

The following responds to the submission of Jennifer Urban *et al.* (OW0663)

I generally agree with the tone of this presentation, but differ on some of the details.

Restricting the orphan designation to newly copyrighted material does not seem practical. The current difficulties involve works that are already copyrighted, and for which potential users already exist. For materials published this year it means that they could not become orphaned for at least 70 years. The repeal of the renewal provisions has accelerated the number of works that would be orphans.

I see no value in the need to have a reasonable search report notarized. A simple "under penalty of perjury" declaration should be enough.

A further requirement that I would impose on a user is a notice with each copy that the material is being published in accordance with orphan works legislation.

I would severely limit the liability of a user who has followed procedures. Even the proposal of a statutory maximum would make for unnecessary litigation. The costs of litigation to collect any amount up to the suggested maximum of \$500 are likely to exceed the amount of damages, especially when (quite properly) attorney fees cannot be awarded. On the other hand, some injunctive relief should be available. The copyright holder should continue to have access to take down orders, and should have some opportunities to recover royalties in instances where publication runs by the user are particularly high. Before valid litigation can be undertaken, however, the copyright holder should have an obligation to make his requests directly to the user and to register his requests with the copyright office.

I do not agree that the orphan status should be limited to a single use. Nevertheless, a user should have an obligation to check the registry if he wishes to use the material again after say 90 days to see if the copyright owner has surfaced. Registering his intent to further use the material would be evidence that he has so checked. Other users, or second generation users also have obligations. Although they should be able to rely on a previous user's reasonable efforts search they should still need to register their intent; failing to do so would lead to the presumption that they have not even paid attention to copyright problems. Where there has been a fraudulent claim to a reasonable efforts search, the person making that fraudulent claim should also be liable for damages sustained by anyone who relied on that claim.