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**THE LAST LAUGH: A CASE STUDY IN COPYRIGHT OF COMEDY AND
THE VIRTUAL IDENTITY STANDARD**

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INTRODUCTION

*Good artists copy. Great artists steal.*¹

*With our hectic lives, a dose of comedy is a must.*²

Comedy is in the midst of a golden age.³ Never before has comedy been so diverse, full of depth, and accessible. Performers today can sell out arenas, tour hundreds of cities, and attract millions of fans, just like the rock stars of years past. Many comedians consider their material to be their craft; legendary comedian Dave Chappelle even elevates comedy to the status of art, comparing the punchlines of comedy to the brushstrokes of Rembrandt.⁴ New forms and mediums of expression allow more of those punchlines. But the gift of more voices comes with a vice: more voices are talking about the same things. Crowded expression is bound to overlap, and figuring out who said what is often complicated. Comedians have traditionally relied on the social norms within their industry to police overlap. But with comedy's resurgence over popular

¹ This quote has been attributed to several people, including T.S. Eliot and Pablo Picasso. *Good Artists Copy, Great Artists Steal*, QUOTE INVESTIGATOR (Mar. 6, 2013), <https://quoteinvestigator.com/2013/03/06/artists-steal/>.

² Anita Hassanandani Reddy, BRAINY QUOTE, <https://www.brainyquote.com/topics/comedy> (last visited May 10, 2019).

³ Elahe Izadi, *The New Rock Stars: Inside Today's Golden Age of Comedy*, WASH. POST (July 13, 2017), https://www.washingtonpost.com/graphics/2017/lifestyle/inside-comedys-new-golden-age/?noredirect=on&utm_term=.0344c10c1df5.

⁴ *See id.*

platforms like Netflix⁵ and Twitter, along with the emerging force of intellectual property law, copyright protection is becoming a major player in policing infringement of comedians' material.

Initially, courts have deferred to standard copyright analysis to judge the infringement of jokes. However, now that jokes are becoming more diverse, courts are differentiating their analyses accordingly, applying different standards for different jokes. One such standard, the virtual identity standard, is beginning to gain traction as a viable solution to determine substantial similarity of a certain category of jokes: those grounded in facts rather than fantasy. This paper argues that the virtual identity standard is the correct standard to judge infringement of those fact-based jokes and yields positive implications for the comedy industry. While virtual identity requires a higher bar for plaintiff-comedians claiming infringement, it ultimately incentivizes creativity among joke creators and facilitates open expression of comedy.

Part I explores the background of copyright protection and infringement in general, how comedy and copyright have interacted in the past, and how Twitter fits into the copyright framework. Part II introduces *Kaseberg v. Conaco, LLC*, a recently-settled case that focused on the intersection of copyright and comedy through the lens of fact-based jokes. Part III then analyzes the virtual identity standard and its applicability in copyright infringement cases, including a discussion and prediction of its applicability to the facts of *Kaseberg*. Finally, Part IV addresses the consequences and concerns of using a virtual identity standard to police infringement of fact-based jokes. Ultimately, the virtual identity standard incentives more varied

⁵ *See id.* (discussing the growing number of stand-up comedy specials released by Netflix each year).

comedic expression, improves public accessibility to comedy, and gives legal reinforcement to the societal norms already present within the comedy industry.

I. BACKGROUND

Copyright protection for creative works finds its roots in the Constitution. Article I states that Congress shall have the power to “promote the progress of science and useful arts, by securing for limited times to authors . . . the exclusive right to their respective writings.”⁶ Accordingly, Congress has continued to evolve its understanding of copyright since the Founding. This Part will discuss the requirements for a valid copyright, including the typical infringement analysis, and how those two frameworks interplay with comedy and a popular social media platform like Twitter.

A. *Copyright Requirements*

Copyright protection has taken many forms, most recently in the Copyright Act of 1976. This Act grants the owner of a copyright a litany of exclusive rights, including reproduction, preparation of derivative works, distribution, public performance, and public display of copyrighted works.⁷ To claim those exclusive rights, Congress established a threshold giving protection only to “original works of authorship fixed in any tangible medium of expression,”⁸ creating three requirements for copyright protection: originality, authorship, and fixation.

⁶ U.S. CONST., art. I, § 8, cl. 8.

⁷ 17 U.S.C. §106 (2012).

⁸ 17 U.S.C. §102(a) (2012).

1. Originality

Courts have traditionally defined originality in a copyright framework.⁹ The Copyright Act of 1976 does not expressly define originality;¹⁰ the Committee Report from the House of Representatives, however, describes this oversight as intentional.¹¹ The Supreme Court handed down the current understanding of copyright originality in *Feist Publications, Inc. v. Rural Telephone Service Co.*, finding that “a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author . . . and that it possess at least some minimal degree of creativity.”¹²

Under that standard of originality, the Supreme Court carefully excluded ideas from copyright protection.¹³ Ideas are uncopyrightable as a matter of policy, as doing so would grant one person the exclusive rights over a broad concept, disallowing others to freely express that

⁹ See Howard B. Abrams, *Originality and Creativity in Copyright Law*, 55 L. & CONTEMP. PROBS. 3, 6 (1992).

¹⁰ See 17 U.S.C. §101 (2012) (where the term originality is not among the defined terms).

¹¹ H.R. REP. NO. 94-1476 at 51 (1976) (stating that “[t]he phrase ‘original works of authorship’ . . . is purposefully left undefined . . . to incorporate without change the standard or originality established by the courts”). The report later rationalizes this flexible originality standard, stating that “[a]uthors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take.” *Id.*

¹² 499 U.S. 340, 345 (1991). The Court set the bar for creativity “extremely low; even a slight amount will suffice.” *Id.*

¹³ See *Baker v. Selden*, 101 U.S. 99 (1879).

concept while at the same time hindering the constitutional goal of public discourse.¹⁴ Facts are also not copyrightable, for largely the same reasons. Facts are deemed to not be independently created by an author because they already exist.¹⁵ Keeping facts free of exclusive control by one author, as with ideas, serves a broader policy to promote the public's access to information.¹⁶

2. Authorship

Like originality, the phrase “works of authorship” is also left undefined by the Copyright Act of 1976.¹⁷ However, the concept of authorship has gotten less attention from the Supreme Court.¹⁸ Section 102(a) of the Copyright Act of 1976 lists eight categories of works that offer indicia of authorship, the most notable of which is “literary works.”¹⁹ These eight categories are not exhaustive; rather, the list is “‘illustrative and not limitative,’ and . . . do[es] not necessarily exhaust the scope of ‘original works of authorship’ that the bill is intended to protect.”²⁰ Additionally, some small amount of “intellectual labor” can demonstrate a work of authorship.²¹

¹⁴ See Abrams, *supra* note 9, at 1.

¹⁵ *Id.* at 7–8.

¹⁶ *Id.*

¹⁷ H.R. REP. NO. 94-1476 at 51 (1976).

¹⁸ See Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1230, 1246 (2016) (criticizing the Court in *Feist* for not addressing whether any of the plaintiff's decisions constituted “authorship”).

¹⁹ 17 U.S.C. §102(a) (2012).

²⁰ H.R. REP. NO. 94-1476 at 53 (1976).

²¹ 1 NIMMER ON COPYRIGHT §1.08(C)(1) (1989).

3. Fixation

Scholars and courts interpret fixation as a constitutional requirement for copyright protection, with many arguing that fixation is implied in the word “writing.”²² The Copyright Act of 1976 defines a work as properly “fixed” when it is embodied in a tangible medium of expression for a period of more than a transitory duration.²³ The medium required for embodiment is defined broadly; the Act only requires that it is “sufficiently permanent or stable to permit [the work] to be perceived, reproduced, or otherwise communicated.”²⁴ A work consisting of sounds or images may even be “fixed” if the fixation of the work is being simultaneously created with its transmission,²⁵ such as a live television broadcast being simultaneously recorded. Copyright protection extends immediately to a work upon its creation, which occurs at the moment of its fixation.²⁶

B. *Copyright Infringement*

A valid copyright is only practical if it can be protected from infringement. Two elements are required to prove infringement of a copyright: (1) ownership of a valid copyright, and (2)

²² U.S. CONST., art. 1, § 8, cl. 8; *Kelley v. Chi. Park Dist.* 635 F.3d 290, 303 (7th Cir. 2011); Megan Carpenter & Steven Hetcher, *Function over Form: Bringing the Fixation Requirement into the Modern Era*, 82 *FORDHAM L. REV.* 2221, 2236 (2014).

²³ 17 U.S.C. §101 (2012).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See id.* at §§101–102.

copying of original elements of the work.²⁷ While clear precedent continues to guide judges in determining valid ownership of a copyright,²⁸ determining copying can be much more challenging. Absent direct evidence of copying, a claimant must prove (1) that the alleged infringer had access to the copyrighted work, and (2) that the infringing work is substantially similar to the original.²⁹ First, access is often proved by showing a “reasonable possibility of viewing the plaintiff’s work.”³⁰ Second, substantial similarity, as described by famed copyright scholar Melville Nimmer, “presents one of the most difficult questions in copyright law.”³¹ Generally, courts use a two-part test relying on both objective expert analysis and the subjective observations of the layman to determine if the two works at issue are substantially similar.³²

An important function of the two-part test is to dissect a work’s elements into two categories: elements protectable by copyright (such as original expression) and elements not

²⁷ Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 361 (1991).

²⁸ See, e.g., Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir 2008) (providing a comprehensive analysis of the “fixation” requirement).

²⁹ 4 NIMMER ON COPYRIGHT §§ 13.02–13.03 (4th ed. 2015); Arnstein v. Porter, 154 F.2d 464, 468–69 (1946).

³⁰ 4 NIMMER ON COPYRIGHT §13.02(A) (4th ed. 2015).

³¹ *Id.*

³² Nicholas Booth, *Backing Down: Blurred Lines in the Standards for Analysis of Substantial Similarity in Copyright Infringement for Musical Works*, 24 J. INTELL. PROP. L. 99, 104 (2016) (citing Elga A. Goodman et al., *Elements of Copyright Infringement*, 49 N.J. PRACTICE, BUS. L. DESKBOOK §11:12 (2015–2016 ed.)).

protectable by copyright (such as ideas and facts).³³ Courts then judge infringement based only on the category of elements protectable by copyright.³⁴ Would-be infringers, therefore, are welcome to copy facts and ideas in other works free from the restraints of copyright law, as it serves the utilitarian purposes of spreading public discourse and improving the wealth of public knowledge.

C. *Comedy*

Categorizing jokes as intellectual property is certainly not new. Judges first implied that jokes could be copyrightable in the 1913 case *Hoffman v. LeTraunik*, with the court deciding the case on originality grounds rather than by the content at issue.³⁵ Thirty years later, in *Universal Pictures Co. v. Harold Lloyd Corp.*,³⁶ comedian Harold Lloyd prevailed on a copyright infringement claim when the Ninth Circuit found that the defendants had infringed upon fifty-seven scenes from his comedy movie.³⁷

³³ *Id.*

³⁴ *Id.*

³⁵ 209 F. 375, 379 (N.D.N.Y. 1913) (ruling against the plaintiff because his material was not original rather than contemplating a categorical prohibition of copyright protection for jokes).

³⁶ 162 F.2d 354, 360 (9th Cir. 1947).

³⁷ David E. Shipley, *A Dangerous Undertaking Indeed: Juvenile Humor, Raunchy Jokes, Obscene Materials and Bad Taste in Copyright*, 98 KY. L.J. 517, 524 (2009) (discussing how the court in *Harold Lloyd Co.* found Lloyd's comedy scenes copyrightable, but also "stressed the substantiality of the taking" as reason for the decision in Lloyd's favor). It seemed as though the

Scholars consider the leading case on the protection of jokes today to be *Foxworthy v. Custom Tees, Inc.*,³⁸ involving Jeff Foxworthy and his famous “redneck humor.”³⁹ The court focused on Foxworthy’s originality of expression, saying that although he “repeatedly stated that he uses other people’s ideas . . . he puts them in his own words.”⁴⁰ The court found that Foxworthy met the originality standard of a “modicum of intellectual labor”⁴¹ and that Custom Tees had copied Foxworthy’s expression verbatim. Not only did Foxworthy win the day, but so too did all comedians. Relying on the reasoning in *Feist*, the court in *Foxworthy* noted that “two entertainers can tell the same joke, but neither entertainer can use the other’s combination of words.”⁴² Such a statement certainly held the door open to comedians developing fresh and unique material on the same or similar ideas, all in the name of original expression.

The Copyright Office has largely followed judicial precedent. By 1984, the Copyright Office extended protection to jokes so long as they “contain a certain minimum amount of

court was not ready to dismiss comedy as copyrightable, but equally not ready to definitively extend copyrights to comedy. *See id.*

³⁸ 879 F. Supp. 1200 (N.D. Ga 1995).

³⁹ Elizabeth M. Bolles, *Stand-Up Comedy, Joke Theft, and Copyright Law*, 14 TUL. J. TECH. & INTELL. PROP. 237, 238 (2011); Shipley, *supra* note 37, at 524 (describing the “You might be a redneck . . .” jokes at issue that Foxworthy is famous for).

⁴⁰ *Foxworthy*, 879 F. Supp. at 1219.

⁴¹ *Id.* (citing *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 346 (1991)).

⁴² *Id.*

original expression in tangible form.”⁴³ However, “[s]hort quips and other slang expressions consisting of no more than short phrases are not registrable,”⁴⁴ creating a distinction for differing levels of protection depending on the nature and structure of the joke.⁴⁵ Perhaps finally recognizing the societal value of comedy and jokes, the Copyright Office’s distinction attempts to balance creative incentive for original expression while still keeping some jokes free of copyright’s exclusivity.

While legal remedies are available, some suggest that they are relatively unknown and underutilized by comedians, and for good reason.⁴⁶ Based on interviews and studies done across a broad spectrum of comedy creators, the main factor driving protection of jokes is social norms within the comedy industry.⁴⁷ For many comedians, the label of “joke-stealer” is far worse for their career than any injunction a court could issue.⁴⁸ One norm closely followed in comedy is that “the first person to get [a joke] on t.v. owns it.”⁴⁹ A legal scholar would look at that norm

⁴³ COMPENDIUM II OF COPYRIGHT OFFICE PRACTICES §420.02 (1984).

⁴⁴ *Id.*

⁴⁵ See Shipley, *supra* note 37, at 526 (offering examples such as “pull my finger” and “silent but deadly” as non-copyrightable expression).

⁴⁶ Bolles, *supra* note 39, at 240.

⁴⁷ *Id.* at 254; Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1790 (2008).

⁴⁸ Bolles, *supra* note 39, at 254; Oliar & Sprigman, *supra* note 47, at 1791.

⁴⁹ Bolles, *supra* note 39, at 242, 242 n.3.

and see both fixation and (assuming originality) the likely copyright protection that follows.⁵⁰ However, a comedian sees originality and thus priority—even if an amateur comic performed the joke first, the public perceives the amateur as having stolen the material once someone performs it on television.⁵¹ To avoid embarrassment and potential negative career backlash as a “joke-stealer,” the amateur would be forced to stop performing the joke, despite the rightful claim of ownership over the material. While these norms may be overbroad, they are the prevalent policing force in comedy and are often unflinchingly rigid.⁵²

D. *Twitter*

In 2018, Twitter averaged a whopping 67.2 million users per month.⁵³ Two oft-cited reasons for Twitter’s high volume are that (1) Twitter offers a never-ending stream of digestible information, and (2) that information updates in real-time.⁵⁴ Users can type anything under 280

⁵⁰ See *supra* Part I.A.3. (describing how a work can become fixed as it is being transmitted on television, thus giving the work copyright protection (assuming originality and authorship are satisfied)).

⁵¹ See Bolles, *supra* note 39, at 242–43.

⁵² See *id.* at 255.

⁵³ *Most Popular Mobile Social Networking Apps in the United States as of October 2018*, STATISTA (Oct. 2018), <https://www.statista.com/statistics/248074/most-popular-us-social-networking-apps-ranked-by-audience/>.

⁵⁴ Zach Cutler, *4 Reasons to Love Twitter*, ENTREPRENEUR (Feb. 11, 2016), <https://www.entrepreneur.com/article/270637>.

characters into the “What’s Happening” box and click Tweet.⁵⁵ That tweet can contain anything, from sporting events and news⁵⁶ to comedy.⁵⁷

Many comedians agree that Twitter has drastically changed the comedy landscape from what it looked like under traditional stand-up.⁵⁸ It is easy to see why—major concerns of joke stealing and other “wrongs” policed by comedy industry norms discussed above are somewhat moot on Twitter. For example, rather than an amateur comedian performing material in a comedy club (where the material could easily be stolen with no practical recourse), Twitter provides a timestamp.⁵⁹ Thanks to Twitter, not only could the amateur continue to perform the joke, he could even prove that he is in fact the joke’s creator, boosting his comedy career.⁶⁰

⁵⁵ Paul Gil, *What is Twitter & How Does it Work?*, LIFEWIRE (Dec. 17, 2018), <https://www.lifewire.com/what-exactly-is-twitter-2483331>.

⁵⁶ *Id.*

⁵⁷ Christine Erickson, *How Twitter is Changing the Craft of Comedy*, MASHABLE (Feb. 16, 2012), <https://mashable.com/2012/02/16/twitter-changed-comedy/#zpjIkQYFxoqX>.

⁵⁸ *Id.*

⁵⁹ Shea Bennett, *How to Find the Exact Time a Tweet Was Posted*, ADWEEK (Oct. 7, 2011), <https://www.adweek.com/digital/tweet-timestamps/>.

⁶⁰ *See also* Dante D’Orazio, *Twitter is Deleting Stolen Jokes on Copyright Grounds*, THE VERGE (July 25, 2015, 10:35 AM), <https://www.theverge.com/2015/7/25/9039127/twitter-deletes-stolen-joke-dmca-takedown> (describing Twitter’s process designed to help curb copyright infringement on their platform).

But can tweets meet the threshold of copyright protection? It certainly seems so. Tweets can possess originality: they can be independently created and possess more than a modicum of creativity.⁶¹ Tweets can be a work of authorship: they can qualify either under a statutory category of authorship as a literary work or by demonstrating the requisite amount of intellectual labor.⁶² Finally, tweets are fixed: they can be embodied in a tangible medium of expression for a period of more than a transitory duration.⁶³ Therefore, while the nature of Twitter does not facilitate copyright protection for *all* tweets, *some* tweets can and do require copyright protection.⁶⁴ More importantly, under Twitter’s Terms of Service, users retain ownership rights of their own tweets,⁶⁵ presenting no ownership barrier to copyright protection of tweets.

⁶¹ Rebecca Haas, Comment, *Twitter: New Challenges to Copyright Law in the Internet Age*, 10 J. MARSHALL REV. INTELL. PROP. L. 231, 242–44 (2010) (comparing and contrasting tweets that do and do not meet the threshold creativity required for copyright protection); *supra* Part I.A.1.

⁶² Haas, *supra* note 61, at 244–45 (stating that Tweets can “qualify as a ‘work of authorship’ if they qualify as a literary work, and also under the intellectual labor review”); *supra* Part I.A.2.

⁶³ Haas, *supra* note 61, at 245–47 (stating that Tweets meet the Copyright Act of 1976’s requirements for fixation and could even be considered a “transmitted” work); *supra* Part I.A.3.

⁶⁴ Haas, *supra* note 61, at 248.

⁶⁵ *Twitter Terms of Service*, TWITTER, <https://twitter.com/en/tos> (last visited May 10, 2019) (describing that users retain their ownership right, while granting Twitter a nonexclusive license to use the content).

II. CASE STUDY: *KASEBERG V. CONACO, LLC*

Twitter has changed the way people create and absorb comedy by facilitating the sharing of shortened tidbits of information, making it the perfect breeding ground for “one-liner” style⁶⁶ comedy material and social commentary. Given the enormous user base and traffic volume on Twitter,⁶⁷ it was only a matter of time before copyright law was implicated. *Kaseberg v. Conaco, LLC* offers a look, albeit a narrow one, into such a scenario. The focus, somewhat surprisingly, was not on the issue of copyrightable tweets, but on the line between unprotectable fact and copyrightable expression.

A. *Factual Background*

Plaintiff Robert Kaseberg, a freelance writer, has been crafting and creating jokes featured in prominent publications and by late-night comedians for over twenty years.⁶⁸ Often, Kaseberg will feature his jokes on his Twitter account.⁶⁹ However, on five separate occasions, Kaseberg noticed that shortly after his tweets were posted, similar jokes appeared on *Conan*, the late-night show created and hosted by comedian Conan O’Brien.⁷⁰ The five jokes as they appeared on Kaseberg’s Twitter and then on *Conan* were:

⁶⁶ Bolles, *supra* note 39, at 246 (describing the one-liner genre of comedy material).

⁶⁷ *See supra* note 53 and accompanying text.

⁶⁸ *Kaseberg v. Conaco, LLC*, 260 F. Supp. 3d 1229, 1232–33 (S.D. Cal. 2017).

⁶⁹ *Id.* at 1233.

⁷⁰ *Id.*

(1) The UAB Joke, December 2, 2014:⁷¹

Kaseberg: “The University of Alabama-Birmingham is shutting down its football program. To which the Oakland Raiders said; ‘Wait, so you can do that?’”

Conan: “Big news in sports. University of Alabama-Birmingham has decided to discontinue its football team. Yeah. When they heard the news, New York Jets fans said, ‘Wait can you do that? It’s something you can do?’”

(2) The Delta Joke, January 14, 2015:

Kaseberg: “A Delta flight this week took off from Cleveland to New York with just two passengers. And they fought over the control of the armrest the entire flight.”

Conan: “Yesterday, a Delta flight from Cleveland to New York took off with just two passengers. Yet somehow, they spent the whole flight fighting over the armrest.”

(3) The Tom Brady Joke, February 3, 2015:

Kaseberg: “Tom Brady said he wants to give his MVP truck to the man who won the game for the Patriots. So enjoy that truck, Pete Carroll.”

Conan: “Tom Brady said he wants to give the truck that he was given as Super Bowl MVP... to the guy won the Super Bowl for the Patriots. Which is

⁷¹ The dates listed here are the dates of which the material appeared on Kaseberg’s Twitter account. *Id.*

very nice. I think that's nice. I do. So Brady's giving his truck to Seahawks coach Pete Carroll."

(4) The Washington Monument Joke, February 17, 2015:

Kaseberg: "The Washington Monument is ten inches shorter than previously thought. You know the winter has been cold when a monument suffers from shrinkage."

Conan: "Yesterday surveyors [] announced that the Washington Monument is ten inches shorter than what's been previously recorded. Yeah. Of course, the monument is blaming the shrinkage on the cold weather."

(5) The Jenner Joke, June 9, 2015:

Kaseberg: "Three towns, two in Texas, one in Tennessee, have streets named after Bruce Jenner and now they have to consider changing them to Caitlyn. And one will have to change from a Cul-De-Sac to a Cul-De-Sackless."

Conan: "Some cities that have streets named after Bruce Jenner are trying to change the streets' names to Caitlyn Jenner. If you live on Bruce Jenner cul-de-sac it will now be cul-de-no-sack."⁷²

Relying on social norms discussed above, Kaseberg first tried to settle the dispute without legal action.⁷³ He made several attempts to reach out to staff writers for *Conan* pointing out the similarities, even reaching *Conan*'s head writer Mike Sweeney by telephone.⁷⁴ Kaseberg

⁷² *Id.* at 1233–35.

⁷³ *See id.* at 1233.

⁷⁴ *Id.* at 1233–34.

described the conversation as “agonizing,”⁷⁵ as Sweeney vehemently denied any copying or wrongdoing.⁷⁶ After Sweeney called him a “no-name failure,” Kaseberg was still hesitant to take formal legal action.⁷⁷ In fact, Kaseberg even publicly tweeted at Sweeney thanking him for the phone call, saying that the “[l]ast thing I wanted was to sound accusing” and offering to formally contribute jokes to *Conan*.⁷⁸ Reluctantly, Kaseberg tried to involve his lawyer, sending correspondence to *Conan*’s writers to no avail.⁷⁹ Finally, Kaseberg filed a copyright infringement suit over the five jokes against Conan O’Brien’s production company Conaco, LLC, Conan O’Brien himself and other staff writers for *Conan*, and *Conan*’s two parent networks Turner Broadcasting System and Time Warner, Inc.⁸⁰

B. *Copyright Infringement*

The defendants promptly filed for summary judgment and adjudication on several grounds, including lack of standing and willful infringement.⁸¹ After addressing those claims, the

⁷⁵ *Id.* at 1234.

⁷⁶ *Id.*

⁷⁷ *See id.* at 1235 (detailing how Kaseberg waited until over a month after the last alleged incident of infringement to file suit).

⁷⁸ *Id.* at 1234.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1235.

⁸¹ *Id.* at 1236. The court found both that Kaseberg had proper standing to bring the suit and a genuine issue of material fact as to the defendants’ willful infringement. Ultimately, the claims unrelated to substantial similarity are beyond the scope of this paper.

court then turned to the remaining claims by following a typical copyright infringement framework. Because both parties did not dispute the lack of evidence concerning direct copying, the court proceeded to analyze access and similarity between Kaseberg's and *Conan*'s jokes.⁸² In other words, Kaseberg had to prove both that the writers of *Conan* accessed his jokes and that both sets of jokes were substantially similar.⁸³

1. Access

To show access, Kaseberg needed to show that the defendants had a "reasonable opportunity" to view his work.⁸⁴ A "reasonable opportunity" can be proven in two ways: either (1) if the plaintiff's work has been widely disseminated, or (2) a chain of events exists between the plaintiff's work and the defendants' access.⁸⁵

The court interestingly only focused on the "chain of events" element, perhaps taking for granted that Kaseberg's tweets were per se "widely disseminated."⁸⁶ The court found that a chain of events leading to a reasonable opportunity for access was present enough to survive summary judgment.⁸⁷ Kaseberg presented expert testimony that the probability of the defendants' independent creation of the jokes at issue was "between .003% and .0075%."⁸⁸ The expert

⁸² *Kaseberg*, 260 F. Supp. 3d at 1240.

⁸³ *See supra* Part I.B.

⁸⁴ 4 NIMMER ON COPYRIGHT §13.02(A) (4th ed. 2015); *Kaseberg*, 260 F. Supp. 3d at 1240.

⁸⁵ 4 NIMMER ON COPYRIGHT §13.02(A) (4th ed. 2015).

⁸⁶ *See supra* note 53 and accompanying text.

⁸⁷ *Kaseberg*, 260 F. Supp. 3d at 1243.

⁸⁸ *Id.* at 1241.

probability testimony was bolstered by the fact that multiple *Conan* writers discussed Kaseberg amongst themselves and were aware of both his Twitter account and his allegations of infringement during the timeline of the five jokes at issue.⁸⁹ The court found this evidence probative of a reasonable possibility of access.⁹⁰

2. Substantial Similarity

Typically, courts utilize a two-part test for substantial similarity; however, because the court here only judged the facts as they pertained to summary judgment, only the first part of the test was applicable, calling for an objective similarity analysis.⁹¹ Relying on *Apple Computer Inc. v. Microsoft Corp.*, the court set out to determine whether “any of the allegedly similar features are protected by copyright” and then had to “define the scope of the plaintiff’s copyright—that is, decide whether the work is entitled to ‘broad’ or ‘thin’ protection.”⁹² “Thin” protection is appropriate where a “copyrighted work is composed of largely ‘unprotectable’ elements, or elements ‘limited’ by ‘merger,’ ‘scenes a faire,’ and/or other limiting doctrines.”⁹³ The standard for “thin” protection is “some form of ‘virtual identity,’”⁹⁴ to be analyzed in the following Part.

⁸⁹ *Id.* at 1242.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 1243–44 (citing *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994)).

⁹³ *Id.* at 1244 (citing *Idema v. Dreamwork, Inc.*, 162 F. Supp. 2d 1129, 1178 (C.D. Cal. 2001)).

⁹⁴ *Id.* at 1245 (citing *Apple Computer*, 35 F.3d at 1439).

III. ANALYSIS

At this point, four jokes remained at issue. Before assessing virtual identity, the court addressed whether each joke warranted copyright protection in the first place, finding that all four jokes met the copyrightability requirements.⁹⁵ Moving to a virtual identity assessment, the court dismissed the UAB Joke as lacking virtual identity as a matter of law. The Tom Brady Joke, Washington Monument Joke, and Jenner Joke all raised triable issues of fact regarding similarity. This Part first discusses copyright protection of the remaining jokes, followed by discussion of the virtual identity standard's use in copyright infringement cases, analysis of the court's correct application of the standard to the UAB joke, and a prediction as to how the standard would apply to the remaining three jokes.

A. *Copyright Protection for the Remaining Jokes*

The court is correct that the four jokes satisfied the copyrightability requirements.⁹⁶ Each joke met the requisite low bar for originality. Kaseberg's jokes certainly offered more than a minimal degree of creativity and cross the threshold of "almost any ingenuity... of expression."⁹⁷ Kaseberg also showed independent creation. There was no evidence suggesting that he copied his jokes from someone else. Additionally, each joke met the standard for authorship. These jokes qualified under the statutory category of "literary works," defined as "works . . . expressed in words . . . regardless of the nature of the material objects."⁹⁸ Finally, each joke met the

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 1 NIMMER ON COPYRIGHT §1.08(C)(1) (1989).

⁹⁸ 17 U.S.C. §§101–102 (2012).

fixation requirement under the Copyright Act of 1976. Tweets are embodied in a tangible medium of expression for a period of longer than transitory duration.⁹⁹ Embodiment extends to tweets regardless of the fact that tweets cannot be viewed without an internet-capable device.¹⁰⁰ Additionally, tweets are “sufficiently permanent or stable to permit [the work] to be perceived, reproduced, or otherwise communicated.”¹⁰¹ Tweets are not automatically deleted or overwritten, can be easily reproduced, and can be easily archived.¹⁰²

Because Kaseberg’s jokes were sufficiently original, independently authored, and properly fixed, copyright protection extended to each joke the moment Kaseberg tweeted them. Additionally, the record shows that Kaseberg had registrations or active registration applications on file with the United States Copyright Office for each joke, giving him standing to bring copyright infringement claims.¹⁰³

Kaseberg’s jokes were also consistent with precedent in extending copyright protection to jokes. In *Foxworthy v. Custom Tees*, the court focused on Foxworthy’s originality of expression—protection extended to Foxworthy’s jokes made in his own words.¹⁰⁴ The jokes at issue here were certainly in Kaseberg’s own words, as nothing suggests otherwise. In other words, the jokes originated with Kaseberg and were not part of the public domain, unlike phrases

⁹⁹ Haas, *supra* note 61, at 245–46.

¹⁰⁰ *Id.*; *supra* Part I.D.

¹⁰¹ 17 U.S.C. §101 (2012).

¹⁰² Haas, *supra* note 61, at 246.

¹⁰³ *Kaseberg v. Conaco, LLC*, 260 F. Supp. 3d, 1229, 1236 (S.D. Cal. 2017).

¹⁰⁴ *Foxworthy v. Custom Tees, Inc.*, 879 F. Supp. 1200, 1219 (N.D. Ga 1995).

like “pull my finger” and “silent but deadly.”¹⁰⁵ Such originality of expression warranted copyright protection.

B. *Virtual Identity is the Correct Test for Infringement for this Type of Comedy*

With copyright protection likely, the question then became how infringement will be determined. The *Foxworthy* case offered little help. There, Custom Tees copied Foxworthy’s jokes verbatim—the similarities required little, if any analysis.¹⁰⁶ Typically, courts would rely on the two-part test to determine substantial similarity: an objective similarity judged by experts and a subjective similarity judged by the average observer.¹⁰⁷ Focusing only on the first part of the test, the court in *Kaseberg* adopted a different approach to the objective test. Taking into consideration the constrained, two-sentence delivery of Kaseberg’s jokes and the “limited number of variations” possible, the court decided to use a virtual identity standard, “supplant[ing] the usual, overarching substantial similarity standard.”¹⁰⁸

The virtual identity standard is tied to copyright works worthy of only “thin” protection.¹⁰⁹ Differing standards of copyright protection were first posited by the court in *Feist*,

¹⁰⁵ See Shipley, *supra* note 37, at 526 (exploring jokes that do *not* meet the standard for copyright protection; finding that those two phrases, rather than originating with the plaintiff or defendant in the *Pull My Finger Fred* case, lie in the public domain).

¹⁰⁶ See *Foxworthy*, 879 F. Supp. at 1217.

¹⁰⁷ Booth, *supra* note 32, at 104; *supra* Part I.B.

¹⁰⁸ *Kaseberg*, 260 F. Supp. 3d at 1245 n.4.

¹⁰⁹ *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1439 (9th Cir. 1994).

drawing the line between thin and broad protection at works of factual compilations.¹¹⁰ Since then, courts have expanded that distinction to include works composed of “largely ‘unprotectable’ elements.”¹¹¹ The court in *Apple Computer, Inc. v. Microsoft Corp.* established the virtual identity standard, now considered the standard to judge infringement of thinly-protected works.¹¹² The standard for virtual identity is that “the fewer original... elements there are in a copyrighted work, the closer to identical an allegedly infringing work must be before it will be considered ‘substantially similar.’”¹¹³

As Kaseberg’s brief pointed out, the virtual identity standard had never before been applied to jokes.¹¹⁴ The first case to use the standard, *Apple Computer*, involved infringement of computer software.¹¹⁵ Apple licensed software to Microsoft with permission to use and sublicense any derivative works generated by a series of graphic user interfaces.¹¹⁶ Once Microsoft’s sublicensee Hewlett-Packard Company began releasing its own graphic user interfaces to make Microsoft’s Windows program more “Mac-like,” Apple sued for copyright infringement.¹¹⁷ The court first dissected the Apple, Microsoft, and Hewlett-Packard interfaces to

¹¹⁰ *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349 (1991).

¹¹¹ *Idema v. Dreamwork, Inc.*, 162 F. Supp. 2d 1129, 1178 (C.D. Cal. 2001).

¹¹² *Apple Computer*, 35 F.3d at 1439.

¹¹³ *Id.*

¹¹⁴ *Kaseberg v. Conaco, LLC*, 260 F. Supp. 3d 1229, 1244 (S.D. Cal. 2017).

¹¹⁵ *Apple Computer*, 35 F.3d at 1438.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

determine which elements were protectable by copyright.¹¹⁸ In doing so, the court relied on several standard copyright-limiting doctrines, such as “originality, functionality, standardization, *scenes a faire* and merger” to limit the scope of protection to only a few individual elements of Hewlett-Packard’s interface.¹¹⁹ Because of the limited scope and few original elements remaining, the court then compared those elements of Hewlett-Packard’s interface with Apple’s interface using the virtual identity standard.¹²⁰ The Ninth Circuit affirmed using the virtual identity standard in large part because of the narrow range of possible expression for the interfaces.¹²¹

Virtual identity has also been extended to copying of commercial photography, given the thin protection and narrow range of expression afforded to commercial photographs. In *Ets-Hokin v. Skyy Spirits, Inc.*, a photographer alleged infringement of his photographs of a blue vodka bottle when Skyy Spirits later hired photographers to take similar photographs for a marketing campaign.¹²² The court relied on the virtual identity standard from *Apple Computer*,¹²³ finding the range of protectable expression narrow “given the shared concept, or idea, of photographing the Skyy bottle”¹²⁴ and the limited “conventions of [a] commercial product

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 1446–47.

¹²² *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 765 (9th Cir. 2003).

¹²³ *Id.* at 766 (citing *Apple Computer*, 35 F.3d at 1439).

¹²⁴ *Id.*

shot.”¹²⁵ The court bolstered their rationale for using virtual identity by recalling Judge Learned Hand’s reasoning from *Nichols v. Universal Pictures Corp.*: “[t]he less developed the [material], the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.”¹²⁶ Ultimately, the court found no virtual identity between the photographs, as they “differ[ed] in as many ways as possible within the constraints of the commercial product shot.”¹²⁷ Differences in lighting, angles, shadowing, highlighting, reflections, and background made the analysis an easy one—“the only constant [was] the bottle itself.”¹²⁸

While extending virtual identity to other copyrights for pictorial, graphic, and sculptural works, courts have generally been hesitant to extend virtual identity to other mediums of expression.¹²⁹ For example, courts have typically excluded musical works and comedy from the virtual identity standard.¹³⁰ In fact, the Ninth Circuit has explicitly said that “[m]usical

¹²⁵ *Id.*

¹²⁶ *Id.* (citing *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2nd Cir. 1930)).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *See generally* *Sophia & Chloe, Inc. v. Brighton Collectables, LLC*, 708 Fed. Appx. 460 (9th Cir. 2018) (jewelry); *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003) (jellyfish sculpture). *But see* *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2017) (where the court did not extend virtual identity to musical compositions, citing the wide range of possible expression for music).

¹³⁰ *See supra* note 129.

compositions are not confined to a narrow range of expression,”¹³¹ and thus the virtual identity standard need not be proven in those cases.¹³²

Comedy and music share many elements: for example, both can be written or performed live; both can be grounded in facts or completely fantasized; both involve a high degree of creativity and skill. Comedians themselves recognize the parallels¹³³ and several comedians are equally talented as musicians.¹³⁴ Comedy and music even have similar judgment criteria at the Grammy Awards.¹³⁵ It would seem that the virtual identity standard should similarly be stopped short of applying to jokes.

¹³¹ *Gaye*, 895 F.3d at 1120 (expressly distinguishing music from the graphic interfaces at issue in *Apple Computer* and the jellyfish sculpture at issue in *Satava*).

¹³² *Id.*

¹³³ *Zach Woods Discusses Jazz and Comedy Improv’s Parallels*, MEDIUM (Jul. 22, 2015), <https://amysmartgirls.com/zach-woods-discusses-jazz-and-comedy-improvs-parallels-48a520d36dc9> (discussing the similarities in style and performance technique of jazz music and improvisational comedy).

¹³⁴ Erika Berlin, *The 11 Best Comedian-Musicians*, ROLLING STONE, <https://www.rollingstone.com/culture/culture-lists/the-11-best-comedian-musicians-21402/jimmy-fallon-10-239430/> (last visited May 10, 2019) (listing eleven popular comedians that perform both comedy and music, often at the same time).

¹³⁵ *See Basic Grammy Guidelines*, RECORDING ACADEMY, https://www.grammy.com/sites/com/files/59th_guidelines_quick_reference_guide.pdf (last visited May 10, 2019).

The court in *Kaseberg*, perhaps recognizing the similarities, necessarily narrowed their application of virtual identity, finding the standard appropriate only because the jokes at issue were largely composed of unprotectable facts.¹³⁶ Unprotectable facts, intertwined with and disseminated by social commentary, create different problems that dissemination of music does not contemplate. Most notably, the range of viable expression for these types of jokes was quite narrow, which distinguished them from the vast range of expression in the musical world. Additionally, the intellectual property rationale promoting freedom of public information directly implicates humorous social commentary as a platform for that information. While music has its place as an effective medium for public discourse, comedy's status as a direct source of public information¹³⁷ sufficiently warrants a higher level of scrutiny for infringement.

Thus, the decision to use a virtual identity standard for jokes in *Kaseberg* presented an instance of first impression.¹³⁸ The *Kaseberg* court gave compelling reasoning for relying on virtual identity:

[T]he jokes here are . . . constrained by their subject matter and the conventions of the two-line, setup-and-delivery paradigm. Each joke begins with a factual sentence and then immediately concludes with another sentence providing

¹³⁶ *Kaseberg v. Conaco, LLC*, 260 F. Supp. 3d 1229, 1244 (S.D. Cal. 2017).

¹³⁷ See Jeffrey Gottfried & Monica Anderson, *For Some, The Satiric 'Colbert Report' is a Trusted Source of Political News*, PEW RESEARCH CENTER (Dec. 12, 2014), <https://www.pewresearch.org/fact-tank/2014/12/12/for-some-the-satiric-colbert-report-is-a-trusted-source-of-political-news/>.

¹³⁸ *Kaseberg*, 260 F. Supp. 3d at 1243.

humorous commentary on the preceding facts. Facts, of course, are not protected by copyright. And although the punchlines of the jokes are creative, they are nonetheless constrained by the limited number of variations that would (1) be humorous (2) as applied to the specific facts articulated in each joke's previous sentence and (3) provide mass appeal. This merits only thin protection. The standard must therefore also be some form of 'virtual identity.'¹³⁹

Given the constrained nature of the jokes at issue and the commercialized reliance on a factual basis for humor, the court correctly invoked the virtual identity standard for these thinly-protected jokes. Extending virtual identity from visual works to written works follows a natural progression and addresses similar concerns. For example, the range of viable expression was narrow in these cases. The joke structure at issue relied on social commentary of factual material, which necessarily limited the number of variations possible to achieve humor. Also, the setup of each joke was only two sentences. The short form of the joke, especially after stripping away the unprotectable facts, left very few original elements to be infringed upon. Such a limited structure warranted both thin protection and a virtual identity standard for infringement.

Additionally, the court must consider the policy implications. Giving protection over a joke's punchline gives exclusivity over that joke. While exclusivity protects the joke creator, it prevents anyone else from expressing that joke in the same manner. Exclusivity of a joke, especially of one so heavily grounded in unprotectable fact, must remain relatively free for public expression. Otherwise, copyright protection of these factual-based jokes could give one person the control over public dissemination of information by precluding anyone else from

¹³⁹ *Id.* at 1245.

using similar social commentary, going directly against the rationales undergirding the intellectual property regime created at the Founding.¹⁴⁰

C. Application of the Virtual Identity Standard to the Four Remaining Jokes

Of the four remaining jokes, the court dismissed only the UAB joke as a matter of law. The remaining three, the Tom Brady Joke, the Washington Monument Joke, and the Jenner Joke, all remained actionable before the settlement was agreed to. This subpart discusses the court's application of virtual identity to the UAB Joke and its dismissal from the case, followed by predictive analysis of virtual identity to the Tom Brady Joke, Washington Monument Joke, and Jenner Joke.

1. The UAB Joke

As a matter of law, the *Kaseberg* court found no virtual identity between the two expressions of the UAB Joke.¹⁴¹ Both versions of the joke mentioned that UAB shut down their football program, a statement that is uncopyrightable as fact.¹⁴² *Kaseberg*'s version, the court noticed, was aimed at the team members of the Oakland Raiders; *Conan*'s version was aimed at the fans of the New York Jets.¹⁴³ The court, citing constitutional concerns of granting exclusive rights to preclude "expression of disbelief and desire for a beloved but beleaguered sports team to also shut down their operations upon hearing the UAB news," found those differences to be significant enough to lack objective virtual identity.

¹⁴⁰ See U.S. CONST., art. I, § 8, cl. 8.

¹⁴¹ *Kaseberg*, 260 F. Supp. 3d at 1245.

¹⁴² *Id.*

¹⁴³ *Id.* at 1246.

The court correctly decided to dismiss the UAB joke as a matter of law. The literal difference between the Oakland Raiders and the New York Jets was certainly enough. Given the wide number of teams and fan bases that could be substituted into the punchline, the range of expression was quite wide. Giving Kaseberg exclusivity over the joke's punchline would prevent any public discourse of that wide range of expression, defeating the utilitarian purpose of copyright doctrine.

2. The Tom Brady Joke

Both versions of the Tom Brady Joke begin with Tom Brady promising his new MVP truck to "the man who won the game for the Patriots."¹⁴⁴ Such a factual statement was uncopyrightable. However, both jokes go on to say that the man Tom Brady was referring to was Pete Carroll, the opposing team's head coach.¹⁴⁵ Although *Conan*'s joke took on an active stance,¹⁴⁶ the premises of each was almost identical. To remain commercially and comedically viable, the range of expression was likely extremely narrow here. The core idea and characters involved in both versions were the same. Both jokes aimed at the same target, looking for the same laugh. The court was likely to give pause to consider the effects of granting protection to Kaseberg's expression and the exclusivity that accompanies such protection. However, the virtual identity here was just shy of verbatim; the court would likely rule for Kaseberg on the Tom Brady Joke.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

3. The Washington Monument Joke

Assuming the Washington Monument Joke was not independently created prior to Kaseberg's tweet, the trial court would then apply virtual identity. As with the other jokes at issue, the first sentence of both versions was fact, and thus uncopyrightable. Both versions referenced a then-recent finding that the Washington Monument was ten inches shorter than previously thought, and then implied that the monument was phallic-shaped and suffered from shrinkage due to cold weather.¹⁴⁷ Again, the premises were nearly identical: both took aim at the same joke. However, the range of expression seems broader than the Tom Brady Joke. There are certainly more than one or two ways to imply that the Washington Monument is suffering from shrinkage. The court in *Kaseberg* even pointed out that *Conan's* joke anthropomorphizes the Monument in a way that Kaseberg does not.¹⁴⁸ Additionally, the same exclusivity concerns that were present with the UAB Joke existed here. Finding the two versions virtually identical, and thus extending protection to Kaseberg's joke, would essentially grant Kaseberg the exclusive right to express the humorous implication of the Washington Monument as a phallus. The court would likely rule for the defendants on the Washington Monument Joke.

4. The Jenner Joke

Both versions of the Jenner Joke center on Bruce Jenner's then-recent high-profile sex change and its effect on streets named after Jenner, which as fact, was not copyrightable.¹⁴⁹ The

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

expression at issue involves a Cul-De-Sac having to change accordingly.¹⁵⁰ Both jokes were nearly identical, the main difference being Kaseberg’s “Cul-De-Sackless” and *Conan*’s “cul-de-no-sack.”¹⁵¹ Given the specific framing of the joke, the range of expression was necessarily narrow. The *Kaseberg* court pointed out that “the change *happens* to the observer no matter what, and that change is the removal of the sac from ‘cul-de-sac.’”¹⁵² Giving Kaseberg protection over the expression of changing the end of the word “cul-de-sac” raised a possible policy concern—protection grants exclusivity, which precludes others’ unlicensed changes to “cul-de-sac” in the same context. However, given the narrow grounds the joke rested on, any policy concern regarding exclusivity was not likely to give the court much pause. Accordingly, the court would likely rule for Kaseberg on the Jenner Joke.

IV. FUTURE IMPLICATIONS FOR COMEDY

On May 9, 2019, Conan O’Brien penned a letter to *Variety* explaining his decision to settle the lawsuit with Kaseberg while continuing to deny any joke theft whatsoever.¹⁵³ Conan defended his writers’ integrity and simply explained that in today’s technologically-savvy

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Conan O’Brien, *Why I Decided to Settle a Lawsuit Over Alleged Joke Stealing*, VARIETY (May 9, 2019, 1:30 PM), <https://variety.com/2019/biz/news/conan-obrien-jokes-lawsuit-alex-kaseberg-settlement-1203210214/>.

culture, “tweet-saming” is an unavoidable occurrence.¹⁵⁴ Unfortunately, we will never know how a court would apply virtual similarity to these thinly-protected jokes. Even so, the possibility of using virtual similarity in this context is all the more likely going forward, and the implications could be far-reaching. This Part will analyze three burning future implications left in the wake of virtual identity and fact-specific jokes: incentives for creation of comedy, the effect on public accessibility of the comedy industry, and the effect on the self-vigilant societal norms within comedy.

A. *Virtual Identity Incentivizes More Variation in Comedic Expression*

On its face, virtual identity seemingly destroys incentives for amateur and unknown comedians to continue producing comedy grounded in facts. With a high bar to prove infringement, comedians trying to make a name for themselves open up their work to rampant poaching by bigger names in the industry. To make matters worse, those comedy poachers might be unlikely to give credit to whom they are stealing from. Kaseberg, for example, initially had little problem that his jokes were stolen—he merely wanted to be recognized as their creator.¹⁵⁵

¹⁵⁴ *Id.* “Tweet-saming,” a term coined by Caroline Moss of CNBC and Melissa Radzimiski of the Huffington Post, is used to describe a commonplace phenomenon where several people inadvertently tweet the same jokes around the same time, something Conan describes as the “parallel creation” of jokes. *Id.*

¹⁵⁵ *See Kaseberg*, 260 F. Supp. 3d at 1233–34. The record also suggests that Kaseberg did not necessarily crave recognition from the *public*, but rather wanted recognition from someone as famous as Conan O’Brien and his writing staff. *See id.*

Without such recognition, performers just beginning to dip their feet in the comedy pool could likely stop creating comedy altogether, harming the ultimate goal of public discourse.

However, the more important consideration is to determine where the incentive to create comedy actually comes from. Economics play an obvious role, but perhaps the biggest incentive is creation for its own sake. Many comedians immerse themselves in their craft, finding comedy as a source of mental and psychological relief, able to poke fun at their own problems.¹⁵⁶ Others simply enjoy making people laugh. While using humor as a source of income is a likely consideration of any amateur comedian, the real incentive to create is largely intrinsic.

A virtual identity standard imposes no negative effect on the intrinsic value of a comedian's jokes. A higher bar for infringement means that more comedians can express their views on more topics without fear of overstepping someone else's exclusivity over a punchline. More expression only increases a comedian's arsenal of subject matter, thus allowing them to create a wider range of jokes and contribute to public discourse to the benefit of themselves and the public.

While Kaseberg might initially have complained of such a high bar, he likely would have prevailed in part, as would comedians in general. The narrow application carves out only a narrow class of jokes subject to the heightened virtual identity standard. If anything, the *Foxworthy* case now has an outer limit: two comedians can tell the same joke (in this case, a joke grounded heavily in unprotectable fact) so long as the expression is not virtually identical. Such a standard allows more expression on the same topic and alleviates concerns of granting exclusive

¹⁵⁶ Mary O'Hara, *How Comedy Makes Us Better People*, BBC (Aug. 30, 2016), <http://www.bbc.com/future/story/20160829-how-laughter-makes-us-better-people>.

creative control over a joke poking fun at a specific fact. Comedians can freely create jokes in this fact-based realm without fear of infringing on another's work while at the same time be confident that their own unique expression will be protected.

The virtual identity standard creates similar incentives for non-fact-specific jokes, or jokes more commonly found in stand-up routines. The application of the virtual identity standard in comedy only extends to jokes with few protectable elements, which includes Kaseberg's jokes. Other, more elaborate jokes, however, contain more than just a few unprotectable elements. Rather, often times the entire joke can be considered uniquely expressive, and is therefore entirely protectable. A classic example is the comedy of Eddie Izzard, a renowned British comedian known for his complex and elaborate stream-of-consciousness comedy persona.¹⁵⁷ The complexity and depth of expression that Izzard offers to his audiences warrants much stronger copyright protection because there are so many expressive elements.¹⁵⁸ Comedians may take notice of the virtual identity standard and resort to creating more unique and elaborate comedy more similar to Izzard and less like Conan. More creative and fantastical comedy, untethered to factual reality, naturally expands the variation of comedic expression.

B. *Virtual Identity Improves Public Accessibility to the Comedy Industry*

If comedians remain incentivized to create comedy, even with a virtual identity standard, the amount of viable comedy will continue to grow. Thus, because more comedy is being

¹⁵⁷ Betsy Price, *Eddie Izzard Heads to Wilmington*, DELAWARE ONLINE (July 15, 2016, 3:12 PM), <https://www.delawareonline.com/story/life/2016/07/15/eddie-izzard-heads-wilmington/87141870/>.

¹⁵⁸ See Abrams, *supra* note 9, at 250.

created, the public has wider and more meaningful access to comedy, especially to those jokes and commentary grounded in factual material.

An excellent example is the late-night television comedy scene. Jimmy Kimmel, Stephen Colbert, Seth Meyers, and Jimmy Fallon, to name a few, all have different brands, styles, and deliveries of comedy. Yet, they routinely provide humorous commentary on very similar topics, often referencing the same current event.¹⁵⁹ While each late-night host might tell similar jokes, each has a devoted fan base that tunes in every night to watch.¹⁶⁰ Wider ranges of comedy offer the public more choices of diverse expression. More importantly, it seems as though the public is ready and willing to take advantage of those choices.

A virtual identity standard only serves to solidify such diverse expression on similar issues. Without a higher bar for infringement, the first person to make a joke tied to a particular topic would get exclusivity over any further humorous expression on that topic. Such exclusivity would bottleneck public access to comedy, forcing comedy consumers to cast a wider net to look for humorous commentary on certain subjects. Clamping down public access to more comedy

¹⁵⁹ See Kelly Lawler, *2018 in Review: What Worked (and What Really Didn't) in Late-Night TV*, USA TODAY (Dec. 12, 2018, 2:44 PM) <https://www.usatoday.com/story/life/tv/2018/12/12/late-night-tv-best-worst-2018-year-review-jimmy-fallon-john-oliver-samantha-bee/2237872002/>.

Conan O'Brien himself acknowledges this in his letter to *Variety*, explaining that this overlap has been happening for decades, and while comedians try to avoid it, it is accepted as inevitable.

O'Brien, *supra* note 153.

¹⁶⁰ See Lawler, *supra* note 159.

cuts directly against both the purpose of copyright law and the foundations of the current comedy resurgence.

C. *Virtual Identity Reinforces the Societal Norms of Comedy*

Despite the development of a legal framework for protection of jokes, comedians are likely to remain reliant on existing societal norms within the industry. Many of the social norms remain untouched—for example, the “joke-stealer” reputation will continue to carry massive consequences for those burdened with its label. Conan O’Brien, even after settling the lawsuit, has remained adamant that no stealing took place and any similarity in expression here was simply an unavoidable by-product of a technologically-savvy culture.¹⁶¹ A virtual identity standard reinforces those social norms by recognizing the immense overlap of expression on a platform like Twitter and allowing the comedy industry to largely regulate itself.

A virtual identity standard, while lingering behind the social norms of comedy, does provide a tool of last resort. Kaseberg attempted to rely on the rigorous social rules within the comedy industry, giving Conan O’Brien and his writers plenty of opportunities to remedy any perceived wrongdoing.¹⁶² Only after months of relying on those norms did Kaseberg resort to filing suit.¹⁶³ While the lawsuit has not stopped Kaseberg himself from continuing to create more

¹⁶¹ O’Brien, *supra* note 153. Conan points out that thirty-four other people tweeted the same Tom Brady Joke at issue here, but only one felt he had been “robbed.” *Id.*

¹⁶² *See supra* Part II.A.

¹⁶³ *Id.*

of these jokes,¹⁶⁴ it could stop any number of present and future amateur comedians from breaking into the industry. Conan O’Brien rightfully points out that several people (especially on Twitter) consistently make the same jokes at the same times—but certainly comedians that pride themselves on originality of expression would want to halt joke theft where it occurs. We may never know if the *Conan* staff stole Kaseberg’s material, but there is now a workable standard to remedy any future, deliberate joke theft that will not upend the comedy industry.

CONCLUSION

After gaining traction in the twentieth century, copyright protection for comedy has never been in doubt. Now, after decades of self-regulation in the industry, comedians can begin to lean on legal reinforcement to help them protect their craft. While initially only subject to a typical infringement analysis, courts are now considering the *nature* of the joke at issue and the protection it warrants. In other words, courts are beginning to take jokes seriously.

Is this debate important? Comedy has been and remains an important facet of public discourse. For example, scholars argue that comedy helps “break[] taboos [and] hold[] those in power to account.” Additionally, comedy acts as a coping mechanism, helping people digest and comprehend complex societal issues.¹⁶⁵ The category of jokes at issue in *Kaseberg* does exactly that. Each joke offers social commentary on a current event, helping the public to both take notice of the fact and understand the context around it. Virtual identity raises the bar for

¹⁶⁴ See Alex Kaseberg (@alexkaseberg), TWITTER, <https://twitter.com/AlexKaseberg> (last visited May 10, 2019). Kaseberg’s Twitter (where he goes by Alex) has been full of these jokes before, during, and after the alleged infringement and ongoing legal proceedings.

¹⁶⁵ O’Hara, *supra* note 156.

infringement, allowing more jokes on the same facts. In essence, more comedians can disseminate these fact-based jokes that perform the function comedy was meant to perform in society. As discussed above, wider access to comedy facilitates comedy creation across the board. It is also important to remember that *Kaseberg* applies narrowly. *Foxworthy*'s original expression analysis remains the prominent protector of comedic expression, with *Kaseberg* simply adding an outer boundary to help better define the appropriate copyright protection for different classes of jokes.

Generally, when asked, comedians consider the expressive elements of a joke, rather than the idea, the most important when considering the success of a joke.¹⁶⁶ A heightened virtual identity standard does not change that—in fact, it celebrates it. Virtual identity offers a vehicle for a more nuanced analysis to the protection of jokes without upending the social norms already prevalent in comedy. Such a vehicle allows for wider protection of jokes as copyrighted material and thus, more expression of comedy. As Elizabeth Bolles points out,

The utilitarian goals of copyright would also be furthered by increased protection for jokes because it would benefit comedy consumers. . . . [B]ecause stronger protection would reduce instances of joke theft, audience members would have increased confidence that the comic they hear tell a joke actually wrote that joke.

The owners of comedy clubs would also benefit because as community norms are replaced by legal standards, the burden of enforcement will shift from club owners to judges. Therefore, presumably, there will be lower costs for club owners by reducing time and expertise currently required to book comics, which

¹⁶⁶ Bolles, *supra* note 39, at 245–46.

could directly benefit consumers through lower prices. . . . By increasing public access to a greater number of works, heftier protection for jokes furthers the most essential utilitarian purpose of American copyright law.¹⁶⁷

By incentivizing more comedy creation, promoting wider public access to comedy, and giving legal reinforcement to societal norms within the industry, the virtual identity standard does not slow down the ongoing golden age of comedy. Rather, the standard facilitates it. Comedy thrives on innovation, both from the top down and the bottom up. The virtual identity standard ensures that the last laugh lies with comedians and their ability to protect that innovation.

¹⁶⁷ *Id.* at 243.