IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>MICROSOFT CORPORATION,<br><br>Defendant. | Civil Action No. 98-1232 (TPJ) |
| STATE OF NEW YORK *ex rel.*<br>Attorney General ELIOT SPITZER, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>MICROSOFT CORPORATION,<br><br>Defendant. | Civil Action No. 98-1233 (TPJ) |

**PLAINTIFFS' RESPONSE TO MICROSOFT'S OBJECTION TO PARTICIPATION BY PROFESSOR LAWRENCE LESSIG AS AN AMICUS CURIAE**

Microsoft has objected to participation by Professor Lawrence Lessig of Harvard Law School as an amicus curiae. Professor Lessig's participation in that role is proper, and Microsoft's objections are ill conceived and unfounded.

## I.
## Background

By Order dated November 19, 1999, the Court invited Professor Lessig to participate as amicus curiae. The Court also permitted the two plaintiffs and Microsoft each to designate an amicus curiae. In a conference with counsel the day before its Order, the Court explained that it asked Professor Lessig to submit a brief that addresses the legal issue of technological tying. Transcript of Proceedings, November 18, 1999, at 10-11. The Court's Order followed the entry of the Court's detailed findings of fact. There is no suggestion in Microsoft's papers, nor could there be, that the amicus process has anything to do with issues of fact.

## II.
## Legal Standard

Although there is no federal rule or statute governing participation by amicus curiae at the district court level,[1] see United States v. Gotti, 755 F.Supp. 1157, 1158 (E.D.N.Y. 1991), a federal district court has the inherent authority to invite participation by amicus curiae to assist the court in its proceedings. United States v. Louisiana, 751 F.Supp. 608, 620 (E.D. La. 1990); United States v. Michigan, 116 F.R.D. 655, 660 (W.D. Mich. 1987). The decision to invite or accept participation by an amicus is committed to the sound discretion of the court. Alexander v. Hall, 64 F.R.D. 152, 155 (D.S.C. 1974).

The classic role of the amicus curiae is to assist in a case of general public interest, supplement the efforts of counsel, and draw the court's attention to law that may otherwise escape consideration. Miller-Wohl Co., Inc. v. Commissioner of Labor and Indus., 694 F.2d 203, 204 (9th Cir. 1982); see also New England Patriots Football Club, Inc., v. University of Colorado, 592 F.2d 1196, 1198 n. 3

[1]Federal Rule of Appellate Procedure 29 governs participation by *amici* in the Courts of Appeal.

(1st Cir. 1979) (historically, the role of an amicus was "to aid the court in resolving doubtful issues of law"). There is no requirement that an amicus be disinterested. Funbus Systems, Inc. v California Public Utilities Commission, 801 F.2d 1120, 1125 (9th Cir. 1986); Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982), although in this case there is no reason to believe that Professor Lessig is other than disinterested.

## III.
## Argument

### A. Microsoft's Arguments

First, Microsoft asserts, without any explanation of its foundation or reasoning, that the Court's Order inviting Professor Lessig's participation is sufficiently broad to constitute a request for proposed conclusions of law. Microsoft also contends that Professor Lessig does not meet requirements to participate as an amicus because he does not have a "particularized 'special interest'" in the legal issues presented in the case, but then goes on to argue, seemingly paradoxically, that he should not participate because he is not impartial. These objections are specious.

### B. Legal Argument By Amici Will Not Usurp The Judicial Function

The intended import of Microsoft's puzzling suggestion that the invitation to Professor Lessig to submit an amicus brief "is sufficiently broad as to constitute an invitation to submit proposed conclusions of law from a non-party," Microsoft's Objection at 2, is unclear and, in any event, does not provide any basis for revoking the invitation. First, Microsoft's suggestion ignores the Court's clear statement to counsel that Professor Lessig was being specifically requested to address the issue of technological tying. Transcript of Proceedings, November 18, 1999, at 10-11. Indeed, the Court made clear the

straightforward purpose of its invitation of the limited brief of Professor Lessig and those of other amici: "I am asking for amici help." *Id.* At 10.

More importantly, that Professor Lessig and the other potential amici may discuss how they believe that the Sherman Act should be applied to the facts as the Court has found them is neither unusual nor improper, and indeed is the traditional role of an amicus. See, e.g., Funbus Systems, Inc. v California Public Utilities Commission, 801 F.2d 1120, 1125 (9th Cir. 1986) ("perfectly permissible role" for amicus to "take a legal position and present legal arguments in support of it"). Submitting a brief as amici involves *no* delegation of judicial authority or duties, raises none of the same concerns that appointment of a special master would raise, and is unobjectionable.

**C. If The Court Believes That Professor Lessig Would Bring A Helpful Perspective To Legal Issues In The Case, It Is Appropriate For Him Participate As Amicus**

"There are no strict prerequisites that must be established prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is useful to or otherwise desirable by the court." United States v. Louisiana, 751 F.Supp. 606, 620 (E.D. La. 1990). Although some courts have required that the amicus possess some "unique information or perspective," this does not require any particular quantum of expertise beyond the expectation that the amicus will add significantly to, not merely parrot, the contributions from the lawyers from the parties. See Ryan v. CFTC, 125 F.3d 1062, 1063 (7th Cir. 1997); see also United States v. Gotti, 755 F.Supp. 1157, 1158-59 (E.D.N.Y. 1991)(rejecting proffered amicus brief that merely parroted arguments of defendants).

In this case, Professor Lessig has written at length and taught law school and multidisciplinary courses on the Internet and the law. Contrary to Microsoft's current assertion, see Microsoft's Objection at 3, Professor Lessig does possess expertise in antitrust law, having taught antitrust law at Harvard and elsewhere. See Microsoft's Memorandum In Support Of Its Motion To Revoke Reference to the Special Master, CV-94-1564, at 7. If the Court believes that he brings a special perspective to the issues raised in this litigation and that his contribution would be useful to the Court, it is appropriate and well within the Court's discretionary authority to invite him to submit his views.

**D. Microsoft Has Not Demonstrated That Professor Lessig Is Biased Against It**

Microsoft again raises the issue of Professor Lessig's purported bias against it. These allegations are not only wholly meritless; they also are irrelevant as there is no requirement that an amicus be impartial in order to participate.

When Microsoft first raised the issue of Professor Lessig's purported bias in connection with the consent decree enforcement proceeding, this Court found that Microsoft's bases for its allegations of impartiality were "both trivial and altogether non-probative." United States v. Microsoft, CV 94-1564, Memorandum and Order, at 2 (January 14, 1998). Having scoured Professor Lessig's record since that time, Microsoft renews its allegations of bias based on two items: (1) that Professor Lessig serves on the advisory board of a non-profit organization devoted to open-source software which is affiliated with, and has received financial support from, Linux vendor Red Hat Software, and (2) that he has expressed the view that the experience of *United States vs. AT&T* may be of some interest when thinking about the instant case. Underlying its specific allegations of bias seems to be Microsoft's

concern about one theme of Professor Lessig's work, that the open nature of the Internet has engendered tremendous competition and innovation, that this openness is neither accidental nor inevitable, and that society will benefit if this openness continues.

Like Microsoft's previous allegations about Professor Lessig, its current allegations of bias are unfounded. Professor Lessig's affiliation with a non-profit organization devoted to open source software is a non-issue. Microsoft has not shown that this organization has any purpose beyond its stated one, *i.e.*, "to take the principles of open-source software and apply them in a variety of scientific and educational projects 'for the greater good of the general public.'" Exhibit A to Microsoft's Objection, at 1. Indeed, the article Microsoft attached to its motion notes that the group will have a "board of academics and technology experts." *Id.* That the group has connections with Red Hat, a participant in the open-source movement, is also of little moment. Microsoft has not alleged, nor are the plaintiffs aware of, any economic interest of Professor Lessig in the outcome of this litigation. At most, Microsoft has shown that Professor Lessig has views about the public welfare implications of developments in the software industry. None of this indicates that Professor Lessig has any bias against Microsoft that would disqualify him to participate as an amicus.[2]

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[2] In any event, there is no requirement that an amicus be impartial or disinterested. E.g., Funbus Systems, Inc., 801 F.2d at 1125; Hoptowit, 682 F.2d at 1260; Krislov, The Amicus Curiae Brief: from Friendship to Advocacy, 72 Yale L.J. 694 (1963). Indeed, "by the nature of things an amicus is not normally disinterested." Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970); see Tigar, Federal Appeals: Jurisdiction and Practice, at 133 (1993) ("An amicus brief is rarely disinterested; usually it supports one party or the other.") For example, to the extent that Microsoft and the plaintiffs invite amici who are themselves or who represent participants in the software industry, these persons will have economic interests that may be affected by this litigation or by Microsoft's conduct far more directly than the non-profit board position that Professor Lessig holds. Thus, even if there were any merit to Microsoft's allegations of some degree of partiality, those allegations would provide no grounds for rescinding the invitation to participate as an amicus.

In an excess of caution and in the interests of full disclosure, the plaintiffs suggest that the Court may wish

Microsoft's allegations concerning Professor Lessig's comments about the AT&T break-up are even more puzzling. Read in context, Professor Lessig's comments merely reflect his recognition of the seriousness of the issues presented by this litigation, not any animus toward Microsoft. Exhibit B to Microsoft Opposition, at 3-4.

## IV.
## Conclusion

For the foregoing reasons, the plaintiffs submit that it is entirely proper and appropriate for the Court to invite Professor Lessig (and others solicited by the parties) to participate as amicus curiae in this important case. Microsoft's motion is nothing more than an attempt to manufacture some appellate point to use to distract attention from defendant's clear and continuing violation of the antitrust laws. Having no plausible basis for appealing any of this Court's findings of fact, and having no plausible argument that those findings do not make out a clear violation of the antitrust laws, Microsoft resorts to an attempt to create an appellate question by unfounded attacks on Professor Lessig and this Court's procedures. The Court may wish to consider whether it should accede to Microsoft's tactics simply to avoid adding another

issue to this case. However, the law is clear that either decision is well within the Court's discretion.

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to consider whether there is any merit in Professor Lessig filing a statement of interest, such as that required by Fed. R. App. P. 29, or disclose in some other format any interest he may have in the litigation, including any relevant information about his role in the Red Hat Center for Open Source.

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Respectfully submitted,

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