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## The Beijing Treaty on Free Expression: How Stopping Digital Piracy May Cost the World Free Expression

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# THE BEIJING TREATY ON AUDIOVISUAL PERFORMANCES: HOW STOPPING DIGITAL PIRACY MAY COST THE WORLD FREE EXPRESSION

MICHAEL A. SHINALL\*

**Abstract:** The Beijing Treaty on Audiovisual Performances grants, for the first time, international rights to performers to protect their work in an audiovisual medium. This is a step forward in protecting audiovisual media from international piracy or infringement, but comes at a cost. While performers' economic rights are kept in check by fair use defenses (favored uses designed to promote the creation of new works) performers' moral rights from the Beijing Treaty contain no counterbalancing defense. This Comment argues that without this counterbalancing defense, performers may assert these moral rights against other artists unchecked, consequently chilling the free expression that copyright laws are supposed to foster.

## INTRODUCTION

On June 24, 2012, member states of the World Intellectual Property Organization (WIPO) adopted the Beijing Treaty on Audiovisual Performances (Beijing Treaty).<sup>1</sup> The Treaty creates copyright protection for “performers”—people such as actors and singers—in audiovisual works, including film, television, or video.<sup>2</sup> The Beijing Treaty aims to (1) protect the images of performers in media and (2) prevent distortion of their performances.<sup>3</sup> Because the Beijing Treaty aims to curb

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<sup>1</sup> *WIPO Beijing Treaty on Audiovisual Performances Is Concluded*, WORLD INTEL. PROP. ORG. (June 26, 2012), [http://www.wipo.int/pressroom/en/articles/2012/article\\_0013.html](http://www.wipo.int/pressroom/en/articles/2012/article_0013.html).

<sup>2</sup> Beijing Treaty on Audiovisual Performances pmbl., arts. 2–3, June 24, 2012, WIPO Doc. AVP/DC/20 [hereinafter Beijing Treaty], available at [http://www.wipo.int/edocs/mdocs/copyright/en/avp\\_dc/avp\\_dc\\_20.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/avp_dc/avp_dc_20.pdf); *WIPO Beijing Treaty on Audiovisual Performances Is Concluded*, *supra* note 1.

<sup>3</sup> See Beijing Treaty, *supra* note 2, arts. 5–10; William New, *WIPO Lauded for New Beijing Treaty on Audiovisual Performances*, INTEL. PROP. WATCH (June 29, 2012, 4:54 AM), <http://www.ip-watch.org/2012/06/29/wipo-lauded-for-new-beijing-treaty-on-audiovisual-performances/>; *WIPO Beijing Treaty on Audiovisual Performances Is Concluded*, *supra* note 1.

international digital piracy<sup>4</sup> by granting moral rights to performers without a counterbalancing fair use type of defense, it curbs the free expression that copyright laws are supposed to foster.<sup>5</sup>

Copyright protection generally is designed to promote creation of new work by offering authors exclusive rights in their works.<sup>6</sup> These rights, however, are typically kept in check by “fair use” defenses—exemptions from infringement that promote favored uses or the creation of new work.<sup>7</sup>

Part I of this Comment discusses WIPO treaties prior to the Beijing Treaty. Part II discusses the new rights the Beijing Treaty creates—including moral rights—and examines comparable provisions found in the Copyright Law of China. Part III argues that granting moral rights to performers creates a subjective standard, and without a counterbalancing fair use or parody defense, will lead to international chilling of free expression. Part III then uses the Copyright Law of China to demonstrate how countries without a fair use provision for moral rights will treat moral rights claims.

## I. BACKGROUND

The Beijing Treaty is the first WIPO international treaty adopted since the WIPO Performance and Phonograms Treaty (WPPT) in 1996.<sup>8</sup> The WPPT, a precursor to the Beijing Treaty, provides two types of copyright protection to performers.<sup>9</sup> First, it protects any fixation

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<sup>4</sup> The words “piracy” and “infringement” are used interchangeably by courts and many scholars. See Melville B. Nimmer, *Inroads on Copyright Protection*, 64 HARV. L. REV. 1125, 1127 n.14 (1951). Similarly, I refer to piracy, but intend to include “infringement” within this meaning. See *id.*

<sup>5</sup> See Beijing Treaty, *supra* note 2, pmbl., art. 5; cf. Copyright Law of the People’s Republic of China art. 22 (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 26, 2010, effective Apr. 1, 2010) [hereinafter Copyright Law of China], available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=186569](http://www.wipo.int/wipolex/en/text.jsp?file_id=186569) (protecting moral rights for copyright holders, but lacking any defense against a moral rights claim); David S. Olson, *First Amendment Based Copyright Misuse*, 52 WM. & MARY L. REV. 537, 540 (2010) (noting that copyright is intended to promote the creation of new work); Mary Morrone, Note, *Moral Rights and Classical Liberal Theory: The Interplay of Two Philosophies in Copyright Law*, 6 N.Y.U. J.L. & LIBERTY 532, 549 (2012) (stating that fear of moral rights liability may chill free expression).

<sup>6</sup> See Olson, *supra* note 5.

<sup>7</sup> See Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 72–74 (1997).

<sup>8</sup> New, *supra* note 3; *WIPO Beijing Treaty on Audiovisual Performances Is Concluded*, *supra* note 1.

<sup>9</sup> See generally WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203 [hereinafter WPPT].

(placing in a tangible medium) of the sounds of their performances, *other than* those in audiovisual works.<sup>10</sup> Specifically, performers have economic rights to make fixed performances available commercially, and reproduce, distribute, and rent their work.<sup>11</sup> Second, performers have moral rights protection—the right to prevent alterations or distortions of their performances.<sup>12</sup>

The WPPT's economic rights address the rapidly growing problem of digital piracy, the illegal file sharing and reproduction of copyright-protected materials.<sup>13</sup> Previously, authors were the only holders of economic rights, but under the WPPT, performers can also collect revenue for the distribution of their work and take legal action against any party that violates their economic rights.<sup>14</sup> The WPPT, however, contained gaps that left audiovisual performers unprotected.<sup>15</sup> Many proponents of stronger copyright protection pushed WIPO to close this gap.<sup>16</sup> Today, digital piracy costs the entertainment industry billions of dollars.<sup>17</sup> If copyright owners cannot enforce their rights, the incentive to create is arguably lost.<sup>18</sup> WIPO needed to act to protect audiovisual works on an international level.<sup>19</sup>

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<sup>10</sup> *Id.* arts. 2(b), 6–10.

<sup>11</sup> *Id.* arts. 6–10.

<sup>12</sup> *Id.* art. 5; Susan A. Mort, *The WTO, WIPO & The Internet: Confounding the Borders of Copyright and Neighboring Rights*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173, 206 (1997).

<sup>13</sup> Mort, *supra* note 12, at 189–91. Previous treaties did not adequately address the right of “distribution” and “temporary reproductions,” a mechanic that is prevalent in storing copies of digital work in a computer’s memory. See Rebecca F. Martin, *The WIPO Performances and Phonograms Treaty: Will the U.S. Whistle a New Tune?*, 44 J. COPYRIGHT SOC’Y U.S.A. 157, 160–61 (1997).

<sup>14</sup> WPPT, *supra* note 9, arts. 6–10; see Mort, *supra* note 12, at 205.

<sup>15</sup> See Adler Bernard, *The Proposed New WIPO Treaty for Increased Protection of Audiovisual Performers: Its Provisions and Its Domestic and International Implications*, 12 FORDHAM INTELL. PROP. & MEDIA ENT. L.J. 1089, 1094 (2002); Tilman Lüder, *The Next Ten Years in E.U. Copyright: Making Markets Work*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 8 n.30 (2007).

<sup>16</sup> *WIPO Beijing Treaty on Audiovisual Performances Is Concluded*, *supra* note 1.

<sup>17</sup> See Eduardo Porter, *The Perpetual War: Pirates and Creators*, N.Y. TIMES, Feb. 5, 2012, at SR10; Ben Sisario, *Net Providers Plan Penalties to Slow Piracy*, N.Y. TIMES, July 8, 2011, at A1.

<sup>18</sup> See New, *supra* note 3; Maureen Ryan, *Fair Use and Academic Expression: Rhetoric, Reality, and Restriction on Academic Freedom*, 8 CORNELL J.L. & PUB. POL’Y 541, 545 (1999) (outlining incentive theory of copyright, where the author’s ability to preclude free-riders from copying the author’s work for free incentivizes the author to invest in the creation of new work).

<sup>19</sup> See WPPT, *supra* note 9, art. 2(b); New, *supra* note 3; *WIPO Beijing Treaty on Audiovisual Performances Is Concluded*, *supra* note 1.

## II. DISCUSSION

The Beijing Treaty includes a number of new rights for audiovisual performers.<sup>20</sup> These new rights aim to curb digital piracy by specifically enabling performers to sue for digital manipulation or infringement of their audiovisual performances, something they could not do under previous treaties.<sup>21</sup> The rights fall into the same two broad groups as the WPPT rights: economic and moral.<sup>22</sup> The economic rights include performers' exclusive right to distribute, reproduce, rent, fix, broadcast, and collect revenue for their performances.<sup>23</sup>

The moral rights, on the other hand, allow performers to object to modifications of their performances.<sup>24</sup> The enforcement of moral rights is generally subjective in nature, and allows performers to object "to any distortion, mutilation, or other modification . . . that would be prejudicial to [the performer's] reputation."<sup>25</sup> These rights extend to individual or institutional heirs to the performer's rights for as long as the economic rights exist.<sup>26</sup> But, unlike the economic rights, the moral rights stay with performers or their heirs regardless of whether the economic rights have been transferred away.<sup>27</sup>

Before the Beijing Treaty, moral rights were not universal, and countries differed on defenses, if any, to moral rights claims.<sup>28</sup> In China, for example, moral rights are protected, but the courts explicitly deny fair use defenses against any moral rights claim.<sup>29</sup> Because defenses to infringement are almost exclusively limited to the explicit exceptions from article 22 of the Copyright Law of the People's Republic of China, Chinese courts will not apply fair use or similar defenses to

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<sup>20</sup> See Beijing Treaty, *supra* note 2, arts. 5–10; New, *supra* note 3.

<sup>21</sup> See Beijing Treaty, *supra* note 2, pmb.; New, *supra* note 3.

<sup>22</sup> See Beijing Treaty, *supra* note 2, arts. 5–12.

<sup>23</sup> *Id.* arts. 7–11.

<sup>24</sup> *Id.* art. 5.

<sup>25</sup> Beijing Treaty, *supra* note 2, art. 5; Paul Edward Gellar, *Copyright History and the Future: What's Culture Got to do With It?*, 47 J. COPYRIGHT SOC'Y U.S.A. 209, 261 (1999).

<sup>26</sup> Beijing Treaty, *supra* note 2, art. 5. This is the case unless a party to the Treaty explicitly denies protection after a performer's death. See *id.* art. 5(2).

<sup>27</sup> *Id.* art. 5.

<sup>28</sup> See Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities Under the U.K.'s New Performances Regulations*, 24 B.U. INT'L L.J. 213, 227–62 (2006) (examining different approaches taken to moral rights in the United States, the United Kingdom, and France). The United States, for example, has a very limited moral rights provision. See Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 353 (2006).

<sup>29</sup> Zhiwen Liang, *Beyond the Copyright Act: The Fair Use Doctrine Under Chinese Judicial Opinions*, 56 J. COPYRIGHT SOC'Y U.S.A. 695, 710 (2009).

any moral rights claim.<sup>30</sup> Other potential defenses, such as parody, are also absent from article 22, and ineligible as defenses.<sup>31</sup> Thus, if an author perceives a distortion of his or her work—virtually a requirement to create a parody—that author has the right to recover from the distorting user.<sup>32</sup> Now, with an international treaty that embraces protection of these moral rights, performers have international reach to prosecute their moral rights subject to limited defenses.<sup>33</sup>

### III. ANALYSIS

The Beijing Treaty's creation of new rights for performers has far-reaching implications for the treatment of copyright law.<sup>34</sup> While the Treaty will help curb digital piracy by granting performers an additional level of protection, it comes at the cost of curbing free expression by granting performers international moral rights.<sup>35</sup> To create the benefit of curbing digital piracy without chilling free expression, a defense parallel to fair use must exist against moral rights claims.<sup>36</sup> Examining pro-

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<sup>30</sup> See *id.* at 704; Haochen Sun, *Can Louis Vuitton Dance with Hiphop? Rethinking the Idea of Social Justice in Intellectual Property Law*, 15 U. PA. J.L. & SOC. CHANGE 389, 429 (2012).

<sup>31</sup> See Robert S. Rogoyski & Kenneth Basin, *The Bloody Case That Started from a Parody: American Intellectual Property and the Pursuit of Democratic Ideals in Modern China*, 16 UCLA ENT. L. REV. 237, 238 (2009). This is particularly interesting in light of the fact that Chinese copyright laws are modeled extensively after the United States Copyright Act. Jing Zhang, *Pushing Copyright Law in China: A Double-Edged Sword*, 18 DEPAUL J. ART TECH. & INTELL. PROP. 27, 74 (2007).

<sup>32</sup> See Rogoyski & Basin, *supra* note 31, at 242.

<sup>33</sup> See Beijing Treaty, *supra* note 2, art. 5.

<sup>34</sup> Cf. Michael Gruenberger, *A Duty to Protect the Rights of Performers? Constitutional Foundations of an Intellectual Property Right*, 24 CARDOZO ARTS & ENT. L.J. 617, 624–30 (2006) (discussing the change in international copyright by including performers); Haochen Sun, *Overcoming the Achilles Heel of Copyright Law*, 5 NW. J. TECH. & INTELL. PROP. 265, 276 (2007) (stating that the WPPT's creation of new rights updated international copyright law for digital technology); Carolina Rossini et al., *Beijing Treaty on Audiovisual Performances: We Need to Read the Fine Print*, ELEC. FRONTIER FOUND. (July 24, 2012), <https://www.eff.org/deeplinks/2012/07/beijing-treaty-audiovisual-performances> (noting many ways treaty could expand copyright regime and restrict creative or otherwise legitimate use of content).

<sup>35</sup> See Beijing Treaty, *supra* note 2, pmbl. (noting the need for protection in digital media); Bird & Ponte, *supra* note 28, at 249 (noting opposition in United States copyright policy to implementation of moral rights due to chilling effect on expression); *WIPO Beijing Treaty on Audiovisual Performances Is Concluded*, *supra* note 1.

<sup>36</sup> See Morrone, *supra* note 5, at 549 (noting moral rights may chill free expression); cf. David S. Olson, *First Amendment Interests and Copyright Accommodations*, 50 B.C. L. REV. 1393, 1396–97 (2009) (examining the First Amendment's purpose in preventing overly restrictive copyright); Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 481–82 (2010) (noting that fair use serves as speech protection). Other scholars note that moral rights are inherently at odds with moral rights provisions. See John W. Gregory, *A Necessary Global Discussion for Improvements to U.S. Copyright Law on*

tection of moral rights and the absence of fair use in the Copyright Law of China will illustrate this point.<sup>37</sup>

As stated above, the moral rights provision in the Beijing Treaty gives performers the right to stop any work that mutilates or distorts their image.<sup>38</sup> Without more, it is unclear how far this provision extends.<sup>39</sup> Economic rights, on the other hand, are checked by fair use defenses.<sup>40</sup> These defenses exist to encourage authors to create new works from old works, so long as the new work is sufficiently distinct from the original.<sup>41</sup> Parody, in particular, *relies* on using the original work to comment on either the author or the underlying work.<sup>42</sup> But the Beijing Treaty's moral rights do not have this counter; should performers view a work as morally distasteful, they now can sue.<sup>43</sup>

This problem becomes particularly obvious in light of how fascinated the world is with expression on the internet.<sup>44</sup> As some commentators note, video clips and YouTube videos are staples of internet expression today.<sup>45</sup> With these formats, users from all over the world can cut existing video to create new works for any number of reasons.<sup>46</sup>

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*Music Sampling*, 15 GONZ. J. INT'L L. 72, 101 (2011); Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 122 (1996) (arguing that without a fair use-like provision, moral rights conflict with the ability of authors to create freely).

<sup>37</sup> Cf. Gregory, *supra* note 36, at 101 (noting tension between moral rights and fair use); Liang, *supra* note 29, at 710 (finding Chinese copyright laws to lack a defense for moral rights claims).

<sup>38</sup> See Beijing Treaty, *supra* note 2, art. 5.

<sup>39</sup> See *id.*; cf. Rothman, *supra* note 36, at 481–82 (noting role of fair use as protector of expression in copyright).

<sup>40</sup> See Copyright Law of China, *supra* note 5, art. 22; Beijing Treaty, *supra* note 2, arts. 6–10; Liang, *supra* note 29, at 701; Sun, *supra* note 30.

<sup>41</sup> See Olson, *supra* note 5, at 537 (“[T]he fair use defense to copyright infringement . . . allows unauthorized use of copyrighted works under certain circumstances that encourage speech and creation of transformative works.”); Rogoyski & Basin, *supra* note 31, at 241–42. Examining the transformative value of the work stems from the United States’ influence on Chinese copyright law. See Wang Qian, *Is Downloading of Pirated Content for Private Purposes a Copyright Infringement in China?*, 57 J. COPYRIGHT SOC’Y U.S.A. 655, 656 (2010); see also *Campbell v. Acuff-RoseMusic, Inc.*, 510 U.S. 569, 579 (1994) (noting that fair use examines how “transformative” a work is when using copyrighted material).

<sup>42</sup> See Rogoyski & Basin, *supra* note 31.

<sup>43</sup> See Copyright Law of China, *supra* note 5, art. 10(4); Beijing Treaty, *supra* note 2, art. 5.

<sup>44</sup> See TARLETON GILLESPIE, *WIRED SHUT: COPYRIGHT AND THE SHAPE OF DIGITAL CULTURE* 4 (2007) (noting that the Internet captured the attention and interest of the world in the same fashion electricity and hydrogen bomb).

<sup>45</sup> See Rogoyski & Basin, *supra* note 31, at 255.

<sup>46</sup> See *About YouTube*, YOUTUBE, [http://www.youtube.com/t/about\\_youtube](http://www.youtube.com/t/about_youtube) (last visited June 2, 2013) (“YouTube allows billions of people to discover, watch and share originally-created videos. YouTube provides a forum for people to connect, inform, and inspire oth-

Searching the term “parody” in YouTube will generate millions of videos from users all over the world.<sup>47</sup>

If performers now have the ability to subjectively decide whether new works distort or mutilate their performances, they have the power to stop new works from being created on a global scale.<sup>48</sup> After all, the subjective input of the performer is likely necessary to decide what constitutes “mutilation” of reputation.<sup>49</sup>

It is important to note, however, that providing a fair use type of defense to moral rights claims in the Beijing Treaty will not harm performers’ international protection.<sup>50</sup> Fair use defenses exist to promote the creation of new work, not provide an escape hatch to infringing parties.<sup>51</sup> Many fair use provisions for economic rights, for example, require the secondary author overcome a set of hurdles to justify using

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ers across the globe and acts as a distribution platform for original content creators and advertisers large and small.”).

<sup>47</sup> See Parody Search Results, YOUTUBE, <http://www.youtube.com> (search “parody”) (last visited June 2, 2013). Searching for a parody of the popular song “Gangnam Style” on YouTube, for example, generates about 838,000 results. Gangnam Style Parody Search Results, YOUTUBE, <http://www.youtube.com> (search “gangnam style parody”) (last visited June 2, 2013). Parodying this particular video is so popular, news outlets compiled top ten lists of “favorite” parodies. See, e.g., Richard James, *Top Ten Gangnam Style Parodies of 2012*, METRO (Dec. 21, 2012, 4:05 PM) <http://metro.co.uk/2012/12/21/top-ten-gangnam-style-parodies-of-2012-3313788/>.

<sup>48</sup> See Beijing Treaty, *supra* note 2, art. 5; Gellar, *supra* note 25.

<sup>49</sup> See Beijing Treaty, *supra* note 2, art. 5; Heidi Hansen Kalscheur, *About “Face”: Using Moral Rights to Increase Copyright Enforcement in China*, 39 HASTINGS CONST. L.Q. 513, 532 (2012); Vera Zlatarski, *“Moral” Rights and Other Moral Interests: Public Art Law in France, Russia, and the United States*, 23 COLUM.-VLA J.L. & ARTS 201, 217 (1999).

<sup>50</sup> Cf. Copyright Law of China, *supra* note 5, arts. 10, 22 (protecting moral rights for any copyright holder); Maureen A. O’Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177, 1191 (2000) (noting that several factors that U.S. courts use in examining fair use examine the economic or market harm to the original author before granting fair use); Jill I. Prater, *When Museums Act Like Gift Shops: The Discordant Derivative Works Exception to the Termination Clause*, 17 LOY. L.A. ENT. L.J. 97, 113–14 (“The economic interests of the artist are preserved through the four fair use factors enumerated in § 107, and the concept of the transformation of copyrighted works into a secondary use with artistic or economic value of its own is consistent with the fundamental policy of protecting the artist’s monopoly interest in her work, and maintaining incentives to create.”); Jeannine M. Marques, Note, *Fair Use in the 21st Century: Bill Graham and Blanch v. Koons*, 22 BERKELEY TECH. L.J. 331, 340 (2007) (noting that courts in the United States examine the amount of economic harm a transformative work creates before protecting granting fair use). Compare Copyright Law of China, *supra* note 5, art. 22 (fair uses of copyrighted material), with 17 U.S.C. § 107 (fair uses of copyrighted material).

<sup>51</sup> See Prater, *supra* note 50, at 113–14.



the original work.<sup>52</sup> This ensures that the secondary author's use of the original work is for creating something new, not merely free-riding off the original.<sup>53</sup>

But without *any* fair use-like defense, performers' monopoly over their moral rights is seemingly limitless.<sup>54</sup> China's Copyright Law demonstrates the effect of denying a fair use defense against moral rights claims.<sup>55</sup> Even parody, which is not traditionally recognized as a fair use in China, provides no protection for secondary authors creating any work that may "mutilate or distort" the image of the original author.<sup>56</sup> But, if the purpose of a fair use or parody defense is to promote creativity and new works, the law cannot serve copyright policy through a moral rights provision where the performer is given complete control and secondary authors lose an important source of creative input and output.<sup>57</sup>

For the Beijing Treaty to fully serve global copyright policy, its moral rights provision must be countered with a fair use provision.<sup>58</sup> The call for fair use protection against moral rights is not new, but now

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<sup>52</sup> See, e.g., 17 U.S.C. § 107 (2012). In the United States, for example, the secondary author must show that her new work is not an infringement of the original work by through an examination of:

- (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.

*Id.*

<sup>53</sup> See Stephen M. McJohn *Fair Use of Copyrighted Software*, 28 RUTGERS L.J. 593, 604 (1997) (noting that failure to overcome the hurdles of fair use will require the secondary author to seek permission from the original author).

<sup>54</sup> See Liang, *supra* note 29, at 701.

<sup>55</sup> Cf. Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 265 (2009) (arguing moral rights endanger art in general); Morrone, *supra* note 5, at 549 ("Thus, many secondary authors who do not run afoul of traditional copyright law may chill their expression and choose not to publish out of fear of offending new moral rights standards.").

<sup>56</sup> See Copyright Law of China, *supra* note 5, arts. 10, 22; Rogoyski & Basin, *supra* note 31, at 243–44.

<sup>57</sup> See, e.g., *Campbell*, 510 U.S. at 575–90 (finding parodies promote creativity); see also Geller, *supra* note 25, at 261; Prater, *supra* note 50, at 113–14; Zlatarski, *supra* note 49 at 203.

<sup>58</sup> Cf. Matthew J. McDonough, *Moral Rights and the Movies: The Threat and Challenge of the Digital Domain*, 31 SUFFOLK U. L. REV. 455, 477 (1997) (arguing movie studios would object to moral rights for film makers due to the likely flood of litigation); Yonover, *supra* note 36, at 110 ("Thus, when moral rights, 'honor or reputation,' are at risk this monopoly might be used to prevent or chill the critic/parodist.").

this problem expands to a global level.<sup>59</sup> Without the fair use defense to counter a performer's moral right, the purpose of copyright laws will be undermined.<sup>60</sup> The goal of curbing digital piracy will come at the cost of free expression.<sup>61</sup>

#### CONCLUSION

Copyright laws are designed to promote innovation and the creation of new works. The Beijing Treaty, however, which lacks any specific defense to a moral rights claim, will give performers international reach to sue for any expression they find subjectively offensive. When moral rights granted by the Beijing Treaty are pursued in countries without counterbalancing fair use protection, the moral rights provision will curb the free expression that copyright laws are supposed to foster.

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<sup>59</sup> Cf. Beijing Treaty, *supra* note 2, art. 5 (providing international protection and reach for performers' moral rights); Adler, *supra* note 55, at 265 (arguing moral rights endanger art in general); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1988 (2006) (noting the interest in First Amendment protection as justification for limiting moral rights); Eric M. Brooks, Comment, "Tilted" Justice: Site-Specific Art and Moral Rights After U.S. Adherence to the Berne Convention, 77 CALIF. L. REV. 1431, 1482 (1989) (arguing that moral rights can be implemented so long as they are checked by an interest in the public welfare).

<sup>60</sup> See Liang, *supra* note 29, at 701.

<sup>61</sup> See Beijing Treaty, *supra* note 2, pmb.; Morrone, *supra* note 5, at 549.