

but also raised other concerns when the international dimensions of orphan works problems are considered. The Copyright Office seeks further information on the following issues within this topic area:

- a. Compliance of various alternatives with the Berne Convention prohibition against formalities.
- b. Compliance of various alternatives with TRIPS/Berne "three-step" test for limitations or exceptions.
- c. Exclusion of foreign works from the orphan work definition.
- d. Gathering information on experience in other countries with orphan works issues.

The roundtable might also take up other issues not encompassed by the above agenda if time permits.

Dated: June 30, 2005

Marybeth Peters,

Register of Copyrights.

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LIBRARY OF CONGRESS

Copyright Office

[Docket No. RM 2005-7]

Satellite Home Viewer Extension and Reauthorization Act of 2004

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of inquiry.

SUMMARY: The Copyright Office of the Library of Congress is requesting information for the preparation of the first report to the Congress required by the Satellite Home Viewer Extension and Reauthorization Act of 2004.

DATES: Comments are due no later than August 22, 2005. Reply comments are due no later than September 12, 2005.

ADDRESSES: If hand delivered by a private party, an original and five copies of a comment should be brought to Room LM-401 of the James Madison Memorial Building between 8:30 a.m. and 5 p.m. and the envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, SE, Washington, DC 20559-6000. If delivered by a commercial courier, an original and five copies of a comment must be delivered to the Congressional Courier Acceptance Site located at 2nd and D Streets, NE, between 8:30 a.m. and 4 p.m. The envelope should be addressed as follows: Office of the General Counsel, Room LM-403, James Madison

Memorial Building, 101 Independence Avenue, SE, Washington, DC. If sent by mail (including overnight delivery using U.S. Postal Service Express Mail), an original and five copies of a comment should be addressed to U.S. Copyright Office, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Comments may not be delivered by means of overnight delivery services such as Federal Express, United Parcel Service, etc., due to delays in processing receipt of such deliveries.

FOR FURTHER INFORMATION CONTACT:

Tanya Sandros, Associate General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 707-8366.

SUPPLEMENTARY INFORMATION: On

December 8, 2004, the President signed the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"), a part of the Consolidated Appropriations Act of 2005. Pub. L. No. 108-447. SHVERA extends for an additional five years the statutory license for satellite carriers retransmitting over-the-air television broadcast stations to their subscribers, as well as making a number of amendments to the existing section 119 of the Copyright Act. In addition to the extension and the amendments, SHVERA directs the Copyright Office to conduct two studies and report its findings to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate. One study, due by June 30, 2008, requires the Copyright Office to examine and compare the statutory licensing systems for the cable and satellite industries under sections 111, 119 and 122 of the Copyright Act and recommend any necessary legislative changes. The other study, due by December 31, 2005, requires the Office to examine select portions of the section 119 license and to determine what, if any, impact sections 119 and 122 have had on copyright owners whose programming is retransmitted by satellite carriers. That study is the subject of this Notice of Inquiry.

The SHVERA Study

Section 110 of SHVERA provides:

No later than December 31, 2005, the Register of Copyrights shall report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate the Register's findings and recommendations on the following:

- (1) The extent to which the unserved

household limitation for network stations contained in section 119 of title 17, United States Code, has operated efficiently and effectively and has forwarded the goal of title 17, United States Code, to protect copyright owners of over-the-air television programming, including what amendments, if any, are necessary to effectively identify the application of the limitation to individual households to receive secondary transmissions of primary digital transmissions of network stations.

- (2) The extent to which secondary transmissions of primary transmissions of network stations and superstations under section 119 of title 17, United States Code, harm copyright owners of broadcast programming throughout the United States and the effect, if any, of the statutory license under section 122 of title 17, United States Code, in reducing such harm.

Pub. L. No. 108-447, 118 Stat. 3394, 3408 (2004).

Part One: The Unserved Household Limitation

The statutory license set forth in section 119 of the Copyright Act enables satellite carriers to retransmit distant over-the-air television broadcast stations to their subscribers.¹ The license has a significant restriction, however, with respect to the retransmission of network television stations. Satellite carriers may only retransmit distant network stations to subscribers who reside in "unserved households." An "unserved household," with respect to a particular television network, is defined in the law as:

[A] household that—

- (A) cannot receive, through the use of a conventional, stationary, outdoor rooftop receiving antenna, an over-the-air signal of a primary network station affiliated with that network of Grade B intensity as defined by the Federal Communications Commission under section 73.683(a) of title 47 of the Code of Federal Regulations, as in effect on January 1, 1999;
- (B) is subject to a waiver that meets the standards of subsection (a)(14) whether or not the waiver was granted before the date of the enactment of the Satellite Home Viewer Extension and Reauthorization Act of 2004;
- (C) is a subscriber to whom subsection (e) applies;
- (D) is a subscriber to whom subsection (a)(12) applies; or
- (E) is a subscriber to whom the exemption under subsection (a)(2)(B)(iii) applies.

17 U.S.C. 119(d)(10).

¹ Section 122 of the Copyright Act permits satellite carriers to retransmit local over-the-air television broadcast stations to their subscribers. See 17 U.S.C. 122.

As can be seen from the above, the unserved household limitation contains a number of involved and complex provisions. It was not always so. In the original law that created section 119, the Satellite Home Viewer Act of 1988, the unserved household limitation was relatively straightforward. Because satellite carriers lacked the technological capability at that time to deliver local signals to their subscribers, the limitation was created to prevent satellite carriers from bringing network stations from distant television markets to subscribers and thereby decrease their incentive to watch the signals of the local over-the-air network stations. H.R. Rep. No. 100-887, pt. 1, at 18 (August 18, 1988). If a satellite subscriber could receive the off-air signal of the local network station using a conventional rooftop antenna, the satellite carrier could not provide the subscriber with a distant network station affiliated with the same network. If a subscriber resided in a household outside the reach of the signal of the local network station—a so-called “white area”—then the subscriber was eligible for satellite service of a distant station of the same network. The unserved household limitation therefore operated similarly to the network nonduplication rules of the Federal Communications Commission (“FCC”) applicable to cable systems.² Unfortunately, satellite carriers largely ignored the proscription of the unserved household limitation in the years after 1988, resulting in revisions to the definition in the 1994 and 1999 extensions of section 119 and a “beefing up” of the enforcement provisions related to the limitation. As a result, the limitation was defined with greater precision. The FCC was directed in the 1999 legislation to precisely define what is meant by receiving a signal of Grade B intensity and to develop a test for determining it. See 47 CFR 73.683(a). In addition to lack of over-the-air receipt of a network signal, other categories were added as demonstrating that a subscriber was unserved for purposes of section 119. Subparagraph (B) was added to the unserved household limitation to provide that even if a subscriber could receive an over-the-air signal of Grade B intensity, if the subscriber obtained a waiver from the local network affiliate then he/she was considered unserved under section 119. Subparagraph (C) applies to subscribers whose receipt of network signals was a

² The FCC has never regulated the satellite industry in the same fashion as the cable industry. Thus, there were no network nonduplication rules applicable to satellite for many years.

violation of the limitation but were grandfathered in by the 1999 legislation if they received the network signals after July 11, 1998, but before October 31, 1999. 17 U.S.C. 119(e). Subparagraph (D), also added by the 1999 legislation, provides that subscribers of satellite service for commercial trucks and recreational vehicles, subject to certain requirements, are also considered unserved. And subsection (e) defines C-band satellite subscribers as unserved regardless of whether they can receive an over-the-air signal from the local network stations.

The world of the unserved household limitation in the Copyright Act is about to be complicated further. All of the existing provisions and definitions were crafted in the era of analog broadcast television. Broadcasters are now switching their transmissions from analog to digital, and it is anticipated that the “digital transition” will soon be completed. The Grade B signal intensity standard, which has been the centerpiece for defining when an individual household is unserved under section 119, does not apply to digital transmissions.³ However, section 204(b) of SHVERA directs the FCC to complete a study within one year from date of enactment to examine a number of factors related to developing a digital signal intensity standard. The study is expressly being done “for purposes of identifying if a household is unserved by an adequate digital signal under section 119(d)(10) of title 17, United States Code.” 37 U.S.C. 339(c)(1)(A) (2005).⁴ Included in that study is a consideration of the development of a predictive model for digital broadcast stations to facilitate application of the unserved household limitation in the Copyright Act.

Part One of the Copyright Office study requires consideration of the unserved household limitation on two levels. First, we must determine whether the limitation has operated “efficiently and effectively” and whether it has promoted the goal of protecting copyright owners of over-the-air television programming. To make these determinations, the Office is soliciting

³ The FCC does set forth the signal propagation areas, similar to Grade B contours, for digital television stations. See 47 CFR 73.622(e)(service areas for channels 2 through 69). These rules do not, however, permit determination of whether a particular household receives an adequate signal with respect to a particular digital network station.

⁴ The FCC has commenced the study with the recent publication of a Notice of Inquiry. See *Technical Standards for Determining Eligibility for Satellite-Delivered Network Signals Pursuant to the Satellite Home Viewer Extension and Reauthorization Act*, ET Docket No. 05-182, Notice of Inquiry (Released May 3, 2005).

public comment in this Notice of Inquiry. With respect to whether the unserved household limitation has operated efficiently and effectively, the Office is interested in public comments directed to the following. Has the Grade B signal intensity standard set forth in 47 CFR 73.683(a) permitted members of the public to receive adequate over-the-air television signals and is it the correct standard for determining when a subscriber resides in a television “white area”? Has the Grade B predictive model developed by the FCC under section 339(c)(3) of the Communications Act, title 37 of the United States Code, permitted effective identification of white areas and promoted the quick and efficient determination of whether subscribers are eligible for receipt of distant network stations under section 119? To what extent has the unserved household limitation been violated by satellite carriers and what are the details of enforcement actions taken against such violations? What improvements and/or amendments could be implemented to improve the effectiveness and efficiency of the unserved household limitation?

With respect to whether the unserved household limitation has protected copyright owners of over-the-air television programming, the Copyright Office is interested in data and information that demonstrates what impact the limitation has on copyright owners’ ability to charge a fair market price from broadcasters that transmit their programming. If the limitation were removed from the law, what impact would that have on the price of programming? Does the limitation promote the interests of copyright owners more, less, or the same as it does the interests of broadcasters?

As to the second level of Part One of the study, we seek comment as to the following. To what extent will the signal intensity standard for households receiving over-the-air digital network stations likely resemble the current standard for analog television? What are likely to be the technical and practical differences between the two standards and how are they likely to affect satellite subscribers’ receipt of over-the-air television stations? Are the coverage levels of a digital standard likely to be sufficient to provide full-time receipt of television signals? To prevent receipt of distant signals by subscribers who can receive an adequate local signal, what, if any, amendments will be necessary to the unserved household definition with respect to satellite subscriber receipt of over-the-air digital television stations?

The Copyright Office encourages comments directed to these inquiries

and welcomes additional comments and information related to the unserved household limitation.

Part Two: Harm to Copyright Owners

Part Two of the study is an inquiry as to the extent to which satellite retransmissions of superstations and network stations under the section 119 license harm copyright owners of broadcast programming in the United States and the effect, if any, of the section 122 license, which permits royalty-free retransmission of local stations, in ameliorating such harm. "Harm" is generally understood to mean the difference in the price that copyright owners would have been able to charge satellite carriers for their programming and the price they actually receive under the fees established for section 119.⁵ At one point in time, the Copyright Royalty Tribunal considered the extent to which different categories of copyright owners (e.g. owners of movies and syndicated television series, sports programmers, owners of noncommercial broadcasting programming, etc.) were harmed by the existence of the section 111 cable license in determining the share of royalties each programming category should receive. That approach was altered by a Copyright Arbitration Royalty Panel ("CARP") in 1996 in a cable royalty distribution proceeding, and it is established precedent in the context of cable royalty distribution proceedings that copyright owners of all programming categories are harmed equally by the existence of the section 111 license. See *Distribution of 1990-1992 Cable Royalties*, Distribution Order, 61 FR 55653, 55658-59 (October 28, 1996). That precedent would presumably apply to a contested distribution proceeding conducted under section 119 should one take place. Nevertheless, the Copyright Office is interested in data, information, and analysis that demonstrates whether and to what extent particular program categories are harmed by the section 119 license.

Because virtually all over-the-air television stations retransmitted by satellite carriers are licensed through the section 119 license, it is difficult to speculate as to how the licensing of broadcast programming would operate in the absence of the license. In other words, what would be the fair market value of different types of broadcast programming if there was no section

119 license, and how would the licensing of that programming be handled (i.e. by the broadcasters, by some type of collective rights organization, etc.)? In the 1997 proceeding to adjust the section 119 royalty rates, the CARP was required to determine the fair market value of superstations and network stations retransmitted by satellite carriers. In making this determination, the CARP examined data from parallel markets. Specifically, the CARP considered the amounts received by programmers of cable-originated networks (ESPN, A&E, and other cable channels that are similar to broadcast channels) who operate in the free market without a statutory license as a proxy for the fair market value of broadcast programming. See 62 FR 55742 (October 28, 1997). The Copyright Office seeks updated data similar to that submitted in the 1997 rate adjustment proceeding as a means of approximating what copyright owners might have received in the absence of the section 119 license, along with analyses of that data that explain how copyright owners have been harmed by being deprived of the ability to license those works to satellite carriers in the open market. Data that compares what satellite carriers would have paid under approximate fair market value scenarios to what was actually paid under the section 119 license is helpful. In addition, the Office seeks information as to how the licensing of broadcast retransmissions by satellite carriers might be handled in the absence of section 119 and approximations as to the costs associated with collecting and distributing royalties.

In assessing the fair market value of broadcast programming, the Copyright Office recognizes that there may be factors beyond consideration of parallel markets. For example, FCC regulations governing satellite retransmissions can ultimately have an effect on the price of programming protected by the copyright laws. The FCC's syndicated exclusivity rules, sports blackout rules, and the network nonduplication rules may play some role in reducing harm to copyright owners from section 119 retransmissions. The Copyright Office requests information and analysis on this possibility. In addition, the Office notes that satellite broadcast retransmissions are exempt from the retransmission consent provisions of the communications law. See 37 U.S.C. 325. What impact, if any, does the retransmission consent exemption have on harm to copyright owners from

broadcast retransmissions under section 119?

Finally, Part Two of the study requires the Copyright Office to consider the effect of the section 122 license on harm caused to copyright owners by section 119 retransmissions. Section 122 is a royalty-free statutory license created during the 1999 reauthorization of section 119 that permits satellite carriers to retransmit superstations and network stations to subscribers that reside within the local markets of those stations. 17 U.S.C. 122. The Office is interested in data, information, and analysis that demonstrates changes in royalties paid under section 119 before and after the adoption of section 122, and any other information demonstrating any impact section 122 may have had on the section 119 royalties or any other effect section 122 has had on harm caused to copyright owners by section 119 retransmissions.

Commenters are encouraged to provide not only the data, information, and analyses requested in this Notice of Inquiry but also any other data, information, and/or analyses they deem relevant to the issues presented in section 110 of SHVERA. The Copyright Office welcomes the opportunity to meet with representatives of satellite carriers, copyright owners, broadcasters, and other parties affected by sections 119 and 122 of the Copyright Act in order to obtain additional relevant information and to hear their concerns.

Dated: June 30, 2005.

Marybeth Peters,

Register of Copyrights.

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NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Arts Advisory Panel

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), as amended, notice is hereby given that four meetings of the Arts Advisory Panel to the National Council on the Arts will be held at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506 as follows:

Music (Access to Artistic Excellence, Panel B): July 25-27, 2005 in Room 714. A portion of this meeting, from 3:30 p.m. to 4:30 p.m. on Wednesday, July 27th, will be open to the public for policy discussion. The remainder of the meeting, from 9 a.m. to 6 p.m.

⁵It is possible for copyright owners to be harmed in other ways by distant signal retransmissions. The Copyright Office is interested in receiving comments and information regarding other types of "harm."