

WHEN LESS ISN'T MORE: ILLUSTRATING THE APPEAL OF A MORAL RIGHTS MODEL OF COPYRIGHT THROUGH A STUDY OF MINIMALIST ART

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I. INTRODUCTION

What do the Apple iPod, Ikea, nouvelle cuisine, and *Seinfeld* have in common? All four are popular examples of the minimalist movement's immense influence on modern culture. Due to its sleek stylization, it is easy to see that minimalism is a guiding principle in the design of Apple products. Consider as an example the iPod Shuffle, the most minimalist of MP3 players. Its interface contains only the items absolutely necessary to play music: a play/pause button, a rocker-ring for moving through songs, a power switch, and a battery check.¹ Even the USB plug is cleverly hidden.² In stark contrast to other MP3 players, there is no display and, there are no playlists or adjustable settings.³ The influence of minimalism is clear.

The popular furniture store Ikea has built an empire selling inexpensive copies of Moderne designer furniture conveniently packaged to easily fit in a station wagon. In design and architecture, Modernism, with its commitment to integrity of materials and "utter simplicity" of design, embraced the mantra "less is more."⁴ Modernist design elements grew out of the minimalist design

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¹ Bill Machrone, *iPod Shuffle*, PC MAGAZINE, May 2005, http://www.findarticles.com/p/articles/mi_zdpcm/is_200505/ai_n13638254#continue.

² *Id.*

³ *Id.*

⁴ Furniture.com, *The Many Paths to Modern Design* para. 8, <http://www.furniture.com/Common/magazine/style/ModernDesign.asp?xs=312834E81A-C529-4D2B-B24569F52F9EB45&se=632757150484218750&CookieFlag=disabled> (last visited Nov. 22, 2006) (quoting the famous words of designer and architect Ludwig Mies van der Rohe that "less is more").

aesthetics of International Style that developed in Europe, particularly at the Bauhaus School of Art and Design.⁵ Modernism became popular in the United States following the development of the minimalist movement in the 1950s and 1960s, as the aesthetics encouraged by minimalism took hold in popular culture.⁶ This influence continues today, as evident in the mass appeal of Ikea's furniture, which showcases raw materials such as metal and wood, that is stripped of unnecessary adornments.

Nouvelle cuisine is another of the many areas where minimalism's influence is evident. In the 1970s, nouvelle cuisine developed as a rejection of the overly-complex and overly-sauced classic French cuisine that had been popular until that time.⁷ Like the minimalist movement before it, nouvelle cuisine rejected the time consuming and complicated food preparation methods used in classic French cooking in favor of simple preparations as chefs sought to maintain the integrity of the ingredients.⁸ Nouvelle cuisine embraced "the 'aesthetics of simplicity'" which developed into austere minimalism, with chefs presenting large, nearly bare plates showcasing a few morsels of select ingredients.⁹

Finally, even the television show *Seinfeld* can trace its roots to the minimalist movement. Although *Seinfeld* does not visually appear to be rooted in minimalist aesthetics, in a broader sense it follows the minimal forms that have invaded popular culture by exemplifying the mantra "less is more."¹⁰ Minimalists embrace the concept that "what you see is what you see;" there is no hidden meaning or overarching agenda to a work of art.¹¹ Likewise, in the minimalist tradition, *Seinfeld* fashioned itself as "a show about nothing," focusing on the minutiae of daily life without any grander plot or theme.¹²

Even these limited examples indicate the important and far-reaching influence that the minimalist movement has had on modern culture. Despite its importance, American copyright law is at odds with many of the aspects that make minimalist art what it is. In this sense, minimalist art is no different than

⁵ *Id.*

⁶ KENNETH BAKER, MINIMALISM: ART OF CIRCUMSTANCE 10, 13, 29 (Alan Axelrod ed., Abbeville Press 1988).

⁷ *Very Tall Orders*, THE INDEPENDENT ON SUNDAY, FOOD & DRINK (U.K.), (Sept. 21, 2003), at para. 8, available at 2003 WLNR 10552364.

⁸ *Id.* at para. 8, 10.

⁹ *Id.* at para. 8.

¹⁰ Craig Bunch, *Minimalism*, in 3 ST. JAMES ENCYCLOPEDIA OF POPULAR CULTURE 369 (Tom Pendergast & Sara Pendergast eds., St. James Press 2000).

¹¹ Johnathan Freeland, *Is Less More?*, THE GUARDIAN, para. 8 (Dec. 1, 2001), http://www.guardian.co.uk/saturday_review/story/0,3605,609721,00.html.

¹² Bunch, *supra* note 10, at 369.

most works of fine art. However, due to its unique nature, the inadequacies of the current Copyright Act, when applied to works of fine art, are especially pronounced when considered in relation to minimalist art.

American copyright law developed to meet the constitutional mandate “[t]o promote the Progress of Science and useful Arts” by providing an economic incentive for artistic creation.¹³ Under the assumption that a major influence on the creation of art is the incentive of anticipated market demand, American copyright law grants artists the exclusive right to copy their work as an incentive for the artist to create, in turn benefiting society through increased availability of works of art.¹⁴ This assumption fails, however, when applied to fine artists, who are generally outwardly influenced by culture and internally influenced by the desire to create, because the economic incentives available under American copyright law are immaterial.¹⁵ Moral rights, as provided under European copyright law, are better adapted to address the interests of fine artists because they protect not only the finished work, but also the artist’s control over the creative process and ultimately her persona and reputation.¹⁶ Protecting the artist’s persona and reputation serves as an incentive to create. The artist will be more willing to expose her inner self, as expressed through her art, if she is assured that the public will treat her art with respect.¹⁷

Despite American copyright law’s lack of incentives geared toward fine artists, minimalist art has continued to flourish in American culture, as evidenced by the four examples above. If minimalist art, and fine art in general, is created regardless of the availability of moral rights, what need is there for protection of moral rights?

Fully developed systems of moral rights protection exists in many European legal systems; France is generally considered the leader in protection of moral rights, with Germany and Italy close behind.¹⁸ This protection reflects the high value these countries and their cultures place on art, both currently and

¹³ U.S. CONST. art. I, § 8, cl. 8; Daniel J. Gifford, *Innovation and Creativity in the Fine Arts: The Relevance and Irrelevance of Copyright*, 18 CARDOZO ARTS & ENT. L.J. 569, 572 (2000).

¹⁴ Gifford, *supra* note 13, at 569, 572.

¹⁵ *See id.* at 569.

¹⁶ Susan P. Liemer, *Understanding Artists’ Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 41–42, 44 (1998).

¹⁷ *Id.* at 43–44.

¹⁸ Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 11–12 (1985); Liemer, *supra* note 16, at 42.

at the time moral rights developed.¹⁹ When copyright developed in the United States, cultural identity was still in development; leaders sought to build a unique American culture focused on industry. As a result, intellectual property rights supporting industry and commercialism developed.²⁰

As American culture has matured, moral rights have also begun to emerge, for example through enactment of the Visual Artists Rights Act, although they are in a much earlier state of development than in most European countries.²¹ Until recently, American art has failed to achieve international recognition; however, the United States is “currently undergoing an important transition” due to changing cultural values, including recognition and appreciation of art’s non-economic aspects in response to increased international recognition of American art.²² As this recognition and appreciation approaches the level shown to artists in countries such as France, Germany, and Italy, American protection of moral rights should develop in a manner that model the protections provided in those countries.

Alternate arguments for increased protection of moral rights have also been advanced. For example, providing an artist with moral rights would ensure that blind reliance on consumer demand will not hinder artistic diversity by providing an artist with bargaining power to prevent publishers, producers, and large corporate entities that often own copyrights from censoring an artist’s work to comply with the public’s taste.²³ Additionally, some have observed the American copyright law’s limited protection of moral rights should be redesigned to become more closely aligned with the requirements of the Berne Convention for the Protection of Literary and Artistic Works, so as not to hinder the United States’ ability to trade with countries offering stricter protection of moral

¹⁹ Kwall, *supra* note 18, at 11; Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 803–04 (2001) (noting that “[a]rt is ‘one of the glories of France’”); Liemer, *supra* note 16, at 42.

²⁰ Susan P. Liemer, *How We Lost Our Moral Rights and the Door Closed on Non-Economic Values in Copyright*, 5 J. MARSHALL REV. INTELL. PROP. L. 1, 34 (2005).

²¹ Liemer, *supra* note 16, at 42.

²² Kwall, *supra* note 18, at 17 n.67; Liemer, *supra* note 16, at 42; John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1042 (1976).

²³ Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 439–40 (1993); *cf.* Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 77–80 (1997) (explaining Netanel’s claims but disagreeing with the ultimate importance of moral rights recognition in “increasing the supply of visionary works”).

rights, especially in light of technological advances and changes in trade agreements that increase globalization of artistic material.²⁴

Finally, it would appear that artists are eager for increased protection of moral rights. Despite the inability of artists to benefit from express application of a moral rights doctrine, attempts have been made to enforce moral rights through unfair competition claims, breach of contract claims, defamation claims, and invasion of privacy claims.²⁵ This patchwork approach, however, cannot rise to the level of protection afforded by a cohesive moral rights doctrine, as illustrated through cases such as *Shostakovich v. Twentieth Century-Fox Film Corp.*²⁶ In *Shostakovich*, a group of composers were unable to assert their moral rights through claims for violation of their right to privacy, defamation, deliberate infliction of an injury without just cause, and, a claim for violation of moral rights.²⁷ However, the composers were able to enforce their moral rights in Europe under French moral right laws, suggesting the increased protection available under cohesive moral rights laws.²⁸

As illustrated above, much legal commentary has addressed the need for increased moral rights protection equivalent to the protections offered in Europe. As many European countries protect both economic and moral rights through two distinct systems, similar dual protection of artists' interests should be considered for the United States.²⁹ Using minimalist art as an example, this thesis considers the advantages of granting full moral rights to works of fine art while maintaining the current copyright law, and its protection of economic rights, to works of commercial artists and fine artists alike. Part II begins with a brief overview of the minimalist movement and some of the notorious works that have resulted from it. Part III looks at minimalist art in relation to the statutory, Section A, and judicial requirements, Section B, for obtaining and enforcing a copyright, and discusses the unique issues that arise when a minimalist

²⁴ Brian T. McCartney, "Creepings" and "Glimmers" of the Moral Rights of Artists in American Copyright Law, 6 UCLA ENT. L. REV. 35, 72 (1998), see also Liemer, *supra* note 20, at 37 ("Because internet technology encourages a global perspective, perhaps as we look forward our common-law jurists may gain better appreciation for moral rights protection, already well-developed in other countries.").

²⁵ Kwall, *supra* note 18, at 17–18.

²⁶ *Id.* at 17–18, 27–28

²⁷ *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575, 577, 579 (N.Y. App. Div. 1948); Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229, 237 (1995); Kwall, *supra* note 18, at 18, 27–28.

²⁸ Dworkin, *supra* note 27, at 237.

²⁹ McCartney, *supra* note 24, at 35.

work attempts to obtain copyright protection. Several famous works of minimalist art are analyzed to determine whether these pieces would likely receive copyright protection under current copyright law. Additionally, although the focus is on minimalist works of painting and sculpture, the ultimate work of minimalist composition, silence, is considered in Section C, through an analysis of the controversy surrounding John Cage's composition 4'33". Section D concludes with a consideration of the problems that arise when the judiciary is required to make determinations concerning "art," especially regarding a movement as controversial as minimalism. Part IV considers alternate models of copyright law and their ability to provide greater protection to works within the fine arts. Section A provides an overview of the European moral rights system and discusses the differences between protection of artists under American and European law. Section B considers current attempts at protecting moral rights under American copyright law through the Visual Artists Rights Act ("VARA") as well as the inadequacies of the protection provided. Finally, Part V advocates for development of a system that will protect both the economic and moral interests of the fine artist. Section A discusses the historical differences in treatment of commercial art and fine art under American copyright law. Section B discusses the additional protection moral rights would provide in practice. Section C advocates for a dual model of artistic protection that would apply traditional American copyright law to all works of art while also granting full protection of moral rights to works of fine art, without imposing the limitations of the originality requirement as enforced through the idea /expression dichotomy and judicial limiting doctrines.

II. OVERVIEW OF MINIMALISM

"Minimalism" refers to any work "that is abstract—or even more inert visually than 'abstract' suggests—and barren of merely decorative detail, in which geometry is emphasized and expressive technique avoided."³⁰ Minimalism has also been defined more generally as "a form of art in which objects are stripped down to their elemental, geometric form, and presented in an impersonal manner."³¹ The minimalist movement began in the 1960s as a reaction to the overly complex and subjective abstract expressionist painting of the 1950s

³⁰ BAKER, *supra* note 6, at 9.

³¹ Artcyclopedia, Minimalism: Artists and their Works, <http://www.artcyclopedia.com/history/minimalism.html> (last visited Nov. 20, 2006).

and was motivated by the artist's desire to control how others viewed and understood her art.³²

Abstract expressionism "saw painting as an emotional, existential act" where art was only "an illusion, a trick by which one object represents something else."³³ Minimalists replaced abstract expressionist's emotional subjectiveness with order and logic through straight lines, primary colors, and mathematical precision.³⁴ Minimalist artists stripped art down to its bare essentials by presenting objects that could only be interpreted one way.³⁵ The viewer was forced to see only the item instead of a representation of something else.³⁶ As Frank Stella, a famous minimalist, stated "what you see is what you see."³⁷

Minimalist painting is often characterized by geometric shapes and patterns in black and white or primary colors.³⁸ For example, Kasimir Malevich is famous for paintings such as *Black Cross*, a black cross on a white canvas, *Black Circle*, a black circle on a white canvas, and *Black Square*, a black square on a white canvas.³⁹ He is even more infamous for *White on White*, which consists of a white square on a white canvas.⁴⁰ Similarly, Agnes Martin is known for several series of works involving straight lines and grids on gray canvases⁴¹ while Frank Stella is famous for his series of white or gray linear designs on black canvases.⁴² Finally, Ad Reinhardt is known for his series of works con-

³² BAKER, *supra* note 6, at 10, 13.

³³ Freeland, *supra* note 11, at paras. 5, 7.

³⁴ *Id.* at para. 5.

³⁵ *Id.* at paras. 7–8.

³⁶ *Id.*

³⁷ *Id.* at para. 8.

³⁸ Artlex, *Artlex on Minimalism*, <http://www.artlex.com/ArtLex/m/minimalism.html> (last visited Nov. 22, 2006).

³⁹ KASIMIR MALEVICH, BLACK CIRCLE (1913), available at http://www.artchive.com/artchive/M/malevich/b_circle.jpg.html (last visited Nov. 22, 2006) (displaying image of *Black Circle*); KASIMIR MALEVICH, BLACK SQUARE (1913), available at <http://www.artlex.com/ArtLex/m/minimalism.html> (last visited Nov. 22, 2006) (displaying image of *Black Square*); KASIMIR MALEVICH, BLACK CROSS (1915), available at <http://www.artlex.com/ArtLex/m/minimalism.html> (last visited Nov. 22, 2006) (displaying image of *Black Cross*).

⁴⁰ KASIMIR MALEVICH, SUPREMATIST COMPOSITION: WHITE ON WHITE (1918), available at http://www.moma.org/collection/browse_results.php?criteria=O%3AAD%3AE%3A3710&page_number=19&template_id=1&sort_order=1 (last visited Nov. 22, 2006) (displaying image of *Suprematist Composition: White on White*).

⁴¹ BAKER, *supra* note 6, at 20, 23.

⁴² *Id.* at 26, 32, 34–35, 38–39.

sisting of black canvases that at first glance appear solid black but upon closer inspection reveal subtle variations of tone.⁴³

Minimalism also encompasses the works of artists who present art items that are indistinguishable from the raw material they were made from.⁴⁴ In this sense, the works are minimally differentiated from the non-art materials the artist used to create the work of art.⁴⁵ This tendency found roots in Marcel Duchamp's "readymades," which were mass-produced items such as vacuum cleaners that Duchamp displayed in art galleries without altering the item.⁴⁶ Of the minimalist sculptors, Carl Andre is a particularly well-known industrial sculptor.⁴⁷ His most famous sculptures include pieces of wood and stacks of bricks that he presents as art without altering the raw material in any way.⁴⁸

Minimalism in contemporary classical music refers to music composed within the last half of the twentieth century characterized by repetition of short musical phrases with minimal variations over long time periods, stasis, such as drones or long tones, an emphasis on consonant harmony, and a steady pulse.⁴⁹ John Cage created what is perhaps the ultimate form of minimalist creation. His composition *4'33"* consisted entirely of four minutes and thirty-three seconds of silence. Cage brought suit against an infringer in England and settled out of court for an undisclosed six-figure award.⁵⁰ Although Cage successfully enforced his copyright in England, if the suit had been brought under American copyright law, it is doubtful that Cage would have prevailed.

⁴³ Guggenheim Museum, Biography of Ad Reinhardt, para. 3, http://www.guggenheimcollection.org/site/artist_bio_133A.html (last visited Nov. 22, 2006); AD REINHARDT, ABSTRACT PAINTING NO. 5 (1962), available at <http://www.tate.org.uk/servlet/ArtistWorks?cgroupid=999999961&artistid=1826> (last visited Nov. 22, 2006); AD REINHARDT, [untitled] (1964), available at <http://www.tate.org.uk/servlet/ArtistWorks?cgroupid=999999961&artistid=1826> (last visited Nov. 22, 2006).

⁴⁴ BAKER, *supra* note 6, at 9.

⁴⁵ *Id.*

⁴⁶ *Id.* at 9–10.

⁴⁷ *Id.* at 41.

⁴⁸ *Id.* at 45, 50–51.

⁴⁹ Wikipedia, Minimalism, http://en.wikipedia.org/wiki/Minimalism#Musical_minimalism (last visited Nov. 20, 2006).

⁵⁰ Jeffery Richardson, *Arts, Communications, Entertainment, and Sports Law: The Sounds of Silence: How Copyrights Affect Composition*, 82 MICH. BAR J. 36, 38 n.2 (2003) (citing "Composer Pays for Piece of Silence," <http://europe.cnn.com/2002/SHOWBIZ/Music/09/23.uk.silence/index.html>).

III. APPLICATION OF COPYRIGHT LAW TO MINIMALIST ART

A. Statutory Requirements

Minimalist artists face many obstacles to obtaining adequate copyright protection under American copyright law, including the originality requirement as well as the judicially created limiting doctrines that are applied before a court makes a determination of infringement. Under the Constitution, and by statute, copyright validity depends upon originality.⁵¹ “Originality” has been defined to “mean[] only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”⁵² The creativity requirement does not come from the copyright statute; it first appeared in a Copyright Office regulation and was further explained in *Nimmer on Copyright*.⁵³ The creativity requirement, as explained in *Nimmer on Copyright*, was accepted by the Court in *Feist Publications, Inc. v. Rural Telephone Serv. Co.*⁵⁴ In determining whether a compilation of phone numbers was copyrightable, the Court decided that originality, as defined under the Copyright Act, required that it possess a minimal level of creativity, citing *Nimmer on Copyright* for this requirement.⁵⁵

Generally, creativity is not a high bar to copyright; the “requisite level of creativity is extremely low; even a slight amount will suffice.”⁵⁶ A court will find that a “work of art” exists when “by the most generous standard [it] may arguably be said to evince creativity.”⁵⁷ Despite the low bar, however, copyright on simple designs has been denied for lack of creativity.⁵⁸ For example, in *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, the court upheld a refusal

⁵¹ U.S. CONST. art. I, § 8, cl. 8 (giving Congress power to “promote the Progress of . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings”); 17 U.S.C. § 102 (2000); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–47 (1991).

⁵² *Feist Publ’ns*, 499 U.S. at 345.

⁵³ Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1, 2 (1992); see 37 C.F.R. § 202.10(a) (2006); MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2.08(B)(1) (Matthew Bender & Co. 2006).

⁵⁴ *Feist Publ’ns*, 499 U.S. at 345.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 1 NIMMER & NIMMER, *supra* note 53, at § 2.08(B)(1).

⁵⁸ *John Muller & Co. v. N.Y. Arrows Soccer Team, Inc.*, 802 F.2d 989, 990 (8th Cir. 1986).

to register a line-drawing of an arrow with the word “Arrows” written under it in cursive script on the grounds that the design lacked creativity.⁵⁹

Further, in *Bailie v. Fisher*, the applicant was denied a copyright for lack of creativity because his work, a cardboard star that stood upright when flaps on the back were folded over, allowing it to be used to display record albums, was not a “work of art.”⁶⁰ The court defined art as any item that “appears to be within the historical and ordinary conception of the term art.”⁶¹ While minimalist art, which is traditionally painting and sculpture, would seem to fall within the “historical and ordinary conception”⁶² of art, minimalism challenged the traditional conception of what is considered art. As a movement that embraced nonart and rejected traditional conventions, by its nature minimalism was not “within the historical and ordinary conception of the term art.”⁶³ Coupled with popular dislike for minimalist art, especially when the movement was founded in the early 1960s, the impact of *Bailie* could have been immense if the availability of copyright protection influenced the minimalist artist’s decision to create. Regardless of the affect, the issue is now moot because the *Bailie* test is tempered by the caveat that a work must be considered a “work of art” under the copyright laws when “any meaningful segment of the population” would regard the work as a “work of art.”⁶⁴ Since minimalism is now widely accepted within the art community, minimalist works fall squarely within the definition of “work of art” provided in *Bailie*.

In theory, minimalist artists should be able to overcome the creativity requirement; at the minimum their work is creative in the sense that the artist has the creativity to express an idea in a minimalist manner. However, as copyright has been denied when the work portrays simple geometric shapes without additional expression, minimalist artists’ similar depictions of simple geometric shapes, primary colors, or linear designs places them in danger of failing to overcome even the minimal creativity requirement. Further, the test enunciated in *Bailie* challenges minimalist art due to the general public’s criticism of the movement’s nonart qualities. Because many within the art world would recognize a piece of minimalist art as a “work of art,” however, the creativity re-

⁵⁹ *Id.*

⁶⁰ 258 F.2d 425, 426 (D.C. Cir. 1958).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 1 NIMMER & NIMMER, *supra* note 53, at § 2.08(B)(1); see *Reiss v. Nat’l Quotation Bureau*, 276 F. 717, 718 (S.D.N.Y. 1921).

quirement is met. As such, it ultimately appears that courts will find that minimalist art meets the creativity requirement.

Creativity is only the first hurdle; to obtain a copyright, a work must also be original. It appears at first glance that minimalist artists would easily meet the originality requirement; their work is original in the sense that it expresses complex ideas in new and different, albeit sparse, ways. Minimalist art fails, however, to meet the originality requirement because it is the idea, not the expression, that is original; whereas copyright protection extends only to original expressions, not original ideas.⁶⁵ The Copyright Act makes clear that “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”⁶⁶ Protection of expression, not ideas, is a constitutional requirement because the primary goal of copyright is not to reward the artist’s labor but “[t]o promote the Progress of Science and useful Arts.”⁶⁷ This standard creates an “idea/expression dichotomy” which allows an artist to protect her original expression while encouraging others to build upon the aspects of the work that are not original, such as facts, ideas, and other materials in the public domain.⁶⁸ Furthermore, if similar features of a work are indispensable or standard in the treatment of a given idea, a court will treat those features as ideas and not grant them copyright protection, despite the fact that the features are actually expression.⁶⁹

Some scholars argue that in the case of minimalist art, regardless of the underlying idea that the expression communicates, the expression itself is so limited that granting it protection could stifle the arts instead of promoting them.⁷⁰ For example, if a copyright was granted on *White on White*, one artist

⁶⁵ 17 U.S.C. § 102(b) (2000); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991); *Baker v. Selden*, 101 U.S. 99, 102–103 (1880) (determining that copyright in a book does not protect the technology described in the book because the patent system is in place to protect the technology).

⁶⁶ 17 U.S.C. § 102(b).

⁶⁷ U.S. CONST. art. I, § 8, cl. 8; *Feist Publ’ns*, 499 U.S. at 349. In the Constitution, “Science” refers to copyrightable works which one would generally consider art, while “useful Arts” refers to patentable inventions which are generally considered science. DONALD S. CHISUM, ET. AL., *PRINCIPLES OF PATENT LAW* 17 n.69 (3rd ed., Found. Press 2004).

⁶⁸ *Feist Publ’ns*, 499 U.S. at 349–50; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547–48 (1985).

⁶⁹ *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1444 (9th Cir. 1994).

⁷⁰ E.g. Lori Petruzzelli, Comment, *Copyright Problems in Post-Modern Art*, 5 DEPAUL-LCA J. ART & ENT. L. 115, 125 (1995).

would have a monopoly on a white square, which would be disastrous, since any work depicting a white square could potentially infringe.⁷¹ In this way, copyright protection of minimalist art could prevent artists from utilizing geometric shapes and primary colors, “the very building blocks of their profession.”⁷²

This fear is unsound, however, because it relies on the mistaken belief that copyright grants the artist the right to exclude all uses of a white square. Instead, copyright grants the artist the right to exclude others from copying her depiction of a white square on a white background. Another artist could appropriate the original art as long as she changed it substantially.⁷³ Therefore, another artist can use a white square without infringing *White on White* as long as she adds enough of her own expression. It is unlikely that a painting depicting a house with a white square window on a white square wall would infringe *White on White* because the second artist, by depicting a house around the white squares, altered the work substantially.

What is more likely is that someone might innocently infringe a work of minimalist art. As originality is defined under the Copyright Act, a work can be original “even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.”⁷⁴ It is highly unlikely that an artist could create a work that is identical to a painting such as *Whistler’s Mother* or the *Mona Lisa* independently and ignorantly of these works due to their complexity and notoriety. It is not nearly as improbable, however, that an artist, unaware of *White on White*, would also have the idea to create a minimalist painting of a white square on a white background. Due to the simplicity of the resulting expression, creating an identical work is not as farfetched as it would be in the case of more traditional art.

Although the ability to copyright primary colors and geometric shapes would not prevent other artists from utilizing those features as part of their work, it appears that the United States Copyright Office is reluctant to grant a copyright on simple shapes, colors, or arrangements. For example, in *Atari Games Corp. v. Oman*, the examiner rejected Atari’s application for copyright on the game *Breakout* because “the ‘flat, unadorned geometric shapes’ . . . ‘d[id] not evince authorship in the nature of perspective, shading, depth or brush-

⁷¹ *Id.*

⁷² *Id.* at 125–26.

⁷³ 4 NIMMER & NIMMER, *supra* note 53, § 13.03(A).

⁷⁴ *Feist Publ’ns*, 499 U.S. at 345–46.

stroke.”⁷⁵ In the rejection letter to the applicant, however, the Register of Copyright also noted that “[i]f the Copyright Office were to examine a painting consisting entirely of rectangles and find it copyrightable, it is important to understand that this decision would be based on creative elements such as depth, perspective, shading, texture of brushstroke, etc. and not on the geometric shapes *per se*,” indicating that artwork consisting of simple geometric shapes and colors might find copyright protection in certain elements.⁷⁶ Additionally, the court noted that, “[r]ecalling the creativity of the work of Mondrian and Malevich . . . [the] arrangement itself may be indicative of authorship.”⁷⁷ This statement is encouraging to the minimalist artist, but passing the creativity and originality requirements is only the first step. Even if this hurdle is overcome, the protection that the minimalist artist actually receives is questionable, as will be discussed *infra*. While *Atari Games Corp.* was remanded to the Register of Copyright for renewed consideration regarding the creativity and originality of *Breakout* as a whole, the court did “not in any way question the [Register of Copyright’s] position that ‘simple geometric shapes and coloring alone are *per se* not copyrightable.’”⁷⁸ Therefore, while the court seemed to indicate that minimalist art warrants copyright protection despite its simple geometric shapes and coloring, whether the Copyright Office would agree and actually grant a copyright is uncertain.

This uncertainty is further aggravated by the many instances where copyright protection was denied due to the simplicity of the work. For example, in *OddzOn Products, Inc. v. Oman*, the court upheld the Copyright Office’s refusal to grant a copyright on the Koosh ball.⁷⁹ The Register of Copyright rejected the application because visually the Koosh ball was a familiar symbol or design.⁸⁰ The examiner noted that the Koosh ball “‘basically define[d] a sphere, and there is no copyrightable authorship in producing such a familiar shape.’”⁸¹ Additionally, the characteristic protrusions of the Koosh ball were found to be functional, since they gave the Koosh ball tactility and allowed it to be used as an aid for increasing coordination skills.⁸² Without the ability to copyright the functional protrusions, all that was left that could be copyrighted was the spheri-

⁷⁵ *Atari Games Corp. v. Oman*, 979 F.2d 242, 243 n.1 (D.C. Cir. 1992).

⁷⁶ *Id.* (citing letter to applicant from Register of Copyrights) (emphasis added).

⁷⁷ *Id.*

⁷⁸ *Id.* at 247.

⁷⁹ 924 F.2d 346, 350 (D.C. Cir. 1991).

⁸⁰ *Id.* at 347.

⁸¹ *Id.*

⁸² *Id.*

cal shape.⁸³ The examiner's rejection, therefore, was not an abuse of discretion because "[i]t is not merely that the [Koosh] ball approximates a sphere, it is also that there is not enough additional creative work beyond the object's basic shape to warrant a copyright."⁸⁴

Copyright protection was also denied to the unique shape of a cake pan in a case regarding copyright infringement of the packaging of frozen baked goods.⁸⁵ In *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, the court upheld a decision finding that Nifty Foods Corp. infringed labels on boxes of frozen cakes because the infringing label contained a cake picture that was identical to the picture used on the original label.⁸⁶ The court did not find infringement for the use of identical cake pans because there was no copyright protection in the pan's circular, rectangular, and octagonal shapes.⁸⁷ Although not explicitly discussed in the case, the court in *Kitchens of Sara Lee* seemed to approve the Copyright Office's position that simple geometric shapes are *per se* not copyrightable.

As the law currently stands, many pieces of minimalist art would be unable to meet the original expression requirement. For example, Carl Andre is famous for his minimalist sculptures, including *Herm*, a 36 x 11 ¾ x 11 ½ inch hunk of unfinished Western red cedar, and *Equivalent VIII*, which consists of 120 sand-lime bricks stacked in two tiers of six bricks by ten bricks.⁸⁸ These sculptures are not original expression; at any lumberyard or masonry one could find similar pieces. What makes Andre's work original is the idea of placing these common items in art galleries and presenting them as art because they are not traditionally conceived to be "art."

Another example of minimalist artists' likely failure to overcome the original expression requirement is Roman Opalka's series of works and Malevich's *White on White*. Opalka paints white sequential numbers on black canvases.⁸⁹ With each painting, he lowers the tone of the black paint one percent, and hence will eventually be painting white numbers on a white canvas.⁹⁰ At this point, Opalka's expression of a white number on a white canvas will appear to be the same expression as Malevich's *White on White*, which is a white

⁸³ *Id.*

⁸⁴ *Id.* at 348.

⁸⁵ *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 545 (2nd Cir. 1959).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ BAKER, *supra* note 6, at 45, 50–51.

⁸⁹ Petruzzelli, *supra* note 70, at 124.

⁹⁰ *Id.* at 124–25.

square on a white background.⁹¹ In turn, both pieces would not be original in light of Robert Rauschenberg's series of all white paintings.⁹² While each artist has a unique idea, the expression is not original, and hence not copyrightable. Similarly, Ad Reinhardt's series of all black paintings would not be original expression because they followed Aleskandr Rodchenko's painting *Black on Black*, which also appears to be an all-black painting.⁹³

Finally, as illustrated in *Atari Games Corp., OddzOn Products, Inc.*, and *Kitchens of Sara Lee, Inc.*, courts are unwilling to find copyrightable expression in geometric shapes without some form of additional expression. Many minimalist works focus on geometric shapes and are characterized by the absence of additional expression. For example, Malevich's works *Black Cross*, *Black Square*, and *Black Circle* all consist solely of a geometric shape on a plain background.⁹⁴ Their originality depends upon the fact that the artist presents the work simply as a shape without any additional adornment. Likewise, Sol LeWitt created a series of sculptures of simple three-dimensional geometric shapes.⁹⁵ For example, his piece *Two Open Modular Cubes/Half-Off* consists of bars of enameled aluminum that outline the shape of two connected open cubes.⁹⁶ Similarly, *Five Open Geometric Structures* consists of five freestanding three-dimensional geometric shapes made out of plainly painted wood.⁹⁷ The five geometric structures are not complex or imaginative; they consist of a square cube, a pyramid, a rectangular cube, a trapezoidal cube, and a parallelogram cube.⁹⁸ Under copyright law, because these works consist of simple and familiar geometric shapes without any additional adornment, they are not worthy of copyright because they lack any additional expression beyond the basic geometric shape.

B. Judicial Limiting Doctrines

Obtaining a copyright on a work of art is only the first step to protecting it. The artist must be able to prevent others from violating her copyright by winning suits against infringers. The Copyright Act allows an artist to bring an

⁹¹ *Id.* at 125.

⁹² *See* Bunch, *supra* note 10, at 369.

⁹³ *See id.*

⁹⁴ *Artlex*, *supra* note 38; MALEVICH: BLACK CIRCLE, *supra* note 39.

⁹⁵ *See* BAKER, *supra* note 6, at 93–94.

⁹⁶ *Artlex*, *supra* note 38.

⁹⁷ *Id.*

⁹⁸ *Id.*

infringement action even if her application for copyright was denied.⁹⁹ This would seem promising to the minimalist artist. Copyright or no copyright, however, the judiciary is highly unlikely to find infringement in cases involving minimalist art, as the application of limiting doctrines will ultimately strip the minimalist work of any uncopyrightable elements, leaving it with only a “thin copyright.”

When making a determination of infringement, a court will first apply limiting doctrines to remove elements that cannot be protected by copyright, such as ideas or facts, before determining whether two pieces of art are substantially similar.¹⁰⁰ These limiting doctrines include the merger doctrine and *scènes à faire*.

The merger doctrine prevents a court from finding infringement of a copyrighted work when the idea underlying the work can only be expressed in a limited number of ways.¹⁰¹ Where the work expresses an unprotectable idea, the idea merges with its expression.¹⁰² Since copyright protection does not extend to the idea, the merger doctrine prevents a monopoly on the underlying idea.¹⁰³ For example, in *Morrissey v. Procter & Gamble Co.*,¹⁰⁴ the Court would not enforce a copyright on rules for a sweepstakes because the rules could only be expressed in a limited number of ways.¹⁰⁵ The Court did not want to allow someone to exhaust all future expression by “copyrighting a mere handful of forms.”¹⁰⁶ The Court determined that because the subject matter only allowed for a limited number of particular forms of expression, the idea and those expressions merged.¹⁰⁷ Using the public’s best interest as a rationale, the Court refused to “recognize copyright as a game of chess in which the public can be check-

⁹⁹ 17 U.S.C. § 411(a) (2000). The statute provides that:

where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights.

Id.

¹⁰⁰ *Ets-Hokin v. Sky Spirits Inc.*, 323 F.3d 763, 766 (9th Cir. 2003).

¹⁰¹ *Id.* at 765.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ 379 F.2d 675 (1st Cir. 1967).

¹⁰⁵ *Id.* at 678.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 678–79.

mated” by invalidating the form’s copyright through creation of the merger doctrine.¹⁰⁸

Likewise, in *Yankee Candle Co. v. Bridgewater Candle Co., LLC*,¹⁰⁹ the Court did not find infringement of candle labels because the pictures on the allegedly infringing label were not identical expression, despite embodying identical ideas.¹¹⁰ The scent of cinnamon could be pictorially expressed in multiple ways, such as by cinnamon sticks, cinnamon rolls, or cinnamon toast. All that was required for the merger doctrine to apply, however, was that there be a “sharply limited number of choices.”¹¹¹ The Court determined such was the case for an ordinary flavor such as cinnamon.¹¹² Although both the plaintiff and the defendant used a picture of a cinnamon roll, and there were other ways to express the idea of cinnamon, the Court applied the merger doctrine and found there was no infringement because the pictures were not substantially identical.¹¹³

A court can also apply the limiting doctrine of *scenes a faire* before determining infringement. *Scenes a faire* is related to the merger doctrine and precludes a finding of infringement when the expression embodied in the work necessarily flows from a commonplace idea.¹¹⁴ In this sense, “[w]hen the range of protectable expression...is narrow, the appropriate standard for illicit copying is virtual identity.”¹¹⁵ For example, commercial product shots have a constrained range of protectable expression because of particular conventions and the limited subject matter of photographing the product.¹¹⁶ When the idea of shooting the product is removed, the work is left with only a “thin” copyright that prevents only “virtually identical copying.”¹¹⁷ This “virtual identity” standard is a considerable obstacle for minimalist artists. For example, all a copyist needs to do to avoid infringement for painting a black square on a white background would be to slightly alter the size of the square, the brushstrokes, the shading, or some other trivial factor. Once any small change is made, the works

¹⁰⁸ *Id.* at 679.

¹⁰⁹ 259 F.3d 25 (1st Cir. 2001).

¹¹⁰ *Id.* at 37.

¹¹¹ *Id.*

¹¹² *Id.* at 36 n.6.

¹¹³ *Id.* at 37 n.7.

¹¹⁴ *Ets-Hokin*, 323 F.3d at 765.

¹¹⁵ *Id.*; *Apple Computer*, 35 F.3d at 1439.

¹¹⁶ *Ets-Hokin*, 323 F.3d at 766.

¹¹⁷ *Id.*

are no longer virtually identical and the copyist is free to use or abuse the artist's original idea.

This virtual identity standard has been applied mostly in the commercial context. Between two pieces of commercial art that express a simple idea, there is generally no infringement because the idea is removed through application of the limiting doctrines. For example, in *Ets-Hokin v. Skky Spirits Inc.*, the Court determined that an advertisement consisting of a photograph of a vodka bottle did not infringe a similar photograph of the same bottle when the defendant's photograph differed as much as possible given the constraints of the commercial product shot.¹¹⁸ Since the lighting, angles, shadows, highlight, reflections, and backgrounds differed, and the only aspect that was the same was the bottle, the photographs were not virtually identical, and therefore, the defendant's photograph did not infringe.¹¹⁹

The decision in *Yankee Candle Co.* is particularly detrimental to a minimalist artist attempting to protect her work. In essence, the Court determined that ideas that have many different ways of being expressed, such as the scent of cinnamon, were not protectable due to the merger doctrine.¹²⁰ If an idea which can be expressed in many starkly different ways, such as the scent of cinnamon, is considered to have only limited possibilities for expression, minimalists might find that regardless of how many different ways they express an idea, the merger doctrine would still apply. Since minimalist artists distill objects down to their core essences, a court might determine that by its very nature, an idea expressed in a minimalist manner can only be expressed in a limited number of ways. The work would be provided with only thin copyright protection, and, in essence, no protection at all.

C. *Music Infringement – The John Cage Suit*

Pictorial art and sculpture are not the only media where application of the limiting doctrines could create a problem for minimalist artists. Cases involving infringement of musical compositions are treated differently than cases involving infringement of other types of art. Generally, a court will compare the alleged infringing composition to the original to determine whether an ordinary listener would find that the two compositions are substantially similar.¹²¹ For example, in *Newton v. Diamond*, the Court found that the Beastie Boys's use in

¹¹⁸ *Id.* at 765.

¹¹⁹ *Id.* at 766.

¹²⁰ *Id.* at 36 n.6, 37 n.7.

¹²¹ *Newton v. Diamond*, 349 F.3d 591, 594 (9th Cir. 2003).

Pass the Mic of a three note segment of jazz flutist James Newton's 1978 composition *Choir* was *de minimis* and therefore noninfringing.¹²² A use is *de minimis* when the average audience would not recognize appropriation because the taking is too minor or fragmentary.¹²³ In that case, although there was a high degree of similarity, the similarity was limited in scope, requiring a determination of "fragmented literal similarity."¹²⁴ Therefore, one must determine whether the similarity is between trivial or substantial elements of the original work, as measured by considering the qualitative and quantitative significance of the portion copied from the whole original work.¹²⁵ Quantitatively the Beastie Boys used only six seconds of Newton's work, and qualitatively, it was not significant because the Beastie Boys used only a generic three-note sequence lacking distinctive elements; therefore, the average listener would not find substantial similarity between the works.¹²⁶

The compositions at issue in *Newton* were not works of minimalist composition. The principles laid out in that decision, however, are applicable in predicting how a court might treat a case involving infringement of a piece of minimalist composition, such as John Cage's composition *4'33"*. British composer Mike Batt created a work entitled *A One Minute Silence* that consisted of one minute of silence.¹²⁷ Cage's estate brought suit in a British court for copyright infringement and ultimately settled for an undisclosed six-figure award.¹²⁸

If an infringement suit over *4'33"* had been brought in the United States, it is unlikely that Cage would have prevailed. First, it is likely that *4'33"* would not be original, hence not copyrightable, since it is solely the idea of silence and arguably contains no expression. Even assuming that Cage could obtain a valid copyright on silence, the court might still determine that Batt's use was *de minimis*. Although both Cage's and Batt's compositions contained no notes, the use was not *de minimis* because Batt used an entire minute of Cage's piece. Even if the use was not *de minimis* and the works were found to be substantially similar, which is likely because the pieces are identical except for their length, Cage's chances of having a valid American copyright is unlikely due to the lack of original expression.

¹²² *Id.* at 598.

¹²³ *Id.* at 594.

¹²⁴ *Id.* at 596.

¹²⁵ *Id.*

¹²⁶ *Id.* at 597–98.

¹²⁷ Richardson, *supra* note 50, at 36.

¹²⁸ *Id.*

The limiting doctrines required by the idea/expression dichotomy, furthermore, would surely limit any copyright protection Cage might have. While the idea of composing a silent piece might be original, there is only one way in which to express silence—by remaining silent. Since there is only one way of expressing the idea, the merger doctrine and *scene a faire* would limit the copyright's protection by removing the idea of remaining silent. Since Cage's idea is the entire composition, Cage would have nothing left to copyright after the application of the limiting doctrines. Batts seemed to understand the weakness of Cage's purported copyright and initially expressed outrage at the suit but later agreed to the settlement out of respect for Cage and his work.¹²⁹

D. *Problems Arising Under Judicial Determinations of "Art"*

Although it is more likely that the minimalist artist would find inadequate copyright protection due to a court's application of the limiting doctrines, some works of minimalist art cannot meet the originality requirement. This situation illustrates the inherent problems that arise from judicial attempts to determine the worth of artwork.¹³⁰ The low standard of originality required to obtain a copyright is intended to minimize the possibility that judges would interject their own ideas of what is and is not art.¹³¹ Refraining from making determinations of whether a work is art ensures that judges remain objective and neutral.¹³² Judge Holmes famously acknowledged that:

[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judges. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.¹³³

¹²⁹ *Id.*

¹³⁰ See, e.g., Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 807 (2005) (recognizing that issues of judging art arise in copyright decisions).

¹³¹ Petruzzelli, *supra* note 70, at 120.

¹³² *Id.* at 811–12.

¹³³ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903).

Since art depends on individual taste, which epitomizes subjectivity, determinations regarding art are inherently subjective and judges cannot make artistic decisions while remaining objective.¹³⁴

While a court might not technically determine whether a work qualifies as art, the determination of originality has a direct relationship to the court's understanding of the work's artistic properties.¹³⁵ For example, Sherrie Levine is famous for her photograph "After Walker Evans," which was reshot from another famous photograph.¹³⁶ In determining whether Levine's photograph was original under the Copyright Act, the Court was not required to determine whether it was *per se* "art," but the determination did require the Court to understand the artistic properties of Levine's work.¹³⁷

Applying an objective standard to determinations of whether a work is "art," such as through a reasonable person test or community standard test, might also fail to achieve the desired objectivity. As acknowledged in *Bleistein v. Donaldson Lithographing Co.*, even artists who are now famous might have been met with severe criticism and public disapproval due to the same innovation and novelty which later placed them in such high esteem.¹³⁸ Minimalist art in particular would be hindered by determining whether it qualifies as "art." Although minimalism is now accepted by the art community, there is still popular resistance. Art historians and critics have stated that "[t]oward the end of the 1960s, art professionals began to stress the aesthetic qualities of minimal art—rightness of proportion, scale and surface—rather than its avant-garde claims, indicating that it had become established in the art world."¹³⁹ Others have noted the respect minimalist art receives from the art community but not the general public. "In the 1960s and 1970s, as the Minimalists and others made their first work and announced their conceptual innovations, the world (especially the art world) reacted with solemn admiration but not widespread enthusiasm. People expressed wonder and respect, then set them aside."¹⁴⁰ Other critics, however, have gone so far as to claim that minimalist art is nonart and, as such, is fraudu-

¹³⁴ Farley, *supra* note 130, at 812–13.

¹³⁵ *Id.* at 807.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See *Bleistein*, 188 U.S. at 251.

¹³⁹ IRVING SANDLER, ART OF THE POSTMODERN ERA: FROM THE LATE 1960S TO THE EARLY 1990S 11 (Icon eds., 1996).

¹⁴⁰ Robert Fulford, *Seeing Minimalists in a Maximal Space: An Innovative Gallery Celebrates Two Years in Upstate New York*, NATIONAL POST, June 28, 2005, at B1.

lent.¹⁴¹ For example, the John Cage settlement sparked much ridicule and outrage, as some could not fathom how an artist could first obtain a copyright on a composition embodying nothing and then attempt to enforce that copyright against an infringer who also composed nothing.¹⁴²

Minimalism's nonart characteristics appear to be the highest point of contention. Minimalism, however, is a movement toward "art as art."¹⁴³ By focusing on the inherent properties of the medium and purging anything extrinsic to the medium from their work, minimalist artists sought to make their painting more painting and their sculpture more sculpture.¹⁴⁴ What resulted from these attempts was that "[t]heir seemingly empty and boring, simple-looking [painting and] sculpture looked...more difficult, even iconoclastic, more an affront to conventional taste, more like nonart."¹⁴⁵ Critics accused early minimalist painters of "nihilism" and being "anti-artist[s] bent on bringing the art of painting to a historical dead-end."¹⁴⁶ Likewise, minimalist sculptors intended to emphasize the "perceptual and institutional terms of art's validation" by having their art vary so slightly from the nonart raw materials.¹⁴⁷ While these traits were calculated to achieve minimalist artists' goals to purify art, "not everyone is willing or able to see those terms laid bare."¹⁴⁸

Another common critique is that the techniques and expression minimalist artists utilize create works that are too "simple" to be considered art. Many people viewing minimalist art believe that they could easily recreate the work. How hard would it be to place a piece of wood in a gallery and call it art as Andre did or paint straight lines or simple geometric shapes on a canvas like Malevich, Martin, and Stella? For example, some critics note that:

[i]f you look at a Pollock drip painting or at a canvas consisting of eight parallel stripes of paint, and what you are looking for is *composition* (matters of balance, form, reference among the parts, etc.), the result is absurdly trivial: a child could do it; I could do it.¹⁴⁹

¹⁴¹ David Luban, *Legal Moderism*, 84 MICH. L. REV. 1656, 1658 (1986).

¹⁴² See William W. Bedsworth, *A Criminal Waste of Space: "Silence is ... Well, Golden,"* 44 ORANGE COUNTY LAWYER 40, 43–44 (2002) (ridiculing Batt's decision to settle for a six-figure sum, "which would make sense . . . only if the first five were zeroes").

¹⁴³ SANDLER, *supra* note 139, at 9.

¹⁴⁴ *Id.* at 9–10.

¹⁴⁵ *Id.*

¹⁴⁶ Baker, *supra* note 6, at 32.

¹⁴⁷ *Id.* at 9.

¹⁴⁸ *Id.*

¹⁴⁹ Luban, *supra* note 141, at 1658.

Conversely, an underlying assumption of minimalist art was that the work resisted “easy reading.”¹⁵⁰ The minimalist artist seeks to “affirm[] intellect as the determinative dimension of people and of art” and give “primacy to the observer’s bodily awareness as the standpoint from which he must construe an artwork’s rationale and his own role in determining what he sees.”¹⁵¹ While the technique might not be difficult, artistic creation resides in the minimalist artist’s decision to present simple geometric shapes or designs and unconventional, minimally altered sculptures as art.¹⁵²

The true validity of minimalism becomes apparent when viewed in the context of the artistic environment in which it developed.¹⁵³ Minimalism was a direct reaction to abstract expressionism, in which nothing was what it seemed.¹⁵⁴ Every object in the painting represented something different and the viewer had to use her subjective emotions to determine what the work actually meant.¹⁵⁵ Minimalists rejected this subjectiveness and replaced it with items that could only be one thing.¹⁵⁶ As one minimalist art historian has noted, minimalist art represents “[o]rder; it is extremely ordered. Purity, because it is perfectly stripped down. But, above all, truth because it doesn’t pretend to be anything else. And, like Shelley says, truth is beauty and beauty is truth.”¹⁵⁷ What could be more worthy of protection and promotion under the copyright laws than the art of truth? It is evident that because of minimalism’s unique nature, however, the current copyright law has the potential of not adequately protecting most minimalist art.

IV. ALTERNATIVE MODELS OF ARTIST’S PROTECTION

A. *Overview of European Moral Rights*

While most minimalist art will arguably meet the minimal standards for creativity and originality, the level of protection from infringement actually

¹⁵⁰ Baker, *supra* note 6, at 10.

¹⁵¹ *Id.*

¹⁵² See Freeland, *supra* note 11, at paras. 2, 5 (determining that minimalist artists’ works are not fraudulent despite criticism they often receive because of the validity of the artist’s message when viewed in the context of the atmosphere in which the art was created).

¹⁵³ *Id.* at paras. 5, 7.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at para. 5.

¹⁵⁷ *Id.* at para. 12.

granted by the copyright following application of the judicially created limiting doctrines is thin. European copyright law could serve as a guide for enacting laws that would promote and protect all artists, regardless of their style. European copyright law is starkly different than American copyright law due to its traditional respect for the moral rights of its artists.¹⁵⁸ In *Eldred v. Ashcroft*, the Supreme Court recognized that unlike European copyright law, American copyright law is not aimed at protecting moral rights, and therefore must be protecting something else.¹⁵⁹

American copyright law's traditional aim is to protect the artist's economic right to her work.¹⁶⁰ The Copyright Act focuses on the economic value of a copyright by granting the copyright owner the exclusive right to copy, reproduce, or distribute the original work, as well as to prepare derivative works, publicly perform the work, or publicly display the work.¹⁶¹ It has been noted that "American Copyright law focuses overwhelmingly, if not exclusively, on economic rights,"¹⁶² in that the Copyright Act "continues this country's tradition of safeguarding only the pecuniary rights of a copyright owner."¹⁶³ This focus on protecting the artist's economic interests derives from the fact that American copyright law was founded in, and attempts to protect, traditional property rights.¹⁶⁴ Moral rights conflict with traditional common law property rights; therefore American copyright law has resisted recognizing artists' moral rights.¹⁶⁵

Moral rights are not traditional property rights and do not protect the artist's interest in her property; they are more analogous to civil rights or rights of publicity and seek to protect the artist's extension of herself.¹⁶⁶ Generally, moral rights protect the artist's control over the creative process and the finished

¹⁵⁸ *Eldred v. Ashcroft*, 537 U.S. 186, 259 (2003).

¹⁵⁹ *Id.*

¹⁶⁰ Gifford, *supra* note 13, at 572; Kwall, *supra* note 18, at 2; Jimmy A. Frazier, Student Author, *On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds: Notes of Building a Sociology of Copyright Law*, 70 TUL. L. REV. 313, 315 (1995).

¹⁶¹ Kwall, *supra* note 18, at 2.

¹⁶² Frazier, *supra* note 160, at 315.

¹⁶³ Kwall, *supra* note 18, at 2.

¹⁶⁴ *Cort v. St. Paul Fire & Marine Ins. Co.*, 311 F.3d 979, 985 (9th Cir. 2002); *Lee v. A.R.T. Co.*, 125 F.3d 580, 582 (7th Cir. 1997).

¹⁶⁵ *Cort*, 311 F.3d at 985; *Lee*, 125 F.3d at 582 (noting that until only recently it was accepted that American Copyright law would not enforce any moral rights).

¹⁶⁶ Liemer, *supra* note 16, at 45.

work of art.¹⁶⁷ Additionally, moral rights protect an artist after she has given up legal title in her work, for example through a sale.¹⁶⁸

Legal systems protecting artists' rights did not emerge until after the invention of the printing press, when the sovereign bestowed upon printers the economic right to a monopoly on the reproduction of a work for a fixed time.¹⁶⁹ Moral rights first emerged in France during the late eighteenth century when courts recognized that artists' rights were a natural right arising through the artist's creation of the work and not a right created and bestowed by the sovereign.¹⁷⁰ During the French Revolution, artists' rights developed into *droits patrimoniaux*, which established that an artist had natural rights in her work instead of a royal privilege from the sovereign.¹⁷¹ While *droits patrimoniaux* recognized natural rights, they were distinguishable from moral rights in that they were primarily economic rights that protected the artist's right to exploit her work.¹⁷²

Moral rights, or *droits moral*, developed following the French Revolution in response to Enlightenment and Revolutionary ideology.¹⁷³ *Droits moral* were designed to protect the personality of the artist and the integrity of her creative work by protecting four overlapping categories of rights.¹⁷⁴ The right of disclosure, *droit de divulgation*, gives the artist complete authority over the decision to publish, sell, unveil, or make her work public.¹⁷⁵ The right of withdrawal or retraction, *droit de retrait ou de repentir*, gives the artist the right to withdraw or modify a work after it was made public.¹⁷⁶ The right of attribution or paternity, *droit a la paternite*, gives the artist the right to claim authorship in her work, disclaim authorship wrongly attributed to her, and prevent attribution of her work to another.¹⁷⁷ The right of integrity, *droit au respect de l'oeuvre*,

¹⁶⁷ *Id.* at 44.

¹⁶⁸ *Cort*, 311 F.3d at 985.

¹⁶⁹ Karen M. Corr, Comment, *Protection of Art Work Through Artists' Rights: An Analysis of State Law and Proposal for Change* 38 AM. U. L. REV. 855, 862–63 (1989).

¹⁷⁰ *Id.* at 863.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Fraizer, *supra* note 158, at 335.

¹⁷⁴ Lee, *supra* note 19, at 801; Corr, *supra* note 169, at 863–64.

¹⁷⁵ Kwall, *supra* note 18, at 6; Lee, *supra* note 19, at 801–02; Liemer, *supra* note 16, at 52–54; Corr, *supra* note 169, at 864; Fraizer, *supra* note 158, at 336.

¹⁷⁶ Kwall, *supra* note 18, at 6; Liemer, *supra* note 16, at 52–54; Corr, *supra* note 169, at 864.

¹⁷⁷ Kwall, *supra* note 18, at 7; Lee, *supra* note 19, at 802; Liemer, *supra* note 16, at 47–50; Corr, *supra* note 169, at 864–65.

gives the artist the right to preserve work from intentional or negligent alteration or mutilation.¹⁷⁸

In addition to traditional moral rights, some countries such as France also recognize resale royalty rights, or *droit de suite*, which give the artist the right to earn a percentage of the profits when another commercially exploits her work or otherwise benefits from it.¹⁷⁹ Resale royalty rights developed in France during the 1920s to allow an artist to earn a royalty from the resale of her work because traditional rights did not adequately compensate fine artists who were less likely to sell reproductions and copies.¹⁸⁰

Moral rights are considered to be independent and superior to economic rights because they are the basis for granting economic rights.¹⁸¹ While economic rights are salable, transferable, and alterable by contract, moral rights are not because they are personal, inalienable, unassignable, and perpetual, theoretically lasting forever.¹⁸² In some countries, an heir can exert the moral rights of a deceased artist, however, the heir cannot protect any independent interest she might have; she can only protect the deceased artist's creative interests.¹⁸³

B. American Copyright Law's Attempt at Protecting Moral Rights

1. Overview of VARA

Fifteen years before the enactment of the Visual Artists Rights Act ("VARA"), which granted limited federal statutory protection to artists' moral rights, a court recognized that protecting moral rights could also serve to protect economic rights.¹⁸⁴ Although American copyright law is designed to give an economic incentive to further artistic creation, moral rights further this economic incentive by granting artists relief for mutilation or misrepresentation of the work on which the artist financially depends.¹⁸⁵

¹⁷⁸ Kwall, *supra* note 18, at 7–9; Lee, *supra* note 19, at 802; Liemer, *supra* note 16, at 50–52; Corr, *supra* note 169, at 865.

¹⁷⁹ Liemer, *supra* note 16, at 55; Frazier, *supra* note 169, at 338.

¹⁸⁰ Frazier, *supra* note 160, at 338.

¹⁸¹ Corr, *supra* note 169, at 865.

¹⁸² Kwall, *supra* note 18, at 15–16; Lee, *supra* note 19, at 802; Liemer, *supra* note 16, at 44–45; Frazier, *supra* note 160, at 336.

¹⁸³ Kwall, *supra* note 18, at 15; Liemer, *supra* note 16, at 44–45.

¹⁸⁴ *Gilliam v. American Broad. Co.*, 538 F.2d 14, 24 (2d Cir. 1976), *see* Liemer, *supra* note 16, at 44.

¹⁸⁵ *Gilliam*, 538 F.2d at 24.

In 1988, the United States acceded to the Berne Convention for the Protection of Literary and Artistic Works, which contained a moral rights provision under Article 6 *bis*.¹⁸⁶ In response, the United States implemented VARA, codified in 17 U.S.C. § 106A, in 1990 to protect the moral rights of certain visual artists.¹⁸⁷ While VARA is analogous to Article 6 *bis* of the Berne Convention, it grants a narrower scope of rights to a more limited category of works.¹⁸⁸ Additionally, some states have enacted general laws protecting moral rights, but federal law preempts these state laws when they grant the same rights to a work of art.¹⁸⁹ States are allowed to grant additional moral rights to artists, however, states are not required to do so, and only a few states offer stronger protection to artist's moral rights.¹⁹⁰

VARA protects two moral rights, the right of "integrity" and the right of "attribution."¹⁹¹ Section 106A grants the artist the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation and any intentional distortion, mutilation, or modification of that work is a violation of that right."¹⁹² This provision creates the right of integrity, which protects the artist by allowing her to prevent any intentional deformation or mutilation to her work, even after transferring legal title.¹⁹³ Section 106A further provides that the right "to claim authorship of that work" as well as the right "to prevent the use of his or her name as the author of any work of visual art which he or she did not create."¹⁹⁴ Additionally, § 106(A) also grants the artist the "right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation."¹⁹⁵ Together, these provisions protect the right of attribution by allowing the artist to be recognized as the creator of the work and include the right

¹⁸⁶ *Cort*, 311 F.3d at 985.

¹⁸⁷ *Id.*

¹⁸⁸ *Quality King Distributors, Inc. v. L'anza Research Intl., Inc.*, 523 U.S. 135, 149 n.21 (1998)

¹⁸⁹ 17 U.S.C. §§ 301(f)(1)–(2) (2000); *see* Liemer, *supra* note 16, at 46 n.36.

¹⁹⁰ Liemer, *supra* note 16, at 46 n.36.

¹⁹¹ 17 U.S.C. § 106A(a) (2000); *Cort*, 311 F.3d at 984–85; *see* H.R. Rep. No. 101–514, at 5 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6915, 6915 (stating that VARA protects rights analogous to moral rights).

¹⁹² 17 U.S.C. § 106A(a)(3)(A).

¹⁹³ *Id.*; *Cort*, 311 F.3d at 985 (quoting *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995)).

¹⁹⁴ 17 U.S.C. § 106A(a)(1)(A)–(B).

¹⁹⁵ 17 U.S.C. § 106A(a)(2).

to prevent the use of the artist's name on a work that has subsequently been distorted by another.¹⁹⁶ Finally, VARA also grants an artist the right "to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right."¹⁹⁷ This provision grants additional protection of the artist's right of integrity by preventing destruction of certain works of "recognized stature."¹⁹⁸

2. Inadequacy of VARA

Despite these attempts to protect moral rights, there are still problems, especially in relation to protecting minimalist art. First, VARA grants only two moral rights, the rights of attribution and integrity, instead of the five moral rights available under European copyright law.¹⁹⁹ Second, VARA only applies to works of visual art, which are narrowly defined to include only paintings, drawings, prints, and sculptures that are limited to two hundred prints or reproductions and "exhibit-quality" photographs.²⁰⁰ Most minimalist artists meet this requirement, because minimalism is a movement within the fine arts, particularly sculpture and painting, and most artists do not reproduce their work.²⁰¹ Minimalist composers such as John Cage, however, would not be protected. Finally, under VARA, the artist is permitted to waive her moral rights and only the artist, not an heir or assign, can assert her moral rights to the work, whereas European moral rights are personal, inalienable, unassignable, and perpetual.²⁰²

Another area within VARA where minimalist artists might not receive adequate protection is through the requirement that a work be of "recognized stature."²⁰³ To be of "recognized stature," a work must be recognized by art experts, the artistic community, or the general public and must be viewed as

¹⁹⁶ 17 U.S.C. § 106A(a)(1)–(2); *Cort*, 311 F.3d at 985 (citing *Carter*, 71 F.3d at 81).

¹⁹⁷ 17 U.S.C. § 106A(a)(3)(B).

¹⁹⁸ *Id.*; *Cort*, 311 F.3d at 985.

¹⁹⁹ See Fraizer, *supra* note 158, at 335–37 (listing the five moral rights typically available under European law)

²⁰⁰ Fraizer, *supra* note 160, at 344. Liemer, *supra* note 20, at 2–3.

²⁰¹ Liemer, *supra* note 20, at 3 (stating that VARA protects what is traditionally known as fine art, including painting and sculpture).

²⁰² 17 U.S.C. § 106A(e)(1); Fraizer, *supra* note 160, at 336; Kwall, *supra* note 18, at 15–16; Lee, *supra* note 19, at 803–804; Liemer, *supra* note 16, at 44–45.

²⁰³ 17 U.S.C. § 106A(a)(3)(B); see Liemer, *supra* note 20, at 2–3 (quoting definition of "work of visual art").

meritorious.²⁰⁴ In general, “[t]o achieve VARA protection, an artist must show not only the work’s artistic merit but also that it has been recognized as having such merit.”²⁰⁵ Stature is usually established through expert testimony.²⁰⁶ Furthermore, the stature of a particular work must be established and not simply through the stature of the artist’s other works.²⁰⁷ For example, although the court noted that it “would be hard pressed to hold that a newly discovered Picasso is not within the scope of VARA simply because it has not been reviewed by experts in the art community,” an artist who had only achieved local notoriety was not so well-known that all her work would be of “recognized stature.”²⁰⁸ Additionally, some courts have suggested that as a matter of law a work that has never been exhibited cannot be a work of recognized stature.²⁰⁹ For example, newspaper articles praising the artist’s sculpture were enough to prove the work was one of “recognized stature” within the meaning of VARA.²¹⁰ The court further noted that “[w]e are not art critics, do not pretend to be and do not need to be to decide this case”²¹¹ because experts had recognized the work.²¹² It is not clear, however, what the decision would have been if critics had criticized instead of praised the work.

Although VARA provides protection of some moral rights, VARA does not address the inadequacies of American copyright law because, while purporting to protect moral rights, it is in fact protecting economic rights.²¹³ For example, the moral rights offered under VARA, the right to integrity and attribution, are most protective of economic rights. It is telling that the rights of disclosure and withdrawal are missing, as these are most protective of purely moral interests that do not also protect economic rights.²¹⁴

²⁰⁴ *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999); *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004).

²⁰⁵ *Scott*, 309 F. Supp. 2d at 400.

²⁰⁶ *Martin*, 192 F.3d at 612; *Scott*, 309 F. Supp. at 400.

²⁰⁷ *Scott*, 309 F. Supp. at 400.

²⁰⁸ *Id.*

²⁰⁹ *Pollara v. Seymour*, 344 F.3d 265, 271 (2d Cir. 2003) (Gleeson, J., concurring).

²¹⁰ *Martin*, 192 F.3d at 613.

²¹¹ *Id.* at 610.

²¹² *Id.* at 613.

²¹³ Dworkin, *supra* note 27, at 264 (noting that “[a] mechanism is required to prevent moral rights from being enforced in a way which primarily promotes an author’s economic interests under the guise of protecting his personality interests”).

²¹⁴ *See infra* Part V, Section B.

Finally, few artists have attempted to enforce their rights under VARA. One reason for this lack of VARA enforcement is the fact that many artists lack knowledge of VARA.²¹⁵ The cost of bringing litigation, as well as the high percentage of plaintiff's who lose on VARA claims, further discourages artists from attempting to enforce their VARA rights.²¹⁶ For example, one commentator has noted that "although Congress professes to protect moral rights through existing law, American courts are still reluctant to embrace the moral right of artists."²¹⁷

Despite VARA's inadequacies, it is a step in the right direction toward full protection of moral rights. Moral rights could offer protections to minimalist artists that are lacking under American copyright law's current focus on economic rights. The current economic rights model of copyright is uniquely adapted to protecting commercial artists and effectively protects their primary interest, the economic value of their work, by preventing copying.²¹⁸ VARA's limited moral rights provisions are consistent with protecting commercial artists' interests, because although VARA purports to grant moral rights, its provision of moral rights are centered on protecting economic interests.²¹⁹ American copyright law's protection of economic interests, however, does not adequately protect the fine artist as it does not address her interest in protecting her persona and reputation in connection to a piece of original work.

V. IMPOSING DIFFERENT STANDARDS FOR COMMERCIAL AND FINE ARTS

A. *Traditional Treatment of Commercial Art and Fine Art Under the Copyright Act*

Minimalist art faces many obstacles to obtaining protection under American copyright law, particularly in the limitation of copyright protection to original expression, as opposed to original ideas. In the commercial context, the idea/expression dichotomy makes sense. If the Yankee Candle Company could secure a monopoly on all depictions of an apple, it could prevent other candle

²¹⁵ Liemer, *supra* note 20, at 6; see RayMing Chang, *Revisiting the Visual Artists Rights Act of 1990: A Follow-up Survey About Awareness and Waiver*, 13 TEX. INTELL. PROP. L.J. 129, 144–45 (2005).

²¹⁶ Liemer, *supra* note 20, at 6; McCartney, *supra* note 24, at 71.

²¹⁷ McCartney, *supra* note 24, at 36.

²¹⁸ See Gifford, *supra* note 13, at 573–74.

²¹⁹ *C.f.* Dworkin, *supra* note 27, at 264 (noting that moral rights should be used to enforce personal interests than to promote economic interests).

companies from effectively representing what their product smells like, and it would ultimately hinder competition.²²⁰ In this sense, the copyright on the label would not only allow the artist to exclude others from copying her work, which she has the legitimate right to do, but also allows her to exclude others from effectively selling the underlying product, which she does not have a legitimate right to do.²²¹

In the context of the fine arts, ensuring fair competition requires different considerations. Unlike in the commercial arts context, there is no fear that granting a monopoly on a painting or sculpture will also give the copyright holder the power to monopolize some related product, such as a candle. Additionally, copyright is granted on the work of art as a whole. If an artist obtains a copyright on a white square, she can only exclude others from copying her white square without additional expression. Her copyright would not give her the right to exclude all uses of a white square, because copyright on a painting of a white square does not hinder other artists from using a similar white square as an element in a larger composition. The issue for the minimalist artist is that her composition as a whole looks so much like what other artists would only consider one element in a larger composition.²²² As the fine artist seeks to protect her entire composition, which includes not only her original expression but also her original idea and her association with the work, the concerns in regard to ensuring fair competition among commercial artists are not relevant and strict compliance to the limiting doctrines is unnecessary.

Prior to 1909, courts, relying on the Constitutional preamble, allowed copyright only for “promotion of science;” to obtain a copyright the work must materially contribute to useful knowledge.²²³ This “promotion of science” test granted protection to certain categories of works that provided general knowledge that would lead to society’s betterment.²²⁴ Advertisement and promotional

²²⁰ See generally, Diane Leenheer Zimmerman, *It’s an Original! (?): In Pursuit of Copyright’s Elusive Essence*, 28 COLUM. J.L. & ARTS 187, 205–06 (2005) (discussing copyright on advertisements for “trite” commercial goods).

²²¹ See generally *id.* at 209–10 (“Today, copyright protects the doodles I drew during my last faculty meeting, and the text on shampoo labels. Claimants can sue for infringement of the tiny changes from the original they have made in a derivative work based on Paddington Bear. A rigorous standard for copyright, I would suggest, actually comports with our common sense understanding of why this form of economic protection is important far better than these examples do”).

²²² By analogy, copyrighting short phrases does not exclude others from using those words in their writings; it only prevents someone from copying the phrase exactly.

²²³ Zimmerman, *supra* note 220, at 199–200.

²²⁴ *Id.* at 200.

materials were not copyrightable subject matter.²²⁵ In 1903, the Court, through its landmark decision in *Bleistein v. Donaldson Lithographing Co.*,²²⁶ determined that promotional circus posters met the originality requirement and were copyrightable despite being advertisements.²²⁷ In response, the Copyright Act was rewritten in 1909 to extend protection to all writings by an author, leaving courts less opportunity to apply the “promotion of science” test.²²⁸

Although copyright was available for advertisements and other trite commercial works, there were stricter standards to securing a copyright, including a requirement that the work be deposited, a strict notice requirement, and strict renewal requirements to maintain the copyright.²²⁹ Under the Copyright Act of 1909, to obtain a copyright on a work it had to be deposited with the Library of Congress; failure to do so could result in loss of the copyright.²³⁰ Currently, copyright attaches upon fixation, which occurs as soon as the artist creates the work in a permanent form.²³¹ Also, under the Copyright Act of 1909, any work published without notice of the copyright entered the public domain.²³² Under the current Copyright Act, notice is permitted but not required, and failure to obtain a formal copyright does not surrender the work to the public domain.²³³ Finally, under the Copyright Act of 1909, an artist was entitled to an initial copyright term and a renewal term, which was lost at the end of the initial term if the copyright owner failed to register an intent to renew in a timely manner.²³⁴

Even during the mid-century, the types of work to which copyright protection extended was limited. The Copyright Act of 1909 initially protected “works of art” not “works of authorship” as it currently does.²³⁵ For example, reconsider the court’s decision in *Bailie* to uphold a denial of copyright on a cardboard star because the star was not a “work of art” as it “appears . . . within

²²⁵ *Id.*

²²⁶ 188 U.S. at 251.

²²⁷ *Id.*

²²⁸ See Zimmerman, *supra* note 220, at 205.

²²⁹ *Id.*

²³⁰ Act of March 4, 1909, ch. 320, § 10, 35 Stat. 1075, 1078 (1909) (repealed 1947).

²³¹ 17 U.S.C. §§ 101–102(a) (2000).

²³² Act of March 4, 1909, ch. 320, § 13, 35 Stat. 1075, 1078 (1909) (repealed 1947).

²³³ 17 U.S.C. §§ 401(a), 402(a) (2000).

²³⁴ Act of March 4, 1909, ch. 320, § 24, 35 Stat. 1075, 1080 (1909) (repealed 1947).

²³⁵ Compare 17 U.S.C. § 102, with *Bailie*, 258 F.2d at 426 (defining “works of art” as used in the Act of March 4, 1909, ch. 320, § 5(g), 35 Stat. 1075, 1076 (1909) (repealed 1947)).

the historical and ordinary conception of the term art.”²³⁶ Through its definition of “art,” the court in *Bailie* was attempting to exclude mere commercial items from obtaining a copyright. Unfortunately, the test the court developed would have an impact on an artist attempting to obtain a copyright on a piece of minimalist art, due to the initial critique and dislike of the movement. As will be discussed *infra*, however, copyright might be immaterial to the minimalist artist, as the economic incentives currently provided are not the protection and incentive needed to promote the fine arts.

The stricter requirements for securing and maintaining a copyright would have prevented artists from copyrighting or maintaining a copyright on trivial commercial works such as labels, advertisements, and other fungible commercial goods like greeting cards or t-shirt designs.²³⁷ Since copyright now attaches to all writings upon fixation for life plus seventy years,²³⁸ obtaining a copyright on trite commercial goods is no longer a burden. As a result, works that might arguably deserve only thin copyright protection, such as the label on a candle, are copyrighted. Therefore, the courts have responded with a stricter originality standard and limiting doctrines.²³⁹ While these stricter standards ensure that works not truly deserving of a copyright receive limited copyright protection, it also prevents many works of minimalist art from receiving a full level of copyright protection because after application of the limiting doctrines the work is left with only a thin copyright.

Inadequate copyright protection for minimalist art might be irrelevant. The lack of copyright cases involving minimalist art, and fine arts in general, indicates that the copyright protection that is currently available is not a major incentive for most minimalist artists. One reason for this lack of copyright litigation is due to the fact that the demand for works in the fine arts is for unique works.²⁴⁰ Artists do not create exact copies of their work, even artists such as Ad Reinhardt, who create a series of works that are similar, strive to create unique pieces of art. The value of a work of fine art is in the fact that there is only one original.²⁴¹ Although forgers attempt to exactly copy a work, if the forgery is discovered the copy is valueless while the original retains its high value.²⁴²

²³⁶ 258 F.2d at 426.

²³⁷ See Zimmerman, *supra* note 220, at 205.

²³⁸ 17 U.S.C. § 302(a) (2000).

²³⁹ Zimmerman, *supra* note 220, at 200–201.

²⁴⁰ Gifford, *supra* note 13, at 599.

²⁴¹ *Id.* at 600.

²⁴² *Id.*

Commercial art is different in that it is fungible.²⁴³ Each subsequent copy of a work of commercial art has the same value as the original (or even the copy of the original) that it was copied from.²⁴⁴ Therefore, as more commercial art is created, more commercial art is consumed without a decrease in cost.

B. *Advantages of a Dual System Protecting Economic and Moral Interests*

Enforcement of moral rights would provide the scope of protection that minimalist artists, as well as other artists working within the fine arts, actually need. Unlike economic rights, moral rights focus on protecting the artist's persona and reputation, which in turn provides an incentive for artistic creation by encouraging an environment in which the artist is comfortable expressing herself without fear of being disrespected.²⁴⁵ In turn, protection of moral rights can also further economic rights, remaining in sync with American copyright law.²⁴⁶

For example, the right of attribution would ensure that a minimalist artist receives recognition for her work and prevents her name from being attributed to other similar works that she did not create.²⁴⁷ In addition, this right would ensure that the minimalist artist received credit only for work she created, which would prevent her image from being tarnished by others who copy her style ineffectively.²⁴⁸

The right of integrity would allow the minimalist artist to preserve the integrity of her work, even after she sells it.²⁴⁹ Likewise, the right of withdrawal or retraction would allow the artist to remove works whose integrity has been compromised.²⁵⁰ Both rights would allow the artist to ensure that others see her work as she intended it, thus protecting her idea by permitting the artist to prevent others from altering the way in which she expresses it. Furthermore, it would ensure the original piece, which is typically the only copy of the work,

²⁴³ *Id.* at 600.

²⁴⁴ *Id.* at 600–01.

²⁴⁵ Liemer, *supra* note 16, at 43–44.

²⁴⁶ *Id.* at 44.

²⁴⁷ Corr, *supra* note 169, at 864–65; Kwall, *supra* note 18, at 7; Lee, *supra* note 19, at 802; Liemer, *supra* note 16, at 47–50.

²⁴⁸ Corr, *supra* note 169, at 864–65; Kwall, *supra* note 18, at 7; Lee, *supra* note 19, at 802; Liemer, *supra* note 16, at 47–50.

²⁴⁹ Corr, *supra* note 169, at 865; Kwall, *supra* note 18, at 8–9; Lee, *supra* note 19, at 802; Liemer, *supra* note 16, at 50–52.

²⁵⁰ Corr, *supra* note 169, at 864; Kwall, *supra* note 18, at 6; Liemer, *supra* note 16, at 54–55.

remains in existence and continues to generate notoriety and respect for the artist.

In the fine arts, a copy does not have the same value as the original, therefore the artist must protect the original, through the rights of integrity and withdrawal, to maintain any economic benefit from her work.²⁵¹ Furthermore, an artist must protect her reputation and association with the original work through the right of attribution so that any new work she creates will receive a warmer reception and, consequently, secure a higher selling price than that of a relatively unknown artist. This protection is important within the field of the fine arts as famous artists can attract astronomical prices for their works, especially upon resale in the secondary market.²⁵² While an artist might not earn a royalty from printing millions of copies of her work onto coffee mugs or t-shirts, by preventing the exploitation of her work and limiting the existence of each copy of her work to a single piece, she maintains her reputation as a serious artist and is able to demand a higher price for future sales of her art.

More crucially, the resale royalty right, which allows an artist to earn a percentage of the profits when another person commercially exploits her work or otherwise benefits from it, would truly protect the minimalist artist's economic interest in her work.²⁵³ Since many minimalist artists work in the fine arts and are less likely to sell reproductions and copies, allowing the artist to recover royalties from the resale of her work can help to compensate for her artistic creation. This right is especially critical to artists who develop new styles and techniques. For example, an artist who develops a new style might originally only be able to sell her work at a low price because the public is not familiar with the style.²⁵⁴ As the style becomes popular or widely accepted within the art world, however, the artist's early works would be much more valuable and sell at much higher prices.²⁵⁵ Without resale royalty rights, the artist would never be able to benefit from the popularity or esteem her work achieved and would be under-compensated for her creation.

While moral rights might incidentally protect economic rights, the focus and intent of these rights is to protect the artist as a whole and not solely the

²⁵¹ Gifford, *supra* note 13, at 600.

²⁵² For example, Vincent Van Gogh sold only one painting during his lifetime (although he did receive some commissions and bartered work for necessities. Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1573 (1989). In 1990, his painting *Portrait of Dr. Gachet* sold at auction for \$82.5 million. Hilarie M. Sheets, *Parting with the Family van Gogh*, N.Y. TIMES, Apr. 22, 2006, at B2.

²⁵³ Liemer, *supra* note 16, at 55.

²⁵⁴ *Supra* text accompanying note 252.

²⁵⁵ *Id.*

artist's pecuniary interests.²⁵⁶ This particular focus on moral right protection can be seen in situations where moral rights protect the artist's interest in her persona and reputation when such protection is not in her best economic interest. For example, the right of disclosure serves the artist's interest in protecting her persona and reputation by providing her complete control over when to declare a work finished and display the work to the public.²⁵⁷ Unlike the rights of integrity and attribution, however, it does not also serve as an economic incentive. The artist cannot economically benefit from a work that is not publicly available. Likewise, the right of withdrawal allows an artist to remove a work from the public at any time, thus protecting her persona and reputation by allowing her to control whether the public can access a work that she is no longer comfortable displaying as an extension of herself.²⁵⁸ The right of withdrawal is an affront to most notations of economic rights, because it allows an artist to retrieve the work and change or destroy it, even after it was sold and the artist received an economic benefit from it.²⁵⁹ Finally, under VARA, moral rights can be waived, suggesting that the artist can do away with these rights when economically favorable. Under European copyright law, however, moral rights cannot be waived and are perpetual, thus eliminating the choice to forego a right for economic gain and reinforcing the importance of protecting the artist's interest in her persona and reputation and not her pecuniary interests.²⁶⁰

Additionally, moral rights will protect interests that are unprotected under a copyright law focusing on economic rights, as the protection of the rights places the artist at an economic disadvantage. For example, the right of disclosure often arises as a practical matter in controversies involving an artist's directive to destroy her unfinished or undisclosed works at her death. For example, the author Franz Kafka's will directed that all his diaries, manuscripts, and letters be destroyed upon his death.²⁶¹ Kafka's heir refused to destroy the unpublished works because he believed they were of great literary value.²⁶² Even if an heir is willing to destroy an artist's unfinished work, a court is likely to prohibit the destruction because such destruction is economically wasteful.²⁶³ Unlike destruction of property before death, where the economic costs fall solely on the

²⁵⁶ Liemer, *supra* note 16, at 44.

²⁵⁷ *Id.* at 53.

²⁵⁸ *Id.* at 54.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 44–45.

²⁶¹ JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 28 (7th ed. 2005).

²⁶² *Id.*

²⁶³ Lior Jacob Strahilevitz, *The Right to Destroy*, 114 *YALE L.J.* 781, 853 (2005).

testator, destruction of property after death falls on the public.²⁶⁴ The right of disclosure would allow an artist to direct the destruction of unfinished works, as only the artist can decide when to release her work. As moral rights are perpetual, the artist's heir could enforce the right of disclosure and destroy the work despite a court's rejection. While destruction of property at death might be economically unsound, it serves to protect the artist's persona and reputation. For example, in evaluating the economic arguments in favor of the prohibition against destruction of property through a will, one scholar has noted that:

courts generally disregard artists' substantial First Amendment interests in ensuring that incomplete, inferior, or otherwise disfavored unpublished works in their collections are destroyed upon their passing. That attitude is disturbing. Sane artists should decide which of their works are presented to the world—they have the correct economic incentives and greater familiarity with their own work than anyone else. Disregarding an unambiguous destruction provision in a will raises the specter of compelled speech. Moreover, an anti-destruction rule creates perverse incentives for ailing artists to destroy works that they might not be able to finish during their lives and to avoid committing high-risk thoughts to paper until they have fully conceptualized the entire project.²⁶⁵

Applied posthumously, the right of disclosure allows an artist to control her persona and reputation even when she would never receive an economic benefit from it, reinforcing the concept that moral rights serve interests that are distinct from the economic interests protected by American copyright law.

The right of integrity can also be invoked to protect the artist's persona and reputation even when the result is economically disadvantageous. Consider the controversy over colorization of the film *The Asphalt Jungle*. After viewing only a few minutes of his classic 1950 film, director John Huston was appalled that it had been colorized without his consent.²⁶⁶ Although he had no recourse under American law, his estate was able to enforce Huston's right of integrity in a French court.²⁶⁷ Allowing the artist to enforce his moral rights and prevent colorization actually harms the artist economically, as the colorization of films has proved to be very profitable. Colorization of films not only allows for the sale of remastered DVDs but also allows broadcasting companies who air the film to charge more for advertising time due to the increased popularity of a

²⁶⁴ DUKEMINIER ET AL., *supra* note 259, at 28–29.

²⁶⁵ Strahilevitz, *supra* note 263, at 853.

²⁶⁶ Fraizer, *supra* note 158, at 314–15.

²⁶⁷ *Id.*

colorized film over the black and white version.²⁶⁸ Compelling examples of this trend include the fact that the black and white version of *Miracle on 34th Street* generated revenue of approximately \$30,000 per year while the colorized version earned \$350,000 per year.²⁶⁹ Additionally, the black and white version of *Yankee Doodle Dandy* attracted 3.5 million viewers when first broadcasted yet the colorized version attracted 5 million viewers when broadcasted one year later.²⁷⁰ Due to the public demand for colorized films, it would be unwise from an economics standpoint to allow an artist to enforce her moral right to integrity. A French court, where moral rights are fully embraced, however, did just that.²⁷¹

C. *Advantages of a Dual System Protecting Both Economic and Moral Interests*

Full adoption of moral rights within American copyright law would not be an adequate solution.²⁷² Although placement of a system of moral rights protection within the Copyright Act seems logical in the absence of a better location, American copyright law in general is starkly different than moral rights protection, as the two systems developed for very different reasons.²⁷³ Similarly, replacing traditional American copyright law with moral rights protection would also be unworkable. Unlike fine artists, commercial artists are motivated by economic interests.²⁷⁴ It is important that American copyright law attempts to prevent commercial exploitation and monopolization of commercial advertising and commercial art through the idea/expression dichotomy and the limiting doctrines. Those concerns, however, do not affect artist who work in the fine arts. Although works of commercial art are often attached to another product to which the artist has no right to monopolize, works of fine arts are not attached to

²⁶⁸ Warren H. Husband, *Resurrecting Hollywood's Golden Age: Balancing the Rights of Film Owners, Artistic Authors and Consumers*, 17 COLUM.-VLA J.L. & ARTS 327, 333–34 (1993).

²⁶⁹ *Id.* at 344.

²⁷⁰ *Id.*

²⁷¹ Fraizer, *supra* note 158, at 314–15.

²⁷² See Dworkin, *supra* note 27, at 264; Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1128 (1990).

²⁷³ Leval, *supra* note 272, at 1128.

²⁷⁴ See Michelle Brownlee, Note, *Safeguarding Style: What Protection is Afforded to Visual Artists by the Copyright and Trademark Laws?*, 93 COLUM. L. REV. 1157, 1161–62 (1993) (explaining that fine artists require a different form of copyright protection because unlike other artists they do not derive value from the reproduction of their works).

a secondary product, so protecting the artist's interests in fine art does not raise similar concerns regarding monopolies.²⁷⁵

In protecting moral rights, economic concerns are secondary as moral rights protect the original work and the artist's persona and reputation in relation to her art and not her pecuniary interests.²⁷⁶ For example, although one might argue that a blank canvas would infringe *White on White*, in reality the argument is nonsensical as the blank canvas does not envision composition. *White on White* is not only a blank expression, it is the idea to paint a canvas so that it appears to be a blank canvas, title the work, and present the work as art.²⁷⁷

Through moral rights protection, the artist seeks to protect her interest in the composition as a whole and her relationship to the work.²⁷⁸ Strict adherence to the idea/dichotomy doctrine, as applied through the limiting doctrines, is not necessary because moral rights already protect the work as a whole.²⁷⁹ Many of the concerns addressed by moral rights are in protecting the original work as well as the artist's relationship to that work.²⁸⁰ While the artist could prevent someone from copying her work and attributing her name to it, she could not prevent another from creating a work similar to hers and placing their own name on it.²⁸¹ In this way, Rauschenberg's all white paintings would not infringe *White on White*, because both Rauschenberg and Malevich make clear that their works are independent pieces created by different artists to convey different ideas.

To account for the conflicting needs of both commercial artists and fine artists, a dual system of copyright should be developed that would apply a traditional economic-rights centered model of copyright to works of commercial art

²⁷⁵ See *Yankee Candle Co.*, 259 F.3d at 37 (involving commercial art attached to candle); *Kitchens of Sara Lee, Inc.*, 266 F.2d at 545 (involving commercial art attached to frozen baked goods).

²⁷⁶ See Corr, *supra* note 169, at 865.

²⁷⁷ See Lee, *supra* note 19, at 800–01 (stating that “[m]oral rights presume that the author’s creative process not only results in a tangible product that is subject to the demands of, and mobility within the marketplace, but also reflects the personality and ‘self’ of the author, indeed, her creative soul”); McCartney, *supra* note 24, at 36 (stating that “the artist’s interest in her work transcends the physical embodiment of the work itself”).

²⁷⁸ See Lee, *supra* note 19, at 800–01; McCartney, *supra* note 24, at 35.

²⁷⁹ See Lee, *supra* note 19, at 800–02; McCartney, *supra* note 24, at 35–36.

²⁸⁰ See *Cort*, 311 F.3d at 984–85; Liemer, *supra* note 16, at 44–45.

²⁸¹ See Lee, *supra* note 19, at 802; Liemer, *supra* note 16, at 44–45.

while granting full protection of moral rights to works of fine art.²⁸² For example, one proponent of moral rights has suggested that:

[a]s the copyright privilege belongs not only to Ernest Hemingway but to anyone who has drafted an interoffice memo or dunning letter or designed a computer program, it would be preposterous to permit all of them to claim, as an incident to copyright, the right to public acknowledgement of authorship, the right to prevent publication, the right to modify a published work, and to prevent others from altering their work of art. If we wish to create such rights for the protection of artists, we should draft them carefully as a separate body of law, and appropriately define what is an artist and what is a work of art. Those difficult definitions should be far narrower than the range of copyright protection. We ought not simply distort copyright to convey such absolutes.²⁸³

While moral rights protection should be adopted, it would be enacted as a separate system that applies only to works most in need of moral rights protection, including artists who work in the fine arts, such as minimalist artists.

In creating a dual system of artist protection, distinguishing between fine art and commercial art is an issue. Similar problems in the judicial determination of what is commercial art versus what is fine art, as outlined *supra*, would likely arise. These concerns, however, are lessened to the extent that the judiciary can utilize objective evidence.²⁸⁴ Potential objective considerations that could be used to determine whether a work was one of fine art or one of commercial art would be data on the number of copies of the work that the artist has sold or intends to sell as well as estimates of the fair market value of subsequent copies, to determine whether the work is commercial art or fine art.²⁸⁵

Protection of artists in the fine arts might ultimately be more important than protection of commercial artists. Commercial art flourished under the old,

²⁸² See Dworkin, *supra* note 27, at 264 (recognizing that common law countries currently take an “all-or-nothing” approach which harms the artists and necessitates an approach that “provides a fair balance between the genuine moral interests of the author and the genuine economic interests of those using and exploiting the work”); Leval, *supra* note 272, at 1128 (recognizing the value of moral rights but “oppos[ing] converting our copyright law, by wave of a judicial magic wand, into American *droit moral*” because “[o]ur copyright law has developed over hundreds of years for a very different purpose and with rules and consequences that are incompatible with the *driot moral*”).

²⁸³ Leval, *supra* note 272, at 1128–29.

²⁸⁴ See Farley, *supra* note 130, at 812–13 (explaining that judges, who “should be objective above all else,” refrain from making determinations regarding whether a work is “art” because such determinations are inherently subjective).

²⁸⁵ See Gifford, *supra* note 13, at 599–600 (discussing the difference in markets for commercial art, where copies have the same value as the original, and fine art, where only the original has value).

stricter copyright laws, despite the absence of copyright protection.²⁸⁶ By analogy, consider the treatment of commercial speech under the First Amendment of the Constitution. Commercial speech is generally awarded less protection than other speech because it is hardy, and there is less fear that commercial speech will be chilled by governmental attempts to regulate it.²⁸⁷ Likewise, commercial art is hardier than noncommercial, or fine art, and just as noncommercial speech receives greater First Amendment Protection to encourage expression and ensure speech is not chilled, the fine artist should receive greater protection to encourage expression and ensure their work is not chilled. While VARA attempts to award greater protection to artists working in the fine arts, VARA seeks to protect economic rights by offering limited protection of moral rights. The economic rights-centered model of copyright law, which seeks to meet the constitutional mandate “to promote the progress of Science” by creating an economic incentive, is inapplicable to fine artists who are outwardly influenced by culture and internally influenced by the desire to create.²⁸⁸ Moral rights would serve as an incentive to create, as the artist would be encouraged to create through the knowledge that her art persona and reputation, as expressed through her art, would be protected.²⁸⁹ Thus, to adequately protect the unique interests of minimalist artists and others who work within the fine arts, full protection of moral rights should be adopted while maintaining the economic rights-centered protection currently available for commercial art.

VI. CONCLUSION

Minimalist art faces many challenges in seeking protection under American copyright law. Under the Constitution and the Copyright Act, a work qualifies for a copyright if it is original. In turn, to be original, the work must display a minimal level of creativity. The requisite level of creativity and originality is “extremely low.” Copyright only protects original expression, not original ideas. This idea/expression dichotomy creates a formidable challenge to the minimalist artist wishing to obtain a copyright on her work, as the idea behind minimalist art is original and creative, but by its nature, the expression

²⁸⁶ See Zimmerman, *supra* note 220, at 205 (explaining that under former copyright laws, one had to value copyright highly in order to expend the time and money necessary to obtain and keep copyright alive, preventing the copyrighting of trivial commercial art such as greeting cards and cartons).

²⁸⁷ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 n.6 (1980).

²⁸⁸ Lacey, *supra* note 252, at 1571–75.

²⁸⁹ Liemer, *supra* note 16, at 44.

itself is not. While in dicta courts have indicated that works by minimalist artists would be capable of obtaining valid copyrights, the reality appears to be acceptance of the Copyright Office's view that "simple geometric shapes and coloring alone are *per se* not copyrightable."²⁹⁰

Furthermore, the judicially created limiting doctrines applied before a determination of infringement is made will strip a work of minimalist art of any copyright protection and prevent only virtually identical copying. Doctrines such as the merger doctrine and *scene a faire* are in place to ensure that an artist cannot obtain a monopoly on an idea by removing any elements stemming from the underlying idea, leaving only that which is original expression. In the case of minimalist art, because the expression is so simple, once the limiting doctrines are applied, the minimalist artist is left with nothing to copyright and will only be able to stop infringers who copy the work exactly.

An alternate model of artist protection is seen in European copyright law's protection of the artist's moral rights, instead of the economic protection offered under American copyright law. In the fine arts, it is most important to protect the artist's persona and reputation by ensuring her art is seen as she intended it and ensuring her art, and only her art, is properly attributed to her. Consequently, protecting the artist's persona and reputation also serves to protect her economic interests, as she can profit off her reputation by ensuring the value of subsequent works.

Unlike the commercial artist, who obtains all value from her work through the sale of copies, copies of minimalist and other fine art are almost valueless; only the original piece of art is capable of economically rewarding the artist. American copyright law's traditional goal of protecting artists' economic rights by allowing only the artist to profit from the sale of copies does not protect fine artists who do not sell copies. To remedy this result and ensure all artists receive protection, a dual system of artist protection should be developed. Commercial artists could continue to operate under traditional American copyright law. The commercial artist's economic interest would be protected, and the public at large would also be protected from any one artist obtaining a monopoly on a commercially necessary idea. Fine artists, however, would be entitled to protect their moral rights, as modeled after European copyright law. While VARA takes some steps toward protecting the interests of fine artists, the protection is severally limited and leaves room for much improvement to ensure fine artists receive protection of their moral interest in her persona and reputation.

²⁹⁰ *Atari Games Corp.*, 979 F.2d at 247.

Minimalist art has had an immense and far-reaching influence on popular culture. Both highly acclaimed and highly criticized, love it or hate it, the importance of minimalism is undeniable. Minimalist art's unique nature also creates unique challenges under copyright law and serves as an example of the utility a dual copyright system that maximizes the appropriate level of protection both commercial artists and fine artists need. This protection is important to ensuring that minimalist art, as well as all movements within the fine arts, are encouraged and promoted. While less might be more when it comes to artistic expression, less is not more when it comes to granting legal rights to minimalist artists.