

**Chinese copyright law from a comparative perspective**  
- a comparison of chinese  
and german copyright law –

**Prof. Dr. Theodor Enders, LL.M. (University of Sydney)**



**Thesis**

Quotation (WHEI Zhi)

„Chinese copyright law is not a fruit of the 5.000 years old chinese culture and tradition but an article of import from the west.“



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**1. International Conventions**

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- ➔ **Paris Convention (PC)**
  - for the Protection of Industrial Property; governed by the **World Intellectual Property Organization (WIPO)**, Geneva (1883)
    - ⇒ Principle of National Treatment
      - = nationals of a membership states are to be treated like nationals (Art. 2 und 3 PVÜ)
- ➔ **Revised Berne Convention (RBC)**
  - **for the Protection of Literary and Artistic Works (1886)**
    - ⇒ Granting of minimum rights
      - e.g. duration of copyright protection 50 years post mortem (Art. 7 RBC)
- ➔ **WIPO Copyright Treaty (WCT) (1996)**
- ➔ **WIPO Performances and Phonogram Treaty (WPPT) (1996)**

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- ➔ **Universal Copyright Convention (1952)**
  - Protection of Copyrights, Art. III UCC; governed by the UNESCO ( Paris)
  - Copyright Protection without any Formalities; only symbol © by the name of copyright proprietor and the year of the first publication
- ➔ **Rom-Convention**
  - for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; **China is no member!**
- ➔ **Geneva Treaty**
  - for the Protection of Producers Against Unauthorized Duplication of their Phonograms
- ➔ **Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)**
  - governed by the World Trade Organization (WTO) in Geneva
  - Most favoured nation principle (Art. 4 TRiPS), but not in the field of Copyright law; Berne Convention prevails against TRIPS
  - WIPO – Arbitration and Mediation Center
  - Art. 41 TRIPS – special rules of law enforcement !**




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## 2. Legal Basis and Organization

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### 2.1 Regulations in Comparison


**Germany:**

- ➔ 1837: Prussian Act for the Protection of scientific and artistic works
- ➔ 1907: Act on Copyright for works of Fine Art and Photography
- ➔ 1965: Copyright Act (last amended by the Act of Protection of Intellectual Property from 29.8.2008, promulgated in 1.9.2008)
- ➔ 1965: Copyright Administration Act (last amended 2007)

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**China:**

- ➔ 1911: first Copyright Act (was revoked after the foundation of the Peoples Republic of China, 1949)
- ➔ 1950: National Conference in the domain of Publishing  
→ Resolution concerning the granting of Copyrights
- ➔ 1990: Copyright Act (first great amendment of copyright law)
- ➔ **2001: Copyright Act**
  - 2001: Computer Software Protection Rules
  - 2002: Implementation Rules for the Copyright law
  - 2004: Implementation Rules for Collecting Societies

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2.2 Five Pillars Model

**Copyright in Germany and China**

material copy- right law	neighboring rights	contractual copy- right	rights of collecting societies	enforcement of rights
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2.3 Organization

Germany „Monistic“ System	China Dual System	
Judicial Enforcement	Judicial Enforcement	National Copyright Administration
Acts and Regulations		

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2.4 Term of Work


Germany: Work (§ 2 Abs. 2 UrhG)

- Creation
- Intellectual Content
- Tangible forms, Reproduceability
- Originality

China: Work (Art. 2 Implementation Rules)

The term „works“ as referred to in the Copyright law means intellectual creations with originality in the literary, artistic or scientific domain, insofar as they can be reproduced in tangible form.

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<b>2.5 Work Categories</b>			Fachhochschule Jena University of Applied Sciences Jena
<b>China</b>	<b>Germany</b>		
<b>Art. 3 chinCA</b>	<b>§ 2 Abs. 1 UrhG</b>		
<ol style="list-style-type: none"> <li>1. written works;</li> <li>2. oral works;</li> <li>3. musical, dramatic, quyi' (<b>Germany: not protected</b>), choreographic and acrobatic works;</li> <li>4. works of fine art and architecture; (<b>not protected are works of applied art, but jurisdiction "Interlego" Higher Court of Beijing</b>)</li> <li>5. photographic works;</li> <li>6. cinematographic works and works created by virtue of an analogous method of film production;</li> <li>7. drawings of engineering designs, and product designs; maps, sketches and other graphic works and model works;</li> <li>8. computer software;</li> <li>9. other works as provided for in laws and administrative regulations.</li> </ol>			
<p><b>Data base works (Art.14 chinCA) but no adequate protection of "simple" data bases (§ 87a UrhG)</b></p>			

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<b>2.6 No Formalities and Registration</b>			Fachhochschule Jena University of Applied Sciences Jena
<p>In accordance to Art. III WUA UCC in Germany and China no formality.</p>			
<p><b>Art. 6 Implementation Rules:</b> „A copyright shall subsist on the date when a work is created.“</p>			
<p><b>China:</b> <b>Art. 7 Implementation Rules:</b> „A software copyright owner may register with the software registration institution recognized by the copyright administration department of the State Council. A registration certificate issued by the software registration institution is a preliminary proof of the registered items.“</p>			

### 2.7 Vorbidden Works

- Art. 4 par. 1 chinCA: „Works the publication or distribution of which is prohibited by law shall not be protected by this law .” **(old version until 2009)**
- Art. 4 par. 1 chinCA mainly seen as a Censorship which will grant no protection to pornographic and some political contents.
- USA in April 2007 complaint to WTO-Dispute Settlement Body “China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights”. USA: Art. 4 par. 1 chinCA violates Art. 9 par. 1 TRIPS in conjunction with Art. 5 par. 2 RBC. WTO-DSB Resolution on 29. January 2009 as applied for.
- **Since 2010 new** Art. 4 chinCA:”Copyright owners should not exercise their copyrights in a manner that violates the constitution or relevant laws, or harms the public interests. The country will supervise publication and distribution of the works in accordance with laws.”

### 3. Scope of Copyright



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3.1 Authorship

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graph TD
    Copyright[Copyright] --> MoralRights[Moral Rights]
    Copyright --> ExploitationRights[Exploitation Rights]
    MoralRights --> List["- the right of publication (§ 12 UrhG, Art. 10 par. 1 Nr. 1 chinCA)  
- the right of authorship (§ 13 UrhG, Art. 10 par. 1 Nr. 2 chinCA)  
- the right of alteration, the right of integrity (§ 14 UrhG, Art. 10 par. 1 Nr. 3, 4 chinCA)"]
  
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**Copyright**

**Moral Rights**

- the right of publication (§ 12 UrhG, Art. 10 par. 1 Nr. 1 chinCA)
- the right of authorship (§ 13 UrhG, Art. 10 par. 1 Nr. 2 chinCA)
- the right of alteration, the right of integrity (§ 14 UrhG, Art. 10 par. 1 Nr. 3, 4 chinCA)

**Exploitation Rights**

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Exploitation Rights:


a) Tangible

- the right of reproduction (§ 16 UrhG, Art. 10 par. 1 Nr. 5 chinCA)
- the right of distribution, the right of rental (§ 17 UrhG; Art. 10 par. 1 Nr. 6, 7 chinCA)

**Exhaustion doesn't exist in China! But is no TRIPS-Standard, see Art. 6 TRIPS**

- the right of exhibition, that is, the right to publicly display the original or reproduction of a work of fine art and photography (§ 18 UrhG, Art. 10 par. 1 Nr. 8 chinCA; **China: not only reserved for non disseminated works, but also after the first dissemination**)

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<p><b>b) <u>Untangible</u></b></p> <ul style="list-style-type: none"> <li>- the right of performance, the right of showing, the right of making cinematographic work (§ 19 UrhG, Art. par. 1 Nr. 9, 10, 13 chinCA)</li> <li>- the right of communication of information on networks (§ 19a UrhG, Art. 10 par. 1 Nr. 12 CA)</li> <li>- the right of broadcast (§§ 20, 20a, 21,22 UrhG, Art. 10 par. 1 Nr. 11 chinCA)</li> </ul> <p><b>c) <u>Adaption</u></b></p> <ul style="list-style-type: none"> <li>- (§ 23 UrhG, Art. 10 par. 1 Nr. 14, 15 chinCA)</li> </ul> <p style="padding-left: 40px;"><b>fair use</b> (§ 24 UrhG) not mentioned in chinCA</p>		

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<p><b>3.3 <u>Limitations</u></b></p> <p><b><u>Duration of copyright</u></b></p> <p><b>Germany:</b> 70 years after the death of the author (§§ 64 bis 69 UrhG)</p> <p><b>China:</b> The rights of authorship, alteration and integrity of an author shall be unlimited in time (Art. 20 chinCA);</p> <p>The term of protection for the right of publication and the rights referred to in Article 10, paragraphs (5) to (17), of this law in respect of a work of a citizen shall be the lifetime of the author and fifty years after his death, and expires on 31 December of the fiftieth year after the death of the author. In the case of a work of joint authorship, such term shall expire on 31 December of the fiftieth year after the death of the last surviving author (Art. 21 chinCA).</p> <p><b><u>Limitation on Rights</u></b></p> <p>Provisions for the general public, media and cultural economy Germany (§§ 44a-63a UrhG) and China (Article 22-23 chinCA) have comparable rules!</p>		

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3.4 Droit d'auteur or Copyright ?

Copyright

Elementes of droit d'auteur  
 „zhuzuquan“

Elementes of Copyright  
 „banquan“

„Except where otherwise provided in this Law, the copyright in a work shall belong to its author.  
 The author of a work is the citizen who has created the Work.“  
 (Art. 11 par. 1 und 2 chinCA)

The term "copyright owners" shall include:  
 "Authors, other citizens, legal entities and other organizations enjoying copyright in accordance with this law." (Art. 9 chinCA)

"Where a work is created according to the intention and under the supervision and responsibility of a legal entity or other organization, such legal entity or organization shall be deemed to be the author of the work." (Art. 11 par. 3 chinCA).

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4. Summary and Preview

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4.1 China has created a modern Copyright Act which follows the five pillar model with the sections material copyright, neighboring rights, contractual rights, rights of collecting societies and enforcement rights.

4.2 By building a dual structure (judicial and administrative enforcement) China has found an independent way of implementation of copyright protection. However, there are still gaps in the effective enforcement.

4.3 Important to the protection of intellectual property is the position of the author. China has found its own way between droit d'auteur and copyright.

4.5 To improve copyright in China it is necessary to change awareness of copyright protection from

- external pressure to internal need
- judicial progress case by case and to
- evolve relation between state and civil society.

## Thoughts...

**„Better than someone who knows what is right is someone who loves what is just; and better as somebody who loves what is right is someone who has a passion to what is just.“ (Laotse)**