

**IS MY JOKE PROTECTED BY COPYRIGHT? : AN ANALYSIS OF JOKE THEFT AND
COPYRIGHT IN STAND-UP COMEDY**

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IN STAND-UP COMEDY

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Abstract

Often, existing artistic works are used in part by other creators as a means to create new artistic work. Copyright law attempts to strike a balance between the rights of the user and the protections of the copyright owner. In Canada, there is some ambiguity in copyright law as it pertains to performance-based art forms such as stand-up comedy. Stand-up comedy creations may be protected as literary or as this paper argues, dramatic works. A performer's performance of comedic work is also protected, but comedians still may not be adequately protected by copyright law. The web series *Killing Gerry* coupled with this support paper, seeks to examine a specific example of an alleged infringement on copyright to illuminate limitations of the law for stand-up comedians.

Table of Contents

1	Introduction	1
1.1.	Beginnings	1
1.2.	Research Aims	8
2.	Copyright and Comedy	14
2.1.	Copyright Explained	14
2.2.	Protecting Originality	16
2.3.	Exceptions	17
2.3.1.	Fair Dealing	17
2.3.2.	Non-commercial User-Generated Content	19
2.4.	Copyright in Comedic Creations	21
2.5.	Protecting Copyright in Comedic Creations	23
3.	Community Norms	34
4.	The Importance of Attribution	40
5.	The Project	43
5.1.	Project Responsibilities	43
5.1.1.	The Writing	44
5.1.2.	Directing and Editing	45
5.1.3.	Acting	47
5.2.	Challenges	48
5.3.	<i>Killing Gerry</i> and Copyright	51
5.4.	Killing Gerry and Copyright Clearance	53
6.	Bit Theft	62
6.1.	Did Gerry Dee Infringe my Copyright?	62
6.2.	A Comparison of Creations	67
6.2.1.	Case Law	67
6.2.2.	The Breakdown of the Bits	68
6.3.	Applying Fair Dealing to the Case	82
7.	Further Research	83
8.	Conclusions	86
9.	References	89
10.	Appendix	92
10.1.	Sequence Analysis: The Protagonist’s Stand-up Comedy Show	92
10.2.	Sequence Analysis: Chapter 3	94

1. Introduction

1.1. Beginnings

In the summer of 2003 I was invited to a teaching colleague's cottage in Ontario's Muskoka region. I was recently married, employed as a teacher and my second career as an actor was beginning to gain momentum. I had been a creator of music, comedy and improvised sketches for some time, and had enjoyed some success in my artistic field with roles in the Hollywood feature film *X-Men* (remember the bullet-in-the-head guy? No? Don't worry, I've brought you a copy! Ba dum bum), the American TV movie *When He Didn't Come Home* and Canadian movie for television *The Arrow*. I had several principal and supporting roles to my credit already, and despite my love for teaching, was hoping to make a permanent career out of performing.

Gerry Dee, an emerging stand-up comedian, was a friend of my colleague's daughter, and accompanied her to the cottage. Rather, he arrived at the cottage fresh off a stand-up performance opening up for Saturday Night Live's Victoria Jackson. It struck me that he was not very "showy", but I had always opined that comedians probably save the funny for the stage, like actors save their most emotional performances for the close-up, so I didn't give it much thought. Later it became clear that he may have been reserved due to a sub-par set at the club that night. I could empathize, being all too familiar with the process of analyzing a performance to death, trying to figure out what could have been better. It is a performer's universal struggle in a quest to deliver the best performance possible.

Comedians have to be observant all the time in order to continue to evolve their

material. A comic who has run out of good bits is on borrowed show time. At this stage in Gerry's career he was far from tapped out, but likely at a similar career point as me, in a position to get a "big break" but still not a household name. Like all good performers, he was able to use ideas from past, day-to-day experiences or chance encounters to generate material or add to his skillset. Gerry Dee discovered some new material that weekend that became part of his act, but it was material that already belonged to another performer – me – and it was used without my permission.

I had brought my guitar and had put on a bit of an amateur show of sorts around the campfire for the 15-20 or so people in attendance. We didn't need a fire, though, because I was hot enough (see how I did that?) and delivered what I felt was one of my best performances. I played comedy songs I had written and performed many times over, albeit in amateur settings, sprinkled with improvisation and practiced routines that I had crafted as part of my creative drive as an entertainer. I had intended to gather an amount of comedic material over time that I could eventually perform as a stand-up routine.

Some of the material performed that day was never scripted. Some of the jokes, or "bits", however, were both written and performed prior to that weekend when I allege they were misappropriated. One of those bits, *You're Fired*, comes in the form of a song and was written in the back seat of a rented Lincoln Town Car on the way back from a punk rock show in London, Ontario in 1997. It is a politically incorrect and inappropriate (by today's standards) ditty inspired by the personal experience of my first real job. It is about a young man who, through the language barriers that exist between the father and son ownership team of a Chinese restaurant, keeps showing up for work even though

he is fired from the job every day. Its comedy relies on a certain amount of skill, judgment and labour in crafting the bit that makes the narrator the butt of the joke, thereby minimizing the offensive nature of the content and allowing the audience to laugh (perhaps somewhat nervously) at the absurdity of the situation.

Gerry Dee turned my song into a bit called *Italian Neighbours*. I discovered this one night when I turned on my television to see him performing in his own TV special. Upon further research over the following year, I discovered Mr. Dee had used two other bits that I had performed in his presence. These ones, unlike the first example, were performed almost verbatim. His bit (that I'll title *The Wedding Gift*, a tale that describes a gift of a small denomination plus change) came from hearing my wife and I tell a story about how we received a similar cheque at our wedding, not realizing it was a Jewish tradition of luck. In another bit that I'll title *The Phone Call*, he retold a story of mine (about how my mother would phone me to argue with my father, who was beside her, and then inform me she "can't talk right now" in a tone that suggested I was to blame) using his family as the cast of characters.

There is an odd feeling when you watch someone perform material you've crafted. It starts as disbelief, moves into anger and culminates in resentment and bitterness. Your pulse quickens and you experience a physiological response that is somewhere between sickening and uneasiness. I still have those responses fourteen years later, but have learned (somewhat) how to deal with them.

Perhaps it would be different if I wasn't also a performer. Perhaps I would have viewed the use of my jokes as more of a tribute. But I didn't, and somewhat ashamedly, I

still don't. I felt that my creations were stolen, and I was both disappointed and angered that I was not consulted or credited.

I'm confident that Mr. Dee would not have come up with these concepts on his own. The access he had to my material that weekend allowed him to take my comedic creations and rework them slightly, or perform what they call a "write-around" in comedy, in which a joke or bit has been rewritten with similar words or phrases that while conveying the same idea, falls shy of direct one-to-one copying. While a write-around may be an effective way to avoid controversy, it does not necessarily absolve the user from infringing on another's creation. My bits and his have extremely similar structures, and involve parallel set-ups and punch lines. I felt that Gerry's use of my creations and portions of my performances that weekend amounted to joke theft, not just because the ideas are similar, but because the expression of the ideas are similar. I believed that then, and still do. I haven't forgotten it, though I wish I could.

I've tried to continue to create, and add the experience to my actor's tool kit. I once pitched a series idea in the dark-comedy genre to some Canadian producers about a failed stand-up comic who, in an effort to exact revenge on the comedian who stole his material, accidentally kills his way to the top, inadvertently causing horrible accidents to rival comedians that would pay homage to classic cinematic deaths every week. As an actor who has died onscreen in many different ways, (occasionally in his performance) I found this idea to be quite comical. The project never got past the treatment and pitch stage, but after my experience I almost expect to see it sometime on television. In fact, one of the cases I will use to examine copyright infringement is *Cinar v Robinson* (2013),

in which that scenario actually happened to Claude Robinson, who witnessed his idea for a children’s television show air on television, produced by someone he had worked with years earlier and who had not only discussed his idea with him but also attempted to get funding to produce it.

There is something that many people do not understand about performers. We can experience two kinds of jealousy: one is professional and generally accepted by the fraternity and one is personal. Professional jealousy happens when you are jealous of the success another performer has garnered, but realize that in the entertainment world (and arguably the sports world, business world etc.,) success is a combination of talent, dedication and timing. A healthy jealousy occurs where you can recognize the skill and talent of the other performer and can accept their “big break” as the good fortune of being in the right place at the right time with the right “stuff”. The personal jealousy is destructive and unhealthy, and occurs when there is something more at play – where you feel the other has been given professional credit for a creation that is yours. This is the jealousy I experienced, and it was coupled with a sense of powerlessness. While I am not proud of this, I found through the course of this project that I am not alone.

I knew that I had little recourse. I could not afford to litigate, and the possible negative press could damage my professional reputation. Also, joke theft at the time was discussed through rumour and hearsay, mostly within the stand-up community. YouTube had not been created yet. There were no examples I could view at the click of a button. Years later, when YouTube was established, I would occasionally torture myself by revisiting *my* material, watching the popularity of the views increase, all the while

wondering if I was just sour and jealous over his success or if I had a legitimate case. In 2011, Mr. D, Gerry Dee's television show, debuted on CBC, and my personal jealousy (leading in part to a depression that year) was in full swing.

Now, I am sure that it was not simply this personal issue that affected me. But it did contribute, though I realize this might have more to do with my character than Gerry Dee's. Still, the trigger was there and I knew that I'd eventually have to deal with it, somehow. Do I contact him? Do I blow the whistle in the media? Do I try to damage his reputation as revenge? No, none of those options were palatable to me. But I didn't want to continue feeling like I was wronged, because quite simply, I may not have been wronged, at least not legally. So, I needed to find out. The opportunity to create something that allowed me to examine if my copyrights were possibly infringed while re-claiming ownership of my material is the impetus behind *Killing Gerry*. This MFA project allowed me to create comedy again, and to do so in a genre I am both experienced in and enjoy immensely. I have written several projects for film and television, and the New Media department provided an opportunity through the Master's program to both script for the screen and to direct; creative areas of filmmaking that I would like to perform professionally in addition to acting. In my experience, I have learned how directors think and how the process works, so the chance to build on those skills by learning about the technical aspects of filmmaking, and then to create an onscreen product, was exciting. The project also acted as an exorcism of sorts. (Of course it will also help me get another degree that should effectively price me out of the teaching market, but I digress.)

Of course I have no desire to "kill" Gerry in the literal sense. I recognize Gerry

Dee's extraordinary talent and despite my bitterness and jealousy, I think he is deserving of all of his success, whether some of my work was infringed or not. He is a master storyteller with a strong sense of timing and character. He can deliberately appear the dolt in his routines, which takes a large amount of creative and performance brilliance. And, to be fair, he was impressed enough with my material to offer to help me get some time at Yuk Yuk's in Toronto back in 2003. It was generous, but I passed, as I felt I wasn't ready or passionate enough for stand-up at the time. But, I also assumed, correctly, that I had the right to reserve my own material for my use until I was ready. Still, the gesture was appreciated, but the appreciation soured once I realized my creations were being used in his act, and that he was having success with them. Once those bits were performed professionally, my ability to perform them to any audience was compromised. And, to be completely honest, I would have appreciated some attribution in return. Credit for your work is very important for artists of all genres. Credit can lead to more opportunities to get the "big break" we all crave. In an industry where the vast majority of actors are unemployed at any given time, credit can offer us opportunities to write material for other creators or producers of content. It can give us more credibility, otherwise known as career-capital, in an extremely competitive world.

Actors would love to experience great commercial and financial success, but failing that, ultimately only want to be able to make a living doing what they love doing. I am grateful to be in this position. My acting career has not been hampered by this alleged infringement (though it certainly hasn't been helped), and while fame and fortune (and everything that goooooeeees with it) may not come, the work is what is

important, and I am proud of my professional achievements.

I'm also proud of this project. *Killing Gerry* allowed me to work on my skills as a writer, actor, director and performer and to finally try my hand at stand-up comedy. It turned out to be a fulfilling and memorable experience that I admittedly may have never attempted if it wasn't for Gerry Dee.

1.2. Research Aims

The web series project *Killing Gerry* was created with specific goals in mind, and crafted with various approaches on achieving those goals. They are outlined below:

Goal 1: The project will examine copyright protections that exist for established and emerging creators of stand-up comedy (and by extension the artistic community as a whole), while illuminating the potential limitations of those protections as they currently exist for creators and users of content.

Approach: I arranged to interview on camera some of the most cited and respected scholars on Canadian Copyright; David Vaver, Professor Emeritus at York University's Osgoode Hall Law School in Ontario, Giuseppina D'Agostino, Associate Professor at York University's Osgoode Hall and Michael Geist, law professor at the University of Ottawa and Canada Research Chair in internet and E-commerce law. All three provided on-camera descriptions of copyright law in both the United States (fair use) and Canada (fair dealing) for my research. In addition, I obtained interviews with several experienced stand-up comedians in order to become informed of their experiences with and thoughts about joke theft in stand-up comedy. This allowed me to build on my somewhat limited existing knowledge of copyright law through one-to-one

question and answer sessions, using questions relating to my area of study.

The project first informs the viewer through the use of the acquired documentary-style interviews with Vaver. As a character, he provides specific reference and interpretation to the law as it stands, and bolsters this interpretation with examples of case law.

The documentary footage in the project then challenges the viewer's understanding of copyright infringement in stand-up comedy, through the informative responses from three of the interviewed stand-up comedians, one of whom is now a booking agent in Toronto. The chosen footage from the interviews provides the viewer with background information into the community norms of the stand-up comedy community in relation to joke theft and misappropriation of comedic material. It also offers the most applicable personal anecdotes to viewers, further clarifying interpretations of community norms, while highlighting the strengths and weaknesses of such norms.

Complementing the informative interviews, the project offers side-by-side comparisons of existing examples of alleged copyright infringement of comedic material, from current and former successful comics like Amy Schumer and Bill Cosby. Examples include stand-up performers and comedy sketches juxtaposed to effectively highlight the similarities of the work in question. Theatrically, this provides a hook for the viewer to become engaged with the story, while serving in the long term as a commentary about rampant allegations of copyright infringements in the stand-up community.

Finally, the viewer is presented with a narrative, which follows and occasionally intersects with the documentary footage. In it, a failed stand-up comedian deals with a perceived infringement of his work. He highlights the emotions consistent with my research of comedians who feel they have been victims of copyright infringement, but his character, unlike those researched, (and me) has literally lost control of his identity and has allowed those emotions to dominate his life. This narrative will potentially allow the viewer an empathetic perspective of what it may be like for a creator of artistic content to feel victimized by a perceived infringement, and hopefully, along with this support paper, encourage some critical thinking toward copyright's potential ambiguities.

The web series further challenges the *Copyright Act's* attempt to balance user and creator rights through its use of existing video, music and art works without permission from the copyright owner. This project takes the position that these uses qualify as fair dealing or non-commercial user-generated content (UGC) exceptions, while acknowledging that the true measure of legality can only be acquired through the courts.

In short, the project explores copyright infringement not only through the protagonist's journey in the narrative, but also through its own potential infringement of copyright as the web series deliberately incorporates excerpts from copyrighted work. In this sense, the project demonstrates how creator rights and user rights, while important and necessary considerations, may often be at odds when weighing the balance of "promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more

accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated” (*Theberge v. Galerie d’Art du Petit Champlain inc.*, 2002, para. 30).

Goal 2: The project will examine if my work was infringed upon, and in doing so, discover and examine any potential limitations of Canada’s *Copyright Act* as it applies to stand-up comedy.

Approach: After gathering information from my stand-up community sources and comparing that information with the expert knowledge contained in my works cited, I wanted to determine if I actually had a legitimate reason to feel that my creations were infringed upon. This goal is more personal than professional. I would like to feel that my experience in the Muskokas was worthwhile in some way. If there was no infringement I may be able to better accept that I made a contribution to a successful artistic work. If there are grounds for believing there was an infringement, I can feel like this project has, in a sense, allowed me to claim some of the credit that I feel has been absent. Either way, while it may not be closure, I hope to feel empowered in some small way. I also feel that the comedians I interviewed for this project would have benefited from knowing if their examples involved probable cases of infringement or not, and in the absence of relevant case law, perhaps this project will provide some answers, or at least food for thought, to them. I will therefore attempt to discover if I have any legitimate claim of infringement.

For a comedian, or creators of all art forms, demonstrating the possibility that infringement has occurred can be a daunting task that involves applying the law and the guiding principles of an artistic community’s accepted norms. These two areas, however

may not be consistent. What may be unacceptable in the community may in fact be legal. As shown in the project, this has led many comedians to feel like they have lost not only some of their artistic protections, but also portions of their artistic identity, or brand, and they feel powerless to do anything about it. Given the costs involved, it is entirely possible that even if an infringement has occurred, there may be no reasonable options available to offer the artist credit or compensation. Still, the knowledge alone that an infringement likely did or did not occur could be somewhat comforting to me in my case, and perhaps act as a potential reference to other creators who find themselves in similar positions.

In an attempt to gain such knowledge, the support paper will examine four guiding questions:

1. Are creators of stand-up comedy adequately protected by copyright law and by Internal IP norms or is there a perceived gap between what comedians feel they need protected, as evidenced by their community norms, and what is protected by copyright?
2. How important is attribution to the creators of comedy and does providing credit offer a potential solution to perceived infringement in the stand-up community?
3. Did Gerry Dee fairly use my creations in creating his own routines according to copyright law and intellectual property (IP) norms of the stand-up community?
4. Is the project *Killing Gerry* likely covered by fair dealing with regard to its

use of existing copyrighted creations?

2. Copyright and Comedy

Copyright is the right of an author to control the use or copying of her work. Copyright grants to an author the sole rights to produce or reproduce, perform in public, and publish for the first time a work or substantial portion of that work (*Copyright Act*, R.S.C., C-42, s. 3 [1], 1985). Copyright law protects the rights of creators while imposing certain limitations on those rights. In the Canadian *Copyright Act* (the *Act*), these limitations are called exceptions to infringement, which include fair dealing for purposes named in the *Act*. Comedic works are not specifically mentioned in the *Act*, but may be examples of literary or dramatic works, which are two of the four categories of works that the *Copyright Act* protects (the other two being musical and artistic works). In addition to works that are afforded copyright protections, copyright is also granted for “other subject-matter,” which includes a performer’s performance. The realm of stand-up comedy incorporates both elements of works and performers’ performances, and therefore may be offered copyright protections for literary works in the form of story writing, dramatic works in the form of scripted routines or recitations, and the performances of those routines themselves. The following subsections examine how copyright is interpreted and applied to comedic creations, focusing on portions most relevant to the project.

2.1. Copyright Explained

Copyright is granted at the birth of an original creation. The concept of originality is a foundation of copyright, and will necessarily be discussed in any potential issues of infringement. While creations are borne out of ideas, ideas are not protected by

copyright; rather, it is the original expression of those ideas that is protected by the *Act*.

The purpose of the *Act* is to “protect copyright owners while promoting creativity and the orderly exchange of ideas” (Canadian Intellectual Property Office [CIPO], 2018). As the Supreme Court of Canada explained in *Theberge*, “The proper balance among these and other public policy objectives lies not only in recognizing the creators’ rights but in giving due weight to their limited nature” (2002, paras. 30-31). This balance is necessary to both stimulate (and avoid stifling) creativity through the use of existing creations while protecting the interests, financially or morally, of the creator. According to the *Act*, “copyright, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work unpublished, to publish the work or any substantial part thereof” (R.S.C., 1985, s. 3 [1]). Explained in layman’s terms, copyright “provides protection for literary, artistic, dramatic or musical works (including computer programs) and other subject-matter known as performer’s performances, sound recordings and communication signals” (CIPO, 2018).

Of most significance to this project are protections for literary, dramatic and artistic works, found in s. 3, and protections for performers’ performances, found in s. 15 of the *Act*. In addition, the project also relies on the Non-commercial User-Generated Content (UGC) exception in s. 29.21 (1) of the *Act* that allows for the use of certain copied material without permission under specific purposes (see Sec. 2.3.2).

2.2. Protecting Originality

In the landmark case of *CCH v. Law Society of Upper Canada (CCH)*, it was determined that a degree of skill and judgment be evident in the expression of ideas in a work in order to be considered original. The Chief Justice wrote:

For a work to be ‘original’ within the meaning of the Copyright Act, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one’s knowledge, developed aptitude or practiced ability in producing the work. By judgment, I mean the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort (*CCH*, 2004, para. 16).

The Canadian copyright system affords copyright protection to everyone provided the work or other subject matter falls under the categories in the *Act*. An artist may register a work with the Canadian Intellectual Property Office for a nominal fee in an effort to have that work recognized as being associated with that artist, but this is no guarantee that a similar existing work is not also registered, since the copyright office, “cannot guarantee that the legitimacy of ownership or the originality of a work will never be questioned” (CIPO, 2017). Therefore, while registering a work may help in creating a presumption of ownership, it is not a guarantee the work will be proven to be original should a conflict arise. Registering a work is not necessary in order to be protected by

copyright, but it does provide an additional record of the work and accurate dates relating to its creation and/or registration, which may come in handy should an issue arise. In Canada, copyright lasts for the creator’s lifetime plus the remaining portion of the year after death, plus 50 years. (R.S.C., 1985, s. 6). Copyright owners also have the option to “assign the right, either wholly or partially” to another party “either for the whole term of the copyright or for any other part thereof” (R.S.C., 1985, s. 13) should they wish to do so, but this assignment must be agreed to in writing by the owner or agent of the owner.

2.3. Exceptions

While the *Copyright Act* protects creators’ rights regarding the use of their work, it also protects user’s rights, where certain uses of a copyrighted work are not considered to be infringing on a copyright owner’s rights. These user’s rights come in the form of exceptions to copyright protections, presented in s. 29 to 32.2 of the *Act*. Most applicable to this project are fair dealing and non-commercial user-generated content exceptions.

2.3.1. Fair Dealing

Fair dealing is an exception in the *Copyright Act* that allows for the use of copyrighted works or other subject-matter without permission. This exception contains a list of purposes for which a fair dealing may occur. Under fair dealing, a work may be used provided the purpose of the use is for research, private study, education, parody, satire, criticism, review or news reporting, and provided the use can be proven to be fair

(for criticism, review and news reporting, sources must be attributed). Fair dealing, as a user right, is necessary for the law to “maintain a proper balance between the rights of a copyright owner and users’ interests” (*CCH*, 2004, para. 48). This closed list of eight exceptions are now entrenched as necessary considerations in copyright cases, because, in *CCH*, the Supreme Court “reaffirmed that fair dealing is a user’s right that must be interpreted in a broad and liberal manner” (Geist, 2012, vii).

Assuming that the use of a protected work fits one of the eight exceptions for fair dealing, there remains necessary considerations to determine if the use is fair (*CCH*, 2004, paras. 51-60). These factors, discussed in more detail in Sec. 5.4, are:

1. The purpose of the dealing (Is the purpose allowable under fair dealing? Are there commercial or charitable reasons for the use?)
2. The character of the dealing (How was the work was dealt with and distributed? Are there customs or practices in a particular trade or industry to consider?)
3. The amount of the dealing (Is the amount used trivial or whole? Quantity of the work taken is not determinative of fairness.)
4. Alternatives to the dealing (Was the dealing reasonable necessary to achieve the ultimate purpose?)
5. The nature of the work (Is it an unpublished work that may lead to a wider public dissemination or was the work in question confidential? Not determinative.)

6. The effect of the dealing on the work (Does the reproduced work compete with the market of the original work?)

2.3.2 Non-Commercial User-Generated Content

Under user's rights, the Canadian *Copyright Act* offers an additional exception for non-commercial user-generated content (UGC). Specifically, sec. 29.21 [1] states:

It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual's authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;

(b) the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;

(c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and

(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one (*R.S.C. 1985 C-42, s. 29.21*).

The UGC exception is in place to guard against owners of copyright taking advantage of their protections to extend potential monetary gain by limiting the exposure of the work that can be used in any way by the public. Murray and Trosow explain in *Canadian Copyright: A Citizen's Guide*:

This exception is not uniquely applicable to video, but it arose out of consumer outrage over certain notorious complaints lodged by corporate rights holders when people posted YouTube videos using music without clearance, so it is associated with burgeoning amateur video practice (2013, p. 152).

The emergence of UGC protections attempts to ensure, then, that the balance between owner rights and creator rights is not tilted in favour one way or the other. In her blog post *The UGC Exception: Copyright for the Digital Age*, Scassa, writes:

What the UGC exception injects into this concept of layered rights is the possibility that someone may create a new work using a pre-existing work in which copyright subsists, AND that they may disseminate it widely, so long as they do so non-commercially, and so long as this does not (and this is the tricky part) have a “substantial adverse effect, financial or otherwise, on the exploitation or potential

exploitation of the existing work (2013).

While originally intended to offer Canadians some protection against frivolous lawsuits for minor uses, such as having a song playing in the background of a YouTube post, the UGC exception may also offer some protections for creators to use copyrighted material so long as the purpose is non-commercial.

2.4. Copyright in Comedic Creations

This thesis project explores what comedians describe as “joke theft”, and asks, “how can a joke or bit be protected from infringement”? In stand-up comedy, the answer may not be simple, due to the nature of the genre itself which involves both the crafting and performing of a comedic creation. Stand-up comedy requires the production (writing, editing, etc.) and performance of routines. The “work” (production) and “other subject-matter” (performance) are both copyright protected. The *Copyright Act* provides the creator of a work the “sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right...(a) to produce, reproduce, perform or publish any translation of the work” (R.S.C. 1985 C-42, s. 3.1). The *Copyright Act* also protects “other subject-matter” such as a performer’s performance, where:

15 (1) Subject to subsection (2), a performer has a copyright in the performer’s performance, consisting of the sole right to do the following in relation to the performer’s performance or any substantial part thereof:

(a) if it is not fixed,

(i) to communicate it to the public by telecommunication,

(ii) to perform it in public, where it is communicated to the public by telecommunication otherwise than by communication signal, and

(iii) to fix it in any material form,

(b) if it is fixed,

(i) to reproduce any fixation that was made without the performer's authorization,

(ii) where the performer authorized a fixation, to reproduce any reproduction of that fixation, if the reproduction being reproduced was made for a purpose other than that for which the performer's authorization was given, and

(iii) where a fixation was permitted under Part III or VIII, to reproduce any reproduction of that fixation, if the reproduction being reproduced was made for a purpose other than one permitted under Part III or VIII, and

(c) to rent out a sound recording of it,

and to authorize any such acts (*R.S.C. 1985 C-42, s. 15.1*).

2.5. Protecting Copyright in Comedic Creations

A performer's performance, while protected in s. 15, are different rights that seem to be much narrower than the protections found in s. 3. However, the potential exists that they may perhaps intersect at some point. This is very confusing for comedians and other creators of comedy. A comic may create a work and perform it, and both the work and performance are protected under s. 3 (works) and 15 (performers' performances) respectively. However, the narrow protections in s. 15 only seem to protect against potential unauthorized reproductions in fixed form, such as a video or audio recording of that specific performance, and the sharing of that fixation. It protects a performer's right to fix her performance and communicate it to the public through telecommunication, but it does not mean that the material that is so precious to comics can be protected – that is a protection under s. 3 where the copyright owner has a right to publish or perform her work.

So, since each performance an artist gives is understandably considered an original creation, protections against infringement under s. 15 deal with fixed copies of a performance, while protections against infringement under s. 3 deal with works. This means that a performance cannot infringe on another performance. However, it could potentially be argued that a performance given by a comic may infringe on another comic's work, as defined in the *Act*, since copyright protections begin at creation, and work is protected under the *Act* in s. 3, even if it is not yet fixed. But that performance would also offer the alleged infringing comedian the right to fix *his* performance under s. 15. Supposing a comic performed his work at a comedy club and then suppose that

performance was viewed by another comic who then performed substantial parts of that performance in his act later. While each performance is protected by copyright, and each performer would maintain the right to fix that performance and communicate it to the public through telecommunication, the potential exists that the second performance infringed on the *work* of the first performer under s. 3, and his right to “produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work unpublished, to publish the work or any substantial part thereof” (R.S.C. 1985, s. 3). However, it seems that any interpretation of the law in a case such as this would likely attempt to examine the content of the alleged infringing performance as a *work* that has not been fixed. Currently, performances are not considered works in the *Act*, yet in *Cinar v. Robinson* (*Cinar*), the completed and edited version of *Robinson Sucroë*, a television show produced by *Cinar*, was found to be an infringement of *The Adventures of Robinson Curiosity*, a literary and dramatic work belonging to *Robinson* that was expressed through scripts, synopses, storyboards, sketches and drawings. The Court, while recognizing protections exist under literary and dramatic work, did not seem to consider *Curiosity* as one or the other, rather it considered the two works holistically, including aspects of the televised show (*Cinar*, 2013, para. 35). The fact that the Court determined that the “features reproduced in *Sucroë* represented a substantial part of *Curiosity*” (2013, para. 11) suggests that the Court considered the final product, that being the first episode of *Sucroë* along with the existing works from *Robinson*. Given this, I would argue it would seem feasible that a stand-up performance that allegedly infringes on another comic’s work, and if that

alleged infringing performance is fixed, then that performance could be likened to the first episode of *Sucroë*. Yet, for comics, it may not be that clear cut. The *Sucroë* episode was considered a work in itself whereas the performance would not be considered a work under the *Act*. Unless it could be shown that the alleged infringer's work, potentially literary or dramatic, (where this paper argues stand-up comedy may reside under the *Act*), copied substantial parts of another work, it would be difficult to support the claim that an infringement had occurred. This ambiguity in the *Act's* protections has made it difficult for stand-up comedians and creators of comedy to feel that they can adequately and effectively protect their work.

Problematic for comedians is that an alleged "joke thief" may take the expression of their creation (the performance) and in effect "write around" it (whether or not it is actually written in text) to suit their performance style and changing to varying degrees the specifics of the plot or structure; in effect creating a new original performance (and work) that would then be copyright protected, despite many seemingly similar portions of the two performances. In this sense, it may be likely that several allegations of "joke theft" may fall into the category of work that is copyright protected while infringing on another copyrighted work at the same time.

A "write around" may or may not necessarily constitute a new original work in the eyes of Canadian law, however. Again, remembering *CCH*, originality would be dependent on the skill and judgment of the re-writer in exploring similar ideas. Since an idea cannot be copyrighted, the author of the rewrite would ideally attempt to ensure that enough skill and judgment had been demonstrated in expressing an idea in a new

way; being careful not to incorporate substantial parts of the existing original work they are rewriting in the creation of the new one. The notion of substantiality, however, is subjective. In *Cinar* it was found that “A substantial part of a work is a flexible notion. It is a matter of fact and degree. ‘Whether a part is substantial must be decided by its quality, rather than its quantity’” (2013, s. 26). Since an infringing work need not be a literal copy of the original, any allegation of infringement in stand-up comedy would likely involve an examination of both work and performance in order to determine if the expression of an idea did or did not demonstrate sufficient skill and judgment in avoiding copying substantial portions of the plaintiff’s work. For comedians, this likely means that a comic must have substantial portions of their work used in the performance by any alleged infringing performer, and that sufficient skill and judgment was not demonstrated by the alleged infringer. In their book *Canadian Copyright: A Citizen’s Guide*, Murray and Trosow state:

a good line or two, spontaneously if aptly delivered, would probably not be covered” [...by copyright, but that] “a more prolonged piece in a public venue, even if improvised, would count as a performer’s performance under section 15 of the Act – according to which the performer alone has the right to fix the performance in any form or to authorize such fixation (2013, p.44).

They go on to suggest that “if comics are working from someone else’s written material rather than generating their own material in performance, they might need permission, because that material, like all written matter, is born copyrighted” (Murray, 2013). What this means for comedians is that while the scripted routine or bit, if original,

is protected, the comedian also has the right to “fix”, (publish the text of, or record), their performance of that work, or authorize another person to fix it. So, the creator of a joke or routine (scripted or not) can authorize another performer to fix that joke or routine in a tangible medium, like video or audio recording for example, or can reserve the right to fix it himself for communication to the public later. In other words, if a comedian performs original material that is not written or recorded, he is granted copyright of that performance and is granted the right under the *Act* to “communicate that performance to the public by telecommunication” and to “perform it in public, where it is communicated to the public by telecommunication otherwise than by communication signal” and to “fix it in any material form” (R.S.C., 1985, C-42, s. 15.1.).

However, the fact that these protections exist is no guarantee that a comic can successfully protect himself from infringement. Two of the three jokes that I allege was infringed by Mr. Dee were nearly verbatim copies of jokes that I had told often. However, I had never fixed the jokes, and despite the fact that the jokes are protected and I have the right to fix them, it would be extremely difficult for me to prove, without a fixation as evidence, that an infringement had likely occurred. This conundrum affects many stand-up comedians since the alleged joke theft usually involves performances, not works, and one performance cannot infringe on another performance. Infringement involves copying a substantial part of another work, or publicly performing a substantial part of another work. But many comics perform improvisational parts of their work, which, while protected, are understandably difficult to legally protect without a fixation, making it unlikely that a comedian could show that infringement likely occurred.

It is notable that stand-up comedy is not specifically mentioned in the Canadian *Copyright Act* under protected dramatic works when a performance form such as mime is. A dramatic work includes “any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise” (R.S.C., 1985, C-42, s. 2). Where, say, a mime performer could potentially point to the dramatic portions of an alleged infringer’s performance (for instance the expression of the work through similar movements and choreography in which the mime story is told) the stand-up comedian is likely hard pressed to demonstrate how the art form would qualify as a dramatic work. Often there is no specific scenic arrangement to the performance (although there can be) and a different style or delivery may be incorporated by the alleged infringer. (This will be addressed in more detail in sec. 5.1.) Regardless, the mime performer would have similar difficulties in proving infringement if both performances in question were not already fixed to compare. For performing artists, examining two performances is only beneficial if it helps to prove an infringement on the dramatic or literary work protections in s. 3 of the *Act*.

The question of where and how a stand-up comedic routine is protected in the *Act*, has made it potentially difficult for comedians to feel like they can actually protect their creations. Often there is no existing script, and it is even more difficult to protect an unfixed literary or dramatic work than a fixed one, especially in stand-up comedy, despite the protections the *Act* provides. Complicating matters is the fact that as of this writing there appears to be no Canadian cases that involve joke-theft in stand-up comedy or cases that broach the issue of performer’s performance in stand-up comedy to clarify

this potential grey area, and while there has been some study in the United States about joke-theft, there seem to be very little clear protections offered for comedians outside of the protection of a literary work.

In his article "*Whose Joke is it Anyway?: Originality and Theft in the World of Standup Comedy*", Pate explains, "For most comedians, writing routines is a long and painful process involving writing new material, trying it out in front of audiences, and then editing it based on the audience's response" (2014, p. 60). Pate describes the process as often taking "years to create perhaps only thirty to sixty minutes of material". He goes on to explain how, given the amount of time and effort it takes to perfect a joke, that comics are understandably upset when their joke is incorporated into someone else's act. Adding to their frustration are the limitations comedians perceive in protecting originality, discussed above, despite the fact that a work can infringe another work without being a literal copy. In *Cinar* the Supreme Court said, "The Act protects authors against both literal and non-literal copying, so long as the copied material forms a substantial part of the infringed work" (2013, para. 27). Again, the notion of substantiality is subjective, and may be extremely difficult to argue with or without a fixation of the work to draw upon.

In their landmark paper "*There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-up Comedy*", Oliar and Sprigman explain that several of the respondents in their research opined that "skillful rewriting makes it difficult for an originator – or a judge or jury – to know whether a comedian has appropriated a joke, or has created it independently" (2008, p. 1811).

Since only the expression of ideas can be copyrighted, not the idea itself, new expressions of existing ideas are commonplace. Yet many examples of perceived joke theft by the stand-up community exist, and several have been included in my web series project *Killing Gerry*. It is problematic for comedians that, as Oliar and Sprigman discovered, there seem to be very few decisions involving stand-up comedians claiming copyright infringement in Canada, the United Kingdom (U.K.) or the United States (U.S.) to draw upon for specific guidance. According to them, “Copyright is the most relevant body of law; formally, it applies to jokes and comedic routines. Yet, we could not find even a single copyright infringement lawsuit between rival comedians” (Oliar, 2008, p. 1789). Currently in the United States, a case is moving forward against Conan O’Brien for allegedly stealing three jokes (one-liners) from comedy writer Robert Kaseberg. The summary judgment hearing found that out of five jokes Kaseberg wrote, three had sufficient cause to proceed (*Kaseberg v. Conaco, LLC et al.*, [Kaseberg], 2017, 1 [C]). However, a decision, or more likely a settlement, is likely to take some time, and the judge has offered that “the jokes are entitled to ‘thin’ protection” (Kaseberg, 2017). In a Washington Post article on the story, Sprigman offers, “Comics rarely sue one another, and to some degree this case illustrates why. The judge ruled the case could go forward but the ruling makes it difficult for Kaseberg to win” (Andrews, 2017). Difficult for most comics seems to be understanding the difference between idea and expression. Pate says, “the law fails to recognize the identity of the joke as a structure combined with a topic, and only protects specific, fixed linguistic expressions” (Pate, 2014, p. 62). However, it seems that more latitude may be granted to comedians in Canada for

protections since, as discussed above, comparisons may be made holistically to determine potential infringement of a work. In short, it seems that in Canada infringement need not be in the form of the “specific fixed linguistic expression” Pate describes. Instead, a work may infringe on another if *substantial parts of the work as a whole* are copied (Cinar, 2013, para. 41).

Pate clarifies what constitutes a joke’s identity in a manner that seems to fit within the parameters of originality as defined by Canadian copyright law. He suggests a joke contains a topic, structure (setup) and punchline. Pate further explains that:

The structure alone does not constitute the joke’s identity; a joke made from that structure could then be reduced to a description, with enough variations to be considered an entirely different structure. These variations largely come in terms of level of abstraction (2014, p. 62).

Here again, the question of infringement seems to hinge on the substantiality of the alleged infringing portions related to the original work. Pate is showing how a new, original work can be derived from an old one, but that the originality of the new work is dependent on the *quality* of that part of the work that has been taken and used. This is hardly a new concept, but illustrates the difficulty in the subjective interpretation of potential infringement in stand-up comedy. It also illustrates the key question in Canadian copyright’s protection against infringement: was a substantial part of the work taken from the original?

Regarding an alleged infringement of a Bill Cosby bit by Carlos Mencia, Pate states, “It is the combination of structure and topic that makes Cosby’s and Mencia’s

jokes the same, and literary originality depends on original combinations of structures and topics, rather than jokes fixed in specific ordering of words” (2014, p. 62). In other words, the topic, structure and performance of a joke give it an originality that is at risk of infringement from another performer, even if the words on the page are different.

Pate believes that “standup comedy operates simultaneously under two constructions of originality that are both irreconcilable and inseparable: literary originality or originality of content on the one hand, and performance originality or originality of style on the other” (2008, p. 57.) Pate implies that the style in which a comedian or performer delivers her material, while separate from the writing of the bits themselves, is of significance to comics, though performance originality may or may not be considered in legal terms as an enforceable concept.

Oliar and Sprigman suggest that comics feel that “copyright law does not provide comedians with a cost effective way of protecting the essence of their creativity” (2008, p. 1790). But, what do they refer to when they mention the “essence”? It seems they are referring to a combination of the work and the performance. Perhaps they refer to the expansion of an idea into a routine, or perhaps they are referring to what Pate called a joke’s “identity”. Here, I will simply use the term “originality” since neither “essence” or “identity” are currently identified as protected in the *Act*. Further, it is likely a stretch to suggest that stand-up comics can in fact protect the identity of their jokes, given the subjective nature of the term. Ultimately, any discussion regarding concepts such as “identity” and “essence” arguably refer to variations of an idea, and it has already been established that an idea cannot be copyrighted. It is this “thin” protection of jokes

highlighted in Kaseberg that seems to have made comics feel there is little they can do to maintain and protect ownership of their creations, for without significant financial resources, litigation is exceptionally risky. The frustration that stand-up comedians feel in protecting their career capital can often lead to confrontation within the community as comics attempt to take other avenues to protect themselves from perceived infringement.

3. Community Norms

Killing Gerry examines many examples of what would be considered “joke theft” in stand-up comedy and sketch comedy. Some, such as Carlos Mencia’s *No Strings Attached* (2006) retelling of Bill Cosby’s *Himself* (1983) “Hi, Mom!” routine seem at first to be expressions of an idea that contain too many similarities over a lengthy discourse to be original. Many would say the two are identical, but in fact there is little literal copying. We can tell both routines apart from each other, yet we are inclined to believe that Cosby was the originator, as his came first and Mencia had access to Cosby’s material (Mencia has since admitted to using other comedian’s jokes by rewriting them). Others may simply seem similar, and depending on the length of the routine, as Murray and Trosow explained, the jokes may possibly have arisen by coincidence, or as explained in the web series *Killing Gerry* through “parallel thinking”, where two comedians simultaneously create the same joke. Regardless, after researching how established comedians like Joe Rogan, Morgan Murphy and Darren Frost deal with the idea of joke theft, and after the interviews I conducted for the web series, I believe many, if not most established comedians would view most if not all examples included in *Killing Gerry* as joke theft. However, after all my research, including the works cited, it seems to me that there is a feeling that there is very little recourse for those who believe they have been infringed upon without taking much financial risk. Occasionally, a perceived infringement can be financially rewarding for the alleged infringer, which can render the potential victim at an even bigger financial disadvantage. This can be especially disconcerting for a comic who has spent countless hours perfecting his routine only to see another

performer reap the rewards. In *That's My Joke...Art...Trick!*, Schacter describes seeing a bit he had crafted and performed form the basis for a candy bar commercial. "I had a visceral reaction. I literally felt sick" (2012, p. 73). In the series *Killing Gerry*, comic Johnny Guardhouse describes the anger felt when witnessing comedic bits he had worked on be used successfully by another comic. These feelings are reflected in Brian, the protagonist in the web series, who is at loss to make sense of his perceived infringement and embarks on a journey to come to terms with his situation and confront Gerry. The experience of feeling shock, anger, nervousness, fear and guilt are common to many artists who contend that others have used their work without permission or credit. Recently, in an interview for CBC radio, artist Gelila Mesfin saw her portrait of Michelle Obama as an Egyptian queen displayed as a mural on Chicago's South Side. Initially, she was almost flattered to see her work displayed, but once she realized she was not credited and the mural's artist was receiving monetary compensation for a painting he claimed was designed by him, her feelings changed. "I was very disheartened and I just felt like it was disrespectful" she said. Her online response to the mural's artist, Chris Devins, went viral, and implied a more emotional response to the theft. Mesfin said:

How can you just steal someone's artwork... someone's hard work and claim it like it's yours... how can you go on record and say you designed this... this is so disheartening and so disrespectful on so many levels... like this man seriously created a gofundme page, raised money and did this... it's one thing to share or even profit from someone's work but to claim it as yours is just wrong! Thank you to those who DM and messaged me to let me know what was going on

[@dnainfochi](#) you guys should take this article down because this man stole this. I wouldn't mind if he had given me credit or said he took the design from another artist but saying you designed it is just wrong! The man is a teacher for God's sake and said he was doing this to create positivity for his students and community... but he didn't think that stealing a young girl's artwork and making a profit out of it does more damage than good (CBC, 2017).

Reactions such as these mirror my own, and are common in artistic communities. Borne out of these reactions, community norms evolved, when members of an artistic community, in this case the stand-up comedy community, began to adhere to an unwritten rule based system of acceptability of originality when it came to joke-telling, allowing potential infringers to be judged by their peers negatively or violently if they infringed on another's originality. As Schachter explains, "The stand-up community accepts the resort to physical violence" (2012, p. 68) as part of its policing. To a Canadian, this seems similar to how the hockey community has long accepted fighting as a means to settle on-ice disputes that are ignored by the referees.

In years past, it was commonplace for jokes to be told and retold by various comedians with various deliveries. In short, the *manner* in which the joke was told was the originality. "In vaudeville, for example, many performers would use the same joke, and the notion of 'stealing' rarely if ever came into play because the thing that distinguished performers – *their career capital* – was the manner and skill with which they delivered the content" (Pate, 2014, p.58). However, the individual performer became much more prevalent post-vaudeville, and the inclusion of literary originality

became much more important to the career capital Pate describes. Where comedians used to perform as part of a variety act or troupe, they were now the headliner, and as such, “the basic unit of humor in the post-vaudeville period was the joke” (Oliar & Sprigman, 2008, p. 1847). Protecting the rights that were of importance during each period was important to the comic’s career, but enforcing those rights was, and remains, difficult, and as stated prior, relevant case law is not readily available. Oliar and Sprigman’s research concluded that “In stand-up comedy, social norms substitute for intellectual property law” and that “aside from respondents’ concerns regarding the cost of lawsuits, there was also the view that “copyright lawsuits were in most instances unlikely to succeed” (2008, p. 1811). This has led comics to resort to the sort of self-policing described previously in the paper and in the web-series as a means to protect their creations. But the comics are not necessarily using community norms to protect what is already covered by copyright law, rather they seem to be responding to what they *think* is an infringement. Community norms then, decide what is deserving of protection, which may not necessarily be in keeping with the law, and enforce those protections, which often leads to misplaced confrontations. All of the comics in my web series discussed how they were confronted and accused of joke theft over jokes that they allege were written by themselves, in a misguided effort to protect colleagues or friends on the stand-up circuit. It is probable that many of the accusations are over the perceived originality of the jokes, and it is likely the accusations arise from comedians comparing performances, some of which may have included the aforementioned “write-around”. Oliar and Sprigman describe how their “respondents noted that comics

appropriate not via literal copying, but by ‘rewriting’” (2008, p. 1811). Comics have often taken pieces of a routine and manipulated those pieces somewhat to make it seem different, often taking “the ‘idea’ of a joke, (its premise, expressed in a high level of generality) and reworking the expression of that idea. Such a strategy takes advantage of copyright law’s distinction between ideas and expression, with protection reserved for the latter” (Oliar & Sprigman, 2008, p. 1811). Still, Schachter points out that to comedians, “unprotected IP is no less valuable to its owners than protected IP” (2012, p. 65). In both the U.S. and Canada, an artist may adapt, restructure or rewrite the premise, often very skillfully in order to straddle the line between infringing and non-infringing use. Comedians then, have become very protective of their creations and have extended this protection to include “unprotected IP”, or in other words, their jokes’ perceived originality, perhaps knowing that there is a difference in what the stand-up community would consider to be an infringement and what the courts would. While this has arguably led to more perceived protections for comics, potential concerns are fairly obvious. As evidenced in the project *Killing Gerry*, the originator of a creation can often be accused of being an infringer, depending on the size of the audience that witnesses the act or routine that reminds them of another performer’s performance, and depending on the popularity comparison between the two artists. Still, the findings of Oliar and Sprigman suggest there is “no reason to suspect, absent more data, that the norms-system underperforms” (2008, p. 1791). However, given the spate of joke-theft allegations since the explosion of YouTube, perhaps there is reason to believe more data is in fact necessary to make this assertion.

4. The Importance of Attribution

While protecting one's intellectual property in the entertainment industry is important, receiving credit for material used by another may soften the blow of any emotional or financial damage, and result in compensation, mitigating the need to litigate. When it comes to performers in film and television, the realms in which stand-up comedians enjoy lucrative deals and increases in popularity, receiving credit as a contributor to a successful production increases that performer's standing, or career capital, and offers the performer more opportunities to create a marketable brand, even if their contributions are used in the promotion of another performer, or the "star" of the show. In film and television, receiving credit for work you have performed on a production is a contractual obligation for most crew and performers. However, the placement and location of the credit can be negotiated by the performer or the performer's agent. As an actor, I have negotiated to have my name appear, if the role warranted, in the "head credits" which appear onscreen during the opening sequences of the film. Often, this placement is important because it helps the viewership identify with your work. The more people identify you with your work, the more successful your brand. Actors who receive head credits can further negotiate the order of appearance of the credit, and whether it is a single credit or on a shared card (several names appearing at the same time). An actor receiving credit at the front of the project, will usually also receive it on the back end in the rolling credits of cast and crew where the performer and the character are connected visually. Once an actor receives credit in the cast of a film, she is more likely to be taken into consideration for the next role she is auditioning

for. When several credits are attached to the actor, it creates what is described as “heat” on a performer, making her more desirable for producers to cast.

Often, as described in the web series interview with Johnny Guardhouse, stand-up comedians who borrow work on some occasions seem to be expected to inform the creator of the material of their actions, working on the assumption that most comics, depending on the crowd, may be in need of a different angle to please the audience and may be more forgiving if they are informed of a potential infringement. This action also seems to provide a mutually understood community acceptance of give and take in certain situations.

Writing credits work somewhat differently. There may be several writers on a project and perhaps even a script doctor who may or may not be credited. These writers would negotiate their credit before attaching themselves to the project.

Occasionally, a writer will not receive a credit that he has negotiated, leading to a missed opportunity should the project become a success. John Howard Lawson, the first president of the Screen Writer’s Guild, said, “A writer's name is his most cherished possession. It is his creative personality, the symbol of the whole body of his ideas and experience” (Web. NexTV, *A Writer’s Guide: Determining Writing Credits*, 2013, para. 4). Being unable to capitalize on the success of a project has been the unfortunate reality for many writers, and the missed opportunity can be felt far into the future. Official recognition of creative contributions in the form of credit allow for a writer to be compensated for additional financial success resulting from public consumption. In the *Screen Credits Manual*, the Writers Guild of America (WGA) explains:

A writer's position in the motion picture or television industry is determined largely by his/her credits. His/her professional status depends on the quality and number of the screenplays, teleplays, or stories which bear his/her name. Writing credit is given for the act of creation in writing for the screen. This includes the creation of plot, characters, dialogue, scenes and all the other elements which comprise a screenplay (WGA, 2017, p. iv).

For writers, the negotiating of credit is their responsibility at the time of hire. Often performers may also contribute as writers, directors or consultants. In Canada, the Writers Guild of Canada (WGC) states, "Copyright of the script material remains with the writer who, in exchange for appropriate compensation, grants the producer a license enabling unlimited worldwide commercial exploitation of the production" (WGC, 2002).

Canadian television writer Trevor Finn recounts his first break in television writing in his blog *The Saga of a Developing TV Writer*:

I worked with some world-class writers and crew and it resulted in a serious boost to my career. The showrunner, Roger Avary, gave me chance to prove myself in helping to fix a problematic script. He liked what I did, and I got promoted to Story Editor for the last four episodes!" (2012).

A quick search of the Internet Movie Data Base shows that since 2012, Mr. Finn has enjoyed regular employment as a writer on two television series and a TV movie. With these credits behind him, Mr. Finn will undoubtedly seek to continue to get "hotter" as a writer in the Canadian entertainment industry.

Furthermore, performances on a television series can allow a writer to put those

bits on a demo reel, to send to producers. “Tapes are not just for booking comedy shows either. They can lead to a variety of opportunities such as TV hosting or man-on-the-street jobs” (Schachter, 2012, p. 76). This is also true of actors. I have often booked gigs without an audition based solely on my reel. When a writer receives a credit for another comedian’s bit, they can use that comic’s performance on their demo reel as well, to show how their writing was used. However, when credit is denied, pecuniary harm may be felt. This is potentially worse for comics who are at the beginning of their careers. Schachter explains, “ECM felt by midlevel comedians could potentially be quite significant. The effect is far worse, however, for a new comedian starting out. A new comedian has none of the reputational advantages of a mid-level or higher comedian” and since it takes a large amount of time to craft material, “ECM on a new comedian can have a devastating pecuniary effect” (2012, p. 76). Being denied credit for any of the works or performances I allege were infringed by Mr. Dee could thus arguably have a pecuniary effect of some sort on my performing career.

5. The Project

I wanted to create a project that drew from both my professional careers in education and acting and that would contribute to an academic discussion about copyright. As a high school teacher, I am constantly interacting with the governing copyright requirements, ensuring that movies I show, papers I copy and sources I use have been cleared for use, while forever checking over student work for evidence of both plagiarism and copyright infringement (the latter being the only legal matter). I had noticed that where high school students used to “cut and paste” portions of essays and hope to avoid being detected, it now seemed that the practice was often used with the belief that a new work was created simply by attaching the literal copies of significant portions of others’ works without citation to their documents and attaching their name to those documents. This experience in the educational field coupled with the perceived infringement of my copyright in my creative works, led me to create *Killing Gerry*.

5.1. Project Responsibilities

Killing Gerry was a self-financed low budget production. I wrote, cast, scheduled, directed, starred in and edited the project from pre-production through post. I hired crew when I could, but when the schedule became unpredictable due to actor and location availability, the number of voluntary crew quickly diminished. I hired the Director of Photography (DOP) and Sound Mixer for a minimal fee, so they were consistently present, however substitutions were occasionally necessary due to the scheduling conflicts. Often, my crew of approximately 10 people became no more than

3. The changing crew coupled with much inexperience occasionally led to problems such as missing digital sound (later re-captured in automatic dialogue replacement, or ADR), lost footage (later re-shot) and on-set technical compromises. Many hopes of a polished visual display became tempered. However, the project's success in reaching its goals depends on other considerations outside the visual aesthetic. Throughout the areas of most concern were the writing, directing, and acting.

5.1.1. The Writing

The narrative initially pulled in too many directions. In attempting to layer the story, it touched on too many areas including method acting, mental health, stand-up comedy, legalities, existentialism and all the human emotions. While attending to many different ideas can be extremely important and effective, they become detrimental when they distract from the through line of the story, which is what occurred in the feature form. Since the project became a web series, the through line is clearer and this has allowed me to add layers to the plot and to the characters that would not have been as effective prior, hopefully leading the audience to realize something new about them and the story with each viewing.

One area I paid much attention to was in writing a voice for each of the characters. When I teach students, I try to suggest that as one reads the script, every character should “sound” different. Crafting the dialogue by writing “in voice” helped in allowing the actors to more truthfully portray the archetype I was giving them in their roles. From the “don’t give a shit” attitude of Dave to the exuberant and challenging Dr. Dee Lite to the confused loss of innocence of Mandy, the characters’ dialogue is

connected to that character. After viewing, I think it would be difficult to take any significant line of dialogue from the script and not be fairly certain to which character it belonged.

The initial hope was that I could craft an original script using ideas originated by others. To an extent this is evident (*Jaws*, *Fight Club*) but in the end I decided that I would focus on incorporating my rights as a user to create user-generated content that, in conjunction with the application of Fair Dealing for educational purposes, would allow the series to be shared fairly. In its completed form, the footage, dialogue and score features homages (*Fight Club*), copies for the purpose of parody (*Jaws* theme), and copies for the purpose of education (Comedy footage), as well as a mashup of existing footage; all designed to challenge the balance between user and creator the copyright act strives to strike. All uses will be argued as Fair Dealing in the “Copyright Considerations” section.

5.1.2 Directing and Editing

The director of a film production must prioritize choices in the interest of maximizing the time that the shooting schedule allows. Out of common areas of focus such as lighting, balance, depth, colour and frame size I chose to focus primarily on frame size because it relates mostly to character. I had adopted an approach of “performance is priority”, and communicated this to my actors, and through this approach was able to elicit strong onscreen performance moments despite time constraints. Telling the story in close allowed me to ensure there was adequate time to devote to performance. Wide frames and establishing shots that include the entire playing area were shelved in favor

of telling the story through the characters' faces. Because most scenes involved only two or three performers, I was able to include many medium and close shots in my editing choices. This proved to be beneficial once the decision was made to focus on displaying the project online rather than in a theatre, where the opportunities to provide many more details in the visual exist. While the two-shot provided an economical approach to storytelling, I preferred to come in to singles and closes quite often, as it is the protagonist's emotional state and the secondary characters' reaction to it that is paramount to the narrative. This strategy is especially evident in the scene involving Dr. Dee Lite where the camera captures important "thoughts" from Brian and the equally important reactions of his therapist.

A director's vision is only as good as the editor a film or video employs, therefore I chose to edit the project myself, learning the skills that were necessary. Editors can affect a film's believability through their aesthetic choices, which in turn, may impact negatively on the audience's suspension of disbelief. In accepting the role of editor, I could make the choices I wanted to ensure my goals in capturing believable performances were met. The beauty of the digital age is that it is economical to "print" many takes. Once I felt I had enough of what was needed, I offered the actors the chance to play, with direction, and try different approaches. Often this resulted in moments were not only natural and effective, but that also allowed for some discovery to take place, which led to many wonderful performance moments. When editing, rather than subscribe to the common procedure of choosing from two or three takes of each character to build my scene, I scoured many takes of varying frame sizes to find those

moments, and build the narrative accordingly, lending professionalism and believability to the performances, albeit at the expense of needing additional time in post-production.

5.1.3. Acting

The roles of Brian and Dave were of most importance for obvious reasons. For Dave, I needed to find a performer who had some experience in performance either with stage or film, and Kelly Roberts brought that to the table. He was able to not only build a character on his own, but could both take direction and offer suggestion. In addition, Kelly took the time to read the script several times and question any unclear motives – leading to a strong and nuanced performance that rivals that of a savvy veteran. As an actor, I enjoy working with directors who have done their homework and know the answers to any possible question I could have, but who can also take suggestion and allow me to try various comedic or dramatic choices. I wanted to bring that approach to my direction of the project, and I think the combination of those two factors led to the two leads providing the chemistry needed to do justice to the roles.

The character of Brian was difficult but enjoyable to play. I find it much more challenging to play the “straight man” than to provide the comedic moments. Brian needed to have a more somber and unsure approach than his friend, for he was a man who had lost everything including his confidence and was trying to make sense out of his world and of himself. Dave on the other hand, was the comedic foil, representing Brian’s self-assured, ever-knowing former self, free to do or say whatever he pleases. To successfully allow the comedy of the script and the talents of the supporting cast to be

showcased, I had to be mindful not to overindulge my character with remorse, since his plight is meant to be darkly comical.

5.2. Challenges

My lack of technological expertise in filmmaking made the task of editing extremely difficult and time-consuming, especially taking into consideration the scope of the project. A lost sound file forced me to abandon hopes of using interview footage from Geist, editor of *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*, leading me to instead rely only on Vaver's contributions. While both Geist and D'Agostino were kind enough to lend their opinions and expertise to the project, it became most prudent to include Vaver as the series' only legal expert.

The Epilogue (chapter 9) became problematic when the sound I thought we had recorded was not, in fact, recorded. Doing an ADR session to replace camera sound would have been too time-consuming. As a solution, I decided to dub various languages over the video, and incorporate closed captioning. The result is less than desirable, but was more cost-effective less time-consuming. Type text was also a solution I used to describe the locations of the therapists offices as shooting exteriors was not able to be scheduled. Therefore, clarity was needed to inform the viewer to give context, and using type text was economical and the process provided a chance to add some comedic elements. I also felt that the compensatory change allowed not only the suggestion that copyright is a global consideration with territorial rules, but that the worldwide web contained a wealth

of content that could be used in the creation of new work either legally or by infringing on existing copyright.

Technical challenges led to changes in the script and difficulties in filming. The climactic scene needed to be re-shot due to lost footage. Filming the second attempt at the climax was rushed (as many scenes were) and determining how to adequately reveal Dave was difficult.

The project suffers occasionally from ineffective cinematic aesthetics due to my inexperience in areas such as lighting and makeup. When I was forced to reschedule and reshoot some scenes some members of my crew were unable to assist, leaving the finished product less than perfect from a cinematic standpoint. But, it should be pointed out here content, not aesthetics, is the focus of the project and the limitations on the aesthetic are effectively lessened by the solid performances of the actors.

Exterior construction noise in one of the locations where we shot the “copyright office” was extremely distracting. When the location was booked, I was told I could only shoot during operational times, but I was not informed that there would be a construction crew replacing fire alarms on the day we were shooting. In retrospect, it would have been much more effective to film in another location, as the building was not very co-operative. In future, I will ensure that I not only make clear what is expected in locking up a location, but that I completely understand the location’s needs.

Creatively and technically, one of the biggest challenges was arranging to film a live stand-up show. I promoted an event at a local establishment as one that would offer the club some patrons on a usually slow evening of the week while gathering many people

together to watch a “movie shoot”. The evening was much fun, and featured local stand up acts warming up for my character’s appearance. We had four cameras rolling at once, and several audio sources, resulting in a realistic portrayal of a stand-up comedy show.

Often creative goals will be compromised or changed in post-production. I initially wanted to address the offensive nature of comedic material in my original vision for the project. The first time I saw Gerry Dee perform *Italian Neighbors* he justified any offensive content by explaining he was Italian, implying the standard excuse that a person’s background can be a factor in determining social acceptability. Having married into a Jewish family, I have experienced many moments where the culture is acceptably mocked by one of their own. But, despite my association, reference to Jewish tradition in a comedic sense is “sort of, but not really” allowable for me. The “if you’re not part of the group you can’t say it” is the assumption here, and can provide humorous moments in itself. That intention is present in *You’re Fired* during the prelude to the routine, where social acceptability is discussed with Brian and his audience. In the original cut, Brian attempts to make the inappropriate Chinese accent more acceptable by saying “I married a Jew, so if you think this is inappropriate, you might be an anti-Semite”, making him (like Gerry Dee in his *I think I was a racist* bit) the deliberate misinformed stereotype rather than someone knowingly attacking the culture or race in question. Later Brian is called to task on the inappropriateness of his routine by his therapist, who believes he should say “Jewish Person” rather than “Jew”. But these portions of the scene, while effectively questioning allowable and inappropriate societal norms, compromised the flow of the narrative and were cut. In doing so, the reason why the protagonist stumbles in saying

“Jewish Person” while trying to be politically correct in Chapter 2 is lost along with any potential cringe-laugh.

But, years in the film business has taught me that the process of filmmaking relies on the abilities of everyone involved to solve problems on the fly. Rarely is the final project exactly reflective of the initial vision, and a filmmaker always takes this into consideration as he makes changes out of necessity. Many of the problems I had to solve arose out of my lack of experience with the technical aspects of production and post-production, but in solving them I was able to enhance my editing skills, become more familiar with various editing suites and be better suited to troubleshoot effectively on them, which will allow me to have technical solutions in mind the next time I am directing in the production stage of the process; allowing me to plan ahead more effectively and use the scheduled shoot day more wisely.

5.3. *Killing Gerry* and Copyright

Killing Gerry was originally intended to examine in copyright in artistic creations in very general terms and across international borders. I felt that, due to the close proximity to the United States and the steady flow of information and entertainment from the U.S. to Canada, that legal concepts could be examined briefly on a more global scale. But it became clear that it is not possible to examine the law without paying attention to the boundaries that encompass them. Infringement in Canada should be discussed and examined with Canadian law in mind, as U.S. infringement should be examined with US legal concepts in mind. The difficulty here is that entertainers (and entertainment) swiftly move from Canada to the US due to their proximity and due to the fact the US is the

country that provides the legitimate financial “big break” to entertainers, especially in the areas of film and television. Unfortunately, the project was scripted and filmed long before arriving at this clarity, leading to inconsistencies between the project and the paper. Many of the legal issues referenced or alluded to in *Killing Gerry* originate stateside, and much of the discussion between Brian and Dave revolve around the USA’s fair use doctrine, and not Canada’s fair dealing exceptions. As well, the concept of Canada’s performer’s performance rights do not appear in the project until the epilogue. Unfortunately, little could be done to fix the areas which were already edited. However, the epilogue, while originally featuring characters discussing laws that are not representative of Canada’s, has been re-edited to reflect Canadian law, after encouragement from my committee. In this case, it was probably a lucky accident that much of the audio recording was lost, as it has allowed me to use text to reflect the Canadian copyright regime. The fact that much of the references for further research on the broadcast sites reflect American issues is acceptable, because they shed additional light on copyright of artistic creations, and can, in conjunction with the support paper, provide food for thought for scholars internationally.

Illuminating the need for artists to become aware of the copyright protections afforded them in their country of residence is the interesting experience I have had so far in using YouTube to release *Killing Gerry*. To date, *Killing Gerry* has only been available for public viewing on Vimeo, and I have received no notices of potential infringement due to the use of existing material in the project. However, YouTube has already sent warning notifications to my account, listing certain chapters as having copyrighted content. So far,

all the notifications refer to the music that is included in the series, and all suggest that if I agree that I am infringing on copyright that I “don’t have to do anything”, but I may have to accept that advertisements will be placed on my content. I could choose to accept this, or more likely I will send a letter disputing the allegations according to the arguments I am outlining in Sec. 4.3. In either scenario, I view the YouTube warnings as validating *Killing Gerry’s* worthiness for being considered educational in nature. It could be that *Killing Gerry’s* use of existing content may be acceptable in Canada under the *Act’s* Non-Commercial User-Generated Content provision, but not in the United States, and that the series may be blocked without certain changes to copyright laws that eliminate the infringements.

While somewhat limited in demonstrating Canadian concepts of copyright within the plot of *Killing Gerry*, the series uses Canadian infringement exceptions to help show viewers how difficult it can be to strike a balance between user and creator rights in copyright law.

5.4 . *Killing Gerry* and Copyright Clearance

The project *Killing Gerry* asks viewers to consider the use of existing material in the creation of this new and original artistic creation. One of the project’s goals was to illuminate relevant potential copyright issues within the project itself, and to argue that the project does not infringe any copyrights.

Taken wholly, *Killing Gerry*, addresses multiple purposes that qualify it for coverage under the *Canadian Copyright Act’s* provision for fair dealing. First, the project was a research project, created and showcased through a recognized Canadian

university (University of Lethbridge). It was created to further my own education while contributing to the ongoing discussion of copyright within artistic communities. Second, I would argue that certain video and audio clips are used to create parody. The “mashup” with Dr. Byrne in Chapter 5 (a UGC exception) and the *Jaws* reference in Chapter 3 (further discussed in Appendix 8.2.) are each examples of *The Oxford English Dictionary* definition of parody as “an imitation of the style of a particular writer, artist, or genre with deliberate exaggeration for comic effect” (oxforddictionaries.com). Third, all of the examples of alleged theft in the stand-up comedy and sketch comedy world are included in the documentary sections of the series, effectively allowing their use to fall under the purposes of criticism or review. As Murray and Trosow explain:

With *Alberta v. Access Copyright* (2012) confirming *CCH v. Law Society of Upper Canada*’s assertion that the fair dealing categories must receive a ‘large and liberal interpretation,’ we can plausibly argue that a great number of photographic or documentary uses constitute criticism, news reporting, parody, or satire (2013, p. 151).

The project also satisfies many of the factors considered in whether a dealing is fair as outlined in *CCH*. In Canada, it is not necessary to satisfy all six factors in determining fairness. *CCH* found that “these factors may be more or less relevant to assessing the fairness of a dealing depending on the factual context of the allegedly infringing dealing” (2004, para. 60). Following are some considerations in general:

1. The purpose of the dealing:

In addition to the purposes discussed above, *Killing Gerry* is non-commercial. No

gross earnings or net profit will be gained from its dissemination by its creator. It is a project that arose out of research, and may in turn be used as research material for educational purposes. *Killing Gerry* is a creative project that is of public interest. The use of *Killing Gerry* as a potential reference source for new scholarly research is an important consideration, as it could contribute to the scholarly discussions that have, over time, consistently affected the evolution of copyright law. Further, new and emergent artistic creators of all genres (but especially sketch and stand-up comedy), may draw inspiration or knowledge from its dissemination. The potential for the series to be used as an educational resource allow for it to be considered wholly as fair dealing with regard to its use of content.

2. The character of the dealing:

The use of video and audio was used to add context to the narrative, and the project will be posted online for free viewing and free use. The use of the borrowed material will be repetitive and ongoing, available whenever *Killing Gerry* is viewed, however it is extremely unlikely that the number of views will approach the number of views the material has already received from its original dissemination. While internet accessibility does not guarantee audience, the possibility exists that the series may, however unlikely, enjoy mass appeal, in which case owners may feel their rights have been infringed upon. However, I would argue that the potential benefits from the research and educational purposes outweigh any copyright concerns. Further, the fact that the character of the dealing (in this case wide distribution which often tends to be thought of as “unfair” by the courts) is at odds somewhat with the purpose of the dealing

(in this case, non-commercial and for research and education) is precisely the point; for it illuminates the complications of copyright law regarding artistic creations. This project encourages further discussion as to what extent each factor might help in determining the fairness of a dealing. In the unlikely event that wide accessibility to *Killing Gerry* occurs, I believe the courts would find the public benefits of the purpose would be a more important consideration than the open non-commercial distribution, and would consider its use of content fair.

3. The amount of the dealing:

In *CCH* the Court stated:

Both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness. If the amount taken from a work is trivial, the fair dealing analysis need not be undertaken at all because the court will have concluded that there was no copyright infringement” (2004, para. 56).

The unauthorized use of video and audio clips were arguably copied in small part, never wholly from a larger work, from readily available online sources. The videos and audio have also been changed and edited (by me) so that they are not exact replicas of the original. This speaks further to the stated goals of the project; to facilitate further discussion about copyright of artistic creations, and alludes to problems I encountered in trying to ascertain if my creation was infringed upon.

The use of all video clips, especially the ones involving Mr. Dee, speak to the heart of the project and must be included for context because they illuminate the potential to demonstrate a possible infringement of my work or performance. In *CCH*, “The amount

taken may also be more or less fair depending on the purpose. For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision” (2004, para. 56). Again, the amount of the dealing (videos and music) will be considered alongside the purpose, which I believe falls within the fair dealing exception

4. The nature of the work:

In *CCH*, it was determined that:

The nature of the work in question should also be considered by courts assessing whether a dealing is fair. Although certainly not determinative, if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work — one of the goals of copyright law” (2004, para. 58).

While the video and audio clips in *Killing Gerry* have been fixed and disseminated prior to the project’s use, they have been fixed and disseminated as entertainment, not as commentary or criticism or parody as they have been in this project. In one case, an unauthorized audio recording of a public performance by Trevor Noah was used which would seem to infringe upon his performers’ performance rights under s. 15 of the *Act*. However, the clip implies that Noah’s performance itself was quite possibly an infringement of Dave Chappelle’s work and performance. Regardless, this use in *Killing Gerry* would need to be considered along with the other uses and factors in determining fairness. Further dissemination of the videos in this light offer the chance to educate the public about possible infringement of comedic creations, stand-up performances or fixed

audio and video recordings.

5. Available alternatives to the dealing:

This is a particularly subjective area. It could be argued that other non-copyrighted alternatives exist that could have been used in place of each chosen work, however, as stated above, this would defeat the purpose of the goals of the project. In order to allow a deeper understanding of the law as it pertains to artists and their work, use of copyrighted works is necessary, as the use not only provides obvious contradictions to the opinions of the protagonist but also demonstrates how existing creations influence new creations. It would be possible, of course, to restructure the theme from *Jaws* in order to allude to the iconic work, but using the work itself guarantees the audience's understanding that the clip is a parody. The use of Robert Plant's music is another example. His band, Led Zeppelin, is currently in litigation over the rights to their smash hit *Stairway to Heaven*, and the band is referred to in the series by a character who opines, like Brett Gaylor's *RiP: A Remix Manifesto* (2008) that they have misappropriated work from blues artists. The inclusion of *Fortune Teller*, a cover of previous work performed Plant that contextualizes the mood of the scene and psyche of the protagonist, is an extremely effective supplement to the educational experience. In my view, not only do I feel the use of all copyrighted works reasonable, I would argue that there are no non-copyrighted equivalents of the used works that would have allowed me to achieve the intended research, criticism and commentary purposes of the project, or that could enable the project to potentially serve the public interest through its dissemination in the future.

6. The effect of the dealing on the work:

The only original work that may have its market affected as a result of its inclusion would be Gerry Dee's *Italian Neighbours* bit. However, it is this bit that is central to the question of the project. Therefore, it is necessary to include in this examination. Any market harm is still extremely unlikely. The video was posted online for free consumption in 2008 and has garnered over 1,080,222 views as of May, 2017. The DVD was marketed prior to this time, and given the relative obscurity of DVD sales today, it is unlikely any future purchases would be discouraged. However, it is possible that, should more than the expected modest numbers of people view *Killing Gerry*, Mr. Dee may suffer some question as to the legitimacy of his future work. This is not relevant to this project, however, since *Killing Gerry* does not draw legal conclusions, while only suggesting possibilities and raising several questions about copyright and comedic creations. The project's reliance on fair dealing relates only to the identified pieces of work which may not prove to be original should a court review become necessary – an unlikely but potential possibility addressed in the epilogue.

It is extremely unlikely that any of the other works will experience any market effect other than a potential increase in sales. It is said in Gaylor's work that the increased exposure and profits for originators has negated the need for litigation against mashup artists (2008). Here, many owners have experienced additional exposure out of the potentially illegal uses referred to in *RiP*, which positively correlated with increased profits.

In addition to fair dealing, I argue that the project's use of video and audio clips

is also largely protected by the Act's UGC exception, described in 2.3.2., where an individual may use works or other subject-matter in the creation of a new work (R.S.C., 1985, C-42 s. 29.21).

I believe all uses of existing content in *Killing Gerry* can be shown to be either fair or to be protected by UGC under the Act. Further, as Murray and Trosow explain:

An increasing range of films have been making use of fair use or fair dealing, often in combination with clearance for some material. In Canada, Brett Gaylor's *RIP! A Remix Manifesto* (2008) was spangled with uncleared clips and made rather a big deal of its likelihood of attracting lawsuits, but it never did. Other recent Canadian films that relied partly on fair dealing (*Reel Injun*, *Shameless: The ART of Disability*, *The Corporation*) have also remained unhassled" (2013, P.155).

The fact that Gaylor's film has remained free from lawsuits is not the point, aside from potentially pointing to the likelihood that it could, like *Killing Gerry*, be considered to have an educational purpose. What is important here is that my use of the video and audio clips in the creation of *Killing Gerry*, since the use is non-commercial and part of a new work, that being the web series as a whole, potentially qualifies for protection under UGC. *Killing Gerry* is not only non-commercial, it is potentially costly to me personally. Being a member of ACTRA, I would not be able to use the footage on my demo reel, as it was a non-union shoot, and I would potentially risk financial penalty for performing in an unprofessional non-union shoot, even if it is my own. While it is possible I could potentially attract interest as a director, that interest would not be generated from the sale of the project, as it is available freely online, but rather from the skills I demonstrate

in the construction of the scenes, not from the use of any existing work. Finally, the work that was used would not suffer any adverse effects from my use, and could potentially offer more revenue for the copyright owners by exposing the work to an audience that may not have otherwise been exposed to it, potentially encouraging further exploration of the work's creators.

Further, in creating UGC through the project, I have not compromised any claim to fair dealing, as both may be considered as exceptions to copyright infringement. Scassa explains:

In *CCH*, the Supreme Court of Canada ruled that the fair dealing exception was always available to users of works, notwithstanding any other exceptions that might be found in the *Act* and that might be specifically tailored to the type of user making use of the work.' Presumably, then, the fair dealing exception is also available to the creator of UGC" (Scassa, 2013, p. 444-445).

6. Bit Theft

According to Dr. Vaver at the beginning of Chapter 1 in *Killing Gerry*, some questions need to be answered in order to establish infringement of copyright. These are:

- 1: How much of the original work is copied? (Remember that the key measure is the substantiality of the part allegedly copied)
- 2: Whose work was created first?
- 3: Did the alleged infringer have access to the original? (If not, there exists a strong possibility that the copy is coincidental.)

Indeed, I would have little trouble in showing that Gerry Dee had access to the original (there are several witnesses that could attest to the weekend's events). The existing video of me performing my song would also show that my creation was the earlier of the two, thereby effectively eliminating the chance that *Italian Neighbours* was coincidentally similar to *You're Fired*. What remains unproven is how much of the original work is copied in Dee's performance. If that part is determined to be substantial (taking into consideration the quality of the work and in focusing on parts of *You're Fired* rather than *Italian Neighbours*), it could be possible to show that Dee may have infringed on my right to perform and publish my work under s. 3 of the *Act*.

6.1. Did Gerry Dee Infringe My Copyright?

As discussed earlier, copyright for stand-up comedy creations exists within the *Act's* provisions for works and other subject-matter such as performer's performance. It

has been established that a performance cannot infringe upon another performance, so in this sense the copyright to my performer's performance for any of the three alleged performances in question was not infringed. Mr. Dee did not fix or communicate any part of the performance to the public by telecommunication. However, it is possible then that Dee's later televised performance infringed on my work, and under the act I am entitled to:

...the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof... (R.S.C., 1985, s. 3).

At the time of the alleged infringement, YouTube and social media did not exist, and my performance of one of those works (*You're Fired*) was only videotaped once prior for personal use, not shared publicly. The live performance of my work that he witnessed may not have been communicated to the public by telecommunication, but if he performed a significant portion of the *work* that I performed, and then he fixed that performance and communicated that performance to the public through telecommunication, as I allege, he could have potentially infringed on my rights under s. 3 (1) of the Act.

However, establishing the likelihood that my comedic work was infringed rest in part on determining where in s. 3 (1) of the *Act* those works are protected by copyright; dramatic works or literary works? It seems that copyright for stand-up comedy, without its own specific protections, may be protected under both, since

stand-up comedy requires both the writing of the jokes and the live delivery of that writing. Remember that in *Cinar*, the works were compared holistically and it was not specified whether protections fell under literary or dramatic works, only that there was a substantial part of Robinson's work as a whole that was copied. However, it may also be true that courts may not consider stand-up comedy to be a dramatic work at all, and this is a point that would likely need to be argued.

To determine if an infringement of literary copyright has occurred the courts would need to decide if the author, in this case Mr. Dee, created a new original work himself or copied it (Vaver, 2011, p. 58.), taking into consideration the notion of originality discussed in Sec. 2.1. Recall that it is possible for a work to be both protected as an original and infringe on copyright. Therefore is very possible that what I consider to be Mr. Dee's rewriting of the lyrics in *You're Fired* are of sufficient skill and judgment and would indeed qualify his literary work as original, yet his work may still infringe on mine. Still, much like the write-around that was admittedly undertaken by Mencia, who as of yet has not been involved in litigation, it may be difficult to satisfy a court that infringement of a literary work has occurred, since many factors (explored in more detail in Sec. 6.2.2.) would need to be examined in order to determine if the standard for originality has been met.

While protections for literary work cover the text portions of the bit in question, the protections for dramatic work differ, as "dramatic work includes

- (a) any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise,

(b) any cinematographic work, and

(c) any compilation of dramatic works” (R.S.C., 1985 C-42 s. 1).

Depending on the nature of the routines, stand-up comedy may perhaps qualify as a recitation of an existing work, and could therefore be considered a dramatic work. Stand-up comedy bits, once practiced and edited to a comfortable and workable script, rarely change aside from the odd improvisational moments a performer utilizes. This is much the same as reciting a dramatic monologue. An actor performing a monologue onstage are usually performing “in character”. Likewise comedians create characters that are separate from their own personas, in effect, crafting a brand. For instance, Stephen Colbert plays the character of a right-wing “devil’s advocate” to add humour to the absurdity of many political positions he takes and accentuate his jokes. In the web series we see a bit performed by Emo Phillips who is clearly playing a character despite keeping his onstage name. In short, this paper takes the position that comics are often indeed characters, and their routines may be categorized as recitations of a work, thereby allowing the comic potential protections under dramatic works.

In this scenario, the fixations of the two routines – my lyrics, my videotaped performance from the late 90’s and Mr. Dee’s performance and script (if it exists) could perhaps be examined. Here, the two routines have been fixed in some form; one in an amateur video and the other in a recorded and commercially marketed DVD and televised performance. The fixations of the two routines could possibly be considered alongside the literary aspects to determine the proportion of the literary or dramatic work that was copied, in order for a court to examine if works were infringed under

either protection. This may possibly allow for a more holistic comparison of the two, since these fixations likely contain original expressions of ideas, and as such would be protected by copyright. It may be less difficult then, to argue infringement if both text and the videotaped fixations were part of an examination of the works as a whole to determine if Mr. Dee demonstrated sufficient skill and judgment in the creation of the alleged copy to qualify his work as original under the *Act*, and if that work, original or not, infringed on mine. Given this in conjunction with Dr. Vaver's four questions it may be possible to establish the likelihood of infringement.

As stated in sec. 1.1., I allege that three pieces of my comedic works were copied by Gerry Dee in a casual setting and used in bits that were televised to a wide audience. Of the three, only *You're Fired* was fixed in a material form. The other two, *The Wedding Gift* and *The Phone Call* were not; though they were practiced routines. The *Act* protects work at its creation, and despite there being no physical record of the latter two routines, it is still possible that Dee infringed on my rights under s. 3 of the *Act* to produce, reproduce, perform or publish these works, especially since, I allege, they were both near-literal copies. However, as discussed prior, attempting to argue this without a fixation would likely be an insurmountable task. My bit *You're Fired* and Dee's bit *Italian Neighbours* on the other hand are not literal copies, but here it may be easier to argue infringement of my work because there exists a fixation of the routine in the form of a videotaped recording. Recall that it is not necessary for an infringement to be a literal copy. In this case, since my work is copyrighted, and since the lyrics that form the bit were written down, and there exists a previous video fixation that was not

communicated to the public but is dated (likely showing that my work was created first), there are reasonable grounds to argue that Gerry Dee could have infringed on my work *You're Fired* by performing portions of it in *Italian Neighbours* in public without my permission, provided I can show evidence that my permission was not granted, and of course, provided the courts agree that a substantial part of my work was copied in his act.

6.2. A Comparison of Creations

I have alleged that there is a substantial part of my literary and dramatic work *You're Fired* that was copied in Gerry Dee's public performance of his work *Italian Neighbours*. This alone does not mean that there was an infringement on my work, however. Whether or not a substantial amount was copied is a subjective matter for further review, possibly by the courts, or more likely, by scholars in the area of copyright and stand-up comedy. I will proceed with a comparison of both routines in an effort to begin this review of the potential arguments that may be made toward proving infringement. The comparison will then apply the case law of *Cinar* to encourage further study that will try to determine if *Italian Neighbours* was written with sufficient skill and judgment to qualify as original *and* non-infringing in comparison to *You're Fired*, or if there was there a reproduction of a substantial portion of the existing work included in it.

6.2.1. Case Law

The analysis will in large part rely on the most relevant Canadian case, *Cinar v. Robinson*, given the lack of stand-up comedy case law in Canada. In *Cinar* (2013), the

Supreme Court of Canada upheld the ruling that Cinar Corporation and Les Films Cinar infringed the copyrights of Claude Robinson and Les Productions Nilem inc. by creating and airing a television show titled *Robinson Sucroe* that proved to use a substantial amount of Robinson's original creation titled *Robinson Curiosity*. One day, like me, Mr. Robinson watched in shock as the expression of his ideas played out on television in front of him, without his authorization. Many elements of an educational children's television show he had created and pitched – at one point to people now associated with Cinar - had been used in the production of a new educational television show under a slightly different name, but without any mention of his work or influence, and without his authorization. Also like me (and the referenced comics) Mr. Robinson suffered some effects to his mental state and personal life as a result of the infringement, which he was eventually compensated for in the decision.

6.2.2. The Breakdown of the Bits

For the purpose of this comparison, I will refer to a comedic act as an overall presentation consisting of combinations of routines, which are further broken down into bits. Comedic bits, like *You're Fired* and *Italian Neighbours* are more elaborate than one-liners and can be broken down structurally. Several bits may form a routine that becomes part of an act. For instance, the comedy show in *Killing Gerry* features the protagonist delivering a bit on his job as a teacher, which in conjunction with *You're Fired*, form a routine about occupations. Pate compares the Cosby and Mencia bits by offering that “they share the same topic, the same structure, and the same punch-line” (2014, p. 62).

The notion of structure is confusing, however, as the structure of a bit could arguably include the topic and punch-line. For the purpose of this comparison, I'll use a similar breakdown of bits that would be accepted by the stand-up and literary community that combines Pate's description and others.

Once a punchline is delivered, further elaboration to a bit may occur in the form of tags, or an added direction or follow-up information. With longer anecdotal humour, the punchline is often the finale, and further elaboration may not be needed. Sometimes a tag can be a reconnection to prior material as a means to add some denouement to the bit. The general steps in joke-writing are not always separate; they may overlap or there may not be a need for further elaboration. Think of this as similar to a short story structure where there is a setting, initial point of conflict, rising action, climax and falling action. While this structure may be applied to all short stories, many short stories end at the climax. Therefore, joke structure is simply a general guide.

Comedians may vary from the standard structure occasionally, and may refer to these points using other terms, but most often we recognize the following order of operations (including the project's examples) in the crafting of bits by comedians, as taken from Matt Taylor's *Emerging Comics* website:

- a. The premise: A concept is stated and the audience knows how the comedian feels about the concept.
- b. The setup: A specific example from the comedian's world is given.
- c. The punchline: An often unexpected surprise that encourages laughter.
- d. The tags: A show or further elaboration of the story the comedian was

telling follows up the punch (*n.d.*).

My bit *You're Fired* and Gerry Dee's bit *Italian Neighbours* follow this structure. There are many obvious similarities, and it is the similarities that are important in determining if an infringement has occurred. These similarities should be recognized keeping in mind that Gerry Dee had firsthand access to my creation before his performance was crafted.

Bit 1: *You're Fired*

1. The premise is brought to the audience's attention:

An ignorant and naïve narrator recounts being exposed to a cultural communication barrier that leads into the heart of the bit.

2. The setup adds some context:

In *You're Fired*, the foundation of the bit is made up of the narrator describing a father and son management system in which neither speaks to the other, yet both need to communicate with the youthful and naïve narrator. Soon, the narrator explains how this miscommunication has led to the absurd situation of him returning to work every day after being fired the previous day. The narrator feigns innocence, as he's just doing his job, but implies to the audience how terrible an employee he was through projecting the opposite: that he was honourable in never leaving his employers "short". (Halfway through this, the narrator briefly improvises a discussion with the audience justifying his use of an accent that by today's standards would be considered offensive, saying, "I'm Scottish! How many bad Scottish accents do I have to put up with?") The narrator

continues with the absurdity of the two characters, the young boy and the old man, re-establishing their relationship because the narrator was somehow placed back on the schedule.

3. The punchline surprises the audience.

The narrator quits, saying “I finally had to quit because I didn’t like the way I was being treated.” This reinforces the narrator as a self-indulgent character ignorant of cultural differences and absent of work ethic.

4. The Tags

There are no tags for the introduction, since the song provides additional elaboration of the topic with more specific details. In it, a similar premise, setup, and punchline structure is evident. In verse 1, the premise is delivered. The narrator begins in the voice of the conflicting force, namely the elder owner. He explains his good intentions, but points out the employee’s flaws.

Next, the chorus provides our punchline, seemingly prior to the setup. The recurring choruses in this case provide the punchline after the premise in verse one and after the setups of verse 2 and 3. In the choruses, the narrator explains he has no choice but to fire the employee due to his shoddy work. The song continues through the setup in verse 2 where more details emerge and the bit evolves. The owner explains how the narrator is costing him profit by taking shortcuts and throwing away food that is still fine to serve. (Please note that during my real experience, the re-boiling of rice actually did occur in this restaurant; a safe and sanitary practice if done correctly. The line about “tomorrow’s sweet and sour pork” is simply a stereotypical and unfair cultural portrayal

that was incorporated to refer to urban myths and rumours being accepted as fact by ignorant members of the dominant culture, in this case the dishwasher-narrator.) This setup is followed by the same punchline, which has now become an audience-participation gag with the line “today’s your last day!” included. This serves to evoke both an uncomfortable feeling mixed with the challenge of accepting the double-standards of comedy from the audience, but also creates a memorable catch phrase that would allow the bit to be identifiable and memorable. In the third act of the plot (verse 3) the narrator further complains about the “out of bounds” attitude of his employee. The narrator is now dating the employer’s daughter, leading again to the punch line, which is now very familiar to the audience. As a tag, the final recurring chorus features the narrator concluding “you can forget about vacation pay”! Further tags are possible, and this bit, as shown in the series, could precede or follow the “right-click” bit seen in the stand-up performance of the protagonist.

Bit 2 – *Italian Neighbours*

1. The premise is brought to the audience’s attention

An ignorant and naïve narrator recounts being exposed to a cultural communication barrier that leads into the heart of the bit. The narrator explains how he knew his neighbour to be Italian due to some cultural stereotypes (the neighbour cuts his hockey sticks for tomato plants). When the narrator confronts his neighbour, Mr. Ricci, he is told, “havva some sauce”! The communication breakdown forms the foundation here as well. The narrator further goes on to ask “You ever work for an Italian?” and then providing the answer “they fire you...every day”.

2. The set-up adds some context:

The narrator, in a thick Italian accent, imitates the neighbour (now an employer) who explains how the narrator is costing him money by taking shortcuts in his tasks (You don't cut this grass in a straight line). He explains his good intentions, but points out the narrator's flaws. He explains he has no choice but to fire the narrator due to his shoddy work.

3. The Punchline:

The Neighbour explains how he saw the young man come to cut his grass the day before and paid no mind, instead assuring himself that "Yesterday I say 'for sure', you come back and I look through this, Jimmy... (holds hand in front of face) and I don't look, I say 'ok, Jackie want to come back, I'm not gonna see it this time, I give him one more chance'", in effect allowing him to work another day even though he doesn't have time to deal with the narrator's ineptitude. This time, however, things have changed and the narrator is told, "don't cut this grass again because you don't work here no more!"

4. The Tag:

The bit is left open-ended when the narrator imitates his neighbour telling him that he'll see him tomorrow when the same routine will recur. ("Tomorrow I see you nine o'clock we go for coff".)

Through these comparisons of overall structure, we can first identify similarities of *Italian Neighbours* and *You're Fired*. Similarities, however, do not necessarily constitute an infringement. Again, it must be proven that a substantial part of an original work has been taken. The Supreme Court of Canada explains in *Cinar* that "A substantial part of a

work is a flexible notion. It is a matter of fact and degree” (2013, para. 26). In 1964’s *Ladbroke (Football), Ltd. v. William Hill (Football)*, [p. 381], the House of Lords (U.K.) found “whether a part is substantial must be decided by its quality rather than its quantity” (as cited in *Cinar*, 2013, para. 26).

In other words, the substantiality factor must be viewed not by considering the length or portion of the work that was taken, but rather the quality of the material taken. In *Cinar*, this approach additionally allowed the court to consider the work as a whole in determining substantiality, rather than taking the work apart piece by piece to focus on each part individually. The Court found that “many types of works do not lend themselves to a reductive analysis” citing J.S. McKeown’s *Fox on Canadian Law of Copyright and Industrial Designs* in determining that “The character of the works will be looked at, and the court will in all cases look, not at isolated passages, but at the two works as a whole to see whether the use by the defendant has unduly interfered with the plaintiff’s right” (*Cinar*, 2013, s. 35). The Supreme Court decided that:

The approach proposed by the *Cinar* appellants would risk dissecting Robinson’s work into its component parts. The ‘abstraction’ of Robinson’s work to the essence of what makes it original and the exclusion of non-protectable elements at the outset of the analysis would prevent a truly holistic assessment. This approach focuses unduly on whether each of the parts of Robinson’s work is individually original and protected by copyright law. Rather, the cumulative effect of the features copied from the work must be considered, to determine whether those features amount to a substantial part of Robinson’s skill and judgment

expressed in his work as a whole (*Cinar*, 2013, para. 36).

I would argue that it would be necessary to use this approach in determining substantiality when considering *Italian Neighbours* and *You're Fired*. Like the *Mencia* and *Cosby* comparison, there exists little literal copying of words or phrases in the rewrite that I allege was undertaken. But, as established, literal copying is not a requirement of an infringement. It is not enough to suggest that because “You don’t come into work tomorrow” is a different expression than “today’s you’re last day”, there is no infringement. Rather, the messages conveyed in the expression would warrant more careful consideration, especially given the access to the performance of my work in this case. As the House of Lords (U.K.) stated in *Designers Guild Ltd. v. Russel Williams* (2001, p. 706), “The original elements in the plot of a play or novel may be a substantial part, so that copyright may be infringed by a work which does not reproduce a single sentence of the original” (as cited in *Cinar*, 2013, para. 27).

Still, the determination of substantiality, while viewing the whole works in comparison, needs to ensure that the rights of the creator and rights of the user are balanced. It is not reasonable to suggest that a theme or plot can be copyrighted without paying attention to some important details within that theme or plot. The exercise of determining substantiality involves recognizing that the idea/expression dichotomy is a foundation of copyright law, and a boundary exists between ideas and expressions. “For example, the boy-meets-girl-and-their-families-are-outraged plot in itself is not copyrightable. But fill things out a bit with character names, specific wording, and plot twists and the author may be able to claim copyright” (Murray & Trosow, 2013, p. 46).

In *You're Fired* and *Italian Neighbours*, characters exist and have names, but they are not the same names. However, as noted in the above comparisons and keeping in mind the notion that the two bits must be compared qualitatively and as a whole, there does exist specific wording and plot twists that may be protected. The fact that the names are not identical is irrelevant, as in stand-up, names usually only refer to the comedian himself, in my case "Dave Brown" (used in the original clip of *You're Fired*, not in the project) and in Mr. Dee's case "Gerry" (and "Jenny" etc.). In both cases the performer name is moot, as argued earlier, they are simply characters the comic utilizes.

Substantiality must also consider the differences in the work, and there are many at play here. However, the Supreme Court has stated that "the differences may have no impact if the borrowing remains substantial" (*Cinar*, 2013 para. 40). But, it is probably wise to consider the structure of the bits as a whole in determining substantiality, as shown above. *You're Fired* and *Italian Neighbours* are two bits that vary in length, for example, but have similar structures. And, while the portion of the alleged infringement of *You're Fired* may be a small portion of the *Italian Neighbours* bit as a whole, it nonetheless may be a substantial portion of the bit *You're Fired*, and any determination of substantiality must be related to the plaintiff's work, not the defendant's. Quoting Vaver in their decision against *Cinar*, the Supreme Court concluded that "The question of whether there has been substantial copying focuses on whether the copied features constitute a substantial part of the plaintiff's work – not whether they amount to a substantial part of the defendant's work" (*Cinar*, para. 39). What this means is that regardless of the structure or size of the alleged infringement with regard to Mr. Dee's

overall bit *Italian Neighbours*, (which may a portion of an entire routine about neighbours in general) what needs to be considered, as a whole, is the quality of the part of the content that I allege was taken from my work *You're Fired*, a part I suggest may be arguably substantial, given the above comparisons. In *Cinar*, the Supreme Court found that the trial judge was correct in stating, “despite any differences between the works, it was still possible to identify in *Sucroë* features copied from *Curiosity* and that these features constituted a substantial part of *Robinson's work*” (*Cinar*, 2013, para. 41).

Another step in the examination of potential copyright infringement is the alleged infringer's access to the work. In *Cinar*, the appeal to the Supreme Court recognized the change of heart by *Cinar* in admitting that *Robinson's work* was original and that they had access to it. “The *Cinar* appellants no longer contest the trial judge's findings that *Robinson's work* as a whole was original, that several of the appellants had access to the work, and that *Sucroë* and *Curiosity* share common features” (2013, para. 29). In my case, Mr. Dee would most likely admit to having access to the material, as there were several other people who were there that are known by both of us, and many photographs of the weekend. (It should be clear here that the “original” clip of *You're Fired* used in *Killing Gerry* was not from that particular weekend, rather from a previous performance the year prior to Mr. Dee's access).

For the above arguments over similarities of structure and content to be considered by the courts, it may potentially help me to be able to show that Mr. Dee may have violated any existing community norms. The access to the performance of the work that I allege was the impetus for Gerry Dee to create *Italian Neighbours* does not

necessarily mean that Mr. Dee likely infringed on my work. In fact, it would still be extremely difficult to argue that it may have been, given the many variations of theme that exist among works. But, showing that the stand-up community may in general feel that my work was infringed by Dee could potentially lend credibility to my claim as it could speak to the notion of substantiality through the eyes of community members. Potential involvement from community members in the first case involving joke-theft could potentially address Pate’s concerns that “the law fails to recognize the identity of the joke as a structure combined with a topic, and only protects specific, fixed linguistic expressions” (2014, p. 62), as well as Oliar and Sprigman’s assertion that “the level of proof required to establish copying requires, as with every element of a copyright claim, only that the evidence suggests that copying is more likely than not” (2008, p. 1805). Recall that Pate’s and Oliar and Sprigman’s research refers to an American system of governance, and the Canadian system may more inclined to offer comparisons holistically, and with potential community members’ input. In *Cinar*, Vaver is quoted as saying:

In my view, the perspective of a lay person in the intended audience for the works at issue is a useful one. It has the merit of keeping the analysis of similarities concrete and grounded in the works themselves, rather than in esoteric theories about the works. However, the question always remains whether a substantial part of the plaintiff’s work was copied. This question should be answered from the perspective of a person whose senses and knowledge allow him or her to fully assess and appreciate all relevant aspects – patent and latent – of the works at

issue. In some cases, it may be necessary to go beyond the perspective of a lay person in the intended audience for the work, and to call upon an expert to place the trial judge in the shoes of ‘someone reasonably versed in the relevant art or technology’ (2013, para. 51).

The Court further explains, regarding an example of two pieces of music, that “the judge may need to consider not only how the work sounds to the lay person in the intended audience, but also structural similarities that only an expert can detect” (para. 52). Vaver’s viewpoint is generally accepted by courts and it may be plausible that inclusion of members from the stand-up community could potentially be relied upon for assistance here, if a judge decides it is warranted. As explained prior, community norms have arisen to assist comics in protecting their work extra-legally within that community, as a means to combat the expenses associated with litigation, and input from professional comedians could shed light on how jokes could or should be compared legally. Even so, a trial judge would have to decide that additional input from community members or other kinds of experts was necessary to help him understand the facts pertaining to any case involving stand-up comedy infringement. After interviewing several stand-up comedians and countless cases of joke theft posted by comedy fans online, I believe that if a judge did allow this input, it is plausible that the holistic comparison between *You’re Fired* and *Italian Neighbours* could be more likely to support the claim that infringement did indeed occur.

I expect that Gerry Dee would disagree, and he may also be correct. First, it must be remembered that *Italian Neighbours* is also a protected work, whether or not it

infringes on mine. Second, it would be probable that Mr. Dee, even after access to the work was established, would believe, perhaps correctly, that his work was not an infringement on mine, but rather mine acted as inspiration for his creation. This view may also be supported by expert evidence or testimony. Comedians, while protective of their work, are equally protective of their right to create, and to draw inspiration from their daily experiences. A community member may suggest that Mr. Dee simply did what all comics do; he drew inspiration from an experience, and crafted a bit around it. But while possible, it seems unlikely here, given all four of the comics interviewed (and many more online) seem to identify stronger with the comic-victim than the comic-creator, and after research, it seems that most comics respect those who create independently around a concept, not those who create via the write-around.

It could be argued that Mr. Dee perhaps felt that his offer to help me get some time at Yuk Yuk's comedy club in Toronto was in effect asking me whether I wanted to use the material or not, and my refusal meant that the routine was free to use in his community. I have not found any evidence that this type of implied permission is acceptable within the stand-up community, however. This is also doubtful because changes were deliberately made, leading me to believe that he was at least aware of a potential misappropriation. Mr. Dee could also perhaps take the stance that if he wanted to copy my material, he would have performed *You're Fired* in the spirit it was written, and not changed location, culture and character, nor would he have added the other original parts such as "going for coff". Mr. Dee would then try to assert that there may not be a substantial portion of my work or performance taken, and would likely argue that

Italian Neighbours simply rewrites and reworks a general premise that has probably been used already. As support, he could point to existing stories that contain the idea of a recurring “firing” to support this claim. For example, *Firing Francine* is a one-act play by Don Hannah that hilariously shows a workplace boss trying in vain to fire his employee, but somehow cannot do it. However, this play, from *Snappy Shorts at the Tarragon*, was published in 2005, after my original recording of *You’re Fired*, so while it could not be argued that I borrowed from the play, it could be suggested that the play borrows from either my work or Dee’s – probably Dee’s due to the sheer breadth of accessibility - and restructures or writes around the plot into a new work. More likely, though, *Firing Francine* is an example of parallel thinking, a term the comedians in the series *Killing Gerry* refer to which describes a scenario in which two creators have a similar idea independent of each other.

Mr. Dee could also point to the fact the characters are quite different, from different cultures and the story is told in a different setting. He has created a new world in which the bit resides, and this world does not contain sufficient similarities to warrant a decision of infringement. All of these arguments would be viable and acceptable, and would need to be considered along with mine in a court of law. For me, my claim would be more likely to succeed if the comparisons of the two performances related to my work were examined holistically and with input from community members, though this is perhaps far from likely to occur.

I suggest that Mr. Dee’s talents as a writer and comedian should have provided him the necessary tools to create a new work out of *You’re Fired* without the possibility

of infringing on it. He could have taken the premise, and rather than rewriting the idea of a young man being fired every day, craft a bit revolving around, say, a young woman who must break up with her inept boyfriend every day, only to discover he just doesn't seem to realize it is happening, creating awkward moments during her attempts to socialize with other boys. Or, if the bit must involve a workplace, craft the bit around a dad who pays his neighbour to give his lazy son work to do around the neighbour's house, in effect paying money to have his neighbour's odd jobs done. This would be in keeping with Gerry Dee's other bits within the routine of *Italian Neighbours* but would not provide me any reason to suggest an infringement of my work has occurred.

6.3. Applying Fair Dealing to the Case

It is not arguable that Mr. Dee's use of my work is fair under fair dealing. *CCH* has provided in effect a two-step "test" of fairness. The first step, as described previously, is to identify one of the *Act's* eight enumerated fair dealing purposes. We cannot proceed to examining the factors that are considered in step two if the purpose is not clearly identifiable in the first step. I suggest it is not feasible that the use would fall into the areas of research, private study, education, parody, satire, criticism, review or news reporting. Mr. Dee would likely need to claim that his work is protected as original, and would not attempt to rely on fair dealing protection.

7. Further Research

Creators of comedy could potentially benefit from more clarity and perhaps more protections from the *Act*. As stated earlier, stand-up comedy is a combination of literary and, arguably, dramatic work with performance skills. The *Act* seems to suggest that a performance arises out of a work, and that the comparison of works then is paramount in determining if a substantial part was taken. However, since performances can be improvised, the unwritten or unfixed work is more prone to infringement, even though improvisation is protected. Perhaps Pate's suggestion that performance originality and literary originality are equally important is a good place to start. Pate says:

There is a middle ground, and understanding that performance and literary originality are separate and equally important helps locate it. Acknowledging that, depending on the comedian, the originality of content may be more or less important and should neither diminish legal rights for comedians nor devalue the work of comedians for whose acts literary originality is crucial" (2014, P. 71).

Perhaps there are aspects of a performance that could infringe on aspects of another comic's performance, much like aspects of a mime performance could potentially infringe on another mime performance. Here it is again worth noting that stand-up comedy is not currently specified in the *Act* as a dramatic work, while mime is. I suggest the separation of a comedian's performance and her work unnecessarily encourages the "write-around," and that more protections in the area of performance copyright may encourage comedians to expand on an idea without simply making

modifications to an existing bit's structure.

Comics appear to be absent from the dramatic works conversation, largely because there may not be specific scenic arrangements (plays) or choreography (dance, mime) to differentiate comparable works. Stand-up then, seems to date to only potentially be considered a dramatic work if it could be argued it may be a recitation, but this argument is at present hypothetical. This paper takes the position that Oliar and Sprigman's work should be continued in an effort to find the data needed to perhaps recognize these limitations of the stand-up community norms policing, and, should case study become available, assist the courts in interpreting the *Act* in its present form and perhaps provide an impetus to evolve the *Act* to more clearly protect what Oliar and Sprigman suggest is the "essence of their creativity" (2008, p. 1970).

Creators of comedy could also benefit from receiving attribution for their work and ideas, in the event of a "write-around". This would involve more research in the areas of stand-up comedy community norms, which seem to attempt to protect more against plagiarism, "the uncredited use (both intentional and unintentional) of somebody else's words or ideas" (Purdue Online Writing Lab [OWL], 2018) than against copyright infringement. This research could potentially look at the community norms of academia to determine if there are any potential strategies that could be put in place that are not already. Arguably this solution already resides in the enforcement of existing community norms, but again, if the infringed creator of comedic work is not a member of that community the enforcement breaks down. For instance, could a comedian's resume include credit for certain bits that may straddle the line between

infringement and plagiarism? Perhaps there are ways for the creators of comedy to be recognized for their contributions to another creator's work, especially once that work is included in a performer's "big break" of a network deal where it is communicated to the public by telecommunication. Here, a comedian who had some of her material used by another may at least be offered some potential future reward in the form of compensation or professional credibility, and the potential infringer may avoid any community backlash that could occur if that comic is labelled a "joke-thief". Any potential research in this area may need to build on Pate's work, where he identifies the problems associated with performing his material on a network television show, and granting the network ownership of his material (2014, p. 55).

8. Conclusions

This paper was guided by four questions. The first asked if creators of stand-up comedy are adequately protected by copyright law and internal IP norms or if there was a perceived gap between what comics feel needed protection, as evidenced by their community norms, and what is protected by copyright.

The *Copyright Act* does not require owners of comedic content to be members of the stand-up profession in order to suffer an infringement of their work. But, membership in the stand-up community has its upside (See what I did there?) when it comes to protecting one's work. I discovered that there is a difference between what the stand-up community would like to protect and what is protected by the *Act*, and that community norms have arisen in an attempt to offer more protections. While it is beyond the scope of this paper and project to conclude that Canadian copyright law currently does not adequately protect comedians (largely because there is not available case law specific to stand-up comedy in Canada), it seems that the genre is in need of some guidance and clarity.

Second, the paper asked how important receiving credit was to comedy creators, and if attribution could offer a potential solution to perceived copyright infringement within the stand-up community.

Attribution is extremely important in helping comedians build their career, both through writing and performance opportunities. The absence of credit for their work is disturbing to comedians because it potentially hinders creators of comedy to build their career capital, and may negatively impact their earning

potential. Receiving credit may mitigate the potential emotional and financial harm copyright infringement can cause, and may minimize conflict over ownership of jokes within the stand-up community.

Third, I wanted to find out if Gerry Dee infringed on my copyright and/or the stand-up community norms in allegedly using what I consider to be a substantial part of my creation.

The *Act* offers protections for my work but the absence of case law renders any interpretation of the *Act*, as it relates to my alleged infringement, hypothetical. The *Act* is also somewhat limiting without stand-up comedy being specifically identified as a dramatic work, like other performance art, such as mime, is. However, this limitation is compensated for somewhat by the Court's determination that holistic comparisons can be appropriate in some circumstances to determine originality in cases of potential infringement. Given this, I have found solace in discovering that it may be possible to show that my work was likely infringed, and, although it may be extremely difficult to do anything about it, to feel that the members of the stand-up community would likely empathize and concur with me.

Finally, the paper examines *Killing Gerry* and its potential to infringe on copyright. I wanted to create a video project that illuminated potential limitations in copyright protections by using works without permission. The uses of all works in *Killing Gerry* are arguably protected under fair dealing and UGC exceptions. However, my belief in this does not make it so, and it remains to be seen if the

project will face, like the epilogue suggests, attempts to shut it down.

This paper contributes to the academic discussion on copyright protections for stand-up comedians and creators of comedy by examining of some of the perceived or potential ambiguities and limitations of the *Act's* protections of the performance, literary and dramatic aspects of the art. This project and paper will be of use to creators of comedy should they seek to ensure their originality is protected while respecting the copyright of other creators, and may also be beneficial to creators of comedy who feel their work has been potentially infringed.

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10. Appendix

10. 1. Sequence Analysis: The Protagonist's Stand-up Comedy Show

Throughout the project, the audience is asked to believe that a potential infringement of copyright has occurred on protagonist's material. To do this, I had to encourage the audience to believe that the protagonist is indeed a stand-up comedian. In order to do so, some documented evidence of his creation needed to exist, hence the creation of the "live" show.

The show served many purposes. The first being to give credibility to the assertion that my work was indeed comical and that my performance contained a certain amount of polish. The timing of the delivery and follow-up tags, both scripted and improvised, are of a quality consistent with those of experienced comedians. The second was to offer a comparison consistent with the project's formula of side-by-side examples of joke-theft. Not only does the comic routine allow the comparison to exist between Brian and Gerry, it also highlights the contradictory inherent claim that Brian is simply a victim by showing a line in his Country Song that is taken verbatim from Emo Phillips' earlier comedy. This represents the frequent occurrence of joke theft. I could claim parallel thinking here, but the truth is I stole that line from Phillips when I was writing Country Song. This perhaps further illuminates Vaver's explanation that it is possible for a work to be both original and copied. The live act demonstrates a successful stand-up comedian but we must remember that this isn't necessarily the case, as Brian flashes back to the reality of his routine being a failure. The audience at this point should question the truth of both the comedy performances and the protagonist's character. In addition, they may

be able to detect similar joke structures with Brian's bits and iconic works. The viewer should be able to recognize the structure of *Right-click That Shit* to the comedy routines of Jeff Foxworthy's *You Might Be a Redneck*. The "right-click that shit" line occurs following examples told in much the same way as Foxworthy tells his jokes, first offering an example that is either absurd or inappropriate, followed by the claim "you might be a redneck" or a version thereof. The premise, set up and punchline in both are unique in content, yet the structural similarities become quite obvious. However, the similarity of structure does not infringe any portion of Foxworthy's work. But, what if the routines were told in a similar style? In a similar voice? Would Foxworthy feel the need to litigate? It is possible that some community members would view the two bits differently than a court would. Through onscreen links, audience members will be exposed to the "Teachable Territory" of Foxworthy's litigious protection of his redneck jokes.

The series asks the audience if the introductory bass riff from *Seinfeld* (then *Night Court*) affects the credibility of the performance at all. While used as parody and thereby fair, the riff undoubtedly serves to remind viewers they are viewing a manipulated performance in a cinematic world while perhaps allowing us to subconsciously accept Brian as a legitimate stand-up performer.

At the end, Dave Clark "kills" his other personality, and performs a stand-up routine much like I did in creating this project as a cathartic creative challenge. I named his character after the man responsible for creating the opening musical riff of *You're Fired*, which was originally written as a bass riff. He lives in Ontario and gave the riff to me to use in the creation of a new song. I felt he deserved a nod, in addition to credit.

The web series began as a feature film, but the narrative pulled in many directions and the stand-up comedy show was exceedingly lengthy, which became a distraction to the audience's ability to connect the comedy show with the protagonist. Under the guidance of my advisor I was able to adapt the project to a web series, and in that format was able to incorporate much of the UGC side-by-side comparisons that built the framework for the narrative; allowing the audience to realize that joke-theft not only existed, but was rampant, and perhaps this would allow them the capacity to feel empathy for the protagonist and his plight. The format also allowed me the ability to use a formula for each episode, in which the viewer realizes they will be shown comparisons of comedic creations, documentary footage for context, and then the protagonist's narrative, which should clarify the goals of the series as stated in the abstract.

10.2. Sequence Analysis: Chapter 3

The series *Killing Gerry* contains numerous references to cinematic works in hopes of creating a reveal or twist reminiscent of M. Night Shayamalan's *The Sixth Sense*. In the series finale, the viewer will hopefully experience an "Ah-Ha" moment when it turns out the protagonist is "just an actor – a Canadian actor" in Chapter 8. Thinking back, the viewer will hopefully connect with the many movie references throughout the project. In Chapter 3, Brian and Dave entertain conspiracy theories about alien researchers while a scene from the Steven Spielberg blockbuster *Jaws* plays on the television. The scene involves the town mayor trying to convince the police chief and shark biologist that there is no threat to the public while Dave tells

Brian that he represents that stock character – another clue (along with similar wardrobe styles and identical timing of physical movements) that Brian and Dave are one and the same.

In the group therapy session, iconic film characters are referenced again to imply Brian's true self. The Joker is included for two reasons outside of the name irony, first because the actor who played this version of the character was a well-known method actor who "created" this darker version of the original character, and because he, like the others, is dealing with obsession. The misinterpreted version of method acting often suggests that obsession with the craft leads to destructive behavior. Brian's eventual comedic tale of woe is a blatant retelling of the iconic "Indianapolis" scene from the aforementioned *Jaws*; the film he was watching on the couch with his friend the evening prior.

Brian's story about his joke theft becomes in part a parody of Spielberg's work, opening the door to a potential Fair Dealing exemption for the use of John Williams' score in the movie, and in part a reinforcement that Brian is constantly creating his new identity, often through his dishonesty. When it becomes clear that the therapist recognizes this iconic scene, he points Brian in a new direction, effectively passing him on to the next therapist. This recurring passing of the torch parallels the daily firing Brian endures in his song.

The series also numerous references to existing and potential copyright issues and provides links for further research. Some of these issues appear in Chapter 3. First, the décor in Brian's living room features the poster of the manipulated version of

Patrick Cariou's *Yes, Rasta* by Richard Prince. This is a case making its way through US courts in which the degree of change a work undergoes and the effect that change has on the meaning of the work is considered in determining originality. Second, the figure on Dave's T-shirt is that of Canadian Cardinal Ouellet, for a time a candidate for Pope. (See Thestar.com, Mar. 10 2013.) The image is styled after Shepard Fairey's manipulation of the Associated Press' photograph of Barrack Obama, in which Fairey pleaded guilty to copyright infringement (New York Times, Feb. 24 2012). Rather than the word "HOPE" at the bottom of the image, the text on Dave's shirt reads "POPE?". Finally, the soundtrack playing in the record store is titled *KMAG YOYO* by Hayes Carll. The structure of the song and the delivery of the lyrics are an homage to Bob Dylan's *Subterranean Homesick Blues*. In an interview with Rolling Stone magazine, Carll has explained how Dylan inspired him to be a songwriter (May 2017), but his song could be

used in comparison to George Harrison's *My Sweet Lord* and the Chiffons' *He's So Fine*. Available through Apple, the iTunes review of *KMAG YOYO* explains how "The title track twists Bob Dylan's 'Subterranean Homesick Blues' into a manic juke-joint knife- fight as it slips into the mind of a young soldier working his way through the difficulties of Afghanistan" (Editor, Apple Music Preview, web. Jan 2011). There is unlikely to be any litigation here, however, as Dylan has already achieved stardom and seems to have been consulted prior to the release of *KMAG YOYO* and is often credited as the influencing force on Carll's work, demonstrating once again the importance of an artist to receive attribution for his creations.