

PUBLIC CITIZEN LITIGATION GROUP

1600 20TH STREET, N.W.
WASHINGTON, D.C. 20009-1001

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(202) 588-1000

February 10, 2009

Erica Simpson, Esquire
Hammonds LLP
Rutland House
148 Edmund Street
Birmingham B3 2JR DX 708610
United Kingdom

Dear Ms. Simpson:

I write on behalf of SoftLayer Technologies, Inc., in response to your letter of January 8, 2009, threatening a claim for defamation based on the contention that SoftLayer is publishing defamatory messages about Mistral Telecom Limited on the web site whocallsme.com.

SoftLayer is not the publisher of the messages identified in your letter. SoftLayer makes Internet access available to its customers, including the proprietor of whocallsme.com. That proprietor, in turn, has chosen to create an interactive message board that allows members of the public to post information about companies that make telemarketing calls, identifying each company by the telemarketing number that it uses. SoftLayer is no more the publisher of the messages posted on its customer's message board than the post office is the publisher of allegedly defamatory messages that are sent through the mails, or than the City of London is a publisher of the comments made at Speaker's Corner in Hyde Park.

SoftLayer provides Internet access for more than 5500 customers, on more than 18,000 servers deployed in data centers in several parts of the United States. Its customers have placed roughly 9000 terabytes of data online, and their web pages, if printed, would consume hundreds of millions of pages. It is unreasonable to expect SoftLayer to pore through the entire opus of all of its customers to find and remove whatever words you may deem defamatory. Indeed, your letter makes clear that you have not identified all of the allegedly defamatory words, and you have not supplied the precise URL's of even the allegedly defamatory words set forth in your letter. Assuming that Mistral intends to proceed in this matter, you should identify the allegedly defamatory words exhaustively. Nor can we accept your suggestion that the entire consumer conversation about Mistral should be taken offline simply because some contributions to that conversation have allegedly been defamatory.

Moreover, under 47 U.S.C. § 230, which regulates the activities of the providers of interactive computer services, SoftLayer is immune from suit based on the material that its customers post to the Internet by means of the SoftLayer service, just as SoftLayer's customer (the proprietor

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of whocallsme.com) is immune from suit based on the content of allegedly defamatory posted to the message boards that it operates. *See Doe v. MySpace, Inc.*, 528 F.3d 413, 422 (5th Cir. 2008); *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997). Moreover, under U.S. law, the courts generally agree that constitutional due process does not permit the operator of a passive web site, which provides the opportunity to see information but does not afford the capability of forming contracts online, to be subject to personal jurisdiction at every location where allegedly tortious speech can be downloaded and read. We are confident that any judgment that your client might obtain would be unenforceable in the United States as a matter of public policy, not to speak of the First Amendment and the Due Process Clause. *See, e.g., Telnikoff v. Matusevich*, 347 Md. 561, 702 A.2d 230 (1996). Other states are following this example, and both New York and Illinois have adopted statutes implementing the same principle. McKinney's CPLR § 5304(b)(8); 735 ILCS 5/12-621(b)(7). Accordingly, Public Citizen has agreed to represent SoftLayer in opposition to such a judgment if Mistral tries to obtain one.

That is not to say that process is unavailable for Mistral to identify the posters of the allegedly defamatory comments so that it can proceed against **them** for speech that Mistral believes is wrongful, so long as it makes a proper showing under the standard *Doe* procedure. *E.g., In re Does 1-10*, 242 S.W.3d 805 (Tex. App.-Texarkana, 2007). However, SoftLayer does not have access to any identifying information, which would have to be obtained from the operator of the whocallsme.com web site. In addition, it appears that the whocallsme.com message board operated by SoftLayer's customer would allow Mistral to reply to the criticisms posted there. Perhaps it would be to Mistral's advantage to explain what it believes are the true facts on the message board, trusting to the good sense of consumers to separate fact from fiction and decide who is telling the truth.

In conclusion, if you intend to pursue this matter, SoftLayer will accept any final determination of liability for the allegedly defamatory words by a court of competent jurisdiction in the United States. You may effect service of any judicial process at SoftLayer's corporate offices at 6400 International Parkway, Suite 2000, Plano, Texas 75093. I should be grateful, however, if you would send me a courtesy copy.

Sincerely yours,


Paul Alan Leyy