

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

UNITED STATES OF AMERICA)

Plaintiff,)

v.)

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

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.)

**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**

Table of Authorities

Cases

Broadcast Music v. CBS, 441 U.S. 1 (1979)..... 3
Buckeye Coal & Ry.Co. v. Hocking Valley Ry. Co., 269 U.S. 42, 49 (1925)..... 5
Country Squire Assocs. v.Rochester Comm.Sav. Bank, Inc., 203 B.R.182, 183 (2d Cir. BAP 1996) 7
Flying J Inc. v. Van Hollen, 578 F.3d 569 (7th Cir. 2009) 4,5,7
FTC. v. Indiana Fed’n of Dentists, 476 U.S. 447, 459 (1986),..... 3
Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S.877 (2007) 3
Mass. Sch of Law at Andover, Inc. v. United States ("MSL"), 118 F.3d 776 (D.C. Cir. 1997)..... 2,3,4,5
Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1234-36 (D.C. Cir. 2004)..... 4,5,7
McCarthy v. Kleindienst, 741 F.2d 1406 (D.C.Cir. 1984)..... 4
NCAA v. Board of Regents, 468 U.S. 85 (1984) 3
Northeastern Telephone v. AT&T, 651 F.2d 76, 87-9 (2d Cir. 1981)..... 3
Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) 3
NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998)..... 3
SEC v. United States Realty & Improvement Co., 310 U. S. 434, 459 (1940) 4
United States v. American Tel. & Tel. Co., 642 F.2d 1287, 1290-94 (D.D.C. 1982) 1,6
United States v. American Tel. & Tel. Co., 552 F.Supp. 131 (D.D.C. 1982)..... 1
United States v. Keyspan Corp., 783 F. Supp.2d 633 (S.D.N.Y. 2011)..... 3
United States v. LTV Corp., 746 F.2d 51 (D.C.Cir. 1984)..... 1,2
United States v. Socony-Vacuum Oil Co. v., 310 U. S. 150 (1940)..... 3
United States v. Thomson Corp., 1997-1 Trade Cas. (CCH) ¶71,735, 1997 U.S. Dist. LEXIS 1893 at *15
(D.C.C. February 27, 1997) 2,7

Statutes

Sherman Act, 15 U.S.C. §2..... 3
Tunney Act, 15 U.S.C. §16(f)(3) 4

Rules

ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (DOJ/FTC 1995)..... 3
Federal Rules of Civil Procedure, Rule 24 passim

Articles & Treatises

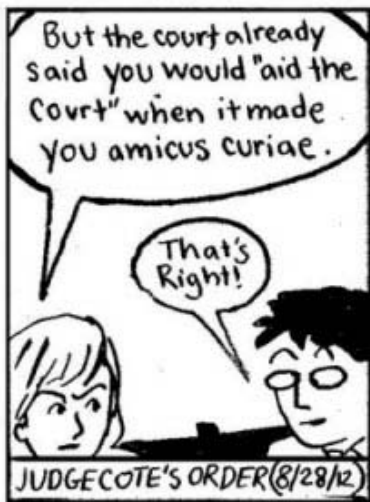
Al Kohn & Bob Kohn, KOHN ON MUSIC LICENSING (Wolters Kluwer, 4th Edition 2010)..... 2
Scott McCloud, UNDERSTANDING COMICS (HarperCollins, 1993)..... 2

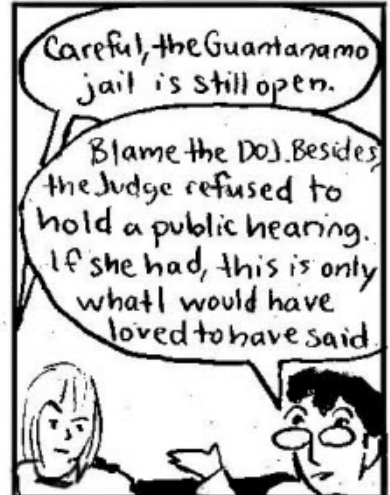
Court Documents *

Amicus Brief of Bob Kohn, 12-cv-2826, Docket No. 110 (September 4, 2012) 2
Amicus Brief of Bob Kohn (proposed), 12-cv-2826, Docket No. 97 (August 13, 2012) 2
Competitive Impact Statement, 12-cv-02826, Docket No. 5 (April 11, 2012) 3
Letter from Bob Kohn to Judge Cote, 12-cv-2826, Docket No. 122 (September 12, 2012) 3
Memo in Support of Kohn Motion to Intervene, 12-cv-2826, Docket No. 115 (September 7, 2012)..... 3
Opinion & Order re: Amicus Participation, 12-cv-02826, Docket No. 108 (August 28, 2012) 2
Opinion & Order re: Final Judgment, 12-cv-2826, Docket No. 113 (September 5, 2012)..... 3
Opinion & Order re: Stay & Intervention, 12-cv-2826, Docket No. 121 (September 10, 2012)..... 1
Opp'n of U.S. to Kohn Motion to Intervene, 12-cv-02826, Docket No. 127 (September 17, 2012) ...passim

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







... 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.

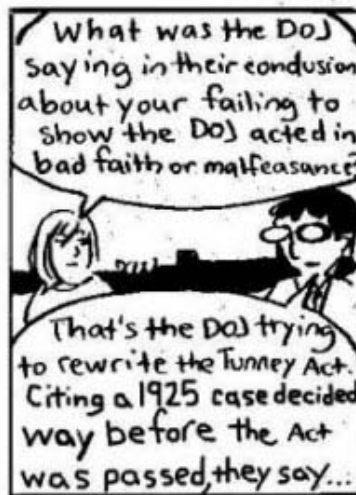
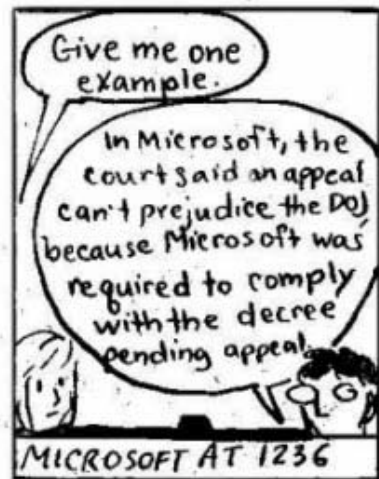
Sounds like you're no different from a trade association, or any consumer or environmental group, who intervene in cases all the time.

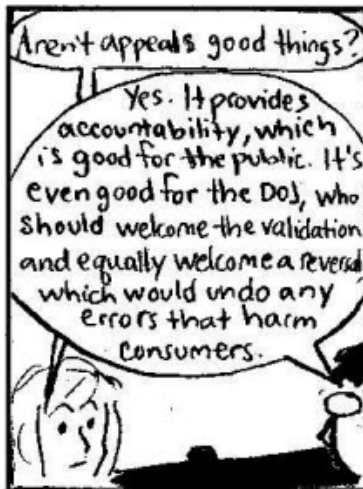
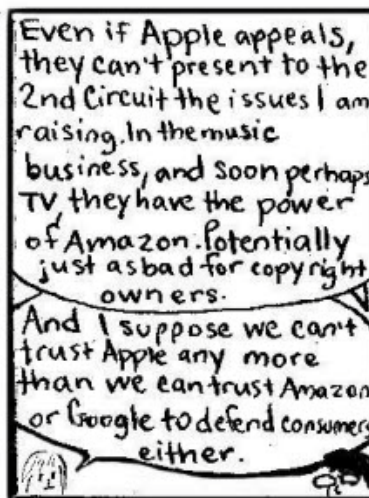
FLYING J; MSL; MCCARTHY

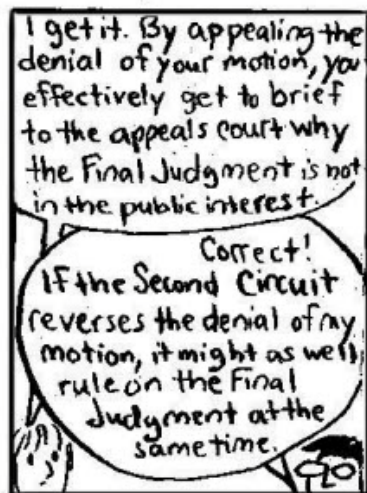
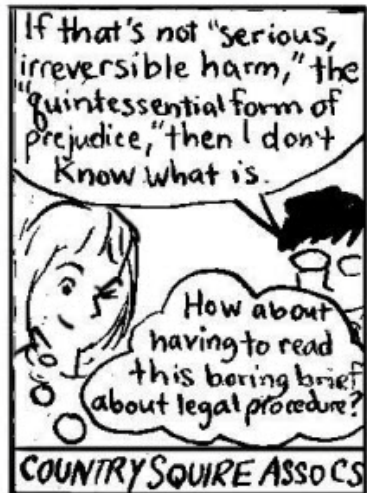
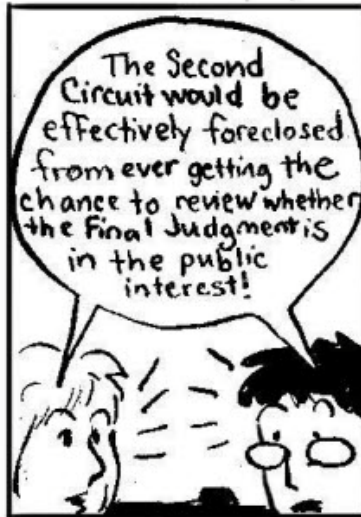
Also, my motion has to be timely.

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