COPYRIGHT TRIBUNAL of Australia

Reference by APRA AMCOS (Summonses) [2022] ACopyT 4

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| File number: |  |
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| The Tribunal: | **PERRAM J (DEPUTY PRESIDENT)**  |
|  |  |
| Date of decision: | 11 July 2022 |
|  |  |
| Catchwords: | **PRACTICE AND PROCEDURE** – application to issue summons – where summonses objected to  |
|  |  |
| Legislation: | *Copyright Act 1968* (Cth) ss 154, 164, 167(3), 172(2)  |
|  |  |
| Cases cited: | *Gloucester Shire Council v Fitch Ratings, Inc* [2016] FCA 587*Reference by Phonographic Performance Company of Australia Ltd* [2009] ACopyT 1; 84 IPR 393*Jones v Dunkel* (1959) 101 CLR 298*Re John Dee (Export) Pty Ltd* (1990) ATPR 41-006*Sabre Corporation Pty Ltd v Russ Kalvin’s Hair Co* (1993) 46 FCR 428  |
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|  |  |
| Date of hearing: | Determined on the papers  |
|  |  |
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ORDERS

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| IN THE COPYRIGHT TRIBUNAL | CT 1 of 2021 |
|  |
| reference by: | **AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED ABN 42 000 016 099** **AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS’ SOCIETY LIMITED ABN 78 001 678 851** Applicants |

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| TRIBUNAL: | PERRAM J (DEPUTY PRESIDENT) |
| DATE OF ORDER: | 11 JULY 2022 |

THE TRIBUNAL ORDERS THAT:

1. APRA AMCOS prepare appropriate orders and summonses in accordance with these reasons within 7 days and forward them to the Associate to Perram J.

REASONS FOR DETERMINATION

PERRAM J (DEPUTY PRESIDENT):

1. The parties remain in dispute about the terms of the summonses to be issued to Apple Pty Ltd (‘Apple’), Netflix, Inc (‘Netflix’), Network Ten All Access Pty Limited (‘Paramount+’), Stan Entertainment Pty Ltd (‘Stan’), and The Walt Disney Company (Australia) Pty Ltd (‘Disney’). Many of these disputes have been resolved by agreement. Some have not. These reasons deal with the disputed paragraphs of the proposed summonses. During the course of the exchange of the parties’ submissions, the Applicants, the Australasian Performing Right Association Limited and the Australasian Mechanical Copyright Owners’ Society Limited (‘APRA AMCOS’), varied some of the disputed paragraphs to address some of the concerns. These reasons deal with the disputed paragraphs in their final form.

# Some General Observations concerning the Issuing of Summonses under s 167(3) of the *Copyright Act 1968* (Cth)

## Relevance

1. The present proceeding is a determination of a reference under s 154 of the *Copyright Act 1968* (Cth) (‘the Act’). Section 154(4) of the Act relevantly provides:

(4)  The Tribunal shall consider a scheme referred under this section and, after giving to the parties to the reference an opportunity of presenting their cases, shall make such [order](http://classic.austlii.edu.au/au/legis/cth/consol_act/ca1968133/s136.html#order), confirming or varying the scheme or substituting for the scheme another scheme proposed by one of the parties, as the Tribunal considers reasonable in the circumstances.

1. Here, the scheme which has been referred to the Tribunal is a licencing scheme proposed by APRA AMCOS. Two of the Respondents to the proceeding, Netflix and Stan, have proposed alternative schemes. The question for the Tribunal is therefore whether it should confirm or vary APRA AMCOS’ proposed scheme or whether it should substitute for that scheme either of the schemes proposed by Netflix and Stan.
2. In exercising the power under s 154(4), the Tribunal is not sitting as a court. It is sitting as a price fixing tribunal which produces a determination which is quasi-legislative in nature. There are no pleadings and no formally defined issues. Whilst the Tribunal must hear the parties on their cases and afford them procedural fairness, it is not bound by the cases which they put. So much is inherent in the power of the Tribunal to vary a scheme. It is open to the Tribunal, so long as it affords the parties procedural fairness, to do something quite different to what they propose. It also within its power to adopt a scheme but for different reasons to those which are advanced in its support. For example, the Tribunal might, in appropriate cases, consider the economic analysis to be largely a thought experiment underpinned by no real data and to conclude instead that some other, more transparent, method of arriving at a price was warranted.
3. The power to require the production of documents is contained in s 167(3) of the Act:

  (3)  A member or the Registrar may summon a person to produce specified documents or articles to the Tribunal by producing the documents or articles to a specified person at a specified time at a specified place.

1. Plainly, this power is not at large. It may be exercised only if it may be seen as having a proximate connection with the exercise of the power in s 154(4). In deciding whether a document sought by a summons has a sufficiently proximate connection with the exercise of the power in s 154(4), the concept of relevance is a useful one. However, in the determination of what is relevant for the purposes of 154(4), two considerations should be borne in mind.
2. First, in a reference proceeding such as the present, it is not the case as I have just explained that the perceived issues between the parties exclusively define the scope of what is relevant to the exercise of the power in s 154(4). So much flows from the fact the Tribunal is entitled to reject the pricing methodologies put forward by them subject only to the requirements of procedural fairness.
3. Secondly, the question of what is relevant to the determination of the reference is likely to be affected by the stage to which the proceedings have progressed. As the matter gets closer to a hearing, there will be an increased focus on the nature of the dispute between the parties. At the outset, however, it will generally be more difficult to be dogmatic about what is relevant and what is not. The fact that the relevance inquiry tends to narrow over time is a well-known phenomenon in ordinary civil litigation and has frequently been remarked upon in the context of attempts to set aside subpoenas: see *Gloucester Shire Council v Fitch Ratings, Inc* [2016] FCA 587 at [23] per Wigney J.
4. The combination of these two matters together widens further the caution with which the Tribunal should approach relevance debates in a context such as the present. It will rarely be likely at this stage of the proceedings that it will be appropriate to reject the issue of a summons which seeks the production of documents on a rigid view of what must be relevant or irrelevant. That degree of forensic precision will rarely be present. For example, it was put by Netflix that production of documents throwing light on the approach its management took to an earlier fee it agreed to pay APRA AMCOS could not be relevant to the question of whether the latter exercised monopoly power which was instead to be determined by reference to the objective circumstances. It is simply not possible to accept that kind of dogmatism at this level. In my view, it is possible that such material may be relevant to the exercise of the power in s 154(4). I do not accept that it is appropriate to determine at this stage that the Tribunal could not as a matter of law accept that the views of Netflix’s management when negotiating the fee with APRA AMCOS were relevant to whether APRA AMCOS was exercising monopoly power.

## A Specified Document

1. The power in s 167(3) is constrained by the need for the summons to seek an identified document. Netflix submits that this requires the document to be identified. If that is correct then it follows that a summons seeking a document which ‘evidences’ or ‘relates to’ some matter would not be within the power conferred by s 167(3).
2. The expression ‘to produce specified documents’ refers to documents having the quality of having been specified. To specify something, according to the Macquarie Dictionary, is ‘to mention or name specifically or definitely’ or ‘to state in detail’. I therefore accept Netflix’s submission that a summons requiring production of documents which are not identified lies outside the power in s 167(3). It also follows that a summons which is unclear in what it seeks production of will fail to identify a specified document.

## Burden

1. The power under s 167(3) is discretionary. Once satisfied that it is being asked to seek the production of a specified document which has the requisite proximate connection with the discharge by the Tribunal of its functions under s 154(4), the Tribunal may still to refuse to issue the summons. The category of situations in which that may occur is not closed. One situation, however, concerns the situation where the Tribunal is satisfied that to require the respondent to comply with the summons would be unduly burdensome. Resistance to the issue of the summons will require evidence of the existence of an identified burden. If the Tribunal accepts that the burden exists it must then weigh that burden against its assessment of how necessary the documents sought are. One arrives at this question having already concluded that the proximate connection is present. Necessarily, an assessment of whether the burden is one which is undue will be impressionistic and involve a degree of speculation about the ultimate relevance of the material. For the reasons I have given, considerable circumspection is necessary at this stage of a proceeding such as the present.

## Non-existent Documents

1. The fact that a document does not exist is not a reason for not issuing a summons for its production. The fact the summons is answered with the response ‘There are no documents produced’ is a formal act which, if false, has criminal consequences under s 172(2). Further, it may be relied on by another party subsequently to prove that there are no such documents. By contrast, the same statement made in a submission to the Tribunal to persuade it not to issue a summons, has no such consequences. The proposition that there are no documents to produce is therefore not generally a reason not to issue a summons.

## Sabre Orders

1. APRA AMCOS has sought the issue of summonses containing what is effectively an order that the recipient make a request of its parent (or other members of its group) to produce documents. This practice overcomes the difficulty that often enough a subsidiary will not have possession of all of the documents. Such orders are made in curial proceedings: see *Sabre Corporation Pty Ltd v Russ Kalvin’s Hair Co* (1993) 46 FCR 428 at 431-432 per Lockhart J (‘*Sabre*’). Generally, a *Sabre* order is not made unless there is reason to believe that the third party will comply with the request. In the case of intra-group requests, this will usually be straightforward because the failure to produce the document may lead to the drawing of a *Jones v Dunkel* inference: see *Jones v Dunkel* (1959) 101 CLR 298 at 320 per Windeyer J.
2. The Respondents dispute the power of the Tribunal to make such an order. APRA AMCOS relied on s 164 which provides:

**164 Procedure**

In proceedings before the Tribunal:

(a)  the procedure of the Tribunal is, subject to this Act and the regulations, within the discretion of the Tribunal;

(b)  the Tribunal is not bound by the rules of evidence; and

(c)  the proceedings shall be conducted with as little formality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Tribunal permit.

1. If s 164 were a blank canvas I would read the reference to ‘the procedure of the Tribunal’ in s 164(a) as a reference to the procedure adopted during the ‘proceedings’ referred to in the first line. Section 164 clearly applies to the actual hearing of a reference under s 154(4). I would also accept that it applies to any interlocutory hearings before that final hearing. Overall, I would read s 164 as specifying how the Tribunal is to conduct its hearings. The power to determine in its own discretion what its procedure is would not in my opinion extend to an order requiring a party to do something outside of the context of a hearing.
2. However, the Tribunal has previously adopted a broader view of the operation of s 164(a). In *Reference by Phonographic Performance Company of Australia Ltd* [2009] ACopyT 1; 84 IPR 393, it was held by Emmett P that the power in s 164(a) extended to empowering the Tribunal to order the person seeking the issue of a summons to pay the expenses of a person required to comply with that summons. At [10], Emmett P reasoned that the power was ‘implied from or are incidental to’ the power to issue the summons, citing a decision of Lockhart P sitting in the then Trade Practices Tribunal (now the Australian Competition Tribunal) in *Re John Dee (Export) Pty Ltd* (1990) ATPR 41-006. It would appear to follow from this that any power which can be implied from or be seen as incidental to, the power in s 167(3) will be within the power conferred by s 164.
3. Emmett P’s interpretation of s 164 is broader than the one I favour. Although the Tribunal is not bound by its own decisions, there is a public interest in consistent decision making. The decision has stood for 13 years and I do not think it would be appropriate to depart from that interpretation. I therefore conclude that if a power can be seen as incidental to the exercise of another power which the Tribunal has, then s 164 confers that power on the Tribunal.
4. The power in s 167(3) is a power to require a person to produce a document. In my view, it is incidental to that power to require a party before the Tribunal to ask another person to produce a document. The power in s 167(3) will be fruitless if the person to whom a summons is addressed does not have possession of a document although it is in the possession of a parent entity. To make the power to order production efficacious it is therefore incidental to that power to order a party before the Tribunal to request another party for the document.
5. Consequently, I accept that s 164(a) allows a *Sabre* order to be made against a respondent. Before such an order is made, the Tribunal should be satisfied that there are reasonable grounds for thinking that the request will be complied with. Where the parties of whom the requests will be made are parent or related entities of one of a parties before the Tribunal, I am satisfied that such grounds exist. They exist because of the possibly adverse inferences which may arise if the request is not complied with.
6. Turning then to the particular complaints made by each of the Respondents:

# Apple

1. The disputes concern paragraphs 1(c), 1(h), 1(i) and 2.

## Paragraph 1(c)

1. The current form of the disputed paragraph is as follows:

1. You are summoned to produce to the Copyright Tribunal of Australia by 4:00pm on 31 April 2022, the following document or articles (in electronic form if available):

...

(c) For the period 2019 to date, one or more documents, recording the total costs, and the total costs under the following items, incurred in relation to conducting the Service in Australia (wherever those costs are incurred) for each financial year:

(i) content costs (broken down by acquisition and commissioned spend);

(ii) music costs;

(iii) variable costs (eg. delivery and billing); and

(iv) fixed costs (eg. distribution costs, marketing, technology, staff, overhead).

1. Apple submitted that it would onerous for it to comply and that 1(c) was not clear. As to the first of these contentions, it submitted that identifying the documents that recorded the costs referred to in (c) would be a very complicated exercise because it does not record such costs by country. It would therefore be required to search for and examine primary documents such as emails and invoices. An additional problem would be that the costs might be attributable to more than one service.
2. There was no evidence to this effect and hence no way of determining whether the suggested burden is undue. Even if there had been evidence to the effect eluded to by Apple, I would not have accepted that the burden was undue. I am far from persuaded at this stage that Apple’s costs are irrelevant to the exercise by the Tribunal of its function under s 154(4).
3. Nor do I accept the second contention. Apple initially submitted that its problems were compounded by the words ‘*in relation to* conducting the Service in Australia’ (emphasis added). Its complaint was that it was unclear whether, for example, it picked up a catering cost. This led APRA AMCOS to add subparagraphs (i)-(iv) to the summons. Apple then submitted that it was now too broad because of the words ‘wherever those costs are incurred’. I do not accept Apple’s submission. It is clear what 1(c) requires. Paragraph 1(c) is therefore appropriate. For completeness, Apple did not submit that 1(c) did not seek a ‘specified’ document.

## Paragraph 1(h)

1. This paragraph is as follows:

1. You are summoned to produce to the Copyright Tribunal of Australia by 4:00pm on 31 April 2022, the following document or articles (in electronic form if available):

 …

(h) Any documents authored or created by, for, or on behalf of, senior management or executives of Apple, or board papers or minutes, recording or evidencing Apple’s consideration of, and/or reasons for agreeing to or resisting the licence fee payable to APRA AMCOS for the communication and reproduction of musical works on the Service in the period 6-months prior to the entering into of any licence with APRA AMCOS.

1. Apple submitted that this paragraph was excessive because it would have to search its records including internal emails and text and chat messages. There is no evidence of how burdensome this is for Apple and therefore no occasion to consider the matter further. Apple also took issue with the words ‘recording or evidencing Apple’s consideration of’. It was said that ‘evidencing’ might capture fleeting references. I do not accept this submission. Consequently, I will permit 1(h). Again, it was not submitted that the paragraph lay outside the requirement that the document be specified.

## Paragraph 1(i)

1. This paragraph is as follows:

1. You are summoned to produce to the Copyright Tribunal of Australia by 4:00pm on 31 April 2022, the following document or articles (in electronic form if available):

 …

(i) Any documents authored or created by, for, or on behalf of, senior management or executives of Apple, recording or evidencing Apple’s consideration of, and/or reasons for agreeing to or resisting the licence fee payable to a collecting society for the communication and reproduction of musical works on the Service in the period 6-months prior to the entering into of any licence with that collecting society in each of the following territories:

(i) the Czech Republic;

(ii) Finland;

(iii) France;

(iv) Germany;

(v) Hong Kong;

(vi) the United Kingdom, or any part thereof;

(vii) the Republic of Ireland; and

(viii) Sweden.

1. Apple submitted that it had not been explained why Apple would have such documents. Since there was no reason to think that it had any such documents, it would be wasteful to require Apple to comply with it. I reject this submission for the reasons I have already given. It was also said to be overbroad and vague. I do not agree – it was clear.

## Paragraph 2

1. This paragraph is as follows:

2. To the extent that any of the documents answerable to 1(g) and 1(i) above are not in the power, custody or control of Apple, Apple is to take all reasonable steps available to it to obtain the documents, or copies thereof, and produce those documents. If the documents are not produced by 4:00pm on 31 April 2022, Apple, by a representative having knowledge of the facts, is to file and serve an affidavit as to Apple’s efforts made pursuant to this order.

1. Apple submitted that: (a) this was not a category of document; (b) it was in the nature of a *Sabre* order; (c) the Tribunal lacked power to make a *Sabre* order; and (d) if it did have power, it ought not to exercise it. I accept (a) and (b). However, a *Sabre* order has no place in a summons. I reject (c) and (d) for the reasons I have given.
2. In those circumstances, the summons may be issued with paragraphs 1(c), (h) and (i). I will not grant leave to include the *Sabre* order in the summons. I will however make such an order separately upon APRA AMCOS furnishing a draft to my chambers.

# Netflix

1. The disputed paragraphs are 1(c), 1(e), 1(g), 1(h), 1(i) and 2.

## Paragraph 1(c)

1. This is essentially the same as paragraph 1(c) for Apple. However, unlike Apple, Netflix submits that the documents sought are not relevant to an issue before the Tribunal. The documents sought would appear to be directed at ascertaining what the costs are for Netflix in conducting the Netflix service in Australia. APRA AMCOS explained the relevance of 1(c) as follows: APRA AMCOS seek by the reference the imposition of a fee calculated as a percentage of Netflix’s Australian revenues. Netflix by contrast proposes a per subscriber per month (PSPM) fee or a fee based on a percentage of revenue with the minimum and maximum fee payable capped by reference to the number of subscribers per month. APRA AMCOS submits that Netflix’s costs are relevant because its expert evidence may show that one justification for an increase in the percentage rate may be that a licensee’s costs have decreased or that its profits as a proportion of revenue have increased. For the reasons I have given it would be inappropriate to uphold this objection at this stage.

## Paragraph 1(e)

1. Paragraph 1(e) is as follows:

1. You are summoned to produce to the Copyright Tribunal of Australia by 4:00pm on 31 April 2022, the following document or articles (in electronic form if available):

 …

(e) For the period 2015 to date, all reports made to Australian Communications and Media Authority in respect of the service.

1. Netflix again objects on the basis of relevance. As above, APRA AMCOS says the relevance is that the expert evidence may reveal that the costs of Netflix may be relevant to the calculation of the fee. I reject Netflix’s objection for the same reason as I reject its objection to paragraph 1(c).

## Paragraph 1(g)

1. This is as follows:

1. You are summoned to produce to the Copyright Tribunal of Australia by 4:00pm on 31 April 2022, the following document or articles (in electronic form if available):

 …

(g) Insofar as they have not been previously produced in the proceedings, all licence agreements (both current and historical) for the reproduction and communication of musical works on the Service with collecting societies in the following territories:

(i) the United Kingdom, or any part thereof;

(ii) the Republic of Ireland;

(iii) Canada;

(iv) France;

(v) Germany;

(vi) Sweden;

(vii) Brazil;

(viii) Korea;

(ix) Chile;

(x) Finland;

(xi) Columbia;

(xii) Peru;

(xiii) Portugal;

(xiv) Czech Republic;

(xv) Hong Kong;

(xvi) Ecudaor; and

(xvii) Uruguay.

1. Netflix has already produced these documents immediately prior to the date that it began providing the service in Australia, and as at 3 November 2021. APRA AMCOS wishes to see whether the rates have changed over that period. Objection is taken to the fact that 17 countries are involved. I do not accept this objection.

## Paragraph 1(h)

1. This is as follows:
2. You are summoned to produce to the Copyright Tribunal of Australia by 4:00pm on 31 April 2022, the following document or articles (in electronic form if available):

 …

(h) Any documents authored or created by, for, or on behalf of, senior management oir executives of Netflix, or board papers or minutes recording or evidencing Netflix’s consideration of, and/or reasons for agreeing to or resisting the licence fee payable to APRA AMCOS for the communication and reproduction of musical works on the Service in the period 6-months prior to the entering into of the licence with APRA AMCOS on 24 March 2015.

(error in original).

1. Netflix submits that its subjective assessment of its APRA AMCOS fee is irrelevant to the question of whether it had ‘no choice’ other than to enter into a licence with APRA AMCOS and was thus subject to monopoly power. The argument was that the subjective understandings of Netflix’s management were not relevant to the objective question of whether APRA AMCOS was exercising monopoly power. I am not prepared to accept this argument at the summons stage. I see no issue with clarity in relation to this paragraph.
2. I accept Netflix’s contention that the words ‘evidencing’ means that 1(h) does not ‘specify’ a document as required by s 167(3) but I reject the same argument in relation to the word ‘recording’. I reject paragraph 1(h) in its current form but would issue it with the word ‘evidencing’ removed.

## Paragraph 1(i)

1. This is as follows:

1. You are summoned to produce to the Copyright Tribunal of Australia by 4:00pm on 31 April 2022, the following document or articles (in electronic form if available):

 …

(i) Any documents authored or created by, for, or on behalf of, senior management or executives of Netflix recording or evidencing Netflix’s consideration of, and/or reasons for agreeing to or resisting the licence fee payable to a collecting society for the communication and reproduction of musical works on the Service in the period 6-months prior to the entering into of any licence with that collecting society in each of the following territories:

(i) the Czech Republic;

(ii) Finland;

(iii) France;

(iv) Germany;

(v) Hong Kong;

(vi) the United Kingdom, or any part thereof;

(vii) the Republic of Ireland; and

(viii) Sweden.

1. I reject Netflix’s relevance objection for reasons already given. Nor am I persuaded that it is unduly burdensome.

## Paragraph 2

1. Subject to it being clarified that the steps to be taken by Netflix relate only to seeking the documents from members of its own group of entities, I accept that the *Sabre* order should be made (but not in the summons).

# Paramount+

1. Paramount+ objects to notes (a) and (d) and paragraphs 1(b), 1(h), 1(i) and 2 of the proposed summons.

## Note (a)

1. This is as follows:

(a) A reference to Paramount+ includes a reference to any of its related bodies corporate, aside from paragraph 1(e) and 2 below.

1. I do not read note (a) as having the effect that the summons is addressed to all of its related bodies. This is because it does not say such a thing and because it would entail that the summons, whilst appearing to be addressed to one entity was, in fact, addressed to a number of unidentified entities. This would be procedurally irregular and I do not read the draft summons this way. That being so, I read note (a) as being intended to apply to the body of the summons.
2. On that assumption, the carve out for 1(e) makes no sense since Paramount+ is not referred to in that paragraph. I think it would be unlikely that that Paramount+ had possession of the documents sought insofar as they were the documents of the related entities. The likely purpose of this definition is to work with the attempted *Sabre* order in paragraph 2. As I shortly conclude, the *Sabre* order should not be in the summons. Since it is to be excised, this definition should be too.

## Note (d)

1. This is as follows:

(d) Production pursuant to categories 1(a); 1(b); 1(c); and 1(f) will be deemed sufficient by the provision of a summary statement on underlying business records in lieu of the records themselves. However, APRA AMCOS reserves the right to inspect the underlying records.

1. There is a debate as to whether APRA AMCOS should have a right to audit the response. This debate has no place in the form of the summons. Note (d) will be deleted. If the parties reach some kind of arrangement about what is to be produced, they may do so.

## Paragraph 1(b)

1. This is as follows:

1. You are summoned to produce to the Copyright Tribunal of Australia by 4:00pm on 31 April 2022, the following document or articles (in electronic form if available):

 …

(b) For the period 2018 to date, one or more documents evidencing the total revenue for each Quarter generated directly or indirectly by operation of the Service in Australia.

1. Paramount+ submits that it is unclear what indirectly generated revenue means. In correspondence, APRA AMCOS has indicated that indirect revenue refers to ‘revenue received other than from subscription fees, and is therefore not reported under the current licensing arrangements’. The wording suggested by APRA AMCOS will be incorporated into 1(b).

## Paragraph 1(h)

1. This is as follows:
2. You are summoned to produce to the Copyright Tribunal of Australia by 4:00pm on 31 April 2022, the following document or articles (in electronic form if available):

…

(h) Any documents, authored or created by, for, or on behalf of, senior management or executives of Paramount+, or board papers or minutes recording or evidencing Paramount+’s consideration of, and/or reasons for agreeing to or resisting the licence fee payable to APRA AMCOS for the communication and reproduction of musical works on the Service in the period 6-months prior to the entering into of any licence with APRA AMCOS.

1. The first objection is relevance which, for reasons already given, I reject. The second objection is burden which I also reject. The third is a lack of clarity which I reject.

## Paragraph 1(i)

1. This is as follows:

1. You are summoned to produce to the Copyright Tribunal of Australia by 4:00pm on 31 April 2022, the following document or articles (in electronic form if available):

 …

(i) Any documents, authored or created by, for, or on behalf of, senior management or executives of Paramount+, or board papers or minutes, including but not limited to board minutes, recording or evidencing the Paramount+’s consideration of and/or reasons for agreeing to or resisting the licence fee payable to a collecting society for the communication and reproduction of musical works on the Service in the period 6-months prior to the entering into of any licence with that collecting society Paramount+ in each of the following territories:

(i) the Czech Republic;

(ii) Finland;

(iii) France;

(iv) Germany;

(v) Hong Kong;

(vi) the United Kingdom, or any part thereof;

(vii) the Republic of Ireland; and

(viii) Sweden.

1. The objections are in substance the same as in 1(h). I reject them for the same reasons.

## Paragraph 2

1. This is as follows:

2. To the extent that any of the documents answerable to 1(g) and 1(i) above are not in the power, custody or control of Paramount+, Paramount+ is to take all reasonable steps available to it to obtain the documents, or copies thereof, and produce those documents. If the documents are not produced by 4:00pm on 31 April 2022, Paramount+, by a representative having knowledge of the facts, is to file and serve an affidavit as to Paramount+’s efforts made pursuant to this order.

1. I conclude that the Tribunal has the power to make the order but not as part of the summons. Objection is also taken on the grounds that what is sought is inappropriate and oppressive. I reject both propositions.

# Stan

1. Stan objects to paragraphs 1(e) and 1(h).

## Paragraph 1(e)

1. This is as follows:

1. You are summoned to produce to the Copyright Tribunal of Australia by 4:00pm on 31 April 2022, the following document or articles (in electronic form if available):

 …

(e) For the period 2015 to date, all reports made to the Australian Communications and Media Authority in respect of the Service.

1. The objections were relevance, confidentiality and the fact that the information was not independent since it was provided by Stan. I reject the relevance objection. Confidentiality is not an objection. The fact that the information is or is not independent does not matter either.

## Paragraph 1(h)

1. This is as follows:

1. You are summoned to produce to the Copyright Tribunal of Australia by 4:00pm on 31 April 2022, the following document or articles (in electronic form if available):

 …

(h) Any documents authored or created by, for, or on behalf of, senior management or executives of Stan, or board papers or minutes recording or evidencing Stan’s consideration of, and/or reasons for agreeing to or resisting the licence fee of 2.0% payable to APRA AMCOS for the communication and reproduction of musical works on the Service in the period 6-months prior to the entering into of the licence with APRA AMCOS dated 9 September 2015.

1. The objections are breadth, oppression and relevance. I reject each.

# Disney

1. Disney objects to notes (a) and (b) and paragraphs 1(b), 1(c), 1(h), 1(i) and 2.

## Note (a)

1. This is as follows:

(a) A reference to Disney includes a reference to any of its related bodies corporate.

1. As in the case of Paramount+, this definition services no purpose outside the context of the *Sabre* order. It will be excised.

## Note (b)

1. This is as follows:

(b) Service means the subscription video on demand service called “Disney+”.

1. The objection is that this definition extends the service to its provision in every country where the service is provided. APRA AMCOS confirms that this was its intent. The word ‘Service’ appears in 1(a), 1(b) and 1(f) in terms which make clear that the service being discussed is the service in Australia. It is referred to in paragraph 1(c) which also make clear that it is the cost of providing the Service everywhere that is being examined so that allocation to Australia can be determined. I see no problem with note (b) in that context. It is also referred to in paragraph 1(e) where the context makes plain that it is the Australian service which is being discussed. Paragraph 1(h) is as follows:

1. You are summoned to produce to the Copyright Tribunal of Australia by 4:00pm on 31 April 2022, the following document or articles (in electronic form if available):

 …

(h) Any documents authored or created by, for, or on behalf of, senior management or executives of Disney, or board papers or minutes, recording or evidencing Disney’s consideration of, and/or reasons for agreeing to or resisting the licence fee payable to APRA AMCOS for the communication and reproduction of musical works on the Service in the period 6-months prior to the entering into of any licence with APRA AMCOS.

1. Although it would be deliberately obtuse to read this as applying to anything but the Australian service I accept that it can be read that way. The definition in note (b) will remain but paragraph 1(h) will be amended to make the obvious clear.

## Paragraph 1(b)

1. This is as follows:

1. You are summoned to produce to the Copyright Tribunal of Australia by 4:00pm on 31 April 2022, the following document or articles (in electronic form if available):

…

(b) For the period 2019 to date, one or more documents evidencing the total revenue for each Quarter generated directly or indirectly by operation of the Service in Australia.

1. This will be limited in the same way as paragraph 1(b) for Paramount+ has been limited. I reject the vagueness and oppression challenges.

## Paragraph 1(c)

1. This is as follows:

1. You are summoned to produce to the Copyright Tribunal of Australia by 4:00pm on 31 April 2022, the following document or articles (in electronic form if available):

 …

(c) For the period 2019 to date, one or more documents, recording the total costs, and the total costs under the following items, incurred in relation to conducting the Service in Australia (wherever those costs are incurred) for each Quarter, or if unavailable on a quarterly basis, for each financial year:

(i) content costs (broken down by acquisition and commissioned spend);

(ii) music costs;

(iii) variable costs (eg. delivery and billing); and

(iv) fixed costs (eg. distribution costs, marketing, technology, staff, overhead).

1. I reject the relevance challenge for reasons already given. I reject the clarity complaint. I reject the oppression argument.

## Paragraph 1(h)

1. This is as follows:

1. You are summoned to produce to the Copyright Tribunal of Australia by 4:00pm on 31 April 2022, the following document or articles (in electronic form if available):

 …

(h) Any documents authored or created by, for, or on behalf of, senior management or executives of Disney, or board papers or minutes, recording or evidencing Disney’s consideration of, and/or reasons for agreeing to or resisting the licence fee payable to APRA AMCOS for the communication and reproduction of musical works on the Service in the period 6-months prior to the entering into of any licence with APRA AMCOS.

1. I reject the relevance objection. I reject the burden argument.

## Paragraph 1(i):

1. This is as follows:

1. You are summoned to produce to the Copyright Tribunal of Australia by 4:00pm on 31 April 2022, the following document or articles (in electronic form if available):

 …

(i) Any documents authored or created by, for, or on behalf of, senior management or executives of Disney recording or evidencing Disney’s consideration of, and/or reasons for agreeing to or resisting the licence fee payable to a collecting society for the communication and reproduction of musical works on the Service in the period 6-months prior to the entering into of any licence with that collecting society in each of the following territories:

(i) the Czech Republic;

(ii) Finland;

(iii) France;

(iv) Germany;

(v) Hong Kong;

(vi) the United Kingdom, or any part thereof;

(vii) the Republic of Ireland; and

(viii) Sweden.

1. This is challenged on the same bases as 1(h). I allow it for the same reasons.

## Paragraph 2

1. The Tribunal has the power to make an order of this nature although not in the form of a summons. Disney correctly submits that as drafted the form of paragraph 2 requires Disney to request the documents from the whole world. Plainly, it should be limited to Disney entities.

# Result

1. APRA AMCOS should now prepare appropriate orders and summonses for issue within 7 days which give effect to these reasons. They are to be sent to my chambers where they will be made and issued respectively.

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| I certify that the preceding eighty (80) numbered paragraphs are a true copy of the Reasons for Determination of the Tribunal constituted by the Honourable Justice Perram (Deputy President). |

Associate:

Dated: 11 July 2022

SCHEDULE OF PARTIES

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|  |
| Respondents |
| NETWORK TEN ALL ACCESS PTY LTD (ABN 60 620 391 117) |
| APPLE PTY LIMITED (ABN 46 002 510 054) |
| STAN ENTERTAINMENT PTY LTD (ABN 94 168 856 924) |
| THE WALT DISNEY COMPANY (AUSTRALIA) PTY LTD (ABN 30 054 610 025) |
| NETFLIX, INC. |
|  |
|  |