

COPYRIGHT NAZI PLUNDER: HOW THE NAZIS ARYANIZED JEWISH WORKS

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I INTRODUCTION

Shortly after the Nazi party gained power in Germany in 1933, the phenomenon of “Nazi plunder” emerged. The term Nazi plunder refers to the massive theft of art and other significant cultural items stolen by the Nazi party as part of an organized looting scheme across Europe. This plunder was carried out by military units of the German army known as *Kunstschutz*, which ironically means “art protection.” In 1935, along with the Nuremberg Laws depriving Jews of their German citizenship,¹ Nazi Germany enacted a new law, which required Jews to register their domestic and foreign property and assets.² The Nazis pushed to “Aryanize” all Jewish businesses. By the end of 1938, approximately two-thirds of Jewish-owned businesses had been sold to Germans at a fixed price below market value. On October 3, 1938, a decree ordered the confiscation of Jewish-owned property and its transfer to non-Jewish hands.

A different form of Nazi plunder also took place during those years leading up to the war. This plunder was not of physical property, but rather a spiritual one of protected artworks authored by Jewish authors. The Nazis published artworks created by Jews under different names and plagiarized their work in an attempt to Aryanize Jewish works. A prominent example is that of Alice Urbach's cookbook. Her book, *So kocht man in Wien!* (This Is How We Cook in Vienna!), was a massive success in German-speaking countries in the 1930s. Urbach was recognized as the author of the book in the edition published in 1938, but despite the fact the cover of the book and the vast majority of its content were identical in every other way, the edition in 1939 was published under the name of Rudolf Rösch. Urbach, who fled to England in 1938

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¹ Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre (Law for the Protection of German Blood and German Honor), § 1-5. Reichsgesetzblatt. Vom 15. September, 1935, Nr. 125, S. 1333f.

² Verordnung über die Anmeldung des Vermögens von Juden (Regulation on the Registration of Jewish Property), § 1. Reichsgesetzblatt, Vom 26. April 1938, Teil I - Inneres, Nr. 56, pp. 414-415.

and died in 1983, never got her rights in her cookbook back. She was not the only victim. Other non-fiction publishers used this method to Aryanize books authored by Jewish writers. Another example is that of Ludwig Reiners who plagiarized Jewish writer Eduard Engel for his bestseller *Stilkunst* (Art of Style). Only a handful of cases of this practice have come to light so far.

This form of Nazi plunder has failed to receive the scholarly attention it deserves. This Chapter aims to amend this wrong. It focuses on the underexplored works created by Jewish authors which were soon Aryanized following the rise of Nazis to power. It argues that this practice denies and confiscates authorial identity. The public has the right to know the authentic truth embedded within these works, which is directly linked to the origin and identity of an artwork. Aryanizing Jewish works essentially denies the public of its valuable right. This right relates to the set of moral rights copyright laws recognized and protected. Moral rights protect authorial integrity, allow viewers of the works to know, if possible, who is the original author, and safeguard the authentic message and meaning they project. Plagiarizing one's spiritual work violates individual and collective moral right. Moral rights in the case of plagiarized Jewish work, we claim, maintain fairness for both authors and the public. This Chapter calls for a global endeavor to ensure that similar to physical property that was looted during the years before the war, stolen intellectual property will also be restituted to its rightful owners and their heirs.

II COPYRIGHT PROTECTION OF JEWISH ARTWORKS IN NAZI GERMANY

Germany signed the Berne Convention in 1886,³ and was thus obligated by its core principles of protecting “literary and artistic works.”⁴ The latter refers to “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.”⁵ However, in complete violation of these obligations, the Nazi regime in the interwar period (mostly from 1933 to 1939) slowly but surely transferred the copyright associated with artwork created by Jews and transferred them to Nazi authors and individuals in a process known as ‘Aryanization.’⁶ The Holocaust Encyclopedia of the United States Holocaust Memorial Museum defines ‘Aryanization’ as “the transfer of Jewish-owned property to non-Jews in Nazi Germany” starting from 1933.⁷ The narrative of the ‘Aryanization’ process focuses entirely on physical property and its economic effects in the interwar period. However,

³ Berne Convention for the Protection of Literary and Artistic Works art. 2(6), Sept. 9, 1886, S. TREATY DOC. NO. 99-27 [hereinafter Berne Convention]; *WIPO-Administered Treaties: Contracting Parties > Berne Convention (Total Contracting Parties: 179)*, WIPO, www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15.

⁴ Berne Convention, *supra* note 1, art. 2(1).

⁵ *Id.*

⁶ Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre (Law for the Protection of German Blood and German Honor), § 1-4. Reichsgesetzblatt. Vom 15. September, 1935, Nr. 125, S. 1333f.

⁶ Verordnung über die Anmeldung des Vermögens von Juden (Regulation on the Registration of Jewish Property), § 1. Reichsgesetzblatt, Vom 26. April 1938, Teil I - Inneres, Nr. 56, pp. 414-415

⁷ “Aryanization”, HOLOCAUST ENCYCLOPEDIA, encyclopedia.ushmm.org/content/en/article/aryanization.

this process also took place with regards to intellectual property which was forcefully transferred from Jewish authors to non-Jews individuals in Nazi Germany.

On August 17, 1938,⁸ the Nazi regime issued an executive order obligating all Jewish men to add “Israel” as an additional name, and all women to add “Sara.”⁹ As a result, Nazi officials were better able to identify Jewish applicants and deny them the ability to register or renew the registration of their intellectual property via the Nazi IP system.¹⁰ Despite the fact that written IP legislation in Nazi Germany did not include specific exclusions for Jewish applicants and authors, in practice, they were excluded by administrative measures alone rather than legal ordinances.¹¹ This is in light of their willingness to avoid any negative international appearances and to maintain their income from German patents used abroad.¹²

The systematic anti-Jewish legislation in the interwar period created an aggregated stigma against Jewish authors and creators which essentially sidelined them and their ability to take a proactive part in the cultural and artistic sphere of Nazi Germany. As a result, some Jewish coauthors agreed to omit their names from research or other artistic works in order to enable its dissemination into the market. For example, the work of the inventor Otto Eppenstein of the Zeiss factory was never acknowledged as he agreed to forgo his economic and moral rights to ensure his work will be registered via the Nazi IP system.¹³

Furthermore, a Nazi decree which went into effect in 1933 prohibited Jews from being members of the Reich Chamber of Culture, thus, Jews were excluded from working in radio, theaters as well as lost their ability to sell their art.¹⁴ On top of that, an unimaginable number of books written by Jews novelists, or which had Jewish elements in them, were burned in massive bonfires in 1933.¹⁵

The new legislation of the Nazi regime deprived Jewish authors of their economic and moral rights associated with their intellectual property. Their creative works were

⁸ Zweite Verordnung zur Durchführung des Gesetzes über die Änderung von Familiennamen und Vornamen (Second Decree for the Enforcement of the Name Law), § 2(1) Reichsgesetzblatt. Vom 17 August 1938 I S. 1044.

⁹ *Law on Alteration of Family and Personal Names*, TIMELINE OF EVENTS, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, www.ushmm.org/learn/timeline-of-events/1933-1938/law-on-alteration-of-family-and-personal-names.

¹⁰ Lida Barner, “Aryanization” Expanded? Patent Rights of Jews under the Nazi Regime, in EXPANDING INTELLECTUAL PROPERTY: COPYRIGHTS AND PATENTS IN 20TH CENTURY EUROPE AND BEYOND 127 (Hannes Siegrist & Augusta Dimou, eds., 2017); Steve Andreadis, *The Seizure of Jewish Intellectual Property Ahead of World War II*, LIBRARY OF CONGRESS (Apr. 28, 2022), blogs.loc.gov/copyright/2022/04/the-seizure-of-jewish-intellectual-property-ahead-of-world-war-ii/.

¹¹ Barner, *supra* note 10, at 132.

¹² However, in 1941 an official decree was issued aiming to deprive Jewish inventors of being named in public. *Id.* at 133.

¹³ Barner, *supra* note 10, at 135.

¹⁴ Reichskulturkammergesetz (Reich Chamber of Culture Law) vom 22. September 1933, ergänzt durch Ergänzungsgesetz vom 15. Mai 1934 (RGBl. I. S. 413), Reichsgesetzblatt 1933 I S. 661; Nazi Germany and Anti-Jewish Policy, ADL (Mar. 6, 2017), www.adl.org/resources/backgrounders/nazi-germany-and-anti-jewish-policy.

¹⁵ *Book Burning*, TIMELINE OF EVENTS, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, www.ushmm.org/learn/timeline-of-events/1933-1938/book-burning.

fundamentally criminalized, and they lacked the genuine ability to create new artworks in light of the aggregated restrictions imposed on them. A prominent part of this Aryanization process by law focused on artworks that were already in existence and registered under Jewish authors. We turn below to discuss this process and the implications it had on the moral and economic rights of Jewish authors in the years leading to World War II.

III ARYANIZATION OF BOOKS, PATENTS AND MUSIC AUTHORED BY JEWS

The interwar period provided the perfect opportunity for the Nazi regime to proactively confiscate, misappropriate or edit artworks authored by Jewish authors. As we have seen, this Ayanization process had a strong influence on physical property, depriving Jews their homes, businesses, and property in an effort to outlaw their mere existence and erect a barrier preventing them from participating in Germany's commerce life. Another important aspect of this process was a spiritual one, in which Jews were excluded from creative spheres and were deprived of their intellectual protection. Their rights in artistic works and patents confiscated and misappropriated under authors, or plain names, who were more in line with the Nazi propaganda agenda.

A couple of examples have been exposed in recent years, though the scope of this phenomenon remains unknow. In the field of music,¹⁶ Levi noted that in the years leading up to the war the Nazi regime “scanned the whole literature of music with the sole intention of rooting out all traces of Judaic influence.”¹⁷ In 1938, the Nazi regime issued an official decree banning music publishers and recording companies to perform music authored by Jewish artists.¹⁸ This greatly affected the performance of Jewish composers, such as Felix Mendelssohn, whose name was constantly smeared by the Nazi regime and the public performance of his works was outlawed or simply replaced by non-Jewish works.¹⁹

Hermann Levi, a German Jewish orchestral conductor who worked in Germany between 1850-1900,²⁰ translated Mozart's and Da Ponte's *Così fan Tutte*, *Le Nozze di Figaro*, and *Don Giovanni*.²¹ In this case, the Nazi regime opted to avoid from the

¹⁶ See generally, ERIK LEVI, *MUSIC IN THE THIRD REICH* 70 (1994).

¹⁷ Erik Levi, *The Aryanization of Music in Nazi Germany*, 131 *THE MUSICAL TIMES* 19, 19 (1990)..

¹⁸ *Verordnung zur Ausschaltung der Juden aus dem deutschen Wirtschaftsleben* (Decree on the Elimination of Jews from German Economic Life), § 2. Reichsgesetzblatt, vom 12. November 1938, I 1938, 1580.

¹⁹ *Id.*; Michael Levitin, *Rescuing Mendelssohn from the Nazi Smear Campaign*, *NEWSWEEK* (May 29, 2009), www.newsweek.com/rescuing-mendelssohn-nazi-smear-campaign-80229.

²⁰ Hermann Levi (1839-1900), Schumann Netzwerk, www.schumann-portal.de/hermann-levi-1359.html.

²¹ Levi, *The Aryanization of Music in Nazi Germany*, *supra* note 17, at 21.

complete ban of these works given the renowned identity of Mozart,²² and instead they were retranslated by Siegfried Anheisser and used in seventy-six German theaters.²³

As mentioned, when the Nazis rose to power, books that were considered “un-German” were burnt. However, another category of non-fiction books presented a different type of challenge. Those books’ content was apolitical, they were extremely popular, loved, and useful. The only problem was that they were authored by Jews.²⁴ This led their publishers, who were usually implicated with the Nazi regime, to Aryanize them maintaining the vast majority of the content, but republishing under a non-Jew name.

In the field of medical scholarship, Dr. Josef Löbel, an Austrian Jewish medical practitioner, was the author of ‘Knaurs Gesundheitslexikon’, a popular health encyclopedia which was published in 1930.²⁵ This book was translated into sixteen languages and was published under the Jewish publishing house of Otto Liebmann. Once this publishing house was taken over by the Nazi publisher, C.H. Beck, Löbel’s bestseller was still published but under the name of Peter Hiron, the pseudonym of the German physician Herbert Volkmann.²⁶ Moreover, Volkmann edited ‘Knaurs Gesundheitslexikon’ to include new material in line of the Nazi agenda on subjects such as “race, homosexuality, prison psychosis and megalomania.”²⁷ Similarly, Volkmann also usurped Dr. Walter Guttman book “Medizinische Terminologie – medical terminology” starting from its 29th edition onwards. Guttman’s book on terminology of medicine was first published in 1902 under his name. Until 1937 there have been 28 new editions published under Dr. Guttman’s name. In July 1939, the 29th edition of Guttman’s book was republished under that name Herbert Volkmann. Up until that point, the book was title ‘Guttman’s Terminologie’ but the publishing house changed it deleting Guttman’s name from the title.²⁸ Löbel and Guttman lost everything once the Nazi regime rose into power and confiscated their lives work.

Moreover, a short commentary on the German Civil Code (BGB) named the Grüneberg (until the 80th edition in 2021 when it was renamed ‘Palandt’) was originally based on Otto Libemann’s ‘pocket and short commentaries’ edited by Liebmann’s publishing house.²⁹ As mentioned, in 1933 Liebmann was forced to sell his publishing

²² For more on Mozart and the Nazi regime see generally, ERIK LEVI, *MOZART AND THE NAZIS: HOW THE THIRD REICH ABUSED A CULTURAL ICON* (2010)

²³ He also claimed that “Hermann Levi initiated a massive conspiracy in which the Jews were engaged in appropriating Mozart for themselves.” Levi, *The Aryanization of Music in Nazi Germany*, *supra* note 17, at 21.

²⁴ Bee Wilson, *Alice’s Book by Karina Urbach — the Recipes Stolen by the Nazis*, FINANCIAL TIMES (May 5, 2022), www.ft.com/content/ee4f7456-f617-4b33-981f-d682bd7d4b20.

²⁵ Ruth Weiss, *Aryanization of Jewish Writer’s Intellectual Property*, RUTH WEISS BLOG, ruthweiss.net/blog/aryanization-of-jewish-writers-intellectual-property/.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Peter Voswinkel, *Um das Lebenswerk betrogen: Walter Guttman (1873–1941) und seine Medizinische Terminologie*, Bd. 32, H. 3/4 (1997), pp. 321-35.

²⁹ Jennifer Allison, Great News From Germany: Legal Publisher Beck Verlag is Renaming the Palandt Civil Code Commentary, <https://etseq.law.harvard.edu/2021/07/great-news-from-germany-legal-publisher-beck-verlag-is-renaming-the-palandt-civil-code-commentary/>.

house, including his series ‘Short Comments’, to the Nazi supporting publishing house CH Beck. The reference to Liebmann was removed from the works he founded, and his property was gradually confiscated by German authorities.³⁰ Liebmann died in 1942, penniless and socially isolated. Despite calls to rename this commentary after Libemann, it was eventually decided in 2021 that its new name will be Palandt, the name of one of the current contributors to this commentary.

In the realm of patent law, Jewish inventors who survived the Holocaust and filed restitution claims for patent loss present a grim picture of vast and deep patent appropriation.³¹ The majority of Jewish patent holders lost their patent rights as a result of persecution which made it impossible for them to “continue exploiting their patents”³² and the economic rights attached to them. In some instances, their social exclusion forced them to sell their rights far under their market value, and in other instances in the process of fleeing or being deported from their homes, they left behind patent documents which were either stolen or destroyed.³³ The circumstances surrounding their continues persecution prevented them from paying their patent fees, which ultimately lead to the lapse of their protection.

Despite the fact no official legal decree was ever issued with respect to the Aryanization of patents of Jewish inventors, after a discussion with Hitler, Göring clarified that “Jewish patents are property values and as such are to be Aryanized as well.”³⁴ This led to the broad transfer of patents owned by Jewish business to non-Jewish hands, and to pressuring Jewish owner of patent rights into forced sales of their patents.³⁵

Perhaps the most well-known instance of copyright Aryanization during the interwar period is that of Alice Urbach’s cookbook, which was first published in 1935.³⁶ In 1938 Urbach was forced to transfer the rights to her more than 500-page cookbook, *So kocht man in Wien!* (This is How We Cook in Vienna!), which was republished under the name Rudolf Rösch. The plagiarized version altered or completely removed about 40% of the original texts but it still included photos showing Alice’s hands demonstrating how to make different dishes. However, elements celebrating Vienna’s diversity were removed.³⁷ The manager of the

³⁰ Stefan Rebenich: CH BECK 1763-2013. The cultural-scientific publishing house and its history . CH Beck, Munich 2013, ISBN 978-3-406-65400-8 , p. 376 .

³¹ Barner, *supra* note 10, at 134.

³² *Id.*

³³ *Id.* at. 135.

³⁴ *Additional Information on Some Details of Hitler's Oral Orders, 28 December 1938*, quoted in EMIGRATION AND EXPULSION OF GERMAN JEWS, 1933–1945: A DOCUMENTARY HISTORY 469 (Norbert Kampe, ed., 1992).

³⁵ Barner, *supra* note 10, at 144.

³⁶ KARINA URBACH, ALICE'S BOOK: HOW THE NAZIS STOLE MY GRANDMOTHER'S COOKBOOK (2022).

³⁷ Sophie Corke, *Nazi Aryanisation of Intellectual Property - and Contemporary Efforts to Restore It*, IPKAT (Jan. 18, 2021), ipkitten.blogspot.com/2021/01/nazi-aryanisation-of-intellectual.html.

publishing company maintained his stance until 1974, that Rösch simply ‘modernized’ the original publication.³⁸

Returning to Austria after fleeing to England when the Nazis rose to power, Urbach found the revised version of her cookbook at a local Viennese bookshop in 1949.³⁹ She then attempted to have her rights in the cookbook returned to her by writing to the publisher, but to no avail. Her request was never granted, and she denied a suggestion to be written as co-author of the book with Rösch. After her death in 1983, at the age of 97, her granddaughter, historian Dr. Katarina Urbach conducted extensive research into her grandmother’s story and published the story of her grandmother’s copyright theft.⁴⁰ Only in 2020, 85 years after the book came out, 40 years after her death, and after a persistent public battle conducted by her granddaughter, the publisher agreed to restore Alice’s copyright in her book.⁴¹

IV MORAL RIGHTS AND AUTHENTICITY CONSIDERATIONS

Copyright, as defined in this Chapter, involves “duties to the public as well as rights in the work.”⁴² Authors of creative works created in the interwar period have exclusive property rights in their intangible expressions. These rights allow them to control the economic and social future of the works. No user can interfere with or eliminate these rights. At the same time, however, these works, because of their historical and social value, cannot be presented to the public under false authorial identity. As dialogical properties,⁴³ the public has a right to know the authentic truth embedded within these works, including the true identity of those who authored them. This truth is one of the major vessels by which to spread accurate information about the years leading to Nazi Germany and Nazi occupation, to teach the lessons, and to promote the messages from which all generations must learn. Accuracy on these terms is less a matter of the economic rights vested in the works, to which the authors have exclusivity, but more related to the set of moral rights copyright laws recognize and protect. These rights protect authorial integrity, allow viewers of the works to know who the original author is, and safeguard the authentic message and meaning they project. Moral rights in the case of Aryanized art, we claim, maintain fairness for both authors and the public.

³⁸ *Id.* See also, Tracey Felder, *Alice Urbach’s Stolen Cookbook*, LEO BECK INSTITUTE, www.lbi.org/collections/Mahlzeit/alice-urbachs-stolen-cookbook/.

³⁹ Felder, *supra* note 38.

⁴⁰ URBACH, *supra* note 36.

⁴¹ *How The Nazis Stole a Cookbook*, LEARN GERMAN, lerngerman.dw.com/en/how-the-nazis-stole-a-cookbook/a-55434703.

⁴² Roberta Rosenthal Kwall, *The Author as Steward “For Limited Times,”* 88 B.U. L. REV. 685, 704 (2008) (reviewing LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* (2007)).

⁴³ For more on this see, Lior Zemer, *Dialogical Transactions*, 95 OR. L. REV. 141 (2016).

The right of attribution and the right of integrity are the two most prominently recognized moral rights.⁴⁴ The former safeguards the author's right to be recognized as the author of the work, while the latter guarantees that the author's work truly represents his creative personality, free of distortions and mutilations amounting to misrepresentation of his creative vision and uniquely personal experiences. As Kwall explained, both rights are intended to "safeguard the author's meaning and message, and thus are designed to increase an author's ability to safeguard the integrity of her texts."⁴⁵ Safeguarding integrity as a goal of moral rights requires striking a balance between authors and the public: "From the creator's perspective, to receive credit for what one does (and to have credit not falsely attributed) and from the audience's perspective, to be able to identify the source of material with which one engages."⁴⁶ In contemporary times, the need to identify the source is more acute, as "traditional publishers play less of a role in distributing, and thus controlling the quality of, material disseminated to audiences"⁴⁷ The unique author-work relations depicted in Aryanized art require a sensitive understanding of how far the public's right to know may interfere with individual proprietary aspirations.

If we consider copyright law to possess a "communicative impact"⁴⁸ on society and see it as the source for a variety of discursive activities, being exposed to the exact original message and meaning of authorial works is crucial. Preservation of the original meaning emphasizes the special connection between authors and their copyrightable

⁴⁴ Continental countries often recognize additional moral rights—e.g., the right of disclosure and the right of withdrawal and repentance. The former recognizes the author as the ultimate judge of when and under what conditions a work can be disseminated, and the latter provides the author with the power to withdraw the work from the public, even after publication, if it no longer reflects his convictions. See, e.g., Elizabeth Adeney, *The Moral Right of Integrity: The Past and Future of "Honour"*, 2 INTELL. PROP. Q. 111, 128–32 (2005). Interestingly, the European Union has not, to date, harmonized moral rights protection, although all member states have such provisions. The Wittem Project Report, however, which introduces a copyright code for Europe, suggests thorough harmonization of moral rights. The Report recognizes the following three moral rights: the right of divulgation, the right of attribution and the right of integrity. THE WITTEM PROJECT, EUROPEAN COPYRIGHT CODE 17–18 (2010); see also Eleonora Rosati, *The Wittem Group and the European Copyright Code*, 5 J. INTELL. PROP. L. & PRAC. 862, 865–66 (2010) (explaining the *European Copyright Code's* integration of moral rights); Bernt Hugenholtz, *The Wittem Group's European Copyright Code*, in CODIFICATION OF EUROPEAN COPYRIGHT LAW: CHALLENGES AND PERSPECTIVES 339 (Tatiana-Eleni Synodinou ed., 2012).

⁴⁵ ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 6 (2010). Certain legal systems provide strong moral rights protection to authors similar in strength to the set of economic rights. "In contrast, American copyright law rewards economic incentives almost exclusively and lacks adequate moral rights protections." *Id.* at xiii. In the 1990s, the United States has joined the group of countries protecting moral rights, but chose a more restrictive application of moral rights. The Visual Artists Rights Act (VARA) was passed two years after the United States joined the Berne Convention for the Protection of Literary and Artistic Works. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. VI, 104 Stat. 5128 (codified in scattered sections of title 17 of the U.S.C.). Enacting VARA was meant to accommodate the obligations imposed on the United States by Article 6*bis* of the Berne Convention, which requires all signatory states to provide at least some protection for the moral rights of authors. In essence, VARA imported "a limited version of the civil-law concept of the 'moral rights of the artist' into our intellectual-property law." *Kelley v. Chicago Park District*, No. 08-3701 & 08-3712, slip op. at 2 (7th Cir. Feb. 15, 2011).

⁴⁶ Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 IND. L.J. 381, 382 (2011).

⁴⁷ *Id.*

⁴⁸ KWALL, *supra* note 45, at 61 (internal quotations omitted).

“spiritual children,”⁴⁹ while also defining access as a public right.⁵⁰ As Mira Sundara Rajan writes, moral rights were created in order to avoid “false attribution . . . ; inaccurate and inappropriate translations; misleading representations of the poet’s personality; and erroneous statements about his life and works.”⁵¹ In this way, moral rights impact cultural integrity. Governments have a duty to protect “national culture for its own prestige, and for the benefit of the public.”⁵² Works created in the interwar period and then Aryanized by the Nazi regime are representations of the Jewish culture, in the shape of non-fiction artworks as well as innovating scientific developments Jewish scientists contributed via patents, that once thrived on European soil. Any misattribution, manipulation, distortion of information, or illegitimate claims of rights in these works is a public wrong. Thus, we claim that moral rights are sacrosanct entitlements to authors of these works but are also imperative to the public itself.

We wish to step outside of the scope of this Chapter on German anti-Semitic crime in the 1930s and into copyright laws in the US. We do this to show the importance of protecting moral rights and its theoretical framework, despite the physical and jurisprudence distance from the events standing at the heart of this Chapter. In *Bilski v. Kappos*, the United States Supreme Court stated that “certain things are free for all to use.”⁵³ Art created in the interwar period and then Aryanized by the Nazi regime have valuable historical and cultural value and thus must remain one of these “certain things.” From a social perspective, we argue that limiting the dual goal of moral rights, both to the author and the public, amounts to a violation of an authorship norm. Moral rights are not only vehicles that afford fairness to authors. The right of attribution, for example, is a “moral obligation.”⁵⁴ True, the right has an “obvious utility in protecting artists from theft of the reputation they have cultivated.”⁵⁵ But this is not its only goal—the right of attribution exists to protect “the public at large from being misled”:⁵⁶ “[T]here is more at stake than the concern of the artist . . . There is also the interests of others in seeing, or preserving the opportunity

⁴⁹ Lior Zemer, *Moral Rights: Limited Edition*, 91 B.U. L. REV. 1519, 1528 (2011).

⁵⁰ Shifting the focus from authors to the benefit for society in general can also be found in the rhetoric preferred by the new trademark-style consumer protectionists. See, e.g., Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1175–1176 (2005).

⁵¹ Mira T. Sundara Rajan, *Moral Rights in the Public Domain: Copyright Matters in the Works of Indian Poet C. Subramania Bharati*, 2001 SING. J. LEGAL STUD. 161, 167 (2001).

⁵² *Id.* at 181.

⁵³ See *Bilski*, 561 U.S. at 622 (internal quotation marks omitted) (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989)).

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

⁵⁵ Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 130 (1997); see also Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 78 (2007) (remarking that the right of attribution is important in order to “promote the smooth functioning of reputation economies”).

⁵⁶ Hansmann & Santilli, *supra* note 55, at 131.

to see, the work as the artist intended it, undistorted . . . We yearn for the authentic, for contact with the work in its true version . . .”⁵⁷ As Kwall emphasized, if the intention of the framers of the Copyright Clause of the US Constitution⁵⁸ was to “stimulate an open culture steeped in knowledge and education,”⁵⁹ then “through a legal framework that promotes the public’s interest in knowing the original source of a work and understanding it in the context of the author’s original meaning and message,”⁶⁰ the objectives of the Clause can be maintained.

A crucial question relating to moral rights and to the public’s right not to be misled is whether moral rights ought to have an expiration date. If the author retains a “right to inform the public about the original nature of her artistic message and the meaning of her work,”⁶¹ why should Picasso’s moral rights end in 2043? Or, for that matter, why should Alice’s moral rights end in 2053?⁶² An expiration date means that personalities die. Once the human brain stops operating, the personality ceases too. However, works of creative content—embodying their author’s personality—never cease to exist even when destroyed, and the public right to be informed continues along with it.

Aryanized artworks are strong candidates for perpetual moral rights protection in order to protect the public interest and reinforce the public’s perpetual duty to respect and never forget, to learn from history and pass on the lessons to future generations. In other words, ownership, when applied to authorial and artistic commodities, cannot be interpreted solely through the lens of economic benefits and rewards. This argument especially applies in the context of Aryanized art, where economic benefits were bluntly deprived as soon as the Nazis rose to power.⁶³ Kwall urges us to rethink the anatomy of copyright and criticizes the hegemony of economic justifications to human creativity, defining “works of authorship as fungible commodities.”⁶⁴ These justifications protect only one convenient subset of the creative process. Translating this line of reasoning into a workable legal standard requires a redefinition of the rigid set of time limitations to which moral rights are subjected to reward the author for his human capital and cater to the public interest and the public’s role as the entity that

⁵⁷ John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1041 (1976). Praising the public interest in the right of integrity, Hansmann and Santilli remark: “[W]orks of art often become important elements in a community’s culture: other works of art are created in response to them, and they become common reference points The loss or alteration of such works would therefore be costly to the community at large, depriving that community . . . of a widely used part of its previously shared vocabulary.” Hansmann & Santilli, *supra* note 55, at 106.

⁵⁸ “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

⁵⁹ Kwall, *supra* note 45, at 57.

⁶⁰ *Id.*

⁶¹ *Id.* at 151.

⁶² She died in California in 1983. See Sara Tor, *Family’s Fight for Cookbook ‘Aryanised’ by the Nazis*, THE TIMES (Jan. 11, 2021), www.thetimes.co.uk/article/family-s-victory-over-nazi-theft-of-cookbook-g2xfnjmfs.

⁶³ Verordnung zur Ausschaltung der Juden aus dem deutschen Wirtschaftsleben (Decree on the Elimination of Jews from German Economic Life), § 1-3. Reichsgesetzblatt, vom 12. November 1938, I 1938, 1580.

⁶⁴ *Id.* at 24.

eventually takes the work in new directions. Practically, accommodating these concerns can be achieved by a limited-in-time actionable right for authors for infringement of their moral rights, lasting as long as economic rights do. Once the actionable right expires, the public's unlimited right to be informed begins. The right of the public can be secured by implementing a system of perpetual mandatory disclaimers. These will require a user of an original work, for which copyright has expired and moral rights are no longer actionable, to provide sufficient attribution to the author who was deprived of their spiritual work.

This offer focuses on the moral rights aspect of copyright, not the economic one. This requirement is urgent in the context of Aryanized artworks. This derives from the unique history surrounding the circumstances that led to these types of Aryanization of artworks and the extensive human rights deprivation the Jewish community suffered from in the years leading to WWII. In these works, the names of the original authors were deliberately and intentionally erased from their lives work in a continuous attempt to completely remove any trace of Jewish identity from the artistic world. Providing this attribution will strive to make amends and ensure those authors' right will be restituted, thus, giving them and their heirs a piece of their identity and history back. This suggestion focuses on Germany and Austria as the Aryanization process took place predominantly on this territory. Nonetheless, it will require international cooperation to reinstate the names of the true authors and inventors over their artworks and patents as their fruit of labor were disseminated across the globe following the chaos of WWII.

Finally, it is important to note that the perpetual right solution mainly focuses on copyright protected artworks. Patents and trademarks present a different set of challenges that are outside of the scope of this Chapter. They deserve a sperate set of solutions given their different features, scope and protection periods. We do believe that patents that were Arynazied should be reinstated under the name of the original Jewish inventor for the historical record, but they cannot belong to them perpetually. Trademarks present an extremely difficult challenge that we cannot properly address in this chapter.⁶⁵

V IP RESTITUTION

Restitution has been an important remedy in the years following the war with regards to physical looted artworks. Restitution is a legal remedy which enables a victim to receive an amount of recovery based on the gains of the wrongdoer rather than the

⁶⁵ For example, if a Jewish trademark was taken by a German company back in 1933 should it be returned? If so, for Germany alone? For any spread of the German company overseas (e.g. a French sister mark)? If it is just a German company still does it lose its investment in the brand over the last 90 years? What if it has been brought by a post war German company? And in any event, what use is a trade mark to the decedent of the original owner 90 years ago? Or should money be paid for the appropriation, but how would it be valued? And in any event as goodwill is so closely linked to marks, what about restitution for seized Jewish businesses (i.e. are trademarks anyway different?).

actual loss of the victim. This remedy is associated with unjust enrichment cases in which a wrongdoer is enriched at the expense of the victim in circumstances that are considered legally unjust (e.g., breach of contract or in the process of committing a crime). Thus, plagiarism of Jewish artworks by the Nazis presents an impeccable example for incidents where a wrongdoer makes a profit via an act that is utterly unjust and unfair to the true author of the artwork.

In this sense, restitution is an important remedy that can be used by victims of Aryanized artworks to ensure they will be compensated for the economic value of their work which was manipulated and abused by the Nazis. Thus, one can consider the solution of restitution as an IP instrument to install 'peace' and remedying the harms caused to Jewish authors during the interwar period.

In the physical property context, art restitution refers to situations in which a wrongdoer returns an object, artifact or collectible to its rightful owner or heir. However, this has proven to be most difficult in the years following World War II. When the Eastern Bloc dissolved in 1990, the East German government passed legislation to return property that the previous communist regime had nationalized.⁶⁶ This legislation covered Jewish-owned property that was sold under duress after 1933 or subject to Nazi confiscation, and allowed survivors and heirs to file claims for property in former East Germany.⁶⁷ However, these restitution agreements had limitations and strict conditions.⁶⁸ For example, the German government declared December 31, 1992, as the application deadline for real estate claims and June 30, 1993, as the deadline for movable property claims.⁶⁹ In light of the vast data and evidence required to prove ownership, such deadlines essentially rendered the obtained restitution agreements impractical.⁷⁰

Even though some looted items were eventually recovered, many artworks are still missing today, more than seventy years after the liberation of the ghettos and concentration camps. International endeavors have been carried out for decades to identify unaccounted for items with the purpose of returning them to their rightful owners or heirs. These efforts included, *inter alia*: international conferences such as the

⁶⁶ See *The Successor Organization*, CLAIMS CONF. ON JEWISH MATERIAL CLAIMS AGAINST GER., <http://www.claimscon.org/what-we-do/successor> [https://perma.cc/U998-EMJZ] (last visited Jan. 27, 2021).

⁶⁷ *Id.*

⁶⁸ See A. Bradley Shingleton, Volker Ahrens & Peter Ries, *Property Rights in Eastern Germany: An Overview of the Amended Property Law*, 21 GA. J. INT'L & COMP. L. 345, 346 (1991).

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

⁷⁰ See *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 142, 159 (E.D.N.Y. 2000); FED. MINISTRY OF FIN., COMPENSATION FOR NATIONAL SOCIALIST INJUSTICE: INDEMNIFICATION PROVISIONS 21 (2019), <https://australien.diplo.de/blob/2234918/accbd456c7f8c6e294b0219057b09cde/entschaedigung-von-ns-unrecht-englisch-data.pdf> [https://perma.cc/XX8C-H7VV].

Washington Conference;⁷¹ U.S. legislation, such as the Holocaust Victims Redress Act⁷² and the “Holocaust Expropriated Art Recovery Act of 2016”;⁷³ and international declarations, such as the “Terezin Declaration on Holocaust Era and Related Issues.”⁷⁴ Research has shown that the property of over nine million Jews in Europe was looted, confiscated, or destroyed before, during and shortly after the Holocaust.⁷⁵ Most looted property was owned by individuals and families. It is estimated that no more than 20% of Jewish properties (private and communal) have been restituted to their rightful owners since the war ended.⁷⁶ New Jewish communities that arose from the ashes in Europe received only a small portion of property that had belonged to their predecessors. Legislation was enacted across Europe in an attempt to reconstitute Jewish property, but these were rarely enforced by local authorities.⁷⁷

Similar to the U.S. Holocaust Expropriated Art Recovery Act of 2016, Israel legislated a designated restitution law, the Israeli Restitution Act.⁷⁸ The Act established the Holocaust Restitution Company of Israel (*Hashava*),⁷⁹ and it defined two main goals for the company: (1) to encourage locating assets in Israel in cases where the assets’ owners died in the Holocaust, locate heirs and other rightful owners, and reconstitute the misappropriated assets; and (2) to ensure that assets for which heirs or other rightful

⁷¹ The Washington Conference produced a document titled “Principles on Nazi-Confiscated Art”, which is comprised of eleven non-binding principles that, *inter alia*, expressly declare the importance of identifying such artwork and returning such works to their rightful owners. See *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEPARTMENT OF STATE, 2001-2009.state.gov/p/eur/rt/hlcst/23231.htm. See also, Samantha Elie, *Why Wait So Long: The Cornelius Gurlitt Collection and the Need for Clear ADR Mechanisms in the Restitution of Looted Art*, 18 CARDOZO J. CONFLICT RESOL. 363, 369 (2017); Jillian E. Meaney, *From Platitudes to the Passage of the Hear Act: How Procedural Obstacles in U.S. Courts Have Prevented the Restitution of Nazi-Expropriated Art and Congress’s Efforts to Provide a Resolution*, 28 U. FLA. J.L. & PUB. POL’Y 371, 375 (2017).

⁷² Holocaust Victims Redress Act, P.L. § 105-158, 112 Stat. 15 (1998). This Act stated that all governments should take measures to facilitate the return of private and public property that was looted by the Nazis.

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

⁷⁴ Prague Holocaust Era Assets Conference, *The Terezin Declaration* (Jun. 30, 2009). This declaration was signed by 46 states. For the complete declaration see wjro.org.il/our-work/international-declarations-resolutions/terezin-declaration/ at WJR.

⁷⁵ Shelly Mizrahi, *Restitution Victims of the Holocaust – Comparative Review*, KNESSET RESEARCH CENTER (May 23, 2010).

⁷⁶ *Ibid.*

⁷⁷ Lorens Vinbaum, *Defrosting History: Restitution of Jewish Property in Eastern Europe*, 31 BESHVIL HAZICARON 4 (1999).

⁷⁸ See Assets of Holocaust Victims Law (Restitution and Dedication to Aid and Commemoration), 5766–2006, SH No. 2049 p. 202–29 (Isr.) [hereinafter Israeli Restitution Act]. Israel also enacted corresponding regulations to facilitate the Israeli Restitution Act’s execution and enforcement. See Regulations for Assets of Holocaust Victims (Inheritance Issues), 5769–2008, KT 6732 p. 226 (Isr.).

⁷⁹ See Israeli Restitution Act, *supra* note 78, p. 203–04; *Types of Assets*, HASHAVA: HOLOCAUST RESTITUTION COMPANY ISR. (Dec. 31, 2017), <https://www.hashava.info/template/default.aspx?catId=37&pageId=358#.X5123YhKjIV> [<https://perma.cc/X584-Y4CA>].

holders could not be found are used to assist Holocaust survivors.⁸⁰ Similar to the U.S. law, the Israeli Restitution Act has limitations. It applies only within Israel's domestic territory, and the law was enacted in 2006, more than sixty years after the end of World War II.⁸¹ The law's limited reach and late enactment cast doubt on its ability to locate and restitute assets.

Globally, nongovernmental organizations and programs played an important role in fighting for the restitution of looted art—one example is the Claims Conference, an international body that operates for the welfare of Holocaust survivors.⁸² The objective of this organization is to negotiate compensation payments for Holocaust victims from the German government.⁸³ The Claims Conference has reached numerous important agreements regarding compensation payments by German and other European governments.⁸⁴ Another important organization working in this field is the World Jewish Restoration Organization (WJRO).⁸⁵ The WJRO's main objective is to negotiate the restitution of private and public property in all countries (except for Germany and Austria).⁸⁶ The WJRO is considered the legal and moral representative of the Jewish people in all matters related to the restitution of assets belonging to Jews in Europe during the interwar period.⁸⁷

Despite the challenges entrenched in the remedy of restitution, when enforced properly and with global collaboration, it can act as an important remedy in the realm of Aryanized artworks, especially in light of today's global connectivity enabling enforcement agencies around the world to locate and restitute artworks which were Aryanized during the interwar period. Furthermore, unlike physical property, claimers

⁸⁰ See Israeli Restitution Act, *supra* note 78, p. 202.

⁸¹ See *id.*

⁸² See *What We Do*, CLAIMS CONF. ON JEWISH MATERIAL CLAIMS AGAINST GER., <http://www.claimscon.org/what-we-do> [<https://perma.cc/A33H-6Q6N>] (last visited Jan. 29, 2021).

⁸³ See *id.*

⁸⁴ See *id.*; see also *The Successor Organization*, *supra* note 66 (“In the absence of a claim from an entitled heir, if the Claims Conference filed a claim and successfully proves the original Jewish ownership of the property, it is entitled to recover property.”).

⁸⁵ See *About Us / Our Mission*, WORLD JEWISH RESTITUTION ORG., <https://wjro.org.il/about-wjro/about-our-mission> [<https://perma.cc/Y92W-GG35>] (last visited Jan. 29, 2021).

⁸⁶ See *id.*

⁸⁷ *Id.* In 1993, WJRO signed an agreement with the government of Israel establishing principles of cooperation and coordination. See Greer Fay Cashman, *Israel, WJRO to Work to Retrieve Assets from Holocaust Era*, JERUSALEM POST (May 5, 2017, 5:18 AM), <https://www.jpost.com/israel-news/israel-wjro-to-work-to-retrieve-assets-from-holocaust-era-489843>; see also CLAIMS CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GER. & WORLD JEWISH RESTITUTION ORG., HOLOCAUST-ERA JUDAICA AND JEWISH CULTURAL PROPERTY: A WORLD-WIDE OVERVIEW, at IV. 2 (2009) [hereinafter CLAIMS CONFERENCE & WJRO, WORLD-WIDE OVERVIEW] (discussing the WJRO's efforts concerning the restitution of Judaica). Some countries tried to return Judaica artifacts to Jewish communities and individuals after the war, but others deposited such artifacts in governmental institutions, such as the Jewish Historical Institute in Warsaw, Poland; libraries in Minsk; and the *Osobyi Arkhiv* (Special Archive) in Moscow, Russia, which is now part of the Russian State Military Archive. See CLAIMS CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GER. & WORLD JEWISH RESTITUTION ORG., DESCRIPTIVE CATALOGUE OF LOOTED JUDAICA 9–33 (2016) (discussing restitution attempts of looted or ruined Judaica). Looted Judaica artifacts can be found today in many countries around the world. The Claims Conference has published a summary report about the restitution attempts of Judaica artifacts in more than fifty countries. See CLAIMS CONFERENCE & WJRO, WORLD-WIDE OVERVIEW, *supra*, at IV. 5–26.

have a greater array of ways to prove ownership over artworks thus it should be easier to prove intellectual property ownership which was plagiarized by the Nazis when they first rose to power. It is important to acknowledge evidentiary issues are still a significant hurdle as documents proving ownership over patents and trademarks, for example, have been lost or destroyed prior to and during the war. With regards to these works, challenges are still fierce once one attempts to prove ownership for the purpose of restitution, similar to today's difficulties of heirs proving their ancestries property was looted.⁸⁸

When discussing artworks protected by copyright, however, it seems that some evidentiary hurdles could be overcome via originals or copies of the original artwork that were smuggled out of Germany and protected over the years. As the case of Urbach's cookbook demonstrates, the road to achieving restitution is not an easy path to take. Many attempt to bury the past by simply ignoring or even deliberately distorting the devastating impacts the Nazi regime had during the interwar period. Nonetheless, public pressure along with public awareness of these issues have become an important instrument to push back against this norm of denial and fight for the restitution of copyright of Jewish authors and their heirs. Considering this, restitution should always be kept in mind as an important intellectual property remedy ensuring those who have been wronged in the past will have the opportunity to demand and achieve justice today and that their name will be rightfully reinstated upon their fruits of labor.

It is important to emphasize that governments have an important role in ensuring these restitution remedies are available and fruitful today and in the future. They can ensure that by creating mechanism for adequate enforcement; establishing extended statutes of limitations once artworks created in the interwar periods are involved; setting lenient evidentiary standards to acknowledge the difficulties involved in collecting evidence regarding artworks Aryanized by the Nazis etc. Restitution is an important tool, but it cannot be a stand-alone solution to the multifaceted challenge presented by works that were Aryanized during the interwar period. Only with active engagement of regulators around the world the heirs of these Jewish will authors receive the justice their forefathers deserve.

VI CONCLUSION

Incidents of Aryanized artworks during the interwar period remain a severely underexplored field in the current vast literature discussing Holocaust art and intellectual property protection. It is safe to assume that vast amounts of patents, trademarks and artworks created and authored by Jewish inventors, businessman and

⁸⁸ See e.g., Graham Bowley, *Court Rules for Germany in Nazi-Era Dispute Over the Guelph Treasure*, THE NEW YORK TIMES (Aug. 31, 2022), www.nytimes.com/2022/08/31/arts/design/germany-nazi-era-dispute-guelph-treasure.html.

authors were republished and rebranded under Nazi names in the years leading up to World War II. The extensive media coverage of the intellectual theft of Urbach's cookbook has brought some attention to these types of cases, but there is still much more to explore. Our aim at the moment should be to pursue justice for Jewish authors who lost their "spiritual children" for the sole reason of being Jewish.

This Chapter aims to take the first step in this direction and shine a much-needed spotlight on plagiarized Jewish artworks in the interwar period. Similar to extensive restitution attempts conducted throughout the years in an attempt to retribute physical property that was stolen by the Nazis,⁸⁹ there lays in important international interest to strive to provide the same justice to Jewish authors whose artworks were Arynaized. This effort will require international coordination, but it is necessary to ensure that moral rights are protected, and society at large has access to authentic works of art manifesting the remarkable Jewish community that once flourished throughout Europe.

⁸⁹ Lior Zemer & Lior Anat, *Art and Copyright in Ghettos and Concentration Camps: A Manifesto of Third-Generation Holocaust Survivors*, 109 GEO. L.J. 813, 828 (2021).