMPLEMENTATION GUIDANCE

Whether the final legislation retains section 12A in its present form and how courts and users will apply its factors in practice.

B

EDUCATION, RESEARCH AND ACCESS

How Parliament narrows section 12D while preserving constitutionally legitimate access to knowledge and learning materials.

C

INTERNATIONAL EXHAUSTION

Whether section 12B is enacted and how parallel importation may affect pricing, distribution models and territorial licensing.

D

PERFORMERS' RIGHTS AND ROYALTIES

How sections 6A, 7A and 8A are taken forward, given that their constitutionality was not decided on the merits.

E

THE CURRENT ACT AND CONSTITUTIONAL JURISPRUDENCE

How the Copyright Act 98 of 1978 continues to operate as the primary statute, informed by constitutional decisions including *Blind SA*.

IP BRIEFS TAKEAWAY

“The judgment keeps the door open to modern copyright reform - but insists that public-interest exceptions must be drafted with constitutional discipline.”

ABOUT THE AUTHOR

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