

Oral Remarks By

**THE CANADIAN FILM AND TELEVISION
PRODUCTION ASSOCIATION**



CFTPA

*Representing television, film
and interactive production in Canada*

ACPFT

*Porte-parole de l'industrie de la production
cinématographique, télévisuelle et interactive au Canada*

and

**THE INDEPENDENT FILM & TELEVISION
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Telecom Public Notice CRTC 2008-19 –
**Review of the Internet traffic management practices of
Internet service providers**

July 8, 2009

CHECK AGAINST DELIVERY

Seating Plan

Commissioners

Mario Mota Vice- President, Broadcasting Policy and Regulatory Affairs, CFTPA	Reynolds Mastin Associate Counsel, CFTPA	John Barrack National Executive Vice- President & Counsel, CFTPA	Susan Cleary Vice- President & General Counsel, IFTA	Brad Fox Producer, Strada Films and Rocket Ace Moving Pictures	Dan Hawes President & Founder, March Entertainment
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JOHN BARRACK

Good morning Mr. Chair, Vice-Chair, Commissioners, and CRTC staff.

My name is **John Barrack** and I'm the CFTPA's National Executive Vice-President and Counsel. We are pleased to be here today to share the perspective of independent producers – from both Canada and abroad – regarding the importance of having a regulatory policy in place that ensures the Internet remains an open-access platform to content providers, application developers, and end-users, while also providing ISPs with flexibility to adopt reasonable traffic management practices.

The CFTPA and the Independent Film and Television Alliance, known as IFTA, requested to jointly appear before you this morning because we share a common message and common concerns. While each of us will be speaking on behalf of our respective organizations and members, we have combined and streamlined our presentation into one so as to avoid duplication and conserve time.

Allow me to introduce our panel. To my immediate right is **Susan Cleary**, IFTA's Vice-President and General Counsel. Los Angeles-based IFTA is the trade association representing more than 140 independent production and distribution companies worldwide, including seven members headquartered in Canada. IFTA members collectively produce more than 400 independent films and countless hours of television programming each year. IFTA has played an active role in the policy and political debates in the United States and indeed worldwide

regarding the traffic management practices of ISPs and their impact on independent producers.

Also with us are two Canadian independent producers who have been pioneers in using the Internet as a primary means of distributing Canadian content to Canadians and to audiences around the world. To my far right is **Dan Hawes**, President and Founder of Sudbury, Ontario-based March Entertainment, an award-winning producer of branded digital content. March Entertainment first came to national prominence with its hit animated series *Chilly Beach*, and has since carved out a reputation for creating compelling digital experiences for a number of platforms, including TV, film, the Internet, and wireless.

To Dan's left is **Brad Fox**. In addition to working with Toronto-based Strada Films, Brad is the co-founder and executive producer of Rocket Ace Moving Pictures (or RAMP) – a company that has been at the forefront of this country's earliest forays into Internet content creation. In addition to *Dead End Days*, Canada's first dramatic video podcast, RAMP has produced several of the country's most popular domestic Internet video series. RAMP's latest production, *Cerealized*, recently became the first independent Internet-exclusive series to be nominated for a Canadian Comedy Award.

We also have two CFTPA staff members with us today. To my immediate left is our Associate Counsel, **Reynolds Mastin**. To Reynolds's left is **Mario Mota**, our Vice-President of Broadcasting Policy and Regulatory Affairs.

We would like to begin by underscoring how important we consider this proceeding to be. When the Commission rendered its decision in the CAIP vs. Bell case last November it was under no obligation to do anything more. It could have easily opted for a “wait and see” approach, addressing ISP traffic management issues on a case-by-case basis. But by deciding to hold a policy proceeding that takes a holistic view of the traffic management practices of ISPs, the Commission recognized that this is an issue that affects all Canadians and is, indeed, worldwide in scope.

As stated earlier, the CFTPA and IFTA share a common message and common concerns. The common message is that independent producers have a vital role as content creators, innovators, and creative entrepreneurs in the digital and online environments. In order for independent producers to equally participate in this emerging marketplace, they need direct, unfettered access to audiences through the Internet, whether via wireline or wireless.

The major common concern is that certain ISP traffic management practices may create unreasonable and insurmountable barriers to online access. Such barriers would imperil innovation, experimentation, and the development of new business models for the distribution of independently produced content, including commercial content financed and developed specifically for the Internet space – what we’ve all come to call “new media” content.

If allowed to take root, such practices may choke off the only distribution method that currently allows independent producers to directly reach their audience without having to go through gatekeepers or aggregators – whether those gatekeepers are a Hollywood studio, an ISP, a Canadian broadcaster or, worse, a combination of these within a vertically integrated company.

Another concern is that traffic management practices of vertically integrated ISPs that own and/or are affiliated with production units or Internet portals may not be able to resist the temptation to give preference to their own and/or affiliated content, leaving independently controlled content in the “slow lane”. Our fear is the creation of a two-tiered Internet.

I will now turn the floor over to Susan Cleary who will provide you with IFTA’s perspective on network traffic management and the need for transparent and neutral practices. Susan.

SUSAN CLEARY

Thank you John, and thank you Commissioners for inviting IFTA to participate in this proceeding.

As I’m sure you are aware, the debate over what ISPs should be allowed to do under the guise of Internet traffic management has been raging for a few years now in the United States. Media reports of the so-called “net neutrality” debate in the U.S. may characterize it as a battle between large ISP telecom and cable companies – like AT&T and

Comcast – squaring off against influential application providers and online companies – such as Google and Amazon – with consumer rights advocates and technologists also providing diverse perspectives on the issue.

IFTA is framing the issue in a way that puts the focus on independent content creators and their ability to produce and distribute their diverse content to consumers in all formats and via all distribution methods, including the vast potential of the online marketplace. This is even more important today as independent producers who finance and distribute content must secure revenue opportunities via Internet distribution in order to replace revenues that are being lost in television, theatrical, and DVD distribution as a result of industry consolidation.

Revenues from downloading or streaming digital content may soon become the primary, and in many cases, the only way for independent producers to finance, produce, and distribute content. That is why it is critical that the rules of the road are clear and that the Commission provides the framework and oversight necessary to ensure unfettered access to online distribution by independent producers and more diverse options for the public.

In the U.S., broadcast and cable television are consolidated in the hands of very few gatekeepers. In the case of vertically integrated Hollywood studios, each has production units that license content directly to the companies' distribution networks and affiliates. The major broadband providers are limited in number and are now directly invested in

destination web sites. An example of this would be Time Warner AOL, which owns or has the ability to control broadcast, cable, and Internet distribution outlets, forming a noose around the neck of content distribution.

This high degree of consolidation in the traditional distribution platforms came about because of a successful drive by the U.S. networks in the 1980s and 1990s to do away with the Financial Interest & Syndication Rules (or “Fin-Syn” Rules), which placed limits on the amount of network-owned television content that could be aired in prime time. As we noted in our written submission in this proceeding, in 1995, 50% of all network prime-time programming was independently produced. Seminal television programming such as *MASH* and *All in the Family* was produced independently and flourished under the Fin-Syn Rules. But by 2003, only 18% of programming in prime time was independently produced as a result of the elimination of the Fin-Syn Rules.

These figures demonstrate that vertically integrated media conglomerates have dramatically shrunk the available shelf space for independently produced programming to make room for their own content on the broadcast and cable platforms that they own and operate. This leaves independent producers rightly concerned that ISP gatekeepers will grant the same preferential treatment and carriage to ISP-owned and/or affiliated content, and squeeze out independent producers from the last open and democratic distribution platform under the guise of “network management”.

The word “congestion” has become the catch-all justification by ISPs for some questionable traffic management practices – practices that threaten the ability of independent producers to build their businesses by distributing their content online to the public. We believe that any network management practices should be targeted at actual congestion and that there should be clear criteria for what constitutes “congestion”.

In my review of sections 27(2) and 36 of Canada’s *Telecommunications Act*, both seem to apply a *reasonableness* standard to the traffic management practices of ISPs. IFTA firmly believes that *reasonable* network management does not include targeting specific legal applications, including peer-to-peer applications, which are being used to monetize and legitimately distribute independent content. Given that such applications may provide the only real alternative to accessing non-ISP-owned and/or affiliated content, we would respectfully suggest that application-based traffic throttling by ISPs should attract a higher degree of scrutiny by the Commission as likely to be in contravention of section 27(2).

With respect to section 36 of the Act, we consider that the type of “packet forging” that Comcast was found to be engaging in amounted to controlling the content or influencing the purpose of telecommunications. We ask the Commission to prohibit this type of discriminatory treatment of legal content or applications.

However section 27(2) and 36 are ultimately interpreted and applied, it is critical that there be active regulatory oversight by the Commission of

the traffic management practices of ISPs. The current business climate and outlook dictates that IFTA and its members take a robust position now in the net neutrality debate before future distribution opportunities are irreparably damaged.

We therefore respectfully urge the Commission to provide the framework, regulation, and oversight of transparent and reasonable network management practices that are necessary to ensure the Internet remains an open-access platform for independent content providers and a source of diverse and compelling content for the public. Brad.

BRAD FOX

Thank you, Susan. If we want to see today's generation provided with their own *MASH* or *All in the Family* – which may take a very different form like a five minute webisode such as *Cerealized* viewed on a wireless device – then we can't kill the goose before it is allowed to lay the golden egg.

That's exactly the risk that we run if we take an "after-the-fact" regulatory approach to the traffic throttling practices of ISPs. Therefore, the CFTPA proposes that the Commission impose, pursuant to its powers under section 24 of the *Telecommunications Act*, a condition of service on ISPs that would prohibit them from engaging in traffic management practices that discriminate on the basis of application or protocol.

Our proposed condition of service is very narrowly tailored – it leaves far more out than it puts in. We have not requested that the Commission either proscribe or prescribe any other traffic management practice by ISPs. We also believe that it would provide a clear, straightforward, bright-line rule for ISPs and all stakeholders, while at the same time promoting competition in the provision of telecommunications services and furthering a number of the policy objectives set out in the Act.

However, should the CRTC determine that a complaint-based regulatory approach to this issue is more appropriate at this time, then we would encourage the Commission to clearly indicate that traffic management practices that throttle specific applications or protocols would likely be considered discriminatory under section 27(2) of the Act, and would require justification by the ISP concerned. We are also of the view that such practices engage section 36 and should not be approved by the Commission.

Practically speaking, we are concerned about throttling practices that are portrayed as being in consumers' interest, when in fact they limit consumer choice. Let us be clear: throttling practices remove choice and potentially promote self-dealing. This is not in the public interest. Dan.

DAN HAWES

Thank you, Brad. In the CFTPA's written submissions, we outlined certain approaches that we regard as the preferred means for ISPs to manage the traffic that flows through their networks.

Of these approaches, we believe that increasing capacity is, by far, the most efficient and effective means of ensuring that broadband supply meets broadband demand. We note that in the U.S., the FCC has embarked on an unprecedented information gathering exercise that will determine how the \$7 billion that Congress recently allocated for national broadband build-out will be spent. This is leaving many Canadians with a bad case of broadband envy, and speaks to both the CFTPA's and the CRTC's urgent calls for the development of a comprehensive national digital media strategy. One of the pillars of any such strategy must be to reclaim Canada's place as a legitimate leader in broadband speed, access, and affordability.

We would note that even since this hearing began two days ago, a number of other options have been proposed to increase network capacity and introduce more efficient methods for managing ISP networks. Those options include increasing last-mile capacity, mandating upstream peering by all ISPs, and aggressively deploying content delivery networks. While not commenting directly on these alternative approaches, the sheer breadth of them would suggest that application and protocol-based throttling is not the "only" potential solution to congestion.

But let us be clear. Any neutral traffic management practices that are adopted should be implemented in combination with building a strong, robust infrastructure capable of meeting the ever-increasing consumer demands on ISP networks. Reynolds.

REYNOLDS MASTIN

Thank you, Dan. The CFTPA is strongly of the view that over and above the issue of which traffic management practices are permissible under the Act, any traffic management practices undertaken by ISPs must be disclosed in a transparent manner that ensures that customers and other affected parties are kept fully informed of the nature and the impact of the practices adopted.

We therefore recommend that the Commission should impose notification requirements with respect to the provision of both wholesale and retail Internet access services, with such notification specifying and explaining the type of traffic management practice adopted, its potential impact on the quality of service provided, the rationale for its adoption, and the timing of any such adoption.

The CFTPA would also urge the Commission to consider requiring, or at the very least encouraging, additional notification measures so as to enable consumers to develop a greater understanding of the quality of the broadband service being offered to them and greater control over the management of their use of broadband. We support, for example, Score Media's proposal of having ISPs disclose the proportion of the physical access link that is dedicated to Internet access. This would provide customers with some means of tracking whether certain content is being accorded "fast lane" priority by an ISP through its distribution on a portion of the access link not used by the "public" Internet.

We also believe that to the greatest degree possible, there should be symmetrical regulation of wireline and wireless services. The Commission should at the very least reconsider whether it should continue to exempt wireless service providers from being subject to section 27(2) of the Act.

With the release of last month's New Media policy, we were pleased that the Commission has proposed to amend the New Media Exemption Order by having the definition of "new media broadcasting undertaking" encompass broadcasting services delivered using point-to-point technology and received by way of mobile devices. We were also pleased to see the inclusion of an undue preference/unjust discrimination clause that would apply to New Media Broadcasting Undertakings. With these amendments, we believe the Commission will have taken an important step in building a regulatory framework that fosters non-discriminatory treatment of "broadcasting" traffic in both the wireline and wireless space.

As the Commission is also aware, the CFTPA took the position in the New Media proceeding that ISPs are "broadcasting undertakings" when they deliver "programming" and are therefore subject to the *Broadcasting Act*. The CFTPA remains strongly of this view, but recognizes that this is a question that will soon be addressed by the Federal Court of Appeal. One of the reasons we have participated in this proceeding is to ensure that our members' interest in maintaining an open-access Internet is protected, regardless of how this issue is ultimately resolved by the Court. John.

JOHN BARRACK

Both of our associations fully recognize the delicate balancing act that the Commission is confronted with in this proceeding.

On the one hand, imposing needlessly inflexible regulatory prescriptions on ISPs may significantly hamper their ability to manage their networks efficiently and effectively, leading to additional costs for all stakeholders, most especially Canadians.

On the other hand, allowing ISPs to engage in practices that discriminate against certain applications and protocols will have the effect of dampening innovation in the development of new applications and forms of content delivery, while at the same time reducing the diversity of content – including Canadian independently produced content – available to Canadian and global audiences on the Internet.

Clearly, we all must be mindful of the law of unintended consequences when discussing what the rules of the road should be when it comes to the traffic management practices of ISPs. But it is equally clear to us that *some* rules are required.

We would caution the Commission to be sceptical of the claim that net neutrality is a solution in search of a problem, or that it is a make-work project for regulatory lawyers. While lawyers should not dictate the future evolution of the Internet, nor should this be the exclusive purview of the network engineers of ISPs. Since we all have a stake in the outcome, we also all need a seat at the table.

We hope that we have come to *this* table with a unique perspective and constructive approaches to what is a highly complex issue. We thank you for giving us the opportunity to be here today and look forward to answering your questions.