

# Copyright and the Holocaust

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This article explores the interface between copyright law and the Holocaust. The Holocaust's duration and scope, its occurrence in the midst of the twentieth century with photography and film technologies already available, and its setting at the heart of Europe, yielded countless documents, diaries, notes, memoirs, musical works, photographs, films, letters, and additional artifacts. On the victims' part, many of those items—including secret archives comprised at various ghettos, music composed in concentration camps, and personal diaries—manifest an explicit act of real-time historical documentation for future generations. On the perpetrators' side, some materials were produced as a result of organized documentation and others—such as Joseph Goebbels' diaries or Hitler's *Mein Kampf*—comprise records of prominent figures in the Nazi regime. Numerous Holocaust-related materials are still subject to copyright protection. Yet, the impact of copyright law on the memory of the Holocaust remains largely unexplored.

This article engages in the first systematic exploration of the copyright-Holocaust interface and presents a twofold argument. First, we demonstrate that copyright law plays a heretofore-unnoticed role in shaping the collective memory of the Holocaust. Second, on a normative level, we argue that the prevalent narratives underlying copyright law, as well as ordinary copyright doctrines, do not comfortably apply to

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\* The Hebrew University of Jerusalem Law Faculty. For invaluable comments, discussions, and suggestions we thank Bitá Amani, Jack Balkin, Barton Beebe, Tomer Broude, Chris Buccafusco, Leah Chan Grinvald, Andrew Gilden, Yitzhak Goldstein, Miri Gur-Aryeh, Oded Heilbronner, Moshe Hirsch, Roberta Kwall, Daphna Lewinsohn-Zamir, Pierre Emmanuel Moysé, Neil Netanel, David Nimmer, Sean Pager, Guy Rub, Josh Sarnoff, Ofer Tur-Sinai, Richard Weisberg, Steven Wilf, Eyal Zamir, the members of the research group on German Visual History at the Hebrew University, the Intellectual Property and Information Law Program and the Institute in Holocaust and Human Rights at Cardozo Law School, as well as the participants of the following conferences and workshops: "Writing Visual History Conference" at the Hebrew University (2016); the Intellectual Property Scholars Conference at Cardozo Law School (2017), the Memory Studies Association Conference at Copenhagen University (2017), the Private Law Workshop at the Hebrew University (2017), and the Yale Information Society Project Idea Speakers' Series (2018). We are also grateful to Wiebke Baars, Rainer Dresen, and the U.S. National Archive for their assistance in accessing relevant materials. Gadi Weiss, JJ Teller, and Noy Lion provided excellent research assistance. This project was supported by the Israel Science Foundation (Grant No. ISF/1342/17), and the Barak Center for Interdisciplinary Legal Research at the Hebrew University.

Holocaust-related materials, and that this state of affairs yields socially undesirable consequences. The latter include, *inter alia*, victims' works created with the explicit goal of documenting the Holocaust that may remain in the file-drawer due to copyright concerns, as well as ordinary copyright protection applying to infamous Nazi materials, thus providing their owners with certain influence over the Holocaust's narrative. By closely examining various case studies, we analyze the principal tensions between the copyright regime and the Holocaust and offer several concrete recommendations concerning the application of copyright law to Holocaust-related materials. On a more general note, our analysis sheds new light on copyright's impact on collective and intergenerational memory.

INTRODUCTION.....	123
I. Collective Memory, Copyright, and the Holocaust.....	130
II. Tensions at the Copyright-Holocaust Interface: A Critical Analysis .....	139
A. Conflicting Narratives.....	140
(1) Incentive, Control, and "A Letter in a Bottle" .....	140
(2) "Ordinary Copyright"?.....	144
B. Publication versus Concealment .....	148
C. Transformative & Partial versus Authentic & Complete .....	151
D. The Anonymous Masses.....	154
III. Doctrinal Recommendations .....	160
A. Implied License.....	161
B. Copyright Misuse.....	164
C. Fair Use.....	167
(1) The Nature of the Work: Holocaust-Related Materials ...	167
(2) Unpublished Holocaust-Related Works in Context.....	169
(3) Beyond Transformative Uses.....	170
CONCLUSION .....	171

## INTRODUCTION

Ten metal boxes and three milk cans were exposed beneath the ruins of the Warsaw ghetto in the years 1946 and 1950. They contained thousands of documents, known as the “Oyneg Shabes Archives.”<sup>1</sup> The archives were collected, created, and compiled in the ghetto during the Holocaust by a group of Jewish intellectuals and scholars under the leadership of Dr. Emanuel Ringelblum.<sup>2</sup> Their contents comprised a detailed documentation of Jewish life under Nazi occupation, focusing on the Warsaw ghetto.<sup>3</sup> Among the materials were scholarly studies, reflections on the situation of the Jews, documents issued by the German authorities, real-time periodization of the extermination of the Jewish population, photos, memoirs, poems, personal letters, and myriad additional documents.<sup>4</sup> In an effort to secure the archives from extermination, the team buried them in the ground when the liquidation of the Warsaw ghetto and the prospective extinction of its occupants became apparent.<sup>5</sup> David Graber, a nineteen-year-old teenager who assisted in the burial process described it in a last-minute note:

What we were unable to cry and shriek out to the world we buried in the ground . . . . I would love to see the moment in which the great treasure will be dug up and scream the truth at the world. So the world may know all. So the ones who did not live through it may be glad. And we may feel like veterans with medals on our chests. We would be the fathers, the teachers, and educators for the future . . . . But no, we shall certainly not live to see it, and therefore I write my last will. May the treasure fall into good hands. May it last into better times. May it alarm and alert the world to what happened . . . . in the twentieth century . . . . May history attest for us.<sup>6</sup>

By 1945, most of the Jews of Europe were dead.<sup>7</sup> Among them were most members of the archives’ group. A search initiated by a few of the survivors after the War led to the exposure of two parts of the archives. The third part has not been found to this day.<sup>8</sup>

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1. Paul A. Shapiro, Eleonora Bergman & Feliks Tych, *Foreword*, in *THE WARSAW GHETTO: OYNEG SHABES – RINGELBLUM ARCHIVE*, xi (Robert M. Shapiro & Tadeusz Epszstein eds., 2009).

2. SAMUEL D. KASSOW, *WHO WILL WRITE OUR HISTORY? EMANUEL RINGELBLUM, THE WARSAW GHETTO, AND THE OYNEG SHABES ARCHIVE* (2007).

3. Shapiro et al., *supra* note 1; KASSOW, *supra* note 2.

4. For a systematic catalogue of the archive’s contents, see Shapiro et al., *supra* note 1.

5. KASSOW, *supra* note 2 at 3-5.

6. As translated and cited in KASSOW, *supra* note 2, at 3.

7. “About the Holocaust”—YAD VASHEM, THE WORLD HOLOCAUST REMEMBRANCE CENTER, available at <http://www.yadvashem.org/Holocaust/about>.

8. KASSOW, *supra* note 2, at 2-5.

In 1943, the opera “Kaiser von Atlantis” (the Emperor of Atlantis) reached the rehearsal stage. Rehearsals took place in basement L-411 in the Theresienstadt concentration camp.<sup>9</sup> The opera—composed in Theresienstadt by Viktor Ullmann, a well-known composer, to a libretto by the young painter and poet Peter Kien—comprises one example of what would later be described as a musical genre unique to the Holocaust: music created in concentration and extermination camps.<sup>10</sup> Through a profound satire of Hitler and the Third Reich, the Kaiser von Atlantis conveyed an authentic, genuine message about the incomprehensible realities of the Holocaust: the inhuman repression, the mass suffering, and the blurring of life and death.<sup>11</sup> By early 1944, the Kaiser was ready for performance. Both Ullmann and Kien were sent to Auschwitz and murdered shortly thereafter, and the performance at Theresienstadt never took place.<sup>12</sup> Yet, before his deportation, Ullmann entrusted the score of the opera and its libretto, typed on the backs of official prisoner information sheets, to a fellow prisoner, who survived the Holocaust. Several decades lapsed until the manuscripts eventually found their way to the musical world. The premiere of the Kaiser von Atlantis finally took place in Amsterdam in 1975, some thirty years after its completion.<sup>13</sup>

The first part of *Mein Kampf* was published in Germany in 1925.<sup>14</sup> The book outlined its author’s ideology and future plan for Germany, but was not an instant success. For a few years, sales were in the range of several thousand copies per year. However, they increased with the author’s political success.<sup>15</sup> By 1933, the book sold over 800,000 copies, and in the

9. Michael Graubart, *The Emperor of Atlantis: The First British Production*, 150 THE MUSICAL TIMES, 85 (2009).

10. See generally, Guido Fackler, *Music in Concentration Camps 1933–1945*, 1 MUSIC & POLITICS 1 (Peter Logan trans., 2007); Kara Wheeler, *Melodies of a Nightmare: Music in the Holocaust*, 13 PERSP. 3 (2005) (discussing the various roles and types of music during the Holocaust); Melanie M. Hutchings, *A Comparative Analysis of the Musical Activities within Three German Occupied Concentration Camps: Warsaw, Terezin, and Auschwitz* (Aug. 5, 2012) (unpublished M.A. thesis, San Diego State University) available at [http://sdsu-dspace.calstate.edu/bitstream/handle/10211.10/2421/Hutchings\\_Melanie.pdf;sequence=1](http://sdsu-dspace.calstate.edu/bitstream/handle/10211.10/2421/Hutchings_Melanie.pdf;sequence=1);

Michal Bilstiger, *Viktor Ullmann’s Kaiser von Atlantis (“The Emperor of Atlantis”)*, MUZIKALIYA VIII/JUDAICA 4, 1 (2012) (“to the history of music, the 20<sup>th</sup> century added a genre previously unknown: the music of the concentration and extermination camps”).

11. Graubart, *supra* note 9, at 86; Bilstiger, *supra* note 10, at pp. 3-5 (offering a detailed analysis of the opera’s contents and the “spiritual message sent by the opera’s creators living in the extreme situation of an historical cataclysm”).

12. Bilstiger, *supra* note 10, at 5.

13. Graubart, *supra* note 9, at 85 (detailing the events leading to the survival of the manuscripts and the performance of the opera).

14. OTHMAR PLÖCKINGER, GESCHICHTE EINES BUCHES: ADOLF HITLERS MEIN KAMPF: 1922-1945 85 (2011); C. Caspar, *‘Mein Kampf’: A Best-Seller*, 20 JEWISH SOCIAL STUDIES 3, 4 (1958). The second part of the book was published in 1926.

15. Caspar, *supra* note 14, at 5.

years that followed sales rose to millions of copies per year.<sup>16</sup> With Hitler's rise to power, interest in the book outside of Germany also grew. In the United States and in France, abridged versions were published under a contract with the German publisher who obtained the rights from Hitler.<sup>17</sup> Yet, with the unfolding of events, it became clear that *Mein Kampf* contains not just propaganda, but also the seeds of Hitler's actual plans.<sup>18</sup> Therefore, the publication of the entire manuscript "assumed a more urgent character."<sup>19</sup> One full-but-edited version was authorized by Hitler's German publisher for circulation in the United States, but a second publisher who distributed an unauthorized full-text version was forced to cease distribution following a copyright infringement claim by the authorized publisher, Houghton Mifflin Co.<sup>20</sup> The court had affirmed Hitler's copyright. The defendants' claim that "the equities [were] in their favor" and that the publication of the entire manuscript comprised "a service of great social value" was proclaimed "bold."<sup>21</sup> Another unabridged version disseminated in France in 1934 was destroyed following a copyright infringement lawsuit by Hitler's publishers.<sup>22</sup> The French people had to make do with an authorized, edited translation, from which the anti-French passages that appeared in the original book were omitted.<sup>23</sup>

The Oyneg Shabes archives, like the Kaiser von Atlantis opera on the one hand and *Mein Kampf* on the other, are but a few examples of Holocaust-related works.<sup>24</sup> The duration and scope of the Holocaust, its

16. *Id.* at 5-6.

17. *Id.*

18. *Id.*, at 9-10. Sarah Smith, *The Kampf about Mein Kampf*, 19 B.U.L. REV. 633, 633-34 (1939) ("[Hitler's] plans were all formulated and narrated therein, and he was following them closely."). For one illustration, see the following passage:

If, at the beginning of the War, or even during the War, if twelve or fifteen thousand of these Hebraic corrupters of the nation had been subjected to poison gas, . . . then the sacrifice of millions in the front would not have been in vain. On the contrary . . .

MEIN KAMPF BY ADOLF HITLER, COMPLETE, UNABRIDGED, ANNOTATED BY NEWTON STEIN, 984 (1939).

19. John Chamberlain et al., *Publishers' Note to MEIN KAMPF BY ADOLF HITLER, COMPLETE, UNABRIDGED, ANNOTATED BY NEWTON STEIN* (1939).

20. *Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 104 F.2d 306 (2 Cir., 1939). *See also* Caspar, *supra* note 15, at 10.

21. *Houghton Mifflin Co.*, 104 F.2d. at 312. For an analysis of the legal questions discussed in court, particularly the question of Hitler's copyright as a "stateless person," see Note, "*Mein Kampf*" and the Protection of Literary Property of Stateless Persons 49 YALE L.J. 132 (1939). The distribution of a second, unauthorized and abridged version of the book which was disseminated in the United States during the same period was also enjoined following a copyright infringement claim by the authorized publishers—*Houton Mifflin Co. v. Noram Pub. Co.*, 28 F. Supp. 676 (S.D.N.Y. 1939).

22. Smith, *supra* note 18, at 634; Caspar, *supra* note 15, at 13.

23. Caspar, *supra* note 15, at 13.

24. We use the term 'Holocaust-related works' or "Holocaust-related materials" throughout this

occurrence in the midst of the twentieth century with photography and film technologies already available, and its setting at the heart of Europe, yielded countless documents, diaries, notes, memoirs, photographs, films, music, poems, letters, and additional artifacts.<sup>25</sup> On the Nazi side, these items include propaganda materials, such as the film *Triumph of the Will*<sup>26</sup>; materials produced as part of the organized documentation carried out by the Nazi regime; and monographs and diaries of prominent Nazi figures such as Hitler, Himmler, and Goebbels.<sup>27</sup> On the victims' part, these materials comprise various documents, photos, drawings, music sheets, poems, and diaries, many of which were produced as purposeful acts of social remembering and cultural preservation for future generations. Examples of such works include Kaiser von Atlantis, Mendel Grossman's photos from the Lodz ghetto,<sup>28</sup> Anne Frank's diary,<sup>29</sup> and the secret archives of the Kovno Jewish Ghetto Police.<sup>30</sup> Whether created by victims or by perpetrators, these authentic real-time materials give us a glimpse into an event whose magnitude and extremity are difficult to

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article to refer primarily to two types of materials: (1) works produced by Holocaust victims during the Holocaust; and (2) works produced by the Nazi regime and its collaborators either during the Holocaust or in proximity thereto. Thus, works such as *Mein Kampf* or the film *Triumph of the Will* that were created during the rise to power of the Nazi regime (but before the Holocaust) are included among the Holocaust-related materials discussed in this article.

<sup>25</sup> For the magnitude of Holocaust-related materials, see, e.g., Karen C. Coe, United States Holocaust Memorial Museum, TESTIMONY BEFORE THE SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ONE HUNDRED TENTH CONGRESS, SECOND SESSION, MARCH 13, 2008, SERIAL NO. 110-131 "PROMOTING THE USE OF ORPHAN WORK: BALANCING THE INTERESTS OF COPYRIGHT OWNERS AND USERS," available at <http://www.copyright.gov/orphan/orphan-hearing-3-10-2008.pdf> (hereafter: "Testimony of Holocaust Memorial Museum") (indicating that "the United States Holocaust Memorial Museum has acquired and currently maintains 42 millions pages of archival documents, 77,000 photographs, and 985 hours of historical film footage"). See also YAD VASHEM, THE WORLD HOLOCAUST REMEMBRANCE CENTER, available at <http://www.yadvashem.org/yv/he/about/documentation.asp> (reporting that the Yad Vashem archives contain 125 million pages of Holocaust documents and 420,000 photographs).

26. For a detailed description of the film, see *May Devereaux, Beauty and Evil: The case of Leni Riefenstahl'S Triumph of the Will*, in JERROLD LEVINSON, ED., AESTHETICS AND ETHICS: ESSAYS AT THE INTERSECTION, 227 (1998), and the discussion in Part I, *infra*.

27. See, e.g., Ed Mazza, *Nazi Heinrich Himmler's Lost Diaries Show How He Mixed Family With Mass Murder*, THE HUFFINGTON POST (August 3 2016), available at [http://www.huffingtonpost.com/entry/heinrich-himmler-diaries\\_us\\_57a1a09de4b0e2e15eb7db40](http://www.huffingtonpost.com/entry/heinrich-himmler-diaries_us_57a1a09de4b0e2e15eb7db40); Dalya Alberge, *Joseph Goebbels' Family Win Legal Battle to be Paid Royalties for Diary Extracts*, THE GUARDIAN (Jul. 9, 2015) available at <https://www.theguardian.com/world/2015/jul/09/joseph-goebbels-family-royalties-diaries-nazi-propaganda-minister>. For the recent legal proceedings concerning Goebbels diaries, see *infra*, notes 137-137 and the accompanying text.

28. For the story of the Grossman photo archive, see Part II *infra*, notes 117-118 and the accompanying text.

29. See Foreword, ANNE FRANK, A DIARY OF A YOUNG GIRL: THE DEFINITIVE EDITION, at 2 (ED. OTTO H. FRANK AND MIRJAM PRESSLET, TRANS. SUSAN MASSOTTI, 1995). For a discussion of Anne Frank's diary, see Part II *infra*.

30. THE CLANDESTINE HISTORY OF THE KOVNO JEWISH GHETTO POLICE 63 (ANONYMOUS MEMBERS OF THE KOVNO JEWISH GHETTO POLICE, TRANS. & ED. SAMUEL SCHALKOWSKY, WITH AN INTRODUCTION BY SAMUEL D. KASSOW (2014) (hereinafter: "THE CLANDESTINE HISTORY"). For the story of the archive, see Part II *infra*.

express post factum.<sup>31</sup> As the number of live witnesses decreases, the significance of these materials increases.

Concomitantly, many of these materials are (or were until very recently) subject to copyright—a private law, market-based mechanism that allocates proprietary rights to the creators of literary, dramatic, musical, and artistic works.<sup>32</sup> The interface between copyright law and the Holocaust raises acute questions concerning both copyright law and the collective memory of the Holocaust. For example, should copyright serve as a vehicle for limiting access to the full text of *Mein Kampf*? Should Nazi propaganda materials award their creators with a stamp of authorship and entitle them to royalties, just like any ordinary copyrighted work? And how should copyright law treat works like the Kaiser von Atlantis or the Oyneg Shabes Archives—works whose creation was motivated not by monetary considerations but by the urgent need to leave a memory to future generations? Works whose ‘chain of distribution’ involved inevitable burial and concealment? It is this interface of copyright and the Holocaust that we explore in this article.

Our argument is two-fold. First, we aim to illuminate the heretofore unexplored impact of copyright law on the collective memory and historical narratives of the Holocaust. Simply put, collective memory and historical narratives rely, to a large extent, on public access to authentic materials.<sup>33</sup> Therefore, and given that numerous Holocaust-related materials were or still are subject to copyright protection, the copyright regime has affected and still affects the collective memory of the Holocaust in nuanced, indirect manners, by limiting the availability of these materials to the public, which in turn hinders the dissemination of knowledge about, and remembrance of the Holocaust. We seek to begin unraveling this impact, focusing specifically on the influence of copyright law on museums, archives, and additional Holocaust remembrance-institutions.

Second, and relatedly, we highlight significant tensions at the interface of copyright law and the Holocaust. Copyright’s principal paradigm of inducing the creation of cultural products by allocating private proprietary rights to their creators is largely irrelevant with respect to numerous Holocaust-related materials. Furthermore, copyright law’s standard doctrinal toolbox does not envision extreme circumstances of genocide and cultural extinction. Therefore, the ‘ordinary’ application of copyright

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31. For a discussion of this point, see Part I, *infra*, notes 62-66 and the accompanying text.

32. See Copyright Act, 17 U.S.C. § 102 (detailing the various subject matter of copyright protection). For copyright’s duration and its subsistence in various Holocaust-related materials, see *infra*, notes 35-39 and the accompanying text.

33. See the discussion in Part I *infra*.

law to Holocaust-related materials raises a series of theoretical and doctrinal challenges and can yield socially undesirable outcomes. To illustrate, heirs and successors of the Nazi regime exercise their copyright in prominent Nazi materials to generate royalties, thereby potentially impacting the Holocaust's narrative. On the other end of the spectrum, institutions dedicated to the commemoration of the Holocaust may be hesitant to publish victims' works created during the genocide, due to copyright constraints. By closely examining various case studies, we identify, classify, and analyze the principal points of friction between the copyright regime and the Holocaust. Some of these tensions are unique to the Holocaust, others subsist in additional circumstances but are brought to the extreme given the radical circumstances of the Holocaust. We further present several normative recommendations that would alleviate or at least mitigate these conflicts.

Whereas copyright aspects of several specific Holocaust-related materials have received limited scholarly attention and media coverage,<sup>34</sup> the interface of copyright and the Holocaust, as such, has not been the subject of a systematic and critical scholarly analysis. Through this article, we take the first steps toward filling in this gap. Our analysis demonstrates that a systematic exploration of the relationship between copyright and the Holocaust brings to the fore unique aspects common to various Holocaust-related materials, enables identification of the principal tensions between copyright and the Holocaust, and allows to devise initial solutions.

Before commencing our exploration, a preliminary question must be addressed: is the inquiry initiated herein still relevant given that more than

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34. For existing scholarly discussions, see, prominently, Note, *supra* note 21; Smith, *supra* note 18 (published in 1939, these two articles discussing the U.S. court decisions concerning *Mein Kampf*); Jessica M. Silbey, *Evidence Verité and the Law of Film*, 31 CARDOZO L. REV. 1257 (2010) (discussing the film *Triumph of the Will* as a form of artistic political expression); Aaron Schwabach, *Reclaiming Copyright From the Outside In: What the Downfall Hitler Meme Means for Transformative Works, Fair Use, and Parody* 8 BUFF. INTEL. PROP. L. J. 1 (2012) (discussing contemporary video parodies depicting Hitler, based on segments from the film "Downfall"); Roberta Rosenthal Kwall, *Protecting Anne Frank's Voice—Even 7 Decades Later*, (Jan. 2, 2016), available at <http://forward.com/opinion/328250/protecting-anne-franks-voice-even-7-decades-later/> (discussing the application of a moral rights regime to protect Anne Frank's authentic 'voice' from unauthorized alterations); ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY*, 100-101 (2010) (discussing the question of moral rights in portraits painted by a Holocaust victim in the direction of Joseph Mengele); Hubert Best, *The Spoils of War*, BIRD & BIRD, (Jan. 7, 2002) available at <http://www.twobirds.com/en/news/articles/2002/germanfilmsandukenemypropertyact1953pt1> (discussing the effect of the U.K. Enemy Property Act 1953 on copyright subsisting in Nazi propaganda films); Clemens Bogedain, *'Mein Kampf', der 'Mythus des 20. Jahrhunderts' und die 'Goebbels-Tagebücher': Werke früherer NS-Größen im Spannungsfeld von Strafrecht, Urheberrecht und künftiger Gemeinfreiheit* ZUM 205 (2015) (discussing copyright and criminal aspects of works of prominent Nazi figures); Martin Husovec, *A Copyright Story of an Infamous Book*, HUSCO'S TECH. LAW BLOG, (October 3, 2016), available at <http://www.husovec.eu/2016/03/a-copyright-story-of-infamous-book.html> (discussing the post-war confiscation of copyright in *Mein Kampf* by the state of Bavaria).

seventy years have lapsed since the end of World War II, and copyright protection commonly expires seventy years after the author's death?<sup>35</sup> A close look reveals that the answer is positive. Numerous Holocaust-related materials are still subject to copyright protection, and will remain so for the next decades. Nazi propaganda and documentation materials generally remain under copyright, since many of their creators survived the War. For example, copyright in the writings of Otto Skorzeny, head of the German Commandos during the War, will likely subsist until 2045,<sup>36</sup> while copyright in *Triumph of the Will* in certain jurisdictions may not expire before 2030.<sup>37</sup> On the victims' side, there is a massive number of works produced during the Holocaust whose authors' identities and fates are unknown.<sup>38</sup> In the case of such anonymous works, copyright in the United States endures for ninety-five years from the year of first publication of the work (which often occurred years after the War), or for a hundred-and-twenty years from the year of the work's creation.<sup>39</sup> In other instances, works of victims whose identities are known were often first published many years after the end of the War. In such cases, according to a complex web of provisions in copyright legislation, the works may be protected for ninety-five years from the year of their first publication, or (in some instances) until 2047.<sup>40</sup> Therefore, copyright still subsists in myriad Holocaust-related materials. In addition, as we elaborate below, even where copyright protection in certain materials has expired, its subsistence until very recently has likely shaped social memory. Altogether, then, our inquiry is by no means "a thing of the past."

Finally, our analysis concentrates primarily on U.S. copyright law, with occasional references to European, mostly German, copyright law. One should note, however, that various (European and other) copyright regimes may potentially apply to some of the Holocaust-related materials we discuss, particularly when such materials are digitized and accessible online. A thorough review of the treatment of Holocaust-related materials

35. See § 302-303 of the U.S. Copyright Act (1976).

36. Based on the manuscript's publication in 1950, as well as Skorzeny's passing in 1975—Charles Messenger, Foreword, in OTTO SKORZENY, SKORZENY'S SPECIAL MISSIONS, xi (1957) (noting that Skorzeny "died peacefully in his bed . . . in 1975").

37. The film was first published in Europe in 1935. Therefore copyright protection seemingly subsists for 95 years—see §§ 303-304 of the U.S. Copyright Act. However, it is not entirely clear whether copyright in the film was automatically restored under the provisions of § 104A of the Copyright Act, or conversely, whether the film was excluded from restoration under the exception set out in § 104A(a)(2) of the Act. For elaboration on the copyright questions surrounding *Triumph of the Will*, and the question of copyright restoration in Nazi works, see Part II *infra*, notes 122–146 and the accompanying text.

38. See the discussion of orphan works in Part II.D, *infra*.

39. See, e.g., § 304 of the U.S. Copyright Act.

40. See §§ 303(a)-304 of the U.S. Copyright Act.

under different copyright jurisdictions and the interactions between these various regimes exceeds the scope of this article.<sup>41</sup> Yet, the possible applicability of various copyright regimes likely increases the overall impact of copyright over the Holocaust's collective memory.

Our discussion proceeds as follows: Part I locates our study within the landscape of copyright law and Holocaust collective memory. We begin by providing necessary background on the concept of collective memory, and the influence of copyright on social remembrance practices and collective memory. We then proceed to focus specifically on the relations between copyright law and the construction of the Holocaust memory. Part II 'zooms-in' to critically analyze the interface of the Holocaust and copyright doctrine. Relying on various examples and case studies, we map and analyze the principal dilemmas and tensions that arise when applying the ordinary 'algorithm' of copyright law to Holocaust-related materials.<sup>42</sup> This investigation further illuminates socially undesirable implications of the current legal regime. Against this analysis, Part III proceeds to advance several normative recommendations designed to alleviate these difficulties and calibrate the application of copyright law to Holocaust-related materials in a manner responsive to the exceptional circumstances surrounding these materials. We conclude with several particular lessons that may be learnt from the exploration of the copyright-Holocaust interface, and with some broader questions concerning copyright and social memory, which our exploration illuminates.

## I. COLLECTIVE MEMORY, COPYRIGHT, AND THE HOLOCAUST

The concept of collective memory, developed by leading sociologists, refers to the joint recollection of the past by a nation, a community, or additional groups with elements of a joint identity.<sup>43</sup> The underlying assumption is that peoples' memories are shaped not just through their own individual experiences but also through social processes and

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41. The matter is complex, involves questions of jurisdiction and international law, and certainly deserves further exploration. To illustrate, the Berne Convention for the Protection of Literary and Artistic Works (Art. 3) sets out a principle of "national treatment, under which works whose authors are nationals of a State which is a party to the convention, or works first published in such a State, must be given protection in each of the other member States, as the latter grant to the works of their own nationals. Moreover, given the online storage of numerous copyrighted works, certain uses of works that are copyright protected under a European regime, especially in digital context, may trigger liability under the foreign law, even if such actions are carried out by a U.S. user.

42. We should perhaps clarify that we use the term "copyright algorithm" in this article metaphorically, to refer to the entire body of copyright law, theory and doctrine, and the ways in which it is applied, and *not* to any software algorithm.

43. The origins of the study of collective memory as a social construct are attributed to Maurice Halbwachs—see MAURICE HALBWACHS, ON COLLECTIVE MEMORY (ED. AND TRANS. LEWIS A. COSER) (1992).

discursive engagements.<sup>44</sup> These processes involve the accumulation of individual memories into integrated narratives about the past.<sup>45</sup> Elements of collective memory thus comprise the shared knowledge, experiences, and imageries of individuals about their joint past.<sup>46</sup> They are entangled in various dimensions of life and influence the formation of self-identity, ideological and political acts, and cultural meaning-making processes.<sup>47</sup> They travel across generations and affect both the group's internal social relations and its relations with other nations and communities.<sup>48</sup> Collective memory, therefore, is imminent for narrating and reflecting the life-stories of nations and communities<sup>49</sup> and for shaping collective identities.<sup>50</sup>

Among the historical events whose impact on collective memory is well recognized, the Holocaust is perhaps the most influential. As the largest event of genocide and mass atrocity, the Holocaust captures a unique place in the collective memory of numerous nations and communities worldwide.<sup>51</sup> Ample research has documented its impact on the collective memories of the State of Israel,<sup>52</sup> post-War Germany,<sup>53</sup> Jewish communities in the United States and elsewhere,<sup>54</sup> as well as on the memory of various additional states and communities.<sup>55</sup>

44. See, e.g., Jeffrey K. Olick; Joyce Robbins, *Social Memory Studies: From "Collective Memory" to the Historical Sociology of Mnemonic Practices*, 24 ANNUAL REV. SOC. 105, 106 (1998); Jeffrey K. Olick, Vered Vinitzky-Seroussi & Daniel Levy, *Introduction*, in THE COLLECTIVE MEMORY READER 8-29 (2011); Jeffrey K. Olick, *Collective Memory: The Two Cultures*, 17 SOC. THEORY 333, 334-335 (1999).

45. Olick, *Collective Memory: The Two Cultures*, *supra* note 44, at 342; Eviatar Zerubavel, *Social Memories: Steps to a Sociology of the Past*, 19 QUALITATIVE SOCIOLOGY 293, 290 (1996).

46. *Id.*

47. Barbie Zelizer, *Reading the Past Against the Grain: The Shape of Memory Studies*, 12 CRITICAL STUDIES IN MASS COMMUNICATION 214, 226-228 (1995); Jan Assmann, *Collective Memory and Cultural Identity*, 65 NEW GERMAN CRITIQUE 125, 126 (1995).

48. Ross Poole, *Memory, History and the Claims of the Past*, 1(2) MEMORY STUDIES, 149 (2008); Olick, *Collective Memory: The Two Cultures*, *supra* note 44.

49. YAEL ZERUBAVEL, *RECOVERED ROOTS: COLLECTIVE MEMORY AND THE MAKING OF ISRAELI NATIONAL TRADITION* 11 (1995).

50. Zelizer, *supra* note 47; Assmann, *supra* note 47.

51. See, generally, Saul Friedlander, *Introduction*, in SAUL FRIEDLANDER, ED., *PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE "FINAL SOLUTION"* 1-21 (1992); PETER NOVICK, *THE HOLOCAUST AND COLLECTIVE MEMORY: THE AMERICAN EXPERIENCE* (1999).

52. See, e.g., TOM SEGEV, *THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST* (HAIM WATZMAN TRANSL., 1993).

53. See, e.g., BILL NIVEN & CHLOE PAVER, *MEMORIALIZATION IN GERMANY SINCE 1945* (2010).

54. See, e.g., Anita Shapira, *The Holocaust: Private Memories, Public Memory*, 4 JEWISH SOC. STUD. 40 (1998); ROBERTA ROSENTHAL KWALL, *THE MYTH OF THE CULTURAL JEW* (2015); JAMES E. YOUNG, *THE TEXTURE OF MEMORY: HOLOCAUST MEMORIALS AND MEANING* (1993).

55. See, e.g., Sheng Mei Ma, *Contrasting Two Survival Literatures: On the Jewish Holocaust and the Chinese Cultural Revolution*, 2 HOLOCAUST AND GENOCIDE STUDIES, 81, 81 (1987) (observing that "indeed, 'Holocaust' has become so universal a reference point that even contemporary Chinese writers, who live thousands of miles from the place of Nazi brutality and possess only scanty knowledge of the details of the Holocaust, came to call their horrendous experiences during the Cultural Revolution 'the ten-year Holocaust.' Yet the Cultural Revolution was

As “an event at the limits,” the Holocaust’s extremity and radicalness generate a range of interactions with collective memory.<sup>56</sup> The following discussion concentrates on those aspects that are particularly relevant for clarifying the connection between the Holocaust’s collective memory and copyright law.

Collective memory, in general, is based on artifacts, documents, rituals, and additional elements that affect meaning-making processes. Among these elements, expressive works and authentic documentary materials are often fundamental to the formation of the narratives that constitute elements of collective memory.<sup>57</sup> For example, scholars observe that the direct, authentic documentation of the My Lai massacre and the Kennedy assassination through audio-visual means conveys a sense of historical truth that is absent from indirect, *ex post*, verbal description.<sup>58</sup> Similarly, the use of original, authentic, documents from constitutive events increases the effectiveness of discursive engagements.<sup>59</sup>

These observations are particularly critical with respect to the Holocaust due to what has become known as the “problem of representation”.<sup>60</sup> The magnitude of the genocide, its “blatant criminality, its coordinated exploitation of all modern resources, cultural and technological,” make it extremely difficult to perceive the Holocaust as a reality.<sup>61</sup> The scope and attributes of the tragedy “do not let the imagination take off” and the moral crisis cannot be fully conveyed by means of conventional storytelling.<sup>62</sup> The famous metaphor of “the other

very different from the Holocaust and to use the same term for both is to distort these different historical events and to dilute the term ‘Holocaust’ to the point of meaninglessness”).

56. The phrase “an event at the limits” was coined by Friedlander, *supra* note 51 at 2-3 (“... we are dealing with ... ‘an event at the limits’ ... the most radical form of genocide encountered in history”).

57. See, generally, JACQUES LE GOFF, *HISTORY AND MEMORY* (1992); John Urry, *How Societies Remember the Past*, in *THEORIZING MUSEUMS*, 46, 63 (SHARON MACDONALD & GORDON FYFE EDITORS, 1996); MOTI NEIGER, OREN MEYERS & EYAL ZANDBERG, *ONE MEDIA MEMORY: COLLECTIVE MEMORY IN A NEW MEDIA AGE* (2011); MARSHALL MCLUHAN & ERIC MCLUHAN, *LAWS OF MEDIA—THE NEW SCIENCE*, 13-91 (1988); HERBERT ALTSCHULL, *FROM MILTON TO MCLUHAN—THE IDEAS BEHIND AMERICAN JOURNALISM*, 337-348 (1990).

58. See Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?* 17 *UCLA L. REV.* 1180, 1186-1204 (1970) (using the examples of the My Lai massacre and the Kennedy assassination as instances regarding which direct, authentic documentation is necessary to convey the meaning and ramifications of the event).

59. See Neil W. Netanel, *Locating Copyright within the First Amendment Skein*, 54 *STAN. L. REV.*, 1, 14-15 (2001) (arguing that quoting verbatim from literary texts and works significantly enhances the effectiveness of communicating the meaning, significance, and implications of the quoted text).

60. Friedlander, *supra* note 56, at 3 (explaining that the Holocaust “tests our traditional conceptual and representational categories”).

61. Geoffrey H. Hartman, *Introduction: Darkness Visible*, in GEOFFREY H. HARTMAN, ED., *HOLOCAUST REMEMBRANCE: THE SHAPES OF MEMORY*, 1, 4, 6 (1994).

62. See Oren Meyers, Eyal Zandberg & Moti Neiger, *Prime Time Commemoration: An Analysis of Television Broadcasts on Israel’s Memorial Day for the Holocaust and the Heroism* 59 *J. OF*

planet” illustrates this difficulty. The image is based on the testimony of writer and Holocaust survivor Yehiel Dinur (Ka-Tzetnik), during the Eichmann trial, where he used it to describe his experiences at Auschwitz:

Time there is not like it is here on earth . . . The inhabitants of this planet had no names, they had no parents nor did they have children . . . They breathed according to different laws of nature, they did not live—nor did they die—according to the laws of this world. . .<sup>63</sup>

In light of the problem of representation, scholarship emphasizes that understanding and absorbing the Holocaust necessitates exposure to diverse materials that unravel the numerous dimensions of life on “the other planet”—materials that reflect the atrocities of the Nazi regime, the victims’ struggle, and the stories of those who did not survive. Such materials include not only the direct representations of the genocide, but also piecemeal documentation of small segments of life during the Holocaust on the one hand, and of the various aspects of the Nazi machinery on the other.<sup>64</sup> Overall, then, the perception of the Holocaust’s historical narrative and its moral ramifications, as well as the endurance of its collective memory, depend upon the ability to access and use myriad authentic materials such as letters, notes, lists, diaries, memoirs, archives, film footage, drawings, and photographs, created throughout the events either by the victims or by the Nazi perpetrators.<sup>65</sup> As we further demonstrate in the next Part, not only were such materials ubiquitously produced, but many of them were created by victims with the explicit goal of providing future generations with authentic records of their personal experiences in the face of imminent extermination and cultural extinction.<sup>66</sup>

Scholarship also recognizes that the law plays a part in constructing historical narratives and collective memory—both in general and with respect to the Holocaust in particular.<sup>67</sup> One prominent example is the role of judicial or quasi-judicial institutions as agents of collective memory, particularly in times of post-trauma. For example, the Nuremberg trials and the Eichmann trial, which took place after World War II, brought the

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COMM. 456, 459 (2009); *cf.* Hartman, *supra* note 61, at 2 (“the imagination has little occasion to leap”).

63. See Criminal Case 40/61 The Attorney General of the State of Israel v. Adolf Eichmann, Record of Proceedings in the District Court in Jerusalem, Session 68, Part 1, June 7 1961, available via “NIZKOR PROJECT”, <http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-068-01.html>.

64. Meyers et al., *supra* note 62.

65. See Introduction *supra*, notes 25–30 and the accompanying text.

66. See the discussion in Part II *infra*, notes 107–121 and the accompanying text;

67. See, generally, Joachim J. Savelsberg & Ryan D. King, *Law & Collective Memory*, 3 ANN. REV. L. & SOC. SCI. 189 (2007).

historical narrative of the Holocaust to the fore and played a significant role in constructing its history and memory.<sup>68</sup> Additional, more nuanced examples of law's impact concern legal norms that regulate access to and dissemination of information. Illustrative of this type of influence are libel laws, or laws prohibiting Holocaust denial, which regulate "what can be said about the past."<sup>69</sup>

This latter observation concerning the indirect impact of different laws on the narratives of the Holocaust prompts us to explore the significant—yet largely unnoticed—role of copyright law in constructing the Holocaust's memory. Copyright is a legal regime that grants proprietary rights in expressive and cultural works, including literary, musical, and artistic works, as well as photographs and audio-visual works.<sup>70</sup> By controlling the access to and the utilization of such materials, copyright law governs their use as part of collective memory processes, and, similar to other laws, imposes certain regulation on "what can be said about the past", and on which conditions. Since myriad Holocaust-related materials are still under copyright protection, and will remain so through the next decades,<sup>71</sup> copyright can substantially affect the construction of the Holocaust's historical narratives and collective memory. Indeed, this effect is not merely abstract. As we demonstrate throughout this article, copyright is very much present in the sphere of Holocaust-related materials.<sup>72</sup> Thus, for example, Nazi propaganda materials and monographs of prominent Nazi figures are declared copyright-protected works.<sup>73</sup> This status entitles their authors or their heirs to royalties and may impose significant constraints on Holocaust research.<sup>74</sup>

68. See, e.g., MARTHA L. MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); Savelsberg & King, *supra* note 67, at 192-193; Renana Keidar, *Rethinking Plurality: On Ethics and Storytelling in the Search for Justice* 1 DIBUR, 19 (2015); HANNA YABLONKA, THE STATE OF ISRAEL VS. ADOLF EICHMANN (2004); ANNETTE WIEVIORKA, THE ERA OF THE WITNESS (TRANS. JARED STARK, 2006).

69. Savelsberg & King, *supra* note 67, at 197-199; Leora Bilsky & Hemda Gur-Aryeh, *The Judenrat as Collaborator: Libel Law in the Service of Memory*, 12 MISHPAT U-MIMSHAL, 33 (2009) (in Hebrew). An additional example concerns a controversial bill recently approved by the Polish Parliament, which prohibits assertions that ". . . the Polish Nation or the Republic of Poland is responsible or co-responsible for Nazi crimes committed by the Third Reich . . ."—see "Full Text of Poland's Controversial Holocaust Legislation", THE TIMES OF ISRAEL, February 1st, 2018, available at <https://www.timesofisrael.com/full-text-of-polands-controversial-holocaust-legislation/>.

70. See 17 U.S.C. § 102 ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.").

71. *Supra*, notes 35–39 and the accompanying text.

72. Part II *infra*.

73. See the discussion in Part II *infra*, notes 130–137 and the accompanying text.

74. Matthew Reisz, *Royalties for Nazi Writing*, TIMES HIGHER EDUCATION (Apr. 30, 2015)

Remembrance institutions dedicated to the commemoration of the Holocaust are constrained in their ability to use masses of authentic works created by anonymous victims;<sup>75</sup> and significant royalties are charged for the use of archival footage documenting the genocide.<sup>76</sup>

Existing copyright scholarship has highlighted copyright's potential influence on historical narratives and public discourse.<sup>77</sup> However, none of these discussions focuses on the memory of the Holocaust. Moreover, extant scholarship tends to concentrate on the constraints which copyright imposes on contemporary discourse, thus framing the topic as a conflict between copyright and free speech.<sup>78</sup> Yet the case of Holocaust-related materials clearly demonstrates that copyright's impact is not confined to current discourses and expressive activities. Rather, it extends to the formation of collective memory and to future generations.<sup>79</sup>

Several factors expand copyright's grasp and enhance its impact on the Holocaust's collective memory. The first concerns a unique combination of properties that characterize Holocaust-related materials and hinder access thereto under existing copyright doctrine. Briefly, Holocaust-related materials authored by victims are often unpublished, a fact which constrains the applicability of statutory exceptions designed to limit the control of copyright.<sup>80</sup> Similarly, while the Holocaust's problem of representation makes access to authentic materials especially vital,<sup>81</sup> the existing "copyright algorithm" is not designed to facilitate access to entire, authentic works (as opposed to partial paraphrases).<sup>82</sup> In addition, the Holocaust yielded enormous amounts of 'orphan works,' namely "copyrighted works whose owners are difficult or even impossible to locate."<sup>83</sup> The need to obtain copyright clearance in order to use these

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available at <https://www.insidehighered.com/news/2015/04/30/scholars-are-troubled-legal-battle-over-goebbels%E2%80%99s-diaries> (interviewing various historians who observe that recent enforcement of copyright in materials composed by Nazi officials are likely to produce a substantial chilling effect on Holocaust research).

75. See the discussion in Part II.D *infra*.

76. See the discussion in Part II *infra*, notes 138–139 and the accompanying text.

77. For discussions of copyright's impact on historically significant materials, see, for example, P. King, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L. J., 1565, 1571, 1573 (1984); SIGMUND TIMBERG, NEW FORMS OF MEDIA AND THE CHALLENGE TO COPYRIGHT, FAIR USE AND FREE INQUIRY, 248, 253-255 (J.S. LAWRENCE & B. TIMBERG EDS., 1980); Nimmer, *supra* note 58; Netanel, *supra* note 59.

78. *Id.*

79. Cf. Sonia Kaytal, *Technoheritage*, 105 CAL. L. REV. 1111 (2017) (exploring the significance of copyright protection for cultural heritage in the context of museums).

80. See the discussion in Part II.B, *infra*.

81. *Supra*, notes 61-66 and the accompanying text.

82. See the discussion in Part II.C, *infra*.

83. See REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 1, 22 (Jan. 2006) available at <http://www.copyright.gov/orphan/orphan-report.pdf> (explaining that the most common obstacles to locating a copyright owner are "(1) inadequate identifying information on a particular copy of the work; (2) inadequate information about copyright ownership because of a change of ownership or a

works constitutes a serious impediment that may jeopardize such use.<sup>84</sup> We discuss these attributes in detail in the following Part, against a close scrutiny of copyright doctrine.<sup>85</sup> The important point at this stage is that each of these characteristics, and the combination thereof, casts doubt over the possibility of making Holocaust-related materials available to the public, and, in turn, increases copyright's influence on the Holocaust's narratives and memory.

Second, and relatedly, copyright's impact is intensified in light of the fundamental role of remembrance institutions in the formation of the Holocaust's memory and their sensitivity to copyright constraints. Remembrance institutions are entities such as archives, libraries, and museums, which select, document, preserve and provide access to documents, artifacts, and additional materials.<sup>86</sup> Numerous remembrance institutions were established after the Holocaust in Israel, the United States, Europe, and elsewhere, with the explicit mission of commemorating the Holocaust for current and future generations.<sup>87</sup> A primary aim of these institutions is to preserve Holocaust-related materials and make them available to the public through archives, public exhibitions, and digital collections.<sup>88</sup> Notably, numerous Holocaust-related materials likely do not have sufficient market demand to be distributed through regular market channels. This is particularly true with respect to the abundant piecemeal letters, notes, photos, illustrations, and additional artifacts, which cannot compete in the art market, yet together comprise a bricolage that conveys the realities of the Holocaust.<sup>89</sup> As a practical matter, Holocaust remembrance institutions are often the only way to preserve these works and expose them to the public.

A broad range of scholarship acknowledges that remembrance

change in the circumstances of the owner; (3) limitations of existing copyright ownership information sources; and (4) difficulties researching copyright information").

84. See the discussion in Part II.D, *infra*.

85. *Infra*, Part II.

86. See Guy Pessach, *[Networked] Memory Institutions Social Remembering: Privatization and its Discontents*, 26 CARDOZO ARTS & ENT. L. J. 71, 73 (2008).

87. See, e.g., YAD VASHEM — THE WORLD HOLOCAUST REMEMBRANCE CENTER — "Mission Statement", <http://www.yadvashem.org/about/mission-statement>; THE UNITED STATES HOLOCAUST MEMORIAL MUSEUM — "Mission and History", <https://www.ushmm.org/information/about-the-museum/mission-and-history>.

88. See, e.g., "The Holocaust Survivors and Victims Resource Center" and the "World Memory Project", at the United States Holocaust Memorial Museum (<https://www.ushmm.org/remember/the-holocaust-survivors-and-victims-resource-center>; <https://www.ushmm.org/online/world-memory-project/>); The archives and collections of Yad Vashem, The World Holocaust Remembrance Center at <http://www.yadvashem.org/archive/about/our-collections>.

89. See Testimony of Holocaust Memorial Museum, *supra* note 25, at 66 ("while the Museum's works have considerable historical and cultural value, they are rarely works of intrinsic artistic value such that they could compete in a fine art market"). For further discussion of this point, see Part II.D *infra*, note 216 and accompanying text.

institutions are generally susceptible to copyright law's constraints, since many of their activities—including copying, reproduction, and distribution of archival copyrighted materials—are governed by the proprietary regime of copyright law.<sup>90</sup> This impact of copyright has intensified in the age of 'mass digitization', namely digitization projects that involve a massive number of copyrighted works, converted into a digital format.<sup>91</sup> While digitization and the Internet provide remembrance institutions with promising capacities for the preservation, distribution, and display of materials, copyright law generally governs such activities. Therefore, mass digitization enhances copyright's centrality in the operations of remembrance institutions, and, in turn, expands these institutions' dependence on copyright owners.<sup>92</sup> Moreover, absent an applicable copyright exception, mass digitization requires that remembrance institutions engage in a case-by-case copyright clearance of the entire contents of their collections—a costly and often impractical task that becomes even more complicated when orphan works constitute a substantial portion of the collection.<sup>93</sup>

In principle, copyright law aspires to deal with some of these obstacles through exemption schemes embedded in copyright doctrine. Chief among these schemes is fair use—a statutory doctrine that permits certain uses of copyrighted material without the owners' consent, and constitutes the principal limitation to the exclusive rights of copyright owners.<sup>94</sup> However, ample literature suggests that the extant schemes provide only partial and limited solutions for the activities of remembrance institutions.<sup>95</sup>

90. See, generally, Pessach, *supra* note 86; Diane Leenheer Zimmerman, *Can Our Culture Be Saved? The Future of Digital Archiving*, 91 MINN. L. REV. 989 (2007); Emily Hudson & Andrew T. Kenyon, *Without Walls: Copyright Law and Digital Collections in Australian Cultural Institutions* 42 SCRIPTED 197 (2007) doi:10.2966/scrip.040207.x; Emily Hudson & Andrew T. Kenyon, *Digital Access: The Impact Of Copyright On Digitisation Practices In Australian Museums, Galleries, Libraries, and Archives* 31 U. NEW SOUTH WALES L. J. 12 (2007).

91. See Maria A. Pallante, *Orphan Works and Mass Digitization: Obstacles and Opportunities*, 27 BERKELEY TECH. L.J. 1251 (2012); MARIA F. PALLANTE, ORPHAN WORKS AND MASS DIGITIZATION: A REPORT OF THE REGISTER OF COPYRIGHT (June, 2015) (hereinafter "ORPHAN WORKS AND MASS DIGITIZATION REPORT"), <http://www.copyright.gov/orphan/reports/orphan-works2015.pdf>, at pp. 72-73.

92. *Id.*

93. See the discussion in Part II.D, *infra*. See also Anna Vuopala, *Assessment of the Orphan Works Issue and Costs for Rights Clearance, European Commission, DG INFSO* (Feb. 2010), [http://cultivate-cier.nl/wp-content/uploads/2012/03/vuopala\\_report.pdf](http://cultivate-cier.nl/wp-content/uploads/2012/03/vuopala_report.pdf) (providing data from actual digitization projects that illustrate the scope of the problem of orphan works and its impact on the time and effort that rights clearance requires in different sectors of cultural institutions).

94. 17 U.S.C. § 107. For a detailed discussion, see Part II.B & C, *infra*.

95. See, e.g., Zimmerman, *supra* note 90, at 1020-1026 (explaining that the application of the fair use doctrine to large scale reproductions of entire copyrighted works for digital preservation projects is questionable at best, particularly when such projects aim to make the materials accessible to the public), and the discussion in Part II.D, *infra*.

We discuss these schemes in detail in the next Part and demonstrate that the solutions they offer are even more partial and far from satisfactory with regard to Holocaust-related materials, given their unique attributes. The point we wish to make at this stage, however, is that the questionable application of copyright exceptions to the activities of Holocaust remembrance institutions combined with the significance of these institutions in commemorating the Holocaust, may yield an undesirable chilling effect. As copyright scholars recently observed, the uncertainties of copyright doctrine make it extremely difficult to predict the prospects of a fair-use argument *ex ante*.<sup>96</sup> These uncertainties, together with the anticipated costs of a copyright infringement suit, may deter those who seek to use copyrighted materials from relying on the exceptions to copyright protection in the first place. Instead, risk aversion directs users to seek licenses, or to completely refrain from using certain materials—even when their use may well be permitted under the fair use doctrine or another copyright exception scheme, or when the subject matter is likely free of copyright protection.<sup>97</sup>

Since Holocaust remembrance institutions are commonly not-for-profit entities, their copyright policies are likely to reflect such risk aversion, and in turn to prevent them from making certain Holocaust-related materials available to the public.<sup>98</sup> The testimony of the U.S. Holocaust Memorial Museum before the U.S. Congress, in a hearing concerning orphan works, clearly demonstrates that this concern is not merely theoretical:

The museum is, therefore, the custodian of a significant number of works that will not be made available to the public unless the museum assumes the risk of a copyright infringer. And even though these risks may be minimal, they are not ones that we can responsibly assume and they, thus, have a chilling effect on all our decisions regarding the use of orphan works.<sup>99</sup>

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96. See, e.g., Jennifer Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VIRGINIA L. REV. 1899, 1910-11 (2007); James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007); Michal Shur-Ofry, *Hatch-Waxmanizing Copyright*, 18 MICH. TELECOMM. TECH. L. REV. 171, 174 (2011).

97. For literature describing this phenomenon and proposing various solutions, see Gibson, *supra* note 96; Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271 (2008); Jennifer Rothman, *Best Intentions: Reconsidering Best Practices Statements in the Context of Fair Use and Copyright Law*, 75 J. COPYRIGHT SOC'Y 371 (2010); Shur-Ofry, *supra* note 96.

98. Notably, the possible applicability of the copyright regimes of additional jurisdictions to specific works, specific cases, and particular uses, which we discuss earlier (note 41 and the accompanying text), is likely to increase uncertainty and enhance remembrance institutions' risk aversion.

99. Testimony of Holocaust Memorial Museum, *supra* note 25. Cf. the policy of the Jewish Museum in Prague, which explicitly refers to copyright constraints in its decisions whether to allow use of and access to various Holocaust victims' works, such as children's drawings from Terezin — <https://www.jewishmuseum.cz/en/info/services/pricelist/>. See also EMILY HUDSON, COPYRIGHT

Overall, the analysis in this Part indicates that copyright law exerts a significant (if largely ignored) impact on the collective memory of the Holocaust, as a result of several interrelated factors, primarily—the Holocaust’s problem of representation, the role of remembrance institutions in shaping the Holocaust’s memory, and a gap between standard copyright doctrine and the radical circumstances of the Holocaust. These findings call for a closer scrutiny of copyright doctrine and its interface with Holocaust-related materials. In the following Part, we embark upon this task and explore the principal conflicts, tensions, and frictions that arise when applying ordinary copyright doctrine to the extraordinary circumstances of the Holocaust. Our central claim in this Part is not merely that copyright law imposes restrictions on the availability of Holocaust-related materials. Rather, we argue that these restrictions may be particularly severe, since the regular copyright ‘algorithm’ is based on narratives and premises concerning the creation and use of materials that are largely inapplicable to the abnormal circumstances of the Holocaust, and to the myriad Holocaust-related materials created under those circumstances.

## II. TENSIONS AT THE COPYRIGHT-HOLOCAUST INTERFACE: A CRITICAL ANALYSIS

We begin this Part by illuminating the fundamental conflicts between copyright’s general paradigms and Holocaust-related materials—both victims’ and Nazi works. Exposing these conflicts illuminates the paradoxes that result from the ordinary application of copyright to the extraordinary circumstances of the Holocaust.<sup>100</sup> Beyond these general dissonances, we identify three attributes common to Holocaust-related materials, whose encounter with copyright doctrine yields particular tensions: (1) the Holocaust’s realities that forced authors to conceal rather than publish their works sharply contrast with copyright’s emphasis on the publication of works by their authors; (2) the need to utilize authentic, entire, works in order to convey the Holocaust’s realities conflicts with

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EXCEPTIONS: THE EXPERIENCES OF CULTURAL INSTITUTIONS IN THE UNITED STATES, CANADA, AND AUSTRALIA (Doctoral Thesis, University of Melbourne, November, 2011) (on file with the authors) (discussing the complexities of the decision-making process that cultural institutions undergo when deciding whether to rely upon fair use in the course of their cultural preservation activities). Cf. evidence of similar chilling effects in additional contexts, for example, Patricia Aufderheide & Peter Jaszi, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers* (2004), available at [http://cmsimpact.org/wp-content/uploads/2016/01/UNTOLDSTORIES\\_Report.pdf](http://cmsimpact.org/wp-content/uploads/2016/01/UNTOLDSTORIES_Report.pdf) (discussing and demonstrating the negative implications and costs of rights-clearance requirements in documentary filmmaking that necessitates the use of authentic copyrighted materials and particularly historical materials).

100. Part II.A *infra*.

the weight that the fair use doctrine places on transformative and partial uses of copyrighted works; and (3) the immense number of anonymous works created by Holocaust victims presents significant challenges when confronted with the ordinary copyright protection afforded to orphan works.<sup>101</sup>

### A. *Conflicting Narratives*

#### (1) *Incentive, Control, and "A Letter in a Bottle"*

Copyright's prevalent narrative awards creators exclusive rights over their works of authorship.<sup>102</sup> Simply put, the underlying rationale is that the control afforded by copyright's exclusive rights allows authors to benefit from the commercial exploitation of their works, which, in turn, incentivizes cultural production to the advantage of society at large.<sup>103</sup> Of course, this description is somewhat simplified. Indeed, scholars have observed that the expectation for monetary return does not comprise the sole motivation for creation of cultural outputs. Psychological and intrinsic motivations, for example, play a significant role in the creative process.<sup>104</sup> Moreover, additional theories of copyright offer more diverse justifications for the control that authors receive over their works of authorship. A Lockean approach perceives copyright as a just reward for the contribution and investment of creators,<sup>105</sup> while personality-based theories regard the personality interests of authors as the primary justification for affording authors rights in their own works.<sup>106</sup> Notwithstanding the significant variations among these theories, the concept of authorial control is a central tenet to all of them.

Yet with respect to numerous works produced during the Holocaust by victims facing genocide, these meta-narratives of 'incentive' and 'control'

101. Part II.B-D *infra*.

102. See U.S. Constitution, Art. I, § 8, cl. 8 (Congress empowered to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries").

103. See, e.g., William Landes and Richard Posner, *An Economic Analysis of Copyright law*, 18 J. LEG. STUD. 325 (1989); Stephen Breyer, *The Uneasy Case for Copyright*, 84 HARV. L. REV. 281 (1974); William Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661 (1988); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1577 (2009).

104. See, e.g., Dianne Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?* 12 THEORETICAL INQUIRIES IN LAW, 29 (2011) (discussing the existence of multiple motivations for creation, focusing particularly on intrinsic factors).

105. For a discussion of Lockean theory in contemporary writing see, for example, Wendy Gordon, *On Owning Information: Intellectual property and the Restitutionary Impulse*, 78 VA. L. REV. 149 (1992); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296-330 (1988).

106. Hughes, *supra* note 105, at pp. 330-355.

are largely irrelevant. The motivation for these works' creation was not the expectation for financial gain. Rather, they were created as an explicit act of cultural and historical preservation for future generations. Moreover, in these cases, the authors' ultimate goal was not to control but rather to disseminate their materials. However, copyright law, when formally applied, can hinder and restrict such dissemination. To illustrate, let us briefly consider an additional case study: that of the history of the Kovno Jewish Ghetto Police.

In 1964, construction workers in the city of Kovno, Lithuania, accidentally stumbled upon a crate buried in the ground. The crate contained thousands of documents, among which was a typed manuscript consisting of over 200 pages, titled "The History of the Viliampole Jewish Ghetto Police" ("the History").<sup>107</sup> The manuscript was part of a larger archive, secretly written and assembled during the Holocaust by anonymous members of the Jewish police that operated in the Kovno ghetto.<sup>108</sup> It covers events that occurred in the ghetto during the years 1941-1942 and reflects its authors' acute awareness that they might be documenting the last days of their community, as evident from the manuscript's opening passages:

It is impossible at this time to sum up, to achieve what might amount to a comprehensive description of life in the Kovno ghetto, or to provide a summary of the activities of the ghetto institutions. First, to this day, we are still, regrettably . . . in the storm of events . . . [N]ew pages are added daily, drenched in tears and blood . . . The time has not yet come to make it possible to accurately investigate everything . . . In any event, the future historian will find here sufficient verified material for the history of the Kovno Jews in the gruesome years of 1941, 1942 . . . and this is the most important objective of the lines that follow.<sup>109</sup>

Similar statements appear in the pages that follow: "If we should not survive, then perhaps the document we are writing here will fall into the hands of Jews who will read and be astonished by what was done to us in the gloomy ghetto."<sup>110</sup>

Although their exact identities are uncertain, in all likelihood the authors of the History did not survive.<sup>111</sup> Shortly before they were

107. Samuel D. Kassaow, *Preface*, in *THE CLANDESTINE HISTORY*, *supra* note 30, at xv; Dov Levin, *How the Jewish Police in the Kovno Ghetto Saw Itself* (2001), [http://www.yadvashem.org/download/about\\_holocaust/studies/LevinEngprint.pdf](http://www.yadvashem.org/download/about_holocaust/studies/LevinEngprint.pdf).

108. Samuel D. Kassaow, *Preface*, in *THE CLANDESTINE HISTORY*, *supra* note 30, at xv.

109. *THE CLANDESTINE HISTORY*, *supra* note 30, at 63-64.

110. *Id.* at 128 (emphasis added).

111. Samuel D. Kassaow, *Preface*, in *THE CLANDESTINE HISTORY*, *supra* note 30, at xv (explaining that most members of the Jewish ghetto police were murdered in the ghetto killing grounds on March 27, 1944, and few members who survived the ghetto liquidation died in camps

murdered, when the liquidation of the Kovno ghetto became apparent, the police's archive, including the History, was placed in a crate and buried in the ground, where it remained until its accidental exposure some twenty years later.<sup>112</sup>

The text of the History clearly conveys its authors' realization that their community faces imminent extinction and that the time for an ordinary, 'distant,' historical account might never arrive. The manuscript also explicitly reveals that its authorship comprises an act of real-time documentation, designated for the historical, collective memory of future generations. In fact, the History is illustrative of a widespread sentiment that motivated the creation of numerous works produced by victims during the Holocaust. The Oyneg Shabes Archive at the Warsaw ghetto (discussed above) conveys the acute realization of its creators that, due to the magnitude of the events, there might be no one left to tell the story of their communities and their people.<sup>113</sup> Somewhat similarly, the Chronicle of the Lodz Ghetto, written during the Holocaust by a group of Jewish intellectuals and scholars, documented the ghetto's day-by-day realities "when there were over 200,000 Jews living in the ghetto, and when the ghetto was being emptied, also day by day, until the Jewish population ceased to exist."<sup>114</sup>

This desire to voice unperceivable realities, to preserve a culture that was being eradicated, and to affect the memory of future generations was not confined to semi-structured documentation performed by clandestine archives; nor was writing its single mode of expression. Similar motivations resonate in various individual works of diverse genres and media created by victims during the Holocaust. Numerous personal diaries reflect a sense of duty to document the mass atrocities and bear witness to the tragedy.<sup>115</sup> To illustrate, Anne Frank, barely a teenager during WWII, rewrote parts of her diary in 1944, after hearing a radio broadcast of the Dutch government in exile calling on people to document

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shortly thereafter); "About Kovno"—YAD VASHEM, THE WORLD HOLOCAUST REMEMBRANCE CENTER available at [http://www.yadvashem.org/yv/en/exhibitions/this\\_month/resources/kovno.asp](http://www.yadvashem.org/yv/en/exhibitions/this_month/resources/kovno.asp). (explaining that of the thirty thousand occupants of the Kovno ghetto, only about eight percent survived the Holocaust).

112. *Id.* at 10.

113. Introduction *supra*, notes 1–7 and the accompanying text.

114. Lucian Dobroszycki, *Introduction*, THE CHRONICLE OF THE LODZ GHETTO, 1941-1944, xxvi (LUCIAN DOBROSZYCKI, ED., 1987).

115. See Alexandra Garbarini, *Holocaust Diaries*, THE YIVO ENCYCLOPEDIA OF JEWS IN EASTERN EUROPE, available at [http://www.yivoencyclopedia.org/article.aspx/Holocaust/Holocaust\\_Diaries](http://www.yivoencyclopedia.org/article.aspx/Holocaust/Holocaust_Diaries) (describing this phenomenon and attributing it partly to a Jewish literary tradition of "bearing witness to a tragedy"); *Hartman*, *supra* note 61, at 2 (referring to Jewish chroniclers and diarists who continued "to record the destruction to the last moment").

the events of the period.<sup>116</sup> In the Lodz ghetto, photographer Mendel Grossman secretly took thousands of photographs of the mass atrocities performed by the Nazis, in an act of commemoration for posterity.<sup>117</sup> His photos documented people writing last notes to their families, the ghetto children waiting to be taken from the ghetto to their subsequent death, and the gradual deterioration of Grossman's own family.<sup>118</sup> The creators of the *Kaiser von Atlantis* conveyed through music and words the experience of life and death under inhuman circumstances, thereby sending "a message in a bottle" to future audiences.<sup>119</sup> Similarly, the poetry of Abraham Sotzkever, written in the Vilna ghetto, reflects not only the author's real-time experiences, but also his wishes that his words reach future generations:

Perhaps these words will endure,  
 And live to see the light loom,  
 And in the destined hour  
 Will unexpectedly bloom?  
 And like the primeval grain  
 That turned into a stock  
 The words will nourish  
 The words will belong to the people  
 In its eternal walk.<sup>120</sup>

The aggregation of these examples illuminates the dissonance with traditional copyright's narratives. Monetary incentives were largely irrelevant with respect to works created in real time by victims facing genocide. Rather, commemoration—the intent to leave a trace and tell the story of an entire community—comprised primary driving forces. In these cases, dissemination, rather than control, best serves not only the societal interest in constructing the history and memory of the Holocaust, but also the authors' will to award their community the "voice" that genocide

116. Foreword, ANNE FRANKE, *A DIARY OF A YOUNG GIRL*, *supra* note 29, at 2.

117. See Sheryl Ochayon, *Who Took The Pictures: The Ghetto Photography of Mendel Grossman in Lodz, As Compared With the Ghetto Photography of German "Ghetto Tourists"*,—Yad Vashem, The World Holocaust Remembrance Center available at [http://www.yadvashem.org/yv/en/education/newsletter/29/who\\_took\\_picture.asp#01](http://www.yadvashem.org/yv/en/education/newsletter/29/who_took_picture.asp#01)

118. *Id.*

119. Bilstiger, *supra* note 10, at 5-6 (using the metaphor of a "message in a bottle" to describe the Opera's spiritual message). For the story of the opera and its creators, see Introduction *supra*, notes 9–13 and the accompanying text.

120. A. Sotzkever, *The Grains of Wheat*, in A. SOTZKEVER, *SELECTED POETRY AND PROSE*, 158 (TRANS. BARBARA AND BENJAMIN HARSHAV, 1991).

attempted to deny. Yet, copyright law, when formally applied, often restricts such dissemination. As we elaborate below, the problem is particularly acute regarding anonymous works whose authors most likely did not survive the genocide.<sup>121</sup> Ironically, then, Holocaust victims facing genocide created works with the explicit purpose of documenting and communicating the Holocaust for future generations, whereas their mass killing by the Nazis left these materials governed by a proprietary regime, which burdens their dissemination, contrary to the creators' wishes.

(2) "Ordinary Copyright"?

An additional, mirror-image dissonance arises with respect to Holocaust-related materials produced by perpetrators, such as organized documentation of the events by the Nazi regime, propaganda materials, monographs, or diaries written by prominent Nazi figures. The subordination of these materials to ordinary copyright protection not only imposes practical constraints on the Holocaust's historical narratives and collective memory, but also results in a moral distortion. To illustrate, let us consider one final case study: the story of the film *Triumph of the Will*.

*Triumph of the Will* premiered in Berlin in March 1935.<sup>122</sup> Made by the acclaimed director Leni Riefenstahl at the request of Hitler himself, the film depicts the 1934 Nuremberg rally of the Nazi Party through powerful artistic techniques.<sup>123</sup> Rhythmic sequences of military marches, Hitler's speeches, German folk songs, Wagner's music, and cheering crowds are all blended to convey the message of the "New Germany"—national socialism its ideology and Hitler its heroic, messianic father.<sup>124</sup> From the Nazi viewpoint, the result was so successful that after *Triumph of the Will* there was no need to make any other propaganda film about Hitler.<sup>125</sup> Powerful as it was, the film continued to attract attention after the War.<sup>126</sup> In 1960, a documentary about the Third Reich used excerpts from *Triumph of the Will*, contrasting them with scenes from concentration camps.<sup>127</sup> The use triggered an immediate legal response by Riefenstahl, for what she described in her memoir as "a gross infringement of

121. See the discussion in section D, *infra*.

122. Devereaux, *supra* note 26, at 348.

123. *Id.* at 349; DAVID WELSH, PROPAGANDA AND THE GERMAN CINEMA, 1933-1945, 133 (2001).

124. Devereaux, *supra* note 26, at 351.

125. WELSH, *supra* note 123, at 134.

126. Devereaux, *supra* note 26, at 347 (noting that the film is perhaps "the most controversial film ever made").

127. JURGEN TRIMBORN, LENI RIEFENSTAHL: A LIFE, 240 (TRANS. EDNA MCCOWN, 2007); LENI RIEFENSTAHL, LENI RIEFENSTAHL: A MEMOIR, 450 (1995).

copyright and intellectual theft.”<sup>128</sup> Riefenstahl demanded that the defendant production company “remove the sequences taken from my film, or else, as was normal, obtain the rights.”<sup>129</sup> The legal proceedings that followed in Germany ended in 1969, in a decision by the Federal High Court. The court held that copyright in the film belonged to the Nazi Party that commissioned its production, not to Riefenstahl, and that the rights were to be administered by the Federal Republic of Germany.<sup>130</sup> Despite the ruling, Riefenstahl continued to receive remuneration for *Triumph of the Will*, and retained the right to refuse its screening, under what presumably was a secret agreement with the German authorities.<sup>131</sup>

The most striking feature when considering the case of *Triumph of the Will* from a copyright perspective is not the question of ownership. Rather, it is the normalcy with which Riefenstahl, as well as the court, treated the copyright question, completely ignoring the contents of the work, the role it played in the history of the Holocaust, or the circumstances surrounding its creation. In fact, this ‘ordinariness’ is common to the treatment of copyright in Nazi materials by various courts and jurisdictions.<sup>132</sup> As described above, in 1939 an American court declared *Mein Kampf* a copyright-protected work and held that its unauthorized distribution triggers regular remedies for copyright infringement.<sup>133</sup> Akin to Riefenstahl’s reference to her right to control *Triumph of the Will* as “normal,”<sup>134</sup> the U.S. court rejected the contention that copyright in *Mein Kampf* was invalid in light of the work’s contents—proclaiming this argument “bold” and reinforcing the seemingly normal application of copyright under the circumstances.<sup>135</sup> Likewise, in 2015, in a dispute concerning the publication of extracts from Joseph Goebbels’ diaries as part of a scientific work, a German court affirmed that copyright continues in the diaries, noting that under the circumstances the assertion of remuneration by Goebbels’ heirs “cannot be regarded as morally objectionable.”<sup>136</sup> Copyright in the diaries (which

128. RIEFENSTAHL, *supra* note 127, at 450.

129. *Id.* at 451 (emphasis added).

130. Urt. v. 10.01.1969, Az.: I ZR 48/67; TRIMBORN, *supra* note 127, at 240-41.

131. TRIMBORN, *supra* note 127, at 241-42; Julia Jacobs & Philipp Schepp, *Triumph des Willens*, in THOMAS HOEREN & LENA MEYER EDS., *VERBOTENE FILME*, 167, 184-85 (2007) (in German); RAINER ROTHER, LENI RIEFENSTAHL: THE SEDUCTION OF GENIUS, 158 (MARTIN H. BOTT, TRANS., 2002) (“... Transit Film GmbH only authorizes showings of *Triumph des Willens* after consulting Leni Riefenstahl”).

132. *Cf.* Bogedain, *supra* note 34, at 208 (explaining that under German law copyright subsists in Nazi writings, regardless of the illegality or immorality of such works).

133. See the discussion of *Mein Kampf* in Introduction *supra*, notes 14-23 and the accompanying text.

134. RIEFENSTAHL, *supra* note 127, at 450.

135. *Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 104 F.2d 306, 312 (2 Cir., 1939).

136. Case Number 21 O 28238/13 *Schacht v. Verlagsgruppe Random House* (Regional Ct. of

include sentences like “the Jewish plague needs to be eradicated. Utterly”) was reaffirmed by a higher court. The court acknowledged “the author Joseph Goebbels’ right of personality” while rejecting defendants’ contention that the issue was of fundamental importance.<sup>137</sup> Similarly, various European archives currently hold the rights to numerous original film footages depicting the actual genocide. These archives often charge regular royalties, which may amount to thousands of dollars per minute, from parties wishing to make use of these materials.<sup>138</sup> As one archivist noted: “although the Holocaust is one of the most tragic chapters of the Hungarian history, we sell material about it just like we sell any other material of ours.”<sup>139</sup>

Notably, for a certain period after WWII, copyright in numerous Nazi materials, alongside myriad additional works of European authors, was vested with the U.S. General Attorney or the Alien Property Custodian.<sup>140</sup> However, after 1962, the vast majority of copyrights in Nazi materials were returned to their original owners (or their heirs).<sup>141</sup> Such was the case, for example, with respect to *Triumph of the Will*. A handful of cases were excluded from this divestment, and the U.S. Government continued to manage their copyright. Among those were Hitler’s *Mein Kampf* and the Goebbels Diaries.<sup>142</sup> While these exceptions prevented the payment of

Munich, 24.9.2014), at p. 8 (copy with the authors, translated from German).

137. Case Number 6 U 3707/14 Schacht v. Verlagsgruppe Random House (Higher Regional Ct. of Munich, 14.8.2015), at 13, 8 (copy with the authors, quote translated from German, emphasis added). See also JEREMY BLACK, *THE HOLOCAUST, HISTORY & MEMORY*, 174-175 (2016); Alberge, *supra* note 27.

138. See Judy Maltz & Victor Isaac Taranto, *Who Profits from Holocaust Archives*, HA’ARETZ, (Apr. 8, 2013) <http://www.haaretz.com/jewish/features/the-unbearably-high-cost-of-holocaust-footage.premium-1.514081>.

139. Maltz & Taranto, *supra* note 138 (quoting Janos Varga, a senior researcher at the Hungarian National Digital Archive and Film Institute).

140. The vesting was executed under the provisions of the Trading with the Enemy Act of 1917 (“TWEA”), which was first enacted during WWI and was amended over the years. A thorough review of this statutory scheme exceeds the scope of this article. In general, the proceeds from the administration of these properties during Government ownership were transferred to the War Claims Fund and used to satisfy war-related claims and damages. For the history of the TWEA and its amendments, see Paul V. Myron, *The Work of the Alien Property Custodian*, 11 LAW & CONT. PROBLEMS (1945); George Middleton, *Rights and Royalties of Foreign Authors and Composers in War Time*, 10 BULL. COPYRIGHT SOC’Y U.S.A. 26 (1962); Michael J. Bazyler & Amber L. Fitzgerald, *Trading With The Enemy: Holocaust Restitution, the United States Government, and American Industry*, 28 BROOKLYN J. INT’L L. 683 (2002).

141. An Act to Amend the War Claims Act of 1948, Pub. Law 87-846, 87th Cong., H.R. 7283, 76 Stat. 1107 (1962) (“the 1962 Amendment”). Section 42(c) of the 1962 Amendment provided that all copyrights vested under the TWEA, save for a few exceptions, were returned to their owners “as a matter of grace.” For detailed analyses of this statutory scheme, see Martin Domke, *The War Claims Act of 1962*, 57 AM. J. INT’L L. VOL. 57, 354, 370-71 (1963); Middleton, *supra* note 140.

142. The additional excepted Nazi works were the photo collection of the official Nazi photographer Heinrich Hoffman, Otto Skorzeny’s work, and the memoirs of Alfred Rosenberg, one of the principal ideologues of the Nazi Party—see the 1962 Amendment, Section 42(c); Middleton, *supra* note 140, at 35.

royalties to the successors of Hitler or Goebbels,<sup>143</sup> they did not bar the intense commercialization of their works, which relied on the subsistence of copyright. In fact, both *Mein Kampf* and the Goebbels Diaries were heavily commercialized in the United States after WWII, generating royalties not only to the U.S. Government, but also to third parties.<sup>144</sup>

Overall, the emerging picture reveals another paradox at the copyright-Holocaust interface: through its system of allocating private rights, copyright awards the Holocaust perpetrators, or their successors, a certain ability to control the Holocaust's narrative, allowing them to impact what can be said about the past, by whom, and under which conditions.<sup>145</sup> And even when this control was limited under the TWEA exception scheme, the limitation applied only to a handful of cases and was based on external legislation, rather than on any internal mechanism embedded in copyright law.<sup>146</sup> In fact, the normal application of copyright law even to the most extreme Nazi materials was taken for granted.

Indeed, copyright law's long-established paradigm adopts an objective, content-neutral approach to copyright protection.<sup>147</sup> Yet such ordinary

143. See, e.g., *Legislative History of the War Claims Act of 1948, Amendment*: P.L. 87-846: 76 Stat. 1107: October 22, 1962. 6872 (1962).

144. See, e.g., Bazylar & Pitzgerald, *supra* note 140, at 733-34 (describing the sales of *Mein Kampf* in the United States after WWII, and the subsequent sale of copyright by the Government to Houghton Mifflin, the publisher who originally contracted with Hitler's publishers to distribute the book in the U.S.); For a detailed discussion of the copyright history of the book, see Guy Pessach & Michal Shur-Ofry, *Copyright and Mein Kampf—Another Look at Copyright Neutrality* (unpublished manuscript, copy with the authors). See also Bertrand M. Patenaude, *Curse of the Goebbels Diaries*, 2012 (3) THE HOOVER DIGEST, available at <https://www.hoover.org/research/curse-goebbels-diaries> (noting that the Goebbels Diaries, distributed in the United States in 1948, became “an instant best-seller,” and describing the ensuing legal battle between the finders of the diaries and the Office of Alien Property).

145. Cf. Savelsberg & King, *supra* note 67, at 197 (noting that the law can shape collective memory by “regulating what can be said about the past”).

146. Notably, Section 104A of the Copyright Act, which sets out an automatic restoration scheme for copyright in foreign works that were in the public domain, may constitute a narrow exception. The provision includes an exception to restoration with respect to works “in which the copyright was ever owned or administered by the Alien Property Custodian and in which the restored work would be owned by a government or instrumentality thereof...”. While the purpose of the exception is not entirely clear, one can presume that the intent was to preclude official works of enemy regimes from restoration of copyright—see William Patry, *The Anschluss and Expropriation of Jewish Copyright in Europe*, THE PATRY COPYRIGHT BLOG, MARCH 12, 2008, <http://williampatry.blogspot.co.il/2008/03/anschluss-and-expropriation-of-jewish.html> (noting that the purpose of the exception was “to ensure that the German and Japanese governments do not receive protection for their wartime works” but that it does not apply to works created by individuals).

147. See, e.g., WILLIAM F. PATRY, PATRY ON COPYRIGHT Vol 2, p. 3-12 (2016); Ned Snow, *Content Based Copyright Denial*, 90 IND. L. J. 1473 (2015) (reviewing the principle of content neutrality under copyright law and its relation to free speech principles); *Bleistein v. Donadlson Lithographing Co.*, 98 F 608, 611 (1899); *Belcher v. Tarbox* 486 F.2d. 1087, 1088 (9<sup>th</sup> Cir. 1973) (“...there is nothing in the Copyright Act to suggest that the courts are to pass upon the truth or falsity of the views embodied in a copyrighted work”); cf. the decision of the German Court in the matter of Goebbels diaries, Case Number 21 O 28238/13 *Schacht v. Verlagsgruppe Random House* (Regional Ct. of Munich, 24.9.2014), at 7 (referring to the “prevalent understanding” that “copyright may also be acquired in works of immoral or criminal content”) (copy with the authors, translated from

application of copyright protection to the aforesaid works creates an implicit, indirect impression that these are just ordinary literary, artistic, dramatic, or musical works, which the copyright system was designed to promote. In other words, affording such works the regular protection of copyright and granting their creators the stamp of authorship normalizes the works is itself far from neutral. Rather, it aestheticizes these works, and indirectly undermines their abnormal contents. In this sense too, applying copyright in its (seemingly) content-neutral, regular manner creates a moral distortion.<sup>148</sup>

Altogether, the foregoing analysis exposes fundamental dissonances between copyright's prevalent narratives and the extreme realities of the Holocaust. On the one hand, victims facing genocide authored materials to 'voice' the genocide to future generations; yet their mass murder during that genocide left these materials governed by a proprietary regime that poses an obstacle to their dissemination. On the other hand, in a somewhat reverse manner, the documentation of the genocide by the Nazis is subject to proprietary rights, that in many cases are controlled by successors of the Nazi regime. In the following sections we proceed to identify more specific doctrinal tensions that arise when the unique attributes of the Holocaust encounter ordinary copyright doctrine.

### *B. Publication versus Concealment*

Consistent with its predominant narrative of authorial control, copyright doctrine emphasizes "the author's right to decide whether and when . . . [the work] will be made public."<sup>149</sup> Thus, the right of first publication is one of the exclusive rights granted under the Copyright Act.<sup>150</sup> In addition, the question of whether the work is published or unpublished carries substantial weight under the fair use doctrine. One of the factors that courts are instructed to consider in applying the doctrine, as specified in the statutory fair use provision, is "the nature of the copyrighted work."<sup>151</sup> In the famous decision of *Harper & Row*, the U.S. Supreme

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German). For criticism of the "aesthetic neutrality" approach, see the discussion *infra*, notes 242-244 and the accompanying text.

148. For a similar argument concerning the intersection of "art and evil" in *Triumph of the Will*, compare Devereaux, *supra* note 26, at 357-58 (arguing that appreciating the artistic beauty of *Triumph of the Will* without attending to its contents is "morally dangerous"). We do not, however, make the simple (possibly simplistic) claim that copyright law should not protect all hateful or evil contents. The doctrinal response we propose to the anomaly we identify here is more nuanced. For elaboration, see Part III.B, *infra*.

149. *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 563 (1985).

150. 17 U.S.C.S. § 106 ("... the owner of copyright under this title ... has the exclusive rights to ... distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending").

151. For the Fair Use provision under the Copyright Act, see 17 U.S.C. § 107 (emphasis added):  
Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including

Court established that “the fact that a work is unpublished is a critical element of its ‘nature’ . . . [and] tends to negate fair use.”<sup>152</sup> A series of subsequent District Court cases reinforced and advanced this interpretation.<sup>153</sup> Although the fair use provision in the Copyright Act was later amended to clarify that “[t]he fact that a work is unpublished shall not itself bar a finding of fair use,”<sup>154</sup> scholarly analyses indicate that the unpublished nature of a work still weighs against a finding of fair use.<sup>155</sup>

Copyright’s stance towards unpublished works largely stems from the law’s respect for the author’s “deliberate choice” regarding whether and when to publish her work.<sup>156</sup> Yet regarding works created by victims in ghettos, concentration camps, and extermination camps, such “deliberate choice” was virtually non-existent. Any attempt to publish a work during

such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) *the nature of the copyrighted work*;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

152. *Harper & Row*, 471 U.S., at 551 & 564 (rejecting an argument that a publication of passages from former president Ford’s unpublished biography in a newspaper article comprised fair use). For a discussion of the case and its implications, see, for example, Diane Conley, *Author, User, Scholar, Thief: Fair Use and Unpublished Works*, 9 CARDOZO ARTS & ENT. L.J. 15 (1990).

153. For several prominent (though not exhaustive) examples, see, *Salinger v. Random House Inc.* 811 F.2d 90, 97 (2d Cir. 1987) (discussing the unpublished work of J.D. Salinger and holding that unpublished works “normally enjoy complete protection against copying any protected expression”); *New Era Publications v. Henry Holt*, 695 F. Supp. 1493, 1524 (2<sup>nd</sup> Cir. 1989) (discussing unpublished letters and diary entries of Ron Hubbard, the founder of the Church of Scientology, and referring to “[a] strong presumption against the finding of fair use in unpublished materials”).

154. Pub. L. No. 102492, 106 Stat. 3145 (1992) (codified as amended at 17 U.S.C. § 107 (2000 & Supp. IV 2004)). For a review of the history of the amendment, see Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, 31 ARIZ. ST. L.J. 1 (1999).

155. See, e.g., Crews, *supra* note 154, at 10 (arguing that following the amendment, uncertainties remain that “leave in doubt the ability of writers and publishers to utilize unpublished works”); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 612-615 (2008) (finding that 29 out of 37 cases concerning unpublished works asserted that this fact disfavored a finding of fair use, while the fact that the work is *published* has become a stronger positive factor, favoring fair use); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2579 (2009) (“[d]rawing expression from unpublished or unfinished works is likely to cut against fair use”); *but cf.* Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. 47, 77 (2012) (presenting an empirical study that finds no significant effect of the unpublished nature of the work on a finding of fair use).

156. *Harper & Row*, 471 U.S., at 553 (“[t]he applicability of the fair use doctrine to unpublished works is narrowly limited, since, although the work is unavailable, this is a result of a *deliberate choice* on part of the copyright owner”) (emphasis added). See also M.B. NIMMER, D. NIMMER, NIMMER ON COPYRIGHT § 13.05[B][2][b][iii] (New York, Matthew Bender, 2015).

the Holocaust risked the lives of its authors and their families and often amounted to a death sentence.<sup>157</sup> In the face of genocide, concealment, rather than publication, was the only way open to victims to try and ensure—with no certainty whatsoever—that their “letter in a bottle” may reach an audience, that future generations would be able to access their works, and that their voice might be heard at some future time.

At times, authors facing imminent death gave their works to fellow victims for safekeeping, as Viktor Ullmann had done with respect to the Kaiser of Altantis.<sup>158</sup> In other instances, the only available route was to bury the works underground.<sup>159</sup> Thus, the Oyneg Shabes archives were buried in metal boxes and milk cans beneath the Warsaw ghetto;<sup>160</sup> the History of the Viliampole Jewish Ghetto Police was placed in crates and buried in the grounds of the Kovno ghetto, along with additional archives;<sup>161</sup> batches of the Chronicle of the Lodz Ghetto were hidden beneath the ghetto’s fire department and in the grounds of its Jewish cemetery;<sup>162</sup> and photographer Mendel Grossman hid his collection of photos from the Lodz ghetto, comprising thousands of negatives, in a hollow space under a windowsill.<sup>163</sup> Even in the most extreme, final stage of the genocide, Jewish prisoners working in the gas chambers and crematoria at Auschwitz-Birkenau buried various manuscripts beneath the ashes of the crematoria, in the hope that one day they would be discovered.<sup>164</sup>

These examples clearly illustrate, that in the extreme reality of the Holocaust, concealment resulted neither from a “deliberate choice” nor from the authors being unready to divulge their intellectual endeavours. In fact, burial was the only means that could lead to publication, albeit at

157. See, e.g., Garbarini, *supra* note 115 (explaining that if discovered, a diary written during the Holocaust would endanger the life of the writer and possibly his family); Stephen Charles Feinstein, *Art and the Holocaust*, in THE YIVO ENCYCLOPEDIA OF JEWS IN EASTERN EUROPE, available at [http://www.yivoencyclopedia.org/article.aspx/Holocaust/Art\\_and\\_the\\_Holocaust](http://www.yivoencyclopedia.org/article.aspx/Holocaust/Art_and_the_Holocaust) (describing how the exposure of a group that attempted to smuggle paintings depicting life in Theresenstadt resulted in group members’ deportation); Glenn Sujo, LEGACIES OF SILENCE: VISUAL ART AND THE HOLOCAUST, 104-107 (2001) (referring to the exposure of clandestine art works in ghettos and concentration camps that resulted in the artists’ deportation and murder); cf. Dobroszycki, *supra* note 114, at xviii (explaining that due to the dangers of exposure by the Nazis, the chroniclers in the Lodz Ghetto limited themselves to facts and descriptions and refrained from expressing any feelings).

158. *Supra* notes 12–13 and the accompanying text.

159. Garbarini, *supra* note 115 (explaining that the typical way to preserve manuscripts of Holocaust diaries was “by giving them to someone for safekeeping or by hiding them in the ground or in the walls of buildings”).

160. *Supra* notes 1–6 and the accompanying text.

161. *Supra*, notes 107–110 and the accompanying text.

162. Dobroszycki, *supra* note 114, at xv, n22 (further explaining that the batch buried at the cemetery was tracked down by the Nazis).

163. Ochayon, *supra*, note 117.

164. Garbarini, *supra* note 115; NICHOLAS CHARE & DOMINIC WILLIAMS, MATTERS OF TESTIMONY—INTERPRETING THE SCROLLS OF AUSCHWITZ, vii (2016).

some unknown, uncertain, future time. As David Graber eloquently elucidated in his heart-breaking note that accompanied the burial of the Oyneg Shabes archive, “[w]hat we were unable to cry and shriek out to the world we buried in the ground.”<sup>165</sup>

Applying ordinary copyright doctrine, therefore, results (again) in clear irony: victims’ works were concealed deliberately in order to enable their future dissemination; yet viewed through the copyright lens, this very fact renders them unpublished works, thereby hindering a finding of fair use and undermining their chances of being disseminated.

### C. Transformative & Partial versus Authentic & Complete

An additional tension at the copyright-Holocaust interface concerns the weight that the fair use doctrine places on transformative and partial uses, as opposed to plain reproductions of entire copyrighted works.

In the famous case of *Campbell v. Acuff Rose*, the transformative nature of the use was embraced as part of the first factor in the fair use analysis,<sup>166</sup> following a proposal by Judge Pierre Leval.<sup>167</sup> The underlying assumption is that transformative uses are creative and therefore better promote copyright’s objectives, in comparison to “mere reproductions” of existing works that do not add new layers of creativity to the cultural and artistic eco-system.<sup>168</sup> In addition, transformative uses are often associated with criticism, protest and contrarianism; thus, they are considered essential from a free-speech perspective.<sup>169</sup> Overall, theoretical and empirical scholarly analyses demonstrate that the fair use doctrine clearly favors transformative uses and increasingly disfavors uses that involve copying without transformation.<sup>170</sup>

165. Introduction *supra* notes 5–6 and the accompanying text.

166. *Campbell v. Acuff Rose*, 510 U.S. 569, 579 (1994) (“Although such transformative use is not absolutely necessary for a finding of fair use, . . . the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”).

167. Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (“[T]he answer to the question of justification turns primarily on whether, and to what extent, the challenged use is *transformative*. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test . . . .”) (emphasis in the original).

168. *Id.* at 1111 (“if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society”); *Campbell*, 510 U.S. at 579 (transformative “works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright”).

169. Rebecca Tushnet, *Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L. J. 535, 558 (2004); C. Edwin Baker, *First Amendment Limits on Copyright*, VAND. L. REV. 891, 941-42 (2002) (explaining that from a First Amendment perspective protecting transformative uses is “perhaps the highest priority”, particularly due to their dissident, norm-challenging character).

170. See, e.g., Tushnet, *supra* note 169, at 546, 556-59 (maintaining that courts perceive non-transformative copying as “increasingly unfair”); Beebe, *supra* note 155, at 605-606 (presenting

In addition to the doctrine's emphasis on transformation, the third factor in the fair use analysis instructs the courts to consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."<sup>171</sup> The test, as applied by the courts, is both quantitative and qualitative;<sup>172</sup> yet the former is particularly important for the present purposes. Simply put, under this test, copying an entire copyrighted work is less likely to be considered fair use than quoting partial segments from the work.<sup>173</sup> Indeed, the age of digitization has yielded certain recognition that the copying of entire works may be necessary for the operation of digital technologies, and in certain cases may constitute fair use.<sup>174</sup> Yet, as we discuss in detail in the next section, this recognition is limited in its scope; while the fair use doctrine may extend to the formation of digital archives, it does not extend to granting public access to entire copyrighted works stored in those archives.<sup>175</sup> Altogether, then, a non-transformative use of an entire copyrighted work is less likely to be considered fair use, in comparison to transformative paraphrases and partial quotations.<sup>176</sup>

This state of affairs attracted some scholarly criticism. In a prominent critique, Rebecca Tushnet articulates that in some instances, copying and dissemination of works in their entirety better serves important free-speech interests in comparison to partial or transformative use.<sup>177</sup> Such is the case, for example, when exposure to original materials better promotes political and cultural discourse, or when using one's own words to convey a message is less powerful than using the original text.<sup>178</sup>

Indeed, these tensions with the fair use doctrine are not unique to the Holocaust; they arise with respect to various copyrighted materials of historical and cultural significance.<sup>179</sup> Yet the case of Holocaust-related materials may be an extreme and paradigmatic embodiment of these

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empirical findings that transformativeness is sufficient to trigger an overall finding of fair use, while non-transformative uses substantially decrease the likelihood of such finding).

171. 17 U.S.C. § 107 (3) (emphasis added).

172. See, e.g., *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 583 (1985); *Campbell*, 510 U.S. at 587-88; PATRY *supra* note 147, Vol. 4, p. 10-488 (2016).

173. Sag, *supra* note 155, at 79 ("transformative use and partial copying are both strong indicators of fair use").

174. Sag, *id.* at 84.

175. Part II.D *infra*, notes 207-210, and the accompanying text.

176. Sag, *supra* note 155, at 79.

177. Tushnet, *supra* note 169, at 565-584.

178. *Id.* at 565, 575. See also Nimmer, *supra* note 58, at 1186-1204 (demonstrating the importance of direct authentic documentation as a means to convey the meaning and ramifications of historical events); Netanel, *supra* note 59, at 14-15 (exemplifying how verbatim quotation from literary works significantly enhances the effectiveness of communicating the meaning, significance, and implications of the quoted text).

179. See, e.g., *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 557 (1985) (court referring to "the fact that the words the President [Ford] has chosen to clothe his narrative may be 'newsworthy'" but holding that this fact is "not an independent justification for copying of the author's expression").

tensions. When such materials are concerned the gap between the use of entire authentic materials and any partial transformation thereof may be particularly large, and the conflict with the fair use doctrine particularly acute. As the discussion above indicates, the extremity of the Holocaust creates a problem of representation; namely, a failure on the part of people external to the events to grasp the Holocaust's realities.<sup>180</sup> Therefore, describing the Holocaust in retrospect through "transformative paraphrases" is considerably less powerful, less meaningful, and less effective, in comparison to using authentic materials, created in real time by those who were 'inside the events'.<sup>181</sup> The realities of ghettos, concentration camps, and extermination camps may become a little more comprehensible (albeit certainly not easy to grasp) if one views the photographs of Mendel Grossman from the Lodz ghetto,<sup>182</sup> reads the notes of prisoners who worked at the crematoria in Birkenau,<sup>183</sup> or listens to the *Kaiser von Atlantis* composed in Theresienstadt.<sup>184</sup> With respect to such materials, the most appropriate images, words, or sounds are those that victims voiced from within the events.

Moreover, the emphasis that the fair use doctrine places on transformative uses reflects the law's recognition of the value of contrarianism and resistance.<sup>185</sup> Yet with respect to the Holocaust, the ultimate cases of dissidence and resistance are embodied not in transformation but in the authentic materials created by victims during the events. Created in secrecy often at a risk to the lives of their creators, many of these works constitute ultimate examples of human resistance under impossible conditions.<sup>186</sup> As our previous discussion indicates, hindering their dissemination in an entire, authentic, form not only harms free-speech values. It can also adversely impact the intergenerational, collective memory of the Holocaust.<sup>187</sup>

Notably, the attempt to understand and construct the Holocaust's historical narratives and collective memory also necessitates access to authentic materials created by the Nazi regime. It is difficult to perceive the Nazi ideology if one is exposed only to abridged segments of *Mein*

180. See the discussion *supra*, Part I.B, notes 61-65 and the accompanying text.

181. See, e.g., CHARE & WILLIAMS, *supra* note 164, at 17 (referring to the writings found in the remnants of Auschwitz-Birkenau as documents from "inside the events," the publication of which might alleviate the problem of "unrepresentability of the Holocaust").

182. For the story of Grossman's photo archive, see *supra* notes 117-118 and the accompanying text.

183. For the diaries written at Auschwitz-Birkenau, see *supra*, note 164 and the accompanying text.

184. For the story of *Kaiser von Atlantis*, see *supra* notes 9-13 and the accompanying text.

185. See, e.g., BAKER, *supra* note 169 and the accompanying text.

186. *Supra*, notes 157-164 and the accompanying text.

187. Part I, *supra*.

*Kampf*, rather than to the entire text;<sup>188</sup> if one cannot cite verbatim paragraphs from the diaries of Joseph Goebbels;<sup>189</sup> or if screening footage from the propaganda film *Triumph of the Will* is prohibited.<sup>190</sup> Likewise, no second-hand, transformative description of the genocide can parallel watching the original photographs or footage taken by the perpetrators in real time.<sup>191</sup>

Finally, and importantly, with respect to Holocaust-related materials transcending the transformative use paradigm is also vital for subsequent uses that are themselves transformative. The initial possibility to preserve Holocaust-related works in their entirety and to make them available to the public often constitutes the sole practical means to use these works further in transformative, socially valuable manners, such as in documentary films, research books, or artistic works. The recent “Yolocaust” project, which depicted ‘selfies’ taken at the Holocaust memorial in Berlin merged with original photos from Auschwitz is one illustration for such a transformation.<sup>192</sup> Yet, as previously explained, numerous Holocaust-related materials are not accessible through widespread market distribution channels. Their availability for further transformative uses often depends on their initial preservation and upon making them accessible to the public by Holocaust remembrance institutions.<sup>193</sup> This preliminary stage, however, is not transformative by nature. Thus, copyright’s emphasis on transformation may undermine both access to authentic Holocaust-related materials and secondary, subsequent, transformative uses of these materials.

#### D. *The Anonymous Masses*

An additional tension at the copyright-Holocaust interface results from the protection that copyright law grants to orphan works, exacerbated by copyright’s broad control over processes of mass digitization.<sup>194</sup> Projects of mass digitization have been thriving with the development of digital technology and the new prospects it provides for museums, archives, and

188. For copyright disputes involving the publication of the unedited manuscript of *Mein Kampf*, including successful lawsuits on behalf of Hitler’s authorized publishers, see *supra*, notes 19–23 and the accompanying text.

189. For the recent court proceedings concerning cited paragraphs from Goebbels’ diaries, see *supra*, notes 137–137 and the accompanying text.

190. For copyright disputes involving *Triumph of the Will*, see *supra*, notes 122–131 and the accompanying text.

191. For applicable copyright and royalty policies with respect to such archival materials, see *supra*, notes 138–139 and the accompanying text.

192. For the project, created by artist Shahak Shapira, see <https://yolocaust.de/>; Allison Kaplan-Sommer, *No More Shoah Selfies: Why the Controversial ‘Yolocaust’ Project Was Taken Down*, HA’ARETZ, Jan. 27, 2017, available at <http://www.haaretz.com/jewish/features/.premium-1.767709>.

193. Part I *supra*, notes 89 and the accompanying text.

194. For the term ‘orphan works’, see Part I *supra*, note 83 and the accompanying text.

other preservation projects.<sup>195</sup> Yet from a copyright perspective, the combination of orphan works and mass digitization poses significant challenges.

In general, orphan works receive ordinary copyright protection in the United States, which implies that their exploitation by third parties is subject to the copyright owners' consent.<sup>196</sup> Of course, if these owners are unknown or unreachable, the clearance of rights is practically impossible. Therefore, the subsistence of copyright in orphan works in its ordinary, property-rule-based form may deter third parties from using these works altogether.<sup>197</sup>

The problem of orphan works becomes more acute in the age of mass digitization, where projects often aim at digitizing complete collections of physical materials, comprising innumerable copyright protected works. In general, these acts require the permission of the copyright owners in the various works. In many cases, searching the right-holders and securing ex-ante permissions for digitization on a case-by-case basis is costly and impractical, even when the copyright owners presumably can be identified. Obviously, the difficulty intensifies when such collections contain large amounts of orphan works.<sup>198</sup> Therefore, the combination of orphan works and mass digitization may effectively prevent many digital preservation projects from materializing.<sup>199</sup>

Both policy makers and scholars have dedicated considerable attention to the triad of copyright, orphan works, and mass digitization.<sup>200</sup> The

195. See, e.g., DANIEL J. COHEN & ROY ROSENZWEIG, *DIGITAL HISTORY*, 3-9 (2005) (listing the principal qualities of digital media and networks that form the revolutionary character of digital preservation: capacity, accessibility, flexibility, diversity, manipulability, interactivity and hypertextuality); Pessach, *supra* note 86.

196. ORPHAN WORKS AND MASS DIGITIZATION REPORT, *supra* note 91, at 2-3.

197. *Id.* at 3 (explaining that the possibility that the copyright owner would eventually emerge and seek an injunction or damages creates a "legal cloud" that impedes the use of orphan works); Jane C. Ginsburg, *Contracts, Orphan Works, and Copyright Norms: What Role for Berne and TRIPs?* in ROCHELLE COOPER DREYFUSS, HARRY FIRST & DIANE LEENHEER ZIMMERMAN, ED., *WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY*, 471, 483 (2010) (explaining that would-be exploiters of orphan works must decide whether to renounce their project or incur a legal risk of the copyright owner reappearing to demand infringement remedies).

198. ORPHAN WORKS AND MASS DIGITIZATION REPORT, *supra* note 91, at 11.

199. See Zimmerman, *supra* note 90, 998-1003 (2007) (discussing the problem of preserving copyrighted works, particularly through digitization, due to the constraints imposed by copyright protection); Ginsburg, *supra* note 197, at 483 (explaining that for museums and cultural institutions, the problem of orphan works goes hand in hand with digitization efforts).

200. See, e.g., Pessach, *supra* note 86; Zimmerman, *supra* note 90; Kenyon & Hudson, *supra* note 90; Pallante, *supra* note 91; Ginsburg, *supra* note 197; Jane C. Ginsburg, *Recent Developments in US Copyright Law: Part I - 'Orphan' Works* 217 *REVUE INTERNATIONALE DU DROIT D'AUTEUR*, 176 (2008); Ryan Andrews, Note: *Contracting Out of the Orphan Works Problem: How the Google Book Search Settlement Serves as a Private Solution to the Orphan Works Problem and why it should Matter to Policy Makers*, 19 *S. CAL. INTERDIS. L.J.* 97 (2009); Joshua O. Mausner, *Copyright Orphan Works: A Multi-Pronged Solution to Solve a Harmful Market Inefficiency*, 12 *J. TECH. L. & POL'Y* 395 (2007); David B. Sherman, *Cost and Resource Allocation Under the Orphan Works Act of 2006: Would the Act Reduce Transaction Costs, Allocate Orphan Works Efficiently, and Serve the Goals of*

predominant view emerging from these extensive debates is that the current copyright regime lacks mechanisms to effectively overcome the problem. Two statutory exceptions under the current copyright doctrine are particularly relevant in this context. The first is a specific statutory exemption for preservation, under Section 108 of the Copyright Act. The second is the fair use doctrine.

Briefly, Section 108 allows libraries and archives to reproduce and distribute a limited number of copies of copyrighted works under certain specific conditions.<sup>201</sup> While the Digital Millennium Copyright Act slightly expanded the original exception<sup>202</sup> the Act also limited its scope by providing that “any . . . copy . . . that is reproduced in digital format” must not be “made available to the public in that format outside the premises of the library or archives.”<sup>203</sup> Although Section 108 reflects a fundamental recognition that libraries and archives play a significant role

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*Copyright Law?*, 12 VA. J.L. & TECH. 4 (2007). See also ORPHAN WORKS AND MASS DIGITIZATION REPORT, *supra* note 91; WIPO STUDY ON COPYRIGHT LIMITATIONS AND EXCEPTIONS FOR LIBRARIES AND ARCHIVES, 16, available at:

[http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=109192](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192); UNITED KINGDOM INTELLECTUAL PROPERTY OFFICE, ORPHAN WORKS, available at: <http://www.ipo.gov.uk/pro-types/pro-copy/c-policy/c-policy-orphanworks.htm>; INTERNATIONAL STUDY ON THE IMPACT OF COPYRIGHT LAW ON DIGITAL PRESERVATION JULY 2008 A JOINT REPORT OF THE LIBRARY OF CONGRESS NATIONAL DIGITAL INFORMATION INFRASTRUCTURE AND PRESERVATION PROGRAM, at 36, available at: [http://www.digitalpreservation.gov/library/resources/pubs/docs/digital\\_preservation\\_final\\_report2008.pdf](http://www.digitalpreservation.gov/library/resources/pubs/docs/digital_preservation_final_report2008.pdf).

201. See 17 U.S.C. § 108 (2000). Subsection 108 (a) instructs that the work must be reproduced without any purpose of obtaining direct or indirect commercial advantage from the copy; the collections of the entity making the reproduction must be open to the public or otherwise available to specialized researchers; and the work that is reproduced or distributed must include a copyright notice or a legend stating that the work may be protected by copyright, even if no copyright notice appears on the reproduced copy. Subsection (b) authorizes the duplication of unpublished works “solely for purposes of preservation and security or for deposit for research use in another qualifying library or archive,” as long as the work reproduced “is currently in the collections of the library or archives.” The provision was intended to apply to “an archival collection of original manuscripts, papers, and the like, most of which are unpublished, and for which a rigorous preservation regime serves the needs of archives and scholars.” See U.S. COPYRIGHT OFFICE, REPORT OF THE REGISTER OF COPYRIGHTS, 17 U.S.C. § 108 (1983), available at <http://www.copyright.gov/reports/library-reproduction-1983.pdf>. Subsection (c) addresses the reproduction of published works “duplicated solely for the purpose of replacement” and also allows for the reproduction of three copies if the library or archive making the copy has determined “after a reasonable effort” that “an unused replacement cannot be obtained at a fair price.” This subsection was intended to ensure that items in a library collection are preserved in a usable form, despite external factors such as time and technology that are beyond an institution’s control. For a discussion of Section 108, see Mary Rasenberger & Chris Weston, *Overview of the Libraries and Archives Exception in the Copyright Act: Background, History, and Meaning* (Apr. 14, 2005), available at [http://www.loc.gov/section108/docs/108\\_background\\_paper.doc](http://www.loc.gov/section108/docs/108_background_paper.doc); Roberta R. Kwall, *Contract Options for Individual Artists: Library Reproduction Rights for Preservation and Replacement in the Digital Era: An Author’s Perspective on § 108*, 29 COLUM. J.L. & ARTS 343 (2006) (explaining that Section 108 is almost obsolete in the case of digital preservation of cultural materials).

202. The Digital Millennium Copyright Act (DMCA). Pub. L. No. 105-304, §§ 103, 1201, 112 Stat. 2860, 2863-65 (1998) (codified as amended at 17 U.S.C. §§ 103, 1201 (2000)). The amendment increased the number of permitted copies and also allowed libraries to make digital reproductions for preservation and replacement.

203. *Id.* Notably, this limitation applies to Sections 108(b) and (c).

in “providing access to the cultural memory,”<sup>204</sup> it does not allow the provision of public access to the digitally preserved materials. Therefore, its usefulness for digital preservation projects that aim to make the digitally archived contents publicly available is extremely limited, if at all applicable.<sup>205</sup> In addition, the section does not mention museums among the cultural institutions that can benefit from the exception, thus excluding a broad category of institutions involved in mass digitization projects.<sup>206</sup>

The fair use doctrine does not change the picture substantially. Recent case law applied the doctrine in a manner that allows certain mass digitization of copyright-protected collections, yet simultaneously limits the public availability of the digitized texts. Thus, in *Authors Guild v. Google*,<sup>207</sup> Google successfully relied on the fair use doctrine with respect to its Library Project. The project included the scanning of entire collections of books from several major academic and public libraries into Google’s databases, allowing users to electronically browse snippets from the books that were subject to copyright.<sup>208</sup> Google’s reproduction of entire copyrighted works for archival and retrieval purposes was held a permitted fair use, yet only insofar as public access was limited to the partial extracts from the copyrighted works. Somewhat similarly, in *Authors Guild, Inc. v. HathiTrust*,<sup>209</sup> the court was willing to recognize that the creation of a digital database of millions of books from research library collections constitutes fair use, provided that the database grants no general public access to the scanned books, but rather limits such access in various manners.<sup>210</sup> While these two decisions reflect a certain expansion of the fair use doctrine to allow the digital reproduction and storage of large collections of entire copyrighted works, they also reinforce the doctrine’s traditional distinction between partial and entire copying by requiring that the digital copies not be made available to the public in their entirety.<sup>211</sup>

Numerous policy makers have addressed the problem of orphan works and mass digitization, yielding various proposals for legislative amendments.<sup>212</sup> A full discussion of these proposals exceeds the scope of

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204. See SECTION 108 STUDY GROUP – INFORMATION FOR THE 2006 PUBLIC ROUNDTABLE AND REQUEST FOR WRITTEN COMMENTS, available at <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>, at 43.

205. *Id.* at 57-60 (arguing that current law lacks a scheme that would enable public-oriented remembrance institutions to function in a networked environment).

206. *Id.* at 31-34.

207. *Authors Guild v. Google, Inc.*, 804 F.3d 202.

208. *Id.* at 212-229.

209. *Authors Guild, Inc. v. HathiTrust* 755 F.3d 87 (2d Cir. 2014).

210. *Id.* at 97. Most notably, access to the full text was limited to library patrons with disabilities.

211. See the discussion in section C, *supra*.

212. See SECTION 108 STUDY GROUP, note 205 *supra*; ORPHAN WORKS AND MASS

this article. The important point for our purposes is the broad consensus that the current copyright exemptions scheme is incapable of providing a solution to the challenges of orphan works and mass digitization.

This problem too, though not unique to the Holocaust, is exacerbated in regard to Holocaust-related materials. Indeed, the mass murder and extreme conditions of the Holocaust yielded a huge amount of victims' works whose authors are unknown.<sup>213</sup> Registration of copyright in these works was not a practical option given the circumstances of their creation.<sup>214</sup> Therefore, the exercise of reasonable efforts will likely not result in identification of the authors of myriad Holocaust-related works, and obtaining copyright clearance for such works is not a practical option.<sup>215</sup> Moreover, although the reasonable assumption is that many (possibly most) of these anonymous authors did not survive the Holocaust, so that, copyright clearance efforts are essentially futile, copyright doctrine does not allow any particular latitude in making their works available to the public.

These problems are magnified even further in light of the role that Holocaust remembrance institutions play in Holocaust commemoration and these institutions' vulnerability to copyright's chilling effects. The only prospects for many orphan works created during the Holocaust to see the light of day is through a Holocaust remembrance institution.<sup>216</sup> Yet, as the foregoing discussion indicates, these institutions are especially risk averse and sensitive to copyright's constraints, and may well refrain from making such works available to the public.<sup>217</sup> To illustrate, representatives of the Holocaust Memorial Museum testified that since the institution is unable to clear the rights and unwilling to assume even the minimal risk of liability for copyright infringement, it may refrain from publishing orphan works such as a diary of a young woman written in a Polish ghetto, musical scores composed in concentration camps, or an album of photographs discovered in Germany shortly after the War.<sup>218</sup> Yet, it is

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DIGITIZATION REPORT, *supra* note 91 (putting forth a series of recommendations designed to overcome current obstacles to mass digitization due to the limitations of Section 108, including, *inter alia*, a legislative scheme of compulsory collective licenses for nonprofit educational and research projects, with an opt-out right for copyright owners).

213. See Testimony of Holocaust Memorial Museum, *supra* note 25, at 62 (explaining that many of the materials held by the Holocaust Memorial Museum are orphan works, and that the Museum does not know whether the authors are dead, or who they might be).

214. In addition, most of these works were created in European jurisdictions, which usually neither require nor maintain a copyright registry.

215. *Id.* (explaining that "often, even a diligent search is not successful").

216. See the discussion in Part I *supra*, notes 87-89 and the accompanying text. *Cf.* Testimony of Holocaust Memorial Museum, *supra* note 25, at 66 (explaining that orphan works held by the museum have cultural and historical value, yet they are rarely works of intrinsic artistic value).

217. For an elaborated analysis of this point, see the discussion in Part I *supra*.

218. Testimony of Holocaust Memorial Museum, *supra* note 25, at 66.

exactly the accumulation of such pieces of authentic, first-hand, documentation that comprises the bricolage that tells the story of the Holocaust, and plays a crucial role in overcoming the Holocaust's problem of representation.<sup>219</sup> As the representative of the Holocaust Memorial Museum eloquently stated (referring to the Museum's collection of family photos), "each one of these photos alone has minimal value . . . but the entire collection created a moving image of a community destroyed in the Holocaust."<sup>220</sup>

The fact that many of these anonymous works were not published by their authors further complicates matters.<sup>221</sup> As discussed above, the works' non-publication decreases the chances that a user wishing to make these works available to the public would be able to rely on the fair use doctrine.<sup>222</sup> Moreover, the combination of anonymity and non-publication extends the duration of copyright to 120 years from the works' creation,<sup>223</sup> which implies that many of the orphan works created by Holocaust victims during the 1940s will remain under copyright until the 2060s.

The emerging picture is that masses of anonymous works may be absent from the publicly accessible Holocaust-related materials, due to copyright constraints. This result may well affect the Holocaust's inter-generational and collective memory. Importantly, the ultimate expiry of copyright in these materials is unlikely to diminish its long-lasting impact. In a world where access is increasingly synonymous with digitization, there is no guarantee that future generations will be able to access Holocaust-related materials that are not digitally archived today, even if such materials are preserved in a physical form. The durability of Holocaust-related materials, therefore, depends to a great extent upon an ongoing, continuous engagement in these materials' digital preservation. The rational tendency to wait until such materials fall into the public domain, alongside the lack of clarity as to when exactly this moment will arrive, is likely to relegate many of these materials to the fringes of (or entirely exclude them from) the collective memory of the Holocaust.

Finally, the analysis in this section reveals, again, the paradox in

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219. See the discussion in Part I *supra*, notes 61-65 and the accompanying text.

220. Testimony of Holocaust Memorial Museum, *supra* note 25, at 66-67.

221. *Id.* ("The majority [of the materials held by the Holocaust Memorial Museum] are foreign works. Many of them are unpublished works, and many of them are orphan works").

222. See our discussion of publication v. concealment in Section III.B, *supra*.

223. See the combination of § 17 U.S.C. 302(c) (providing that "in the case of an anonymous work, . . . the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first") and § 17 U.S.C. 303 (a) ("copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047").

applying ordinary copyright doctrine to Holocaust-related materials. The accumulation of works created by victims facing genocide constitutes the ultimate evidence of the realities of the Holocaust. Yet the mass murder of those victims left their works practically immobilized, subject to a strict copyright regime that undermines their ability to serve as testimony for the mass atrocities that motivated their creation.<sup>224</sup>

Altogether, the analysis in this Part demonstrates that the ordinary copyright 'algorithm' reflects a narrative that is largely alien to the circumstances that surrounded the creation of myriad Holocaust-related materials. Applying copyright doctrine to these materials often yields both moral dissonances and an undesirable impact on the Holocaust's collective memory. Against this analysis, we proceed to outline several doctrinal proposals that may help resolve some of the problems we identified.

### III. DOCTRINAL RECOMMENDATIONS

The following sections offer several normative recommendations designed to overcome or mitigate some of the conflicts between copyright law and the use of Holocaust-related materials. The overarching principle guiding our recommendations is that in light of the significance of the Holocaust and the unique combination of attributes described throughout this article, copyright law should be applied to Holocaust-related materials in a way that encourages the dissemination of knowledge about, and remembrance of the Holocaust. We therefore propose to focus on Holocaust-related materials as a distinct category of works and to calibrate extant copyright doctrines to accommodate the particular attributes of those works, through interpretative choices that do not require statutory amendments.<sup>225</sup> Before delving into specific doctrines, however, several clarifications are in order.

First, we do not attempt to provide an overarching solution to general problems in copyright law discussed above, such as the problems of the chilling effect or of mass digitization. Obviously, the solutions proposed in the literature to some of these issues can also assist in resolving part of the problems concerning Holocaust-related materials. However, we submit that in the particular context of Holocaust-related materials, in light of the unique combination of extraordinary attributes as described

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224. For a detailed discussion of this paradox, see Section III.A, *supra*.

225. For a similar approach with respect to a different category of works, *cf.* Michal Shur-Ofry, *Popularity as a Factor in Copyright Law* 59 U. Toronto L. J. 525 (2009) (proposing to recognize iconic, popular works as a category of works bearing specific attributes and to calibrate copyright doctrine accordingly).

above, there exist both justifications and appropriate doctrinal tools to devise tailor-made doctrinal solutions that would apply specifically to these materials.

Notably, while our analysis pertains only to Holocaust-related materials, some of the attributes we highlight throughout this article may also apply in additional cases of genocide and mass atrocities, and some of our following suggestions—for example, applying the implied license doctrine to materials created by victims facing genocide—might be extended to such instances. Yet, the broader applicability of our analysis to additional cases of genocide requires close scrutiny, and thus constitutes a subject for future research.

Second, with respect to victims' works, the analysis in Part II indicates that the core of the conflict with copyright lies in the myriad cases of anonymous and orphan works authored by victims who did not survive the Holocaust or whose fate or identity are unknown. Hence, we confine the proposals which pertain to victims' works to these types of works and do not extend them to cases of identified Holocaust survivors.

Finally, we do not call for a general expiry of copyright in Holocaust-related materials. As we show below, such a result is unfeasible under existing law and may yield undesirable consequences in some cases. Instead, we search for copyright doctrines that would allow more flexible, context-based solutions, and could correspond the nuanced and diverse circumstances at the interface of copyright and the Holocaust. The discussion below therefore, concentrates on three specific doctrines: (1) implied license; (2) copyright misuse; and (3) fair use. While the first is particularly relevant with respect to victims' works, the second doctrine may be useable with respect to Nazi-related materials, and the third, fair-use doctrine, may apply to both types of materials.

The following paragraphs briefly review these doctrines and sketch, in broad strokes, how they can be interpreted and calibrated to better accommodate Holocaust-related materials.

#### *A. Implied License*

One existing mechanism to facilitate the use of works whose authors are unknown or did not survive the Holocaust is the doctrine of implied license.

Licensing the use of copyrighted works usually requires an explicit contractual consent on part of the copyright owner.<sup>226</sup> Yet, the court-made doctrine of implied license provides that under certain circumstances a

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226. 17 U.S.C. § 101 & § 204(a). *See also* NIMMER & NIMMER, *supra* note 156, at § 10.03[A][7].

license may be implied, even in the absence of such consent.<sup>227</sup> While originally, the doctrine of implied license was used to supplement contractual relations that already existed between parties,<sup>228</sup> it was expanded in the case of *Field v. Google* to circumstances under which no contractual relations existed.<sup>229</sup> According to the *Field* court, implied license may also apply “where the copyright holder knows of the use and encourages it”; indeed, passive behavior on part of the copyright owner may suffice.<sup>230</sup>

Scholars greeted this development with enthusiasm. Scholarly proposals advocate the further development of the doctrine as a non-contractual means that could be used to inject a standard of reasonableness into copyright law and allow the courts to legitimize certain normatively desired uses, while taking into account broad policy considerations.<sup>231</sup>

Numerous Holocaust-related materials authored by victims constitute paradigmatic candidates for applying the implied license doctrine. The doctrine’s underlying presumption—that under certain circumstances, implied consent for the use a copyrighted work in specific manners exists—is particularly applicable with respect to such materials. As the discussion in Part II demonstrates, many of these materials—from semi-structured archives of ghetto communities, to personal diaries, notes, poems, and music—were created as acts of cultural and historical preservation for future generations.<sup>232</sup> The wish to ensure the possibility of such future use led to these works’ burial in the ground, their concealment underneath the ashes of the crematoria, or their deposit in the hands of fellow prisoners.<sup>233</sup> Such works’ use by future generations for the exact purposes for which they were created not only reflects the

227. For the doctrine’s development and application by the courts, *see, generally*, Orit Fischman Afori, *Implied License: An Emerging New Standard in Copyright Law*, 25 SANTA CLARA COMP. & HIGH TECH L.J. 276, 292-300 (2008); John S. Sieman, *Using the Implied License To Inject Common Sense into Digital Copyright*, 85 N.C. L. REV. 885, 890 (2007); Monika Isia Jasiewicz, *Copyright Protection in an Opt-out world: Implied License Doctrine and News Aggregators*, 122 YALE L.J. 837 (2012).

228. *See* Fischman-Afori, *supra* note 227, at 285-86; *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558-559 (9th Cir. 1990) (holding that a film producer that paid a copyright owner substantial amounts for film footage had an implied license to use that footage).

229. *Field v. Google, Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006).

230. *Field*, 412 F. Supp. 2d at 1116.

231. *See* Sieman, *supra* note 227, at 915 and 925 (advocating a broad reading of *Field* and arguing that implied license comprises useful means to fill in gaps in copyright law and calibrate the law to technological developments); Jasiewicz, *supra* note 227, at 846-850 (advocating the extension of the doctrine to facilitate the conduct of news aggregators); Fischman-Afori, *supra* note 227, at 280-281 and 324-25 (positing a general argument for the use of implied license to inject an objective standard into copyright law).

232. Part II *supra*, particularly notes 107-121 and the accompanying text.

233. *See* the discussion in Part II.A(1) and Part II.B *supra*.

implied consent of their authors, but also often amounts to fulfillment of their explicit wishes.<sup>234</sup> Hence, applying the implied license doctrine to enable these uses is warranted.

Moreover, the doctrine of implied license is particularly appropriate in such cases, since it does not amount to a complete expiry of copyright protection, but rather preserves a nucleus of authorial rights. Therefore, the uses that can be authorized under the doctrine are only those that presumably are consistent with the victims' intent, as can be inferred from their works and the surrounding circumstances. To illustrate, let us return for a minute to the opera *the Kaiser von Atlantis*.<sup>235</sup> The preparation of the opera for its London performance many years after the Holocaust encountered a curious intervention from a famous London medium, who claimed that the dead Viktor Ullmann (the opera's composer) dictated to her some musical revisions posthumously.<sup>236</sup> The producers rejected the attempt to revise the work and decided "as far as practicable to perform the opera in the state that Kien and Ullmann had left it in 1943."<sup>237</sup> This decision seems consistent with the doctrine of implied license: the circumstances surrounding the opera's creation, its reflection of the horrors of the Holocaust through artistic means, and its deposit in the hand of a fellow prisoner in the hope it will be rescued all imply a license to third parties to perform the opera on stage.<sup>238</sup> Yet, changes to the original opera inserted by a third party would not be covered by that implied license.

We do not ignore the uncertainty as to whether the decision in *Field v. Google* alone can carry the weight of applying the implied license doctrine to Holocaust-related works. The main difficulty is the court's requirement that the copyright owners "knows of the use and encourages it,"<sup>239</sup> which cannot apply literally to the myriad works of anonymous victims, most of whom did not survive the Holocaust. However, the analysis above indicates that these are exactly the instances where leniency is justified, whereas a strict application of copyright law might leave materials immobilized against their authors' wishes. Therefore, we argue for a broad interpretation of the doctrine that would extend it to

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234. *Id.*

235. Introduction *supra*, notes 9–13 and the accompanying text.

236. For the details of this curious story, see Graubart, *supra* note 9, at 86–88 (explaining that the medium was apparently enlisted by the conductor who prepared the work for its first performance in Amsterdam).

237. *Id.* at 88. Notably, Graubart, who was one of the London production's producers, recounts that the Dutch version of the opera did incorporate some of the revisions that the medium had suggested.

238. *Cf.* Bilstiger, *supra* note 10, at 6 (comparing the opera to a "message in a bottle").

239. *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1116 (D. Nev. 2006).

those instances.<sup>240</sup>

We also acknowledge that under current copyright law, the doctrine of implied license, even in combination with calibration of the fair use doctrine (as discussed below), may be insufficient to provide a complete solution to the problem of orphan works and mass digitization of Holocaust-related materials. Yet, if both doctrines are developed in the manner suggested here, their cumulative application will provide a significant tool that would considerably mitigate the dissonance of Holocaust victims' works that are locked in by the copyright regime.<sup>241</sup>

### B. Copyright Misuse

How can copyright doctrine be calibrated to treat Holocaust-related materials created by the Nazi regime and its collaborators? We do not advocate here a complete denial of copyright in such materials. Indeed, recent scholarship has addressed the problems entailed in affording full copyright protection to works whose contents are illegal or immoral.<sup>242</sup> However, a result which completely denies copyright in such materials seems unfeasible under the current doctrinal regime, in light of copyright's "content neutrality" principle which is traditionally perceived as protecting free speech values.<sup>243</sup> This latter position is not free of difficulties, and deserves a thorough analysis that exceeds the scope of this article. We leave it for another day.<sup>244</sup> In the following paragraphs we explore another doctrinal solution, which does not entail a complete expiry of copyright. We submit that the evolving doctrine of copyright

240. Cf. Fischman-Afori, *supra* note 227, at 280-81, 324-25 (discussing the extended application of the implied license doctrine in patent law and proposing a similar extension in copyright law); Sieman, *supra* note 227, at 915 and 925 (advocating a broad reading of *Field*, to advance socially beneficial outcomes).

241. Part II, *supra*.

242. See Anne Bartow, *Copyright Law and Pornography* 91 Oregon L. Rev. 1 (2012); Eldar Haber, *Copyrighted Crimes: The Copyrightability of Illegal Works*, 16 YALE J. L. AND TECH. 454 (2014); Snow, *supra* note 147 and the accompanying text.

243. See note 147 *supra*, and the accompanying text. Cf. the recent decision of the Supreme Court in *Matal v. Tam* 582 U.S. (2017) (holding that a provision under the Lanham Act which allows to refuse the registration of trademarks on the basis, *inter alia*, of "immoral" nature, is unconstitutional and conflicts with the First Amendment). For recent scholarship criticizing "aesthetic neutrality" principles, see Ben Depoorter & Robert Kirk Walker, *Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard*, 109 NW. U. L. REV. 343 (2015) (arguing that implicit aesthetic criteria are deeply embedded in copyright law); Brian Soucek, *Aesthetic Judgement in Law*, 69 ALA. L. REV. 381 (2017) (arguing that the arguments for refraining from aesthetic judgements in the law are generally unconvincing).

244. Briefly, we do not overlook problems of boundary-drawing and the moral choices that are embedded in alleviating the content-neutrality principle. However, we argue that because affording ordinary copyright protection to Nazi works renders these works ordinary and carries aesthetic and moral implications, the "neutrality" principle itself is far from neutral, but rather is laden with inevitable moral choices. For further elaboration of this point, see Guy Pessach & Michal Shur-Ofry, *Copyright and Mein Kampf—Another Look at Copyright Neutrality* (unpublished manuscript, copy with the authors).

misuse could apply with respect the use of Holocaust-related materials created by the Nazi regime and its collaborators.

Similar to the implied license doctrine, copyright misuse is also a court-made doctrine.<sup>245</sup> It is based upon the principle that, in certain exceptional cases, the protection afforded by copyright should withdraw in favor of the public interest.<sup>246</sup> While copyright misuse was applied in many cases that involved antitrust considerations, both case law and scholars indicate that the doctrine need not be confined to such circumstances, but rather reflects broader public policy considerations.<sup>247</sup> As the court noted in the case of *Lasercomb v. Reynolds*:

[M]isuse need not be a violation of antitrust law in order to comprise an equitable defense to an infringement action. The question is not whether the copyright is being used in a manner violative of antitrust law . . . but whether the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright.<sup>248</sup>

The latter statement clarifies the relevance of copyright misuse in our context. Ordinary copyright protection of Nazi materials is difficult to justify on the basis of the “public policy embodied in the grant of a copyright.”<sup>249</sup> Moreover, the discussion in the previous parts demonstrated that enabling perpetrators to rely on ordinary copyright law as a means to control the use of their works and receive royalties for their utilization yields anomalous consequences and produces a chilling effect on the Holocaust’s commemoration.<sup>250</sup> Therefore, policy and equitable considerations, in their broader sense, seem to justify the denial of full enforceability of copyright in these materials, in order to mitigate the distortions that we discussed earlier: first, the moral distortion in recognizing Nazi materials as ‘ordinary’ copyrighted works worthy of

245. For principal cases recognizing the doctrine, see *Lasercomb Inc. v. Reynolds* 911 F2d 970, 979 (4<sup>th</sup> Cir. 1990); *Alcatel USA Inc. v. DGI Technologies, Inc* 166 F3d. 772, 793 (5<sup>th</sup> Cir. 1999); *Practice Management Information Corp. v. American Medical Association* 121 F3d 516 (9<sup>th</sup> Cir. 1997). See also PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT*, 11:38-11:39 (3rd. ed., 2015).

246. See, generally, Brett Frischmann & Dan Moylan, *The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software* 15 BERKLEY TECH. L. J., 865, 901-902 (2000); Ramsey Hanna, *Misusing Antitrust: The Search for Functional Copyright Misuse Standards*, 46 STANFORD LAW REV. 401 (1994); Tom Bell, *Codifying Copyright’s Misuse Defense* 2007 UTAH L. REV. 573; Kathryn Judge, *Rethinking Copyright Misuse* 57 STAN. L. REV. 901 (2004); Shur-Ofry, *supra* note 225, at 574-75.

247. See GOLDSTEIN, *supra* note 245, at 11:41-11:42 (objecting to limiting the doctrine to cases of antitrust infringement, and noting that “the majority of copyright misuse decisions today explicitly or implicitly reject any requirement that copyright misuse must also constitute an antitrust violation”).

248. *Lasercomb Inc. v. Reynolds* 911 F2d 970, 979 (4<sup>th</sup> Cir. 1990) (emphasis added).

249. See Part II *supra*, notes 102–105 and the accompanying text; Cf. Bartow, *supra* note at pp. 3-4 (arguing that pornographic materials cannot reasonably be construed as promoting “progress” or “useful arts”).

250. See Part II *supra*, notes 121-145 and the accompanying text.

protection, entitling their creators to a stamp of authorship and their successors to a financial reward; and second, the paradox that arises when copyright in these works serves as a mechanism affecting the collective memory and history of the Holocaust.<sup>251</sup> Thus, overall, employing the copyright misuse doctrine in order to bar harmful enforcement of copyright in these materials is theoretically consistent with the *raison d'être* of the doctrine.

Similar to the implied license doctrine, copyright misuse as well is not tantamount to a complete expiry of copyright. Rather, its application prevents the enforcement of copyright in certain cases.<sup>252</sup> Thus, the doctrine allows some sensitivity to the context and circumstances under which enforcement is sought. For example, under this analysis, requiring the payment of royalties for the use of excerpts from *Triumph of the Will* in a post-War film about the Nazi regime<sup>253</sup> or for the use of quotations from Goebbels' diaries in a book<sup>254</sup> would constitute copyright misuse. So would the use of copyright by Hitler's authorized publishers in order to prevent the distribution of the full text of *Mein Kampf* during Hitler's rise to power.<sup>255</sup> On the other hand, the use of copyright in *Mein Kampf* by the government of Bavaria (which became the legal owner of the rights after the War) during the post-War years in order to prevent the further dissemination of the Nazi ideology would not necessarily give rise to a copyright misuse defense.<sup>256</sup>

Indeed, in some cases, the fair use doctrine (which we discuss below) may supplement or overlap with copyright misuse. Yet, in the circumstances we are concerned with, copyright misuse has an advantage over fair use: while the focus of fair use is on the conduct of the defendant using the work, the focus of copyright misuse is on the unclean hands and harmful conduct of the copyright owner.<sup>257</sup> Consequently, the doctrine of copyright misuse entails an expressive element of illuminating and delegitimizing the copyright owner's conduct.<sup>258</sup> As such, this principle

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251. See Part II.A(2), *supra*.

252. Goldstein, *supra* note 245, at 11:32 (32 (explaining that the prevalent view is that the rights do not expire but are unenforceable, "at least until the taint is purged").

253. For the story of *Triumph of the Will* and the legal proceedings initiated by Riefenstahl, see Part I *supra*, notes 122-131 and the accompanying text.

254. For the copyright litigation concerning the citation of paragraphs from Goebbels' diaries, and the decisions of the German courts, see *supra*, notes 137-137 and the accompanying text.

255. For the copyright claims filed by Hitler's publishers in order to prevent the dissemination of the full text of *Mein Kampf*, see the discussion in Introduction *supra*, notes 14-23 and the accompanying text.

256. For the policy of Bavaria with regard to *Mein Kampf* in the post-War years, and its reliance on copyright, see Caesar C. Aronsfeld, *Mein Kampf, 1945-1982*, 45 JEWISH SOCIAL STUDIES 311 (1983).

257. GOLDSTEIN, *supra* note 245, at 11:41.

258. *Id.* at 11:47 (explaining that fair use asks "whether the user's conduct is salutary," whereas

may constitute a particularly suitable doctrinal vehicle to alleviate the moral distortions entailed in copyright protection of materials created by the Nazi regime and its collaborators.

Copyright misuse is currently an evolving doctrine, and one of the challenges courts face is identifying categories of cases that may constitute copyright misuse, so as to award the doctrine a “measure of predictability.”<sup>259</sup> Our proposal in this context is to recognize Holocaust-related works created by the Nazis and their collaborators as a relevant category within the framework of the copyright misuse doctrine.<sup>260</sup> Such recognition is not only consistent with the doctrine’s rationales but will also assist in its further development.

### C. Fair Use

Finally, we propose to calibrate the fair use doctrine to better accommodate the properties of Holocaust-related materials. The foregoing discussion demonstrated two major difficulties in the application of the fair use doctrine to such materials: first, courts’ reluctance to acknowledge fair use in the case of unpublished materials (primarily relevant to materials authored by victims);<sup>261</sup> and second, the judicial inclination to prefer transformative and partial uses over the bare utilization of an entire copyrighted work ‘as is’ (which is relevant to materials created by either victims or perpetrators).<sup>262</sup> These problems can be partially resolved by adopting certain interpretive choices when applying the fair use doctrine to Holocaust-related materials. The holistic nature of the fair use inquiry and its embedded flexibility would allow courts to adopt the interpretations we propose here and take into account the unusual circumstances surrounding Holocaust related materials.

#### (1) *The Nature of the Work: Holocaust-Related Materials*

The second factor in the statutory provision instructs the courts to consider “the nature of the copyrighted work” as part of the fair use analysis.<sup>263</sup> Apart from the case of unpublished works (which courts consider under this factor, and which we will discuss shortly), the nature of the work is regarded the least important among the fair use factors.<sup>264</sup>

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copyright misuse inquires whether the owner’s conduct is “harmful”).

259. *Id.* at 11:41.

260. *Cf.* Shur-Ofry, *supra* note 225, at 575 (arguing that identifying categories of works within the framework of copyright misuse will increase the doctrine’s predictability).

261. Part II.B, *supra*.

262. Part II.C, *supra*.

263. 17 U.S.C. § 107(2) (“in determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include ... (2) the nature of the copyrighted work”).

264. *See* Beebe, *supra* note 155, at 610 (providing empirical evidence of the limited weight that

The general approach is that the more creative the work is, the more would this factor weigh in favor of the copyright owner, and vice versa.<sup>265</sup> Yet apart from this distinction, the nature of the work does not receive considerable weight under the fair use analysis.

We propose to recognize Holocaust-related works as a distinct category of works under the nature of the work prong of the fair use doctrine (regardless of their level of creativity). In other words, if the work in question is a Holocaust-related work, this factor would weigh in favor of a fair use finding. The primary justifications for this proposal arise from our previous analysis;<sup>266</sup> namely, the vital role of these materials in the perception and commemoration of the Holocaust and in overcoming the problem of representation; the convincing policy reasons not to award ordinary copyright protection to Holocaust-related materials created by the Nazi regime, and—with respect to materials authored by victims—the moral imperative (often reflected in the authors' explicit wishes) to disseminate these works and expose them to future generations. The combination of these considerations implies that copyright law should demonstrate particular leniency toward the use of Holocaust-related materials.

In addition, our proposal to recognize Holocaust-related materials as a relevant category within the fair use doctrine is largely consistent with the fourth factor of the doctrine, which instructs the courts to examine “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>267</sup> In many cases, the preservation of and the provision of access to Holocaust-related works will not harm their value or potential markets. Often, the historical-cultural value of Holocaust-related materials does not easily translate into actual market value. Works such as letters, personal notes, sketches, or drawings may not be able to compete in a regular artistic market; yet, their combination creates a whole that is greater than the sum of its components—a valuable bricolage of life during the

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courts grant the second factor of the fair use defense); *NIMMER & NIMMER*, *supra* note 156, at § 13.05[A][2][a] (stating that “notwithstanding that general pronouncement, this second factor more typically recedes into insignificance in the greater fair use calculus”).

265. Beebe, *supra* note 155, at 611 (presenting empirical evidence that courts grant considerable weight to the degree of the work's creativity within the framework of the second factor); *NIMMER & NIMMER*, *supra* note 156, at § 13.05[A][2][a] (stating that “it has been said that, with respect to ‘a work more of diligence than of originality or inventiveness’ such as a catalog, index or other compilation, there is a ‘greater license’ to use portions of such a work under the doctrine of fair use than would be the case ‘if a creative work had been involved.’ . . . the scope of fair use is greater when informational type works, as opposed to more creative products are involved . . . . If a work is more appropriately characterized as entertainment, it is less likely that a claim of fair use will be accepted”).

266. Parts I & II.A, *supra*.

267. 17 U.S.C. § 107(4) (“in determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include . . . (4) the effect of the use upon the potential market for or value of the copyrighted work”).

Holocaust.<sup>268</sup> Moreover, the previous analysis indicates that the market-oriented framework of copyright law is often inapplicable to Holocaust-related works created by victims. It also indicates that there are good policy reasons for copyright law to avoid creating or protecting a market for Nazi materials.

We do not argue that there would never be a market for Holocaust-related works, or that it would always be unjustified to consider that market. We claim that as a general matter, in light of the circumstances underlying the creation of Holocaust-related works, the doctrinal leverage should lie in the second factor of the fair use doctrine (the work's nature), and that (again, as a general matter) the fourth, market, factor should not bar a finding of fair use.

### (2) *Unpublished Holocaust-Related Works in Context*

The previous analysis illuminated the conflict between the weight that copyright law affords to unpublished works as a factor that considers against fair use on the one hand, and the common burial and concealment of materials created by victims during the Holocaust in an attempt to ensure their future dissemination, on the other hand.<sup>269</sup>

Therefore, we submit that where Holocaust-related materials are concerned, the unpublished nature of the work should not weigh against fair use. To a large extent, our proposal is consistent with the 1992 statutory amendment of the fair use provision.<sup>270</sup> Our argument is also consistent with the legislative history of the amendment, which indicates that it was designed to increase the ability of biographers, historians, and publishers to use unpublished primary materials such as copyrighted letters and diaries.<sup>271</sup> More significantly, however, our proposal does not conflict with the rationale underlying the law's reserved approach toward unpublished works. As previously explained, the purpose of the

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268. See the discussion in Part I *supra*, note 89 and the accompanying text.

269. Part II.B, *supra*.

270. Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145 (providing that "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors"). *But see* the discussion *supra*, notes 154–155 and the accompanying text (indicating that the unpublished nature of a work still carries weight under the fair use analysis). Our proposal is also consistent with Nimmer's position, that the fair use doctrine should be considerably narrower where the authors sought the confidentiality of the unpublished work, in comparison to cases where no confidentiality was sought by the authors—see NIMMER & NIMMER, *supra* note 156, at § 13.05[A][2][b][ii].

271. Thus, several senators stated that the amendment "applies to uses of letters, diaries and other unpublished copyrighted works" but does not "broaden the fair use of unpublished computer programs [or secure tests]." See 138 Cong. Rec. S17358 (daily ed. Oct. 7, 1992) (statement of Sens. Simon, Leahy, Kennedy, Grassley, Metzenbaum, and Kohl); S. Rep. No. 102-141, 102d Cong., 1st Sess. 6 (1991); H.R. Rep. No. 102-286, 102d Cong., 2d Sess. 4 (1992). See also Lynn Miller, *Fair Use, Biographies, and Unpublished Works: Life After H.R. 4412*, 40 J. COPR. SOC'Y 349, 395 (1993).

distinction between published and unpublished works is to provide authors with the power and discretion to determine whether and when their works will be made public.<sup>272</sup> In the context of Holocaust-victims' works, however, the choice to publish in real time was virtually non-existent. The authors' wish to make their works publicly accessible was expressed either explicitly—as in the case of the History of the Kovno Jewish Ghetto Police, or the Oyneg Shabes archive—or implicitly by the mere attempt to rescue the works.<sup>273</sup> Therefore, in those cases, the unpublished nature of the works should not function to prevent a finding of fair use.

### (3) *Beyond Transformative Uses*

Finally, our analysis also suggests a new interpretation of the first and third factors of the fair use doctrine.<sup>274</sup> The discussion throughout this article illuminated the significance of using entire, authentic, unabridged Holocaust-related materials in order to minimize the Holocaust's problem of representation and convey its realities to future generations.<sup>275</sup> This insight applies both to the use of victims' works and to materials created by the Nazi perpetrators.<sup>276</sup> We also demonstrated that such uses may conflict with the dominance of the transformative use paradigm within fair use jurisprudence, as well as with the doctrine's preference for partial uses over uses of entire copyrighted materials.<sup>277</sup> Against this background, we propose that in appropriate circumstances, the use of Holocaust-related materials in their entirety would be recognized as fair use, even when such use is not transformative by nature.

Our proposal may find support in the views expressed by some courts, that a transformative use is not a sine-qua-non requirement for a finding of fair use.<sup>278</sup> It is also consistent with the scholarship that highlights the

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272. Part II.B *supra*, notes 156–165 and the accompanying text.

273. *Id.*

274. See 17 U.S.C. § 107(1) & (3): (“in determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include ... (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes ... [and] (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole”).

275. Parts I & II.C *supra*.

276. See the discussion in III.C *supra*, notes 180–191 and the accompanying text.

277. Part II.C, *supra*. The transformative-ness of the use is considered as part of the first statutory factor, while the preference for partial uses relies on the third factor.

278. See, e.g., *Sarl Louis Feraud Int'l v. Viewfinder Inc.*, 627 F. Supp. 2d 123, 128 (S.D.N.Y. 2008) (“transformative use is not a requirement for a finding of fair use, but ‘the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.’”). *Cf.* *Time Inc. v. Bernard Geis Associates*, 293 F.Supp. 130, 146 (D.C.N.Y. 1968) (holding that the use of frames from Zapruder's film documenting the Kennedy assassination constituted fair use, while acknowledging the public interest “to have the fullest information available on the murder of President Kennedy”, and the defendants' difficulty to explain

significance of unadorned reproductions of copyrighted works for protecting speech-related values.<sup>279</sup> The primary justification for our proposal is the inimitable value of access to authentic, unabridged, Holocaust-related materials for the formation of the Holocaust's collective memory and historical narratives. Yet as previously explained, transcending the transformative use paradigm is also vital for the subsequent transformative uses of original Holocaust-related materials. This is so because the availability of such materials for secondary, transformative uses largely depends on primary non-transformative uses, namely upon their initial digitization and upon making them available to the public by Holocaust remembrance institutions.<sup>280</sup>

Altogether, the analysis in this Part indicates that the current copyright regime can calibrate its doctrinal tools, through interpretation of existing doctrines, so as to better accommodate Holocaust-related materials. The proposals above are non-exhaustive, and do not provide comprehensive solutions to each and every case of Holocaust-related materials. Yet, jointly, they could help in mitigating some of the conflicts at the interface of copyright and the Holocaust.

## CONCLUSION

Our exploration of the interface between copyright and the Holocaust reveals an area fraught with tensions and conflicts. Copyright's ordinary narrative is often ill-suited to treat Holocaust-related materials, created under conditions that were anything but ordinary. Thus, on the one hand, a regular application of copyright to such materials can stifle the voices of Holocaust victims who attempted to send us a "message in a bottle." On the other hand, it may normalize Nazi materials and render them administratively ordinary, while granting the Holocaust perpetrators (and their successors) a certain control over the Holocaust memory. Our analysis indicates that extant copyright law should be sensitive to these dissonances and presents several normative recommendations that may alleviate some of the tensions.

Our focus here is solely on the Holocaust. Yet, the scheme we propose here may be applicable to additional cases of genocide, which may have

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their theory with sketches, rather than frames from the original film). The latter case, however, preceded the transformative-use era in U.S. copyright law. Cf. Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 770 (2011) (explaining that the delineation of what exactly falls within this category of non-transformative fair-uses remains relatively unclear).

279. See Tushnet, *supra* note 169, and the discussion in Part II.C, notes 178-179 and the accompanying text.

280. See the discussion in Part II.C, notes 192-193 and the accompanying text.

involved concealment practices, masses of anonymous works, or other extreme attributes similar to the ones explored above. This application, however, would require a close scrutiny of the attributes and circumstances surrounding each such case, and exceeds the scope of this article. Therefore, while acknowledging the potential broader relevance of our analysis or parts thereof to other cases of genocide, we leave this issue to future research.

Our study further illuminates the (largely overlooked) role of copyright in shaping the Holocaust's collective memory. This exploration reveals the limitations and shortcomings of the copyright system in dealing with questions concerning the inter-generational memory of the Holocaust. The Holocaust is perhaps the most influential case in the study of social memory. The analysis of its interface with copyright law demonstrates how our memory of the past is constructed by the present copyright regime. More generally, it can deepen our understanding of copyright's impact on collective memory and social remembrance. The latter, broader question requires further research.

Finally, the exploration initiated in this study is far from comprehensive. Our journey to the boundaries of copyright and the Holocaust reveals that this interface is comprised of numerous legal, cultural, and historical facets; of myriad stories and case studies; of institutional, social, and individual interests. All these aspects warrant further investigation. Our study constitutes a first step. Future research should follow.