

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

SURFCAST, INC.,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

Case No. 2:12-CV-00333-DBH

**DECLARATION OF JOHN ELSWEILER REGARDING RECORDS OF THE MERRILL-
CAZIER LIBRARY OF UTAH STATE UNIVERSITY**

I, John Elswailer, under penalty of perjury declare and state as follows:

1. I am an employee of the Merrill-Cazier Library of Utah State University (“the Library”). I have been employed by the Library since 1986.
2. My current position is Associate Dean for Public Services. I am in charge of, among other things, patron services, circulation, reference materials, government documents, and information technology systems. In this position, I am responsible for accessing and utilizing the Library’s records, including records of the circulation and accessibility of library materials.
3. This declaration particularly concerns Microsoft Internet Explorer Resource Kit (Microsoft Press 1998) (“the Book”), a book held by the Library. I have reviewed the Library’s copy of the Book, including the front and back covers, title and copyright pages, and the due date slip affixed to the title page. Exhibit 1 to this declaration is an accurate reproduction of the Library’s copy of the Book.
4. I am familiar with the circulation and record-keeping procedures used by the Library in 1998. In 1998 my position at the Library was Head of Reference Services.

5. In 1998, the Library was (as it is today) open to all members of the public.
6. The Library has kept an electronic catalog of its materials since 1988. Books, such as the Book, are indexed in the Library's electronic catalog. In 1998, the Library catalog was accessible via the Internet. In 1998, the Library's regular practice was to enter searchable information for each book, such as its title, author, call number, subject, and keywords, into the Library's catalog before the book was available for circulation.
7. In 1998, as part of the indexing process, the Library assigned call numbers to each book that represented the book's subject areas. The Library organized its books on its shelves according to the call number and thus subject area.
8. The Book has a sticker on its spine with its assigned call number, TK5105.883.M53 M536 1998. That call number is also stamped on the Book's inside cover. This sticker and stamp serve as a record of the Library's indexing and cataloging of the Book.
9. In 1998, either by searching the Library's electronic catalog or by browsing the shelves associated with the subject matter of the Book, patrons would have been able to locate the Book.
10. In 1998, it was the regular practice of the Library to use due date slips to record the date on which patrons were required to return Library material that they had borrowed. At the time patrons borrowed Library material, Library personnel stamped a return date on the due date slip. In 1998, faculty members were loaned material for twelve weeks while other persons were loaned material for two weeks.
11. The due date slip of the Book has three due dates stamps. These stamps are a record of the date on which the borrowing patron was due to return the Book, and are consistent with the Library's regularly conducted record keeping in 1998.

12. The earliest stamp is November 4, 1998. This stamp shows that the Book was borrowed before November 4, 1998 and was due to be returned to the Library on or before November 4, 1998. Depending on whether it was a faculty member or non-faculty that had borrowed the Book, this due date corresponds to a borrowing date at least two weeks prior to November 4, 1998. In other words, a patron borrowed the Book from the Library at least as early as October 22, 1998.

13. The stamped due dates thus show that the Book was accessible to the public, by way of the Library, at least as early as October 22, 1998.

14. In 1998, the regular procedure of the Library was to make media accompanying books, such as CDs, available at the same time as the book itself. The accompanying media could be borrowed separate from the book. The front cover of the Book indicates that a CD-ROM is included. The front cover of the Book also has a Library sticker indicating that computer disks that accompany the Book can be borrowed from the circulation desk. This means that the CD-ROM accompanying the Book was also accessible to the public, by way of the Library, at least as early as October 22, 1998.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: 5-1-13

Signed: John A. Elswelder, Jr.

Printed: John A. Elswelder, Jr.