

The Uncopyrightability of Jokes

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I. INTRODUCTION

Seth Buchwald walks out on stage. He is a young comedian wearing a black T-shirt with a skull on the front. The year is 1994 and he has been doing this T-shirt routine for about five years. "I hate visiting my parents because they treat me like a child," he says. He tells the story of coming home late and seeing his mom waiting up for him. He pulls the shirt over his head so that the skull covers his face like a mask. Then he starts taunting his mom through the window of the house. "Mom, it's me Seth. Your only son. I'm lying dead by the side of the road. . . . I used to be a Rhodes Scholar. Now I'm just roadkill."¹

In the same year, the movie *The Mask*, starring Jim Carrey, was released. In this film, Jim Carrey, while wearing a magic mask, falls out of a window and lands in the street. As he pries his flattened body up from the middle of the road he says, "Look Ma, now I'm roadkill."²

Comedians that write original material see their material being used by others all the time.³ Does federal copyright law protect these comedians? This article answers that question generally in the negative.⁴

The structure of jokes and performances complicates the issue of copyright protection for comedians. For purposes of this article, a joke can range from one word to several minutes of patter consisting of a premise (idea, image, or fact), a set-up (if necessary), and a punchline. For instance, "I went to a restaurant [setup]. It said, 'Breakfast anytime' [premise]. So I ordered French toast during the Renaissance [punchline]."⁵

A routine can range from a couple of minutes to forty-five minutes of jokes on a common theme. An example is Ken Sevara's approximately twenty minute impersonation of the late Harry Caray (former sportscaster

1. Telephone Interview with Seth Buchwald, Comedian (Oct. 10, 1996) [hereinafter Buchwald Interview]. Mr. Buchwald has been performing for 7 years and teaches a comedy class at Michigan State University.

2. *THE MASK* (New Line Productions 1994).

3. Telephone Interview with Ken Sevara, Comedian (Oct. 28, 1996) [hereinafter Sevara Interview]. Mr. Sevara has been a comedian for 26 years and has had two radio shows in Chicago, Illinois, and Grand Rapids, Michigan.

4. Jokes themselves often suggest the same. See MELVIN HELITZER, *COMEDY WRITING SECRETS 4* (1987) ("One day Milton Berle and Henny Youngman were listening to Joey Bishop tell a particularly funny gag. 'Gee, I wish I said that,' Berle whispered. 'Don't worry, Milton, you will,' said Henny.'").

5. *Id.* at 185 (quoting Stephen Wright). Short jokes may not have a set-up.

for the Chicago Cubs baseball team) falling from the announcing booth, screwing up names backward and forward, and taking LSD.⁶

Full performances vary in length depending on the comedian's placement in the night's lineup. Masters of Ceremonies (MCs) perform for five to twenty minutes; the middle act performs for twenty to forty-five minutes; and headliners (the final acts, ideally with recognizable names) perform for thirty to sixty minutes. A performance can be one routine or a mixture of unrelated jokes and/or routines.

At least one commentator suggests that jokes are probably protected under the current copyright law and that courts should enforce such copyrights more often.⁷ However, this article will explain that the most important part of a joke, the punchline, probably cannot be protected by copyright because words used in the punchline merge with the underlying idea, and such ideas are not copyrightable. Furthermore, copyright protection for the set-up of a joke is severely limited by the *scenes a faire* doctrine.⁸

II. CURRENT PROTECTION: SELF-REGULATION

A. *The Reason for Self-Regulation*

The comedy industry is largely self-regulating for a few reasons.⁹ First, each copyright costs twenty dollars to register with the copyright office.¹⁰ If comedians were to register all jokes before performing them, comedians would go broke.¹¹ Since it is doubtful that every joke a comedian writes will work in a performance, a comedian would waste twenty dollars for each joke that failed.

6. Sevara Interview, *supra* note 3 ("Holy cow! The scoreboard has lips and its telling me the score!").

7. See Gayle Herman, Note, *The Copyrightability of Jokes: "Take My Registration Deposit . . . Please!"* 6 COMMENT: HASTINGS JOURNAL OF COMM. & ENT. LAW 391 (1983-84). Gayle Herman actually appears to be the only commentator to write an article on the subject in the last 12 years.

8. See *infra* Part III. Although this paper paints a grim picture for comedians and joke writers because it suggests the underlying ideas of jokes are not entitled to federal copyright protection, it does not consider state law remedies that may protect ideas. See Herman, *supra* note 7, at 397-99.

9. See Sevara Interview, *supra* note 3.

10. See 17 U.S.C. § 708(a)(1) (1994).

11. Most performing comedians, unless regionally or nationally popular, are probably broke as it is.

Henny Youngman released a book containing a collection of 10,000 jokes that are purportedly his own.¹² If Youngman had registered each joke separately, it would have cost \$200,000 at today's copyright fee.¹³ Although this cost could be minimized by saving up jokes and registering a group of them at once as part of a single performance, the "fair use" doctrine gives comedians little incentive to do so.¹⁴ Another reason for relying on self-regulation is that lawsuits are expensive¹⁵ and time-consuming. By the time a lawsuit is over, so may be a comedian's career. A third reason is that jokes are not well protected by copyright laws because of the merger and *scenes a faire* doctrines.¹⁶

B. Types of Self-Regulation

The most troubling type of self-regulation is physical violence. Ken Sevara stated that fights regularly break out on a local level among comedians.¹⁷ This resort to violence may be explained by the fact that comedians are trying to make a living. A comedian who sees his routine performed by someone else on stage may react as he would toward a thief who has literally taken the food from his mouth.¹⁸ Fortunately, this type of self-regulation is not used by most comics.

Another way comedians protect themselves without federal copyright laws is by monitoring others' use of the material developed by fellow comics and agents in the industry.¹⁹ For example, if comedian Abe sees comedian Bob performing comedian Cal's material, Abe will inform

12. HENNY YOUNGMAN, *HENNY YOUNGMAN'S 10,000 ONELINERS* (1989).

13. Actually, at the time the jokes must have been written, the registration fee for copyrights was as little as \$1, so the total cost could have been anywhere from \$10,000 to \$200,000. See Copyright Act of 1909, ch.320, §61, 35 Stat. 1075, 1087 (1909) (current version at 17 U.S.C. § 708 (1994)).

14. Even if a comedian were to copyright a collection of jokes, which some have argued would be protected by copyright law (see Herman, *supra* note 7, at 40607), if another comedian used only one joke from the collection, it would probably be a fair use. See 17 U.S.C. § 107 (1994). Under the doctrine of fair use, no copyright infringement occurs if the borrowed material is only an insubstantial or small part of the complete work and does not affect the market in which it is sold. See *id.*

15. See YOUNGMAN, *supra* note 12, at 175 ("The man who said talk is cheap never hired a lawyer."). If a copyright is properly registered, the holder is statutorily entitled to legal fees if he prevails in an infringement suit. See 17 U.S.C. § 412(1) (1994). Under current law, however, a comedian is unlikely to prevail. See 17 U.S.C. § 505 (1994); *infra* Part III.

16. See *infra* Part III.

17. See Sevara Interview, *supra* note 3.

18. See, e.g., Colin Colvert, *Louie Anderson: The Last Laugh*, STAR TRIB., Feb. 28, 1988, at 6 (suggesting Louie Anderson attacked Robin Williams for "stealing a bit of his act").

19. See *id.*

Cal immediately.²⁰ Ken Sevara claims that he could mobilize comedians and agents across the country to have a comedian denied access to work if he stole Ken's material.²¹

A fairly pervasive type of self-regulation is just plain courtesy—i.e., the Golden Rule. Many comedians do not do to others what they would not want done to them. For example, Jay Leno saw Ken Sevara and his partner perform a routine that he wanted to use.²² Leno called Sevara and asked to buy the material.²³ Ken explained that the routine was too important to their act to sell,²⁴ so Jay never used it.²⁵ If all comedians were this courteous, the difficulties associated with protecting jokes through copyright law would not matter.

A final way that comedians protect themselves is by being creative. Jay Leno once said that he can create new jokes faster than anyone can steal them.²⁶ However, most comedians do not have the access to a joke-writing staff that Jay has. Many comedians perform the same routines for years.²⁷

C. Effectiveness of Self-Regulation

As with any type of self-regulation, some people are happy with it and some are not. For every Ken Sevara who is happy with the amount of protection he has,²⁸ there are probably many who cannot sustain a living without some kind of protection. Indeed, compensating the author for his creative efforts is a principal reason copyright protection is provided to works of authorship.²⁹ It is possible that the comedy club

20. *See id.*

21. Sevara Interview, *supra* note 3.

22. The routine revolved around what Ken Sevara and his partner called "the bullshit buzzer." Ken said, "I just got back from singing with Frank Sinatra (Bzzzz [bullshit buzzer]) junior." *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. See Lawrence Christon, *For Jay Leno, Being Funny Means Work: Comic's Killer Schedule Amazes Friends, Fans*, RICHMOND TIMES-DISPATCH, Jan. 31, 1990, at 26 (quoting Jay Leno on the topic of joke stealing: "'I get ripped off. Everybody gets ripped off. There's nothing you can do about it. You just learn to write faster.'").

27. *See* Buchwald Interview, *supra* note 1.

28. Sevara Interview, *supra* note 3.

29. *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03(B)(2)(a), at 13-62 n.151 (2d ed. 1978 & Supp. 1997) (citing *Sayre v. Moore*, 102 Eng. Rep. 139, 140 (1785)).

scene has been shrinking³⁰ because, in the absence of a federal property right to the material, writing and performing jokes just does not pay.³¹

III. COPYRIGHT'S PUNCHLINE: MERGER/NECESSITY

The punchline of copyright law is that even if a comedian proves that a defendant actually copied the comedian's joke, the comedian had a valid copyright,³² and the defendant's use was not a fair use, there still may be no infringement. According to current copyright law, ideas may not be protected.³³ Protection is only granted to the *expression* of ideas.³⁴ This "dichotomy"³⁵ of idea and expression disallows an individual from monopolizing an idea through copyright.³⁶ If there were only a limited number of ways to express a particular idea, then it would follow that copyright should also not grant protection to any of the expressions. This is because a copyright seeker could secure the idea by copyrighting each of the expressions.³⁷ This extension to the idea/expression dichotomy is embodied in the merger and *scenes a faire* doctrines.

The idea/expression distinction originated in *Baker v. Selden*³⁸ and was further developed in *Mazer v. Stein*.³⁹ Most cases dealing with ideas and other unprotected expression cite *Baker* or *Mazer* for the proposition that ideas are not copyrightable.⁴⁰

30. See, e.g., Allan Johnson, *Just for Laughs: 1995 Was the Year of George Lopez*, CHI. TRIB., Dec. 29, 1995, at 4 (noting that "[c]omedy continued its [sic] downward slide of popularity in 1995"); Ben Feller, *Did You Hear the One About the Comedy Recession?*, GREENSBORO NEWS & RECORD (Sept. 29, 1995) at W8 (noting a "comedy recession" since the "boom period of the mid '80s to the early '90s").

31. Ken Sevara believes other factors caused the decline. But Sevara is an established professional with political remedies to deter other comics from using his material, so he personally would not be discouraged by the lack of federal protection. Sevara Interview, *supra* note 3. There is also recent evidence that comedy is becoming popular again. See Cynthia Crossen, *Funny Business*, WALL ST. J., Jan. 31, 1997, at A1.

32. To avail oneself of copyright protection, one must create an "original work[]" of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a) (1994).

33. See 17 U.S.C. § 102(b) (1994).

34. See *id.* at § 102(a).

35. 4 NIMMER & NIMMER, *supra* note 29, § 13.03(B)(3), at 13-70.

36. See *id.* § 13.03(B)(2)(a), at 13-61.

37. See *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678 (1st Cir. 1967).

38. 101 U.S. 99 (1879).

39. 347 U.S. 201 (1954).

40. See *Feist Publications, Inc. v. Rural Tel. Serv. Co. Inc.*, 499 U.S. 340, 350 (1991) (citing *Baker*); *Mazer v. Stein*, 347 U.S. 201, 217 (1954) (citing *Baker*); *Allen v. Academic Games League of Am., Inc.*, 89 F.3d 614, 617 (9th Cir. 1996) (citing *Mazer*); *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir. 1984) (citing *Mazer*); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977) (citing *Baker* and *Mazer*); *Reyher v.*

In *Baker*, the plaintiff copyrighted a particular manner of arranging an account book that allowed all of the entries for a day, a week, and a month to appear on the same page.⁴¹ Using a different arrangement, the defendant created an account book that also fit the entries on one page.⁴² The useful result of the plaintiff's idea, a convenient accounting ledger, was presented to the public through the plaintiff's description in a copyrighted book.⁴³ The court held that the description itself was copyrightable as an expression.⁴⁴ Although the book was copyrighted, the court held that the single page result could not be withheld from the public through the copyright laws.⁴⁵

What does this have to do with jokes? Although it is not readily apparent that a single page ledger is similar to a joke, as Jeff Foxworthy said, "the idea is key" to a joke.⁴⁶ Ideas cannot be copyrighted because the goal of copyright protection is to promote "the progress of science and useful arts."⁴⁷ To protect an idea would limit the ability of other authors to create expressions of the idea.⁴⁸ A single page ledger and the substance of most jokes are ideas.⁴⁹

The Supreme Court also differentiated between useful ideas and expression in *Mazer v. Stein*.⁵⁰ In *Mazer*, the plaintiff designed a

Children's Television Workshop, 533 F.2d 87, 90 (2nd Cir. 1976) (citing *Baker* and *Mazer*); *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678 (1st Cir. 1967) (citing *Baker*); *Continental Cas. Co., Inc. v. Beardsley*, 253 F.2d 702, 704 (2nd Cir. 1958) (citing *Baker* and *Mazer*); *Denker v. Uhry*, 820 F. Supp. 722, 729 (S.D.N.Y. 1992) (citing *Baker*); *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 71112 (S.D.N.Y. 1987) (citing *Baker* and *Mazer*); *Pendleton v. Acuff-Rose Publications, Inc.*, 605 F. Supp. 477, 48081 (M.D. Tenn. 1984) (citing *Mazer*); *Perma Greetings, Inc. v. Russ Berrie & Co.*, 598 F. Supp. 445, 447 (E.D. Mo. 1984) (citing *Baker*); *Signo Trading Int'l Ltd. v. Gordon*, 535 F. Supp. 362, 365 (N.D. Cal. 1981) (citing *Baker*); *Gibson v. CBS, Inc.*, 491 F. Supp. 583, 584 (S.D.N.Y. 1980) (citing *Mazer* and *Baker*); *Gaye v. Gillis*, 167 F. Supp. 416, 418 (D. Mass. 1958) (citing *Baker*).

41. *Baker*, 101 U.S. at 100.

42. *Id.*

43. *Id.*

44. *Id.* at 102.

45. *Id.* at 103.

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

47. 4 NIMMER & NIMMER, *supra* note 29, § 13.03(B)(2)(a), at 13-62.

48. *See id.*

49. *See Foxworthy*, 879 F. Supp. at 1219 (using plaintiff's testimony at trial that the idea is the most important part of writing a joke). *See also Baker*, 101 U.S. 99.

50. 347 U.S. 201 (1954).

“fanciful” statuette that formed the base of a lamp.⁵¹ The court found that the statuette had an artistic expression separate from the design of the lamp, thereby making it copyrightable.⁵² As will become apparent, the useful idea underlying a joke is not as easily separable from its expression, because a joke is not a concrete object in which functional and expressive aspects are readily distinguishable.

A. *Financial Instruments*

1. *Continental Insurance v. Beardsley*

The idea/expression dichotomy was extended to what is now known as the merger doctrine in *Continental Insurance Co. v. Beardsley*.⁵³ Language necessary to effectuate an idea is not afforded protection. When “the use of specific language . . . [is] so essential to accomplish a desired result and so integrated with the use of a legal or commercial conception[,] . . . [copyright law] allow[s] free use of the thought beneath the language.”⁵⁴

In *Beardsley*, the plaintiff sued Continental for using copyrighted parts of a pamphlet consisting of forms, indemnity agreements, and instructions necessary to create a “blanket bond to cover replacement of lost securities.”⁵⁵ The court in *Beardsley* found that the only use by the defendant was language “incidental to its use of the underlying idea.”⁵⁶ Continental could not have carried out the specific transaction without using the language that was contained in Beardsley’s pamphlets.

An obvious application of *Beardsley* to jokes would be any formula joke such as a light bulb joke. “How many _____ does it take to change a light bulb? _____ because _____.” This would probably apply to “knock, knock” jokes as well. These are standard formulations for jokes that are similar to transactional language in contracts that would be uncopyrightable under *Beardsley*.

Jokes themselves can be analogous to transactions. Specific words necessary to create trusts⁵⁷ or promissory notes⁵⁸ would be uncopyrightable under *Beardsley*. These are expressions of ideas using

51. *Id.* at 216 n.35 (the “fanciful” statuette referred to in note 35 was, according to the defendant, similar to the plaintiff’s).

52. *Id.* at 217.

53. 253 F.2d 702, 706 (2nd Cir. 1958).

54. *Id.*

55. *Id.* at 703.

56. *Id.* at 706.

57. Consider, for example, the words “in trust for.”

58. For example, “pay to the order of.”

specific language essential to accomplish a specific result: a creation of a trust or a financial obligation.

Similarly, a joke is often the expression of an idea in specific language essential to accomplish a specific result: humor. An example of this is Seth Buchwald's common response to hecklers.⁵⁹ When Seth is faced with a heckler who is interfering with his work, i.e., a comedy performance, he will often point out that he does not interfere with the heckler's work, "flipping burgers."⁶⁰ The two words, "flipping burgers," are necessary to express disdain in a humorous way. There is no joke apart from the words themselves. Responding to the heckler by saying, "I don't interfere with you while you are working at a fast food restaurant," just would not be funny.

Beardsley would probably apply to almost any "play on words."⁶¹ Some general ideas themselves are simply funny, like technology, sex, and technology and sex. Comedians are free to write jokes about these ideas without encroaching on some other joke about sex and/or technology. However, even when the ideas can be expressed humorously only by the words themselves as in a play on words, the joke itself is still not likely to be protectable. For example, some would say that "military intelligence" is an example of an oxymoron.⁶² Basically, the two words themselves are the joke. To grant copyright protection to such an idea that is "open to the public but . . . can be used only by the employment of different words . . . which mean the same thing, borders on the preposterous."⁶³

2. *Crume v. Pacific Mutual Life Insurance*

The Seventh Circuit recognized the merger doctrine in *Crume v. Pacific Mutual Life Insurance Co.*⁶⁴ The holding in *Crume* is similar to that in *Beardsley* in that ideas are not protected.⁶⁵ In *Crume*, the plaintiff developed reorganization plans for four different insolvent

59. A heckler is someone who verbally interrupts a comedian's show. See WILLIAM MORRIS, *THE AMERICAN HERITAGE DICTIONARY* 602 (2d ed. 1985).

60. Buchwald Interview, *supra* note 1.

61. See HELITZER, *supra* note 4, at 47-84.

62. An oxymoron is a "contradiction in terms." *Id.* at 57.

63. *Crume v. Pacific Mut. Life Ins. Co.*, 140 F.2d 182, 185 (7th Cir. 1944).

64. *Id.*

65. *Id.* at 184.

insurance companies and distributed a copyrighted pamphlet to each one.⁶⁶ When the defendant, Pacific Mutual Life Insurance Co., distributed a similar agreement throughout the country without permission, Crume sued.⁶⁷ Although Crume acknowledged that the defendant had the right to use the idea itself, he attempted to block the defendant's use of the words necessary to carry out the reorganization plan.⁶⁸ The court analogized the reorganization plan to the discovery of a method or an idea.⁶⁹ When such a discovery is made, the public is entitled to use the discovered idea or method.⁷⁰ If such use is not possible without the "employment of words descriptive thereof," it cannot be copyrighted.⁷¹

Similarly, jokes are basically discoveries of a particular configuration of words that cause a particular type of reaction in people. A skit performed by Monty Python⁷² illustrates the discovery-like nature of jokes. In the skit, a British civilian wrote a joke so funny that it killed whoever read it or heard it.⁷³ After the police determined the author's cause of death,⁷⁴ the joke was turned over to the army for military use.⁷⁵ While translating each word of the joke separately into German, some of the translators accidentally heard a couple of the words and were hospitalized.⁷⁶ Eventually, the English translated the joke in such a manner that their soldiers could not understand the joke that they were telling, but the Germans could.⁷⁷

According to the *Crume* doctrine, because the use of the idea is impossible without the specified words in the joke, the British would not be entitled to copyright the joke in order to prevent its use by another army in combat. Similarly, another comedian could use the joke without risking copyright infringement because of its general discovery-like nature. With the joke in the Monty Python skit, however, there may be other risks.

66. *Id.* at 182.

67. *Id.* at 183.

68. *Id.* at 182.

69. *Id.*

70. *Id.* at 184.

71. *Id.*

72. A popular British comedy group that performed fictional skits on the BBC in England.

73. See AND NOW FOR SOMETHING COMPLETELY DIFFERENT (Kettledrum/Lownes Productions Ltd. 1971).

74. This was difficult because the joke was written on a piece of paper next to the author. Suspecting it to be a suicide note, the next person to enter the room would also read it and die. See *id.*

75. See *id.*

76. See *id.*

77. See *id.*

B. Short Words and Phrases

1. Signo Trading v. Gordon

Since *Beardsley* and *Crume*, courts have simplified the argument denying copyright to jokes that are words or short phrases, such as the pairing of “military” and “intelligence.” In general, short words and phrases are not copyrightable.⁷⁸ In *Signo Trading International, Ltd. v. Gordon*, the plaintiff sought, *inter alia*, damages for copyright infringement for the use of words and short phrases in an electronic translator.⁷⁹ The court found that the plaintiff could not protect the use of the translation system because “[i]t is inconceivable that anyone could copyright a single word or a commonly used short phrase” like “how are you.”⁸⁰

2. Perma Greetings Inc. v. Russ Berrie & Co.

The court in *Perma Greetings, Inc. v. Russ Berrie & Co.*⁸¹ simplified the argument even more. According to the court in *Perma Greetings*, “[c]lichéd language, phrases and expressions conveying an idea that is typically expressed in a limited number of stereotypic fashions are not subject to copyright protection.”⁸² The judge compared the items under dispute—mug-type coasters imprinted with various phrases that were manufactured by both the plaintiff and the defendant.⁸³ Comparing both parties’ use of the phrase, “Hang in there,” the court found that the phrase was “unprotected” because it is clichéd language expressed in stereotypic fashion.⁸⁴ Similarly, punchlines often sound like clichés. For example, “If at first you don’t succeed—you’re fired!”⁸⁵ Therefore, if a comedian creates a phrase that sounds like a cliché and can only be expressed in a limited number of ways, it will not be protected.

78. See 37 C.F.R. § 202.1 (1997); *Signo Trading Int’l, Ltd. v. Gordon*, 535 F. Supp. 362, 365 (N.D. Cal. 1981).

79. *Signo Trading*, 535 F. Supp. at 363–64.

80. *Id.* at 364–65.

81. 598 F. Supp. 445 (E.D. Miss. 1984).

82. *Id.* at 448.

83. *Id.* at 448–49.

84. *Id.* at 448.

85. HELITZER, *supra* note 4, at 78.

The court also noted “parallels in the use of the same words but in varied phrases,⁸⁶ such as, ‘enjoy’ versus ‘I’d enjoy the day more;’ ‘Mug me’ versus ‘I love my mug;’ and ‘A friend is someone special’ versus ‘good friends are hard to find.’”⁸⁷ The court held that the common term in each of these comparisons—enjoyment, drinking mug, friendship—was merely an idea, expressed in a way that was not able to be protected by copyright law.⁸⁸ This analysis demonstrates that one joke would not infringe upon another that contained a similar idea but was worded slightly differently.

C. Sweepstakes Rules: *Morrissey v. Procter & Gamble*

Another important case that extends the merger doctrine is *Morrissey v. Procter & Gamble Co.*⁸⁹ Although the holding of *Beardsley* implied that if an idea can be expressed in a limited number of ways, it will not be protected, *Morrissey* established this explicitly.⁹⁰ In *Morrissey*, the plaintiff had allegedly tried to sell his idea for a sweepstakes contest to Procter & Gamble.⁹¹ After *Morrissey* claimed to have solicited Procter & Gamble by mailing the rules to the company, the company conducted a similar contest on its own.⁹² The court found that the contest rules were similar enough to show access and copying, but nonetheless held that there was no infringement.⁹³ The court’s concern was that when uncopyrightable subject matter like an idea can only be expressed in a limited number of ways, to copyright expression would permit an individual to limit all future use of the idea.⁹⁴

D. Stories: *Reyher v. Children’s Television Workshop*

Comedians or joke writers reading this (or lawyers considering representing comedians or joke writers) may be sighing in relief that the merger doctrine appears to apply only to formulas, plays on words, or other short jokes where the words are all important. For longer jokes,

86. *Perma Greetings*, 598 F. Supp. at 449.

87. *Id.*

88. *See id.*

89. 379 F.2d 675 (1st Cir. 1967).

90. *Id.* at 678–79.

91. *Id.* at 677.

92. *Id.*

93. *Id.* To prevail in a infringement action, the plaintiff needs to prove that he owns a valid copyright and that the defendant actually copied it. *See* 4 NIMMER & NIMMER, *supra* note 29, § 13.01, at 13–15. Actual copying can be proven through demonstrating that the infringing work is substantially similar to the plaintiff’s. *See id.* § 13.01(B), at 13–19.

94. *See Morrissey*, 379 F.2d at 678–79.

however, the *scenes a faire* doctrine illustrated in *Reyher v. Children's Television Workshop*⁹⁵ would probably apply to the set-up of a joke.

The *scenes a faire* doctrine generally leaves unprotected material that is standard, stock, or common to a particular topic, or that necessarily follows from a common theme, setting, or identical situation.⁹⁶ The plaintiff, Reyher, wrote a book entitled *My Mother Is the Most Beautiful Woman in the World*.⁹⁷ In essence, the book told a story about a young girl in the Ukraine who is separated from her mother. The girl describes her mother as the most beautiful woman in the world.⁹⁸ The villagers find women who they think fit the description and present several of them to the little girl.⁹⁹ However, her mother is not among them.¹⁰⁰ It turns out that a woman who is not considered attractive by the villagers is the girl's mother.¹⁰¹

The version published in the defendant's *Sesame Street Magazine* is similar in theme and sequence of events.¹⁰² A mother described by a lost child turns out to be homely by community standards.¹⁰³ Many aspects of the publications, however, are different. Reyher's book is thirty-five pages and the *Sesame Street Magazine* version is only two pages.¹⁰⁴ While Reyher's story is of a little girl in the Ukraine, the defendant's is of a little boy in Africa.¹⁰⁵ The plaintiff's illustrations of the customs of the community in which the story takes place are absent in the defendant's story.¹⁰⁶ The court held that although the two stories were basically the same, the similarity was only in the idea, not the expression; therefore no infringement occurred.¹⁰⁷

95. 533 F.2d 87 (2nd Cir. 1976).

96. See *Reyher* at 92; *Autoskill Inc. v. Nat'l Educ. Support Sys.*, 994 F.2d 1476, 1494 (10th Cir. 1993); 4 NIMMER & NIMMER, *supra* note 29, § 13.03(B)(4), at 13-71 to 13-73.

97. *Reyher*, 533 F.2d at 88.

98. *Id.* at 92.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 92-93.

IV. COPYRIGHT PROTECTION OF JOKES IN CASE LAW

A. Marvin Worth Productions v. Superior Films

In the past, some courts have purportedly extended copyright protection to jokes, the decisions however, do not negate the application of the idea/expression dichotomy and the merger and *scenes a faire* doctrines to jokes. According to one commentator, *Marvin Worth Productions v. Superior Films Corp.*¹⁰⁸ held that apart from a “few jokes which involve . . . stock situations’ and lack ‘the quality of originality necessary to render them copyrightable,’ . . . the remainder of [the author’s] books, composed of commentaries, jokes, monologues and routines, was fully protected by copyright.”¹⁰⁹ However, a close reading of *Marvin Worth* does not reveal whether the jokes were in the remainder of the material that is subject to copyright. Moreover, even if the commentator’s assumption that jokes were present in the copyrightable part of the materials is correct, she admits that protection was provided, not because the jokes themselves were copyrightable, but because the jokes were incorporated into a larger work.¹¹⁰

At issue in *Marvin Worth* was whether a number of passages in two books by and about Lenny Bruce were protected by copyright.¹¹¹ The main defense as to the infringement claim was that the “material [was] derived from public sources, jokes and factual items, and is not copyrightable.”¹¹² In fact, the court explained that the defendants did not have a valid defense *except* as to the few jokes and factual items that the defendants successfully argued were not copyrightable.¹¹³ Later in the opinion, however, the court indicated that there might be “other stock jokes and factual items” to which it would extend copyright protection.¹¹⁴ This makes little sense because, by the court’s own rule, a *stock* joke or *factual* item should not be copyrightable because it would lack originality.¹¹⁵

108. 319 F. Supp. 1269 (S.D.N.Y. 1970).

109. Herman, *supra* note 7, at 402 (quoting *Marvin Worth Prod. v. Superior Films Corp.*, 319 F. Supp. 1269, 1270 (S.D.N.Y. 1970)).

110. *Id.* at 403.

111. *Marvin Worth Prod. v. Superior Films Corp.*, 319 F. Supp. 1269, 1270 (S.D.N.Y. 1970).

112. *Id.*

113. *Id.* at 1271.

114. *Id.* at 1272.

115. *Id.* at 1271.

Furthermore, because the actual materials at issue were deleted from the official reporter, it is difficult to ascertain whether they included actual jokes (based on ideas and facts that would not be copyrightable) or commentary.¹¹⁶ If the remainder was merely commentary, it would be protected by copyright if the following conditions were satisfied. First, the expression was easily separable from the idea.¹¹⁷ Second, the expression was not necessary for achieving a particular result, i.e., there was no merger of idea and expression.¹¹⁸ Finally, the expression did not necessarily follow from a stock situation, i.e., the *scenes a faire* doctrine did not apply.¹¹⁹

If these three conditions were met for some but not all of the material, the opinion would be in conformity with copyright law as it exists today. Unfortunately, however, it is impossible to determine how the judge viewed the continuum between idea and expression because the materials at issue were deleted from the reporter, leaving the case with virtually no precedential, persuasive, or didactic value.¹²⁰

B. Hoffman v. Le Traunik

Another case that appears to stand for the copyright protectability of jokes is *Hoffman v. Le Traunik*.¹²¹ In *Hoffman*, the plaintiff sought a preliminary injunction preventing the defendants from performing monologues containing jokes that the plaintiff claimed to have originated.¹²² The court held that Hoffman's jokes were not so clearly original that it should grant the injunction.¹²³ However, the issue of whether copyright protection extends to jokes was not litigated. Therefore, *Hoffman* did not hold that jokes are copyrightable; it merely held that Hoffman's jokes were not copyrightable.

116. *Id.* at 1277-78.

117. *See Baker v. Selden*, 101 U.S. 99, 102-03 (1879).

118. *See Continental Cas. Co. v. Beardsley*, 253 F.2d 702, 706 (2nd Cir. 1958).

119. *See Reyher*, 533 F.2d at 92.

120. *See Marvin Worth Prod. v. Superior Films Corp.*, 319 F. Supp. 1269, 1271 (S.D.N.Y. 1970).

121. 209 F. 375 (N.D.N.Y. 1913). This case was also mentioned by Gayle Herman. Herman, *supra* note 7, at 401; *see also* 1 NIMMER & NIMMER, *supra* note 29, § 2.13, at 2-178.3.

122. *Hoffman*, 209 F. at 375-77.

123. *Id.* at 379.

Hoffman, the plaintiff, only claimed that the jokes were originated by him and that the defendants took them.¹²⁴ In order to defeat the preliminary injunction, the defendants only needed to claim that the jokes did not originate with Hoffman. This factual issue needed to be determined in trial.¹²⁵ Because the *Hoffman* court assumed valid copyright, and the defendants had no need to challenge it, the court did not have to analyze whether the jokes were themselves copyrightable ideas.

The determining factor in the case may have been that the court could not properly issue a preliminary injunction where “[n]o public interest [was] involved, and the damage to the claimant [would] not be very serious.”¹²⁶ Also, at the time of *Hoffman* (1913), the idea/expression dichotomy and the related necessity doctrines of merger and *scenes a faire* had not yet fully developed.

C. Foxworthy v. Custom Tees

Foxworthy v. Custom Tees, Inc. is a more recent case addressing the copyrightability of jokes.¹²⁷ Plaintiff Jeff Foxworthy has been known for creating an industry out of “You might be a redneck if . . .” jokes.¹²⁸ In *Foxworthy*, the defendant produced shirts that replicated jokes either licensed by Foxworthy to various merchandisers for use on T-shirts, calendars, etc., or recorded on Foxworthy’s album entitled, coincidentally, “You Might be a Redneck if. . . .”¹²⁹

Possibly due to *Beardsley*, the plaintiff’s copyright claim only applied to phrases *following* the line, “You might be a redneck if. . . .”¹³⁰ Some examples that follow the phrase include, “you’ve ever financed a tattoo,” “your dog and wallet are both on a chain,” and “your dad walks you to school because you’re in the same grade.”¹³¹

The court focused on the originality of the jokes because the defendants did not raise an idea/expression, merger, or *scenes a faire* defense. Had these defenses been raised, however, findings the court

124. *Id.* at 378–79.

125. *Id.* at 379.

126. *Id.* at 378.

127. Foxworthy v. Custom Tees, Inc., 879 F. Supp. 1200 (N.D. Ga. 1995). In *Foxworthy*, the court humorously uses headings in the format of Foxworthy’s formula, such as “This Action’s Venue Might be Proper If . . .” and “The Public’s Interest Might be Served If . . .”. *Id.* at 1207, 1219.

128. *Id.* at 1204.

129. *Id.*

130. See *supra* Part III.A.1 (stating that copyright probably does not apply to formulaic aspects of jokes).

131. *Foxworthy*, 879 F. Supp. at 1204.

made in regard to the jokes at issue would have forced the court to be even more creative if it were still to grant Foxworthy's injunction. When making its decision, the court credited Foxworthy's testimony that "more than 95% of his redneck joke ideas are original to him" and that he "had the ideas for each joke appearing on defendants' t-shirts produced at the hearing."¹³² This focus on ideas, however, should have led to the opposite result. In telling the jokes, printing them on T-shirts, or using them in calendars, the plaintiff donated the ideas behind the jokes to the public for its own use and enjoyment.

Because only a limited number of ways to effectuate the idea exist, the joke should be unprotected under *Morrissey*.¹³³ Foxworthy testified to the necessity of using certain language to express an idea. For example, he explained that, to create a joke, "the whole trick is to take the smallest amount of words and put them in the proper order."¹³⁴ "The smallest amount of words" obviously means that particular words are essential to express an idea behind a joke, which would make it unprotected by copyright under *Beardsley*.¹³⁵ Through his statement that he takes the words he has picked to create the joke and "put[s] them in the proper order," it is obvious that there are a limited number of ways to express the idea to achieve the desired result.¹³⁶ He further testified that he consulted with other comedians "about a particular one line in a joke, which word should go where, should you delete this, which word should go to the end of the joke . . . to get the maximum laugh from . . . the shortest amount of material." This testimony supports the *Beardsley* and *Morrissey* arguments that his jokes should not be entitled to copyright protection because there was only a limited number of ways to effectuate the idea.¹³⁷

Additionally, the *Foxworthy* court, citing to no authority and advocating a bright line rule without exception, proposed that "where . . . an idea is written or otherwise fixed in tangible form, a copyright is earned if the expression is original."¹³⁸ The importance of fixation

132. *Id.* at 1218.

133. *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678 (1st Cir. 1967).

134. *Id.* at 1219.

135. *Continental Cas. Co. v. Beardsley*, 253 F.2d 702, 706 (2nd Cir. 1958).

136. *Foxworthy*, 879 F. Supp. at 1219.

137. *Foxworthy*, 879 F. Supp. at 1219.

138. *Id.* at 1218.

and originality of expression *are* embodied in the Copyright Act.¹³⁹ “Copyright protection subsists . . . in *original* works of authorship *fixed* in any tangible medium of expression.”¹⁴⁰ However, the statute also says that “[i]n no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.”¹⁴¹

The *Foxworthy* court briefly addressed the argument that ideas are not subject to copyright, but then dismissed it as an originality issue.¹⁴² The court went so far as to say that “ideas are not the stuff of copyrights.”¹⁴³ To sidestep the issue, the court relied on *Feist Publications, Inc. v. Rural Telephone Service*, a case involving the compilation of facts.¹⁴⁴

Reliance on *Feist* was severely misplaced. The *Foxworthy* court used that case to support the proposition that the combination of words that constitute a joke is a compilation similar to a compilation of names and addresses.¹⁴⁵ The statement from *Feist* that appears to be the basis for the *Foxworthy* court’s analysis is that “[o]thers may copy the underlying *facts* from the publication, but not the precise words used to present them.”¹⁴⁶

Apparently, the court did not realize that jokes convey ideas through combining words in a specific manner, whereas a combination of names and addresses, which were at issue in *Feist*, will never convey an idea. Unaware of this distinction between facts and ideas, the court proposed that “[t]wo painters painting the same scene each own a copyright in their paintings In the same way, two entertainers can tell the same joke, but neither entertainer can use the other’s combination of words.”¹⁴⁷ Without mentioning that it may be necessary to use the other entertainer’s combination of words to achieve the result that it has put in the public domain, the court said that “[c]opyright is concerned with the originality of the expression, not the subject matter.”¹⁴⁸

First, the analogy of a joke to a painting is faulty. The proper analogy of a joke would be to the landscape that the artist paints because, like an

139. 17 U.S.C. § 102 (1994).

140. *Id.* § 102(a) (emphasis added).

141. *Id.* § 102(b).

142. *Foxworthy*, 879 F. Supp. at 1218–19.

143. *Id.* at 1218.

144. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

145. *Foxworthy*, 879 F. Supp. at 1219.

146. *Id.* (emphasis added) (quoting *Feist*, 499 U.S. at 348).

147. *Id.* at 1218–19.

148. *Id.* at 1219.

idea, it is in the public domain.¹⁴⁹ For example, a hypothetical artist named Alex paints a picture looking out from the top of a hill over a beautiful landscape that includes a farm, a clear blue sky, and a distant factory. Obviously, copyright protection would extend to the painting, as the court correctly stated.¹⁵⁰ If an artist named Bill were to copy Alex's painting, Bill would then be infringing on the copyright in Alex's painting. It is also clear, however, that if Bill were to paint the same landscape from the same spot where Alex sat, it would *not* infringe Alex's copyright. Bill is free to paint the same landscape because it is a public place and therefore in the public domain.

In painting from the same vantage point, Bill's painting would have to include the same farm, the same lake, and the same distant factory. In both paintings, the farm, the lake, and the distant factory would necessarily be approximately the same colors, shapes, etc. Granting copyright protection to a joke would be like granting copyright protection to the landscape described above. Alex would be able to deny others the right to paint the landscape even though it is in the public domain. Like a landscape, a joke has necessary elements that are not protectable by copyright, such as ideas, facts, and *words*. The words are like colors which are not an element of the painting; they are an element of the landscape itself. The landscape is thus both the idea and the art itself, i.e., the joke.

Second, the court implied that originality is the *only* concern with copyright, explicitly denying that the subject matter is a concern *at all*.¹⁵¹ Perhaps the court did not contemplate its previous statement that "ideas are not the stuff of copyrights."¹⁵² It is doubtful that "stuff" referred to anything but subject matter. Or perhaps the *Foxworthy* court misunderstood the Supreme Court's statement in *Feist* that originality is the "*sine qua non* of copyright."¹⁵³ Because *sine qua non* means "[a]n indispensable requisite or condition,"¹⁵⁴ the Supreme Court probably did not mean that originality is all that matters.

149. See *Baker v. Selden*, 101 U.S. 99, 103 (1879).

150. See *Foxworthy*, 879 F. Supp. at 1218.

151. See *id.* at 1219 ("Copyright is concerned with the originality of the expression, not the subject matter.").

152. *Id.* at 1218.

153. *Id.*

154. BLACK'S LAW DICTIONARY 1385 (6th ed. 1990).

Originality is necessary in copyright, but, as mentioned above, not conclusive.¹⁵⁵

Also, the Supreme Court in *Feist* was referring to facts, which always lack originality, while the judge in *Foxworthy* was referring to ideas.¹⁵⁶ Unlike facts, ideas do not always lack originality. Therefore, there must have been some other reason the Supreme Court in *Feist* stated that “[n]o author may copyright his *ideas* or the facts he narrates.”¹⁵⁷

The missing piece is that copyright *is* concerned with subject matter. The judge in *Foxworthy* treated *Feist* as if it were the first Supreme Court case addressing the issues before the Court. At the time of this writing, *Feist* was probably the last to address them.

The first Supreme Court case was *Baker v. Selden*, which dealt with fitting all necessary accounting entries for a day, a week, or a month onto the same page.¹⁵⁸ The Supreme Court decided back in 1879 that the particular subject matter at issue in *Baker* was not the proper subject matter of copyright.¹⁵⁹ As *Feist*'s reliance on the case suggests,¹⁶⁰ *Baker* is still good law. Aside from the fact that no other court in this country has deemed jokes to be copyrightable, the above analysis shows that *Foxworthy* was probably erroneously decided on the copyright issue.

V. APPLICATION OF THE DOCTRINES TO JOKES

A. Roadkill Joke

Seth Buchwald's "roadkill" joke¹⁶¹ has a premise, a set-up, and a punchline. The premise is that Seth taunted his mom by pretending to be dead. His punchline is basically the word "roadkill." To set up the joke, Seth said he happened upon his mom who fell asleep waiting for him to come home.¹⁶²

Note that *The Mask* had the same premise as Seth's joke. Jim Carrey said, "Look Ma, now I'm roadkill,"¹⁶³ which can only mean that the character wearing the mask was taunting his mom by saying that he was

155. See 17 U.S.C. § 102(b) (1994).

156. See *Foxworthy*, 879 F. Supp. at 1218–19.

157. *Id.* at 1218 (emphasis added) (citing *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985)).

158. *Baker v. Selden*, 101 U.S. 99, 100 (1879).

159. *Id.* at 107.

160. *Feist*, 499 U.S. at 350.

161. Buchwald Interview, *supra* note 1.

162. *Id.*

163. *THE MASK* (New Line Productions 1994).

dead. Thus, it is possible that Mike Werb¹⁶⁴ had seen Seth perform. Why else would the word "Ma" be in the script? From where else would Werb have gotten the idea that the word "roadkill" could be used to taunt one's mom?¹⁶⁵ Unfortunately, Seth is out of luck because ideas such as this are not copyrightable for the simple reason that ideas are not copyrightable.¹⁶⁶

The word "roadkill" may have been copied by Werb. Under copyright law, recall that all that is necessary is a valid copyright and actual copying.¹⁶⁷ Seth has a valid copyright because he has it "fixed" on videotape.¹⁶⁸ He may be able to prove actual copying because Werb's use of the word "Ma" may show that he had seen Seth perform. However, a lawsuit would be precluded because words and short phrases are not copyrightable under *Signo Trading*.¹⁶⁹ Although the idea of taunting one's mom by pretending to be dead and claiming to be roadkill is an original one,¹⁷⁰ it is not copyrightable under today's laws.

164. Mike Werb wrote the THE MASK screenplay. *Id.*

165. Even if Seth's "roadkill" joke was copyrightable, the use in *The Mask* could be a parodic fair use and hence not a copyright violation. See 17 U.S.C. § 107 (1994).

[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use . . . ;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work . . . ; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id. The fourth factor tends to be the most important for parody. 4 NIMMER & NIMMER, *supra* note 29, § 13.05(A)(4), at 13-179, 13-181 to 13-182, 13-189. If a parody "takes the place of the original," it violates copyright law. Gretchen A. Pemberton, *The Parodist's Claim to Fame: A Parody Exception to the Right of Publicity*, 27 U.C. DAVIS L. REV. 97, 133 (1993). It is unlikely that the movie *The Mask* would take the place of Seth's original joke, so it would not violate Seth's copyright.

166. See 17 U.S.C. § 102(b) (1994) ("In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.")

167. See 4 NIMMER & NIMMER, *supra* note 29, §§ 13.01(A)-(B), at 13-6 to 13-15.

168. See Buchwald Interview, *supra* note 1; see also 17 U.S.C. § 102(a) (1994).

169. *Signo Trading Int'l, Ltd. v. Gordon*, 535 F. Supp. 362, 365 (N.D. Cal. 1981); see also 37 C.F.R. § 202.1 (1997).

170. Poor Mrs. Buchwald!

B. A Long Lawyer Joke

It would be difficult to copyright a long joke because the idea/expression dichotomy, merger, and *scenes a faire* could all come into play. Consider this lawyer joke:

“Don’t forget: Appearances are everything,” the senior partner tells George, the new lawyer in the firm. “Yes, sir,” George responds and goes off to his office. Since this is his first day on the job, he’s got nothing to do, so he shuffles paper and sorts paper clips.

Finally, to his relief, George sees his secretary approaching with his first client. As they enter, George grabs his phone and snaps, “Look, Trump, I’ve told you a dozen times, I can’t possibly go over that deal for at least another week. I’m just too swamped. Give me a call in ten days and I’ll see what I can do.”

With a flourish, he hangs up the phone and regards the man standing before him. “Is there something I can do for you?” George says, coolly.

“No. I just stopped by to hook up your phone.”¹⁷¹

The components of this joke include an idea, a set-up, and a punchline. The idea behind this joke is that a new recruit who tries to impress someone who appears to be a new client may end up looking like a fool to the phone installer. This idea would not be subject to copyright protection. The punchline, “I just stopped by to hook up your phone,” is what converts the idea into a joke. Because this language is necessary to achieve the desired result and therefore merges with the idea conveyed, it is not entitled to copyright. To the extent that the set-up of the joke merges with the underlying idea, the set-up would also be unprotectable.

Assuming that the set-up for this joke does not merge with the idea, the set-up would probably still not be entitled to copyright protection. The set-up includes a new recruit at a law firm who is induced to be mindful of his appearance. To create a favorable impression, he pretends to talk to someone important on the phone. When the scene is sufficiently set up, the joke follows, surprising the audience and producing the effect of humor.¹⁷² The elements of the set-up appear to be fairly standard or stock situations that are necessary to create the surprise. Because of their stock nature, the *scenes a faire* doctrine would leave them unprotected by copyright.

After filtering out the unprotected material, what remains is the names of the characters and the type of firm or employee. A comedian using this joke verbatim would probably not constitute infringement. The

171. ELLIE GROSSMAN, *LAWYERS FROM HELL JOKE BOOK* 22 (1993).

172. See HELITZER, *supra* note 4, at 17.

punchline and the situations would not be copyrighted, and there is probably no protection for the name George.

In *Reyher* the defendant used an identical story-line with different characters set in a different country.¹⁷³ However, the story contained elements that were necessary for telling a story about the “most beautiful woman in the world”: a lost child found by villagers, a homely woman, and an unfruitful search for the beautiful woman who is supposed to be the child’s mother. The story was just as effective and valuable when the setting changed from the Ukraine to Africa. In fact, the story could take place in numerous locations.

By contrast, part of the value of the lawyer joke is that it pokes fun at lawyers. There is a specific target, i.e., someone who thinks that he is important. Although there are other professions that people poke fun at, the number is probably much more limited than the number of possible settings for the story in *Reyher*. Because of the limited number of substitutes, granting that part of the joke protection would violate *Morrissey*. The court in *Morrissey* stated that, when a limited number of ways to express an idea exist, allowing a copyright would permit an author to copyright all the variations and thereby obtain control over the idea.¹⁷⁴ Such an outcome would violate the spirit of copyright law.

VI. CONCLUSION

Comedians are the incidental victims of the nature of copyright law. Very little case law exists on the copyrightability of jokes, presumably because lawyers, realizing that jokes are difficult to copyright, are reluctant to risk taking these cases to court.

Jeff Foxworthy was very lucky. As a result of the preliminary injunction, the defendant probably settled with him out of court. Indeed, settling such cases is not unusual. However, the plaintiff-comedian is forced to concede the most under the analysis in this article. Perhaps comedians will use *Foxworthy* as bargaining leverage in the future, but hopefully a comedian will try to take it further. Jokes deserve protection, but present law does not seem to allow such protection.

Computer companies have billions of dollars to spend to lobby Congress to change copyright law as it applies to them. However, few

173. *Reyher v. Children’s Television Workshop*, 533 F.2d 87, 92 (2nd Cir. 1976).

174. *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678 (1st Cir. 1967).

comedians possess the resources to mount serious campaigns to the legislature. Congress may not take comedians seriously anyway, given the fact that members of Congress are often the target of jokes. Besides, the few comedians who have the resources to lobby Congress are the established, popular ones who benefit from limited, extralegal protection for jokes. Thus, they have no desire to change the status quo.

Although it will take complicated legislation to protect computer programs properly, Congress would only have to add jokes to the enumerated list in the Copyright Act to provide them with protection.¹⁷⁵ Additionally, Congress could opt to leave the decision of how to deal with the idea/expression dichotomy and the merger and *scenes a faire* doctrines to the courts.

175. 17 U.S.C. § 102(a) (1994).