

COMMONWEALTH OF AUSTRALIA

Copyright Act 1968

**IN THE COPYRIGHT TRIBUNAL OF AUSTRALIA
FILE NO. CT1 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 (**APRA AMCOS**)

under Section 154 of the *Copyright Act 1968 (Cth)*

ORDER

TRIBUNAL: PERRAM J (Deputy President)

DATE: 4 AUGUST 2021

WHERE MADE: SYDNEY



BY CONSENT, THE TRIBUNAL ORDERS THAT:

1. Subject to further order, the confidentiality regime attached as Annexure 1 apply to documents filed or produced in the proceedings which are identified as 'confidential documents' in accordance with that regime (**Confidentiality Regime**). The Confidentiality Regime supersedes and replaces the interim confidentiality regime ordered pursuant to order 4 of the orders made on 2 July 2021.
2. Within 1 day of the date of this order (or as soon thereafter as is practicable), APRA AMCOS serve a copy of these Orders on any third party referred to in the confidential annexures and addendum to its position paper (**Confidential Annexures**) and on the Australian Competition and Consumer Commission (**ACCC**).
3. Unless any application has been made in accordance with Order 6 and remains unresolved, after 14 days of the date of this order, APRA AMCOS serve on the solicitors for the Respondents to the proceedings unredacted copies of the Confidential Annexures, in accordance with the Confidentiality Regime.
4. Subject to further order and the terms of Confidentiality Regime, the unredacted copies of

the Confidential Annexures are to be treated by the Respondents as Category B documents for the purposes of the Confidentiality Regime.

5. Unless any application has been made in accordance with Order 6 and remains unresolved, after 14 days of the date of this order, APRA AMCOS serve unredacted copies of the Confidential Annexures on the ACCC, provided the ACCC employees that will be accessing those documents have provided to the parties written undertakings in accordance with Annexure 2.
6. Any entity or person that wishes to be heard in respect of Orders 3-5 above has liberty to apply to the Associate to Perram J, by email copied to the solicitors for APRA AMCOS, on 24 hours' notice. APRA AMCOS must notify the Respondents' solicitors of any application made pursuant to this Order 6.
7. Each Respondent file and serve its response to APRA AMCOS' position paper within 7 days of service on it of the unredacted copies of the Confidential Annexures.
8. Any Respondent that wishes to seek an interim order pursuant to s 160 of the *Copyright Act 1968* (Cth) must file an application and supporting evidence within 6 weeks of the date of this order.
9. List the reference for further case management on a date to be fixed in the week following the filing of the last response in accordance with Order 7, or on 23 November 2021, whichever is sooner.
10. The matter be listed for a hearing in relation to any application made in accordance with order 6 on a date convenient to the Tribunal.
11. Liberty to apply.

Date that entry is stamped: 5 August 2021



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The Hon Justice Nye Perram, Deputy President

ANNEXURE 1

Copyright Tribunal of Australia
CT1 of 2021

AUSTRALASIAN PERFORMING RIGHT ASSOCIATION
LIMITED
AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS'
SOCIETY LIMITED
Referees

NETFLIX, INC
STAN ENTERTAINMENT PTY LTD
APPLE PTY LIMITED
NETWORK TEN ALL ACCESS PTY LTD
THE WALT DISNEY COMPANY (AUSTRALIA) PTY LIMITED
Respondents

CONFIDENTIALITY UNDERTAKING

- 1 In this undertaking:
- (a) **"Category A Confidential Document"** means each document:
 - (i) disclosed, exchanged, produced, annexed, filed and/or served by a Confidentiality Claimant in relation to this Proceeding; or
 - (ii) that contains information of a Confidentiality Claimant disclosed, exchanged, produced, annexed, filed and/or served by APRA AMCOS in relation to this Proceeding,that has been designated by the relevant Confidentiality Claimant as a "Category A Confidential Document", and **Category B and C Confidential Documents** shall have corresponding meanings.
 - (b) **"Confidential Document"** means, collectively, Category A Confidential Documents; Category B Confidential Documents and Category C Confidential Documents.
 - (c) **"Confidential Information"** means each Confidential Document, the contents thereof and information contained therein or information derived or notes taken or reports or other documents generated therefrom, including copies of such additional documents.
 - (d) **"Confidentiality Claimant"** means, in respect of particular Confidential Information, the party who made a claim of confidentiality in respect of that information.
 - (e) **"Legal Representatives"** means the external Australian solicitors and barristers representing a party in this Proceeding.

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- (f) "Proceeding" means Copyright Tribunal proceeding No. 1 of 2021 and any judicial review of the Tribunal's decision in that proceeding.
- (g) "Related Body Corporate" has the meaning given to that term in section 9 of the *Corporations Act 2001* (Cth).
- (h) "Support Staff" means:
 - (i) administrative and secretarial staff; and
 - (ii) staff of external printing and document management vendors retained by Legal Representatives who need to handle documents containing Confidential Information.

2 Each of the Confidentiality Claimants agrees that:

- (a) in designating a Confidential Document as a Category A; Category B; or Category C Confidential Document, it will not seek a higher classification of confidentiality than is warranted having regard to the commercial sensitivity of the Confidential Information and all other relevant circumstances; and
- (b) in the event that a party challenges the categorisation of a Confidential Document (Challenging Party):
 - (i) within 5 business days of receipt of a request in writing by the Challenging Party, the Confidentiality Claimant must provide a written explanation for the basis for the proposed categorisation, including the purported harm that it will suffer if the Confidential Document does not receive that categorisation; and
 - (ii) if the Challenging Party and the Confidentiality Claimant are unable to agree on the appropriate categorisation of the Confidential Document, the Challenging Party may make an application to the Tribunal for a determination to resolve the dispute.

I, [INSERT NAME], [INSERT CAPACITY], of [INSERT ADDRESS] undertake to the Copyright Tribunal of Australia (Tribunal) and to the Confidentiality Claimant that unless the Tribunal otherwise orders:

- 3 I will keep the Confidential Documents and the Confidential Information confidential at all times and will establish and maintain effective security measures to safeguard them from unauthorised access or use.
- 4 I will not use the Confidential Documents, any copies of them or their contents for any purpose other than the conduct of the Proceeding.

- 5 I will promptly notify the external Australian solicitors of the Confidentiality Claimant if I become aware of any unauthorised use or disclosure of the Confidential Documents, or any notes, records, memoranda or other documents (including but not limited to any electronic versions thereof) created by me or any other person who has also provided an undertaking in this form, incorporating or referring to, or derived directly or indirectly from the Confidential Documents, or Confidential Information.
- 6 I will not disclose the Confidential Documents or Confidential Information to any person:
- (a) other than for the purpose of this Proceeding and only:
 - (i) in the case of Category A Confidential Documents, to:
 - (A) the Legal Representatives who have signed a copy of this undertaking;
 - (B) any independent expert witness retained in this Proceeding, notified to the Confidentiality Claimant in writing in advance, and who has signed a copy of this undertaking;
 - (C) Support Staff of the Legal Representatives who have signed a copy of this undertaking;
 - (ii) in the case of Category B Confidential Documents:
 - (A) the Legal Representatives who have signed a copy of this undertaking;
 - (B) any independent expert retained in this Proceeding, notified to the Confidentiality Claimant in writing in advance, and who has signed a copy of this undertaking;
 - (C) any nominated in-house legal counsel for APRA AMCOS who has been authorised to access Category B Confidential Documents and who has signed a copy of this undertaking;
 - (D) Support Staff of the Legal Representatives who have signed a copy of this undertaking;
 - (iii) in the case of Category C Confidential Documents:
 - (A) the Legal Representatives who have signed a copy of this undertaking;
 - (B) any independent expert retained in this Proceeding, notified to the Confidentiality Claimant in writing in advance, and who has signed a copy of this undertaking;

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(C) any nominated in-house legal counsel and/or up to 3 nominated instructing executives of:

- (1) any party; and/or
- (2) that party's Related Body Corporate, provided the identity of that Related Body Corporate is disclosed to the Confidentiality Claimant prior to the making of any disclosure,

who have been authorised, and have a genuine need for the purpose of the Proceeding, to access Category C Confidential Documents and who has signed a copy of this undertaking. For clarity, the total number of nominated instructing executives across a party and that party's Related Bodies Corporate shall not exceed 3;

(D) Support Staff of the Legal Representatives who have signed a copy of this undertaking;

- (b) other than to the Tribunal, Tribunal staff, any other person assisting the Tribunal or as ordered by the Tribunal;
- (c) other than as required by law; and
- (d) other than in accordance with any other agreement with the Confidentiality Claimant or its Legal Representatives.

7 If I am required to disclose the Confidential Documents or Confidential Information pursuant to paragraph 6(c) above, I will take all reasonable steps to preserve the confidentiality of the Confidential Documents or Confidential Information disclosed.

8 Upon completion of the Proceeding, and without limiting the obligations above, I shall at my election: (a) destroy; (b) deliver up (in the case of physical documents) to the external Australian solicitors of the Confidentiality Claimant (or in the case of independent experts and barristers, their instructing external Australian solicitors); or (c) store in a secure location, the Confidential Documents, or any notes, records, memoranda or other documents (including but not limited to any electronic versions thereof) incorporating or referring to, or derived directly or indirectly from, the Confidential Documents or Confidential Information.

9 This undertaking does not prevent me from disclosing material which is in the public domain or comes into the public domain, unless the material comes into the public domain because of a breach of this undertaking or any other obligation of confidentiality owed by any person to any Confidentiality Claimant.

10 I may vary this undertaking with the written consent of the Confidentiality Claimant or its Legal Representatives.

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- 11 The parties or I may apply to the Tribunal to seek orders or directions in respect of this undertaking.

Signature

Capacity

Date

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ANNEXURE 2

Copyright Tribunal of Australia
CT1 of 2021

AUSTRALASIAN PERFORMING RIGHT ASSOCIATION
LIMITED
AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS'
SOCIETY LIMITED
Referees

NETFLIX, INC
STAN ENTERTAINMENT PTY LTD
APPLE PTY LIMITED
NETWORK TEN ALL ACCESS PTY LTD
THE WALT DISNEY COMPANY (AUSTRALIA) PTY LIMITED
Respondents

CONFIDENTIALITY UNDERTAKING

In this undertaking:

- (a) **"ACCC"** means the Australian Competition and Consumer Commission.
- (b) **"Proceeding"** means Copyright Tribunal proceeding No. 1 of 2021 and any judicial review of the Tribunal's decision in that proceeding.
- (c) **"Confidential Documents"** means the Confidential Annexures and Addendum to the APRA AMCOS Position Paper in this Proceeding
- (d) **"Confidentiality Claimant"** means, in respect of particular Confidential Information, the party who made a claim of confidentiality in respect of that information (which is not confined to the Parties in this Proceeding).
- (e) **"Confidential Information"** means any information in the Confidential Documents.
- (f) **"Legal Representatives"** means the external Australian solicitors and barristers representing a Party.
- (g) **"Party"** means any party to the Proceedings.

I, [INSERT NAME], [INSERT CAPACITY AT ACCC], of [INSERT ADDRESS] undertake to the Copyright Tribunal of Australia (Tribunal) and to the Confidentiality Claimant that unless the Tribunal otherwise orders:

- 1 I will keep the Confidential Documents and the Confidential Information confidential at all times and will establish and maintain effective security measures to safeguard them from unauthorised access or use.

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- 2 I will not use the Confidential Documents, any copies of them or their contents for any purpose other than the conduct of the Proceeding.
- 3 I will promptly notify the external Australian solicitors for APRA AMCOS if I become aware of any unauthorised use or disclosure of the Confidential Documents, or any notes, records, memoranda or other documents (including but not limited to any electronic versions thereof) created by me or any other person who has also provided an undertaking in this form, incorporating or referring to, or derived directly or indirectly from the Confidential Documents, or Confidential Information.
- 4 I will not disclose the Confidential Documents or Confidential Information to any person:
 - (a) other than for the purpose of this Proceeding and only to any nominated officer at the ACCC who is responsible for the ACCC's statutory functions with respect to Copyright Tribunal proceedings under the *Copyright Act 1968* (Cth) who has signed an undertaking in the same terms as this undertaking;
 - (b) other than to the Tribunal, Tribunal staff, any other person assisting the Tribunal or as ordered by the Tribunal;
 - (c) other than as required by law;
 - (d) other than the Legal Representatives of each Party who have signed a confidentiality undertaking in this Proceeding.
- 5 If I am required to disclose the Confidential Documents or Confidential Information pursuant to paragraph 4(c) above, I will take all reasonable steps to preserve the confidentiality of the Confidential Documents or Confidential Information disclosed.
- 6 Upon completion of the Proceeding, and without limiting the obligations above, I shall at my election: (a) destroy; (b) deliver up (in the case of physical documents) to the external Australian solicitors of the Confidentiality Claimant; or (c) store in a secure location, the Confidential Documents, or any notes, records, memoranda or other documents (including but not limited to any electronic versions thereof) incorporating or referring to, or derived directly or indirectly from, the Confidential Documents or Confidential Information.
- 7 This undertaking does not prevent me from disclosing material which is in the public domain or comes into the public domain, unless the material comes into the public domain because of a breach of this undertaking or any other obligation of confidentiality owed by any person to any other person.
- 8 I may vary this undertaking with the written consent of the Confidentiality Claimants with respect to its Confidential Information or its external Australian solicitors and barristers.

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- 9 A Confidentiality Claimant or I may apply to the Tribunal to seek orders or directions in respect of this undertaking.

Signature

Capacity

Date