



**Commission questionnaire  
Open Internet and 'Net Neutrality'  
UK Music observations**

- UK Music is the umbrella organisation which represents the collective interests of the UK's commercial music industry - from songwriters and composers, artists, musicians, music producers and music managers, to music publishers, record labels and collecting societies.
- UK Music consists of: the Association of Independent Music representing 850 small and medium sized independent music companies; the British Academy of Songwriters, Composers and Authors with over 2,200 songwriter and composer members; the BPI representing over 440 record company members; the Music Managers Forum representing 425 managers throughout the music industry; the Music Producers Guild representing and promoting the interests of all those involved in the production of recorded music – including producers, engineers, mixers, re-mixers, programmers and mastering engineers; the Music Publishers Association, with more than 250 major and independent music publishers representing close to 4,000 catalogues; the Musicians Union representing 32,000 musicians; PPL representing 42,000 performer members and 5,000 record company members; and PRS for Music representing over 73,000 songwriters and composers and music publishers.

**Summary of the position:**

- **Traffic management is a commonly used practice to ensure the efficient operation of internet networks.**
- **Given capacity limitations, the efficient use of the internet by business (as well as by consumers and citizens) depends upon traffic management.**
- **Net Neutrality is a design principle which attempts to describe how the internet works. However, 20 years after the launch of the World Wide Web, Net Neutrality reflects neither the reality nor the future of the internet. It has been conflated into a governance principle which is out of step with today's level of broadband consumption.**
- **Traffic management only creates an issue if it constitutes unfair discrimination.**

- **However, in the UK, unfair discrimination is countered by market competition in addition to the competition law powers bestowed upon regulators.**
- **We welcome the European Commission's focus on transparency and suggest further co-operation between ISPs, business, consumers and citizens to achieve a comprehensible standard of transparency.**
- **Rigid legislation will stifle innovation in what is a nascent but already competitive market.**
- We urge the Commission not to intervene in traffic management developments that reflect the reaction of the market to consumers' and citizens' online behaviour and data consumption levels; it is not the role of the legislator to regulate what the market provides as a service solution to a capacity problem. Unlike the US where the market is significantly consolidated, the European market provides a variety of ISPs from which consumers can choose. The role of the Commission and the relevant National Regulatory Authorities should be to provide broad principles ensuring transparency in all traffic management practices; this should be based on the enforcement of existing competition rules. Similarly, the Commission should assist National Regulatory Authorities to apply harmonised minimum quality of service standards on behalf of consumers and citizens, e.g. minimum requirements of actual upload and download speeds. These standards would ensure that consumers have the opportunity to make a choice of their service provider based on a genuine and informed comparison.
- Discriminatory behaviour is only a concern where firms with considerable market power disrupt the data packets of rival content services in favour of their own content services or prioritise their own services in some way. However, there is no evidence such discrimination in the UK, nor in other member states as far as we understand; unfair discrimination can be addressed by competition law and wider recognition of the duty and responsibility that ISPs have to their consumers.
- The outcome of the debate about traffic management practices will shape the future of content delivery for consumers and producers, and do much to define any future digital marketplace. The music industry is at the cutting edge of such a vibrant, competitive digital marketplace working with a new generation of licensed online services, from streaming services such as we7 and Spotify to retailers of digital downloads such as iTunes and Amazon. To sustain such services requires a functioning and well managed Internet. Traffic management may come to be a vital tool in tackling the unlicensed use of music online and, consequentially, the further development of a diverse, innovative and legitimate marketplace.

- The content industries are an essential link in the internet service value chain; it is content that consumers are paying to access. In terms of UK Music members, we simply want to provide music fans with whatever music they want, on whatever platform they want it, whilst fairly rewarding the creator and those who invest in creativity.
- We welcome any initiatives which will help establish newer, faster broadband services and extend access throughout Europe as has been announced as part of the Digital Agenda. We do not believe that the availability of service models that offer basic broadband plus additional traffic management will have an impact on the open and innovative character of the Internet.
- Internet access creates a two-sided market and the network benefits derived from fair and transparent traffic management practices will affect both consumers and internet based services alike. We hope that the Commission and the National Regulatory Authorities will monitor possible manipulations resulting from a two-sided market and act using the powers granted by competition law.
- Consumers' rights and protection are central in the Commission's questionnaire and the relevant Commission press statements. While network management has the potential for anti-competitive abuse, UK Music believes that the twin concerns of fairness and efficiency can be adequately balanced through openness on clearly intelligible traffic management policies.
- The Revised European Framework for Electronic Communication Regulation introduces specific transparency requirements for consumers but allows the National Regulatory Authority to impose minimum quality of service requirements for all ISPs. If the National Regulatory Authority can guarantee all users a minimum quality of basic broadband service, then differentiated service levels become better understood and more acceptable to consumers. ISPs and the content industries share the same consumer base; this is the nature of the two way market. Any abuse of consumer trust affects our members and hinders our ability to sell and licence content.

#### 4.1. The open internet and the end-to-end principle

**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?

- **We don't see a problem with network neutrality and the openness of the Internet in Europe. Traffic management is an important feature of the internet to ensure the accessibility of the Internet by all consumers and citizens. Broadband service providers are faced with a capacity paradox. Consumers' and citizens' use patterns, specifically with regards to VoIP, video, gaming, music, and other content consumption, indicate a need for more and more bandwidth. The ISPs can build more network infrastructure, but data is a selfish actor as it travels. It chooses the path that looks easiest, not most efficient. Therefore, the efficiency of the network will not only depend on the quality and speed of the connections, but also on the managed flow of internet traffic through those connections. Without the interplay of traffic management and investment in better infrastructure, consumers and the next generation of content delivery businesses will suffer a major economic and developmental setback through slower connections.**
- **During peak internet use hours, traffic shaping by ISPs is already commonplace. C.f. Talk Talk's *"fair usage policy, which is designed to ensure your service is fast and reliable 24 hours a day. This only involves managing non-time critical traffic on our network, such as Bittorrent or Peer-to-Peer file sharing – These services often involve huge files being uploaded and downloaded, which can cause network problems."*<sup>1</sup> Similar traffic shaping policies are applied by a variety of ISPs, such as O2, BT, Sky and Virgin.<sup>2</sup> Best efforts in information delivery will no longer suffice in place of co-ordinated traffic management. Given the current economic climate, it is unlikely that investment in the next generation of super fast broadband networks and necessary infrastructure investment will be taken on by the State. Consequentially, intelligently managing available broadband becomes even more important.<sup>3</sup>**

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<sup>1</sup> <http://www.talktalk.co.uk/legal/fair-usage-policy/?utype=nonmember>

<sup>2</sup> <http://www.ispreview.co.uk/story/2009/10/06/uk-isp-o2-restricts-p2p-file-sharing-and-newsgroup-broadband-speeds.html> (all accessed on 30th September 2010)

[http://bt.custhelp.com/app/answers/detail/a\\_id/10495/c/346](http://bt.custhelp.com/app/answers/detail/a_id/10495/c/346)

<http://www.sky.com/shop/terms-conditions/broadband/>

[http://help.virginmedia.com/system/selfservice.controller?CONFIGURATION=1002&PARTITION\\_ID=1&TIMEZONE\\_OFFSET=&USER\\_TYPE=1&VM\\_USER\\_TYPE=Cable&CMD=VIEW\\_ARTICLE&ARTICLE\\_ID=2781](http://help.virginmedia.com/system/selfservice.controller?CONFIGURATION=1002&PARTITION_ID=1&TIMEZONE_OFFSET=&USER_TYPE=1&VM_USER_TYPE=Cable&CMD=VIEW_ARTICLE&ARTICLE_ID=2781)

<sup>3</sup> [http://www.telco2.net/blog/2010/06/press\\_release\\_broadband\\_happy.html](http://www.telco2.net/blog/2010/06/press_release_broadband_happy.html)

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

- **The music industry’s evolution in the digital age depends on an Internet that is capable of functioning as a marketplace for content distribution. However, none of these developments should come at the expense of consumer transparency or an open and competitive playing field for applications and services.**

**Licensed use of music is often bundled with new applications and video services. The content industries are an important link in the internet service value chain because content is what the consumers ultimately pay to access. We want consumers to have continued and high quality access to legal services. The ubiquity and availability of legal music should be a part of every internet user’s life. Music services on their own have less need for high speed broadband than video or VoIP services, and are unlikely to be affected at the supply side. However, we expect that, increasingly, the consumption of music will require more bandwidth – especially with the development of more “cloud services”. Additionally, music is an integral component of more bandwidth-heavy content such as streaming television, film, video or games.**

**It would be very disconcerting should new and innovative business models for content delivery fail because their services are unfairly restricted by preferential treatment for established players. We acknowledge it is for the market to provide a solution according to the needs and requirements of our sector; however, it is important to guarantee online innovation.**

- **Internet access creates a two-sided market and the network benefits derived from fair traffic management practices will affect both consumers and internet based services alike. If implemented, Internet traffic management can promote competition and innovation. It will allow consumers to get the quality of service they value and will allow for innovative bandwidth heavy services to develop.**

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

- **Unfair discrimination would harm consumers and content producers in the short term and ISPs in the long term. Because some ISPs also own content services or online application services, there might potentially be an incentive for ISPs to unfairly discriminate in favour of their own services, thus restricting access to the internet for content providers and ultimately limiting consumer choice.**

We suggest that in the UK existing competition powers bestowed upon the National Regulatory Authorities (Ofcom and the OFT) are sufficient to combat such behaviour.

- Section 369 of the Communications Act 2003 bestows upon Ofcom considerable competition law functions (concurrent with the Office of Fair Trading) relating to:
  - Agreements, decisions or practices affecting trade and having their object or effect the prevention, restriction or distortion of competition and which relate to activities connected with communication matters; or
  - The abuse of a dominant position.

These functions empower Ofcom to prevent any unfair discrimination.

- The existence of a single gatekeeper providing access to the Internet would be harmful, but the situation is unlikely to arise in Europe, e.g. the UK has more competing ISPs than the US. Committing anti-competitive abuses in an environment of consumer transparency would also be a poor business decision for any internet access provider. There is however the danger of a dominant service provider unfairly managing access to the internet.
- While network management has the potential for anti-competitive abuse, UK Music believes that the twin concerns of fairness and efficiency can be adequately balanced when laying the ground rules for the types of traffic management in which ISPs can and can not engage. This will create a reliable and stable marketplace for legal content, services and applications.
- In our experience there is no evidence at UK level, and we would warn against referring to the US experience given the contrasting situation between the two markets. We urge the Commission to have a bias against intervention and to seek the least intrusive regulatory mechanisms to achieve their policy objectives. Yet, it is equally important the National Regulatory Authorities remain willing to act decisively and proportionately when necessary.

#### 4.2. Traffic management/ discrimination (questions 4-8)

- The music industry is, and will continue to be a vital part of the internet value chain. If existing traffic management - coupled with the mechanisms suggested in the UK Digital Economy Act - can incentivise the development of the digital marketplace, then there is definitely value generated for the creative industries and Europe as a whole.

- **The UK Digital Economy Act will potentially provide a framework in which all creative industries can continue to take risks and licence new online services. It will also, potentially, help make those services profitable and generate more market growth.**
- **As an industry, our sights are set firmly on pursuing opportunities, growth and innovation in the digital marketplace. In 2010, we have a quantifiable foundation on which to build, with more than 50 licensed digital music services in the UK (excluding the hundreds of direct-to-fan artist or label run stores, Smartphone applications and other digital innovations). Digital income now accounts for 20.3% of overall recorded music revenues - an increase of 47.8% on 2008<sup>4</sup>. It is our ambition to accelerate and diversify this growth.**

#### **4.4. Consumers – quality of service**

**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?

- **Currently, we do not think traffic management in the UK will cause consumer harm given the competitive ISP market. Research by Ofcom shows that existing traffic management causes no real consumer harm in practice. However, we stress the requirement that consumers can easily access information about differing levels of traffic management for each ISP in order to make informed choices about what service they want. This should not be buried in the small print of terms and conditions. Also, it is imperative that ISPs provide clear and unambiguous explanations of their traffic management practices to content providers and services so as not to stifle innovative services or future content distribution models. Clarity about service and pricing is not only important to the music industry but also to consumers and citizens. Transparency on the impact of traffic management policies is vital for consumer confidence.**

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

- **The Revised European Framework for Electronic Communication Regulation introduces specific transparency requirements for consumers. However, it also allows Ofcom as the National Regulatory Authority to impose a minimum quality of service requirement for all ISPs.**

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<sup>4</sup> <http://www.bpi.co.uk/press-area/news-amp3b-press-release/article/recorded-music-sales-revenue-stabilise-in-2009.aspx>

**If Ofcom can guarantee all users a minimum quality of basic broadband service, then differentiated service levels will be acceptable to consumers. We recognise that ISPs' growth and ability to charge for differentiated levels of service comes with an important set of responsibilities to consumers. Our interest is in seeing the development of an improved, more functional digital marketplace. We are equally interested in maintaining fair and transparent practices.**

- **The economics of building future communication and broadband networks is complex, but recognition of the costs and industries affected must be a part of any discussion on Net Neutrality.**

**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?

- **The role of the National Regulatory Authority as an ombudsman could be utilized to investigate on behalf of consumers, mediate disputes and offer recommendations to ISPs about when their transparency efforts fall short.**

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

- **We agree that transparency is a vital concept. Traffic shaping provisions in the Terms and Conditions of access providers should not be hidden in the small print of services' Terms & Conditions. Any information that affects consumers' ability to use or access content should be very clearly presented. We believe that if consumers are allowed to make informed choices about their internet service and the practical effect of those choices on their internet use, then this will be an efficient mechanism to prevent traffic management abuses by ISPs.**
- **From the perspective of an industry that functions on the basis of contractual obligations and licensing agreements, one can not assume that all users will read detailed or technical service agreements. Even if consumers do read the small print of the Terms & Conditions, there is no guarantee they will understand what effect traffic shaping policies will have on their ability to, for example, stream video. Using technological terminology is not sufficient.**
- **Ensuring that consumers understand the nature of their internet service agreements is a strategic communications issue for ISPs and implicates how the public perceives socially embedded technology. This is a resource to be shouldered by ISPs. Price points are an insufficient means of communicating the nature of a consumer's connection.**

- **ISPs have a responsibility to both internet dependant industries and consumers to be clear about what traffic shaping will do.**
- **We note that traffic shaping as currently applied by ISPs mainly relates to peer-2-peer technology (c.f. references in footnote 2).**

**While the nuanced service requirements for internet access providers should not be provided for by legislation or regulation, ensuring a minimum quality of service would inform consumers about the nature of their Internet connections.**

**If consumers understand that they have been ensured a base quality of connection, it will help them understand what traffic shaping does and does not do.**

- **Establishing a base connection or a guaranteed base rate will help consumers understand what each ISP is offering. As we mention above, burying information about traffic shaping policies in a service contract is not sufficient.**



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