



Comments by the Motion Picture Association (MPA) in response to the European Commission's questionnaire "for the public consultation on the open internet and net neutrality in Europe"

(30 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 the European Commission to contribute to an issue of particular importance to us.

In introduction, we would like to point out that illegal behaviour and the distribution of illegal/unauthorised content on the Internet undermines consumer confidence in the safety and security of the Internet and, by extension, e-commerce as a whole. In addition, the theft of creative works poses a tremendous threat on the cultural and commercial interests of all those involved in the creation of professional media content. Thirdly, illegal and unauthorised content contribute massively to clogging broadband pipes and we therefore submit that a reduction in illegal online activity would contribute to both improving quality of service and to gaining clarity on other sources of network congestion.

We fully support the European Commission's comment on p. 5 of the Questionnaire that it is up to customers and content/service providers to decide what they want to access or provide online "as long as it is legal" [emphasis added]. It is with these premises 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.

Question 1: Is there currently a problem of net neutrality and the openness of the internet in Europe? If so, illustrate with concrete examples. Where are the bottlenecks, if any? Is the problem such that it cannot be solved by the existing degree of competition in fixed and mobile access markets?

Telecoms operators in Europe, although generally not offering services or competing across national borders, have been obliged by means of regulation – including the application of competition law – to open up access to their high-speed networks to new entrants in the home markets in which they operate on a wholesale basis (i.e. competitors in the “broadband access” market). In this context, the MPA considers that the most urgent and appropriate question in Europe is whether liberalisation and competitive markets for broadband access are doing enough to appropriately meet consumer demand for high quality of service and transparency.

As to current and future bottlenecks, the MPA is very concerned that the growing problem of congestion on electronic communications networks caused by illegal and unauthorised audiovisual traffic will both threaten the QoS legitimately expected by broadband subscribers and create obstacle for legitimate companies wishing to offer new and innovative services.

Question 2: How might problems arise in the future? Could these emerge in other parts of the internet value chain? What would the causes be?

On top of our reply to Question 1 regarding the threat posed by the growth of illegal video services as a part of overall Internet traffic, it bears noting that the majority of Internet video streaming to date has been of 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 truer for 3D and interactive content and the future holds the promise for even higher resolutions and bandwidth requirements.

Hence, for the distribution of these new formats to develop into a compelling consumer viewing experience, the offering is dependent on the availability of high speed, low latency network connectivity. Therefore, the network congestion problem will only continue to grow worse even as ISPs build out their infrastructure if they, the ISPs, are unable to address illegitimate traffic through technological means.

Question 3: Is the regulatory framework capable of dealing with the issues identified, including in relation to monitoring/assessment and subsequent enforcement?

The regime put in place at the EU level by the recently-adopted “EU Telecoms Package” rightly focuses on the concrete and measureable notion of “Quality of Service” rather than on the more abstract concept of “net neutrality”. In doing so, we understand that the new regulatory framework focuses on the ability of end-users to access and distribute information or run applications and services of their choosing.

In parallel, transparency requirements are imposed on undertakings providing publicly available electronic communications networks, which translate into obligations to publish comparable, adequate and up-to-date information on the quality of service offered. To prevent the degradation of service and the hindering or slowing down of traffic over networks, we understand that national regulatory authorities (NRAs) will retain the ability to set minimum quality of service requirements on undertakings providing public communications networks².

The MPA is supportive of these mechanisms and welcomes the fact that the new regulatory framework accepts the principle that traffic/network management can be a legitimate tool for the provision of differentiated services and in the interest of the efficient functioning of networks. However, in this context, it is of critical importance that reasonable measures really be taken to prevent the transfer and streaming of unauthorized content that contribute massively to clogging up the broadband networks. Requirements for minimum QoS must only be applied to legal traffic.

Question 4: To what extent is traffic management necessary from an operator's point of view? How is it carried out in practice? What technologies are used to carry out such traffic management?

The MPA understands that this question is primarily directed at operators of electronic communications networks and services. Nevertheless, we would like to share our views regarding the first part of the question (i.e., "...is traffic management necessary from an operator's point of view"). Our views are notably based on a June 2010 Deloitte report (attached), which focused on the United Kingdom in the context of the adoption of the British Digital Economy Act (DEA). This report notably 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 UK 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. Specifically, the Deloitte study notes that "[t]raffic 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...."
- 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.

² See notably Article 8.4(g) of the Framework Directive (2002/21/EC) as well as Articles 20, 21 and 22 of the Universal Service Directive (2002/22/EC) – in their consolidated versions as amended by the 2009 EU Telecoms Package.

Question 5: To what extent will net neutrality concerns be allayed by the provision of transparent information to end users, which distinguishes between managed services on the one hand and services offering access to the public internet on a 'best efforts' basis, on the other?

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, some limitations may need to apply to transparency requirements 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 or streaming 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.

Question 6: Should the principles governing traffic management be the same for fixed and mobile networks?

Yes, the principles should be the same. However, their implementation should take into account the fact that bandwidth resources are currently significantly scarcer on mobile than on fixed networks.

Question 7: What other forms of prioritisation are taking place? Do content and application providers also try to prioritise their services? If so, how – and how does this prioritisation affect other players in the value chain?

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Question 8: In the case of managed services, should the same quality of service conditions and parameters be available to all content/application/online service providers which are in the same situation? May exclusive agreements between network operators and content/application/online service providers create problems for achieving that objective?

At the outset, it is important to understand that network traffic is already differentiated today and that a fair level of differentiation actually needs to be applied in order to meet consumer expectations. 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.

In this context, public authorities should tread cautiously with respect to any non-discrimination requirement they might consider and, in any event, carefully tailor any such requirement to prevent demonstrably anti-competitive acts where Internet service providers are vertically integrated and may have an incentive to favour their own/affiliated services, applications or content. In other cases, public authorities should preserve the flexibility needed to spur the kind of investment and innovation that Member States properly seek to achieve.

The MPA submits 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. Indeed, if the Internet is to remain a laboratory for innovation and, in turn, a driver of pioneering new choices for consumers, public authorities should proceed with caution and permit continued experimentation with different delivery approaches for online services.

It seems generally accepted that new kinds of consumer-friendly digital distribution services may require enhanced quality of service to work well. Content creators and ISPs may thus need to enter into quality-of-service agreements to enable consumers to enjoy innovative forms of digital content 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. The emergence of such new online services should under no circumstances be endangered by overly restrictive requirements on managed services.

Question 9: If the objective referred to in Question 8 is retained, are additional measures needed to achieve it? If so, should such measures have a voluntary nature (such as, for example, an industry code of conduct) or a regulatory one?

As stated in our response to Question 8, we do not think that differentiation of network traffic should be precluded as a matter of principle. Requirements and associated remedies should only be contemplated in order to prevent demonstrably anti-competitive acts where Internet service providers are vertically integrated and may have an incentive to favour their own (or affiliated) services, applications or content.

As a more general but crucial point, discrimination between authorised and unauthorised content should under no circumstances be deemed unfair, just as there is no expectation that unlawful conduct will be tolerated alongside lawful conduct in the offline world.

Question 10: Are the commercial arrangements that currently govern the provision of access to the internet adequate, in order to ensure that the internet remains open and that infrastructure investment is maintained? If not, how should they change?

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Question 11: What instances could trigger intervention by national regulatory authorities in setting minimum quality of service requirements on an undertaking or undertakings providing public communications services?

Regarding quality of service, the MPA is supportive of the mechanism brought into the Universal Service Directive by the 2009 Telecoms Package, namely that national regulatory authorities should potentially be in a position to set minimum quality of service requirements to prevent the degradation of services and the hindering or slowing down of traffic over networks. However, in this framework we believe that minimum quality of service requirements are only appropriate for lifeline services, such as VoIP or Internet telephony. Beyond that, we support the belief shared by many NRAs that market forces will naturally ensure that quality of service meets the needs of different types of applications and services.

Question 12: How should quality of service requirements be determined, and how could they be monitored?

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Question 13: In the case where NRAs find it necessary to intervene to impose minimum quality of service requirements, what form should they take, and to what extent should there be co-operation between NRAs to arrive at a common approach?

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Question 14: What should transparency for consumers consist of? Should the standards currently applied be further improved?

The MPA supports 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.

As noted in our response to Question 5, some limitations may need to apply to transparency requirements in traffic management. Traffic management parameters change on a second-by-second basis as the network adapts to a particular mix of traffic. Secondly, when traffic management is used to manage illegal 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.

Question 15: Besides the traffic management issues discussed above, are there any other concerns affecting freedom of expression, media pluralism and cultural diversity on the internet? If so, what further measures would be needed to safeguard those values?

The European debate about traffic management is set against a somewhat different background in Europe than it is in the US, notably because of the high level of competition in the broadband access market brought in at EU level by specific rules on electronic communications networks and services. As a result, we would argue that European discussions around the notion of “net neutrality” have been somewhat more serene and exchanges less vitriolic than they have in the US. The European debate should continue to focus on pragmatic priorities, such as ensuring high levels of quality of service to end-users.

Now whilst nobody could seriously argue that freedom of expression on the Internet is being threatened anywhere in the European Union (nor in the US, for that matter), the MPA submits that traffic management cannot and should not be treated solely as a purely technical topic. Issues of societal importance should also be taken actively into account, such as maintaining media pluralism and cultural diversity, as specifically mentioned in this EC Questionnaire.

In this context, it should be recognised that broadband holds immense promises as a means to enable consumers to access a wide variety of digital content in new and exciting ways. At the same time, it should also be acknowledged that 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. As to citizens using many sites distributing illegal or unauthorized content, they often face the imminent threat of identity theft amongst other risks such as malware infection.

The distribution of illegal and unauthorized content raises both societal issues (i.e. the imperative to protect the works of the mind by intellectual property rights) and technical problems linked to ensuring quality of service (i.e., the clogging of broadband pipes with illegal content). The MPA submits that it is in society's and Internet service providers' interest to remove the sources of congestion. Moreover, 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 contribute to improving quality of service and gaining clarity on other sources of congestion. We submit that broadband providers should have the ability and obligation to 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 have offered answers to your questions above.

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We thank you for your attention and remain at your disposal should you have any questions.

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