

# Art and Copyright in Ghettos and Concentration Camps: A Manifesto of Third-Generation Holocaust Survivors

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*Copyright ownership in works of art, drama, music, and literature, created by Jewish prisoners in Nazi concentration camps and ghettos, is one of the few debates omitted from academic legal research to date. These works expose the untold stories of the final moments of those who walked or labored to their deaths. Most of these works do not have names, but they do have authors.*

*Theaters, artists, authors, orchestras, and other groups of creative individuals formed an integral part of the otherwise horrific environments surrounding prisoners in the ghettos. The absence of a global debate on their property rights in their works has created an anomaly that permits public bodies and other repositories of these works, such as libraries in Germany, the Auschwitz–Birkenau Museum, and other European and international museums, to claim ownership of these works and patronize the social and cultural life that they depict. Copyright laws protect and incentivize the use of creative voices in a manner that is mutually beneficial to creators and communities of listeners. The voices of Jewish prisoners in the concentration camps and ghettos have been continuously silenced from the moment those prisoners were deprived of their rights and murdered to today—when their works have yet to receive rightful protection. Copyright law has failed its main purpose of freeing knowledge from illegitimate shelters and allowing lessons to be gleaned from history that cannot otherwise be expressed.*

*Literature dealing with looted works of arts, stolen during the Nazi occupation from Jewish families forced to leave behind their homes and*

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\*\* Yale Law School, J.S.D. Candidate and Resident Fellow, Information Society Project. This Article began over a decade ago and forms part of a larger study offering the first juridical inquiry into the ownership of copyrighted works created within the ghettos and concentration camps by Jews who perished during the Holocaust. The ideas developed in this Article benefited from discussions and comments provided on earlier drafts. For this we are grateful to Jack Balkin, Aharon Barak, Suzy Frankel, Aviv Gaon, Wendy Gordon, Aileen Kavanagh, Niva Elkin-Koren, Roberta Rosenthal Kwall, Mark Llemely, Miriam Marcowitz-Biton, Ryszard Markiewicz, Andreas Rahmatian, Jerome Reichman, Anna Tischner, David Vaver, Shlomit Yaniski Ravid, and Peter Yu. In the past decade, a group of researchers have contributed to this project. For this we are grateful to Mai Arlowski, Reut Dahan, Amit Elazari, Michaela Halpern, Noalee Harel, Yonatan Hezroni, Sagi Lapid, Jason Rozenberg, Shine Shaman, and Natalie Schneider. Earlier versions of the Article were presented at conferences and faculty seminars, including at Glasgow Law School, Osgoode Hall Law School, and the Yale Information Society Project. This Article is dedicated to the memory of our families and the seventy-fifth anniversary of the liberation of the Nazi Auschwitz–Birkenau concentration and extermination camp, which took place on January 25, 1945.

*histories, covers only one subset of what should be a larger discourse on copyright and the Holocaust. This Article opens new ground by exploring and answering questions about the ownership of creative expressions made within the ghettos during the most inhumane and barbaric moment of human history. We aim to remedy the blind focus given to looted art and the lack of awareness regarding art in the ghettos. We have the audacity to open a provocative debate on who should have moral rights in works of art, music, drama, and authorship that were created within the boundaries of concentration camps and ghettos across Europe before and during the Holocaust. This debate has no comparable example in human history. Most authors and artists of these works were murdered in gas chambers, ghettos, and labor camps. These works documented Nazi atrocities, but they also shed light on the cultural life of those who could not change their fate. Legal scholarship has never debated ownership of these works and the perplexing questions implied by such a debate. In this Article, we aim to start the conversation, not to close it. The Article offers the first inquiry challenging the ownership paradigm of copyrighted works created within the ghettos and concertation camps in Nazi-occupied territories. The uncomfortable findings of our legal examination are based on sensitive human issues and legal controversies, which were given insufficient scholarly attention for over seven decades. This is the most difficult Article we have ever written and will ever write. This Article is our manifesto—a manifesto written by third-generation Holocaust survivors.*

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#### INTRODUCTION

A walk through Block 27 at the Auschwitz–Birkenau concentration camp tells a copyright story that has never been told. *Traces of Life* is a permanent exhibition that publicly shows the intrinsic power of art as an emotional escape through the creations of some of the 1.5 million children murdered in the Holocaust, expressing the atrocities those children experienced in their lives.<sup>1</sup> Artist Michal Rovner, curator of the exhibition, stated that “[o]ne can almost feel the urgency of the situation in many of the [children’s] drawings. They are reflections and details of the life they were forced to leave behind, and the new reality they encountered. These drawings are their legacy—and our inheritance.”<sup>2</sup> In the exhibit, every visitor enters an empty space in which nothing is displayed and hears the faint sound of children’s voices in the background. After the voices fade, the visitor finds drawings displayed on the walls. The drawings around the room give voice to the children’s *Shoah*.<sup>3</sup> The feeling of emptiness is inescapable as visitors stand in the middle of the enormous void left behind by these children. In the words of David Grossman:

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1. See Eldad Beck, *Auschwitz: Art in Name of Memory*, YNETNEWS: JEWISH WORLD (June 13, 2013, 8:05 AM), <https://www.ynetnews.com/articles/0,7340,L-4391683,00.html> [<https://perma.cc/WB3X-2FBT>]; ‘*Traces of Life*’ Exhibit at Auschwitz-Birkenau Pays Tribute to Children of the Holocaust (PHOTOS), HUFFINGTON POST (Dec. 6, 2017), [https://www.huffpost.com/entry/traces-of-life-exhibit-children-of-the-holocaust\\_n\\_3443074](https://www.huffpost.com/entry/traces-of-life-exhibit-children-of-the-holocaust_n_3443074); ‘*Traces of Life*’: *The World of the Children*, YAD VASHEM, [https://www.yadvashem.org/yv/en/exhibitions/pavilion\\_auschwitz/children.asp#!popup\[inline\]/0](https://www.yadvashem.org/yv/en/exhibitions/pavilion_auschwitz/children.asp#!popup[inline]/0) [<https://perma.cc/WZE9-WSR4>] (last visited Jan. 24, 2021).

2. ‘*Traces of Life*’: *The World of the Children*, *supra* note 1.

3. *Shoah* is a Hebrew word used for centuries to describe a complete and disastrous destruction. Today, it commonly refers to the Holocaust and the Nazi decimation of Europe’s Jewish communities.

The artist Michal Rovner has brought back to life, line by line, drawings made by children during the years of war and annihilation. Fragile yet strong, these pencil drawings glimmer from the walls of the barrack, signals sent to us from the childhood swept away and lost in the *Shoah*.

As we look at them here, in Auschwitz, we can sense how art is the place where life and its loss may exist together.<sup>4</sup>

Rovner “remain[ed] true to her undertaking not to change or produce her own version of the drawings”<sup>5</sup> and “decided to copy the fragments with a pencil, exactly as they were, onto the walls of the room dedicated to the children. . . . With just a pencil and copy paper, one by one, detail after detail, Rovner drew each line again on a scale of [one-to-one].”<sup>6</sup> Rovner added color to some of the black and white and sometimes-unfinished drawings.<sup>7</sup> Rovner’s use of the drawings raises conflicting emotional and copyright concerns. *Traces of Life* has made an impact on visitors because it shows, in speaking colors, the atrocities inflicted upon innocent children. In making these colored reproductions, however, Rovner changed the messages and meanings of the children’s drawings and altered the artistic symbolism embedded in the original black and white versions. By doing this, Rovner changed the artists’ “original conceptions,”<sup>8</sup> interfered with their “authorship dignity,”<sup>9</sup> and altered the narratives they sought to communicate.<sup>10</sup>

At the same time, and despite these changes, Rovner made these works accessible to young viewers, transformed the works’ messages and meanings to touch every viewer, and thus raised awareness of the power of art. Rovner’s use of these works raises copyright concerns pertaining to their ownership, their colored reproductions, and the changes and modifications Rovner made to the messages and meanings of the drawings.<sup>11</sup>

Another recent case dramatically presents this ownership and authenticity challenge. In October 2019, five letters written in Hebrew in 1938 by Jewish children in Poland were set to be auctioned by a private auction house. These letters

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4. David Grossman, *Special Accompanying Text by David Grossman, in “Traces of Life”: The World of the Children*, *supra* note 1.

5. “*Traces of Life”: The World of the Children*, *supra* note 1.

6. *Id.*

7. *See id.* (displaying images of the exhibition that reveal Rovner’s addition of color to at least one of the drawings).

8. ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 3 (2010).

9. *Id.*

10. *See id.* (“The message of the [artwork]. . . is the narrative the author seeks to communicate . . .”).

11. A January 2020 two-part documentary broadcast in the United Kingdom, *Auschwitz Untold in Colour*, raises similar issues. The documentary added color to black and white footage and photographs from inside the Nazi death camp at Auschwitz. Director David Shulman commented that it was “extremely surprising to see the dimension of humanity that was added” to the horrible scenes within the camps, and it “gives the film more contemporary resonance. It is not just about history but about today.” Hannah J. Davies, ‘A New Dimension of Humanity’: *Auschwitz Comes to TV*, in *Colour*, *GUARDIAN* (Jan. 13, 2020, 10:26 AM), <https://www.theguardian.com/tv-and-radio/2020/jan/13/a-new-dimension-of-humanity-auschwitz-comes-to-tv-in-colour>.

described the difficult life of a Jewish family not long before the Holocaust. An injunction issued by an Israeli court ordered the businessman who owned the letters to postpone the auction. Relatives of Rachel Mintz, whose letter was among the five discovered, requested the injunction. Her family demanded that her letter be returned to them rather than auctioned to the public. The Zagłębie (Zagłębie) World Organization<sup>12</sup> petitioned against the auction of the other four letters and asked that they be handed over to a public body, such as Yad Vashem, for their preservation.<sup>13</sup> Even though the question of copyright ownership subsisting in these letters has yet to be asked, this case presents a striking legal dispute about which entity should own the letters.

The drawings in Rovner's exhibition and these letters are only two examples of the cultural and creative lives Jews maintained in ghettos and concentration camps.<sup>14</sup> A significant portion of the works created in these places are held today in archives, libraries, museums, and other official facilities that are closed to the public. For example, archival projects such as *Exilpresse Digital* and *Jüdische Periodika in NS-Deutschland* have refused to grant access to Holocaust-related artworks due to fear of copyright infringement.<sup>15</sup> Current legislation, including modern copyright laws, governs these works, withholds them from their legitimate owners and potential users by relying on laws and international conventions that, whatever their suitability in times of peace, should not apply to the Holocaust.<sup>16</sup> The goal of this Article is to address this problem and present a

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12. This organization exists to remember and commemorate the destroyed Jewish communities of the Zagłębie region of Poland. See ZAGŁĘBIE WORLD ORGANIZATION, <https://www.zaglembie.org/en> [<https://perma.cc/5CUA-F4DZ>] (last visited Jan. 24, 2021).

13. See Ofer Aderet, *Israeli Court Blocks Auction of Letter Written by Young Girl Killed in the Holocaust*, HAARETZ (Oct. 29, 2019), <https://www.haaretz.com/israel-news/premium-court-blocks-auction-of-letter-written-by-young-girl-killed-in-the-holocaust-1.8055171>; see also Ofer Aderet, *Israeli Family of Girl Killed in Holocaust Tries to Block Auction of Her Letters*, HAARETZ (Oct. 27, 2019), <https://www.haaretz.com/israel-news/premium-israeli-family-of-girl-killed-in-holocaust-tries-to-block-auction-of-her-letters-1.8031839> (providing further details regarding the dispute); TOI Staff, *Court Blocks Sale of Holocaust Letter by Yad Vashem Board Member*, TIMES ISR. (Nov. 1, 2019, 9:41 AM), <https://www.timesofisrael.com/court-blocks-sale-of-holocaust-letter-by-yad-vashem-board-member> [<https://perma.cc/T3DN-SKVA>] (same).

14. See *infra* Part I.

15. See E-mail from Jörn Hasenclever, Deputy Head, German Nat'l Library, to Aviad Stollman, Judaica Collection Curator, Nat'l Library of Isr. (Apr. 15, 2013, 9:54 CEST) (on file with authors). Another example is found in the testimony of the U.S. Holocaust Memorial Museum before the U.S. Congress, during which it was stated that the museum would not make its works available to the public due to copyright concerns. *Promoting the Use of Orphan Works: Balancing the Interests of Copyright Owners and Users: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. 62 (2008) [hereinafter *Promoting the Use of Orphan Works*] (statement of Karen C. Coe, Associate Legal Counsel, U.S. Holocaust Memorial Museum). For more on the museum's current copyright policy, see *Rights and Reproductions*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/collections/ask-a-research-question/rights-and-reproductions> [<https://perma.cc/9JMS-QPXV>] (last visited Jan. 24, 2021).

16. The first owner of a copyrighted work is its author unless otherwise indicated. International copyright treaties confirm this rule. See Berne Convention for the Protection of Literary and Artistic Works art. 2(6), Sept. 9, 1886, S. TREATY DOC. NO. 99-27 [hereinafter *Berne Convention*]; see also Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9, in Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299 (incorporating key provisions of the Berne Convention into the World Trade Organization's foundational treaty). Most of the artworks created within

copyright framework that provides justice to these legitimate owners and potential users in a manner that enables the public dissemination and memorialization of these invaluable artworks.

Following this Introduction, Part I describes the power of artistic and authorial creations within the ghettos. Through unique examples of artistic individuals and groups, we explain how the lack of academic and legal discourse on this matter has formed a copyright anomaly. Part II presents the historical background of Nazi plunder and the global legal effort aimed at restitution for Jewish communities after the Holocaust. Part III discusses artworks that were created within the ghettos and concentration camps and emphasizes the authorial intimacy of the creators to their works—a fact that must dictate contemporary and future ownership in such works. Together, Parts II and III highlight a missing element in the common copyright discourse on the Holocaust. These Parts argue that this existing discourse has overlooked its most fundamental focal point—that the works of art were not created by others before the war and confiscated by the Nazis, but rather that the works of art and authorship were created by the victims of the Holocaust themselves. Part IV continues this argument and analyzes the dialogical value of these works and how ordinary and common copyright standards are inapplicable to them. Part V applies and evaluates relevant copyright principles. In this Part, we present a debate over several suggested mechanisms relevant to the context of artworks created within the ghettos and concentration camps: fair use, orphan works, and perpetual rights. In Part VI, we present our preferred model of ownership for these artworks and claim that the international community should redefine copyright for works created during the *Shoah*. We argue that, in accordance with international treaties and conventions, these works are properties that should be defined as “traditional knowledge” of Jewish culture.

This Article is the most difficult we have written and will ever write. It is an emotional and legal manifesto of third-generation Holocaust survivors. We argue that the uncomfortable findings of our research require reassessment of the standards commonly applied to the use and ownership of copyrighted works created within the ghettos and concentration camps of the Holocaust. These findings carry significant historical and legal value for Jewish identity, heritage, and culture. Artworks that remain from the Holocaust stand as silent memorials to a time when Jews were deprived of their basic humanity. These poems, sculptures, portraits, songs, symphonies, and other forms of cultural expression are part of our history and Jewish heritage; they are the only speaking legacy of many Jewish communities and over six million

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the ghettos and concentration camps have neither a living nor known owner, and they also lack a recognized legal heir. Only the rightsholders of the artworks have the legal capacity to change the works or issue licenses to use or display them publicly. Ownership shall be governed by country of residence. *See* Berne Convention, *supra*, art. 5(2). For works created during the Holocaust, the country of residence could be Germany, Poland, the Netherlands, the Baltic States, Hungary, Greece, Slovakia, Romania, Austria, Luxembourg, and others that were under Nazi occupation and deported their Jewish residents to concentration camps. This rule that country of residence governs ownership may rightfully apply in times of peace, but it seems ill-suited to the monstrous orchestration of the mass killing of over six million Jews that was the Holocaust.

members of Jewish culture murdered by the Nazis. We must cherish, commemorate, and protect these works as an important part of our history and Jewish heritage.

### I. AN UNIMAGINABLE COPYRIGHT SCENE: MUSIC, THEATER, AND ART

Life in concentration camps is unimaginable to us. The routine of facing death and sorrow, of not knowing whether you would live to see another day, made death an ongoing possibility. This uncertainty, however, did not overpower every aspect of human and social life. Instead, Jews in ghettos and concentration camps found, as often as they could, moments of escape in different forms of creativity. Creative activities such as writing, drawing, acting in theaters, and playing in orchestras<sup>17</sup> were, for the Jewish victims, an escape from their unbearable fate and have since become their last will and testament to us—to remember and never forget.<sup>18</sup>

Jewish music and songs were an integral part of the cultural scene in the ghettos.<sup>19</sup> Some were folk songs inspired by biblical texts passed down through generations,<sup>20</sup> and others were original lyrics and melodies written by inmates to rebel

17. See generally, e.g., Moshe Fass, *Theatrical Activities in the Polish Ghettos During the Years 1939-1942*, 38 JEWISH SOC. STUD. 54 (1976) (describing various forms of theatrical activities and institutions that arose in the Polish ghettos); *Vilna During the Holocaust: Daily Life in the Vilna Ghetto, Theatre and Music in the Ghetto*, YAD VASHEM, <https://www.yadvashem.org/yv/en/exhibitions/vilna/during/theatre.asp> [<https://perma.cc/3ZWA-TJ2S>] (last visited Jan. 24, 2021) (describing the theater and orchestra that emerged in the Vilna ghetto).

18. See Jeff Jacoby, 'Never Forget,' the World Said of the Holocaust. But the World Is Forgetting, BOS. GLOBE (May 1, 2016, 12:00 AM), <https://www.bostonglobe.com/opinion/2016/04/30/never-forget-world-said-holocaust-but-world-forgetting/59cUqLNFxylkW7BDuRPgNK/story.html#>; Karol Markowicz, *Why We're Forgetting the Holocaust*, N.Y. POST (Apr. 15, 2018, 7:06 PM), <https://nypost.com/2018/04/15/why-were-forgetting-the-holocaust> [<https://perma.cc/U4KU-KKDU>].

19. See generally FANIA FÉNELON & MARCELLE ROUTIER, PLAYING FOR TIME (Judith Landry trans., 1997) (1976) (describing the story of Fania Fénelon, a Paris cabaret singer, secret member of the Resistance, and a Jew, whom the Nazis captured and sent to Auschwitz, where she became one of the legendary orchestra girls who used music to survive the Holocaust); GILA FLAM, SINGING FOR SURVIVAL: SONGS OF THE LODZ GHETTO, 1940-45 (1992) (detailing the song repertoire created and performed in the Lodz ghetto of Poland); SHIRLI GILBERT, MUSIC IN THE HOLOCAUST: CONFRONTING LIFE IN THE NAZI GHETTOS AND CAMPS (2005) (providing a critical account of the role of music within communities imprisoned under Nazism); JOŽA KARAS, MUSIC IN TEREZÍN 1941-1945 (1985) (detailing the musical life and community of the Terezín camp and the roles that active musical life played in the struggle for hope); *Music of the Holocaust*, YAD VASHEM, <https://www.yadvashem.org/yv/en/exhibitions/music/index.asp> [<https://perma.cc/Q6VX-H44Z>] (last visited Jan. 25, 2021) (giving an overview of the important role of music during the Holocaust).

A famous song written in the Vilna ghetto is the Yiddish song *Shtiler, Shtiler*. See *Shtiler, Shtiler*, ORT: MUSIC & THE HOLOCAUST, <http://holocaustmusic.ort.org/places/ghettos/vilna/shtiler-shtiler> [<https://perma.cc/6GVJ-L9GE>] (last visited Jan. 25, 2021). This powerful song has become one of the Holocaust songs most frequently sung during memorial ceremonies today. For more on this song, see PONAR (Israel Film Center 2002).

20. See Dan Ben-Amos, *Jewish Folk Literature*, 14 ORAL TRADITION 140, 228 (1999); Serdar Ilban, *Songs from the Ashes: An Examination of Three Holocaust-Themed Song Cycles by Lori Laitman* 12 (Apr. 14, 2008) (unpublished dissertation, University of Nevada, Las Vegas) (on file with the University Libraries, University of Nevada, Las Vegas), <https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=3789&context=rtds> [<https://perma.cc/ZN3K-RLMT>]; see also *Music of the Holocaust*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/collections/the-museums-collections/collections-highlights/music-of-the-holocaust-highlights-from-the-collection/music-of-the-holocaust> [<https://perma.cc/MJ65-GFT2>] (last visited Jan. 25, 2021) (listing various songs and songwriters).

against the Nazis and to preserve their sense of freedom and humanity while on their way to grueling work in dire conditions.<sup>21</sup> Rabbi Simon Dasberg, for example, wrote notes and songs in the acrostic form during roll call at the Bergen-Belsen concentration camp.<sup>22</sup> While collecting information about music in the ghettos, Guido Fackler remarked that choirs and choral groups were also prevalent in the early days of the concentration camps and that “inmate bands shaped the musical life of the larger concentration camps.”<sup>23</sup> After the Nazis expanded the camp system, inmates established official orchestras “in almost all of the main concentration camps, larger subcamps and in some death camps.”<sup>24</sup> Fackler also stated that the prisoners

played and composed music on their own initiative, for themselves and their fellow inmates. Here, music served as a cultural survival technique and as a means of psychological resistance: it helped overcome the life-threatening situation at the camp and assisted in alleviating the terror. Simple humming or whistling could combat fear and loneliness in solitary confinement. Music helped inmates retain their identity and traditions, counteracting the SS’s destructive intention, which was directed not only towards the prisoners’ physical existence, but also towards their culture.<sup>25</sup>

Francesco Lotoro, an Italian musician, has searched across the globe for the lost music of Holocaust victims. For Lotoro, the most important goal as a musician was to revive this music and fill the void in world music history created by the Holocaust.<sup>26</sup> He has collected about 4,000 works, some originals and others copies.<sup>27</sup> Many were written hurriedly on scraps of paper, and one was even written on toilet paper.<sup>28</sup> Lotoro sought this lost music across dozens of

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21. See generally FLAM, *supra* note 19 (describing interviews with survivors that illustrate the themes of the Lodz repertoire and explore the nature of Holocaust song); GILBERT, *supra* note 19 (documenting the wide scope of musical activities in some of the most important internment centers in Nazi-occupied Europe, including Auschwitz and the Warsaw and Vilna ghettos); JAMES A. GRYMES, VIOLINS OF HOPE: VIOLINS OF THE HOLOCAUST—INSTRUMENTS OF HOPE AND LIBERATION IN MANKIND’S DARKEST HOUR (2014) (detailing the remarkable stories of violins played by Jewish musicians during the Holocaust); PHILIP ROSEN & NINA APFELBAUM, BEARING WITNESS: A RESOURCE GUIDE TO LITERATURE, POETRY, ART, MUSIC, AND VIDEOS BY HOLOCAUST VICTIMS AND SURVIVORS (2002) (providing over eight hundred first-person accounts of Holocaust victims and survivors and their music, as well as videos of that testimony).

22. For biographical information about Rabbi Dasberg and his life in Bergen-Belsen, see *Rabbi Shimon Dasberg (Dasbark) - The Netherlands*, ZACHOR, <https://perma.cc/QGQ6-MC34> (last visited Jan. 25, 2021) and *Rosh Hashanah Cards from Bergen-Belsen Camp*, YAD VASHEM, [https://www.yadvashem.org/yv/en/exhibitions/rosh\\_hashana/dasberg.asp](https://www.yadvashem.org/yv/en/exhibitions/rosh_hashana/dasberg.asp) [<https://perma.cc/A8LH-3HER>] (last visited Jan. 25, 2021).

23. Guido Fackler, *The Concentration and Death Camps*, ORT: MUSIC & THE HOLOCAUST, <https://holocaustmusic.ort.org/places/camps> [<https://perma.cc/724E-2DML>] (last visited Jan. 25, 2021).

24. *Id.*

25. *Id.*

26. See Ruth Ellen Gruber, *Italian Pianist Revives Music Created in Concentration Camps*, TIMES ISR. (Sept. 27, 2012, 10:03 PM), <https://www.timesofisrael.com/italian-pianist-revives-music-created-in-concentration-camps> [<https://perma.cc/7TX8-LSJG>].

27. *Id.*

28. See *id.*



countries in second-hand bookstores, archives, and interviews with Holocaust survivors.<sup>29</sup> He managed to obtain thousands of musical works created by concentration camp inmates, including songs, symphonies, and operas.<sup>30</sup> In 2013, Lotoro published an edition of twenty-four CDs titled *The Encyclopedia of Concentrationary Music*.<sup>31</sup> In April 2018, his work was performed at a concert in Jerusalem.<sup>32</sup>

Like music composition, theatrical activities in Nazi concentration camps were also sometimes possible.<sup>33</sup> This was despite the danger posed by such activities—for example, “[p]erformances in Dachau were, in the nature of things, extremely undercover, being carried out by the prisoners at great personal risk.”<sup>34</sup> The first significant exhibition focusing on theater in concentration camps took place in 2017 at the Museum of Contemporary Art in Krakow, Poland.<sup>35</sup> The exhibition included documentation that revealed “how difficult it was—in spite of the radical methods of extermination used—to extinguish the prisoners’ sense of their inner worth, which they expressed through the creative act.”<sup>36</sup> The exhibition displayed photographs, documents, and even hand-sewn puppets made for a 1944 New Year cabaret staged in the Stutthof concentration camp near Gdansk.<sup>37</sup> Another famous example of such theater was the Ovitz family’s Lilliput Troupe. The Ovitz family was a Jewish family of actors and musicians from Romania that performed in the 1930s.<sup>38</sup> Out of the twelve family members, eight were dwarfs.<sup>39</sup> Despite the race laws that banned Jewish artists from performing in front of non-Jewish audiences, the Ovitz family members were able to perform until 1944,

29. *See id.*

30. *See id.*

31. *See id.*

32. Peter Beaumont, *Lost Music of Nazis’ Prisoners to Be Heard at Concert in Jerusalem*, *GUARDIAN* (Mar. 1, 2018, 12:00 AM), <https://www.theguardian.com/music/2018/mar/01/lost-music-of-nazis-prisoners-to-be-heard-at-concert-in-jerusalem>.

33. *See* Alvin Goldfarb, *Theatrical Activities in Nazi Concentration Camps*, 1 *PERFORMING ARTS J.* 3, 6 (1976). *See generally* THEATRICAL PERFORMANCE DURING THE HOLOCAUST: TEXTS, DOCUMENTS, MEMOIRS (Rebecca Rovit & Alvin Goldfarb eds., 1999) (offering a collection of critical essays, memoirs, and primary source materials relating to the history of Jewish drama, cabaret, music, and opera under the Third Reich).

34. Curt Daniel, *Theatre in the Nazi Concentration Camps: Creativity and Resistance in Dachau and Buchenwald*, *MY JEWISH LEARNING*, <https://www.myjewishlearning.com/article/theatre-in-the-nazi-concentration-camps> [<https://perma.cc/6LJV-ST59>] (last visited Jan. 25, 2021).

35. *See Lagertheater*, *MUSEUM CONTEMP. ART KRAKOW*, <https://en.mocak.pl/lagertheater> [<https://perma.cc/Y84D-L5SH>] (last visited Jan. 25, 2021).

36. *Id.*

37. *See* Julia Michalska, *How Theatre Provided a Brief Escape for Prisoners from Concentration Camp Horrors*, *ART NEWSPAPER* (Dec. 19, 2017, 1:31 PM), <https://www.theartnewspaper.com/preview/how-theatre-provided-a-brief-escape-for-prisoners-from-concentration-camp-horrors>.

38. *See* Yehuda Koren & Eilat Negev, *The Dwarves of Auschwitz*, *GUARDIAN* (Mar. 23, 2013, 5:00 AM), <https://www.theguardian.com/world/2013/mar/23/the-dwarves-of-auschwitz>; *see also* YEHUDA KOREN & EILAT NEGEV, *GIANTS: THE DWARVES OF AUSCHWITZ* (2013); YEHUDA KOREN & EILAT NEGEV, *IN OUR HEARTS WE WERE GIANTS: THE REMARKABLE STORY OF THE LILLIPUT TROUPE—A DWARF FAMILY’S SURVIVAL OF THE HOLOCAUST* (2004).

39. *See* Koren & Negev, *supra* note 38.

when they were deported to Auschwitz.<sup>40</sup> They were sent there to take part in Josef Mengele's experiments.<sup>41</sup> Due to his special interest in them, they endured a nightmare of systematic torture but survived.<sup>42</sup>

Another form of artistic expression can be found in the drawings, photographs, and portraits of Jewish prisoners in ghettos and concentration camps. Without them, much of what the world knows today about the realities of the Holocaust could not have been fully perceived and understood. Franciszek Jaźwiecki created 114 drawings while he was a prisoner at Auschwitz.<sup>43</sup> These drawings contain portraits of fellow inmates who were murdered there, enabling those inmates' memorialization.<sup>44</sup> Moshe Rynecki, an artist from Warsaw, created about 800 paintings and sculptures before and during the war.<sup>45</sup> Most of his work was lost, and his great-granddaughter went to great lengths to recover his lost art across Europe.<sup>46</sup> Leo Haas and Bedřich Fritta were inmates in the Terazín ghetto where the Nazis forced them and other artists to create propaganda pictures depicting the ghetto as a joyful place.<sup>47</sup> They both, however, also secretly created paintings showing the horrific realities of ghetto life.<sup>48</sup> Their artworks were displayed in a 2016 exhibition in Berlin.<sup>49</sup> That exhibition displayed 100 paintings

40. *Group Portrait of the Ovici Family, a Family of Jewish Dwarf Entertainers Known as the Lilliput Troupe, Who Survived Auschwitz: About This Photograph*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://collections.ushmm.org/search/catalog/pa1038162> [<https://perma.cc/Y9DU-L2HQ>] (“In 1940, when Hungary took over northern Transylvania and implemented racial laws, the Ovicis managed to obtain identification papers with no mention of their religion and thereby continue in their career until March 1944. Following the German occupation of Hungary in the spring of 1944, the Ovicis were deported to Auschwitz.”); *see also supra* note 395 and accompanying text (discussing Josef Mengele).

41. *See* Koren & Negev, *supra* note 38.

42. *See id.*

43. *See* Wendy Soderburg, *Inmates' Once-Hidden Artwork Offers Poignant Look at Concentration Camp Life*, UCLA NEWSROOM (Jan. 11, 2013), <https://newsroom.ucla.edu/stories/a-poignant-look-at-concentration-242585> [<https://perma.cc/6YY8-VMGU>].

44. *See* Katie Halper, *Ten Portraits Secretly Drawn by an Auschwitz Prisoner*, RAW STORY (Jan. 27, 2015), <https://www.rawstory.com/2015/01/ten-portraits-secretly-drawn-by-an-auschwitz-prisoner> [<https://perma.cc/GE4A-6AQD>]; *see also infra* note 179 and accompanying text (describing portraiture at Auschwitz).

45. *See* *Moshe Rynecki (1881–1943)*, MOSHE RYNECKI, <https://rynecki.org/biography> [<https://perma.cc/9YKB-F6F5>] (last visited Jan. 25, 2021).

46. *See* Elizabeth Rynecki, *A Great-Granddaughter's Legacy*, ELIZABETH'S BLOG (Nov. 26, 2019), <http://rynecki.org/blog> [<https://perma.cc/37FT-VCQF>]; *see also* ELIZABETH RYNECKI, CHASING PORTRAITS: A GREAT-GRANDDAUGHTER'S QUEST FOR HER LOST ART LEGACY (2016) (describing Rynecki's efforts to rebuild her great-grandfather's art collection).

47. *See* Amah-Rose Abrams, *Angela Merkel Opens Berlin Exhibition of Art Created During the Holocaust*, ARTNET NEWS (Jan. 26, 2016), <https://news.artnet.com/exhibitions/holocaust-art-german-history-museum-berlin-413567> [<https://perma.cc/S2VJ-XFMD>]; *Bedřich Fritta: Drawings from the Theresienstadt Ghetto*, JEWISH MUSEUM BERLIN, <https://www.jmberlin.de/fritta/en/index.php> [<https://perma.cc/7DTX-AL8N>] (last visited Jan. 25, 2021); Mary M. Lane, 'Art from the Holocaust': The Beauty and Brutality in Forbidden Works, N.Y. TIMES (Jan. 22, 2016), <https://www.nytimes.com/2016/01/23/arts/design/art-from-the-holocaust-the-beauty-and-brutality-in-forbidden-works.html>; Thomas Rogers, *Art from the Holocaust: The Stories Behind the Images*, BBC (Feb. 3, 2016), <http://www.bbc.com/culture/story/20160203-art-from-the-holocaust-the-stories-behind-the-images> [<https://perma.cc/FU6E-W9A7>].

48. *See supra* note 47.

49. *See supra* note 47.

that were created by Jews in ghettos, concentration camps, and hideaways.<sup>50</sup> Nelly Toll's work was also displayed in this exhibition.<sup>51</sup> During the war, Nelly and her mother hid with a Christian family, and Nelly was encouraged to draw, write, and keep a diary to maintain a normal routine in her abnormal life.<sup>52</sup> Her artwork was selected from the collection of Yad Vashem for the Berlin exhibition—the first time it was displayed outside of Israel.<sup>53</sup>

In the Warsaw ghetto, Gela Seksztajn, a Polish–Jewish artist and painter, drew over 300 portraits, mostly of children, which were hidden in the Ringelblum Archive and meant to be found after the war to serve as a record of its horrific events.<sup>54</sup> Today, most of Gela's paintings are located in the archive of the Jewish Historical Institute in Warsaw, Poland.<sup>55</sup> Her will stated, "I ask not of praises, all I want is to preserve the memory of me and my talented daughter Margelit."<sup>56</sup> Henryk Ross, a Polish Jew, was the official photographer in the Lodz ghetto in Poland.<sup>57</sup> Henryk worked for the ghetto's department of statistics and shot photographs for identification cards and propaganda.<sup>58</sup> He surreptitiously recorded the devastating everyday life in the ghetto at the risk of being caught.<sup>59</sup> Toward the end of the war, Ross buried 6,000 negative film images near his house in the ghetto—he explained years later that there needed to be "some record of our tragedy."<sup>60</sup> He returned after liberation to Lodz to dig up his negatives.<sup>61</sup> About half of them were ruined, but enough survived to fulfill his promise to "leave a historical record of our martyrdom."<sup>62</sup> His works were presented at the Museum of Fine Arts in Boston in March 2017.<sup>63</sup> Lastly, Naftali Hertz Kon, a Yiddish poet, writer,

50. See Abrams, *supra* note 47.

51. See *id.*

52. See *Artist Bio: Nelly Toll*, MASSILLON MUSEUM, [https://www.massillonmuseum.org/media/1/7/ImaginingABetterWorld\\_NellyTollBio.pdf](https://www.massillonmuseum.org/media/1/7/ImaginingABetterWorld_NellyTollBio.pdf) [<https://perma.cc/G67X-AZ94>] (last visited Jan. 25, 2021).

53. David Sim, *Holocaust Memorial Day 2016: Poignant Paintings by Jewish Concentration Camp Prisoners Go on Show in Berlin*, INT'L BUS. TIMES (Feb. 26, 2016, 5:19 PM), <https://www.ibtimes.co.uk/holocaust-memorial-day-2016-poignant-paintings-by-jewish-concentration-camp-prisoners-goes-show-1539988> [<https://perma.cc/NU4Q-S6JG>].

54. See Magdalena Tarnowska, *Gela Seksztajn*, CULTURE.PL (Apr. 2013), <https://culture.pl/en/artist/gela-seksztajn> [<https://perma.cc/7ZUH-GQ9Z>].

55. See *id.*

56. *Id.* For more information about Gela Seksztajn, see Yehudit Shendar, *Fulfilling the Artists' Last Will*, YAD VASHEM (Dec. 2013), <https://www.yadvashem.org/museum/museum-complex/art/articles/last-will.html> [<https://perma.cc/TTV2-6TDE>].

57. Clyde Haberman, *This Jewish Photographer Documented a Nazi-Controlled Ghetto*, N.Y. TIMES (Mar. 20, 2017), <https://lens.blogs.nytimes.com/2017/03/20/a-jewish-photographers-view-of-a-nazi-controlled-ghetto-henryk-ross/?smid=fb-nytimes&smtyp=cur>.

58. *Id.*

59. *Id.*

60. See *id.*

61. See *id.*

62. *Id.*

63. See Jake Romm, *The Incredible Holocaust Photographs of Henryk Ross Show Daily Life in the Lodz Ghetto*, FORWARD (Mar. 8, 2017), <https://forward.com/culture/365432/the-incredible-holocaust-photographs-of-henryk-ross-show-daily-life-in-the> [<https://perma.cc/Y8HA-3YN6>]; Penny Schwartz, *Exhibit Trains Overdue Lens on Secret Record of Life Under Nazis*, TIMES ISR. (Mar. 20, 2017, 9:09 PM), <https://www.timesofisrael.com/exhibit-trains-overdue-lens-on-secret-record-of-life-under-nazis> [<https://perma.cc/Z6F2-3RYH>]; Hilarie

and journalist, was a prolific author during the war.<sup>64</sup> Most of his writings were confiscated and later released only after a long legal dispute between his son and Polish authorities.<sup>65</sup>

These are only a few of the innumerable, heart-wrenching stories that demonstrate the mayhem that possessed Europe during the reign of the Nazi party, as well as that mayhem's brutal and bewildering effects on the cultural wealth and prosperity that once characterized a significant part of the Jewish diaspora. These works—produced in the extreme and inhumane circumstances of ghettos and concentration camps surrounded by death—are protected works according to copyright law and the Berne Convention. Germany signed the Convention in 1887, and Poland signed it in 1920.<sup>66</sup> Article 2(1) of the Berne Convention defines “literary and artistic works” as “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.”<sup>67</sup> This definition perfectly applies to the artworks described throughout this Part. These works should not be controlled by the same body of international copyright law that allowed the creator and executor of the “Final Solution” to profit from his art—his book *Mein Kampf*.<sup>68</sup> This inquiry is a clarion call to recognize and amplify, for the first time, the voices who were violently silenced over seventy years ago.

Copyright law is meant to protect and incentivize us to use our voices in a manner that is mutually beneficial to us as creators and our community or communities of listeners.<sup>69</sup> The voices of Jewish prisoners in concentration camps and ghettos have been continuously silenced from the moment that they were deprived of their rights until today—when their works have yet to receive rightful protection. Copyright law has failed its main purpose of freeing knowledge from illegitimate shelters and allowing lessons to be gleaned from history that cannot speak but for expression in copyrighted works.<sup>70</sup> Before discussing the artworks

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Sheets, *The Haunting Photos That a Holocaust Victim Buried as Evidence*, ARTSY (Mar. 20, 2017, 4:54 PM), <https://www.artsy.net/article/artsy-editorial-miraculous-survival-holocaust-victims-buried-photos> [https://perma.cc/6Y4U-DCGY].

64. See Ina Lancman, *Literary Estate as Mirror of Persecution: The Papers of Naftali Hertz Kon*, 24 GAZETA, Spring 2017, at 9, 9.

65. See Paul Berger, *After Long Struggle, Yiddish Writer's Work Finally Comes Home*, FORWARD, July 26, 2013, at 1.

66. WIPO-Administered Treaties: Contracting Parties > Berne Convention (Total Contracting Parties: 179), WIPO, [https://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=15](https://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15) [https://perma.cc/D4JH-DMUS] (last visited Jan. 26, 2021) [hereinafter *Contracting Parties > Berne Convention*].

67. Berne Convention, *supra* note 16, art. 2(1).

68. See Zlatica Hoke, *Hitler's 'Mein Kampf' Returns to Stores as Copyright Expires*, VOA NEWS (Jan. 6, 2016, 12:38 AM), <https://www.voanews.com/europe/hitlers-mein-kampf-returns-stores-copyright-expires> [https://perma.cc/4Q9N-8AEH].

69. See Lior Zemer, *Diallogical Transactions*, 95 OR. L. REV. 141, 148 (2016).

70. Another example is that of Yevgeni Khaldei, a Jewish Red Army photographer who took thousands of pictures during the war. See generally ALEXANDER NAKHIMVOSKY & ALICE NAKHIMVOSKY, WITNESS TO HISTORY: THE PHOTOGRAPHS OF YEVGENY KHALDEI (1997). His most famous photograph is of the Soviet flag placed on top of the German Reichstag building in Berlin after the defeat of the Nazis on May 2, 1945. See *id.* at 10, 60–61. Shortly after his death in 1997, a long legal dispute developed between his daughter and his agent regarding ownership of his works. The dispute came to an end when a U.S. district court held that the works now belong to Khaldei's daughter. See *Khaldei v. Kaspiev*, 135 F. Supp. 3d 70, 81 (S.D.N.Y.

that stand at the heart of this Part, we first discuss the existing literature about the intersection between Holocaust art and ownership—a discussion about artworks that the Nazis looted from Jewish families and that were never returned to their rightful owners after the war ended.

## II. THE LIMITED MESSAGE OF LOOTED ART

This Part of the Article examines artworks looted from Jews during the Holocaust and during World War II. It shows the limited emotional and personal messages that these artworks hold, as well as the limited efforts made by various legal systems to ensure that these artworks return to their legal owners. These limited efforts made no attempt to look inside the gates of concentration camps and ghettos, where the right to life as a natural right ceased to exist.

### A. NAZI PLUNDER AND FAILED ATTEMPTS TO RECOVER LOOTED ART AFTER THE WAR

Shortly after the Nazi party gained power in Germany in 1933, the phenomenon of “Nazi plunder” emerged. The term Nazi plunder refers to the massive theft of art and other significant cultural items stolen by the Nazi party as part of an organized looting scheme across Europe.<sup>71</sup> This plunder was carried out by military units of the German army known as *Kunstschutz*,<sup>72</sup> which ironically means “art protection.” In 1935, along with the Nuremberg Laws depriving Jews of their German citizenship,<sup>73</sup> Nazi Germany enacted a new law, which required Jews to register their domestic and foreign property and assets.<sup>74</sup> The Nazis pushed to “Aryanize” all Jewish businesses. By the end of 1938, approximately two-thirds of Jewish-owned businesses had been sold to Germans at a fixed price below market value.<sup>75</sup> On October 3, 1938, a decree ordered the confiscation of

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2015); Jim Heintz, *Negatives of Famed Soviet Photographer Finally Recovered*, AP NEWS (Mar. 10, 2017), <https://apnews.com/d6e2c9688ea14be5b625ebfc41a4437b/Negatives-of-famed-Soviet-photographer-finally-recovered> [<https://perma.cc/ZW7E-FQ2N>]. Though this example does not focus on artworks that were produced in ghettos or concentration camps, it nevertheless demonstrates the nature of legal disputes regarding ownership and their ramifications for the dissemination of artworks that were created to be shared.

71. See KENNETH D. ALFORD, *NAZI PLUNDER: GREAT TREASURE STORIES OF WORLD WAR II*, at iii (2000).

72. See, e.g., Marvin C. Ross, *The Kunstschutz in Occupied France*, 5 C. ART J. 336, 336–37 (1946).

73. See Hans-Christian Jasch, *Civil Service Lawyers and the Holocaust: The Case of Wilhelm Stuckart*, in *THE LAW IN NAZI GERMANY: IDEOLOGY, OPPORTUNISM, AND THE PERVERSION OF JUSTICE* 37, 48 (Alan E. Steinweis & Robert D. Rachlin eds., 2013); see also *Germany, Index of Jews Whose German Nationality Was Annulled by Nazi Regime, 1935–1944*, ANCESTRY.COM, <https://www.ancestry.com/search/collections/2027> (last visited Jan. 26, 2021) (providing database of Jews who had their German citizenship revoked).

74. See KARL A. SCHLEUNES, *THE TWISTED ROAD TO AUSCHWITZ: NAZI POLICY TOWARD GERMAN JEWS 1933–1939*, at 221 (Univ. of Ill. Press 1990) (1970).

75. See HAROLD JAMES, *THE DEUTSCHE BANK AND THE NAZI ECONOMIC WAR AGAINST THE JEWS: THE EXPROPRIATION OF JEWISH-OWNED PROPERTY* 47 (2004); HAROLD JAMES, *THE NAZI DICTATORSHIP AND THE DEUTSCHE BANK* 63 (2004); Rudi van Doorslaer, *The Expropriation of Jewish Property and Restitution in Belgium*, in *ROBBERY AND RESTITUTION: THE CONFLICT OVER JEWISH PROPERTY IN EUROPE* 155, 157 (Martin Dean et al. eds., 2007); *Anti-Jewish Legislation in Prewar Germany*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/anti-jewish-legislation-in-prewar-germany> [<https://perma.cc/2XV5-TVHA>] (last visited Jan. 26, 2021).

Jewish-owned property and its transfer to non-Jewish hands.<sup>76</sup> The Nazis continued to deprive basic human rights from the Jewish community and individuals through legislation, but the creation of the ghettos symbolized the greatest deprivation of all. By that point, the vast majority of Jewish-owned property had already been expropriated.<sup>77</sup> Ultimately, the property of over nine million Jews in Europe was looted, confiscated, or destroyed during the Holocaust.<sup>78</sup> Most of this property was owned by private individuals and families.<sup>79</sup> One assessment states that no more than twenty percent of Jewish property (private and communal) was restituted to the rightful owners after the end of the war.<sup>80</sup>

In 1943, during the war, the Allies published a statement guaranteeing the restitution of properties looted in enemy territories.<sup>81</sup> Nevertheless, many Jews who relied on this statement and requested their property suffered from harassment and violence and received no restitution.<sup>82</sup> Those who tried to legally regain ownership of their properties were blocked by excessively complex bureaucratic arrangements.<sup>83</sup> New Jewish communities that arose from the ashes of Europe received only a small portion of property that had belonged to their predecessors before the war. Some countries legislated and issued warrants to restitute Jewish-owned property, but local authorities rarely enforced such orders.<sup>84</sup> Even though many looted items were recovered,<sup>85</sup> many other artworks remain missing, despite decades-long international endeavors attempting to identify such works and return them to their rightful owners or heirs.<sup>86</sup>

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76. *Antisemitic Legislation 1933–1939*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/antisemitic-legislation-1933-1939> [<https://perma.cc/F7XJ-57TB>] (last visited Jan. 26, 2021).

77. See Martin C. Dean, *The Finanzamt Moabit-West and the Development of the Property Confiscation Infrastructure, 1933–1945*, in CTR. FOR ADVANCED HOLOCAUST STUDIES, U.S. HOLOCAUST MEM’L MUSEUM, *CONFISCATION OF JEWISH PROPERTY IN EUROPE, 1933–1945: NEW SOURCES AND PERSPECTIVES* 9, 13–14 (2003), [https://www.ushmm.org/m/pdfs/Publication\\_OP\\_2003-01.pdf](https://www.ushmm.org/m/pdfs/Publication_OP_2003-01.pdf) [<https://perma.cc/LD9K-UKRB>].

78. שְׁלֵי מִזְרָחִי, הַשְׁבֵּת כְּרוֹשׁ קוֹמְבֵּנֵת הַשׁוֹאָה – בְּקִיכָה מְשׁוּוּה, [SHELLY MIZRAHI, KNESSET, RESTITUTION OF HOLOCAUST VICTIMS’ PROPERTY—COMPARATIVE REVIEW] 1 (2010) [hereinafter MIZRAHI], <https://perma.cc/W2PR-ECKA>.

79. *Id.*

80. *Id.*

81. See COMM’N FOR LOOTED ART IN EUR., INTRODUCTION TO THE NATIONAL ARCHIVES’ RECORDS ON NAZI-ERA LOOTED CULTURAL PROPERTY, 1939–1961, at 3 (2011), <https://www.nationalarchives.gov.uk/documents/records/looted-art-in-depth-intro.pdf> [<https://perma.cc/YZS4-VBxB>].

82. MIZRAHI, *supra* note 78, at 3.

83. *Id.*

84. Laurence Weinbaum, *Defrosting History: The Restitution of Jewish Property in Eastern Europe*, in *THE PLUNDER OF JEWISH PROPERTY DURING THE HOLOCAUST: CONFRONTING EUROPEAN HISTORY* 83, 85 (Avi Beker ed., 2001).

85. A special Allied unit known as the “Monuments Men” recovered the items. See generally ROBERT M. EDSSEL, *THE GREATEST TREASURE HUNT IN HISTORY: THE STORY OF THE MONUMENTS MEN* (2019) (chronicling the history of the Monuments Men); ROBERT M. EDSSEL & BRET WITTER, *THE MONUMENTS MEN: ALLIED HEROES, NAZI THIEVES, AND THE GREATEST TREASURE HUNT IN HISTORY* (2009) (same).

86. For more information, see *infra* Section II.B.

In the 1950s, the issue of restitution of Jewish-owned property was removed from the international agenda upon the division of Europe into two ideological blocs—East and West. A fear of communism led the West to shun this issue amidst concern that the problem could harm its sense of unity.<sup>87</sup> In the East, communist governments expressed hostility toward the concept of restitution. In some cases, private property that had already been restituted was re-expropriated as a consequence of the nationalization goals of the communist regimes.<sup>88</sup>

The relationship between art and the Holocaust has been debated for decades,<sup>89</sup> including by scholars examining restitution claims of Jewish families whose properties were lost.<sup>90</sup> This property includes famous paintings and art by world-renowned artists seized by the Nazis. Looted artworks have been displayed in many of the most famous museums, and many items have not been returned to their lawful owners.<sup>91</sup> These stories are frequently featured in media outlets around the world.<sup>92</sup> For example, a report in the *Guardian* discussing John Constable's painting *Dedham from Langham* stated, "Nazi loot carries a legacy of hate. And that is why a Swiss art museum is wrong to refuse to return a

87. See Avi Beker, *Introduction: Unmasking National Myths – Europeans Challenge Their History*, in *THE PLUNDER OF JEWISH PROPERTY DURING THE HOLOCAUST: CONFRONTING EUROPEAN HISTORY*, *supra* note 84, at 1, 5.

88. MIZRAHI, *supra* note 78, at 3–4.

89. See, e.g., Republic of Austria v. Altmann, 541 U.S. 677, 680 (2004); Otto Waechter & Petra Fizimayer, *Stolen Masters: The Sale of Stolen and Plundered Art—An Austrian Perspective*, 25 NYSBA INT'L L. PRACTICUM 167, 170–71 (2012); see also Jeremiah R. Blocker, *Legal Perspectives on the Holocaust Artwork Recovery Claims and Modern Law: Contemporary Issues from the Holocaust*, 21 TRINITY L. REV. 1, 16–18 (2016) (discussing the alternate dispute resolution in *Altmann*); Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 243, 264–65 (2006) (discussing the *Altmann* decision and its subsequent history). See generally ANNE-MARIE O'CONNOR, *THE LADY IN GOLD: THE EXTRAORDINARY TALE OF GUSTAV KLIMT'S MASTERPIECE, PORTRAIT OF ADELE BLOCH-BAUER* (2012) (describing the story of a famous portrait stolen by the Nazis and then subject to litigation between the Austrian government and the artist's heirs).

90. See, e.g., BRUCE L. HAY, *NAZI-LOOTED ART AND THE LAW: THE AMERICAN CASES* (2017) (examining case law in the United States on looted art from the Holocaust); see also Stephen K. Urice, *Elizabeth Taylor's Van Gogh: An Alternative Route to Restitution of Holocaust Art?*, 22 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 2–3 (2011) (discussing an alternate restitution approach).

91. See, e.g., Jessica Grimes, Note, *Forgotten Prisoners of War: Returning Nazi-Looted Art by Relaxing the National Stolen Property Act*, 15 ROGER WILLIAMS U. L. REV. 521, 523–24, 532 (2010).

92. See, e.g., Daniel Boffey, *Dutch Museums Discover 170 Artworks Stolen by Nazis*, *GUARDIAN* (Oct. 10, 2018, 8:15 AM), <https://www.theguardian.com/world/2018/oct/10/dutch-museums-discover-170-artworks-stolen-by-nazis>; Kate Brown, *Three Munich Museums Restitute 9 Nazi-Looted Artworks to the Heirs of Jewish Collectors*, *ARTNET NEWS* (Aug. 5, 2019), <https://news.artnet.com/art-world/restitution-munich-museums-1616695> [<https://perma.cc/6N48-GCS8>]; *Judge Rules Museum 'Rightfully Owns' Nazi-Looted Painting*, *BBC* (May 1, 2019), <https://www.bbc.com/news/world-europe-48118342> [<https://perma.cc/2WND-Q2PM>]; Barbie Latza Nadeau, *Museums Use 'Nazi Tactics' to Keep Art Stolen by the Nazis*, *DAILY BEAST* (Nov. 29, 2018, 10:04 AM), <https://www.thedailybeast.com/museums-use-nazi-tactics-to-keep-art-stolen-by-the-nazis> [<https://perma.cc/FAT6-ELLC>]; Isabel Vincent, *New York City Museums Are Fighting to Keep Art Stolen by the Nazis*, *N.Y. POST* (Nov. 24, 2018, 9:31 AM), <https://nypost.com/2018/11/24/new-york-city-museums-are-fighting-to-keep-art-stolen-by-the-nazis> [<https://perma.cc/SDB7-74QZ>]; see also Erin L. Thompson, *Cultural Losses and Cultural Gains: Ethical Dilemmas in WWII-Looted Art Repatriation Claims Against Public Institutions*, 33 HASTINGS COMM. & ENT. L.J. 407, 423–24 (2011) (discussing the ethics of removing art from public access).

painting by John Constable to the despoiled owner's rightful heirs."<sup>93</sup> In a ridiculous response, the Musée des Beaux-Arts in La Chaux-de-Fonds insisted on keeping the work, offering to tell the story of its provenance written on a special plaque in the gallery instead.<sup>94</sup>

In another example, Ludwig and Margret Kainer's relatives, who were heirs to an art collection that the Nazis confiscated, filed lawsuits accusing UBS, a Switzerland-based global financial institution, of "cheating them out of their inheritance."<sup>95</sup> The lawsuits were filed in New York and Switzerland against both UBS and a foundation controlled by UBS.<sup>96</sup> According to the heirs, the bank transferred proceeds from art sales and reparations to a foundation created by bank officials while claiming to act on the heirs' behalf.<sup>97</sup> One example they gave was the 2009 auction of Edgar Degas's *Danseuses*, which an auction catalog described as "being sold as part of a restitution agreement with the 'heirs of Ludwig and Margret Kainer.'"<sup>98</sup> The masterpiece was sold that same year for nearly \$11 million.<sup>99</sup> The Kainers' heirs argued not only that they were cheated out of a benefit but also that they were never informed about the sale.<sup>100</sup> UBS was one of several Swiss banks accused of preventing Jewish survivors and heirs from reclaiming assets.<sup>101</sup> This led to limited global efforts to return what was once owned by Jews and Jewish communities.

#### B. EFFORTS TO RETURN LOOTED ART

When the Eastern Bloc dissolved in 1990, the East German government passed legislation to return property that the previous communist regime had nationalized.<sup>102</sup> This legislation covered Jewish-owned property that was sold under duress after 1933 or subject to Nazi confiscation, and allowed survivors and heirs to file claims for property in former East Germany.<sup>103</sup> However, these restitution agreements had limitations and strict conditions.<sup>104</sup> For example, the German government declared December 31, 1992, as the application deadline for real

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93. Jonathan Jones, *Why a Swiss Gallery Should Return Its Looted Nazi Art Out of Simple Decency*, GUARDIAN (Jan. 27, 2016, 12:51 PM), <https://www.theguardian.com/artanddesign/jonathanjonesblog/2016/jan/27/swiss-gallery-nazi-art-restitution-constable-painting-jaffe>.

94. *Id.*

95. *Heirs to Art Looted by Nazis Sue Swiss Bank for Fraudulent Sales*, HAARETZ (Oct. 18, 2014), <https://www.haaretz.com/hblocked?returnTo=https%3A%2F%2Fwww.haaretz.com%2Fjewish%2Fheirs-sue-swiss-bank-over-art-sales-1.5316813>.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *See The Successor Organization*, CLAIMS CONF. ON JEWISH MATERIAL CLAIMS AGAINST GER., <http://www.claimscon.org/what-we-do/successor> [https://perma.cc/U998-EMJZ] (last visited Jan. 27, 2021).

103. *Id.*

104. *See A. Bradley Shingleton, Volker Ahrens & Peter Ries, Property Rights in Eastern Germany: An Overview of the Amended Property Law*, 21 GA. J. INT'L & COMP. L. 345, 346 (1991).



estate claims and June 30, 1993, as the deadline for movable property claims.<sup>105</sup> In light of the vast data and evidence required to prove ownership, such deadlines essentially rendered the obtained restitution agreements impractical.<sup>106</sup>

In December 1997, a conference composed of representatives from forty-one countries assembled in London to discuss the Nazi gold that was held by the Tripartite Commission for the Restitution of Monetary Gold (TGC).<sup>107</sup> Since 1946, the TGC has distributed gold to fifteen countries whose national banks were looted by the Nazis.<sup>108</sup> The TGC recommended that the remnants of this gold, worth approximately sixty million dollars, should be given to survivors of the Holocaust.<sup>109</sup> As a result, the International Fund for Needy Victims of Nazi Persecution was established.<sup>110</sup>

In 1998, the United States hosted the Washington Conference with forty-four participant nations to discuss the mass robbery of art carried out by the Nazis.<sup>111</sup> The Washington Conference produced a document titled Principles on Nazi-Confiscated Art, which established eleven nonbinding principles that, among other things, expressly declare the importance of identifying such artwork and returning it to the rightful owners.<sup>112</sup> That same year, the U.S. Congress enacted the Holocaust Victims Redress Act, which states as one of its purposes to provide justice to living survivors of the Holocaust around the world and to call for all governments

105. CLAIMS CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GER., 2007 ANNUAL REPORT WITH 2008 HIGHLIGHTS 42 (2008), [http://www.claimscon.org/forms/CC\\_AR\\_2007.pdf](http://www.claimscon.org/forms/CC_AR_2007.pdf) [<https://perma.cc/69QJ-6DMH>].

106. See *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 142, 159 (E.D.N.Y. 2000); FED. MINISTRY OF FIN., COMPENSATION FOR NATIONAL SOCIALIST INJUSTICE: INDEMNIFICATION PROVISIONS 21 (2019), <https://perma.cc/XX8C-H7VV>.

107. This Commission was established in 1946 by the United States, the United Kingdom, and France to deal with recovered gold that had been seized by the Nazis from the national banks of occupied territories. See generally FOREIGN & COMMONWEALTH OFFICE STAFF, NAZI GOLD: THE LONDON CONFERENCE 2–4 DECEMBER 1997 (1998) (presenting a detailed transcript of the Commission's 1997 conference); GEORGE M. TABER, CHASING GOLD: THE INCREDIBLE STORY BEHIND THE NAZI SEARCH FOR EUROPE'S BULLION (2014) (describing how the Nazis attempted to gain Europe's gold to finance history's bloodiest war).

108. Stuart E. Eizenstat, U.S. Under Sec'y of State for Econ., Bus. & Agric. Affairs, Review of Gold Issues, Research and Resolution, in WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS PROCEEDINGS 57, 62 (J.D. Bindenagel ed., 1999), <https://perma.cc/DR32-7CD4>.

109. See *id.*

110. See *Statement on the International Fund for Needy Victims of Nazi Persecution at the Washington Conference on Holocaust-Era Assets, 1998*, LOOTEDART.COM, <https://www.lootedart.com/MFEU4399571> [<https://perma.cc/VH3Z-EBAL>] (last visited Jan. 27, 2021).

111. See Jillian E. Meaney, *From Platitudes to the Passage of the HEAR Act: How Procedural Obstacles in U.S. Courts Have Prevented the Restitution of Nazi-Expropriated Art and Congress's Efforts to Provide a Resolution*, 28 U. FLA. J.L. & PUB. POL'Y 371, 375 (2017); Samantha Elie, Note, *Why Wait So Long: The Cornelius Gurlitt Collection and the Need for Clear ADR Mechanisms in the Restitution of Looted Art*, 18 CARDOZO J. CONFLICT RESOL. 363, 369 (2017).

112. See Meaney, *supra* note 111; Elie, *supra* note 111; *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP'T ST. ARCHIVE, <https://2001-2009.state.gov/p/eur/rt/hlcst/23231.htm> [<https://perma.cc/UK36-6SX2>] (last visited Jan. 28, 2021).

to facilitate the return of private and public looted property.<sup>113</sup>

In 2009, forty-eight nations and numerous organizations convened the Holocaust Era Assets Conference in Prague.<sup>114</sup> This conference issued the Terezín Declaration on Holocaust Era Assets and Related Issues, which reaffirmed the 1998 Washington Conference Principles.<sup>115</sup> This declaration advised all signing nations to facilitate “just and fair” solutions regarding Nazi-confiscated and looted art.<sup>116</sup>

Over the years, several victims of Nazi looting or their heirs have taken legal action to recover their confiscated property.<sup>117</sup> In 2012 alone, more than one thousand looted artworks were discovered in Munich.<sup>118</sup> These included works by some of the world’s greatest painters such as Picasso, Matisse, and Chagall.<sup>119</sup> One of the most well-known ownership disputes that resulted from the Nazi plunder involved the *Woman in Gold—the Portrait of Adele Bloch-Bauer I*, painted by Austrian artist Gustav Klimt.<sup>120</sup> At the end of a long legal procedure, a binding arbitration panel of Austrian judges declared Maria Altmann, the niece of Adele and the painting’s subject and first owner, the rightful owner of this portrait and four other paintings by Klimt that belonged to her family.<sup>121</sup>

113. Pub. L. No. 105-158, §§ 101(b)(1), 202, 112 Stat. 15, 16, 17–18 (1998).

114. See generally HOLOCAUST ERA ASSETS: CONFERENCE PROCEEDINGS PRAGUE, JUNE 26–30, 2009, at 1196–201 (Jiří Schneider et al. eds., 2009), <http://www.commartrecovery.org/docs/PragueConferenceProceedings.pdf> [<https://perma.cc/GN8T-A74B>] (documenting the conference proceedings); see also *Terezin Declaration*, WJRO, <https://wjro.org.il/our-work/international-declarations-resolutions/terezin-declaration> [<https://perma.cc/C625-8HE6>] (last visited Jan. 28, 2021) (describing the declaration issued at the end of the conference). This declaration was signed by forty-seven of the forty-eight attending states. See *id.*

115. See *Terezin Declaration*, *supra* note 114; see also Bert Demarsin, *Let’s Not Talk About Terezin: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, 37 BROOK. J. INT’L L. 117, 118 (2011) (discussing the issuance of the Terezín Declaration during the Prague Holocaust Era Assets Conference); Rebecca E. Hatch, *Litigation Under Common Law for Recovery of Nazi Looted Art*, 141 AM. JURIS. TRIALS 189, § 46 (2015) (providing the text of the Terezín Declaration); Michael J. Birnkrant, Note, *The Failure of Soft Law to Provide an Equitable Framework for Restitution of Nazi-Looted Art*, 18 WASH. U. GLOBAL STUD. L. REV. 213, 219 (2019) (“The Terezin Declaration . . . reads as a broad affirmation of the goals set forth in the Washington Conference [p]rinciples.”). See generally MICHAEL J. BAZYLER, KATHRYN LEE BOYD, KRISTEN L. NELSON & RAJIKA L. SHAH, *SEARCHING FOR JUSTICE AFTER THE HOLOCAUST: FULFILLING THE TEREZIN DECLARATION AND IMMOVABLE PROPERTY RESTITUTION* (2019) (providing the legal history of Holocaust immovable property restitution in each of the signatory states to the Terezín Declaration).

116. See HAY, *supra* note 90, at 221; *Terezin Declaration*, *supra* note 114.

117. See generally MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS* (2003) (discussing Holocaust restitution litigation in U.S. courts).

118. See Alex Shoumatoff, *The Devil and the Art Dealer*, VANITY FAIR (Mar. 19, 2014), <https://www.vanityfair.com/news/2014/04/degenerate-art-cornelius-gurlitt-munich-apartment>.

119. *Id.*

120. See generally O’CONNOR, *supra* note 89 (describing the history of the painting from its creation up to the legal dispute surrounding it).

121. See CAROLINE RENOLD, ALESSANDRO CHECHI, ANNE LAURE BANDLE & MARC-ANDRÉ RENOLD, ARTHEMIS ART-LAW CTR., UNIV. OF GENEVA, *CASE SIX KLIMT PAINTINGS – MARIA ALTMANN AND AUSTRIA 1* (2012), <https://plone.unige.ch/art-adr/cases-affaires/6-klimt-paintings-2013-maria-altmann-and-austria/CaseNoteSixKlimtpaintingsMariaAltmannandAustria.pdf> [<https://perma.cc/ULE5-LENU>].

Courts have rejected many ownership claims for looted art, often because relevant statutory limitation periods expired prior to the end of the war. In *Detroit Institute of Arts v. Ullin*, the heirs of Martha Nathan, a former German citizen who fled to Switzerland shortly before the war, approached the Detroit Institute of Art and claimed ownership over Van Gogh's *Les Becheurs*.<sup>122</sup> The district court ruled that Michigan's three-year statute of limitations disqualified the heir's claim.<sup>123</sup> In *Von Saher v. Norton Simon Museum of Art*, the U.S. Court of Appeals for the Ninth Circuit invalidated a California law that extended the local statute of limitations for victims seeking recovery for artworks stolen by the Nazis.<sup>124</sup> The case regarded the ownership of two sixteenth-century oil paintings, *Adam and Eve* by Lucas Cranach the Elder, which were looted from the collection of Jewish art collector Jacques Goudstikker.<sup>125</sup> The paintings ended up at the Simon Museum of Art in Pasadena, California.<sup>126</sup> Marei von Saher, the Jewish art collector's sole heir, filed a complaint seeking to recover these paintings.<sup>127</sup> The court concluded that the extension of the statute of limitations infringed on the federal government's exclusive jurisdiction over foreign affairs, which includes war-related disputes.<sup>128</sup> On remand, the district court dismissed the restitution claim and granted summary judgment to the Norton Simon Museum, which retained legal title to the paintings.<sup>129</sup> This was because Goudstikker's widow failed to

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122. No. 06-10333, 2007 WL 1016996, at \*1–2 (E.D. Mich. Mar. 31, 2007). For further discussion of the case, see HAY, *supra* note 90, at 253; Raymond J. Dowd, *Nazi Looted Art and Cocaine: When Museum Directors Take It, Call the Cops*, 14 RUTGERS J. L. & RELIGION 529, 543 (2013); Simon J. Frankel & Ethan Forrest, *Museums' Initiation of Declaratory Judgment Actions and Assertion of Statutes of Limitations in Response to Nazi-Era Art Restitution Claims—A Defense*, 23 DEPAUL J. ART, TECH. & INTELL. PROP. L. 279, 310, 312–13 (2013); Jennifer Anglim Kreder, *Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation*, 61 U. KAN. L. REV. 75, 107–08 (2012); and Erica B. Marcus, *Nazi Looted Art: Setting Precedence for Museums Decisions 37–39* (Aug. 2010) (unpublished M.A. thesis, Seton Hall University) (on file with authors).

123. See *Ullin*, 2007 WL 1016996, at \*4.

124. 592 F.3d 954, 968 (9th Cir. 2010). For further discussion of the case, see Charles Cronin, *Ethical Quandaries: The Holocaust Expropriated Art Recovery Act and Claims for Works in Public Museums*, 92 ST. JOHN'S L. REV. 509, 523–35 (2018); Erica Wolf, *The Ninth Circuit's Decision in Von Saher v. Norton Simon Museum of Art at Pasadena: The Invocation of the Act of State Doctrine and its Implications for Future Nazi-Stolen Art Claims*, 34 CARDOZO ARTS & ENT. L.J. 525, 539 (2016); Mikka Gee Conway, Note, *Dormant Foreign Affairs Preemption and Von Saher v. Norton Simon Museum: Complicating the "Just and Fair Solution" to Holocaust-Era Art Claims*, 28 LAW & INEQ. 373, 392 (2010); Mark I. Labaton, *Restoring Lost Legacies*, L.A. LAW., June 2018, at 34, 39; and Anne Laure Bandle, Nare G. Aleksanyan & Marc-André Renold, *Cranach Diptych—Goudstikker Heirs and Norton Simon Museum*, ARTHEMIS ART-L. CTR., U. GENEVA, <https://plone.unige.ch/art-adr/cases-affaires/cranach-diptych-2013-goudstikker-heirs-and-norton-simon-museum> [<https://perma.cc/3X82-NB3M>] (last visited Jan. 28, 2021).

125. See *Von Saher*, 592 F.3d at 959–60.

126. See *id.* at 957.

127. See *id.* At the time, Section 354.3 of the California Code of Civil Procedure extended the limitation period for recovering Nazi-looted art in museums and galleries until December 31, 2010. See Bandle et al., *supra* note 124.

128. See *Von Saher*, 592 F.3d at 968.

129. See *Von Saher v. Norton Simon Museum of Art*, CV 07-2866-JFW (SSx), 2016 WL 7626153, at \*14 (C.D. Cal. Aug. 9, 2016); Judgment at 1, *Von Saher v. Norton Simon Museum of Art*, No. CV 07-2866 JFW (SSx) (C.D. Cal. Aug. 15, 2016) (“Norton Simon Art Foundation, defendant in this action, is

make a claim for the paintings by 1951, the required date under Dutch law, after the war ended.<sup>130</sup> As a result, these paintings became the property of the Dutch state.<sup>131</sup> Thus, the final sale to the Simon Museum was valid.<sup>132</sup>

These outcomes are grossly absurd and unjust. In comparison, when the entertainment industry seeks to extend the copyright duration of characters like Mickey Mouse, Congress rightfully considers the economic effects on the industry of ending the copyright and extends it accordingly.<sup>133</sup> When Sir Burry bequeathed his Peter Pan story to a children's hospital in London, the British House of Commons added Section 301 to the Copyright, Designs and Patents Act of 1988 in order to formally legalize the perpetual copyright for the hospital.<sup>134</sup> These two examples project economic, emotional, and humanitarian concerns. Looted artworks from Jewish families murdered in concentration camps on European soil deserve to be treated as the exemplar of cases dealing with these ideologies. If looted art cannot create a unique case for emotional redress and justice, then nothing else can. Furthermore, rulings rejecting the lawful rights of heirs strongly contradict the Principles on Nazi-Confiscated Art, the Terezín

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the sole owner of the title to the personal property described as the oil on panel paintings 'Adam' and 'Eve' by Lucas Cranach the Elder. . . . Plaintiff has no right, title, or interest whatever in the Cranachs.""). The court's decision grew out of a previous ruling that found a similar California statue unconstitutional because it allowed a cause of action for claims involving World War II slave labor. *See* Conway, *supra* note 124, at 386–87.

130. Isaac Kaplan, *The Surprise Norton Simon Museum Nazi Loot Ruling, Explained*, ARTSY EDITORIAL (Aug. 19, 2016, 3:58 PM), <https://www.artsy.net/article/artsy-editorial-why-the-norton-simon-museum-is-getting-to-keep-two-pieces-of-nazi-looted-art>.

131. *Id.*

132. *See id.*

133. *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998); *see also* Eldred v. Ashcroft, 537 U.S. 186, 222 (2003) (rejecting plaintiff's argument that the Act and a previous extension of the protection term have de facto created a perpetual copyright and concluding that there is no limitation to the number of times Congress can extend the term of a copyright, as long as it is a limited term). *See generally* Howard B. Abrams, Eldred, Golan and Their Aftermath, 60 J. COPYRIGHT SOC'Y U.S.A. 491 (2013) (reviewing *Eldred* and discussing the interplay between Congress and the Supreme Court regarding increased copyright duration); Marvin Ammori, *The Uneasy Case for Copyright Extension*, 16 HARV. J.L. & TECH. 287 (2002) (suggesting that the limitation on the Copyright Clause requires a duration where the benefits of financial incentives outweigh the societal costs of monopoly); Victoria A. Grzelak, *Mickey Mouse & Sonny Bono Go to Court: The Copyright Term Extension Act and Its Effect on Current and Future Rights*, 2 J. MARSHALL REV. INTELL. PROP. L. 95 (2002) (examining the constitutional problems associated with the Copyright Term Extension Act (CTEA), by examining the history of copyright law and legal disputes like *Eldred*); Joseph D. Mirarchi, *The Big Effect of Two Little Words: Why a "Limited Times" Challenge Will Stop the Next Copyright Term Extension*, 43 RUTGERS L.J. 131 (2011) (arguing that challenges to future copyright extensions should succeed under the U.S. Constitution's Copyright Clause); Christopher Ledford, Comment, *The Dream That Never Dies: Eldred v. Ashcroft, the Author, and the Search for Perpetual Copyright*, 84 OR. L. REV. 655 (2005) (analyzing the doctrinal role of the author within U.S. copyright law); Peter K. Yu, *Mickey Mouse, Peter Pan, and the Tall Tale of Copyright Harmonization*, PETER YU, [www.peteryu.com/IPLB0403.pdf](http://www.peteryu.com/IPLB0403.pdf) [<https://perma.cc/5Q9S-NCW3>] (last visited Jan. 28, 2021) (discussing *Eldred*).

134. Copyright, Designs and Patents Act 1988, c. 301 § 13(1), sch. 1 (UK); *see* Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907, 932 (2004); Jennifer S. Green, Comment, *Copyrights in Perpetuity: Peter Pan May Never Grow Up*, 24 PENN ST. INT'L L. REV. 841, 842 (2006); Joo-Young Rognlie, *Copyrights in Neverland*, HARV. J. SPORTS & ENT. L. (Nov. 6, 2012), <https://harvardjsel.com/2012/11/copyrights-in-neverland> [<https://perma.cc/6AF8-68HT>].

Declaration, and the widely accepted concept of consent, which advocates returning Nazi-looted artworks to their rightful owners.<sup>135</sup>

The *Ullin* and *Von Saher* cases demonstrate gross injustice based on formal rules and procedures. In July 2016, the U.S. Congress unanimously passed the Holocaust Expropriated Art Recovery Act.<sup>136</sup> The law expands opportunities for Holocaust survivors, victims, and their families to file lawsuits disputing ownership of Nazi-looted artworks.<sup>137</sup> One of the main purposes of the law is to ensure that legal claims regarding artworks that were stolen or misappropriated by the Nazis would not be barred by statutes of limitations, but rather would be resolved in a just and fair manner based on the merits of the claim.<sup>138</sup> Redefining the limitation period may prevent similar cases from being blocked by courts in the future.<sup>139</sup>

Similarly, Israel legislated a designated restitution law, the Israeli Restitution Act.<sup>140</sup> The Act established the Holocaust Restitution Company of Israel (*Hashava*),<sup>141</sup> and it defined two main goals for the company: (1) to encourage locating assets in Israel in cases where the assets' owners died in the Holocaust, locate heirs and other rightful owners, and restitute the misappropriated assets; and (2) to ensure that assets for which heirs or other rightful holders could not be found are used to assist Holocaust survivors.<sup>142</sup> Like the U.S. law, the Israeli Restitution Act has limitations. It applies only within Israel's domestic territory, and was enacted in 2006, more than sixty years after the end of World War II.<sup>143</sup> The law's limited reach and late enactment cast doubt on its ability to locate and restitute assets.

135. See *supra* notes 105–16 and accompanying text.

136. See Jennifer Anglim Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act of 2016*, 20 CHAP. L. REV. 1, 23 (2017) (concluding that the HEAR Act will help provide survivors and their heirs a fair opportunity to recover stolen art); Jason Barnes, Note, *Holocaust Expropriated Art Recovery (HEAR) Act of 2016: A Federal Reform to State Statutes of Limitations for Art Restitution Claims*, 56 COLUM. J. TRANSNAT'L L. 593, 596, 622 (2018) (arguing that the HEAR Act, despite its many positive traits, may cause uncertainty in the federal–state balance and among litigants).

137. See Emmarie Huetteman, *Holocaust Survivors Score Victory in Reclaiming Stolen Art*, N.Y. TIMES (Dec. 10, 2016), <https://www.nytimes.com/2016/12/10/us/congress-holocaust-nazis-stolen-art.html>.

138. Pub. L. No. 114-308, § 3, 130 Stat. 1524, 1525–26 (2016).

139. See *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 189 (2d Cir. 2019); *Gowen v. Helly Nahmad Gallery, Inc.*, 77 N.Y.S.3d 605, 623–24 (Sup. Ct. 2018); *Reif v. Nagy*, 52 N.Y.S.3d 100, 102 (App. Div. 2017); see also *New York Judge Awards Egon Schiele Art to Holocaust Heirs*, BBC (Apr. 6, 2018), <https://www.bbc.com/news/world-us-canada-43665737> (“[T]he Manhattan state court ruled against [the defendant], citing the 2016 Holocaust Expropriated Art Recovery (Hear) Act.”) [<https://perma.cc/8YJ3-34AM>].

140. See *Assets of Holocaust Victims Law (Restitution and Dedication to Aid and Commemoration)*, 5766–2006, SH No. 2049 p. 202–29 (Isr.) [hereinafter *Israeli Restitution Act*]. Israel also enacted corresponding regulations to facilitate the Israeli Restitution Act's execution and enforcement. See *Regulations for Assets of Holocaust Victims (Inheritance Issues)*, 5769–2008, KT 6732 p. 226 (Isr.).

141. See *Israeli Restitution Act*, *supra* note 140, p. 203–04; *Types of Assets*, HASHAVA: HOLOCAUST RESTITUTION COMPANY ISR. (Dec. 31, 2017), <https://www.hashava.info/template/default.aspx?catId=37&pageId=358#X5123YhKjIV> [<https://perma.cc/X584-Y4CA>].

142. See *Israeli Restitution Act*, *supra* note 140, p. 202.

143. See *id.*

Globally, nongovernmental organizations and programs played an important role in fighting for the restitution of looted art—one example is the Claims Conference, an international body that operates for the welfare of Holocaust survivors.<sup>144</sup> The objective of this organization is to negotiate compensation payments for Holocaust victims from the German government.<sup>145</sup> The Claims Conference has reached numerous important agreements regarding compensation payments by German and other European governments.<sup>146</sup> Another important organization working in this field is the World Jewish Restoration Organization (WJRO).<sup>147</sup> The WJRO's main objective is to negotiate the restitution of private and public property in all countries except for Germany and Austria.<sup>148</sup> The WJRO is considered the legal and moral representative of the Jewish people in all matters related to the restitution of assets belonging to Jews in Europe before World War II.<sup>149</sup>

Looted art is primarily a legal matter related to property rights in tangible and movable properties. Though the personal connection of the creator to an artwork is strong even under normal circumstances, that connection is still weaker in copyright terms than the connection between authors and their art portraying the horrid worlds of the ghettos and concentration camps. Jewish prisoners found an emotional haven in taking photographs, creating theater productions, painting and sketching portraits, and writing poems, stories, and diaries. These works deserve the world's attention. Most of these works are orphan works, and others are held in museums and archives in Europe, the United States, Israel, and in other countries. Modern copyright law cannot free them from these places;

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144. See *What We Do*, CLAIMS CONF. ON JEWISH MATERIAL CLAIMS AGAINST GER., <http://www.claimscon.org/what-we-do> [<https://perma.cc/A33H-6Q6N>] (last visited Jan. 29, 2021).

145. See *id.*

146. See *id.*; see also *The Successor Organization*, *supra* note 102 (“In the absence of a claim from an entitled heir, if the Claims Conference filed a claim and successfully proves the original Jewish ownership of the property, it is entitled to recover property.”).

147. See *About Us / Our Mission*, WORLD JEWISH RESTITUTION ORG., <https://wjro.org.il/about-wjro/about-us-our-mission> [<https://perma.cc/Y92W-GG35>] (last visited Jan. 29, 2021).

148. See *id.*

149. *Id.* In 1993, WJRO signed an agreement with the government of Israel establishing principles of cooperation and coordination. See Greer Fay Cashman, *Israel, WJRO to Work to Retrieve Assets from Holocaust Era*, JERUSALEM POST (May 5, 2017, 5:18 AM), <https://www.jpost.com/israel-news/israel-wjro-to-work-to-retrieve-assets-from-holocaust-era-489843>; see also CLAIMS CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GER. & WORLD JEWISH RESTITUTION ORG., HOLOCAUST-ERA JUDAICA AND JEWISH CULTURAL PROPERTY: A WORLD-WIDE OVERVIEW, at IV. 2 (2009) [hereinafter CLAIMS CONFERENCE & WJRO, WORLD-WIDE OVERVIEW] (discussing the WJRO's efforts concerning the restitution of Judaica). Some countries tried to return Judaica artifacts to Jewish communities and individuals after the war, but others deposited such artifacts in governmental institutions, such as the Jewish Historical Institute in Warsaw, Poland; libraries in Minsk; and the *Osohyi Arkhiv* (Special Archive) in Moscow, Russia, which is now part of the Russian State Military Archive. See CLAIMS CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GER. & WORLD JEWISH RESTITUTION ORG., DESCRIPTIVE CATALOGUE OF LOOTED JUDAICA 9–33 (2016) (discussing restitution attempts of looted or ruined Judaica). Looted Judaica artifacts can be found today in many countries around the world. The Claims Conference has published a summary report about the restitution attempts of Judaica artifacts in more than fifty countries. See CLAIMS CONFERENCE & WJRO, WORLD-WIDE OVERVIEW, *supra*, at IV. 5–26.

instead, it actually legitimizes the injustice of prolonged contemporary confiscation of what our ancestors created before their horrific deaths. Furthermore, over 12,000 Holocaust survivors die in Israel alone every year.<sup>150</sup> By 2025, there may be no Holocaust survivors left among us,<sup>151</sup> Failing to remedy this injustice now means that many Holocaust survivors will suffer from it for the rest of their lives. Copyright limits on what authors, musicians, and artists can own and for how long do create certainty in contemporary disputes. But copyrighted works created within concentration camps, as the following Parts argue, should not be subject to these limits. They deserve their own laws.

### III. THE LIMITLESS MESSAGE OF ART IN GHETTOS

Art is a form of testimony.<sup>152</sup> When art is created under extreme circumstances, its limitless message to the outer world is unparalleled; no other medium can express the experiences of those circumstances. This differentiates the artwork discussed in the previous Part from the artwork that we will delve into in this Part. The message the latter possesses and provides to the public is inherently different from the former, and the contribution of the artwork from the ghettos and concentration camps to the public is incomparable in the value it holds and conveys. As creative works of self-expression, art in the Holocaust took many forms. These forms included diaries,<sup>153</sup> notes, sketches, music,<sup>154</sup> theater scripts,<sup>155</sup> paintings, portraits, poems, sculptures,<sup>156</sup> Judaica artifacts (such as Torah scrolls and prayer shawls), newspapers, novels, books, and letters.<sup>157</sup> Yad Vashem, Israel's official memorial to the victims of the Holocaust, has thousands of such

150. See Raf Sanchez, *Tens of Thousands of Israeli Holocaust Survivors Are Living in Abject Poverty*, TELEGRAPH (Jan. 27, 2016, 7:00 AM), <https://www.telegraph.co.uk/news/worldnews/middleeast/israel/12122754/Tens-of-thousands-of-Israeli-Holocaust-survivors-are-living-in-abject-poverty.html>.

151. See *id.*

152. See generally YAD VASHEM, TESTIMONY: ART OF THE HOLOCAUST (Irit Salmon-Livne et al. eds., 1986) (cataloging selected artistic activities of Jews during the Holocaust). We use the term "art" to encompass in this Article all forms of copyrighted expression created within the ghettos and concentration camps.

153. The most famous diary is that by Anne Frank. See generally ANNE FRANK, THE DIARY OF A YOUNG GIRL (Enrich Spot 2016) (1947); see also David Chrisinger, *A Secret Diary Chronicled the 'Satanic World' That Was Dachau*, N.Y. TIMES MAG. (Sept. 4, 2020), [www.nytimes.com/2020/09/04/magazine/secret-diarist-dachau.html](http://www.nytimes.com/2020/09/04/magazine/secret-diarist-dachau.html) (detailing another diary written by a prisoner in a German concentration camp).

154. See, e.g., *The Birkenau Women's Camp Orchestra*, FACING HISTORY AND OURSELVES, <https://www.facinghistory.org/music-memory-and-resistance-during-holocaust/birkenau-womens-camp-orchestra> [<https://perma.cc/FR29-WXBU>] (last visited Jan. 29, 2021).

155. See *Theatre of the Camps & Ghettos*, HOLOCAUST ONLINE, <http://holocaustonline.org/theatre-of-the-camps-ghettos> (last visited Jan. 29, 2021).

156. *A Figurine of the Devil* is an example of a sculpture, in the form of a doll, that was manufactured in Auschwitz from ribbon and a piece of wire. See Soderburg, *supra* note 43 (noting that the Resistance Movement used the figure to smuggle secret messages out of the camp).

157. See, e.g., CLAIMS CONFERENCE & WJRO, WORLD-WIDE OVERVIEW, *supra* note 149, at IV.3; Dana Herman, *Hashavat Avedah: A History of Jewish Cultural Reconstruction*, Inc. 8 (Oct. 2008) (unpublished dissertation, McGill University) (on file with Library and Archives Canada); Joseph Berger, *A Trove of Yiddish Artifacts Rescued from the Nazis, and Oblivion*, N.Y. TIMES (Oct. 18, 2017), <https://www.nytimes.com/2017/10/18/arts/a-trove-of-yiddish-artifacts-rescued-from-the-nazis-and-oblivion.html?>

artworks on display and in its archives. These artworks are the last messages from their creators. Personal letters, for example, were sent by young and old Jews in the ghettos to their families and friends, expressing their authors' hopes to return home safely—in many such letters, writers often promised their beloved readers that they will meet again.<sup>158</sup> Letters written during the Holocaust, such as those discovered in 2019,<sup>159</sup> further convey to the world the difficult reality faced by the Jewish community at the time.

Among the many illuminating artistic, authorial, and musical examples that attest to the atrocities in the ghettos and concentration camps, portraiture was a relatively common form of art, providing an almost physical connection to the reality in which they were painted.<sup>160</sup> The artists created their portraits on any material they could readily find like coal, toilet paper, pieces of wood, baking paper, the backs of old letters, and even sculptures made from stale bread and toothbrushes.<sup>161</sup> In *Last Portrait: Painting for Posterity*, Yad Vashem published portraits drawn by twenty-one artists in ghettos and concentration camps during the Holocaust.<sup>162</sup> It elaborates on the characteristics of this form of art and presents the significance of these drawings as a means to perpetuate, commemorate, and immortalize the artists and the subjects they drew. These portraits possess a limitless social and moral message: “By reproducing each individual’s facial features, the artists gave him back his soul—the very quality the Nazis sought to eliminate.”<sup>163</sup> The portraits that survived offer a brief glimpse at the faces of men, women, and children living in the ghettos and concentration camps. They came from many European countries, spoke different languages, and could not communicate. Yet, they shared one common goal—to survive. The book presents a rare mosaic of individuals who shared the Jewish people’s common fate during the

158. See “We Shall Meet Again”: *Last Letters from the Holocaust: 1941*, YAD VASHEM, <https://www.yadvashem.org/yv/en/exhibitions/last-letters/1941/index.asp#/home> [https://perma.cc/GD6W-W9GJ] (last visited Jan. 30, 2021).

159. See *supra* notes 12–13 and accompanying text.

160. Portraits were also used by the Nazis to track prisoners in concentration camps and ghettos. Brazilian artist Marina Amaral has colorized a segment of these portraitists’ photos for the project *Faces of Auschwitz*. See Laura Mallonee, *Auschwitz Photographs Hidden from the Nazis Are Given New Life in Color*, ARTSY (Nov. 26, 2018, 1:23 PM), <https://www.artsy.net/article/artsy-editorial-auschwitz-photographs-hidden-nazis-new-life-color>; FACES OF AUSCHWITZ, <https://facesofauschwitz.com> [https://perma.cc/2QLV-TB48] (last visited Jan. 30, 2021).

161. See, e.g., Chris Boyette, *Auschwitz’s Forbidden Art*, CNN (Jan. 26, 2015, 2:59 PM), <https://edition.cnn.com/2015/01/23/world/art-auschwitz> [https://perma.cc/QQ5U-84PR].

162. *Last Portrait: Painting for Posterity*, YAD VASHEM, [https://www.yadvashem.org/yv/en/exhibitions/last\\_portrait/overview.asp](https://www.yadvashem.org/yv/en/exhibitions/last_portrait/overview.asp) [https://perma.cc/Q2P3-44X8] (last visited Jan. 30, 2021). For more on portraits as a mean of art, see Beth Gersh-Nesic, *Defining Portraits and Portraiture in Art*, THOUGHTCO. (Mar. 25, 2019), <https://www.thoughtco.com/definition-portrait-and-portraiture-183227> [https://perma.cc/4HP7-2HN7]; Dushko Petrovich, *The New Face of Portrait Painting*, N.Y. TIMES STYLE MAG. (Feb. 12, 2018), <https://www.nytimes.com/2018/02/12/t-magazine/portrait-art-painting.html>; and Jean Sorabella, *Portraiture in Renaissance and Baroque Europe*, METROPOLITAN MUSEUM ART (Aug. 2007), [https://www.metmuseum.org/toah/hd/port/hd\\_port.htm](https://www.metmuseum.org/toah/hd/port/hd_port.htm).

163. *Last Portrait*, *supra* note 162.



*Shoah*—“[t]ogether these works sketch the last portrait of a community in the throes of destruction.”<sup>164</sup>

Art researcher Janet Blatter and Professor Ziva Amishai-Maisels referred to the large number of portraits that were drawn during the Holocaust as commemorative acts.<sup>165</sup> That is, the desire to paint portraits was “a desire to leave a trace behind: to immortalize individuals and perpetuate their memory.”<sup>166</sup> In some cases, the artists knew they were documenting final memories because they signed the date they drew the portrait, often adding information about its subject.<sup>167</sup> “[I]n addition to being a powerful work of art” signing the portrait was “also a testimonial with the weight of a historical document.”<sup>168</sup> These portraits were considered a form of “spiritual resistance” against the Nazis—not to create “fine art” but to perpetuate and document people *as such*.<sup>169</sup> Portraits restored individuality to their subjects. The faces and identifies of each subject are important characteristics of these works, and they were not chosen by chance or for reasons of convenience.<sup>170</sup> Artists painting portraits were aware of the vital importance of the task at hand, seeking to immortalize their subjects out of respect and empathy.<sup>171</sup> They convey a feeling of brotherhood among Jews.<sup>172</sup>

These portraits share many features despite the unique signature of each artist. According to Yad Vashem, the artists used a “figurative style and focused on head and facial outline, while drawings were typically full-faced using a realistic approach[] . . . by presenting a detailed representation of the individual’s facial features . . . [as if] in a mirror, the artists were clearly aiming to restore the prisoners’ human identity.”<sup>173</sup> The style chosen for the portraits was to “bequeath the most authentic evidence to posterity, beyond the context of time and place.”<sup>174</sup> It is unclear from many of the portraits whether they were drawn at camps or ghettos, though some drawings include a yellow Star of David.<sup>175</sup> Regardless, “[t]he artists memorialize their brethren as they see them, and draw their own portraits as they would like to be remembered by future generations—not as victims, but as human beings.”<sup>176</sup>

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164. Yehudit Shendar, “*Sketch the Contour of My Own Shadow*,” in YAD VASHEM, LAST PORTRAIT: PAINTING FOR POSTERITY 204, 216 (2012).

165. See ZIVA AMISHAI-MAISELS, DEPICTION AND INTERPRETATION: THE INFLUENCE OF THE HOLOCAUST ON THE VISUAL ARTS 5 (1993); Janet Blatter, *Art from the Whirlwind*, in ART OF THE HOLOCAUST 20, 28 (Janet Blatter & Sybil Milton eds., 1981).

166. Shendar, *supra* note 164, at 215.

167. *See id.*

168. *Id.* at 209.

169. *Id.* at 214.

170. *See id.*

171. *See id.*

172. *See id.* at 213.

173. *Id.* at 209.

174. *Id.* at 208.

175. *See id.*

176. *Id.* at 207–08 (emphasis omitted).

Portraits have always been a means for people to leave behind a memory of their existence: “The portrait represents a humble victory over the passage of the years, insofar as it immortalizes a face for generations to come—a face that will remain unspoiled by the destructive talons of time.”<sup>177</sup> Portraits from the Holocaust, unlike portraits from other periods in history, “produce a chilling effect that goes beyond our recognition of the ravages of time. The bare faces of these innocent men, women, and children, immortalized moments before their execution, serve as a painful warning of the potential for brutality and barbarism inherent in human nature.”<sup>178</sup> Franciszek Jaźwiecki was a notable portraitist at Auschwitz.<sup>179</sup> Agnieszka Sieradzka, an art historian at the Auschwitz State Museum, believes these portraits were made because the author was aware of their importance as historical documents.<sup>180</sup> Almost every one of the 114 portraits Jaźwiecki created features the subject’s prisoner number, giving historians the opportunity to attach a name to each face.<sup>181</sup> After his death in 1946, Jaźwiecki’s portraits were donated to the Auschwitz–Birkenau Museum<sup>182</sup> (which possesses more than 2,000 pieces of art created inside various Nazi camps).<sup>183</sup>

This type of art is the only authentic testimonial about the reality of these Jewish prisoners. All the works created in these places are protectable subject

177. *Id.* at 207.

178. *Id.* at 205.

179. *The Forbidden Art of Auschwitz*, CNN (Jan. 23, 2015, 2:31 PM), <https://edition.cnn.com/2015/01/23/world/gallery/art-auschwitz/index.html> [<https://perma.cc/WFC9-GRNG>]; see also *supra* notes 43–44 and accompanying text (describing Jaźwiecki’s artwork). For further discussion of copyright in portraits, see generally Jessica Silbey, *Control over Contemporary Photography: A Tangle of Copyright, Right of Publicity, and the First Amendment*, 42 COLUM. J.L. & ARTS 351 (2019) (describing the interplay of photographer and subject in the process of storytelling and the assertion of free speech in the current digital environment); Eva E. Subotnik, *The Author Was Not an Author: The Copyright Interests of Photographic Subjects from Wilde to Garcia*, 39 COLUM. J.L. & ARTS 449, 458 (2016) (discussing the history of copyright of portrait photographs).

180. *The Forbidden Art of Auschwitz*, *supra* note 179.

181. See *id.*

182. *The Forbidden Art of Auschwitz*, *supra* note 179.

183. Boyette, *supra* note 161. The Auschwitz–Birkenau Museum’s collection is divided to four categories: (1) illegal works made secretly in concealment from the Schutzstaffel (SS); (2) sketches and small objects made for private use by prisoners that illustrate the need for emotional and aesthetic experiences even in the difficult conditions of the camp while suffering from the fear of being caught; (3) works created by prisoners who were artists by profession for the Lager museum set up by the Germans; and (4) post-war artworks. See *Works of Art*, AUSCHWITZ–BIRKENAU STATE MUSEUM, <http://auschwitz.org/en/museum/historical-collection/works-of-art> [<https://perma.cc/24XB-XRN2>] (last visited Jan. 30, 2021). The second category includes an important sketchbook containing twenty-two pictures drawn around 1943 by an anonymous prisoner at Auschwitz. Boyette, *supra* note 161. This sketchbook, the only artwork documenting extermination at the camp, was found in 1947 stuffed into a bottle and hidden in the foundation of one of the crematoria. *Id.* Children also drew sketches at Auschwitz, some of which were the subject of Rovner’s exhibition. See *supra* note 1 and accompanying text. Another exhibition of forty sketches drawn by Jewish children who lived at the Theresienstadt concentration camp in the former Czechoslovakia during World War II was held at a gallery in the United Kingdom in 2014. Chris Long, ‘Haunting’ Art by Jewish Children in WW2 Concentration Camp, BBC (Apr. 14, 2014), <https://www.bbc.com/news/uk-england-lancashire-26987720> [<https://perma.cc/FTP6-KDQC>]. The exhibition organizer stated that families at this concentration camp encouraged their young ones to draw in order to shield them from the difficulties of everyday life. *Id.* Ninety percent of the children living in Theresienstadt were murdered during the war. *Id.*

matter in accordance with the Berne Convention,<sup>184</sup> which was signed by Germany in 1886, by Poland in 1920, and by other countries invaded by the Nazis.<sup>185</sup> Irrespective of applicable copyright principles, however, the question remains whether the countries once occupied by the Nazis, which deported their Jewish populations to concentration camps, can legitimately own these works and be entrusted to preserve the memories of the Jewish communities and people whose deaths the Nazis celebrated. The copyright notice on the Auschwitz–Birkenau website states that: “Unless otherwise indicated, all material is property of the Auschwitz–Birkenau State Museum.”<sup>186</sup> Properties created in Auschwitz and other concentration camps and ghettos were created on Polish soil. They deserve to remain there as authentic memories; they belong to this soil. At the same time, these properties have another purpose—the preservation of Jewish cultural history. Works created in the ghettos and concentration camps match no creative work created at any point in the history of humankind. The works’ limitless moral message to the world and its strong moral ties to the remaining Jewish community, everywhere in the world, are unsurpassed. These ties and limitless moral messages, which play a critical role in defining collective Jewish identity, should be the basis for creating a novel ownership paradigm for these works.

#### IV. AUTHENTICITY CONSIDERATIONS

In this Part, we discuss the authenticity considerations that should be examined as we reformulate a novel ownership paradigm for Holocaust art. Section IV.A discusses the dialogical value these artworks inherently possess. Section IV.B focuses on the ownership of these artworks. Section IV.C discusses the alteration problem of Holocaust art via the case study of the Eve.Stories Instagram account. All three Sections center on the authenticity of Holocaust art and the significance of protecting these artworks, to the best of our abilities, “as is.”

##### A. AUTHENTIC DIALOGUES

Artistic, musical, authorial, and dramatic works created within the ghettos and concentration camps communicate authentic realities, moral thoughts, personal ideals, and rare creative qualities in extreme circumstances. The importance of

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184. See generally Berne Convention, *supra* note 16.

185. See *Contracting Parties > Berne Convention*, *supra* note 66 (listing the following countries and dates of accession to the Convention: Denmark in 1903; Norway in 1896; Belgium in 1887; the Netherlands in 1912; Luxembourg in 1888; France in 1887; and Greece in 1920).

186. *Copyright*, AUSCHWITZ–BIRKENAU STATE MUSEUM, <http://auschwitz.org/en/copyright> [https://perma.cc/6F2E-B9GX] (last visited Jan. 30, 2021). The notice also states:

Material belonging to the Museum may be used free of charge exclusively for non-commercial and strictly educational purposes. . . . An additional condition to which there are absolutely no exceptions is that this material may be used only in undertakings and projects that do not impugn or violate the good name of the victims of Auschwitz Concentration Camp. Use for any other purposes requires the express written consent of the Museum in every such case.

free and open communication in modern societies raises questions about the legitimacy of attaching exclusive rights to creative and innovative commodities.<sup>187</sup> A genuine dialogue is a conversation of change;<sup>188</sup> a “focused conversation”;<sup>189</sup> and a purposeful, communicative act.<sup>190</sup> As Martin Buber wrote, an authentic dialogue “derives its genuineness only from the consciousness of the element of inclusion.”<sup>191</sup> What defines a dialogue as such is that the *other* is integral to the dialogue and is seen as it wants to be seen—from these mutual relations, the dialogical experience emerges.<sup>192</sup> The sociology of dialogue means connecting and interacting in society. In dialogues, parties suspend “personal opinions and judgments to listen deeply,” understand each other, and create a community.<sup>193</sup>

Parties to a dialogue create mutual commitments.<sup>194</sup> As an act that is never solitary, a dialogue connects the thoughts and knowledge each individual holds “to transform existing beliefs as well as create new innovations and cultural artifacts.”<sup>195</sup> That is, dialogue is a relation “that we create and sustain by conjoint agreement and through shared discourse”<sup>196</sup> and a mechanism for creating culture by virtue of connecting one’s subjective individual consciousness with the

187. As James Boyle suggested: “[If an] author is merely taking public goods—language, ideas, culture, humor, genre—and converting them to his or her own use,” why do they deserve an exclusive right to the commodity? See JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 53 (1996).

188. See Patrick M. Jenlink, *The Power of Dialogue in Social Systems*, in DIALOGUE AS A COLLECTIVE MEANS OF DESIGN CONVERSATION 51, 53–54 (Patrick M. Jenlink & Bela H. Banathy eds., 2008).

189. Patricia Romney, *The Art of Dialogue*, ANIMATING DEMOCRACY, [https://www.animatingdemocracy.org/sites/default/files/documents/reading\\_room/art\\_of\\_dialogue.pdf](https://www.animatingdemocracy.org/sites/default/files/documents/reading_room/art_of_dialogue.pdf) [<https://perma.cc/9792-KW29>].

190. See STEPHEN MILLER, CONVERSATION: A HISTORY OF A DECLINING ART 14 (2006) (asserting that “talk is generally purposeful whereas conversation is not”).

191. MARTIN BUBER, BETWEEN MAN AND MAN 97 (Ronald Gregor Smith trans., The Macmillian Co. 1965) (1947). Friedman defines two additional types of quasi-dialogue: technical dialogue and false dialogue. See MAURICE S. FRIEDMAN, MARTIN BUBER: THE LIFE OF DIALOGUE 143 (4th ed. 2002) (1955). Technical dialogue is akin to a simple conversation, and false dialogue “is prompted solely by the need of objective understanding.” *Id.* (internal quotation marks omitted). Such dialogue is a “monologue disguised as dialogue.” *Id.*

192. As Martin Buber explained: “There is genuine dialogue—no matter whether spoken or silent—where each of the participants really has in mind the other or others in their present and particular being and turns to them with the intention of establishing a living mutual relation between himself and them.” BUBER, *supra* note 191, at 19. Martin Friedman, a scholar of Buber’s ontology dialogue, argues that a genuine dialogue is where the uniqueness of the person is secured: “The proper understanding of dialogue includes uniqueness; for it is only in uniqueness that there is real mutuality, presentness, and presence. Dialogue means a mutual sharing in reciprocal presentness of the unique.” Martin Friedman, “*Dialogue of Touchstones*”: An Approach to Communication and Identity, 2 COMM. & IDENTITY 143, 152 (1976).

193. Patrick M. Jenlink & Bela H. Banathy, *Dialogue and Designing Our Future: Conversation as Culture Creating and Consciousness Evolving*, in DIALOGUE AS A COLLECTIVE MEANS OF DESIGN CONVERSATION, *supra* note 188, at 159, 161.

194. See Douglas Walton, *Commitment, Types of Dialogue, and Fallacies*, 14 INFORMAL LOGIC 93, 93 (1993) (“What is commitment in dialogue? Is it a state of mind? Or is it an inference to be drawn from what you say and how you act when you are interacting with another participant in a social situation?”).

195. Jenlink & Banathy, *supra* note 193, at 160.

196. *Id.*

institutionalized structure of society, allowing cross-cultural communication and learning. Dialogue, as a relational act, transforms the isolated being from an autonomous to a communicative entity.<sup>197</sup> It diversifies participants' thinking by virtue of their social exposure and their affiliation to others. Artistic works created in the ghettos, as embodiments of complex dialogical processes, express a multiplicity of contributions grounded in the visual expression of the impossible life lived in these places. Through their works, the artists in the ghettos acted as communicative entities, providing authentic messages that others must view, listen, touch, or learn from to complete the dialogical act.<sup>198</sup>

Because of the dialogical value provided by the artworks of Jewish prisoners, these artworks are governed by copyright law and are entitled to its protection. We agree that copyright law protects, and should continue to protect, communicative and dialogical spaces. However, we argue that copyright protection must be mitigated by and balanced against the exclusive normative stature that rightfully belongs to works created under extreme circumstances such as those in ghettos and concentration camps during the Holocaust. These works are the only speaking monuments to the six million murdered Jews. We argue that the authenticity of these works makes them a closed category that deserves to remain unaltered and unchangeable. Copyright laws lack any such exclusion for works created in the extreme circumstances of the Holocaust. Copyright law is an assemblage of principles that aim to protect communicative spaces and make such spaces available for as many individuals to use as possible. For example, the main objective behind fair use, which distinguishes between ideas and expressions<sup>199</sup> and the limited duration of copyright

197. See DMITRI NIKULIN, ON DIALOGUE 141 (2006) (arguing that dialogue transforms “the individual from a closed, self-sustaining, and isolated subject into a dialogical person”).

198. An illustration of this can be found in the photographs and portraits created in the ghettos, which embody dialogical value. They document the Holocaust and express the personal ideals and feelings of the prisoners. They convey this message to the broader society with the dialogue they create. See *supra* Part III.

199. See Amaury Cruz, *What's the Big Idea Behind the Idea-Expression Dichotomy?—Modern Ramifications of the Tree of Porphyry in Copyright Law*, 18 FLA. ST. U. L. REV. 221, 221 (1990) (“An axiom of copyright law is that only the expression of ideas, not the ideas themselves, are copyrightable. The Copyright Act of 1976 codifies this axiom by explicitly denying protection to ‘any idea.’” (citations omitted)); Leslie A. Kurtz, *Speaking to the Ghost: Idea and Expression in Copyright*, 47 U. MIAMI L. REV. 1221, 1222 (1993) (“This distinction between unprotected idea and protected expression, often called the idea/expression dichotomy, is one of the central tenets of copyright law.”); Dale P. Olson, *The Uneasy Legacy of Baker v. Selden*, 43 S.D. L. REV. 604, 608 (1998) (“Central to the evolution of the idea/expression dichotomy is the appreciation that copyright law is limited in its scope. This requires, in turn, an appreciation that because copyright accords to the copyright owner rights only in the *protected* components of a work, as opposed to a work in its entirety, that the failure to exclude ideas from any assessment of infringement could impermissibly accord protection to ideas and other materials in the public domain contained in a copyrighted work, as well as properly protected expression.”); Marc K. Temin, *The Irrelevance of Creativity: Feist's Wrong Turn and the Scope of Copyright Protection for Factual Works*, 111 PENN ST. L. REV. 263, 284 (2006) (“The items listed in Section 102(b) provide a practical guide to the concept of content that is the basis for the protected/unprotected distinction. They fall under either the idea/expression distinction, which covers the immunity of ideas, concepts, and principles . . .”).

protection,<sup>200</sup> is to facilitate “uncompensated transfers”<sup>201</sup> of social wealth which effectuate and expand broad, communicative dialogical opportunities by limiting the preemptive enclosure of cultural properties.<sup>202</sup> In essence, the dialogical importance of copyrightable spaces requires the law to protect the messages of certain works. This assumption is relevant to both sides of the argument: it allows users to access the works, but at the same time, it protects certain works from being subjected to creative mutilation or changes to their inherent meaning and message. Although developing this argument is beyond the scope of the present research, it is an unavoidable consequence of our inquiry.

We derive the social and moral standing of our argument from the wrongs embedded in any version of Holocaust denial. Several countries have enacted laws criminalizing the denial of the history of ghettos and concentration camps, the genocide of the Jewish people, and the means by which the Nazis achieved their goal.<sup>203</sup> Copyrighted works created during the Holocaust authentically document

200. See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 323–29 (1970) (discussing and arguing against the length of copyright protection copyright law provides); Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 991 (1997) (“Both patents and copyrights are limited in duration and in scope. Each of these limitations provides some freedom of action to subsequent improvers. Improvers are free to use material that is in the public domain because the copyright or patent has expired.”); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 366–71 (1996) (discussing the origins of copyright duration and comparing the neoclassical and democratic approaches).

201. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982).

202. See generally *Am. Broad. Co. v. Aereo, Inc.*, 573 U.S. 431 (2014) (holding that a party that allows viewing of live and time-shifted, over-the-air TV using internet-connected devices is a violation of copyright law); *Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1146 (9th Cir. 2007) (holding that Google’s thumbnail images, as part of their search engine, was fair use); *Capitol Records, LLC v. ReDigi, Inc.*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013) (holding that the resale of digital music violates copyright law and is not protected by the fair use doctrine); PATRICIA AUFDERHEIDE & PETER JASZI, *RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT* (2011) (discussing the importance of utilizing the fair use doctrine in today’s digital age); RENEE HOBBS, *COPYRIGHT CLARITY: HOW FAIR USE SUPPORTS DIGITAL LEARNING* (2010) (describing the current misconceptions that have raised concerns about the educational use of materials related to mass media, popular culture, and digital media); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990) (“The doctrine of fair use need not be so mysterious or dependent on intuitive judgments. Fair use should be perceived not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law.”). For more on fair use, see *infra* Section V.A.

203. See Dan Bilefsky, *EU Adopts Measure Outlawing Holocaust Denial*, N.Y. TIMES (Apr. 19, 2007), <https://www.nytimes.com/2007/04/19/world/europe/19iht-eu.4.5359640.html>; Ben Collins, *George Brandis: Holocaust Denial Would Not Become Legal Under My New Laws*, BUS. INSIDER AUSTRALIA (Mar. 26, 2014, 11:48 AM), <https://www.businessinsider.com.au/george-brandis-holocaust-denial-would-not-become-legal-under-my-new-laws-2014-3> [<https://perma.cc/U4WU-SEKX>]; *Holocaust Denier Fredrick Toben Jailed in Australia*, TELEGRAPH (Aug. 14, 2009, 7:00 AM), <https://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/6025275/Holocaust-denier-Fredrick-Toben-jailed-in-Australia.html>; Tom McIlroy, *Racial Discrimination Act Changes Would Allow Holocaust Denial, Says Shane Rattenbury*, AGE (May 5, 2014, 2:01 PM), <https://www.theage.com.au/national/act/racial-discrimination-act-changes-would-allow-holocaust-denial-says-shane-rattenbury-20140505-zr4vk.html> [<https://perma.cc/54QQ-V4TY>]; Jeremy

this history. Changing their inherent communicative effects, messages, and meanings amount to a creative denial of these works and what they aim to convey to society—an unimaginable reality, inexplicable through words. The act of withholding these works from the public and storing them in archives effectively obstructs their dialogical potential and communicative importance. Changing them softens their message and interferes with their unique meaning. The inherent dialogical value of these works offers an invaluable experience to all who have access to them, and for that reason, copyright needs to ensure that all *will* have access to them.

As a social virtue that strengthens one to form part of a social organization,<sup>204</sup> dialogue requires a deeper understanding of mutuality and interaction, and therefore, “Dialogue still reigns supreme in the imagination of many as to what good communication might be. . . .”<sup>205</sup> We argue that dialogue does not necessitate the physical presence of the *other*: a person who creatively expresses themselves is constantly in dialogue with others, and the *other* is in constant, genuine discourse with the artist’s original message. Dialogue is a defining element in human relations and, as such, exists at all times. It is a constant expression of progressive interaction that engages the *other* at all times, but not in any particular moment. Carrying out a dialogue on the Holocaust by experiencing the art created at that time allows viewers to communicate with the original artist and with that artist’s personal message. These important dialogues are currently nonexistent because of the contemporary framework of copyright laws applicable to such artworks.

In creating artistic and authorial expressions, participants in dialogue address and respond to a polyphony of voices. They do not always know to whom and to how many to respond.<sup>206</sup> Authors and artists, for example, are engaged in an unlimited dialogue, often with no particular direction. The unique social nature of dialogue renders it an advanced form of communication, which defies closure and finality, and perpetually serves as a “vehicle for reformulating old elements into new patterns.”<sup>207</sup>

Copyrighted properties are dialogical for exactly the same reasons. First, they are not solitary activities but rather manifestations of the dialogical experiences

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Sharon, ‘Landmark Decision’ in UK Upholds Conviction for Holocaust Denial, JERUSALEM POST (Feb. 13, 2019, 7:14 PM), <https://www.jpost.com/Diaspora/Landmark-decision-in-UK-upholds-conviction-for-Holocaust-denial-580589>; Ian Traynor, *Holocaust Denier Jailed*, GUARDIAN WEEKLY, <https://www.theguardian.com/guardianweekly/story/0,,1715580,00.html> (last visited Feb. 1, 2021). In July 1986, Israel passed a law criminalizing Holocaust denial. Denial of Holocaust (Prohibition) Law, 5746–1986, SH No. 1187 p. 196.

204. See Charles H. Cooley, *The Process of Social Change*, 12 POL. SCI. Q. 63, 69 (1897) (“A man is not so much strong in himself as formed to make part of a strong whole.”). We require “communicated arts and actions” in our struggle for existence. *Id.* at 70.

205. JOHN DURHAM PETERS, *SPEAKING INTO THE AIR: A HISTORY OF THE IDEA OF COMMUNICATION* 62 (1999).

206. See generally, e.g., JEFF HOWE, *CROWDSOURCING: WHY THE POWER OF THE CROWD IS DRIVING THE FUTURE OF BUSINESS* (2008) (discussing how crowds can create knowledge and respond to a multiplicity of voices without having to personally know each and every member of the crowd).

207. C. Jan Swearingen, *Dialogue and Dialectic: The Logic of Conversation and the Interpretation of Logic*, in *THE INTERPRETATION OF DIALOGUE* 47, 47 (Tullio Maranhão ed., 1990).

of the writer, musician, poet, author, or artist. Second, they are futuristic entities because they preclude finality and closure by allowing users to take, quote, and share the creative works and to develop parts of a given work into new creative expressions. For one to genuinely communicate about the Holocaust through creative works, one must remain steadfast to the original message the creator intended in the given work. To allow for the development of an unlimited dialogue on the Holocaust, copyright must allow for simultaneous access to and protection of the original messages inherent in the works.

#### B. AUTHENTICITY IN OWNERSHIP

This Section focuses on the ownership problem of artworks. We claim that authors of Holocaust works should have exclusive rights in their works without an expiration date. Cultivating broad spaces for genuine dialogue on the Holocaust is tied to the requisite ownership protection of the authentic messages and meanings within these creative properties. This public interest can override private authorial interests.<sup>208</sup> However, the public interest defense is more complicated when applied to our argument. A system that rewards individuals for the creation of social wealth has to both find a way to allocate reasonable rights in the event of such contribution and simultaneously allow for public access to that contribution. That is, copyright ownership ought to be understood as involving “duties to the public as well as rights in the work.”<sup>209</sup> “If copyright law [has] a ‘communicative impact’ [and a dialogical importance in society] and is the source for a variety of discursive activities, knowing the exact—or as close as possible to the original—message and meaning of authorial works is imperative.”<sup>210</sup> This is not only an author-centered argument praising the special connection between authors and their copyrightable “spiritual children.”<sup>211</sup> This is a public right.<sup>212</sup> In copyright, the system of moral rights protects aspects of cultural integrity as well as the author’s rights. Governments have a duty to protect “national culture for its own prestige and for the benefit of the public.”<sup>213</sup> Our argument does not seek to legitimize enclosing copyright by providing further rights to authors, but rather to consider misattribution, manipulation, and

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208. See generally LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* (2007) (arguing that because copyrighted works profit from significant public contributions, those works should not be privately owned, but should be considered to be a joint enterprise, made real by both the public and author, and that on these grounds, the public interest may override private authorial interests).

209. Roberta Rosenthal Kwall, *The Author as Steward “For Limited Times,”* 88 B.U. L. REV. 685, 704 (2008) (reviewing ZEMER, *supra* note 208).

210. Lior Zemer, *Moral Rights: Limited Edition*, 91 B.U. L. REV. 1519, 1562 (2011) (footnote omitted) (quoting KWALL, *supra* note 8, at 61).

211. See *infra* Part VI.

212. A shift in focus from authors to the general benefit for society can also be found in the rhetoric preferred by the new trademark-style consumer protectionists. See, e.g., Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1175–76 (2005) (arguing that an analysis of how attribution practices benefit society is more productive than “the standard tug-of-war”).

213. Mira T Sundara Rajan, *Moral Rights in the Public Domain: Copyright Matters in the Works of Indian Poet C. Subramania Bharati*, 2001 SING. J. LEGAL STUD. 161, 181.



distortion of information as a public wrong. This information defines the essence of the “[c]ertain things” that “are free for all to use.”<sup>214</sup> Justifying copyright as a democracy-enhancing mechanism<sup>215</sup> requires the copyright system to be “the engine of free expression,”<sup>216</sup> notwithstanding the allocation of rights, both moral and material, to authors and artists.

The *material* aspect of these rights assigns ownership of these works to private individuals—the authors. The *moral* rights aspect of copyright has the capacity to balance the two sides of our argument. Moral rights are not merely vehicles that afford fairness to authors. The right of attribution, for example, is a “moral obligation.”<sup>217</sup> True, these rights have an “obvious utility in protecting artists from theft of the reputation they have cultivated.”<sup>218</sup> But this is not their only goal. These rights also help prevent misleading the public: “[T]here is more at stake than the concern of the artist[:]. . . . [T]he interest[s] of others in seeing, or preserving the opportunity to see, the work as the artist intended it. . . . We yearn for the authentic, for contact with the work in its true version. . . .”<sup>219</sup> If the intention of the Framers of the U.S. Constitution’s Copyright Clause was to “stimulate an open culture steeped in knowledge and education,”<sup>220</sup> then providing “a legal framework that promotes the public’s interest in knowing the original source of a work and understanding it in the context of the author’s original meaning and message”<sup>221</sup> is sufficient to meet the Framers’ objectives.

A related and crucial question regarding moral rights and the public’s right not to be misled while exposed to copyrighted materials is whether this right should have an expiration date. If the author retains a “right to *inform the public* about the original nature of her artistic message and the meaning of her work,”<sup>222</sup> why should authors and artists enjoy only limited moral rights? Artists, authors, and musicians, who created artworks in the ghettos and concentration camps of the Holocaust, never published their works, and archives are now withholding them

214. *Bilski v. Kappos*, 561 U.S. 593, 622 (2010) (Stevens, J., concurring) (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989)).

215. See generally NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* (2008) (viewing copyright law as critical to free expression, but also as a mechanism that can ultimately stifle some forms of such expression).

216. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

217. Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 *HASTINGS L.J.* 167, 175 (2002).

218. Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 *J. LEGAL STUD.* 95, 130–31 (1997). Greg Lastowka also remarked that the right of attribution is important in order to “promote the smooth functioning of reputation economies.” Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 *B.U. L. REV.* 41, 78 (2007).

219. John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 *HASTINGS L.J.* 1023, 1041 (1976) (praising the public interest in the right of integrity); see also Hansmann & Santilli, *supra* note 218, at 106, 131 (arguing that “works of art often become important elements in a community’s culture” and “[t]he loss or alteration of such works . . . depriv[e] th[e] community . . . of a widely used part of its previously shared vocabulary).

220. KWALL, *supra* note 8, at 57.

221. *Id.*

222. *Id.* at 151.

from the public. These works are most likely the sole available evidence of the unbearable reality in the ghettos. We assert that there should be no expiration date to authors' moral rights in the works that they created within the ghettos and concentration camps. No authority has the right to withhold these authors from reaching society and informing us of the genuine meaning and message of their works, some of which are in the form of ashes in the "gigantic, circular [m]ausoleum at the Majdanek Memorial Site" in Lublin, Poland.<sup>223</sup> An expiration date to their works means that personalities die. After the human brain stops operating, one's personality—never fully known to the world—ceases to exist. However, creative works embody their author's personality in such a deep capacity that the authors never cease to exist, even when destroyed. Cultural history tells us that creative personalities never die. In copyright, personalities have perpetual life-spans that require legal adjustments in certain circumstances.<sup>224</sup>

Correspondence from 2015 illuminates the difficulty of assigning ownership of Holocaust artworks from government or other public institutions to the author or someone on their behalf. This correspondence regards the National Library of Israel's request for exhibition materials from the *Exilpresse Digital* and *Jüdische Periodika in NS-Deutschland* archives of the German National Library, which contain images relating to the Holocaust.<sup>225</sup> The German National Library declined the request, explaining that they were unable to provide digital images, even for restricted use.<sup>226</sup> The legal department of the German Library found "pending legal issues prohibiting this."<sup>227</sup>

Another example is the testimony of a U.S. Holocaust Memorial Museum representative before Congress. The museum's legal counsel stated that the museum would not make its works available to the public due to copyright concerns.<sup>228</sup> The representative testified to past cases where the museum accepted artworks by unknown authors.<sup>229</sup> The museum claimed to be the custodian of these orphan artworks that it said "will not be made available to the public unless the museum assumes the risks of a copyright infringer."<sup>230</sup> Despite only a minimal risk, the museum has refused to take any chances, thus chilling any consideration for making an orphan work publicly available.<sup>231</sup> These examples highlight the absurdity of copyright laws' limits on fundamental dialogical spaces while at the same time raising doubts about national archives' rights to expropriate the only remains of

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223. *Mausoleum at Majdanek*, MAUSOLEUM AT MAJDANEK MEMORIAL SITE (Aug. 23, 2014), <https://perma.cc/8MQR-NFP4>.

224. For more on perpetual rights in the context of artworks generated in ghettos and concentration camps, see *infra* Section V.C.

225. E-mail from Jörn Hasenclever to Aviad Stollman, *supra* note 15.

226. *Id.*

227. *Id.*

228. See *Promoting the Use of Orphan Works*, *supra* note 15.

229. See *id.*

230. *Id.*

231. See *id.*

what was once a thriving Jewish culture in Europe before the Nazis rose to power.

### C. AUTHENTICITY IN ALTERATION: EVA.STORIES ON INSTAGRAM

How to communicate authentically about the Holocaust is an emotionally charged issue. Our argument suggests that the only possible communication of the Holocaust's history is the dissemination of original works created at the time. However, communicative platforms have been transformed in recent decades and the methods by which people read, interact, communicate, and respond are different. We agree that sometimes, to convey the messages from the time of this historical inhuman orchestration of mass killing, our argument must be adjusted. Rovner, for example, could display both the original and the colored-in versions of the children's drawings to show how color changes life and how lack of color projects the end of life.<sup>232</sup>

In the most famous recent conflict on how to document and present the Holocaust, which sparked a fierce debate in Israel and abroad, Mati Kochavi and his daughter, Maya, produced short videos to refresh what they saw as fading memories of the genocide. Eva.Stories, an Instagram account, tells the story of Eva Heyman, a thirteen-year-old Hungarian Jewish girl murdered in a concentration camp who chronicled the 1944 German invasion of Hungary.<sup>233</sup> The account posted imagined documentation of her experience.<sup>234</sup> With over 1.1 million followers, Eva.Stories is "a high-budget visual depiction" of her diary and "features hashtags, internet lingo, and emojis used by a 21st century-teenager [sic]."<sup>235</sup> There are many similarities between Eva's story and that of Anne Frank, whose famous diary published in 1947 revealed the horror of Jewish life in Europe during the Holocaust to generations of readers.<sup>236</sup> Kochavi and his daughter sought to do the same, using one of the most popular social media platforms among today's younger generation. As Kochavi remarked: "If we want to bring the

232. See *supra* note 2 and accompanying text.

233. See generally ÉVA HEYMAN, *THE DIARY OF ÉVA HEYMAN* (Moshe M. Kohn trans., 1988); LAUREL HOLLIDAY, *CHILDREN IN THE HOLOCAUST AND WORLD WAR II: THEIR SECRET DIARIES 99–126* (1996); Isabel Kershner, *A Holocaust Story for the Social Media Generation*, N.Y. TIMES (Apr. 30, 2019), <https://www.nytimes.com/2019/04/30/world/middleeast/eva-heyman-instagram-holocaust.html>; see also JACOB BOAS, *WE ARE WITNESSES: FIVE DIARIES OF TEENAGERS WHO DIED IN THE HOLOCAUST 115–54* (Square Fish 2009) (1995) (reprinting Eva Heyman's diary); Franziska Reiniger, *The Diary of Éva Heyman - Éva Heyman: Teaching the Story of the Holocaust in Hungary Through One Diary*, YAD VASHEM, <https://www.yadvashem.org/education/educational-materials/books/dear-diary.html> (last visited Feb. 2, 2021) (discussing Eva Heyman's diary); Jeremy Sharon, *Diary of a Holocaust-Era Teenager Eva Heyman Brought to Life on Social Media*, JERUSALEM POST (May 1, 2019 11:35 AM), [www.jpost.com/Diaspora/Diary-of-a-Holocaust-era-teenager-Eva-Heyman-brought-to-life-on-social-media-588195](http://www.jpost.com/Diaspora/Diary-of-a-Holocaust-era-teenager-Eva-Heyman-brought-to-life-on-social-media-588195) (discussing the Instagram account).

234. See Kershner, *supra* note 233.

235. Oliver Holmes, *Instagram Holocaust Diary Eva.Stories Sparks Debate in Israel*, GUARDIAN (May 8, 2019, 6:14 AM), <https://www.theguardian.com/world/2019/may/08/instagram-holocaust-diary-evastories-sparks-debate-in-israel>; see @eva.stories, INSTAGRAM, <https://www.instagram.com/eva.stories> [<https://perma.cc/5LUR-ER2V>] (last visited Feb. 2, 2021).

236. See HEDDA ROSNER KOPF, *UNDERSTANDING ANNE FRANK'S THE DIARY OF A YOUNG GIRL: A STUDENT CASEBOOK TO ISSUES, SOURCES, AND HISTORICAL DOCUMENTS 114* (1997).

memory of the Holocaust to the young generation, we have to bring it to where they are. . . . And they're on Instagram."<sup>237</sup>

The real Eva was born in Nagyvàrad, Hungary.<sup>238</sup> On her thirteenth birthday, she began writing a diary.<sup>239</sup> She was murdered in Auschwitz in October 1944.<sup>240</sup> Her mother survived and then discovered and published her daughter's diaries.<sup>241</sup> Presenting this and similar stories with a modern twist is controversial. Some have argued it trivializes the Holocaust atrocities and that it is "a display of bad taste, being promoted aggressively and crudely."<sup>242</sup> However, the vast number of followers of Eva.Stories has undoubtedly brought attention to a part of history, which many young people know little about. A recent study conducted in the United States found that eleven percent of U.S. adults and over one-fifth of millennials (twenty-two percent) have not heard about or are not sure if they have heard about the Holocaust.<sup>243</sup> The same research also indicated that almost half of U.S. adults (forty-five percent) and millennials (forty-nine percent) cannot name one of the over 40,000 concentration camps and ghettos in Europe during the Holocaust.<sup>244</sup> Furthermore, a new survey conducted by the Claims Conference in Austria reveals disturbing gaps in Holocaust knowledge. The survey found that the majority polled did not know that six million Jews were killed during the Holocaust.<sup>245</sup> The survey also found that more than one-third of Austrians think National Socialism or Nazism could return to power.<sup>246</sup> Ronald Leopold, executive director of the Anne Frank House, has said that the use of new media to portray the Holocaust "always stirs a controversy."<sup>247</sup> However, "[a]t the same time, [he] think[s] what is really important is that we should do our utmost to make the story itself as reliable and authentic as possible."<sup>248</sup>

Our research does not aim to limit modern platforms of social communication from delivering the messages of the Holocaust. We believe that the Holocaust should be a mandatory component of every educational endeavor. In this Article, we aim to raise fundamental awareness of a neglected area of the Holocaust—creative works which project the truth of life in the ghettos and concentration camps and which, by their nature, remain as steadfast as possible to the artists'

237. Holmes, *supra* note 235.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* (quoting an Israeli musician and civics teacher).

243. SCHON CONSULTING, HOLOCAUST KNOWLEDGE AND AWARENESS STUDY 2 (2018), [http://www.claimscon.org/wp-content/uploads/2018/04/Holocaust-Knowledge-Awareness-Study\\_Executive-Summary-2018.pdf](http://www.claimscon.org/wp-content/uploads/2018/04/Holocaust-Knowledge-Awareness-Study_Executive-Summary-2018.pdf) [<https://perma.cc/A332-K4AR>].

244. *Id.* at 3.

245. *New Survey by the Claims Conference Finds Critical Gaps in Holocaust Knowledge in Austria*, CLAIMS CONF. ON JEWISH MATERIAL CLAIMS AGAINST GER., <http://www.claimscon.org/austria-study> [<https://perma.cc/6ZVG-FBYR>] (last visited Feb. 2, 2021).

246. *Id.*

247. Holmes, *supra* note 235.

248. *Id.*

original messages and meanings. In this Article, we offer the theoretical basis that will enable the development of a stable paradigm addressing questions of ownership and copyright of these works.<sup>249</sup>

In a recent study, Eva Subotnik argued that in order to expand our cultural wealth as a society, the interest of the living in works of the deceased should be given high importance and priority, “even if that means overriding artistic control by the dead.”<sup>250</sup> It is complicated to apply this rationale to works created in the ghettos because most victims did not leave behind specific instructions on how to use their works upon their demise. In cases like these, we should prioritize allowing the living to use the works of the deceased in their authentic form with necessary alterations for cultural reasons that do not smear or defame the name and reputation of the dead, such as in Eva.Stories and Rovner’s exhibit. These alterations allow greater accessibility to and visibility of these important artworks and their cultural value. The works created within the ghettos expressed rebellion and mutiny against their authors’ horrific circumstances, yet the works simultaneously served as instruments for the memorialization, perpetuation, and immortalization of the Holocaust’s victims. They gave a voice, a face, and a purpose to each individual who had been stripped of their most basic human rights. As far as the Nazi regime was concerned, these individuals had no name, personality, or identity—only a number. The art created by victims of the Holocaust manifests the artists’ individuality and forms an essential piece of Jewish history and heritage.

The following Part presents existing, albeit insufficient, doctrinal remedies to the legal challenge presented by Holocaust art, as was detailed throughout this Part. We argue that the scale of atrocities in the Holocaust renders the Jewish *Shoah* a *sui generis* historical event. As such, contemporary copyright principles, such as fair use, orphan works, and the duration of the right, can only partially address the concerns of this Article. They do not fully and properly handle the concerns surrounding the protection of Holocaust artwork—mainly their authenticity, ownership, accessibility, and alteration. A more robust instrument is required in light of the unique characteristics of the Holocaust.

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249. In this Article, we have elected to distance our argument from claims based on early copyright theories and philosophies, focusing instead on claims rooted in modern legislation. The Lockean and Hegelian theories, frequently debated and challenged in academic legal discourse, are insufficient grounds for our normative argument. Needless to say, inmates in the ghettos and concentration camps labored all day, every day, and those who managed to creatively express the experiences effectively imbued their personalities into these works in such an inseparable way that no words are needed for explanation. On the theories of intellectual property see generally ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011); ZEMER, *supra* note 208; Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 *STAN. L. REV.* 1343 (1989); Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 *LOY. L.A. L. REV.* 159 (2002); Gordon, *supra* note 201.

250. Eva E. Subotnik, *Artistic Control After Death*, 92 *WASH. L. REV.* 253, 253 (2017).

## V. EXISTING DOCTRINAL REMEDIES

This Part focuses on three existing doctrinal remedies in the context of Holocaust artworks. First, this Part discusses the fair use doctrine, which permits limited use of copyrightable materials without acquiring the permission of the copyright holder. Second, this Part examines the legal infrastructure for dealing with orphan works, which are works whose owners or heirs cannot be located (a category that contains the majority of works created in the Holocaust). Third, this Part considers granting Holocaust works perpetual copyright protection. These remedies provide partial solutions for Holocaust art. They may offer effective ad hoc solutions for promoting accessibility to this art, but taken as a whole, they are ineffective in tackling the copyright issues presented by Holocaust art.

## A. FAIR USE

The common law doctrine of fair use enables limited public use of copyrighted material without obtaining permission from the copyright owner. Common examples of fair use are using copyrightable works for educational purposes and for parody.<sup>251</sup> This doctrine attempts to strike a balance between the personal interests of the authors and the public interest in obtaining access and slightly altering copyrighted works.<sup>252</sup> As such, it is the most intuitive copyright law doctrine to remedy the limited access to art created within the ghettos and concentration camps. This doctrine evaluates four factors, set out in the U.S. Copyright Act, to decide whether a use is permitted: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used; and the effect of the use upon the potential market.<sup>253</sup>

In the context of our Article, these four factors may not be sufficient for protecting the authenticity of artworks created in the ghettos and concentration camps.<sup>254</sup> Purpose and character, as well as the nature of the copyrighted work,

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251. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575–78 (1994) (examining the emergence of the fair use doctrine under common and U.S. statutory law).

252. See AUFDERHEIDE & JASZI, *supra* note 202, at 10; Leval, *supra* note 202, at 1111; Lauren Gorab, Note, *A Fair Use to Remember: Restoring Application of the Fair Use Doctrine to Strengthen Copyright Law and Disarm Abusive Copyright Litigation*, 87 *FORDHAM L. REV.* 703, 705 (2018); see also William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 *HARV. L. REV.* 1659 (1988) (discussing the development of the fair use doctrine and proposing a new way forward); Elizabeth L. Rosenblatt, *Fair Use as Resistance*, 9 *U.C. IRVINE L. REV.* 377, 378 (2019) (arguing that the fair use doctrine allows authors to resist the inherent hierarchies in copyright law). For a critical view of the doctrine, see Dan L. Burk, *Algorithmic Fair Use*, 86 *U. CHI. L. REV.* 283 (2019); Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the “Server Rule”?*, 42 *COLUM. J.L. & ARTS* 417 (2019); Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537 (2009); Peter K. Yu, *Fair Use and Its Global Paradigm Evolution*, 2019 *U. ILL. L. REV.* 111.

253. 17 U.S.C. § 107 (2018); see, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001). See generally Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 *U. PA. L. REV.* 549 (2008) (analyzing which factors practically determine the outcome of the fair use test).

254. The uniqueness of the Holocaust makes clear that judicial interpretive choices should serve to extend the boundaries of fair use to account for works created within the ghettos and concentration camps. Rebecca Tushnet has disputed the ability of courts to apply fair use in ways that accommodate multiple

might be relatively easily met given these artworks' immortalized character and purpose of their, as well as their unique nature derived from the circumstances surrounding their creation. Therefore, we will not elaborate on these factors, but rather delve into the more controversial factors—those concerning amount and substantiality factor as well as the effect of the use on the potential market.

For a use to be fair, it must demonstrate that it advances knowledge by adding something new to an existing artwork, as required by the amount and substantiality factor.<sup>255</sup> As emphasized in this Article, the works under consideration commemorate the victims of the Holocaust and carry a fundamental historical message while telling a story that has no other means of expression. Therefore, a requirement that fair use consist of a supplement to an existing artwork, a crucial part of the fair use doctrine, is less apt because such an interpretation may detrimentally impact the authenticity of the work.

Evaluating the effect of the use on the potential market raises an interesting question in light of recent events where works of art created during the Holocaust by prisoners and victims (such as letters) were auctioned off by private parties, causing a public outcry.<sup>256</sup> There seems to be a distinct market for Holocaust-related artworks, and applying the fair use doctrine will likely have a negative effect upon this market. However, there also seems to be widespread moral and ideological condemnation of this market and a broad appeal to transfer said artworks to institutions such as Yad Vashem, where they will be displayed solely to immortalize the Holocaust and the artists behind those works. Therefore, this test also shows that despite the merit of fair use as a remedy, it is only partially beneficial and applicable in our case.

More recent, unfortunate historical events show how the monopolizing of public information through copyright can be socially harmful. Highlighting this problem are the *Zapruder* film (filmed on November 22, 1963) and the *Kempler* film (filmed on November 4, 1995), which respectively captured the assassinations of

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meanings and interpretations of art. Courts “rarely acknowledge multiplicity of meaning” and take “a universalist perspective that denies that different observers might generate different meanings from the same view.” Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 LAW & LIT. 20, 22 (2013). This is perhaps a result of judges becoming arbiters of art. Eric Felten, *Is It Art? Increasingly, Nowadays, That’s a Judicial Decision*, WALL ST. J. (May 31, 2012, 8:29 PM), <https://www.wsj.com/articles/SB10001424052702303640104577438242141270380>. A good example to the contrary is the decision of the U.S. Second Circuit Court of Appeals in *Blanch v. Koons* where the court, accepting the defendant’s claim for fair use and artistic borrowing, announced that “we need not depend on our own poorly honed artistic sensibilities” and did not question the defendant’s “artistic purposes.” 467 F.3d 244, 255 (2d Cir. 2006). See also Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 807 (2005) (“[J]udges should refrain from indulging in subjective aesthetic determinations.”). If courts will not allow for interpretive choices with respect to works created in the ghettos and concentration camps, the copyright system will only further curtail the dialogical platform surrounding these works, rendering the fair use doctrine an insufficient tool for our purposes.

255. See Leval, *supra* note 202, at 1107, 1122.

256. See *supra* notes 12–13 and accompanying text.

U.S. President John F. Kennedy and Israeli Prime Minister Yitzhak Rabin.<sup>257</sup> In 1968, Josiah Thompson, an author publishing a book about the assassination of President Kennedy, failed to obtain the copyright to the *Zapruder* film from its owner at that time, *Life Magazine*, so that he could include frames from the film in his book.<sup>258</sup> Instead, he hired an artist to recreate the necessary frames from the film for the book in the form of charcoal sketches.<sup>259</sup> Time, the magazine's parent company, sued Thompson for copyright infringement, but the court found in favor of Thompson based on the fair use doctrine.<sup>260</sup> The court stated: "There is a public interest in having the fullest information available on the murder of President Kennedy. Thompson did serious work on the subject and has a theory entitled to public consideration."<sup>261</sup>

In 1975, after Zapruder's death, his family bought back the copyright to the film from *Life Magazine* for only one dollar.<sup>262</sup> In April 1997, the Kennedy Assassination Records Review Board<sup>263</sup> decided by a vote of five to zero that the *Zapruder* film would become part of the public record.<sup>264</sup> Witnesses at a review board hearing claimed that the Zapruder family had earned enough from the film, including a \$150,000 license fee from Time and other license fees from commercial use of the film.<sup>265</sup> The review board had also noted, however, that although the Zapruder family had made copies of the film available for educational purposes free of charge, they charged fees for "commercial exploitation."<sup>266</sup> As a result, the Zapruder family was awarded sixteen million dollars from the U.S. government as compensation in 1999.<sup>267</sup> That year, the family donated the film copyright to the Sixth Floor Museum at Dealey Plaza.<sup>268</sup>

Similarly, Roni Kempler was the only person who filmed the assassination of Israeli Prime Minister Yitzhak Rabin in 1995.<sup>269</sup> Sometime after the

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257. Ron Rosenbaum, *What Does the Zapruder Film Really Tell Us?*, SMITHSONIAN MAG. (Oct. 2013), <https://www.smithsonianmag.com/history/what-does-the-zapruder-film-really-tell-us-14194>; Serge Schmemmann, *A Trial, a Tape and a Warning in the Rabin Murder Case*, N.Y. TIMES, Dec. 20, 1995, at A3.

258. See *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 135 (S.D.N.Y. 1968).

259. See *id.* at 138.

260. See *id.* at 146.

261. *Id.*

262. See Evan Andrew, *What Happened to the Zapruder Film?*, HISTORY (Aug. 22, 2018), <http://www.history.com/news/what-happened-to-the-zapruder-film> [<https://perma.cc/9K3S-8X57>].

263. For more information on the Review Board, see *JFK Assassination Records Review Board*, NAT'L ARCHIVES, <https://www.archives.gov/research/jfk/review-board> [<https://perma.cc/V6H7-PEG7>] (last visited Feb. 3, 2021).

264. See George Lardner Jr., *Zapruder Film of JFK Assassination is Public Record, Review Board Decides*, WASH. POST (Apr. 25, 1997), <https://www.washingtonpost.com/archive/politics/1997/04/25/zapruder-film-of-jfk-assassination-is-public-record-review-board-decides/16a4ffa6-5837-46a4-84a6-6d0135a90bca/>.

265. *Id.*

266. *Id.*

267. See James Warren, *Zapruder's JFK Film Value Set at \$16 Million*, CHI. TRIB. (Aug. 4, 1999), <https://www.chicagotribune.com/news/ct-xpm-1999-08-04-9908040337-story.html>.

268. Andrew, *supra* note 262.

269. See Lital Levin, *This Week in Haaretz 1995 | Amateur Video of Rabin Assassination Aired*, HAARETZ, <https://www.haaretz.com/1.5097860> (last visited Feb. 3, 2021).



assassination, he sent a letter to the Shamgar Commission, appointed to investigate the assassination, to inform the commission of his video.<sup>270</sup> Lawyers on behalf of the commission took the film and later informed Kempler that he had copyright privileges over the film and he could decide whether to allow the press access to and use of it.<sup>271</sup> Kempler sold the video to an Israeli news company for approximately \$270,000.<sup>272</sup>

The *Zapruder* and *Kempler* films demonstrate how copyright laws have the power to limit and even prevent access to the sole remaining evidence of historical events. Extraordinary cases require extraordinary measures. During these events of immense public interest and significance, individuals who successfully captured what unfolded and then controlled their dissemination through copyright require a redefinition of fair use for the doctrine to apply to such cases. Copyrighted expressions created within the ghettos and concentration camps must not be held in indefinite captivity by private entities (even those with a public purpose like museums) that claim to have ownership of these works—works whose original creators will never come to claim them and whose value to the public is too great to be clandestinely controlled by those private entities. Given this gross inefficiency in the fair use doctrine, a new paradigm is desperately needed to deal with the similar issue posed by artworks created in the ghettos and concentration camps.

#### B. ORPHAN WORKS

Another doctrine able to provide some access to Holocaust artworks—though, like fair use, is only partially applicable—is the doctrine of “orphan works.”<sup>273</sup> The term refers to artworks whose owner is impossible to locate; because of the lack of proven ownership, users have no one to ask for permission to use these protected works. Therefore, it is practically impossible to make use of these artworks without infringing copyright; they are secluded and abandoned by society.<sup>274</sup> The orphan works problem has been described as “the starkest failure of

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270. כמה שווה לך הכיפוח שלי, אכתי אהכונוביץ? [Esti Aharonovich, *How Much Is My Story Worth to You?*], HAARETZ (Oct. 4, 2011, 12:05 PM), <https://www.haaretz.co.il/misc/1.1490034>.

271. *See id.*

272. *See id.*

273. *See generally* David R. Hansen, Kathryn Hashimoto, Gwen Hinze, Pamela Samuelson & Jennifer M. Urban, *Solving the Orphan Works Problem for the United States*, 37 COLUM. J.L. & ARTS 1, 3 (2013) (defining orphan works as “copyrighted works whose owners cannot be located by a reasonably diligent search,” providing background for the orphan works doctrine, and suggesting various frameworks for solving the problem in light of the social benefits associated with wider public access to orphan works); Aislinn O’Connell, *Copyright in Unpublished Works: 2039 and Orphan Works*, 39 LIBR. & INFO. RES. 41 (2015) (presenting the current legislative framework for the orphan works doctrine in the United Kingdom and discussing the ways in which cultural and heritage institutions may use orphan works despite protective legislation).

274. The absence of an authority from which to seek permission prevents using these artworks in, among other things, new artworks or their digitization, except when fair use is applicable. For detailed information about the legal issues that orphan works present to copyright law and recommendations for how to approach the problem, see generally U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION: A REPORT OF THE REGISTER OF COPYRIGHTS (2015) [hereinafter U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS

the copyright framework to adapt” on the basis of evidence indicating that over forty percent of artworks in some EU archives are orphan works.<sup>275</sup> If orphan works continue to be ignored, then as “archives in old formats . . . continue to decay, and [there is] further delay to digitisation . . . some [works] will be lost for good.”<sup>276</sup> The vast majority of artworks that were created in ghettos and concentration camps are today, by default, orphan works because their owners are mostly unknown, unable to be located, or they left no heirs.

Orphan works present three distinct issues that require legislators’ attention. First, the public as a whole is deprived of the cultural value that orphan works have to offer.<sup>277</sup> The public cannot use these orphan works in creating new art, thus limiting the available goods in the public domain and the potential public dialogue. Second, because no identified owner can receive royalties, the economic incentive to create copyrightable artworks is stifled.<sup>278</sup> Third, those who do choose to use orphan works for the benefit of all are forced to violate copyright laws.<sup>279</sup> It seems as though the mere existence of orphan works impedes our ability as a society to enjoy the many benefits that the copyright system has to offer as an incentive-based scheme. All copyrightable artworks are created to enrich our lives, culture, tradition, and heritage. Forbidding their use, regardless of the circumstances from which they emerged, undermines the basic principles of the copyright system. This is especially problematic in the context of Holocaust art, as we will discuss below.

Many countries have created specific legislation meant to tackle the legal issues orphan works present. On January 1, 2019, the Israeli parliament approved an amendment to its copyright law that referenced orphan works for the first time.<sup>280</sup>

DIGITIZATION], <https://www.copyright.gov/orphan/reports/orphan-works2015.pdf>. [<https://perma.cc/NE22-7CHV>], and U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS: A REPORT OF THE REGISTER OF COPYRIGHTS (2006), <https://www.copyright.gov/orphan/orphan-report.pdf> [<https://perma.cc/3SL9-8C23>].

275. IAN HARGREAVES, DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH 38 (2011), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32563/ipreview-finalreport.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf) [<https://perma.cc/YTA5-MKBE>].

276. *Id.*; see also Shannon Price, *Remembering the CLASSICs: Impact of the CLASSICs Act on Memory Institutions, Orphan Works, and Mass Digitization*, 26 UCLA ENT. L. REV. 79 (2019) (discussing the legal problems presented by mass digitization and orphan works, as well as current legislative and other efforts to address those problems).

277. Laura N. Bradrick, Note, *Copyright—Don’t Forget About the Orphans: A Look at a (Better) Legislative Solution to the Orphan Works Problem*, 34 W. NEW ENG. L. REV. 537, 538 (2012). Orphan works can also impact free speech rights and lead to unintentional censorship by prohibiting their utilization. See, e.g., Jake Goldenfein & Dan Hunter, *Blockchains, Orphan Works, and the Public Domain*, 41 COLUM. J. L. & ARTS 1, 14–15 (2017).

278. Bradrick, *supra* note 277.

279. *Id.* at 538–39.

280. See Copyright Law (Amendment No. 5), 5779–2019, SH No. 2777 p. 187 (Isr.). This amendment refers to orphan works as “artworks for which the owner of the copyright is unknown or unlocated.” The law states that the usage of such artworks is permitted if (a) due diligence was taken in order to locate the rightful owner(s) prior to usage; (b) the user explicitly mentions that the usage of the artwork is carried out according to the exception stated in the law and that the rightful owner is entitled

Similarly, other countries, such as Canada,<sup>281</sup> Japan,<sup>282</sup> and Korea<sup>283</sup> have implemented legal mechanisms that enable the utilization of orphan works. In the United States, even though many hearings have been held on the subject,<sup>284</sup> no legislation regarding orphan works exists.<sup>285</sup>

Unlike the United States, the European Union and the United Kingdom both created legal mechanisms to handle the issues presented by orphan works. The European Union is the current leader in regulating the use of orphan works. The European Union has a statutory exemption-based model as applied in its Directive on Certain Permitted Uses of Orphan Works.<sup>286</sup> The Directive requires EU member states to provide a statutory exception to the reproduction right, which ensures that orphan works are publicly available for certain permitted uses.<sup>287</sup> This exception limits access to orphan works to public service entities such as “libraries, educational establishments and museums, . . . archives, film or audio heritage institutions and public-service [sic] broadcasting organisations” within the member states.<sup>288</sup> Once an artwork is deemed as orphan in one state, it

to demand the user will cease the usage of the artwork; (c) the user will cease the usage upon being notified by the rightful owner. *See id.* Furthermore, if the use is commercial, in addition to the above terms, the user must publish a message online or in a daily newspaper stating their obligation to pay the rightful owner of the artwork any applicable royalties if that owner is ever discovered. *See id.*

281. Copyright Act, R.S.C. 1985, c C-42, § 77 (Can.); *see also* U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 274, at 30–31 (reviewing the Canadian Copyright Act).

282. ChosakukenHō [Copyright Act], Law No. 48 of 1970, art. 67 (Japan), *translated in* COPYRIGHT RESEARCH & INFO. CTR., COPYRIGHT LAW OF JAPAN 115 (2014), [https://www.cric.or.jp/english/clj/doc/20150227\\_October,2014\\_Copyright\\_Law\\_of\\_Japan.pdf](https://www.cric.or.jp/english/clj/doc/20150227_October,2014_Copyright_Law_of_Japan.pdf) [<https://perma.cc/36PX-XDPS>]; *see also* U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 274, at 31–32 (reviewing the Copyright Law of Japan).

283. Copyright Act, Act No. 432, Jan. 28, 1957, *amended by* Act No. 12137, Dec. 30, 2013, art. 50(1) (S. Kor.), *translated in* Korea Legislation Research Institution online database, <https://perma.cc/TBH4-PRK2>; *see also* U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 274, at 32–33 (reviewing the Korean Copyright Act).

284. *See, e.g.*, U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 274, at 1; BRIAN T. YEH, CONG. RESEARCH SERV., RL33392, “ORPHAN WORKS” IN COPYRIGHT LAW 1 (2008). *See generally* COPYRIGHT AND THE ORPHAN WORKS ISSUE (Andrew D. Owens ed., 2010) (recounting testimonies from hearings on orphan works).

285. In September 2011, the orphan works projects at several universities faced a lawsuit, which ultimately led to their indefinite termination. *See* Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445, 449 (S.D.N.Y. 2012), *aff d*, 755 F.3d 87, 104–05 (2d Cir. 2014). Both the trial court and the appellate court concluded that the claim against the Orphan Works Project was premature given the suspension of the projects. *Authors Guild, Inc.*, 902 F. Supp. 2d at 455–56, *aff d*, 755 F.3d at 104–05. The judiciary lost an important opportunity to express its opinion about the need for legislation regarding the use of orphan works.

286. *See* Directive 2012/28, of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, 2012 O.J. (L 299) [hereinafter EU Directive]. Article 2 of the EU Directive defines “orphan works” as follows: “A work or a phonogram [where] none of the rightholders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightholders having been carried out and recorded in accordance with Article 3.” *Id.* art. 2(1).

287. *See id.* art. 6(1).

288. *Id.* art. 1(1).

will be deemed as orphan within all member states.<sup>289</sup> The Directive requires a single registry for the safekeeping of information regarding orphan works.<sup>290</sup> As a second and complementary legal requirement in the European Union, there is a collective licensing scheme.<sup>291</sup> The combination of these legislative actions facilitates the development and growth of digital libraries in Europe.

In the United Kingdom, an independent review panel assembled in 2010 and produced a report known as the Hargreaves Report in 2011.<sup>292</sup> This report called for a two-step “extended collective licensing” regime for the mass licensing of orphan works and to delineate a procedure for the individual use of orphan works.<sup>293</sup> The United Kingdom adopted this approach two years later by amending the Copyright, Designs and Patents Act of 1988 to allow individuals to use orphan works after the prospective user conducts a diligent search and finds no owner.<sup>294</sup> The United Kingdom’s amended copyright legislation enables the U.K. Intellectual Property Office to grant a wider exception to copyright protection, even for circumstances that do not fall within the EU Directive, such as commercial use by a nonprofit organization.<sup>295</sup> Though many countries acknowledge

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289. The explanatory segment of the Directive states:

Different approaches in the Member States to the recognition of orphan work status can present obstacles to the functioning of the internal market and the use of, and cross-border access to, orphan works. Such different approaches can also result in restrictions on the free movement of goods and services which incorporate cultural content. Therefore, ensuring the mutual recognition of such status is appropriate, since it will allow access to orphan works in all Member States.

*Id.* pmbi., cl. 8.

290. *See id.* art. 3(6). Similar to Israeli law, should a rightholder appear after an artwork has been deemed as orphan, that rightholder may claim and receive compensation for the usage of their artwork in accordance with the individual member state’s legislation. This will lead to the declassification of the work as orphan, eliminating any possible public effectiveness of orphan work statutes. *See id.* art. 6(5).

291. In 2011, the European Commission took part in the negotiation of a Memorandum of Understanding in an attempt to “encourage voluntary collective licensing for ‘out-of-commerce’ books and journals.” Orphan Works and Mass Digitization, 77 Fed. Reg. 64,555, 64,559 (Oct. 22, 2012); *see* European Commission Memorandum MEMO/11/619, Memorandum of Understanding (MoU) on Key Principles of the Digitisation and Making Available of Out-of-Commerce Works – Frequently Asked Questions (Sept. 20, 2011); European Commission Press Release, IP/11/1055, Copyright: Commission Brokers Agreement to Increase the Number of Out-of-Commerce Books Being Made Available Again (Sept. 20, 2011).

292. HARGREAVES, *HAR* *supra* note 275, at 1–2.

293. *Id.* at 40.

294. *See* Enterprise and Regulatory Reform Act 2013, c. 24, § 77. The Secretary of State has the authority to grant these nonexclusive licenses. *Id.* § 77(3) (adding a new subsection to the Copyright, Designs and Patents Act). This licensing program is intended to operate in cooperation with the exceptions stated in the EU Directive, which the United Kingdom implemented by law. *See* The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014, SI 2014/2861, explanatory note.

295. *See* U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 274, at 28–29 (discussing U.K. protections in the context of a survey of EU member states’ implementation of the Directive). The United Kingdom implemented the terms and issuance of individual orphan works licenses by regulation in 2014. *See* The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014, SI 2014/2863, art. 6. The U.K.’s Intellectual Property Office has published industry-specific guidelines for prospective subject-matter users conducting due diligence research. *See Orphan Works Diligent Search Guidance for*

the inherent difficulties related to rights in these artworks and apply legal accommodations to meet such challenges,<sup>296</sup> other countries continue to take no action to amend copyright legislation to facilitate the use of orphan works. This inconsistency is extremely problematic when orphan works are discovered around the world, including works created during the Holocaust.

The vast majority of artworks that were created in ghettos and concentration camps are today, by default, orphan works.<sup>297</sup> They were created in locations that were nothing more than a threshold to the death of the author and the author's heirs. Conducting due diligence research will most likely lead to a dead end. The dizzying speed of destruction and death that permeated these years has created extreme challenges in locating the authors or the owners of these type of artworks, which is a tremendously difficult task even for orphan works more recently abandoned. Because most of these works are indeed orphan works, this doctrine can only do so much for them. We must push for better global regulation enabling the use of orphan artworks and we must act to ensure that everyone can benefit from the enriching culture, history, and dialogue embodied in the orphan works of the Holocaust. We should also adjust due diligence requirements to better adapt the process of gathering ownership evidence to the unique difficulties presented by the Holocaust.

The copyright challenges of ownership and restitution embedded in orphan works seriously affect Holocaust art and cannot be compared to other protected orphan artworks. Artworks by victims of the Holocaust are distinct even as orphan works because of their historical context and because of the causes which led to the demise of the creators, their heirs, and the work's resulting orphanhood. On top of that, restitution is another severe problem unique to the artworks discussed in this case that is not adequately addressed by the orphan works doctrine. This unique context should have special legal consideration, and there should be a robust attempt to reconstitute or license the use of Holocaust art to, if not the heirs of the artist, then at least to an entity that shall commemorate the works' inimitable historical context.<sup>298</sup> Unlike other orphan artworks, all works of art made during the Holocaust by their Jewish victims share a common Jewish heritage. This bond compels us to treat them differently than other orphan works and to use this common ground as a baseline for a solution to reconstitute or license their use to an entity that values them.

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*Applicants*, GOV.U.K.: INTELL. PROP. OFF. (Jan. 4, 2021), <https://www.gov.uk/government/publications/orphan-works-diligent-search-guidance-for-applicants> [<https://perma.cc/EZ9E-8DRG>]. Once a user has demonstrated the work's lack of ownership, the user will be issued a nonexclusive license to use the work within the United Kingdom for up to seven years, with the opportunity to renew the license at the end of the term. See Copyright and Rights in Performances (Licensing of Orphan Works) Regulations art. 6, *supra*, para. 2. The license fees accrued are directed toward funding social, cultural, and educational activities if no rightsholder makes a claim for the fees within the time the license is in effect. *Id.* art. 13, paras. 1–2.

296. See *supra* notes 286–95 and accompanying text.

297. See Brianna Dahlberg, Note, *The Orphan Works Problem: Preserving Access to the Cultural History of Disadvantaged Groups*, 20 S. CAL. REV. L. & SOC. JUST. 275, 275–76 (2011); *supra* Part II (discussing disputes over ownership of looted art).

298. We propose to do so in Part VI below.

A study conducted by the Knesset Research and Information Center in 2010 reviewed the regulations of eleven European countries in which thriving Jewish communities lived before the war.<sup>299</sup> The Center's research focused on the restitution of private property, public property, and property without heirs (orphan property).<sup>300</sup> It concluded that the issue of restitution is poorly handled in most of the eleven countries, especially considering private property and orphan property. Eight of the countries had no policy in place either for the restitution of private property to the heirs of citizens of former European Jewish communities or for enabling progress toward restitution.<sup>301</sup> Almost eighty percent of the countries reviewed had no policy in place for the restitution of orphan property.<sup>302</sup> The EU Directive discussed above partially addresses this problem by defining and applying legal procedure to these situations. In practice, however, the effectiveness of the directive depends on its adoption into domestic legislation by EU member states.<sup>303</sup>

The Netherlands and Germany are two countries in which all three aspects of this issue are regulated on some level. In the Netherlands, the government established the Maror Fund to compensate the Jewish community.<sup>304</sup> In the early 1980s, the Dutch Jewish community requested compensation for orphan properties transferred to the state and eventually received 2.1 million Dutch guilders.<sup>305</sup> In Germany, the Claims Conference was acknowledged as the legal heir to unclaimed public properties once belonging to Jewish communities and organizations.<sup>306</sup> These two examples demonstrate that it is possible to handle Holocaust orphan works in a manner that respects both the copyrighted art and the context from which it emerged. However, it is important to emphasize that the licensing of and restitution for use of orphan works created in the ghettos are extremely difficult, thereby making the orphan work framework unsuitable for solving the problem presented by Holocaust art.

In light of the above review, it is clear that the doctrine of orphan works can only offer a partial solution to the difficulty inherent in the application of copyright law to works of Holocaust art. The lack of global enforcement of this doctrine and the unique circumstance that led to the orphanhood of these works renders this doctrine insufficient.

Here it is worth mentioning the EU Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, as amended in

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299. See MIZRAHI, *supra* note 78, at 1. The countries reviewed were Austria, Croatia, Germany, Greece, Hungary, Lithuania, the Netherlands, Poland, Romania, Serbia, and Ukraine. *Id.* at 2.

300. *Id.* at 1.

301. *Id.* at 12.

302. *Id.*

303. See EU Directive, *supra* note 286.

304. See *Support for Victims*, GOV'T NETH, <https://www.government.nl/topics/second-world-war/support-for-victims> [<https://perma.cc/9VWU-XKFF>] (last visited Feb. 5, 2021).

305. MIZRAHI, *supra* note 78, at 7.

306. See *The Successor Organization*, *supra* note 102.

2014.<sup>307</sup> The European Union missed an important opportunity to specifically address ownership of looted artworks and of copyrighted expressions created within the ghettos and concentration camps, which are essentially orphan works. Despite their orphanhood, these works are cultural objects of Jewish heritage that have been, as the title of the directive provides, “unlawfully removed” during the Holocaust.<sup>308</sup> The Directive defines cultural objects as objects which are classified by a member state as being among “national treasures possessing artistic, historic or archaeological value.”<sup>309</sup> Vanished Jewish communities during the Holocaust ought to be considered “national treasures” of the European countries from which Jews were deported to their death in Nazi ghettos and concentration camps. Creative expressions of art and authorship once owned by Jewish communities and families, as well as works produced in concentration camps and ghettos, should be defined and treated as “national treasures possessing artistic [and] historic . . . value.”<sup>310</sup> This could have been another avenue for handling the legal issues created by orphan works of the Holocaust given their linkage to Jewish heritage.<sup>311</sup>

### C. PERPETUAL RIGHTS

A third approach toward Holocaust works could be to grant perpetual copyright protection. At common law, there is a general rule against perpetuities—the rule is that “no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.”<sup>312</sup> It was developed by courts in the seventeenth century to make sure a single person would not perpetually possess power or control of property after his or her death and to ensure the transferability of property.<sup>313</sup> Article 7(6) of the Berne Convention states that “[t]he countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs,” meaning that parties to the convention have the discretion to protect artworks beyond the general rule of fifty years’ protection after the death of the author.<sup>314</sup> Nothing, however, directly refers to extending copyright in perpetuity.

In the copyright realm, “perpetual rights” refer to a protected work “without a finite protection term or a work for which the protection term is perpetually

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307. Directive 2014/60, of the European Parliament and of the Council of 15 May 2014 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State and Amending Regulation (EU) No. 1024/2012 (Recast), 2014 O.J. (L 159).

308. *See id.* art. 2(2).

309. *Id.* art. 2(1).

310. *Id.*

311. In Part VI, we will elaborate further on this linkage, as we describe our proposed method for handling Holocaust art.

312. *Arundel Corp. v. Marie*, 860 A.2d 886, 890 (Md. 2004) (quoting *Fitzpatrick v. Mercantile-Safe Deposit & Tr. Co.*, 155 A.2d 702, 705 (Md. 1959)); *see Bird Anderson v. BNY Mellon*, N.A. 974 N.E.2d 21, 32 n.19 (Mass. 2012) (quoting *Hochberg v. Proctor*, 805 N.E.2d 979, 983 n.8 (Mass. 2004)).

313. *See George L. Haskins, Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19, 20 (1977).

314. Berne Convention, *supra* note 16, art. 7(6); *see id.* art. 7(1)–(3).

extended.<sup>315</sup> The former is far less common than the latter given that most existing laws around the world set a definitive copyright protection time limit. Special legislation that perpetually extends protection for a specific category of works would be required. In the United Kingdom, for example, the Copyright Act of 1775 created a de facto, perpetual copyright and gave it to the royal printer and the printers of the universities at Oxford and Cambridge to print the authorized version of the Bible.<sup>316</sup> This copyright is due to expire in 2039.<sup>317</sup> A more famous example is the case of J. M. Barrie's story *Peter Pan*. The Great Ormond Street Hospital was granted, by legislation, a right to royalties in perpetuity for the commercial usage of *Peter Pan*.<sup>318</sup>

In the United States, perpetual copyright is prohibited by the Constitution, which requires copyright be "for limited Times."<sup>319</sup> Nevertheless, the Constitution does not elaborate on how long a specific term should be. It also refrains from imposing any limitation upon the number of times a term can be extended. In practice, Congress has used its power to retroactively extend the protection period of artworks. It did so in 1998 by passing the Copyright Term Extension Act,<sup>320</sup> derisively known as the Mickey Mouse Protection Act,<sup>321</sup> which then led to the case of *Eldred v. Ashcroft*.<sup>322</sup> In that case, the plaintiff argued that the Act and previous extensions of the granted protection term created a de facto, perpetual copyright.<sup>323</sup> The U.S. Supreme Court rejected this argument, ruling that there is no limit on the number of times Congress may extend copyright terms as long as there is still a limit attached to the terms.<sup>324</sup>

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315. In Singapore, for example, Section 197 of the Copyright Act states that unpublished governmental literary, dramatic, and musical works are protected perpetually until they are published, from which time they are protected only for seventy years. Copyright Act, ch. 63, § 197(3) (2006) (Sing.). For further discussion weighing the pros and cons of perpetual rights in copyright, compare Mark Helprin, *A Great Idea Lives Forever. Shouldn't Its Copyright?*, N.Y. TIMES (May 20, 2007), <https://www.nytimes.com/2007/05/20/opinion/20helprin.html> (arguing in favor of perpetual rights), with Lawrence Lessig, *Against Perpetual Copyright*, LESSIG WIKI, [https://wiki.lessig.org/Against\\_perpetual\\_copyright](https://wiki.lessig.org/Against_perpetual_copyright) [<https://perma.cc/L8UU-Z9UU>] (last visited Feb. 5, 2021) (arguing against perpetual terms), and Arlen W. Langvardt, *The Beat Should Not Go On: Resisting Early Calls for Further Extensions of Copyright Duration*, 112 PENN ST. L. REV. 783 (2008) (same).

316. See E. J. MACGILLIVRAY, A TREATISE UPON THE LAW OF COPYRIGHT 358 (1902).

317. Copyright, Designs and Patents Act 1988, c. 48, sch. 1, § 13(1) ("The rights conferred on universities and colleges by the Copyright Act [of] 1775 shall continue to subsist until the end of the period of 50 years from the end of the calendar year in which the new copyright provisions come into force and shall then expire.").

318. In practice, this perpetual right does not affect the commercial exploitation of the story of Peter Pan because the Great Ormond Street Hospital does not retain creative control over the work, which has been in the public domain in the United Kingdom since 2008, seventy years after the death of J. M. Barrie. See *supra* note 134.

319. U.S. CONST. art. I, § 8, cl. 8.

320. Pub. L. No. 105-298, 112 Stat. 2827 (1998).

321. See Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1065 (2001). The Act was officially referred to as the Sonny Bono Copyright Term Extension Act or the Sonny Bono Act. See *supra* note 133.

322. 537 U.S. 186 (2003).

323. See *id.* at 193.

324. See *id.* at 204.



The connection between moral rights and perpetual rights is worth highlighting. Moral rights refer to rights granted to the author which are personal rather than economic in nature, such as the right of attribution and the right to the integrity of the work.<sup>325</sup> These rights are widely recognized in civil law jurisdictions and in some common law jurisdictions.<sup>326</sup> The basic rationale behind an author's moral rights in their work is the special and distinct connection between the author's personality and the expression the author conveys in their work.<sup>327</sup> If we acknowledge this bond, then the death of the author should not represent the end of that link; "part of our duty to the public [is] a 'textual commitment' to provide the public optimal accuracy regarding the intention and authorial message of the original author."<sup>328</sup> The personality of an author exists indefinitely, far beyond physical death, in memories and media.<sup>329</sup> Therefore, the moral rights in Holocaust works should be granted perpetual protection.

The notion of protecting artworks perpetually given the moral rights of the works' authors intensifies when those authors created artworks shortly before their deaths as a means to leave behind a trace of their existence. There may be no stronger bond between an artist and their art than that between the artist and their dying expression, their swan song, whether in the shape of music, poetry, painting, or a portrait. Such artworks deserve unique treatment because they were created under unique circumstances that establish an exceptional connection between the author and the author's work. This connection, we argue, is worthy of heightened protection. Moreover, recognizing moral rights in a copyright-protected work prohibits new owners of the protected artworks from destroying or altering them, distinguishing copyright from all other kinds of property ownership.<sup>330</sup> Our suggested legal intervention acknowledges the connection between the author and the author's work and actively pursues the protection of that work. Judicial decisions and legislative provisions should also defend perpetual moral rights in these important artworks given the purpose and circumstances of their creation.

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325. See Lior Zemer, *Moral Rights: Limited Edition*, 91 B.U. L. REV. 1519, 1524 (2011).

326. See *id.* at 1524–25.

327. See *id.* at 1524; *supra* notes 222–24 and accompanying text.

328. Zemer, *supra* note 325, at 1561. See generally Brian Angelo Lee, *Making Sense of "Moral Rights" in Intellectual Property*, 84 TEMP. L. REV. 71, 81–82 (2011) (explaining that some states make moral rights "implicitly perpetual by phrasing [them] as a general prohibition against certain actions done without the artist's permission," which prevents certain actions after the artist's death because the artist cannot provide permission while other states perpetuate moral rights in works for fifty years after the author's death).

329. See Zemer, *supra* note 325, at 1560.

330. See Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 265 (2009); see also Lee, *supra* note 328, at 82–83 (stating that the moral right of integrity is a "reasonable exception to property law's general prohibition on servitudes in chattels" because "current owners can seriously affect the interests of the artists who created those works" (internal quotation marks omitted) (quoting Hansmann & Santilli, *supra* note 218, at 102)); Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 787–88 (2005) (explaining the long history of the right to destroy one's property and the view that this was a fundamental right of property ownership).

Another important aspect of our discussion of perpetuity is the right of preservation and its inherent connection to the protection of cultures.<sup>331</sup> As discussed later, the artworks contemplated in this Article are entrenched in Jewish culture and can be viewed as the traditional knowledge of the Jewish diaspora.<sup>332</sup> The protection of a specific community's culture must, in one way or another, include that community's right to take actions to preserve its culture. Preservation stands at the heart of every community's right to culture and extends to art and copyright-protected works.<sup>333</sup> The Jewish community has the right to preserve its forgotten art and culture, which were created under the unbearable circumstances of the Holocaust.<sup>334</sup> This preservation can be ensured by extending in perpetuity the copyright protection afforded to Holocaust artworks.

We previously argued that to expand our wealth of culture as a society, the interest of the living in the works of the deceased should be given greater importance and priority, even if that means overriding artistic decisions made by those no longer with us.<sup>335</sup> This rationale undoubtedly applies to artworks created during the Holocaust because most victims did not leave behind specific instructions on how to use their works upon their demise. We should prioritize the rationale for allowing the living to make use in perpetuity of these artworks for cultural reasons in ways that do not smear or defame the deceased.<sup>336</sup> The authors themselves, not the archives and libraries that physically possess their work, have perpetual rights to that work, and it is a cultural obligation for all of us to use those works in a manner that honors their creators and the art itself that memorializes the carnage of the Holocaust. Thus, the perpetual copyright of the authors makes possible the perpetual cultural use of these artworks by anyone who wishes to

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331. For more on the connection between preservation and culture, see Elizabeth A. Thomas-Hoffman, Cultural Preservation and Protection 2 (unpublished paper) (available at <https://perma.cc/AL9J-KG8L>) (last visited Feb. 5, 2021); Olivia Luciani, *Preserving People's Cultural Heritage Is a Crucial Part of Development*, CIEL (Aug. 1, 2017), <https://www.ciel.org/preserving-peoples-cultural-heritage-crucial-part-development> [<https://perma.cc/FFL8-4PSJ>].

332. See *infra* Section VI.B; see also Guy Pessach & Michal Shur-Ofry, *Copyright and the Holocaust*, 30 YALE J.L. & HUMAN. 121, 126 (2018) (explaining that artworks created by Holocaust victims "were produced as purposeful acts of social remembering and cultural preservation for future generations").

333. Christine Steiner, *Intellectual Property and the Right to Culture*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS 43, 44 (World Intellectual Prop. Org. & Office of the United Nations High Comm'r for Human Rights eds., 1999), [https://www.wipo.int/edocs/pubdocs/en/intproperty/762/wipo\\_pub\\_762.pdf](https://www.wipo.int/edocs/pubdocs/en/intproperty/762/wipo_pub_762.pdf) [<https://perma.cc/W8SM-GYXC>].

334. See Pessach & Shur-Ofry, *supra* note 332, at 126–27 ("[T]hese authentic real-time materials give us a glimpse into an event whose magnitude and extremity are difficult to express post factum.").

335. See, e.g., Subotnik, *supra* note 250; *supra* text accompanying note 250; see also Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1329 (disfavoring the ability of property owners to exert "superintend their successors' behavior").

336. For more on this in a digital context, see generally Damien McCallig, *Facebook After Death: An Evolving Policy in a Social Network*, 22 INT'L J.L. & INFO. TECH. 107 (2014).

keep the authors and their art alive in our collective memory.<sup>337</sup>

The defense of perpetual moral rights in copyright-protected works becomes even more important when discussing artworks that were crafted in the midst of ongoing human rights violations. The author or artist of each such work deserves the protection of perpetual moral rights. Moral rights ought to be considered as perpetual rights in connection with the public's right to be informed: "[V]iewing moral rights as perpetual moral obligations toward[] the public is commensurate with constitutional values, concerns for the public domain, authorial collectivity, and cultural integrity."<sup>338</sup> In this way, moral rights maintain fairness for both the public and the author by granting the public "a *right* to be informed of the accurate meaning and message of authorial works."<sup>339</sup> The perpetual protection of moral rights is thus a means to create a better informed public and to protect freedom of information.

The authors of many Holocaust artworks could not have economically exploited their works at their time of creation or after the war because of the authors' untimely demise. As a result, the duration of these artworks' economic rights under copyright law will begin only when they are taken from their places of storage, such as archives and libraries. In this sense, these artworks have not yet enjoyed either the moral or material protections of copyright law. On these grounds, for example, copyright protection for Anne Frank's *The Diary of a Young Girl*, which ended in 2015, should have been extended. A claim to extend the diary's copyright protection was indeed made by the foundation that owned the copyright.<sup>340</sup> They claimed that, prior to publication, the diary entries were extensively edited by Anne's father, Otto Frank, to an extent that justifies granting Otto status as a co-author of the work.<sup>341</sup> This is a problematic stance to take because it harms Anne Frank's moral rights in her priceless diary. A better argument would have been what we present here—that this historically significant artwork should be granted extended copyright protection because of the extreme circumstances in which it was created. The Holocaust has had a lasting effect on the world; this should manifest in the copyright protection granted to artworks created in its midst. Offering strong protection for the moral rights of these works' creators effects an important purpose—to ensure that these creators, by way of their artistic expression, shall never be forgotten.

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337. See Pessach & Shur-Ofry, *supra* note 332, at 127 (describing how the current "copyright regime has affected and still affects the collective memory of the Holocaust in nuanced, indirect manners, by limiting the availability of these materials to the public, which in turn hinders the dissemination of knowledge about, and remembrance of the Holocaust").

338. Zemer, *supra* note 325, at 1567.

339. *Id.* at 1566.

340. See Jeremy Wednesday, *Copyright Term, Authorship and Moral Rights: The Intriguing Tale of Anne Frank's Diary*, IPKAT (Nov. 18, 2015), <http://ipkitten.blogspot.com/2015/11/copyright-term-authorship-and-moral.html> [<https://perma.cc/2TEY-4BFM>] (quoting blog contributor Mira T. Sundara Rajan).

341. *Id.* Because Otto survived Anne by many years, this claim of co-authorship, if accepted, would have prolonged the copyright protection under Dutch law, which determines the copyright term based on the lifetime of the last surviving co-author. *Id.*

Adopting this approach would require specific legislation, such as that drafted to protect *Peter Pan* and Mickey Mouse,<sup>342</sup> and embracing a legal doctrine that creates a type of perpetual property right, something the law tends to reject.<sup>343</sup> The legislative enactment of this approach for Holocaust art, thus seems unlikely because of such dispute surrounding perpetual rights. Therefore, we must rely on something more than hope for legislative protection to adequately remedy the injustice facing Holocaust artworks under the existing system of copyright law.

The existing copyright doctrines discussed in this Part are insufficient for comprehensively handling the legal challenges presented by Holocaust art. Though each might address some small part of the problem, even taken together, they fail to provide a sufficient and efficient legal remedy that enhances public access to Holocaust art while also honoring the unique circumstances that suffused that art's creation. We now offer a more comprehensive remedy founded on the concept of "traditional knowledge."

## VI. HOLOCAUST ART AS PROTECTED JEWISH HERITAGE AND TRADITIONAL KNOWLEDGE

### A. CREATING A LAYER OF HERITAGE

Over six million Jews were murdered in the Holocaust for being Jewish—for being participants in and creators of Jewish religion, tradition, heritage, and culture. Though some Nazis sought to create a future display of curios depicting a destroyed people, most Nazis "could not see the reason for preserving any remnant of Jewish culture"<sup>344</sup> and took "special pride" in the destruction of Jewish heritage, cultural artifacts, and symbols.<sup>345</sup> Jewish culture, heritage, and tradition are not merely descriptive terms of what Jewishness means—these elements together are repositories of expressions of traditional knowledge passed down through generations of Jewish culture. Symbols, rituals, stories, music, folklore, scrolls, texts, art, and other cultural expressions all reside within these fundamental repositories. The Nazi regime systematically destroyed an estimated 100 million books either religiously or culturally associated with Judaism or Jews over the course of nine years, and this act was inextricably bound up with the murder of six million Jews.<sup>346</sup> Looting libraries, burning books, and censoring "un-German" publications were part of the Nazis' coordinated effort to eradicate all

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342. See *supra* notes 318–21 and accompanying text.

343. See *supra* notes 312–13 and accompanying text.

344. Stanislaw G. Pugliese, *Bloodless Torture: The Books of the Roman Ghetto Under the Nazi Occupation*, in *THE HOLOCAUST AND THE BOOK: DESTRUCTION AND PRESERVATION* 47, 49 (Jonathan Rose ed., 2001).

345. *Id.* (quoting a Nazi correspondent reporting on the destruction of the Lublin Yeshiva library).

346. See Stephen J. Whitfield, *Where They Burn Books . . .*, 22 *MOD. JUDAISM* 213, 213 (2002) ("To set their sacred texts on fire was a way of accelerating the disappearance or extinction of those who read such works out of existential and theological compulsion."); Erica Wagner, *The History of Book Burning*, *NEW STATESMAN* (Sept. 16, 2020), <https://www.newstatesman.com/culture/books/2020/09/history-book-burning>.

traces of Jewish culture and the Jewish people themselves.<sup>347</sup>

The genocide of Jews and destruction of Jewish culture has made the Holocaust a defining element of Jewishness and a foundational component of Jewish identity—both collectively and individually, in the diaspora and in Israel.<sup>348</sup> It marks not only one of the most devastating and inhumane projects in history,<sup>349</sup> but also a critical moment in the evolution of Jewish culture that is integral to Jewish tradition and heritage. Expressions of the atrocities, the unimaginable conditions of life in death camps, and the re-created identities and attempts at survival, both futile and successful, are all embedded in the artistic and authorial expressions created within the walls and barbed wire fences of ghettos and concentration camps.

Thus far, we have reviewed the artworks created in ghettos and concentration camps and their special features and purposes, as well as art that was looted from Jews across Europe as part of a systematic plan to destroy Judaism and both Jewish-owned and Jewish-created art. We have explored the authenticity concerns at issue when determining how much protection Holocaust art deserves, a particularly resonant determination given the almost nonexistent protection this art currently receives. We saw that existing doctrinal remedies are inherently insufficient to address the legal challenges presented by Holocaust work and cannot free these artworks from their cages in archives and libraries across the world. Now we turn to discuss our suggested framework for approaching the copyright issues presented by Holocaust art.

In the following Sections, we argue that Holocaust art should be defined as Jewish “cultural expressions” and recognized as part of Jewish collective identity and “traditional knowledge” of Jewish culture, passed on from generation to generation. Our argument is rooted in the societal importance of culture and joins the growing body of literature on the relationship between intellectual property and cultural property; this relationship reveals that rights in creative expression represent processes inherent in the human condition.<sup>350</sup> Roberta Kwall explains: “A

347. See Pugliese, *supra* note 344, at 47–49 (highlighting the cultural and societal implications of the Nazi efforts to destroy Jewish literature by recalling Heinrich Heine’s quote that “wherever they burn books they will also, in the end, burn human beings” and by analogizing to Ray Bradbury’s *Fahrenheit 451*).

348. See, e.g., Shaul Magid, *The Holocaust and Jewish Identity in America: Memory, the Unique, and the Universal*, 18 JEWISH SOC. STUD. 100, 107 (2012).

349. The world officially recognized this in 2005, when a UN resolution remembering the victims of the Holocaust designated January 27th as International Holocaust Remembrance Day—on that date in 1945, Auschwitz–Birkenau, the largest of the Nazi concentration and death camps, was liberated. See, e.g., *International Holocaust Remembrance Day*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/remember/international-holocaust-remembrance-day> [<https://perma.cc/WJD6-C4KL>] (last visited Feb. 7, 2021).

350. See generally DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS (Irene Calboli & Srividhya Ragavan eds., 2015) (discussing how an intellectual property framework can be effectively used to protect and promote diversity, including cultural diversity); INTELLECTUAL PROPERTY, CULTURAL PROPERTY AND INTANGIBLE CULTURAL HERITAGE (Christoph Antons & William Logan eds., 2018) (discussing the intersection of its eponymous ideas and exploring developments in these areas using case studies from Asia, Europe, and Australia); SUSAN SCAFIDI, WHO OWNS CULTURE? APPROPRIATION AND

culturally sensitive perspective understands law as a product of the human condition, grounded in specific historical contexts, rather than as an objectively neutral system.”<sup>351</sup> This means that traditions can be modified and renewed by adding layers that represent specific communities when one can find a historic basis for including these layers within the cultural product of that tradition. We argue that Holocaust art should be recognized as an undeniable and integral part of Jewish heritage and tradition.

#### B. “A LIVING BODY OF KNOWLEDGE”

The common understanding of what amounts to traditional expressions of culture, as defined by international treaties and conventions, may raise questions regarding that idea’s applicability to our argument. Traditional knowledge refers to “a living body of knowledge passed on from generation to generation within a community. It often forms part of a people’s cultural and spiritual identity.”<sup>352</sup> The aim behind international recognition of a new category of protectable knowledge is to ethically and economically reward systems of knowledge that are embedded in the specific cultural traditions of local communities.<sup>353</sup> These systems embody knowledge worthy of *sui generis* intellectual property protection because of their unique and inherent ties to a set of features in a specific community.<sup>354</sup>

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AUTHENTICITY IN AMERICAN LAW (2005) (discussing the ownership of art forms and the battle between the community from which they originated and the culture that absorbed them); Roberta Rosenthal Kwall, *Is the Jewish Tradition Intellectual Property?*, 4 WIPO J. 129 (2012) (exploring aspects of Jewish culture as intellectual or cultural property); Michael Seadle, *Whose Rules? Intellectual Property, Culture, and Indigenous Communities*, 8 D-LIB MAG., Mar. 2002, <http://www.dlib.org/dlib/march02/seadle/03seadle.html> [<https://perma.cc/L3WV-QN96>] (“A wide variety of indigenous and newly immigrant cultures exist within most legal entities in the modern world. It is increasingly important to gain access to the conceptual world of other societies, in order to discuss with them areas where scholarly desires for intellectual goods may overwhelm appropriate cultural respect.”).

351. Kwall, *supra* note 350, at 135.

352. *Traditional Knowledge*, WIPO, <https://www.wipo.int/tk/en> [<https://perma.cc/Z5YF-V7WH>] (last visited Feb. 7, 2021); *see also* Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1, 4 (2001) (discussing issues with trying to protect traditional knowledge as intellectual property).

353. *See generally* John T Cross, *Justifying Property Rights in Native American Traditional Knowledge*, 15 TEX. WESLEYAN L. REV. 257 (2009) (discussing property rights in traditional knowledge from the perspective of Native peoples); Julie Yassine, *IP Rights and Indigenous Rights: Between Commercialization and Humanization of Traditional Knowledge*, 20 SAN DIEGO INT’L L.J. 71 (2018) (describing the challenges of utilizing intellectual property frameworks to protect traditional knowledge without commercializing the indigenous communities who created it); Ann Marie Sullivan, Comment, *Cultural Heritage & New Media: A Future for the Past*, 15 J. MARSHALL REV. INTELL. PROP. L. 604 (2016) (detailing different approaches to the protection of cultural heritage through intellectual property frameworks and suggesting modifications to current law at the intersection of intellectual property and cultural heritage).

354. *See generally* GRAHAM DUTFIELD, *PROTECTING TRADITIONAL KNOWLEDGE: PATHWAYS TO THE FUTURE* (2006) (providing extensive background about traditional knowledge, including justifications for and objections to its existence, information about current legislative efforts around the world regarding traditional knowledge, and recommendations for the future); INTELLECTUAL PROPERTY, CULTURAL PROPERTY AND INTANGIBLE CULTURAL HERITAGE, *supra* note 350; TOBIAS KIENE, *THE LEGAL PROTECTION OF TRADITIONAL KNOWLEDGE IN THE PHARMACEUTICAL FIELD: AN INTERCULTURAL PROBLEM ON THE INTERNATIONAL AGENDA* (2011) (describing the legal challenges presented by the protection of traditional knowledge in the pharmaceutical field in theory and in practice); *PROTECTING*

Traditional knowledge includes knowledge from a variety of fields, including traditional technologies of subsistence (such as methods for hunting or agriculture), rituals, stories, legends, music, sounds, artifacts, and folklore.<sup>355</sup>

We, the authors of this Article, are the grandchildren of Holocaust survivors. We are speaking about the knowledge on which our own spiritual identities were formed. This knowledge has been passed down to us by our parents' and grandparents' generations and form part of our inner beings and selves. The Holocaust has become a part of what collectively and individually defines Jewish culture and history. An affirmation of this idea can be found in the 1948 Israeli Proclamation of Independence, which states:

The catastrophe which recently befell the Jewish people—the massacre of millions of Jews in Europe—was another clear demonstration of the urgency of solving the problem of its homelessness by re-establishing in Eretz-Israel the Jewish State, which would open the gates of the homeland wide to every Jew and confer upon the Jewish people the status of a fully privileged member of the community of nations.<sup>356</sup>

This affirmation can also be found in the Israeli education system, which emphasizes the Holocaust as an essential part of its curriculum,<sup>357</sup> and the national observance of Holocaust Remembrance Day (*Yom HaShoah*). This day was anchored in a law passed by the Knesset in 1959 and is observed on the date of the Hebrew calendar when the Warsaw Ghetto uprising began.<sup>358</sup> The Holocaust is an inseparable part of Jewish history and the Jewish state's history. Copyrighted expressions created within the ghettos and concentration camps—stories, diaries, art, expressions of dance and drama, and music, whether religious or secular—communicate Jewish culture and tradition as a “living body of knowledge.”<sup>359</sup>

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TRADITIONAL KNOWLEDGE: THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, *TRADITIONAL KNOWLEDGE AND FOLKLORE* (Daniel F. Robinson et al. eds., 2017) (reviewing the activities of WIPO's committee focused on genetic resources, traditional knowledge, and traditional cultural expressions since the committee's establishment in 2000).

355. See DUTFIELD, *supra* note 354, at 16.

356. *Proclamation of Independence*, KNESSET, [https://www.knesset.gov.il/docs/eng/megilat\\_eng.htm](https://www.knesset.gov.il/docs/eng/megilat_eng.htm) (last visited Nov. 2, 2020).

357. See Nili Keren, *Teaching the Holocaust in Israel*, 22 *INTERNATIONALE SCHULBUCHFORSCHUNG* 95, 95–96 (2000).

358. See Martyrs' and Heroes' Remembrance Day Law, 5719–1959, SH No. 36 p. 120 (Isr.); *Jewish Holidays: Yom HaShoah - Holocaust Memorial Day*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/yom-ha-shoah-holocaust-memorial-day> [<https://perma.cc/GCB2-7V29>] (last visited Feb. 7, 2021).

359. See *Traditional Knowledge*, *supra* note 352. Some scholars have argued against the protection of traditional knowledge with a general intellectual property regime. See, e.g., J. Janewa Oseitutu, *Traditional Knowledge: Is Perpetual Protection a Good Idea?*, 50 *IDEA* 697, 703 (2010). In making such arguments, these scholars claim that protecting traditional knowledge “fits poorly within standard justifications of property” and that there are no “moral, political, and legal philosophies of property” that justify the strong protection intellectual property provides for traditional knowledge. Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 *CARDOZO ARTS & ENT. L.J.* 37, 40 (2009). From an economics perspective, this criticism is

Although “traditions cannot be defined with sufficient detail,”<sup>360</sup> the World Intellectual Property Organization (WIPO) defines tradition with enough room to bring our argument within the parameters of traditional knowledge and “traditional cultural expressions,” the latter being a subcategory of the former. According to the WIPO:

What makes knowledge or cultural expressions “traditional” is not their antiquity: much [traditional knowledge] and many [traditional cultural expressions] are not ancient or inert, but a vital, dynamic part of the lives of many communities today. The adjective “traditional” qualifies a form of knowledge or an expression which has a traditional link with a community: it is developed, sustained and passed on within a community, sometimes through specific customary systems of transmission. In short, it is the relationship with the community that makes knowledge or expressions “traditional.” For example, the essential characteristics of “traditional” creations are that they contain motifs, a style or other items that are characteristic of and identify a tradition and a community that still bears and practices it. They are often regarded as “belonging” to the community.<sup>361</sup>

As a “living body of knowledge,” copyrighted endeavors created within the ghettos and concentration camps do not cease to re-create meanings and identities, nor do they cease to express the vital link between the collective Jewish community and this body of knowledge. The Holocaust is not only a memorial day—it is a historical event that has redefined Jewish heritage and the expressions created by the Jewish victims of the Holocaust that belong to Jewish culture. The many examples of copyrighted expressions created within the ghettos discussed in this Article comply with the categories of traditional knowledge and cultural expression as the WIPO defines them.<sup>362</sup>

Today, the *Protection of Traditional Knowledge: Draft Articles*, designed and administered by the WIPO, is the most elaborate proposed regulation of

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understandable. However, the main purpose for such protection stems from our commitment as a society to give protection to traditional knowledge on grounds of fairness and distributive justice. Justin Hughes, *Traditional Knowledge, Cultural Expression, and the Siren’s Call of Property*, 49 SAN DIEGO L. REV. 1215, 1254 (2012).

360. Andreas Rahmatian, *Universalist Norms for a Globalised Diversity: On the Protection of Traditional Cultural Expressions*, in 6 NEW DIRECTIONS IN COPYRIGHT LAW 199, 228 (Fiona Macmillan ed., 2007).

361. WORLD INTELLECTUAL PROP. ORG., INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS 17 (2020), [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_933\\_2020.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_933_2020.pdf) [<https://perma.cc/27M2-BPQC>].

362. See *id.* Well-known examples of traditional knowledge and traditional cultural expression include Ghana’s folklore, see generally Gertrude Tokomoo, *Creating Capital from Culture – Re-Thinking the Provisions on Expressions of Folklore in Ghana’s Copyright Law*, 18 ANN. SURV. INT’L & COMP. L. 1 (2012), and Chinese folklore, see generally Deming Liu, *Can Copyright Lend Its Cinderellaic Magic to Chinese Folklore?*, 5 J. MARSHALL REV. INTELL. PROP. L. 203 (2006). For more examples and case studies of traditional knowledge from around the world, see generally TERRI JANKE, WORLD INTELLECTUAL PROP. ORG., MINDING CULTURE: CASE STUDIES ON INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS (2003), [https://www.wipo.int/edocs/pubdocs/en/tk/781/wipo\\_pub\\_781.pdf](https://www.wipo.int/edocs/pubdocs/en/tk/781/wipo_pub_781.pdf) [<https://perma.cc/8ZFH-4QEE>].



traditional knowledge.<sup>363</sup> The draft aims to protect traditional knowledge and traditional cultural expression by defining them as bodies of knowledge created by local communities in a collective context and by associating them with the cultural heritage and social identity of those local communities.<sup>364</sup> Traditional knowledge is “transmitted from generation to generation.”<sup>365</sup> Article 2 of the draft defines the beneficiaries of traditional-knowledge protection.<sup>366</sup> According to Article 2.2, if the traditional knowledge is not claimed by local communities, a national authority may be designated to be a custodian of any benefits.<sup>367</sup> Article 3 discusses the scope of protection traditional knowledge should receive.<sup>368</sup> In situations where the traditional knowledge is used by those other than the relevant community, Article 3.2 ensures that moral rights in the traditional knowledge are protected. Users must, among other obligations: (1) acknowledge the source of traditional knowledge and attribute it to the beneficiary, unless the beneficiary decides otherwise; and (2) “utilize the knowledge in a manner that respects the cultures and practices of the beneficiary.”<sup>369</sup> This does not mean that access is denied. The draft calls for traditional knowledge to be used without compromising the “inalienable, indivisible and imprescriptible nature of the moral rights associated with” the protected traditional knowledge.<sup>370</sup>

A fundamental conceptual invention in the draft is the provision of equitable-benefit sharing. Article 3 requires the users of knowledge to share the benefits emerging from their use.<sup>371</sup> Equitable-benefit sharing, usually related to genetics,<sup>372</sup> stipulates that countries and indigenous communities that grant access to their traditional knowledge are entitled to a share in the benefits derived from the

363. For the complete draft, see WORLD INTELLECTUAL PROP. ORG., THE PROTECTION OF TRADITIONAL KNOWLEDGE: DRAFT ARTICLES (2014), [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_28/wipo\\_grtkf\\_ic\\_28\\_5.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_28/wipo_grtkf_ic_28_5.pdf) [<https://perma.cc/G8HN-RXM5>].

364. *See id.* art. 1.

365. *Id.*

366. *See id.* art. 2. Article 2.1 states: “Beneficiaries [of protection] are indigenous [peoples] and local communities [and/or nations] who create, [hold], maintain, use and/[or] develop the [subject matter]/[traditional knowledge] [meeting the criteria for eligibility defined in Article 1]/[3.]” *Id.* (alterations in original). It alternatively provides: “[Beneficiaries of [protection] are indigenous [peoples] and local communities who create, [hold], maintain, use and/[or] develop the [subject matter]/[traditional knowledge] defined in Article 1.]” *Id.* (alterations in original) (footnote omitted).

367. *See id.* art. 2.2 (“[Where the [subject matter]/[traditional knowledge] [is not claimed by specific indigenous [peoples] or local communities despite reasonable efforts to identify them,] [Member States]/[Contracting Parties] may designate a national authority as custodian of the [benefits]/[beneficiaries] [of protection under this instrument] where the [subject matter]/[traditional knowledge] [traditional knowledge meeting the eligibility criteria in Article 1] as defined in Article 1. . . .”).

368. *See id.* art. 3.

369. *See id.* art. 3.2(a), 3.3(b).

370. *Id.* art. 3.2(c).

371. *See id.* art. 3.2(b).

372. *See* Elisa Morgera & Elsa Tsioumani, *Benefit-Sharing and Traditional Knowledge: The Need for International Guidance*, BENELEX BLOG (July 8, 2014), <https://benelexblog.wordpress.com/2014/07/08/benefit-sharing-and-traditional-knowledge-the-need-for-international-guidance> [<https://perma.cc/U546-KBJE>]; *see also* GENETIC RESOURCES, TRADITIONAL KNOWLEDGE & THE LAW: SOLUTIONS FOR ACCESS & BENEFIT SHARING (Evanson C. Kamau & Gerd Winter eds., 2009) (analyzing and providing policy recommendations for further utilization of the Convention on Biological Diversity);

use of their resources.<sup>373</sup> In the draft, the WIPO referred to benefit sharing as a means to “compensate[e]” communities who have been exploited by authorized users, whether countries or individuals.<sup>374</sup> Applying this to our argument, works created within the ghettos are not different from other types of knowledge gathered by certain local communities and based on shared experience and communal living. The users of these works must acknowledge the source of this knowledge and use it in a manner that respects the cultures and practices of the beneficiary.<sup>375</sup> We argue that the use of copyrighted expressions created within the ghettos and concentration camps belong to Jewish cultural tradition and therefore, these expressions must be subject to benefit sharing. These benefits can be directed to the well-being of Holocaust survivors who decrease in number each year.<sup>376</sup> The Holocaust has created another layer within Jewish identity, heritage, and culture. This layer has added an additional part to Jewish tradition, confirming the nature of traditions as creations and inventions comprising a greater “process of formalization and ritualization.”<sup>377</sup> The impact of the Holocaust, a deeply unfortunate but integral layer contributing to Jewish tradition, seems to be reflected in the development of collective values, “nation-building,”<sup>378</sup> and the body of knowledge of Jewish culture and traditions.

#### C. ART CREATED IN THE GHETTO AS CULTURAL PROPERTY

This debate raises a fundamental question: Is there “a perceived societal benefit to safeguarding a work’s original authenticity and, if so, under what circumstances”?<sup>379</sup> We claim that the Holocaust exemplifies such circumstances. Addressing this question with respect to intellectual property protection for Jewish traditional cultural expressions, Kwall asserts: “If there is a perceived

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SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, INTRODUCTION TO ACCESS AND BENEFIT-SHARING (2010) (explaining the basic terms and key themes of genetic resources and how to gain access to those resources); Lorraine Sheremeta & Bartha Maria Knoppers, *Beyond the Rhetoric: Population Genetics and Benefit-Sharing*, 11 HEALTH L.J. 89 (2003) (focusing on genetics benefit-sharing in the context of intellectual property); Geertrui Van Overwalle, *Protecting and Sharing Biodiversity and Traditional Knowledge: Holder and User Tools*, 53 ECOLOGICAL ECON. 585, 585 (2005) (discussing “how legal protection of biodiversity and traditional knowledge can be accommodated and how the results from the use and exploitation of biodiversity and traditional knowledge can be shared”).

373. Bram De Jonge, *What is Fair and Equitable Benefit-Sharing?*, 24 J. AGRIC. & ENVTL. ETHICS 127 (2011).

374. See WORLD INTELLECTUAL PROP. ORG., *supra* note 363, art. 3.2(b).

375. See *id.* art. 3.

376. See Lidar Gravé-Lazi, *Report: Only 26,200 Holocaust Survivors Will Be Living in Israel by 2035*, JERUSALEM POST (Jan. 24, 2018, 1:37 PM), <https://www.jpost.com/Israel-News/Only-26200-Holocaust-survivors-will-be-living-in-Israel-by-2035-539668>; Shachar Peled, *On Holocaust Remembrance Day: A Third of Survivors in the US Are Poor*, CNN (Jan. 27, 2017, 12:38 PM), [www.cnn.com/2017/01/27/us/holocaust-survivor-poverty/index.html](http://www.cnn.com/2017/01/27/us/holocaust-survivor-poverty/index.html) [<https://perma.cc/5JFS-72HJ>]; Sanchez, *supra* note 150; Yehuda Shohat, *Opinion, Holocaust Survivors’ Situation Is a Stain on Israeli Society*, YNET NEWS (Apr. 21, 2017, 1:16 PM), [www.ynetnews.com/articles/0,7340,L-4951469,00.html](http://www.ynetnews.com/articles/0,7340,L-4951469,00.html) [<https://perma.cc/5LWU-LGB7>].

377. Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1, 4 (Eric Hobsbawm & Terence Ranger eds., 2012) (1983).

378. Rahmatian, *supra* note 360, at 207.

379. Kwall, *supra* note 350.

value to safeguarding a text's authenticity, this benefit must be weighed against a competing social interest in fostering creativity and in developing subsequent works of authorship based on previous works."<sup>380</sup> Referring to the *halakhah* (Jewish law) and the *mesorah* (the transmission of Jewish religious tradition) as cultural products of creative human activity designed to be "transmitted to future generations,"<sup>381</sup> Kwall argues that Jewish law can be viewed as works of authorship eligible for intellectual property protection. The concepts of "cultural products" and "cultural property" are essential to Kwall's argument, in which she treats certain aspects of Jewish law as a "unique form of cultural property and one that manifests an undeniable human component."<sup>382</sup> Creative works created within the ghettos and concentration camps during the Holocaust are a "unique form of cultural property"<sup>383</sup> that have become inseparable from Jewish heritage. Kwall introduces three reasons on which she concludes that the Jewish tradition embedded in Jewish law is cultural property. First, "Jewish law exists to protect a set of practices that are integral to the survival of the Jewish people."<sup>384</sup> Second, "the essence of Jewish law is similar to any type of cultural property in that it has been developed and adapted by humans throughout the ages."<sup>385</sup> That is, there is a significant *human* element alongside the divine in Jewish law: "Jewish law is a cultural product of creative human activity that represents the product of human judgment about God's will."<sup>386</sup> Third, the Holocaust exemplifies the constant danger Jews have faced throughout history, namely, "the loss of their particularity."<sup>387</sup> Protecting the Jewish tradition is imperative. This claim is not unique to the Jewish people and is applicable to "many groups who are the intended beneficiaries of the emerging law of cultural property."<sup>388</sup>

Cultural rights have long been recognized as defining elements of heritage that deserve legal protection. The international community recognized this important fact in 2003 with the signing the Convention for the Safeguarding of Intangible Cultural Heritage, an inherent part of traditional knowledge. The Convention, "a mainspring of cultural diversity,"<sup>389</sup> put forth a basis for defining "cultural property" as including intangible heritage transmitted from generation to generation. The Convention defines "intangible cultural heritage" as "constantly recreated by communities and groups in response to their environment, their interaction with nature and their history."<sup>390</sup> Cultural property and cultural traditions are meant

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380. *Id.*

381. *Id.*

382. *Id.* at 130.

383. *Id.*

384. *Id.* at 133.

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. Convention for the Safeguarding of the Intangible Cultural Heritage pmbll., para. 3, Oct. 17, 2003, 2368 U.N.T.S. 3.

390. *Id.* art. 2, para. 1.

“to afford groups autonomy over their communities.”<sup>391</sup> The authenticity of a cultural product or tradition over time is inherently connected to its community and that community’s collective history. Here, we face an unavoidable conflict between the desire to preserve authentic properties of cultural traditions and the need to provide access to knowledge. Possible limits on derivative use of Holocaust artworks, in view of our emphasis on the preservation of their authenticity, must ensure that the use does not smear or defame the memory of the Holocaust. These types of limitations should be determined despite our efforts to provide access to Holocaust art and they should focus on preserving the genuine meaning of the work while aiming to safeguard the memory of the Holocaust in a dignified way.

The Holocaust motivated the adoption of the Universal Declaration of Human Rights,<sup>392</sup> effecting the inclusion of intellectual property in the legislative framework that protects human rights.<sup>393</sup> During the drafting process of the Declaration, “delegates repeatedly condemned forced intellectual labor.”<sup>394</sup> For example, the “Angel of Death,” Josef Mengele, forced Dina Gottliebowa Babbitt, while a prisoner at Auschwitz, to paint watercolors of the haggard faces of Gypsy prisoners.<sup>395</sup> Seven of the eleven portraits that saved Mrs. Babbitt and her mother were found and are on display at the Auschwitz–Birkenau Memorial and Museum in Poland. “They are definitely my own paintings; they belong to me, my soul is in them, and without these paintings I wouldn’t be alive. . . .”<sup>396</sup> The museum, “which considers the watercolors its property, has argued that they are rare artifacts and important evidence of the Nazi genocide, part of the cultural heritage of the world.”<sup>397</sup> Usually, we would accept a claim that “some living person(s) be authorized to decide how works of authorship are used—even if that means overriding artistic control by the dead.”<sup>398</sup> However, Dina requested ownership before she passed away in 2009, and even if she had not, why should the museum be entrusted with commemorating her sufferings? By retaining the paintings, the museum has reaped benefits from Dina’s identity as a human being, an Auschwitz survivor, and a Jew. This delegitimizes Jewish cultural heritage by presuming that Dina’s membership in world culture has priority over her belonging to a particular group that was subject to the horrors of the Holocaust. There would not have been a Holocaust without the prevalence of Jews and Jewish culture. Dina is, first and foremost, a member of the Jewish tradition, before she is a

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391. Kwall, *supra* note 350, at 131.

392. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

393. *See id.* art. 27; *see also* Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1047–75 (2007) (discussing the drafting history of Article 27(2) of the Universal Declaration of Human Rights).

394. Yu, *supra* note 393, at 1087.

395. *See* Steve Friess, *History Claims Her Artwork, but She Wants It Back*, N.Y. TIMES (Aug. 30, 2006), <https://www.nytimes.com/2006/08/30/arts/design/30surv.html>.

396. *Id.*

397. *Id.*

398. Subotnik, *supra* note 250.

member of world culture and heritage. Providing exclusive protection to unique cultures that own traditional cultural expressions, securing them equitable benefit sharing, and excluding them from ideals of world culture to preserve diversity and authentic human histories are applicable to Dina's paintings and all other works created within the ghettos and concentration camps.

Many attempts were made to reclaim Dina's ownership in the portraits, including a 2001 resolution of the U.S. House of Representatives and a call by U.S. President George W. Bush to assist Dina's legitimate claim.<sup>399</sup> In one of the exchanges between U.S. Congresswoman Shelley Berkeley and the Polish Ambassador to the United States, Przemyslaw Grudzinski, the former wrote: "Let's be clear from the start. The pictures painted by Dina Babbitt do not belong to the whole world."<sup>400</sup> Dina's watercolor artworks are not only her exclusive property as expressions of her "soul,"<sup>401</sup> which cannot be owned by the Auschwitz museum or anyone else but herself; the artworks also comprise an authentic part of Jewish cultural property and heritage after the Holocaust. This argument is familiar to those who grapple with the possible circumstances in which a work of authorship may be modified without the consent of the original author. Moral rights preserve integrity and attribution for conventional works of authorship, allowing them to foster public knowledge and awareness of the original meaning and message of each work.<sup>402</sup> Kwall applies this argument to cultural properties that collectively represent a specific heritage: "Underlying this aspect of moral rights [in] law is a policy judgment that a value exists to preserving to some degree the meaning and message of an original work of authorship; a similar theme underscores cultural property's concern with preserving cultural heritage, particularly for endangered groups and traditions."<sup>403</sup> This example involves one aspect of the debate over preserving the authenticity of the original work.<sup>404</sup> But more importantly, Dina's watercolors are an example of Holocaust artwork that is part of Jewish cultural heritage. Jewish authors like Dina deserve ownership copyrights over works they created in the Holocaust.

A recent example of this principle is a case involving the auction of a ledger known as the Bergen Belsen Protocol, which was written during the Holocaust. The Israeli Attorney General asked that the document be transferred to Yad Vashem, which would act as a trustee. In his request to the court, the Attorney General stated that the ledger had the status of a cultural asset that was "irreplaceable cultural property for the Jewish nation and humanity as a whole."<sup>405</sup> This

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399. See LIDIA OSTAIOWSKA, *WATERCOLOURS: A STORY FROM AUSCHWITZ* 217 (Sean Gasper Bye trans., 2016) (2011).

400. *Id.* (internal quotation mark omitted).

401. See Natalie Robinson, "Snow White in Auschwitz": *The Tale of Dina Gottliebowa-Babbitt*, in *WORKING MEMORY: WOMEN AND WORK IN WORLD WAR II* 129, 129 (Marlene Kadar & Jeanne Perreault eds., 2015) (quoting Dina Gottliebowa-Babbitt).

402. See Kwall, *supra* note 8.

403. Kwall, *supra* note 350, at 137.

404. For details on this debate, see *supra* Part IV.

405. Ofer Aderet, *Mandelblit Wanted to Transfer a Historic Item That Was Put Up for Auction to Yad Vashem*, HAARETZ (July 15, 2020), <https://perma.cc/UMW5-EDYZ>; see Yael Friedson & Gilad

request emphasizes the immense importance to the Jewish people of documents and art created in the Holocaust, which are an integral part of their heritage.

#### D. THE COLLECTIVE INTENTION EFFECT

Recognizing rights in traditional cultural properties that collectively represent a particular tradition implies that members of that tradition act with the collective intention of preserving that tradition. Members of Jewish culture, *en masse*, hold the implicit intention to preserve their Jewish traditions and identity, as much as they held an implicit collective intention to remain united within Jewish culture throughout the countries occupied by Nazi Germany and despite being subject to the infliction of inhuman atrocities upon them only because they were Jewish. Just as nations, cultures, communities, and certain societies fight about political and cultural control over their collective identity, so too does Jewish culture require legal protection for certain properties to be satisfactorily preserved.

Margaret Gilbert recognizes the principle of a “society-wide convention”<sup>406</sup> and provides a broad definition of “plural subjects” as “any set of jointly committed persons, whatever the content of the particular joint commitment in question.”<sup>407</sup> In her definition, Gilbert includes collectives such as unions and armies. Gilbert also refers to “social rules and conventions, group languages, everyday agreements, collective beliefs and values, and genuinely collective emotions.”<sup>408</sup> Formal constitutions aim to legally ground such collective beliefs, values, and emotions and transform them into “rules of governance.”<sup>409</sup> Gilbert argues that “people become jointly committed by mutually expressing their willingness *to be jointly committed*, in conditions of common knowledge.”<sup>410</sup>

Because people live within particular political and social structures, they naturally recognize themselves as part of a social group, or plural subject, and acknowledge the rights and obligations that their joint commitment to society imposes on them. Gilbert’s ideal applies at a more general level, suggesting the existence of superagents and asserting that “there is no reason in principle why large populations may not create joint commitments for themselves” and “the parties to a given joint commitment need not know each other or even know of each other as individuals.”<sup>411</sup> On these grounds, Jewish individuals form plural subjects whose unity is based on their belonging to Jewish tradition. Although

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Morag, *The Spokesman Demands: “Bergen Belsen Protocol” - to Yad Vashem*, YNET (July 15, 2020, 3:25 PM), <https://perma.cc/GF8U-8M9H>.

406. Margaret Gilbert, *The Structure of the Social Atom: Joint Commitment as the Foundation of Human Social Behavior*, in *SOCIALIZING METAPHYSICS: THE NATURE OF SOCIAL REALITY* 39, 43 (Frederick F. Schmitt ed., 2003).

407. *Id.* at 55 (emphasis omitted); see also MARGARET GILBERT, *RIGHTS AND DEMANDS: A FOUNDATIONAL INQUIRY* 180–81 (2018) (discussing plural subjects).

408. Gilbert, *supra* note 406, at 55 (emphasis omitted).

409. MARGARET GILBERT, *A THEORY OF POLITICAL OBLIGATION: MEMBERSHIP, COMMITMENT, AND THE BONDS OF SOCIETY* 213 (2006).

410. MARGARET GILBERT, *LIVING TOGETHER: RATIONALITY, SOCIALITY, AND OBLIGATION* 349 (1996).

411. Gilbert, *supra* note 406, at 55.

Gilbert requires that people express their willingness to submit to the commitment, there are social activities that do not require express agreement. We share a “collective will”—a general will to preserve certain social norms by virtue of being defined by a certain culture.

This line of reasoning is advocated by Raimo Tuomela, who defines group-collective intentionality by reference to an authority system—a group-will formation system. For collective intention we have to believe in one common will: “‘Groupness’ means the existence of ‘one will,’ as it were, and it is shared group-intentions that make one will out of many wills.”<sup>412</sup> There exists the capacity of “pooling the individual wills into a group will,”<sup>413</sup> which allows us to move from a multitude of “I’s” to a “we.”<sup>414</sup> In this way, an authority system is created and individuals transfer their wills, as it were, to the group. According to Tuomela, transfer of will is not enough, and he emphasizes the centrality of the principle of acceptance.<sup>415</sup> Collective intentionality presupposes acceptance of social norms, rules, and institutions. For example, we share a “collective will” to preserve social stability, unique political and cultural identities, and the regulation of property rights. Tuomela reminds us that collective intention is “directed to a collective goal”<sup>416</sup> and that collective acceptance can be “based on external power as long as the participants still act as intentional agents.”<sup>417</sup> Defining works of art and authorship created within the ghettos as part of Jewish heritage and tradition presupposes groupness, a collective intention to preserve the memory of the Holocaust, which stands as a reflection of the “we” component embedded in Jewish heritage. This collective intention shared by the Jewish people everywhere enhances our argument that Holocaust artworks should be treated as a part of Jewish heritage in an attempt to preserve it. This is because this art is embedded in the “we” of the Jewish people, and its effect is engraved in the hearts and minds of all of those who consider themselves a part of the Jewish community. This provides legitimacy for viewing this art as an inseparable part of Jewish history and heritage, and it deserves the utmost protection. This also explains the suggested transition away from private ownership to community ownership, and this Article has argued for ownership by the whole Jewish community of Holocaust artworks and not by individuals. The strong protection that Holocaust art deserves stems from the community that stands behind it, as well as its collective intention. Thus, private ownership does not do justice to the historical circumstances surrounding the Holocaust and the extent to which Holocaust art immortalizes its creators and

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412. RAIMO TUOMELA, *THE IMPORTANCE OF US: A PHILOSOPHICAL STUDY OF BASIC SOCIAL NOTIONS* 175 (1995); see also Raimo Tuomela, *We Will Do It: An Analysis of Group-Intentions*, 51 *PHIL. & PHENOMENOLOGICAL RES.* 249 (1991) (investigating group intentions).

413. TUOMELA, *supra* note 412, at 189 (internal quotation marks omitted).

414. *Id.* at 177.

415. See Raimo Tuomela, *Collective Acceptance, Social Institutions, and Social Reality*, 62 *AM. J. ECON. & SOC.* 123, 146 (2003); see also TUOMELA, *supra* note 412, at 314–16.

416. RAIMO TUOMELA, *SOCIAL ONTOLOGY: COLLECTIVE INTENTIONALITY AND GROUP AGENTS* 62 (2013).

417. *Id.* at 129.

community. If the need is for access to authentic Holocaust artworks, private ownership will only take us further away from this goal. No individual should have the ability to prevent the public, and specifically the Jewish community, from accessing this invaluable art.

The traditional utilitarian approach to intellectual property economically justifies the protection of the rights we are suggesting. In this Part, we offer a culture-based approach to the relationship between intellectual property and tradition. A cultural approach places “the emphasis . . . on intellectual property’s relationship to a multiplicity of values, such as autonomy, culture, equality and democracy.”<sup>418</sup> Through the examination of traditional property, traditional knowledge, traditional cultural expressions, collective intentions and commitments, and by broadening the normative bounds of cultural property, we urge the recognition of works created within the ghettos and concentration camps by Jewish victims of the Holocaust as part of Jewish heritage and tradition. This requires a reconfiguration of doctrines regarding attribution and rewards using these works. In this Article, we offer a theoretical model for an unexplored fundamental issue in copyright. Our claim to recognize the Holocaust as part of the traditional knowledge of Jewish culture does not, in any capacity, mean limiting the access to and use of copyrighted expressions such as Rovner’s exhibition and Dina’s paintings. We argue that the existing legal models of ownership are flawed, and they fail to give recognition that Holocaust victims, survivors, and their contributions to Jewish heritage rightfully deserve.

#### CONCLUSION

World Jewish Congress President Ronald Lauder declared that stolen works of art from Jewish families in the Holocaust are the “last prisoners” of World War II.<sup>419</sup> Here lies the fundamental message of our inquiry. The “last prisoners of WWII” are not only looted works of art, music, and literature; they are also those works, created in the ghettos and concentration camps by Jewish prisoners, that tell the world the true story behind the genocide of a culture that was once an integral part of every country in Europe. A recent discovery of letters written by Jewish Polish children in 1938 shows how these works, discovered more than seventy years after the end of World War II and the Holocaust are held by private institutions and individuals who claim ownership over them despite their value to society and especially to the Jewish people.<sup>420</sup> In this Article, we opened a debate; we do not close it. We advocated for declaring these works part of Jewish tradition and heritage. Culture is not a static enterprise. Culture does not only encompass the accumulated wisdom and defining properties of bygone histories.

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418. Kwall, *supra* note 350, at 130.

419. Danielle Wiener-Bronner, *Sixty More Works Discovered in Hidden Nazi Art Trove*, ATLANTIC (Feb. 11, 2014), <https://www.theatlantic.com/culture/archive/2014/02/more-nazi-art-loot/357951>; see E. B., *How Is Nazi-Looted Art Returned?*, ECONOMIST (Jan. 12, 2014), <https://www.economist.com/the-economist-explains/2014/01/12/how-is-nazi-looted-art-returned>.

420. See *supra* notes 12–13 and accompanying text.



Because “culture is fluid and evolving,”<sup>421</sup> it can recreate its boundaries and invite new, defining elements into these boundaries.

The artworks at the heart of this Article are the most extreme examples in human history of the creation of copyrighted works. Withholding them from their legitimate legal and moral owners, and from the public, perpetuates the awful injustice that the creation of these works rebelled against. The Jewish people should be granted rights over the creative messages of ancestors whom they have never known and whom were murdered based solely on their Jewish identity. This Article brings forward the claim that existing intellectual property doctrines and law continued this gross injustice regarding the protection of artworks created in the ghettos and concentration camps. The existing protection offered by the current intellectual property infrastructure, such as fair use, orphan works, and perpetual rights, only provide a partial solution to the problem these artworks present. They are insufficient and flawed. We argue that recognizing these artworks as traditional knowledge and as cultural property belonging to the Jewish community—the target of the Holocaust—may help mitigate this wrong. It will provide the world access to important, authentic artworks and the immortal value they hold. A recent report commissioned by the U.K. Intellectual Property Office notes that “[c]opyright works that are not used have no cultural or economic value, neither to rightholders nor to innovators, or the general public.”<sup>422</sup> Holocaust art should be widely shared because of the works’ immense historical and dialogical contribution. These artworks carry authentic messages that should be accessible for the benefit of society, beyond the Jewish community. At the same time, however, the works should be declared the property of the tradition and heritage that was the target of the Holocaust. “Knowledge, once witnessed, cannot and should not be contained.”<sup>423</sup> This statement embodies the essence of this Article. Although we claim ownership through Jewish culture of art and authorship created within the ghettos and concentration camps of the Holocaust, we advocate that these expressions—which form part of Jewish identity, tradition, and heritage—must not be sealed off from public access. We must protect and promote the potential of these artworks to teach their most important lesson to us all—*never again*.

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421. SCAFIDI, *supra* note 350, at ix.

422. MARCELLA FAVALE, FABIAN HOMBERG, MARTIN KRETSCHMER, DINUSHA MENDIS, & DAVIDE SECCHI, COPYRIGHT, AND THE REGULATION OF ORPHAN WORKS: A COMPARATIVE REVIEW OF SEVEN JURISDICTIONS AND A RIGHTS CLEARANCE SIMULATION 5 (2013).

423. Shubha Ghosh, *Genetic Identity and Personalized Medicine Patenting: An Update on Myriad's Patents Related to Ashkenazim Jewish Ancestry*, in DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS 169, 190 (Irene Calboli & Srividhya Ragavan eds., 2015).