

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.

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

**ORAL ARGUMENT REQUESTED**

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**TABLE OF CONTENTS**

INDEX OF AUTHORITIES..... iii

INTRODUCTION ..... 1

I. The Complaint Fails To Allege Facts Indicating That Pandora “Lends” Sound Recordings, Or That Pandora Listeners “Borrow” Them, Within The Ordinary Meanings Of The Terms “Lend” and Borrow”. ..... 1

II. Plaintiff’s Proffered Analogy Is Inapposite And Further Shows Why He Fails To State A Claim. .... 5

III. Although There Are No Copyright Claims In This Case, Cases Interpreting “Lending” and “Borrowing” Under The Copyright Act Are Instructive and Support the District Court. .... 6

IV. The VRPA Protects “Choices” Made by Consumers, Not Choices Made by the Companies that Provide Music Content to Consumers. .... 7

V. The Issue Of Whether To Expand Liability Under The VRPA Should Be Left To The Legislature. .... 8

CONCLUSION..... 9

**INDEX OF AUTHORITIES**

**CASES**

*Arista Records, LLC v Launch Media, Inc*, 578 F3d 148 (CA 2, 2009),  
*cert denied*, 559 US 929; 130 S Ct 1290; 175 L Ed 2d 1105 (2010)..... 7

*Bonneville Int’l Corp v Peters*,  
 347 F3d 485 (SDNY, 2014)..... 7

*In re Pandora Media, Inc*,  
 6 F Supp 3d 317 (SDNY, 2014), *aff’d*, 785 F3d 73 (CA 2, 2015) ..... 7

*Intercollegiate Broad Sys, Inc v Copyright Royalty Bd*,  
 684 F3d 1332 (CA DC, 2012), *cert denied*, \_US\_; 133 S Ct 2723; 186 L Ed 2d 192 (2013)... 7

*People v Lee*,  
 447 Mich 552; 526 NW2d 882 (1994)..... 3

*People v Martin*,  
 271 Mich App 280; 721 NW2d 815 (2006)..... 3

*People v Thompson*,  
 477 Mich 146; 730 NW2d 708 (2007)..... 3

*Spectrum Health Hosp v Farm Bureau Mut Ins Co*,  
 492 Mich 503; 821 NW2d 117 (2012)..... 2, 3

*Twichel v MIC Gen Ins Corp*,  
 469 Mich 524; 676 NW2d 161 (2004)..... 8

*United States v ASCAP*,  
 627 F3d 64 (CA 2, 2010) ..... 7

**STATUTES**

MCL 445.1711 ..... passim

MCL 445.1712 ..... 1

**OTHER AUTHORITIES**

dictionary.com ..... 2

Merriam-Webster.com ..... 1, 2

Random House Dictionary: Second Edition ..... 3

Senate Bill No. 490 ..... 8

**RULES**

MCR 3.501 ..... 9

## INTRODUCTION

Pandora submits this brief pursuant to the Court's September 25, 2015 Order directing the parties to file supplemental briefs addressing whether Deacon has 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.

The answer to this question is "no," for the reasons set forth below and in Pandora's May 27, 2015 and July 29, 2015 briefs to this Court, which also address this question. In accordance with the Court's Order, Pandora will not restate the arguments from its prior briefs, but will instead respond to Deacon's August 19, 2015 Reply Brief on Merits of Certified Question ("Reply Brief"), and discuss recent proposed amendments to the VRPA that are further evidence that the statute was never intended to create the broad liability Deacon seeks to impose on Pandora.

**I. The Complaint Fails To Allege Facts Indicating That Pandora "Lends" Sound Recordings, Or That Pandora Listeners "Borrow" Them, Within The Ordinary Meanings Of The Terms "Lend" and Borrow".**

The District Court's decision is mandated by the VRPA's plain text. The VRPA pertains only to sound recordings (and other types of materials) that are "purchased", "leased", "rented", or "borrowed". MCL 445.1712.<sup>1</sup> Seizing on this, Plaintiff accuses Pandora of trying to "shift the focus" from "borrowing" and "lending", to "use" and "control". (Reply Brief, pp. 2, 4). Contrary to Plaintiff's assertion, this focus is *not* an improper diversion; rather, "use" and "control" are integral components of the definitions of "borrowing" and "lending". *See, e.g.*,

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<sup>1</sup> Plaintiff seems to have abandoned his earlier claim that Pandora "rents", and Pandora listeners "purchase", sound recordings, as this case involves Pandora's free radio services; and Plaintiff's briefs to this Court only discuss the concepts of "borrowing" and "lending".

Merriam-Webster.com (<http://merriam-webster.com/dictionary/borrow> and <http://merriam-webster.com/dictionary/lend>, defining “borrow” as “to appropriate for one’s own *use*” and “to receive with the implied or expressed intention of returning the same or an equivalent,” and defining “lend” as “give for temporary *use* on condition that the same or its equivalent be returned”)(emphases added). Deacon himself has defined “lending” or “renting” as granting “temporary *control* over an electronic media file...” (Plaintiff’s Opening Brief in Ninth Circuit Court of Appeals, p. 16, Appx. 53a (emphasis added).) And as the district court noted, “use” requires a “volitional act”, rather than mere passivity. (Dist. Ct. Opinion, p. 8, Appx. 19a.) Of course, a volitional act can only be undertaken by one who possesses requisite control over the subject matter. (see. e.g., <http://merriam-webster.com/dictionary/volitional>, defining “volitional” as “the power of choosing or determining: will”; [www.dictionary.com](http://www.dictionary.com), defining “volitional” as “the act of willing, choosing or resolving... a choice or decision made by the will.”)

Thus, the district court – properly – considered the concepts of “use” and “control” in finding that the Pandora service falls outside the scope of the VRPA. This is consistent with Michigan principles of statutory interpretation. Courts interpret undefined statutory terms—like “borrow[ing]” and “lend[ing]”—according to their “plain and ordinary meaning,” and routinely “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). As discussed above and in the prior briefing, the dictionary definitions of “borrow[ing]” and “lend[ing]” all include elements of “use” and “control”, and both parties have looked to and cited such definitions. Even more telling, both parties have argued “use” and “control”, or lack thereof, throughout this litigation, and Plaintiff even does so in the beginning of his latest brief. See Reply Brief, p. 2 (arguing “use” and “control”); Plaintiff’s June 17, 2015 Brief, pp. 11-12

(same and citing dictionary definitions); Plaintiff's Opening Brief in Ninth Circuit, pp. 15-16, Appx. 52a-53a (same); Plaintiff's Reply Brief in Ninth Circuit, p. 2, Appx. 255a (arguing "control"); *see also* Pandora's May 27, 2015 Brief, pp. 14-15 (citing numerous definitions of the terms at issue); District Court Opinion, pp. 8-11, Appx. 19a-22a (same).

Later in his Reply Brief, however, Plaintiff abruptly changes course and appears to claim that consulting a dictionary is inappropriate if the statutory terms are "generally familiar to lay persons and...susceptible of ordinary comprehension" (Reply Brief, p. 5) (whatever that means, and query when an "ordinary comprehension" would ever be different from a dictionary definition.) But the one Michigan case he cites to support this proposition addressed whether a trial court had to define terms for a jury, not whether a court should consult dictionary definitions to resolve a question of statutory interpretation on a motion to dismiss. *See People v Martin*, 271 Mich App 280, 352; 721 NW2d 815 (2006). As stated above, Michigan courts—including this Court—have looked to dictionary definitions to assist in interpreting statutes on countless occasions, including when interpreting the term "lend." *See, e.g., 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); *Spectrum*; *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007)(consulting dictionary definitions for common terms "keep" and "maintain".)

Plaintiff's retreat from his prior position and oft-cited dictionary definitions is not surprising: such definitions, including those Plaintiff cites, require elements of use and control not alleged in the Complaint. More to this point, Pandora has, in prior briefing, provided examples of the type of factual allegations that would be necessary in order to adequately plead "use" and "control". But Plaintiff has been tellingly silent about whether he could plead such

facts (because he cannot). Instead, Plaintiff protests that, in his opinion, Pandora has improperly argued “adjudicative facts” (such as the fact that Pandora listeners cannot chose which sound recordings to play, cannot rewind or fast forward songs, and cannot replay or (legally) copy recordings<sup>2</sup>) to support the district court’s ruling. (Reply Brief, p. 2, n1.) This misses the point. Pandora is not, as Plaintiff claims, asking “this Court to try the case...based on purported facts not contained in” the Complaint. (Reply Brief, p. 6, n5.) Rather, these undisputed facts are relevant because they demonstrate the use-based allegations that Plaintiff failed to allege, despite: (1) being given the opportunity to amend his Complaint after it was dismissed, which he chose not to exercise; and (2) having access to the truth of such facts by purportedly being a Pandora listener himself.

Nor is discovery needed to determine the accuracy of these assertions. As a Pandora listener, Plaintiff can easily determine what he can and cannot do with, and what he receives from, his Pandora music player. Plaintiff cannot turn a blind eye to this easily accessible information and then claim that his Complaint should not have been dismissed because he knowingly chose to omit allegations necessary to state a claim.

Similarly, Pandora does not argue, as Plaintiff claims, that listeners must have “total control” over sound recordings for its services to come within the purview of the VRPA. (Reply Brief, p. 2.) Instead, Pandora argues that the District Court correctly found the Complaint to be deficient because it is devoid of factual allegations sufficient to support a plausible claim that

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<sup>2</sup> Remarkably, Plaintiff claims that Pandora listeners have “control” over the sound recordings streamed to them because some listeners may be sophisticated enough to game the system and unlawfully copy the recordings. (Reply Brief, p. 5, n.4.) This is not alleged in the Complaint, but in any event, is akin to arguing that a store does not have control over its inventory because some patrons may shoplift items. It is without question that Pandora is not “in the business” of allowing listeners to copy sound recordings, given that Pandora’s Terms of Use expressly prohibit the practice. (*See Appx. 138a.*)

Plaintiff exercised, over the temporary Internet file, the type of use and control inherent in a “borrowing” or “renting” relationship. And contrary to Plaintiff’s latest assertion, the Complaint nowhere alleges that Pandora listeners “use” and “control” temporary files by “playing the music”. (Reply Brief, p. 2.)<sup>3</sup> Nor could it. Pandora listeners turn on their devices, just as listeners turn on traditional broadcast radios, and hear whatever sound recordings Pandora chooses to stream to them, just as listeners to traditional broadcast radio hear whatever sound recordings the station broadcasts when they listen. Listeners do not “play” sound recordings—they “listen” to sound recordings that Pandora plays on the station(s) selected.

Finally, in any event, the Complaint fails to state a claim even if the Court does not resort to dictionary definitions, because, as stated in Pandora’s prior briefs, a streaming radio service like Pandora that places a temporary file on a computer to facilitate streaming audio does not equate to “borrowing” or “lending” a sound recording under any common understanding of either term. Nobody has ever said they were turning on the radio to “borrow” some tunes, or that a radio station “lends” great music. (Pandora May 27, 2015 Brief, at 17-18; July 29, 2015 Brief at 6-7.) For all of the reasons set forth in Pandora’s other briefs to this Court, the passive act of “listening” to a streamed sound recording on a radio station cannot be enough to bring it within the definitions of “lending” and “borrowing” under the “commonly understood definitions” of these terms.

## **II. Plaintiff’s Proffered Analogy Is Inapposite And Further Shows Why He Fails To State A Claim.**

Plaintiff’s Reply Brief resorts to inapposite analogies that, far from supporting his argument, demonstrate the key distinctions between the Pandora services and the allegedly

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<sup>3</sup> The Complaint is also devoid of allegations that listeners can control sound recordings by “pausing it to listen to it later, or skipping it to listen to another sound recording.” (Reply Brief, p. 6.)

analogous services that Plaintiff asserts are “no doubt” covered by the VRPA. (Reply Brief, p. 4.) Plaintiff suggests that if his “friend” named “Pandora” brought him a jazz CD and left it at his house overnight, “Pandora” clearly would have “lent” him the CD. (*Id.*, 4.) This is not what Pandora does. Plaintiff would have control over the hypothetical CD during the time his friend “Pandora” left it with him, in that he could: (1) choose which tracks to play or not to play; (2) play and replay the songs on the CD as often and in whatever order he chose; (3) take the CD to a friend’s house to play it for them; and/or (4) copy the CD. The Complaint does not allege that Pandora listeners can exercise any of these types of acts over the music streamed to them. *See also* Plaintiff’s June 17, 2015 Brief, pp. 11-14 (analogizing Pandora to public libraries, music download services, and digital rental services); and Pandora’s July 29, 2015 Response Brief, pp. 10-15 (explaining the distinguishing features between Pandora and the allegedly analogous services identified by Plaintiff).

For all of these reasons and those set forth in Pandora’s prior briefs (*see* Pandora’s May 27, 2015 Brief, pp. 13-20 and Pandora’s July 29, 2015 Brief, pp. 5-15), the Complaint fails to adequately allege that Pandora is in the business of “renting” or “lending” sound recordings.

**III. Although There Are No Copyright Claims In This Case, Cases Interpreting “Lending” and “Borrowing” Under The Copyright Act Are Instructive and Support the District Court.**

Plaintiff has tried to turn Pandora’s discussion of the federal Copyright Act into a preemption argument. This also misses the point. Cases decided under the Copyright Act are important, not for their preemptive effect, but because they are helpful in interpreting the terms “renting” and “lending” under the VRPA. Such cases represent an existing body of case law that has thoroughly considered—and decided—that providers of streaming Internet radio services such as Pandora are *not* subject to the royalties applicable to “renting” or “lending” sound

recordings, but instead, are subject to the “public performance” royalty applicable to traditional radio stations. *See* Pandora’s May 27, 2015 Brief, pp. 20-22; *see also In re Pandora Media, Inc.*, 6 F Supp 3d 317 (SDNY, 2014), *aff’d*, 785 F3d 73 (CA 2, 2015); *Intercollegiate Broad Sys, Inc v Copyright Royalty Bd*, 684 F3d 1332, 1334 (CA DC, 2012), *cert denied*, *\_US\_*; 133 S Ct 2723, 186 L Ed 2d 192 (2013); *United States v ASCAP*, 627 F3d 64 (CA 2, 2010); *Arista Records, LLC v Launch Media, Inc*, 578 F3d 148 (CA 2, 2009), *cert denied*, 559 US 929; 130 S Ct 1290; 175 L Ed 2d 1105 (2010); *Bonneville Int’l Corp v Peters*, 347 F3d 485 (SDNY, 2014). That numerous courts have specifically found, albeit in a different context, that Pandora does not “rent”, but merely “performs”, sound recordings, is significant and in keeping with the commonly understood use of the terms.

#### **IV. The VRPA Protects “Choices” Made by Consumers, Not Choices Made by the Companies that Provide Music Content to Consumers.**

The opening and closing paragraphs of Plaintiff’s Reply Brief show yet another flaw in this case. As Plaintiff admits, the VRPA was enacted to protect a listener’s “*choice*...in records.” (Reply Brief, p. 1 (emphasis added), citing legislative history); *see also id.*, stating the statute protects a listener’s “*choice* in music” (emphasis added) and p 7, referring to “*choices* in listening materials” (emphasis added).) But Pandora listeners cannot “*choose*” the particular sound recordings streamed to them. Rather, Pandora, and not the listener, “*chooses*” which sound recordings to play.<sup>4</sup> Thus, Plaintiff is attempting to use the VRPA to protect the privacy of music choices made not by him, but by Pandora, which makes no sense. There is no protected

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<sup>4</sup> Pandora listeners cannot choose what particular sound recordings will be streamed any more than traditional radio listeners can choose what particular songs will be played. Pandora listeners, like traditional radio listeners, can select a genre of music to which to listen by tuning in to a particular station (such as classical, pop, or country western). But the decision of what to play on each station is then made by Pandora alone.

“choice” by Plaintiff and the district court’s ruling that Plaintiff has not stated a claim under the VRPA does not “undermine the purpose” of the Act. (Reply Brief, p. 7.)<sup>5</sup>

**V. The Issue Of Whether To Expand Liability Under The VRPA Should Be Left To The Legislature.**

Finally, Plaintiff does not—and cannot—dispute that in the more than twenty years since the VRPA was enacted, the Michigan Legislature has had ample opportunity to broaden the statute to cover materials beyond those “purchased”, “rented”, or “borrowed”, or to specifically provide that the statute applies to materials streamed over the Internet. Yes despite having had the opportunity, the Legislature has elected not to amend the statute in this fashion. To the contrary, the Legislature is considering amendments to the VRPA, but these new amendments would *limit, not expand*, the coverage of the VRPA. (In particular, the proposed amendments would: (1) limit the VRPA’s protection to individuals, (2) require that an individual suffer “actual injury” to pursue a civil lawsuit for violation of the Act, and (3) restrict the circumstances under which an individual could recover statutory damages to situations in which information was disclosed after the individual requested in writing that his/her information not be disclosed. *See* Exhibit A, Senate Bill No. 490.) Allowing Plaintiff to proceed with his claims would circumvent the Legislature’s intent of these proposed amendments. (Plaintiff would fail to fulfill criteria (2) and (3)), but more significantly, would circumvent the other limitations the Legislature has already built into the VRPA, such as those that: (1) limit VPRA claims to defendants who “rent” or “lend” music; and (2) foreclose plaintiffs from pursuing VRPA claims on a class action basis in state court by failing to specifically authorize such actions. *See* MCR 3.501(A)(5) (“[a]n action for a penalty or minimum amount of recovery without regard to actual

<sup>5</sup> As this Court has recognized, courts “are not free to manipulate interpretations of statutes to accommodate their own views of the overall purpose of the legislation.” *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 531; 676 NW2d 161 (2004).

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.”).

In sum, there is no evidence that the Legislature intended for the terms “lend,” and “borrow” used in a statute enacted in 1989 (pre-Internet music streaming) to be interpreted to allow Plaintiffs to seek class action-based individual damages based on the fleeting placement of a temporary Internet file incidental to the streaming process, where the content of the file was not chosen by the listener, and the Complaint does not allege that the file can be controlled by the listener. Such liability should be imposed only through a reasoned act of the Legislature, which has not occurred.

### CONCLUSION

Pandora respectfully requests this Court grant the Ninth Circuit’s request for certification, and advise the Ninth Circuit it finds that: (1) Pandora is not in the business of “renting” or “lending” sound recordings within the meaning of VRPA; and (2) Pandora listeners like Deacon do not “rent” or “borrow” sound recordings from Pandora and are therefore not “customers” under the VRPA.

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Date: November 6, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that on November 6, 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 counsel of record as ECF participants.

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# SENATE BILL No. 490

September 10, 2015, Introduced by Senator SCHUITMAKER and referred to the Committee on Commerce.

A bill to amend 1988 PA 378, entitled

"An act to preserve personal privacy with respect to the purchase, rental, or borrowing of certain materials; and to provide penalties and remedies for violation of this act,"

by amending sections 1, 3, 4, and 5 (MCL 445.1711, 445.1713, 445.1714, and 445.1715), section 5 as added by 1989 PA 206.

**THE PEOPLE OF THE STATE OF MICHIGAN ENACT:**

1           Sec. 1. As used in this act:

2           (a) "Customer" means ~~a person~~ **AN INDIVIDUAL** who purchases,  
3 rents, or borrows a book, ~~or~~ other written material, ~~or~~ a sound  
4 recording, or a video recording.

5           (b) "Employee" means ~~a person~~ **AN INDIVIDUAL** who works for an  
6 employer in exchange for wages or other remuneration.

7           (c) "Employer" means a person ~~who~~ **THAT** has 1 or more  
8 employees.

SENATE BILL No. 490

1           Sec. 3. A record or information described in section 2 may be  
2 disclosed only in 1 or more of the following circumstances:

3           (a) With the written permission of the customer.

4           (b) Pursuant to a court order.

5           (c) To the extent reasonably necessary to collect payment for  
6 the materials or the rental of the materials, if the customer has  
7 received written notice that the payment is due and has failed to  
8 pay or arrange for payment within a reasonable time after notice.

9           (D) TO ANY PERSON IF THE DISCLOSURE IS INCIDENT TO THE  
10 ORDINARY COURSE OF BUSINESS OF THE PERSON THAT IS DISCLOSING THE  
11 INFORMATION.

12           (E) ~~(d)~~ If the disclosure is for the ~~exclusive~~ purpose of  
13 marketing goods and services ~~directly~~ to the consumer. **ALL OF THE**  
14 **FOLLOWING APPLY FOR PURPOSES OF THIS SUBPARAGRAPH:**

15           (i) The person **THAT IS** disclosing the information shall inform  
16 the customer by written notice that the customer may remove his or  
17 her name at any time ~~by~~ **IN THE MANNER DESCRIBED IN SUBPARAGRAPH**

18 **(ii) . ANY OF THE FOLLOWING METHODS OF NOTICE SATISFY THE WRITTEN**  
19 **NOTICE REQUIREMENTS OF THIS SUBPARAGRAPH:**

20           (A) WRITTEN NOTICE INCLUDED IN OR WITH ANY MATERIALS SOLD,  
21 RENTED, OR LENT TO THE CUSTOMER UNDER SECTION 2.

22           (B) WRITTEN NOTICE PROVIDED TO THE CUSTOMER AT THE TIME HE OR  
23 SHE ORDERS ANY OF THE MATERIALS DESCRIBED IN SECTION 2 OR OTHERWISE  
24 PROVIDED TO THE CUSTOMER IN CONNECTION WITH THE TRANSACTION BETWEEN  
25 THE PERSON AND CUSTOMER FOR THE SALE, RENTAL, OR LOAN OF THE  
26 MATERIALS TO THE CUSTOMER.

27           (C) NOTICE THAT IS INCLUDED IN AN ONLINE PRIVACY POLICY THAT

1 IS POSTED ON THE INTERNET AND MAINTAINED BY THE PERSON THAT IS  
2 DISCLOSING THE INFORMATION AND IS AVAILABLE TO THE GENERAL PUBLIC.

3 (ii) A CUSTOMER MAY PROVIDE written notice to ~~the~~A person  
4 THAT IS disclosing ~~the~~information UNDER THIS SUBDIVISION THAT THE  
5 CUSTOMER DOES NOT WANT HIS OR HER NAME DISCLOSED. BEGINNING 30 DAYS  
6 AFTER THE PERSON RECEIVES THE WRITTEN NOTICE, THE PERSON SHALL NOT  
7 DISCLOSE THE CUSTOMER'S NAME TO ANY OTHER PERSON UNDER THIS  
8 SUBDIVISION.

9 (F) ~~(e)~~Pursuant to a search warrant issued by a state or  
10 federal court or A grand jury subpoena.

11 Sec. 4. A person ~~who~~THAT violates this act is guilty of a  
12 misdemeanor.

13 Sec. 5. (1) Regardless of any criminal prosecution for ~~a~~THE  
14 violation, ~~of this act,~~a person ~~who~~THAT violates this act shall  
15 MAY be liable in a civil action for damages to ~~the customer~~  
16 ~~identified in a record or other information that is disclosed in~~  
17 ~~violation of this act.~~The A CUSTOMER UNDER SUBSECTION (2).

18 (2) A customer DESCRIBED IN SUBSECTION (1) WHO SUFFERS ACTUAL  
19 INJURY AS A RESULT OF A VIOLATION OF THIS ACT may bring a civil  
20 action against the person THAT VIOLATED THIS ACT and may recover  
21 both of the following:

22 (a) ~~Actual~~ONE OF THE FOLLOWING, WHICHEVER IS GREATER:

23 (i) THE CUSTOMER'S ACTUAL damages, including damages for  
24 emotional distress. ~~, or \$5,000.00, whichever is greater.~~

25 (ii) IF THE VIOLATION IS THE DISCLOSURE OF THE CUSTOMER'S  
26 INFORMATION AFTER HE OR SHE PROVIDED WRITTEN NOTICE TO THE PERSON  
27 UNDER SECTION 3 (E) (ii), \$5,000.00.

1 (b) Costs and reasonable attorney fees.

2 Enacting section 1. This amendatory act takes effect 90 days  
3 after the date it is enacted into law.

4 Enacting section 2. This amendatory act is curative and  
5 intended to clarify that the prohibitions on disclosing information  
6 contained in 1988 PA 378, MCL 445.1711 to 445.1715, do not prohibit  
7 disclosing information if it is incident to the ordinary course of  
8 business of the person disclosing the information, including  
9 marketing goods and services to the consumer, when written notice  
10 is provided.