

Plaintiff Andrew Yeckel (“Yeckel”) for his Complaint against Defendants Jeffrey Derby and Regents of the University of Minnesota (collectively “Defendants”) hereby allege as follows:

1. Plaintiff Yeckel is an individual with his residence at 3414 31st Avenue South, Minneapolis, MN 55406.
2. Upon information and belief, Defendant Jeffrey Derby (“Derby”) is an individual with his residence at 7931 Tierneys Woods Road, Minneapolis, MN 55438 and his office at 421 Washington Avenue Southeast, 239 Amundson Hall, Minneapolis, MN 55455.
3. Defendant Regents of the University of Minnesota (“the University”) is a public institution of higher education and research created by charter and perpetuated by the Constitution of the State of Minnesota, Article XIII, Section 3.

4. This action arises under the Copyright Act, 17 U.S.C. § 101 *et seq.*

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1338.

6. This Court has personal jurisdiction over Defendant Derby because, upon information and belief, Derby is a resident of Minnesota. Derby is also employed by the University which is located in Minnesota, and the alleged copyright violations occurred in Minnesota and caused injury to Yeckel giving the Court personal jurisdiction over Derby even if he is a nonresident under Minn. Stat. § 543.19 and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

7. This Court has personal jurisdiction over Defendant University because it is a Minnesota institution created by charter and perpetuated by the Constitution of the State of Minnesota, Article XIII, Section 3.

8. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391, 1400.

BACKGROUND

9. Yeckel is currently an independent researcher who develops algorithms for computational fluid dynamics and heat and mass transport in multiphase systems with free boundaries.

10. In 1991 Mr. Ralph Goodwin (“Goodwin”) began developing a software program to simulate problems in multiphase fluid dynamics having free surfaces with capillarity. Yeckel joined Goodwin in 1992 to expand the code to include heat and mass transport and other physical phenomena.

11. By the end of 1993 Yeckel and Goodwin had developed a substantially complete multi-physics software program that already possessed all of the core elements and most of the

features found in the final version completed by them in 2014. That software program became known as The Old Cats2D.

THE ASSERTED COPYRIGHTS

12. Yeckel is the owner of the copyright in *The Old Cats2D*, U.S. Copyright Registration No. TXu 2-056-546, effective March 31, 2017. (Exhibit A.)

13. The Copyright Registration identifies the authors of The Olds Cats2D as Yeckel and Goodwin.

14. Since at least 1994, Yeckel and Goodwin have provided notice of their rights in this code:

- The 1994 user manual for the code, at that time called Charisma, credits Yeckel and Goodwin as the authors and provides a copyright notice identifying Yeckel and Goodwin as the copyright owners. (Exhibit B (excerpts from 1994 manual).)
- Since at least 1994, a copyright notice has appeared in the source code and splash screen associated with code now known as The Old Cats2D.

15. Yeckel and Goodwin continued to provide notice of their rights in this code through 2014. A copyright notice appears in the source code and splash screen associated with The Old Cats2D, and the manual for The Old Cats2D from 2014 (then simply referred to as Cats2D) identifies Yeckel and Goodwin as authors and again provides a copyright notice identifying Yeckel and Goodwin as the copyright owners. (Exhibit C (excerpts from 2014 manual).)

16. From initial development through present, Yeckel and Goodwin have not published The Old Cats2D or otherwise made it available commercially or to the general public.

17. All licensees have been notified in a timely fashion not to distribute the code without permission from Yeckel and Goodwin.

18. On March 31, 2017, Goodwin assigned his rights in The Old Cats2D to Yeckel. (Exhibit D.)

DEFENDANTS' INFRINGING ACTIVITY

19. In January of 1994 Yeckel began working in a research group run by Derby at the University of Minnesota.

20. Shortly after starting in Derby's research group, Yeckel began using The Old Cats2D in his research and copied The Old Cats2D onto a computer in Derby's lab. Yeckel also copied The Old Cats2D onto a computer in the Minnesota Supercomputer Institute at the University of Minnesota. Both of these copies of code were located in a user account that only Yeckel had access to. Around that time, Yeckel expressly informed Derby that he and Goodwin owned rights to The Old Cats2D code and stated that he and Goodwin would be maintaining ownership of that code. At that time, Derby agreed that Yeckel and Goodwin owned the code.

21. Indeed, Yeckel and Derby wrote a paper that same year (published in 1995) which cited the code, again then called Charisma, and identified the authors of the code as Yeckel and Goodwin. (Exhibit E at note 24 (excerpt of 1995 publication by Yeckel and Derby).)

22. In approximately 2000-2001, graduate student(s) in Derby's research group began using The Old Cats2D with permission, and an implied license, from Yeckel. Yeckel provided those student(s) with temporary access to his user account, and the student(s) then copied The Old Cats2D to their own user accounts.

23. Graduate students in Derby's research group continued using copies of The Old Cats2D, again with permission and an implied license from Yeckel, through 2014 when Yeckel

left Derby's research group. During that time period the students either copied The Old Cats2D from Yeckel's user account to their own user accounts or Yeckel emailed a copy of the code to the students.

24. Derby's graduate students, including at least Jeff Peterson, Mia Divecha, Kerry Wang, Chang Zhang, John Roerig, and Scott Dossa, continued using copies of The Old Cats2D after Yeckel's departure in 2014 and, upon information and belief, at least some graduate students in Derby's research group currently continue to use and/or modify those copies of The Old Cats2D.

25. Use and/or modification of copies of The Old Cats2D by Derby's graduate students was with Yeckel's permission and an implied license until April 3, 2017 when, as explained below, Yeckel revoked his permission and implied license.

26. On January 23, 2017, Yeckel, through counsel, sent Derby a letter again informing him that Yeckel and Goodwin held the copyright in the relevant software and further informing him that only Yeckel and Goodwin had the exclusive right to reproduce, distribute, and prepare derivative works based upon the original software. (Exhibit F.)

27. On April 3, 2017, Yeckel informed Derby via email that Goodwin had assigned his copyright rights in The Old Cats2D to Yeckel and that Yeckel was revoking his implied license to Derby and Derby's research group members in The Old Cats2D. Yeckel requested Derby cease and desist from using the copy of The Old Cats2D, destroy that copy, and inform others to do the same. (Exhibit G.)

28. On April 3, 2017, Yeckel also informed Derby's graduate students of the same.

29. On April 3, 2017, Yeckel sent the University an email informing the University that he was the sole owner of the relevant software, that he had revoked all permission to use the

code by Derby and Derby's research group members, and that he had informed Derby and his research group members to destroy any copies of the code in their possession. Yeckel expressly requested that the University ensure Derby's compliance. (Exhibit H.)

30. On April 5, 2017, the University responded to the January 23, 2017 letter sent to Derby by Yeckel's counsel and to Yeckel's April 3, 2017 letters to Derby, Derby's graduate students, and the University. The University's response alleged:

The version of Cats2D now being run in Professor Derby's lab, we understand, was derived from software that Dr. Yeckel first developed prior to his university employment. The current version of Cats2D was developed by Dr. Yeckel and others in the lab, while they were acting in their university employment. To be more specific: the university employed Dr. Yeckel for over 20 years, first as a post-doc (1994-1995) then as a research associate (1995-1999) and finally, when the [sic]he left the university, as a senior research associate (1999-2014). During his employment, Dr. Yeckel authored several, significant modifications to Cats2D. Those modifications were merged into the original version of Cats2D, resulting in a new, inseparable program. That program is a joint work, authored by Dr. Yeckel as an individual and the university, acting through Dr. Yeckel as an employee. The university and Dr. Yeckel, consequently, jointly hold the copyright in Cats2D. As such, the university is free to use or permit others to use Cats2D as it wishes. It does not need Dr. Yeckel's permission.

...

His work . . . was . . . a work made for hire, granting the university complete ownership of the developments he made.

(Exhibit I.)

31. The University's own policies explain that "[t]he University shall maintain the strong academic tradition that vests copyright ownership of academic works in the faculty" and that "[c]onsistent with academic tradition, University faculty and students shall own the copyright in the academic works they create, except for academic works described below in Section IV, subd. 2(b)-(e), or unless otherwise provided in written agreement between the creator(s) and the University." (E.g., Exhibit J (the University's Copyright Policy from 2007).)

32. None of the exceptions outlined in the University's policy apply to Yeckel's work (see Exhibit J at Section IV, subd. 2(b)-(e)), and there is no written agreement between Yeckel and University in which Yeckel gave his rights to the University.

33. Furthermore, during the time-period in which Yeckel worked in Derby's research group at the University, only minor changes and/or additions were made to the code, and those changes and/or additions were not made within the scope of Yeckel's employment; rather, they were largely the result of work done by Goodwin—a non-University employee—or work done by Yeckel as an outside consultant for non-party business(es).

34. Throughout Yeckel's time in Derby's research group from 1994-2014 and while Derby's graduate students were using copies of The Old Cats2D, papers published by Derby and his graduate students credit Yeckel and Goodwin for The Old Cats2D. (E.g., Exhibits E at note 24 (excerpt from 1995 publication), K at note 22 (excerpt from 2003 publication), L at note 41 (excerpt from 2012 publication).)

35. Publications by members of Derby's research group post-dating Yeckel's departure from Derby's research group through 2017 continued to credit Yeckel and Goodwin for The Old Cats2D. (E.g., Exhibits M at note 72 (excerpt from 2016 publication), N at note 84 (excerpt from 2017 dissertation).)

36. Other publications by researchers unaffiliated with Derby's research group also credit Yeckel and Goodwin for The Old Cats2D. (E.g., Exhibit O at note 7 (excerpt of 2007 publication).)

37. Upon information and belief, despite revocation by Yeckel of their licenses, Derby's graduate students and the University retain copies of The Old Cats2D and continue using and/or modifying those copies for their own advantage.

38. As a result of access to and use of The Old Cats2D, Derby, Derby's research group and graduate students, and the University have profited, *inter alia*, via improved research abilities and publications associated therewith; improved access to funding opportunities and, upon information and belief, increased funding; increased and improved prestige and reputation; and, upon information and belief, increased demand for outside consulting jobs with non-party businesses.

COUNT 1 – COPYRIGHT INFRINGEMENT OF THE OLD CATS2D BY ALL PARTIES

39. Yeckel incorporates all previous allegations by reference.

40. Yeckel is the sole owner of all right, title, and interest in and to the copyright for The Old Cats2D, as identified by Exhibits A, D.

41. Derby and the University each had notice of Yeckel's rights in The Old Cats2D since at least 1994 via a splash screen notice on The Old Cats2D as well as an express statement by Yeckel to Derby in 1994 informing Derby that Yeckel and Goodwin owned rights to The Old Cats2D code. Derby and the University also had notice of Yeckel's rights in The Old Cats2D based on letters and emails sent by Yeckel and/or Yeckel's counsel on January 23, 2017 and April 3, 2017.

42. Yeckel revoked his permission and any and all implied licenses provided to Derby, Derby's graduate students, and the University via email dated April 3, 2017.

43. Derby and the University continue to possess at least a copy of Yeckel's copyrighted The Old Cats2D.

44. Derby, through his research group member/students, and the University, through Derby and his research group members/students, continue to use and/or modify Yeckel's copyrighted The Old Cats2D.

45. Derby's and the University's continued and unauthorized possession and use and/or modification of Yeckel's copy of The Old Cats2D after his express revocation of his permission and license to the program on April 3, 2017, constitute copyright infringement under the Copyright Act, 17 U.S.C. § 101 *et seq.*, and such acts of infringement have been willful

**COUNT 2 – VICARIOUS COPYRIGHT INFRINGEMENT OF THE OLD CATS2D BY
THE UNIVERSITY**

46. Yeckel incorporates all previous allegations by reference.

47. The University, as an employer of Derby and his research group, control and supervise Derby and his group and the activities associated therewith.

48. The University is complicit and has allowed the above described copyright infringement to continue to the University's benefit constituting vicarious copyright infringement and such infringement is willful.

**COUNT 2 – VICARIOUS COPYRIGHT INFRINGEMENT OF THE OLD CATS2D BY
DERBY**

49. Yeckel incorporates all previous allegations by reference.

50. Derby, as head of his research group, controls and supervises graduate students in his lab and members of his research group and their activities.

51. Derby has allowed and benefitted from the above described copyright infringement, and his actions constitute vicarious copyright infringement and such infringement is willful.

PRAYER FOR RELIEF

Wherefore, Yeckel requests that judgment be entered in his favor and against Defendants as follows:

A. Pursuant to 17 U.S.C. § 502, an order permanently enjoining Derby, the University, and all persons in active concert or participation therewith from copying, creating

derivative works based on, using, performing, or otherwise infringing on Yeckel's rights in The Old Cats2D;

B. Pursuant to 17 U.S.C. § 503, an order for seizure to recover, impound, and/or destroy all things infringing upon Yeckel's rights in The Old Cats2D, including any software programs and code Derby, the University, and all persons in active concert or participation therewith may possess;

C. An order that Derby and the University file with this Court and serve on Yeckel, within 30 days of service of this order, a report in writing under oath setting forth in detail the manner in which Derby and the University has complied with the terms of the ordered relief;

D. Pursuant to 17 U.S.C. § 504 or any other applicable provision, an award of actual damages from Derby and the University and a finding of willful infringement by Derby and the University and award of enhanced damages as provided by law.

E. Pursuant to 17 U.S.C. § 504 or any other applicable provision, an award of statutory damages from Derby and the University and a finding of willful infringement by Derby and the University and award of enhanced damages as provided by law.

F. Pursuant to 17 U.S.C. § 505 or any other applicable statute, an award of costs and a finding that Yeckel is the prevailing party and an award of attorneys' fees;

G. An assessment and award of prejudgment and post-judgment interest; and

H. An award of such other relief as deemed appropriate.

JURY DEMAND

Yeckel demands a trial by jury on all issues so triable.

Dated: September 7, 2018

Respectfully submitted,

By: s/ Paige S. Stradley
Paige S. Stradley, No. 393432
John A. Clifford, No. 134181
MERCHANT & GOULD P.C.
3200 IDS Center
80 South 8th Street
Minneapolis, MN 55402
Phone: 612.332.5300

Attorneys for Andrew Yeckel