

Michigan Video Rental Privacy Act (“VRPA”)

Litigation Update

Scott Dailard

Cooley LLC

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attorney advertisement

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Five Palo Alto Square, 3000 El Camino Real, Palo Alto, CA 94306
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Prohibited Disclosures Broader than federal VPPA



- 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.

- Michigan Act 378 of 1988 Section 445.1712

- With the **written permission** of the customer.
- Pursuant to a court order.
- If reasonably necessary to collect payment after written notice to customer that payment is overdue.
- **If disclosure is for exclusive purpose of marketing goods and services directly to the consumer and consumer receives written notice of right to opt out at any time by sending written notice to the person disclosing the information.**
- Pursuant to a search warrant or grand jury subpoena.
- No parallel to federal VPPA's exception for disclosures incident to ordinary course of business.

- Violations punished as misdemeanors
- VRPA also creates private right of action for customer identified in a record or other information that disclosed in violation of the Act to recover both of the following:
 - Actual damages, including damages for emotional distress, or ***\$5,000.00, whichever is greater.***
 - Costs and reasonable attorney fees.

- Michigan Act 378 of 1988 Section 445.1715

- Class action complaints filed by same Chicago firm Edelson-McGuire behind most of the VPPA suits.
- Venue is United States District Court for the Eastern District of Michigan in Detroit.
- Defendants:
 - Hearst Communications, Inc.
 - Bauer Publishing
 - Time, Inc.
 - Meredith Corporation

- Suits target longstanding magazine industry list rental practices.
- Allegations that defendants sell or rent magazine subscribers' "personal reading information" including full names, titles of magazines subscribed to, home addresses, e-mail addresses, gender, and age and other information, to data brokers, direct marketers, charitable organizations and political campaigns without subscribers' prior consent.
- Separate counts for unlawful disclosure of Personal Reading Information in violation of Michigan's VRPA and for breach of contract and unjust enrichment.

- Defense motions to dismiss mostly unsuccessful. Held:
 - Actual injury not required for either statutory or Article III standing – alleged violation of statutory right sufficient.
 - Magazines covered by VRPA as “other written material.”
 - Magazines subscriptions sold to consumers directly by publishers are “sold at retail.”
 - Defenses based on direct marketing exception, although plausible, cannot be resolved without discovery.
 - Most of the defendants disclosed list rental practices and opt-out choices in online privacy policies and/or on masthead pages of magazines
 - Contract counts dismissed but unjust enrichment claims allowed to go forward.

- Bauer has entered into class settlement -- \$750k settlement fund (est. \$175 per class member).
- Defendant also agreed to:
 - Maintain privacy policy disclosing list rental practices and providing free opt-out mechanism
 - Honor opt-out requests from Michigan residents within 30 days if made following instructions in privacy policy, or within 150 days if made some other way.
 - Refrain from disclosing subscriber information of new Michigan subscribers for 30 days from the subscription date of purchase.
 - Direct new Michigan subscribers who purchase their subscription(s) directly from Bauer to view its online privacy policy by including a written notice to that effect on its printed, online, and electronic order forms.

Pandora VRPA Litigation



- Pandora more successful in dismissing earlier VRPA complaint in Northern District of California: *Deacon v. Pandora Media, Inc.*, 901 F.Supp.2d 1166 (N.D. Cal., 2012)
- Held: defendant not covered by statute because not engaged in the business of selling, renting, or lending sound recordings.
 - Court applied standard law dictionary definitions for terms “selling,” “renting,” and “lending.”
 - Defendant does not sell or rent sound recordings because service underlying suit was provided to consumers for free; no money or other consideration exchanged for music service.
 - Defendant does not “loan” and plaintiffs did not “borrow” music files because temporary recording of songs downloaded on consumer devices to facilitate streaming are not “returned” by consumers but are deleted by Pandora after playback.
- MTD decision appealed to Ninth Circuit which subsequently certified key questions of statutory interpretation to Michigan Supreme Court. No ruling from Michigan Court expected before 1Q 2016.

- Consider Suppression of Michigan Subscriber Records from Rented List/Database Marketing Transactions
- Review TOS, Privacy Policies and Require Affirmative Consent for Online Subscription Channels
- Model Bauer Settlement terms – Notice, Opt-out choice, order form language, etc.
- Magazine suits could be tip of iceberg
 - “Written materials” may not cover website content
 - Users of free websites and apps do not purchase, lease rent or borrow content
 - Implicitly authorizes disclosures to “agents”