

practices. As Microsoft acknowledges, a decision to accept an amicus brief is within the sound discretion of the court. See Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970). This Court will exercise its discretion for the reasons to follow to overrule the objection and accept an amicus curiae brief from Professor Lessig.

As to the first ground of objection, Professor Lessig's curriculum vitae (attached) furnishes ample answer. Professor Lessig appears to the Court to be uniquely qualified to offer advice on a subject few other academics in the country are sufficiently knowledgeable to address at all, and he has, to the Court's knowledge, no financial or professional interest in the outcome of the case one way or another. Although invited to file an amicus brief on an issue or issues of his choice, he has advised the Court (as Microsoft has been informed) he will submit his views exclusively on the issue of technological tying.

Both sides are, indeed, represented by able counsel. As both sides have publicly and repeatedly announced, however, they hold starkly divergent views on what is and what is not lawful business conduct on Microsoft's part, and both proclaim to have the best interests of the public in mind as they advocate their respective positions. The Court suspects that there may be valid legal analyses to be made of its Findings of Fact which would comport fully with neither position likely to be taken by the parties, but which the Court itself might find more consistent with the public interest. It was in anticipation that Professor Lessig might offer just such an analysis that the Court extended the invitation to him to appear as amicus curiae.

Finally, Microsoft purports to have detected an anti-Microsoft bias on Professor Lessig's part that might affect his ability to offer "impartial" advice to the Court. Apart from the fact that the Court itself perceives no such bias as evident from the examples of Professor Lessig's public utterances

Microsoft has tendered, and that it credits his earlier assurances to the Court (as a prospective special master) that he bears no animus towards Microsoft, the Court is confident of its ability to assess Professor Lessig's submission critically without being affected by any occult bias of which he might be possessed. Moreover, the Court has invited each side – Microsoft included – to nominate an amicus curiae of its choosing to advise the Court in the premises, and it is not so naive to expect that any amicus selected by a party – Microsoft included – will be likely to offer advice to the Court inimical to that party's position.

It is, this ____ day of December, 1999,

ORDERED, that defendant Microsoft's objection to participation by Professor Lawrence Lessig as amicus curiae herein is overruled.

Thomas Penfield Jackson
U.S. District Judge