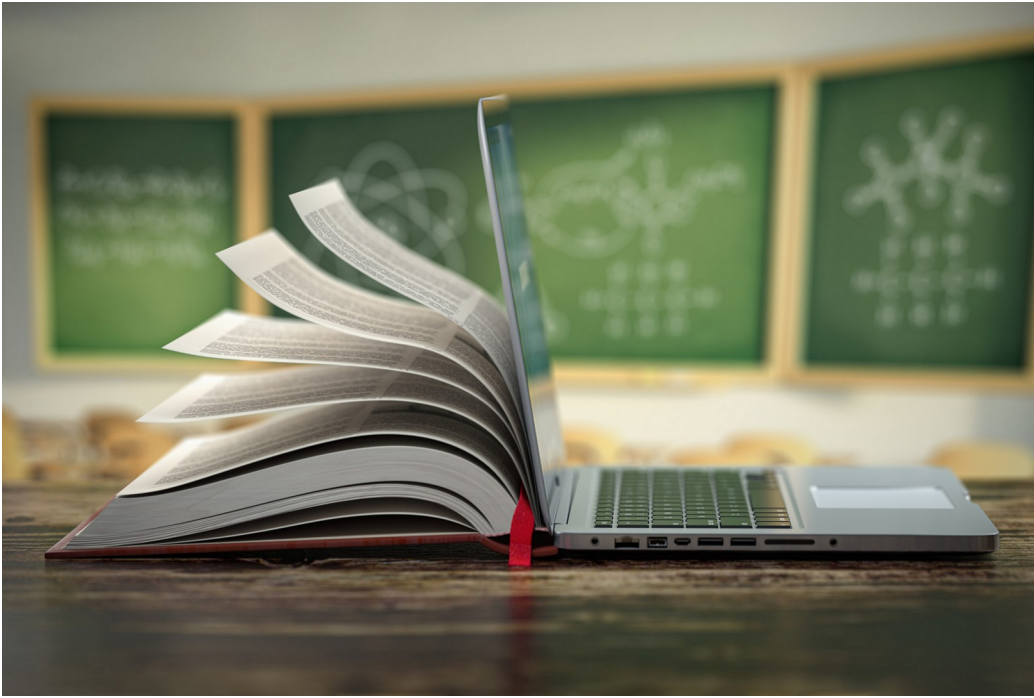


To Recuse or Not to Recuse? An Update.

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by Lindsey Sadler



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Given that litigation in the United States can take *years* from start to finish, we rarely see a conclusion to the cases we follow. In a [prior blog post](#), we looked at the potential recusal requirements of the U.S. Supreme Court when one—or even six—Justices have a personal, professional, or financial interest in the parties arguing before it. Although our ultimate question of whether a Justice would, or should, recuse themselves will remain unanswered, a long-standing copyright infringement case has concluded and warrants a final review.

To refresh, in a September 2024 decision, the Second Circuit affirmed a lower court’s decision that defendant Internet Archive had infringed the copyrights of 127 books by facilitating the unfettered lending of digitized copies during the COVID-19 pandemic. In light of libraries shutting down across the country, Internet Archive created its “National Emergency Library,” which provided thousands of digital copies of books to people around the country who did not otherwise have access to such resources. However, the plaintiff book publishers argued that while Internet Archive had a right to loan out copies of the *printed* books it had lawfully acquired, it went too far by digitizing those same books and allowing upwards of 10,000 digital loan outs. These acts through the National Emergency Library, the plaintiffs argued, amounted to blatant copyright infringement. The courts agreed.

Internet Archive had until December 7, 2024 to file a writ of certiorari with the U.S. Supreme Court. In a [press release](#) dated just three days prior, Internet Archives stated that it had decided not to pursue Supreme Court review of the appellate court’s decision. Although lamenting the opinion, Internet Archive vowed to continue advocating for a future in which “libraries can purchase, own, lend, and preserve digital books” as part of its ongoing mission to provide individuals with access to knowledge they might not otherwise have. But as a result of the Second Circuit’s decision, it would continue to work with the Association of American Publishers (“AAP”) to remove digital copies of the

AAP's member publishers' books from Internet Archive's repository upon request.

The AAP celebrated Internet Archive's decision, which effectively ended five years of combative litigation. In its own press release, the AAP proclaimed that "publishers have achieved a decisive and broadly applicable victory for authors' rights and digital markets." Such authors' rights include further protection against online piracy, as well as unlawful use by artificial intelligence developers, who collect voluminous amounts of material to train their generative systems. As we have seen in numerous other cases working their way up through the courts, copyright owners, authors, and news outlets argue that AI systems feed on digitized copyrighted materials for training purposes, and the output is, allegedly, copyright infringing material. Permanently enjoining Internet Archive from digitizing printed books and loaning them out *en masse* is just one more step in protecting authors' work from widespread, unrestricted dissemination, the AAP's logic follows.

So the Internet Archive lawsuit will not be the case that tests the Supreme Court's recusal standards. But this is only the beginning. Outside of the intellectual property world, there continue to be calls for Supreme Court Justices to step down from cases before them if they have a conflict with, or an interest in, any involved party. But until the Code of Conduct for Justices of the Supreme Court of the United States is amended to add clarity to its vague terms, such as "financial relationship" or "private interest," recusals will continue to be based on an honor system.