

To Recuse or Not to Recuse? That is the Question Potentially Facing Supreme Court Justices on Book Publisher Copyright Case

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What happens if two-thirds of the U.S. Supreme Court justices have a conflict of interest in a case presented before the Court? The speculative possibilities are abundant in such a situation—do all of the affected Justices have to agree to recuse? What if only some, but not all, recuse? Can the case just be decided by the three unaffected Justices?

While it is not a circumstance the Supreme Court has ever faced before, it may have to in the upcoming term. The potential scenario stems from a lawsuit filed by four large book publishing companies against a non-profit digital library alleging copyright infringement of printed books owned by the co-plaintiff book publishers. Six of the nine justices have previously published books or have signed book deals with three of the co-plaintiff book publishers, including Justices Barrett, Gorsuch, Jackson, Kavanaugh,

Sotomayor, and Thomas. The Second Circuit issued a decision in this case in September. If that decision is appealed by the December 7th deadline, and the Supreme Court grants certiorari, six of the nine justices will have a professional relationship with some of the co-plaintiffs, which raises a host of conflict of issue questions.

Founded in 1996, the defendant, Internet Archive, is a San Francisco-based non-profit digital library that offers the public free access to digitized versions of printed materials, software applications, music, and audiovisual content. To date, Internet Archive has digitized millions of printed books, and subsequently provides copies to its users for free. But while millions of the source printed books are in the public domain and not currently protected by intellectual property rights, roughly 3.6 million of the source books are subject to current copyright protection. Of these books, about 33,000 books and the subject copyrights belong to four prominent book publishers.

For years, Internet Archive would limit its lending practices to one digital “checkout” for each physical book it held in storage. However, during the COVID-19 pandemic when libraries around the world were closed indefinitely, Internet Archive expanded its lending policies by lifting limitations on how many people could borrow a single digitized book at a time, allowing checkouts by up to 10,000 users at a single time. In 2020, the book publishers sued Internet Archive over the non-profit’s lending of, in particular, 127 books, including titles by Malcolm Gladwell, Toni Morrison, and C.S. Lewis. The book publishers’ case centered on the argument that while Internet Archive has the right to loan out copies of printed books that it has lawfully acquired, it does not have the legal right to digitize those books and lend out the scanned copies *en masse*. Internet Archive argues its practices are protected by copyright fair use laws because its digitalization of the books was “transformative” as it made the process of lending out the books more convenient, and served the greater public interest by promoting “access to knowledge.”

Both the District Court for the Southern District of New York and the Second Circuit of Appeals agreed with the book publishers—Internet Archive had merely digitized verbatim the original books, instead of transforming them into something new, a requirement under the fair use doctrine. In its affirmation of the lower court’s decision, the Second Circuit’s rationale was that making books available for free not only injured the co-plaintiff book publishers as valid copyright owners, but it would also negatively impacted the public at large by removing the incentive for consumers and libraries to pay for books, and in turn, for authors to create new works in the first place. Internet Archive decried the Second Circuit’s ruling, claiming that it harms individuals who do not live near or have access to the public library system, and thus, cannot readily access this “valuable knowledge.”

While the underlying case is interesting from a broader copyright perspective, the real conundrum arises if Internet Archive files such a writ with the U.S. Supreme Court, **and** if the Supreme Court decides to hear the case. By all objective standards, six of the nine Justices have conflicts of interest in the case, as those Justices have either published or have current book deals with three of the four co-plaintiff book publishers. As such, there is little question they have financial ties to parties in the case. While the Justices’

published books were not subjects of Internet Archive's digitalization, the Justices have a professional relationship with the co-plaintiffs, which, under the "Code of Conduct for Justices of the Supreme Court of the United States," may constitute an ethics violation. For instance, Canon 1(b) of the Code of Conduct states "[a] Justice should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment," and a Justice should not "knowingly lend the prestige of the judicial office to advance the private interests of the Justice."

However, this language is relatively vague, and there is no enforcement mechanism or requirement that Justices recuse themselves if they may be subject to a "financial relationship" or a "private interest." As other questions surrounding the Justices' personal interests in cases in front of the Supreme Court abound, the general consensus appears to be that the decision to recuse is left up to the individual Justices. Some may feel their private, financial relationship with the respective co-plaintiff book publishers renders them unable to act impartially, while others may not view it as a concern. But if one Justice recuses, should all six? Must the decision be made as a collective unit of the conflicted justices? Currently, a quorum of six Justices is required to decide a case, which would still leave three conflicted Justices hearing the Internet Archive case.

The Code of Conduct is silent as to this issue, so we won't know unless and until a case reaches the Supreme Court that requires the Court to resolve it. It could be the Internet Archive case, or it could be another in the future. But given the possibility of such a stalemate occurring in the near future, it might be prudent to shore up Supreme Court Justice recusal requirements now - before the issue comes up on a granted writ of certiorari.