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Viran Corea
Malathy Knight
Research

Nishan de Mel
Series Editor



Image courtesy of *The New Yorker*

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No. of ISPs listed on the stock exchange

15+

MILLION

No. of subscribers for Dialog and SLT

30+

THOUSAND

No. of shareholders of Dialog and SLT

Is blocking websites making Sri Lankan telecom share prices vulnerable?

If Sri Lankan Internet Service Providers (ISPs) are blocking news websites without due diligence, then their present and future share values are vulnerable. This *Insight* explains what ISPs should do to ensure minimum due diligence, and how they can further protect themselves by following Google's example in sharing information on government requests.

Significant questions have been raised over Sri Lankan Internet Service Providers (ISPs) blocking news related websites. For example, the blocking of Colombo Telegraph generated much concern, including from the opposition leader and the International Press Institute, and there are many other news and opinion websites which are also blocked by Sri Lankan ISPs.

Most of the attention and speculation has focused on the government, blaming it for the blockade. However, with many of the blocked sites, there is apparently no evidence of the blockade being legally instituted by the government.

This opens another dimension of concern. If the blockades are illegal (not done in conformity with the law), and the Sri Lankan ISPs are complicit in such illegal blockades, they would then be vulnerable to legal action in the future from any of their subscribers, or even a virtual Class Action/ Representative Action suit suing for past damages on behalf of millions of subscribers. The larger the subscriber base of the ISP, the greater the vulnerability.

Such a vulnerability to legal action affects the estimation of future profits of ISPs and translates to a vulnerability in the present value of ISP share prices. (In the share market current prices reflect

estimations of future profits). Currently the ISPs listed in the Colombo Stock Exchange (CSE) are Dialog and Sri Lanka Telecom.

LEGAL CONSTRAINTS ON THE IMPOSITION OF BLOCKADES

Under the Sri Lanka Telecommunications Act No. 25 of 1991, the Telecommunications Regulatory Commission (TRC) licenses and exercises oversight of ISPs. The TRC is required to *'take such regulatory measures as may be prescribed to comply with any general or special directions that may be given to it from time to time by the Government of Sri Lanka'* (Section 5(f)), or *'in writing'* by the Minister for the subject of Media (section 66).

However, the Act does not grant the TRC any express right to issue on ISPs, any arbitrary directive to block or restrict access to some websites at its own discretion. To the contrary, among the general objects of the Act are *'to ensure that operators are able to carry out their obligations for providing a reliable and efficient service free of undue delay, hindrance or impediment'* (Section 4(f)).

All of the above can be summarised in a simple **Legality-Test**: Any restriction requested of ISPs by the TRC are legal only when directed by published decisions of the government (i.e. prescribed) or written directions of the Minister.

These constraints show that those who framed the law have been wise and responsible. They have recognised the importance of *providing a reliable and efficient service free of undue delay, hindrance or impediment*, and of protecting the *freedom of thought and conscience*, guaranteed by the constitution, by not allowing arbitrary or undue restriction of access to information on the Internet. But have the ISPs in Sri Lanka understood these constraints?

THREE CONDITIONS TO EVALUATE LAWFUL CONDUCT BY ISPs

Three conditions should be met for ISPs to be confident that they are acting on legally valid directives.

- Directives acted upon should have come from the TRC. No other authority, not even the president, is empowered to give a directive to the

The SL Telecommunications Act does not grant the TRC any express right to issue on ISPs, or any arbitrary directive to block or restrict access to websites at its own discretion.

On the contrary, the Act is meant to ensure that operators are able to carry out their obligations freely.

ISPs. That means, directives to the ISPs come from the TRC. This is a necessary condition but it is not sufficient.

- Directives from the TRC must conform to the legality-test in order to be considered lawful. The TRC has no power to issue directives at its whim and fancy. Its scope of lawful directives are therefore constrained by the legality-test.
- Directives from the TRC should have been received in writing by the ISPs and be available for examination by a court of law. Principles of administrative law would not ascribe credibility to claims of oral directives.

DUE DILIGENCE REQUIRED OF ISPs

Therefore, an ISP should be able to establish with regard to the blocking of any website that it was done with proper due diligence in respect to the three conditions of lawful conduct. If not, the ISP can be accused of having acted illegally.

To establish that it did not act illegally, an ISP would need to be able to provide evidence of a request from the TRC, which cites the relevant published decisions of the government or asserts itself to be based on written directives of the Minister.

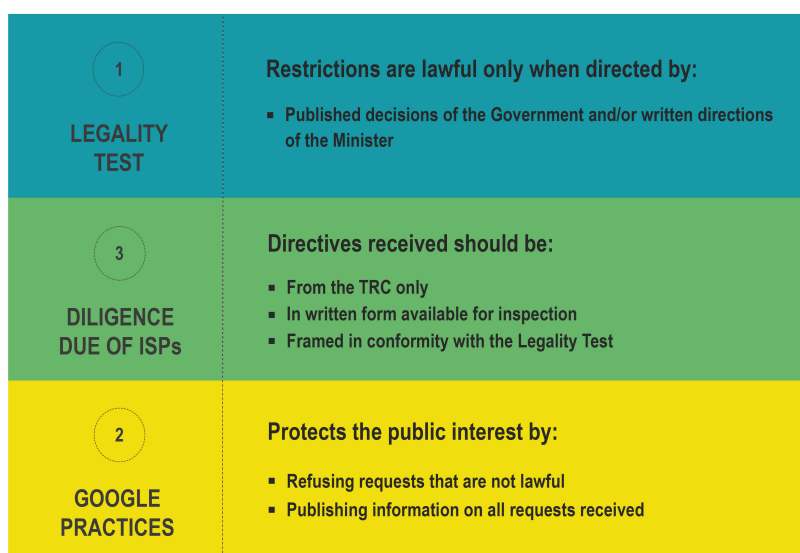
For example, prohibited content, such as obscene publications, pornographic or paedophilic content can be blocked and such blockades are clearly referable to a specific, clear violation of a law (e.g. Obscene Publications Act No. 22 of 1983).

But what law is applicable in the selective blocking of websites? What are the published decisions of government or written directives of the Minister under which these blockades are implemented? If ISPs do not possess written directives from the TRC that claim to conform to these requirements, in blocking a website, they would be vulnerable to legal action by their subscribers.

SUBSCRIBERS' RIGHT TO KNOW AND ISP CULPABILITY

Any customer of an ISP has a basic right to know the limits imposed on the service for which she is paying. Therefore, all customers of ISPs should be able to request and receive a list of sites that are being blocked by the ISP, and the reasons for the blockades imposed.

It is curious that despite the significant public concerns no ISP has so far made public the list of sites that they block. The failure to share this information can be seen as increasing their culpability, in the event that the blockades themselves are one day adjudged to be illegal.



LEARNING FROM GOOGLE

Google is an internet giant that is heavily reliant on governments to provide them access to operate, and is also pressured by governments and politicians to act in ways that are inimical to the public interest. Google deals with this

in two ways: (1) refusing or resisting requests that are not lawful or not in the public interest (2) publishing requests made and how they were handled, to inform their users. Google's transparency report can be found here: www.google.com/transparencyreport

These examples of how Google dealt with requests from governments, between January and June 2014, can be a guide for Sri Lankan ISPs (from Google's current transparency report).

GOOGLE PRACTICES: BRAZIL | ARGENTINA | UNITED STATES | FRANCE



BRAZIL

We received a court order **to remove 107 blog posts** and search results for linking to information that criticised a local government official for allegedly corrupt hiring practices. We appealed because the order did not specify why it was illegal and **did not remove** the content. (i.e refused due to the legal basis not being clarified).

ARGENTINA

We received a phone call **to remove a Google Autocomplete entry** linking a politician's name with an illicit drug. We **did not remove** the entry (i.e. refused, with no written request, and no legal basis).

UNITED STATES

We received 27 requests from a federal government agency **to suspend 89 apps** from the Google Play store that allegedly infringed its trademark rights. After reviewing the apps in question with respect to those trademarks, **we removed 76 apps**. (i.e. selectively complied after evaluating legal basis and its application).

FRANCE

We received a request from local officials **to remove six blog posts** about their town because they allegedly defamed the town, its mayor and other elected officials. **We did not remove the blog posts**. (i.e. refused, with allegation not being legally established).

In addition to such details Google publishes a range of statistics on the sources, types and number of requests it receives from governments to block websites. Sri Lankan ISPs, however, seem to be concealing such information from their customers who keep them in business.

In the Lanka Marine Services Ltd., Waters-Edge and Sri Lanka Insurance Corporation cases, Sri Lankan courts have established that private companies cannot escape the consequences of wrongful conduct by hiding behind the coat-tails of government officials. The courts held culpable not only government officials who acted wrongfully

against the public interest, but also the private companies that went along with those actions. Sri Lankan courts could follow that precedent in the future. ISPs should take note. Quick action towards Google-like transparency and ensuring legal conformity could help their future success and protect the value of their shares. ■