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INHUMAN COPYRIGHT SCENE: THE FORGOTTEN LAW OF ART IN THE HOLOCAUST

Lior Zemer* & Anat Lior**

Abstract

Artists, authors, musicians, and other creative individuals formed an integral part of the horrific life in the ghettos, concentration camps, and extermination camps during the Holocaust. Through their works, Jewish prisoners documented the atrocities of the Nazis and exposed the untold stories of six million Jews who walked or labored to death. The vast majority of the authors of these works were murdered in gas chambers, labor camps, and ghettos. While much has been written about looted works of art, which were stolen from Jewish families during the Nazi occupation, this material covers only one limited subset of questions relating to ownership of works owned or created by Jews during the Holocaust. Scholarship on art and authorship in the Holocaust has failed to legally and morally explore the works that were created in the most extreme circumstances under which copyrighted works have ever been created. This Article aims to remedy this lack of awareness. The Article opens a debate that has no comparable example in human history.

The lack of social and legal discourse on property rights vested in works created within the ghettos and concentration camps has created legal anomalies that perpetuate historical injustice. These anomalies, disguised as copyright rules, prohibit legal owners of these works from claiming their rights and restrict public access to these works, while permitting public bodies (such as European and international museums and archives) to make repositories of these works, to declare ownership of the works, and to patronize their social fate and unprecedented historical value. This Article aims to reconcile the unexplored tension between the authorial rights in these works and the public interest in accessing and learning from them. Copyright laws protect and incentivize access to and use of creative voices vested in cultural commodities in a manner that is mutually beneficial to creators and communities of listeners. The creative voices of Jewish prisoners in the ghettos and

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concentration camps have been continuously silenced since the end of the Holocaust. From the moment they were stripped of their basic humanity in the ghettos until now, more than seventy years later, authors, artists, musicians, theatrical and opera playwrights, and stage actors have yet to receive legal protection in their works.

This Article offers the first inquiry into the fundamental law of ghetto art. The Article focuses on works created by Jewish prisoners in the ghettos, concentration camps, and extermination camps, with the aim to expose the many flaws in the way contemporary copyright laws are used to hold these works captive in institutions where they do not belong, rather than freeing them to the public in order to raise awareness, provide moral respect to their authors, rescue them from illegitimate owners, and deliver historical justice. As the third-generation of Holocaust survivors, we find this Article a moral duty. It is a duty that travels through works of art, music, and authorship and tells the many stories that the creators of the works could not tell. The unsettling findings of our research call for a reassessment of the common standards applied to the use and ownership of copyrighted works created during the Holocaust within the ghettos and concentration and extermination camps—in the most inhuman copyright scene humanity has ever created.

INTRODUCTION

As a prisoner in Auschwitz, Dina Gottliebova Babbitt was forced by Josef Mengele, the “Angel of Death,” to paint watercolors of the haggard faces of Gypsy prisoners.¹ “Seven of the eleven portraits that saved Mrs. Babbitt and her mother” were later discovered and “display[ed] at the Auschwitz-Birkenau Memorial and Museum in Poland.”² Dina requested ownership of the eleven portraits before she passed away in 2009, but her petitions were denied.³ “They are definitely my own paintings; they belong to me, my soul is in them, and without these paintings I wouldn’t be alive.”⁴ Many attempts were made to reclaim Dina’s ownership in the portraits, including a 2001 Resolution of the United States House of Representatives calling on President George W. Bush to make all efforts to assist Dina’s legitimate

¹ Steve Friess, *History Claims Her Artwork, but She Wants It Back*, THE NEW YORK TIMES (Aug. 30, 2006), <https://www.nytimes.com/2006/08/30/arts/design/30surv.html> [<https://perma.cc/BZ8Z-NKLG>]; David B. Green, *This Day in Jewish History // 1923: Czech Woman Who Drew Fellow Auschwitz Inmates Is Born*, HAARETZ (Jan. 21, 2014), <http://www.haaretz.com/jewish/.premium-1923-auschwitz-artist-is-born-1.5313700> [<https://perma.cc/L86A-6DPQ>].

² Friess, *supra* note 1.

³ Larry Gordon, *Art or a Part of History?*, LOS ANGELES TIMES (Nov. 29, 2006, 12:00 AM), <http://www.latimes.com/archives/la-xpm-2006-nov-29-et-babbitt29-story.html> [<https://perma.cc/XMT8-ZFCZ>].

⁴ Friess, *supra* note 1.

claim.⁵ The Auschwitz Museum, which considers the watercolor artworks to be its property, has argued that they are rare artifacts and important evidence of the Nazi genocide.

In one of the exchanges between Congresswoman Shelley Berkeley and the Polish ambassador to the U.S., 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.”⁶ Here lies the most difficult moral conflict in copyright—a conflict that has never been explored in legal scholarship. The portraits, like all other artifacts created within the ghettos and concentration camps (hereinafter: ‘Holocaust art’ or ‘ghetto art’), provide evidence of the inhuman atrocities and genocide committed against the Jewish population of Europe during the Nazi occupation. They tell authentic stories that every member of the human community must know. These stories cannot be altered, changed, or destroyed; they draw the limits of humanity. As such, a work of art and authorship that was created within the ghettos and concentration camps must be made available to the public in its original form. At the same time, such works are unquestionably their respective creators’ exclusive property. The eleven portraits painted by Gottliebova were commissioned under terms of slavery. Gottliebova’s art is a form of testimony.⁷ When art is created under extreme circumstances, its message to the outer world is unparalleled. On the one hand, it is for the artists and authors to dictate how this message is to be displayed, told, and remain alive. On the other hand, the public *en masse* holds a moral right to learn from these works and a moral duty to take part in maintaining their authentic message and meaning.

Daniele Israel spent months in jail in Trieste before being deported to Auschwitz.⁸ While in prison, he wrote letters to his wife, Anna, and two sons, Dario and Vittorio.⁹ These letters, which only recently came to light, paint a deeply moving portrait of a family shattered by the Holocaust.¹⁰ His two sons described the way their father used to send letters from his cell in Trieste’s Coroneo prison—by stitching them into his dirty shirts that were sent to the laundry.¹¹ Two of his former employees would deliver them to the hiding place of his wife and two sons.¹² These employees would later deliver the shirts back to Daniele with his wife’s reply.¹³

⁵ LIDIA OSTAŁOWSKA, *WATERCOLOURS: A STORY FROM AUSCHWITZ* 167, 216–17 (2016).

⁶ *Id.* at 217.

⁷ TESTIMONY – ART OF THE HOLOCAUST (Irit Salmon-Livne, Ilana Guri & Yitzchak Mais eds., 1986). In this Article, we use the term “art” generally, encompassing all forms of copyrighted expressions created within the ghettos and concentration camps.

⁸ *Letters of Love: ‘Our Father Wrote Every Day as He Waited to Be Sent to Auschwitz,’* BBC (Jul. 12, 2020), <https://www.bbc.com/news/stories-53358123> [<https://perma.cc/AP86-9BW6>] [hereinafter, *Letters of Love*].

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

Although SS officials often interrogated Daniele about the whereabouts of his family, he did not reveal their location despite being tortured.¹⁴ After each interrogation, he would write a letter to his family describing what had happened.¹⁵ Even though Anna was able to preserve all of Daniele's 250 letters, none of her replies survived the war.¹⁶ Daniele destroyed each of them after reading them in order to avoid being discovered. He sent the last letter from his train heading to Auschwitz in September 1944 with his parents-in-law.¹⁷ In that last letter, he wrote: "From the distance you can see the smoke. There's so much smoke here. This is hell."¹⁸ These letters are copyrighted works, and today, the original letters are kept in Yad Vashem and available to the public.¹⁹

In January 2021, a drawing of the Compiègne concentration camp in France authored by camp inmate Abraham Berline was auctioned in Jerusalem for the bidding price of \$8,000.²⁰ Berline was held at the Compiègne concentration camp in 1941 for seven months.²¹ Under difficult conditions, he created a painting of the camp, including the camp's watchtower and prison booths.²² Because no paper was available, Berline used eggshells from the scraps Jewish inmates were given as food.²³ He attached them to a wooden plate he found in the camp.²⁴ In 1942, he was transferred to Auschwitz, where he was murdered along with his wife.²⁵ Yad Vashem heavily criticized the auction stating that such artifacts must not be used as a commodity for the sole purpose of profit, and that they belong at Yad Vashem where they can be preserved, serving as historical testimony and as a vessel for presenting authentic inhuman moments of the Holocaust.²⁶

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*; see also *Secret Letters of a Jewish Family Torn Apart by the Holocaust Rediscovered*, WJC (Aug. 12, 2020), <https://www.worldjewishcongress.org/en/news/secret-letters-of-a-jewish-family-torn-apart-by-the-holocaust-rediscovered-8-3-2020> [<https://perma.cc/6GDM-U955>] [hereinafter *Secret Letters*].

¹⁹ *Letters of Love*, *supra* note 8.

²⁰ For the auction house bidding page for this work, see *A drawing of the Compiègne concentration camp on eggshells by camp inmate Abraham Berlin. Compiègne Camp - France, 1941*, BIDSPIRIT, <https://il.bidspirit.com/ui/lotPage/source/search/auction/13121/lot/19869> [<https://perma.cc/6T8V-ZJXK>] (last visited Sept. 22, 2021).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Abraham Berline*, ACADEMIC, <https://en-academic.com/dic.nsf/enwiki/5346817> [<https://perma.cc/CSK2-YKLR>] (last visited Sept. 8, 2021).

²⁶ Itamar Eichner, *Rare Documentation: He Painted the Concentration Camp on Eggshells – and Was Murdered in Auschwitz*, YNET (Jan. 7, 2021, 9:42 AM), <https://www.ynet.co.il/judaism/article/r1Ct9oNCP> [<https://perma.cc/2GNL-728F>]; Eli

The relationship between art and the Holocaust has been debated for years, often through the case studies of scholars examining restitution claims from Jewish families whose properties were plundered by the Nazis and subsequently lost. The legal challenge presented by looted art centers around property rights in tangible and movable properties. Artworks that were stolen from Jewish families during the war have serious aggregated monetary and financial implications. However, this issue lacks the unique personal connection of an author to his work; looted artworks cannot tell the authentic story of what happened within the ghettos and concentration camps. This Article offers the first inquiry into the fundamental law of ghetto art. The Article focuses on works created by Jewish prisoners in the ghettos, concentration camps, and extermination camps, with the aim to expose the many flaws in the way contemporary copyright laws are used to hold these works captive in institutions where they do not belong, rather than freeing them to the public in order to raise awareness, provide moral respect to their authors, rescue the works from illegitimate owners, and deliver historical justice. Creating art, from portraits and diaries, to musical and theatrical works, provided an emotional haven to Jewish prisoners at their most difficult time. Soon there will be no Holocaust survivors left to share their stories of the atrocities that they experienced as a warning tale to us all.²⁷ These artworks provide unique dialogical platforms reflecting authentic inhuman historical moments. These works are invaluable as they will continue to serve as the only remaining authentic message Holocaust survivors and victims have left to give to future generations.

Following this introduction, Part I presents the unbearable and inhuman copyright scene that existed in ghettos and concentration camps. Part II describes the historical background of the Nazi plunder and retraces the global legal efforts of restitution for Jewish communities after the Holocaust. Part II also highlights the error in focusing on Nazi plunder only, leaving the art scene in the ghettos unexplored. Part III examines the dialogical importance and effects of artworks that were created within the ghettos and concentration camps and emphasizes the unique authorial intimacy of the creators to their works. Part IV challenges existing doctrinal remedies through which copyright laws balance authors' rights and the public interest. Further, Part IV offers a comparative examination of the fair use doctrine, orphan works, perpetual rights, and the resale right. Part V analyzes and highlights the deficiencies embedded in ordinary and common copyright standards and their inapplicability to Holocaust art. Part V also advocates for the application of the unique public interest defense enacted in British copyright law and further justifies our claim that copyright works involve duties to the public as well as rights in the work. Prior to concluding, Part VI delves into the role of moral rights with

Ashkenazi, *A Painting of the Eggshells that Hides Years of Subversive Creation in the Concentration Camps*, WALLA NEWS (Jan. 9, 2021, 8:00 AM), <https://news.walla.co.il/item/3409482> [<https://perma.cc/G4XF-L3H4>].

²⁷ Ayelet Gundar-Goshen, 'You Shall Never Be a Bystander.' *How We Learn About the Holocaust When the Last Survivors Are Gone*, TIME (Jan. 27, 2020), <https://time.com/5772511/learn-holocaust-last-survivors-gone/> [<https://perma.cc/GKB2-LFHH>].

regards to works created within the ghettos and concentration camps, as well as the limited right to destroy these works versus the unlimited right for ownership by their authors and artists. This final Part also advocates for the use of compulsory licenses in a manner that safeguards the public interest along with the authors' rights to own their works.

As the third-generation of Holocaust survivors, we find this Article an overwhelming emotional journey. It is a journey that travels through works of art, music, and authorship all of which tell the many stories that their creators could not tell. The unsettling findings of our research call for a reassessment of the common standards applied to the use and ownership of copyrighted works created during the Holocaust within the ghettos, concentration camps, and extermination camps. We argue that a fundamental law of Holocaust art must be declared and adopted, one that encompasses all creative expressions created in these horrific places. Artworks remaining from the Holocaust stand as silent memorials to a time when human beings were deprived of their basic humanity. This law will cherish, commemorate, and protect these works as one of the most important parts of human history.

I. INHUMAN COPYRIGHT SCENE

As creative works of self-expression and unparalleled emotional attachment, works of art and authorship created in the Holocaust by Jewish prisoners took many forms, including, *inter alia*: diaries,²⁸ notes, sketches, musical compositions and marches,²⁹ plays,³⁰ paintings, portraits, poems, sculptures,³¹ newspapers, novels, books, and letters. Gottliebova, Israel, and Berline show the unique emotional attachment of authors to the works they created in the ghettos and the authors' unbelievable and heroic attempts to remain cultural and human through creatively expressing themselves, without knowing who would live to see the next day. Together, these and the examples provided below define the most inhuman copyright scene humanity has ever created.

²⁸ The most famous diary is of Anne Frank. *See generally* ANNE FRANK, *THE DIARY OF A YOUNG GIRL* (1947).

²⁹ *See, e.g., The Birkenau Women's Camp Orchestra*, *FACING HISTORY AND OURSELVES*, <https://www.facinghistory.org/music-memory-and-resistance-during-holocaust/birkenau-womens-camp-orchestra> [<https://perma.cc/5F3V-K5X8>] (last visited Sept. 8, 2021).

³⁰ *See Theatre of the Camps & Ghettos*, *HOLOCAUST ONLINE*, <https://holocaustonline.org/theatre-of-the-camps-ghettos/> [<https://perma.cc/7FKS-M9SQ>] (last visited Sept. 8, 2021).

³¹ An example for a sculpture in the form of a doll, is "A Figurine of the Devil" (1941–1944). This doll was manufactured in Auschwitz from ribbon and a piece of wire. With help from the Resistance Movement, the figurine was used to smuggle secret messages out of the camp. *See* Wendy Soderburg, *Inmates' Once-Hidden Artwork Offers Poignant Look at Concentration Camp Life*, *UCLA NEWSROOM* (Jan. 11, 2013), <https://newsroom.ucla.edu/stories/a-poignant-look-at-concentration-242585> [<https://perma.cc/7EC9-ZESX>].

Felix Nussbaum was a German-Jewish surrealist painter.³² In 1940, he was arrested and sent to the camp of Saint Cyprien in southern France.³³ Miraculously, he managed to escape the camp and lived in hiding in Brussels until he was caught in 1944.³⁴ Shortly thereafter, he was sent to Auschwitz with his wife, where they were murdered.³⁵ While in hiding, Nussbaum authored several paintings depicting his fear of persecution and death—“Nussbaum’s artwork began to express his overwhelming feelings of dread, melancholy, persecution, and the approach of death, although occasionally portraying symbols of a fragile optimism.”³⁶ He drew a self-portrait in 1943 titled “Self Portrait with Jewish Identity Card.”³⁷ Unlike in his previous works, where the symbols of Jewish identity, such as the star of David and prayer shawls, had meaning that stemmed from his strong Jewish faith, these symbols in the 1943 self-portrait embodied the sense of persecution and degradation which were imposed on Nussbaum solely for being a Jew.³⁸ As Elsby aptly phrases in her review of Nussbaum’s work, “By seeing Felix Nussbaum’s artwork, and trying to understand its messages, we honor one of his last wishes: that after his death, his artwork would not die with him.”³⁹ Bedřich Fritta was a Czech-Jewish artist and cartoonist who was murdered in Auschwitz in 1944.⁴⁰ In 1941 he was sent

³² Yehudit Shendar, Senior Curator, *Felix Nussbaum 1904–1944 – The Fate of a Jewish Artist*, YAD VASHEM, https://www.yadvashem.org/yv/en/exhibitions/nussbaum/about_nussbaum.asp [<https://perma.cc/2ZJP-VHYR>] (last visited Sept. 8, 2021).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Liz Elsby, *Felix Nussbaum: Self Portraits of a Jew in Turmoil*, YAD VASHEM, <https://www.yadvashem.org/articles/general/felix-nussbaum.html> [<https://perma.cc/VKW4-BU3Q>] (last visited Sept. 8, 2021).

³⁷ *Self Portrait with Jewish Identity Card*, NEUE GALERIE, <https://www.neuegalerie.org/content/self-portrait-jewish-identity-card> [<https://perma.cc/G8FN-YRHC>] (last visited Sept. 8, 2021).

³⁸ Elsby, *supra* note 36 (“Turning his head to visually engage the viewer, Nussbaum seems to have been cornered next to a crumbling and dirty white wall (a symbol of menace in Nussbaum’s visual vocabulary). Lifting his coat collar up, he reveals the yellow badge of shame concealed under it, while his left hand shows us his Jewish identity card. His expression is furtive, alert, his direct gaze is penetrating. What does it mean to us as viewers? Is it a conspiratorial gaze, asking us to help keep the secret of his Jewish identity? Is it the gaze of the accuser, demanding from the viewer answers as to why he has been allowed to be so humiliated and persecuted? Is this the terrified face his persecutors will see when he is eventually arrested in July, 1944? Or perhaps, 17 years after first painting himself as a Jew, he again asks the viewer to consider the implications of what it means to be a Jew at this point in history, with the threat of annihilation looming so close.”).

³⁹ *Id.*

⁴⁰ *Bedřich Fritta – Drawings from the Theresienstadt Ghetto*, JÜDISCHES MUSEUM BERLIN, <https://www.jmberlin.de/en/exhibition-bedrich-fritta> [<https://perma.cc/HFH8-KPMM>] (last visited Sept. 8, 2021).

to the Theresienstadt Ghetto with his wife and three-year-old son.⁴¹ He was appointed the director of the painting section, where he and fellow artists created graphic prints as propaganda material for the Nazis.⁴² Secretly, they also authored clandestine paintings and drawings describing the horrific reality of the ghetto.⁴³ Some of these artworks were smuggled out of the ghetto but were captured and destroyed by the Nazis.⁴⁴ Fritta was deported to Auschwitz in 1944.⁴⁵ After liberation, two hundred of his artworks were discovered in the Theresienstadt ghetto, where he hid them behind the brick walls.⁴⁶ During his time at the ghetto, Fritta painted “Rear Entrance,” which was presented in an exhibition in Berlin in 2016.⁴⁷ A curator of this exhibition explained his interpretation of the painting as, “The half-open gate is a metaphor for death, there is no visible alternative, the only way out is into the darkness . . . He shows architecture and empty nature as a stage for an event that is itself invisible.”⁴⁸

Art and literature were not the only cultural and creative activities within the ghettos and concentration camps. Theatres, including comedic theater,⁴⁹ and music were also part of the prisoners’ attempts to remain cultural and human.⁵⁰ Theater survived because it was “seen as [a] vital act[] of resistance, with satire as the main ingredient of camp cabarets.”⁵¹ For example, a theatre in the Vilna ghetto continued to actively perform until its liquidation in 1943.⁵² During April 1942, the ghetto’s theater performed, *inter alia*, a production of “Shlomo Molcho” and was able to

⁴¹ *Art from the Holocaust, Works from the Yad Vashem Collection, Bedřich Fritta (Friedrich Taussig)*, YAD VASHEM, <https://www.yadvashem.org/yv/en/exhibitions/art/fritta.asp> [<https://perma.cc/U9DL-XHUK>] (last visited Sept. 8, 2021).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Art from the Holocaust: The Stories Behind the Images*, BBC, <https://www.bbc.com/culture/article/20160203-art-from-the-holocaust-the-stories-behind-the-images> [<https://perma.cc/7H7W-3A6Q>] (last visited Jan. 9, 2022).

⁴⁸ Thomas Rogers, *A New Exhibition in Berlin Explores the Grim Realities of Life for Jews in Nazi Camps and Ghettos. Thomas Rogers Meets One of Its Curators*, BBC CULTURE (Feb. 3, 2016), <https://www.bbc.com/culture/article/20160203-art-from-the-holocaust-the-stories-behind-the-images> [<https://perma.cc/T93J-B49K>].

⁴⁹ Robin J. Knepp, *Laughing Together: Comedic Theatre as a Mechanism of Survival during the Holocaust* (2013) (M.F.A. thesis, Virginia Commonwealth University).

⁵⁰ Jon Wertheim, *Prisoners in Nazi Concentration Camps Made Music; Now It’s Being Discovered and Performed*, CBS NEWS (June 7, 2020), <https://www.cbsnews.com/news/holocaust-prisoners-in-nazi-concentration-camps-made-music-now-being-discovered-and-performed-60-minutes-2020-06-07/> [<https://perma.cc/B4Q9-9DME>].

⁵¹ Alvin Goldfarb, *Theatrical Activities in Nazi Concentration Camps*, 1 PERFORMING ARTS J. 3, 10 (1976).

⁵² *Vilna During the Holocaust, THE JERUSALEM OF LITHUANIA*, https://www.yadvashem.org/yv/en/exhibitions/vilna/during/ghetto_last_days.asp [<https://perma.cc/2YSE-M5FW>] (last visited Jan. 9, 2022).

maintain an active puppet theatre.⁵³ In 1942 alone, 120 performances were carried out in the ghetto's theater in front of 38,000 viewers.⁵⁴ The first major exhibition focusing on theater in concentration camps took place in 2018 at the Museum of Contemporary Art in Krakow, Poland, and indicated the fundamental social and cultural role theaters played in those places.⁵⁵ The exhibition displayed notes, letters, sketches, drawings, masks, and even puppets for a 1944 New Year cabaret staged in the Stutthof concentration camp near Gdansk.⁵⁶

Music was not an uncommon cultural activity in the ghettos and concentration camps.⁵⁷ New songs were written, including "topical songs inspired by the latest gossip and news, and songs of personal expression that often concerned the loss of family and home."⁵⁸ For example, playwright Jura Soyfer and composer Herbert Zipper coauthored the "Dachau Song" in 1938 "as an ironic response to the motto 'Arbeit Macht Frei' (Work Makes Freedom) inscribed on the gate at the entrance to

⁵³ See *Ghetto—The Last Performance in the Vilna Ghetto*, PLAYBILL, <https://www.playbill.com/production/ghetto-circle-in-the-square-theatre-vault-0000003251> [<https://perma.cc/WX4U-RJZM>] (last visited Sept. 22, 2021) (describing a Broadway show where "[a] theatre troupe proves unexpectedly popular in a Jewish ghetto in Vilna, Lithuania, shortly after many of its residents have been murdered by the Nazis.").

⁵⁴ *Vilna During the Holocaust, Daily Life in the Vilna Ghetto, Theatre and Music in the Ghetto*, YAD VASHEM, <https://www.yadvashem.org/yv/en/exhibitions/vilna/during/theatre.asp> [<https://perma.cc/WUV2-GTZE>] (last visited Feb. 26, 2022).

⁵⁵ *Lagertheater*, MUSEUM OF CONTEMP. ART IN KRAKOW (MOCAK), <https://n.mocak.pl/lagertheater> [<https://perma.cc/RF8C-FGFR>] (last visited Sept. 22, 2021).

⁵⁶ See *id.*; an important example of theatre work in the Holocaust is that of the Ovitz family and their Lilliput tour. See, e.g., YEHUDA KOREN & EILAT NEGEV, IN OUR HEARTS WE WERE GIANTS: THE REMARKABLE STORY OF THE LILLIPUT TROUPE—A DWARF FAMILY'S SURVIVAL OF THE HOLOCAUST (2004); Yehuda Koren & Eilat Negev, *The Dwarves of Auschwitz*, THE GUARDIAN (Mar. 23, 2013, 5:00 AM), <https://www.theguardian.com/world/2013/mar/23/the-dwarves-of-auschwitz> [<https://perma.cc/ZGU7-LRHK>]; YEHUDA KOREN & EILAT NEGEV, GIANTS: THE DWARVES OF AUSCHWITZ—THE EXTRAORDINARY STORY OF THE LILLIPUT TROUPE (2013).

⁵⁷ For more about music originated during the Holocaust by Jewish prisoners and inmates see *Music of the Holocaust*, YAD VASHEM, <https://www.yadvashem.org/yv/en/exhibitions/music/index.asp> [<https://perma.cc/TUM5-RQC8>]; SHIRLI GILBERT, MUSIC IN THE HOLOCAUST: CONFRONTING LIFE IN THE NAZI GHETTOS AND CAMPS (2005); A very famous song written in Vilna Ghetto is the Yiddish song *Shtiler Shtiler*—a powerful song that's become one of the most sung Holocaust songs in memorial ceremonies today. ADRIENNE COOPER, SHTILER SHTILER (Flying Fish Records 1989); *Shtiler Shtiler*, MUSIC AND THE HOLOCAUST, <https://holocaustmusic.ort.org/places/ghettos/vilna/shtiler-shtiler/> [<https://perma.cc/GFM6-RQ4E>] (last visited Sept. 8, 2021); see also PONAR (*Israel Film Center* 2002) <https://israelfilmcenterstream.org/film/ponar/> [<https://perma.cc/F69E-PJQJ>] (last visited on Sept. 22, 2021) (describing a film directed by Racheli Schwartz that portrays the creation of the song *Ponar* or *Shtilar*, *Shtilar* in Yiddish).

⁵⁸ *Music of the Holocaust*, U.S. HOLOCAUST MEM'L MUSEUM, <https://www.ushmm.org/collections/the-museums-collections/collections-highlights/music-of-the-holocaust-highlights-from-the-collection/music-of-the-holocaust> [<https://perma.cc/W4FB-M9NX>] (last visited Sept. 8, 2021).

the camp.”⁵⁹ Avrom Akselrod and Mark Warshawsky coauthored “By The Ghetto Gate” in 1941 at Kovno Ghetto, which was “a topical song about food smuggling.”⁶⁰ 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. . . . With the expansion of the camp system and the founding of a satellite system of subcamps, official orchestras existed in almost all of the main concentration camps, larger subcamps and in some death camps. Sometimes there were several ensembles in one place, such as in Auschwitz, among them a brass band comprising 120 musicians and a symphony orchestra with 80 musicians.⁶¹

In 2020, a seminar was taught in the Exilarte Center discussing European music in the Holocaust.⁶² One of the seminar’s objectives was to show “the plurality of music that was prevented and destroyed by the Nazi seizure of power.”⁶³ 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 and its brutal, bewildering effects on the cultural wealth and prosperity that once characterized a significant part of Jewish Diaspora.

Copyright law is meant to protect authors and incentivize them to use their voices in a manner that is mutually beneficial to them as creators and to us as communities of listeners.⁶⁴ The voices of Jewish prisoners in concentration camps and ghettos have been continuously silenced from the moment that they were deprived of their rights, through today—as their works have yet to receive rightful protection. Copyright law has failed its main purpose to free knowledge from

⁵⁹ *Dachau Song (Dachau Lied)*, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/collections/the-museums-collections/collections-highlights/music-of-the-holocaust-highlights-from-the-collection/music-of-the-holocaust/dachau-song> [https://perma.cc/23HR-P2GP] (last visited Sept. 8, 2021).

⁶⁰ *By the Ghetto Gate (Baym Geto Toyerl)*, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/collections/the-museums-collections/collections-highlights/music-of-the-holocaust-highlights-from-the-collection/music-of-the-holocaust/by-the-ghetto-gate> [https://perma.cc/WA5G-EESB] (last visited Sept. 8, 2021).

⁶¹ Guido Fackler, *The Concertation and Death Camps*, MUSIC AND THE HOLOCAUST, <https://holocaustmusic.ort.org/places/camps/> [https://perma.cc/V9YE-VBGT] (last visited Sept. 8, 2021).

⁶² See *Forbidden Music – “Jewish Destiny” and the Defiance of Richard Fuchs*, EXILARTE, <https://exilarte.org/?lang=en> [https://perma.cc/X8CA-QPB8] (last visited Sept. 22, 2021).

⁶³ *Expelled, Persecuted, Banned – European Music and the Consequences of National Socialism*, EXILARTE, <https://exilarte.org/expelled-persecuted-banned-european-music-and-the-consequences-of-national-socialism?lang=en> [https://perma.cc/LRE9-Y2F8] (last visited Sept. 22, 2021).

⁶⁴ See Lior Zemer, *Dialogical Transactions*, 95 OR. L. REV. 141, 143–44 (2016).

illegitimate control and allow lessons to be gleaned from history. A significant portion of the works created in concentration camps and ghettos are held today in archives, libraries, museums, and other official facilities, some of which are closed to the public. The testimony of the U.S. Holocaust Memorial Museum before the U.S. Congress was astonishing. The legal counsel of the Museum stated that the Museum would not make its works available to the public due to copyright concerns.⁶⁵ From an emotional point of view, most of these works are held by institutions that operate in the countries that legalized antisemitic activities, denied Jewish authors and artists their basic rights, and forced them to walk to their death. This emotional point of view must, as this Article provides, be translated into legal rules.

The current legislation which governs these works, including modern copyright law, withholds the works from their legitimate owners and potential users by referring to ordinary laws and international conventions that might be suitable in times of peace but cannot, as we argue, apply to Holocaust art. An example is Article 2(6) of the Berne Convention for the Protection of Literary and Artistic Works,⁶⁶ according to which the first owner of a copyrighted work is its author, unless otherwise indicated.⁶⁷ Most of the literary, musical, artistic, and dramatic works created within the ghettos and concentration camps have neither a living nor known owner nor a recognized legal heir. Only the rightsholders of the artworks have the legal capacity to change the works or issue licenses to use or display them publicly.⁶⁸ Article 2(2) of this Convention stipulates that ownership shall be governed according to the country of residence.⁶⁹ In the case of works created during the Holocaust, the country of residence can be Germany, Poland, the Netherlands, the Baltic States, Hungary, Greece, Slovakia, Romania, Austria, Luxembourg, or one of

⁶⁵ *Promoting the Use of Orphan Works: Balancing the Interests of Copyright Owners and Users: Hearing Before the Subcomm. on Cts., the Internet & Intell. Prop. of the H. Comm. on the Judiciary*, 110th Cong. 62–67 (2008), <https://www.copyright.gov/orphan/orphan-hearing-3-10-2008.pdf> [<https://perma.cc/8EXK-L4CT>] (statement of Karen C. Coe, Associate Legal Counsel, United States Holocaust Memorial Museum); see also *Rights and Reproductions*, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/collections/ask-a-research-question/rights-and-reproductions> [<https://perma.cc/CY3S-YYFR>] (last visited Sept. 9, 2021) (providing information on the United States Holocaust Memorial Museum’s copyright policy today).

⁶⁶ See World Intellectual Property Organization, Berne Convention for the Protection of Literary and Artistic Works, art. 2(1), Sept. 9, 1886, as amended on Sept. 28, 1979 (defining “protected works” as literary and artistic works that “include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression”).

⁶⁷ *Id.* art. 2(6); see also World Trade Organization, The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), art. 9, Apr. 15, 1994.

⁶⁸ See Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 780 (2001); Graeme B. Dinwoodie, *Developing a Private International Intellectual Property Law: The Demise of Territoriality?*, 51 WM. & MARY L. REV. 711, 717, 783 (2009).

⁶⁹ See World Intellectual Property Organization, *supra* note 66, at art. 2(2).

the many other countries under Nazi occupation that deported their Jewish nationals to concentration and extermination camps. Germany signed the Berne Convention in 1887, and Poland signed it in 1920.⁷⁰ Under this treaty, works by Jewish prisoners in ghettos and concentration camps belong to these countries as countries of residence. Accordingly, the works created by Gottliebova, Israel, Berline, Nussbaum, Fritta, Soyfer, Zipper, Axelrod, and Warshawsky belong to those countries where their families were murdered in gas chambers, where their lives ended. This is the outrageous outcome on which the Auschwitz Museum bases its property claim over Gottliebova's eleven portraits. This outcome may rightfully apply in times of peace, but it is morally and legally disturbing and inapplicable as a rule to commemorate the orchestration of mass killing ending with over six million Jews murdered.

II. THE FOCUS ON NAZI PLUNDER

The relationship between art and the Holocaust has been debated for years, mostly through many case studies by scholars examining restitution claims from Jewish families whose properties were plundered by the Nazis and subsequently lost.⁷¹ This includes famous paintings, such as Klimt's *Woman in Gold*,⁷² and art by

⁷⁰ *WIPO-Administered Treaties: Contracting Parties > Berne Convention (Total Contracting Parties: 179)*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, https://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15 [<https://perma.cc/2THP-3K GK>] (last visited Sept. 9, 2021).

⁷¹ BRUCE L. HAY, NAZI-LOOTED ART AND THE LAW (2017) (examining case law on looted art from the Holocaust, which was litigated in the U.S.). See, e.g., *United States v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009); *Westfield v. Federal Republic of Germany*, 633 F.3d 409 (6th Cir. 2011); *Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007); *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2010); *Cassirer v. Kingdom of Spain & Thyssen-Bornemisza Collection Found.*, 616 F.3d 1019 (9th Cir. 2010); *Grosz v. Museum of Mod. Art*, 772 F. Supp. 2d 473 (S.D.N.Y. 2010); *Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010); *Museum of Fine Arts Boston v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010); *Schoeps v. Museum of Mod. Art*, 594 F. Supp. 2d 461 (S.D.N.Y. 2009); *De Csepel v. Republic of Hung.*, 714 F.3d 591 (D.C. Cir. 2013); *Detroit Inst. of Arts & Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802 (N.D. Ohio 2006); *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 U.S. Dist. LEXIS 28364 (E.D. Mich. 2007); *Vineberg v. Bissonnette*, 548 F.3d 50 (1st Cir. 2008).

⁷² In this case, the *Portrait of Adele Bloch-Bauer I*, painted by Gustav Klimt, was in the center of a legal dispute between Maria Altmann, the niece of the original owner and subject of the painting, and the Austrian government. See *Republic of Austria v. Altmann*, 541 U.S. 677 (2004); Otto Waechter & Petra Fizimayear, *Stolen Masters: The Sale of Stolen and Plundered Art – An Austrian Perspective*, 25 AUT INT'L L. PRACTICUM 167 (2012); ANNE-MARIE O'CONNOR, *THE LADY IN GOLD: THE EXTRAORDINARY TALE OF GUSTAVE KLIMT'S MASTERPIECE, PORTRAIT OF ADELE BLOCH-BAUER* (2012); Jeremiah R. Blocker, *Legal Perspectives on the Holocaust Artwork Recovery Claims and Modern Law: Contemporary Issues from the Holocaust*, 21 TRINITY L. REV. 1 (2016); Lawrence M. Kaye, *Avoidance and*

world-renowned artists seized by the Nazis. A complex array of international laws, statutes of limitation, and national confidentiality regulations have prevented the timely return of artifacts to their lawful owners.⁷³ The media still unearths these stories quite frequently, even more than seventy years after the war ended.⁷⁴ A recent report in *The Guardian* focusing on John Constable's *Dedham From Langham* (1813) stated that "Nazi loot carries a legacy of hate. And that is why a Swiss art museum is wrong to refuse to return a painting by John Constable to the despoiled owner's rightful heirs."⁷⁵ The current possessor, the Musée des Beaux-Arts in La

Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 243 (2006); see also LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1994) (presenting a broad review of the Nazis' actions since they first gained power until the end of the war, including legal struggles Jewish survivors and their families conducted against Germany and its former allies).

⁷³ See, e.g., Jessica Grimes, *Forgotten Prisoners of War: Returning Nazi-Looted Art by Relaxing the National Stolen Property Act*, 15 ROGER WILLIAMS UNIV. L. REV. 521, 526 (2010).

⁷⁴ See, e.g., *Judge Rules Museum 'Rightfully Owns' Nazi-Looted Painting*, BBC (May 1, 2019), <https://www.bbc.com/news/world-europe-48118342> [<https://perma.cc/62K5-TVWF>]; Daniel Boffey, *Dutch Museums Discover 170 Artworks Stolen by Nazis*, *GUARDIAN* (Oct. 10, 2018), <https://www.theguardian.com/world/2018/oct/10/dutch-museums-discover-170-artworks-stolen-by-nazis> [<https://perma.cc/3ADH-XE6M>]; Barbie Latza Nadeau, *Museums Use 'Nazi Tactics' to Keep Art Stolen by the Nazis*, *DAILY BEAST* (Nov. 29, 2018, 10:04 AM), <https://www.thedailybeast.com/museums-use-nazi-tactics-to-keep-art-stolen-by-the-nazis> [<https://perma.cc/C72N-7S9S>]; Isabel Vincent, *New York City Museums Are Fighting to Keep Art Stolen by the Nazis*, *N.Y. POST* (Nov. 24, 2018, 9:31 AM), <https://nypost.com/2018/11/24/new-york-city-museums-are-fighting-to-keep-art-stolen-by-the-nazis/> [<https://perma.cc/T8VX-KZTG>]; Kate Brown, *Three Munich Museums Restitute 9 Nazi-Looted Artworks to the Heirs of Jewish Collectors*, *ARTNET NEWS* (Aug. 5, 2019), <https://news.artnet.com/art-world/restitution-munich-museums-1616695> [<https://perma.cc/ZF9K-FW97>]. See generally Erin L. Thompson, *Cultural Losses and Cultural Gains: Ethical Dilemmas in WWII-Looted Art Repatriation Claims Against Public Institutions*, 33 *HASTINGS COMM. & ENT. L.J.* 407 (2011) (examining the ethical dilemmas of looted Nazi art and the ways in which these dilemmas will increasingly need to be addressed); Stephen K. Urice, *Elizabeth Taylor's Van Gogh: An Alternative Route to Restitution of Holocaust Art?*, 22 *DEPAUL J. ART, TECH. & INTELL. PROP. L.* 1 (2011) (suggesting an approach to restitution of looted art that would solve issues related to statutes of limitation).

⁷⁵ Jonathan Jones, *Why a Swiss Gallery Should Return Its Looted Nazi Art Out of Simple Decency*, *GUARDIAN* (Jan. 27, 2016, 12:15 PM), <https://www.theguardian.com/artanddesign/jonathanjonesblog/2016/jan/27/swiss-gallery-nazi-art-restitution-constable-painting-jaffe> [<https://perma.cc/JHF8-9ZTD>]; see also *Heirs to Art Looted by Nazis Sue Swiss Bank for Fraudulent Sales*, *HAARETZ* (Oct. 18, 2014), <https://www.haaretz.com/hblocked?returnTo=https%3A%2F%2Fwww.haaretz.com%2Fjewish%2Fheirs-sue-swiss-bank-over-art-sales-1.5316813> [<https://perma.cc/7GAW-6UXZ>].

Chaux-de-Fonds, insists on keeping the work but offered to display a plaque explaining its provenance in the gallery.⁷⁶

The Nazi Plunder emerged shortly after the Nazi party gained power in Germany in 1933. It expanded in the following years and reached its peak during the devastating period of World War II and the formation of the ghettos and concentration camps. 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. Working in tandem with the Nuremberg Laws, which came into effect in 1935⁷⁷ and deprived Jews of their German citizenship, a new law in Nazi Germany required Jews to register their domestic and foreign property and assets. This was part of a general scheme to “Aryanize” all Jewish businesses.⁷⁸ By the end of 1938, approximately two-thirds of previously Jewish-owned businesses were sold to Germans at a fixed price below their market value.⁷⁹ This process essentially expropriated all property that was owned by Jews.

The ongoing efforts to Aryanize all property continued with a decree, published on October 3, 1938, ordering the confiscation of Jewish property and its transfer to non-Jewish hands (i.e., German hands).⁸⁰ The use of discriminatory legislation to deprive Jews of their basic human rights continued until the final creation of the ghettos, symbolizing the greatest deprivation of all. By the time that the Jewish communities had been sequestered into the ghettos, the vast majority of Jewish

⁷⁶ *Id.*; see also Lior Zemer & Anat Lior, *Art and Copyright in Ghettos and Concentration Camps: A Manifesto of Third-Generation Holocaust Survivors*, 109 GEO. L. J. 813 (2021) (including the discussion elsewhere in this Note the history of the massive art theft by the Nazis).

⁷⁷ *Germany, Index of Jews Whose German Nationality Was Annulled by Nazi Regime, 1935–1944*, ANCESTRY, <https://www.ancestry.com/search/collections/2027/> [<https://perma.cc/F9CB-69U6>] (last visited Sept. 9, 2021).

⁷⁸ See *Anti-Jewish Legislation in Prewar German*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/anti-jewish-legislation-in-prewar-germany> [<https://perma.cc/Z8XE-GM4H>] (last visited Sept. 9, 2021); See also HAROLD JAMES, *THE DEUTSCHE BANK AND THE NAZI ECONOMIC WAR AGAINST THE JEWS: THE EXPROPRIATION OF JEWISH-OWNED PROPERTY* 47, 53–62 (2004); ROBBERY AND RESTITUTION: THE CONFLICT OVER JEWISH PROPERTY IN EUROPE (Martin Dean, Constantin Goschler & Philipp Ther eds., 2006); Hans-Christian Jasch, *Civil Service Lawyers and the Holocaust: The Case of Wilhelm Stuckart*, in *THE LAW IN NAZI GERMANY: IDEOLOGY, OPPORTUNISM, AND THE PERVERSION OF JUSTICE* 49 (Alan E. Steinweis & Robert D. Rachlin, eds., 2013); HAROLD JAMES, *THE NAZI DICTATORSHIP AND THE DEUTSCHE BANK* 63 (2004).

⁷⁹ *Id.*

⁸⁰ *Antisemitic Legislation 1933–1939*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/antisemitic-legislation-1933-1939> [<https://perma.cc/3NAW-L46F>] (last visited Sept. 9, 2021); see also *Confiscation of Jewish Property in Europe, 1933–1945: New Sources and Perspectives*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM 76 (2003), <https://collections.ushmm.org/search/catalog/bib78563> [<https://perma.cc/H9C5-5NGK>].

property had already been expropriated.⁸¹ Even though some looted items were eventually recovered, many artworks are still missing today, more than seventy years after the liberation of the ghettos and concentration camps. International endeavors have been carried out for decades to identify unaccounted for items with the purpose of returning them to their rightful owners or heirs. These efforts included, *inter alia*: international conferences such as the Washington Conference;⁸² U.S. legislation, such as the “Holocaust Victims Redress Act”⁸³ and the “Holocaust Expropriated Art Recovery Act of 2016”;⁸⁴ and international declarations, such as the “Terezin Declaration on Holocaust Era and Related Issues.”⁸⁵ Research has shown that the property of over nine million Jews in Europe was looted, confiscated, or destroyed during and shortly after the Holocaust.⁸⁶ Most looted property was owned by individuals and families. It is estimated that no more than 20% of Jewish properties (private and communal) have been restituted to their rightful owners since

⁸¹ See LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS 1933–1945* 99 (1985); KARL A. SCHLEUNES, *THE TWISTED ROAD TO AUSCHWITZ: NAZI POLICY TOWARD GERMAN JEWS 1933–1939* (1990).

⁸² The Washington Conference produced a document titled “Principles on Nazi-Confiscated Art,” which is comprised of eleven non-binding principles that, *inter alia*, expressly declare the importance of identifying such artwork and returning such works to their rightful owners. See *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP’T OF STATE ARCHIVE, <https://2001-2009.state.gov/p/eur/rt/hlcst/23231.htm> [<https://perma.cc/AC5L-24Y9>] (last visited Sept. 9, 2021); see also Samantha Elie, *Why Wait So Long: The Cornelius Gurlitt Collection and the Need for Clear ADR Mechanisms in the Restitution of Looted Art*, 18 CARDOZO J. CONFLICT RESOL. 363, 369 (2017); Jillian E. Meaney, *From Platitudes to the Passage of the HEAR Act: How Procedural Obstacles in U.S. Courts Have Prevented the Restitution of Nazi-Expropriated Art and Congress’s Efforts to Provide a Resolution*, 28 U. FLA. J.L. & PUB. POL’Y 371, 375 (2017).

⁸³ See generally Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998) (stating that all governments should take measures to facilitate the return of private and public property that was looted by the Nazis).

⁸⁴ For more on this Act, see Jennifer Anglim Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act of 2016*, 20 CHAP. L. REV. 1, 13 nn.72–73 (2017); Jason Barnes, *Holocaust Expropriated Art Recovery (HEAR) Act of 2016: A Federal Reform to State Statutes of Limitations for Art Restitution Claims*, 56 COLUM. J. TRANSNAT’L L. 593, 603–05 (2018). See also Scott M. Caravello, *The Role of the Doctrine of Laches in Undermining the Holocaust Expropriated Art Recovery Act*, 106 VA. L. REV. 1769, 1794–95 (2020) (arguing that the doctrine of laches undermines the effectiveness of this Act and thus must be precluded as an available defense); see generally *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304 (S.D.N.Y. 2018) (discussing the laches defense in a restitution claim under the Act).

⁸⁵ Bureau of Eur. & Eurasian Aff., U.S. Dep’t of State, *Prague Holocaust Era Assesses Conference: Terezin Declaration* (June 30, 2009), <https://wjro.org.il/our-work/international-declarations-resolutions/terezin-declaration/> [<https://perma.cc/XL3B-2UG7>] (signed by 46 countries).

⁸⁶ Zemer & Lior, *supra* note 76 (citing Shelly Mizrahi, *Restitution Victims of the Holocaust: Comparative Review*, KNESSET RSCH. CTR., May 23, 2010, at 3 n.65, 4).

the war ended.⁸⁷ New Jewish communities that arose from the ashes in Europe received only a small portion of the property that had belonged to their predecessors. Legislation was enacted across Europe in an attempt to reconstitute Jewish property, but the legislation was rarely enforced by local authorities.⁸⁸

Since the end of the war, several cases have been brought to courts by victims of Nazi looting, or their heirs, in an attempt to reconstitute looted property owned by them or by their families.⁸⁹ Even when a work of art is identified as a plundered work, the current possessors are not eager to make efforts to return the item. For example, in 2020, an art researcher was “disappointed that a German museum that employed her did not seem serious about returning artworks with tainted provenances.”⁹⁰ This story revealed a deep disagreement concerning the obligations of private art collectors to reconstitute looted artwork in their possession, as opposed to the obligations of the German government when it possesses a looted artifact. The foundation that hired the art researcher stated that “the German federal government as the legal successor of the Third Reich is responsible for compensating for the crimes of the Third Reich,” not private entities.⁹¹ This leads to much confusion and legal uncertainty, and it diminishes the ability of the original owner to receive what is rightfully theirs.

The legal challenge presented by looted art centers around property rights in tangible and movable properties. Artworks that were stolen from Jewish families during the war have serious aggregated monetary and financial implications. However, this issue lacks the unique personal connection of an author to her work; looted artworks cannot tell the authentic story of what happened within the ghettos and concentration camps. Creating art, from portraits and diaries to musical and theatrical works, provided an emotional haven to Jewish prisoners at their most difficult time. These works provide unique dialogical platforms reflecting authentic inhuman historical moments. Every year, over 14,000 Holocaust survivors die in Israel alone.⁹² It is predicted that by 2025 in Israel, only 92,600 Holocaust survivors

⁸⁷ Zemer & Lior, *supra* note 76 (citing Shelly Mizrahi, *Restitution Victims of the Holocaust: Comparative Review*, KNESSET RSCH. CTR., May 23, 2010, at 3 n.66, 5).

⁸⁸ See Laurence Weinbaum, *Defrosting History: The Restitution of Jewish Property in Eastern Europe*, in *THE PLUNDER OF JEWISH PROPERTY DURING THE HOLOCAUST* 83–108 (Avi Beker ed., 2001).

⁸⁹ See MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS* 202–48 (2003).

⁹⁰ Catherine Hickley, *She Tracked Nazi-Looted Art. She Quit When No One Returned It*, N. Y. TIMES (Mar. 18, 2020), <https://www.nytimes.com/2020/03/17/arts/design/georg-schafer-museum-nazi-looted-art.html> [<https://perma.cc/DD9U-M2P7>].

⁹¹ *Id.*

⁹² Raf Sanchez, *Tens of Thousands of Israeli Holocaust Survivors Are Living in Abject Poverty*, TELEGRAPH (Jan. 27, 2016, 7:00 AM), <https://www.telegraph.co.uk/news/world-news/middleeast/israel/12122754/Tens-of-thousands-of-Israeli-Holocaust-survivors-are-living-in-abject-poverty.html> [<https://perma.cc/2GTH-6E59>].

will remain alive and that by 2035 that number will decrease to 26,200.⁹³ These artworks are invaluable as they will serve as the only remaining authentic message Holocaust survivors and victims have to share with future generations. The next Part demonstrates the dialogical value of these works.

III. AUTHENTIC DIALOGUES

A. *Against Denial*

Copyright works involve “duties to the public as well as rights in the work.”⁹⁴ From this premise, we derive our analysis on how to reconcile the tension between ownership rights of authors of ghetto art and the public interest. Artistic, musical, literary, and dramatic works created within the ghettos and concentration camps communicate authentic realities, desperate thoughts, personal ideals, and hopes.⁹⁵ These works hold unparalleled dialogical value by virtue of being the penultimate properties that communicate to the public the true story of this barbaric history. The nature of these works as dialogical raises an unexplored and neglected moral tension that this Article aims to reconcile—the tension between the original authors’ legitimate exclusive rights to own and control their creative expressions and the public’s collective duty to preserve the authentic memories embedded in these works. This duty can be delivered if the public retains a right to be exposed to the works and communicate with their authentic message.

The societal need for free and open communicative spaces in modern times raises questions about the legitimacy of attaching exclusive rights to creative and ideational commodities.⁹⁶ Copyright laws are a storehouse of principles and doctrines that aim to provide protection to these spaces and make them available to

⁹³ Lidar Grave-Lazi, *Report: Only 26,200 Holocaust Survivors Will Be Living in Israel by 2035*, THE JERUSALEM POST (Jan. 24, 2018, 1:37 PM), <https://www.jpost.com/israel-news/only-26200-holocaust-survivors-will-be-living-in-israel-by-2035-539668> [<https://perma.cc/7S7R-ZPQ2>]. It is important to note that the predictions might be grimmer due to the impact of Covid-19. See, e.g., *Israel: 900 Holocaust Survivors Died of Covid-19 in 2020*, AP NEWS (Jan. 26, 2021), <https://apnews.com/article/pandemics-seniors-coronavirus-pandemic-the-holocaust-ad5f95db83171731d71337002e839b6a> [<https://perma.cc/Y5SD-J9DY>].

⁹⁴ Roberta Rosenthal Kwall, *The Author as Steward “For Limited Times,”* 88 B.U. L. REV. 685, 704 (2008) (reviewing LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* (2007)).

⁹⁵ See generally Zemer, *supra* note 64 (articulating an innovative approach to copyright in which works of art are expressions of dialogical transactions).

⁹⁶ JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* 53 (1996) (asking why an author deserves a right if he or she “is merely taking public goods—language, ideas, culture, humor, genre—and converting them to his or her own use?”).

as many members of society as possible. Doctrines such as fair use,⁹⁷ the idea/expression dichotomy,⁹⁸ or the limited duration of copyright protection⁹⁹ facilitate “uncompensated transfers”¹⁰⁰ of social wealth, which effectuate and expand broad, communicative, and dialogical opportunities by limiting the preemptive enclosure of cultural properties. Works created within the ghettos, concentration camps, and extermination camps provide genuine and authentic dialogical spaces within which a solid and effective public discourse can form. Exposure to these works feeds conversations of change.¹⁰¹ In these dialogical spaces, the *other*—the user, listener, or viewer of the works—becomes part of the dialogical event despite the absence of the original author. Martin Buber once wrote that “all conversation derives its genuineness only from the consciousness of the element of inclusion.”¹⁰² What defines a true dialogue is the fact that the *other* is integral to the communicative act. In dialogues, parties “listen deeply,”¹⁰³ understand each other,

⁹⁷ See generally PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE – HOW TO PUT BALANCE BACK IN COPYRIGHT (2011) (discussing the use of copyright material, especially use without permission or payment); RENÉE HOBBS, COPYRIGHT CLARITY HOW FAIR USE SUPPORTS DIGITAL LEARNING (2010); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1135–36 (1990); Capitol Records, LLC v. ReDigi, Inc., 934 F.Supp.2d 640, 652–54 (S.D.N.Y. 2013) (confronting a copyright dispute between artists and a technology marketplace company); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1163–68 (9th Cir. 2007) (considering a copyright owner’s efforts to stop an internet search engine from creating access to infringing images); Am. Broad. Co. v. Aereo, Inc., 134 S. Ct. 2498, 2511 (2014) (considering a television producer’s copyright infringement claim against a subscription service that allows its users to watch broadcasts as they air). For more on fair use, see Section IV.A.

⁹⁸ Dale P. Olson, *The Uneasy Legacy of Baker v. Selden*, 43 S.D. L. REV. 604, 608 (1998); 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); Leslie A. Kurtz, *Speaking to the Ghost: Idea and Expression in Copyright*, 47 U. MIAMI L. REV. 1221, 1222 (1993); Amaury Cruz, Comment, *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 (1990).

⁹⁹ See Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 991 (1997); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970); Saul Cohen, *Duration*, 24 UCLA L. REV. 1180 (1977); M. William Krasilovsky, *Observations on Public Domain*, 14 BULL. COPYRIGHT SOC’Y U.S. 205 (1967); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 366 (1996).

¹⁰⁰ 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).

¹⁰¹ Patrick M. Jenlink, *The Power of Dialogue in Social Systems*, in DIALOGUE AS A COLLECTIVE MEANS OF DESIGN CONVERSATION 51, 53 (Patrick M. Jenlink & Bela H. Banathy eds., 2008).

¹⁰² MARTIN BUBER, BETWEEN MAN AND MAN 115 (Maurice Friedman ed., Ronald Gregor-Smith trans., 1965).

¹⁰³ *Id.*

and create a community. For a communicative event on works created within the ghettos and concentration camps to reach the level of a conversation of change,¹⁰⁴ a dialogue, a process of inclusion and exposure, must take place where the *other*, the user, is allowed access to the works in order to form a dialogical union with the authentic message of the given work. In most works of Holocaust art, the formation of such a union is made unilaterally because the authors have been murdered.

Dialogue is a relational act—a relation “that we create and sustain by conjoint agreement through shared discourse”¹⁰⁵ and a mechanism for creating culture by virtue of connecting one’s subjective individual consciousness with the institutionalized structure of society, which allows cross-cultural communication and learning. Dialogue, as a relational act, transforms the isolated being from an autonomous to a communicative entity.¹⁰⁶ The examples provided of works created within the ghettos and concentration camps explain how the copyright scene within these places rescued the subjective artist and author from their solitude, inviting them to communicate through music, art, and theater. These communicative attempts have yielded creative works, made either deliberately or under threat, that project the communicative reality in which the authors created as well as the place of the *other* in this reality.

As a social virtue that endows one with the strength to form part of a social organization,¹⁰⁷ dialogue requires a deeper understanding of mutuality and interaction, and therefore, “[dialogue] reigns supreme in the imagination of many as to what good communication might be.”¹⁰⁸ Dialogue does not necessitate the physical presence of the *other*: a person who creatively expresses himself is in a constant dialogue with others—and the *other* is in a constant genuine discourse with the artist’s original message. 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 they respond,¹⁰⁹ but they reflect the outer environment of the author or artist who is always engaged in an unlimited dialogue. The reflection of outer experiences becomes more acute in Holocaust works of art

¹⁰⁴ See Jenlink, *supra* note 101.

¹⁰⁵ Patrick M. Jenlink & Bela H. Banathy, *Dialogue and Designing Our Future: Conversation as Culture Creating and Consciousness Evolving*, in *DIALOGUE AS A COLLECTIVE MEANS OF DESIGN CONVERSATION* 51, 160 (Patrick M. Jenlink & Bela H. Banathy eds., 2008).

¹⁰⁶ DMITRI NIKULIN, *ON DIALOGUE* 141 (2006) (arguing that dialogue transforms “the individual from a closed, self-sustaining, and isolated subject to a dialogical person.”).

¹⁰⁷ Charles H. Cooley, *The Process of Social Change*, 12 *POL. SCI. Q.* 63, 69–70 (1897) (providing that “[a] man is not so much strong in himself as formed to make part of a strong whole” and instead requires good “communicated arts and actions” in his struggle for existence).

¹⁰⁸ JOHN DURHAM PETERS, *SPEAKING INTO THE AIR: A HISTORY OF THE IDEA OF COMMUNICATION* 62 (1999).

¹⁰⁹ See, 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).

that were created in a reality where artists could not avoid addressing a polyphony of desperate and devastating voices representing the authentic collective experience in the ghettos.

The unique social nature of dialogue renders it an advanced form of communication that defies closure and finality and perpetually serves as a “vehicle for reformulating old elements into new patterns.”¹¹⁰ Copyrighted properties are dialogical for exactly the same reasons. First, they are, as indicated, not solitary activities but rather manifestations of the dialogical experiences 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. In order to genuinely dialogue with works created within the ghettos, the authentic works must be made available to viewers and users. Withholding these works from public access shuts the public’s right to learn from, be exposed to, and communicate with the messages that those who died bequeathed to them. Withholding these works from free public access disturbs their perpetual role as vehicles for change—an outcome that may feed Holocaust denial. Therefore, copyright ownership of ghetto art ought to be understood as involving “duties to the public as well as rights in the work.”¹¹¹ If copyright law has a “communicative impact,”¹¹² a dialogical importance in society, and is the source for a variety of discursive activities, knowing the original—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.”¹¹³ This is a public right.¹¹⁴

In copyright, the system of moral rights provides protection to aspects of cultural integrity. Governments have a duty to protect “national culture for its own prestige, and for the benefit of the public.”¹¹⁵ Applying this to our argument, we do not seek to legitimize enclosing copyright by virtue of providing further rights to authors, but rather we propose to consider misattribution, manipulation, and distortion of information as a public wrong. The dialogical importance of copyrightable spaces requires the law to ensure that the moral integrity and message of certain works cannot be altered. This assumption is relevant to both sides of the argument: it protects users from being barred from accessing the works, but at the

¹¹⁰ C. Jan Swearingen, *Dialogue and Dialectic: The Logic of Conversation and the Interpretation of Logic*, in *THE INTERPRETATION OF DIALOGUE* 47 (Tulio Maranhão ed., 1990).

¹¹¹ Kwall, *supra* note 94, at 704.

¹¹² LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* 61 (2007).

¹¹³ *See infra* Section VI.B.

¹¹⁴ Shifting the focus from authors to the benefit for society in general 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).

¹¹⁵ Mira T. Sundara Rajan, *Moral Rights in the Public Domain: Copyright Matters in the Works of Indian Poet C. Subramania Bharati*, 2001 SING. J. LEGAL STUD. 161, 181 (2001).

same time, protects certain authors' works from being subjected to creative mutilation or changes of the inherent meaning and message. True, there are "[c]ertain things" that, as the U.S. Supreme Court held in *Bilski v. Kappos*, must remain "free for all to use."¹¹⁶ However, this freedom cannot always alter authentic authorial and artists' messages. Copyright is a democracy-enhancing mechanism¹¹⁷ that requires the system to maintain its objective of being "the engine of free expression,"¹¹⁸ notwithstanding the allocation of rights, both moral and material, to authors.

Copyright law controls what the public can and cannot do with protected works. These types of control regimes affect our ability "to transform ourselves and our environment."¹¹⁹ The property rights vested in works created in communicative and dialogical spaces are statutorily granted to the control of the author.¹²⁰ However, copyright protection must be mitigated by and balanced against the exclusive normative value that rightfully belongs to works created under such extreme circumstances as those characterizing life in the ghettos and concentration camps during the Holocaust. These works are the only remaining testimonies of the six million Jews murdered. We argue that the authenticity of the works makes them a closed category of works that deserves to remain unamenable, unaltered, and unchangeable. Copyright law lacks any such exclusion for works created in extreme circumstances.

Allowing access to authentic messages from authors who created work in the ghettos would serve to progress fundamental dialogues on the Holocaust—dialogues that confront the fatal wrongs embedded in any version of Holocaust denial. Several countries have enacted laws criminalizing the denial of the authentic history of ghettos and concentration camps, the genocide of the Jewish people, and the means by which the Nazis achieved their goal.¹²¹ Copyrighted works created during the

¹¹⁶ *Bilski v. Kappos*, 561 U.S. 593, 622 (2010), referring to *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989).

¹¹⁷ See generally NEIL W. NETANEL, *COPYRIGHT'S PARADOX* (2008).

¹¹⁸ *Harper & Row v. Nation Enter.*, 471 U.S. 539, 558 (1985).

¹¹⁹ MARCUS BOON, *IN PRAISE OF COPYING* 104 (2010).

¹²⁰ See *Berne Convention for the Protection of Literary and Artistic Works*, WIPO, <https://www.wipo.int/treaties/en/ip/berne/> [<https://perma.cc/YP3S-3EZV>] (last visited Sept. 21, 2021) (stating that the Berne Convention for the Protection of Literary and Artistic Works gives "creators such as authors, musicians, poets, painters, etc. with the means to control how their works are used, by whom, and on what terms").

¹²¹ See, e.g., Dan Bilefsky, *EU Adopts Measure Outlawing Holocaust Denial*, N.Y. TIMES (Apr. 19, 2007), <https://www.nytimes.com/2007/04/19/world/europe/19iht-eu.4.5359640.html> [<https://perma.cc/3U6B-RPBB>]; Joe Mulhall, *Holocaust Denial Is Changing – The Fight Against It Must Change Too*, GUARDIAN (Nov. 21, 2018, 11:33 AM), <https://www.theguardian.com/commentisfree/2018/nov/21/holocaust-denial-changing-anti-semitism-far-right> [<https://perma.cc/YAA7-VGUD>]; Ben Collins, *George Brandis: Holocaust Denial Would Not Become Legal Under My New Laws*, BUS. INSIDER AUSTRALIA (Mar. 26, 2014, 11:48 AM), <https://www.businessinsider.com.au/george-brandis-holocaust-denial-would-not-become-legal-under-my-new-laws-2014-3> [<https://perma.cc/LX35->

Holocaust authentically document this history. Withholding or changing their inherent communicative effect, message, and meaning amounts to a creative denial of these works and their fundamental value to society. The act of withholding these works from the public and storing them in archives in effect obstructs their dialogical potential and communicative importance. Changing them softens and disrupts their message and interferes with their unique meaning.¹²²

B. Three Levels of Dialogue

Martin Buber distinguishes between three different levels of dialogue.¹²³ First, there exists genuine dialogue.¹²⁴ This rare level occurs when “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 living mutual relations between himself and them.”¹²⁵ The second level is technical dialogue, which occurs when

F6Q4]; Tom McIlroy, *Racial Discrimination Act Changes Would Allow Holocaust Denial, Says Shane Rattenbury*, AGE (May 5, 2014, 2:01 PM), <https://www.theage.com.au/national/act/racial-discrimination-act-changes-would-allow-holocaust-denial-says-shane-rattenbury-20140505-zr4vk.html> [<https://perma.cc/5CEV-8CB7>]; *Holocaust Denier Fredrick Toben Jailed in Australia*, TELEGRAPH (Aug. 14, 2009, 7:00 AM), <https://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/6025275/Holocaust-denier-Fredrick-Toben-jailed-in-Australia.html> [<https://perma.cc/878M-23G9>]; Chris Baynes, *More than 2.6m Brits Are Holocaust Deniers, Poll Finds*, INDEP. (Jan. 27, 2019, 1:20 AM), <https://www.independent.co.uk/news/uk/home-news/holocaust-memorial-day-poll-uk-jews-murdered-nazi-germany-hope-not-hate-a8746741.html> [<https://perma.cc/GPH7-CT8K>]; Ian Traynor, *Holocaust Denier Jailed*, GUARDIAN WKLY., <https://www.theguardian.com/guardianweekly/story/0,,1715580,00.html> [<https://perma.cc/92Q5-E463>] (last visited Sept. 21, 2021); Jeremy Sharon, *‘Landmark Decision’ in UK Upholds Conviction for Holocaust Denial*, JERUSALEM POST (Feb. 13, 2019, 7:14 PM), <https://www.jpost.com/Diaspora/Landmark-decision-in-UK-upholds-conviction-for-Holocaust-denial-580589> [<https://perma.cc/Z54L-3H6G>]. On July 1986 Israel passed a law criminalizing Holocaust denial: Denial of Holocaust (Prohibition) Law, 5746-1986.

¹²² See, e.g., *Hunters: Jewish Groups Criticise Holocaust Portrayal in Amazon Show*, BBC NEWS (Feb. 24, 2020), <https://www.bbc.com/news/world-europe-51606389> [<https://perma.cc/35DR-DVXU>] (stating that changing works that were created during the Holocaust portrays an unauthentic and “fictitious depiction[] of the Holocaust”); see also Clare Duffy, *Amazon Facing Criticism from Holocaust Remembrance Groups over Books, Prime TV Show*, CNN BUS. (Feb. 24, 2020, 12:56 AM), <https://www.cnn.com/2020/02/23/business/amazon-holocaust-criticism/index.html> [<https://perma.cc/4YHV-GACD>].

¹²³ Vaida Asakavičiūtė & Vytis Valtka, *Martin Buber’s Dialogical Communication: Life as an Existential Dialogue*, 31 *Filosofija Sociologija* 51, 55 (2020).

¹²⁴ *Id.*

¹²⁵ BUBER, *supra* note 102, at 22. This relates to one of the basic elements in Buber’s conception of dialogue: confirmation. An awareness of the other as unique and whole necessitate turning to the other in the sense of confirming the other. Buber writes: “In human society at all its levels, persons confirm one another in a practical way to some extent or other in their personal qualities and capacities, and a society may be termed human in the

people reciprocate in understanding each other, such as dialogue between coworkers or strangers seeking directions.¹²⁶ Such dialogues are low-level, verbal exchanges.¹²⁷ The third level is a monologue disguised as a dialogue.¹²⁸ This level includes “a conversation in which someone seeks only to make a particular impression on the other.”¹²⁹ A monologue under these terms is a solitary and exclusionary experience in the sense that “the focus is more on the self than on one’s partner.”¹³⁰

Although the first level of dialogue can occur surprisingly in “all kinds of odd corners[,]” it is, Buber writes, a rare occasion.¹³¹ We argue that a genuine dialogue in the realm of copyrighted commodities is not as rare as it may be in other social realms. A genuine dialogue, defined according to the first level, is fundamental to creative expressions in which one’s cultural and social experiences are combined with one’s monological properties. Every copyrighted enterprise establishes “a living mutual relation” between the author or artist and others.¹³² Because “the life of dialogue is the turning towards the other,”¹³³ and because authorial and artistic works require dialogical resources to emerge, formalize, and generate meaning to be understood by the audience, a monological view of copyright that overemphasizes the authorial self by treating authors as the main source of their creative expressions thereby strengthening authors’ exclusive rights in their works is socially and legally wrong. Dina Gottliebova’s eleven portraits, Felix Nussbaum’s self-portrait, as well as playwright Jura Soyfer and composer Herbert Zipper’s ‘Dachau Song’ are dialogical. They required the *other* for their creative expression. These works are expressions of the first level of dialogue and, as such, authentically project the horrific reality of the ghettos to which the creators’ fellow inmates contributed by virtue of supplying the surroundings, the suffering, the faces, the lack of basic human traits—the properties of these works.

An individualistic approach to copyright hinders the interhuman life of creative dialogues by virtue of providing authors exclusive rights to control their creative

measure to which its members confirm one another.” MARTIN BUBER, *THE KNOWLEDGE OF MAN: SELECTED ESSAYS* 67 (Maurice Friedman ed., Maurice Friedman & Ronald Gregor Smith trans., 1965).

¹²⁶ See Asakavičiūtė & Valtka, *supra* note 123, at 55–56.

¹²⁷ See *id.*

¹²⁸ See *id.* at 56.

¹²⁹ See *id.*

¹³⁰ *Id.*

¹³¹ BUBER, *supra* note 102, at 22.

¹³² *Id.*

¹³³ *Id.* at 25. Turning towards the other has a temporal dimension as well. Buber referred specifically to “genuine dialogical moments.” Martin Buber, *Replies to My Critics*, in *THE PHILOSOPHY OF MARTIN BUBER* 689, 692 (Paul Arthur Schilpp & Maurice Friedman eds., 1967). Cissna and Anderson explain a dialogic moment as “the experience of inventive surprise shared by the dialogic partners as each ‘turns toward’ the other and both mutually perceive the impact of each other’s turning. It is a brief interlude of focused awareness and acceptance of otherness” Kenneth N. Cissna & Rob Anderson, *Theorizing About Dialogic Moments: The Buber-Rogers Position and Postmodern Themes*, 8 *COMMUNICATIVE THEORY* 63, 74 (1998).

expressions, ignoring the role of the *other* in the creative process, and imposing on the public only limited access rights that in turn restrict the fundamental interhuman relations necessary for the creative process. For example, the term of protection in copyright law favors policies of exclusion.¹³⁴ It limits the evolution of creative development by enclosing the storehouse of cultural resources¹³⁵ and imposing on others a duty to comply with the rules of exclusion. In the Statute of Anne 1710, known as the first modern copyright law, the initial term of protection was fourteen years.¹³⁶ The statute recognized a right of reversion should an author live after the expiration date of the copyright.¹³⁷ The term could be renewed for another period of fourteen years if merited by social or economic circumstances.¹³⁸ In the 1710 Act, the author and the interhuman aspect of creativity together were part of the legal bargain. Bentley and Ginsburg explain, “the second fourteen years should have enabled the author to grant rights anew from a stronger bargaining position should her work have earned a substantial audience.”¹³⁹ Acquiring an audience substantial enough to secure an additional term required wide dissemination of the work and, consequently, the recognition of the other—the audience—as the social target for the work’s communicative future. That recognition is possible only in the realm of the interhuman.

Genuine dialogue requires seeing the other *qua* other, that is, as he wishes to be seen and treated. Copyright law protects this principle, too, through the set of moral rights that preserve the integrity of an author’s creative text, both its “meaning and message.”¹⁴⁰ The private and social dimensions of moral rights explain their fundamentality to genuine dialogical experiences. From an individualistic perspective, a lack of protection may “strip the author of an important aspect of her persona, and might also garble or diminish the author’s attempt to communicate the nature of her culture to the audience.”¹⁴¹ As discussed earlier in this Part, moral

¹³⁴ See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998). The Act was challenged in *Eldred v. Ashcroft*, 537 U.S. 186, 193–194 (2003) (rejecting a constitutional challenge to the CTEA). The effect of this extension is to place a burden on creative people. Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159, 197 (2002) (discussing the extension of copyright and asserting that “the extension will impose strong restraints, many of whose negative effects will be felt by creative activities”).

¹³⁵ BOYLE, *supra* note 96, at 33.

¹³⁶ Statute of Anne 1710, 8 Ann. c. 19, § 2 (Gr. Brit.).

¹³⁷ *Id.* §§ 1, 9.

¹³⁸ *Id.* § 11.

¹³⁹ Lionel Bently & Jane C. Ginsburg, “*The Sole Right . . . Shall Return to the Authors*”: *Anglo-American Authors’ Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L.J. 1475, 1479 (2010).

¹⁴⁰ ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 58 (2010) [hereinafter KWALL, *THE SOUL OF CREATIVITY*].

¹⁴¹ Joshua M. Daniels, Note, “*Lost in Translation*”: *Anime, Moral Rights, and Market Failure*, 88 B.U. L. REV. 709, 715–16 (2008); see also Edward J. Damich, *The Right of*

rights give authors the ability to be treated as they wish, restricting the ways in which the public can use or manipulate the authors' creative works. One can license his copyright, but not the moral rights attached to the protected work. Moral rights are manifestations of one's personality in one's intellectual expressions. They act as barriers to expropriation of inalienable features of one's personality, embedded in one's artistic creations. The right of integrity, for example, gives an author the exclusive right to project his "soul of creativity."¹⁴² The relationship between the work and the author is so strong that, as Kwall writes, it resembles that between "a parent and a child."¹⁴³ From a social perspective, moral rights act as guardians of accurate information, as they give the author a "right to *inform the public* about the original nature of the artistic message and the meaning of her work."¹⁴⁴ Furthermore, because copyrighted works are products of the creative collectivity, the public, and its creative members, which together hold the various roles of the *other*, retain a legitimate right to communicate with the author *qua* author and to access the new resource created with the public's contribution.

Moral rights ensure that every use of a work acknowledges the author in his uniqueness and wholeness. The doctrine of moral rights requires an attitude that "encourages turning towards the other, imagining the reality of the other, receiving the other as partner, and hence confirming the other as a person."¹⁴⁵ Moral rights unfold the *other* in ways that conform with Buber's ideal dialogue. This supports an argument that moral rights are better candidates for stronger protection than economic rights because they better foster genuine dialogue premised on accurate information and the building of new dialogical paths. Moral rights, then, ensure that the author, in his capacity as the *other*, receives protection for his expression and that the public receives accurate information based on the real message and meaning intended by the author in his expressive commodity. Although moral rights create some barriers to free dialogue,¹⁴⁶ they feed the ground on which public dialogue can receive and benefit from the author's genuine message.

One may wrongly assume that Martin Buber, with his ideal approach to dialogism, was simply trying to convince us to live a harmonious life of dialogue and inclusion. But, according to Lothstein, what Buber attempted to do was remind us of the "*right to community* that deserves our philosophical attention"¹⁴⁷ by crafting a philosophical anthropology depicting the human experience as a continuum of struggle. It is neither monological *nor* dialogical but a continuous management of the tension between these two polarities, which allows people to

Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors, 23 GA. L. REV. 1 (1988).

¹⁴² KWALL, THE SOUL OF CREATIVITY, *supra* note 140, at 6.

¹⁴³ *Id.* at xiv.

¹⁴⁴ *Id.* at 151 (emphasis added); *see also* Lior Zemer, *Moral Rights: Limited Edition*, 91 B.U. L. REV. 1519, 1564 (2011).

¹⁴⁵ Cissna & Anderson, *supra* note 133, at 65.

¹⁴⁶ *See, e.g.*, Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263 (2009).

¹⁴⁷ Arthur S. Lothstein, *To Be Is to Be Relational: Martin Buber and John Dewey*, in MARTIN BUBER AND THE HUMAN SCIENCES 33, 48 (Maurice Friedman ed., 1996).

seek both unity and individuation.¹⁴⁸ Unity in copyright requires a strong public domain and recognition of the role of the collective in the creative process. Individuation in copyright is manifested in the rewards authors obtain for the labor and personality they invest in a given work. The copyright-making process is an ongoing process premised on mutuality in every act of creation. Indeed, if mutuality can happen, as Buber maintains, in an underground air-raid shelter or between two audience members listening to Mozart in a darkened opera house,¹⁴⁹ then mutuality between creators and others in the process of creating texts and art is unquestionable. Martin Buber's first level of dialogue refers to rare and infrequent occurrences when "each of the participants really has in mind the other or others in their present . . . and turns to them with the intention of establishing a living mutual relations . . ." ¹⁵⁰ Intellectual properties are dialogical manifestations of interhuman experiences. Martin Buber's philosophy of dialogue invites us to rethink the interpersonal dimension of the creative process.¹⁵¹ It restores the notion of "we" and its place in this process.¹⁵² This "we" notion was integral to the creation of Holocaust works of art. The strong reciprocal connection between the author and the *other* surrounding him or her stands at the center of the creation of these works in an attempt to commemorate, preserve, and immortalize the dialogue between the authors and *others* and the unspoken meaning behind the works.

IV. UNSATISFACTORY DOCTRINAL REMEDIES

A. Fair Use

Contemporary copyright doctrines, such as fair use and orphan works, aim at freeing copyrighted materials from the confinements of property rules. These doctrines impact the property entitlement of ghetto art and may seem strong enough to reconcile the balance we examine. However, as we observe in this Part, these doctrines are unsatisfactory as full remedies for that purpose. The fair use doctrine enables the public to use protected artworks for restricted use, without obtaining the author's authorization. Common uses that fall within this doctrine's umbrella are educational purposes and parody.¹⁵³ At its crux, this doctrine attempts to reach a desired balance between the public's need to gain access to protected works (and

¹⁴⁸ Cissna & Anderson, *supra* note 133, at 86–90.

¹⁴⁹ BUBER, *supra* note 102, at 242.

¹⁵⁰ *Id.* at 22.

¹⁵¹ See Ruth Birnbaum, *The Uniqueness of Martin Buber*, 40 MOD. AGE 389, 395 (1998) (“[H]uman scientists have conscientiously embraced Buber’s philosophy to restore an interpersonal dimension to their diverse disciplines.”).

¹⁵² *Id.* (arguing that restoring the “we” into “I-Thou interactions will serve to guard the moral, material, economic, and technological essentials to sustain the core of centralization without destroying the communal character”).

¹⁵³ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575–78 (1994) (examining the emergence of the fair use doctrine under common and U.S. statutory law).

sometimes even change them) and the personal interests of the author.¹⁵⁴ The doctrine follows four proportionality tests in deciding if a certain use is permitted. These tests evaluate 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.¹⁵⁵

Unlike the fair use doctrine, the fair dealing approach, common in other Anglo-countries, is much less flexible. In the UK, for example, the Copyright, Designs, and Patents Act of 1988 (CDPA) sets specific circumstances under which fair dealings are allowed and where their use does not amount to copyright infringement. The uses are limited to non-commercial research and private study, criticism, review, quotation, and news reports.¹⁵⁶ Other permitted activities include parody, caricature, pastiche,¹⁵⁷ and illustration for teaching. The UK Intellectual Property Office published guidelines that include key elements identified by the court as relevant to determine the validity of fair dealing in a particular work. These elements question whether “using the work affect[s] the market for the original work[.] If a use of a work acts as a substitute for it, causing the owner to lose revenue, then it is not likely to be fair[.]”¹⁵⁸ The elements also ask whether “the amount of the work taken [was] reasonable and appropriate . . . [and whether] it [was] necessary to use the amount that was taken[.] Usually, only part of a work may be used.”¹⁵⁹ While the fair use doctrine in the U.S. allows a wider recognition of unpaid legitimate uses, the requirement presented by the British Intellectual Property Office, namely the demand that no more than a reasonable amount will be taken from the original work, presents a significant hurdle when applied to Holocaust art. Given their social and dialogical value, ghetto artworks need to be presented in full and *as is*. Allowing their use only if “a reasonable and appropriate” amount was taken from them interferes with the very idea of freeing these works to the public.

B. Orphan Works

The orphan works doctrine refers to artworks for which an owner or heir is impossible to locate or find. This doctrine applies in many countries around the

¹⁵⁴ See, e.g., William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1687–89 (1988); Elizabeth L. Rosenblatt, *Fair Use as Resistance*, 9 U.C. IRVINE L. REV. 377, 378 (2019); Lauren Gorab, Note, *A Fair Use to Remember: Restoring Application of the Fair Use Doctrine to Strengthen Copyright Law and Disarm Abusive Copyright Litigation*, 87 FORDHAM L. REV. 703, 705 (2018).

¹⁵⁵ Copyright Act, 17 U.S.C. § 107 (2018). See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001).

¹⁵⁶ Copyright, Designs and Patents Act 1988, c. 48, §§ 29, 30, 178.

¹⁵⁷ Copyright, Designs and Patents Act 1988, c. 48, § 30A.

¹⁵⁸ *Exceptions to Copyright*, UK INTELL. PROP. OFF. (Jan. 4, 2021), <https://www.gov.uk/guidance/exceptions-to-copyright#fair-dealing> [<https://perma.cc/WWM9-8FZY>].

¹⁵⁹ *Id.*

world, including Canada and Israel,¹⁶⁰ but as of now, it has yet to be adopted in the US.¹⁶¹ In the UK, this body of works is protected by an amendment to the CDPA that allows individuals to use orphan works once the prospective user conducts a diligent search and finds no owner.¹⁶² In these cases, the Secretary of State will grant non-exclusive licenses. This licensing program is intended to operate in cooperation with the exceptions stated in the EU Directive, which were implemented into UK law.¹⁶³ This amendment enables the UK 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.¹⁶⁴ These regulations governing the terms and issuance of individual orphan works licenses were implemented in 2014.¹⁶⁵ The UK Intellectual Property Office has published industry-specific guidelines for prospective subject matter users conducting due diligence research.¹⁶⁶ Once a user has demonstrated the work's lack of ownership, the Intellectual Property Office may issue a non-exclusive license to use the work within the UK for up to seven years, with the opportunity to renew the license at the

¹⁶⁰ For Canada, see Copyright Act, R.S.C. 1985, c. C-42, s. 77. For Israel, see Copyright Law (Amendment No. 5). Zemer & Lior, *supra* note 76, at 854 (citing Copyright Law (Amendment No. 5), 5779–2019, SH No. 2777 p. 187 (Isr.)). “This amendment refers to orphan works as ‘artworks for which the owner of the copyright is unknown or unlocated.’” *Id.* at 854, n.280. “The law states that the usage of such artworks is permitted if (a) due diligence was taken in order to locate the rightful owner(s) prior to usage; (b) the user explicitly mentions that the usage of the artwork is carried out according to the exception stated in the law and that the rightful owner is entitled 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.” *Id.* at 854–55, n.280. “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.” *Id.* at 855, n.280.

¹⁶¹ See U.S. COPYRIGHT OFF., ORPHAN WORKS AND MASS DIGITIZATION: A REPORT OF THE REGISTER OF COPYRIGHTS (2015), <https://www.copyright.gov/orphan/reports/orphan-works2015.pdf> [<https://perma.cc/W9SC-XTJ4>] (discussing the orphan works doctrine at length to make a recommendation that the United States adopt orphan works legislation); see also U.S. COPYRIGHT OFF., REPORT ON ORPHAN WORKS: A REPORT OF THE REGISTER OF COPYRIGHTS (2006), <https://www.copyright.gov/orphan/orphan-report.pdf> [<https://perma.cc/8ACL-4KXH>].

¹⁶² Enterprise and Regulatory Reform Act 2013, c. 24, § 77.

¹⁶³ Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014, SI 2014/2861.

¹⁶⁴ U.S. COPYRIGHT OFF., ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 161, at 28–29.

¹⁶⁵ Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014, SI 2014/2863.

¹⁶⁶ See *Orphan Works Diligent Search Guidance for Applicants*, U.K. INTELL. PROP. OFF. (Sept. 17, 2014), <https://www.gov.uk/government/publications/orphan-works-diligent-search-guidance-for-applicants> [<https://perma.cc/VE68-ADUU>].

end of the term.¹⁶⁷ The license fees accrued are directed towards funding social, cultural, and educational activities in the case that no right-holder makes a claim for the fees within the time that the license is in effect.¹⁶⁸ The vast majority of creative works created within the ghettos are orphan works due to the devastating circumstances of the Holocaust; due diligence research for such works would lead to a name on the list of Jews murdered, in the best-case scenario, and in most cases to no name at all. Thus, the stringent orphan works legislation that exists in the UK, and the unique circumstances of Holocaust art, render this doctrine also unsatisfactory and insufficient to liberate these works and provide the public with access.

C. Resale Right

Another possible remedy is the resale right. Directive 2001/84/EC of the European Parliament and European Council on the resale right for the benefit of the author of an original work of art creates a right in favor of authors to receive royalties even if their works are resold.¹⁶⁹ This right is also known as *droit de suite*.¹⁷⁰ Although this right appeared in the Berne Convention,¹⁷¹ not all Member States applied the resale right in their territories. Because some took advantage of this fact by selling works of art to countries that did not apply *droit de suite*, the Directive was legislated.¹⁷² The Directive states that “Member States shall provide, for the benefit of the author of an original work of art, a resale right, to be defined as an inalienable right, which cannot be waived, even in advance, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author.”¹⁷³ This right applies to original works of art defined as “works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware

¹⁶⁷ U.S. COPYRIGHT OFF., ORPHAN WORKS AND MASS DIGITIZATION, *supra* note 161, at 29.

¹⁶⁸ *Id.*

¹⁶⁹ See Directive 2001/84, of the European Parliament and of the Council of 27 September 2011 on the Resale Right for the Benefit of the Author of an Original Work of Art, 2001 O.J. (L 272) 32; Catherine Jewell, *The Artist's Resale Right: A Fair Deal for Visual Artists*, WIPO MAG, https://www.wipo.int/wipo_magazine/en/2017/03/article_0001.html [<https://perma.cc/KZ65-KTPC>] (last visited Sept. 15, 2021).

¹⁷⁰ The French version of Directive 2001/84/EC refers to the resale right as “droit de suite.”

¹⁷¹ Berne Convention for the Protection of Literary and Artistic Works, art. 14ter, Sept. 26, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986).

¹⁷² For a review of this right around the world, see *Resale Right: Artists All Over the World*, <https://www.resale-right.org/> [<https://perma.cc/U743-SLZU>] (last visited Sept. 15, 2021).

¹⁷³ Directive 2001/84, of the European Parliament and of the Council of 27 September 2011 on the Resale Right for the Benefit of the Author of an Original Work of Art, 2001 O.J. (L 272) 32, art. 1, § 1.

and photographs, provided they are made by the artist himself or are copies considered to be original works of art.”¹⁷⁴ This makes the right relevant to certain works only and excludes works such as literature and music. Furthermore, this right applies to “all acts of resale involving as sellers, buyers or intermediaries’ art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art.”¹⁷⁵ This is extremely important in the context of Holocaust artworks, given that in many cases, these works have ended up at private art galleries, museums, and other ‘intermediaries art market professionals.’ However, this right does not apply to sales between private individuals and public museums,¹⁷⁶ which leaves many Holocaust artworks unprotected. Also, the Directive states that member states that did not apply this right in the past can limit its application to artworks of living artists until January 1, 2010,¹⁷⁷ which renders this doctrine unsatisfactory to protect Holocaust artworks.

In the US, Congress has considered implementing a *droit de suite* right but has failed to do so thus far.¹⁷⁸ In 2018, the American Royalties Too (ART) Act was proposed.¹⁷⁹ Although it has been introduced to Congress several times in the past, it has not been signed into law.¹⁸⁰ This Act offers to amend Title 17 of the United States Code to provide a “small measure of equity”¹⁸¹ for artists, which is a lesser degree of protection than that which the European scheme offers. Although the resale right offers some relief to artists when their art has been resold in Europe as well as other countries,¹⁸² it does not provide much remedy in the context of works created within the ghettos or concentration camps. This is true because the largest art market in the world—the US—does not apply this right. Many Holocaust artworks ended up in private American institutions, but the resale right cannot protect the authors. Furthermore, this right cannot help artists from whom art was

¹⁷⁴ *Id.* art. 2, § 1.

¹⁷⁵ *Id.* art. 1, § 2.

¹⁷⁶ *Id.* pmb. § 18 (“This right should not extend to acts of resale by persons acting in their private capacity to museums which are not for profit and which are open to the public.”).

¹⁷⁷ *Id.* art. 8, § 2.

¹⁷⁸ UNITED STATES COPYRIGHT OFFICE, *RESALE ROYALTIES: AN UPDATED ANALYSIS* 2–3 (December 2013) (“The Copyright Office agrees that these factors place many visual artists at a material disadvantage vis-à-vis other authors, and therefore the Office supports congressional consideration of a resale royalty right, or *droit de suite* . . .”).

¹⁷⁹ American Royalties Too Act, H.R. 6868 115th Cong. (2018).

¹⁸⁰ Laurel Wickersham Salisbury, *It’s Not that Easy: Artist Resale Royalty Rights and the ART Act*, CTR. FOR ART L. (July 1, 2019), <https://itsartlaw.org/2019/07/01/its-not-that-easy-artist-resale-royalty-rights-and-the-art-act/> [<https://perma.cc/KB5C-CA6F>].

¹⁸¹ Maxwell L. Anderson, *Why American Artists Should Benefit from the Resale of Their Works*, ART NEWSPAPER (Jan. 4, 2019, 12:02 PM), <https://www.theartnewspaper.com/comment/why-american-artists-should-benefit-from-the-resale-of-their-works> [<https://perma.cc/2XU4-U5CP>].

¹⁸² See *What Is the Artist’s Resale Right*, *RESALE RIGHT*, https://resale-right.org/wp-content/uploads/2017/02/SG14-0464_Resale_right_2014-05-15_EN-3.pdf. [<https://perma.cc/VDF5-ZH8D>] (last visited Sept. 16, 2021) (listing over seventy countries that had implemented this right as of 2014).

acquired by public museums, which also represents a significant share of Holocaust artworks. Therefore, despite the theoretical and practical importance of the *droit de suite* right, it is another unsatisfactory remedy.

V. GHETTO ART AND THE PUBLIC INTEREST

A. *A Neglected Conceptual Advantage*

Finding a normative argument, within contemporary copyright law, for rescuing copyrighted works created within the ghettos and concentration camps is almost inconceivable given the bare structure of these laws and their lack of the basic legal and interpretive sensitivity necessary for this goal. If any such argument is to be found, it must involve a strong public interest defense that offers protection to both public and individual rights.¹⁸³ In the following parts, we offer an innovative, thorough, and extensive analysis of the public interest as it appears in copyright laws, international treaties, or as directly and indirectly applied in the judicial jurisprudence of certain countries. We argue that a strong public interest defense would allow the general public and its individual members to uphold their duty to remember, authentically communicate with, and absorb the historical lessons from these works.

“The public interest that copyright law is designed to promote is the wide availability of creative works.”¹⁸⁴ The concept of “public interest” is enshrined within contemporary copyright discourse.¹⁸⁵ The power of rightsholders to control the use of and access to copyrighted materials interferes with and challenges the way the public interest is treated in practice. One of the initial aims of intellectual property laws was to protect public, social, and cultural wealth in conjunction with authors’ and inventors’ ability to ensure their works and inventions are not infringed upon or exploited against their will and consent.¹⁸⁶ That copyright law is inherently sensitive to the public interest¹⁸⁷ can be seen from the intrinsic structure and features

¹⁸³ See, e.g., Amy Adler & Jeanne C. Fromera, *Taking Intellectual Property into Their Own Hands*, 107 CALIF. L. REV. 1455 (2019); Neil W. Netanel & David Nimmer, *Is Copyright Property?—The Debate in Jewish Law*, 12 THEORETICAL INQUIRIES L. 241 (2011); Wendy J. Gordon, *The Core of Copyright: Authors, Not Publishers*, 52 HOUS. L. REV. 613 (2014).

¹⁸⁴ *Matthew Bender & Co., Inc. v. West Pub. Co.*, 240 F.3d 116, 124 n.8 (2d Cir. 2001).

¹⁸⁵ See, e.g., ROBERT BURRELL & ALLISON COLEMAN, COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT 80 (2005); ISABELLA ALEXANDER, COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY 1–4 (2010); ELENA COOPER, ART AND MODERN COPYRIGHT: THE CONTESTED IMAGE 204 (2018).

¹⁸⁶ See ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 3 (2011).

¹⁸⁷ See Edward L. Carter, *Harmonization of Copyright Law in Response to Technological Change: Lessons from Europe About Fair Use and Free Expression*, 30 U. LA VERNE L. REV. 312, 317 (2009); Anthony Mason, *Public-Interest Objectives and the Law of Copyright*, 9 J. L. & INFO. SCI. 7 (1998); ISABELLA ALEXANDER, COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY (2010); GILLIAN DAVIES, COPYRIGHT AND THE PUBLIC INTEREST (2002).

of copyright law, such as the main objective behind fair use,¹⁸⁸ the distinction between ideas and expressions,¹⁸⁹ and the limited duration of the rights.¹⁹⁰

Scholars recognize the public interest as an organizing principle within copyright law. Patry argued that “in all copyright systems, furthering the interest of the public is said to be an important goal In order to further any type of interest, you have to identify it, study its characteristics, and then figure out empirically how to ensure it thrives.”¹⁹¹ Dworkin provided that “copyright and the public interest are inextricably linked. All copyright systems seek to strike a balance between the rights of the copyright owner and the public interest.”¹⁹² Patterson noted that “the principle that copyright exists primarily to serve the public interest remains a crucial protection against any use of copyright to monopolize the market place of ideas.”¹⁹³ Tushnet remarked that “the concept of public interest in intellectual property theory generally seems to mean a thumb on the scales against private control in certain arguments about good policy, as well as concern for distribution and not just for maximizing utility.”¹⁹⁴ Copinger and Skone James reiterated the balance that copyright law must strike between rightsholders and the general public:

[I]t is considered a social requirement in the public interest that authors and other rights owners should be encouraged to publish their work so as to permit the widest possible dissemination of works to the public at large The protection of copyright, along with other intellectual property rights, is considered as a form of property worthy of special protection because it is seen as benefiting society as a whole and stimulating further creative activity and competition in the public interest.¹⁹⁵

¹⁸⁸ See AUFDERHEIDE & JASZI, *supra* note 97.

¹⁸⁹ Dale P. Olson, *The Uneasy Legacy of Baker v. Selden*, 43 S.D. L. REV. 604, 608 (1998); 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); Leslie A. Kurtz, *Speaking to the Ghost: Idea and Expression in Copyright*, 47 U. MIAMI L. REV. 1221 (1993). See also *infra* note 336.

¹⁹⁰ See *supra* note 93.

¹⁹¹ WILLIAM PATRY, HOW TO FIX COPYRIGHT 131–40 (2012). See also KIMBERLEE WEATHERALL & REBECCA GIBLIN, WHAT IF WE COULD REIMAGINE COPYRIGHT? 3 (2017).

¹⁹² Gerald Dworkin, *Copyright, The Public Interest and Freedom of Speech: A UK Copyright Lawyer’s Preceptive*, in COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSIS 153, 154 (Jonathan Griffiths & Uma Suthersane eds., 2005).

¹⁹³ LYMAN RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS 71 (1991).

¹⁹⁴ Rebecca Tushnet, *Intellectual Property as a Public Interest Mechanism*, in THE OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW 95, 95 (Justine Pila & Rochelle Cooper Dreyfuss eds., 2018).

¹⁹⁵ 1 COPINGER AND SKONE JAMES ON COPYRIGHT ¶¶ 2-05, at 27 (Kevin Garnett, Gillian Davies & Gwilym Harbottle eds., 15th ed. 2005) (citation omitted). See also GILLIAN DAVIES, COPYRIGHT AND THE PUBLIC INTEREST 3 (2002) (where Davies discusses the proposition that copyright is in the public interest and explores the influence of the public interest on copyright legislation in France, Germany, the UK and the US).

The copyright laws of most countries do not offer a direct “public interest” defense as part of their statutory commitments to allow public access to and permitted uses of copyrighted works. The UK and New Zealand are unique examples to the contrary.¹⁹⁶ In the US, courts have referred to the “public interest” along with First Amendment rights and the fair use doctrine in order to justify limits on copyright and reject claims for infringements.¹⁹⁷ As Balganesch remarked, “courts have sought to introduce an element of ‘public interest’ clearly not expressly mandated under the traditionally understood requirements of fair use.”¹⁹⁸ For example, in *Rosemont Enterprises v. Random House*,¹⁹⁹ although the court decided to apply the fair use doctrine, it added that the public interest also preferred the dissemination of the copyright-protected information given the fact that it concerned an important individual. In *New York Times v. Roxbury Data Interface*,²⁰⁰ the court allowed the publication of certain names from an index created by the plaintiff because that index would “serve the public interest in the dissemination of information.”²⁰¹

In the famous case of *Times, Inc. v. Bernard Geis Associates*,²⁰² the court utilized the public interest to allow the use of the Kennedy assassination video because “there was a public interest in having the fullest information available on the murder of President Kennedy.”²⁰³ In *Shady Records*, the court stated that “[E]ven while imputing bad faith to the Source Parties, [a court] may nonetheless conclude that this is outweighed in the final analysis by the importance of the dissemination

¹⁹⁶ See Section V.B below. For more on New Zealand, see *infra* note 249.

¹⁹⁷ See Haochen Sun, *Copyright Law as an Engine of Public Interest Protection*, 16 NW. J. TECH. & INTELL. PROP. 123 (2019); Shyamkrishna Balganesch, *Copyright and Free Expression: Analyzing the Convergence of Conflicting Normative Frameworks*, 4 CHI.-KENT J. INTELL. PROP. 45, 68–69 (2004).

¹⁹⁸ Balganesch, *supra* note 197, at 68–9; see also Shyamkrishna Balganesch, *Copyright as Legal Process: The Transformation of American Copyright Law*, 168 U. PA. L. REV. 1101, 1117 (2020).

¹⁹⁹ *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966).

²⁰⁰ *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217 (D.N.J. 1977).

²⁰¹ *Id.* at 221.

²⁰² *Times, Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130 (S.D.N.Y. 1968).

²⁰³ *Id.* at 146. A similar conclusion was drawn with regards to a television biography about Muhammed Ali, see *Monster Communications, Inc. v. Turner Broadcasting System, Inc.* 935 F. Supp. 490, (1996) (holding that the use in a television biography about Muhammed Ali of up to 14 film clips of historical footage, aggregating between 41 seconds and two minutes, was likely to be fair use, even if producers of the movie about Ali had protectable rights in the footage; and that Ali was a figure of legitimate public concern and his television biography was subject of public interest, allegedly infringing footage was not focus of documentary and was not particularly noticeable, and use of footage was not likely to undercut the market for motion picture).

of the recordings to the public.”²⁰⁴ In *Peteski Productions*, the court noted that “[I]t is possible that a breach of contract or some other act of bad faith may sometimes be necessary to further an important public interest and therefore such conduct might not always weigh against fair use.”²⁰⁵ In *Meeropol*, while evaluating the factors incorporated in the doctrine of fair use, the court remarked that “an extremely important consideration is the public interest served by the use of the copied materials and by the copying work itself.”²⁰⁶ And in the *Cariou* case, the court recognized “the inherent public interest and cultural value of public exhibition of art and of an overall increase in public access to artwork.”²⁰⁷ Other cases further emphasized the important role of the public interest in evaluating whether to allow uses of copyright-protected works, even if such uses fell short of the scope of fair use.²⁰⁸ All these cases directly reference the public interest and its role within the copyright system. However, in their decisions, courts mainly relied on legislated doctrines, such as fair use, when ruling in favor of defendants advocating for the protection of the public interest. The “public interest” principle has not reached the level of a normative stand-alone defense, but rather subsists as a vital supporting principle of copyright values.²⁰⁹ In common law countries, such as Australia and

²⁰⁴ *Shady Records, Inc. v. Source Enterprises, Inc.*, No. 03 CIV. 9944, 2005 WL 14920, at 18 (S.D.N.Y. Jan. 3, 2005).

²⁰⁵ *Peteski Productions, Inc. v. Rothman*, 64 F. Supp. 3d 731, 738 (E.D. Tex. 2017) (“However, there is a difference between a defendant who “purloins” a private manuscript or confidential video for personal gain and one who obtains, or even misappropriates, materials of significant public interest.”).

²⁰⁶ *Meeropol v. Nizer*, 417 F. Supp. 1201, 1207 (S.D.N.Y. 1976).

²⁰⁷ *Cariou v. Prince*, 784 F. Supp. 2d 337, 351 (S.D.N.Y. 2011), *judgment rev’d in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013).

²⁰⁸ *See, e.g., Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006) (“[C]ourts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest Notwithstanding the fact that artists are sometimes paid and museums sometimes earn money, the public exhibition of art is widely . . . considered to have value that benefits the wider public interest.”) (third alteration in original) (citations omitted) (internal quotation marks omitted); *Lindberg v. Cnty. of Kitsap*, 133 Wash. 2d 729, 744 (1997) (“[T]he public benefit resulting from the particular use of copyrighted work need not necessarily be direct or tangible, but may arise because the challenged use serves a public interest.”); *Sega Enters., Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir.1992), *as amended* (Jan. 6, 1993); *Lamb v. Starks*, 949 F. Supp. 753 (N.D. Cal. 1996) (explaining that, when determining whether use of copyrighted work is fair use, “courts must balance the statutory factors to determine whether the public interest in the free flow of information outweighs the copyright holder’s interest in exclusive control over the work”) (citation omitted) (internal quotation marks omitted). *See also Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260 (E.D. Va. 1995); *Wolff v. Inst. of Elec. & Elecs. Eng’rs, Inc.*, 768 F. Supp. 66 (S.D.N.Y. 1991); *Hustler Mag., Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986).

²⁰⁹ *See also Haochen Sun, Copyright Law as an Engine of Public Interest Protection*, 16 NW. J. TECH. & INTELL. PROP. 123, 127 (2019) (offering to change the current fair use doctrine to better incorporate and protect the public interest principle. The author claims “that a public interest principle ought to be adopted for the judicial application of the fair use

Canada, the public interest appears in copyright legislation but not as an enforceable independent defense against infringement claims.²¹⁰ Despite this, the notion of the public interest has made its way into judicial rulings where it has been referred to as a common law protection, independent of statutes. Australia has narrowly interpreted the notion of public interest or plainly rejected it.²¹¹ In the *Defence Paper* case,²¹² a narrow public interest defense was accepted; subsequent cases have doubted the existence of this defense.²¹³ In *Collier*,²¹⁴ Judge Gummow stated that “in my view, there is no legislative or other warrant for the introduction of such a concept into the law of this country.”²¹⁵ On appeal, the Full Federal Court avoided expressing its view on the public interest as an independent defense.²¹⁶ Canada does have a general public interest defense.²¹⁷ The importance of the public interest as a defining property of the Copyright Act was emphasized in *Théberge v. Galerie d’Art du Petit Champlain Inc.*²¹⁸ In this case, the court provided that the Copyright Act is “a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator[.]”²¹⁹ Therefore, “[t]he evaluation of whether the dealing is ‘fair’ must be considered with this balance in mind.”²²⁰ In 2001, Canada added a public interest

doctrine.”); Janice E. Oakes, *Copyright and the First Amendment: Where Lies the Public Interest?*, 59 TUL. L. REV. 135, 160 (1984) (rejecting the usage of public interest in evaluating fair use and concluding that “taken together, the idea-expression dichotomy and the fair use doctrine can adequately protect first amendment interests. The public interest in the dissemination of the appropriated material should not be an independent factor in the fair use analysis. Undue emphasis on the public’s short-term interest in access at the expense of the author’s copyright monopoly will only discourage authors from producing these same works of ‘significant public interest’ and thereby defeat the very purpose of copyright.”).

²¹⁰ See Cheng Lim Saw, *Is There a Defense of Public Interest in the Law of Copyright in Singapore?*, 2003 SINGAPORE J. LEGAL STUD. 519, 537–538 (2007).

²¹¹ GRAHAM GREENLEAF & DAVID LINDSAY, PUBLIC RIGHTS – COPYRIGHT’S PUBLIC DOMAINS 242–43 (2018).

²¹² *Commonwealth v John Fairfax & Sons Ltd* [1980] HCA 44 (Austl.).

²¹³ See, e.g., *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* [1987] FCA 266 (Austl.); *Smith Kline and French Laboratories (Austl) Ltd v Dep’t of Cmty Servs and Health* [1990] FCA 206 (Austl.).

²¹⁴ *Collier Constructions Pty Ltd v Foskett Pty Ltd* [1990] FCA 392 (Austl.).

²¹⁵ *Id.* ¶ 62.

²¹⁶ *Collier Constructions Pty Ltd v Foskett Pty Ltd* [1991] FCA 130 (Austl.).

²¹⁷ See generally Giuseppina D’Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use*, 53 MCGILL L. J. 309, 327 (2008); David Vaver, *To Serve and Protect: The Challenge for Intellectual Property Law*, in TECH. & COMPETITION: CONTRIBUTIONS IN HONOUR OF HANNS ULLRICH 379, 392 (Laurence Boy, Josef Drexel, Christine Godt, Reto Hilty & Bernard Rémiche, eds., 2009).

²¹⁸ [2002] 2 S.C.R. 336, 355 (Can.). See also Orit Fischman Afori, *Copyright Infringement Without Copying - Reflections on the Théberge Case*, 39 OTTAWA L. REV. 23 (2007).

²¹⁹ *Théberge*, 2 S.C.R. at 355 (Can.).

²²⁰ *Stross v. Trend Hunter Inc.*, [2020] FC 201, 215 (Can.).

defense as part of its reform to its Security of Information Act.²²¹ However, the scope of this defense is limited, and one must comply with specific measurements set by the legislature.

In the European Union, Recital 14 of the Information Society Directive²²² states that “[t]his Directive should seek to promote learning and culture by protecting works and other subject matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.”²²³ The European Court of Justice, in the 2018 case of *Funke Medien*, was asked whether a military report is entitled to copyright protection.²²⁴ The court stated that “a balance between copyright and the right to freedom of expression . . . need[s] to take into account the fact that the nature of the ‘speech’ or information at issue is of particular importance, inter alia in political discourse and discourse concerning matters of the *public interest*.”²²⁵ In a different case, the Court stated that “it is important initially to recall that the public interest in respect for property rights in general and for intellectual property rights in particular is expressly reflected in Articles 30 EC and 295 EC.”²²⁶ That is, the underlying EU legislation on copyright requires an explicit reference to the public interest.

In India, the Supreme Court has discussed the notion of public interest in a copyright context:

[W]hat would be a public interest? Would it depend upon the facts and circumstances of each case and the provisions of the statute? General meaning of the word ‘public policy’ has always been held to be an unruly horse by this Court. . . . The right to property, therefore, is not dealt with its subject to restrict when a right to property creates a monopoly to which public must have access. Withholding the same from public may amount to unfair trade practice. In our constitutional Scheme of statute monopoly

²²¹ Security of Information Act, R.S.C., 1985, c. O-5, s. 15, (“No person is guilty of an offence under section 13 or 14 if the person establishes that he or she acted in the public interest.”).

²²² On the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Council Directive 2001/29/EC (May 22, 2001).

²²³ *Id.*; see also *Soulier v. Ministre de la Culture et de la Communication*, July 7, 2016 E.C.L.I. EU: Case C-301/15 536 (Fr.).

²²⁴ *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, July 29, 2019, E.C.L.I. EU: Case C-469/17 623 (Ger.); IPPLANET, *BREAKING NEWS – Military Reports and Copyright – A European Court’s Decision* (Aug. 7, 2019), <https://intellectualpropertyplanet.wordpress.com/2019/08/07/breaking-news-military-reports-and-copyright-a-european-courts-decision/> [<https://perma.cc/X3CQ-K75B>].

²²⁵ *Funke Medien*, C-469/17 at para. 74 (emphasis added).

²²⁶ *NDC Health Corporation v. Comm’n Eur. Cmty.*, Apr. 11, 2002, E.C.R. EU: Case C-481/01 3405, 3416 (Ger.).

is not encouraged. Knowledge must be allowed to be disseminated. An artistic work if made public should be made available subject of course to reasonable terms and grant of reasonable compensation to the public at large.²²⁷

The High Court of Delhi further stated:

Copyright is a property right. Throughout the world it is regarded as a form of property worthy of social protection in the ultimate public interest. The law starts from the premise that protection should be as long and as broad as possible and should provide only those exceptions and limitations which are essential in the public interest.²²⁸

These examples show how Indian courts made an indirect use of a non-affirmative public interest defense to justify copyright infringement which the court wished to defend when other defense mechanisms and doctrines failed.

Gottliebova's eleven portraits, Nussbaum's portraits, Akselrod and Warshawsky's "By The Ghetto Gate" song, and many other artworks created within the ghettos and concentration camps all serve a compelling public interest. The public interest which stands behind Holocaust artwork is perfectly aligned with the above rationale presented by different courts around the world. It is aimed to educate and teach the public at large, as well as to ensure just reward for the author, given the indisputable fact that these works were created to immortalize the people and events depicted in them. The only way to do so is through broad dissemination of these works. The public interest compels us to do so. Continuing to prevent access to these works adds insult to injury and should be rejected by courts that have incorporated the public interest, whether by statute or common law, into their principles.

B. International Public Interest

The public interest has been at the forefront of the drafting process of many international treaties on copyright, albeit with almost no explicit reference to the concept itself. This has left the role of the public interest contested amongst those who seek to apply it, especially given that the bedrock historical treaty, the Berne Convention 1886, does not explicitly mention the public interest. Nevertheless, the UK chose to adopt an independent public interest defense against copyright infringements. In one of his decisions, Judge Aldous concluded that the public interest defense was incompatible with Berne:²²⁹

²²⁷ M/S. Ent. Network India v. M/S. Super Cassette Indus., (2008) 37 PTC 353, INSC 969 (India).

²²⁸ Warner Bros. Ent. v. Santosh, (2009) INDLHC 1365, para. 24 (India).

²²⁹ BURRELL & COLEMAN, *supra* note 185, at 106.

[T]here is no general power for courts of the signatories [to the Berne Convention] to refuse to enforce copyright if it is thought to be in the public interest of that State that it should not be enforced. Thus a general defense of public interest would appear to be contrary to this country's international obligations.²³⁰

Phillips further provided that the Berne Convention does not explicitly permit the 'public interest' defense that UK copyright law permits,²³¹ and that even if the exceptions stated in the convention are considered cumulatively, they will still not justify the public interest defense.²³² Burrell rejected these assumptions stating that a public interest defense can be justified under Article 9(2) or Article 17 of the Convention. Article 9(2) "allows member states to provide exceptions to the reproduction right," and Article 17 allows member states to "permit, control or to prohibit the circulation or protection of a work."²³³ These Articles allow member countries to incorporate them in the guise of a public interest defense, an act that will be in compliance with the demand of the Berne Convention and the TRIPS agreement.²³⁴ As stated above, except for the UK and New Zealand, world copyright laws do not refer to the public interest as a general exception to copyright protection.

The Preamble to the two WIPO Internet Treaties "recognizes the need to maintain a balance between the rights of authors and the larger *public interest*, particularly education, research and access to information, as reflected in the Berne Convention."²³⁵ The Preamble to the Marrakesh Treaty also refers to the public interest advocating that signatories recognize "the need to maintain a balance between the effective protection of the rights of authors and the larger *public interest*, particularly education, research and access to information, and that such a balance must facilitate effective and timely access to works for the benefit of persons with visual impairments or with other print disabilities."²³⁶ In addition to the Berne and WIPO Treaties, the term 'public interest' appears in the TRIPs Agreement in

²³⁰ Hyde Park Residence Ltd. v. Yelland & Ors [2000] EWCA Civ 37 (Eng.).

²³¹ See Jeremy Phillips, *The Berne Convention and the Public Interest*, 11 COLUM.-VLA J.L. & ARTS 165, 169 (1986).

²³² *Id.* at 180 (arguing that even "i[f] the 'public interest' defense exists, it does so without regard to whether the work infringed is published or not").

²³³ BURRELL & COLEMAN, *supra* note 185, at 106.

²³⁴ See also Poorna Mysoor, *Capturing the Dynamism of Fairness: A Common Law Perspective*, in FAIRNESS, MORALITY AND ORDRE PUBLIC IN INTELLECTUAL PROPERTY 8, 12 (Daniel J. Gervais ed., 2020).

²³⁵ World Intellectual Property Organization Copyright Treaty & World Intellectual Property Organization Performances and Phonogram Treaty, preamble, Dec. 20, 1996 (emphasis added) [hereinafter Internet Treaties]; see also MREILLE VAN EECHOU, P. BERNT HUGENHOLTZ, STEF VAN GOMPEL, LUCIE GUIBAULT & NATALI HELBERGER, HARMONIZING EUROPEAN COPYRIGHT LAW: THE CHALLENGES OF BETTER LAWMAKING 95 (2009).

²³⁶ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, 52 I.L.M. 1312 (2013) (emphasis added).

two different places. First, Article 8 states that copyright can be overridden “to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development.” Second, with regards to the obligation of transparency, Article 63(4) stipulates that the obligations taken by the signature states will not “require Members to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.” Arguably, verbatim reference to the public interest in the TRIPS agreement elevates the normative status of the public interest and invites countries to legislate it as a defense mechanism.²³⁷

Interestingly, Decision 160 of the Dispute Settlement Body of the World Trade Organization²³⁸ examined the term “interest.” In this decision, the Body evaluated the compliance of Section 110(5) of the US Copyright Act (permitting “playing of radio and television music in public places (bars, shops, restaurants, etc.) without the payment of a royalty fee”²³⁹) with the TRIPS Agreement. The Panel referenced a Swedish/BIRPI Study Group²⁴⁰ which stated that “it should not be forgotten that domestic laws already contained a series of exceptions in favor of various *public and cultural interests* and that it would be vain to suppose that countries would be ready at this stage to abolish these exceptions to any appreciable extent.”²⁴¹ These various “public and cultural interests” are unique to each country and can seldom protect exemptions which are not in line with international conventions, as the Study Group suggested. As a result, a specific country may prefer to advance and provide copyright protection to works created by their citizens, for humanitarian reasons, in defiance of international copyright laws.²⁴² An example of this is Barrie’s *Peter Pan*, where the Great Ormond Street Hospital was granted, by legislation, a perpetual right to royalties for the commercial use of the story.²⁴³

²³⁷ See, e.g., M. C. E. J. BRONCKERS, D. W. F. VERKADE & N. M. MCNELIS, TRIPS AGREEMENT: ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS (2000); DUNCAN MATTHEWS, GLOBALISING INTELLECTUAL PROPERTY RIGHTS – THE TRIPS AGREEMENT (2003).

²³⁸ WORLD TRADE ORGANIZATION, *United States — Section 110(5) of US Copyright Act: Report of the Panel*, WT/DS160/R (June 15, 2000) [hereinafter, *The Panel Report*].

²³⁹ WORLD TRADE ORGANIZATION, *DS160: United States — Section 110(5) of US Copyright Act: Status Report by the United States*, WT/DS160/24 (Sept. 17, 2021), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm [<https://perma.cc/ZA-D9-HVX2>].

²⁴⁰ This is a study group composed of representatives of the Swedish Government and the United International Bureaux for the Protection of Intellectual Property. It was set in order to prepare for the Revision Conference at Stockholm in 1967. See *The Panel Report*, *supra* note 238.

²⁴¹ See *id.* at 48 (emphasis added).

²⁴² PATRY, *supra* note 191, at 131 (“The public interest will not be the same in all countries or in all cultures, just as the nature of creativity varies across the world.”).

²⁴³ See Jennifer S. Green, *Copyrights in Perpetuity: Peter Pan May Never Grow Up*, 24 PENN ST. INT’L L. REV. 841, 843–44 (2006).

Decision 160 further assists in defining private authorial interests, as opposed to the public interest. The Panel analyzed the term “interest” as part of its discussion on the third condition set in Article 13 of the TRIPS Agreement, according to which limitations and exceptions to copyright can be set with regards to protected artworks, as long as those do “not unreasonably prejudice the legitimate interests of the right holder.”²⁴⁴ The Panel stated that:

[T]he ordinary meaning of the term ‘interests’ may encompass a legal right or title to a property or to use or benefit of a property (including intellectual property). It may also refer to a concern about a potential detriment or advantage, and more generally, to something that is of some importance to a natural or legal person. Accordingly, the notion of ‘interests’ is not necessarily limited to actual or potential economic advantage or detriment.²⁴⁵

On the basis of this comment, different types of interests, economic as well as moral, must be considered in the course of assessing the meaning and implication of protecting a rightsholder’s *interest*. In other words, any evaluation of the term “interest” as it pertains to exceptions and limitations to copyright is not limited to economic effects. The value of works of art, literature, and music created within the ghettos cannot be appraised by monetary worth only. When Gottliebova insisted on gaining possession of the portraits she painted at Auschwitz, her claim projected her emotional attachment to the works that saved her and her mother’s lives from death in the gas chambers. Gottliebova’s interest was morally and emotionally driven. To use the Panel’s reasoning, Gottliebova’s “interest” consists of “something that is of some importance to a natural or legal person” and not only “limited to actual or potential economic advantage or detriment.”²⁴⁶ If this argument is correct, then the Auschwitz-Birkenau Museum cannot claim ownership, dictate the social and cultural future of the portraits, or decide on how to benefit from them. Only Gottliebova can make such decisions.

C. *The Public Interest as a Legal Standard*

The right of authors who created work within the ghettos and concentration camps to own their creations is unquestionable. This right is fundamental for historical justice and carries wide social commitments on the part of the public, who will remain indefinitely under a duty to remember, respect, and contemplate the consequences of this inhuman event. This duty requires public exposure to these works and the ability to communicate with them. This duty can be achieved only if the public interest receives sufficient stature within the copyright framework that regulates the ownership of these works. Unfortunately, the public interest as such

²⁴⁴ *The Panel Report*, *supra* note 238, at 57.

²⁴⁵ *Id.* at 57–58.

²⁴⁶ *See id.*

does not appear in the vast majority of national copyright laws. This means it is left for courts to adjudicate limitations on copyright in light of the public interest. As aforementioned, two jurisdictions provide a unique public interest defense in cases where the enacted lists of permitted uses of copyrighted works do not provide sufficient public access. In the UK, Section 171(3) of the CDPA²⁴⁷ stipulates that “Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise.”²⁴⁸ Section 225(3) of the New Zealand Copyright Act of 1994 replicates the words of its British counterpart.²⁴⁹

We argue that the public interest defense, as a defense mechanism that limits property rights vested in works of art and authorship, is an appropriate legal mechanism applicable to artworks created within concentration camps and ghettos and later withheld from public access, either by illegitimate owners, archives and museums, auction houses, or by the creators themselves. The public interest defense originates in common law around the world.²⁵⁰ In a landmark case on exceptions to

²⁴⁷ Copyright, Designs and Patents Act 1988, c. 48, § 171(3) (UK).

²⁴⁸ See also Jonathan Griffiths, *The United Kingdom’s Public Interest “Defence” and European Union Copyright Law*, in INTELLECTUAL PROPERTY, UNFAIR COMPETITION AND PUBLICITY: CONVERGES AND DEVELOPMENT 289 (Nari Lee, Guido Westkamp, Annette Kur & Ansgar Ohly eds., 2014).

²⁴⁹ “Nothing in this Act affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise.” Copyright Act 1994, s. 225(3) (N.Z.). For more on New Zealand, see, for example, Rachel A. Yurkowski, *Is Hyde Park Hiding the Truth? An Analysis of the Public Interest Defence to Copyright Infringement*, 32 VIC. UNIV. WELLINGT. L. REV. 51 (2001) (“It is be noted that, although this paper refers primarily to English law, the reasoning for and scope of the public interest defence to copyright infringement apply equally to copyright in the New Zealand context.”); ANNA KINGSBURY, INTELLECTUAL PROPERTY LAW IN NEW ZEALAND chpt. 1 § 7.VII (2017) (“One uncertain area of New Zealand copyright law is the scope of any public interest defence to copyright infringement.”); Jo Oliver, *Copyright, Fair Dealing, and Freedom of Expression*, 19 N.Z. UNIVS. L. REV. 89, 112 (2000); Susy Frankel, *The Copyright and Privacy Nexus*, 36 VICT. UNIV. WELLINGTON L. REV. 507, 512, 518 (2005); Alexandra Sims, *Strange Bedfellows: Fair Dealing and Freedom of Expression in New Zealand*, E.I.P.R. 2011, 33(8), 490–98.

²⁵⁰ Although this defense is not common in many countries, there is scholarly writing on its application in different jurisdictions. For a discussion about Singapore, see Saw, *supra* note 210 (Saw states that the Singapore Parliament can adopt this defense, but that it is not really necessary as the court can use this defense as part of the fair dealing exceptions); for a discussion about China, see Tang Guanhong, *A Comparative Study of Copyright and the Public Interest in the United Kingdom and China*, 1 SCRIPTED 272 (2004) (claiming the cultural and judicial gap between China and the UK is a significant hurdle to the adoption of this defense in China); for a discussion about France, see SUNIMAL MENDIS, COPYRIGHT, THE FREEDOM OF EXPRESSION AND THE RIGHT TO INFORMATION: EXPLORING A POTENTIAL PUBLIC INTEREST EXCEPTION TO COPYRIGHT IN EUROPE 37, 51–52 (2011) (“[T]he perceptible trend towards greater recognition of the need to achieve an adequate equilibrium between the rights of authors and performers and the public interest as well as the strong

copyright protection, the English Court of Appeal declared that the public interest defense is limited to cases where enforcement of the copyright would offend against the policy of a given law. That is, a court can refuse the granting of copyright protection if the work at issue is “(i) immoral, scandalous or contrary to family life; (ii) injurious to public life, public health and safety or the administration of justice; or (iii) incites or encourages others to act in a way referred to in (ii).”²⁵¹ The public interest is enshrined within copyright law, especially in the lists of permitted uses. As Lord Justice Robert Walker explained, “The wide variety of uses of copyright material permitted by the 49 sections comprised in Chapter III (acts permitted in relation to copyright works) are all directed to achieving a proper balance between protection of the rights of a creative author and the wider public interest.”²⁵² These restrictions, however, did not satisfy the British legislature, and Section 171(3) was added to the arsenal of defenses against infringement claims.

The true meaning of the public interest defense is to aid where a use is not permitted under the fair use lists. In this case, one could still make use of a protected work on public interest grounds that can override the rightsholder’s copyright.²⁵³ This defense was designed to ensure that the judiciary remain free to develop a general public interest mechanism.²⁵⁴ The judiciary embarked on this task and

tradition of cultural heritage in French copyright law may furnish the necessary conditions to render the copyright legal framework of France conducive to the introduction of a public interest exception to copyright.”); for a discussion about Germany, see *id.*, at 59 (“[I]t may be seen that the prevailing conditions within the German legal framework are exceedingly conducive to the introduction of a broad based public interest exception to copyright.”); in Australia the decision made by the High Court in *Commonwealth v John Fairfax & Sons Ltd* [1980] HCA 44 recognized this defense. However, subsequent judgments rejected it. See, e.g., *Collier Constructions Pty Ltd v Foskett Pty Ltd* [1990] FCA 392 (Austl.); *Smith Kline and French Laboratories (Austl) Ltd v Dep’t of Cmty Servs and Health* [1989] FCA 384 (Austl.). For a discussion about South Africa, see S. Karjiker, *The Case for the Recognition of a Public Interest Defence in Copyright*, 2017 J. S. AFR. L. 451 (claiming that South Africa should recognize this defense under the constitutional framework).

²⁵¹ *Hyde Park Residence Ltd v. Yelland*, [2001] EWCA Civ 37, para. 66 (Eng. & Wales); Robert Danay, *Copyright vs. Free Expression: The Case of Peer-to-Peer File-Sharing of Music in the United Kingdom*, 8 YALE J.L. & TECH. 32, 38 (2006).

²⁵² *Pro Sieben Media A.G. v. Carlton U.K. Television Ltd.*, [1998] EWCA (Civ) 2001 (Eng.).

²⁵³ For the history of this doctrine, see Yurkowski, *supra* note 249, at Part 5.A.1; MENDIS, *supra* note 250, at 45; Jonathan Griffiths, *Pre-Emptying Conflict - A Re-Examination of the Public Interest Defence in UK Copyright Law*, 34 LEGAL STUD. 76, 78 (2014); Saw, *supra* note 210, at 521; Mysoor, *supra* note 234, at 10.

²⁵⁴ Dinusha Mendis, *The Historical Development of Exceptions to Copyright and Its Application to Copyright Law in the Twenty-First Century*, 7.5 EJCL (2003), <https://www.ejcl.org/75/art75-8.html>. For a critical analysis of this defense, see Griffiths, *supra* note 253, at 76 (claiming that “the defence is to be viewed as a form of pre-emption doctrine, allowing courts to avoid the explicit rules established under the CDPA in circumstances in which their application would frustrate the outcomes of other more appropriate forms of regulation”).

gradually developed the defense over time.²⁵⁵ The defense is considered applicable when the public interest is served by the disclosure of the information contained in the protected work, despite the fact that “(i) the act of infringement does not fall with any of the CDPA’s ‘permitted acts’ and (ii) the enforcement of copyright in the particular circumstances would not be tainted by wrongdoing.”²⁵⁶ In other words, the public interest defense offers an escape from the closed list of exceptions and limitations offered by the British fair dealing doctrine and allows the court flexibility in justifying copyright infringement.

The British public interest defense was influenced by a Canadian court decision. In Canada, the defense exists at common law for rare cases only.²⁵⁷ In 1984, in the case of *Lion Laboratories v. Evans*,²⁵⁸ former employees of the undertaking exposed defects in the latter’s intoximeter, which was used by the police to measure the blood alcohol levels of motorists.²⁵⁹ The employees were sued for copyright infringement by their former employers.²⁶⁰ In his decision, Judge Griffiths stated, “I am quite satisfied that the defense of public interest is now well established in actions for breach of confidence and, although there is less authority on the point, that it also extends to breach of copyright.”²⁶¹ The court further remarked that the use of the public interest defense is not limited to cases where there is wrongdoing on the part of the plaintiffs, thus rejecting the “iniquity rule.” As the court put it: “It is not difficult to think of instances where, although there has been no wrongdoing on the part of the plaintiff, it may be vital in the public interest to publish a part of his confidential information.”²⁶² Shortly after this case, the CDPA was enacted and included Section 171(3), which some considered a statutory endorsement of the public interest defense as it was interpreted and applied in *Lion Laboratories*.²⁶³ The latter had an impact on future case law. In the case of *Hyde Park Residence Ltd. v.*

²⁵⁵ For earlier cases of this defense, see *Fraser v. Evans*, [1969] 1 QB 349 (Eng.); *Hubbard v. Vosper*, [1972] 2 QB 84 (Eng.); *Beloff v. Pressdram Ltd.* [1973] 1 All ER 24 (Eng.); *Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.* [1975] 1 QB 613 (Eng.); see also Phillips, *supra* note 231 at 171–75.

²⁵⁶ Griffiths, *supra* note 253, at 79.

²⁵⁷ DAVID VAVER, *INTELLECTUAL PROPERTY LAW: COPYRIGHT PATENTS TRADE-MARKS* 218–19 (2d ed., 2011); see also Sunny Handa, *Reverse Engineering Computer Programs Under Canadian Copyright Law*, 40 MCGILL L.J. 621, 645 (1995) (“The public interest defence has not yet been raised successfully in Canada with respect to copyright, and has only gained judicial recognition in one small passage in *Lorimer*.”).

²⁵⁸ *Lion Laboratories v. Evans*, [1984] 2 All ER 417 (Eng.). For more on this case, see Griffiths, *supra* note 253, at 79.

²⁵⁹ Griffiths, *supra* note 253, at 79.

²⁶⁰ *Id.* at 79.

²⁶¹ *Id.* at 80 (citing *Lion Laboratories v. Evans*, [1984] 2 All ER 417 (Eng.)).

²⁶² *Id.*

²⁶³ See, e.g., Robert Burrell, *Defending the Public Interest*, EIPR 403 (2000); G Dworkin, *Judicial Control of Copyright on Public Policy Grounds*, in *INTELLECTUAL PROPERTY & INFORMATION LAW* 137 (J Kabel & G Mom eds., 1998); L. Bently & B. Sherman, *Intellectual Property Law* 219 (3d ed., 2009).

Yelland & Ors,²⁶⁴ fifteen years after *Lion Laboratories*, the British court adhered to a similar interpretation of the public interest, stating that “the defendant’s publication of stills from a security video contributed to a debate on a matter of important public interest and was therefore justified under the public interest defense.”²⁶⁵ This decision was overturned on appeal²⁶⁶ when the Court of Appeal favored a narrower interpretive approach to the public interest defense. The Court introduced general guidelines to instances for which the defense was appropriate: “[A] court would be entitled to refuse to enforce copyright if the work is: (i) immoral, scandalous or contrary to family life; (ii) injurious to public life, public health and safety or the administration of justice; (iii) incites or encourages others to act in a way referred to in (ii).”²⁶⁷

The last noteworthy case which discussed the defense at length was nearly two decades ago. The 2002 case *Ashdown v. Telegraph Group Ltd.*²⁶⁸ was decided after the Human Rights Act 1998 entered into force and before a different panel than the one which discussed *Hyde Park Residence Ltd. v. Yelland*, only three years before. *Ashdown* concerns a newspaper’s publication “of parts of a previously unpublished memorandum written by the leader of a political party.”²⁶⁹ The leader of the Liberal Democrats Party, Paddy Ashdown, sued the newspaper for breach of confidence and copyright infringement.²⁷⁰ The newspaper’s argument was based on the statutory fair dealing provisions and the common law public interest defense.²⁷¹ The Court recognized that the obligation to protect freedom of expression through Article 10 of the European Convention on Human Rights requires in some circumstances for “the use of a copyright work to be excused even though such use was not covered by any of the CDPA’s permitted acts.”²⁷² The Court rejected the restrictive conception of the public interest defense, as was interpreted in *Hyde Park Residence Ltd. v. Yelland*, and held:

[T]he ratio of *Lion Laboratories* ought not to have been interpreted so narrowly and, accordingly, that Parliament had not intended to endorse only the narrower *ex turpi* form of the defense. As a result, the public interest defense might potentially apply in situations in which the use of a copyright work was protected by Art. 10, but was not covered by any of the CDPA’s permitted acts.²⁷³

²⁶⁴ *Hyde Park Residence Ltd. v. Yelland & Ors* [1999] RPC 655 (Eng.); Mysoor, *supra* 234, at 24.

²⁶⁵ Griffiths, *supra* note 253, at 81.

²⁶⁶ *Hyde Park Residence Ltd. v. Yelland & Ors* [2000] EWCA Civ 37 (Eng.).

²⁶⁷ *Id.* ¶ 66. For more on this case, see Yurkowski, *supra* note 249.

²⁶⁸ *Ashdown v. Telegraph Group Ltd.* [2002] ECDR 32 (Eng.).

²⁶⁹ Griffiths, *supra* note 253, at 82.

²⁷⁰ *Id.* at 82.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* at 82–83.

Although the Court of Appeal in this case confirmed that the public interest defense is a legitimate copyright principle, it failed to provide measures to define the parameters of such a defense. The Court vaguely described the circumcenters of its application as not “capable of precise categori[z]ation or definition,”²⁷⁴ a statement that was regarded by many as vague and shrouded by uncertainty.²⁷⁵

Since *Ashdown*, there have been several cases that invited courts to discuss the public interest defense.²⁷⁶ The only case appearing before the Court of Appeal was *HRH Prince of Wales v. Associated Newspapers Ltd.*²⁷⁷ in 2006, where Charles, Prince of Wales, filed a lawsuit against a newsgroup following their publication of extracts from his unpublished journals.²⁷⁸ The Court rejected the newsgroup’s public interest defense claim stating that this case is not “one of those rare cases where the public interest trumps the rights conferred by the CDPA [identified in *Ashdown*].”²⁷⁹ This decision, similar to court decisions given after it,²⁸⁰ shows the unclear scope of this defense. Recent copyright infringement cases in the UK, in which the public interest defense was raised by the defendants, confirm that only in rare instances will courts find that the public interest supersedes the protected rights of the copyright owner.²⁸¹ Recently, this defense was raised by Mail’s newspaper after it was sued

²⁷⁴ *Ashdown v. Telegraph Group Ltd.* [2002] ECDR 32 (Eng.) ¶ 58; *see also* Griffiths, *supra* note 253, at 82.

²⁷⁵ *See* Griffiths, *supra* note 253, at 82; *see, e.g.*, Bently & Sherman, *supra* note 263, at 219, 221; BURRELL & COLEMAN, *supra* note 185, at 94; Jonathan Griffiths, *Copyright Law After Ashdown - Time to Deal Fairly with the Public*, 3 I.P.Q. 240 (2002). Doubts arose about the ability of this defense to coexist with EU copyright law, especially the Information Society Directive. *See* Directive 2001 on the harmonisation of certain aspects of copyright and related rights in the information society of the European Parliament and of the Council of 22 May 2001/2. The Directive was implemented in the UK by means of the Copyright and Related Rights Regulations. Copyright and Related Rights Regulations 2003, SI 2003/2498, schd. 5A, 43 (Eng.). The Directive sets an exhaustive list of exceptions to copyright infringement, which did not include a public interest defense. Griffiths, *supra* note 253, at 84–85.

²⁷⁶ *See, e.g.*, *EC v. Sunday Newspapers Ltd.* [2017] NIQB 117 (N. Ir.); *BBC, Petitioners* [2012] HCJ 10 (Scot.); *Football Data Co. Ltd. v. Stan James (Abingdon)* [2010] EWHC 1454 (Ch) (UK); *French Connection Ltd. v. Woodman* [2007] ETMR 8 (UK).

²⁷⁷ *HRH Prince of Wales v. Associated Newspapers Ltd.* [2006] EWHC 522 (Ch) (Eng.); *HRH Prince of Wales v. Associated Newspapers Ltd.* [2006] EWCA Civ 1776 (Eng.); *see also* Griffiths, *supra* note 253, at 88–89.

²⁷⁸ *See* *HRH Prince of Wales v. Associated Newspapers Ltd.* [2006] EWHC 522 (Ch) (Eng.).

²⁷⁹ *Id.* ¶ 180.

²⁸⁰ *See, e.g.*, *Vitof Limited v. Altoft* [2006] EWHC 1678 (Ch) (Eng.); *Unilever Plc v. Griffin & Anor* [2010] EWHC 899 (Ch) (Eng.); *BBC, Petitioners* [2012] HCJ 10 (Scot.); *see also* Griffiths, *supra* note 253, at 89–90.

²⁸¹ *Compare* *Hyde Park Residence Ltd. v. Yelland & Ors* [1999] RPC 655 (Eng.), *and* *Hyde Park Residence Ltd. v. Yelland & Ors* [2000] EWCA Civ 37 (Eng.), *with* *Ashdown v. Telegraph Group Ltd.* [2002] ECDR 32 ¶ 268 (Eng.) (allowing this defense and rejecting the argument that free speech should be invoked as a claim for breach of copyright), *and* HM

by the Duchess of Sussex, Meghan Markle, for publishing a letter she wrote to her father.²⁸² Given the Court's decision in *HRH Prince of Wales*, it is doubtful that the defense will be successful. The last time the public interest defense was discussed in the UK was in 2017, in *EC v. Sunday Newspapers Limited*, where the High Court of Justice in Northern Ireland Queen's Bench Division accepted and applied the public interest defense with regards to articles concerning the plaintiff, which were published by the defendant.²⁸³ The court took the existence of this defense as a fact and did not discuss its validity, rather only its applicability to the circumstances of the case.²⁸⁴

Despite its rare judicial application and public awareness,²⁸⁵ the public interest defense holds great promise for societal justice and is certainly not moot.²⁸⁶ Although the "public interest is in itself an elusive concept,"²⁸⁷ it has a fundamental role in the dissemination of copyrighted works.²⁸⁸ The following considerations must be taken by a court tasked with determining the scope of the public interest defense. First, the circumstances which led to claiming this defense, i.e., the particular facts of the case. Second, the status of the plaintiff, whether the case involves a private or a public entity claiming that a certain work should not be publicly accessible. Third, whether the work has been already published in the past. Fourth, whether the publication of the artwork by the defendant was inappropriate or motivated by impure motives.²⁸⁹ Works created within the ghettos and concentration camps provide a stand-alone and illuminating exemplar for these considerations, making such works the ultimate candidates for the public interest defense.

Advocate v. Hainey [2012] HCJ 2 (Scot.); see also ABBE BROWN, SMITA KHERIA, JANE CORNWELL & MARTA ILJADICA CONTEMPORARY INTELLECTUAL PROPERTY: LAW AND POLICY 197 (5th ed., 2019).

²⁸² See Chris Ship, *Mail on Sunday to Use Public Interest Defence in Meghan Legal Claim*, ITV NEWS (Jan. 14, 2020), <https://www.itv.com/news/2020-01-14/mail-on-sunday-to-use-public-interest-defence-in-meghan-legal-claim/> [<https://perma.cc/N524-L9WL>].

²⁸³ *EC v. Sunday Newspapers Ltd.* [2017] NIQB 117 (N. Ir.).

²⁸⁴ See *id.*

²⁸⁵ Alexandra Sims, *The Public Interest Defence in Copyright Law: Myth or Reality?*, 6 EUR. INTELL. PROP. REV. 335, 335 (2006).

²⁸⁶ See, e.g., Owen Bowcott, *Free Speech Groups Call for Public Interest Defence for Whistleblowers*, GUARDIAN (May 2, 2017), <https://www.theguardian.com/media/2017/may/02/free-speech-groups-call-for-public-interest-defence-for-whistleblowers> [<https://perma.cc/H86A-3X6M>] (discussing how in 2017, free speech groups called for its application for whistleblower). It is still used and advocated for as a defense mechanism for copyright infringement cases across the UK. The fact it is hardly used in courts proves it is preserved to 'rare circumstances.' See *Pro Sieben Media A.G. v. Carlton U.K. Television Ltd.*, [1998] EWCA (Civ) 2001 (Eng.).

²⁸⁷ Saw, *supra* note 210, at 519.

²⁸⁸ Sims claimed that the enactment of the public interest defense, and its use until now, was necessary in order to prevent copyright law from excessively prohibiting access and expression rights held by the public.

²⁸⁹ See also Yurkowski, *supra* note 249.

First, on the basis of prior adjudication, only one circumstance fits the subject of this Article—“the disclosure by means of publication will prevent the public from being misled and in doing so protect their health and safety.”²⁹⁰ Preventing the public from being misled by unauthentic ghetto art, or the complete lack thereof, in effect prevents society from learning from the past, allowing Holocaust denial to flourish.²⁹¹ There is a fundamental public interest in facilitating authentic dialogues on ghetto art.

Second, in most cases, the plaintiffs would be libraries, museums, and archives unwilling to publish the works they possess. These institutions are quasi-public entities due to the societal value they hold, and therefore, are required to meet a higher standard of reasoning as to why these works are withheld from the public.²⁹²

Third, many of these works are unpublished. Those who own them are concerned that by publishing them, they will commit copyright infringement.²⁹³ The public interest defense applies more fiercely to unpublished works—“when a private and unpublished document that would otherwise be protected by copyright is published and exposes something the public ought to know, the rationale for the existence of the defense is satisfied.”²⁹⁴ When the work is already published, this defense will be justified if “the publication serves to disseminate the information to a wider group of the public.”²⁹⁵ Published works created within the ghettos and concentration camps, as well as unpublished works, fulfill these requirements.

Fourth, in most cases, the defendant will not perform an act of misconduct by publishing these works, given their fundamental value to society. Publishing and disseminating these works can hardly be said to derive from impure motives.

If copyright in ghetto artworks was more often balanced against certain human rights, we might have seen a shift in copyright disputes towards the public interest.²⁹⁶ Drahos proclaimed that the communities of human rights and intellectual property are intertwined and “should begin a dialogue. The two communities have a great deal to learn from each other. Viewing intellectual property through the eyes of human rights advocates will encourage consideration of the ways in which the property mechanism might be reshaped to include interests and needs that it

²⁹⁰ *Id.* at 1080. *Lion Laboratories v. Evans*, [1984] 2 All ER 417 (Eng.). The publication of the memorandum served to prevent the public being misled as to the effectiveness of the breath-testing devices.

²⁹¹ *See supra* Section III.A.

²⁹² *See, e.g.*, International Council of Museums, ICOM Code of Ethics for Museums (2017), <https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf> [<https://perma.cc/UZ9S-BJRB>] (stating in Article II that “[m]useums that maintain collections hold them in trust for the benefit of society and its development.”).

²⁹³ *See generally* Edward L. Carter, *Reclaiming Copyright from Privacy: Public Interest in Use of Unpublished Materials*, 85 JOURNALISM & MASS COMM’N Q. 417, 420–21 (2008) (discussing unpublished works in the context of the public interest defense).

²⁹⁴ Yurkowski, *supra* note 249, at 1082.

²⁹⁵ *Id.*

²⁹⁶ *See* Lior Zemer, *Rethinking Copyright Alternatives*, 14 INT’L J. L. & INFO. TECH. 137, 140–41 (2005).

currently does not.”²⁹⁷ There is an imminent human right need behind the publication of works created within the ghettos. The violation of every human right in the course of the Nazi genocide of the Jewish people must affect the way ownership of these works is defined. The extraordinary circumstances under which these works emerged require us to offer a lenient and embracing understanding regarding the ownership of these works, for the sake of both the public as well as the original authors. A robust dialogue between the communities of human rights and intellectual property rights will bring to the fore the need to apply the public interest defense for a public of listeners yearning for the authentic message and meaning of these works.

Given the difficulties associated with the open-textured definition of the public interest defense, it is predominantly available “in exceptional circumstances, such that it is unlikely to provide users with much additional protection.”²⁹⁸ These circumstances occur “where the owner is attempting to use copyright to protect some other interest and where public health or safety or the administration of justice or rights to freedom of information and political communication are otherwise in danger of being jeopardized”²⁹⁹ Keeping works created within the ghettos and concentration camps behind the bars of archives and museums, prohibiting their publication and dissemination to the public, falls into the penumbra of these exceptional circumstances. Society owes a duty to cherish this history and simultaneously has a right to the information which would allow its members to respect their duty.³⁰⁰

The public interest defense completes a full circle in which protected artworks are transferred from the realm of private ownership—by the authors themselves or their heirs—to the public. When it comes to Holocaust art, it is rare to find the author or trace any living kin.³⁰¹ In cases in which we can identify the author, such as in the

²⁹⁷ Peter Drahos, *Intellectual Property and Human Rights*, 3 INTELL. PROP. Q. 349, 370–71 (1999).

²⁹⁸ BURRELL & COLEMAN, *supra* note 185, at 80.

²⁹⁹ *Id.* at 288.

³⁰⁰ Opponents to the public interest defense rely on substitutes such as the doctrines of clean hands or fraud. Like the public interest defense, “considerable uncertainty surrounds” these doctrines. *Id.* at 94. Clean hands, for example, “is at times capable of causing considerable harm.” See Zechariah Chafee, Jr., *Coming into Equity with Unclean Hands*, pt. 1, 47 MICH. L. REV. 877, 878. (1949); see also Zechariah Chafee, Jr., *Coming into Equity with Unclean Hands*, pt. 2, 47 MICH. L. REV. 877 (1949). For more on the criticism about clean hands, see BURRELL, *supra* note 263, at 95–96. This doctrine is surrounded with uncertainty and does not offer a better remedy than that offered through the public interest defense. See, e.g., PAUL S. DAVIES, & GRAHAM VIRGO, *EQUITY & TRUSTS: TEXT, CASES & MATERIALS* 18 (2nd ed., 2016) (quoting P. Pettit, in his ‘He Who Comes into Equity Must Come with Clean Hands’ article, as he says “[t]he clean hands doctrine is perhaps no more than a background principle from which have developed particular equitable defences”); See generally I. SPRY, *THE PRINCIPLES OF EQUITABLE REMEDIES: SPECIFIC PERFORMANCE, INJUNCTIONS, RECTIFICATION AND EQUITABLE DAMAGES* (6th ed., 2001). For more on fraud, see BURRELL & COLEMAN, *supra* note 185, at 96–97.

³⁰¹ As they are usually orphan works. See *Supra* Section IV.B.

case of Gottliebova's watercolors,³⁰² *Ashdown* provides the necessary guidelines to decide how to balance between the public interest and the proprietary rights of the author. The legal infrastructure of copyright provides for mechanisms that promote public access in the form of lists of exceptions and limitations to the right. Although these lists have the capacity to promote the public interest,³⁰³ they lack the definitional flexibility required to overcome ill-suited copyright considerations in regard to Holocaust art. The UK and the EU have closed lists of permitted uses, while the US and Israel have open-ended fair use doctrines. Both models of exceptions and limitations offer insufficient definitional flexibility.³⁰⁴ An almost insurmountable gap exists between the public interest and the original authors' rights in the case of works created under the most extreme circumstances—in the ghettos and concentration camps. The emotional attachment to their works of authors who survived the Holocaust is unparalleled to any other authorial attachment. Alongside advocating the public interest and its collective duty, we heavily criticize any attempt to deprive authors, artists, and musicians who created within the ghettos and concentration camps of their rights. The following part of the Article struggles to overcome this insurmountable gap.

VI. AN UNCOMFORTABLE BALANCE

A. *Unparalleled Authorial Attachment*

The emotional attachment of authors creating within the ghettos, concentration camps, and extermination camps to their works is unparalleled in any other author-work relationship. These works were created in the midst of the most inhuman and barbaric circumstances. The brutalized personalities of these authors have been embedded in their works. Those who survived the Holocaust, and the few who still walk among us, tell how fundamental this attachment is to their lives. Gottliebova is one example. Authors, artists, and musicians who did not survive the camps bequeathed to us the noble commitment to tell their story and never put their message behind bars again. Holding their works in archives and museums, or by other private entities that do not have a legitimate right in them, violates the authors' last wish to us all. As descendants of Holocaust survivors, we believe we have an inalienable duty to speak on their behalf. To do so, we introduce a three-prong argument. Our aim is to achieve the difficult balance between those authors and the public. We ought to apologize for taking a public-centered approach that discounts, albeit to a minimal extent, the property effect of the emotional attachment of these

³⁰² See *supra* note 1 and accompanying text.

³⁰³ Jonathan Griffiths, *Fair Dealing in the Law of Copyright*, 8 NOTTINGHAM L.J. 54, 58 (1999).

³⁰⁴ See, e.g., Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008) (analyzing which factors practically determine the outcome of the fair use test); Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 LAW & LIT. 20, 22 (2013) (disputing the ability of courts to apply fair use in ways that accommodate multiple meanings and interpretations of art).

authors to their works. This, however, is not at the price of reaping the latter of their property rights. Here lies an uncomfortable balance we aim to define.

First, we argue that the public retains a collective right to be informed and that this right encompasses exposure and communication with works created within the ghettos. This collective right requires releasing these works into the public realm in the exact form in which they were created so as to deliver the authentic message and meaning expressed in the works. Second, we advocate a no-right to destroy these works. This no-right does not forfeit the author's rights to possess their works but ensures that humanity does not forget or discount the atrocities of Nazi Germany. Third, we invite the compulsory licensing argument into the present discourse as a mechanism that forces illegitimate owners to part with those works to which they are not entitled, transfer possession to the legitimate rightsholders, and at the same time, ensures that the right of the public to be informed is secured.

B. The Public Right to Know

Copyright, as defined in this Article, involves “duties to the public as well as rights in the work.”³⁰⁵ Authors of creative works created within the ghettos and concentration camps have exclusive property rights in their intangible expressions. These rights allow them to control the economic and social future of the works. No user can interfere with or eliminate these rights. At the same time, however, these works, because of their singular and unparalleled historical and social value, cannot be withheld from the public either by illegitimate owners or even by the creators themselves. As dialogical properties created in the darkest times, the public has a right to know the authentic truth embedded within these works. This truth is one of the major vessels by which to spread accurate information on Nazi Germany, to teach the lessons, and to promote the messages from which all generations must learn. Accuracy on these terms is less a matter of the economic rights vested in the works, to which the authors have exclusivity, but more related to the set of moral rights copyright law recognizes and protects. These rights protect authorial integrity, allow viewers of the works to know, if possible, the identity of the original author, and safeguard the authentic message and meaning the works project. Moral rights in the case of Holocaust art, we claim, maintain fairness for both authors and the public.

The right of attribution and the right of integrity are the two most prominently recognized moral rights.³⁰⁶ The former safeguards the author's right to be recognized

³⁰⁵ Kwall, *supra* note 94, at 704 (reviewing Lior Zemer's, “The Idea of Authorship in Copyright”).

³⁰⁶ Continental countries often recognize additional moral rights—e.g., the right of disclosure and the right of withdrawal and repentance. The former recognizes the author as the ultimate judge of when and under what conditions a work can be disseminated, and the latter provides the author with the power to withdraw the work from the public, even after publication, if it no longer reflects his convictions. *See, e.g.,* Elizabeth Adeney, *The Moral Right of Integrity: The Past and Future of “Honour,”* 2 INTELL. PROP. Q. 111, 128–32 (2005). Interestingly, the European Union has not, to date, harmonized moral rights

as the author of the work, while the latter guarantees that the author's work truly represents his creative personality, free of distortions and mutilations amounting to misrepresentation of his creative vision and uniquely personal experiences. As Kwall explained, both rights are intended to "safeguard the author's meaning and message, and thus are designed to increase an author's ability to safeguard the integrity of her texts."³⁰⁷ Safeguarding integrity as a goal of moral rights requires striking a balance between authors and the public: "From the creator's perspective, to receive credit for what one does (and to have credit not falsely attributed) and from the audience's perspective, to be able to identify the source of material with which one engages."³⁰⁸ In contemporary times, the need to identify the source is more acute, as "traditional publishers play less of a role in distributing, and thus controlling the quality of, material disseminated to audiences"³⁰⁹ The unique author-work relations depicted in ghetto art require a sensitive understanding of how far the public's right to know may interfere with individual proprietary aspirations.

As stated above,³¹⁰ if we consider copyright law to possess a "communicative impact"³¹¹ on society and see it as the source for a variety of discursive activities, being exposed to the exact original message and meaning of authorial works is crucial. Preservation of the original meaning emphasizes the special connection

protection, although all member states have such provisions. The Wittem Project Report, however, which introduces a copyright code for Europe, suggests thorough harmonization of moral rights. The Report recognizes the following three moral rights: the right of divulgation, the right of attribution and the right of integrity. THE WITTEM PROJECT, EUROPEAN COPYRIGHT CODE 17–18 (2010); *see also* Eleonora Rosati, *The Wittem Group and the European Copyright Code*, 5 J. INTELL. PROP. L. & PRAC. 862, 865–66 (2010) (explaining the *European Copyright Code's* integration of moral rights); Bernt Hugenholtz, *The Wittem Group's European Copyright Code*, in CODIFICATION OF EUROPEAN COPYRIGHT LAW: CHALLENGES AND PERSPECTIVES 339 (Tatiana-Eleni Synodinou ed., 2012).

³⁰⁷ KWALL, *THE SOUL OF CREATIVITY*, *supra* note 140, at 6. Certain legal systems provide strong moral rights protection to authors similar in strength to the set of economic rights. "In contrast, American copyright law rewards economic incentives almost exclusively and lacks adequate moral rights protections." *Id.* at xiii. In the 1990s, the United States has joined the group of countries protecting moral rights, but chose a more restrictive application of moral rights. The Visual Artists Rights Act (VARA) was passed two years after the United States joined the Berne Convention for the Protection of Literary and Artistic Works. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. VI, 104 Stat. 5128 (codified in scattered sections of title 17 of the U.S.C.). Enacting VARA was meant to accommodate the obligations imposed on the United States by Article 6bis of the Berne Convention, which requires all signatory states to provide at least some protection for the moral rights of authors. In essence, VARA imported "a limited version of the civil-law concept of the 'moral rights of the artist' into our intellectual-property law." *Kelley v. Chicago Park District*, No. 08-3701 & 08-3712, slip op. at 2 (7th Cir. Feb. 15, 2011).

³⁰⁸ Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 IND. L.J. 381, 382 (2011).

³⁰⁹ *Id.*

³¹⁰ *See supra* Section III.A.

³¹¹ KWALL, *THE SOUL OF CREATIVITY*, *supra* note 140, at 61 (internal quotations omitted).

between authors and their copyrightable “spiritual children,”³¹² while also defining access as a public right.³¹³ As Mira Sundara Rajan writes, moral rights were created in order to avoid “false attribution . . . ; inaccurate and inappropriate translations; misleading representations of the poet’s personality; and erroneous statements about his life and works.”³¹⁴ In this way, moral rights impact cultural integrity. Governments have a duty to protect “national culture for its own prestige, and for the benefit of the public.”³¹⁵ Works created in the ghettos and concentration camps are representations of the Jewish culture that once thrived on European soil. Any misattribution, manipulation, distortion of information, or illegitimate claims of rights in these works is a public wrong. Thus, we claim that moral rights are sacrosanct entitlements to authors of these works but are also imperative to the public itself.

In *Bilski v. Kappos*, the Supreme Court stated that “certain things are free for all to use.”³¹⁶ Art created under the inhuman circumstances of the Holocaust must remain one of these “certain things.” From a social perspective, we argue that limiting the dual goal of moral rights, both to the author and the public, amounts to a violation of an authorship norm. Moral rights are not only vehicles that afford fairness to authors. The right of attribution, for example, is a “moral obligation.”³¹⁷ True, the right has an “obvious utility in protecting artists from theft of the reputation they have cultivated.”³¹⁸ But this is not its only goal—the right of attribution exists to protect “the public at large from being misled”:³¹⁹ “[T]here is more at stake than the concern of the artist There is also the interests of others in seeing, or preserving the opportunity to see, the work as the artist intended it, undistorted We yearn for the authentic, for contact with the work in its true version”³²⁰ As

³¹² Zemer, *supra* note 144, at 1528.

³¹³ Shifting the focus from authors to the benefit for society in general can also be found in the rhetoric preferred by the new trademark-style consumer protectionists. See, e.g., Lastowka, *supra* note 114, at 1175–76.

³¹⁴ Rajan, *supra* note 115, at 167.

³¹⁵ *Id.* at 181.

³¹⁶ See *Bilski*, 561 U.S. at 622 (internal quotation marks omitted) (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989)).

³¹⁷ Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 175 (2002) (arguing that attribution norms are moral obligations).

³¹⁸ Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 130 (1997); see also Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 78 (2007) (remarking that the right of attribution is important in order to “promote the smooth functioning of reputation economies”).

³¹⁹ Hansmann & Santilli, *supra* note 318, at 131.

³²⁰ John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1041 (1976). Praising the public interest in the right of integrity, Hansmann and Santilli remark: “[W]orks of art often become important elements in a community’s culture: other works of art are created in response to them, and they become common reference points”

Kwall emphasized, if the intention of the framers of the Copyright Clause of the US Constitution³²¹ was to “stimulate an open culture steeped in knowledge and education,”³²² then “through 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,”³²³ the objectives of the Clause can be maintained.

A crucial question relating to moral rights and to the public’s right not to be misled is whether moral rights ought to 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,”³²⁴ why should Picasso’s moral rights end in 2043? Or, for that matter, why should Gottlieb’s moral rights end in 2079? An expiration date means that personalities die. Once the human brain stops operating, the personality ceases too. However, works of creative content—embodying their author’s personality—never cease to exist even when destroyed, and the public right to be informed continues along with it. Holocaust artworks are the ultimate candidates for perpetual moral rights protection in order to protect the public interest and reinforce the public’s perpetual duty to respect and never forget, to learn from history and pass on the lessons to future generations. In other words, ownership, when applied to authorial and artistic commodities, cannot be interpreted solely through the lens of economic benefits and rewards. This argument especially applies in the context of ghetto art, where economic benefits did not exist when the work was authored. Kwall urges us to rethink the anatomy of copyright and criticizes the hegemony of economic justifications to human creativity, defining “works of authorship as fungible commodities.”³²⁵ These justifications protect only one convenient subset of the creative process. Translating this line of reasoning into a workable legal standard requires a redefinition of the rigid set of time limitations to which moral rights are subjected to reward the author for his human capital and cater to the public interest and the public’s role as the entity that eventually takes the work in new directions. Practically, accommodating these concerns can be achieved by a limited-in-time actionable right for authors for infringement of their moral rights, lasting as long as economic rights do. Once the actionable right expires, the public’s unlimited right to be informed begins. The right of the public can be secured by implementing a system of perpetual mandatory disclaimers. These will require a user of an original work, for which copyright has expired and moral rights are no longer actionable, to provide sufficient attribution to the author.

The loss or alteration of such works would therefore be costly to the community at large, depriving that community . . . of a widely used part of its previously shared vocabulary.” Hansmann & Santilli, *supra* note 318, at 106.

³²¹ “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

³²² Kwall, *THE SOUL OF CREATIVITY*, *supra* note 140, at 57.

³²³ *Id.*

³²⁴ *Id.* at 151.

³²⁵ *Id.* at 24.

C. *The No-Right to Destroy*

Moral rights include the author's right that his or her work will not be destroyed as a part of the author's right to integrity,³²⁶ which allows the author to prevent certain modifications of protected works.³²⁷ This extension of the author's right to integrity means that even if the original artwork is purchased, the new owner of the work cannot modify or destroy it.³²⁸ Adler has criticized this right, stating that it "fails to recognize the profound artistic importance of modifying, even destroying, works of art."³²⁹ A recent example is Banksy's destruction of his famous piece being auctioned in 2018, "Girl with Balloon."³³⁰ To this, Adler would say that "the public interest may sometimes lie in the destruction of art, even when the artist [or others] favor[] preservation."³³¹ She claims that "artists will sometimes want to preserve works that many if not most members of the public wish to destroy or modify."³³² Rejecting the idea of moral rights law as a shield to all artworks, she argues against the assumption that the public interest will always be on the side of the artwork and its author and advocate for its preservation.³³³ It is true that the public interest may change over time and the public's attitude towards a work of art may shift as time progresses. We also agree that "it is sometimes in the public interest to mutilate a work rather than to preserve it."³³⁴ Perhaps certain Nazi artworks created during the Holocaust embodying severe anti-Semitism that once plagued Europe and reappear today belong to this category. However, an argument favoring destruction cannot apply to ghetto art, neither can the argument that "metaphorical destruction lies at the heart of contemporary art."³³⁵ Contemporary art is inherently distinct from ghetto art. The latter was not created for the entertainment of the masses but rather for the rebellion and commemoration of the few. Ghetto art is the type of art to which destruction or mutilation should never be valuable.

³²⁶ UNITED STATES COPYRIGHT OFFICE, AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 76 (April 2019). For more on the right to destroy, see Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005).

³²⁷ Leslie Kim Treiger-Bar-Am, *The Moral Right of Integrity: A Freedom of Expression*, in DEVELOPMENTS IN RIGHTS NEIGHBOURING ON COPYRIGHT 127 (2006).

³²⁸ *Id.*

³²⁹ Adler, *supra* note 146, at 265.

³³⁰ Andrew Liptak, *One of Banksy's Paintings Self-Destructed Just After It as Auctioned*, THE VERGE (Oct. 7, 2018), <https://www.theverge.com/2018/10/7/17947744/banksy-ballon-girl-artwork-self-destructed-sothbys> [<https://perma.cc/UYZ7-X44N>]. Paradoxically, the destruction of the piece, which alternatively can only be seen as a modification, has raised its value. See Brittany Shoot, *Banksy 'Girl With Balloon' Painting Worth Double After Self-Destructing at Auction*, FORTUNE (Oct. 8, 2018), <https://fortune.com/2018/10/08/banksy-girl-with-balloon-self-destructed-video-art-worth-double/> [<https://perma.cc/5CDH-UJQ9>].

³³¹ Adler, *supra* note 146, at 274.

³³² *Id.*

³³³ *Id.* at 281.

³³⁴ *Id.*

³³⁵ *Id.* at 284.

But what if the author himself is the one who desires to destroy his or her art? Joseph Sax has stated that he believes authors have a right to destroy their own art because an “artist should be entitled to decide how the world will remember him or her.”³³⁶ He doesn’t, however, attribute the same right to public figures who created historical documents. These may include Supreme Court judges or government officials. A similar argument can be applied to our case due to the historical significance of ghetto art, even though the artists themselves are not public figures. Strahilevitz agrees with Sax’s general argument.³³⁷ He refers to the work of Posner, which stated that if a will obligates its executor to destroy all the deceased’s artwork, it will usually be struck down under public policy grounds.³³⁸ Strahilevitz rejects this course of action, which goes against the author’s “right of destruction,” based on four reasons. First, if we protect the author’s right to destroy, it “should encourage high-risk, high-reward projects, and might prevent writers from worrying that they should not commit words to paper unless they have complete visions of the narrative structures for their work.”³³⁹ Second, an economic reason states that the author is in the best position to take actions, even destruction, to maximize the value of his art, and as a result, his estate.³⁴⁰ Third, the destruction of the art can convey to the public that the author “is not the type of artist who will tolerate, let alone publish, inferior works.”³⁴¹ Lastly, preventing authors from destroying their work compels them “to speak when he [or she] would have preferred to remain silent,”³⁴² which can conflict with the author’s First Amendment right, or the right for free speech outside the US, which encompasses both the right to speak and the right to stay silent.³⁴³

Similar to Adler’s argument, Strahilevitz’s four explanations might be applicable to modern art and contemporary authorship but are inapplicable to works created within the ghettos and concentration camps. Works, with a singular historical value that have an exceptional impact on mankind, cannot be the subject of a debate on the destruction of art. Strahilevitz’s rationales are based on the presumption that the lack of publication was a choice of the author. It assumes the art has not “been published or publicly displayed”³⁴⁴ because the author had a valid individual reason to do so, whether it is striving to perfection, raising the value of his or her estate, or considering the work as inferior. That is rarely the case with regards to ghetto art. The fact that these works were not published or displayed to the public derives from the circumstances surrounding their creation and the subsequential chaos after the end of the war. Moreover, economic incentives, which

³³⁶ JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 200 (1999).

³³⁷ Strahilevitz, *supra* note 326, at 830.

³³⁸ *Id.* at 832 (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 559 (5th ed. 1998)).

³³⁹ *Id.*

³⁴⁰ *Id.* at 833.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.* at 834.

³⁴⁴ *Id.* at 835.

stand at the heart of Strahilevitz's arguments, are rarely relevant to ghetto art. Works of ghetto art were not crafted for advancing reputation or making a profit. They were crafted in order to document the horrific events of the Holocaust, mutiny against the Nazis, and other personal reasons of the authors trying to create some routine in the ghettos and concentration camps. Thus, Strahilevitz's reasons cannot be applied to ghetto art.

Nonetheless, it is conceivable that only the author herself has the right to destroy the original artwork if she so chooses. For example, if Gottliebova had decided that her paintings project too much suffering and hurt to be preserved, she would have had the right to destroy the originals. Although we find this possibility inconvenient, Gottliebova's potential right to destroy is based on very different normative grounds than the ones discussed by Adler and Strahilevitz. Arguably, only the author should have such a right to destroy, and only with regards to the original piece, not its duplicates. Granting a right to destroy all copies of a ghetto work to those who are entitled to it directly conflicts with the public's interest to preserve these works. The public interest imposes upon us the obligation to protect ghetto art and authorship and the message such artworks convey. Through the prism of the public interest, the right to reproduce and distribute ghetto art, even if only copies of the original work, is imperative to commemorate the memory of the Holocaust. Granting the author an absolute right to destroy all copies of his or her work does not achieve the necessary balance between the public's right to know and the author's propriety interest.

D. Involuntary Contracts

"Compulsory licenses are involuntary contracts between a willing buyer and an unwilling seller, imposed or enforced by the state."³⁴⁵ Compulsory licenses enable access and use when the state acknowledges that the legal framework protecting a given intellectual property right should be softened in light of a prevailing or overriding public interest.³⁴⁶ For example, pharmaceutical compulsory licenses are

³⁴⁵ Angela Foster, *Compulsory Licensing After eBay*, 258 N.J. LAW. 41, 43 (2009); see also Gianna Julian-Arnold, *International Compulsory Licensing: The Rationales and the Reality*, 33 IDEA 349, 349–50 (1993).

³⁴⁶ See, e.g., Robert Fair, *Does Climate Change Justify Compulsory Licensing of Green Technology?*, 6 BYU INT'L L. & MGMT. REV. 21, 26–29, 29–41 (2009) (discussing past examples of compulsory licensing as a response to an overriding public interest and discussing the role of this tool in the context of climate change); Colleen Chien, *Cheap Drugs at What Price to Innovation: Does the Compulsory Licensing of Pharmaceuticals Hurt Innovation?*, 18 BERKELEY TECH. L.J. 853, 856 (2003) ("[C]ompulsory licensing is authorized under certain circumstances, such as public health emergencies."); Emily Ranger-Murdock, *"Blurred Lines" to "Stairway to Heaven": Applicability of Selection and Arrangement Infringement Actions in Musical Compositions*, 67 UCLA L. REV. 1066, 1102 (2020) ("Compulsory licenses are another mechanism by which music copyright law has adjusted to promote the purpose of copyright law [i.e. to promote the Progress of Science

issued based on a public health interest that the state holds, which outweighs the proprietary right of the patent holder in a certain medicine.³⁴⁷ The EU specifically allows the issuance of compulsory licenses of “pharmaceutical products for export to countries with public health problems.”³⁴⁸ Compulsory licenses provide a legal instrument to achieve the necessary balance between the public interest, as evaluated by the state and ad-hoc necessities, and the rightsholder. It alleviates the lengthy monopoly right secured by copyright laws by allowing exclusions when the public interest so requires or demands.³⁴⁹

Compulsory licenses are more common in the realm of patent law. In these situations, patent registrars have the authority to enable the use of a patent, despite the inventor’s rights. Article 31 of the TRIPS Agreement lists a number of conditions for issuing compulsory licenses; for example, “the scope and duration of the license must be limited to the purpose for which it was granted, it cannot be given exclusively to licensees (e.g. the patent-holder can continue to produce), and it should be subject to legal review.”³⁵⁰ As stated, in the past, compulsory licenses have most often been issued with regards to pharmaceutical patents allowing their distribution at a low cost where needed.³⁵¹ In copyright, Article 11bis(2) and Article

and useful Arts]. In addition to the safety valves, compulsory licenses provide exceptions to the exclusive rights enjoyed by copyright holders.”).

³⁴⁷ See Robert C. Bird, *Developing Nations and the Compulsory License: Maximizing Access to Essential Medicines While Minimizing Investment Side Effects*, 37 J.L., MED. & ETHICS 209, 210 (2009) (“Citizens in developing countries desperately and immediately need patented life-saving medicines on an epidemic scale. Developing countries are increasingly relying on compulsory licenses to encourage the manufacture and sale of patented drugs inside their borders for a lower price than what the patent owner would charge.”).

³⁴⁸ Regulation 816/2006, of the European Parliament and of the Council of 17 May 2006 on Compulsory Licensing of Patents Relating to the Manufacture of Pharmaceutical Products of Export to Countries with Public Health Problems, 2006 O.J. (L 157) 1, 1.

³⁴⁹ For example, it is safe to assume that a compulsory license can be issued with regards to a COVID-19 vaccine, if necessary, to enable worldwide access to this invaluable resource. See WEINIAN HU, COMPULSORY LICENSING AND ACCESS TO FUTURE COVID-19 VACCINES 15 (2020), <https://www.ceps.eu/ceps-publications/compulsory-licensing-and-access-to-future-covid-19-vaccines/> [<https://perma.cc/7CT7-P88E>] (“When future Covid-19 vaccines are under patent rights protection, the policy choice of compulsory licensing . . . could be engaged to compliment voluntary licensing, to facilitate affordable access to future Covid-19 pharmaceutical products and to deliver on the commitment to public health.”); Nasos Koukakis, *Countries Worldwide Look to Acquire the Intellectual Property Rights of Covid-19 Vaccine Makers*, CNBC (Jan. 22, 2021, 8:45 AM), <https://www.cnbc.com/2021/01/22/countries-look-to-acquire-the-ip-of-vaccine-makers-to-fight-pandemic.html> [<https://perma.cc/7HZJ-TTUP>].

³⁵⁰ World Trade Org., *Compulsory Licensing of Pharmaceuticals and TRIPS*, https://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm [<https://perma.cc/T2S2-TLEQ>] (last visited Sept. 17, 2021).

³⁵¹ See James Packard Love, *Recent Examples of the Use of Compulsory Licenses on Patents*, KNOWLEDGE ECOLOGY INT’L (Mar. 31, 2007), https://www.keionline.org/misc-docs/recent_cls_8mar07.pdf [<https://perma.cc/T2S2-TLEQ>].

13(1) of the Berne Convention provide the legal foundations to grant compulsory licenses. The latter clause specifically refers to the right of recording musical works (and any words pertaining thereto), while the former refers to broadcasting and related rights of any literary and artistic works. Article 11bis(2) states that “[I]t shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised.” These rights include the right to broadcast or communicate an author’s art to the public.

In the US, copyright law delineates several different compulsory license provisions.³⁵² These include issuing compulsory licenses for non-dramatic musical compositions,³⁵³ public broadcasting,³⁵⁴ retransmission by cable systems,³⁵⁵ subscription digital audio transmission,³⁵⁶ and non-subscription digital audio transmission such as Internet radio.³⁵⁷ Compulsory licensing as a regulatory infrastructure provides a strong foundation that can enable adequate protection for works created within the ghettos and concertation camps. For example, the non-dramatic musical compositions compulsory license can permit the use of and access to musical compositions which were authored in ghettos and concentration camps by Holocaust victims and survivors. This scheme requires the recording artist to provide notice and pay a royalty. The recording artist also cannot change the basic melody or fundamental characters of the work. These requirements are aligned with our overarching call to preserve the original message and meaning of the work as well as vest ownership in the author. This compulsory license only allows a person to distribute a new sound recording of existing musical work if that work had been previously distributed to the public by or under the authority of the copyright owner.³⁵⁸ Although Holocaust music and artworks were never published in the “traditional sense,” this requirement can be waived to allow the usage of compulsory license even if the Holocaust art has not been distributed to the public. This is due to the underlying public interest in obtaining access to these works and the unique

³⁵² See Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915, 915 (2020) (“[T]he Copyright Act also outlines several detailed compulsory licensing schemes requiring the owners of certain copyright interests, musical works in particular, to license to anyone at government-set prices.”).

³⁵³ 17 U.S.C. § 115. See Howard B. Abrams, *Copyright’s First Compulsory License*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 215, 215 (2009) for an argument against this type of compulsory license. On the other hand, some have even called for the expansion of compulsory licenses, for example, with regards to digital sound sampling, see Michael L. Baroni, *A Pirate’s Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65 (1993) and as a tool to save the music industry, see James H. Richardson, *The Spotify Paradox: How the Creation of a Compulsory License Scheme for Streaming on-Demand Music Platforms Can Save the Music Industry*, 22 UCLA ENT. L. REV. 45 (2014).

³⁵⁴ 17 U.S.C. § 118.

³⁵⁵ 17 U.S.C. § 111(c).

³⁵⁶ 17 U.S.C. § 114(d)(2).

³⁵⁷ 17 U.S.C. § 114(d)(1).

³⁵⁸ Foster, *supra* note 345, at 43.

circumstances surrounding their creation, which inhibited the authors' ability to publish them. The fact that such artworks have not been publicly distributed only amplifies the public interest in gaining access to them.

Applying this framework to ghetto art, music, drama, and authorship is the desired outcome that should encompass all works created in ghettos and concentration camps during the Holocaust. The compelling public interest in providing access to these works is unquestionable. Compulsory licenses compel states to recalibrate the necessary balance between sheltering ghetto artworks and the public's interest. They provide an adequate, acknowledged legal instrument that enables access without trampling over the author's proprietary rights. Despite their shortcomings, issuing these licenses strengthens the importance of their exposure to the community.³⁵⁹ The utilization of compulsory licenses will enable an appropriate balance between the public's right to know and the authors' proprietary rights in their art. Bridging this gap will ensure the adequate protection of both the public interest and authors' rights.

CONCLUSION

Artists, authors, musicians, and other creative individuals formed an integral part of the otherwise horrific life in the ghettos, concentration camps, and extermination camps during the Holocaust. Even today, more than seventy years after the liberation of ghettos across Europe, Holocaust art is discovered and traded around the world.³⁶⁰ The vast majority of the rightful authors and owners of these works were murdered in gas chambers, labor camps, and ghettos shortly after creating their works. Through their works, Jewish prisoners documented the atrocities of the Nazis, exposing the untold stories of over six million Jews who walked or labored to death. While much has been written about looted works of art that were stolen from Jewish families during the Nazi occupation, such literature covers only one limited, and perhaps convenient, subset of questions relating to ownership of works owned or created by Jews during the Holocaust. In this Article, we aimed to remedy this fundamental lack of awareness. We took the temerity to open and provoke a debate about who should be the moral owner of works of art, music, drama, and authorship that were created within the boundaries of the most inhuman copyright scene. At the same time, we advocated a strong public interest defense in making these works available to the public, rescuing them from illegitimate owners, and reconciling the nearly insurmountable tension between rightful owners and the public interest.

³⁵⁹ Abrams, *supra* note 353, at 215 (“[C]ompulsory licenses deviate from the traditional bargain struck by copyright law, the lack of moral rights under the present system, the debatability of the assertion that repeal of the compulsory license will result in a sufficient quantity of exclusive licenses that will not only be exclusive but will harm the public interest, the lack of anti-monopoly concerns in the modern marketplace, and a belief that private negotiation will result in fairer treatment of the authors of nondramatic musical compositions.”).

³⁶⁰ See, e.g., *Secret Letters*, *supra* note 18 and accompanying text.

The works created by Gottliebova, Israel, Berline, Nussbaum, Fritta, Soyfer, Zipper, Axelrod, Warshawsky, and thousands more, some of whom we will never be able to acknowledge, are of unparalleled historical value. It is a fundamental public interest that these works be made freely accessible to the public, who has the right to be exposed to the authentic message and meaning embedded in them. Berline's painting of the concentration camp where he was held and Nussbaum's self-portrait drawn in the ghetto were created for the purpose of immortalizing the people that lived and events that occurred in these places. The talent of these authors and artists was realized in the most inhuman copyright circumstances that no imagination could predict. Leaving this scene veiled and legally unexplored has allowed these works to be locked away from public access or to have ownership declared over them by illegitimate rightsholders, resulting in constant perpetuation of historical injustice and violation of basic human values.

In 1905, in *The Life of Reason*, Philosopher George Santayana wrote, "[t]hose who cannot remember the past are condemned to repeat it."³⁶¹ In a 1948 speech to the House of Commons, Churchill paraphrased Santayana when he said that "[t]hose who fail to learn from history are condemned to repeat it."³⁶² As third-generation of Holocaust survivors, we have an inalienable duty to speak on behalf of survivors and ensure that these remarks are realized in perpetuity. Copyrighted expressions created within the ghettos and concentration camps enable society to learn fundamental historical lessons that are necessary to guarantee that this history not be repeated.³⁶³ The public interest defense, along with the doctrine of compulsory licenses, empowers the public to claim, demand, and gain access to these parts and pieces of inhuman history. In their exchange over Dina Gottliebova's ownership of the eleven paintings, Congresswoman Shelley Berkeley was right to assert to the Polish ambassador to the U.S., Przemyslaw Grudzinski, that "The pictures painted by Dina Babbitt do not belong to the whole world."³⁶⁴ They belong to Dina. They definitely do not belong to the Auschwitz-Birkenau Museum. As remnants of the horrific life in ghettos and concentration camps, however, these works must be made available for unlimited public access. Copyright laws cannot supply distorted shelters for illegitimate property claims and must be altered in order to pursue historical justice and the public interest for this inhuman copyright scene.

³⁶¹ GEORGE SANTAYANA, *THE LIFE OF REASON: REASON IN COMMON SENSE* 172 (Marianne S. Woceck & Martin A. Coleman eds., MIT Critical ed. 2011) (1905).

³⁶² See *Folger Library – Churchill's Shakespeare*, INT'S CHURCHILL SOC'Y (Oct. 21, 2018), <https://winstonchurchill.org/resources/in-the-media/churchill-in-the-news/folger-library-churchills-shakespeare/> [<https://perma.cc/V8X2-LV66>].

³⁶³ Cf. David Crabtree, *The Importance of History*, GUTENBERG COLL. (Feb. 26, 2001), <https://gutenberg.edu/2001/02/the-importance-of-history/> [<https://perma.cc/R2A4-C4ES>] ("[I]f we do not sincerely seek to learn from the past, we will learn nothing . . . If we will listen to what history has to say, we can come to a sound understanding of the past that will tell us much about the problems we now face.").

³⁶⁴ See TESTIMONY – ART OF THE HOLOCAUST, *supra* note 7, at 217.