

STATE OF MICHIGAN
IN THE SUPREME COURT

Request for Certified Question From the U.S. Court of Appeals for the Ninth Circuit

IN RE CERTIFIED QUESTION,

PETER DEACON,

Docket No. 151104

Plaintiff-Appellant,

vs.

PANDORA MEDIA, INC.,

Defendant-Appellee.

**APPELLEE'S BRIEF IN SUPPORT OF REQUEST FOR A CERTIFIED QUESTION
FROM THE NINTH CIRCUIT COURT OF APPEALS.**

ORAL ARGUMENT REQUESTED

Jill M. Wheaton (P49921)
Krista L. Lenart (P59601)
Dykema Gossett PLLC
2723 South State Street, Ste. 400
Ann Arbor, MI 48104
(734) 214-7629
jwheaton@dykema.com
klenart@dykema.com

*Attorneys for Defendant-Appellee Pandora
Media, Inc.*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
COUNTER-STATEMENT OF JURISDICTION	1
COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW	2
INTRODUCTION	3
COUNTER-STATEMENT OF FACTS	4
A. The Pandora Service	4
B. The VRPA.....	5
C. Procedural History	6
ARGUMENT	9
I. Standard of Review.....	9
II. This Court Should Grant the Ninth Circuit’s Certification Request.....	9
A. The Certified Question May Be Resolved By Michigan Law.....	10
B. The Certified Question Presents A Novel Issue of State Law That Is Not Controlled By Michigan Supreme Court Precedent.	10
C. Interpretation of the Michigan VRPA Has Important Public Policy Ramifications.	11
D. The Issue Presented By The Certified Question Will Likely Continue to Evade Review by Michigan Courts, and a Finding That Pandora’s Services Are Not Covered By The VRPA Will Effectuate The Legislature’s Intent By Curtailing Prohibited Class Action Lawsuits.....	12
III. Assuming The Court Accepts The Certification Question, It Should Find That Pandora Does Not “Rent” or “Lend” Sound Recordings and Deacon Did Not “Rent” Or “Borrow” Sound Recordings From Pandora.	13
A. Principles of Statutory Interpretation.....	13

B. Pandora Does Not “Rent” Sound Recordings Because The Ordinary Meaning of “Rent” Requires A Payment..... 14

C. The Pandora Service Does Not Allow For “Renting”, “Lending”, or “Borrowing” Because Pandora Listeners Cannot Control The Sound Recordings That Pandora Streams to Them..... 15

D. Pandora’s Terms of Service Support a Finding That Its Listeners Are Not Borrowers or Renters. 19

E. This Court Should Find That “Renting” And “Lending” Sound Recordings Have The Same Meaning Under the VRPA As They Have Under The Copyright Act. 20

F. By Finding That Pandora Is Not In The Business of “Renting” or “Lending” Sound Recordings, This Court Can Ensure That The VRPA Will Not Be Expanded Beyond Its Plain Language Without An Act Of The Legislature. 22

CONCLUSION..... 24

CERTIFICATE OF SERVICE 25

INDEX OF AUTHORITIES

CASES

Apple Inc v Psystar Corp, 658 F3d 1150 (CA 9, 2011), *cert denied*,
132 S Ct 2374, 182 L Ed 2d 1017 (2012)..... 19

Arista Records, LLC v Launch Media, Inc, 578 F3d 148 (CA 2, 2009)..... 19, 21

Ashcroft v Iqbal, 556 US 662; 129 S Ct 1937; 173 L Ed 2d 868 (2009)..... 14

Bailey v United States, 516 US 137; 116 S Ct 501; 133 L Ed 2d 472 (1995) 15

Bertolotti v Macomb County, 20 Mich App 162; 173 NW2d 723 (1969) 14

Bonneville Intern Corp v Peters, 347 F3d 485 (CA 3, 2003)..... 21

Briggs Tax Serv, LLC v Detroit Pub Sch, 485 Mich 69; 780 NW2d 753 (2010) 13

Howell Educ Ass'n MEA/NEA v Howell Bd of Educ, 287 Mich App 228;
789 NW2d 495 (2010) 23

In re Certified Question (Jewell Theatre Corp v Patterson), 420 Mich 51;
359 NW2d 513 (1984) 10

In re Certified Questions (Karl v Bryant Air Conditioning Co), 416 Mich 558;
331 NW2d 456 (1982) 10

*In re Certified Question (Kenneth Henes Special Projects Procurement, Mktg
& Consulting Corp v Cont'l Biomass Indus, Inc)*, 468 Mich 109; 659 NW2d 597 (2003)..... 10

In re Certified Question (Mattison v Soc Sec Comm'r), 493 Mich 70; 25 NW2d 566 (2012)..... 9

In re Certified Question (Miller v Ford Motor Co), 479 Mich 498; 740 NW2d 206 (2007) 9

In re Certified Question (Preferred Risk Mutual Ins Co v Mich Catastrophic Claims Ass'n),
433 Mich 710; 449 NW2d 660 (1989)..... 10

In re Pandora Media, Inc, 6 F Supp 3d 317 (SDNY, 2014)..... 21

Intercollegiate Broad Sys, Inc v Copyright Royalty Bd, 684 F3d 1332 (CA DC, 2012), *cert
denied*, 133 S Ct 2735, 186 L Ed 2d 192 (2013) 21

People v Gilbert, 414 Mich 191; 324 NW2d 834 (1982) 23

People v Lee, 447 Mich 552; 526 NW2d 882 (1994)..... 15

DYKEMA GOSSETT & ASSOCIATES, PROFESSIONAL LIMITED LIABILITY COMPANY, 2723 SOUTH STATE STREET, SUITE 400, ANN ARBOR, MICHIGAN 48104

People v Webb, 127 Mich 29; 86 NW 406, 407 (1901)..... 11

Recording Indus Ass’n of Am v Librarian of Cong, 176 F3d 528 (CA DC, 1999)..... 20

Riggs v Prober & Raphael, 681 F3d 1097 (CA 9, 2012) 16

Spectrum Health Hosp v Farm Bureau Mut Ins Co, 492 Mich 503; 821 NW2d 117 (2012)..... 13

State ex rel Gurganus v CVS Caremark Corp, 496 Mich 45; 852 NW2d 103 (2014) 14

Twichel v MIC Gen Ins Corp, 469 Mich 524; 676 NW2d 616 (2004) 14

United States v ASCAP, 627 F3d 64 (CA 2, 2010)..... 21

United States v Trident Seafoods Corp, 92 F3d 855, 862 (CA 9, 1996) 20

United States v Trinidad-Aquino, 259 F3d 1140 (CA 9, 2001) 15

United States v Wade, 181 F Supp 2d 715 (ED Mich, 2002) 20

STATUTES

17 USC 101..... 20, 21, 23

17 USC 106..... 20, 21, 23

17 USC 114..... 20, 21

18 USC 2710..... 22

28 USC 1332.....12

MCL 445.903 6

MCL 445.1711 passim

MCL 445.1712 passim

MCL 445.1714..... 6

MCL 445.1715 6

OTHER AUTHORITIES

Black's Law Dictionary (9th ed) 14, 15

Merriam-Webster’s Collegiate Dictionary 1378 (11th ed.) 15

Merriam-Webster.com 15

Random House Dictionary of the English Language: Second Unabridged Edition..... 15

Webster's Third New International Dictionary (1966) 14

RULES

Fed R Civ P 12(b)(6)..... 7

MCR 3.501(A)(5) 12

MCR 7.305(B) 9, 10

COUNTER-STATEMENT OF JURISDICTION

Defendant-Appellee Pandora Media, Inc. (“Pandora”) agrees that the jurisdictional summary set forth in Plaintiff-Appellant Peter Deacon’s brief is complete and correct.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should grant the Ninth Circuit Court of Appeals’ request to answer the following certified question:

Has Deacon stated a claim against Pandora for violation of the [Michigan Video Rental Privacy Act (“VRPA”), MCL 445.1711, *et. seq.*] by adequately alleging that Pandora is [in] the business of “renting” or “lending” sound recordings, and that he is a “customer” of Pandora because he “rents” or “borrows” sound recordings from Pandora?

Trial Court’s Answer: The Trial Court did not address whether the Michigan Supreme should grant the Ninth Circuit’s certification request.

Deacon’s Answer: Yes

Pandora’s Answer: Yes

2. Assuming this Court accepts the certification request, should this Court find that Pandora is engaged in the business of “renting” or “lending” sound recordings, and that Pandora listeners are “customers” within the meaning of the VRPA because they “rent” or “borrow” sound recordings from Pandora?

Trial Court’s Answer: No

Deacon’s Answer: Yes

Pandora’s Answer: No

INTRODUCTION

The VRPA provides that one “engaged in the business of *selling* at retail, *renting* or *lending* books or other written materials, sound recordings, or video recordings shall not disclose to any person, other than the customer, a record or information concerning the *purchase, lease, rental or borrowing* of those materials by a customer that indicates the identity of the customer.” MCL 445.1712 (emphasis added). “Customer” is defined as one who “purchases, rents, or borrows” a book, sound recording, or video recording. MCL 445.1711(a). Plaintiff Deacon, a listener of Pandora’s streaming music service, alleges that Pandora violated the VRPA’s disclosure provisions by making his listener profile (which may or may not have contained his listening history, the Complaint is not clear on this) searchable on the Internet and viewable by his Facebook contacts.

The United States District Court for the Northern District of California dismissed Deacon’s purported class action because the plain meanings of the statutory terms “sell”, “rent”, “lend”, and “borrow” – essential elements of a claim under the VRPA – require “use” of the sound recordings and/or payment of consideration, neither of which Deacon alleged:

[N]o facts are alleged showing that Plaintiff paid any consideration to Pandora in exchange for use of its service. More fundamentally, Plaintiff has not alleged any facts showing his ‘use’ of Pandora’s property; that is, a volitional act relating to the temporary song file supplied by Pandora.

(Order Granting Defendant’s Motion to Dismiss (“Dist. Ct. Order”), p. 8, Appx. 19a.)¹

The Ninth Circuit Court of Appeals elected to certify the above issue to this Court because it involved a “novel” question of statutory interpretation that “has the potential to affect

¹ Deacon did not create a Joint Appendix and the Court Clerk has indicated the parties should not resubmit what has already been provided as Appellant’s Appendix in a Joint Appendix form. Citations to “Appx.__a” are to Appellant’s Appendix. The only potentially relevant materials not included in Appellant’s Appendix would be the motion to dismiss briefs filed in the District Court. These may be part of the record sent to this Court by the Ninth Circuit but if they were not included and the Court would like to see them, Pandora will provide them upon request.

the rights of millions of Michigan citizens and the potential to evade review by the Michigan courts.” (Order, p. 11, Appx. 284a.) This Court should accept the question certified by the Ninth Circuit and, like the district court, find that: (1) Pandora is not in the business of “renting” or “lending” sound recordings under the VRPA, and (2) Deacon (and others similarly situated) are not “customers” within the meaning of the VRPA because they do not “rent” or “borrow” sound recordings from Pandora.

COUNTER-STATEMENT OF FACTS

A. The Pandora Service

Pandora offers an Internet radio service through the web and on mobile devices. (Complaint, ¶ 2, Appx. 140a.) Listeners tell Pandora which artists, songs, and music genres they like, and do little else. Pandora then chooses which music to stream to the listener based on the listener’s stated preferences. (*Id.*, ¶ 3, Appx. 141a.) Like virtually all Internet radio, Pandora’s method for streaming audio involves placing a temporary music file (which typically consists of only portions of a song, rather than the song in its entirety) on each listener’s computer or device so that the song may stream without annoying pauses or skipping. (*Id.*, ¶ 20, Appx. 143a.) Upon completion of the track or portion of a track, Pandora removes the corresponding file from the listener’s computer. (*Id.*)

Critically, Pandora listeners:

- * cannot choose which songs or artists will stream to their devices;
- * cannot fast forward, rewind, or replay a song;
- * cannot copy or save a song to replay it at a later time; and
- * cannot share a song with others by transferring a file.

Pandora alone chooses what is played and when.² Should a subscriber wish to purchase a song, Pandora provides links to Apple's iTunes service and/or Amazon.com for such a purpose; Pandora itself does not sell sound recordings.³ (*Id.*, ¶ 21, Appx. 143a; Dist. Ct. Opinion, p. 11, Appx. 22a.) Each Pandora listener is provided with a "Profile" page as part of their account. (Complaint, ¶ 6, Appx 141a.) The Complaint alleges that a Pandora listener's Profile page displays such things as the listener's name, recent listening history, stations created, and bookmarked tracks and artists. (*Id.*)

All listeners must agree to Pandora's terms and conditions. (Dist. Ct. Order, p. 2, Appx. 13a; Complaint ¶ 24, Appx. 144a.) The terms provide that Pandora listeners do not have any ownership rights in the music Pandora streams. (Terms 2.1, 4, Appx. 137a-138a.) The terms also place prohibitions on what listeners may do with the music that is streamed to them. Section 3.2, for example, states that listeners agree they will not "copy, store, edit, change, prepare any derivative work of or alter in any way any of the tracks streamed through the Pandora Services . . . [or] make the Pandora services available over a network...." (Appx. 138a.)

B. The VRPA

The following provisions of the VRPA are at issue here:

445.1711 Definitions.

Sec. 1. As used in this act:

(a) "Customer" means a person who purchases, *rents*, or *borrow*s a book or other written material, or a sound recording, or a video recording.

² Pandora has both free and paid models. The paid model, which is not at issue in this case, provides an advertisement free experience for the listener. Thus, for \$4.99 a month, a listener can listen to Pandora without ads. Like the free model, Pandora's paid model does not allow the listener to choose songs or artists, fast forward, rewind, or replay songs, or exhibit any level of control over the music that is streamed to the listener's device.

³ Deacon does not challenge the District Court's finding that Pandora does not sell sound recordings. (Deacon's Opening Brief in the Ninth Circuit ("Opening Br"), p. 8, n. 2, Appx. 45a.)

445.1712 Record or information concerning purchase, lease, rental, or borrowing of books or other written materials, sound recordings, or video recordings; disclosure prohibited.

Sec. 2. Except as provided in section 3 or as otherwise provided by law, a person, or an employee or agent of the person, ***engaged in the business of selling at retail, renting, or lending*** books or other written materials, sound recordings, or video recordings shall not disclose to any person, other than the customer, a record or information concerning the purchase, lease, rental, or borrowing of those materials by a customer that indicates the identity of the customer.

MCL 445.1711-12 (emphasis added).

Although the VRPA is a criminal statute (violators are guilty of a misdemeanor), it also contains civil provisions that provide for actual damages or \$5,000, whichever is greater. MCL 445.1714, MCL 445.1715. The VRPA does not specifically authorize class actions.

C. Procedural History

Deacon filed a class action complaint against Pandora in the United States District Court for the Northern District of California. (Complaint, Appx. 139-151a.) Deacon is a Michigan resident who claims to have created a Pandora account in or before 2008. (*Id.*, ¶¶ 29-30, Appx. 145a.) The Complaint alleges that Pandora’s streaming service allows listeners to “temporarily store a digital copy of the song currently playing on their computer” and that “[u]pon completion of the track, Pandora removes the track from the user’s computer.” (*Id.*, ¶ 20, Appx. 143a.) These are the only allegations in the Complaint regarding how Pandora’s technology streams audio files for listening.

The Complaint contains two counts: (1) violation of the VRPA and (2) violation of the Michigan Consumer Protection Act, MCL 445.903 (“MCPA”). Both counts are based on allegations that Pandora disclosed “Protected Information” about its listeners although the Complaint does not allege that Pandora disclosed any information about Deacon himself. The

Complaint defines “Protected Information” as listeners’ names, profile information, most recent stations, recent activities, listening histories, and bookmarked tracks and artists, and alleged that Pandora violated the statute by making listener’s profile pages searchable on the Internet, and integrating listeners’ profile pages with their Facebook accounts. (*Id.*, ¶¶ 6, 43-55, Appx. 141a, 148-150a.) The Complaint was brought on behalf of two proposed classes, defined as:

1. The Disclosure Class: A class consisting of all Michigan residents who registered as users or subscribers of Pandora’s services before August 5, 2010.
2. The Facebook Disclosure Subclass: A subclass consisting of all Michigan residents whose Pandora account was automatically integrated with a Facebook account before August 5, 2010.

(*Id.*, ¶ 35, Appx. 146a.)

The Complaint is silent about Deacon’s use of Pandora. Among other things:

(1) it does not allege that Deacon himself provided Pandora with his real name, created custom stations, or marked songs as favorites, nor does it even allege how Deacon used the Pandora service after registering;

(2) it does not allege that Deacon made any use of, or at any time exercised control over, any file Pandora temporarily placed on his device to facilitate audio streaming;

(3) it does not allege that anyone actually saw Deacon’s “Protected Information”; and

(4) it does not allege any actual damages.

The Complaint seeks declaratory relief, statutory damages under the VRPA, “injunctive and equitable relief,” and costs and attorneys’ fees. (*Id.*, p. 12, Appx. 150a.)

Pandora filed a motion to dismiss under Fed R Civ P 12(b)(6), making various arguments. At issue here is Pandora’s contention that Deacon failed to state a claim under the VPRA because Pandora is not engaged in the business of “selling at retail, renting, or

lending...sound recordings”.⁴ The District Court granted Pandora’s motion, finding that Deacon failed to state a claim under the VRPA because Pandora “merely streamed music to Plaintiff’s computer and therefore, could not have violated the VRPA because it never rented, lent or sold sound recordings to him.” (Dist. Ct. Order, p. 8, Appx. 19a.) The court noted that the VRPA did not define the terms “renting,” “lending,” or “sells”, and therefore looked to dictionary definitions for guidance.

The District Court first concluded that Deacon had not stated a claim that Pandora “sells” or “rents” sound recordings because he did not allege that Pandora gave up any property to listeners in exchange for money, or that Deacon paid Pandora for its services. The court also found that Deacon failed to state a claim that Pandora engaged in “lending”, or that he “borrowed” sound recordings from Pandora, because he had not alleged “use” of the recordings, nor had he alleged that he was required to return recordings to Pandora. (*Id.*, pp. 8-11, Appx. 19a-22a.) Finally, the court noted that finding that Pandora “rented” or “lent” sound recordings to Deacon would be inconsistent with copyright law, because Pandora only has a license to perform music, not to distribute it by sale, rental, lease or lending. (*Id.*, pp. 12-13, Appx. 23a-24a.)⁵ Although the District Court gave Deacon leave to amend, he chose to stand on his original allegations. Accordingly, the court entered judgment in Pandora’s favor. (Judgment and Order Dismissing Action, Appx. 112a-113a.)

⁴ Pandora also argued that it did not publicly disclose Deacon’s information, and that even if it had, Deacon had necessarily consented to any such disclosure by agreeing to Pandora’s Terms of Service and Privacy Policy. In addition, Pandora challenged Deacon’s standing to raise a claim under the VRPA, given that he did not claim to have suffered any actual injury. None of these arguments are at issue here.

⁵ The court also found that Deacon failed to state a claim under the MCPA. (*Id.*, pp. 14-17, Appx. 25-28a.)

Deacon appealed to the United States Court of Appeals for the Ninth Circuit. After briefing and oral argument, the Ninth Circuit issued an order in which it certified the following question of law for consideration by this Court:

Has Deacon stated a claim against Pandora for violation of the VRPA by adequately alleging that Pandora is [in] the business of “renting” or “lending” sound recordings, and that he is a “customer” of Pandora because he “rents” or “borrows” sound recordings from Pandora?

(Amended Order, Appx. 288a-300a.)

ARGUMENT

I. Standard of Review

Whether to accept a certified question is within this Court’s discretion. If it accepts the question, it will not review the District Court’s Order under any applicable standard of review, but rather, will “answer” the certified question in the affirmative or the negative, and then return the question to the certifying court. *See, e.g., In re Certified Question (Mattison v Soc Sec Comm’r)* 493 Mich 70, 798; 25 NW2d 566 (2012); *In re Certified Question (Miller v Ford Motor Co)* 479 Mich 498, 503; 740 NW2d 206 (2007).⁶

II. This Court Should Grant the Ninth Circuit’s Certification Request.

“When a federal court . . . considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative or that of an interested party certify the question to the Michigan Supreme Court.” MCR 7.305(B).

Pandora agrees with both the Ninth Circuit Court of Appeals and Deacon that this Court should answer the certified question because it: (1) can be resolved by Michigan law; (2) involves a

⁶ Deacon’s brief to this Court only addresses the certification question, which puts Pandora in the awkward position of submitting the first (and perhaps only) brief on the merits, despite being the appellee. Should Deacon be permitted to file a second brief, addressing the merits, Pandora requests permission to file a brief in response.

novel issue of state law that Michigan courts have not resolved and is not controlled by precedent from this Court; (3) presents significant issues with important public policy ramifications; and (4) is likely to evade review by Michigan courts.

A. The Certified Question May Be Resolved By Michigan Law.

The first element of MCR 7.305(B) is met because the certified question requires interpretation of a Michigan statute, which is clearly a question of Michigan law. *See, e.g., In re Certified Question (Jewell Theatre Corp v Patterson)*, 420 Mich 51, 65; 359 NW2d 513 (1984) (interpretation of a Michigan statute presents a question of Michigan law). This Court has, on numerous occasions, granted federal courts' requests that it answer certified questions that call for interpretation of a Michigan statute. *See, e.g., In re Certified Question (Kenneth Henes Special Projects Procurement, Mktg & Consulting Corp v Cont'l Biomass Indus, Inc)*, 468 Mich 109; 659 NW2d 597 (2003) (granting request from Sixth Circuit to answer certified question pertaining to interpretation of Michigan Sales Representative Commission Act); *In re Certified Question (Preferred Risk Mutual Ins Co v Mich Catastrophic Claims Ass'n)*, 433 Mich 710; 449 NW2d 660 (1989) (granting request from Sixth Circuit to answer certified question pertaining to interpretation of Michigan's No-Fault Act); *In re Certified Questions (Karl v Bryant Air Conditioning Co)*, 416 Mich 558; 331 NW2d 456 (1982) (granting request from Sixth Circuit to answer certified question pertaining to interpretation of Michigan's products liability statute).

B. The Certified Question Presents A Novel Issue of State Law That Is Not Controlled By Michigan Supreme Court Precedent.

The second element under MCR 7.305(B) is also satisfied because the certified question is not directly controlled by existing Michigan Supreme Court precedent. This Court has not interpreted the meaning of the terms "rent," "borrow", "renting," or "lending" as used in the VRPA (or ever addressed the statute in any way, for that matter). Whether an Internet radio

station fits within these definitions because it happens to temporarily place portions of song files on its listeners' computers – data which the listener cannot control – presents an issue of Michigan law this Court has not addressed.

C. Interpretation of the Michigan VRPA Has Important Public Policy Ramifications.

Since 2010, a number of class actions have been filed asserting violations of the VRPA.⁷

As VRPA litigation increases, guidance from this Court is needed to ensure that the VRPA is interpreted consistently and in a manner that accords with Michigan's principles of statutory interpretation. This is especially true given the disparate and extra-territorial forums in which VRPA litigation may be brought.

Proper interpretation of the VRPA affects not only the rights of Michigan citizens who “rent” or “borrow” written materials or sound or video recordings, it also affects the rights of entities that provide such materials, including those who place temporary copies of such media on the computer of a viewer, listener, or reader, to facilitate delivery. Indeed, that group includes nearly every entity that provides content on the Internet. Each of these entities may now be targets of civil actions or criminal charges brought under the statute (which is penal in nature, and should therefore be interpreted narrowly in accordance with the rule of lenity, *People v Webb*, 127 Mich 29, 32; 86 NW 406, 407 (1901)), simply because of the way their technology works – not the business in which they are actually engaged. Clear lines are necessary so that companies like Pandora can continue to offer their services to Michigan residents without uncertainty about whether doing so will subject them to criminal or civil liability.

⁷ All of these lawsuits appear to have been brought by the same Chicago law firm that represents Deacon in this case.

D. The Issue Presented By The Certified Question Will Likely Continue to Evade Review by Michigan Courts, and a Finding That Pandora’s Services Are Not Covered By The VRPA Will Effectuate The Legislature’s Intent By Curtailing Prohibited Class Action Lawsuits.

The issue presented by the certified question is likely to continue to evade review by Michigan courts because: 1) claims under the VRPA have only been raised in class actions that are litigated in federal court by virtue of the federal Class Action Fairness Act (“CAFA”), 28 USC 1332, *et. seq.* and 2) Deacon’s claims could not be brought as a class action in Michigan state court.

As pertains to the first point, all known VRPA cases to date have been brought as class actions in federal courts.⁸ More, even if a class action was filed in state court, it could be removed to federal court by the defendant under CAFA.

As pertains to the second point, Michigan law precludes class actions for statutory damages where, as here, the plaintiff fails to allege any actual damages and the statute does not specifically authorize class actions. *See* MCR 3.501(A)(5) (“[a]n action for a penalty or minimum amount of recovery without regard to actual damages imposed or authorized by statute may not be maintained as a class action unless the statute specifically authorizes its recovery in a class action.”). Here, Deacon is seeking to extract statutory damages (\$5,000 per class member) that are totally untethered to any actual damages. (Complaint, p. 12, Appx. 150a.) This violates MCR 3.501(A)(5). Thus, if the Court fails to accept the certified question and provide clarity, plaintiffs may to continue to thwart the will of the Michigan Legislature by filing federal class action lawsuits seeking statutory damages under circumstances where such damages should not be allowed.

⁸ *See, e.g., Coulter-Owens v Rodale, Inc*, ED Mich Case No 14-12688; *Kinder v Meredith Corp*, ED Mich Case No 14-11284; *Cain v Redbox Automated Retail, LLC*; ED Mich Case No 12-15014; *Halaburda v Bauer Publ Co, LP*, ED Mich Case No 12-12831. None of these cases addressed the definitional question at issue here.

For all of the above reasons, Pandora respectfully requests that this Court grant the Ninth Circuit's request to answer the certified question.

III. Assuming The Court Accepts The Certification Question, It Should Find That Pandora Does Not “Rent” or “Lend” Sound Recordings and Deacon Did Not “Rent” Or “Borrow” Sound Recordings From Pandora.⁹

Because Deacon's interpretation of the VRPA would expand liability well beyond the plain language of the statute, this Court should affirm the common sense reasoning of the United States District Court and find that: (1) Pandora is not in the business of “renting” or “lending” sound recordings, and (2) Pandora listeners are not “customers” within the meaning of the VRPA because they do not “rent” or “borrow” sound recordings from Pandora. As explained below, the common definitions of these statutory terms require an element of possession, use and control over the sound recordings. Pandora listeners do not have said possession, use, and control.

A. Principles of Statutory Interpretation.

“The primary goal of statutory construction is to give effect to the intent of the Legislature.” *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76; 780 NW2d 753 (2010). Statutory construction begins with a review of the statutory language. “If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute.” *Id.* “Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. We may consult dictionary definitions to give words their common and ordinary meaning.” *Spectrum Health Hosp v Farm Bureau Mut Ins Co*, 492 Mich 503, 515; 821 NW2d 117 (2012) (citations omitted). Significantly, “[t]he focus of statutory interpretation must be on the language used by the Legislature. The courts are not free to manipulate interpretations of statutes to

⁹ Pandora also refers the Court to its Response Brief on appeal in the Ninth Circuit. (Appx. 170a-249a.)

accommodate their own views of the overall purpose of the legislation.” *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 531; 676 NW2d 616 (2004) (cites omitted).

As set forth below, Deacon fails to allege that the services Pandora provides fit within the ordinary meanings of the terms “rent,” “lend,” and “borrow,” and therefore fails to state a claim against Pandora under the VRPA.¹⁰

B. Pandora Does Not “Rent” Sound Recordings Because The Ordinary Meaning of “Rent” Requires A Payment.

The plain meaning of “rent” requires payment in return for control over, or use of, the rented materials. The District Court defined rent as “consideration paid [usually] periodically for use . . . of property,” citing Black’s Law Dictionary (9th ed) (Dist. Ct. Order, p. 8, Appx. 19a (emphasis in original).) *Bertolotti v Macomb County*, 20 Mich App 162, 165; 173 NW2d 723 (1969) (defining “rent” as “[t]o take and hold under an agreement to pay rent”, citing Webster’s Third New International Dictionary (1966)).

The Complaint did not allege that Deacon paid money to use Pandora (and he declined to amend his complaint to add such an allegation despite being granted the opportunity to do so). Accordingly, this Court should find that Pandora is not in the business of “renting” sound recordings, and that Deacon does not “rent” sound recordings from Pandora.

¹⁰ As pertains to this certification request, there is no relevant difference between the Michigan pleading rules and the pleading rules set forth in the Federal Rules of Civil Procedure. *See State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 64, n. 41; 852 NW2d 103 (2014) (citing standard set forth in *Ashcroft v Iqbal*, 556 US 662; 129 S Ct 1937; 173 L Ed 2d 868 (2009) and characterizing that opinion as “construing the federal analogue to our pleading rules”).

C. The Pandora Service Does Not Allow For “Renting”, “Lending”, or “Borrowing” Because Pandora Listeners Cannot Control The Sound Recordings That Pandora Streams to Them.

The plain meanings of the terms “rent,” “lend,” and “borrow” all require an element of active use or control. *See, e.g.*, Black’s Law Dictionary (9th ed) (defining “rental” as requiring consideration paid “periodically, for the *use* ... of property” and defining “lending” as “[t]o allow the temporary *use* of (something), sometimes in exchange for compensation, on the condition that the thing or its equivalent be returned”) (emphasis added). “Borrow” is defined by Deacon as “to appropriate for one’s own use” and “to receive with the implied or expressed intention of returning the same or an equivalent.” (Opening Br, p. 16, Appx. 53a (citing Merriam-Webster.com (<http://merriam-webster.com/dictionary/borrow>)).¹¹ And “lend” is similarly defined as to “give for temporary use on condition that the same or its equivalent be returned”. (<http://merriam-webster.com/dictionary/lend>.) Indeed, Deacon himself has defined “lending” or “renting” as granting “temporary control over an electronic media file...” (Opening Br, p. 16, Appx. 53a.)

“Use” means “to put into action or service.” Merriam-Webster’s Collegiate Dictionary 1378 (11th ed.) (cited in Dist. Ct. Order, p. 8, Appx. 19a.) As the District Court noted, “In ordinary, contemporary, and common parlance, the ‘use’ of something requires a volitional act,” as opposed to passive activity. (*Id.*, citing *United States v Trinidad-Aquino*, 259 F3d 1140, 1145 & n2 (CA 9, 2001)); *see also Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995) (*superseded by statute on other grounds*) (examining definitions of “use” and finding “[t]hese various definitions of ‘use’ imply action and implementation”).

¹¹ Merriam-Webster.com also defines “rent” as “to grant the possession and enjoyment of in exchange for rent.” (Also cited by Deacon in Opening Br at 16, Appx. 53a.) *See also People v Lee*, 447 Mich 552, 558; 526 NW2d 882 (1994) (defining “lend” as “to grant the use of (something) on condition that it or its equivalent will be returned”, citing Random House Dictionary of the English Language: Second Unabridged Edition).

Here, Deacon's Complaint does not allege that listeners have the ability to actively use or control the temporary data that Pandora places on their devices. In fact, Deacon admits the opposite – that Pandora uses and exercises control over the temporary files streamed to listeners' computers. (*See* Complaint, ¶ 20, Appx. 143a. (“when an individual listens to music through Pandora, Defendant allows the user to temporarily store a digital copy of the song currently playing on their computer. Upon completion of the track, Pandora removes the track from the user's computer.”)) As noted earlier, it is Pandora, and not the user, that selects what sound recordings will be streamed and when. The District Court got it right, noting:

The actual songs played by Pandora are selected by Pandora, *not* the subscriber....The temporary song file used to facilitate the streaming process is controlled at all times by Pandora; Pandora places the file on the subscriber's computer and Pandora deletes the file when the song is over....There are no allegations that the subscriber engages in any volitional activity with respect to the temporary file, which exists solely to facilitate the streaming process so that the subscriber can listen to the song.

(Dist. Ct. Order, p. 9, Appx. 20a.)

In the Ninth Circuit, Deacon asserted for the first time that Pandora listeners “use” the sound recordings by listening to them, and “return” the sound recordings by “skipping the song or closing Pandora's media player.” (Reply Brief, p. 6, Appx. 259a). Deacon also articulated his first “control” argument on appeal, arguing that Pandora listeners “control” the music that is streamed to them because they have the ability to “pause a song to answer the phone or skip a song he or she does not like.”¹² (*Id.*, p. 11, Appx. 264a.) These arguments fail for multiple reasons. First, the Complaint contains no such assertions, let alone any discussion of “use” or “control” by the listener. A party may not amend their complaint through arguments made for

¹² Pandora listeners are only allowed to “skip” through a limited amount of songs per hour.

the first time on appeal. *See, e.g., Riggs v Prober & Raphael*, 681 F3d 1097, 1104 (CA 9, 2012) (citations omitted). Second, watching and listening are passive activities: Pandora is an Internet radio service – you never hear anyone say, “I just borrowed a great song from the radio” or “let’s turn on the radio to rent some tunes.” Third, Deacon’s argument turns the meaning of “control” on its head by suggesting that *not* listening to a sound recording constitutes *control* over, or use of, that sound recording. Nowhere else has turning off the radio or changing the station been deemed to constitute “control” over the songs that are played on the radio. As for the ability to “pause”, television sets and DVRs allow you to pause your television, yet this does not mean that you “borrow” the broadcast copy of a television show.¹³

Deacon also attempted to analogize Pandora’s streaming service to borrowing library books (whether traditional or e-books) and video services like Amazon.com. (Opening Br, pp. 17-22, Appx. 54a-59a.) But library patrons get to choose which particular books they check out, can read them whenever they want (including more than once), can access any part of the book at any time during the rental period, can extend the rental period to keep the book longer, and must return the book when they are finished. These are all quintessential elements of “borrowing”. The same is true for the video files that Deacon argues are “rented” from Amazon. Amazon’s “renters” (who pay for the particular movies, unlike the Pandora service) pick their own movies, fast forward and rewind, and may watch at their leisure again and again during the rental period. In contrast, as Deacon admits, Pandora asks listeners only for musical preferences and then

¹³ To use another analogy, Pandora is like a disc jockey (“DJ”) at a party. DJs ask what types of music a person likes, and sometimes even particular songs they would like to hear. DJs then play songs they choose. They control when a song plays. Party guests can request songs or even ask a DJ to stop the music. But the fact that guest can do so does not mean that they suddenly have “use” of or “control” over the DJ’s records, CDs, or digital files, or that they “borrowed” or “rented” them.

selects and streams “songs containing similar musical attributes,” (Complaint ¶ 3, Appx. 140a.) that Pandora alone controls. Each song is played once and will not be heard by that listener again on Pandora unless and until Pandora chooses to stream it again. And since sound recordings and the data temporarily stored on a listener’s computer are never “returned” to Pandora, Pandora does not, as Deacon asserts in his brief to this Court, function as a “music library lending music to its users.” (Deacon’s Brief at 3.)¹⁴ Like listeners and viewers of traditional television and radio stations, Pandora listeners lack the control of library book borrowers, or Amazon.com viewers, over the materials received.

Deacon also argued for the first time on appeal that Pandora “rents” or “lends” songs because Pandora listeners are supposedly allowed to “electronically download” songs. (Opening Br, p. 21, Appx. 58a.) But here too Deacon argues outside the allegations of his Complaint. Contrary to Deacon’s argument, the Complaint merely (and correctly) states that Pandora (not a listener) “temporarily” stores a “digital copy of the song *currently playing* on [a listener’s] computer,” and “*Pandora removes the track* from the user’s computer” when the song is finished streaming. (Complaint ¶ 20, Appx. 143a.) (emphasis added).¹⁵ This is not “downloading” under any commonly accepted definition. The main difference between downloading and streaming is control, or lack thereof. When a song (or video) is streamed, it is sent to the transient memory of the receiving device and is not kept; the listener (or viewer) has no control over the song (or video). In contrast, a download is sent to the persistent storage of the device, such that it can be kept for later viewing or listening at any time. Downloads are also specifically selected by the

¹⁴ The District Court noted that “since the song file is deleted by Pandora, there by definition can be no ability by the subscriber to “return” the file to Pandora. (Dist. Ct. Order, p. 11, Appx. 22a.)

¹⁵ As noted above, Pandora typically only stores a portion of the song on a user’s computer, as opposed to the song in its entirety.

recipient; it is the recipient who chooses what he or she wants to download and when. *See Arista Records, LLC v Launch Media, Inc*, 578 F3d 148, 161 n19 (CA 2, 2009) (distinguishing between websites that allow users to download music files “thereby enabling the user to listen to the music any time” and “[w]ebcasting services” like Pandora that “do not allow the user to download files of the music being webcast”). In any event, the Complaint does not allege that Pandora listeners are able to use the files they supposedly “downloaded”.

This Court should find that Pandora is not in the business of “renting” or “lending” sound recordings and that Deacon is not a “customer” of Pandora for purposes of the VRPA because he does not “rent or “borrow” sound recordings from Pandora.

D. Pandora’s Terms of Service Support a Finding That Its Listeners Are Not Borrowers or Renters.

Pandora’s agreement with its listeners is a logical place to look to determine the nature of Pandora’s relationship with its listeners and the business in which Pandora is engaged. *Apple Inc v Psystar Corp*, 658 F3d 1150, 1159 (CA 9, 2011), *cert denied*, 132 S Ct 2374, 182 L Ed 2d 1017 (2012) (user agreement governs users’ ownership in software). A Pandora listener’s rights in the music Pandora streams are subject to the license set forth in Pandora’s terms, to which listeners must agree. (Complaint, ¶ 24, Appx. 144a; Dist. Ct. Order, p. 2, Appx. 13a.) Pandora’s terms nowhere state that they are a “rental” or “lending” agreement. Rather, the terms expressly provide that data sent to a listener’s computer is licensed only to facilitate streaming, and is not rented, sold, or lent. Listeners may not “copy, store, edit, change, prepare any derivative work of or alter in any way any of the tracks streamed” without violating Pandora’s terms. (Terms, Section 3.2, Appx. 138a.) The terms also plainly provide that “[y]ou can’t use Pandora to steal music, and you have to listen to [the music] through pandora.com or on a device officially supported by Pandora.” (*Id.*, Appx. 136a.) Once again, the terms make clear that files used to

facilitate streaming are not available for listeners to enjoy at their leisure during a rental or lending period, as one would expect under the common usage of the terms “borrow”, “rent”, or “lend”. Any unlicensed use would be piracy. Because the complaint only alleges that Pandora “lends” music by storing a temporary copy on listeners’ hard drives to facilitate streaming (which, as discussed above, is not “lending”), and Pandora’s terms forbid any other use, Deacon fails to state a claim against Pandora under the VRPA.

E. This Court Should Find That “Renting” And “Lending” Sound Recordings Have The Same Meaning Under the VRPA As They Have Under The Copyright Act.

The Federal Copyright Act, 17 USC 101, *et seq.*, also supports the determination that Pandora does not “rent” or “lend” sound recordings. Unlike the VRPA, the Copyright Act addresses “renting” and “lending” specifically in regards to sound recordings, and thus is a logical source for understanding how these terms apply to music. *See, e.g., United States v Wade*, 181 F Supp 2d 715 (ED Mich, 2002) (when a statutory term is undefined, courts commonly and properly look to other statutory uses of the same terms for guidance.) Under well-established principles of statutory construction, statutes should not be read in such a way as to render them inconsistent with one another. *See, e.g., United States v Trident Seafoods Corp*, 92 F3d 855, 862 (CA 9, 1996) (“to the extent that statutes can be harmonized, they should be.”)

Under the Copyright Act, a copyright holder has an exclusive right “to distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending” and “to perform the copyrighted work publicly.” 17 USC 106 (3), (4). For sound recordings, Congress has specifically prohibited “rental, lease, or lending” of a sound recording without first obtaining the copyright holder’s consent. *Id.* Copyright owners also have an exclusive right in sound recordings to make public performances of their works by digital audio transmissions. 17 USC 114(d)(2); 17 USC 106(6); *Recording Indus Ass’n of Am v Librarian of*

Cong, 176 F3d 528, 530 (CA DC, 1999). The Copyright Act allows Internet radio services like Pandora to pay a compulsory statutory license fee under 17 USC 114(d) and 106, but only to publicly perform (*not* to rent or lend) sound recordings.

By prohibiting Pandora from renting or lending sound recordings, while permitting audio streaming, the Copyright Act clearly distinguishes between Pandora’s digital audio streaming on the one hand, and renting or lending sound recordings on the other. Accordingly, it has been held that “[a]s with traditional radio”, Internet radio service streams “are ‘performances’ under the Copyright Act”. *Intercollegiate Broad Sys, Inc v Copyright Royalty Bd*, 684 F3d 1332, 1334 (CA DC, 2012), *cert denied*, 133 S Ct 2735, 186 L Ed 2d 192 (2013). *See also, United States v ASCAP*, 627 F3d 64, 74 (CA 2, 2010). When presented with the precise question of whether streaming Internet radio services are in the business of renting or lending sound recordings, courts have found they are not. In *Arista Records LLC, supra.*, the plaintiff brought claims against LAUNCHCast (“Launch”), which like Pandora, operated “an Internet radio website... which enables a user to create ‘stations’ that play songs that are within a particular genre or similar to a particular artist or song the user selects.” 578 F3d at 150. The court found the ability to customize radio stations to a listener’s preferences did not make Launch a renter or lender of sound recordings, only a performer. *See also Bonneville Intern Corp v Peters*, 347 F3d 485, 489 n8 (CA 3, 2003). Indeed, recent litigation has extensively addressed what royalty rates Pandora must pay under the Copyright Act, with the courts holding they must pay the “public performance” royalty, and *not* the royalties applicable to lending or renting. *In re Pandora Media, Inc*, 6 F Supp 3d 317 (SDNY, 2014), *affirmed*, ___ F3d ___ (CA 2, 2015). In sum, under the Copyright Act, Internet radio is a performance and nothing more. Deacon’s proffered interpretation of the VRPA would place the VRPA in conflict with the Copyright Act because it

would transform a “public performance” for purposes of federal copyright law into a “rental, lease or lending” for purposes of state law.

F. By Finding That Pandora Is Not In The Business of “Renting” or “Lending” Sound Recordings, This Court Can Ensure That The VRPA Will Not Be Expanded Beyond Its Plain Language Without An Act Of The Legislature.

That Deacon seeks to expand the VRPA’s reach far beyond the plain language of the statute is clear from his suggestion that the Court rephrase the certified question as “whether companies like Pandora that provide digital media over the internet are deemed to be engaging in the business of selling at retail, renting, or lending written materials, sound recordings, and/or video recordings under the VRPA.” (Deacon’s Brief at 7-8.) Deacon thus asks this Court to simply disregard the actual language of the statute, and find that *all* companies “that provide digital media over the internet” fall under the VRPA, regardless of whether the business conducted by any specific company actually fits within the language chosen by the Legislature.

Had the legislature wished to broaden the coverage of the VRPA at any time during the last twenty years, it could have drafted the statute so it covered all persons or entities engaged in the business of “providing” or “delivering”¹⁶ books or other written materials, sound recordings, or video recordings, instead of limiting the coverage of the statute to the “business of selling at retail, renting, or lending” such materials. And it could have defined “customer” to include “subscriber” or “viewer” “reader” or “listener” instead of limiting it to “a person who purchases, rents, or borrows” the covered materials. But the Legislature did not choose such broader language. In the almost 30 years since the statute was enacted, the ways one can access written materials, sound recordings, and video recordings, have expanded exponentially, yet the statute

¹⁶ The federal Video Privacy Protection Act, 18 USC 2710, which predated the Michigan VRPA, defines “video tape service provider” more broadly, as “any person, engaged in the business . . . of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials.” 18 USC 2710(a)(4).

has not been amended. If the Legislature wanted the VRPA to apply to materials streamed over the Internet, it could have easily so provided in the last decade or two.¹⁷ As this Court stated in rejecting another proposal to expand an old statute to cover new technology:

Technological innovation often breeds problems with which the Legislature has yet to grapple. Barring the use of radar detectors in automobiles may embody a wise public policy, but it is one the Legislature has not as yet embraced.

A court should not place a tenuous construction on this statute to address a problem to which legislative attention is readily directed and which it can readily resolve if in its judgment it is an appropriate subject of legislation.

People v Gilbert, 414 Mich 191, 212-13; 324 NW2d 834, 843-44 (1982).

Similarly, in *Howell Educ Ass'n MEA/NEA v Howell Bd of Educ*, 287 Mich App 228; 789 NW2d 495 (2010), the Court of Appeals was asked to determine if e-mails were recoverable under the Freedom of Information Act (“FOIA”). The court framed the issue before it as considering the “application of the FOIA statute, adopted in 1977 and last amended in 1997, in the context of today’s ubiquitous e-mail technology.” *Id.* at 234. The court stated that the application of the older statute to new technology “is best left to the legislature because it is plainly an issue concerning social policy”. *Id.* at 234-35. Ultimately, the court rejected the trial court’s expansive construction of the term “personal record,” to include school employees’

¹⁷ Indeed, the United States Congress amended the Copyright Act twice to address advances in digital and internet-based technology. As the District Court noted, the Digital Performance Right in Sound Recordings Act of 1995, PL 104-39, 109 Stat 336, expanded the scope of copyright protection afforded to sound recordings by including a new right for public performances of sound recordings by digital audio transmission. *See* 17 USC 106(6). Congress then amended the DPRA in 1998 through the Digital Millennium Copyright Act, PL 105-304, 112 Stat 2860, which resolved confusion over whether webcasters were required to pay royalties for the streaming of sound recordings. (Dist. Ct. Order, p.15, n. 6, Appx. 26a.)

personal e-mails. The court concluded, “we do not suggest that a change in technology cannot be a part of the circumstances that would result in a significant change in the scope of a statute. However, where the change in technology is the sole factor, we should be very cautious in expanding the scope of the law.” *Id.* at 238.

The same is true here. If liability under the VRPA penal statute is to be expanded to service providers like Pandora – which would unquestionably be an expansion in the scope of the Act solely due to a change in technology – it should be through a reasoned act of the Legislature, not through a tortured reading of the statutory language of the statute, which on its face and under the plain meaning of its terms, does not cover the services provided by Pandora.

CONCLUSION

For the reasons set forth above, Pandora respectfully requests that this Court grant the Ninth Circuit’s request, and find that Pandora is not in the business of “renting” or “lending” sound recordings, and Pandora listeners like Deacon do not “rent” or “borrow” sound recordings from Pandora and are therefore not “customers” under the VRPA.

DYKEMA GOSSETT PLLC

By: s/Jill M. Wheaton
Jill M. Wheaton (P49921)
Krista L. Lenart (P59601)
Attorneys for Defendant-Appellee
2723 South State Street, Suite 400
Ann Arbor, Michigan 48104
(734) 214-7629
jwheaton@dykema.com

Date: May 27, 2015

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2015, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to all ECF participants.

Respectfully submitted,

DYKEMA GOSSETT PLLC

By: s/Jill M. Wheaton

Jill M. Wheaton (P49921)

Krista L. Lenart (P59601)

Attorneys for Defendant-Appellee

2723 South State Street, Suite 400

Ann Arbor, Michigan 48104

(734) 214-7629

jwheaton@dykema.com

AA01\415760.3
ID\KLLLE - 111924\0001