
IN THE SUPREME COURT

Request from the United States Court of Appeals
for the Ninth Circuit for a certified question

Honorable Barry G. Silverman, Circuit Judge

PETER DEACON,

Plaintiff-Appellant,

v.

Docket No. 151104

PANDORA MEDIA, INC.,

Defendant-Appellee.

Brief in Support of Request for a Certified Question – Appellant

ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to MCR 7.301(A)(5), because it involves a request from a federal court to respond to a certified question pursuant to MCR 7.305(B). The certified question was docketed in this Court on February 25, 2015.

STATEMENT OF QUESTION INVOLVED

Should this Court answer the question certified to it by the United States Court of Appeals for the Ninth Circuit regarding the proper interpretation of Michigan's Video Rental Privacy Act, MCL 445.1711 - 445.1715?

Trial Court Answer: N/A

Ninth Circuit Court of Appeals Answer: Yes.

Appellant's Answer: Yes.

STATEMENT OF FACTS

Michigan's Video Rental Privacy Act ("VRPA") prohibits companies "engaged in the business of selling at retail, renting, or lending books or other written materials, sound recordings, or video recordings [from] disclos[ing] 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. This case involves the alleged violation of the VRPA by Defendant-Appellee Pandora Media, Inc. ("Pandora").

Pandora operates an internet "radio" service through its website, www.pandora.com, which functions as a massive for-profit music library lending music to its users. (App. at 140a, 289a.)¹ Unlike traditional terrestrial radio, however, in which a radio station anonymously broadcasts the same song at the same time to all its listeners, Pandora provides a unique, customizable experience to each of its individual listeners that they can pause, play, or skip at will because it provides an actual copy of the music to each user for a temporary period of time. (*Id.* at 140a, 289a-290a.) Critically, Pandora automatically creates a user account for its listeners, which includes their full name along with their own musical preferences such as specific artists, songs, or genres of music. (*Id.* at 144a, 289a.) Pandora then plays different songs for different users based on the musical preferences inputted by the user and real-time individual feedback, all while keeping detailed records of its users' specific listening activity. (*Id.* at 140a, 289a.) Pandora's music service is

¹ Citations to "App." refer to Appellant's Appendix filed concurrently herewith.

free to use, but it also offers a premium version of the service without advertisements for a fee. (*Id.* at 290a-291a; *see also id.* at 121a.)

Plaintiff-Appellant Peter Deacon, a Michigan resident, created a Pandora account in 2008 and listened to music from Pandora. (*Id.* at 145a, 291a.) He alleges that Pandora—in violation of the VRPA—disclosed without consent his full name, listening history, bookmarked artists, and bookmarked songs to the public generally, as well as to his friends on the Facebook social network. (*Id.* at 148a, 291a.) Consequently, he filed a putative class action complaint against Pandora in the United States District Court for the Northern District of California. (*See id.* at 139a-151a.)² Although based on Michigan law, federal court in California was an appropriate venue for the suit because Pandora has its principal place of business in Oakland, California, (*Id.* at 142a), the putative class action fell within the federal diversity jurisdiction statute, and MCR 3.501(A)(5) prevents bringing VRPA statutory damages claims as class actions in Michigan state court.

The federal district court dismissed Deacon’s VRPA claim on the pleadings and without the benefit of any discovery. (App. at 114a, 292a.) While the court found that Deacon “sufficiently alleged the disclosure of information governed by the VRPA,” (*id.* at 120a), it concluded that the VRPA does not apply to Pandora as a matter of law. (*Id.* at 120a-126a, 292a-294a.) Deacon appealed that ruling to the United States Court of Appeals for the Ninth Circuit, presenting the issue on appeal

² In addition to his VRPA claim, Deacon’s complaint also alleged that Pandora violated the Michigan Consumer Protection Act, MCL 445.903. That claim is no longer part of this case, and not at issue here.

as whether Pandora is “engaged in the business of . . . renting, or lending . . . sound recordings’ within the meaning of [the VRPA].” (*Id.* at 39a.) Following briefing and oral argument, the Ninth Circuit certified that question to this Court pursuant to MCR 7.305(B). (App. at 295a-300a.)

ARGUMENT

As explained more fully below, this Court should take up the Ninth Circuit’s certified question for four reasons:

First, the certified question satisfies the requirements of MCR 7.305(B)(1). A determination by this Court whether companies like Pandora that provide digital media over the internet are engaged in the business of selling, renting, or lending sound recordings or other audio-visual materials under the VRPA will resolve the Ninth Circuit’s question, and no Michigan court has yet opined on this question.

Second, responding to the certified question presents this Court with a rare opportunity to consider this open question of Michigan law. Because most VRPA claims are likely to be brought as class actions, and because federal jurisdiction rules steer most such cases to federal court, Michigan state courts will rarely—if ever—have an opportunity to offer their guidance on the proper interpretation of the VRPA.

Third, determining whether digital media providers like Pandora can publicly disclose the listening, viewing, or reading habits of their Michigan users will profoundly impact the privacy rights of consumers in this state. This Court is

much better positioned than the Ninth Circuit or other federal courts to answer questions involving such important policy considerations for Michigan citizens.

Finally, the Ninth Circuit has not made its request lightly. Its decision to certify this novel and unsettled question of state law necessary to resolving the underlying dispute was guided by directives from the United States Supreme Court that significantly limit its ability to certify questions to state supreme courts, and that instruct it to consider important principles of comity and federalism before doing so.

For these reasons, this Court should address and answer the certified question.

I. The Certified Question Satisfies the Requirements of Michigan Court Rule 7.305(B)(1).

This Court may answer questions certified from federal courts that meet two requirements: (1) Michigan law may resolve the question and (2) the question is not controlled by Michigan Supreme Court precedent. MCR 7.305(B)(1). The certified question here meets both requirements.

First, Michigan law will resolve the certified question, and indeed, will resolve the entire motion to dismiss that is the subject of the federal court proceedings. The certified question is whether Deacon sufficiently alleged a claim against Pandora under the VRPA, which prohibits companies “engaged in the business of selling at retail, renting, or lending books or other written materials, sound recordings, or video recordings [from] disclos[ing] 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 identify of the customer.” MCL 445.1712.³ There are thus two elements to a VRPA claim: (1) that the defendant is engaged in the business of selling at retail, renting, or lending written materials, sound recordings, or video recordings, and (2) that the defendant disclosed protected information about what a customer rented, lent, or borrowed to someone other than the customer.

The California federal district court held that Deacon satisfied the second element, finding that he “alleges that Pandora disclosed his name and “listening history,” (i.e., a list of the songs he listened to on Pandora’s radio service) to the general public. (App. at 120a.) The Ninth Circuit agreed. (*Id.* at 283a n.4.)⁴ Thus, whether Deacon states a *prima facie* claim under the VRPA (and therefore whether his claim may proceed in the federal court) depends on whether he sufficiently alleged the first element: that Pandora is covered by the VRPA. That answer depends in turn on whether companies like Pandora that provide digital media over the internet are deemed to be engaging in the business of selling at

³ The sufficiency of a plaintiff’s allegations is governed by a similar “notice pleading” standard in both Michigan and federal courts. *Compare* Fed. R. Civ. P. 8(a)(2) (requiring “a short and plain statement of the claim showing that the pleader is entitled to relief.”), *with* MCR 2.111(B) (“A complaint . . . must contain . . . [a] statement of the facts . . . on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend”); *see also* *Roberts v Mecosta Co. Gen. Hosp. (After Remand)*, 470 Mich. 679, 700 n.17, 684 N.W.2d 711, 722 n.17 (2004) (characterizing MCR 2.111(B)(1) as consistent with a “notice pleading environment”); *Johnson v. QFD, Inc.*, 292 Mich. App. 359, 368, 807 N.W.2d 719, 726 (2011) (“Michigan is a notice-pleading state.”).

⁴ An Amended Order from the Ninth Circuit omitted the cited footnote without explanation. (*See* App. at 297a.)

retail, renting, or lending written materials, sound recordings and/or video recordings under the VRPA. That is a question that Michigan law (via this Court's authoritative interpretation of the VRPA) will resolve.⁵

This lawsuit is distinguishable from cases in which this Court's answer to a certified question would not clearly resolve the underlying dispute. For example, in *In re Certified Questions (Melson v. Prime Ins. Syndicate, Inc.)*, this Court rejected the Sixth Circuit's request to answer a question that would not obviously settle a contract dispute. 472 Mich. 1225, 696 N.W.2d 687 (2005). Complicating factors—such as the contract's Illinois choice of law provision, doubts over the Michigan law's applicability to the defendant, and the parties' assertion that the Sixth Circuit “misunderstood and misstated their arguments”—made members of this Court skeptical over whether answering the certified question would actually resolve the case. *Id.* at 691 (Young, J., concurring).

In contrast with *Melson*, this case is controlled by a single, clear-cut issue of Michigan law. The certified question—and the entire federal court dispute involving Pandora's motion to dismiss Deacon's complaint for failure to state a claim under the VRPA—will be resolved by definitively answering whether the VRPA applies to Pandora's internet music service.

The second requirement of this Court's certification rule—that the question “is not controlled by Michigan Supreme Court precedent,” MCR 7.305(B)(1)—is also

⁵ Although the Ninth Circuit phrased the certified question differently, it expressly noted that “the particular phrasing used in the certified question is not to restrict the Michigan Supreme Court's consideration of the problems involved.” (App. at 299a) (internal quotation and alteration omitted).

satisfied here. No Michigan state court—let alone this one—has addressed any part of the VRPA, including what it means to be in the business of selling, renting, or lending sound recordings, books, or videos. Indeed, the California federal district court in this case was the first court to interpret this provision of Michigan law.

Consequently, because the certified question is one “that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent,” both requirements of MCR 7.305(B) are satisfied here.

II. Answering the Ninth Circuit’s Certified Question Presents This Court with a Rare Opportunity to Interpret this Open Question of Michigan Law.

In addition to fully satisfying the requirements of MCR 7.305(B), the certified question represents this Court’s best—and perhaps only—opportunity to interpret the VRPA’s reach because most, if not all, VRPA lawsuits are likely to end up in federal court.

In light of the relatively small monetary damages to victims of VRPA violations, *see* MCL 445.1715 (authorizing recovery of the greater of actual damages or \$5,000), VRPA claims are likely to be brought only as class actions. *See, e.g., Hill v. City of Warren*, 469 Mich. 964, 964, 671 N.W.2d 534, 535 (2003) (noting that claims are unlikely to proceed individually where damages are relatively small compared with cost of individual litigation). Further, in 2005, the United States Congress passed the Class Action Fairness Act (“CAFA”), which, among other things, creates federal jurisdiction over putative class actions in which class members number at least 100, at least one plaintiff class member is diverse in

citizenship from any defendant, and the aggregate amount in controversy exceeds \$5 million. 28 U.S.C. § 1332(d); *see also* William Rubenstein et al., *Newberg on Class Actions* §§ 6:13 et seq. (5th ed. 2013). The United States Congress concluded that CAFA was necessary to prevent what it saw as “cases of national importance” being kept out of federal court as well as a perceived bias of “State and local courts” against out-of-state defendants. Class Action Fairness Act of 2005, Pub. L. No. 109–2, § 2, 118 Stat 4, 5. As was intended, CAFA substantially increased class action activity in federal courts—both initial filings and removals of cases filed in state courts.⁶ Finally, when a statute—like the VRPA—does not specifically authorize recovery in a class action, MCR 3.501(A)(5) precludes class actions that allege only statutory damages. Consequently, Michigan state courts cannot hear VRPA class actions for statutory damages.⁷

The incentive to bring low-individual-value claims only as class actions coupled with MCR 3.501(A)(5)’s bar on bringing VRPA statutory damage claims as class actions in state court could ultimately prevent Michigan courts from ever

⁶ For example, class action activity in federal courts increased 72 percent in eighty-eight district courts when comparing six-month periods before and after CAFA went into effect. *See* Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules 1-2* (2008), *available at* <http://www2.fjc.gov/sites/default/files/2012/CAFA0408.pdf>.

⁷ Even when state law precludes class action recovery in state court, a plaintiff may bring a class action lawsuit pursuant to Federal Rule of Civil Procedure 23 before a federal court sitting in diversity. *See Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408-09 (2010) (upholding validity of Federal Rule of Civil Procedure 23 despite conflict with New York law prohibiting class actions in suits seeking statutory minimum damages).

addressing the VRPA. Ninth Circuit Judge Barry G. Silverman voiced this exact concern at oral argument in this case:

Because of the quirks of federal diversity jurisdiction . . . it seems like this would never get in front of the Michigan Supreme Court The Michigan courts would really never have an opportunity to pass on this statute

Oral Argument in 12-17734 Peter Deacon v. Pandora Media, United States Court for the Ninth Circuit, http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000007153 (last visited April 16, 2015) (Silverman, J. at 17:52-18:07).

This concern is not merely academic; federal courts have heard every lawsuit brought under the VRPA. *See, e.g., Owens v. Rodale, Inc.*, No. 14-12688, 2015 WL 575004, at *4 (E.D. Mich. Feb. 11, 2015) (denying Pennsylvania corporation's motion to dismiss VRPA claim brought on behalf of Michigan residents whose reading information the corporation allegedly disclosed); *Kinder v. Meredith Corp.*, No. 14-CV-11284, 2014 WL 4209575 (E.D. Mich. Aug. 26, 2014) (denying Iowa corporation's motion to dismiss VRPA claim brought on behalf of Michigan residents whose reading information the corporation allegedly disclosed); *Cain v. Redbox Automated Retail, LLC*, 981 F. Supp. 2d 674 (E.D. Mich. 2013) (denying Ohio corporation's motion to dismiss VRPA claim brought on behalf of purported class of Michigan residents whose video viewing information the corporation allegedly disclosed).

Unless this Court considers the Ninth Circuit's question, federal case law will likely control the scope of Michigan citizens' rights under the VRPA. "Pending a decision by the Michigan Supreme Court, 'potential litigants are likely to behave as

if the federal decision were the law of the state.” *In re Certified Questions (Melson v. Prime Ins. Syndicate Inc.)*, 472 Mich. at 1238 (Markman, J. dissenting) (quoting Wade McCree, Foreword, *1976 Annual Survey of Michigan Law*, 23 Wayne L. R. 255, 257 n. 10 (1977)). If this Court, rather than the federal courts, is to be the final expositor of the VRPA, it must take advantage of this opportunity to do so.

III. **Resolving Which Companies are Covered by the Video Rental Privacy Act Will Require Weighing Policy Considerations That Implicate the Privacy Rights of Michigan Citizens.**

A third reason to answer the certified question is because it implicates important policy considerations concerning Michigan citizens’ privacy that this Court—rather than federal courts—should resolve. As the Ninth Circuit noted, “resolution of the issues in this appeal has the potential to affect the privacy rights of millions of Michigan residents.” (App. at 297a-298a.) Individual privacy is a significant concern in this state. Michigan was “one of the first jurisdictions to acknowledge the concept of [a] ‘right to privacy.’” *Beaumont v. Brown*, 401 Mich. 80, 93, 257 N.W.2d 522, 526 (1977), *overruled on other grounds by Bradley v. Saranac Cmty. Sch. Bd. of Educ.*, 455 Mich. 285, 565 N.W.2d 650 (1997). This right protects against the “unreasonable and serious interference with [a citizen’s] interest in not having his affairs known to others.” *Hawley v. Prof’l Credit Bureau, Inc.*, 345 Mich. 500, 514, 76 N.W.2d 835, 841 (1956) (Smith, J. dissenting).

By enacting the VRPA, the Michigan legislature expressly extended this traditional right of privacy to one’s choices in music, books, and videos. The statute reflected the prevailing belief that legislation was necessary to protect “consumer’s

privacy” because “one’s choice in videos, records, and books is nobody’s business but one’s own.” (App. at 168a) (*Privacy: Sales, Rentals of Videos, etc.*, House Legislative Analysis Section, H.B. No. 5331, Jan. 20, 1989).

Whether the VRPA covers internet digital media providers impacts more than whether Pandora can freely disclose Deacon’s listening choices without consequence. Michigan consumers obtain a wide variety of media from an ever-expanding selection of content providers, such as YouTube, Spotify, Amazon, and Netflix. These companies, along with others both in Michigan and those wishing to operate within the limits of Michigan’s laws, will benefit from clarity on what it means to be “engaged in the business of selling at retail, renting, or lending books or other written materials, sound recordings, or video recordings” under the VRPA. If covered by the law, Michigan citizens will be given the option to provide these media providers with consent to disclose their listening, viewing, or reading habits. If these companies are not covered, they will be free to tell the world (or sell to the highest bidder) the details of Michigan citizens’ private choices in what they read, watch, and listen to in their own homes. Whichever way the certified question is answered, the privacy rights of millions of Michigan consumers will be affected. This Court—not the Ninth Circuit or another federal court—should make that determination.

IV. The Ninth Circuit May Certify Questions Only When Answering a Novel, Unsettled Question of State Law is Necessary to Resolving the Underlying Dispute.

Finally, that the Ninth Circuit did not lightly certify this question also weighs in favor of this Court answering it. Internal checks ensure that the Ninth Circuit avails itself of the certification process only when examining unanswered and consequential questions of state law. It may ask for guidance from the highest state court only when confronting “novel, unsettled questions of state law.”

Arizonans for Official English v. Arizona, 520 U.S. 43, 79 (1997); *see also Kremen v. Cohen*, 325 F.3d 1035, 1038 (9th Cir. 2003) (certification appropriate when case “raises a new and substantial issue of state law in an arena that will have broad application”). Conversely, the Ninth Circuit cannot certify questions that present issues of state law that the state’s courts have previously considered. *See, e.g., Ashmus v. Woodford*, 202 F.3d 1160, 1164 n.6 (9th Cir. 2000) (finding that “[n]either of the questions posed by the State is novel, and therefore certification is not appropriate”); *see also Iletto v. Glock Inc.*, 370 F.3d 860, 866 (9th Cir. 2004) (“[C]ertification would not be appropriate to avoid a difficult legal issue.”).

Yet the Ninth Circuit is also sensitive to recent United States Supreme Court reprimand for failing to certify unsettled questions of state law. *See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 294 F.3d 1085, 1086 (9th Cir. 2002) (noting that the Ninth Circuit has been “admonished” in the past for failing “to consider whether novel state-law questions should be certified”). With the possibility of Supreme Court rebuke both for unnecessarily certifying questions that

could be answered by applying existing precedent and for failing to certify unresolved state-law questions, the Ninth Circuit certifies questions to other courts only after careful consideration. It asks for direction from a state's highest court only where (as here) an important and unanswered question of state law will control the outcome of the case.

Furthermore, the Ninth Circuit's request is guided by principles of comity and federalism. The United States Supreme Court has frequently reminded lower federal courts sitting in diversity to give "a State's high court the opportunity to answer important questions of state law." *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 777 (2005); *see also Arizonans for Official English*, 520 U.S. at 46 (1997) ("Certification saves time, energy, and resources and helps build a cooperative judicial federalism."); *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (remarking that, with respect to state law, the federal courts act "as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction").

The Ninth Circuit made its request against this backdrop. The question—whether "Pandora is [in] the business of 'renting or 'lending' sound recordings" under the VRPA, (App. at 299a.)—is a pure question of Michigan law. In this case, the certifying panel acted both out of recognition for the right of Michigan courts to interpret an act of the Michigan legislature (comity) and respect for the distribution of power between federal and state governments (federalism).

CONCLUSION

For the reasons stated above, Deacon respectfully requests that this Court answer the certified question regarding the proper interpretation of the VRPA and permit the parties to brief the merits underlying the certified question to this Court.

Dated: April 22, 2015

Respectfully submitted,

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ADDENDUM

MCR 7.305(B)(1)

When a federal court, state appellate court, or tribal 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.

Video Rental Privacy Act, MCL 445.1711 – 15

445.1711 Definitions.

Sec. 1.

As used in this Act:

- (a) “Customer” means a person who purchases, rents, or borrows a book or other written material, or a sound recording, or a video recording.
- (b) “Employee” means a person who works for an employer in exchange for wages or other remuneration.
- (c) “Employer” means a person who has 1 or more employees.

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.

445.1713 Exceptions.

Sec 3.

A record or information described in section 2 may be disclosed only in 1 or more of the following circumstances:

- (a) With the written permission of the customer.
- (b) Pursuant to a court order.
- (c) To the extent reasonably necessary to collect payment for the materials or the rental of the materials, if the customer has received written notice that the payment is due and has failed to pay or arrange for payment within a reasonable time after notice.
- (d) If the disclosure is for the exclusive purpose of marketing goods and services directly to the consumer. The person disclosing the information shall inform the customer by written notice that the customer may remove his or her name at any time by written notice to the person disclosing the information.
- (e) Pursuant to a search warrant issued by a state or federal court or grand jury subpoena.

445.1714 Violation as a misdemeanor.

Sec. 4.

A person who violates this act is guilty of a misdemeanor.

445.1715 Civil action for damages.

Sec. 5.

Regardless of any criminal prosecution for a violation of this act, a person who violates this act shall be liable in a civil action for damages to the customer identified in a record or other information that is disclosed in violation of this act. The customer may bring a civil action against the person and may recover both of the following:

- (a) Actual damages, including damages for emotional distress, or \$5,000.00, whichever is greater.
- (b) Costs and reasonable attorney fees.