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
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 concentration 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.

TABLE OF CONTENTS

INTRODUCTION ......................................................... 815

I. AN UNIMAGINABLE COPYRIGHT SCENE: MUSIC, THEATER, AND ART . . 819

II. THE LIMITED MESSAGE OF LOOTED ART ......................... 825

A. NAZI PLUNDER AND FAILED ATTEMPTS TO RECOVER LOOTED ART 
after the war ..................................................... 825

B. EFFORTS TO RETURN LOOTED ART .............................. 828

III. THE LIMITLESS MESSAGE OF ART IN GHETTOS .................. 835

IV. AUTHENTICITY CONSIDERATIONS ................................. 839

A. AUTHENTIC DIALOGUES ............................................. 839

B. AUTHENTICITY IN OWNERSHIP ................................. 844

C. AUTHENTICITY IN ALTERATION: EVA.STORIES ON INSTAGRAM .... 847
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.1 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.”2 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.3 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:

---

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.5

Rovner “remain[ed] true to her undertaking not to change or produce her own version of the drawings”5 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].”6 Rovner added color to some of the black and white and sometimes-unfinished drawings.7 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,”8 interfered with their “authorship dignity,”9 and altered the narratives they sought to communicate.10

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.11

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

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

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 Zaglembie (Zagłębie) World Organization 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. 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. 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. 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. The goal of this Article is to address this problem and present a


14. See infra Part I.


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
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. A N 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\textsuperscript{17} 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.\textsuperscript{18}

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


\textsuperscript{18. See \textsc{Jeff Jacoby}, \textquote{Never Forget, the World Said of the Holocaust. But the World Is Forgetting}, \textsc{Bos. Globe} (May 1, 2016, 12:00 AM), https://www.bostonglobe.com/opinion/2016/04/30/never-forget-world-said-holocaust-but-world-forgetting/59cUqlNFXylkW7BDuRP2gNK/story.html#: Karol Markowicz, \textquote{Why We’re Forgetting the Holocaust}, \textsc{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].}

\textsuperscript{19. See generally \textsc{Fania Fénelon & Marcelle Routier}, \textit{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); \textsc{Gila Flam}, \textit{Singing for Survival: Songs of the Lodz Ghetto, 1940–45} (1992) (detailing the song repertoire created and performed in the Lodz ghetto of Poland); \textsc{Shirli Gilbert}, \textit{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); \textsc{Joža Karas}, \textit{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); \textsc{Music of the Holocaust}, \textsc{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).}

against the Nazis and to preserve their sense of freedom and humanity while on their way to grueling work in dire conditions.\(^\text{21}\) Rabbi Simon Dasberg, for example, wrote notes and songs in the acrostic form during roll call at the Bergen-Belsen concentration camp.\(^\text{22}\) 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.”\(^\text{23}\) 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.”\(^\text{24}\) 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.\(^\text{25}\)

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.\(^\text{26}\) He has collected about 4,000 works, some originals and others copies.\(^\text{27}\) Many were written hurriedly on scraps of paper, and one was even written on toilet paper.\(^\text{28}\) Lotoro sought this lost music across dozens of

\(^{21}\) 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).


\(^{24}\) Id.

\(^{25}\) Id.


\(^{27}\) Id.

\(^{28}\) See id.
countries in second-hand bookstores, archives, and interviews with Holocaust survivors.\textsuperscript{29} He managed to obtain thousands of musical works created by concentration camp inmates, including songs, symphonies, and operas.\textsuperscript{30} In 2013, Lotoro published an edition of twenty-four CDs titled The Encyclopedia of Concentrationary Music.\textsuperscript{31} In April 2018, his work was performed at a concert in Jerusalem.\textsuperscript{32}

Like music composition, theatrical activities in Nazi concentration camps were also sometimes possible.\textsuperscript{33} 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.”\textsuperscript{34} The first significant exhibition focusing on theater in concentration camps took place in 2017 at the Museum of Contemporary Art in Krakow, Poland.\textsuperscript{35} 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.”\textsuperscript{36} 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.\textsuperscript{37} 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.\textsuperscript{38} Out of the twelve family members, eight were dwarfs.\textsuperscript{39} 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.

\textsuperscript{29} See id.
\textsuperscript{30} See id.
\textsuperscript{31} See id.
\textsuperscript{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).
\textsuperscript{36} Id.
\textsuperscript{39} See Koren & Negev, supra note 38.
when they were deported to Auschwitz. 40 They were sent there to take part in Josef Mengele’s experiments. 41 Due to his special interest in them, they endured a nightmare of systematic torture but survived. 42

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. 43 These drawings contain portraits of fellow inmates who were murdered there, enabling those inmates’ memorialization. 44 Moshe Rynecki, an artist from Warsaw, created about 800 paintings and sculptures before and during the war. 45 Most of his work was lost, and his great-granddaughter went to great lengths to recover his lost art across Europe. 46 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. 47 They both, however, also secretly created paintings showing the horrific realities of ghetto life. 48 Their artworks were displayed in a 2016 exhibition in Berlin. 49 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.


48. See supra note 47.

49. See supra note 47.
that were created by Jews in ghettos, concentration camps, and hideaways. Nelly Toll’s work was also displayed in this exhibition. 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. Her artwork was selected from the collection of Yad Vashem for the Berlin exhibition—the first time it was displayed outside of Israel.

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. Today, most of Gela’s paintings are located in the archive of the Jewish Historical Institute in Warsaw, Poland. Her will stated, “I ask not of praises, all I want is to preserve the memory of me and my talented daughter Margelit.”

Henryk Ross, a Polish Jew, was the official photographer in the Lodz ghetto in Poland. Henryk worked for the ghetto’s department of statistics and shot photographs for identification cards and propaganda. He surreptitiously recorded the devastating everyday life in the ghetto at the risk of being caught. 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.” He returned after liberation to Lodz to dig up his negatives. About half of them were ruined, but enough survived to fulfill his promise to “leave a historical record of our martyrdom.” His works were presented at the Museum of Fine Arts in Boston in March 2017.

Lastly, Naftali Hertz Kon, a Yiddish poet, writer,
and journalist, was a prolific author during the war.\textsuperscript{64} Most of his writings were confiscated and later released only after a long legal dispute between his son and Polish authorities.\textsuperscript{65}

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.\textsuperscript{66} 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.”\textsuperscript{67} 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 \textit{Mein Kampf}.\textsuperscript{68} 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.\textsuperscript{69} 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.\textsuperscript{70} Before discussing the artworks


\textsuperscript{65} See Paul Berger, \textit{After Long Struggle, Yiddish Writer’s Work Finally Comes Home}, \textit{FORWARD}, July 26, 2013, at 1.


\textsuperscript{67} Berne Convention, supra note 16, art. 2(1).

\textsuperscript{68} See Zlatica Hoke, \textit{Hitler’s ‘Mein Kampf’ Returns to Stores as Copyright Expires}, \textit{VOA NEWS} (Jan. 6, 2016, 12:38 AM), \url{https://www.voanews.com/europe/hitlers-mein-kampf-returns-stores-copyright-expires} [hereinafter Hitler’s ‘Mein Kampf’ Returns to Stores].


\textsuperscript{70} Another example is that of Yevgeni Khaldei, a Jewish Red Army photographer who took thousands of pictures during the war. See \textit{generally ALEXANDER NAKHMIVOSKY & ALICE NAKHMIVOSKY, 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 \textit{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. This plunder was carried out by military units of the German army known as Kunstschutz, which ironically means “art protection.” In 1935, along with the Nuremberg Laws depriving Jews of their German citizenship, Nazi Germany enacted a new law, which required Jews to register their domestic and foreign property and assets. 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. On October 3, 1938, a decree ordered the confiscation of...
Jewish-owned property and its transfer to non-Jewish hands.76 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.77 Ultimately, the property of over nine million Jews in Europe was looted, confiscated, or destroyed during the Holocaust.78 Most of this property was owned by private individuals and families.79 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.80

In 1943, during the war, the Allies published a statement guaranteeing the restitution of properties looted in enemy territories.81 Nevertheless, many Jews who relied on this statement and requested their property suffered from harassment and violence and received no restitution.82 Those who tried to legally regain ownership of their properties were blocked by excessively complex bureaucratic arrangements.83 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.84 Even though many looted items were recovered,85 many other artworks remain missing, despite decades-long international endeavors attempting to identify such works and return them to their rightful owners or heirs.86


78. Id.

79. Id.

80. Id.


82. MIZRAHI, supra note 78, at 3.


84. 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. 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.

The relationship between art and the Holocaust has been debated for decades, including by scholars examining restitution claims of Jewish families whose properties were lost. 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. These stories are frequently featured in media outlets around the world. 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


88. Mizrahi, supra note 78, at 3–4.


painting by John Constable to the despoiled owner’s rightful heirs.” 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.

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.” The lawsuits were filed in New York and Switzerland against both UBS and a foundation controlled by UBS. 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. 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.’” The masterpiece was sold that same year for nearly $11 million. The Kainers’ heirs argued not only that they were cheated out of a benefit but also that they were never informed about the sale. UBS was one of several Swiss banks accused of preventing Jewish survivors and heirs from reclaiming assets. 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. 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. However, these restitution agreements had limitations and strict conditions. For example, the German government declared December 31, 1992, as the application deadline for real

---


94. Id.


96. Id.

97. Id.

98. Id.

99. Id.

100. Id.

101. Id.


103. Id.

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

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). Since 1946, the TGC has distributed gold to fifteen countries whose national banks were looted by the Nazis. The TGC recommended that the remnants of this gold, worth approximately sixty million dollars, should be given to survivors of the Holocaust. As a result, the International Fund for Needy Victims of Nazi Persecution was established.

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. 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. 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


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).


109. See id.


to facilitate the return of private and public looted property. 113

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

Over the years, several victims of Nazi looting or their heirs have taken legal action to recover their confiscated property. 117 In 2012 alone, more than one thousand looted artworks were discovered in Munich. 118 These included works by some of the world’s greatest painters such as Picasso, Matisse, and Chagall. 119 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. 120 At the end of a long legal procedure, a binding arbitration panel of Austrian judges declared Maria Altman, 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. 121

116. See HAY, supra note 90, at 221; Terezin Declaration, supra note 114.
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).
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*. The district court ruled that Michigan’s three-year statute of limitations disqualified the heir’s claim. 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. 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. The paintings ended up at the Simon Museum of Art in Pasadena, California. Marei von Saher, the Jewish art collector's sole heir, filed a complaint seeking to recover these paintings. 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. 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. This was because Goudstikker’s widow failed to

---


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

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.

make a claim for the paintings by 1951, the required date under Dutch law, after the war ended.\(^\text{130}\) As a result, these paintings became the property of the Dutch state.\(^\text{131}\) Thus, the final sale to the Simon Museum was valid.\(^\text{132}\)

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.\(^\text{133}\) 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.\(^\text{134}\) 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

---

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.


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 [https://perma.cc/5Q9S-NCW3] (last visited Jan. 28, 2021) (discussing Eldred).

Declaration, and the widely accepted concept of consent, which advocates returning Nazi-looted artworks to their rightful owners.\footnote{135. See supra notes 105–16 and accompanying text.}


Similarly, Israel legislated a designated restitution law, the Israeli Restitution Act.\footnote{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.).} The Act established the Holocaust Restitution Company of Israel (Hashava),\footnote{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].} 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.\footnote{142. See Israeli Restitution Act, supra note 140, p. 202.} 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.\footnote{143. See id.} The law’s limited reach and late enactment cast doubt on its ability to locate and restitute assets.
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. The objective of this organization is to negotiate compensation payments for Holocaust victims from the German government. The Claims Conference has reached numerous important agreements regarding compensation payments by German and other European governments. Another important organization working in this field is the World Jewish Restoration Organization (WJRO). The WJRO’s main objective is to negotiate the restitution of private and public property in all countries except for Germany and Austria. 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.

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;

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.”).
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 Osobyi 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. By 2025, there may be no Holocaust survivors left among us. 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. 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, notes, sketches, music, theater scripts, paintings, portraits, poems, sculptures, Judaica artifacts (such as Torah scrolls and prayer shawls), newspapers, novels, books, and letters. Yad Vashem, Israel’s official memorial to the victims of the Holocaust, has thousands of such


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.


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).

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. Letters written during the Holocaust, such as those discovered in 2019, 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. 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. In Last Portrait: Painting for Posterity, Yad Vashem published portraits drawn by twenty-one artists in ghettos and concentration camps during the Holocaust. 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.” 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

---

159. See supra notes 12–13 and accompanying text.
163. Last Portrait, supra note 162.
Shoah—“[t]ogether these works sketch the last portrait of a community in the throes of destruction.” 164

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. 165 That is, the desire to paint portraits was “a desire to leave a trace behind: to immortalize individuals and perpetuate their memory.” 166 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. 167 “[I]n addition to being a powerful work of art” signing the portrait was “also a testimonial with the weight of a historical document.” 168 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. 169 Portraits restored individuality to their subjects. The faces and identities of each subject are important characteristics of these works, and they were not chosen by chance or for reasons of convenience. 170 Artists painting portraits were aware of the vital importance of the task at hand, seeking to immortalize their subjects out of respect and empathy. 171 They convey a feeling of brotherhood among Jews. 172

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.” 173 The style chosen for the portraits was to “bequeath the most authentic evidence to posterity, beyond the context of time and place.” 174 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. 175 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.” 176

---

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.” 177 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.” 178 Franciszek Jaźwiecki was a notable portraitist at Auschwitz. 179

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. 180 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. 181 After his death in 1946, Jaźwiecki’s portraits were donated to the Auschwitz–Birkenau Museum 182 (which possesses more than 2,000 pieces of art created inside various Nazi camps). 183

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.
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 Camps, 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,\(^{184}\) which was signed by Germany in 1886, by Poland in 1920, and by other countries invaded by the Nazis.\(^{185}\) 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.”\(^{186}\) 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

\(^{184}\) 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).


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.

Id.
free and open communication in modern societies raises questions about the legitimacy of attaching exclusive rights to creative and innovative commodities. A genuine dialogue is a conversation of change, a “focused conversation,” and a purposeful, communicative act. As Martin Buber wrote, an authentic dialogue “derives its genuineness only from the consciousness of the element of inclusion.” 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. 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.

Parties to a dialogue create mutual commitments. 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.” That is, dialogue is a relation “that we create and sustain by conjoint agreement and through shared discourse” and a mechanism for creating culture by virtue of connecting one’s subjective individual consciousness with the

189. See Stephen Miller, Conversation: A History of a Declining Art 14 (2006) (asserting that “talk is generally purposeful whereas conversation is not”).
190. 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.”
191. 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.
193. 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?”).
194. Id.
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. 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.

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 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. M IAMI 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,\textsuperscript{200} is to facilitate “uncompensated transfers”\textsuperscript{201} of social wealth which effectuate and expand broad, communicative dialogical opportunities by limiting the preemptive enclosure of cultural properties.\textsuperscript{202} 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.\textsuperscript{203} Copyrighted works created during the Holocaust authentically document

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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.

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, 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 . . .” 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. 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.”

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


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.


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).

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. 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.” 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. This is not only an author-centered argument praising the special connection between authors and their copyrightable “spiritual children.” This is a public right. 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.” Our argument does not seek to legitimize enclosing copyright by providing further rights to authors, but rather to consider misattribution, manipulation, and

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).


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”).

distortion of information as a public wrong. This information defines the essence of the “[c]ertain things” that “are free for all to use.” 214 Justifying copyright as a democracy-enhancing mechanism 215 requires the copyright system to be “the engine of free expression,” 216 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.” 217 True, these rights have an “obvious utility in protecting artists from theft of the reputation they have cultivated.” 218 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. . . .” 219 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,” 220 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” 221 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,” 222 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

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).
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. K Wall, 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. 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.

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. The German National Library declined the request, explaining that they were unable to provide digital images, even for restricted use. The legal department of the German Library found “pending legal issues prohibiting this.”

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. The representative testified to past cases where the museum accepted artworks by unknown authors. 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.” Despite only a minimal risk, the museum has refused to take any chances, thus chilling any consideration for making an orphan work publicly available. 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

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.232

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.233 The account posted imagined documentation of her experience.234 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].”235 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.236 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.


234. See Kershner, supra note 233.


memory of the Holocaust to the young generation, we have to bring it to where they are. . . . And they’re on Instagram.”

The real Eva was born in Nagyvárad, Hungary. On her thirteenth birthday, she began writing a diary. She was murdered in Auschwitz in October 1944. Her mother survived and then discovered and published her daughter’s diaries. 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.” 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. 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. 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. The survey also found that more than one-third of Austrians think National Socialism or Nazism could return to power. 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.” 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.”

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).
244. Id. at 3.
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.249

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.”250 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.

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.

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.251 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.252 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.253

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.254 Purpose and character, as well as the nature of the copyrighted work,
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 substantiability 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 substantiability factor. 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. 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
U.S. President John F. Kennedy and Israeli Prime Minister Yitzhak Rabin. 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. Instead, he hired an artist to recreate the necessary frames from the film for the book in the form of charcoal sketches. 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. 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.”

In 1975, after Zapruder’s death, his family bought back the copyright to the film from Life Magazine for only one dollar. In April 1997, the Kennedy Assassination Records Review Board decided by a vote of five to zero that the Zapruder film would become part of the public record. 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. 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.” As a result, the Zapruder family was awarded sixteen million dollars from the U.S. government as compensation in 1999. That year, the family donated the film copyright to the Sixth Floor Museum at Dealey Plaza.

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


259. See id. at 138.

260. See id. at 146.

261. Id.


265. Id.

266. Id.


268. Andrew, supra note 262.

assassination, he sent a letter to the Shamgar Commission, appointed to investi-
gate the assassination, to inform the commission of his video.270 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.271 Kempler sold the video to an Israeli news company for
approximately $270,000.272

The Zapruder and Kempler films demonstrate how copyright laws have the
power to limit and even prevent access to the sole remaining evidence of histori-
cal 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 pub-
lic 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.”273

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 art-
works without infringing copyright; they are secluded and abandoned by soci-
ety.274 The orphan works problem has been described as “the starkest failure of

---

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. 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.” 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. 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. Third, those who do choose to use orphan works for the benefit of all are forced to violate copyright laws. 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.
Similarly, other countries, such as Canada, Japan, and Korea 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, no legislation regarding orphan works exists.

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. 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. 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. 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).


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.\(^{289}\) The Directive requires a single registry for the safekeeping of information regarding orphan works.\(^{290}\) As a second and complementary legal requirement in the European Union, there is a collective licensing scheme.\(^{291}\) 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.\(^{292}\) 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.\(^{293}\) 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.\(^{294}\) 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.\(^{295}\) Though many countries acknowledge

\(^{289}\) 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.

\(^{290}\) 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).


\(^{292}\) 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.

the inherent difficulties related to rights in these artworks and apply legal accommodations to meet such challenges,296 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.297 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 restitute 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.298 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 restitute or license their use to an entity that values them.

296. See supra notes 286–95 and accompanying text.
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.299 The Center’s research focused on the restitution of private property, public property, and property without heirs (orphan property).300 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.301 Almost eighty percent of the countries reviewed had no policy in place for the restitution of orphan property.302 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.303

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.304 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.305 In Germany, the Claims Conference was acknowledged as the legal heir to unclaimed public properties once belonging to Jewish communities and organizations.306 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

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.
305. Mizrahi, supra note 78, at 7.
306. See The Successor Organization, supra note 102.
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. 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.” 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.” This could have been another avenue for handling the legal issues created by orphan works of the Holocaust given their linkage to Jewish heritage.

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.” 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. 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. 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

---

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.
314. Berne Convention, supra note 16, art. 7(6); see id. art. 7(1)–(3).
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.\(^\text{316}\) This copyright is due to expire in 2039.\(^\text{317}\) 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*.\(^\text{318}\)

In the United States, perpetual copyright is prohibited by the Constitution, which requires copyright be “for limited Times.”\(^\text{319}\) 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,\(^\text{320}\) derisively known as the Mickey Mouse Protection Act,\(^\text{321}\) which then led to the case of *Eldred v. Ashcroft*.\(^\text{322}\) In that case, the plaintiff argued that the Act and previous extensions of the granted protection term created a de facto, perpetual copyright.\(^\text{323}\) 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.\(^\text{324}\)

---


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.


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.


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.325 These rights are widely recognized in civil law jurisdictions and in some common law jurisdictions.326 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.327 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.”328 The personality of an author exists indefinitely, far beyond physical death, in memories and media.329 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.330 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.

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, at102)); 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.\textsuperscript{331} 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.\textsuperscript{332} 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.\textsuperscript{333} The Jewish community has the right to preserve its forgotten art and culture, which were created under the unbearable circumstances of the Holocaust.\textsuperscript{334} 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.\textsuperscript{335} 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.\textsuperscript{336} 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...


\textsuperscript{332} See infra Section VI.B; see also Guy Pessach & Michal Shur-Ofry, Copyright and the Holocaust, 30 YALE J. & 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”).


\textsuperscript{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.”).

\textsuperscript{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”).

\textsuperscript{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.\textsuperscript{337}

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: “[W]hen moral rights as perpetual moral obligations toward the public is commensurate with constitutional values, concerns for the public domain, authorial collectivity, and cultural integrity.”\textsuperscript{338} 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.”\textsuperscript{339} 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 \textit{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.\textsuperscript{340} 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.\textsuperscript{341} 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.

\textsuperscript{337}. See Pessach & Shur-Ofry, \textit{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”).

\textsuperscript{338}. Zemer, \textit{supra} note 325, at 1567.

\textsuperscript{339}. \textit{Id.} at 1566.


\textsuperscript{341}. \textit{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. \textit{Id.}
Adopting this approach would require specific legislation, such as that drafted to protect *Peter Pan* and Mickey Mouse, and embracing a legal doctrine that creates a type of perpetual property right, something the law tends to reject. 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” and took “special pride” in the destruction of Jewish heritage, cultural artifacts, and symbols. 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. Looting libraries, burning books, and censoring “un-German” publications were part of the Nazis’ coordinated effort to eradicate all

---

342. *See supra* notes 318–21 and accompanying text.
343. *See supra* notes 312–13 and accompanying text.
345. *Id.* (quoting a Nazi correspondent reporting on the destruction of the Lublin Yeshiva library).
traces of Jewish culture and the Jewish people themselves.347

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.348 It marks not only one of the most devastating and inhumane projects in history,349 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.350 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).


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.351 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.”352 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.353 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.354

---


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.\footnote{See Dutfeld, supra note 354, at 16.}

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.\footnote{Proclamation of Independence, Kneset, \url{https://www.knesset.gov.il/docs/eng/megilat_eng.htm} (last visited Nov. 2, 2020).}

This affirmation can also be found in the Israeli education system, which emphasizes the Holocaust as an essential part of its curriculum,\footnote{See Nili Keren, Teaching the Holocaust in Israel, 22 Internationale Schulbuchforschung 95, 95–96 (2000).} 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.\footnote{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., \url{https://www.jewishvirtuallibrary.org/yom-ha-shoah-holocaust-memorial-day} [https://perma.cc/GCB2-7V29] (last visited Feb. 7, 2021).} 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.”\footnote{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,” 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.

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.

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


362. See id. Well-known examples of traditional knowledge and traditional cultural expression include Ghana’s folklore, see generally Gertrude Torkornoo, 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. INTELLECT. 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].
traditional knowledge. 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. Traditional knowledge is “transmitted from generation to generation.” Article 2 of the draft defines the beneficiaries of traditional-knowledge protection. 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. Article 3 discusses the scope of protection traditional knowledge should receive. 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.” 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.

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. Equitable-benefit sharing, usually related to genetics, stipulates that countries and indigenous communities that grant access to their traditional knowledge are entitled to a share in the benefits derived from the


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).

use of their resources. 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. 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. 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. 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.” 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,” 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”? 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

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”).

374. See WORLD INTELLECTUAL PROP. ORG., supra note 363, art. 3.2(b).
375. See id. art. 3.
378. Rahmatian, supra note 360, at 207.
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.”

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,” 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.” Creative works created within the ghettos and concentration camps during the Holocaust are a “unique form of cultural property” 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.” 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.” 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.” Third, the Holocaust exemplifies the constant danger Jews have faced throughout history, namely, “the loss of their particularity.” 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.”

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,” 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.” Cultural property and cultural traditions are meant

380. Id.
381. Id.
382. Id. at 130.
383. Id.
384. Id. at 133.
385. Id.
386. Id.
387. Id.
388. Id.
390. Id. art. 2, para. 1.
“to afford groups autonomy over their communities.” 391 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, 392 effecting the inclusion of intellectual property in the legislative framework that protects human rights. 393 During the drafting process of the Declaration, “delegates repeatedly condemned forced intellectual labor.” 394 For example, the “Angel of Death,” Josef Mengele, forced Dina Gottliebova Babbitt, while a prisoner at Auschwitz, to paint watercolors of the haggard faces of Gypsy prisoners. 395 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...” 396 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.” 397 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.” 398 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

394. Yu, supra note 393, at 1087.
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. 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.” Dina’s watercolor artworks are not only her exclusive property as expressions of her “soul,” 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. 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.” This example involves one aspect of the debate over preserving the authenticity of the original work. 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.”

400. Id. (internal quotation mark omitted).
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 Adret, 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” 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.” 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.”

Formal constitutions aim to legally ground such collective beliefs, values, and emotions and transform them into “rules of governance.” Gilbert argues that “people become jointly committed by mutually expressing their willingness to be jointly committed, in conditions of common knowledge.”

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.” On these grounds, Jewish individuals form plural subjects whose unity is based on their belonging to Jewish tradition. Although

---


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


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.”

There exists the capacity of “pooling the individual wills into a group will,” which allows us to move from a multitude of “I’s” to a “we.” 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.

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” and that collective acceptance can be “based on external power as long as the participants still act as intentional agents.”

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


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.


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.”418 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.”419 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.420 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.

418. Kwall, supra note 350, at 130.
420. See supra notes 12–13 and accompanying text.
Because “culture is fluid and evolving,”\textsuperscript{421} 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.”\textsuperscript{422} 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.”\textsuperscript{423} 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.

\textsuperscript{421} SCAFIDI, supra note 350, at ix.
\textsuperscript{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).
\textsuperscript{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).