

Visit of the Chinese delegation
on May 27th 2008

THE DUTCH PUBLIC PROSECUTOR

—

Enforcement of intellectual property rights

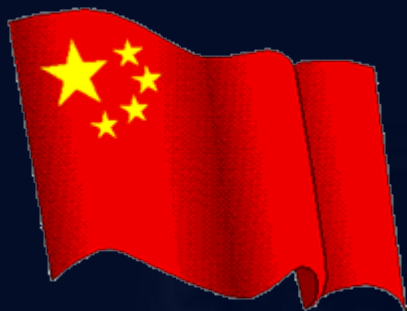


A warm welcome to the Chinese delegation,

- Mr. Zhang Sujun, Vice Minister of Justice of P.R. China
- Mr. Xia Guojia, Director-General, Hunan Provincial Department of Justice
- Mr. Zhao Guangjun, Director-General, Zhejiang Provincial Department of Justice
- Mr. Kang Yu, Deputy Director-General, Department of Judicial Assistance and Foreign Affairs, Ministry of Justice
- Mr. Li Hongwei, Deputy Division Chief, General Office, Ministry of Justice
- Ms. Mao Jialing, Project Officer, department of Judicial Assistance and Foreign Affairs, Ministry of Justice

- Mr. QU Wensheng,
Counsellor in charge of legal
and political affairs
- Ms. Zhang Tiehong,
Second Secretary

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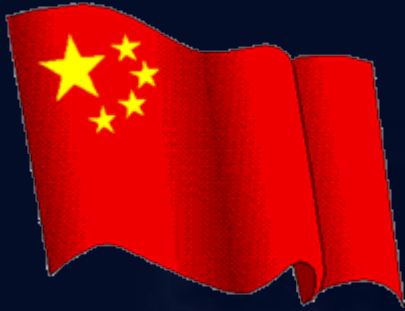
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New Year

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- Chinese forensic team
to Phuket – Thailand
Tsunami



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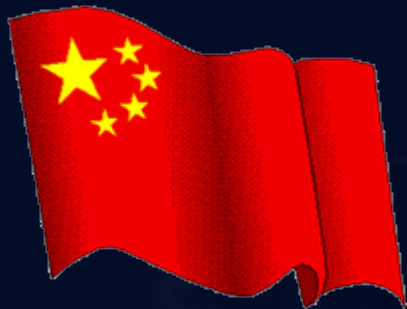


Basics: National

- In the Netherlands the hierarchical relationship government/police is two folded:
- In criminal matters, the police is subordinated to the Crown Prosecutorial Service directed by the Higher Prosecutorial Office in The Hague.
- In matters of public security and national order, the police is subordinated to the Ministry for the Interior.



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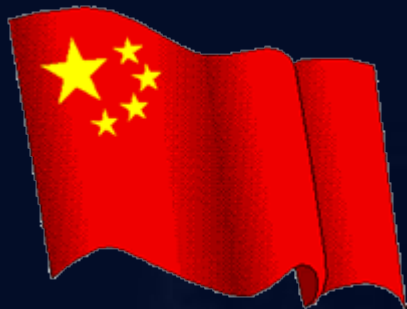


Basics National 2

- In both cases there is, eventually, a political responsibility to be carried towards the Houses of Parliament by the politically responsible Ministers:
- the Minister of Justice is, ultimately, responsible for the way the Higher Prosecutorial Office conducts the national policy in criminal matters. He has to answer the questions putted forward in the Parliament; if the answers do not satisfy, he can be dismissed.
- The same goes for the Minister of the Interior: She has to stand interrogation by the Houses for the way she instructed by guidelines the Police.



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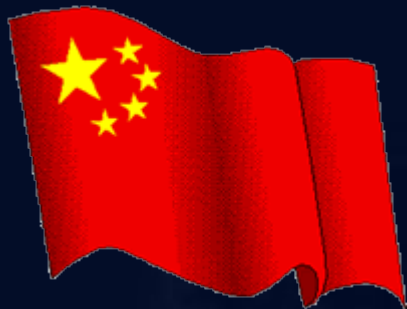


Basics Local

- In criminal matters, the police is subordinated to the Local Prosecutorial Service. The Prosecutor is accountable to the Higher Prosecutorial Office.
- In matters of public order, the police is subordinated to the Mayor. The Mayor is accountable to the local Council.
- The Police is organised and financed within a national system by law.



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Basics for prosecution

- Not every crime, coming to the cognizance of the Service, has to be pursued.

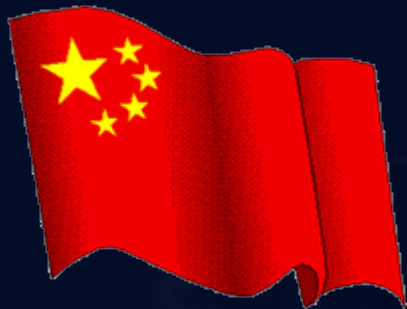
The Service, directed by the Office, has the

“rule of expediency”
at its disposal.

- The discretionary power to prosecute or not

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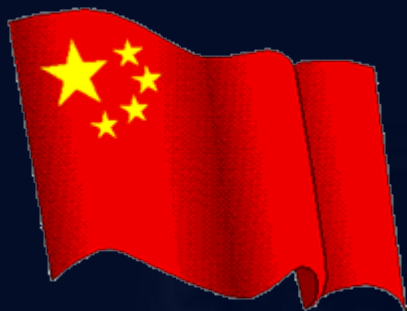
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Example: Coffee shop



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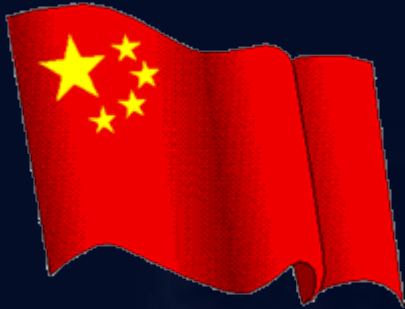
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Example:
Child pornography and Child abuse



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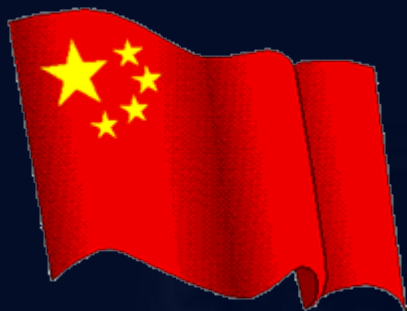


Example: Euthanasia

- _Piergiorgio Welby december 2006



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In the EU-framework,
with a view to the respective prosecutorial
national systems, there are two systems, at first
sight antithetical to each other:

1. The rule of absolute legality:

The Prosecutorial Service is submitted to the
mandatory obligation to pursue each crime
under its cognizance.
There is no latitude of appreciation.
This is the system of the Bundes Republik
Deutschland.

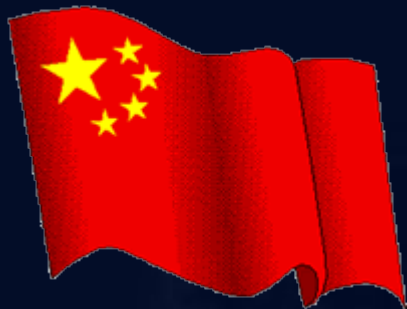
2. The rule of relative expediency:

It is up to the Prosecutorial Service, on a case-
by-case bound basis, to decide as to whether
positive prosecutorial action will be serving
positive national interests of justice in the case.

Munchen-Germany
Justizpalast



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- But certainly, the system of relative expediency activates as an inherent element of the *balance of powers* in matters of criminal policy the constant braking system by the *primacy of politics*.
- By virtue of the fact that the Prosecutorial Service knows that there is a constant risk that the Minister of Justice has to come to the Parliament to carry full responsibility, the Office will act according to the presumed wishes and desires of the Minister of Justice.
- The Office will not wait until the Minister is going to show his disapproval or the Parliament its official disavowal.

- In the Dutch view, this gives the system the highest level of democratic legitimation.

Therefore:

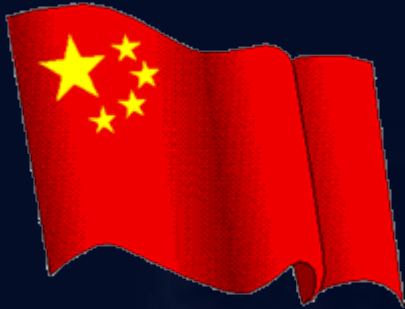
LET'S PONDER UPON

THE RULE OF RELATIVE EXPEDIENCY
IN THE DUTCH LEGAL SYSTEM.



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THE DUTCH PUBLIC PROSECUTOR (PP)

- **ADVERSARIAL SYSTEM**

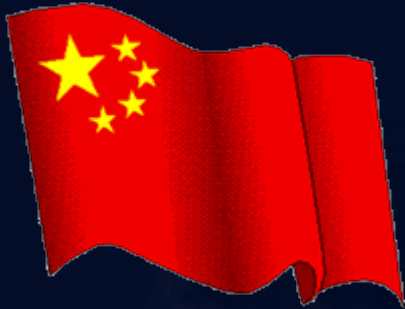
- State against accused
- Equal parties in criminal proceedings

- **INQUISITORIAL SYSTEM**

- The pp is a part of the judiciary
- Pp is investigator and advisor to judge



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EXAMPLE: The Netherlands versus The UK

• UK:

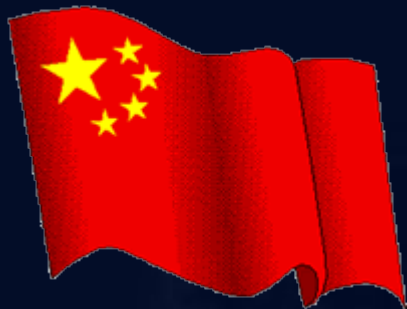
– NO 'PUBLIC' PROSECUTION

- PUBLIC INTEREST
- DISCRETION POWER

– SOLLICITOR

- PARTY IN CRIMINAL PROCEEDING
- SOLLICITORS 'HIRED BY' POLICE
- DEFENDS QUEEN'S PEACE IN HER REALM





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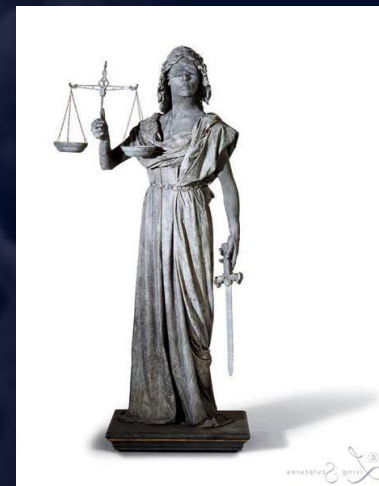
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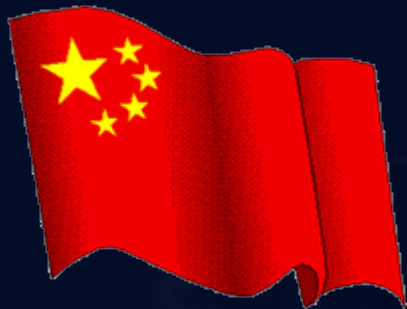


MAIN ROLE OF THE PP (CRIMINAL CASES)

- **DECISION IF A CASE SHOULD BE BROUGHT TO COURT**
 - The right to exercise prosecutorial discretion
- **POLICY ON CERTAIN CATEGORIES OF MINOR OFFENCES**
 - No involvement of the courts
- **PROTECTING THE RIGHTS OF VICTIMS AND OFFENDERS**
 - Throughout the judicial process



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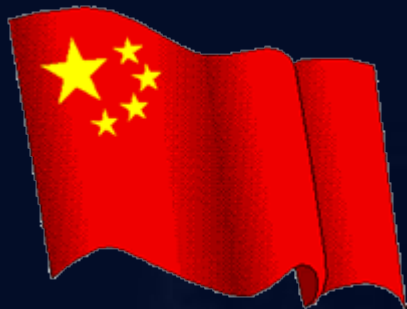


PP: Dominus Litis

- PP is the “master of the criminal proceedings”.
 - only the public prosecutor may initiate criminal proceedings
 - there is no such thing as a “civil party” (“partie civile” like in Italy or France)
 - it is only with the prosecutor to define the crime in the indictment
 - the judge is completely bound by the wordings of the indictment:
 - The judge is not entitled to “go behind the indictment” even in the cases he is convinced that the accused committed an other crime than the wordings in the indictment:
 - the indictment is “tyrannical” for the judge.
 - There is no jury; only the professional judge appointed by the QUEEN for lifetime may rule upon the indictment.
 - *This is one of the most characteristic features of the Dutch prosecutorial system. No other EU-country is acquainted with such a system.*



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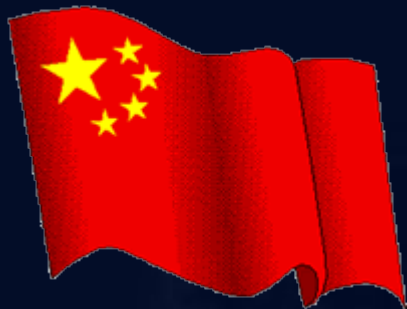
Europe and Napoleon

• **NAPOLEON**

- *essential that the “partie civile” could initiate proceeding.*
- *In criminal matters, according to his codex, ultimately, the VOX POPULI should be VOX DEI (the people’s voice is to be equivalent to the voice of God in criminal matters): t*
- *The jury system should have the predominance in criminal matters:*
- *COUR d’Assises should be the basic procedure in matters of capital crime.*



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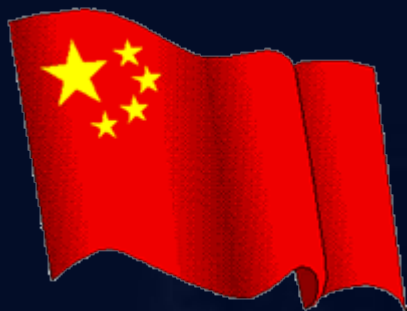


Main System EU countries

- *The Assizes may go behind the indictment.*
 - *The indictment may be amended and changed during every phase of proceedings.*
- *There is NO factual appeal to a higher instance.*
 - *THIS IS THE MAIN SYSTEM IN EU-COUNTRIES.*



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• Eurojust

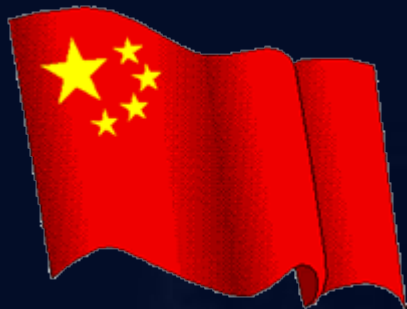
Dutch system

- *In the Netherlands, it is not with the judge to rule upon the lawfulness and legitimacy of the prosecutorial policy:*
- *the tyranny of the indictment prohibits that.*
- *Only the PARLIAMENT may rule upon that policy.*
- *It provides the highest level of democratic legitimacy.*
- *If the EU is going to establish EUROJUST as EU-Prosecutorial Service, certainly the French system will be followed.*



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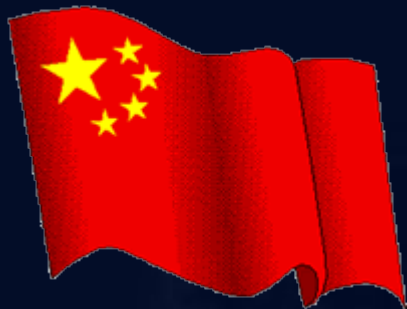


August 20Th 2007

Higher Prosecutorial office of the Kingdom
of the Netherlands

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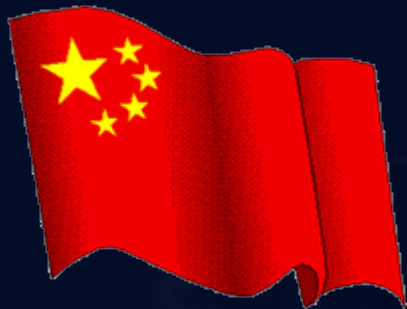
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Definitions

1. First introductory remark:

- there is no overarching definition in criminal law of infringement on intellectual property
- not at the national level nor at the level of the European Union
- the legislator confines itself to criminalise certain phenomena of intellectual fraud or infringements on intellectual property.
- This goes for the Netherlands, this goes for the Union.



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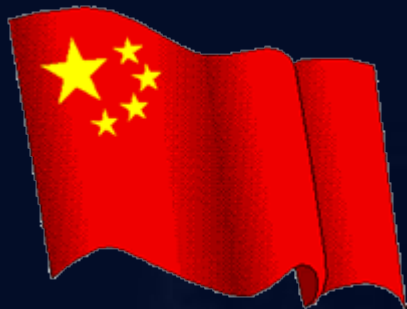
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2. Second introductory remark

- The basic point of departure of the DUTCH legislator in criminal matters is that private interests should be protected by the private individuals their self. This is not a matter for statal intervention by virtue of using penal enforcement power.
- This is a typical DUTCH feature of the legislature. It goes NOT for other EU member states.
- Nor does it go for the Union itself.
- On the contrary:
as of 1994 the Union promulgated lots of binding regulations to prohibit



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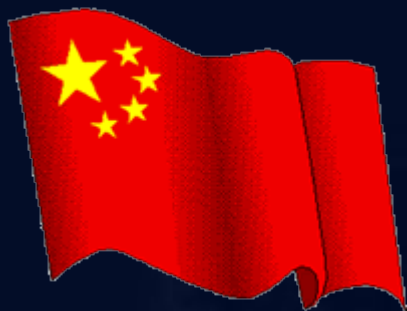
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Counterfeiture of goods, whatsoever

- THE BRINGING INTO FREE CIRCULATION of counterfeited goods within the common free trade area of the Union
- THE EXPORT FROM AND IMPORT to that common free trade area of those counterfeited goods;
- THE RE-IMPORT TO and RE-EXPORT FROM of those counterfeited goods to that area;
- And to prohibit the member states to place those counterfeited goods on a list of “suspensure of customs formalities”

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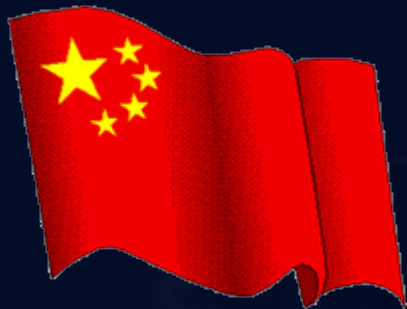
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“suspensure of customs formalities”

- This item concerns the statal practice to exclude semimanufactures from those formalities in case of temporary import
- with a view to bring those manufactures to an final product to be exported from the common EU–area.



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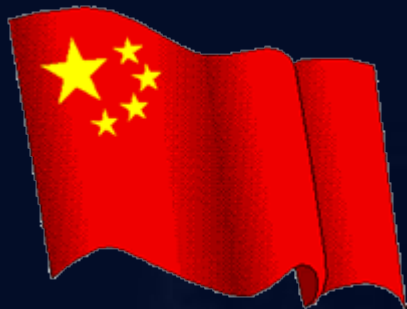
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EU: European Union

- It is with the EU–member states to decide as to whether they would criminalise those kinds of counterfeitures and acts regarding counterfeited goods or would choose for an other kind of “effective sanctions”.





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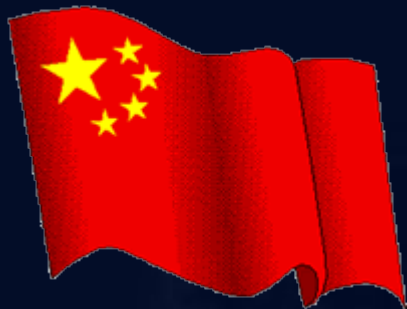
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EU– 2

- The EU–Commission deliberately did not use the noun “penalties” in the regulation leaving the EU–member states thus a wide margin of appreciation HOW to “sanction” the aforementioned kinds of counterfeiting and acts connected with counterfeiture.
- THIS is the gist of REGULATION 3295/94 of the EU–COUNCIL.



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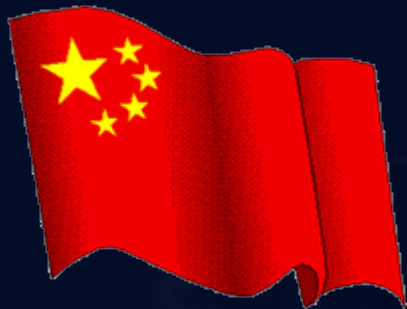
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REGULATION 3295/94

- This is the main instrument within the EU–common area to combat counterfeiture and acts related to counterfeiture.
- Despite the large margin of appreciation, the majority of states chose for penalisation.
- So did the Netherlands.



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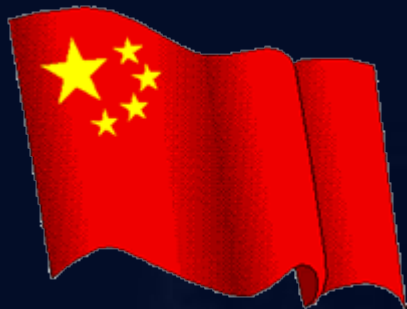


The Netherlands

It abandoned its original stand
that counterfeiture is only a private matter.

- The Netherlands opted for enabling legislation at the national level within three areas:
 1. it changed the criminal law book considerably
 2. it altered the law on the copyrights
 3. it changed the legislation on the neighbourhooding rights.
- The main article is article 337 of the Criminal Code Book.

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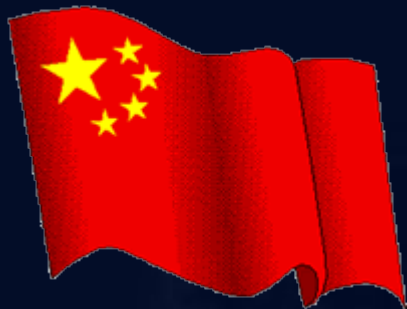


article 337 of the Criminal Code Book.

It criminalises

- “...intentional importation or exportation or conveying in transit or possessing of **counterfeited marks, brands, names, trademarks and labels;**
- intentional importation or exportation or conveying in transit or possessing of goods completed with **forged trademarks;**
- international importation (etc.) of goods **completed with a false place of origin or a false trademark;**
- intentional importation (etc.) of goods completed with a **false brand or imitated trademark;**
- intentional importation (etc.) showing resemblance to a model, an appearance to which only **an other exclusively is entitled...**”

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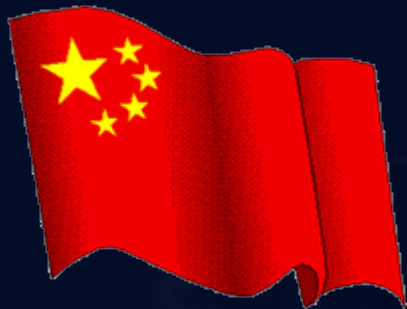
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article 337 of the Criminal Code Book-2

- Lots of probative hurdles have to be taken by the Dutch Prosecutorial Service when prosecuting on the basis of this article.
 - the subjective element “intentional” is a hurdle
 - is “downloading” equivalent to possessing
 - what exactly is “copying” and is it equivalent to “forging” and so on
- Therefore, it chose several times to prosecute on the basis of article 140 of the Criminal Code Book.

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article 140 of the Criminal Code Book.

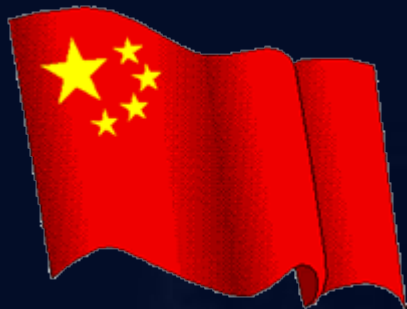
It penalises

“...intentional participation into a criminal
organisation”.

Yet, here are probative hurdles' to be overcome as
well.

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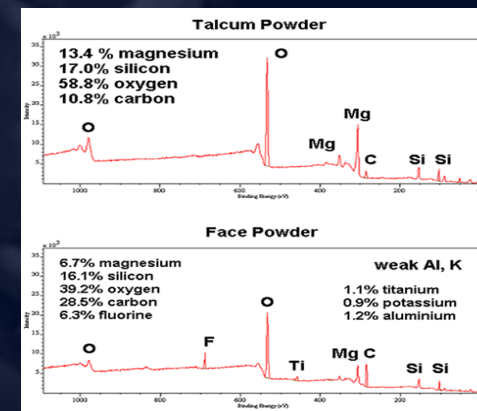
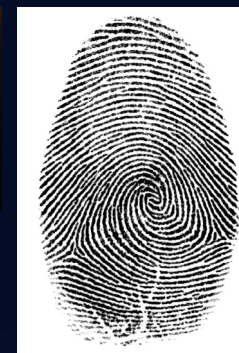
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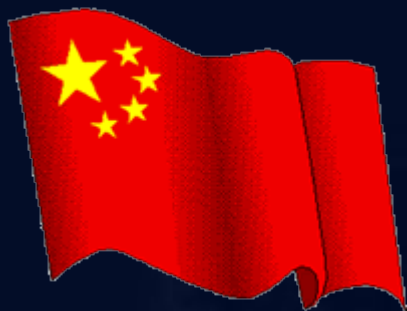


Expertise

- The Dutch Forensic Institute is one of the centers of expertise on which the judge can rely.
- The Institute is an agency subordinated to the Ministry of Justice.
- Its services stand at the disposal of the Prosecutorial Service.
- If the attorney for the defense wants to use the Institute's expertise, he has to ask the intervention of the Service. The Service is free to comply with the requests for the defense.
- Unwillingness to comply will be an issue to be discussed in Court. The judge can order the compliance.



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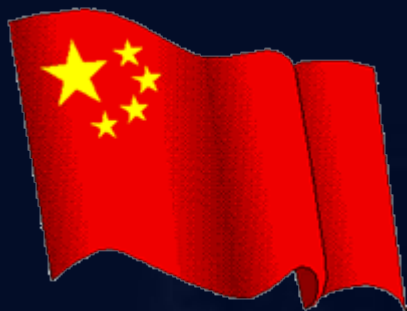
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We thank you for your attention,

and wish you a
safe return home.

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