



Writers Guild  
of Canada

**Writers Guild of Canada  
Response to the  
Discussion Paper on  
the Compulsory Retransmission License  
and the Internet**

**Brief by the Writers Guild of Canada  
to the Copyright Policy Branch, Canadian Heritage  
and  
Intellectual Property Policy Directorate, Industry Canada**

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## **Introduction**

The Writers Guild of Canada is the national association representing more than 1,500 professional English-language screenwriters working in film, television, radio and new media in Canada.

The WGC exists to further the professional, creative and economic rights and interests of screenwriters in Canada working radio, television and new media.

The WGC's primary collective agreement is the Independent Production Agreement (IPA) with the Canadian Film and Television Producers Association (CFTPA) and l'Association des Producteurs de Films et de Télévision du Québec. In addition, it has collective agreements with the CBC, CanWest Global, CTV and TVOntario. The WGC is formally recognized as the official bargaining agent for English-language professional screenwriters under the federal Status of the Artist Act, as well as under Quebec's Status of the Artist Legislation.

The Canadian Screenwriters Collection Society (CSCS) is a not-for-profit corporation established by the Writers Guild of Canada in late 1998 with the mandate of administering the rights of Canadian writers to collect royalties and levies to which screenwriters are entitled under copyright legislation worldwide from the secondary uses of audiovisual works, such as private copying, rental and retransmission. In March of 2001, CSCS applied to the Canadian Copyright Board for a retransmission royalty on behalf of its members.

## **Position of the Writers Guild of Canada Regarding Internet-based Retransmission**

The Writers Guild shares common interests with Canadian producers in seeking to protect the commercial and artistic integrity of audiovisual productions created by our members. As holders of copyright in the screenplay, the underlying work essential to an audiovisual production, screenwriters have a direct stake in any proposal to extend the retransmission regime beyond existing conventional broadcasting distribution undertakings (i.e. cable, satellite, and multi-point distribution systems).

As the Departments of Canadian Heritage and Industry Canada note in the consultation document, The Internet is a new medium that has the potential to supercede existing distribution/broadcast technologies, substituting for existing markets from which producers and underlying rightsholders derive their revenues.

On behalf of screenwriters, the Writers Guild wants to ensure that the evolution of this new medium takes place in a manner that does not erode the value of the intellectual property that our members create.

We believe this is best done by allowing the contractual arrangements governing the exploitation of audiovisual works over the Internet to be addressed through existing industrial processes. Specifically, through the collective bargaining process between writers (as well as directors and performers) and producers, and contractual arrangements between producers and broadcasters.

The imposition of a compulsory license for Internet retransmission would disrupt the natural evolution of this process, and would principally benefit third parties with no direct investment in the creation of audiovisual works.

Fundamentally, exceptions to rightsholders' control over their work should be invoked only a last resort, when there is a demonstrated public interest requiring that this be the case. Any party seeking to extend the compulsory license to the Internet must be required to demonstrate convincingly that there are public interest reasons justifying this interference of the rights of copyright holders.

We in no way believe that the advocates of extending the mandatory licensing regime to the Internet have made this case. Rather, we believe it is far preferable—both for rightsholders and the public interest—that the Internet be left to develop naturally under the influence of market forces.

For these reasons, the Writers Guild of Canada takes the position that the best course of action is to avoid extending the compulsory retransmission regime to the Internet. Further, we believe the Internet should be the subject of a specific exemption from the retransmission regime.

Our position is based on the following principles:

### **Policy rationale lacking**

There is no compelling public policy rationale for imposing compulsory licensing in the case of would-be Internet 're-transmitters'.

As the consultation document notes, a compulsory license is an exception to an otherwise exclusive right. Both in Canada and on the international stage, compulsory licenses have been a course of last resort. This position has been stated both at WIPO and in Canada in the 1985 'A Charter of Rights for Creators' Report. While a compulsory license was imposed in the case of conventional broadcast distribution undertakings, this was done recognizing that BDUs were required by the CRTC to carry certain domestic signals. In that context, as the consultation document states, "the License provides an efficient, certain means by which conventional BDUs can clear the rights necessary to continue to fulfill their vital role in the Canadian broadcasting system and comply with applicable regulatory obligations, while ensuring that affected rightsholders are provided fair and equitable remuneration." None of this applies in the case of would-be Internet 'retransmitters', as they are not regulated under the CRTC.

Canada's vastly distributed population is now covered extensively by competing BDU services—cable, satellite, and multi-point distribution. So there is no pressure from this perspective to add the Internet to this mix.

### **Distorting the natural evolution of a new medium**

The imposition of a compulsory license will distort the natural development of the Internet as a medium for distributing audiovisual works.

Through the collective bargaining process, writers, as well as directors and performers, are negotiating with independent producers and broadcasters provisions for addressing the distribution of their work over the Internet. Producers are similarly working out contractual arrangements with conventional broadcasters for the exhibition of audiovisual works over the Internet.

The evolution of arrangements covering Internet exploitation negotiated by the parties making a direct investment in the creation of these works is far more equitable than according a retransmission right to a third-party that has made no prior contribution to creation of this work.

Moreover, it risks pre-empting the possibility that creators and producers might elect to pursue Internet distribution of their works without the involvement of third parties. Given the fact that the Internet makes possible virtually cost-free distribution of works, this is a distinct possibility. While technological limitations currently make the Internet a less-than-satisfactory medium for viewing or downloading audiovisual works, these bottlenecks are likely to overcome shortly and, as the example of music has shown, it is entirely possible that artists and producers may explore the option of distributing their own work directly.

### **Piracy Concerns**

Distribution over the Internet without the consent of creators poses a serious risk that their work will be at greatly increased risk of copyright theft.

Because digital copies are equivalent in all respects to the originals—in effect, copying becomes a virtually cost-free method of distribution—the potential cost to creators of such theft is far greater than is the case from traditional analog piracy. While aspiring Internet 'retransmitters' may offer assurances that their operations will be secure from piracy, we do not believe these sites are likely to be secure from technically proficient hackers.

Further, by placing broadcast audiovisual works in a new context—one in which the works are framed by banner ads and other material—Internet retransmission raises the potential that the moral rights of screenwriters would be compromised.

## **Consistency**

Government regulation of the Internet through a retransmission regime is inconsistent with a pre-existing CRTC decision against regulating the Internet.

In its 1999 decision regarding the Internet, the CRTC ruled that it would not regulate the Internet, but would continue to monitor this rapidly-evolving medium and would review this decision as the medium matured. The CRTC's 1999 decision foresees a possible review of its position in 2004, and the Writers Guild has urged the Commission to review its position at that time. Given that parties currently covered by the retransmission regime are also subject to regulation by the CRTC (and thereby incur, over and above the requirement to pay a tariff established by the Copyright Board, responsibilities that include supporting the broadcast system through financial investments such as contributing a percentage of their gross revenues to the Canadian Television Fund), it is our position that any entity proposing to engage in the retransmission of broadcast signals should be subject to the same regulations and responsibilities as the parties they would in effect be competing with.

## **Territorial licensing concerns**

Unlike signals distributed via cable, satellite and multi-point distribution systems, the retransmission of audiovisual programming over the Internet would have a global reach. While this could be potentially limited by mechanisms incorporated into an Internet transmitter's site, the risk is that such distribution could seriously reduce the current and future value of an audiovisual work to broadcasters in foreign territories because audiences in these regions might access the work over the Internet first.

## **Conclusion**

The Writers Guild of Canada believes that the compulsory licensing of Internet-based retransmission within Canada is not justified and would instead unfairly deprive audiovisual rightsholders of the right to determine when and how their work will be made available and commercially exploited in this new medium.

While understanding the desire that copyright provisions be as much as possible technologically neutral, in the case of the Internet we believe the complexities are such that a specific exclusion is necessary.

However, like the Directors Guild of Canada, the WGC accepts the view of the Departments that the use of Internet Protocol technology by a retransmitter employing a network appropriately distinct from what might be thought of as the "public Internet", should not automatically disqualify the retransmitter from reliance upon the Retransmission License.

To address the need for a specific exclusion of the Internet from the compulsory licensing regime, and to address the issue above, the DGC has proposed specific wording for revising Section 31 of the Canadian Copyright Act. The Writers Guild believes this draft wording represents a useful basis for starting the discussion on this question.