



Submission of comments by the Motion Picture Association (MPA) in response to the Discussion on Traffic Management and "net neutrality"

(Ofcom, September 2010)

The Motion Picture Association (MPA) is a trade association representing six major international producers and distributors of films, home entertainment and television programmes¹. The Companies that we serve devote substantial effort and resources to developing a wide range of entertainment content and services in a variety of formats and on a variety of media, including the Internet. We are therefore grateful for the opportunity offered by Ofcom to contribute to an issue of particular importance to us.

We recognize that broadband holds immense promise as a means to enable consumers to access a wide variety of digital content in new and exciting ways. At the same time, all content creators (and indeed society at large) are facing a tremendous threat from illegal online conduct, including the theft and unauthorized distribution of a vast array of creative works. Consumers using many sites distributing illegal or unauthorized content face the imminent threat of identity theft amongst other risks such as malware infection. Illegal and unauthorized content currently clogs broadband pipes and it is in Ofcom's and the ISPs' interests to remove the sources of congestion. In addition, illegal behaviour undermines consumer confidence in the safety and security of the Internet and by extension e-commerce as a whole. Therefore a reduction in illegal online activity would help Ofcom gain clarity on other sources of congestion. We submit that broadband providers should have the ability to and must take reasonable measures to prevent the transfer and streaming of unauthorized content. To the extent that private cooperative efforts have thus far not resulted in ISPs taking actual measures to prevent such conduct, it appears essential that government policies explicitly compel ISPs to work with content creators to utilize the best available tools and technologies to combat online content theft. It is with that main premise in mind that we are offering answers to your questions below:

¹ The MOTION PICTURE ASSOCIATION INC. ("MPA"), is a wholly-owned subsidiary of the MPAA, a trade association representing six major international producers and distributors of films, home entertainment and television programmes: Paramount Pictures Corporation, Sony Pictures Entertainment Inc, Twentieth Century Fox Film Corporation, Universal City Studios LLLP, The Walt Disney Studios and Warner Bros. Entertainment Inc.

i) How enduring do you think congestion problems are likely to be on different networks and for different players?

The MPAA member companies are very concerned that the growing problem of congestion caused by illegal video services will hinder legitimate companies from offering new and innovative services. It bears noting that the majority of Internet video streaming to date has been standard definition. High definition content, which better meets consumer expectations, requires more bandwidth and is therefore more susceptible to network congestion and quality of service disruptions. This is even more true for 3D and interactive content and the future holds the promise for even higher resolutions and bandwidth requirements. Thus, for the distribution of these new formats to develop into legitimate, consumer-friendly businesses online, the content must be presented to consumers as part of a compelling, high speed, low latency viewing experience. Therefore, the congestion problem will only continue to grow no matter how fast the networks build out their infrastructure if the networks are unable to address the illegitimate sites through technological means.

ii) What do you think are possible incentives for potentially unfair discrimination?

At the outset, it is important to note that network traffic is already differentiated today (sometimes referred to as "discriminated").

We agree with OFCOM's initial assessment that the UK government should tread cautiously with respect to any non-discrimination requirement and should carefully tailor any such requirement to prevent demonstrably anti-competitive acts where ISPs are vertically integrated because they may have an incentive to favour their own (or affiliated) services, applications or content. Otherwise the government should preserve the flexibility needed to spur the kind of investment and innovation that the government properly seeks to achieve. We would submit that, given the competitiveness of the broadband marketplace, ISPs be permitted to enter into agreements to prioritize content, at least until demonstrated consumer or anti-competitive harm is shown to exist. If the Internet is to remain a laboratory for innovation and, in turn, a driver of pioneering new choices for consumers, the government should proceed with caution and permit continued experimentation with different delivery approaches for online video distribution. Discrimination between authorized and unauthorized content should not be deemed unfair, just as there is no expectation that unlawful conduct will be tolerated alongside lawful conduct in the offline world.

There is clear recognition that new kinds of consumer-friendly digital distribution services "may require enhanced quality of service to work well." Content creators and ISPs may need to enter into quality-of-service agreements to enable consumers to enjoy innovative forms of digital entertainment without delay, disruption or interference. No one knows precisely what delivery models may emerge for online digital content distribution, or how those models might be received by consumers.

iii) Can you provide any evidence of economic and or consumer value generated by traffic management?

The value of traffic management to the consumer is self-evident. Consumers have certain expectations when downloading or watching video content over the Internet, for example with the BBC's iPlayer. These expectations include video playback that doesn't stutter or stop and downloads that complete in a reasonable amount of time. Similarly, consumers using voice over IP (telephony services) do not expect to have their calls interrupted with silence as packets are lost in a congested network. Many of the services that consumers want are commercial, but many of these services like telephony and video services cannot exist if they rely on an unmanaged but congested network. Consumer value lies in the availability of as many quality services as possible. The *economic* value of traffic management is evidenced by research conducted by Deloitte, attached (also referenced in our answer to question vi) below). According to that study, the potential benefits to ISPs – taking account of existing traffic management practices in place – of reducing illegal file-sharing, as envisaged by the Digital Economy Act, could amount to approximately £10 million over the course of one year, with the potential for benefits to be more than twice as high, depending on the proportion of the customer base actively engaged in illegal file sharing activity at any peak time and the extent to which traffic management is applied. Such estimated savings come on top of those currently achieved through existing network management. The tools are in place and traffic management is a reality. The obvious targets have alas not been that obvious to all.

iv) Conversely, do you think that unconstrained traffic management has the potential for (or is already causing) consumer/citizen harm? Please include any relevant evidence.

Unconstrained traffic management has the potential to cause consumer harm if, for reasons other than the simple expedient of managing the network as efficiently as possible, the consumer is denied reasonable access to legitimate services or is used by ISPs to favor their own (or affiliated) services, applications or content.

v) Can you provide any evidence that allowing traffic management has a negative impact on innovation?

Quite the reverse, if traffic management were not permitted, then innovative services like IP telephony and IPTV would not flourish. At the same time, innovation and creativity can be encouraged by allowing the development of constructive network management technologies that address the harms caused by the proliferation of unlawful content on broadband networks. By way of example, in the United States, a group of private entities – both commercial copyright holders and services providing user-generated content – collaborated to establish a set of principles governing user-uploaded content.

vi) Ofcom's preliminary view is that there is currently insufficient evidence to justify ex ante regulation to prohibit certain forms of traffic management. Are you aware of evidence that supports or contradicts this view?

A June 2010 Deloitte report (attached) shows that:

- ISPs could derive cost savings from the reduction in traffic and network congestion resulting from action taken to reduce illegal file-sharing, as is envisaged by the Digital Economy Act;
- The additional traffic generated by illegal file-sharing traffic, if left unmanaged, could result in increased cost for an ISP due to the additional capacity required. As the Deloitte study notes: "Traffic management enables ISPs to actively manage individual subscriber traffic within its network. Therefore, this reduces the need to increase the total capacity of the network at peak times, [and] helps maintain quality of service for standard users...."
- The study also shows that ISPs have adopted traffic management systems on a widespread basis over recent years, reducing the need to increase the total capacity of the network by managing illegal file sharing traffic at peak times.

This evidence clearly supports Ofcom's preliminary view that there is no need for hasty and far-reaching regulation at this time. It demonstrates that traffic management systems are widespread across ISPs, which can facilitate implementation of the provisions in the DEA legislation relating to technical measures. The MPA believes that it is right to ensure sufficient flexibility to respond to future challenges to copyright, including streaming piracy over ISP networks, as the Act does.

vii) Ofcom's preliminary view is that more should be done to increase consumer transparency around traffic management. Do you think doing so would sufficiently address any potential concerns and why?

We support the goal of ensuring that consumers are informed about the methods that ISPs use to manage network traffic both to protect personal privacy and to safeguard the security and reliability of the Internet. We believe that appropriate transparency can help consumers understand the network management techniques employed and how such tools impact their online experience. However, caution must be exercised in requiring total transparency in traffic management. Firstly, traffic management will change on a second-by-second basis as the network adapts to the particular mix of traffic it has to accommodate. Secondly, where traffic management is used to manage, for example, illegal file sharing traffic, too much detail on the methods employed may enable bad actors to circumvent those methods and reduce the service provider's ability to limit the negative impact of that type of traffic. Thus the level of detail should be appropriate for the informed consumer.

viii) Are you aware of any evidence that sheds light on peoples' ability to understand and act upon information they are given regarding traffic management?

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ix) How can information on traffic management be presented so that it is accessible and meaningful to consumers, both in understanding any restrictions on their existing offering, and in choosing between rival offerings? Can you give examples of useful approaches to informing consumers about complex issues, including from other sectors?

Traffic management is a complex technical issue. Too much technical detail will make the presentation of the information inaccessible to consumers and, as noted in the answer to (vii), may defeat the purpose of the traffic management. The consumer is best served by presenting the information on the basis of the service the consumer is trying to use (e.g. "I'm trying to make an Internet telephone call") rather than in terms of the technical details of protocol and port number.

x) How can compliance with transparency obligations best be verified?

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xi) Under what circumstances do you think the imposition of a minimum quality of service would be appropriate and why?

Minimum quality of service is appropriate for lifeline services such as VoIP or Internet telephony. Beyond that, we support Ofcom's belief that market forces will naturally ensure that quality of service meets the needs of different types of applications and services.

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