

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA)
)
 Plaintiff,)
)
 v.)
)
 APPLE, INC.,)
 HACHETTE BOOK GROUP, INC.,)
 HARPERCOLLINS PUBLISHERS, L.L.C.)
 VERLAGSGRUPPE GEORG VON)
 HOLTZBRINK PUBLISHERS, LLC)
 d/b/a MACMILLAN,)
 THE PENGUIN GROUP,)
 A DIVISION OF PEARSON PLC,)
 PENGUIN GROUP (USA), INC. and)
 SIMON & SCHUSTER, INC.,)
 Defendants.)

Civil Action No.12-CV-2826 (DLC)

**MEMORANDUM OF LAW IN REPLY TO OPPOSITION OF THE UNITED STATES
TO MOTION BY BOB KOHN FOR LEAVE TO INTERVENE
FOR THE SOLE PURPOSE OF APPEAL**

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* The Court's Docket is available at <http://dockets.justia.com/docket/new-york/nysdce/1:2012cv02826/394628/>.





As I said, there are serious problems with Judge Cote's decision about the final judgment that require review by the appeals court.

Like what?

First, your honor, this is not a "straight-forward price-fixing case." You read Broadcast Music too narrowly. The fact that you didn't cite Indiana Fed'n of Dentists says a lot.

Careful, the Guantanamo jail is still open.

Blame the DOJ. Besides, the Judge refused to hold a public hearing. If she had, this is only what I would have loved to have said.

Second, the DOJ admitted in the CIS that Amazon sold e-books below marginal cost. They bought an e-book for \$13 and sold it for \$9.99.

Oh, now I see! And selling at \$9.99 is presumed predatory under the Sherman Act.

COMPETITIVE IMPACT STATEMENT; NORTHEASTERN; SHERMAN ACT § 2

With Amazon selling below marginal cost, conduct to raise prices back up could not have harmed consumers.

So, without consumer harm, DOJ had no factual basis for the decree. I get it!

KEYSPAN

Third, Amazon's predatory pricing and monopsony was an excuse for literal price fixing - which is not a "wrong"! The Supreme Court has come a long way from 1940 when it ruled in Socony.

BROADCAST MUSIC; NCAA; INDIAN FED'N DENTISTS; PACIFIC STATIONERS; NYNEX; LEEGIN; ORDER 9/12/12 AT 40

Finally, we must look at pro-competitive benefits in markets other than the one alleged.

Not necessary to look at other markets. Amazon's e-book market share dropped from 90% to 60% a strong countervailing pro-competitive virtue.

IP GUIDELINES; ORDER 9/5 AND OPINION 9/5/12

Perhaps a little more "hesitation" on my part was in order. Looks like, Mr. Kohn, you'll get your "fall ship and star to steer her by." Good luck on the appeal.

Boy, if life were only like this?

KOHN LETTER TO JUDGE COTE 9/12/12, DOCKET NO. 122

OK, Alvy Singer, what else do you need to get to the Court of appeals?

Just a sec. Here's why this is so serious. When the DOJ decided to ignore its own IP Guidelines...

ANNIE HALL

... and build a case on the false premise that low prices are always good for consumers, the result in this case, and in future cases, is a dangerous threat to digital commerce in copyrighted works on the internet.

You know, dad, when the DOJ called your comic a "frolic," I was thinking...

...they seem to forget that you have been working on this stuff far longer than any of the attorneys working for the DOJ.

Well, those attorneys don't have to listen to me. It's the Second Circuit that matters.

So, what else do you have to do to get there?

I also have to comply with rule 24.

Oh, how boring!

15 U.S.C. 16(f)(3); FEDERAL RULES OF CIVIL PROCEDURE

I know. That's why I'm not a litigator or a judge.

So, have you complied with the rule?

Yes, but the DOJ doesn't think so. They say I don't have defenses that share with the main action common questions of law or fact.

That's ridiculous. You are one of the consumers being harmed by the Final Judgment!

RULE 24(b)(1)(B); U.S., REALTY

And the Tunney Act was specifically intended to welcome public participation, even intervention.

Does the DOJ cite any Tunney Act cases to support them?

Not a single one. And none of their cases explain the fact that two trade associations got to intervene to appeal the Microsoft decree. Neither of them were "alleged to have participated" in the alleged wrongdoings, and neither had a legal claim against Microsoft.

DOJ Opp. at 3, Microsoft at 1234-37 & at fn 19; MSL

Moreover, Judge Posner of the 7th Circuit said all I have to do is to "want to" present the same defenses as Defendants.

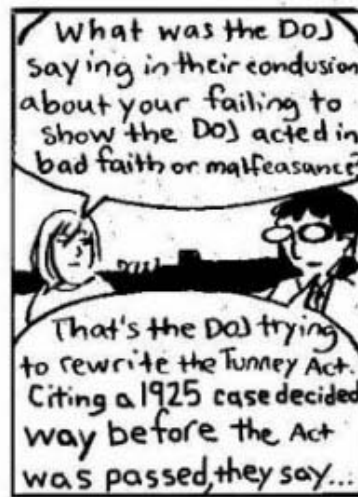
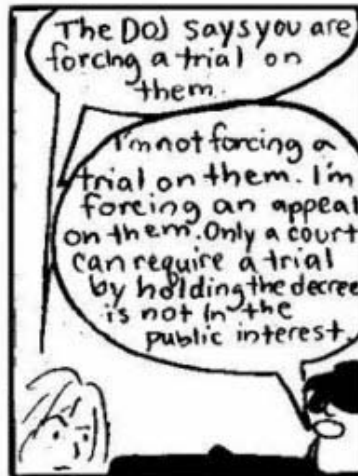
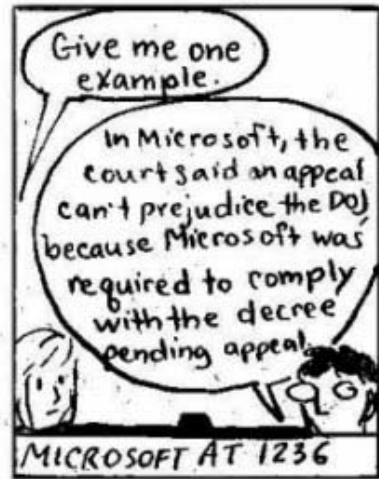
Sounds like you're no different from a trade association, or any consumer or environmental group, who intervene in cases all the time.

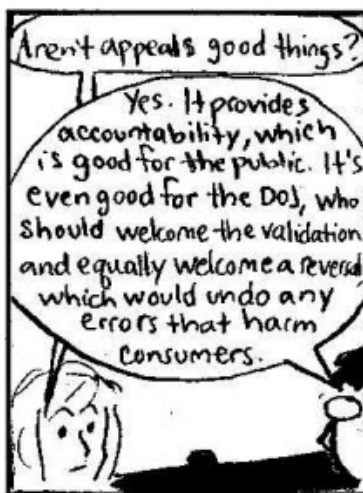
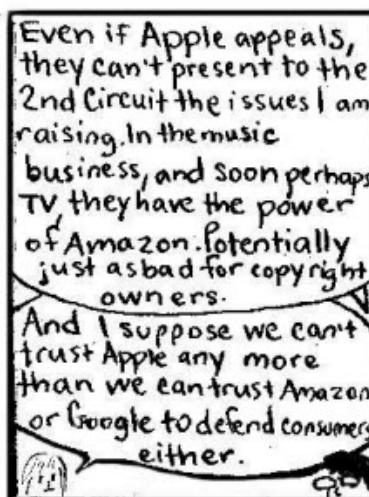
FLYING J; MSL; MCCARTHY

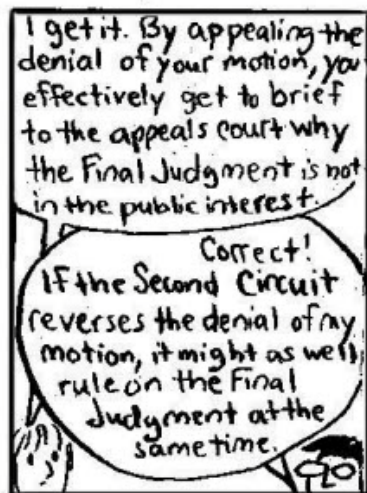
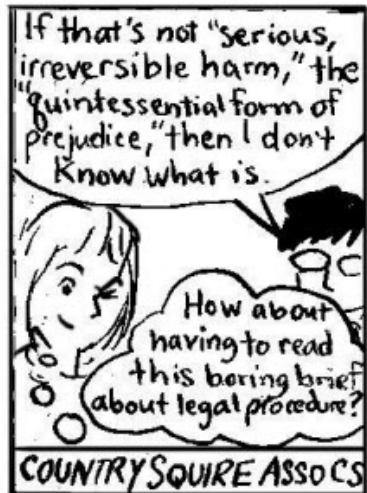
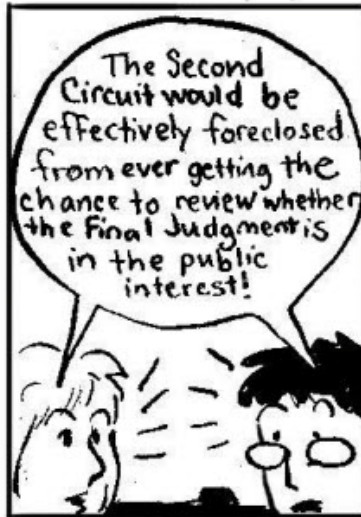
Also, my motion has to be timely.

But you filed your motion within hours after entry of the Final Judgment?

RULE 24(b)(1)







Dated: September 20, 2012

Respectfully submitted,



BOB KOHN

BOB KOHN
(California Bar No. 100793)
140 E. 28th St.
New York, NY 10016
+1-408-602-5646
bob@bobkohn.com

/s/ Steven Brower

By: _____
STEVEN BROWER [PRO HAC]

California Bar No. 93568
BUCHALTER NEMER
18400 Von Karman Ave., Suite 800
Irvine, California 92612-0514
Tel: +1.714.549.5150
Fax: +1.949.224.6410
Email: sbrower@buchalter.com

Pro Bono Counsel to Bob Kohn