

Stay Away From Missing Persons' Cases On The Internet:

*Should managers and users of missing persons' websites
be afraid of copyright infringement and defamation?*

Nathalie L. Swinkels LL.M.

S525727

Tilburg University, Faculty of Law

Master Law and Technology

Examination Committee: Mr. Ir. M.H.M. Schellekens (supervisor)

Dr. C.M.K.C. Cuijpers

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Preface

Missing persons...

Everyone has been confronted in his or her life with an appeal to locate a missing person made by left-behind family or friends. Sometimes they are found and sometimes it seems that no one will ever know what truly happened that very day.

There are a lot of people who are interested in the field of missing persons and the internet is an excellent instrument in trying to provide information and solve many of these cases.

There are several reasons why people can become interested in a missing person's case.

When I started with gathering information about missing persons, one of the first cases I came across was the case of Kirsti Lynn Nikle, a woman who disappeared on 10 October 1996 in Grand Forks (North Dakota) and who is still missing¹, who reminded me slightly by her appearance of a former friend with whom I went to class during primary school. Hereafter, since I became more interested in the field of missing persons, there were more cases which caught my attention such as the case of Ray Gricar, a District Attorney for the Center County Pennsylvania who disappeared from Bellefonte (Pennsylvania) on 15 April 2005² and of Alexis Patterson, a primary school pupil who went missing from her primary school in Milwaukee (Wisconsin) on 3 May 2002³. Thanks to organizations like the *Doe Network*⁴, strangers can help in solving missing persons' cases and therefore, maybe someday, they will be located and know that they were not only remembered by their family, friends, but also by people who have never met them or known them before their disappearance.

It is safe to say that no one will be entirely forgotten.

I would like to express gratitude for the guidance and advice of my supervisor, Mr. Ir. M.H.M. Schellekens and of Dr. C.M.K.C. Cuijpers, who both helped me throughout the process of writing this thesis.

Special thanks are mainly directed to my sister who not only provided feedback, but also liked to play the *Advocatus Diaboli* so that my work would be objective, and also to my mother and father for their support, patience and feedback. Furthermore, I would thank my friends who often listened when I was talking about missing persons. And last but not least to Mrs. Good of *The Charley Project*⁵, who provides insight, through her blog⁶, in the operating of a missing persons' website, to Mrs. Keller of the *For the Lost Organization*⁷ for her dedication to help left-behind family of missing persons, and to all others who are unselfishly trying to locate missing persons and hopefully will find them in order to close their case.

Per aspera ad astra...

Tilburg, 20 August 2012

¹ <http://doenetwork.org/cases/1668dfnd.html/> (12 August 2012).

² http://www.charleyproject.org/cases/g/gricar_ray.html/ (12 August 2012).

³ http://www.charleyproject.org/cases/p/patterson_alexis.html/ (12 August 2012).

⁴ <http://www.doenetwork.org/> (12 August 2012).

⁵ <http://www.charleyproject.org/> (12 August 2012).

⁶ <http://charleyross.wordpress.com/> (12 August 2012).

⁷ <http://www.forthelost.org/> (12 August 2012).

Introduction

Each day people disappear, however, special attention is often only paid to missing children since they are more vulnerable than adults. Today, the internet is generally used as a primary source in asking the general public for help in locating missing persons. In the US, it is not uncommon to involve the media such as television, radio stations, newspapers⁸, magazines... (in order to attract attention to a case)⁹.¹⁰ For example, the *America Most Wanted Safety Center*¹¹ published a guide containing information about how to draw attention to missing persons online.¹²

A Google internet search on 30 July 2012 reveals that there are at least 99.300.000 results concerning the topic *US missing persons' websites*.¹³ Therefore, it can be assumed that there are a lot of US based websites involved in locating missing people (adults and/or children). Missing persons' websites do raise some legal issues, besides questions about their social value, and the most significant problems which could be faced by a manager and/or user of such a website are copyright infringement and defamation. Especially since there can be misunderstandings concerning the copying of flyers and information or about the fact that a comment or theory posted on such a website could defame someone. Also, since it is simple to access and copy information from foreign missing persons' websites through the internet, it is not unlikely that a manager and/or user can be accused of copyright infringement or defamation in another country which could have different rules concerning these subjects than in the US. In this Master Thesis attention is paid to The Netherlands and England (The UK) and to EU law since both countries are EU Member-States and, as a consequence, it is necessary to provide some background information on how copyright and defamation law is dealt with in the EU.¹⁴ This Master Thesis will be divided into four chapters. The first chapter will be about the social value and the benefit of US based missing persons' websites since it is important that before attention should be paid to copyright and defamation law, some legal background concerning missing persons should be provided. The second and third chapter will concern US, EU, Dutch and English copyright and defamation law. The fourth chapter will contain the conclusion and recommendations.

Therefore, the research questions will be:

“Do managers and users of US based missing-persons-websites run the risk of committing copyright infringement or defamation? If, so, what can they do to minimise possible risks?”

From the foregoing, the following sub questions will be answered:

1. What is the social value or benefit of US based missing persons' websites?
2. What are copyright and defamation according to US law?
3. How should copyright infringement and defamation by a manager and/or (US citizen or foreign) user of a US based missing persons' website be dealt with according to US law?

⁸ See e.g. in the paper edition of the *USA Today* (<http://www.usatoday.com/> (12 August 2012)) distributed in the US, flyers of missing children are placed in the section “*Marketplace Today*” in the segment “*Notices*” and than “*Public Notice*”.

⁹ http://www.amw.com/pdf/making%20noise_guide.pdf (12 August 2012).

¹⁰ Watnik 2003, p. 419.

¹¹ <http://safety.amw.com/> (12 August 2012).

¹² <http://safety.amw.com/family/making-noise-bringing-attention-to-missing-loved-ones/> (12 August 2012).

¹³ http://www.google.be/#hl=nl&sa=X&ei=AqoWULuqO5G2hAf15oHACg&ved=0CFwQBSgA&q=US+missing+persons%27+websites&spell=1&bav=on.2,or.r_gc.r_pw.r_qf.&fp=9dd313392708d8d2&biw=1024&bih=432 of 30 July 2012.

¹⁴ http://europa.eu/about-eu/countries/index_en.htm (12 August 2012).

4. How are copyright infringement and defamation prevented and dealt with in the EU, The Netherlands and England?
5. How is a foreign judgment from the EU, The Netherlands and/or the UK against a US manager and/or user of a US based missing persons' website concerning copyright infringement and defamation enforced in the US?

The research was primarily desk research and the main sources used were US, EU, Dutch and English law and case-law, studies, reports, guides, websites and other documents.

Chapter 1: Is there a need of missing persons' websites?

Introduction

Before the research questions can be answered, some legal background information concerning missing persons should be provided. Therefore, in this chapter an answer will be given to the first sub question: “*What is the social value or benefit of US based missing persons' websites?*” The chapter is divided into four paragraphs. The first paragraph is about the history of missing persons in the US which is split into three parts answering first, who should be considered a missing person, second, how many missing persons are there in the US and, third, how the law concerning missing persons has developed throughout the years. The second paragraph will be about the legal definitions, explanations and problems surrounding missing persons and is divided into two parts, first, about missing children and, second, concerning missing adults. The third paragraph will clarify if the *US Government*¹⁵ should be involved in the problems surrounding missing people. This paragraph consists of two parts: first, the obligations of the *US Government* and, second, if the general public should help to locate missing persons. Hereafter, the content of the fourth paragraph will focus only on information needed for the following two chapters as which US based missing persons' websites a manager of a missing persons' website should use as reliable sources.

1.1 The history of missing persons in the US

1.1.1 Who is a missing person?¹⁶

In general, a missing person can be a child or an adult. However, it is possible that there is overlap between the two categories as, although the *Amber Alert*¹⁷ is for missing children only, as the child must be, amongst others, younger than 17 years¹⁸, it can also be issued if the person is younger than 21 years due to *Suzanne's Law*¹⁹.

1.1.2 How many missing persons are there?

The total number of missing children and adults is unknown.²⁰

There are three reasons which explain why it will never be exactly known how many missing persons' there are:

First, the numbers provided only concern the cases of persons who are reported as missing to law enforcement.²¹ An example of a missing person's case not reported to law enforcement is the case of Caylee Anthony, a two year old, who disappeared in June 2008 and who was reported missing by her grandmother on 15 July 2008 to law enforcement after the mother of the girl could not explain where Caylee was.²² Eventually, the girl was found deceased on 11 December 2008.²³ Due to this tragedy, members of the general public²⁴ and different states, as

¹⁵ <http://www.usa.gov/> (12 August 2012).

¹⁶ See also part: *1.1.4 Legal definitions, explanations and problems*, p. 12-17.

¹⁷ <http://www.amberalert.gov/> (12 August 2012).

¹⁸ <http://www.amberalert.gov/guidelines.htm> (12 August 2012) and O'Brien and French 2008, p. 37.

¹⁹ <http://www.mass.gov/eopss/law-enforce-and-cj/law-enforce/missing-and-wanted/mmcc/missing-children-laws.html> (12 August 2012).

²⁰ For children, see e.g. for missing children the introduction of “*Caylee's Law*” (felony charges for parents who do not report their child to be missing) from New York State Senator A.J. Lanza (<http://www.nysenate.gov/press-release/senator-lanza-introduces-caylee-s-law-ny-bill-would-create-felony-charge-failing-repor> (12 August 2012)) and for missing adults: Fernandes 2009, p. 7-10.

²¹ Moore 2011, p. 154.

²² Wolbert Burgess, Regehr and Roberts 2010, p. 2.

²³ *Ibid.*

²⁴ <http://www.change.org/petitions/create-caylee-s-law-3> (12 August 2012).

New York²⁵, wanted to create a “*Caylee’s Law*”.²⁶ In sum, if this law should enter into force, it will be regarded a felony if a parent or a guardian does not report his or her child or the child he or she is taking care of as missing to law enforcement within 24 hours.²⁷

Second, when it concerns a missing adult, it does not always have to be the case that he or she has met with foul play, as adults can choose where they want to go without the obligation of telling anyone.²⁸ Additionally, due to this freedom, it can happen that an adult is found dead, for example murdered, while nobody even noticed that this person was missing.²⁹

According to the report “*Missing adults: Background, Federal Programs, and Issues for Congress*” of 2 February 2009³⁰, adults have a legal right to leave, which creates problems for left-behind families in reporting an adult as missing to law enforcement.³¹ In sum, the reasons why an adult can disappear are: foul play, a high-risk lifestyle (e.g. involved in drugs), a history of victimization (e.g. domestic abuse), a physical disability, a developmental disability, a cognitive disorder and/or a nature disaster.³²

Third, although the adult is regarded as missing, his or her body has turned up, but could not be identified by law enforcement and therefore the person is still listed as missing.³³

1.1.3 The legal history of missing persons’ laws

1.1.3.1 Missing children

A tragedy has to take place before action is taken, which happened in the field of missing children, since it lasted until the beginning of the 1980s before it became a topic for politics and legislation.³⁴ It all began with three child abductions: First, the parental abduction of five year old Joanna Yerkovich (she was abducted by her father on 20 December 1974 and located in 1984), second, the disappearance of six year old Etan Patz (he vanished while walking to school on 25 May 1979) and, third, the abduction of six year old Adam Walsh (he disappeared from a shopping centre on 27 July 1981 and was found murdered two weeks later).³⁵ These three cases became well known to the American public due to the actions by their left-behind parent(s) of attracting awareness to them and other missing children. In 1980 Gloria Yerkovich set up the national non-profit agency *Child Find, Inc.*³⁶, an organization specialized in, amongst others, locating missing children.³⁷ Etan Patz was the first child whose picture was published on a milk carton and due to the fact that, since 1982, 25 May

²⁵ <http://www.nysenate.gov/press-release/senator-lanza-introduces-caylee-s-law-ny-bill-would-create-felony-charge-failing-repor>, <http://www.capitaltonight.com/2011/07/caylees-law/> and <http://assembly.state.ny.us/leg/?bn=A08539> (all 12 August 2012).

²⁶ http://www.usatoday.com/news/nation/2011-07-07-caylee-anthony-petition_n.htm, <http://abcnews.go.com/US/casey-anthony-trial-aftermath-caylee-law-drafted-states/story?id=14020260> and <http://blogs.findlaw.com/blotter/2011/07/caylees-law-proposed-in-fl-ny-ok-wv.html> (all 12 August 2012).

²⁷ <http://www.change.org/petitions/create-caylee-s-law-3> and http://www.washingtonpost.com/blogs/post_now/post/casey-anthony-case-inspires-md-legislation/2011/07/08/gIQANctP3H_blog.html (both 12 August 2012).

²⁸ Vaccariello 2009, p. 80-84, p. 88 and p. 213.

²⁹ Ibid, p. 82.

³⁰ Fernandes 2009, p. 1-34.

³¹ Ibid, p. 3.

³² Ibid, p. 6-7.

³³ Vaccariello 2009, p. 83.

³⁴ Tedisco and Paludi 1996, p. 112-113.

³⁵ Ibid and Kamerman, Phipps and Ben-Arieh (editors) 2010, p. 164.

³⁶ <http://www.childfindofamerica.org/> (12 August 2012).

³⁷ Kamerman, Phipps and Ben-Arieh (editors) 2010, p. 164-165 and <http://www.childfindofamerica.org/about%20Child%20Find.htm> (12 August 2012).

became the annual “*National Missing Children day*”³⁸. John Walsh, became, together with others, involved in lobbying for legislation concerning missing children^{39, 40}.

During the following years, several federal laws concerning missing children came into existence.⁴¹ However, only five of them will be examined in short because they can be considered as relevant for a missing persons’ website.

The first act which came into force was the *Missing Children Act (28 USC § 534)* of 1982⁴² in which the tasks of the *Attorney General* are described as, for example, he or she shall appoint officials who will collect information concerning a deceased non-identified child or will gather information concerning the location of missing child (*Missing Children Act (28 USC § 534 (a) 2 and 3*)⁴³, which could then be exchanged with other officials of federal and/or state level and with institutions (*Missing Children Act (28 USC § 534 (a) 4*)⁴⁴.

Second, there is the *Missing Children’s Assistance Act (42 USC § 5771 et seq.)*⁴⁵ of 1984⁴⁶, in which it is required, amongst others, that a clearinghouse for missing children had to come into existence.⁴⁷ This was realized with the coming into existence of the *National Center of Missing and Exploited Children* (or *NCMEC*)⁴⁸ in 1984.⁴⁹

The Congress also admitted in *Section 5771 Missing Children’s Assistance Act (42 USC § 5771 et seq.)*⁵⁰ that there was need for a more adequate legal response concerning the resolving of missing children cases:

“*The Congress hereby finds that —*

- (1) each year thousands of children are abducted or removed from the control of a parent having legal custody without such parent’s consent, under circumstances which immediately place them in grave danger;*
- (2) many of these children are never reunited with their families;*
- (3) often there are no clues to the whereabouts of these children;*
- (4) many missing children are at great risk of both physical harm and sexual exploitation;*
- (5) in many cases, parents and local law enforcement officials have neither the resources nor the expertise to mount expanded search efforts;*

³⁸ Katz 2010, p. 306.

³⁹ Kamerman, Phipps and Ben-Arieh (editors) 2010, p. 165.

⁴⁰ Ibid, p. 160 and 165.

⁴¹ See e.g. <https://www.interpol.int/Public/Children/Missing/NationalLaws/mcUSA.asp> and http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1615 (both 12 August 2012).

⁴² *Missing Children’s Act* or *28 USC § 534*.

⁴³ O’Brien and French 2008, p. 21 and

http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1615 (12 August 2012).

⁴⁴ Ibid.

⁴⁵ *Missing Children’s Assistance Act* or *42 USC § 5771 et seq.*

⁴⁶ http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1615 (12 August 2012).

⁴⁷ O’Brien and French 2008, p. 21, Fairman Cooper 2003, p. 1-2 and De Ruyver, Zanders, Vermeulen and Derre 2000, p. 118-120. For more information concerning the *NCMEC* see their website:

http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012). See also the section: *1.2.2.1 The National Center For Missing and Exploited Children or NCMEC*, p. 24-26.

⁴⁸ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

⁴⁹ O’Brien and French 2008, p. 21, Fairman Cooper 2003, p. 1-2 and De Ruyver, Zanders, Vermeulen and Derre 2000, p. 118-120. For more information concerning the *NCMEC* see their website:

http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012). See also the section: *1.2.2.1 The National Center For Missing and Exploited Children or NCMEC*, p. 24-26.

⁵⁰ *Missing Children’s Assistance Act* or *42 USC § 5771 et seq.*

(6) abducted children are frequently moved from one locality to another, requiring the cooperation and coordination of local, State, and Federal law enforcement efforts;
(7) on frequent occasions, law enforcement authorities quickly exhaust all leads in missing children cases, and require assistance from distant communities where the child may be located; and
(8) Federal assistance is urgently needed to coordinate and assist in this interstate problem.”⁵¹

Third, the *National Child Search Assistance Act* or *Title 42 USC § 5779-5780*⁵² of 1990 explains in § 5780 (3) which information of the missing child must be included in a state report:

“(3) provide that each such report and all necessary and available information, which, with respect to each missing child report, shall include—

(A) the name, date of birth, sex, race, height, weight, and eye and hair color of the child;

(B) the date and location of the last known contact with the child; and

(C) the category under which the child is reported missing;... ”⁵³

After the collection of this information, the following procedure should be followed according to *Title 42 USC § 5780 (3) and (4) National Child Search Assistance Act*⁵⁴:

“...is entered within 2 hours of receipt into the State law enforcement system and the National Crime Information Center computer networks and made available to the Missing Children Information Clearinghouse within the State or other agency designated within the State to receive such reports; and

(4) provide that after receiving reports as provided in paragraph (2), the law enforcement agency that entered the report into the National Crime Information Center shall—

(A) no later than 60 days after the original entry of the record into the State law enforcement system and National Crime Information Center computer networks, verify and update such record with any additional information, including, where available, medical and dental records;

(B) institute or assist with appropriate search and investigative procedures; and

(C) maintain close liaison with the National Center for Missing and Exploited Children for the exchange of information and technical assistance in the missing children cases.”⁵⁵

The fourth act concerns the *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act* (or *PROTECT* or *Public Law 108-21*)⁵⁶ of 2003⁵⁷, which came into existence on 30 April 2003.⁵⁸ In sum, it is about the reauthorization of the *NCMEC*⁵⁹, about law enforcement and about the development and/or enhancement of the *Amber Alert*^{60, 61}.

The fifth act is the *Adam Walsh Child Protection and Safety Act*⁶² of 2006, in which it is clarified, amongst others, that no state law enforcement is allowed to remove a missing person’s report from the state law enforcement system or from the *FBI’s National Crime Information Center* (or *NCIC*)⁶³ computer database only due to the fact that the missing child

⁵¹ Ibid.

⁵² *National Child Search Assistance Act* or *Title 42 USC § 5779-5780* and http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1615 (12 August 2012).

⁵³ *National Child Search Assistance Act* or *Title 42 USC § 5779-5780*.

⁵⁴ Ibid and

http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1615 (12 August 2012).

⁵⁵ *National Child Search Assistance Act* or *Title 42 USC § 5779-5780*.

⁵⁶ *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act* or *PROTECT Act* or *42 USC §5791 et seq.*

⁵⁷ http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1615 (12 August 2012).

⁵⁸ Fairman Cooper 2003, p. 3.

⁵⁹ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012). See also the section: *1.2.2.1 The National Center For Missing and Exploited Children or NCMEC*, p. 24-26.

⁶⁰ <http://www.amberalert.gov/> (12 August 2012). See also the section: *1.2.1.1 The Amber Alert*, p. 21-23.

⁶¹ Fairman Cooper 2003, p. viii and 3.

⁶² *H.R. 4472: Adam Walsh Child Protection and Safety Act* or *Public Law 109-248*.

⁶³ <http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm> (12 August 2012).

has reached a certain age.⁶⁴ This act is also well known because of its sections concerning protecting children from sex offenders.⁶⁵

1.1.3.2 Missing adults

Again, a tragedy has to take place before politicians come into action, since awareness to the problems of missing adults began until after the disappearance of Kristen Modafferi, who had just become 18 years old in 1997.⁶⁶ She went missing on 23 June 1997 after leaving her place of employment, a coffee shop in San Francisco.⁶⁷ As she was 18, she was considered an adult and therefore could not be included in the missing children register of the *NCMEC*.^{68, 69} To solve this problem, her parents and others advocated for the *Kristen's Act*.⁷⁰ The first *Kristen's Act* became known as *H.R. 2780: Kristen's Law*⁷¹ (*Public Law 106-468*)⁷² on 9 November 2000.⁷³ In sum, the law was about the funding of a clearinghouse for missing adults who had disappeared, according to law enforcement, due to foul play.⁷⁴ It obliged that missing adults should be reported to the *National Center for Missing Adults*.^{75, 76}

The reason why the *Kristen's Act* needs to be reauthorized was because its funding ended in 2004⁷⁷ and is best explained in *Title II: Kristen's Act Reauthorization Section 202 Findings of the ("H.R. 112: Kristen's Act Reauthorization of 2011)*⁷⁸:

“Congress finds the following:

(1) Every year thousands of adults become missing due to advanced age, diminished mental capacity, or foul play. Often there is no information regarding the whereabouts of these adults and many of them are never reunited with their families.

(2) Missing adults are at great risk of both physical harm and sexual exploitation.

(3) In most cases, families and local law enforcement officials have neither the resources nor the expertise to undertake appropriate search efforts for a missing adult.

(4) The search for a missing adult requires cooperation and coordination among Federal, State, and local law enforcement agencies and assistance from distant communities where the adult may be located.

(5) Federal assistance is urgently needed to help with coordination among such agencies.”⁷⁹

Another law concerning missing adults is *Suzanne's Law*⁸⁰, which is important for two reasons: First, it obligates authorities to enter information about missing persons under the age

⁶⁴ Section 154: Missing Child Reporting Requirements (a) of the H.R. 4472: Adam Walsh Child Protection and Safety Act or Public Law 109-248.

⁶⁵ Maras 2012, p. 155.

⁶⁶ O'Brien and French 2008, p. 93.

⁶⁷ Ibid and Newton 2009, p. 246.

⁶⁸ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

⁶⁹ O'Brien and French 2008, p. 93 and Patterson Ludwig 2001-2002, p. 83.

⁷⁰ Ibid.

⁷¹ O'Brien and French 2008, p. 93.

⁷² *H.R. 2780: Kristen's Act* or *Public Law 106-486*.

⁷³ http://charlotte.news14.com/content/top_stories/642820/woman-missing-14-years-inspired-change-for-similar-cases (12 August 2012).

⁷⁴ Myrick 2008, p. 1-3.

⁷⁵ <http://www.lbth.org/ncma/index.php> (12 August 2012).

⁷⁶ http://www.ehow.com/list_6855833_legal-laws-missing-persons.html#ixzzlHiljhvhz (12 August 2012).

⁷⁷ *H.R. 2780: Kristen's Act* or *Public Law 106-486* and <http://www.phoenixnewtimes.com/2009-01-15/news/the-national-center-for-missing-adults-funding-was-slashed-by-the-feds-but-three-volunteers-are-keeping-it-alive/> (12 August 2012). See also the section: 1.2.2.2 *The National Center for Missing Adults*, p. 25-26.

⁷⁸ *H.R. 112: Kristen's Act Reauthorization of 2011*.

⁷⁹ Ibid.

⁸⁰ Part of the *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act* or *PROTECT Act* or 42 USC §5791 et seq, O'Brien and French 2008, p. 94, <http://www.mass.gov/eopss/law-enforce-and-cj/law-enforce/missing-and-wanted/mmcc/missing-children-laws.html>, <http://definitions.uslegal.com/s/suzannes-law/>, http://www.justice.gov/opa/pr/2003/April/03_ag_266.htm and

of 21, yet older than 18⁸¹, in the *FBI's NCIC⁸² System⁸³* and, second, there is no waiting period allowed before a law enforcement agency should investigate a missing adult's case.⁸⁴ The law is named after Suzanne Lyall, a student at the *State University of New York* in Albany, who went missing on 2 March 1998 after she left her work in a software shop and due to the fact that law enforcement only started to investigate her disappearance after a waiting period of 48 hours.⁸⁵

The last federal law (which, unfortunately, never passed the *Senate⁸⁶*)⁸⁷ is *Billy's Law (H.R. 3695: Billy's Law or Help Find the Missing Act)*.⁸⁸ In short the law regulates, amongst others, the funding and accessibility of the *National Missing and Unidentified Persons System* (or *NamUs*)⁸⁹ and is important for data sharing activities between *NamUs⁹⁰* and the *NCIC⁹¹* of the *FBI⁹²*.⁹³ It also describes in "*Section 4: Incentive Grants Program*" which information of the missing adult must be included in the missing adult report:

"(1) *CONTENT FOR MISSING PERSONS-* The minimum information described in this section, with respect to a missing person, is the following:

(A) *The name, date of birth, city and State of residence, gender, race, height, weight, eye color, and hair color of the missing person.*

(B) *The date and location of the last known contact with the missing person.*

(C) *The category described in subsection (e) in which the missing person is classified.*"⁹⁴

In sum, the law was named after Billy Smolinski who disappeared on 24 August 2004 from Waterbury (Connecticut) after he had asked a neighbour to look after his dog, and, although the neighbour accepted the request, he or she could not find the key the following day in its usual place.⁹⁵ His parents, who wanted to file a missing person's report, were told by law enforcement that they had to wait three days (because Mr. Smolinski had indicated that he would go away for three days) and even after the elapse of those three days, his parents experienced many problems concerning the way their missing son's case was handled by law enforcement.⁹⁶

1.1.4 Legal definitions, explanations and problems

Taking into account the background of missing persons' law the legal definition and the hereto related problems of a missing person, will now be examined in more detail.

http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1615 (all 12 August 2012)

⁸¹ Moore 2011, p. 154.

⁸² <http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm> (12 August 2012).

⁸³ <http://www.amberalert.gov/guidelines.htm> (12 August 2012) and O'Brien and French 2008, p. 37.

⁸⁴ O'Brien and French 2008, p. 94 and 102.

⁸⁵ *Ibid*, p. 93 and <http://www.teamhope.org/suzanneslaw.html> (12 August 2012).

⁸⁶ <http://www.senate.gov/> (12 August 2012).

⁸⁷ <http://www.govtrack.us/congress/bills/111/hr3695> (12 August 2012).

⁸⁸ *H.R. 3695: Billy's Law*.

⁸⁹ <http://www.namus.gov/> (12 August 2012).

⁹⁰ *Ibid*.

⁹¹ <http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm> (12 August 2012).

⁹² <http://www.fbi.gov/> (12 August 2012)

⁹³ <http://www.govtrack.us/congress/bills/111/hr3695> (12 August 2012).

⁹⁴ *H.R. 3695: Billy's Law*.

⁹⁵ <http://www.ctpost.com/opinion/article/One-step-closer-maybe-to-finding-Billy-Smolinski-446713.php> and http://www.amw.com/missing_persons/brief.cfm?id=37752 (both 12 August 2012).

⁹⁶ *Ibid*, http://vrc.poe.house.gov/index.php?option=com_content&view=article&id=6521&catid=104:press-releases and <http://www.nhregister.com/articles/2009/08/07/news/a1-billylaw.txt?viewmode=fullstory> (both 12 August 2012).

1.1.4.1 Missing children

In this paragraph the definition of a “*missing child*” is explained and it is clarified how a distinction can be made amongst the heterogeneous group of missing children.

According to the *Missing Children’s Assistance Act*⁹⁷ (42 USC § 5772 (1)) a “*Missing Child*” is defined as:

“...any individual less than 18 years of age whose whereabouts are unknown to such individual’s legal custodian if—

(A) the circumstances surrounding such individual’s disappearance indicate that such individual may possibly have been removed by another from the control of such individual’s legal custodian without such custodian’s consent; or

(B) the circumstances of the case strongly indicate that such individual is likely to be abused or sexually exploited;...”⁹⁸

This definition should be explained broadly⁹⁹, which can lead to disagreement. For example, in *Lazaridis v. International Centre for Missing and Exploited Children*¹⁰⁰ a (former) abductor, claimed that he had a definition for a “*not missing child*”¹⁰¹, since he suggested that there was need for a distinction between children who should be regarded as missing and not missing. However, the *United States District Court* of Columbia was of the opinion that this definition was too vague to be useful.¹⁰²

There are different forms of “*missing children*”, which are explained with the help of the *National Incidence Studies of Missing, Abducted, Runaway, and Thrownaway Children* (or *NISMART*)¹⁰³. However, it is not unusual that a missing persons’ website does not use the definitions provided by the *NISMART-2* studies and instead uses their own definitions of categories of “*missing children*”.¹⁰⁴

Making distinction among the missing children is important and might have legal implications, because if a law enforcement agency wrongly classifies a missing child, the parents can sue the police for civil liability.¹⁰⁵ For example, it is not uncommon that the disappearance of a teenager is classified by law enforcement as a runaway while he or she is in fact abducted by a stranger.¹⁰⁶

In sum, *NISMART*¹⁰⁷ are periodic studies, obligated by the *Missing Children Assistance Act* (42 USC § 5771)¹⁰⁸ and made by the *Office of Justice and Delinquency Prevention* (*OJJDP*)¹⁰⁹, to determine how many missing and recovered children there were in a certain timeframe.¹¹⁰ The studies were conducted two times: First, in 1988, which was called

⁹⁷ *Missing Children’s Assistance Act* or 42 USC § 5771 et seq.

⁹⁸ Section 5772 (1) *Missing Children’s Assistance Act* or 42 USC § 5771 et seq

⁹⁹ Plass 2007, p. 30-31.

¹⁰⁰ *Lazaridis v. International Centre for Missing and Exploited Children*.

¹⁰¹ *Ibid.*, (footnote 6).

¹⁰² *Ibid.*

¹⁰³ Flores 2002, p. 1-2.

¹⁰⁴ See e.g. for *The Charley Project* (<http://www.charleyproject.org/>): <http://www.charleyproject.org/terms.html> and the *For the Lost Organization* (<http://www.forthelost.org/>): <http://www.forthelost.org/terms.html> (all 12 August 2012).

¹⁰⁵ Patterson Ludwig 2001-2002, p. 96-98.

¹⁰⁶ Moore 2011, p. 155.

¹⁰⁷ Flores 2002, p. 1-2.

¹⁰⁸ *Missing Children’s Assistance Act* or 42 USC § 5771 et seq.

¹⁰⁹ <http://www.ojp.usdoj.gov/about/offices/ojjdp.htm> and <http://www.ojjdp.gov/> (both 12 August 2012).

¹¹⁰ Flores 2002, p. 1.

NISMART-1 and which was published in May 1990¹¹¹, and, second, in 1999 (although the period was from 1997-1999, most of the conducted studies¹¹² had as a central year 1999), which was called *NISMART-2* and which was published in 2002 and later.¹¹³

Both studies can be regarded as the most inclusive reports available concerning the number of missing children and the reasons why a child could be missing in the US.¹¹⁴ However, only the results of the second study will be used, because it is the most recent one. And also, it is recognized on several occasions that there can be no conclusions made based on both surveys, since different methods and definitions were used.¹¹⁵ For example, it is acknowledged that the definition to describe which children should be considered as “*missing children*” in the studies of *NISMART-1* was too broad^{116 117}. Nevertheless, the *OJJDP*¹¹⁸ did publish an outcome concerning the two *NISMART* studies claiming a decline of missing children in the US^{119 120}.

In the *NISMART-2* studies missing children are divided into two categories, namely, first, “*Caretaker Missing*”, and, second, “*Reported Missing*” (meaning that the caretaker went to a law agency, e.g. a police station, claimed that the child was missing and got assistance of that agency to find the child), nonetheless, other combinations are possible as well.¹²¹

According to the *NISMART-2* studies there can be four groups of “*missing children*”, although, a difference exists when it concerns children who are “*abducted*” and children who are “*not abducted*” and therefore called “*missing*”, although both categories can also overlap^{122 123}.

The first category of a missing child is a “*runaway*”, which the *NISMART-2* study defines as:

- *A child leaves home without permission and stays away overnight.*
- *A child 14 years old or younger (or older and mentally incompetent) who is away from home chooses not to come home when expected to and stays away overnight.*
- *A child 15 years old or older who is away from home chooses not to come home and stays away two nights.*¹²⁴

Runaways should not be confused with “*throwaways*” (although there is no strict separation between the two), as the definition, according to the *NISMART-2* study, of the last one is:

- *A child is asked or told to leave home by a parent or other household adult, no adequate alternative care is arranged for the child by a household adult, and the child is out of the household overnight.*
- *A child who is away from home is prevented from returning home by a parent or other household adult, no adequate alternative care is arranged for the child by a household adult, and the child is out of the household overnight.*¹²⁵

¹¹¹ Fairman Cooper 2003, p. 3.

¹¹² The studies fall into different categories, e.g. the study of “*Runaway/Throwaway children*” was published in October 2002 (Hammer, Finkelhor and Sedlak 2002 I, p. 1), while the study of “*Children Missing Involuntarily of for Benign Reasons*” was published in July 2005 (Sedlak, Finkelhor and Hammer 2005, p. 1).

¹¹³ Fairman Cooper 2003, p. 3. However, some material was published at other moments (See e.g. Sedlak, Finkelhor and Hammer 2005, p. 1-12).

¹¹⁴ Lampinen, Arnal, Culbertson-Faegre and Sweeney 2010, p. 131.

¹¹⁵ Flores 2002, p. 1-2 and Eagle Shutt, Mitchell Miller, Schreck and Brown 2004, p. 132.

¹¹⁶ Fairman Cooper 2003, p. 3-4 and 13-14.

¹¹⁷ Flores 2002, p. 1-2.

¹¹⁸ <http://www.ojp.usdoj.gov/about/offices/ojjdp.htm> and <http://www.ojjdp.gov/> (both 12 August 2012).

¹¹⁹ Flores 2002, p. 1-2, Hammer, Finkelhor, Sedlak and Porcellini 2004, p. 1-8 and Fairman Cooper 2003, p. 3-4 and 13-14.

¹²⁰ Flores 2002, p. 1-2.

¹²¹ Lampinen, Arnal, Culbertson-Faegre and Sweeney 2010, p. 131-132 and Fairman Cooper 2003, p. 5. See e.g. Sedlak, Finkelhor and Hammer 2005, p. 1-6 as p. 4 of this study provides some examples of what should be seen as “*Caretaker Missing*” and/or “*Reported Missing*”.

¹²² Lampinen, Arnal, Culbertson-Faegre and Sweeney 2010, p. 131.

¹²³ Hammer, Finkelhor and Sedlak 2002 I, p. 1-12, Sedlak, Finkelhor and Hammer 2005, p. 1-12, Hammer, Finkelhor and Sedlak 2002 II, p. 1-12 and Finkelhor, Hammer and Sedlak 2002, p. 1-16.

¹²⁴ Hammer, Finkelhor and Sedlak 2002 I, p. 2.

¹²⁵ Ibid.

The second category concerns children who are missing involuntarily or for benign reasons, which are being defined by *NISMART-2* study as, first, in the case of “*Missing Involuntarily, Lost or Injured*”:

“A missing involuntary, lost, or injured episode occurs when a child’s whereabouts are unknown to the child’s caretaker, who either contacts law enforcement or a missing children’s agency to locate the missing child or becomes alarmed for at least 1 hour and tries to locate the child, and one of the following conditions applies: (1) the child was trying to get home or make contact with the caretaker but was unable to do so because the child was lost, stranded, or injured (defined as physical harm that required medical attention or resulted in injuries that were evident the next day, e.g., cuts, bruises, or sprains); or (2) the child was too young to know how to return home or make contact with the caretaker.”¹²⁶

And second, when it concerns “*Missing Benign Explanation*”:

“A missing benign explanation episode occurs when a child’s whereabouts are unknown to the child’s caretaker, who either contacts law enforcement or a missing children’s agency to locate the missing child or (1) becomes alarmed for at least an hour, (2) tries to locate the child, and (3) contacts the police about the episode for any reason, as long as the child was not lost, injured, abducted, victimized, or classified as runaway/throwaway.”¹²⁷

The third reason why children become missing is due to (international) parental abduction which is defined by the *NISMART-2* study as:

“...the taking or keeping of a child by a family member in violation of a custody order, a decree, or other legitimate custodial rights, where the taking or keeping involved some element of concealment, flight, or intent to deprive a lawful custodian indefinitely of custodial privileges.”¹²⁸

The last reason why children are missing (also included in this study are children who where, at the moment of their abduction, not considered to be missing because e.g. their parent was of the opinion that the child was on its way to school)¹²⁹ is abductions by strangers or non-family abductions which is defined by the *NISMART-2* study as:

“Nonfamily abduction: (1) An episode in which a nonfamily perpetrator takes a child by the use of physical force or threat of bodily harm or detains the child for a substantial period of time (at least 1 hour) in an isolated place by the use of physical force or threat of bodily harm without lawful authority or parental permission, or (2) an episode in which a child younger than 15 or mentally incompetent, and without lawful authority or parental permission, is taken or detained or voluntarily accompanies a nonfamily perpetrator who conceals the child’s whereabouts, demands ransom, or expresses the intention to keep the child permanently.”¹³⁰

The *Missing Children’s Assistance Act (Title 42 USC § 5772 (1))*¹³¹ explains what is meant with a “missing child” and the *NISMART-2* studies¹³² clarifies the categories of missing children. Nevertheless, there are still discussions as to whether some children should be considered as missing. Most of the time it is about the status of runaways and children who are abducted by their parent(s).

First, it is claimed that runaways should not be regarded as missing, because they chose to leave.¹³³ For example, the child could have decided to leave home because he or she was sexually abused.¹³⁴ Some authors are therefore of the opinion that not only attention should be paid to the reason why the child disappeared in the first place, but also to the problem that, during the period that he or she is missing, he or she can encounter other harm (to clarify, a child who has runaway from home to escape from a violent father, can, while living on the street, come into contact with a sexual predator).¹³⁵

¹²⁶ Sedlak, Finkelhor and Hammer 2005, p. 2.

¹²⁷ Ibid.

¹²⁸ Hammer, Finkelhor and Sedlak 2002 II, p. 2.

¹²⁹ Finkelhor, Hammer and Sedlak 2002, p. 3.

¹³⁰ Ibid, p. 2.

¹³¹ *Missing Children’s Assistance Act or 42 USC § 5771 et seq.*

¹³² Hammer, Finkelhor and Sedlak 2002 I, p. 2, Sedlak, Finkelhor and Hammer 2005, p. 2, Hammer, Finkelhor and Sedlak 2002 II, p. 2 and Finkelhor, Hammer and Sedlak 2002, p. 2.

¹³³ Hammer, Finkelhor and Sedlak 2002 I, p. 2.

¹³⁴ Ibid.

¹³⁵ Plass 2007, p. 31.

Second, it is stated that a(n) (international) parental abducted child should not be regarded as missing (in other words as not being a law-enforcement problem), since he or she is in the company of (one of) his or her parent(s), who, as frequently assumed, has only the best interest of the child in mind.¹³⁶ For example, if the abductor is the mother of the child, she often will have, according to many members of the general public, a legitimate defense to hide the child from his or her father.¹³⁷ At the moment, there are efforts to change this view with the help of actual cases¹³⁸ and/or with studies¹³⁹. This can be illustrated with two examples, first, according to different US studies, the motive of the abductor has more to do with anger and/or revenge against the left-behind parent than with the best interest of the child¹⁴⁰ and, second, in the article “*Early Identification of Risk Factors for Parental Abduction*”¹⁴¹ the researchers explain that parental abduction is not a case of “*just mothers or fathers*”, but that both genders are equally likely to take the child.¹⁴² Furthermore, international parental abduction is also associated with the problem of “*forum shopping*”¹⁴³, meaning that it can happen that the parent who takes his or her child from the US to another state, is acquitted of abducting his or her child by the foreign court, yet not by the US court.¹⁴⁴

1.1.4.2 Missing adults

Less attention is paid to the legal definition of who can be considered a missing adult. As illustrated by the history surrounding *Kristen’s Law*¹⁴⁵, *Suzanne’s Law*¹⁴⁶ and *Billy’s Law*¹⁴⁷, the problem with missing adults is that law enforcement and other organizations have a different approach than in cases of missing children (i.e. giving more priority to the problem of missing children than of missing adults).¹⁴⁸ To give two examples: First, if the missing person is a child, he or she must be reported missing as soon as possible to law enforcement, which is not the case when it concerns an adult¹⁴⁹, and, second, if a missing adult is located, the police has no obligation to inform e.g. the left-behind family where the former missing adult is, because it is up to him or her to contact the left-behind family.¹⁵⁰ This is due to the possible consequence that, in the event that the police would notify the left-behind family of the location of the former missing person, the former missing person’s civil rights could be compromised.¹⁵¹

¹³⁶ Allen 1991, p. 1 and the *Polly Klaas Foundation 2004*, p. 1-24.

¹³⁷ Although it can happen that a mother has a legitimate motive to hide her child from an abusive father (see e.g. Klein, Orloff & Sarangapani 2005, p. 109-156), this does not mean that it cannot be the other way around.

¹³⁸ See e.g. the *For the Lost Organization* (<http://www.forthelost.org/>) which explains on its website why parental abduction is not in the best interests of the child: <http://forthelost.wordpress.com/the-victims-of-family-abduction/> and the *Polly Klaas Foundation 2004*, p. 1-24 (all 12 August 2012).

¹³⁹ See e.g. Allen 1991, p. 2, Chiancone 2001, p. 1-13, Plass, Finkelhor and Hotaling 1997, p. 333-348 and Watnik 2003, p. 415-416.

¹⁴⁰ Ibid.

¹⁴¹ Johnston, Sagatun-Edwards, Blomquist and Girdner 2001, p. 1-11 and *Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction April 2009*, p. 7.

¹⁴² Johnston, Sagatun-Edwards, Blomquist and Girdner 2001, p. 4.

¹⁴³ Pérez-Vera 1982, p. 429 (or p. 17).

¹⁴⁴ See also the part: *1.1.4 Legal definitions, explanations and problems*, p. 12-17.

¹⁴⁵ O’Brien and French 2008, p. 93.

¹⁴⁶ <http://www.mass.gov/eopss/law-enforce-and-cj/law-enforce/missing-and-wanted/mmcc/missing-children-laws.html> (12 August 2012).

¹⁴⁷ *H.R. 3695: Billy’s Law*.

¹⁴⁸ Myrick 2008, p. 1-3 and http://www.ehow.com/info_7803098_legal-rights-locating-missing-adult.html#ixzz1hil2pzNh (12 August 2012).

¹⁴⁹ http://www.ehow.com/list_6855833_legal-laws-missing-persons.html#ixzz1Hiljhvhz (12 August 2012).

¹⁵⁰ http://www.ehow.com/info_7803098_legal-rights-locating-missing-adult.html#ixzz1hil2pzNh (12 August 2012).

¹⁵¹ Ibid.

Nevertheless, in “Section 4: Incentive Grants” of *Billy’s Law*¹⁵² a missing adult is defined as: “(e) Categories of Missing Persons- The categories of missing persons described in this subsection are the following:

(1) A missing person age 21 or older who--

(A) is senile or is suffering from a proven mental or physical disability, as documented by a source deemed credible to an appropriate law enforcement entity; or

(B) is missing under circumstances that indicate, as determined by an appropriate law enforcement entity--

(i) that the person’s physical safety may be endangered;

(ii) that the disappearance may not have been voluntary, such as abduction or kidnapping; or

(iii) that the disappearance may have been caused by a natural disaster or catastrophe (such as an airplane crash or terrorist attack).

(2) A missing person who does not meet the criteria described in paragraph (1) but who meets one of the following criteria:

(A) There is a reasonable concern, as determined by an appropriate law enforcement entity, for the safety of the missing person.

(B) The person is under age 21 and emancipated under the laws of the person’s State of residence.”¹⁵³

Yet, although *Billy’s Law*¹⁵⁴ did not pass the *Senate*¹⁵⁵, it can be assumed that its definition of a missing adult in this law is nevertheless used by e.g. law enforcement.¹⁵⁶

1.1.5 Should the US government be involved?

As indicated above in the paragraph “*The legal history of missing persons’ laws*”, the general public and left-behind persons have asked for the involvement of the *US Government* to undertake action in the field of missing persons, which can be illustrated with, for example, the Billy Smolinski case¹⁵⁷.¹⁵⁸ The question answered in this paragraph will be if the *US Government*, together with law enforcement, can prevent and solve the problem of missing persons.

1.1.5.1 The obligations of the US Government

1.1.5.1.1 **Protection of the victim**

First, the *US Government* should protect people from going and being missing. As is illustrated above, tragedy has to strike before the *US Government* and law enforcement get involved.¹⁵⁹ It has been established, due to e.g. the *Missing Children’s Assistance Act (42 USC § 5771 et seq.)*¹⁶⁰ and “*Missing adults: Background, Federal Programs, and Issues for Congress*”¹⁶¹, that there is a problem regarding locating missing people. Therefore, for example, more enhanced studies regarding missing children¹⁶² and missing adults are needed. Second, it has been acknowledged that there are difficulties in locating e.g. missing adults, due to, e.g. the resistance of law enforcement to make a missing person’s report since adults have a legal right to go missing and due to the fact that there are differences in the response of

¹⁵² *H.R. 3695: Billy’s Law.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ <http://www.senate.gov/> (12 August 2012).

¹⁵⁶ <http://www.govtrack.us/congress/bills/111/hr3695> (12 August 2012).

¹⁵⁷ <http://www.ctpost.com/opinion/article/One-step-closer-maybe-to-finding-Billy-Smolinski-446713.php/>, http://vrc.poe.house.gov/index.php?option=com_content&view=article&id=6521&catid=104:press-releases and <http://www.nhregister.com/articles/2009/08/07/news/a1-billylaw.txt?viewmode=fullstory> (all 12 August 2012).

¹⁵⁸ See the section: *1.1.3.2 Missing adults*, p. 11-12.

¹⁵⁹ See the section: *1.1.3.1 Missing children*, p. 8-11.

¹⁶⁰ *Missing Children’s Assistance Act or 42 USC § 5771 et seq.*

¹⁶¹ Fernandes 2009, p. 1-34.

¹⁶² See the section: *1.1.4.1 Missing children*, p. 13-16.

state law.¹⁶³ Therefore, federal law, as for example *Suzanne's Law*¹⁶⁴, can be regarded as necessary.

Third, even if law enforcement is involved, e.g. by using the *Amber Alert*¹⁶⁵, it is acknowledged that there are problems concerning the use of this system and a possible solution is that there should be a better evaluation of the system by e.g. law enforcement.¹⁶⁶

Fourth, there are many unidentified deceased persons who could be identified, since it is possible that they are reported elsewhere as missing persons, however due to the different responses of e.g. law enforcement, there are problems concerning the identification of these deceased persons.¹⁶⁷ This problem could be solved with the help of federal law like *Billy's Law*¹⁶⁸.

Fifth, although many legal problems concerning missing persons are solved by applying missing persons' laws, there are still legal problems which should be addressed in this area, as for example the need for a "*Caylee's Law*" shows.¹⁶⁹

1.1.5.1.2 Protection of the left-behind persons and/or the general public

First, it must be easier for left-behind persons to report a missing adult since the resistance of law enforcement to make a missing person's report should diminish (although adults have a legal right to go missing), because problems are experienced with the fact that there are differences in the legal responses of states¹⁷⁰ and because details about unidentified bodies are not properly stored in databases¹⁷¹. Also, more information from the *US Government* should be provided about what left-behind persons and others can and cannot do to locate a missing child and/or missing adult.

Second, the left-behind persons and/or the general public should be protected against, for example, hoaxes¹⁷² and extortion¹⁷³.

1.1.5.1.3 Why the US Government should not be involved

The author clarifies in the article "*Spin doctors and moral crusaders: the moral panic behind child safety legislation*"¹⁷⁴ that, as far as legislation about children is concerned, there rarely is resistance or consideration about the possible negative effects of these new laws.¹⁷⁵ The *US Government* should take into account that it could create or that there could already be some sort of "*moral panic*" concerning the safety of children by parents if too much attention is provided to e.g. missing children abducted by a stranger, while in reality these kinds of abductions do not happen very often.¹⁷⁶ Also, too much attention to missing persons could

¹⁶³ Fernandes 2009, p. 5.

¹⁶⁴ <http://www.mass.gov/eopss/law-enforce-and-cj/law-enforce/missing-and-wanted/mmcc/missing-children-laws.html> (12 August 2012).

¹⁶⁵ <http://www.amberalert.gov/> (12 August 2012).

¹⁶⁶ Griffin 2010, p. 1061.

¹⁶⁷ <http://www.namus.gov/about.htm> (12 August 2012).

¹⁶⁸ *H.R. 3695: Billy's Law*.

¹⁶⁹ http://www.usatoday.com/news/nation/2011-07-07-caylee-anthony-petition_n.htm, <http://abcnews.go.com/US/casey-anthony-trial-aftermath-caylee-law-drafted-states/story?id=14020260> and <http://blogs.findlaw.com/blotter/2011/07/caylees-law-proposed-in-fl-ny-ok-wv.html> (all 12 August 2012).

¹⁷⁰ Fernandes 2009, p. 5.

¹⁷¹ <http://www.namus.gov/about.htm> (12 August 2012).

¹⁷² Thomas Milhorn 2007, p.276, 280 and 286 and Newton 2004, p. 63.

¹⁷³ See e.g. *US v. Haggard*, <http://www.fbi.gov/miami/press-releases/2011/virginia-woman-sentenced-to-24-months-in-prison-for-role-in-extortion-scheme-involving-staged-kidnapping-in-guatemala> (12 August 2012) and Lawrence 1985, p. 5A.

¹⁷⁴ Zgoba 2004, p. 385-404.

¹⁷⁵ *Ibid.*, p. 386, 394 and 398-401.

¹⁷⁶ *Ibid.*, p. 385-404 and http://us.cnn.com/2012/04/20/us/etan-patz-significance/index.html?hpt=hp_t1 (12 August 2012).

easily result in the fact that people will pay less attention to locating them (e.g. if the *Amber Alert*¹⁷⁷ is used too often, less attention might be given to it by the general public).¹⁷⁸

1.1.5.2 Should the general public be of help?

Although the number of missing children and adults is unclear¹⁷⁹, there is a need for support from the general public to help law enforcement in locating missing persons.

In the case *U.S. v. Montes-Reyes*¹⁸⁰ it was acknowledged that US state and federal laws recognize the problem of missing children and that it is allowed for a private person to help law enforcement in locating a missing child.¹⁸¹

1.1.5.2.1 The advantages of the involvement of the general public

First, as is the case with murder, burglary... some crimes can be solved easier if there is information from the general public. The same is true for missing persons' cases. For example, law enforcement can issue an *Amber Alert*¹⁸² to locate a missing child.

Second, due to the number of missing persons, law enforcement cannot spend the same amount of time, resources... to every missing person's case. It often happens that a case has a wrong classification, for example, the disappearance of a teenager is classified as a runaway while he or she is abducted by a stranger.¹⁸³ Therefore, missing persons' websites can inform law enforcement when they receive a possible lead from one of its users. Sometimes, a missing persons' website even succeeds in locating a missing person, as is the case with for example the *Doe Network*¹⁸⁴.

Third, however, even if cases are published in the media due to law enforcement, there still can be problems which can be (partially solved) by creating a specialized missing persons' website. For example, it is not uncommon that there are complaints that not enough attention is being paid to missing Afro-American children¹⁸⁵ in the news¹⁸⁶, for runaways (as they have decided on their own accord to leave home)¹⁸⁷ or for children who are abducted by one of their parents¹⁸⁸ (e.g. the problem of "forum shopping",¹⁸⁹).

Fourth, left-behind people are encouraged to draw 'online' attention to missing persons. For example, the *America Most Wanted Safety Center*¹⁹⁰ published a guide containing tips about how to draw attention to missing persons online (e.g. a page on *Facebook*¹⁹¹, *MySpace*¹⁹²... containing information about the missing person and distributing a telephone number and/or e-mail address for leads.¹⁹³).¹⁹⁴ This is also common procedure in the case of (international) parental abduction. It is often advised that the media should be involved in the search of the

¹⁷⁷ <http://www.amberalert.gov/> (12 August 2012).

¹⁷⁸ Sadler 2005, p. 131.

¹⁷⁹ See the part: 1.1.2 *How many missing persons are there?*, p. 7-8.

¹⁸⁰ *U.S. v. Montes-Reyes*.

¹⁸¹ Ibid and http://www.amberalert.gov/newsroom/pressreleases/ojp_05_0217.htm (12 August 2012).

¹⁸² <http://www.amberalert.gov/> (12 August 2012).

¹⁸³ Moore 2011, p. 155.

¹⁸⁴ <http://www.doenetwork.org/> (12 August 2012).

¹⁸⁵ See e.g. <http://www.blackandmissinginc.com/cdad/> and <http://blackandmissing.org/> (both 12 August 2012).

¹⁸⁶ See e.g. Min and Feaster 2010, p. 207-216.

¹⁸⁷ Hammer, Finkelhor and Sedlak 2002 I, p. 2.

¹⁸⁸ Allen 1991, p. 1-2, the *Polly Klaas Foundation 2004*, p. 1-24, <http://forthelost.wordpress.com/the-victims-of-family-abduction/> (12 August 2012), Chiancone 2001, p. 1-13, Plass, Finkelhor and Hotaling 1997, p. 333-348 and Watnik 2003, p. 415-416.

¹⁸⁹ Pérez-Vera 1982, p. 429 (or p. 17).

¹⁹⁰ <http://safety.amw.com/> (12 August 2012).

¹⁹¹ <http://www.facebook.com> (12 August 2012).

¹⁹² <http://www.myspace.com/> (12 August 2012).

¹⁹³ http://www.amw.com/pdf/making%20noise_guide.pdf (12 August 2012).

¹⁹⁴ <http://safety.amw.com/family/making-noise-bringing-attention-to-missing-loved-ones/> (12 August 2012).

left-behind parent, although it should be decided on a case to case base if media attention would bring a positive outcome.¹⁹⁵

Fifth, a member of the general public could be more willing to report to a missing persons' website than to law enforcement, since he or she feels more confident when doubting whether the information could be useful.

Sixth, most of these websites do not only address the general public of the US, but also the rest of the world, because a (possible) missing person's case can be solved with the help of tourists, exchange students...

Seventh, it is possible that a former missing person or a left-behind person can sue a missing persons' website for e.g. defamation. However, it is unlikely that managers of a US based missing persons' website have a malicious intent, because their primary motive behind publishing a disappearance on their website is locating the missing person and not for e.g. financial gain.¹⁹⁶

1.1.5.2.2 The disadvantages of the involvement of the general public

First, a Google internet search revealed on 30 July 2012 that there are at least 99.300.000 results concerning the topic "US missing persons' websites".¹⁹⁷ Most of them just copy the flyer of the NCMEC¹⁹⁸, which might have little additional effect. Furthermore, a website might be updated irregularly, creating confusion whether or not the missing persons published on that missing persons' website are still missing. Moreover, sometimes it even is uncertain whether the persons who are profiled on the website are truly missing (e.g. how many users will check if the missing child as profiled on a missing persons' website is also profiled on the website of the NCMEC¹⁹⁹).

Second, by creating a missing persons' website, attention should be given to the intention of its users. For example, the website can lead to the exploitation by people with other motives than helping to find a missing person. Those kinds of visitors can collect information from such a website and use it, for example, for financial gain, extortion²⁰⁰, gossip etc. (while they have no actual information concerning the missing adult or child).

Third, if more information is available on the website concerning a missing person case, it might be suspicious when there is no mention of e.g. sources. Furthermore, on the one hand the privacy of missing persons might also be an issue²⁰¹, although, on the other hand, the circumstances and lifestyle of a victim could be important in order to locate him or her.²⁰²

¹⁹⁵ Watnik 2003, p. 418-419 and *US Department of Justice, Office of Juvenile Justice and Delinquency Prevention 2007*, p. 95-96.

¹⁹⁶ It should be considered that such an event can happen. For example, the administrator of the *Charley Project Blog* wrote on 23 November 2010 about a missing persons' website of an internet psychic who, not only asked people for money in order that they could become a member, but also did not update the case files on his website (<http://charleyross.wordpress.com/2010/11/23/gaaahh-update/> (12 August 2012)).

¹⁹⁷ http://www.google.be/#hl=nl&sa=X&ei=AqoWULuqO5G2hAfl5oHACg&ved=0CFwQBSgA&q=US+missing+persons%27+websites&spell=1&bav=on.2,or.r_gc.r_pw.r_qf.&fp=9dd313392708d8d2&biw=1024&bih=432 of 30 July 2012.

¹⁹⁸ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

¹⁹⁹ *Ibid.*

²⁰⁰ See e.g. *US v. Haggard*, <http://www.fbi.gov/miami/press-releases/2011/virginia-woman-sentenced-to-24-months-in-prison-for-role-in-extortion-scheme-involving-staged-kidnapping-in-guatemala> and Lawrence 1985, p. 5A.

²⁰¹ See e.g. *Madeleine Gleason, et al v. Janice Smolinski, et al*: A case in which the former ex-girlfriend of Billy Smolinski, (see the section: *1.1.3.2 Missing adults*, p. 11-12), sued, amongst others, the owner of a newspaper and the parents of Billy Smolinski because of an article published in a newspaper where the parents, in short, accused the former ex-girlfriend of being involved in the disappearance of Billy Smolinski.

²⁰² See e.g. <http://charleyross.wordpress.com/2009/08/13/derogatory-information/> and <http://charleyross.wordpress.com/2009/05/18/libeling-the-missing/> (both 12 August 2012).

Also, once information is published on the internet, it is almost always retrievable. In any case, attention should always be paid by law enforcement and others, to the *Privacy Act* or §552a Title 5 United States Code²⁰³.

Fourth, it is not uncommon that a left-behind parent has a website dedicated to his search. However, a foreign court can, amongst others, order the left-behind parent to remove all references and photos of the missing child from his or her website, yet, even when the left-behind parent complies, the foreign court can still prevent the left-behind parent to have contact and build up a relationship with the child.²⁰⁴

Fifth, people can also be scared to start a legal procedure (e.g. in the case of defamation) against a missing persons' website, since it will draw more attention of the general public to them and even in the event that e.g. a former missing person or left-behind person would win the defamation claim (although not all elements were proven to be actual defamation), it could happen that (some) members of the general public are still of the opinion that there was no defamation at all.²⁰⁵

1.2 Seven possible resources of US based missing persons' websites

In this paragraph the use of internet sources will be provided. The list of sources will be expanded in the following two chapters because of, for example, by the use of foreign sources. Via this way, the differences between US and foreign copyright and defamation law will be demonstrated.

In general, there are not many coordination problems to detect among the missing persons' websites, since most only copy the flyer of the website of the *NCMEC*²⁰⁶, which is their primary source.

1.2.1 Law enforcement

1.2.1.1 The Amber Alert²⁰⁷

The *Amber Alert* stands for: “*America's Missing: Broadcast Emergency Response*”²⁰⁸, but is also known as the “*Amber Alert System*”^{209, 210}. The setting up of the *Amber Alert* by a state is financed by means of federal funding since 2003 when it was signed by former President G. Bush in the autumn of 2002.²¹¹

The *Amber Alert* is primarily used to get assistance from the general public.²¹² During an abduction, the *Amber Alert* is shown on television stations (including cable stations) and announced on radio stations (first on the radio stations because they are the primary stations as described by the *Emergency Alert Systems*²¹³ and then on other stations).²¹⁴ The *Amber*

²⁰³ *Privacy Act*.

²⁰⁴ *Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction April 2009*, p. 32.

²⁰⁵ http://www.expertlaw.com/library/personal_injury/defamation.html (12 August 2012).

²⁰⁶ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

²⁰⁷ <http://www.amberalert.gov/> (12 August 2012).

²⁰⁸ *Ibid* and O'Brien and French 2008, p. 35.

²⁰⁹ <http://www.amberalert.gov/about.htm> (12 August 2012).

²¹⁰ Miller, Griffin, Clinkinbeard and Thomas 2009, p. 111-123.

²¹¹ Sadler 2005, p. 130 and Palmiotto 2004, p. 225.

²¹² O'Brien and French 2008, p. 35-37.

²¹³ <http://transition.fcc.gov/pshs/services/eas/> (12 August 2012).

²¹⁴ Woodson 2002, p. 46.

Alert system is used in all 50 states²¹⁵, but it does not have the same name in all these states, e.g. in Georgia it is called the *Levi's Call*²¹⁶, in Hawaii it goes by the name of the *Maile Amber Alert*²¹⁷ and in Arkansas it is known as the *Morgan Nick Amber Alert*²¹⁸.

The *Amber Alert* was named after the girl Amber Hagerman, who was found murdered, after she had disappeared while she rode her bike in Arlington in the state of Texas in 1996.²¹⁹ It was first used that same year and should be regarded as an early warning system for locating abducted children.²²⁰ It is based on the assumption that if the abductor is aware that there is an *Amber Alert*, he or she would prefer to surrender or let the child go.²²¹

The *Amber Alert* will only be used in case of emergency, meaning that the following criteria of the US *Department of Justice*²²² have to be met²²³: The child is younger than 17 years, he or she is in danger of violence (serious bodily injury or death), there is a description of the child (and, if possible, of the abductor) and the child has been entered in the *NCIC*²²⁴ *System*.²²⁵

It was established that in the period between 1996 and 2003 a total of 100 children were located alive after an *Amber Alert*.²²⁶ In the case of (international) parental abduction the percentage of recovered children is higher than when the child is abducted by a stranger.²²⁷ The number of issued *Amber Alerts*, is believed to be declining each year (from 275 activations in 2005 till 227 activations in 2007).²²⁸

Almost every missing persons' website has an *Amber Alert Ticker*^{229, 230}.

Nevertheless, there are also disadvantages concerning the use of the *Amber Alert*.

First, the danger exists that if the *Amber Alert* is used too frequently, people will pay less attention to it.²³¹ This is the reason why the *Amber Alert* is not used in the case of endangered runaways.²³² Also, although a missing persons' website has an *Amber Alert Ticker*²³³, this does not mean that all visitors will pay attention to it.

²¹⁵ http://www.amberalert.gov/state_contacts.htm

http://www.amberalert.gov/newsroom/pressreleases/ojp_05_0217.htm (both 12 August 2012) and O'Brien and French 2008, p. 39.

²¹⁶ http://alerts.gbi.georgia.gov/00/channel_modifieddate/0,2096,67865199_67868035,00.html (12 August 2012).

²¹⁷ http://hawaii.gov/ag/mcch/main/maile_amber (12 August 2012).

²¹⁸ <http://www.asp.arkansas.gov/asp/mnaa.html> (12 August 2012).

²¹⁹ Fairman Cooper 2003, p. 9 and Bell, Ezell and Van Roekel 2007, p. 7.

²²⁰ Bell, Ezell and Van Roekel 2007, p. 7.

²²¹ Miller, Griffin, Clinkinbeard and Thomas 2009, p. 115 and 120-121.

²²² <http://www.justice.gov/> (12 August 2012)

²²³ Fairman Cooper 2003, p. 16-17 and

http://www.missingkids.com/en_US/documents/AMBERCriteria_Apr04.pdf (12 August 2012).

²²⁴ <http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm> (12 August 2012).

²²⁵ <http://www.amberalert.gov/guidelines.htm> (12 August 2012) and O'Brien and French 2008, p. 37.

²²⁶ Sadler 2005, p. 130-131.

²²⁷ Meloy 2006, p. 46.

²²⁸ *The Amber Advocate Conference Edition 2008*, p. 2.

²²⁹ <http://codeamber.org/index-2.php> (12 August 2012).

²³⁰ US *Department of Justice, Office of Juvenile Justice and Delinquency Prevention 2007*, p. 24-25. See e.g. <http://www.charleyproject.org/> and <http://www.forthelost.org/> (both 12 August 2012).

²³¹ Sadler 2005, p. 131.

²³² Meloy 2006, p. 46.

²³³ <http://codeamber.org/index-2.php> (12 August 2012).

Second, not everyone is convinced that the *Amber Alert* is successful in locating missing children.²³⁴ The following problems with the *Amber Alert* can be concluded: First, the picture emerged that the *Amber Alert* system was often misused by hoaxes and misunderstandings which provided the conclusion that state authorities could be using it too soon and too much.²³⁵ Second, the system seemed to be more effective in parental abduction cases than non-family abductions.²³⁶ Third, the success depends on the memory of the individual of the general public aware of the *Amber Alert*.²³⁷ Fourth, the time to collect the information necessary and the time to respond to such an *Amber Alert*, is often difficult.²³⁸ Fifth, the general public can become outraged if in a case an *Amber Alert* is not issued and, sixth, the abduction (and murder) of a child by a stranger does not happen frequently.²³⁹ Often it depends on the situation of the case since not all cases in which an *Amber Alert* was issued seemed to be life threatening.²⁴⁰

Unfortunately, sometimes an *Amber Alert* can also be a hoax.²⁴¹ Luckily, this does not happen often, but still, the manager of a missing persons' website can have another opinion concerning its added value, which is to receive assistance from the general public, and decide not to display an *Amber Alert Ticker*²⁴² on his or her website.²⁴³ Another problem of the alert system is that the manager of the missing persons' website cannot choose which alert he or she will publish on his or her website and can decide, because of this drawback, that he or she does not want to display the *Amber Alert Ticker*²⁴⁴ on his or her website.

Besides, there is also the *Silver Alert*²⁴⁵ which was proposed in 2008 ("*H.R. 6064: Kristen's Act Reauthorization of 2008, 110th Congress 2007-2008*")²⁴⁶, in 2009 ("*H.R. 632: Kristen's Act Reauthorization of 2009, 111th Congress 2009-2010*")²⁴⁷ and finally again in 2011 ("*H.R. 112: Kristen's Act Reauthorization of 2011, 112th Congress 2011-2012*")²⁴⁸. On 23 June 2011 Senators H. Kohl²⁴⁹ and J. Manchin²⁵⁰ have proposed a "*National Silver Alert Act*" which should be regarded as a nationwide network in locating missing adults.²⁵¹ Currently, in accordance with the proposition, there are 28 states and New York City which have a *Silver Alert* or a similar program.²⁵² Although another source lists 32 of the 50 US states.²⁵³ Since the *Silver Alert*²⁵⁴ is not used in every state of the US, it will not be discussed in this Master Thesis.

²³⁴ Miller, Griffin, Clinkinbeard and Thomas 2009, p. 111-123 and Zgoba 2004, p. 385-404.

²³⁵ Griffin 2010, p. 1053-1056 and 1059-1060.

²³⁶ Ibid, p. 1062 and Miller, Griffin, Clinkinbeard and Thomas 2009, p. 115 and 117.

²³⁷ Miller, Griffin, Clinkinbeard and Thomas 2009, p. 113-114.

²³⁸ Griffin 2010, p. 1054-1056 and 1059-1060.

²³⁹ Ibid.

²⁴⁰ Ibid, p. 1056-1060.

²⁴¹ Meloy 2006, p. 47.

²⁴² <http://codeamber.org/index-2.php> (12 August 2012).

²⁴³ O'Brien and French 2008, p. 35-37.

²⁴⁴ <http://codeamber.org/index-2.php> (12 August 2012).

²⁴⁵ *H.R. 6064: Kristen's Act Reauthorization of 2008*.

²⁴⁶ Ibid.

²⁴⁷ *H.R. 632: Kristen's Act Reauthorization of 2009*.

²⁴⁸ *H.R. 112: Kristen's Act Reauthorization of 2011*.

²⁴⁹ <http://kohl.senate.gov/> (12 August 2012).

²⁵⁰ <http://manchin.senate.gov/public/> (12 August 2012).

²⁵¹ <http://silveralertbill.com/> and <http://manchin.senate.gov/public/index.cfm/press-releases?ID=0898aada-ac35-4860-88ed-82bb3ca8ac60> (both 12 August 2012).

²⁵² <http://silveralertbill.com/> (12 August 2012).

²⁵³ <http://nationalsilveralert.org/silveralert.htm> (12 August 2012).

²⁵⁴ *H.R. 6064: Kristen's Act Reauthorization of 2008*.

1.2.1.2 The National Missing and Unidentified Persons System or NamUs²⁵⁵

*NamUs*²⁵⁶ came into existence in 2007²⁵⁷, is sponsored by the *US Justice Department*²⁵⁸ and is a system where flyers of missing and deceased unidentified persons can be found since the website is divided into two separate categories, namely: *NamUs Missing Persons*²⁵⁹, which contains the missing persons database, and *NamUs Unidentified Persons*²⁶⁰, which contains the database for the deceased unidentified persons, nevertheless both can be used together²⁶¹.²⁶² As a remark, *NamUs Unidentified Persons*²⁶³ is not only accessible for law enforcement, but also for the general public, although, the database of the deceased unidentified persons is better accessible for e.g. medical examiners than for the general public²⁶⁴.²⁶⁵ Left-behind persons or medical examiners can submit DNA profiles to establish whether e.g. there is or could be (now or in the future) a match in the database for deceased unidentified persons²⁶⁶.²⁶⁷ What makes this website different from other missing persons' websites is the fact that this system provides dental characteristics which can be used in the case of unidentified dead persons.²⁶⁸ However, there are problems with this system, especially when it concerns the unidentified such as problems with data entry.²⁶⁹ Also, as a remark, although it is sponsored by the *US Justice Department*²⁷⁰, it is not responsible for, amongst others, the content of *NamUs Missing Persons*²⁷¹ and *NamUs Unidentified Persons*²⁷².²⁷³

1.2.2 Non-profit organizations and organizations referred to by law

1.2.2.1 The National Center For Missing and Exploited Children or NCMEC²⁷⁴

The *NCMEC*²⁷⁵ came into existence in 1984 due to the efforts of, amongst others, the Walsh family (their son disappeared and was found murdered in July 1981 and the family had complained that there was no resource concerning missing children when their son went missing) and US Congressional staffer J. Howell.²⁷⁶ Also, the *Missing Children's Assistance*

²⁵⁵ <http://www.namus.gov/> (12 August 2012).

²⁵⁶ Ibid.

²⁵⁷ Butler 2011, p. 272.

²⁵⁸ <http://www.justice.gov/> (12 August 2012).

²⁵⁹ See also <https://www.findthemissing.org/en/homes/about> and https://www.findthemissing.org/en/users/terms_of_use (both 12 August 2012).

²⁶⁰ See also <https://identifyus.org/en/home/about> and https://identifyus.org/en/home/terms_of_use (both 12 August 2012).

²⁶¹ Butler 2011, p. 272 and <http://www.namus.gov/> (12 August 2012).

²⁶² Garvin (editor) 2010, p. 399 and <http://www.namus.gov/> (12 August 2012).

²⁶³ See also <https://identifyus.org/en/home/about> and https://identifyus.org/en/home/terms_of_use (both 12 August 2012).

²⁶⁴ Butler 2011, p. 272.

²⁶⁵ Garvin (editor) 2010, p. 399 and <http://www.namus.gov/> (12 August 2012).

²⁶⁶ <https://identifyus.org/en> (12 August 2012).

²⁶⁷ Moore 2011, p. 65 and <http://www.namus.gov/about.htm> (12 August 2012).

²⁶⁸ Bell 2011, p. 202.

²⁶⁹ *National Research Council of the National Academies 2009*, p. 245.

²⁷⁰ <http://www.justice.gov/> (12 August 2012).

²⁷¹ See also <https://www.findthemissing.org/en/homes/about> and https://www.findthemissing.org/en/users/terms_of_use (both 12 August 2012).

²⁷² See also <https://identifyus.org/en/home/about> and https://identifyus.org/en/home/terms_of_use (both 12 August 2012).

²⁷³ <https://www.findthemissing.org/en> and <https://identifyus.org/en/> (both 12 August 2012).

²⁷⁴ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

²⁷⁵ Ibid.

²⁷⁶ Concannon 2008, p. 18-19 and Fairman Cooper 2003, p. 1-2.

Act (42 USC § 5771 et seq.)²⁷⁷ of 1984²⁷⁸ explained, amongst others, that a clearinghouse for missing children had to come into existence²⁷⁹ which became the *NCMEC*^{280, 281}.

The *NCMEC*²⁸² should be regarded as a private and nonprofit cooperation²⁸³, which has a Congressional Mandate²⁸⁴ and which is recognized by the *US Department of Justice*²⁸⁵, however, it is not responsible for, amongst others, the content of the website^{286, 287}. Its tasks are, amongst others, operating a 24-hours toll-free telephone line, not only for missing children, but also for locating child pornography, supplying information to e.g. the *US Government*, attorneys, the general public, and coordinating public and private programs to recover, locate and/or reunite children with their caretakers...²⁸⁸ It also and acts, in the case of (international) parental abduction as the *Central Authority* (or *CA*).²⁸⁹ In, for example, the case *Madden v. National Center for Missing and Exploited Children*²⁹⁰, information concerning the background of the *NCMEC*²⁹¹, its tasks... can be found.²⁹²

At the moment, together with the *International Center for Missing and Exploited Children* or *ICMEC*²⁹³ (which should be seen as the “*more uniform response to the problem of missing children around the world*”²⁹⁴), it can be considered a well known, worldwide organization on the topic of missing children.²⁹⁵

1.2.2.2 The National Center for Missing Adults²⁹⁶

Due to *Kristen’s Law*²⁹⁷, a missing adult should be reported to the *National Center for Missing Adults*^{298, 299}. The Center came into existence in 2002.³⁰⁰

²⁷⁷ *Missing Children’s Assistance Act* or 42 USC § 5771 et seq.

²⁷⁸ http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1615 (12 August 2012).

²⁷⁹ O’Brien and French 2008, p. 21, Fairman Cooper 2003, p. 1-2 and De Ruyver, Zanders, Vermeulen and Derre 2000, p. 118-120. For more information concerning the *NCMEC* see their website:

http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012). See also the section: 1.2.2.1 *The National Center For Missing and Exploited Children or NCMEC*, p. 24-26.

²⁸⁰ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

²⁸¹ O’Brien and French 2008, p. 21, Fairman Cooper 2003, p. 1-2 and De Ruyver, Zanders, Vermeulen and Derre 2000, p. 118-120. For more information concerning the *NCMEC* see their website:

http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012). See also the section: 1.2.2.1 *The National Center For Missing and Exploited Children or NCMEC*, p. 24-26.

²⁸² http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

²⁸³ Concannon 2008, p. 19 and Dube 1999, p. 69.

²⁸⁴ Fairman Cooper 2003, p. 2 and Holliday 2003, p. 54.

²⁸⁵ <http://www.namus.gov/volunteer.htm> (12 August 2012).

²⁸⁶ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US/ (12 August 2012).

²⁸⁷ Concannon 2008, p. 19 and Dube 1999, p. 69.

²⁸⁸ Fairman Cooper 2003, p. 2 and Holliday 2003, p. 54.

²⁸⁹ See e.g. *Wojcik v. Wojcik*.

²⁹⁰ *Madden v. National Center for Missing and Exploited Children*.

²⁹¹ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

²⁹² *Madden v. National Center for Missing and Exploited Children*.

²⁹³ <http://www.icmec.org/missingkids/servlet/PublicHomeServlet> (12 August 2012).

²⁹⁴ Dube 1999, p. 71.

²⁹⁵ See e.g. Dube 1999 p. 69-70.

²⁹⁶ <http://www.lbth.org/ncma/index.php> (12 August 2012).

In short, it is involved in collecting and sharing missing person's information and helping law enforcement and/or left behind persons in locating a missing adult.³⁰¹

In its "Mission Statement" it describes that it, amongst others, wants to be regarded as a resource for left-behind family of missing adults.³⁰²

The Center received grants from the *US Department of Justice*³⁰³, although it was not in charge of its website.³⁰⁴ Due to the fact that the funding was only permitted until 2004³⁰⁵, reauthorization was necessary, however, until this day, this has not taken place.³⁰⁶ According to an electronic interview with Mrs. K. Pasqualini, the founder of the *National Center for Missing Adults*³⁰⁷ and CEO of the organization until January 2010³⁰⁸, in the *Phoenix New Times*³⁰⁹ of 15 January 2009, it is unknown why the reauthorization of the *Kristen's Act* could not make it in the *Senate*³¹⁰, after passing the *House of Representatives*³¹¹ in September 2008.³¹² In total, there were already four attempted reauthorization acts, namely in 2005 ("H.R. 2103: *Kristen's Act Reauthorization of 2005, 109th Congress 2005-2006*")³¹³, in 2008 ("H.R. 6064: *Kristen's Act Reauthorization of 2008, 110th Congress 2007-2008*")³¹⁴, in 2009 ("H.R. 632: *Kristen's Act Reauthorization of 2009, 111th Congress 2009-2010*")³¹⁵ and in 2011 ("H.R. 112: *Kristen's Act Reauthorization of 2011, 112th Congress 2011-2012*")³¹⁶.

However, according to "Register a Missing Person", a left-behind person can register the missing person with this organization, although the case will not be added to the website, but to the *NamUs* website^{317 318}.

²⁹⁷ <http://www.criminaljusticeuniversity.net/blog/2010/10-laws-passed-after-horrible-crimes/> (12 August 2012) and see the section: *1.1.3.1 Missing adults*, p. 11-12.

²⁹⁸ <http://www.lbth.org/ncma/index.php> (12 August 2012).

²⁹⁹ http://www.ehow.com/list_6855833_legal-laws-missing-persons.html#ixzzHiljhvhz (12 August 2012).

³⁰⁰ http://www.usatoday.com/news/nation/2006-11-02-missing-adults_x.htm (12 August 2012).

³⁰¹ O'Brien and French 2008, p. 93 and http://www.lbth.org/ncma/content.php?webid=about_ncma (12 August 2012).

³⁰² http://www.lbth.org/ncma/content.php?webid=about_ncma (12 August 2012).

³⁰³ <http://www.justice.gov/> (12 August 2012).

³⁰⁴ <http://www.lbth.org/ncma/index.php> and <http://www.lbth.org/ncma/content.php?webid=training> (both 12 August 2012).

³⁰⁵ *H.R. 2780: Kristen's Act or Public Law 106-486* and <http://www.phoenixnewtimes.com/2009-01-15/news/the-national-center-for-missing-adults-funding-was-slashed-by-the-feds-but-three-volunteers-are-keeping-it-alive/> (both 12 August 2012).

³⁰⁶ http://www.house.gov/list/press/nc09_myrick/02112009_KristensAct2009.html (12 August 2012).

³⁰⁷ <http://www.lbth.org/ncma/index.php> (12 August 2012).

³⁰⁸ <http://www.linkedin.com/in/kympasqualini> (12 August 2012).

³⁰⁹ <http://www.phoenixnewtimes.com/> (12 August 2012).

³¹⁰ <http://www.senate.gov/> (12 August 2012).

³¹¹ <http://www.house.gov/> (12 August 2012).

³¹² <http://www.phoenixnewtimes.com/2009-01-15/news/the-national-center-for-missing-adults-funding-was-slashed-by-the-feds-but-three-volunteers-are-keeping-it-alive/> (12 August 2012).

³¹³ *H.R. 2103: Kristen's Act Reauthorization of 2005*.

³¹⁴ *H.R. 6064: Kristen's Act Reauthorization of 2008*.

³¹⁵ *H.R. 632: Kristen's Act Reauthorization of 2009*.

³¹⁶ *H.R. 112: Kristen's Act Reauthorization of 2011*.

³¹⁷ <http://www.namus.gov/> (12 August 2012).

³¹⁸ <http://www.lbth.org/ncma/content.php?webid=register> (12 August 2012).

1.2.3 Volunteer missing persons' website

1.2.3.1 The Doe Network³¹⁹

The *Doe Network*³²⁰ is one of the independent websites run by American citizens for locating missing and unidentified adults.³²¹ Its full name is: *the Doe Network: International Center for Unidentified & Missing Persons*³²², it provides assistance to law enforcement and it is recognized as being part of the *Responsible Volunteer Community*³²³ by the *US Department of Justice*^{324, 325}. It came into existence on 5 November 1998.³²⁶

It should be regarded as a volunteer organization and is not only limited to missing and unidentified people from North America, but also from Australia and Europe.³²⁷ However, the conditions are that the missing person must be from the US, he or she must be missing since 1999 or before (cases of missing persons after 1999 are published on the website of *The North American Missing Persons Network*³²⁸), there must be a file submitted by law enforcement and the case had to be actively investigated by law enforcement at least six months before a request can be made to get the case filed with the *Doe Network*.³²⁹

1.2.4 Other missing persons' websites

In this part, attention will be paid to two other forms of missing persons' websites. The *For the Lost Organization*³³⁰ will be used as an example of a missing persons' website dedicated to a certain goal and *The Charley Project*³³¹ is chosen because it provides useful information concerning missing persons and, amongst others, the issues a manager of such a website can encounter³³².

1.2.4.1 The For the Lost Organization³³³

This organization exists of a website³³⁴ and a blog³³⁵. Users can write comments below case-files on the blog³³⁶, but have to pay attention to the "*Comment/post policy*" section.³³⁷

The organization strongly focuses on missing children cases or "*Jahi's Pages-Closed but unsolved cases*"³³⁸ (children who remain missing after his or her case was closed by law enforcement), (international) family abduction cases or "*The Adam Haseeb Memorial Pages text listing*"³³⁹ and children who are (mostly) not mentioned on other missing persons' websites or "*California Kids photo directories (Poster Campaign)*"³⁴⁰ and "*California Kids*

³¹⁹ <http://www.doenetwork.org/> (12 August 2012). See also Vaccariello 2009, p. 80-83, 88 and 213 concerning the history of the *Doe Network*.

³²⁰ <http://www.doenetwork.org/> (12 August 2012).

³²¹ Vaccariello 2009, p. 83.

³²² Moore 2011, p. 177.

³²³ <http://www.doenetwork.org/> (12 August 2012).

³²⁴ <http://www.justice.gov/> (12 August 2012).

³²⁵ <http://www.doenetwork.org/> and <http://www.namus.gov/volunteer.htm> (both 12 August 2012).

³²⁶ <http://whois.domaintools.com/network.org> (12 August 2012).

³²⁷ Moore 2011, p. 177.

³²⁸ <http://www.nampn.org/submit.html> (12 August 2012).

³²⁹ Bidgoli (editor in chief) 2004, p. 446 and <http://www.doenetwork.org/> (12 August 2012).

³³⁰ <http://www.forthelost.org/> (12 August 2012).

³³¹ <http://www.charleyproject.org/> (12 August 2012).

³³² <http://charleyross.wordpress.com/> (12 August 2012).

³³³ <http://www.forthelost.org/> (12 August 2012).

³³⁴ Ibid.

³³⁵ <http://forthelost.wordpress.com/> (12 August 2012).

³³⁶ Ibid.

³³⁷ <http://forthelost.wordpress.com/about/commentpost-policy/> (12 August 2012).

³³⁸ <http://www.forthelost.org/jahi/> (12 August 2012).

³³⁹ <http://www.forthelost.org/family/text.html> (12 August 2012).

³⁴⁰ <http://www.forthelost.org/calikids/> (12 August 2012).

*text listing*³⁴¹.³⁴² The purpose of why attention is drawn to these sorts of cases is explained by the *For the Lost Organization*³⁴³ as follows:

*“...In this aspect we are like the National Center For Missing and Exploited Children with a strong focus on older cases. These older cases are often neglected by both law enforcement and online sites. Even when they are listed, very few people concentrate on them. The typical attitude is "The person's probably dead anyway, so why bother?" This prevails especially for the Non-Family abductions (see this page for a definition of this and other missing person's terms), where the primary desire for many is to start looking for a body right away. This is flawed, we believe. If one is looking for a body, they may neglect to find a person. If one looks for a person, however, a body may come up, but so may an alive person....”*³⁴⁴

It also provides, amongst others, links to other missing persons' websites.³⁴⁵

1.2.4.2 The Charley Project³⁴⁶

*The Charley Project*³⁴⁷ (which also, amongst others, exists of a website and blog³⁴⁸) came into existence on 12 October 2004 and was founded by Meaghan Good.³⁴⁹ She is the administrator (manager) of the site and responsible for updating, removing and adding case files to the site.³⁵⁰ *The Charley Project*³⁵¹ features, according to the website, more than 9000 cold cases of the US and more or less 500 links to other missing persons' websites.³⁵²

It is not possible to become a member (there is only the administrator), nevertheless visitors are allowed to provide additional information concerning cases mentioned on the site.³⁵³

The website is also well-known because the administrator writes a blog (where users can write comments) in which she describes, amongst others, the problems which she encounters with running a missing persons' website.³⁵⁴

³⁴¹ <http://www.forthelost.org/calikids/catext.html> (12 August 2012).

³⁴² <http://www.forthelost.org/difference.html> (12 August 2012).

³⁴³ <http://www.forthelost.org/> (12 August 2012).

³⁴⁴ <http://www.forthelost.org/difference.html> (12 August 2012).

³⁴⁵ <http://www.forthelost.org/links.html> (12 August 2012).

³⁴⁶ <http://www.charleyproject.org/> (12 August 2012).

³⁴⁷ Ibid.

³⁴⁸ <http://charleyross.wordpress.com/> (12 August 2012).

³⁴⁹ <http://www.charleyproject.org/history.html> and <http://www.charleyproject.org/administrator.html> (both 12 August 2012).

³⁵⁰ <http://www.charleyproject.org/faq.html> (12 August 2012).

³⁵¹ <http://www.charleyproject.org/> (12 August 2012).

³⁵² Ibid and Moore 2011, p. 209-210.

³⁵³ Moore 2011, p. 210 and <http://www.charleyproject.org/faq.html> (12 August 2012).

³⁵⁴ See e.g. her blog entry of 13 December 2010 concerning the use of sources (<http://charleyross.wordpress.com/2010/12/13/hate-mail-and-mail-in-general/>) and her blog entry of 3 December 2010 about the threat of lawsuits concerning defamation (<http://charleyross.wordpress.com/2010/12/03/another-lawsuit-threat-yawn/>) (both (22 April 2012)).

Chapter 2: Copyright

Introduction

In most missing persons' cases, everything is about getting the word out. It is about informing the general public that someone has gone missing. However, does this mean that the content of every website involved in locating missing persons can freely be copied without taking notice of its copyright? As can be expected, this is not the case.³⁵⁵ Even when it concerns missing persons' websites, a manager and/or user can be accused of copyright infringement. Therefore, this chapter will answer the following sub questions:

1. What is copyright according to US law?
2. How should copyright infringement by a manager and/or (US citizen or foreign) user of a US based missing persons' website be dealt with according to US law?
3. How is copyright infringement prevented and dealt with in the EU, The Netherlands and England?

This chapter will be divided into two paragraphs.

First, the copyright law of the US will be examined. This paragraph will be the most elaborate one, since this Master Thesis is about US based missing persons websites. It will be divided into six parts. To begin, attention will be paid to what is copyright protected, which will be followed by who is the copyright owner of a work and his or her rights will be explained. Hereafter, the duration of copyright will be examined since it is important to detect if a work has entered the public domain. Next, the "*merger doctrine*"³⁵⁶ will be explained as a possible defense of why there could be no copyright infringement. The following two parts will be about copyright infringement. In the last part examples will be provided about how managers of US based missing persons' websites deal with copyright issues in practice.

Second, attention is given to foreign copyright. This paragraph is divided into three parts. First, the EU copyright policy will be discussed. Second, attention will be paid to Dutch copyright law. The third part will concern English copyright law. The outline of each of these parts will be, more or less, the same as the paragraph about US copyright law.

2.1 Copyright

On the internet, all kinds of material as texts, photos... can be located which leads to questions as "*Are these materials in the public domain?*" or "*Who owns the copyright?*".

2.1.1 What is copyright protected?

Since there is no universal copyright protection, attention has to be paid to how copyright law is regulated in each country.³⁵⁷ Nevertheless, there are international conventions on this topic and the most well-known convention in the field of copyright law is the *Berne Convention*³⁵⁸, of which the US became a member-country on 1 March 1989.³⁵⁹ In art. 2 (2) *Berne Convention*³⁶⁰ reference is made to the fact that national law is important, which means that

³⁵⁵ Stim 2010 II, p. 188.

³⁵⁶ Fishman 2011, p. 117-119 and Halpern, Nard and Port 2011, p. 10-11.

³⁵⁷ Fishman 2011, p. 330.

³⁵⁸ *Berne Convention* and Fishman 2011, p. 330.

³⁵⁹ http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=179C&start_year=ANY&end_year=ANY&search_what=C&treaty_id=15 (12 August 2012).

³⁶⁰ *Berne Convention* and Fishman 2011, p. 330.

the copyright of US authors is protected outside the US in other countries that are a member of the *Berne Convention*³⁶¹.

In the US, copyright law falls under federal law, namely *Title 17 United States Code*.³⁶² According to Article I, Section I, Clause 8 *US Constitution* and §301 *Title 17 United States Code*, US copyright law is regulated exclusively on federal level³⁶³, which means that a state cannot grant copyright protection.³⁶⁴

But what is “copyright protected”?

Copyright protects a works which is literary, scientific and/or artistic.³⁶⁵ As §202 *Title 17 United States Code* explains, it is not the material object, but the physical object which receives the copyright protection.³⁶⁶ It has to be an original work and not e.g. just an idea³⁶⁷ or a fact³⁶⁸ and it has to be fixed (see §102 (a) and (b) *Title 17 United States Code*).³⁶⁹ What is meant with fixed is clarified in §101 *Title 17 United States Code*, e.g. a work is fixed when it is written in a book. *Section 103 Title 17 United States Code* explains which works are copyright protected and that there can be copyright on both published and unpublished works, according to §104 *Title 17 United States Code*.³⁷⁰ However, the quality or value of the work is not important.³⁷¹ A work that is fixed on a website for the first time can be protected by copyright³⁷², since there is no mode or form of expression which must be followed in order to obtain copyright protection.³⁷³ A website normally falls under literary works §102 (a) *Title 17 United States Code*.³⁷⁴ A comment can be copyright protected if it is an original creation of the author and not merely the mentioning of e.g. a fact.³⁷⁵

Normally there is no need to register copyright (it is even not necessary to publish a *Notice of Copyright*), since it is automatically given, however there is the possibility to register a work with the *US Copyright Office*³⁷⁶ (see also *Chapter 7 Title 17 United States Code*).³⁷⁷ A website (such as a blog) can be protected by copyright³⁷⁸, but it is questionable if the manager of a website would register his or her website with the *US Copyright Office*³⁷⁹, since websites do often change their appearance and/or update their site to attract people to visit their website and each alternation (to have the benefits of the copyright protection offered by

³⁶¹ Ibid.

³⁶² Bouchoux 2009, p. 176 and Crews 1993, p. 146.

³⁶³ Bouchoux 2009, p. 176 and Halpern, Nard and Port 2011, p. 1.

³⁶⁴ Bouchoux 2009, p. 176 and Crews 1993, p. 146.

³⁶⁵ WIPO 2008, p. 5 and 153.

³⁶⁶ Halpern, Nard and Port 2011, p. 55.

³⁶⁷ Ibid, p. 8-10.

³⁶⁸ See also Fishman 2011, p. 127-129.

³⁶⁹ WIPO 2008, p. 153-154, *Circular 66: Copyright registration for online works*, p. 1, Fishman 2011, p. 6-7 and Fishman 2010, p. 20-22.

³⁷⁰ See also Fishman 2011, p. 6.

³⁷¹ WIPO 2008, p. 153-154 and Fishman 2011, p. 6.

³⁷² <http://www.copyright.gov/help/faq/faq-protect.html#website/> (12 August 2012).

³⁷³ WIPO 2008, p. 153.

³⁷⁴ Stim 2010 II, p. 188.

³⁷⁵ <http://www.copyrightlaws.com/copyright-qs-as/9-0-copyright-permissions/> (12 August 2012).

³⁷⁶ <http://www.copyright.gov/> (12 August 2012).

³⁷⁷ *Circular 1: Copyright Basics*, p. 7 and Fishman 2010, p. 23.

³⁷⁸ <http://www.copyright.gov/help/faq/faq-protect.html#website> (12 August 2012) and *Circular 66: Copyright registration for online works*, p. 2 and Fishman 2011, p. 138 and 140.

³⁷⁹ <http://www.copyright.gov/> (12 August 2012).

the *US Copyright Office*³⁸⁰) will have to be as registered by the *US Copyright Office*^{381 382}. However, the rules for *Serials* and *Newsletters* can be different.³⁸³

The copyright owner can place a *Notice of Copyright* (§401 Title 17 United States Code). Websites (also when they offer the possibility to write comments) and/or blogs can be seen as collective works, but normally only a single notice (although not necessary) on the first page of the website or on every page, identifying who the copyright owner is, can be enough.³⁸⁴ Nevertheless, the use of a *Notice of Copyright* is not regulated by e.g. the *Copyright Office*^{385 386}. Furthermore, just because there is a *Notice of Copyright*, this does not mean that the work could not be in the public domain.³⁸⁷ Yet, if there is no *Notice of Copyright*, this does not indicate that the work is in the public domain.³⁸⁸ In §403 Title 17 United States Code it is explained that, in general, it is not allowed to have a *Notice of Copyright* when the works of the *US Government* are used.

When it concerns copyright protection, it usually does not matter if the copyright owner has created a work inside or outside the US since according to art. 5 *Berne Convention*³⁸⁹ and §104 Title 17 United States Code explains that a work created outside of the country of origin shall be treated the same way as a work in the US.³⁹⁰ Moreover, if a work is first published in another country than the US and this other country is a member-country of the *Berne Convention*³⁹¹, the work has copyright protection in the US.³⁹²

2.1.2 *Who is the copyright owner?*

An answer can be found in §201 (a) Title 17 United States Code which explains that the copyright owner is normally the person who created the work.³⁹³ Nevertheless, it can be different when it concerns a situation where a third person is hired to make the work or when it concerns a contribution to a collective work (§201 (c) Title 17 United States Code).³⁹⁴ Copyright can also be transferred or licensed from the copyright owner to someone else.³⁹⁵ What is meant with a “*transfer of copyright ownership*” can be found in §101 Title 17 United States Code.³⁹⁶

According to §105 Title 17 United States Code, the *US Government* cannot claim copyright protection of its work.³⁹⁷

³⁸⁰ Ibid.

³⁸¹ Ibid.

³⁸² *Circular 66: Copyright registration for online works*, p. 2.

³⁸³ Ibid.

³⁸⁴ Fishman 2011, p. 24, 27 and 30.

³⁸⁵ <http://www.copyright.gov/> (12 August 2012).

³⁸⁶ Fishman 2010, p. 23 and *Circular 3: Copyright Notice*, p. 1.

³⁸⁷ Fishman 2010, p. 10.

³⁸⁸ Ibid.

³⁸⁹ *Berne Convention*.

³⁹⁰ Fishman 2011, p. 330-331 and WIPO 2008, p. 386.

³⁹¹ *Berne Convention* and Fishman 2011, p. 330.

³⁹² Fishman 2011, p. 338.

³⁹³ See also the part: 2.2.1 *What is copyright protected?*, p. 29-31.

³⁹⁴ Fishman 2011, p. 7 and Halpern, Nard and Port 2011, p.56-63.

³⁹⁵ Halpern, Nard and Port 2011, p. 64.

³⁹⁶ Ibid.

³⁹⁷ Ibid, p. 7.

2.1.3 Which rights does a copyright owner have?

In §106 Title 17 United States Code the exclusive rights of the copyright owner are clarified.³⁹⁸ It reads: “Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”³⁹⁹

2.1.3.1 Consent and licensing⁴⁰⁰

In §106 Title 17 United States Code the author of the work can authorize the making of copies.⁴⁰¹ So, before publishing a copyrighted work on a website, the owner of the copyright protected work should be asked for permission to copy and publish.⁴⁰² In other words, if the manager and/or user gets permission from the copyright owner to publish the copyrighted material on a website, the copyright owner has granted the manager and/or user a license.⁴⁰³ It is not uncommon that the copyright owner can ask that some conditions, such as payment, must be fulfilled.⁴⁰⁴

There are three approaches to ask for permission, e.g. the manager of a website can ask the owner of the copyright protected work, the publisher or make use of e.g. an *Online Permission Service*.⁴⁰⁵

However, it could be possible that the copyright owner uses a “*Creative Common License*”.⁴⁰⁶ In general, *Creative Commons*⁴⁰⁷ is a non-profit organization from the US (started by Stanford University Law professor L. Lessig and others), which concerns the licensing of free use of works, with the permission of the owner of the work, for certain purposes.⁴⁰⁸ In sum, there are 6 types of licences available.⁴⁰⁹

2.1.3.2 Fair use

However, there are some situations in which the copyright owner cannot claim that the person who copied and published the copyrighted material on his or her website is infringing his or her copyright (exclusive rights) since it can happen that there are limitations (see e.g. §106 Title 17 United States Code) which can be found in §107-118 Title 17 United States Code.⁴¹⁰

³⁹⁸ Ibid, p. 70-71.

³⁹⁹ Section 106 Title 17 United States Code.

⁴⁰⁰ Suthersanen 2007, p. 59 and Kim 2007, p. 187.

⁴⁰¹ Fishman 2011, p. 372.

⁴⁰² Ibid.

⁴⁰³ Stim 2010 II, p. 11, 19 and 198.

⁴⁰⁴ Ibid.

⁴⁰⁵ Fishman 2011, p. 372-379.

⁴⁰⁶ Ibid, p. 374.

⁴⁰⁷ <http://creativecommons.org/> (12 August 2012).

⁴⁰⁸ Suthersanen 2007, p. 59 and Kim 2007, p. 187.

⁴⁰⁹ <http://creativecommons.org/licenses/?lang=en> (12 August 2012).

⁴¹⁰ Halpern, Nard and Port 2011, p. 116 and <http://www.copyright.gov/fls/fl102.html> (12 August 2012).

Of these limitations, “*fair use*”⁴¹¹ (§107 Title 17 United States Code) is most used in case of copying and publishing of copyrighted material and is defined as:

“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”⁴¹²

The exception of “*fair use*” can be applied by the manager and/or user who has exploited a copyright protected work if he or she can prove that he or she did so under this exception.⁴¹³

In other words, if the limitation of “*fair use*” can be applied, the manager and/or user can make limited use (copy and publish) of the work of the copyright owner without first obtaining permission.⁴¹⁴ For example, a non-commercial website republishes a part of an article of a newspaper on its website and the exception of “*fair use*” could be applied.⁴¹⁵

In case of doubt if the limitation of “*fair use*” could be applied, it is always possible to ask the copyright owner for permission.⁴¹⁶

2.1.4 How long is copyright protection available?

2.1.4.1 The public domain

Copyright protection does not last forever, but is only temporary.⁴¹⁷ In §301-305 Title 17 United States Code the duration of copyright is clarified.⁴¹⁸ To know when a work will enter the public domain, one can check the “*Copyright and the Public Domain in the United States*”⁴¹⁹ chart where the conditions are described when a work (will) fall(s) in the public domain, which is made available each year by P. Hirtle⁴²⁰ of the *Cornell University Library*⁴²¹.⁴²² In general, all works (both US as foreign) before 1923 are in the public domain since for these works the copyright protection has expired.⁴²³ Starting from 1923, one has to look at the chart to determine when a work enters the public domain and attention has not only to be paid to the year when the work was published, but also to other conditions.⁴²⁴ For example, a book printed on 4 March 1925 (a work published between 1923 till 1963) with a copyright notice and with a renewal registration at the end of its 28 year term (without such notice and renewal the work should be regarded as belonging to the public domain since it has

⁴¹¹ Halpern, Nard and Port 2011, p. 116-136.

⁴¹² Section 107 Title 17 United States Code

⁴¹³ Fishman 2011, p. 7 and 308.

⁴¹⁴ Fishman 2010, p. 414 and Fishman 2011, p. 254.

⁴¹⁵ <http://www.nolo.com/legal-encyclopedia/fair-use-rule-copyright-material-30100.html> (12 August 2012) and Stim 2010 II, p. 243-253.

⁴¹⁶ <http://www.copyright.gov/fls/fl102.html> (12 August 2012) and Stim 2010 II, p. 191-189.

⁴¹⁷ Fishman 2010, p. 23 and WIPO 2008, p. 164.

⁴¹⁸ <http://www.copyright.gov/title17/92chap3.html/> (12 August 2012) and Stim 2010 I, p. 199.

⁴¹⁹ <http://copyright.cornell.edu/resources/publicdomain.cfm> (12 August 2012).

⁴²⁰ <http://vivo.cornell.edu/display/individual23436/> (12 August 2012).

⁴²¹ <http://www.library.cornell.edu/> (12 August 2012).

⁴²² <http://copyright.cornell.edu/resources/> (12 August 2012).

⁴²³ Fishman 2011, p. 7, <http://copyright.cornell.edu/resources/publicdomain.cfm> (12 August 2012) and Stim 2010 I, p. 199.

⁴²⁴ <http://copyright.cornell.edu/resources/publicdomain.cfm> (12 August 2012) and Fishman 2011, p. 242.

failed to comply with US formalities), will receive a renewal term of 67 years (together a term of 95 years) and will enter the public domain on 1 January 2020.⁴²⁵

There are other possibilities of how a work enters the public domain. Since the *US Government* cannot claim copyright according to §105 Title 17 *United States Code*, the information provided by the *US Government* falls within the public domain.⁴²⁶ Case-law falls within the public domain, however, it is difficult to find free judicial decisions to copy and publish, since editors can e.g. add new material to the plain text and receive copyright for the creation of a new work.⁴²⁷ Another example of the public domain is the use of a hyperlink on a website.⁴²⁸ Although, sometimes permission has to be asked before a hyperlink can be placed on a website.⁴²⁹

To know if a work of a foreign country should be regarded as being in the public domain and thus can be used freely, a research has to be done of the copyright laws of the foreign country.⁴³⁰

2.1.5 Are there other ways not to infringe copyright?

If a manager is receiving a complaint of a copyright owner that there is copyright infringing material on his or her website, e.g. in a comment, the manager should first investigate if the complaint is truthful and then remove that material in order to prevent being sued for copyright infringement.⁴³¹ Also, in the case of linking, a website could have a “*Linking disclaimer*” in which it is explained that the manager of the website, for example, does not endorse the use of copyrighted infringing material possibly found in links in his or her resources page.⁴³² Another defence which could be applicable is the “*merger doctrine*”⁴³³.

In the case of a factual work, it is not always possible that the information provided about a subject is described in an original way by each author.⁴³⁴ For example, it is not possible that an author describing the history of the *NCMEC*⁴³⁵, is each time original when it concerns certain facts and since the *NCMEC*⁴³⁶ still exists today, there will be other authors who also will write about this topic and therefore, the problem could be that they cannot do so, since the factual information cannot be expressed differently each time. To solve this problem, the US court has decided that the manner of how the factual information is expressed in the work belongs to the public domain or just acknowledges that it is protected from copying (without further consequences).⁴³⁷ Therefore, it can happen that in the same case each court has a different interpretation which results in legal uncertainty.⁴³⁸

⁴²⁵ Ibid.

⁴²⁶ Fishman 2010, p. 42.

⁴²⁷ Fishman 2010, p. 50, <http://www.nytimes.com/2008/09/29/business/media/29link.html?pagewanted=print> and <http://copyright.uslegal.com/statutes-judicial-opinions-law-reports/> (both 12 August 2012).

⁴²⁸ Fishman 2010, p. 328.

⁴²⁹ Stim 2010 II, p. 200 and 202-204.

⁴³⁰ Fishman 2010, p. 296. See also paragraph: 2.3 *Missing persons' websites and foreign copyright*, p. 41-56.

⁴³¹ Stim 2010 II, p. 189 and 192.

⁴³² Ibid, p. 204.

⁴³³ Fishman 2011, p. 117-119 and Halpern, Nard and Port 2011, p. 10-11.

⁴³⁴ Ibid.

⁴³⁵ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

⁴³⁶ Ibid.

⁴³⁷ Fishman 2011, p. 118 and Halpern, Nard and Port 2011, p. 10-11.

⁴³⁸ Halpern, Nard and Port 2011, p. 11.

2.1.6 *When is there a copyright infringement?*

*Title 17 United States Code*⁴³⁹, which was amended a few times⁴⁴⁰, has to be applied after the copyright holder has discovered that a copyright infringement has taken place.⁴⁴¹ A copyright infringement case can be brought against any person who knowingly or unknowingly breaches copyright law and the case must be brought before a *Federal Court*.⁴⁴² For example, in the case of a website, there can be a violation of §106-118 *Title 17 United States Code* (infringement rights of the copyright owner).⁴⁴³ The US court has no jurisdiction when the copyright infringement of a US author happened abroad, since *Title 17 United States Code* cannot be applied outside of the US.⁴⁴⁴

A copyright infringement case can be solved with the help of a civil procedure or as a criminal offence.⁴⁴⁵ Besides, since it is unlikely that a manager and/or a user of a missing persons' website is copying from other websites with the clear intent of committing copyright infringement, the criminal procedure will only be discussed briefly.

To begin with the civil procedure, *Chapter 5 (§501-513) Title 17 United States Code* covers copyright infringement and its remedies. In §501(b) *Title 17 United States Code* it is explained that the copyright holder or a person who has an exclusive right has an exclusive right to take action against the copyright infringer.⁴⁴⁶ The copyright owner has to prove two things, namely: First, that he or she has a valid copyright and, second, that his or her work, in other words the original work, has been copied.⁴⁴⁷ Moreover, not only the person who committed the copyright infringement can be prosecuted, but also the person who, for example, has helped another person to carry out the copyright infringement, can be punished⁴⁴⁸, which is also known as “contributory infringement”⁴⁴⁹ ⁴⁵⁰.

In §502 *Title 17 United States Code* a temporary or final “injunction”, which means to stop the continuation of the copyright infringement with the help of a court order⁴⁵¹, can be ordered by the court if certain conditions like e.g. irreparable harm are met.⁴⁵² *Section 504 Title 17 United States Code* explains which alternative bases there can be for the award of monetary damages, as the copyright owner’s “actual damages and profits” (with profits meaning the profits of the infringer (§504 (b) *Title 17 United States Code*)) or “Statutory damages” (which can be used when it is difficult to prove the actual damages when there is clear copyright infringement (§504 (c) *Title 17 United States Code*)).⁴⁵³ According to §505 *Title 17 United States Code*, it is also possible, under the conditions mentioned in that section, that the costs and attorney’s fees can be recovered by the winner of the case.⁴⁵⁴

When it concerns a criminal offence, *Section 506 Title 17 United States Code* explains which conditions must be fulfilled. In general, it can be the case that the copyright infringement is a

⁴³⁹ Bouchoux 2009, p. 176 and Crews 1993, p. 146.

⁴⁴⁰ Halpern, Nard and Port 2011, p. 2.

⁴⁴¹ Fishman 2011, p. 8.

⁴⁴² Smith, Bird & Bird 2007, p. 98, Bouchoux 2009, p. 176, Fishman 2011, p. 309 and Halpern, Nard and Port 2011, p. 159-160.

⁴⁴³ Halpern, Nard and Port 2011, p. 144.

⁴⁴⁴ Ibid, p. 147-148.

⁴⁴⁵ See *Chapter 5 Title 17 United States Code*.

⁴⁴⁶ Halpern, Nard and Port 2011, p. 148-149.

⁴⁴⁷ Ibid, p. 152-159.

⁴⁴⁸ Fishman 2011, p. 309 and Halpern, Nard and Port 2011, p. 161-165.

⁴⁴⁹ Halpern, Nard and Port 2011, p. 161 and 162-165.

⁴⁵⁰ Ibid, p. 161-162.

⁴⁵¹ Merriam-Webster Inc. 1996, p. 246 and see e.g. WIPO 2008, p. 171

⁴⁵² Halpern, Nard and Port 2011, p. 169.

⁴⁵³ Ibid, p. 170-175.

⁴⁵⁴ Ibid, p. 176-177.

“wilfully” committed offense (§506 (1) Title 17 United States Code) and is made for, for example, financial gain (§506 (a) (1) C Title 17 United States Code).⁴⁵⁵ In §2319 Title 18 United States Code, it is explained that the copyright infringer, depending on the situation, can be sentenced to imprisonment and/or a fine.⁴⁵⁶ When it concerns a “fraudulent copyright notice”, “fraudulent removal of copyright notice” and/or “false representation” (§506 (a) (3) c-e Title 17 United States Code), the infringer has to pay a fine.⁴⁵⁷

In §507 Title 17 United States Code the term is mentioned when a civil action (three years) or criminal proceeding (five years) by the copyright owner can be brought against the infringer.⁴⁵⁸

2.2 US based missing persons’ websites and copyright

In the previous paragraph US copyright in general was explained. It was clarified that a website or a comment could be copyright protected.⁴⁵⁹ The question to be answered here is if the information concerning US copyright is applicable when it concerns missing persons’ websites and its comments in practice.

It is a fact that missing persons’ websites are involved in “copying”. If there is a claim that someone is missing, a source has to be provided, since it is not legally allowed to claim someone is missing when in fact he or she is not. The person who makes the claim (not the person who gets a hoax e-mail concerning e.g. a missing child) can be, amongst others, be sued for defamation. In this paragraph, it will be examined how a missing persons’ website cannot be accused of copyright infringement.

2.2.1 What is copyright protected?

Sections 102 and 103 Title 17 United States Code explain which works are copyright protected⁴⁶⁰, which means that the work must be fixed and be original.⁴⁶¹

If the missing persons’ website is e.g. only copying and publishing flyers from e.g. the NCMEC⁴⁶², this could not be regarded as original or having a minimum level of creativity and therefore the site will not have copyright. If the website has a specific goal, as e.g. the *For the Lost Organization*⁴⁶³ and *The Charley Project*⁴⁶⁴ have, it can be regarded as having copyright protection since the two conditions fixed and original are met.

The manager of a website can decide to register his or her copyright with the *US Copyright Office*^{465 466}. It is not likely that a website is registered with the *US Copyright Office*⁴⁶⁷, since missing persons’ websites do often change their site (e.g. updating), which would mean that

⁴⁵⁵ Ibid, p. 160-161.

⁴⁵⁶ Ibid, p. 160.

⁴⁵⁷ Ibid, p. 160-161.

⁴⁵⁸ Ibid, p. 148.

⁴⁵⁹ <http://www.copyright.gov/help/faq/faq-protect.html#website> (12 August 2012), WIPO 2008, p. 153 and <http://www.copyrightlaws.com/copyright-qs-as/9-0-copyright-permissions/> (12 August 2012).

⁴⁶⁰ See also Fishman 2011, p. 6.

⁴⁶¹ Fishman 2010, p. 20-22.

⁴⁶² http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

⁴⁶³ <http://www.forthelost.org/> (12 August 2012).

⁴⁶⁴ <http://www.charleyproject.org/> (12 August 2012).

⁴⁶⁵ <http://www.copyright.gov/> (12 August 2012).

⁴⁶⁶ *Circular 1: Copyright Basics*, p. 7-12 and Fishman 2010, p. 23.

⁴⁶⁷ <http://www.copyright.gov/> (12 August 2012).

each time they alter a case file they have to register it with the *US Copyright Office*⁴⁶⁸.⁴⁶⁹ If they register for copyright with the *US Copyright Office*⁴⁷⁰, it is more likely to protect e.g. their publications, logo... To give an example, the *NCMEC*⁴⁷¹ has registered, amongst others, the logo and publications, but not the website.⁴⁷²

If the website allows for the writing of comments, a comment can be copyright protected if it is an original creation of the author and not merely the mentioning of e.g. a fact.⁴⁷³ For example, a member of the general public has devoted much of his or her time to locate a missing person and writes about his or her efforts in a comment under a case file of a missing persons' website, his or her comment can be regarded as copyright protected since it is fixed and original. Four of the websites mentioned, the *National Center for Missing Adults*⁴⁷⁴ (see their "*Let's bring them home: The Missing Persons Blog*"⁴⁷⁵), the *Doe Network*⁴⁷⁶ (see their "*Guestbook*"⁴⁷⁷), the *For the Lost Organization*⁴⁷⁸ (see the "*For the Lost Blog*"⁴⁷⁹) and *The Charley Project*⁴⁸⁰ (see "*The Charley Project Blog*"⁴⁸¹) offer the possibility for the general public to write a comment, which means that a comment written on their website by a user can be copyright protected.

2.2.2 Who is the copyright owner?

An answer can be found in §201 (a) Title 17 United States Code. If it is not mentioned on the website, use can be made of "*whois software*"⁴⁸² or when it concerns an e-mail address by "*Email Trace-Email Tracking*"⁴⁸³.⁴⁸⁴ An e-mail address from a user is not difficult to acquire since in the case of a comment, before writing a comment on the missing persons' website, an e-mail address of the user (possible among with some other information) has to be given, see e.g. the *Doe Network*⁴⁸⁵ and their "*Guestbook*"⁴⁸⁶.

2.2.3 Which rights does a copyright owner have?

The exclusive rights of the copyright owner are explained in §106 Title 17 United States Code.⁴⁸⁷ Before placing copyrighted work on a website, the owner of the work should be

⁴⁶⁸ Ibid.

⁴⁶⁹ *Circular 66: Copyright registration for online works*, p. 2.

⁴⁷⁰ <http://www.copyright.gov/> (12 August 2012).

⁴⁷¹ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

⁴⁷² http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?Search_Arg=%22national+center+for+missing+and+exploited+children%22&Search_Code=FT*&PID=BiAu31xsREAqbjVKEiq33f-Guptm&SEQ=20120415111932&CNT=25&HIST=1 (12 August 2012).

⁴⁷³ <http://www.copyrightlaws.com/copyright-qs-as/9-0-copyright-permissions/> (12 August 2012).

⁴⁷⁴ <http://www.lbth.org/ncma/index.php> (12 August 2012).

⁴⁷⁵ <http://lbth.org/ncma/blog/> (12 August 2012).

⁴⁷⁶ <http://www.doenetwork.org/> (12 August 2012). See also Vaccariello 2009, p. 80-83, 88 and 213.

⁴⁷⁷ <http://www.doenetwork.org/> (12 August 2012).

⁴⁷⁸ <http://www.forthelost.org/> (12 August 2012).

⁴⁷⁹ <http://forthelost.wordpress.com/> (12 August 2012).

⁴⁸⁰ <http://www.charleyproject.org/> (12 August 2012).

⁴⁸¹ <http://charleyross.wordpress.com/> (12 August 2012).

⁴⁸² <http://www.ip-adress.com/whois/> (12 August 2012).

⁴⁸³ See e.g. http://www.ip-adress.com/trace_email/ (12 August 2012).

⁴⁸⁴ Walden 2004, p. 275-287 and 276.

⁴⁸⁵ <http://www.doenetwork.org/> (12 August 2012). See also Vaccariello 2009, p. 80-83, 88 and 213.

⁴⁸⁶ <http://www.doenetwork.org/> (12 August 2012).

⁴⁸⁷ Halpern, Nard and Port 2011, p. 70.

asked for permission.⁴⁸⁸ This could be the case when a missing persons' website does not have e.g. a copyright policy. For example, the *National Center for Missing Adults*⁴⁸⁹ has not published a copyright policy on its website besides that its content is copyright protected by mentioning below each page: "Copyright 2010-2011 Let's Bring Them Home. All rights reserved".⁴⁹⁰ In this case the manager of a missing persons' website could write an e-mail and ask permission before copying and publishing.

The copyright owner can transfer or license his or her copyright to someone else.⁴⁹¹

To give an example, the *NCMEC*⁴⁹² permits the use of its banners, its hypertext links and flyers on websites (e.g. publishing and reprinting) under certain conditions which can be found on its webpage: "*Terms of Use for NCMEC Intellectual Property*".⁴⁹³

Another possibility could be that the copyright owner is using a "*Creative Common License*" for its website.⁴⁹⁴ For example, the administrator (manager) of *The Charley Project*⁴⁹⁵ has her work protected under a "*Creative Common License*".⁴⁹⁶ She allows another missing persons' website to use (copy, alter...) and adapt her work on two conditions: First, her website as source must be mentioned and, second, the information provided may not be used for financial purposes.⁴⁹⁷

If the copying meets the conditions of §107 Title 17 United States Code, "*fair use*"⁴⁹⁸ can be seen as a legal justification. For example, the *Doe Network*⁴⁹⁹ explains in its "*Terms of services*": "This site may contain copyrighted (©) material, the use of which may or may not have been specifically authorized by the copyright owner. This material is being made available in an effort to further public understanding of social issues relating to missing persons, unidentified remains and its impact on society. The DoeNetwork believes this constitutes a 'fair use' of any such copyrighted material as provided for in section 107 of the US Copyright Law. In accordance with Title 17 U.S.C. Section 107, the material on this site is distributed without profit to those who, by visiting www.DoeNetwork.org, have expressed an implied interest in viewing the included information for research and educational purposes."⁵⁰⁰

In other words, a manager of a missing persons' website is allowed to make use of the information provided by the *Doe Network*⁵⁰¹, only if he or she uses it e.g. to comment or for news reporting.

2.2.4 *How long is copyright protection available?*

Missing children became a topic for politics and legislation since the beginning of the 1980s⁵⁰² and in the case of missing adults it took even longer (see e.g. the disappearance of

⁴⁸⁸ Fishman 2011, p. 372.

⁴⁸⁹ <http://www.lbth.org/ncma/index.php> (12 August 2012).

⁴⁹⁰ http://www.lbth.org/ncma/content.php?webid=about_ncma (12 August 2012).

⁴⁹¹ Halpern, Nard and Port 2011, p. 64.

⁴⁹² http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US/ (12 August 2012).

⁴⁹³ http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1923 (12 August 2012).

⁴⁹⁴ Fishman 2011, p. 374.

⁴⁹⁵ <http://www.charleyproject.org/> (12 August 2012).

⁴⁹⁶ <http://www.charleyproject.org/> (bottom of the page) (12 August 2012).

⁴⁹⁷ <http://www.charleyproject.org/copyright.html> and <http://creativecommons.org/licenses/by-nc/2.0/> (both 12 August 2012). See also her blog entry "*A big thorn in my side*" in which she described her efforts to stop people from copying her web pages (<http://charleyross.wordpress.com/2009/07/31/a-big-thorn-in-my-side/> (12 August 2012)).

⁴⁹⁸ Halpern, Nard and Port 2011, p. 116-136.

⁴⁹⁹ <http://www.doenetwork.org/> (12 August 2012).

⁵⁰⁰ Ibid.

⁵⁰¹ Ibid.

⁵⁰² Tedisco and Paludi 1996, p. 112-113.

Kristen Modafferi on 23 June 1997 after leaving her place of employment⁵⁰³). The oldest missing persons website referred to in this Master Thesis is the *NCMEC*⁵⁰⁴, which came into existence in 1984.⁵⁰⁵ It is unlikely that any of the websites mentioned, except of the *Amber Alert*⁵⁰⁶ and *NamUs*⁵⁰⁷, since they should be regarded as *US Government* websites (§105 Title 17 United States Code), will enter the public domain soon.

It is a fact that all works which originate from before 1923 are in the public domain.⁵⁰⁸ It is not uncommon that a missing persons' website has a case file of someone who went missing before 1923 and does this fact mean that the case file is free from copying because it should be regarded in the public domain? To give an example, both the *Doe Network*⁵⁰⁹ as *The Charley Project*⁵¹⁰ have a case file concerning the disappearance of Dorothy Arnold, who went missing on 12 December 1910.⁵¹¹ Since she disappeared before 1923, everything concerning the investigation from before 1923 is in the public domain.⁵¹² Nevertheless, this does not mean that the case file can be reproduced since, although the information is in the public domain, the case file can be regarded as fixed and original.⁵¹³ However, it can be different when it concerns the copyright of the photograph of the missing person (although normally the whole case file or flyer should be regarded as belonging together). Nevertheless, some missing persons' websites explain their policy concerning the copyright of pictures. For example, the manager (administrator) of *The Charley Project*⁵¹⁴ clarifies: "*The contents of the Charley Project, except for the photographs of the missing, are copyright 2004 - 2008 by Meaghan Good.*"⁵¹⁵ *The Doe Network*⁵¹⁶ explains: "*All photos and information contained within this Web site are the properties of the listed information sources within the case files.*"⁵¹⁷

According to §105 Title 17 United States Code, the *US Government* cannot claim copyright and therefore the information falls within the public domain.⁵¹⁸ The *Amber Alert*⁵¹⁹ as *NamUs*⁵²⁰ fall in the public domain, since they both refer in the bottom on their websites to

⁵⁰³ O'Brien and French 2008, p. 93 and Newton 2009, p. 246.

⁵⁰⁴ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

⁵⁰⁵ Concannon 2008, p. 18-19 and Fairman Cooper 2003, p. 1-2.

⁵⁰⁶ <http://www.amberalert.gov/> (12 August 2012).

⁵⁰⁷ <http://www.namus.gov/>, but not the sections of the missing and unidentified persons (<https://www.findthemissing.org/en> and <https://identifyus.org/en>), they have another copyright protection (https://www.findthemissing.org/en/users/terms_of_use and https://identifyus.org/en/home/terms_of_use/) (all 12 August 2012).

⁵⁰⁸ Fishman 2011, p. 7 and <http://copyright.cornell.edu/resources/publicdomain.cfm> (12 August 2012) and Stim 2010 I, p. 199.

⁵⁰⁹ <http://www.doenetwork.org/> (12 August 2012). See also Vaccariello 2009, p. 80-83, 88 and 213.

⁵¹⁰ <http://www.charleyproject.org/> (12 August 2012).

⁵¹¹ <http://www.doenetwork.org/cases/1028dfny.html> and

http://www.charleyproject.org/cases/a/arnold_dorothy.html (both 12 August 2012).

⁵¹² Fishman 2011, p. 7, <http://copyright.cornell.edu/resources/publicdomain.cfm> (12 August 2012) and Stim 2010 I, p. 199.

⁵¹³ Fishman 2010, p. 20-22.

⁵¹⁴ <http://www.charleyproject.org/> (12 August 2012).

⁵¹⁵ <http://www.charleyproject.org/copyright.html> (12 August 2012).

⁵¹⁶ <http://www.doenetwork.org/> (12 August 2012).

⁵¹⁷ Ibid.

⁵¹⁸ Fishman 2010, p. 42.

⁵¹⁹ <http://www.amberalert.gov/> (12 August 2012).

⁵²⁰ <http://www.namus.gov/>, but not the sections of the missing and unidentified persons (<https://www.findthemissing.org/en> and <https://identifyus.org/en>), they have another copyright protection (https://www.findthemissing.org/en/users/terms_of_use and https://identifyus.org/en/home/terms_of_use/) (all 12 August 2012).

the legal policies and disclaimers of the website of the *Department of Justice*⁵²¹, which means according to the *Department of Justice Website*:

“Information generated by the Department of Justice is in the public domain and may be reproduced, published or otherwise used without the Department’s permission. Citation to the Department of Justice as the source of the information is appreciated, as appropriate.”⁵²²

Most missing persons’ websites have hyperlinks to other websites.⁵²³

2.2.5 When is there copyright infringement?

Although, a manager of a missing persons’ website could be accused of copyright infringement⁵²⁴, until now⁵²⁵, there were no copyright infringement cases brought before the US courts concerning any of the above mentioned missing persons websites and/or its user(s).⁵²⁶

The reason why this could be the case is because missing persons’ websites are on the internet to attract attention to missing persons and, since it is more important that more people know about the missing person in an effort to locate him or her than, than to put effort in protecting their copyright of the flyer of the missing person in question. Also, the “*merger doctrine*”⁵²⁷ could be used as a defence in a copyright infringement case since some factual information, as the name of the missing person, his or her hair colour, when he or she went missing, how old he or she was... cannot be expressed each time in a different manner on every missing persons’ website.

Moreover, if the manager of the missing persons’ website is following the conditions mentioned of the websites mentioned in this Master Thesis (even removing a comment which of a user who does not follow the conditions), it is unlikely that he or she will be confronted with a copyright infringement claim. Besides, if a manager is operating a missing persons’ website, he or she would know where to find information and how to use it, for example, he or she will most likely start with information available on law enforcement websites before moving to other sources like newspapers.

Also, the missing persons’ websites themselves are involved to detect copyright infringement of their websites. For example, the *For the Lost Organization*⁵²⁸ detected on the *Children of the Underground Watch Newsletter Site*⁵²⁹ (a website bringing attention to (international) parental abducted children hidden by the *Children of the Underground Organization*)⁵³⁰, a copy of one of its case files and informed the manager of the website, with the help of a comment, that the copied case file could remain on the website if the manager would credit the *For the Lost Organization*^{531 532}.

⁵²¹ <http://www.justice.gov/> (12 August 2012).

⁵²² <http://www.justice.gov/legalpolicies.htm#copyright> (12 August 2012).

⁵²³ See e.g. <http://charleyross.wordpress.com/> (12 August 2012).

⁵²⁴ See e.g. <http://charleyross.wordpress.com/2010/12/13/hate-mail-and-mail-in-general/> (12 August 2012)..

⁵²⁵ Until 12 August 2012.

⁵²⁶ There is one case-law involving the Amber Alert and copyright (*Vikon International, Inc. v. Sensorlogic, Inc.*), but this concerned the technology used for the Amber Alert and not its website.

⁵²⁷ Fishman 2011, p. 117-119 and Halpern, Nard and Port 2011, p. 10-11.

⁵²⁸ <http://www.forthelost.org/> (12 August 2012).

⁵²⁹ <http://underwatch.wordpress.com/> and <http://underwatch.wordpress.com/about/> (both 12 August 2012).

⁵³⁰ <http://underwatch.wordpress.com/about/> (12 August 2012).

⁵³¹ <http://www.forthelost.org/> (12 August 2012).

⁵³² <http://underwatch.wordpress.com/2011/05/18/where-is-dorothy-barnett-and-savannah-todd/#comment-5460> (12 August 2012).

2.3 Missing persons' websites and foreign copyright

It is not unimaginable that a manager and/or user of a missing persons' website could retrieve information concerning a missing person from websites outside of the US. To give an example, if a Dutch tourist disappeared in the US or a child from the US is abducted to The UK, there could be found additional information on e.g. websites of that other country. The question answered in this paragraph is if the manager of the missing persons' website could copy this information without legal consequences. Therefore, attention will be paid to copyright law in general of the EU, The Netherlands and England.

2.3.1 The European Union

2.3.1.1 What is copyright protected?

Except of art. 1 (1) *Directive 2009/24/EC*⁵³³ which is only applicable on “*computer programs*”, it is not defined in the EU what is meant with a work.⁵³⁴ Instead, e.g. art. 1 (1) *Directive 2006/116/EC*⁵³⁵ (concerning the term of protection) refers to art. 2 *Berne Convention*⁵³⁶ in explaining what a “*literary or artistic work*” should mean.⁵³⁷ However, the EU itself is not a member country of the *Berne Convention*^{538 539}.

2.3.1.2 Which rights does a copyright owner have?

In art. 2 *Directive 2001/29/EC*⁵⁴⁰ it is explained that the author of the work has the exclusive right to reproduce, direct or indirect, or to give permission to someone else to reproduce (a part of) the work. Art. 3 *Directive 2001/29/EC*⁵⁴¹ clarifies that the owner of the work can communicate his or her work, make it available to the public or give someone else permission to do so. Art. 4 *Directive 2001/29/EC*⁵⁴² clarifies that the owner also has the right of distribution.

2.3.1.3 How long is copyright protection available?

*Directive 2006/116/EC*⁵⁴³ is about the term of copyright protection. In recital 3 of the preamble of *Directive 2006/116/EC*⁵⁴⁴, it is explained that the existence of this directive is necessary, since it harmonizes the term of protection with the result that the terms of copyright protection will be the same in all the EU Member-States. According to art. 1 (1) *Directive 2006/116/EC*⁵⁴⁵ the duration of a literary or artistic work will be:

“1. *The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public.*”⁵⁴⁶ According to art. 6 *Directive 2006/116/EC*⁵⁴⁷, in the case of the term of protection of photographs, art. 1 *Directive 2006/116/EC*⁵⁴⁸ is also applicable.

⁵³³ *Directive 2009/24/EC*.

⁵³⁴ *Institute for Information Law of the University of Amsterdam 2006*, p. 33.

⁵³⁵ *Directive 2006/116/EC*.

⁵³⁶ *Berne Convention*.

⁵³⁷ *Institute for Information Law of the University of Amsterdam 2006*, p. 33.

⁵³⁸ *Berne Convention*.

⁵³⁹ http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=15 (12 August 2012).

⁵⁴⁰ *Directive 2001/29/EC*.

⁵⁴¹ *Ibid.*

⁵⁴² *Ibid.*

⁵⁴³ *Directive 2006/116/EC*.

⁵⁴⁴ *Ibid.*

⁵⁴⁵ *Ibid.*

⁵⁴⁶ art. 1 (1) *Directive 2006/116/EC*.

⁵⁴⁷ *Directive 2006/116/EC*.

⁵⁴⁸ *Ibid.*

Art. 8 *Directive 2006/116/EC*⁵⁴⁹ explains that the duration of the term will be calculated as follows: “The terms laid down in this Directive shall be calculated from the first day of January of the year following the event which gives rise to them.”⁵⁵⁰ In art. 9 *Directive 2006/116/EC*⁵⁵¹ it is clarified if the copyright, that was applicable before the directive came into force, is still valid.⁵⁵² To know how long copyright protection lasts in a particular EU Member-State, see the “*EU Copyrights Durations*”⁵⁵³ chart of the *European Union Copyright Information*⁵⁵⁴.

2.3.1.4 Are there other ways not to infringe copyright?

In art. 5 *Directive 2001/29/EC*⁵⁵⁵, the exceptions and limitations of the copyright owner are discussed. For example, according to art. 5 (3) c and d *Directive 2001/29/EC*⁵⁵⁶ a person of the general public is allowed, under certain conditions (see also art. 5 (5) *Directive 2001/29/EC*⁵⁵⁷), to reproduce or use quotations of the work. Also, it is allowed to e.g. report about judicial proceedings (art. 5 (3) e *Directive 2001/29/EC*⁵⁵⁸).

Art. 5 (1)-(4) *Directive 2001/29/EC*⁵⁵⁹ should be seen as exhaustive and art. 5 (5) *Directive 2001/29/EC*⁵⁶⁰ contains a “three-step-test”, which originates from art. 9 (2) *Berne Convention*⁵⁶¹, and explains when reproduction is allowed under national law.⁵⁶²

Art. 9 (2) *Berne Convention*⁵⁶³ reads: “(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” Art. 5 (5) *Directive 2001/29/EC*⁵⁶⁴ reads: “The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.” In sum, both The Netherlands as The UK have not transposed art. 5(5) *Directive 2001/29/EC*⁵⁶⁵ in their national law since the two are of the opinion that the article is directed against the legislative power and not also to the judiciary, although The Netherlands and The UK sometimes use the test in their case-law in case of doubt when there are questions if an exemption should be applied in a specific case.⁵⁶⁶

2.3.1.5 When is there copyright infringement?

There are two regulations which could be applicable: First, the *Brussels I Regulation*⁵⁶⁷, which concerns jurisdiction, but only if the defendant has his or her habitual residence in one of the EU Member-States (Recital 8 and 9 and art. 4 *Brussels I Regulation*⁵⁶⁸) and, second, the

⁵⁴⁹ Ibid.

⁵⁵⁰ Art. 8 *Directive 2006/116/EC*.

⁵⁵¹ *Directive 2006/116/EC*.

⁵⁵² See e.g. C-240/07.

⁵⁵³ http://www.eucopyright.org/2008/04/copyright_eu_list/ (12 August 2012).

⁵⁵⁴ <http://www.eucopyright.org/> (12 August 2012).

⁵⁵⁵ *Directive 2001/29/EC*.

⁵⁵⁶ Ibid.

⁵⁵⁷ Ibid.

⁵⁵⁸ Ibid.

⁵⁵⁹ Ibid.

⁵⁶⁰ Ibid.

⁵⁶¹ *Berne Convention*.

⁵⁶² Griffiths 2009, p. 3, Bernt Hugenholtz 2010, p. 341 and Koelman 2006, p. 407.

⁵⁶³ *Berne Convention*.

⁵⁶⁴ *Directive 2001/29/EC*.

⁵⁶⁵ Ibid.

⁵⁶⁶ Koelman 2006, p. 407-408 and Griffiths 2009, p. 3-4.

⁵⁶⁷ *Council Regulation (EC) No 44/2001*.

⁵⁶⁸ Ibid.

*Rome II Regulation*⁵⁶⁹, which explains which national law of a EU Member-State should be applied.⁵⁷⁰ In the case of jurisdiction, art. 5 (3) *Brussels I Regulation*⁵⁷¹ is applicable, which means that the court where the harmful event occurred, has jurisdiction. Nevertheless, since it concerns a non-contractual obligation, art. 8 *Rome II Regulation*⁵⁷² should be used. Art. 8 (1) and (2) *Rome II Regulation*⁵⁷³ explain that a copyright infringement case can take place before the national court (e.g. the national law of the copyrighted work) or before the court where the infringement took place (e.g. in case of unitary copyright law). According to art. 8 (3) *Rome II Regulation*⁵⁷⁴, it is not possible that the plaintiff and defendant can choose where to start a copyright infringement case (art. 14 *Rome II Regulation*⁵⁷⁵ is not applicable). Art. 8 *Directive 2001/29/EC*⁵⁷⁶ explains that it is up to the EU Member-States to provide for sanctions and remedies against copyright infringement. The *Enforcement Directive* (or *Directive 2004/48/EC*)⁵⁷⁷ is only applicable in the case of counterfeiting and piracy.⁵⁷⁸

2.3.1.6 Missing persons' websites and the EU

In the EU a distinction can be made between “true EU websites” and websites supported by the EU. Normally, information from the *European Union Website*⁵⁷⁹, e.g. from the website of the *European Commission*, may be copied and published if the source is mentioned, unless otherwise specified.⁵⁸⁰ In this Master Thesis “EU Missing persons' websites” should be explained as websites supported by the EU.

Although the EU is involved in locating missing adults, these initiatives mostly have a political background as e.g. locating missing people in Cyprus⁵⁸¹, and therefore, only attention will be paid to four missing children websites supported by the EU.

The first one is the *European Federation for Missing and Sexually Exploited Children or Missing Children Europe*⁵⁸² which was established in 2009, represents 28 Non-Governmental Organisations and which is active in Switzerland and 19 EU Member-States.⁵⁸³ *Missing Children Europe*⁵⁸⁴ has the following mission: “

- *Ensure that in every EU Member State, the basic conditions (institutions, regulations, procedures) for helping missing and sexually exploited children as well as for the prevention of children going missing or being exploited are established, and the professional minimum standards for dealing with these phenomena are observed;*
- *Stimulate European and transnational cooperation to cope with the growing cross border nature of the problem;*
- *Extend the level of its Members' activities to a truly operational and highly standardised level;*

⁵⁶⁹ *Regulation (EC) No 864/2007.*

⁵⁷⁰ <http://epceurope.eu/wp-content/themes/striking/factsheets/epc-brussels-I-and-rome-II-fact-sheet-april-2010.pdf/> (12 August 2012).

⁵⁷¹ *Council Regulation (EC) No 44/2001.*

⁵⁷² *Regulation (EC) No 864/2007.*

⁵⁷³ *Ibid.*

⁵⁷⁴ *Ibid.*

⁵⁷⁵ *Ibid.*

⁵⁷⁶ *Directive 2001/29/EC.*

⁵⁷⁷ *Directive 2004/48/EC.*

⁵⁷⁸ *Recital 29 of Directive 2001/29/EC and Directive 2004/48/EC.*

⁵⁷⁹ http://europa.eu/index_en.htm (12 August 2012).

⁵⁸⁰ http://ec.europa.eu/geninfo/legal_notices_en.htm#copyright (12 August 2012) and *Commission Decision 2011.*

⁵⁸¹ See e.g. *Missing Persons in Cyprus-Follow up.*

⁵⁸² <http://www.missingchildreneurope.eu> (12 August 2012). There is also the website of the *MCE Supporting Committee* (<http://www.supportmce.eu/> (12 August 2012)), but in this Master Thesis only attention will be given to the website of *Missing Children Europe.*

⁵⁸³ Paludi and Kelly 2010, p. 34 and <http://www.missingchildreneurope.eu> (12 August 2012).

⁵⁸⁴ <http://www.missingchildreneurope.eu> (12 August 2012).

- Assist its Members in their dealings with national authorities to achieve speedy, efficient and accurate implementation of binding European legislation.⁵⁸⁵

To succeed, *Missing Children Europe*⁵⁸⁶, amongst others, shares best practices of its members and works together with the *ICMEC*^{587, 588}. In sum, *Missing Children Europe*⁵⁸⁹ can be described as an information website and is not directly involved in finding missing children⁵⁹⁰. On the site there has been made no mention concerning its copyright policy (except that the site is created by *CherryandCake*⁵⁹¹ indicated at the bottom of the page)⁵⁹². Art. 5 (3) c and d *Directive 2001/29/EC*⁵⁹³ explain that a person of the general public is allowed, under certain conditions (see also art. 5 (5) *Directive 2001/29/EC*⁵⁹⁴), to reproduce or use quotations of the work, however, in case of doubt, a manager of a missing persons' website can always contact the manager⁵⁹⁵ of *Missing Children Europe*⁵⁹⁶. *Missing Children Europe*⁵⁹⁷ also refers to other websites concerning the topic of missing children.⁵⁹⁸ Two referrals will be discussed later on, namely the *ICMEC*⁵⁹⁹ and *Childscope*⁶⁰⁰. Second, at the moment only 11 of the 27 EU Member-States have a *Child Alert System*⁶⁰¹, which can be compared with the US *Amber Alert*⁶⁰², but not the EU itself.⁶⁰³ Some EU Member-States like Greece (*Amber Alert Hellas*⁶⁰⁴) and France (*Alert-enlèvement*⁶⁰⁵) are using such system⁶⁰⁶, while other Member-States as Germany do not see why a *Child Alert System*⁶⁰⁷ should be necessary.⁶⁰⁸ On 24 November 2008 the *Commission Staff Working Document on the Best Practice for Launching a Cross-border Child Abduction Alert*⁶⁰⁹ was published in which it is explained which kinds of missing alert system the EU Member-States should use.⁶¹⁰ In the mean time, *Missing Children Europe*⁶¹¹ tries to make it possible that the

⁵⁸⁵ http://www.missingchildreneurope.eu/index.php?option=com_content&view=article&id=52&Itemid=53 (12 August 2012).

⁵⁸⁶ <http://www.missingchildreneurope.eu> (12 August 2012).

⁵⁸⁷ <http://www.icmec.org/missingkids/servlet/PublicHomeServlet> (12 August 2012).

⁵⁸⁸ http://www.missingchildreneurope.eu/index.php?option=com_content&view=article&id=52&Itemid=53 (12 August 2012).

⁵⁸⁹ <http://www.missingchildreneurope.eu> (12 August 2012).

⁵⁹⁰ http://www.missingchildreneurope.eu/index.php?option=com_content&view=article&id=92&Itemid=29 (12 August 2012).

⁵⁹¹ <http://www.cherryandcake.eu/> (12 August 2012).

⁵⁹² <http://www.missingchildreneurope.eu> (12 August 2012).

⁵⁹³ *Directive 2001/29/EC*.

⁵⁹⁴ *Ibid.*

⁵⁹⁵ http://www.missingchildreneurope.eu/index.php?option=com_content&view=article&id=91&Itemid=28 (12 August 2012).

⁵⁹⁶ <http://www.missingchildreneurope.eu> (12 August 2012).

⁵⁹⁷ *Ibid.*

⁵⁹⁸ These are: *The European Hotline Number for Missing Children* (<http://www.hotline116000.eu/> and http://ec.europa.eu/information_society/activities/116/index_en.htm), the *MCE Supporting Committee* (<http://www.supportmce.eu/>), the *ICMEC* (<http://www.icmec.com/>) and *Childscope* (<http://www.childscope.net/2009/httpdocs/index.php?sw=2>) (all 12 August 2012).

⁵⁹⁹ <http://www.icmec.org/missingkids/servlet/PublicHomeServlet> (12 August 2012).

⁶⁰⁰ <http://www.childscope.net/2009/httpdocs/index.php?sw=2/> (12 August 2012).

⁶⁰¹ http://ec.europa.eu/justice/fundamental-rights/rights-child/alert-mechanism/index_en.htm (12 August 2012).

⁶⁰² <http://www.amberalert.gov/> (12 August 2012) and Paludi and Kelly 2010, p. 34.

⁶⁰³ *European Parliament 2009*, p. C 295E/23-25.

⁶⁰⁴ http://gr.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_GR&PageId=3269 (12 August 2012).

⁶⁰⁵ <http://www.alerte-enlevement.gouv.fr/index.php> (12 August 2012).

⁶⁰⁶ Paludi and Kelly 2010, p. 34.

⁶⁰⁷ http://ec.europa.eu/justice/fundamental-rights/rights-child/alert-mechanism/index_en.htm (12 August 2012).

⁶⁰⁸ <http://news.bbc.co.uk/2/hi/europe/7339335.stm> (12 August 2012).

⁶⁰⁹ *Commission Staff Working Document 2008*.

⁶¹⁰ *Ibid.*, p. 1-8.

different *Amber Alert* systems of the EU Member-States are connected with each other.⁶¹² The *EU Commission*⁶¹³ as well is attempting to make sure that every EU Member-State will have its own *Child Alert* system which also should be activated in case of a cross border situation.⁶¹⁴ Therefore, the *European Child Alert Automated System*⁶¹⁵ project, with the help of the financial support of the *EU Fundamental Rights & Citizenship Programme*⁶¹⁶, was developed.⁶¹⁷ According to the *Press Release* of 27 April 2010, the *European Child Alert Automated System*⁶¹⁸, launched in 2011, should be used in the case of a cross border abduction of a child.⁶¹⁹ For now, only Cyprus, Greece, Italy and Portugal are a member, but it is expected that at the end of the project, all EU Member-States will be involved.⁶²⁰ The *European Child Alert Automated System*⁶²¹ website is copyrighted by *Google Sites*⁶²². The copyrighted material does not belong to *Google Sites*⁶²³, but to the copyright owner.⁶²⁴ There is no direct contact information provided on the *European Child Alert Automated System*⁶²⁵ website and there is no copy policy either, although by using “*Whois’ software*”⁶²⁶ the possible owner (manager or administrator) can be found.⁶²⁷ Third, the *ICMEC*⁶²⁸ should be seen as the “*more uniform response to the problem of missing children around the world*”⁶²⁹ and is considered, together with the *NCMEC*⁶³⁰, as the worldwide well known organization concerning the topic of missing children.⁶³¹ The “*Term of Use*”⁶³² section on its website is almost identical as the “*Terms of Use*”⁶³³ section of the *NCMEC*⁶³⁴.

⁶¹¹ <http://www.missingchildreneurope.eu> (12 August 2012).

⁶¹² http://www.missingchildreneurope.eu/index.php?option=com_content&view=article&id=71&Itemid=58 (12 August 2012).

⁶¹³ http://ec.europa.eu/index_en.htm/ (12 August 2012).

⁶¹⁴ *The Stockholm Programme 2009*, p. C115/9 and C115/22 and http://ec.europa.eu/justice/fundamental-rights/rights-child/alert-mechanism/index_en.htm (12 August 2012).

⁶¹⁵ <http://www.europeanchildalert.com/> (12 August 2012).

⁶¹⁶ http://ec.europa.eu/justice/grants/programmes/fundamental-citizenship/index_en.htm (12 August 2012).

⁶¹⁷ *ECAAS Press Release 2010*, p. 1.

⁶¹⁸ <http://www.europeanchildalert.com/> (12 August 2012).

⁶¹⁹ *ECAAS Press Release 2010*, p. 1.

⁶²⁰ *Ibid.*

⁶²¹ <http://www.europeanchildalert.com/> (12 August 2012).

⁶²² See <http://www.europeanchildalert.com/> (at the bottom),

<https://accounts.google.com/ServiceLogin?continue=http%3A%2F%2Fsites.google.com%2F&followup=http%3A%2F%2Fsites.google.com%2F&service=jotspot&passive=true&ul=1> and

<http://www.google.com/sites/help/intl/nl/overview.html> (all 12 August 2012).

⁶²³ <https://accounts.google.com/ServiceLogin?continue=https%3A%2F%2Fsites.google.com%2F%3Fhl%3Dnl&followup=https%3A%2F%2Fsites.google.com%2F%3Fhl%3Dnl&hl=nl&service=jotspot&passive=true&ul=1> (12 August 2012).

⁶²⁴ <http://www.google.com/intl/en/policies/terms/> (12 August 2012).

⁶²⁵ <http://www.europeanchildalert.com/> (12 August 2012).

⁶²⁶ See e.g. <http://www.ip-adress.com/whois/> (12 August 2012).

⁶²⁷ <http://www.ip-adress.com/whois/europeanchildalert.com> (12 August 2012).

⁶²⁸ <http://www.icmec.org/missingkids/servlet/PublicHomeServlet> (12 August 2012).

⁶²⁹ Dube 1999, p. 71.

⁶³⁰ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

⁶³¹ See e.g. Dube 1999 p. 69-70. As a remark, this is not truly an EU website, it is an organization with which the *Missing Children Europe* (<http://www.missingchildreneurope.eu/> (12 August 2012)) is working together http://www.missingchildreneurope.eu/index.php?option=com_content&view=article&id=52&Itemid=53/ (12 August 2012).

⁶³² http://www.icmec.org/missingkids/servlet/PageServlet?LanguageCountry=en_X1&PageId=3246#Reprint Policy (12 August 2012).

⁶³³ http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1923 (12 August 2012).

⁶³⁴ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

The fourth website is *Childscope*⁶³⁵ which, amongst others, provides definitions of missing children⁶³⁶ and refers to other existing non-governmental organizations of EU Member-States involved in the field of missing and/or sexually exploited children^{637, 638}. Besides the “*Terms of use*” in which it is explained, amongst others, that the authors of this directory cannot be hold responsible for the information provided on the other non-governmental websites⁶³⁹, there is no mention of any copyright notice, however, it is explained that the website is under the direction of *Missing Children Europe*⁶⁴⁰ and therefore, it can be assumed that copyright belongs to them.

Until now, there was no copyright case brought before the *ECJ*⁶⁴¹ concerning any of the above mentioned EU and/or US missing persons’ websites and/or its user(s).

2.3.2 The Netherlands

2.3.2.1 What is copyright protected?

The Netherlands is a member country of the *Berne Convention*^{642, 643}.

In general, the legal framework concerning Dutch copyright law can be found in the *Dutch Copyright Law (Auteurswet)*. It does not provide a definition of what is meant with a “*work*”, however, according to the case *Romme/Van Dale*⁶⁴⁴ of the *Dutch Supreme Court* on 4 January 1991, a work must be fixed and it has to be original, meaning that it must have a personal stamp of the author.⁶⁴⁵ However, no attention has to be paid to e.g. the moral of a work.⁶⁴⁶ In art. 10 *Dutch Copyright Law* it is explained which works are be copyright protected. According to art. 5 (2) *Berne Convention*⁶⁴⁷, it is not necessary to register copyright as it is automatically provided for.⁶⁴⁸

2.3.2.2 Who is the copyright owner?

Art. 1 *Dutch Copyright Law* explains that the author of the work is the person who has created the work.⁶⁴⁹ In art. 4-8 *Dutch Copyright Law* other forms of ownership, as e.g. works commissioned for someone else (art. 7 *Dutch Copyright Law*), are clarified.⁶⁵⁰

2.3.2.3 Which rights does a copyright owner have?

In art. 1 and 12 *Dutch Copyright Law*, it is explained that the owner of the work has the right to publish and reproduce his or her work. He or she can also transfer the rights of the work (art. 2 *Dutch Copyright Law*). The copyright owner has the right of making his work public, to reproduce, to distribute and lend it (art. 1, 2, 12, 12a and 13 *Dutch Copyright Law*).

⁶³⁵ <http://www.childscope.net/2009/httpdocs/index.php?sw=2/> (12 August 2012).

⁶³⁶ <http://www.childscope.net/2009/httpdocs/main/faq.php> (12 August 2012).

⁶³⁷ <http://www.childscope.net/2009/httpdocs/index.php?sw=2> (12 August 2012).

⁶³⁸ Ibid and <http://www.childscope.net/2009/httpdocs/main/general.php/> (12 August 2012).

⁶³⁹ <http://www.childscope.net/2009/httpdocs/index.php?sw=2/> (12 August 2012).

⁶⁴⁰ <http://www.missingchildreneurope.eu> (12 August 2012).

⁶⁴¹ http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm/ (12 August 2012).

⁶⁴² *Berne Convention*.

⁶⁴³ http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=1000C (12 August 2012).

⁶⁴⁴ Hoge Raad 4 januari 1991, *LJN ZC0104*.

⁶⁴⁵ Ibid, paragraph 3.4. See also Spoor, Verkade and Visser 2005, p. 57-79.

⁶⁴⁶ Spoor, Verkade and Visser 2005, p. 77.

⁶⁴⁷ *Berne Convention*.

⁶⁴⁸ Spoor, Verkade and Visser 2005, p. 3.

⁶⁴⁹ Ibid, p. 25.

⁶⁵⁰ Ibid, p. 25-51.

2.3.2.3.1 Consent and licensing

Licensing is allowed according to art. 2 *Dutch Copyright Law*. Also, it is possible for the owner of a work to have a Dutch “*Creative Common License*”.⁶⁵¹

2.3.2.3.2 Fair Use

At the moment, the “*fair use*” defence is not applicable in The Netherlands.⁶⁵²

2.3.2.4 How long is copyright protection available?

According to art. 37 (1) *Dutch Copyright Law*, the copyright of a work expires after 70 years of the dead of the owner of the work.

2.3.2.4.1 The Public Domain

When the limitation of copyright law is expired, the work will enter the public domain.⁶⁵³

According to art. 11 *Dutch Copyright Law* there is no copyright on laws, regulations, decisions, case-law and administrative decisions taken by the public powers⁶⁵⁴, which mean that they enter the public domain.⁶⁵⁵ Nevertheless, when it concerns a prior disclosure of a possible law, the case could be that there is copyright protection according to art. 15b *Dutch Copyright Law*.⁶⁵⁶

2.3.2.5 Are there other ways not to infringe copyright?

The placing of a hyperlink of the work is allowed.⁶⁵⁷

Art. 15 *Dutch Copyright Law* explains that it is permitted to copy from newspapers (although, attention should be paid to the context of the article since an article published in such a medium can be more than only news)⁶⁵⁸ from and by the press. Yet, since a manager or a user of a missing persons’ website should not be considered to belong to the press, he or she is not allowed to use this argument in court.⁶⁵⁹ However, even if in the event that the manager could be regarded as belonging to the press, than still art. 15 *Dutch Copyright Law* is not applicable if the copied information is only used as background information and not as a news article.⁶⁶⁰

Art. 15a *Dutch Copyright Law* concerns quoting and the article provides six reasons when quotation is allowed, e.g. a manager and/or user of a missing persons’ website is allowed to quote when it concerns the purpose of explaining how a person became missing, since it concerns informing other people about the circumstances of a disappearing.⁶⁶¹ The publishing of a whole newspaper article cannot be regarded as quoting.⁶⁶² The source of the information quoted must be provided.⁶⁶³ However, although a manager and/or user has provided a source,

⁶⁵¹ <http://wiki.creativecommons.org/Netherlands> (12 August 2012).

⁶⁵² <http://kluwercopyrightblog.com/2011/03/10/in-defence-of-a-fair-use-defence/> (12 August 2012). See also Alberdingk Thijm 1998, p. 145-154 and Senftleben 2009, p. 1-7.

⁶⁵³ Spoor, Verkade and Visser 2005, p. 550.

⁶⁵⁴ Ibid, p. 137-140.

⁶⁵⁵ Schroevers and Doğan 2004, p. 21 and <http://creativecommons.nl/2010/03/31/rijksoverheid-in-het-publieke-domein/> (12 August 2012).

⁶⁵⁶ Spoor, Verkade and Visser 2005, p. 137-138 and 140-150.

⁶⁵⁷ Ibid, p. 407-408.

⁶⁵⁸ Rechtbank Breda 30 mei 2012, *LJN* BW7204, paragraphs 3.8.4-3.8.5.

⁶⁵⁹ Spoor, Verkade and Visser 2005, p. 227-230. See e.g. Rechtbank Dordrecht 20 juli 2011, *LJN* BR2517, paragraphs 4.7-4.12.

⁶⁶⁰ See e.g. Rechtbank Dordrecht 20 juli 2011, *LJN* BR2517, paragraph 4.11.

⁶⁶¹ Spoor, Verkade and Visser 2005, p. 241-243.

⁶⁶² Rechtbank Breda 30 mei 2012, *LJN* BW7204, paragraphs 3.10.1-3.10.2.

⁶⁶³ Spoor, Verkade and Visser 2005, p. 241-243.

he or she can still be sued for copyright infringement because, for example, the original author of the work missed out on compensation for the republication of his or her work since the reader of the article does not visit its original source.⁶⁶⁴

Art. 15c *Dutch Copyright Law* (paying for e.g. reproduction) can be considered important.

2.3.2.6 When is there copyright infringement?

There are three possibilities to claim for a Dutch court to have jurisdiction: First, if the damage of the copyright infringement was felt in The Netherlands (art. 6 (e) *Dutch Code of Civil Procedure*), second, if the act took place in The Netherlands (art. 102 *Dutch Code of Civil Procedure*) or, third, when the plaintiff and the defendant decided together that a Dutch court should hear the case (art. 8 (1) *Dutch Code of Civil Procedure*).⁶⁶⁵

Normally, the owner of the work is the person who can sue the infringer of his or her copyright.⁶⁶⁶ A copyright infringement in a civil procedure can be brought against any person who breaches copyright law, even against e.g. the person who provoked the copyright infringer (art. 6:162 *Dutch Civil Code*).⁶⁶⁷ The plaintiff has to prove four conditions: First, the act must be considered unlawful, second, the unlawful act has been committed by the defendant, third, the unlawful act committed by the defendant must result in damage, and, fourth, there must be causality between the damage and the unlawful act committed by the defendant.⁶⁶⁸ Nevertheless, even if these four conditions are fulfilled by the defendant, the Dutch judge can declare that, based on the circumstances of the case, the defendant is not guilty due to the relativity requirement as mentioned in art. 6:163 *Dutch Civil Code* (also seen as a fifth condition).⁶⁶⁹ In other words, the damages of the plaintiff must be the result of the wrongful act committed by the defendant.⁶⁷⁰

The copyright owner can ask for monetary damages (likely including the profits of the infringer), for a declaratory judgement (art. 3:302 *Dutch Civil Code*), for a prohibition (with a monetary penalty if necessary), rectification and/or publication of the judgement and other sanctions as the destruction of copies.⁶⁷¹

The limitation to begin a copyright infringement case is within five years that the plaintiff became aware that he had suffered damage due to the copyright infringement act and knew who had committed it (art. 3:310 (1) and (5) *Dutch Civil Code*).⁶⁷²

2.3.2.7 Missing persons' websites and The Netherlands

The website of the *Government of the Netherlands (Rijksoverheid)*⁶⁷³ should be regarded as an information website.⁶⁷⁴ It is created under a “*Creative Commons Zero*” license⁶⁷⁵, which means that the information provided on its website can be copied unless otherwise stated.⁶⁷⁶

⁶⁶⁴ Rechtbank Breda 30 mei 2012, *LJN* BW7204, paragraph 3.14.2.

⁶⁶⁵ http://ec.europa.eu/civiljustice/jurisdiction_courts/jurisdiction_courts_net_nl.htm (12 August 2012), Smith, Bird & Bird 2007, p. 627 and Pontier 2001, p. 74-81.

⁶⁶⁶ Spoor, Verkade and Visser 2005, p. 480.

⁶⁶⁷ *Ibid.*, p. 489-490.

⁶⁶⁸ Kottenhagen and Kottenhagen-Edzes 2007, p. 188 and <http://www.aansprakelijkheid.nl/nl/overige-aansprakelijkheid/onrechtmatige-daad-en-aansprakelijkheid/> (12 August 2012).

⁶⁶⁹ Spier, Hartlief, van Maanen and Vriesendorp 2009, p. 21 and 60-67, Kottenhagen and Kottenhagen-Edzes 2007, p. 188 and 191 and <http://www.aansprakelijkheid.nl/nl/overige-aansprakelijkheid/onrechtmatige-daad-en-aansprakelijkheid/> (12 August 2012).

⁶⁷⁰ *Ibid.* and Hoge Raad 22 februari 2002, *LJN* AD5356 (Conclusion of Mr. L. Strikwerda), paragraph 16.

⁶⁷¹ Spoor, Verkade, Visser 2005, p. 490-525.

⁶⁷² Verheij 2005, p. 18-20 and <http://www.aansprakelijkheid.nl/nl/overige-aansprakelijkheid/verjaring-en-onrechtmatige-daad/> (12 August 2012).

⁶⁷³ <http://www.government.nl/> and <http://www.rijksoverheid.nl/> (both 12 August 2012).

There are four missing persons' websites in The Netherlands. The first one concerns the Dutch missing children website⁶⁷⁷ of which, according to its "Copyright" section, no information or flyers of this website can be used without the permission of the *Korps Landelijke Politiediensten* (or *National Police Services Agency*)^{678 679}. However, since the website is part of the US missing children website *NCMEC*⁶⁸⁰, it is a part of "The Global Missing Children's Network"⁶⁸¹ of the *ICMEC*⁶⁸², meaning that it could be possible that the copyright condition of the Dutch missing children's website could be circumvented by using the US based missing children's website and using the "Terms of Use"⁶⁸³ section of that website.⁶⁸⁴

Second, since 11 November 2008, the Dutch *Amber Alert*⁶⁸⁵ can be applied in cases where the child is missing and considered to be in (mortal or physical) danger.⁶⁸⁶ In general, the criteria for a Dutch *Amber Alert*⁶⁸⁷ are: the child is younger than 18 years, he or she is in danger, information about the child is available and the child must be missing according to the police.⁶⁸⁸ If a child is parental abducted or has runaway from home, the system will not be used.⁶⁸⁹ From 14 December 2010 till now⁶⁹⁰, all missing children shown on the Dutch missing children website⁶⁹¹ are placed on the website of the Dutch *Amber Alert*.⁶⁹² A manager of a missing persons' website can choose for the possibility of placing an *Amber Alert Banner* on his or her website.⁶⁹³ When it concerns copyright, in the "FQA – Amber Alert" section, it is only explained that the logo is copyright protected.⁶⁹⁴ Since the Dutch *Amber Alert*⁶⁹⁵ works together with the *Korps Landelijke Politiediensten* (or *National Police Services Agency*)⁶⁹⁶ and the flyers from the Dutch *Amber Alert*⁶⁹⁷ immediately redirect to the Dutch missing

⁶⁷⁴ <http://www.rijksoverheid.nl/onderwerpen/> (12 August 2012).

⁶⁷⁵ http://wiki.creativecommons.org/Case_Studies/Netherlands_Government (12 August 2012).

⁶⁷⁶ <http://www.rijksoverheid.nl/copyright>, <http://www.rijksoverheid.nl/copyright/nederlandse-vertaling-cc0>, <http://www.government.nl/copyright> and <http://creativecommons.org/licenses/?lang=en> (all 12 August 2012).

⁶⁷⁷ <http://www.missingkids.nl/missingkids/servlet/PublicHomeServlet> (12 August 2012).

⁶⁷⁸ <http://www.politie.nl/KLPD/default.asp> and <http://www.politie.nl/English/> (both 12 August 2012).

⁶⁷⁹ http://www.missingkids.nl/missingkids/servlet/PageServlet?LanguageCountry=nl_NL&PageId=1010 (12 August 2012).

⁶⁸⁰ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

⁶⁸¹ http://www.icmec.org/missingkids/servlet/PageServlet?LanguageCountry=en_X1&PageId=3065 (12 August 2012).

⁶⁸² <http://www.icmec.org/missingkids/servlet/PublicHomeServlet> (12 August 2012).

⁶⁸³ http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1923 (12 August 2012).

⁶⁸⁴ *US Department of Justice 2011*, p. 13.

⁶⁸⁵ <http://www.amberalernederland.nl/Default.aspx?lang=nl> (12 August 2012).

⁶⁸⁶ Beek 2008, p. 2-3 and <http://www.amberalernederland.nl/> (12 August 2012).

⁶⁸⁷ <http://www.amberalernederland.nl/Default.aspx?lang=nl> (12 August 2012).

⁶⁸⁸ <http://www.amberalernederland.nl/Faq.aspx> (12 August 2012).

⁶⁸⁹ Beek 2008, p. 2.

⁶⁹⁰ Until 12 August 2012.

⁶⁹¹ <http://www.missingkids.nl/missingkids/servlet/PublicHomeServlet> (12 August 2012).

⁶⁹² <http://www.amberalernederland.nl/Default.aspx?lang=nl> (12 August 2012).

⁶⁹³ <http://www.amberalernederland.nl/ReceiveAlert.aspx?id=3&lang=nl>,

<http://www.amberalernederland.nl/ReceiveAlert.aspx?id=banner&lang=nl> and

<http://www.amberalernederland.nl/Faq.aspx?lang=nl> (all 12 August 2012).

⁶⁹⁴ <http://www.amberalernederland.nl/Faq.aspx?lang=nl/> (12 August 2012) and at the bottom of each page.

⁶⁹⁵ <http://www.amberalernederland.nl/Default.aspx?lang=nl> (12 August 2012).

⁶⁹⁶ <http://www.politie.nl/KLPD/default.asp> and <http://www.politie.nl/English/> (both 12 August 2012).

⁶⁹⁷ <http://www.amberalernederland.nl/Default.aspx?lang=nl> (12 August 2012).

children website⁶⁹⁸, the copyright policy of the *Korps Landelijke Politiediensten* (or *National Police Services Agency*)⁶⁹⁹ should be followed.⁷⁰⁰

The third one concerns a missing adults' website⁷⁰¹, which explains, according to its "Copyright" section on the website of the *Korps Landelijke Politiediensten* (or *National Police Services Agency*)⁷⁰², that no information or flyers of this website may be used without the permission of this agency.⁷⁰³

Fourth, another source of finding missing and abducted children is the Dutch television programme *Vermist*⁷⁰⁴, which is broadcasted twice a month on Friday.⁷⁰⁵ The programme asks the help of the general public in locating missing people.⁷⁰⁶ The programme is involved in finding missing persons as finding people lost of sight due to other circumstances (e.g. adoption).⁷⁰⁷ On the website of *Vermist*⁷⁰⁸ flyers of missing adults and children can be found.⁷⁰⁹ According to their "Help" section, materials, as information and flyers, may not be copied from the website without permission of the Dutch television and radio organization *Televisie Radio Omroep Stichting* or *TROS*^{710 711}.

Until now, there was no case brought before the Dutch court about copyright infringement and missing people regarding the website of the *Government of the Netherlands* (*Rijksoverheid*)⁷¹², any of the organizations mentioned above, a US based missing persons' website or its user(s).⁷¹³

2.3.3 *England*

2.3.3.1 What is copyright protected?

The UK is a member country of the *Berne Convention*^{714 715}.

In general, the legal framework concerning English copyright law can be found in the *Copyright, Designs and Patents Act* of 1988 (also known as the *1988 Act*).⁷¹⁶

A work can only be copyright protected if it falls under one of the categories as described under Section 1 Chapter I Part 1 *1988 Act*.⁷¹⁷ Websites and/or comments can be seen as

⁶⁹⁸ <http://www.missingkids.nl/missingkids/servlet/PublicHomeServlet> (12 August 2012).

⁶⁹⁹ <http://www.politie.nl/KLPD/default.asp> and <http://www.politie.nl/English/> (both 12 August 2012).

⁷⁰⁰ http://www.amberalernederland.nl/files/press/AMBER_Alert_Realtime_opsporen_via_ieder_scherm.pdf and <http://www.amberalernederland.nl/Default.aspx?lang=nl> (both 12 August 2012).

⁷⁰¹ http://www.politie.nl/Opsporing/vermiste_personen.asp (12 August 2012).

⁷⁰² <http://www.politie.nl/KLPD/default.asp> and <http://www.politie.nl/English/> (both 12 August 2012).

⁷⁰³ <http://www.vermistepersonen.info/copyright/default.asp> (12 August 2012).

⁷⁰⁴ <http://www.vermist.nl/> (12 August 2012).

⁷⁰⁵ <http://www.vermist.nl/index.php?id=16> (12 August 2012).

⁷⁰⁶ Bos and Broer 2011, p. 91.

⁷⁰⁷ <http://www.vermist.nl/index.php?id=16> (12 August 2012).

⁷⁰⁸ <http://www.vermist.nl/> (12 August 2012).

⁷⁰⁹ <http://www.vermist.nl/index.php?id=5> (12 August 2012).

⁷¹⁰ <http://www.tros.nl/overdetros/> (12 August 2012).

⁷¹¹ <http://www.vermist.nl/index.php?id=9> (12 August 2012).

⁷¹² <http://www.government.nl/> and <http://www.rijksoverheid.nl/> (both 12 August 2012).

⁷¹³ There is the case *Rechtbank Amsterdam* 14 december 2006, *LJN AZ4480* in which it was decided that the abductor of a child cannot ask the court that a Dutch website is not allowed to publish the picture of his or her child when it is established that the other parent has custody of the child (art. 21 *Dutch Copyright Law*) (*Rechtbank Amsterdam* 14 december 2006, *LJN AZ4480*, paragraph *De beoordeling*). But this case-law concerned the publishing of a portrait of a person without his or her consent.

⁷¹⁴ *Berne Convention*.

⁷¹⁵ http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=1043C (12 August 2012).

⁷¹⁶ Bently and Sherman 2004, p. 29 and <http://www.legislation.gov.uk/ukpga/1988/48/contents> (12 August 2012).

⁷¹⁷ Bently and Sherman 2004, p. 56.

literary or artistic works.⁷¹⁸ Furthermore, a work is protected if the following four conditions are met: First, the work must be in a material form, second, it must be original, third the work must be connected with the UK and, fourth, no public policy grounds should apply on the work (e.g. a work may not be blasphemous, immoral or obscene)⁷¹⁹.⁷²⁰ The copyright protection is automatically given.⁷²¹ A copyright notice is not necessary, therefore, if a website does not have one, it is not correct to assume that the material on the site falls within the public domain, since the work can be listed with the *UK Copyright service*.⁷²² For example, the structure of a website can be registered with the *UK Copyright Service*.⁷²³

Sections 45-50 Part I Chapter III *1988 Act* states that acts which fall under public administration are permitted to be copied.⁷²⁴ However, when it concerns a work that is made under the direction or control of the *House of Commons*⁷²⁵ or the *House of Lords*⁷²⁶, copyright belongs to them.⁷²⁷

2.3.3.2 Who is the copyright owner?

According to Section 9 Chapter I Part I *1988 Act* the author of the work is the person who has created the work.⁷²⁸ Additionally, there can be exceptions as e.g. works created by employees or *Crown copyright* (which are works made by the government)⁷²⁹⁷³⁰.

2.3.3.3 Which rights does a copyright owner have?

Sections 16-21 Chapter II Part I *1988 Act* explain which acts are only permitted by the owner of the work who has copyright, unless the copier has received permission of the copyright owner to do so.⁷³¹ Section 16 (1) Chapter II Part I *1988 Act* elaborates that the owner of the copyright protected work is allowed, amongst others, to make copies (Section 17 Chapter II Part I *1988 Act*), to issue copies of the work to the public (Section 18 Chapter II Part I *1988 Act*), lending or renting of the work (Section 18A Chapter II Part I *1988 Act*), to make the work available to the public (Section 20 Chapter II Part I *1988 Act*) and adapting the work (Section 21 Chapter II Part I *1988 Act*).⁷³²

2.3.3.3.1 Consent and licensing

It is possible for the owner of a work to have a “*Creative Common License*” in the UK (only for England and Wales).⁷³³ Another possibility is to get a “*copyleft license*” (e.g. for

⁷¹⁸ Ibid, p. 84.

⁷¹⁹ Ibid, p. 11-112.

⁷²⁰ Ibid, p. 86-113.

⁷²¹ http://www.copyrightservice.co.uk/copyright/p01_uk_copyright_law (12 August 2012) and Bently and Sherman 2004, p. 115.

⁷²² http://www.copyrightservice.co.uk/copyright/copyright_myths and http://www.copyrightservice.co.uk/copyright/p02_protecting_copyright (both 12 August 2012).

⁷²³ http://www.copyrightservice.co.uk/protect/p23_registering_websites (12 August 2012).

⁷²⁴ Bently and Sherman 2004, p. 215-216.

⁷²⁵ <http://www.parliament.uk/business/commons/> (12 August 2012).

⁷²⁶ <http://www.parliament.uk/lords> (12 August 2012).

⁷²⁷ Bently and Sherman 2004, p. 126.

⁷²⁸ Ibid, p. 114.

⁷²⁹ Judge 2011, p. 211-214 and http://www.copyrightservice.co.uk/copyright/p01_uk_copyright_law/ (12 August 2012).

⁷³⁰ Bently and Sherman 2004, p. 122.

⁷³¹ Ibid, p. 130-131.

⁷³² http://www.copyrightservice.co.uk/copyright/p01_uk_copyright_law/ (12 August 2012).

⁷³³ http://wiki.creativecommons.org/UK:_England_and_Wales and <http://www.creativecommons.org.uk/> (both 12 August 2012).

software)⁷³⁴, which allows others than the copyright owner that the work can, without restraint, be copied, distributed or adapted, only if, e.g. the altered work is again free to be copied, altered and distributed.⁷³⁵ However, a “*copyleft license*” is not the same as claiming that the work is in the public domain, since if a work is in the public domain, a person using that work is allowed to make financial gain, while this is not necessarily the case with a “*copyleft license*”.⁷³⁶

2.3.3.3.2 Fair Use

There is no copyright infringement if the “*fair dealing*” defence can be used, which means that the manager and/or user was allowed to copy some material (quoting) and publish it on a website (Sections 29-30 Chapter III Part I 1988 Act).⁷³⁷ However, it may only be used for information as described in the article.⁷³⁸ For example, if the copying took place in case of criticism⁷³⁹ or news reporting⁷⁴⁰, there is no copyright infringement (Section 30 Chapter III Part I 1988 Act).

If the purpose of the copying does not fall under the “*fair dealing*” justification, the copying is not allowed.⁷⁴¹ Therefore, it can be concluded that the UK approach can be seen as the opposite of the US approach of “*fair use*”.⁷⁴²

2.3.3.4 How long is copyright protection available?

Section 16 Chapter II Part I 1988 Act clarifies that there is copyright protection for 70 years after the death of the author when it concerns literary, dramatic, musical or artistic works.⁷⁴³ In the case of “*Crown Copyright*”⁷⁴⁴, it can be 75 or 125 years which depends on the fact if the work is commercially published within the 75 years of its existence (Section 163 (3) Chapter X Part I 1988 Act).⁷⁴⁵

2.3.3.4.1 The Public Domain

Section 12 Chapter I Part I 1988 Act explains how long a work can be copyright protected and after the copyright is expired, the work enters the public domain.⁷⁴⁶ According to Section 12 (2) Chapter I Part I 1988 Act explains the copyright of e.g. a literary work expires after 70 years of the death of the owner of the work.

2.3.3.5 Are there other ways not to infringe copyright?

It is possible that during a copyright infringement procedure, the infringer can, if possible, to get a license from the copyright owner according to Section 98 Chapter VI Part I 1988 Act.

⁷³⁴ See e.g. <http://www.gnu.org/copyleft/> (12 August 2012).

⁷³⁵ http://www.copyrightservice.co.uk/copyright/p20_copyleft (12 August 2012).

⁷³⁶ Ibid.

⁷³⁷ Bently and Sherman 2004, p. 193- 206 and http://www.copyrightservice.co.uk/copyright/p09_fair_use/ (12 August 2012).

⁷³⁸ Alberdingk Thijm 1998, p. 149.

⁷³⁹ See also Bently and Sherman 2004, p. 200-202.

⁷⁴⁰ See also Bently and Sherman 2004, p. 203-206.

⁷⁴¹ Bently and Sherman 2004, p. 192-193.

⁷⁴² Ibid, p. 193.

⁷⁴³ http://www.copyrightservice.co.uk/copyright/p01_uk_copyright_law and http://www.copyrightservice.co.uk/copyright/p05_copyright_infringement (both 12 August 2012).

⁷⁴⁴ Judge 2011, p. 211-214 and http://www.copyrightservice.co.uk/copyright/p01_uk_copyright_law/ (12 August 2012).

⁷⁴⁵ http://www.copyrightservice.co.uk/copyright/p01_uk_copyright_law/ (12 August 2012).

⁷⁴⁶ http://www.copyrightservice.co.uk/copyright/p10_duration (12 August 2012).

According to Sections 45-50 Chapter III Part I *1988 Act*, there is no copyright infringement when it concerns the reproduction of information of parliamentary and judicial proceedings, the Royal Commission and statutory inquiries, material that is open to public inspection or located on official registers, material communicated to the Crown and in the course of public business, public records and acts done under statutory authority.

In the UK it is not entirely clear if judicial decisions fall under “*Crown Copyright*”⁷⁴⁷, but it is assumed they do.⁷⁴⁸

2.3.3.6 When is there copyright infringement?

Normally the English court can claim “*Forum non-conveniens*” to decline jurisdiction because it is of the opinion that a court in another jurisdiction is more suitable to decide about the case in question.⁷⁴⁹ Yet, since the UK is an EU-Member-State, it is obliged to follow EU law concerning jurisdiction, as the *Brussels I Regulation*⁷⁵⁰ and the *Rome II Regulation*⁷⁵¹, instead of its own national law.⁷⁵² The English court can have jurisdiction on the basis of territory⁷⁵³ since, according to art. 8 (1) and (2) *Rome II Regulation*⁷⁵⁴, copyright infringement cases can be decided by the English court when it concerns the national law of the copyrighted work or the place where the infringement took place. Nevertheless, a defendant can argue that the English court does not have jurisdiction according to Rule 11 *Civil Procedure Rules* or *CPR*.⁷⁵⁵

Sections 16 -21 Chapter II Part I *1988 Act* clarify when a copyright infringement act has happened.⁷⁵⁶ Not important is what the intention of the infringer was, since the sections mentioned are based on strict liability.⁷⁵⁷ Nevertheless, in the case of determining the damages, it could be a relevant factor.⁷⁵⁸ As a remark, the infringement of a copyright is also not allowed even if it is not committed for financial gain.⁷⁵⁹ There could also be secondary infringement (Sections 22-26 Chapter II Part I *1988 Act*), however this kind of infringement will not be examined since it concerns the commercial exploitations of copies where the copyright infringer had reason to believe or could have known that the material was copyright infringed material.⁷⁶⁰

⁷⁴⁷ Judge 2011, p. 211-214 and http://www.copyrightservice.co.uk/copyright/p01_uk_copyright_law/ (12 August 2012).

⁷⁴⁸ http://www.theregister.co.uk/2009/08/10/court_filing_copyright/, <http://www.barcouncil.org.uk/for-the-bar/practice-updates-and-guidance/guidance-on-other-issues/copyright-status-of-court-judgments/>, <http://www.opsi.gov.uk/advice/crown-copyright/crown-copyright-in-the-information-age.pdf/> (all 12 August 2012) and Bently and Sherman 2004, p. 126 and 156.

⁷⁴⁹ <http://www.herbertsmith.com/NR/rdonlyres/3F7524EE-9AB8-4B6A-9993-285934A7EF14/1605/Regjuris.pdf/> (12 August 2012).

⁷⁵⁰ *Council Regulation (EC) No 44/2001*.

⁷⁵¹ *Regulation (EC) No 864/2007*.

⁷⁵² <http://www.herbertsmith.com/NR/rdonlyres/3F7524EE-9AB8-4B6A-9993-285934A7EF14/1605/Regjuris.pdf> and

<http://www.clarkslegal.com/Article/783/Determining%20Jurisdiction%20under%20English%20Law/> (both 12 August 2012).

⁷⁵³ Smith, Bird & Bird 2007, p. 492.

⁷⁵⁴ *Regulation (EC) No 864/2007*.

⁷⁵⁵ Stone 2010, p. 187-188.

⁷⁵⁶ Bently and Sherman 2004, p. 130-131.

⁷⁵⁷ *Ibid*, p. 130-132.

⁷⁵⁸ *Ibid*, p. 132.

⁷⁵⁹ http://www.copyrightservice.co.uk/copyright/copyright_myths (12 August 2012).

⁷⁶⁰ Bently and Sherman 2004, p. 132.

Section 16 (2) and (3) Chapter II Part I 1988 Act explains that primary copyright infringement⁷⁶¹ takes place when:

“(2) Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.

(3) References in this Part to the doing of an act restricted by the copyright in a work are to the doing of it—
(a) in relation to the work as a whole or any substantial part of it, and
(b) either directly or indirectly;

and it is immaterial whether any intervening acts themselves infringe copyright.”

Section 27 Chapter II Part I 1988 Act describes what should be regarded as an “*infringing copy*”.

The owner or exclusive licensee can start a copyright infringement procedure before the court and can ask for damages, injunctions (against service providers)⁷⁶² ... (Section 96 (1) and (2) and Sections 99-104 Chapter VI Part I 1988 Act).⁷⁶³ Section 97 Chapter VI Part I 1988 Act concerns the damages. In Sections 107-110 Section 97 Chapter VI Part I 1988 Act, the criminal procedure is explained.

Besides, if the copyright owner should chose between a civil or criminal case, it is recommended to choose for a civil case since civil law requires a lower burden of proof than in a criminal case.⁷⁶⁴ However, it is recommended that the copyright owner should first write a letter to the copyright infringer in order for him or her to stop the copyright infringing act, unless the copyright owner is of the opinion that he or she should receive e.g. damages.⁷⁶⁵

Section 58 Part I *Limitation Act 1980* explains that the limitation to begin a copyright infringement case is six years.

2.3.3.7 Missing persons’ websites in England

The website of the *UK Government*⁷⁶⁶ explains that it applies “*Crown Copyright*”⁷⁶⁷ on its website.⁷⁶⁸ It also clarifies in its “*Terms and conditions*” section that, amongst others, a user may not distribute copyright infringed material on the website and that it is not responsible for the content of other websites it links to.⁷⁶⁹

The *Missing Persons Bureau*⁷⁷⁰ is part of the *Serious Organized Crime Agency* or *SOCA*.⁷⁷¹ It provides, amongst others, information for the general public⁷⁷² and the police concerning missing persons.⁷⁷³ It has a “*Terms and Conditions for using this Website*” section in which it explains, besides its copyright, that it also has an “*Open Government License*” and that “*Crown Copyrighted*” material can be located on its website.⁷⁷⁴

⁷⁶¹ Ibid, p. 162-185.

⁷⁶² Section 97A Chapter VI Part I 1988 Act.

⁷⁶³ http://www.copyrightservice.co.uk/copyright/p01_uk_copyright_law (12 August 2012).

⁷⁶⁴ http://www.copyrightservice.co.uk/copyright/copyright_myths (12 August 2012).

⁷⁶⁵ http://www.copyrightservice.co.uk/copyright/p05_copyright_infringement (12 August 2012).

⁷⁶⁶ <http://www.direct.gov.uk/en/index.htm> / (12 August 2012).

⁷⁶⁷ Judge 2011, p. 211-214 and http://www.copyrightservice.co.uk/copyright/p01_uk_copyright_law/ (12 August 2012).

⁷⁶⁸ http://www.direct.gov.uk/en/SiteInformation/DG_020460/ (12 August 2012).

⁷⁶⁹ http://www.direct.gov.uk/en/SiteInformation/DG_020455/ (12 August 2012).

⁷⁷⁰ <http://www.soca.gov.uk/about-soca/missing-persons-bureau/> (12 August 2012).

⁷⁷¹ <http://www.soca.gov.uk/> and <http://www.soca.gov.uk/about-soca/> (both 12 August 2012).

⁷⁷² <http://www.soca.gov.uk/about-soca/missing-persons-bureau/412/> (12 August 2012).

⁷⁷³ <http://www.soca.gov.uk/about-soca/missing-persons-bureau/> (12 August 2012).

⁷⁷⁴ <http://www.soca.gov.uk/terms-and-conditions/> and <http://www.nationalarchives.gov.uk/doc/open-government-licence/> (both 12 August 2012).

The national missing children website⁷⁷⁵ is part of “*The Global Missing Children’s Network*” of the ICMEC^{776 777}. It has a “*Terms and Conditions*” section on its website explaining when copying is allowed.⁷⁷⁸ It has a copyright notice at the bottom of each page of its website.⁷⁷⁹ It also refers to other websites as *Parents & Abducted Children Together* or *Pact*⁷⁸⁰, the *Missing Persons Bureau*⁷⁸¹ and *Missing People*^{782 783}.

The UK does have an *Amber Alert system* called the *Child Rescue Alert*.⁷⁸⁴ The system works the same way as the US *Amber Alert*^{785 786}. Nevertheless, the website of the UK *Child Rescue Alert*⁷⁸⁷ no longer exists⁷⁸⁸ and the information provided by the *National Policing Improvement Agency*⁷⁸⁹ is outdated.⁷⁹⁰ While on the website of *Missing Persons Bureau*⁷⁹¹ the alert is only explained.⁷⁹²

In sum, *Parents & Abducted Children Together* or *Pact*⁷⁹³ is a non-profit organization (registered in the US as the UK), which should be regarded as an associate of the ICMEC^{794 795}. It came into existence in 1999 by Lady Catherine Meyer who also co-founded, together with Ernie Allen, the ICMEC^{796 797}. It is involved in shaping policies concerning the protection and recovery of missing children.⁷⁹⁸ There is no copyright policy on the website, but it seems that permission to use and publish the information provided of the website must be obtained in advanced, since the organization must be contacted before a link from *Pact*⁷⁹⁹ can be provided on another missing persons’ website.⁸⁰⁰

⁷⁷⁵ <http://uk.missingkids.com> (12 August 2012).

⁷⁷⁶ <http://www.icmec.org/missingkids/servlet/PublicHomeServlet> (12 August 2012).

⁷⁷⁷ <http://uk.missingkids.com/> (12 August 2012).

⁷⁷⁸ <http://uk.missingkids.com/terms/> (12 August 2012).

⁷⁷⁹ See e.g. <http://uk.missingkids.com/terms/> (12 August 2012).

⁷⁸⁰ <http://www.pact-online.org/> (12 August 2012).

⁷⁸¹ <http://www.soca.gov.uk/about-soca/missing-persons-bureau/> (12 August 2012).

⁷⁸² <http://www.missingpeople.org.uk/> (12 August 2012).

⁷⁸³ <http://uk.missingkids.com/terms/>. The website of the *Child Exploitation & Online Protection Centre* (<http://ceop.police.uk/>) will not be discussed since it is not about missing children (all 12 August 2012).

⁷⁸⁴ <http://www.npia.police.uk/en/16017.htm> and <http://www.soca.gov.uk/about-soca/missing-persons-bureau/child-rescue-alert> (both 12 August 2012).

⁷⁸⁵ <http://www.amberalert.gov/> (12 August 2012).

⁷⁸⁶ <http://www.npia.police.uk/en/16017.htm> (12 August 2012).

⁷⁸⁷ Ibid.

⁷⁸⁸ <http://www.npia.police.uk/cps/rde/xchg/npia/root.xml/404.htm?rdeStandardPropertyPage=yes> and http://uk.missingkids.com/missingkids/servlet/ServiceServlet?LanguageCountry=en_GB&PageId=2943 (both 12 August 2012).

⁷⁸⁹ <http://www.npia.police.uk/en/home.htm> (12 August 2012).

⁷⁹⁰ The information provided is from 2009 and 2010 (<http://www.npia.police.uk/en/13253.htm> and <http://www.npia.police.uk/en/16017.htm> (both 12 August 2012)).

⁷⁹¹ <http://www.soca.gov.uk/about-soca/missing-persons-bureau/> (12 August 2012).

⁷⁹² <http://www.soca.gov.uk/about-soca/missing-persons-bureau/child-rescue-alert/> (12 August 2012).

⁷⁹³ <http://www.pact-online.org/> (12 August 2012).

⁷⁹⁴ <http://www.icmec.org/missingkids/servlet/PublicHomeServlet> (12 August 2012).

⁷⁹⁵ <http://www.pact-online.org/About-Us/about-us-what-is-pact-parents-and-abducted-children-together-parental-abduction-missing-children-associate-of-icmec.html> (12 August 2012).

⁷⁹⁶ <http://www.icmec.org/missingkids/servlet/PublicHomeServlet> (12 August 2012).

⁷⁹⁷ <http://www.pact-online.org/About-Us/about-us-what-is-pact-parents-and-abducted-children-together-parental-abduction-missing-children-associate-of-icmec.html> and

http://www.icmec.org/missingkids/servlet/NewsEventServlet?LanguageCountry=en_X1&PageId=1236 (both 12 August 2012).

⁷⁹⁸ <http://www.pact-online.org/About-Us/about-us-what-is-pact-parents-and-abducted-children-together-parental-abduction-missing-children-associate-of-icmec.html> (12 August 2012).

⁷⁹⁹ <http://www.pact-online.org/> (12 August 2012).

⁸⁰⁰ <http://www.pact-online.org/Get-Involved/get-involved-pact-parents-and-abducted-children-together-parental-abduction-missing-children-associate-of-icmec.html> (12 August 2012).

When it concerns missing adults, there is *Missing People*⁸⁰¹, a charity which helps left-behind persons in their search for a missing person.⁸⁰² It even exchanges messages between missing people (located but not ready to get in touch with their family) and left-behind persons.⁸⁰³ The website has a copyright policy in which it is explained that the information provided on the website cannot be copied and published and that links must be approved by the charity first.⁸⁰⁴ A manager of a missing persons' website can write an e-mail concerning copying and republishing the copyrighted material of this organization.⁸⁰⁵ Comments containing copyright infringement material will be removed by the manager of this website.⁸⁰⁶

Until now, there was no case brought before the English court about copyright infringement and missing people regarding the website of the *UK Government*⁸⁰⁷, the *Missing Persons Bureau*⁸⁰⁸, any of the organizations mentioned above, a US based missing persons' website or its user(s)

⁸⁰¹ <http://www.missingpeople.org.uk/> (12 August 2012).

⁸⁰² Ibid.

⁸⁰³ *Home Office 2011*, p. 8.

⁸⁰⁴ <http://www.missingpeople.org.uk/missing-people/terms-of-use> (12 August 2012).

⁸⁰⁵ Ibid.

⁸⁰⁶ Ibid.

⁸⁰⁷ <http://www.direct.gov.uk/en/index.htm/> (12 August 2012).

⁸⁰⁸ <http://www.soca.gov.uk/about-soca/missing-persons-bureau/> (12 August 2012).

Chapter 3: Defamation

Introduction

It is not uncommon that in the case of missing persons (and especially when it concerns the disappearance of a child) all kinds of theories and/or comments are posted on the internet. Some of them are well documented, while others are just unfounded statements. However, even if a manager or user has thoroughly researched a disappearance and writes a case file or comment about it, he or she can still be accused of defamation.

In this chapter the following sub questions will be discussed:

1. What is defamation according to US law?
2. How should defamation by a manager and/or (US citizen or foreign) user of a US based missing persons' website be dealt with according to US law?
3. How is defamation prevented and dealt with in the EU, The Netherlands and England?

This chapter will be divided into two paragraphs.

First, US defamation law will be examined in detail. It will be split into four parts. To begin, the description of defamation according to US law is clarified. Then, it will be explained who can start a defamation case. Hereafter, attention will be paid to the civil court procedure, followed by defenses against a defamation claim, which is divided into three sections, first, explaining how to prevent a defamation claim, second, which legal defenses there are when there is a defamation case before a US court and, third, an answer will be given to the problem concerning the liability of the manager of a missing persons' website of a(n) (alleged) defamatory statement made by a user. The last part will show how defamation problems are solved in practice.

Second, attention is given to foreign defamation laws. This paragraph is divided into three parts, covering defamation respectively in EU, Dutch and English law. In each of these parts, a short description concerning defamation law will be provided, followed by how managers of foreign missing persons' websites are trying to prevent defamation claims.

3.1 US defamation law

3.1.1 What is defamation?

The US considers the existence of the *First Amendment* of the *US Constitution*, the *Freedom of Religion, Press and Expression*, as one of its essential rights.⁸⁰⁹ Therefore it is acknowledged and/or complaint about that the US is more interested in preserving the right of the *Freedom of Speech* than in the *Protection of Reputation*.⁸¹⁰

The *First Amendment* reads:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.”

However, the *Freedom of Speech* is not an absolute right⁸¹¹ and thus a manager and/or user of a US based missing persons' website can be accused of defamation.

Unlike US copyright law, US defamation law is not addressed on the level of federal law.⁸¹² Defamation should be regarded as a tort (a civil wrong)⁸¹³ and is defined by state law.⁸¹⁴

⁸⁰⁹ Reed 2000, p. 224.

⁸¹⁰ Mullis and Scott 2010, p. 8, 12 and 22.

⁸¹¹ Middleton and Lee 2009, p. 26.

⁸¹² In the case of copyright law see: Bouchoux 2009, p. 176 and Crews 1993, p. 146. In the case of defamation law see e.g. Golden, Vogel, Faar & Gallagher LLP 2009, p. 50-53 and Zelezny 2011, p. 119.

Important is *Restatement (Second) of Torts*⁸¹⁵ §558 and further (which is a secondary source of law, used by the US courts and prepared by the *American Law Institute*⁸¹⁶, explaining which common law trends there are and provides guidance on how a certain legal problem should be solved)⁸¹⁷ which describes the elements of defamation.

There are two forms of defamation: First, there can be defamatory statements which are made orally and are called slander or, second, the defamatory statements are in print or fixed form which are called libel (see also *Restatement (Second) of Torts*⁸¹⁸ §568).⁸¹⁹ In the case of the internet, defamation should be defined as libel instead of slander.⁸²⁰

Libel can be divided into three categories.⁸²¹

First, there can be “*libel per se*”, i.e. when the obvious defamatory statement (meaning a statement which is absolutely false) about a plaintiff is believed to cause him or her damage.⁸²² However, this kind of libel cannot be used when it only concerns the disclosure of embarrassing information.⁸²³

Second, there can be “*libel per quod*”, which is applied in cases that do not fall under “*libel per se*”.⁸²⁴ In sum, the statement itself is innocent; however, if a reader has some background knowledge about the person, the sentence can harm his or her reputation.⁸²⁵ It concerns situations where the factual accusation must be considered untrue and should not be confused with “*libel by implication*” where the statement is true, but used to create a false impression.⁸²⁶

Third, there is “*libel by implication*” or “*implied libel*” which means that a true statement is given a false impression.⁸²⁷ Nevertheless, the interpretation and thus application of this kind of libel can differ from state to state.⁸²⁸

⁸¹³ <http://www.law.cornell.edu/wex/tort> and <http://www.nolo.com/dictionary/tort-term.html> (both 12 August 2012).

⁸¹⁴ Schwabach 2006, p. 80 and <http://www.law.cornell.edu/wex/defamation> (12 August 2012).

⁸¹⁵ The *Restatement (Second) of Torts* is adopted by most states and courts (see e.g. http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2314, <http://www.kentlaw.edu/academics/lrw/tutorials/restate.htm>, <http://libguides.law.harvard.edu/content.php?pid=103327&sid=776882>, <http://libguides.law.harvard.edu/content.php?pid=103327&sid=1036651> and <http://www.lectlaw.com/files/lwr16.htm> (all 12 August 2012) and Conway-Jones 2005, p. 18).

⁸¹⁶ <http://www.ali.org/> (12 August 2012).

⁸¹⁷ <http://libguides.law.harvard.edu/content.php?pid=103327&sid=776882> and <http://libguides.law.harvard.edu/content.php?pid=103327&sid=1036651> (both 12 August 2012).

⁸¹⁸ The *Restatement (Second) of Torts* is adopted by most states and courts (see e.g. http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2314, <http://www.kentlaw.edu/academics/lrw/tutorials/restate.htm>, <http://libguides.law.harvard.edu/content.php?pid=103327&sid=776882>, <http://libguides.law.harvard.edu/content.php?pid=103327&sid=1036651> and <http://www.lectlaw.com/files/lwr16.htm> (all 12 August 2012) and Conway-Jones 2005, p. 18).

⁸¹⁹ http://www.expertlaw.com/library/personal_injury/defamation.html/ (12 August 2012).

⁸²⁰ Middleton and Lee 2009, p. 96, Smith, Bird & Bird 2007, p. 315 and http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=1874 (12 August 2012).

⁸²¹ Siegel 2011, p. 84-85.

⁸²² Carroll 2010, p. 271, Siegel 2011, p. 84, Nieto and Schmitt 2005, p.55 and http://www.expertlaw.com/library/personal_injury/defamation (12 August 2012).

⁸²³ Carroll 2010, p. 271.

⁸²⁴ Siegel 2011, p. 84-85.

⁸²⁵ Ibid.

⁸²⁶ Ibid and Nieto and Schmitt 2005, p. 56.

⁸²⁷ Golden, Vogel, Faar & Gallagher LLP 2009, p. 50-53, Siegel 2011, p. 85 and <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-law-summer-2011/libel-omission-creating-false-i> (12 August 2012).

⁸²⁸ Ibid.

Libel can also be divided into civil and criminal libel (or criminal defamation).⁸²⁹ Criminal libel can be found in 17 state laws such as in the State of Colorado.⁸³⁰ It is not applied very often, because there could be problems with the *First Amendment* and criminal libel laws are considered to be broad and vague.⁸³¹ Although, in the case of the internet, there is a discussion if criminal libel should be applied again.⁸³² Therefore, due to the problems surrounding criminal libel, only civil libel will be examined.

3.1.2 Who is the plaintiff in a defamation case?

The defendant can be sued by the person about whom the defamatory statement was made, however only if he or she is alive, since dead people cannot claim that e.g. their reputation is damaged (see *Restatement (Second) of Torts*⁸³³ §560), by e.g. family (a lawsuit does not end if the plaintiff who initiated the court procedure dies, since his or her successors could be authorized to continue the case), by a business (see *Restatement (Second) of Torts*⁸³⁴ §561 and §562) or by a group or class (see *Restatement (Second) of Torts*⁸³⁵ §564A).⁸³⁶

The *US Government* cannot sue.⁸³⁷ A person can be “free” to criticize a public official⁸³⁸, however, it can depend on the circumstances of the case if an individual staff member of the government can take the defendant to court for defamation.⁸³⁹

Since, there is a discussion in the US if a manager (and/or user) of a website (blog) should be seen as belonging to the media⁸⁴⁰, it is decided in this Master Thesis that missing persons’ websites (and eventually their blogs) are not considered to belong to the media unless otherwise specified.

3.1.3 The civil court procedure

There are several courts which can claim jurisdiction: The place where the defamation happened (also known as the “*place of origin principle*”)⁸⁴¹, the state where the person who made the defamatory statement is located, the court of the state where the harm of the defamatory statement is felt or of the state where the defamatory statement is received (nevertheless, a combination is also possible).⁸⁴² State law is the source to find how

⁸²⁹ *Organization for Security and Co-operation in Europe, The Representative on Freedom of the Media 2005*, p. 171-174.

⁸³⁰ Gardner and Anderson 2006, p. 227, Carroll 2010, p. 270 and *Organization for Security and Co-operation in Europe, The Representative on Freedom of the Media 2005*, p. 171-172.

⁸³¹ *Ibid.*

⁸³² See e.g. Carter 2005, p. 289-318 in which the author explains why criminal libel should not be applied in the case of internet speech.

⁸³³ The *Restatement (Second) of Torts* is adopted by most states and courts (see e.g. http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2314, <http://www.kentlaw.edu/academics/lrw/tutorials/restate.htm>, <http://libguides.law.harvard.edu/content.php?pid=103327&sid=776882>, <http://libguides.law.harvard.edu/content.php?pid=103327&sid=1036651> and <http://www.lectlaw.com/files/lwr16.htm> (all 12 August 2012) and Conway-Jones 2005, p. 18).

⁸³⁴ *Ibid.*

⁸³⁵ *Ibid.*

⁸³⁶ Carroll 2010, p. 270-271.

⁸³⁷ *Ibid.*, p. 270.

⁸³⁸ Bank 2010, p. 215-216.

⁸³⁹ Carroll 2010, p. 270-271.

⁸⁴⁰ See e.g. Domingo and Heinonen 2008, p. 3-15.

⁸⁴¹ *Committee on legal affairs (Rapporteur D. Wallis) 2010*, p. 10-11.

⁸⁴² *Ibid.*, Schwabach 2006, p.81 and Jerker B. Svantesson 2007, p. 156-157.

defamation cases are dealt with within a state.⁸⁴³ For example, the State of Oregon expects that the plaintiff, before starting a court case, should offer the defendant the opportunity to make a retraction (see *Chapter 31, Section 31.215 Oregon Revised Statutes*)^{844 845}.

In the case of civil libel, to demonstrate that e.g. a manager of a website and/or its user is libellous, the plaintiff must prove the following six elements: defamation, identification, publication (even when it concerns a republication), fault, falsity and injury (see also *Restatement (Second) of Torts*⁸⁴⁶ §558 (1977)).⁸⁴⁷ Although, it is possible that these elements differ from state to state, they are applied more or less the same.⁸⁴⁸

When the question arises whether a manager of a website has defamed someone, the US *State Court* will pay attention to the entire webpage and/or website in order to get an impression of the website's context.⁸⁴⁹ Also, there only exists a single-publication rule.⁸⁵⁰

The time limitation for starting a defamation case can differ from state to state (in general, for libel it is between one to three years).⁸⁵¹

3.1.4 *Defences against defamation*

Each manager or user of a website should try to protect him- or herself against a defamation claim. One possibility is to allow the other party to provide his or her side of the story (to react on the statement) by e.g. providing an e-mail address.⁸⁵² Another possibility could be that a manager of a website could take insurance against a defamation claim.⁸⁵³

This part is divided into three sections: First, how can a manager and/or user prevent a defamation claim beforehand, second, which defences are there for a manager and/or user when confronted with such a claim and third, can a manager of a website pass a defamation claim of to the user who made the actual defamatory statement on his or her website?

3.1.5 *How to prevent a defamation claim?*

There are two possible ways to prevent such claim, which can be used, by, both, the manager as the user.

⁸⁴³ Golden, Vogel, Faar & Gallagher LLP 2009, p. 53,

http://www.expertlaw.com/library/personal_injury/defamation.html and <http://www.citmedialaw.org/legal-guide/defamation> (both 12 August 2012).

⁸⁴⁴ <http://law.onecle.com/oregon/31-tort-actions/31.215.html> (12 August 2012).

⁸⁴⁵ http://www.expertlaw.com/library/personal_injury/defamation.html, <http://www.leg.state.or.us/ors/031.html>, <http://oregonintellectualproperty.com/2009/10/25/defamation-issues-for-blogs/> and http://www.osbar.org/public/legalinfo/1186_LibelSlander.htm (all 12 August 2012).

⁸⁴⁶ The *Restatement (Second) of Torts* is adopted by most states and courts (see e.g. http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2314, <http://www.kentlaw.edu/academics/lrw/tutorials/restate.htm>,

<http://libguides.law.harvard.edu/content.php?pid=103327&sid=776882>,

<http://libguides.law.harvard.edu/content.php?pid=103327&sid=1036651> and

<http://www.lectlaw.com/files/lwr16.htm> (all 12 August 2012) and Conway-Jones 2005, p. 18).

⁸⁴⁷ Carroll 2010, p. 270-271 and Golden, Vogel, Faar & Gallagher LLP 2009, p. 49.

⁸⁴⁸ Golden, Vogel, Faar & Gallagher LLP 2009, p. 49.

⁸⁴⁹ Middleton and Lee 2009, p. 106-107.

⁸⁵⁰ Rendleman 2010, p. 467-487 and Warshaw 2006, p. 273. For more information see e.g. *Notes 2010*, p. 1315-1338.

⁸⁵¹ <http://www.dancingwithlawyers.com/freeinfo/defamation-statute-limitations.shtml> and http://www.rexxfield.com/internet_libel_statute_of_limitations.php/ (both 12 August 2012).

⁸⁵² Carroll 2010, p. 270.

⁸⁵³ Bank 2010, p. 217.

First, before publishing a statement on a missing persons' website, the manager and/or user must be certain that the information provided on his or her website or comment is correct (e.g. by documenting resources beforehand such as with newspaper articles or case-law).⁸⁵⁴ Second, the manager or user could ask the consent of the person before placing the particular statement on the website, although this is not always possible.⁸⁵⁵

3.1.6 Which defences are there to react on a defamation claim?

The following defences can be used by a manager and/or user (defendant) of a website:

First, the manager and/or user can claim and prove that the statement is “*substantially true*” (e.g. by the information collected before issuing the statement).⁸⁵⁶ Even in the event that the truthful statement harms the plaintiff's reputation, the plaintiff cannot sue the manager or user for defamation. (However, a plaintiff can still hold the manager and/or user of the statement liable because e.g. the information was shared on a personal basis).⁸⁵⁷ Nevertheless, although the statement is considered to be “*substantial true*”,⁸⁵⁸ it can be regarded as defamatory due to its context according to *Restatement (Second) of Torts*⁸⁵⁹ §565 (1977).⁸⁶⁰ See e.g. as is the case with “*libel by implication*” or “*implied libel*”.⁸⁶¹

Second, opinions are protected by the *First Amendment* of the *US Constitution* (see also *Restatement (Second) of Torts*⁸⁶² §566 (1977)), however, the manager and/or user of a website should be aware that merely writing the words “*I think*” or “*in my opinion*” before the statement, does not always make it an opinion (see also *Restatement (second) of Torts*⁸⁶³ §566 (1977)).⁸⁶⁴ Name-calling falls under opinion, since it is not a fact or statement and therefore it cannot be the basis of a defamatory claim.⁸⁶⁵ Nevertheless, everything else except of the name-calling can be regarded as a defamatory statement.⁸⁶⁶

Third, another possibility could be the “*limited public figure*”⁸⁶⁷ defence, which means that if the plaintiff is known to the general public as a forefront person who is voluntarily and

⁸⁵⁴ Carroll 2010, p. 270 and Bank 2010, p. 213-214.

⁸⁵⁵ Bank 2010, p. 214.

⁸⁵⁶ <http://www.citmedialaw.org/legal-guide/defamation> and <http://www.citmedialaw.org/legal-guide/substantial-truth> (both 12 August 2012).

⁸⁵⁷ <http://www.citmedialaw.org/legal-guide/defamation> (12 August 2012).

⁸⁵⁸ Ibid and <http://www.citmedialaw.org/legal-guide/substantial-truth> (12 August 2012).

⁸⁵⁹ The *Restatement (Second) of Torts* is adopted by most states and courts (see e.g. http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2314, <http://www.kentlaw.edu/academics/lrw/tutorials/restate.htm>, <http://libguides.law.harvard.edu/content.php?pid=103327&sid=776882>, <http://libguides.law.harvard.edu/content.php?pid=103327&sid=1036651> and <http://www.lectlaw.com/files/lwr16.htm> (all 12 August 2012) and Conway-Jones 2005, p. 18).

⁸⁶⁰ Warner-Fredman 1983, p. 133.

⁸⁶¹ Golden, Vogel, Faar & Gallagher LLP 2009, p. 50-53, Siegel 2011, p. 85 and <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-law-summer-2011/libel-omission-creating-false-i> (12 August 2012).

⁸⁶² The *Restatement (Second) of Torts* is adopted by most states and courts (see e.g. http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2314, <http://www.kentlaw.edu/academics/lrw/tutorials/restate.htm>, <http://libguides.law.harvard.edu/content.php?pid=103327&sid=776882>, <http://libguides.law.harvard.edu/content.php?pid=103327&sid=1036651> and <http://www.lectlaw.com/files/lwr16.htm> (all 12 August 2012) and Conway-Jones 2005, p. 18).

⁸⁶³ Ibid.

⁸⁶⁴ http://www.expertlaw.com/library/personal_injury/defamation.html, <http://maudnewton.com/blog/?p=3899> (both 12 August 2012), Bank 2010, p. 215 and Shuy 2010, p. 15-16.

⁸⁶⁵ Ibid.

⁸⁶⁶ Ibid.

⁸⁶⁷ Merriam-Webster Inc. 1996, p. 296, Bank 2010, p. 217 and http://www.expertlaw.com/library/personal_injury/defamation.html/ (12 August 2012).

publically involved in a certain subject of a public debate (in other words he or she wants that other people are aware of his or her opinion), he or she could be considered such a figure.⁸⁶⁸ However, it is not the defendant who can state this (he or she can only suggest and prove), as it is the court who decides.⁸⁶⁹ If the plaintiff is regarded as a “*limited public figure*”⁸⁷⁰, the standard of proving “*actual malice*” on the side of the manager and/or user of the website by the plaintiff would become more difficult.⁸⁷¹

3.1.6.1 Which defence against defamation can a manager of a website have in a case where he or she is accused of a defamatory statement made by a user?

A manager of a website can claim that he or she cannot be held liable in the case of defamatory statements made by a user due to *Section 230 Communications Decency Act*⁸⁷² or *CDA* (which is a part of the *Telecommunication Act of 1996*⁸⁷³ or *Public Law 104-104, 110 Stat 56 [104th Cong, 2d Sess, Feb. 8, 1996]*)^{874, 875}.

In the case of *Shiamili v. Real Estate Group of N.Y., Inc.*⁸⁷⁶, the *New York Court of Appeals* decided on 14 June 2011 that, although a publisher of defamatory material written by a third party normally is subjected to tort liability, there is a possibility, when it concerns an internet publication (in this case a blog), to circumvent the defamation claim by applying *Section 230 CDA*.⁸⁷⁷ In sum, it is established that a blog cannot be regarded as a “*content provider*” when it concerns comments which are posted by users and when it concerns the placing of a defamatory comment under a new post.⁸⁷⁸ Also, in this case, the manager of the blog did not explicitly express that defamatory statements should be made about the plaintiff.⁸⁷⁹

3.2 US Missing persons’ websites and defamation

Below will be explained how a manager and/or user of a missing persons’ website deal in practice with defamation cases.

3.2.1 What is defamation?

In *Meuse v. Fox New Channel, Inc., and others*⁸⁸⁰, it has been clarified that locating missing children and their possible abductors are matters of public concern⁸⁸¹ and in *U.S. v. Montes-Reyes*⁸⁸² it was accepted that it is allowed for a private person to help law enforcement in locating a missing child.⁸⁸³

Defamation should be seen as a tort which is defined by state law.⁸⁸⁴ When it concerns a case of civil libel the plaintiff has to prove six elements: defamation, identification, publication,

⁸⁶⁸ Bank 2010, p. 217.

⁸⁶⁹ Milmo, Rogers and others (editors) 2004, p. 482.

⁸⁷⁰ Merriam-Webster Inc. 1996, p. 296, Bank 2010, p. 217 and

http://www.expertlaw.com/library/personal_injury/defamation.html/ (12 August 2012).

⁸⁷¹ Milmo, Rogers and others (editors) 2004, p. 482

⁸⁷² *Communications Decency Act or 47 USC §230*.

⁸⁷³ *Telecommunication Act of 1996 or Public Law 104-104, 110 Stat 56 [104th Cong, 2d Sess, Feb. 8, 1996]*.

⁸⁷⁴ *Communications Decency Act or 47 USC §230*.

⁸⁷⁵ Biederman, Pierson, Silfen, Glasser, Biederman, Abdo and Sanders 2007, p. 915.

⁸⁷⁶ *Shiamili v. Real Estate Group of N.Y., Inc.*

⁸⁷⁷ *Ibid* and Belmas and Overbeck 2012, p. 167.

⁸⁷⁸ *Ibid*.

⁸⁷⁹ *Ibid*.

⁸⁸⁰ *Meuse v. Fox News Channel, Inc., and others*.

⁸⁸¹ *Ibid*.

⁸⁸² *U.S. v. Montes-Reyes*.

⁸⁸³ *Ibid* and http://www.amberalert.gov/newsroom/pressreleases/ojp_05_0217.htm (12 August 2012).

⁸⁸⁴ Schwabach 2006, p. 80.

fault, falsity and injury (*Restatement (Second) of Torts*⁸⁸⁵ §558 (1977)).⁸⁸⁶ It is possible that these elements can differ (however, they are more or less the same) from state to state.⁸⁸⁷ For example, in the case of *Meuse v. Fox New Channel, Inc., and others*⁸⁸⁸ the *Superior Court* of Massachusetts stated that the plaintiff had to prove four conditions before he could succeed on a claim of defamation.⁸⁸⁹ These four conditions are: “...To prevail on a claim for defamation, the plaintiff must show that: (1) the defendant made a statement concerning the plaintiff to a third party, (2) the statement could damage the plaintiff's reputation in the community, (3) the defendant was at least negligent in making the statement, and (4) the statement caused the plaintiff economic harm or is actionable without proof of economic loss...”⁸⁹⁰

The Missouri case *Kenney v. Wal-Mart Stores, Inc.*⁸⁹¹ of 1 April 2003 can be used to explain what is meant with the condition of “injury” (in other words, the person claiming that he or she has been defamed has to prove any suffered damages).⁸⁹² The case concerned the distribution of missing persons’ flyers.⁸⁹³ In sum, after the father had abducted the child, the mother had reported the child missing to the *Kansas City Missouri Police Department*, had made flyers about the disappearance of her child and had accused the father and his mother of abducting the child.⁸⁹⁴ One of the flyers ended up in *Children’s Network display case*.⁸⁹⁵ The grandmother sued *Wal-Mart*⁸⁹⁶ for defamation and damages because there was inaccurate information on the flyer and because the flyer remained in display although the child was returned to her mother.⁸⁹⁷ The jury verdict was that *Wal-Mart*⁸⁹⁸ had published the flyer by failing to remove it from the display case and therefore awarded the grandmother damages.⁸⁹⁹ Hereafter, *Wal-Mart*⁹⁰⁰ went in appeal against the verdict and the judge ordered that the grandmother had to prove under Missouri law that she had suffered reputational harm.⁹⁰¹ The fact that the grandmother had experienced e.g. humiliation was not enough and it was decided in this case that the jury had not taken this into consideration.⁹⁰² Besides, *Wal-Mart*⁹⁰³ also questioned the issue of damages incurred by the alleged defamation, since there were no other circumstances (e.g. loss of employment directly linked to the defamation) besides emotional distress and therefore, the *Supreme Court* of Missouri ordered that the trial court should be reversed and that a new trial should take place in order to let the grandmother prove that she had indeed suffered reputational harm.⁹⁰⁴

⁸⁸⁵ The *Restatement (Second) of Torts* is adopted by most states and courts (see e.g. http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2314, <http://www.kentlaw.edu/academics/lrw/tutorials/restate.htm>, <http://libguides.law.harvard.edu/content.php?pid=103327&sid=776882>, <http://libguides.law.harvard.edu/content.php?pid=103327&sid=1036651> and <http://www.lectlaw.com/files/lwr16.htm> (all 12 August 2012) and Conway-Jones 2005, p. 18).

⁸⁸⁶ Carroll 2010, p. 270-271 and Golden, Vogel, Faar & Gallagher LLP 2009, p. 49.

⁸⁸⁷ Golden, Vogel, Faar & Gallagher LLP 2009, p. 49.

⁸⁸⁸ *Meuse v. Fox News Channel, Inc., and others*.

⁸⁸⁹ *Ibid.*

⁸⁹⁰ *Ibid.*

⁸⁹¹ *Kenney v. Wal-Mart Stores*.

⁸⁹² Carroll 2010, p. 270.

⁸⁹³ *Kenney v. Wal-Mart Stores*.

⁸⁹⁴ *Ibid.*

⁸⁹⁵ *Ibid.*

⁸⁹⁶ <http://www.walmart.com/> (12 August 2012).

⁸⁹⁷ *Kenney v. Wal-Mart Stores*.

⁸⁹⁸ <http://www.walmart.com/> (12 August 2012).

⁸⁹⁹ *Kenney v. Wal-Mart Stores*.

⁹⁰⁰ <http://www.walmart.com/> (12 August 2012).

⁹⁰¹ *Kenney v. Wal-Mart Stores*.

⁹⁰² *Ibid.*

⁹⁰³ <http://www.walmart.com/> (12 August 2012).

⁹⁰⁴ *Kenney v. Wal-Mart Stores*.

3.2.2 Who is the plaintiff in a defamation case?

In a missing person's case, it depends on the circumstances who can be regarded as plaintiff. It can be the missing person, although he or she has to be alive (see *Restatement (Second) of Torts*⁹⁰⁵ §560 (1977)), the (former) abductor, a left-behind person, a person who is believed to be involved in a disappearance or even a manager of another missing persons' website.

3.2.3 The civil court procedure

When it concerns jurisdiction, there are several courts which could claim jurisdiction on the basis of certain conditions, e.g. the court of the place where the defamation happened and/or the state where the person who made the defamatory statement is located....⁹⁰⁶ An example is e.g. the case *Senese v. Hindle*⁹⁰⁷ where the plaintiff, amongst others, accused the defendant of defamatory statements on websites regarding the international parental abduction of his child and tried to convince in vain that the *District Court* of New York had jurisdiction.⁹⁰⁸

3.2.4 Defences against defamation

3.2.4.1 How to prevent a defamation claim?

First, before publishing a statement about a missing persons' case (e.g. writing a case file or comment), the manager or user of the missing persons' website must be sure that the information provided is correct.⁹⁰⁹ Normally, this is not a problem since the manager or user usually relies on reliable sources as e.g. *NamUs*⁹¹⁰ or the *NCMEC*⁹¹¹. This approach is beneficial because, in case of a defamation claim, the manager or user of the missing website is "protected" since he or she can point out that the information came from a source that is sponsored by the *US Justice Department*⁹¹² (however, there is a disclaimer on both websites that, although they are sponsored by the *Department of Justice*⁹¹³, it does, amongst others, not mean that they approve with its content)⁹¹⁴ and that he or she therefore had no reason to think that the statement published on that website could be incorrect.⁹¹⁵ Also, a missing persons' organization, such as the *Doe Network*⁹¹⁶, can be acknowledged by the *US Justice Department*⁹¹⁷ as part of the "Responsible Volunteer Community"^{918, 919}. On the webpage the

⁹⁰⁵ The *Restatement (Second) of Torts* is adopted by most states and courts (see e.g. http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2314, <http://www.kentlaw.edu/academics/lrw/tutorials/restate.htm>, <http://libguides.law.harvard.edu/content.php?pid=103327&sid=776882>, <http://libguides.law.harvard.edu/content.php?pid=103327&sid=1036651> and <http://www.lectlaw.com/files/lwr16.htm> (all 12 August 2012) and Conway-Jones 2005, p. 18).

⁹⁰⁶ *Committee on legal affairs (Rapporteur D. Wallis) 2010*, p. 10-11, Schwabach 2006, p. 81 and Jerker B. Svantesson 2007, p. 156-157.

⁹⁰⁷ *Senese v. Hindle*.

⁹⁰⁸ *Ibid*.

⁹⁰⁹ Carroll 2010, p. 270 and Bank 2010, p. 213-214.

⁹¹⁰ <http://www.namus.gov/> (including <https://www.findthemissing.org/en> and <https://identifyus.org/en>) (all 12 August 2012).

⁹¹¹ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

⁹¹² <http://www.justice.gov/> (12 August 2012).

⁹¹³ *Ibid*.

⁹¹⁴ See the disclaimer at the bottom of the page of <https://www.findthemissing.org/en> and http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US/ (both 12 August 2012).

⁹¹⁵ See e.g. <http://fortheLost.wordpress.com/2012/02/25/steven-douglas-and-angelica-valenzuela-missing-six-years/#comment-3665> (12 August 2012).

⁹¹⁶ <http://www.doenetwork.org/> (12 August 2012).

⁹¹⁷ <http://www.justice.gov/> (12 August 2012).

⁹¹⁸ <http://www.namus.gov/volunteer.htm> (12 August 2012).

“Responsible Volunteer Community” it is explained how a person of the general public can get involved in missing persons’ cases.⁹²⁰

Second, the manager of the missing persons’ website has to keep his or her website up-to-date. On some websites, like the *NCMEC*⁹²¹ and *NamUs*⁹²², a manager can apply for the option to be notified if a missing child or adult has been located.⁹²³

Third, all missing persons’ websites provide for an e-mail address where the manager can be contacted.⁹²⁴

Fourth, a missing persons’ website can have some sort of policy to prevent defamation. For example, *NamUs*⁹²⁵ explains that, amongst others, it wants to be mentioned as a source when a flyer is reprinted.⁹²⁶

Fifth, some missing persons’ websites explain which person they consider as a “missing person” in accordance with the terms of their website.⁹²⁷ For example, the *For the Lost Organization*⁹²⁸ has a “Glossary of Missing Person’s Terms”.⁹²⁹

Sixth, it is explained in the § 5772 (1) *Missing Children’s Assistance Act*⁹³⁰ what is meant with a “Missing Child” and that this definition should be interpreted broadly.⁹³¹ Nevertheless, the definition can create confusion, since in some cases it is known where the child is located. For example, it is not uncommon in the field of international parental abduction that the abductor went “forum shopping”⁹³² or succeeded in another way to receive a custody order in another country, which results in the problem that there are two court orders, namely a US court order, in which the parent is accused of abducting the child, and a foreign court order, in which the parent is acquitted from abducting the child (since in the opinion of the foreign court, the (former) abductor should be regarded as the custodial parent).⁹³³ *The Charley Project*⁹³⁴ and the *For the Lost Organization*⁹³⁵ solve this problem by explaining on their website why they still regard these children as missing.⁹³⁶

Seventh, a website, as e.g. the *Doe Network*⁹³⁷, can claim in a disclaimer that they are not responsible if the information provided on the website is not accurate or complete.⁹³⁸

⁹¹⁹ <http://www.doenetwork.org/start.html> (12 August 2012).

⁹²⁰ <http://www.namus.gov/volunteer.htm> (12 August 2012).

⁹²¹ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

⁹²² <http://www.namus.gov/> (12 August 2012).

⁹²³ http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1923 and https://www.findthemissing.org/en/users/terms_of_use (both 12 August 2012).

⁹²⁴ <http://www.amberalert.gov/contact.htm>, <https://www.findthemissing.org/en>, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=403, http://www.lbth.org/ncma/content.php?webid=ncma_contact, <http://www.doenetwork.org/>, <http://www.forthelost.org/> and <http://www.charleyproject.org/> (all 12 August 2012).

⁹²⁵ <http://www.namus.gov/> (12 August 2012).

⁹²⁶ https://www.findthemissing.org/en/users/terms_of_use (12 August 2012).

⁹²⁷ See also part: *1.1.4 Legal definitions, explanations and problems*, p. 12-17.

⁹²⁸ <http://www.forthelost.org/> (12 August 2012).

⁹²⁹ <http://www.forthelost.org/terms.html> (12 August 2012).

⁹³⁰ *Missing Children’s Assistance Act* or 42 USC § 5771 *et seq.*

⁹³¹ Plass 2007, p. 30-31.

⁹³² Pérez-Vera 1982, p. 429 (or p. 17).

⁹³³ See e.g. *Lazaridis v. International Centre for Missing and Exploited Children*.

⁹³⁴ <http://www.charleyproject.org/> (12 August 2012).

⁹³⁵ <http://www.forthelost.org/> (12 August 2012).

⁹³⁶ <http://www.charleyproject.org/faq.html> and <http://www.forthelost.org/faq.html> (both 12 August 2012).

⁹³⁷ <http://www.doenetwork.org/start.html> (12 August 2012).

⁹³⁸ <http://www.doenetwork.org/> (Click on their “Terms of Service”) (12 August 2012).

3.2.4.2 Which defences are there to react to a defamation claim?

It is unlikely that a plaintiff will succeed in a defamation case against the manager and/or user of a missing persons' website, if the manager and/or user relies e.g. on trustworthy sources concerning the missing person, if it removes defamatory comments...

For example, in the case *Meuse v. Fox New Channel, Inc., and others*⁹³⁹, a former abductor (he was acquitted by a jury of the kidnapping of his daughter) claimed, amongst others, that the flyers distributed by the *NCMEC*⁹⁴⁰ should be regarded as defamation.⁹⁴¹ At the moment that the alleged defamatory statements were made, the former abductor was wanted by the *FBI*⁹⁴² and other law enforcement agencies for kidnapping charges and it could be proven that at the time when the flyers were circulating, the former abductor had acted unlawfully by not returning the child to her mother.⁹⁴³ According to the *Superior Court* of Massachusetts, the later acquittal of the former abductor did not mean that the flyer of the *NCMEC*⁹⁴⁴ circulating before the acquittal should be regarded defamatory.⁹⁴⁵

Nevertheless, if the manager of a missing persons' website has not updated his or her website (e.g. by deleting the flyer or stating that the case is resolved), it can happen that the manager can be accused of defamation.

3.2.4.3 Which defences against defamation can a manager of a website have when accused of a defamatory statement made by a user?

Of course, in the case of comments, it can happen that a manager of a missing persons' website cannot be held liable in the case of defamatory statement(s) made by a user due to *Section 230 CDA*⁹⁴⁶, but until now there is no example of this approach in practice.

3.3 Missing persons' websites and foreign defamation

Defamation law differs from country to country. However, it is a fact that a plaintiff successfully suing a defendant for defamation is harder in the US than in e.g. in Europe, since in the US more attention is given to the *Freedom of Expression*.⁹⁴⁷ Therefore, every manager and user of a missing persons' website should be aware that it might be possible that he or she can be sued before a foreign court for defamation. For example, in the case *In re Application of Emmanuel Lazaridis*⁹⁴⁸, a plaintiff from Greece had been allowed by a *District Court* of New Jersey to serve a *Subpoena* to the *Bring Sean Home Foundation*⁹⁴⁹ (a foundation where, amongst others, left-behind parents can inform and support each other concerning their individual international parental abductions cases)⁹⁵⁰ for the reproduction of published and not published information on the *Bring Sean Home Foundation* website^{951 952}. Nevertheless, the

⁹³⁹ *Meuse v. Fox News Channel, Inc., and others*.

⁹⁴⁰ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

⁹⁴¹ *Meuse v. Fox News Channel, Inc., and others*.

⁹⁴² <http://www.fbi.gov/> (12 August 2012).

⁹⁴³ *Meuse v. Fox News Channel, Inc., and others*.

⁹⁴⁴ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

⁹⁴⁵ *Meuse v. Fox News Channel, Inc., and others*.

⁹⁴⁶ *Communications Decency Act or 47 USC §230*.

⁹⁴⁷ Reed 2000, p. 224.

⁹⁴⁸ *In re Application of Emmanuel Lazaridis*.

⁹⁴⁹ <http://bringseanhome.org/> (12 August 2012).

⁹⁵⁰ *Ibid.*

⁹⁵¹ *Ibid.*

⁹⁵² *In re Application of Emmanuel Lazaridis*.

Subpoena was quashed since the request was, amongst others, unreasonable.⁹⁵³ However, it is not unthinkable that there will be a rise of these court cases in the future due to different reasons. For example, more use will be made of the internet to locate missing persons', to inform people about missing persons' cases... while some of these websites will not be updated, can misinform people... To illustrate which legal difficulties concerning foreign defamation a manager and/or user of a US based missing persons' website can face, attention is being paid in the following parts to the defamation law of the EU, The Netherlands and England. First, the general background concerning defamation law will be provided, where after it will be examined how foreign missing persons' websites try to prevent defamation claims in practice.

3.3.1 *The European Union*

3.3.1.1 *Defamation and the European Union*

Solving the problem of defamation with the help of EU legislation is known to be difficult, since there is a cross-border problem concerning the *Right of Privacy* and the *Right of Freedom of Expression* in the EU.⁹⁵⁴ Two regulations could be used: First, when it concerns cases in which the media is accused of defamation, the *Brussels I Regulation*⁹⁵⁵ applies while, second, in other cases the *Rome II Regulation*⁹⁵⁶ is applicable.⁹⁵⁷ It is questionable if managers (and/or users) of missing persons' websites (and their blogs)⁹⁵⁸ should be regarded as belonging to the media⁹⁵⁹ and therefore, only the *Rome II Regulation*⁹⁶⁰ will be examined.

In general, the *Rome II Regulation*⁹⁶¹ provides a set of rules concerning, amongst others, the choice of which law is applicable when it concerns non-contractual obligations in both commercial as in civil matters (e.g. in cross boarder defamation cases).⁹⁶² It should create more legal certainty and the possibility to predict the outcome of litigation.⁹⁶³ There are two important outcomes due to the *Rome II Regulation*⁹⁶⁴: First, it recognizes that the court of the EU Member-State where the wrong took place has jurisdiction and, second, it provides specialised conflict-of-law rules in some areas concerning defamation.⁹⁶⁵

Art. 3 *Rome II Regulation*⁹⁶⁶ explains that it has universal application, meaning that the law applicable could be from an EU Member-State or from a non-EU Member-State.⁹⁶⁷

In art. 4 *Rome II Regulation*⁹⁶⁸, it is explained that the EU Member-State where the harm took place, can be considered as the location where the plaintiff can bring the defendant to court.⁹⁶⁹

⁹⁵³ Ibid.

⁹⁵⁴ *Committee on legal affairs (Rapporteur D. Wallis) 2010*, p. 3-4.

⁹⁵⁵ *Council Regulation (EC) No 44/2001*.

⁹⁵⁶ *Regulation (EC) No 864/2007*.

⁹⁵⁷ <http://epceurope.eu/wp-content/themes/striking/factsheets/epc-brussels-I-and-rome-II-fact-sheet-april-2010.pdf> (12 August 2012).

⁹⁵⁸ See <http://charleyross.wordpress.com/> and <http://fortheLost.wordpress.com/> (12 August 2012).

⁹⁵⁹ See e.g. Andrews 2003, p. 63-64.

⁹⁶⁰ *Regulation (EC) No 864/2007*.

⁹⁶¹ Ibid.

⁹⁶² Warsaw 2006, p. 273 and http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.12.5.pdf (12 August 2012)

⁹⁶³ Ibid.

⁹⁶⁴ *Regulation (EC) No 864/2007*.

⁹⁶⁵ *Committee on legal affairs (Rapporteur D. Wallis) 2010*, p. 2.

⁹⁶⁶ *Regulation (EC) No 864/2007*.

⁹⁶⁷ http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/11602_7_en.htm (12 August 2012).

⁹⁶⁸ *Regulation (EC) No 864/2007*.

⁹⁶⁹ *Committee on legal affairs (Rapporteur D. Wallis) 2010*, p. 7

Due to art. 4 (1) *Rome II Regulation*⁹⁷⁰, the future plaintiff, meaning the person who is of the opinion that he or she is defamed by the defendant, can go to court in the EU Member-State where the damages occurred, which does not have to be the EU Member-State of the future defendant. This could be disadvantageous for the future defendant, since the future plaintiff, can decide, after having studied the different defamation laws of the EU Member-States, where he or she wants to start a defamation lawsuit to obtain most damages.⁹⁷¹ However, if the user of a US based missing persons' website and the plaintiff both live in the same country, the law of that country will be applicable (art. 4 (2) *Rome II Regulation*⁹⁷²). Also, it can be that case that, although art. 4 (1) and (2) *Rome II Regulation*⁹⁷³ could be used to claim jurisdiction by a court, the circumstances of the case describe that another court should have jurisdiction (art. 4 (3) *Rome II Regulation*⁹⁷⁴). Nevertheless, the plaintiff and the defendant can also decide together where to start a defamation court case based on art. 14 (1) *Rome II Regulation*⁹⁷⁵. Art. 21 *Rome II Regulation*⁹⁷⁶ clarifies that a defamation case can be heard in the EU Member-State that has jurisdiction if the national conditions of defamation are fulfilled. Art. 15 *Rome II Regulation*⁹⁷⁷, clarifies the scope of the regulation and concerns, amongst others, the basis, the extent and the exemption from liability. The burden of proof, according to art. 22 *Rome II Regulation*⁹⁷⁸, will be decided by the national law of the EU Member-State that has jurisdiction.

No mention is made concerning the term of limitation to start a defamation case.

Furthermore, the EU is trying to reduce the problem of the different treatments of defamation cases within its EU Member-States.⁹⁷⁹

According to the *Working Document on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) 2010*⁹⁸⁰, at the moment each EU Member-State is using its own private international law to solve disputes concerning violations of privacy.⁹⁸¹ However, there are not a lot of defamation cases before the *ECJ*.⁹⁸² And the cases available are about journalism and defamation and not about 'non-journalism' and defamation.⁹⁸³

In *Working Document on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) 2011*⁹⁸⁴, solutions are given to deal with the problem concerning international private law rules and defamation cases as e.g. inserting an article concerning privacy in the *Rome II Regulation*⁹⁸⁵.⁹⁸⁶ Attention is also paid to the decisions of the *European Court of Human Rights*⁹⁸⁷ (ECtHR) concerning the *Freedom of*

⁹⁷⁰ *Regulation (EC) No 864/2007*.

⁹⁷¹ Overs 2002, p. 68.

⁹⁷² *Regulation (EC) No 864/2007*.

⁹⁷³ Ibid.

⁹⁷⁴ Ibid.

⁹⁷⁵ Ibid.

⁹⁷⁶ Ibid.

⁹⁷⁷ Ibid.

⁹⁷⁸ Ibid.

⁹⁷⁹ *Committee on legal affairs (Rapporteur D. Wallis) 2010*, p. 1-12.

⁹⁸⁰ Ibid.

⁹⁸¹ Ibid, p. 2.

⁹⁸² Ibid, p. 3-4.

⁹⁸³ Ibid, p. 5.

⁹⁸⁴ *Committee on legal affairs (Rapporteur D. Wallis) 2011*, p. 1-9.

⁹⁸⁵ *Regulation (EC) No 864/2007*.

⁹⁸⁶ *Committee on legal affairs (Rapporteur D. Wallis) 2011*, p. 6.

⁹⁸⁷ <http://www.echr.coe.int/echr/> (12 August 2012).

Speech about media in the EU.⁹⁸⁸ Since in the EU, on the basis of art. 6 (2) *TEU*, awareness is being given to ECtHR decisions, due to the fact that it could become a member to the *European Convention of Human Rights (ECHR)*⁹⁸⁹ because of the new art. 59 (2) (*ECHR*) (see also the *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*⁹⁹⁰) and because all EU Member-States are a member country of the *ECHR*⁹⁹¹, attention will briefly be paid to the ECtHR and its approach of solving defamation cases.⁹⁹² The “*Freedom of Expression*” of art. 10 *ECHR* is applicable and reads:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The first paragraph explains what is meant with “*Freedom of Expression*” and the second one explains its restrictions. It is a misunderstanding that a user who writes comments on bulletin boards and/or on websites would automatically fall under the protection of art. 10 *ECHR*.⁹⁹³

When a defamation case is brought before the ECtHR, attention will be paid to, amongst others, the context in which the alleged defamatory statement was made.⁹⁹⁴ The ECtHR does make a distinction between statements of fact and expression of opinion, as publishers will be asked whether they have, when it concerns possible serious defamatory statements, sufficient factual proof and in case of less seriously defamatory statements, some reasonable proof.⁹⁹⁵

The ECtHR has supervisory jurisdiction and can decide if the restriction of the freedom of expression by the state was “*proportionate to the legitimate aims perused*” and if the national court reasoning was “*relevant and sufficient*”.⁹⁹⁶ Also, the member-countries to the *ECHR* do have a “*margin of appreciation*”.⁹⁹⁷ There are at the moment (till 12 August 2012) no cases pending for or decided by the ECtHR concerning missing persons’ websites and defamation.

3.3.1.2 Missing persons’ websites and the EU

In this paragraph attention will be given how, in practice, managers of missing persons’ websites supported by the EU are trying to prevent defamation.

The *Missing Children Europe*⁹⁹⁸ website can be considered a reliable source since it represents 28 Non-Governmental Organisations, is active in Switzerland and 19 EU Member-

⁹⁸⁸ *Committee on legal affairs (Rapporteur D. Wallis) 2011*, p. 7-8.

⁹⁸⁹ *ECHR*.

⁹⁹⁰ *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*.

⁹⁹¹ *Committee on legal affairs (Rapporteur D. Wallis) 2010*, p. 5 and <http://www.coe.int/lportal/web/coe-portal/> (12 August 2012).

⁹⁹² <http://www.coe.int/lportal/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention> (12 August 2012).

⁹⁹³ Collins 2001, p. 350.

⁹⁹⁴ *Ibid.*

⁹⁹⁵ *Ibid.*, p. 348-349. See e.g. *ECHR Kuliš v. Poland*, paragraph 51 where the ECtHR explained that a “*value judgement*” should have a foundation.

⁹⁹⁶ Collins 2001, p. 344-345.

⁹⁹⁷ *Committee on legal affairs (Rapporteur D. Wallis) 2010*, p. 5.

⁹⁹⁸ <http://www.missingchildreurope.eu> (12 August 2012).

States, is supported by, amongst others, the *European Commission*⁹⁹⁹, is more of an information website (it does not comment or issue a statement on actual cases)¹⁰⁰⁰ than involved in finding missing children and, in case of, the website provides a contact webpage¹⁰⁰¹.¹⁰⁰² Also, there is no possibility on the website for a user to make a comment and therefore, it is unlikely that *Missing Children Europe* would be involved in a defamation case due to the actions of a user. A manager and/or user of US based missing persons' website can use the information of this website without being afraid of that he or she would be accused of defamation due to the available information.

The same can be concluded for the website of the project of the *European Child Alert Automated System*¹⁰⁰³ since it is supported, amongst others, by the *European Commission*¹⁰⁰⁴, can be regarded as an information website (although it is explained in the disclaimer on the bottom of the page that the authors are responsible for the contents of the website and not the *European Commission*)¹⁰⁰⁵ and there is no possibility for a user to write comments.¹⁰⁰⁶ It has no direct contact details.

The website of *Childscope*¹⁰⁰⁷ is a database containing European missing and/or sexually exploited children organisations and is supported, amongst others, by *Missing Children Europe*¹⁰⁰⁸ (which is also in charge of the database). It indicates *Missing Children Europe*¹⁰⁰⁹ as its contact address and there is no possibility for a user to write comments.¹⁰¹⁰

For the *ICMEC*¹⁰¹¹, conditions concerning the prevention of defamation can be found in the "Term of Use" section¹⁰¹², e.g. if a manager of a US based missing persons' website receives a notification from this organization that a child has been located, the manager is no longer allowed to distribute the flyer in which it is described that the child is missing.¹⁰¹³ The organization also has a "Contact" section.¹⁰¹⁴ Users cannot write comments on the website of the *ICMEC*¹⁰¹⁵.

Until now, there was no defamation case brought before the *ECJ*¹⁰¹⁶ concerning any of the above mentioned EU and/or US missing persons' websites and/or its user(s).

⁹⁹⁹ http://ec.europa.eu/index_en.htm/ (12 August 2012).

¹⁰⁰⁰ See e.g.

http://www.missingchildreneurope.eu/index.php?option=com_content&view=article&id=92&Itemid=29 (12 August 2012).

¹⁰⁰¹ http://www.missingchildreneurope.eu/index.php?option=com_content&view=article&id=91&Itemid=28/ (12 August 2012).

¹⁰⁰² Paludi and Kelly 2010, p. 34 and <http://www.missingchildreneurope.eu> and

http://www.missingchildreneurope.eu/index.php?option=com_content&view=article&id=92&Itemid=29 (both 12 August 2012).

¹⁰⁰³ <http://www.europeanchildalert.com/> (12 August 2012).

¹⁰⁰⁴ http://ec.europa.eu/index_en.htm/ (12 August 2012).

¹⁰⁰⁵ <http://www.europeanchildalert.com/home/> (12 August 2012).

¹⁰⁰⁶ <http://www.europeanchildalert.com/> (12 August 2012).

¹⁰⁰⁷ <http://www.childscope.net/2009/httpdocs/index.php?sw=2> (12 August 2012).

¹⁰⁰⁸ <http://www.missingchildreneurope.eu> (12 August 2012).

¹⁰⁰⁹ Ibid.

¹⁰¹⁰ <http://www.childscope.net/2009/httpdocs/Childscope-brochure.pdf> and

<http://www.childscope.net/2009/httpdocs/index.php?sw=2> (both 12 August 2012).

¹⁰¹¹ <http://www.icmec.org/missingkids/servlet/PublicHomeServlet> (12 August 2012).

¹⁰¹² http://www.icmec.org/missingkids/servlet/PageServlet?LanguageCountry=en_X1&PageId=3246/ (12 August 2012).

¹⁰¹³ Ibid.

¹⁰¹⁴ http://www.icmec.org/missingkids/servlet/PageServlet?LanguageCountry=en_X1&PageId=1729/ (12 August 2012).

¹⁰¹⁵ <http://www.icmec.org/missingkids/servlet/PublicHomeServlet> (12 August 2012).

¹⁰¹⁶ http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm/ (12 August 2012).

3.3.2 *The Netherlands*

3.3.2.1 *Defamation in The Netherlands*

Dutch law can be used if the damage or place where the defamation occurred was in The Netherlands (art. 6 (e) and 102 *Dutch Code of Civil Procedure*)¹⁰¹⁷.¹⁰¹⁸ Of course, the plaintiff and the defendant can also decide together that a Dutch court should have jurisdiction (art. 8 (1) *Dutch Code of Civil Procedure*).

The plaintiff would start a civil case on the basis of art. 6:162 *Dutch Civil Code*.¹⁰¹⁹ He or she has to provide the evidence of loss and the extent that he suffered due to the defamatory statement.¹⁰²⁰

If the defendant cannot convince the court that the conditions of art. 6:162 and 6:163 *Dutch Civil Code* are not fulfilled, he or she can claim *Freedom of Speech*.¹⁰²¹ The judge will decide, by balancing the interests of the plaintiff and defendant, if the interest of the defendant (*Freedom of Speech*) is allowed or if he or she has to pay damages to the plaintiff because the plaintiff has been harmed in his or her reputation.¹⁰²² In sum, the Dutch judge will pay attention to the context in which the defamatory statement was made, how the defamatory statement was formulated (this does not implicate that the statement should only be truthful, because the court will also consider the evidence on how the defendant came to that statement and the possible consequences of the publication for the plaintiff).¹⁰²³ It depends on the context (meaning the “*proper social conduct status*”) if the publication on the website should be regarded as unlawful.¹⁰²⁴ For example, a mother accused the father of abduction, maltreatment and sexual conduct committed against their child in a blog on the internet, while she provided no evidence to backup her claims and therefore was found accountable of defamation (art. 6:162 *Dutch Civil Code*).¹⁰²⁵ Although the mother claimed that she published the information on her blog while, at the same time, paying attention to the best interest of their child, her defence was not considered as convincing by the Dutch court since the child would be confronted with these accusations for the rest of her life.¹⁰²⁶ Nevertheless, it is allowed that a private person can start a website claiming that a judge should have decided differently in a case and/or explain the background of a conflict, however, he or she is not allowed to defame another person (e.g. name calling...).¹⁰²⁷ The Dutch court will decide, based on the circumstances of the case, if name calling can be considered *Freedom of Speech*.¹⁰²⁸

¹⁰¹⁷ http://ec.europa.eu/civiljustice/jurisdiction_courts/jurisdiction_courts_net_nl.htm (12 August 2012).

¹⁰¹⁸ Smith, Bird & Bird 2007, p. 627 and Pontier 2001, p. 74-81.

¹⁰¹⁹ Spier, Hartlief, van Maanen and Vriesendorp 2009, p.58.

¹⁰²⁰ Koch (editor) 2010, p. 405. See also part: 2.3.2 *The Netherlands*, p. 46-50.

¹⁰²¹ See e.g. Rechtbank Almelo 7 oktober 2009, *LJN* BK0004, Vick and Macpherson 1996, p. 958 and <http://www.advocaten-amsterdam.nl/107/rectificatie-misleidend-publicatie-verbod-smaad-laster> (12 August 2012). See also e.g. Hoge Raad 18 januari 2008, *LJN* BB3210, paragraph 3.4.1.

¹⁰²² *Ibid.*

¹⁰²³ Vick and Macpherson 1996, p. 958, <http://www.advocaten-amsterdam.nl/107/rectificatie-misleidend-publicatie-verbod-smaad-laster> and <http://www.advocaten-amsterdam.nl/112/publicatie-onrechtmatig-belediging-rectificatie> (both 12 August 2012).

¹⁰²⁴ Brüggemeier, Colombi Ciacchi, O’Callaghan (editors) 2010, p. 220-221.

¹⁰²⁵ Rechtbank Zwolle 9 maart 2011, *LJN* BT1913.

¹⁰²⁶ *Ibid.*, paragraphs 4.6-4.9.

¹⁰²⁷ Voorzieningenrechter Rechtbank Arnhem 8 juli 2011, *LJN* BR3905.

¹⁰²⁸ See e.g. Rechtbank Amsterdam 15 september 2011, *LJN* BS8892 (name-calling allowed) and Voorzieningenrechter Rechtbank Arnhem 29 oktober 2010, *LJN* BO3981 (name-calling not allowed).

The plaintiff can also ask the judge that the defendant is no longer allowed to publish another statement or comment concerning the plaintiff (art.6:168 *Dutch Civil Code*), although the Dutch judge could refuse this possibility when the case concerns a matter of public interest.¹⁰²⁹

The limitation to begin a defamation case in The Netherlands is within five years that the plaintiff was aware that he had suffered damage to his reputation and knew who had caused it (see e.g. art. 3:310 (1) and (5) *Dutch Civil Code*).¹⁰³⁰

3.3.2.2 Missing persons' websites and The Netherlands

In practice, there are different ways to prevent a defamation claim for a Dutch missing persons' website.

In the case of the Dutch website of the *Government of the Netherlands (Rijksoverheid)*¹⁰³¹, a condition concerning the prevention of defamation can be located in the "*Copyright*" policy in which it is explained that it is allowed that the information provided on the website may be copied (there is a "*Creative Commons Zero*" license¹⁰³²) by a manager and/or user of a US based missing persons' website, but not in a manner that the context of the derived work is supported by the *Government of the Netherlands (Rijksoverheid)*¹⁰³³, meaning e.g. that the copied information is used in such a way that seems that the *Government of the Netherlands (Rijksoverheid)*¹⁰³⁴ agrees with the statement while, in fact, it does not.¹⁰³⁵ The website of the *Government of the Netherlands (Rijksoverheid)*¹⁰³⁶ has a "*Contact*" section.¹⁰³⁷

In the "*Privacy Policy*" of the website of the Dutch *Amber Alert*¹⁰³⁸, it is explained that privacy information will be passed on to the police in case of fraud.¹⁰³⁹ It has a "*Contact*" section.¹⁰⁴⁰

For the Dutch missing adults' website¹⁰⁴¹ (see the "*Copyright*" section) and the Dutch missing children website¹⁰⁴² (see the "*Over ons*" section), the interested party, such as a missing person or (possible) abductor, is encouraged to contact the police concerning the (wrongful) information (portrait) published on the websites.¹⁰⁴³ Also, asking permission before publishing material by a manager and/or user of a US based missing persons' website can be regarded, as is requested by the Dutch missing children website¹⁰⁴⁴, as a way to prevent defamation.¹⁰⁴⁵ On both websites it is explained how they can be reached.¹⁰⁴⁶

¹⁰²⁹ Spier, Hartlief, van Maanen and Vriesendorp 2009, p. 90-91.

¹⁰³⁰ Verheij 2005, p. 18-20 and <http://www.aansprakelijkheid.nl/nl/overige-aansprakelijkheid/verjaring-en-onrechtmatige-daad/> (12 August 2012).

¹⁰³¹ <http://www.government.nl/> and <http://www.rijksoverheid.nl/> (both 12 August 2012).

¹⁰³² <http://www.rijksoverheid.nl/copyright>, <http://www.rijksoverheid.nl/copyright/nederlandse-vertaling-cc0>, <http://www.government.nl/copyright> and <http://creativecommons.org/licenses/?lang=en> (all 12 August 2012).

¹⁰³³ <http://www.government.nl/> and <http://www.rijksoverheid.nl/> (both 12 August 2012).

¹⁰³⁴ Ibid.

¹⁰³⁵ <http://www.rijksoverheid.nl/copyright> (12 August 2012).

¹⁰³⁶ <http://www.government.nl/> and <http://www.rijksoverheid.nl/> (both 12 August 2012).

¹⁰³⁷ <http://www.government.nl/contact> (12 August 2012).

¹⁰³⁸ <http://www.amberalertnederland.nl/Default.aspx?lang=nl> (12 August 2012).

¹⁰³⁹ <http://www.amberalertnederland.nl/Privacy.aspx?lang=nl> (12 August 2012).

¹⁰⁴⁰ <http://www.amberalertnederland.nl/Contact.aspx?lang=nl> (12 August 2012).

¹⁰⁴¹ http://www.politie.nl/Opsporing/vermiste_personen.asp (12 August 2012).

¹⁰⁴² <http://www.missingkids.nl/missingkids/servlet/PublicHomeServlet> (12 August 2012).

¹⁰⁴³ http://www.missingkids.nl/missingkids/servlet/PageServlet?LanguageCountry=nl_NL&PageId=832 and <http://www.politie.nl/Copyright/default.asp> (both 12 August 2012).

¹⁰⁴⁴ <http://www.missingkids.nl/missingkids/servlet/PublicHomeServlet> (12 August 2012).

¹⁰⁴⁵ http://www.missingkids.nl/missingkids/servlet/PageServlet?LanguageCountry=nl_NL&PageId=1010/ (12 August 2012).

The website of *Vermist*¹⁰⁴⁷ has a disclaimer in which it is clarified that the information from the website may not be reproduced without the permission of the *TROS*^{1048 1049}.

Until now, there was no defamation case brought before the Dutch court concerning any of the above mentioned Dutch and/or US missing persons' websites and/or its user(s).¹⁰⁵⁰

3.3.3 *England*

3.3.3.1 *Defamation in England*

It does not matter under English law if the plaintiff is a resident of the country¹⁰⁵¹, however, it does matter if it concerns a non-resident living in an EU Member-State or not.¹⁰⁵² If the plaintiff does live in an EU Member-State, EU-law (e.g. the *Rome II Regulation*¹⁰⁵³) is applicable.¹⁰⁵⁴ If he or she is from outside the EU, then the English rules of jurisdiction apply.¹⁰⁵⁵ Nevertheless, a difference between the two is that the English Court, when it concerns a non-EU resident, can decide that another court should hear the case (also known as “*forum non conveniens*”).¹⁰⁵⁶ Yet, this problem can be solved if the plaintiff only wants to sue the defendant for its publication in The UK.¹⁰⁵⁷

Before an English court procedure concerning defamation can be initiated, a “*letter of Claim*”¹⁰⁵⁸, according to the *Defamation Pre-Action Protocol*¹⁰⁵⁹, must be sent to the defendant in order for the plaintiff and defendant themselves to try to solve the issue first.¹⁰⁶⁰ If the “*letter of Claim*”¹⁰⁶¹ does not lead to the envisioned result in the opinion of plaintiff, he or she can start a defamation case before the English court when two conditions are fulfilled, namely: First, that he or she has a reputation in the UK and, second, that the publication of the defamation has happened in the UK (see e.g. art. 4 *Rome II Regulation*¹⁰⁶²).¹⁰⁶³

¹⁰⁴⁶ http://www.missingkids.nl/missingkids/servlet/PageServlet?LanguageCountry=nl_NL&PageId=832, <http://www.politie.nl/Copyright/default.asp> and <http://www.politie.nl/Contact> (all 12 August 2012).

¹⁰⁴⁷ <http://www.vermist.nl/> (12 August 2012).

¹⁰⁴⁸ <http://www.tros.nl/overdetros/> (12 August 2012).

¹⁰⁴⁹ <http://www.vermist.nl/index.php?id=9> (12 August 2012).

¹⁰⁵⁰ In the case of the Dutch Amber Alert (<http://www.amberalertnederland.nl>) there was a Dutch case about defamation since a journalist of *De Telegraaf* (www.telegraaf.nl) had accused *Netpresenter B.V.* of cybersquatting concerning the Domain Name www.amberalert.nl (Rechtbank Amsterdam 30 december 2008, *LJN* BH6234). A member of the general public was accused in a television episode of the Dutch *Vermist* (<http://www.vermist.nl/>) of being involved of the disappearance of a woman and the man claimed that he was defamed by *Vermist* (<http://www.vermist.nl/>) (Rechtbank Amsterdam 25 november 2009, *LJN* BL5242). *Vermist* (<http://www.vermist.nl/>) was of the opinion that it just repeated the accusation of the left-behind family of the missing person and that it was not the opinion of the Dutch programme (Rechtbank Amsterdam 25 november 2009, *LJN* BL5242, paragraphs 4.2-4.3). The Dutch Court disagreed since it was not without reasonable doubt that the person was involved in the disappearance of the woman (Rechtbank Amsterdam 25 november 2009, *LJN* BL5242, paragraphs 4.2-5.4).

¹⁰⁵¹ Hartley 2010, p. 26-30.

¹⁰⁵² *Ibid.*

¹⁰⁵³ *Regulation (EC) No 864/2007*.

¹⁰⁵⁴ Hartley 2010, p. 28-29.

¹⁰⁵⁵ *Ibid.*, p. 29-30.

¹⁰⁵⁶ *Ibid.* and Milmo, Rogers and others (editors) 2004, p. 769-771.

¹⁰⁵⁷ Hartley 2010, p. 29.

¹⁰⁵⁸ Milmo, Rogers and others (editors) 2004, p. 759-761 and http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_def/ (12 August 2012).

¹⁰⁵⁹ http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_def/ (12 August 2012).

¹⁰⁶⁰ Milmo, Rogers and others (editors) 2004, p. 759-761.

¹⁰⁶¹ *Ibid.* and http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_def/ (12 August 2012).

¹⁰⁶² *Regulation (EC) No 864/2007*.

¹⁰⁶³ Mullis and Scott 2010, p. 14 and Kunke 2005, p. 1756.

In England, defamation is tort and has to be “*published*”, meaning accessible, to at least one other person.¹⁰⁶⁴ In the case of the internet, the English courts are of the opinion that the material on the internet should be considered as published, when it can be downloaded in England.¹⁰⁶⁵ Again, libel is applicable when it is a written statement and it always concerns *libel per se* (no need to show actual damage).¹⁰⁶⁶ If a statement should be regarded as being defamatory, three requirements are important: First, the defamatory statement encourages people to adapt their view about the plaintiff in a negative manner, second, this situation results in the fact that people do not want to be around the plaintiff anymore and, third, the plaintiff is exposed to being hated, ridiculed... by the general public due to that statement.¹⁰⁶⁷ However, when it concerns the damage of the reputation of the possible defamed person, it is about who has read the material and not about the extent of the publication.¹⁰⁶⁸ Name-calling alone is not a ground for a defamation claim.¹⁰⁶⁹

There are several options for a defendant (a manager and/or user of a missing persons’ website) to solve an English defamation claim.

To begin, the defendant can try to convince the judge (“*submission of no case*”), for example, that there is no defamatory statement at all and, therefore, that there is no need to start a jury court procedure.¹⁰⁷⁰

Second, if the defendant is telling the truth, then there is no defamation (“*Claiming of Justification*”¹⁰⁷¹, which has to be done with every material fact of the statement)¹⁰⁷², although the defendant can still be held liable in court due to e.g. a breach of confidence.¹⁰⁷³

Third, there is the “*Honest Comment*” defence.¹⁰⁷⁴ In sum, it means that the alleged defamatory statement made by the defendant must be regarded as an honestly held opinion which was based on true facts and concerned a matter of public interest.¹⁰⁷⁵ Although, if the plaintiff can show that the statement was made by the defendant with malice, this defence can no longer be applied.¹⁰⁷⁶

Fourth, defences against defamation claims can also be found in the *Defamation Act* of 1996, for example, in *Section 1* of the “*Responsibility for publication*” it is explained that:

“1.—(1) In defamation proceedings a person has a defence if he shows *Responsibility for that— publication.*

(a) he was not the author, editor or publisher of the statement complained of,

(b) he took reasonable care in relation to its publication, and

(c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.”

¹⁰⁶⁴ Milmo, Rogers and others (editors) 2004, p. 3 and 7.

¹⁰⁶⁵ Mullis and Scott 2010, p. 30.

¹⁰⁶⁶ Milmo, Rogers and others (editors) 2004, p. 79-80 and Kunke 2005, p. 1746.

¹⁰⁶⁷ Milmo, Rogers and others (editors) 2004, p. 8.

¹⁰⁶⁸ Mullis and Scott 2010, p. 14-15.

¹⁰⁶⁹ http://findlaw.co.uk/law/accidents_and_injuries/defamation/500052.html/ (12 August 2012).

¹⁰⁷⁰ Milmo, Rogers and others (editors) 2004, p. 992-994.

¹⁰⁷¹ Kunke 2005, p. 1748, Milmo, Rogers and others (editors) 2004, p. 7 and 843-851 and 859 and <http://www.yourrights.org.uk/yourrights/right-of-free-expression/defamation/defences-to-a-claim-of-defamation.html> (12 August 2012).

¹⁰⁷² Beauchamp 2006, p. 3078-3079.

¹⁰⁷³ Milmo, Rogers and others (editors) 2004, p. 7 and 993.

¹⁰⁷⁴ It was first called the “*fair comment*” defence but it was changed to “*Honest Comment*” defence after the case *Spiller v. Joseph* (Jones and Benson 2011, p. 178-181, <http://www.lawgazette.co.uk/news/libel-defence-broadened-reflect-internet-age> and <http://www.lawgazette.co.uk/in-practice/redefining-defence-fair-comment> (both 12 August 2012)).

¹⁰⁷⁵ Jones and Benson 2011, p. 178-181.

¹⁰⁷⁶ *Ibid*, p. 178-179.

Fifth, the defendant can claim that he or she is not the original author of the statement and use the “*innocent dissemination*” defence (e.g. a manager and/or user could have copied and published a statement from another missing persons’ website on their own website not knowing that the copied statement was defamatory).¹⁰⁷⁷

Sixth, it is also possible to make amends (see *Section 2 “offer to make amends”* and further *Defamation Act of 1996*).¹⁰⁷⁸ In this case the defendant acknowledges that he or she has published a defamatory statement about the plaintiff and wants to pay damages.¹⁰⁷⁹ As a remark, the *Defamation Act of 1996* is applicable to any publication, including the publication on a website.¹⁰⁸⁰

The time-limitation concerning defamation is only one year starting from the moment of publication.¹⁰⁸¹

There is a lot of discussion concerning English defamation law, since some authors are of the opinion that there is the problem of forum shopping or “*Libel Tourism*”¹⁰⁸², while others do not find any evidence that this is or could become a problem in practice¹⁰⁸³.

There are several reasons why it is attractive to start a libel case before an English court: First, it does not matter under English law if the plaintiff is a resident of the country.¹⁰⁸⁴ He or she must only have a reputation in The UK¹⁰⁸⁵ because, according to English Common law, the *Right of Reputation* is important.¹⁰⁸⁶

Second, the decision to sue for defamation before the English court is mostly given by the fact that the English courts do not request that the plaintiff has to prove that the defamatory statement is false, as under US law.¹⁰⁸⁷ The only thing the plaintiff has to do is to show that the manager and/or user of a US based missing persons’ website has voluntarily published a statement in which he or she defames the plaintiff and which is directly or indirectly accessible for another person.¹⁰⁸⁸ The defendant has the task to prove, for example, that the statement is true.¹⁰⁸⁹ By placing the burden on the publisher (the author of the comment), it is deemed that the publisher will think twice before he or she will place the statement online (e.g. the manager and/or user can ask him- or herself if he or she can justify the statement before publishing?).¹⁰⁹⁰

Third, if the plaintiff succeeds in his defamation claim, he can be awarded damages not only for his or her injured reputation, but also for the emotional distress he or she has suffered and the amount of these damages can be larger than in other EU Member-States.¹⁰⁹¹ The plaintiff does not have to prove that he indeed has suffered damages because of the defamatory statement.¹⁰⁹²

¹⁰⁷⁷ Beauchamp 2006, p. 3088.

¹⁰⁷⁸ Milmo, Rogers and others (editors), 2004, p. 546-556.

¹⁰⁷⁹ Beauchamp 2006, p. 3088.

¹⁰⁸⁰ Cauchi 2002, p. 24.

¹⁰⁸¹ http://findlaw.co.uk/law/accidents_and_injuries/defamation/500051.html (12 August 2012).

¹⁰⁸² See e.g. Sanchez 2011, p. 470-520 and Rendleman 2010, p. 467-487.

¹⁰⁸³ *Committee on legal affairs (Rapporteur D. Wallis) 2011*, p. 3-4 and Bennett 2010, p. 1-22.

¹⁰⁸⁴ Hartley 2010, p. 26-30.

¹⁰⁸⁵ Ibid.

¹⁰⁸⁶ Cauchi 2002, p. 2.

¹⁰⁸⁷ Hartley 2010, p. 26 and Dinse and Rösler 2011, p. 415.

¹⁰⁸⁸ Kunke 2005, p. 1746.

¹⁰⁸⁹ Ibid.

¹⁰⁹⁰ Mullis and Scott 2010, p. 14.

¹⁰⁹¹ Kunke 2005, p. 1761.

¹⁰⁹² Beauchamp 2006, p. 3080.

Fourth, in the US there is a single-publication rule¹⁰⁹³, while according to the English courts, each repetition of the defamatory statement means another libel tort.¹⁰⁹⁴

However, in practice it turns out that there are not many cross border defamation cases.¹⁰⁹⁵ Also, the UK is planning to reform its defamation law to tackle the problem of “*Libel Tourism*”,¹⁰⁹⁶¹⁰⁹⁷ Nevertheless, it seems that the English court procedure is more often used in procedures against citizens of the US than against citizens of the EU Member-States.¹⁰⁹⁸ Besides, it is a fact that there were already English libel judgements not recognized and enforced in the US due to lack of jurisdiction of the English court.¹⁰⁹⁹

3.3.3.2 Missing persons’ websites and England

In this part, attention will be paid on how UK missing persons’ websites try to prevent the accusation of defamation.

The *UK Government*¹¹⁰⁰ clarifies in its “*Crown copyright*”,¹¹⁰¹ section that it is allowed to “*re-use the text information on this website provided you identify the source and state that it is Crown copyright*”, and, amongst other conditions, “*not imply endorsement by Directgov, another government department or other public sector organisation*” and “*not re-use the information in a deliberately misleading way*”.¹¹⁰²

The *Pact*¹¹⁰³ website has a disclaimer at the end of every webpage which reads: “*PACT’s website is designed to provide information. This is not a legal site. PACT cannot be held responsible for any inaccuracies in the text, nor can it take any responsibility for the content on external Internet sites.*”¹¹⁰⁴

The two websites discussed above do not offer the possibility to write a comment. They do have a contact section on their website.¹¹⁰⁵

*Missing People*¹¹⁰⁶ has a strict policy claiming that nothing can be copied unless with permission from *Missing People*¹¹⁰⁷ and, for example, it removes any material that could be regarded as defamatory of their media platforms, their blog and website.¹¹⁰⁸ It has a “*Contact us*” section.¹¹⁰⁹

Until now, there was no defamation case brought before the English court concerning any of the above mentioned UK and/or US missing persons’ websites and/or its user(s).

¹⁰⁹³ Rendleman 2010, p. 467-487 and Warshaw 2006, p. 273.

¹⁰⁹⁴ Hartley 2010, p. 26-30 and Kunke 2005, p. 1746-1747.

¹⁰⁹⁵ *Committee on legal affairs (Rapporteur D. Wallis) 2010*, p. 3-4 and 6-10.

¹⁰⁹⁶ See e.g. Sanchez 2011, p. 470-520 and Rendleman 2010, p. 467-487.

¹⁰⁹⁷ *Committee on legal affairs (Rapporteur D. Wallis) 2010*, p. 3-4 and 6-10 and Levi 2011, p. 4-6.

¹⁰⁹⁸ *Committee on legal affairs (Rapporteur D. Wallis) 2010*, p. 3-4 and 6-10, *Committee on legal affairs (Rapporteur D. Wallis) 2011*, p. 3-4 and Levi 2011, p. 12-20.

¹⁰⁹⁹ *Organization for Security and Co-operation in Europe, The Representative on Freedom of the Media 2005*, p. 170 and Milmo, Rogers and others (editors) 2004, p. 772-774.

¹¹⁰⁰ <http://www.direct.gov.uk/en/index.htm/> (12 August 2012).

¹¹⁰¹ http://www.direct.gov.uk/en/SiteInformation/DG_020460/ (12 August 2012).

¹¹⁰² Ibid.

¹¹⁰³ <http://www.pact-online.org/> (12 August 2012).

¹¹⁰⁴ See e.g. at the bottom of the webpage of <http://www.pact-online.org/> (12 August 2012).

¹¹⁰⁵ <https://www.ceop.police.uk/Contact-Us/Contact-form/> and <http://www.pact-online.org/General/contact-us-pact-parents-and-abducted-children-together-parental-abduction-missing-children-associate-of-icmec.html> (both 12 August 2012).

¹¹⁰⁶ <http://www.missingpeople.org.uk/> (12 August 2012).

¹¹⁰⁷ Ibid.

¹¹⁰⁸ <http://www.missingpeople.org.uk/missing-people/terms-of-use> (12 August 2012).

¹¹⁰⁹ <http://www.missingpeople.org.uk/missing-people/contact-us/> (12 August 2012).

Chapter 4: Should there be fear?

Introduction

In the previous chapters the legal background and need of missing persons' websites, the copyright issues and the defamation problems, both in theory as in practice were discussed. The purpose of this chapter will be to provide an answer as to whether a manager of a US based missing persons' website or a user should be afraid of copyright infringement or defamation claims from in and/or outside of the US. Therefore, the research questions were: *“Do managers and users of US based missing-persons-websites run the risk of committing copyright infringement or defamation? If, so, what can they do to minimise possible risks?”*

This chapter is divided into five paragraphs.

In the first paragraph, it will be explained that not everybody can stay anonymous on the internet. Hereafter, it will be clarified that managers and users from the US should not too easily be of the opinion that foreign judgements will not be recognised and/or enforced in the US. The third paragraph is about copyright and is divided into two sections, namely US copyright law and EU, Dutch and English copyright law. Each section contains five parts concerning copyright protected material, the rights of the copyright owner, other persons who could reproduce and make available to the public, jurisdiction and practice. The fourth paragraph is about defamation and is also divided into the same two sections. Each section examines four parts concerning the conditions of defamation, jurisdiction, prevention against a defamation claim and practice. The fifth paragraph is the end conclusion which will provide an answer to the research question.

4.1 The lifting of anonymity

The identification of the manager and/or user can be achieved in two ways:

First, it is possible to find out who the manager and/or user is with the help of *“Whois' software”*¹¹¹⁰ (manager) or with the help of *“Email Trace-Email Tracking”*¹¹¹¹ (user).¹¹¹²

Nevertheless, it can happen that the IP address is false or that the comment was written from a computer, for example, belonging to an internet café.¹¹¹³

Second, the plaintiff can subpoena the manager of the US based missing persons' website in order to receive the information leading to the identification of the user.¹¹¹⁴ The US court will normally investigate the legitimacy of the claim of the plaintiff and if the plaintiff could win the court case hypothetically when the requested information is provided.¹¹¹⁵ However, the plaintiff has to provide evidence that he or she tried in other ways to identify and contact the user (*“showing of good faith”*).¹¹¹⁶ Moreover, the US court will balance the rights of the plaintiff (to know who the user is and bring him or her to court) and the rights of the defendant (the user who wrote the comment and his or her right to stay anonymous).¹¹¹⁷ Nevertheless, there is still no uniform standard that concerns the protection of John or Jane Doe as it is still a matter which has to be decided on a court-by-court and case-by-case basis.¹¹¹⁸

¹¹¹⁰ See e.g. <http://www.ip-adress.com/whois/> (12 August 2012).

¹¹¹¹ See e.g. http://www.ip-adress.com/trace_email/ (12 August 2012).

¹¹¹² Walden 2004, p. 275-287.

¹¹¹³ Ibid, p. 276.

¹¹¹⁴ Smith Ekstrand 2003, p. 415-417.

¹¹¹⁵ Ibid, p. 421-423.

¹¹¹⁶ Ibid, p. 423.

¹¹¹⁷ Ibid, p. 424-425 and Barnett Lidsky 2009, p. 1373-1391.

¹¹¹⁸ Barnett Lidsky 2009, p. 1373-1391.

For example, in the case *In re Application of Emmanuel Lazaridis*¹¹¹⁹, a Greek plaintiff had been allowed to serve a *Subpoena*, which was quashed in this case since the request was, *inter alia*, unreasonable, to the *Bring Sean Home Foundation*¹¹²⁰ for, amongst others, the identification of certain members of that foundation's website.¹¹²¹

4.2 The recognition and/or enforcement of foreign judgements by a US Court

Copyright and defamation related issues do not only arise in the US. It is possible that a manager of a US based missing persons' website is being sued for using foreign copyright protected material on his or her US based website or that he or she is accused of libel, since it can happen, for example, that in a case file the name of a foreigner is mentioned concerning someone's disappearance. A manager and/or user should not ignore the accusation before a foreign court and expect that the foreign decision will not be recognized and/or enforced in the US due to e.g. freedom of speech issues. Therefore, in the following two parts, attention will be given to foreign judgements concerning copyright infringement and defamation.

4.2.1 Does the US have to recognize and/or enforce a foreign judgement?

There is no federal law which regulates how foreign judgements should be recognised and/or enforced.¹¹²² It depends on the law of the state and the decision of the *State Court*.¹¹²³ *Federal Courts* are only involved when it concerns a federal question regarding this topic.¹¹²⁴ Normally, a US *State Court* will be guided by the "*principle of comity*", which means that a US court will voluntarily and informally recognize the judgement of another court even if that court is located outside of the US¹¹²⁵. In the US Supreme Court case *Hilton v. Guyot*¹¹²⁶ it was decided that the justification for comity was reciprocity.¹¹²⁷ However, in *Johnston v. Compagnie Generale Transatlantique*¹¹²⁸ it was decided that comity had to do with the coming into existence of the foreign judgement ("*persuasiveness of the foreign judgement*") and with preventing that the same case would be decided before different courts ("*discouraging repeated litigation of the same question*").¹¹²⁹ *Restatement (Third) of Foreign Relations Law of the United States*¹¹³⁰ §482 (1987) clarifies when a foreign judgement should not be recognized and/or enforced, for example, when the US defendant was never summoned before the foreign court.¹¹³¹

Most states have adopted the *Uniform Foreign Money Judgements Recognition Act*¹¹³² or its revision of 2005¹¹³³. Recognition and/or enforcement under this act are not possible when the

¹¹¹⁹ *In re Application of Emmanuel Lazaridis*.

¹¹²⁰ <http://bringseanhome.org> (12 August 2012).

¹¹²¹ *In re Application of Emmanuel Lazaridis*.

¹¹²² Born 1996, p. 938.

¹¹²³ http://travel.state.gov/law/judicial/judicial_691.html/ (12 August 2012), Heiser 2010, p. 1024-1025 and Jerker B. Svantesson 2007, p. 157-159.

¹¹²⁴ Murr 2003, p. 341.

¹¹²⁵ Merriam-Webster Inc. 1996, p. 85.

¹¹²⁶ *Hilton v. Guyot* and Dinse and Rösler 2011, p. 416, footnote 26.

¹¹²⁷ Murr 2003, p. 341-367, p. 346-348 and 350-351 and Hulbert 2008, p. 642-643.

¹¹²⁸ *Johnston v. Compagnie Generale Transatlantique*.

¹¹²⁹ Hulbert 2008, p. 642-643.

¹¹³⁰ <http://www.kentlaw.edu/academics/lrw/tutorials/restate.htm>,

<http://libguides.law.harvard.edu/content.php?pid=103327&sid=776882> and

<http://libguides.law.harvard.edu/content.php?pid=103327&sid=1036651> (all 12 August 2012).

¹¹³¹ Jerker B. Svantesson 2007, p. 157.

¹¹³² See e.g. *New York Practice Law and Rules- Article 53 (5301-5309) Recognition of Foreign Country Money Judgements*.

¹¹³³ Heiser 2010, p. 1025.

foreign court has no personal or subject matter jurisdiction or when it did not follow due process.¹¹³⁴ Besides, the US *State Court* also has discretionary grounds to refuse recognition.¹¹³⁵

4.2.1.1 Foreign judgements in the case of copyright infringement or defamation

A plaintiff is not obliged to take a copyright infringement or defamation case to a US court. Nevertheless, it is more likely to occur with libel (because of “*Libel Tourism*”¹¹³⁶)¹¹³⁷, than with copyright infringement cases. In the following part two examples, one concerning copyright infringement and the other about defamation, before a US court will be provided in order to explain how a foreign judgement can be recognised and/or enforced before a US court.

The case *Sarl Louis Feraud Intern. v. Viewfinder, Inc.*¹¹³⁸ is an example of a foreign judgement on copyright infringement.

In sum, the case was about a US based website which had published photos of French plaintiffs’ designs without their permission.¹¹³⁹ The French plaintiffs wanted to receive the compensation which was awarded to them by the French court and therefore used the New York *Uniform Foreign Money Judgements Recognition Act*¹¹⁴⁰.¹¹⁴¹ The US defendants claimed that the judgements of the French court were repugnant (i.e. that they were contrary to US public policy).¹¹⁴² The US *Court of Appeals* of New York first established that the copyright protection under the French copyright law is the same as the protection provided by the US copyright law.¹¹⁴³ Also, the US defendants should have taken part in the French court proceedings (they had been properly notified), according to the US court, yet they had refused to participate.¹¹⁴⁴ It should not be the case that news agencies (as the US defendants stated they were) could claim under the *First Amendment* of the *US Constitution* that they did not have to comply with (foreign) intellectual property rights.¹¹⁴⁵

In the case of libel, there are two escape routes to stop a foreign judgement from being recognized and enforced in the US: First, there is the exception of public policy¹¹⁴⁶ and, second, because the recognition and/or enforcement of a foreign judgement could be in violation with the federal law *Securing the Protection of Our Enduring and Established Constitutional Heritage Act (H.R. 2765 or 28 USCS § 4101 or SPEECH ACT)*¹¹⁴⁷. To begin with the the exception of public policy¹¹⁴⁸. A US citizen is or can be sued for libel before e.g. an English court.¹¹⁴⁹ In that event, the US citizen can go to the US court and ask

¹¹³⁴ Ibid, p. 1026-1029.

¹¹³⁵ Ibid, p. 1029-1032.

¹¹³⁶ See e.g. Sanchez 2011, p. 470-520 and Rendleman 2010, p. 467-487.

¹¹³⁷ See part: 3.3.3 *Defamation in England*, p. 73-76.

¹¹³⁸ *Sarl Louis Feraud Intern. v. Viewfinder, Inc.*

¹¹³⁹ Ibid and http://www.lawupdates.com/summary/sarl_louis_feraud_international_v_viewfinder_inc/ (12 August 2012).

¹¹⁴⁰ *New York Practice Law and Rules- Article 53 (5301-5309) Recognition of Foreign Country Money Judgements* and Heiser 2010, p. 1025.

¹¹⁴¹ *Sarl Louis Feraud Intern. v. Viewfinder, Inc* and

http://www.lawupdates.com/summary/sarl_louis_feraud_international_v_viewfinder_inc/ (12 August 2012).

¹¹⁴² Ibid.

¹¹⁴³ Ibid.

¹¹⁴⁴ Ibid.

¹¹⁴⁵ Ibid.

¹¹⁴⁶ Dinse and Rösler 2011, p. 416.

¹¹⁴⁷ Crook (editor) 2010, p. 681-684.

¹¹⁴⁸ Dinse and Rösler 2011, p. 416.

that court for a declaratory judgment, meaning that the US court will not enforce the foreign judgment since the foreign judgment is not in accordance with the *US Constitution* and US public policy.¹¹⁵⁰ For example, in the *Bin Mahfouz v. Ehrenfeld*¹¹⁵¹ case, a US author was brought before an English court by a Saudi Arabian businessman, who claimed that the US author had defamed him because she had claimed in her book that he was involved in the financing of terrorism.¹¹⁵² During the English proceedings, in which she was ordered to pay damages to the plaintiff, she asked the *US District Court* of the Southern District of New York for a declaratory judgement, which was refused due to the lack of jurisdiction.¹¹⁵³ Second, a US citizen might want to prevent that a foreign judgement against him or her would be recognized and/or enforced in the US. The danger of “*Libel Tourism*”¹¹⁵⁴ is that the judgement could harm the *Right of the Freedom of Speech (US Constitution)* of the US citizen.¹¹⁵⁵ Normally, US state laws regulate if and how a foreign judgement should be recognized and enforced.¹¹⁵⁶ After the *Bin Mahfouz v. Ehrenfeld* case¹¹⁵⁷, the current US President B. Obama signed the *SPEECH ACT*¹¹⁵⁸ on 10 August 2011.¹¹⁵⁹ *Section 4102 Recognition of Foreign Judgements under (a) First Amendment Considerations SPEECH ACT*¹¹⁶⁰ reads:

“(1) *IN GENERAL*- Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that--
 ‘(A) the defamation law applied in the foreign court’s adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located; or
 ‘(B) even if the defamation law applied in the foreign court’s adjudication did not provide as much protection for freedom of speech and press as the first amendment to the Constitution of the United States and the constitution and law of the State, the party opposing recognition or enforcement of that foreign judgment would have been found liable for defamation by a domestic court applying the first amendment to the Constitution of the United States and the constitution and law of the State in which the domestic court is located.”

In sum, the *SPEECH ACT*¹¹⁶¹ should be regarded as a federal law which prevents that foreign libel judgements against US citizens are recognized and/or enforced by US courts, when it is acknowledged that such a case would not have had the same positive outcome for the foreign plaintiff in a US court as before the foreign court.¹¹⁶² Besides, if the (foreign) plaintiff wants a foreign libel judgement to be recognized in the US, the US defendant can, if the conditions mentioned in the *SPEECH ACT*¹¹⁶³ are met, ask the US court for declaratory relief, injunctions, compensation, compensatory damages and/or treble damages against the plaintiff under the *SPEECH ACT*^{1164 1165}.

¹¹⁴⁹ Packard 2010, p. 95-96 and Rendleman 2010, p. 467-487.

¹¹⁵⁰ Ibid.

¹¹⁵¹ *Bin Mahfouz v. Ehrenfeld*, Hartley 2010, p. 31-32 and footnote 29 and Dinse and Rösler 2011, p. 414-415.

¹¹⁵² Ibid.

¹¹⁵³ *Ehrenfeld v. Bin Mahfouz I*, *Ehrenfeld v. Bin Mahfouz II* and Hartley 2010, p. 32 and footnote 33.

¹¹⁵⁴ See e.g. Sanchez 2011, p. 470-520 and Rendleman 2010, p. 467-487.

¹¹⁵⁵ Crook (editor) 2010, p. 681-682, Dinse and Rösler 2011, p. 414-415, Hartley 2010, p. 25 and 30-32 and <http://www.bbc.co.uk/news/uk-10940211/> (12 August 2012).

¹¹⁵⁶ Dinse and Rösler 2011, p. 416.

¹¹⁵⁷ *Bin Mahfouz v. Ehrenfeld* and Hartley 2010, p. 31 and footnote 29.

¹¹⁵⁸ *H.R. 2765: Securing the Protection of Our Enduring and Established Constitutional Heritage Act or SPEECH ACT or 28 USCS § 4101*.

¹¹⁵⁹ Crook (editor) 2010, p. 681.

¹¹⁶⁰ *H.R. 2765: Securing the Protection of Our Enduring and Established Constitutional Heritage Act or SPEECH ACT or 28 USCS § 4101*.

¹¹⁶¹ Ibid.

¹¹⁶² Siegel 2011, p. 137, footnote 34.

¹¹⁶³ *H.R. 2765: Securing the Protection of Our Enduring and Established Constitutional Heritage Act or SPEECH ACT or 28 USCS § 4101*.

¹¹⁶⁴ Ibid.

It can, carefully, be concluded that in case of a copyright infringement (if it is e.g. not contradicting the public policy of the state), the US court will more easily recognize and/or enforce the foreign decision than in the case of libel.¹¹⁶⁶

4.3 Copyright law

4.3.1 US copyright law

4.3.1.1 What is copyright protected?

Is the information provided on a missing persons' website copyright protected?

In order for a manager and/or user of a US based missing persons' website to receive copyright protection for his or her work, in general, the following two conditions must be met: First, the work must be fixed and second, it must be original (§101 and §102 (a) and (b) Title 17 United States Code).¹¹⁶⁷ Its value or quality is not important.¹¹⁶⁸ A website or a comment will be regarded a literary work as described in §102 (a) Title 17 United States Code.¹¹⁶⁹

4.3.1.2 Which rights does the copyright owner have?

If the owner is the *US Government*, it cannot claim copyright protection for its works (§105 Title 17 United States Code).¹¹⁷⁰

It is explained in §201 (a)-(c) Title 17 United States Code who should be considered to be the copyright owner when it concerns a normal work, a work made for hire or a collective work. Sections 106-122 Title 17 United States Code clarifies which exclusive rights the copyright owner has and which limitations¹¹⁷¹ exist. In sum, the copyright owner has, amongst others, the right to reproduce, to make derivative works, to distribute and to show the work in public (§106 (1)-(5) Title 17 United States Code). The copyright owner can decide to transfer his or her rights of ownership voluntary or involuntary to someone else according to section 201 (d)-(e) Title 17 United States Code.

4.3.1.3 Who else has the right of reproduction and making available to the public except of the copyright owner?

To begin with, the US copyright owner can give permission by issuing a license to the manager of the missing persons' website to copy and make available to the public.¹¹⁷² Second, Sections 107-122 Title 17 United States Code explain which exceptions there can be, amongst others, to the right of reproduction and making available to the public by the copyright holder. The most important restriction is the "fair use"¹¹⁷³ limitation which can be found in §107 Title 17 United States Code.

¹¹⁶⁵ Hartley 2010, p. 33.

¹¹⁶⁶ Jerker B. Svantesson 2007, p. 157.

¹¹⁶⁷ Fishman 2010, p. 20-22, <http://www.copyright.gov/help/faq/faq-protect.html#website> and <http://www.copyrightlaws.com/copyright-qs-as/9-0-copyright-permissions/> (both 12 August 2012).

¹¹⁶⁸ WIPO 2008, p. 153-154 and Fishman 2011, p. 6.

¹¹⁶⁹ Stim 2010 II, p. 188.

¹¹⁷⁰ Fishman 2010, p. 42.

¹¹⁷¹ Section 106A Title 17 United States Code is about the right of the copyright holder in the case of visual art. Sections 107-122 Title 17 United States Code are the exceptions of the rights of the copyright holder.

¹¹⁷² Stim 2010 II, p. 11, 19 and 198, Suthersanen 2007, p. 59, Kim 2007, p. 187 and Fishman 2011, p. 372.

¹¹⁷³ Halpern, Nard and Port 2011, p. 116-136.

If a manager of a missing persons' website receives a complaint of a copyright owner that there is copyright infringement material on his or her website, e.g. in a comment, he or she should examine if the complaint is legit and, if this is the case, remove the material.¹¹⁷⁴

4.3.1.4 Which court has jurisdiction?

Copyright law falls under federal law (Article I, Section I, Clause 8 *US Constitution* and §301 *Title 17 United States Code*).¹¹⁷⁵ Therefore, a copyright infringement case must be initiated before a *Federal Court* and can be brought against anyone who knowingly or unknowingly breaches copyright law (§106-118 *Title 17 United States Code*).¹¹⁷⁶ Chapter 5 (§501-513) *Title 17 United States Code* explains copyright infringement and its remedies in civil cases.

The term of limitation in a civil action is three years (§507 (b) *Title 17 United States Code*).

4.3.1.5 Are there problems concerning US missing persons' websites in practice?

It can be assumed that the websites of the *Amber Alert*¹¹⁷⁷, *NamUs*¹¹⁷⁸, the *NCMEC*¹¹⁷⁹, the *Doe Network*¹¹⁸⁰, the *National Center for Missing Adults*¹¹⁸¹, the *For the Lost Organization*¹¹⁸² and *The Charley Project*¹¹⁸³ are copyright protected, since their work is fixed on a website and original (§101 and §102 (a) and (b) *Title 17 United States Code*).¹¹⁸⁴

The *Amber Alert*¹¹⁸⁵ and *NamUs*¹¹⁸⁶ should be defined as *US Government* websites (§105 *Title 17 United States Code*) and therefore their content belongs to the public domain.¹¹⁸⁷

The manager of a missing persons' website can have been granted a license by the copyright owner.¹¹⁸⁸ The *NCMEC*¹¹⁸⁹ permits the use of its banners, its hypertext links and flyers on websites under certain conditions (“*Terms of Use for NCMEC Intellectual Property*”)¹¹⁹⁰ or a manager, as the managers of *The Charley Project*¹¹⁹¹ and of the *For the Lost Organization*¹¹⁹², can use a “*Creative Common License*”^{1193 1194}.

¹¹⁷⁴ Stim 2010 II, p. 189 and 192.

¹¹⁷⁵ Bouchoux 2009, p. 176, Crews 1993, p. 146 and Halpern, Nard and Port 2011, p. 1.

¹¹⁷⁶ Smith, Bird & Bird 2007, p. 98, Bouchoux 2009, p. 176, Fishman 2011, p. 309 and Halpern, Nard and Port 2011, p. 159-160.

¹¹⁷⁷ <http://www.amberalert.gov/> (12 August 2012).

¹¹⁷⁸ <http://www.namus.gov/> (including <https://www.findthemissing.org/en> and <https://identifyus.org/en> (all 12 August 2012)).

¹¹⁷⁹ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

¹¹⁸⁰ <http://www.doenetwork.org/> (12 August 2012).

¹¹⁸¹ <http://www.lbth.org/ncma/index.php> (12 August 2012).

¹¹⁸² <http://www.forthelost.org/> (12 August 2012).

¹¹⁸³ <http://www.charleyproject.org/> (12 August 2012).

¹¹⁸⁴ Fishman 2010, p. 20-22.

¹¹⁸⁵ <http://www.amberalert.gov/> (12 August 2012).

¹¹⁸⁶ <http://www.namus.gov/> (12 August 2012). The sections <https://www.findthemissing.org/en> and <https://identifyus.org/en> have another copyright policy (https://www.findthemissing.org/en/users/terms_of_use and https://identifyus.org/en/home/terms_of_use/ (all 12 August 2012)).

¹¹⁸⁷ Both times the section “*Legal Policies and Disclaimers*” redirects to <http://www.justice.gov/legalpolicies.htm/> (12 August 2012).

¹¹⁸⁸ Stim 2010 II, p. 11, 19 and 198 and Suthersanen 2007, p. 59 and Kim 2007, p. 187. Fishman 2011, p. 372.

¹¹⁸⁹ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

¹¹⁹⁰ http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1923 (12 August 2012).

¹¹⁹¹ <http://www.charleyproject.org/> (12 August 2012).

¹¹⁹² <http://www.forthelost.org/> (12 August 2012).

¹¹⁹³ Fishman 2011, p. 374.

The information found on the *Doe Network*¹¹⁹⁵, may be reproduced only if attention is paid to the “fair use” limitation (§107 Title 17 United States Code), according to the “terms of services” of the website.¹¹⁹⁶

The *National Center for Missing Adults*¹¹⁹⁷ provides no copyright policy, nevertheless a license could be obtained¹¹⁹⁸ or the limitation of “fair use” (§107 Title 17 United States Code) could be applied.¹¹⁹⁹

Until now, there were no copyright infringement cases brought before the US *State Courts* concerning any of the organizations mentioned above or its user(s). It can be assumed that the managers of missing persons’ websites themselves will resolve the issue of copyright infringement.¹²⁰⁰

4.3.2 *EU, Dutch and English copyright law*

A manager of a US based missing persons’ website can decide that he or she wants to use or copy and make it available to the public information from other sources outside of the US. Or the manager can be confronted with the fact that a user has placed material from a foreign website on his or her website which is relevant to the case, but the manager has doubts if the material might be copyright infringing material.

4.3.2.1 Is the information provided on a missing persons’ website copyright protected?

4.3.2.1.1 **The EU**

The EU does not define what a “work” is, but merely refers to art. 2 *Berne Convention*¹²⁰¹ in explaining what a “literary or artistic work” should be, however, the EU itself is not a member country of it, yet its Member-States are.¹²⁰²

4.3.2.1.2 **The Netherlands**

With the help of case-law, such as *Romme/Van Dale*¹²⁰³, it is clarified that a work will be copyright protected if it is original and fixed¹²⁰⁴. The moral of a work is not important.¹²⁰⁵ Art. 10 *Dutch Copyright Law* clarifies which works are copyright protected.

4.3.2.1.3 **England**

In England, a work must fall under one of the categories as described in Section 1 Chapter I Part 1 *1988 Act*.¹²⁰⁶ Websites and/or comments can fall in the category literary or artistic

¹¹⁹⁴ For *The Charley Project*: <http://www.charleyproject.org/copyright.html> and <http://creativecommons.org/licenses/by-nc/2.0/> and for the *For the Lost Organization*: <http://www.forthelost.org/> and <http://creativecommons.org/licenses/by-sa/2.0/> (all 12 August 2012).

¹¹⁹⁵ <http://www.doenetwork.org/> (12 August 2012).

¹¹⁹⁶ Ibid.

¹¹⁹⁷ <http://www.lbth.org/ncma/index.php> (12 August 2012).

¹¹⁹⁸ http://www.lbth.org/ncma/content.php?webid=ncma_contact and <http://www.copyright.gov/fls/fl102.html> (both 12 August 2012).

¹¹⁹⁹ Fishman 2011, p. 7 and 308.

¹²⁰⁰ <http://underwatch.wordpress.com/2011/05/18/where-is-dorothy-barnett-and-savannah-todd/#comment-5460> (12 August 2012).

¹²⁰¹ *Berne Convention*.

¹²⁰² *Institute for Information Law of the University of Amsterdam 2006*, p. 33 and http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=15 (12 August 2012).

¹²⁰³ Hoge Raad 4 januari 1991, *LJN ZC0104*.

¹²⁰⁴ Ibid, paragraph 3.4. See also Spoor, Verkade, Visser 2005, p. 57-79.

¹²⁰⁵ Spoor, Verkade, Visser 2005, p. 77.

¹²⁰⁶ Bently and Sherman 2004, p. 56.

works.¹²⁰⁷ Before a work can obtain copyright protection, four conditions need to be completed: the work must be in a material form, it must be original, it must be connected with the UK and no public policy grounds should apply on the work (which differs with the US and The Netherlands as mentioned above).¹²⁰⁸

4.3.2.2 Which rights does the copyright owner have?

4.3.2.2.1 **The EU**

Art. 2 and 3 *Directive 2001/29/EC*¹²⁰⁹ clarify that the author of the work has the exclusive right to, directly or indirectly, reproduce, communicate and/or make it available to the public the work or to give permission to someone else to do so. Art. 4 *Directive 2001/29/EC*¹²¹⁰ describes that the copyright owner has the right of distribution.

4.3.2.2.2 **The Netherlands**

The author of the work is explained in art. 1 *Dutch Copyright Law*, while art. 4-8 *Dutch Copyright Law* clarify other forms of ownership.¹²¹¹ The copyright owner has the right of making his or her work public, to reproduce, to distribute, to lend and to transfer his or her rights to someone else (art. 1, 2, 12, 12a and 13 *Dutch Copyright Law*).

4.3.2.2.3 **England**

Sections 16-21 Chapter II Part I *1988 Act* explains which exploitations are permitted by the copyright owner, unless someone else has received permission of the copyright owner.¹²¹²

The copyright owner is allowed, amongst others, to make copies (Section 17 Chapter II Part I *1988 Act*), to issue copies of the work to the public (Section 18 Chapter II Part I *1988 Act*), to lend or rent the work (Section 18A Chapter II Part I *1988 Act*), to make the work available to the public (Section 20 Chapter II Part I *1988 Act*) and to adapt the work (Section 21 Chapter II Part I *1988 Act*) as described in Section 16 (1) Chapter II Part I *1988 Act*.¹²¹³

4.3.2.3 Who else has the right of reproduction and making available to the public except of the copyright owner?

4.3.2.3.1 **The EU**

Art. 2 and 3 *Directive 2001/29/EC*¹²¹⁴ clarify that the author of the work can decide to give permission to someone else to, directly or indirectly, reproduce, communicate and/or make it available to the public the work.

In the EU, the limitations of the right of the owner of the work can be found in art. 5 *Directive 2001/29/EC*¹²¹⁵. The limitations mentioned in this article are exhaustive and art. 5 (5) *Directive 2001/29/EC*¹²¹⁶ contains a “*three-step-test*” which clarifies when reproduction could be allowed under national law.¹²¹⁷ The Netherlands as The UK have not transposed this section in their national law, because they are of the opinion that art. 5 (5) *Directive*

¹²⁰⁷ Ibid, p. 84.

¹²⁰⁸ Ibid, p. 86-113.

¹²⁰⁹ *Directive 2001/29/EC*.

¹²¹⁰ Ibid.

¹²¹¹ Spoor, Verkade, Visser 2005, p. 25-51.

¹²¹² Bently and Sherman 2004, p. 130-131.

¹²¹³ http://www.copyrightservice.co.uk/copyright/p01_uk_copyright_law/ (12 August 2012).

¹²¹⁴ *Directive 2001/29/EC*.

¹²¹⁵ Ibid.

¹²¹⁶ Ibid.

¹²¹⁷ Griffiths 2009, p. 3, Bernt Hugenholtz 2010, p. 341 and Koelman 2006, p. 407.

2001/29/EC¹²¹⁸ is directed against the legislative power and not also to the judiciary power, although both sometimes use the test in their case-law in case of doubt.¹²¹⁹

4.3.2.3.2 The Netherlands

In the case of missing persons' websites, the limitations found in art. 15a (quotation) and 15c (paying for e.g. reproduction) *Dutch Copyright Law* can be considered important. There is no "fair use" limitation applicable in The Netherlands.¹²²⁰

4.3.2.3.3 England

There are two permissible ways for a manager and/or user of a missing persons' website to copy from an English copyrighted work, which are: fair dealing (Sections 29-30 Chapter III Part I 1988 Act).¹²²¹, and licensing (Section 31D Chapter III Part I 1988 Act and Section 98 Chapter VI Part I 1988 Act).¹²²²

4.3.2.4 Which court has jurisdiction?

4.3.2.4.1 The EU

Art. 8 (1) and (2) *Rome II Regulation*¹²²³ clarify that copyright infringement is decided by the national court (the national law applicable on the copyrighted work) or before the court where the infringement took place, however, it is not possible that the plaintiff and defendant can together choose where to start a copyright infringement case (art. 8 (3) *Rome II Regulation*¹²²⁴).

The EU Member-State decides which sanctions and remedies there are against copyright infringement (art. 8 *Directive 2001/29/EC*¹²²⁵).

No mention is made concerning the term of limitation.

4.3.2.4.2 The Netherlands

If the damage or place where the copyright infringement took place was in The Netherlands the Dutch court has jurisdiction according to art. 6 (e) and 102 *Dutch Code of Civil Procedure*¹²²⁶.¹²²⁷ However, the plaintiff and the defendant can also decide together that a Dutch court should decide about the case (art. 8 (1) *Dutch Code of Civil Procedure*).

A copyright infringement in a civil procedure can be started against anyone who has breached copyright law (art. 6:162 *Dutch Civil Code*).¹²²⁸ The plaintiff has to prove that: The act must be considered unlawful, the unlawful act must be committed by the defendant, the unlawful act committed by the defendant must result in damage, and, there must be causality between the damage and the unlawful act committed by the defendant.¹²²⁹ However, attention should

¹²¹⁸ *Directive 2001/29/EC*.

¹²¹⁹ Koelman 2006, p. 407-408 and Griffiths 2009, p. 3-4.

¹²²⁰ <http://kluwercopyrightblog.com/2011/03/10/in-defence-of-a-fair-use-defence/> (12 August 2012). See also Alberdingk Thijm 1998, p. 145-154 and Senftleben 2009, p. 1-7.

¹²²¹ Bently and Sherman 2004, p. 193- 206.

¹²²² <http://www.copyrightservice.co.uk/ukcs/docs/edupack.pdf> (12 August 2012).

¹²²³ *Regulation (EC) No 864/2007*.

¹²²⁴ *Ibid.*

¹²²⁵ *Directive 2001/29/EC*.

¹²²⁶ http://ec.europa.eu/civiljustice/jurisdiction_courts/jurisdiction_courts_net_nl.htm (12 August 2012).

¹²²⁷ Smith, Bird & Bird 2007, p. 627 and Pontier 2001, p. 74-81.

¹²²⁸ Spoor, Verkade and Visser 2005, p. 489-490.

¹²²⁹ Spier, Hartlief, van Maanen and Vriesendorp 2009, p.58, Kottenhagen and Kottenhagen-Edzes 2007, p. 188 and <http://www.aansprakelijkheid.nl/nl/overige-aansprakelijkheid/onrechtmatige-daad-en-aansprakelijkheid/> (12 August 2012).

also be paid to the relativity requirement mentioned in art. 6:163 *Dutch Civil Code* (the fifth condition).¹²³⁰

According to art. 3:310 (1) and (5) *Dutch Civil Code*, the limitation to begin a copyright infringement case is within five years that the plaintiff became aware that he had suffered damage due to the copyright infringement act and knew who had committed it.¹²³¹

4.3.2.4.3 England

Since the UK is a EU-Member-State, it is obliged to follow EU law concerning jurisdiction instead of its own national law.¹²³² Art. 8 (1) and (2) *Rome II Regulation*¹²³³ explain that copyright infringement cases can be decided by the English court if it concerns a work which is protected under English copyright law. Although, it is possible for a defendant to argue that the English court does not have jurisdiction according to Rule 11 *CPR*.¹²³⁴

According to Section 58 Part I *Limitation Act 1980* the limitation to begin a copyright infringement case is six years.

4.3.2.5 Are there problems concerning missing persons' websites in practice?

4.3.2.5.1 The EU

In the EU, a distinction can be made between missing adults and missing children since, in the case of missing adults, these initiatives mostly have a political background.¹²³⁵ Therefore, the EU websites discussed will only be about missing children.

*Missing Children Europe*¹²³⁶, the website of the project of the *European Child Alert Automated System*¹²³⁷ and *Childscope*¹²³⁸ do not have a copyright section as the website of the *ICMEC*¹²³⁹ has.¹²⁴⁰ However, it can be concluded that the material on the site is copyright protected since it can be regarded as original and fixed.¹²⁴¹ Permission to copy and make available to the public of the websites *Missing Children Europe*¹²⁴² and *Childscope*¹²⁴³ (functions under the direction of *Missing Children Europe*)¹²⁴⁴ can be asked from the manager of the website of *Missing Children Europe*¹²⁴⁵, since it has a “Contact” section.¹²⁴⁶ It is unclear who the manager of the website of the project of the *European Child Alert Automated*

¹²³⁰ Ibid.

¹²³¹ Verheij 2005, p. 18-20 and <http://www.aansprakelijkheid.nl/nl/overige-aansprakelijkheid/verjaring-en-onrechtmatige-daad/> (12 August 2012).

¹²³² <http://www.herbertsmith.com/NR/rdonlyres/3F7524EE-9AB8-4B6A-9993-285934A7EF14/1605/Regjuris.pdf> and

<http://www.clarkslegal.com/Article/783/Determining%20Jurisdiction%20under%20English%20Law/> (both 12 August 2012).

¹²³³ *Regulation (EC) No 864/2007*.

¹²³⁴ Stone 2010, p. 187-188.

¹²³⁵ See e.g. *Missing Persons in Cyprus-Follow up*.

¹²³⁶ <http://www.missingchildreneurope.eu> (12 August 2012).

¹²³⁷ <http://www.europeanchildalert.com/> (12 August 2012).

¹²³⁸ <http://www.childscope.net/2009/httpdocs/index.php?sw=2> (12 August 2012).

¹²³⁹ <http://www.icmec.org/missingkids/servlet/PublicHomeServlet> (12 August 2012).

¹²⁴⁰ http://www.icmec.org/missingkids/servlet/PageServlet?LanguageCountry=en_X1&PageId=3246#ReprintPolicy (12 August 2012).

¹²⁴¹ *Institute for Information Law of the University of Amsterdam 2006*, p. 33.

¹²⁴² <http://www.missingchildreneurope.eu> (12 August 2012).

¹²⁴³ <http://www.childscope.net/2009/httpdocs/index.php?sw=2> (12 August 2012).

¹²⁴⁴ <http://www.missingchildreneurope.eu> (12 August 2012).

¹²⁴⁵ Ibid.

¹²⁴⁶ http://www.missingchildreneurope.eu/index.php?option=com_content&view=article&id=91&Itemid=28/ (12 August 2012).

*System*¹²⁴⁷ is, and therefore, in the case of copying and making available to the public, it is advisable to apply the limitations, reproduce and quoting, as described in art. 5 (3) c and d *Directive 2001/29/EC*¹²⁴⁸.

*Missing Children Europe*¹²⁴⁹, the *European Child Alert Automated System*¹²⁵⁰, *Childscope*¹²⁵¹ and the *ICMEC*¹²⁵² do not offer the possibility to users to write comments, therefore they will not be sued before the *ECJ*¹²⁵³ when it concerns copyright infringement committed by a user.

Until now, there was no copyright case brought before the *ECJ*¹²⁵⁴ concerning any of the organizations mentioned above, about a US based missing persons' website or its user(s).

4.3.2.5.2 The Netherlands

It can be concluded that the Dutch Missing children website¹²⁵⁵, the Dutch *Amber Alert*¹²⁵⁶ website, the Dutch missing adults' website¹²⁵⁷ and *Vermist*¹²⁵⁸ are copyright protected because they are original and fixed.¹²⁵⁹

Permission of the copyright owner for copying must be asked beforehand when it concerns the Dutch missing children website¹²⁶⁰, the missing adults' website¹²⁶¹ and *Vermist*¹²⁶².¹²⁶³ In the case of the Dutch *Amber Alert*¹²⁶⁴, there is no copyright information (except of the use of its logo)¹²⁶⁵ concerning the information displayed on the website.

None of the above mentioned missing persons' websites offer the possibility for a user to write a comment.

Until now, there was no copyright case brought before a Dutch court concerning any of the organizations mentioned above, about a US based missing persons' website or its user(s).

4.3.2.5.3 England

The websites of the national missing children website¹²⁶⁶, *Pact*¹²⁶⁷ and *Missing People*¹²⁶⁸ are literary or artistic works (Section 1 Chapter I Part 1 *1988 Act*)¹²⁶⁹ and are in a material form, are original, are connected with the UK and no public policy grounds applies on them and therefore it can be concluded that they should be regarded as copyright protected.¹²⁷⁰

¹²⁴⁷ <http://www.europeanchildalert.com/> (12 August 2012).

¹²⁴⁸ *Directive 2001/29/EC*.

¹²⁴⁹ <http://www.missingchildreneurope.eu> (12 August 2012).

¹²⁵⁰ <http://www.europeanchildalert.com/> (12 August 2012).

¹²⁵¹ <http://www.childscope.net/2009/httpdocs/index.php?sw=2> (12 August 2012).

¹²⁵² <http://www.icmec.org/missingkids/servlet/PublicHomeServlet> (12 August 2012).

¹²⁵³ http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm (12 August 2012).

¹²⁵⁴ *Ibid*.

¹²⁵⁵ <http://www.missingkids.nl/missingkids/servlet/PublicHomeServlet> (12 August 2012).

¹²⁵⁶ <http://www.amberalertnederland.nl/Default.aspx?lang=nl> (12 August 2012).

¹²⁵⁷ http://www.politie.nl/Opsporing/vermiste_personen.asp (12 August 2012).

¹²⁵⁸ <http://www.vermist.nl/> (12 August 2012).

¹²⁵⁹ Hoge Raad 4 januari 1991, *LJN ZC0104*, paragraph 3.4. See also Spoor, Verkade, Visser 2005, p. 57-79.

¹²⁶⁰ <http://www.missingkids.nl/missingkids/servlet/PublicHomeServlet> (12 August 2012).

¹²⁶¹ http://www.politie.nl/Opsporing/vermiste_personen.asp (12 August 2012).

¹²⁶² <http://www.vermist.nl/> (12 August 2012).

¹²⁶³ <http://www.politie.nl/KLPD/default.asp>, <http://www.politie.nl/English/>,

<http://www.vermistepersonen.info/copyright/default.asp> and <http://www.vermist.nl/index.php?id=9> (all 12 August 2012).

¹²⁶⁴ <http://www.amberalertnederland.nl/Default.aspx?lang=nl> (12 August 2012).

¹²⁶⁵ <http://www.amberalertnederland.nl/Faq.aspx?lang=nl/> (12 August 2012) and at the bottom of each page.

¹²⁶⁶ <http://uk.missingkids.com> (12 August 2012).

¹²⁶⁷ <http://www.pact-online.org/> (12 August 2012).

¹²⁶⁸ <http://www.missingpeople.org.uk/> (12 August 2012).

¹²⁶⁹ Bently and Sherman 2004, p. 56 and 84.

¹²⁷⁰ *Ibid*, p. 86-113.

In case of copying from the copyright protected website of *Missing People*¹²⁷¹, permission has to be obtained beforehand.¹²⁷² The same can be concluded for the information provided on the website of *Pact*¹²⁷³, since permission to reproduce and make available to the public has to be asked before placing a link to this organization.¹²⁷⁴ The national missing children website¹²⁷⁵ allows copying only when certain conditions are met.¹²⁷⁶

The UK missing children website¹²⁷⁷ and *Pact*¹²⁷⁸ do not offer the possibility to write a comment on their website, while *Missing People*¹²⁷⁹ does offer this possibility on its blog¹²⁸⁰. However, defamatory statements will be removed.¹²⁸¹

The UK missing children website¹²⁸², *Pact*¹²⁸³ and *Missing People*¹²⁸⁴ have a contact section on their website.¹²⁸⁵

Until now, there was no copyright infringement case brought before an English court concerning any of the organizations mentioned above, about a US based missing persons' website or its user(s).

4.4 Defamation law

4.4.1 US defamation law

4.4.1.1 Which conditions must be fulfilled in a defamation case?

US defamation law is addressed at state law level.¹²⁸⁶ However, use is made in this field of *Restatement (Second) of Torts*¹²⁸⁷. Important is *Restatement (Second) of Torts*¹²⁸⁸ §558, which explains that the conditions for defamation should be: defamation, identification, publication, fault, falsity and injury.¹²⁸⁹

4.4.1.2 Which court has jurisdiction?

The court of the state where the defamation happened, where the person who made the defamatory statement lives, where the harm of the defamatory statement is felt or where the defamatory statement is received (nevertheless, a combination is also possible) can claim

¹²⁷¹ <http://www.missingpeople.org.uk/> (12 August 2012).

¹²⁷² <http://www.missingpeople.org.uk/missing-people/terms-of-use> (12 August 2012).

¹²⁷³ <http://www.pact-online.org/> (12 August 2012).

¹²⁷⁴ <http://www.pact-online.org/Get-Involved/get-involved-pact-parents-and-abducted-children-together-parental-abduction-missing-children-associate-of-icmec.html> (12 August 2012).

¹²⁷⁵ <http://uk.missingkids.com> (12 August 2012).

¹²⁷⁶ <http://uk.missingkids.com/terms/> (12 August 2012).

¹²⁷⁷ <http://uk.missingkids.com/> (12 August 2012).

¹²⁷⁸ <http://www.pact-online.org/> (12 August 2012).

¹²⁷⁹ <http://www.missingpeople.org.uk/> (12 August 2012).

¹²⁸⁰ <http://www.themissingblog.com/> (12 August 2012).

¹²⁸¹ <http://www.missingpeople.org.uk/missing-people/terms-of-use> (12 August 2012).

¹²⁸² <http://uk.missingkids.com/> (12 August 2012).

¹²⁸³ <http://www.pact-online.org/> (12 August 2012).

¹²⁸⁴ <http://www.missingpeople.org.uk/> (12 August 2012).

¹²⁸⁵ <https://www.ceop.police.uk/Contact-Us/Contact-form/>, <http://www.pact-online.org/General/contact-us-pact-parents-and-abducted-children-together-parental-abduction-missing-children-associate-of-icmec.html> and <http://www.missingpeople.org.uk/missing-people/contact-us/> (all 12 August 2012).

¹²⁸⁶ See e.g. Golden, Vogel, Faar & Gallagher LLP 2009, p. 50-53 and Zelezny 2011, p. 119.

¹²⁸⁷ The *Restatement (Second) of Torts* is adopted by most states and courts (see e.g.

http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2314,

<http://www.kentlaw.edu/academics/lrw/tutorials/restate.htm>,

<http://libguides.law.harvard.edu/content.php?pid=103327&sid=776882>,

<http://libguides.law.harvard.edu/content.php?pid=103327&sid=1036651> and

<http://www.lectlaw.com/files/lwr16.htm> (all 12 August 2012) and Conway-Jones 2005, p. 18).

¹²⁸⁸ Ibid.

¹²⁸⁹ Conway-Jones 2005, p. 19, Carroll 2010, p. 270-271 and Golden, Vogel, Faar & Gallagher LLP 2009, p. 49.

jurisdiction.¹²⁹⁰ However, state law should be examined on how defamation cases are dealt with within the state.¹²⁹¹

4.4.1.3 How can a manager and/or user defend him- or herself against a defamation claim?
Besides providing an e-mail address¹²⁹² or taking insurance¹²⁹³, there are other possibilities how a manager and/or user can prevent a defamation claim.

In the case of prevention, the manager and/or user has to be sure that the statement is truthful¹²⁹⁴ and/or ask permission of the person in question before issuing the statement.¹²⁹⁵

In court, a manager and/or user can protect him or herself against liability by claiming that the statement is truthful¹²⁹⁶, it is an opinion¹²⁹⁷ or the plaintiff is a “limited public figure”¹²⁹⁸.

A manager of a missing persons’ website can circumvent liability for defamation by explaining that the defamatory statement was made by a user (*Section 230 CDA*¹²⁹⁹ and see e.g. *Shiamili v. Real Estate Group of N.Y., Inc.*¹³⁰⁰),¹³⁰¹

4.4.1.4 Are there problems concerning missing persons’ websites in practice?

There are different possibilities of how managers of US based missing persons’ websites are trying to prevent defamation claims. Some of these examples will now be provided.

First, the manager and/or user should quote from a reliable source as the *NCMEC*¹³⁰² or *NamUs*¹³⁰³, since both, amongst others, are supported by the *US Justice Department*¹³⁰⁴ (however, it is not responsible for, amongst others, the content on *NamUs Missing Persons*¹³⁰⁵, *NamUs Unidentified Persons*¹³⁰⁶ and the *NCMEC*¹³⁰⁷)¹³⁰⁸. Another example of a

¹²⁹⁰ *Committee on legal affairs (Rapporteur D. Wallis) 2010*, p. 10-11, Schwabach 2006, p.81 and Jerker B. Svantesson 2007, p. 156-157.

¹²⁹¹ Golden, Vogel, Faar & Gallagher LLP 2009, p. 53,

http://www.expertlaw.com/library/personal_injury/defamation.html and <http://www.citmedialaw.org/legal-guide/defamation> (both 12 August 2012).

¹²⁹² Carroll 2010, p. 270.

¹²⁹³ Bank 2010, p. 217.

¹²⁹⁴ Carroll 2010, p. 270 and Bank 2010, p. 213-214.

¹²⁹⁵ Bank 2010, p. 214.

¹²⁹⁶ <http://www.citmedialaw.org/legal-guide/defamation> (12 August 2012).

¹²⁹⁷ http://www.expertlaw.com/library/personal_injury/defamation.html, <http://maudnewton.com/blog/?p=3899> (both 12 August 2012), Bank 2010, p. 215 and Shuy 2010, p. 15-16.

¹²⁹⁸ Merriam-Webster Inc. 1996, p. 296, http://www.expertlaw.com/library/personal_injury/defamation.html/ (12 August 2012) and Bank 2010, p. 217.

¹²⁹⁹ *Communications Decency Act or 47 USC §230*.

¹³⁰⁰ *Shiamili v. Real Estate Group of N.Y., Inc.*

¹³⁰¹ Biederman, Pierson, Silfen, Glasser, Biederman, Abdo and Sanders 2007, p. 915 and Belmas and Overbeck 2012, p. 167.

¹³⁰² http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

¹³⁰³ <http://www.namus.gov/> (12 August 2012).

¹³⁰⁴ <http://www.justice.gov/> (12 August 2012).

¹³⁰⁵ See also <https://www.findthemissing.org/en/homes/about> and

https://www.findthemissing.org/en/users/terms_of_use (both 12 August 2012).

¹³⁰⁶ See also <https://identifyus.org/en/home/about> and https://identifyus.org/en/home/terms_of_use (both 12 August 2012).

¹³⁰⁷ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US/ (12 August 2012).

¹³⁰⁸ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US and <http://www.namus.gov/> (both 12 August 2012).

reliable source is the *Doe Network*¹³⁰⁹, which is acknowledged by the *US Justice Department*¹³¹⁰ as part of the “*Responsible Volunteer Community*”^{1311 1312}.

Second, a manager should keep his or her website up-to-date, e.g. in the case of *NamUs*¹³¹³ a manager can apply for the option to be notified when a missing person is located.¹³¹⁴

Third, a missing persons’ website can explain in a policy that its users are not allowed to defame someone (see e.g. the “*Comment/post policy*”¹³¹⁵ of the *For the Lost Organization*¹³¹⁶).

Fourth, apart from a comment policy, some missing persons’ websites explain which person they consider as a “*missing person*” in accordance with the terms of their website, e.g. the *For the Lost Organization*¹³¹⁷ has a “*Glossary of Missing Person’s Terms*”.¹³¹⁸

Fifth, a manager can also decide to explain why some persons are defined as missing on his or her website as *The Charley Project*¹³¹⁹ and the *For the Lost Organization*¹³²⁰ have done.¹³²¹

Sixth, the use of a disclaimer can be encouraged as is done by the *Doe Network*¹³²².

Seventh, all the US based missing persons’ websites mentioned in this Master Thesis provide an e-mail address where the manager can be contacted.¹³²³

Until now, there were some defamation cases brought before the *US State Courts* concerning a few of the organizations mentioned above or its user(s).¹³²⁴

4.4.2 EU, Dutch and English defamation law

A US based missing persons’ website can normally be visited inside as outside of the US. Since sometimes it is suspected that someone else is involved in a disappearance, it is not unthinkable that a manager and/or user of a missing persons’ website can be sued for defamation by a plaintiff from The Netherlands or The UK (England). Since both countries are an EU Member-State¹³²⁵, attention should be first paid to EU defamation law.

4.4.2.1 Which conditions must be fulfilled in a defamation case?

4.4.2.1.1 The EU

Art. 15 *Rome II Regulation*¹³²⁶ is about the scope of the Regulation, while art 21 *Rome II Regulation*¹³²⁷ explains that the law of the court of the EU Member-State which has jurisdiction must be used in order to determine the conditions of defamation.

¹³⁰⁹ <http://www.doenetwork.org/start.html> (12 August 2012).

¹³¹⁰ <http://www.justice.gov/> (12 August 2012).

¹³¹¹ <http://www.namus.gov/volunteer.htm> (12 August 2012).

¹³¹² <http://www.doenetwork.org/start.html> (12 August 2012).

¹³¹³ <http://www.namus.gov/> (12 August 2012).

¹³¹⁴ http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1923 and https://www.findthemissing.org/en/users/terms_of_use (both 12 August 2012).

¹³¹⁵ <http://forthelost.wordpress.com/about/commentpost-policy/> (12 August 2012).

¹³¹⁶ <http://www.forthelost.org/> (12 August 2012).

¹³¹⁷ Ibid.

¹³¹⁸ <http://www.forthelost.org/terms.html> (12 August 2012).

¹³¹⁹ <http://www.charleyproject.org/> (12 August 2012).

¹³²⁰ <http://www.forthelost.org/> (12 August 2012).

¹³²¹ <http://www.charleyproject.org/faq.html> and <http://www.forthelost.org/faq.html> (both 12 August 2012).

¹³²² <http://www.doenetwork.org/start.html> (12 August 2012).

¹³²³ <http://www.amberalert.gov/contact.htm>, <https://www.findthemissing.org/en>, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=403, http://www.lbth.org/ncma/content.php?webid=ncma_contact, <http://www.doenetwork.org/>, <http://www.forthelost.org/> and <http://www.charleyproject.org/> (all 12 August 2012).

¹³²⁴ See e.g. *Meuse v. Fox News Channel, Inc., and others*.

¹³²⁵ http://europa.eu/about-eu/countries/index_en.htm (12 August 2012).

¹³²⁶ *Regulation (EC) No 864/2007*.

¹³²⁷ Ibid.

4.4.2.2 The Netherlands

The plaintiff would start a civil defamation case on the basis of art. 6:162 *Dutch Civil Code* and he or she has to prove four conditions and the relativity requirement of art. 6:163 *Dutch Civil Code* should be applicable.¹³²⁸ If so, the Dutch court can declare that the defendant is not guilty of defamation.¹³²⁹

4.4.2.3 England

A “*letter of Claim*”¹³³⁰, according to the *Defamation Pre-Action Protocol*¹³³¹, must first be sent to the defendant in order to resolve the defamation matter between the plaintiff and defendant themselves, before the plaintiff can start a defamation case.¹³³² If the *letter of Claim*¹³³³ does not lead to the envisioned result according to the plaintiff, a defamation case can be started before the English Court when two conditions are fulfilled: it must be established that the plaintiff has a reputation in The UK and that the publication of the defamation has happened in there.¹³³⁴ Defamation should be seen as a tort which has to be “*published*”, meaning accessible to at least one other person¹³³⁵, for example material on a website should be considered as published when it can be downloaded in England.¹³³⁶ Nevertheless, determined is not the fact that that the material can be downloaded, but about who has actual read the material.¹³³⁷ Defamation should be seen as libel per se.¹³³⁸ A statement is considered to be defamatory if: The defamatory statement encourages people to adapt their view about the plaintiff in a negative manner, this results in a situation that people do not want to be around the plaintiff anymore and the plaintiff is exposed to being hated, ridiculed... by the general public due to that statement.¹³³⁹

4.4.2.2 Which court has jurisdiction?

4.4.2.2.1 The EU

Since a manager and/or user of a missing persons’ website should not be regarded as belonging to the press, the *Rome II Regulation*¹³⁴⁰ should be applied instead of the *Brussels I Regulation*¹³⁴¹.¹³⁴² Art. 4 (1)-(3) *Rome II Regulation*¹³⁴³ explains which court has jurisdiction,

¹³²⁸ Koch (editor) 2010, p. 405 and Spier, Hartlief, van Maanen and Vriesendorp 2009, p.58. See also part: 2.3.2 *The Netherlands*, p. 46-50.

¹³²⁹ Spier, Hartlief, van Maanen and Vriesendorp 2009, p. 21 and 60-67, Kottenhagen and Kottenhagen-Edzes 2007, p. 188 and 191 and <http://www.aansprakelijkheid.nl/nl/overige-aansprakelijkheid/onrechtmatige-daad-en-aansprakelijkheid/> (12 August 2012) and Hoge Raad 22 februari 2002, *LJN AD5356* (Conclusion of Mr. L. Strikwerda), paragraph 16.

¹³³⁰ Milmo, Rogers and others (editors) 2004, p. 759-761 and http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_def/ (12 August 2012).

¹³³¹ http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_def/ (12 August 2012).

¹³³² Milmo, Rogers and others (editors) 2004, p. 759-761.

¹³³³ Ibid and http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_def/ (12 August 2012).

¹³³⁴ Mullis and Scott 2010, p. 14 and Kunke 2005, p. 1756.

¹³³⁵ Milmo, Rogers and others (editors) 2004, p. 3 and 7.

¹³³⁶ Mullis and Scott 2010, p. 30.

¹³³⁷ Ibid, p. 14-15.

¹³³⁸ Milmo, Rogers and others (editors) 2004, p. 79-80 and Kunke 2005, p. 1746.

¹³³⁹ Milmo, Rogers and others (editors) 2004, p. 8.

¹³⁴⁰ *Regulation (EC) No 864/2007*.

¹³⁴¹ *Council Regulation (EC) No 44/2001*.

¹³⁴² Deibert, Palfrey, Rohozinski and Zittrain (editors) 2010, p. 288, Warshaw 2006, p. 273 and http://www.europarl.europa.eu/ftu/pdf/en//FTU_4.12.5.pdf (12 August 2012).

¹³⁴³ *Regulation (EC) No 864/2007*.

although, according to 14 (1) *Rome II Regulation*¹³⁴⁴, the plaintiff and defendant together can also decide together which court should hear the case.

No mention is made in this Regulation concerning the term of limitation.

4.4.2.2.2 The Netherlands

Dutch law is applicable if the damage or place where the defamation occurred was in The Netherlands¹³⁴⁵ or if the plaintiff and the defendant decide together that a Dutch court should hear the case ((art. 6 (e), 8 (1) and 102 *Dutch Code of Civil Procedure*).¹³⁴⁶

In The Netherlands, the limitation to begin a defamation case is within five years that the plaintiff was aware that he had suffered damage to his reputation and knew who had caused it (see e.g. art. 3:310 (1) and (5) *Dutch Civil Code*).¹³⁴⁷

4.4.2.2.3 England

According to English defamation law, it matters if the plaintiff is a non-resident living in an EU Member-State or not.¹³⁴⁸ In the first case, EU-law (e.g. the *Rome II Regulation*¹³⁴⁹) is applicable¹³⁵⁰, otherwise the English rules of jurisdiction apply.¹³⁵¹

The time-limitation concerning defamation is only one year starting from the moment of publication.¹³⁵²

There is a lot of discussion concerning the problem of forum shopping or “*Libel Tourism*” in English defamation law¹³⁵³. A libel case before an English court can be attractive since: It does not matter under English law if the plaintiff is a resident of the country since only his or her *Right of Reputation* in The UK is important¹³⁵⁴, the English court does not request that the plaintiff has to prove that the defamatory statement is false or that he has suffered damages¹³⁵⁵, the defendant has to prove, for example, that the statement is true¹³⁵⁶, by placing the burden on the publisher, it is deemed that the publisher will think twice before he or she will place the statement online¹³⁵⁷, if the plaintiff succeeds in his defamation claim, he can be awarded damages for his or her injured reputation and emotional distress and the amount of these damages can be larger than in other EU Member-States¹³⁵⁸ and, according to the English, Court, each repetition of the defamatory statement means another libel tort¹³⁵⁹. Nevertheless, in practice, it turns out that there are not many cross border defamation cases¹³⁶⁰, except of court procedures against US citizens¹³⁶¹. However, it is possible that

¹³⁴⁴ Ibid.

¹³⁴⁵ Smith, Bird & Bird 2007, p. 627, Pontier 2001, p. 74-81 and

http://ec.europa.eu/civiljustice/jurisdiction_courts/jurisdiction_courts_net_nl.htm (12 August 2012).

¹³⁴⁶ Ibid.

¹³⁴⁷ Verheij 2005, p. 18-20 and <http://www.aansprakelijkheid.nl/nl/overige-aansprakelijkheid/verjaring-en-onrechtmatige-daad/> (12 August 2012).

¹³⁴⁸ Hartley 2010, p. 26-30.

¹³⁴⁹ *Regulation (EC) No 864/2007*.

¹³⁵⁰ Hartley 2010, p. 28-29.

¹³⁵¹ Ibid, p. 29-30.

¹³⁵² http://findlaw.co.uk/law/accidents_and_injuries/defamation/500051.html (12 August 2012).

¹³⁵³ See e.g. Sanchez 2011, p. 470-520, Rendleman 2010, p. 467-487, *Committee on legal affairs (Rapporteur D. Wallis) 2011*, p. 3-4 and Bennett 2010, p. 1-22.

¹³⁵⁴ Cauchi 2002, p. 2 and Hartley 2010, p. 26-30.

¹³⁵⁵ Beauchamp 2006, p. 3080, Kunke 2005, p. 1746, Hartley 2010, p. 26 and Dinse and Rösler 2011, p. 415.

¹³⁵⁶ Kunke 2005, p. 1746.

¹³⁵⁷ Mullis and Scott 2010, p. 14.

¹³⁵⁸ Kunke 2005, p. 1761.

¹³⁵⁹ Hartley 2010, p. 26-30 and Kunke 2005, p. 1746-1747.

¹³⁶⁰ *Committee on legal affairs (Rapporteur D. Wallis) 2010*, p. 3-4 and 6-10.

¹³⁶¹ Ibid, *Committee on legal affairs (Rapporteur D. Wallis) 2011*, p. 3-4 and Levi 2011, p. 12-20.

English libel judgements are not recognized and/or enforced in the US due to lack of jurisdiction of the English Court.¹³⁶²

4.4.2.3 How can a manager and/or user defend him- or herself against a defamation claim?

4.4.2.3.1 The EU

Art. 15 (b) *Rome II Regulation*¹³⁶³ explains that the Regulation is applicable in the national law of a EU Member-State when it concerns the defences of a manager and/or user against a defamation claim of that country.

4.4.2.3.2 The Netherlands

A manager and or user of a US based missing persons' website can claim that the conditions of art. 6:162 *Dutch Civil Code* are not fulfilled, can state that the relativity requirement of art. 6:163 *Dutch Civil Code* is not applicable or claim *Freedom of Speech*.¹³⁶⁴

4.4.2.3.3 England

There are several options for a defendant (a manager and/or user of a missing persons' website) to solve an English defamation claim: First, he or she can try to convince the judge that there is a "submission of no case"¹³⁶⁵, second, he or she can claim that the statement is truthful¹³⁶⁶, third, he or she can try to make amends (see *Section 2 "offer to make amends"* and further *Defamation Act* of 1996)¹³⁶⁷, fourth, he or she can state that he or she has not made the defamatory statement (*Section 1 Defamation Act* of 1996) or he or she can use the "innocent dissemination" defence¹³⁶⁸.

4.4.2.4 Are there problems concerning missing persons' websites in practice?

4.4.2.4.1 The EU

Only the *ICMEC*¹³⁶⁹ provides flyers and information of missing children, while *Missing Children Europe*¹³⁷⁰, *Childscope*¹³⁷¹ and the *European Child Alert Automated System*¹³⁷² should be regarded as websites only providing information concerning this topic.¹³⁷³ Since all websites mentioned are, in one way or another, supported, amongst others, by the *European Commission*¹³⁷⁴, it can be concluded that these websites could be regarded as accurate and reliable.¹³⁷⁵

¹³⁶² *Organization for Security and Co-operation in Europe, The Representative on Freedom of the Media* 2005, p. 170 and Milmo, Rogers and others (editors) 2004, p. 772-774.

¹³⁶³ *Regulation (EC) No 864/2007*.

¹³⁶⁴ See e.g. Rechtbank Almelo 7 oktober 2009, *LJN* BK0004, Vick and Macpherson 1996, p. 958 and <http://www.advocaten-amsterdam.nl/107/rectificatie-misleidend-publicatie-verbod-smaad-laster> (12 August 2012). See also e.g. Hoge Raad 18 januari 2008, *LJN* BB3210, paragraph 3.4.1.

¹³⁶⁵ Milmo, Rogers and others (editors) 2004, p. 992-994.

¹³⁶⁶ Beauchamp 2006, p. 3078-3079, Kunke 2005, p. 1748, Milmo, Rogers and others (editors) 2004, p. 7 and 843-851, 859 and 993 and <http://www.yourrights.org.uk/yourrights/right-of-free-expression/defamation/defences-to-a-claim-of-defamation.html> (12 August 2012).

¹³⁶⁷ Milmo, Rogers and others (editors) 2004 p. 546-556.

¹³⁶⁸ Beauchamp 2006, p. 3088.

¹³⁶⁹ <http://www.icmec.org/missingkids/servlet/PublicHomeServlet> (12 August 2012).

¹³⁷⁰ <http://www.missingchildreneurope.eu> (12 August 2012).

¹³⁷¹ <http://www.childscope.net/2009/httpdocs/index.php?sw=2> (12 August 2012).

¹³⁷² <http://www.europeanchildalert.com/> (12 August 2012).

¹³⁷³ See section: 3.3.1.2 *Missing persons' websites and the EU*, p. 69-70.

¹³⁷⁴ http://ec.europa.eu/index_en.htm/ (12 August 2012).

¹³⁷⁵ http://www.missingchildreneurope.eu/index.php?option=com_content&view=article&id=92&Itemid=29, <http://www.europeanchildalert.com/>, <http://www.childscope.net/2009/httpdocs/Childscope-brochure.pdf>, <http://www.childscope.net/2009/httpdocs/index.php?sw=2> and

*Missing Children Europe*¹³⁷⁶, *Childscope*¹³⁷⁷ and the *ICMEC*¹³⁷⁸ have a contact address on their website.¹³⁷⁹ This is however not the case for the *European Child Alert Automated System*¹³⁸⁰.

*Missing Children Europe*¹³⁸¹, the *European Child Alert Automated System*¹³⁸², *Childscope*¹³⁸³ and the *ICMEC*¹³⁸⁴ do not offer the possibility to write comments, therefore they will not be sued before the *ECJ*¹³⁸⁵ when it concerns defamation committed by a user. Until now, there was no defamation case brought before the *ECJ*¹³⁸⁶ concerning any of these organizations mentioned above, about a US based missing persons' website or its user(s).

4.4.2.4.2 The Netherlands

The website of the Dutch *Amber Alert*¹³⁸⁷, the Dutch missing children website¹³⁸⁸ and the Dutch missing adults' website¹³⁸⁹ are from of supported by the *Korps Landelijke Politiediensten* (or *National Police Services Agency*)¹³⁹⁰.¹³⁹¹ The flyers and information provided on these websites should be regarded both accurate as reliable. The website of *Vermist*¹³⁹² belongs to the Dutch television and radio organization *TROS*¹³⁹³.¹³⁹⁴ Since it does not concern a law enforcement website, it is advisable to check of the person shown on this website is still missing and not already located.

All four websites mentioned above try to prevent a defamation claim. The Dutch *Amber Alert*¹³⁹⁵ explains in its "*Privacy Policy*" that privacy information will be passed on to the police in case of fraud.¹³⁹⁶ The Dutch missing adults' website¹³⁹⁷ ("*Copyright*" section) and the Dutch missing children website¹³⁹⁸ ("*Over ons*" section) ask the interested party to contact

http://www.missingchildreneurope.eu/index.php?option=com_content&view=article&id=52&Itemid=53/ (all 12 August 2012).

¹³⁷⁶ <http://www.missingchildreneurope.eu> (12 August 2012).

¹³⁷⁷ <http://www.childscope.net/2009/httpdocs/index.php?sw=2> (12 August 2012).

¹³⁷⁸ <http://www.icmec.org/missingkids/servlet/PublicHomeServlet> (12 August 2012).

¹³⁷⁹ http://www.missingchildreneurope.eu/index.php?option=com_content&view=article&id=91&Itemid=28,
<http://www.childscope.net/2009/httpdocs/Childscope-brochure.pdf>,

<http://www.childscope.net/2009/httpdocs/index.php?sw=2> and

http://www.icmec.org/missingkids/servlet/PageServlet?LanguageCountry=en_X1&PageId=1729/ (all 12 August 2012).

¹³⁸⁰ <http://www.europeanchildalert.com/> (12 August 2012).

¹³⁸¹ <http://www.missingchildreneurope.eu> (12 August 2012).

¹³⁸² <http://www.europeanchildalert.com/> (12 August 2012).

¹³⁸³ <http://www.childscope.net/2009/httpdocs/index.php?sw=2> (12 August 2012).

¹³⁸⁴ <http://www.icmec.org/missingkids/servlet/PublicHomeServlet> (12 August 2012).

¹³⁸⁵ http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm (12 August 2012).

¹³⁸⁶ Ibid.

¹³⁸⁷ <http://www.amberalertnederland.nl/Default.aspx?lang=nl> (12 August 2012).

¹³⁸⁸ <http://www.missingkids.nl/missingkids/servlet/PublicHomeServlet> (12 August 2012).

¹³⁸⁹ http://www.politie.nl/Opsporing/vermiste_personen.asp (12 August 2012).

¹³⁹⁰ <http://www.politie.nl/KLPD/default.asp> and <http://www.politie.nl/English/> (both 12 August 2012).

¹³⁹¹ http://www.missingkids.nl/missingkids/servlet/PageServlet?LanguageCountry=nl_NL&PageId=1010,

http://www.amberalertnederland.nl/files/press/AMBER_Alert_Realtime_opsporen_via_ieder_scherm.pdf,

<http://www.amberalertnederland.nl/Default.aspx?lang=nl> and

<http://www.vermistepersonen.info/copyright/default.asp> (all 12 August 2012).

¹³⁹² <http://www.vermist.nl/> (12 August 2012).

¹³⁹³ <http://www.tros.nl/overdetros/> (12 August 2012).

¹³⁹⁴ <http://www.vermist.nl/index.php?id=9> (12 August 2012).

¹³⁹⁵ <http://www.amberalertnederland.nl/Default.aspx?lang=nl> (12 August 2012).

¹³⁹⁶ <http://www.amberalertnederland.nl/Privacy.aspx?lang=nl> (12 August 2012).

¹³⁹⁷ http://www.politie.nl/Opsporing/vermiste_personen.asp (12 August 2012).

¹³⁹⁸ <http://www.missingkids.nl/missingkids/servlet/PublicHomeServlet> (12 August 2012).

them in case of wrongful provide information on the websites.¹³⁹⁹ *Vermist*¹⁴⁰⁰ explains in its disclaimer that permission must be asked beforehand, a request also made by the Dutch missing children' website¹⁴⁰¹ ¹⁴⁰².

All websites mentioned provide contact information.¹⁴⁰³

It is not possible to write comments on any of the Dutch missing persons' websites mentioned above.

Until now, there was no defamation case before the Dutch court concerning any of these organizations mentioned above, about a US based missing persons' website or its user(s).

4.4.2.4.3 England

The UK missing children website¹⁴⁰⁴ explains in the “*Terms and Conditions*” section that flyers of the website may not be used for defamatory purposes.¹⁴⁰⁵ The *Parents & Abducted Children Together* or *Pact*¹⁴⁰⁶ website has a disclaimer at the end of every webpage which reads.¹⁴⁰⁷

The UK missing children website¹⁴⁰⁸ and *Pact*¹⁴⁰⁹ do not offer the possibility to write a comment on their website, while *Missing People*¹⁴¹⁰ offers this possibility on its blog¹⁴¹¹. However, defamatory statements will be removed.¹⁴¹²

The UK missing children website¹⁴¹³, *Pact*¹⁴¹⁴ and *Missing People*¹⁴¹⁵ have a contact section on their website.¹⁴¹⁶

Until now, there was no defamation case brought before the English court concerning any of these organizations mentioned above, about a US based missing persons' website or its user(s).

End conclusion

The research questions in this Master Thesis were:

“*Do managers and users of US based missing-persons-websites run the risk of committing copyright infringement or defamation? If, so, what can they do to minimise possible risks?*”

¹³⁹⁹ http://www.missingkids.nl/missingkids/servlet/PageServlet?LanguageCountry=nl_NL&PageId=832 and <http://www.politie.nl/Copyright/default.asp> (both 12 August 2012).

¹⁴⁰⁰ <http://www.vermist.nl/> (12 August 2012).

¹⁴⁰¹ <http://www.missingkids.nl/missingkids/servlet/PublicHomeServlet> (12 August 2012).

¹⁴⁰² <http://www.vermist.nl/index.php?id=9> and

http://www.missingkids.nl/missingkids/servlet/PageServlet?LanguageCountry=nl_NL&PageId=1010/ (both 12 August 2012).

¹⁴⁰³ <http://www.amberalertnederland.nl/Contact.aspx?lang=nl>,

http://www.missingkids.nl/missingkids/servlet/PageServlet?LanguageCountry=nl_NL&PageId=832,

<http://www.politie.nl/Copyright/default.asp>, <http://www.politie.nl/Contact> and

<http://www.vermist.nl/index.php?id=9> (all 12 August 2012).

¹⁴⁰⁴ <http://uk.missingkids.com/> (12 August 2012).

¹⁴⁰⁵ <http://uk.missingkids.com/terms/> (12 August 2012).

¹⁴⁰⁶ <http://www.pact-online.org/> (12 August 2012).

¹⁴⁰⁷ See e.g. at the bottom of the webpage of <http://www.pact-online.org/> (12 August 2012).

¹⁴⁰⁸ <http://uk.missingkids.com/> (12 August 2012).

¹⁴⁰⁹ <http://www.pact-online.org/> (12 August 2012).

¹⁴¹⁰ <http://www.missingpeople.org.uk/> (12 August 2012).

¹⁴¹¹ <http://www.themissingblog.com/> (12 August 2012).

¹⁴¹² <http://www.missingpeople.org.uk/missing-people/terms-of-use> (12 August 2012).

¹⁴¹³ <http://uk.missingkids.com/> (12 August 2012).

¹⁴¹⁴ <http://www.pact-online.org/> (12 August 2012).

¹⁴¹⁵ <http://www.missingpeople.org.uk/> (12 August 2012).

¹⁴¹⁶ <https://www.ceop.police.uk/Contact-Us/Contact-form/>, <http://www.pact-online.org/General/contact-us-pact-parents-and-abducted-children-together-parental-abduction-missing-children-associate-of-icmec.html> and <http://www.missingpeople.org.uk/missing-people/contact-us/> (all 12 August 2012).

It has been established that missing persons' websites attracting the attention of the general public are beneficial in locating missing people, since the *US Government* and law enforcement cannot deal with the problem by themselves alone and because cases can be solved due to the fact that a potential witness will more easily contact a missing persons' website instead of going to the police.¹⁴¹⁷

Nonetheless, a Google internet search on 30 July 2012 has revealed that there are 99.300.000 results concerning the topic *US missing persons' websites*.¹⁴¹⁸ Therefore, if someone would want to create a new missing persons' website and be involved in locating missing people, it has to be different (original) than the other websites. Besides being original, he or she should start by deciding which sources he or she would use. Since the information provided by all sources mentioned in this master thesis are copyright protected, the manager should pay attention to their copyright protection and, for example, study their copyright policy before copying and publishing the information on his or her own website in order to prevent a copyright infringement claim. If the manager also wants to give his or her users the opportunity to write comments, he or she should check if they do not publish copyright infringing material on his or her website. In practice, there are no copyright infringement cases brought before US, Dutch, English courts or the *ECJ*¹⁴¹⁹ concerning managers and/or users of missing persons' websites. However, in case of copyright infringing material, it is more likely that it will be dealt with between the managers of the missing persons' websites themselves.¹⁴²⁰ Nevertheless, a US court would most likely recognize and/or enforce a foreign judgement concerning copyright infringement.¹⁴²¹

Deciding which sources to use is not only important when it concerns copyright, but also in case of defamation claims. However, although the *US Justice Department*¹⁴²² sponsors *NamUs*¹⁴²³ and the *NCMEC*¹⁴²⁴, it is not responsible for, amongst others, the content on *NamUs Missing Persons*¹⁴²⁵, *NamUs Unidentified Persons*¹⁴²⁶ and the *NCMEC*¹⁴²⁷, they still can be considered reliable sources, together with others, since they are considered to be the most known to the general public as valuable recourses for retrieving information concerning missing persons.¹⁴²⁸ In the case of defamatory comments, the manager can escape liability through *Section 230 CDA*.¹⁴²⁹ Nevertheless, it is not likely that a plaintiff will win a defamation suite against a manager of a missing persons' website, if the manager uses reliable sources, updates regularly... Except of the case *Meuse v. Fox New Channel, Inc., and*

¹⁴¹⁷ See part: *1.1.5 Should the US Government be involved?*, p. 17-21.

¹⁴¹⁸ http://www.google.be/#hl=nl&sa=X&ei=AqoWULuqO5G2hAfl5oHACg&ved=0CFwQBSgA&q=US+missing+persons%27+websites&spell=1&bav=on.2,or.r_gc.r_pw.r_qf.&fp=9dd313392708d8d2&biw=1024&bih=432 of 30 July 2012.

¹⁴¹⁹ http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm/ (12 August 2012).

¹⁴²⁰ <http://underwatch.wordpress.com/2011/05/18/where-is-dorothy-barnett-and-savannah-todd/#comment-5460> (12 August 2012).

¹⁴²¹ See paragraph: *4.2 The recognition and/or enforcement of foreign judgements by a US court*, p. 78-81.

¹⁴²² <http://www.justice.gov/> (12 August 2012).

¹⁴²³ <http://www.namus.gov/> (12 August 2012).

¹⁴²⁴ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US (12 August 2012).

¹⁴²⁵ See also <https://www.findthemissing.org/en/homes/about> and https://www.findthemissing.org/en/users/terms_of_use (both 12 August 2012).

¹⁴²⁶ See also <https://identifyus.org/en/home/about> and https://identifyus.org/en/home/terms_of_use (both 12 August 2012).

¹⁴²⁷ http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US/ (12 August 2012).

¹⁴²⁸ Bell 2011, p. 202.

¹⁴²⁹ *Shiamili v. Real Estate Group of N.Y., Inc* and *Belmas and Overbeck* 2012, p. 167.

others¹⁴³⁰, there were almost no other cases decided by US, Dutch, English courts or the ECJ¹⁴³¹ concerning defamation and managers and/or users of missing persons' websites. Although, there exists a possibility that the amount of (foreign) defamation cases against a manager of a US based missing persons' website and/or its users will rise in the future. Especially, in international parental abduction cases when there are two court orders, the US and the foreign court order, which contradict each other.¹⁴³² However, a US based manager or US user can prevent the recognition and/or enforcement of a foreign defamation judgment with the help of the exception of public policy¹⁴³³ or with the federal *SPEECH ACT*¹⁴³⁴. A Dutch or English user of a US based missing persons' website is dependent on the outcome of the Dutch or English court procedure and cannot prevent the recognition and/or enforcement due to EU law.¹⁴³⁵ However, it seems that "*Libel Tourism*"¹⁴³⁶ is more often used in English court procedures against US citizens than against citizens of the EU Member-States¹⁴³⁷ and that there are not many cross border defamation cases in practice.¹⁴³⁸ Besides, it is unlikely that a Dutch or English user of a US based missing persons' website will successfully be accused of defamation if he or she can prove, for example, that the statement is true or any of the other defences provided by Dutch or English law.

To conclude, every manager and/or user should be aware of the possibility that he or she can be accused of copyright infringement and/or defamation. Nevertheless, in practice, there are not a lot of cases and often it stays only to threats of 'going to court'.

¹⁴³⁰ *Meuse v. Fox News Channel, Inc., and others.*

¹⁴³¹ http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm/ (12 August 2012).

¹⁴³² See e.g. *Lazaridis v. International Centre for Missing and Exploited Children.*

¹⁴³³ Dinse and Rösler 2011, p. 416.

¹⁴³⁴ Crook (editor) 2010, p. 681-684.

¹⁴³⁵ See paragraph: 3.3 *Missing persons' websites and foreign defamation*, p. 66-76.

¹⁴³⁶ See e.g. Sanchez 2011, p. 470-520 and Rendleman 2010, p. 467-487.

¹⁴³⁷ *Committee on legal affairs (Rapporteur D. Wallis) 2010*, p. 3-4 and 6-10, *Committee on legal affairs (Rapporteur D. Wallis) 2011*, p. 3-4 and Levi 2011, p. 12-20.

¹⁴³⁸ *Committee on legal affairs (Rapporteur D. Wallis) 2010*, p. 3-4 and 6-10.

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