

COMPETITION TRIBUNAL

IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an Application by Stargrove Entertainment Inc. for an Order pursuant to section 103.1 granting leave to make application under sections 75, 76 and 77 of the *Competition Act*;

AND IN THE MATTER OF an Application by Stargrove Entertainment Inc. for an Interim Order pursuant to section 104 of the *Competition Act*;

BETWEEN:

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

November 20, 2015
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Jos LaRose for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT

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STARGROVE ENTERTAINMENT INC.

Applicant

- and -

**UNIVERSAL MUSIC CANADA INC.,
SONY/ATV MUSIC PUBLISHING CANADA CO.,
SONY MUSIC ENTERTAINMENT CANADA INC.,
ABKCO MUSIC & RECORDS, INC.,
CASABLANCA MEDIA PUBLISHING, and
CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.**

Respondents

**WRITTEN REPRESENTATIONS OF THE RESPONDENT
UNIVERSAL MUSIC CANADA INC.
IN RESPONSE TO THE APPLICATION FOR LEAVE
PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT***

November 20, 2015

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I. OVERVIEW

1. Universal Music Canada Inc. (of which Universal Music Publishing Group Canada is a division) (“**Universal**”), opposes the application of Stargrove Entertainment Inc. (“**Stargrove**”) to the Competition Tribunal (the “**Tribunal**”) for leave to apply for orders under sections 75, 76 and 77 of the *Competition Act*.¹

2. Stargrove’s application for leave to initiate a proceeding against Universal must fail as Stargrove has *no* chance of obtaining any order from the Tribunal against Universal or against Canadian Musical Reproduction Rights Agency Ltd. (“**CMRRA**”) which, in some cases, facilitates the issuance of non-exclusive licences on behalf of Universal.

- (a) The only licences Stargrove seeks are non-exclusive licences in musical works under section 3(1)(d) of the *Copyright Act*.² The copyrights in the musical works in issue subsist and are not in the public domain. The owners of these copyrights have the exclusive right, in their sole discretion and for any reason, or no reason, to grant or to withhold the granting of such licences.
- (b) Parliament expressly abolished compulsory licensing of the mechanical right in musical works under the *Copyright Act*. When the *Competition Act*, including section 32 thereof, is read together with the *Copyright Act*, it is clear that Parliament never intended to confer on the Tribunal any right to grant licences to copyrights, especially licences to the mechanical rights in musical works.
- (c) The Federal Court of Appeal, the Tribunal and the Competition Bureau (the “**Bureau**”) have all recognized that the general provisions of the *Competition Act*, which include sections 75, 76 and 77, do not apply to the mere exercise of intellectual property rights. The refusal to grant Stargrove a licence to make CDs which reproduce the copyright works cannot be a reviewable practice under sections 75, 76, or 77 of the *Competition Act*.
- (d) Stargrove’s proposed order, which would require CMRRA to accept it as a customer under CMRRA’s usual trade terms, would not give Stargrove any relief

¹ R.S.C., 1985, c. C-34 (“*Competition Act*”).

² R.S.C., 1985, c. C-42, (“*Copyright Act*”).

as Universal retains the right for any reason, or no reason, to refuse to authorize CMRRA to grant a licence to Stargrove.

- (e) A non-exclusive licence is not a “product” within the meaning of sections 75, 76, or 77 of the *Competition Act*.
- (f) Stargrove alleges that CMRRA only has a right to issue non-exclusive licences on behalf of music publishers. As CMRRA does not supply any products, no order can be made against CMRRA or to require Universal to compel CMRRA to issue any licence on its behalf.

3. Further, in *Warner Music*, the Tribunal, on nearly identical facts, made two determinations that are directly applicable here, determinations which are not distinguishable on the facts alleged by Stargrove:

- a. First, “the right granted by Parliament to exclude others is fundamental to intellectual property rights and cannot be considered to be anti-competitive, and there is nothing in the legislative history of section 75 of the Act which would reveal an intention to have section 75 operate as a compulsory licensing provision for intellectual property”.
- b. Second, that a copyright is not a “product” with respect to section 75 refusal to deal, meaning no order could be made.³

4. The principles of *Warner Music* apply equally to section 76 price maintenance and section 77 exclusive dealing as well; the *Competition Act* would function as a compulsory licence regime if a refusal to grant a licence to reproduce musical works to make CDs was a violation of those provisions or if a copyright licence constituted a “product” under sections 76 and 77.

5. Even if Universal’s exercise of its intellectual property rights could be the subject of an order under sections 75, 76 or 77 (which it could not be), Stargrove has still not met the requirements for leave, including the following:

³ *Director of Investigation and Research v. Warner Music Canada Ltd.*, [1997] 78 C.P.R. (3d) 321 at para. 30 (“*Warner Music*”).

- a. Stargrove has not demonstrated that it is directly affected, let alone that its business is directly and substantially affected.
 - b. With respect to price maintenance, Stargrove does not meet the requirement for a resale (Universal grants mechanical licences, Stargrove sells CDs) and does not provide any evidence that it was discriminated against due to its low pricing policy.
 - c. With respect to exclusive dealing, Stargrove has not alleged the required elements.
 - d. Stargrove has not provided evidence to demonstrate that there is a likely or actual adverse effect on competition in any market. Rather, even under its own narrow market definition, Stargrove leads evidence of competition.
6. In short, there are multiple compelling reasons why there is no basis to grant Stargrove's application for leave.

II. CONCISE STATEMENT OF FACTS

7. Stargrove appears not to have had any business before 2015.
8. In January, 2015, Stargrove manufactured some CDs which it sold to Walmart. In so doing, Stargrove did not obtain the required mechanical licences from the Respondents.
9. When some of the Respondents took issue with the Stargrove's actions, Stargrove ultimately responded with this Application, which seeks, in substance to impose a compulsory licence regime on the Respondents.
10. CMRRA is a non-exclusive musical licensing agent that represents music rights holders, including individual song writers and large music publishers. It facilitates the granting of non-exclusive mechanical licences to musical works of publishers who own or have the right to licence those musical works.
11. Stargrove manufactured and distributed CDs containing musical works that required mechanical licences from the Publishers. Under CMRRA's terms, CDs cannot be made until the applicable licence is actually issued. Stargrove's evidence acknowledges that obtaining the

necessary mechanical licences is required before pressing a CD. Stargrove never had such licences before engaging in selling the CDs for which it now seeks licences.⁴

12. Stargrove's evidence refers to a practice of manufacturing CDs before obtaining required licences in the context of the Mechanical Licensing Agreement ("MLA") scheme.⁵ However, Stargrove attempted to utilize the pay-as-you-press system; Stargrove was not and is not party to an MLA with CMRRA, therefore, the practice, such as it may exist, of making copies before a licence under the MLA is issued, is irrelevant in this case. In any event, the MLAs entered into evidence by Stargrove state at section 2(c) that CMRRA will follow publishers' instructions even during the term of the MLA with respect to "Non-Authorized Compositions", for which licences are not granted.⁶

13. At the time Stargrove manufactured and distributed the CDs in issue, it had not obtained the licences required to do so.⁷ It effectively now seeks an order from the Tribunal to enable it to get into a business it had never lawfully engaged in before.

14. Universal adopts the submissions of CMRRA on the numerous deficiencies in the purported expert report of Mario Bouchard. Universal also adopts CMRAA's submission that Stargrove's reliance, in this case, on a 2009 affidavit of David Basskin from another proceeding is misplaced.

III. STATEMENT OF THE POINTS IN ISSUE

15. There are two points in issue in this application:

- a. Has Stargrove demonstrated reason to believe that the actions of Universal could be subject to an order under sections 75, 76 or 77 of the *Competition Act*;

⁴ Stargrove alleges that it had given CMRRA a cheque to cover some "pay-as-you-press" licences. The cheque was cashed and then refunded by CMRRA. Perusini Affidavit at paras. 31-35, 45 (Application Record, pp. 93, 95). However, under CMRRA's standard trade terms, no licence is effective until it is actually issued on behalf of the applicable music publisher. Affidavit of Mario Bouchard, sworn August 27, 2015 ("Bouchard Affidavit"), Exhibit A, para 29 (Application Record, p. 359). Stargrove's own evidence, in quoting from CMRRA's website, is that a pay-as-you-press-licence is not valid until the licence is issued, even if payment has been made. Perusini Affidavit, Exhibit 2 (Application Record, p. 119, 120, 122, 131). See also paras. 91 to 93 below.

⁵ Bouchard Affidavit, Exhibit A, para. 28 (Application Record, p. 359).

⁶ Perusini Affidavit, Exhibits 34 and 35 (Application Record, pp. 252 and 292-293); Bouchard Affidavit, Exhibit A, Appendix 3 (Application Record, p. 427).

⁷ *Copyright Act*, s. 3(1)(d).

- b. Has Stargrove demonstrated reason to believe that it is directly and substantially affected in its business by the actions of Universal and/or the Respondents.

IV. CONCISE STATEMENT OF SUBMISSIONS

A. Standard For Granting Leave

- 16. The test for granting leave is set out in sections 103.1 (7) and (7.1) as follows:

(7) Granting leave to make application under section 75 or 77 – the Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicant's business by any practice referred to in one of those sections that could be subject to an order under that section.

(7.1) Granting leave to make application under section 76 – The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section.

- 17. There are two parts to the tests:

- a. First, the Applicant must provide sufficient credible evidence to demonstrate reason to believe that the Applicant is “directly affected” (subsection 7.1) or “directly and substantially affected in the Applicant’s business” (subsection 7) by the conduct alleged.
- b. Second, the Applicant must provide sufficient credible evidence to demonstrate reason to believe that the conduct alleged “could” be subject to an order under sections 75, 76 or 77. That is a question of law which the Tribunal must find in the Applicant’s favour and all of the elements must be met. At a minimum, the Applicant must demonstrate that if the facts alleged in its Application are proved to be true, the Tribunal would have the jurisdiction under sections 75, 76 or 77 to make the order sought. The Tribunal cannot grant leave, and require respondents

to incur substantial costs, where no order can be granted on the basis of the facts before the Tribunal on the leave application.⁸

B. No Order Could Be Made Under the *Competition Act*

(a) ***The Right Not to License a Copyright for any Reason is Within the Exclusive Rights of Publishers***

18. The Respondent Publishers in this proceeding are copyright holders who are granted a series of exclusive rights under the *Copyright Act*. These rights give the copyright owners the sole right to exercise, and to restrain others from exercising, specific statutory rights in musical works.⁹ The specific right for which Stargrove seeks a licence is the right under section 3(1)(d) of the *Copyright Act* to make any contrivance (e.g., a CD) from which the musical work can be mechanically reproduced or performed.

19. The *Copyright Act* is statutory law that simply creates rights and obligations upon the terms and in the circumstances set out in the statute.¹⁰ The effect of such rights, like rights granted under the *Patent Act* and the *Trade-Marks Act*,¹¹ is to create exclusive economic rights that can be licensed, or not licensed, to others for any reason or no reason.¹² This principle applies to section 3(1)(d) of the *Copyright Act* which the Supreme Court of Canada has confirmed applies to enable the copyright holder to refuse to authorize the making of sound recordings of musical works (among other things) even if not prejudicial to the copyright holder.¹³

20. In 1988 Parliament expressly abolished a system of compulsory licensing of the mechanical right in musical works.¹⁴ It did so following a 1985 report of a *Subcommittee of the*

⁸ *National Capital News Canada v. Milliken* 2002 Competition Tribunal 41 at paras. 14, 29-30, aff'd 2004 FCA 27; *Symbol Technologies Canada ULC v. Barcode Systems Inc.*, 2004 2 FCA 339 at para. 16.

⁹ John S. McKeown, Fox, *Canadian Law of Copyright and Industrial Designs*, 3d ed (Scarborough: Thomson Carswell, 2000) at 2.

¹⁰ *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357 at p. 11 (cited to QuickLaw).

¹¹ See the authorities referred to in paras. 24 to 30 below.

¹² *Director of Investigation and Research v. Warner Music Canada Ltd.*, [1997] 78 C.P.R. (3d) 321 at para. 32: "The Copyright Act is similar to the Trade-marks Act, in that it allows the trade-mark owner to refuse to licence and it places no limit on the sole and exclusive right to licence." See, *Euro-Excellence Inc. v. Kraft Canada Inc.*, [2007] 3 S.C.R. 20 at paras. 7-9, 112-113 in which the Supreme Court refused to adopt a principle that copyright rights could be limited to those justified by legitimate economic interests.

¹³ *Bishop v. Stevens*, [1990] 2 SCR 467, [1990] S.C.J. No. 78 at paras. 27-28 (cited to QuickLaw).

¹⁴ *An Act to amend the Copyright Act and to amend other Acts in consequence thereof*, R.S.C., 1985, c. 10 (4th Supp) [S.C. 1988, c. 15, assented to 8th June 1988].

House of Commons Standing Committee on Communications and Culture which examined copyright revision and reassessed the need for the compulsory licence for mechanical reproduction. In its report entitled *A Charter of Rights for Creators*,¹⁵ the Subcommittee stated (at pp. 33-35):

In its approach to this issue, as with the other exceptions to copyright that it has considered, the Subcommittee returns to its basic philosophy: copyright law is a matter of the property rights of creators and any derogation from those rights must be for strong public policy reasons.

There is no question that the compulsory licence constitutes such a derogation. ***It takes away a copyright owner's right to control who will record a work and under what circumstances. It takes away the right to negotiate the most favourable terms possible.*** In effect, the compulsory licence forces a seller to a buyer, and arbitrarily sets the price of the product.

The Sub-Committee thinks...that the diversity of musical works fostered by the present system would not be jeopardized should the compulsory licence be abolished....A system which treats publishers and composers of musical works differently from other creators should be changed...Composers of musical works should have the same exclusive rights to control the use of their works as provided to the creators of other works. [emphasis added]

21. The Sub-Committee also found that compulsory mechanical licences were not required to protect the public from monopolies. Further, it found that a compulsory mechanical licence created discrimination between publishers and composers of musical works and other creators.¹⁶

22. By abolishing compulsory mechanical licences Parliament clearly indicated and confirmed its intention to guarantee that owners of copyrights in musical works would have the unrestricted right either to license or to refuse to license the right to make sound recordings in their sole discretion.

23. The rights and exceptions to infringement set out in the *Copyright Act* reflect a balance prescribed by Parliament between “the public interest in promoting the encouragement and

¹⁵ House of Commons, Standing Committee on Communications and Culture, *A Charter of Rights for Creators* (Ottawa: Minister of Supply & Services, 1985) at pp. 33-35.

¹⁶ *Ibid* at pp. 34- 35.

dissemination of works of the arts and intellect and obtaining a just reward for the creator.”¹⁷ The Supreme Court in *Bishop v Stevens* recognized that the exclusive right conferred by section 3(1)(d) reflects a balance chosen by Parliament, a balance that the Supreme Court refused to unilaterally change to permit temporary copying of musical works for the purposes of broadcasting (ephemeral copying) because “the court may not be in a position to appreciate fully the economic and policy issues” and possible unintended consequences of making changes to the sub-section not enacted by Parliament.¹⁸ Stargrove’s Application asks the Tribunal to derogate from the rights of copyright holders to a much greater extent than the copying the Supreme Court refused to permit in the *Bishop* case. It is essentially asking for an order that reverses the decision of Parliament to abolish compulsory licensing of musical works for making sound recordings.

(b) *Universal’s Mere Exercise of an Intellectual Property Right Is Not Subject to the General Provisions of the Competition Act*

24. Since the refusal of owners of the copyrights in musical works to grant a licence to make CDs is merely an exercise of the exclusive rights of the copyright holders, this mere exercise of these rights cannot be the subject of an order under sections 75, 76, or 77 of the *Competition Act*.

25. The Bureau’s *Intellectual Property Enforcement Guidelines* (“IPEGs”) state that the general provisions of the *Competition Act*, which include sections 75, 76 and 77, are not triggered “from the mere exercise of the IP right”.¹⁹ In fact, the IPEGs state that:

The unilateral exercise of the IP right to exclude does not violate the general provisions of the Act no matter to what degree competition is affected. To hold otherwise could effectively nullify IP rights, impair or remove the economic, cultural, social and educational benefits created by them, and be inconsistent with the Bureau's underlying view that IP and competition law are generally complementary.²⁰ [emphasis added]

¹⁷ *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 283 at para. 40.

¹⁸ *Bishop v Stevens*, [1990] 2 S.C.R. 467, [1990] S.C.J. No. 78 at para. 31 (cited to QuickLaw).

¹⁹ Canada, Competition Bureau, *Intellectual Property Enforcement Guidelines*, (Ottawa: Communications and Marketing Branch, Industry Canada, 2014), at 4.2.1 General Provisions (“*Intellectual Property Enforcement Guidelines*”).

²⁰ Canada, Competition Bureau, *Intellectual Property Enforcement Guidelines*, (Ottawa: Communications and Marketing Branch, Industry Canada, 2014), at 4.2.1 General Provisions (“*Intellectual Property Enforcement Guidelines*”).

26. The Federal Court of Appeal has cited a prior iteration of the IPEGs with approval in a case involving patent rights stating:

The mere exercise of an IP right is not cause for concern under the general provisions of the Competition Act. **The Bureau defines the mere exercise of an IP right as the exercise of the owner's right to unilaterally exclude others from using the IP.**²¹
[emphasis added]

27. As noted by the Ontario Court of Appeal in another case involving patent rights, “[t]he distinction between intellectual property rights and unlawful anti-competitive acts is well-established in competition law.”²²

28. For example, in the abuse of dominance provisions of the *Competition Act*, subsection 79(5) expressly states that the exercise of an intellectual property right is not an anti-competitive act. Subsection 79(5) states:

For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.²³

29. In a case involving trade-marks, the Tribunal held that subsection 79(5) of the *Competition Act* explicitly recognizes that “something more than the mere exercise of statutory rights, even if exclusionary in effect, must be present before there can be a finding of misuse” of an intellectual property right.²⁴

30. The IPEGs, in a view echoed by the Federal Court of Appeal,²⁵ explain that only section 32 of the *Competition Act*, which requires intervention from the Attorney General of Canada, can apply where there has been a mere exercise of an intellectual property right:

Only section 32, in the special remedies part of the Act, contemplates the possibility that the mere exercise of an IP right may cause concern and result in the Bureau seeking to have the

²¹ *Apotex Inc. v. Eli Lilly and Company*, 2005 FCA 361 at para. 34.

²² *Harris v. Glaxosmithkline Inc.*, 2010 ONCA 872 at para. 19.

²³ *Competition Act*, s. 79(5).

²⁴ *Director of Investigation and Research v. Tele-Direct Inc.*, [1997] 73 C.P.R. (3d) 1 at para. 65.

²⁵ *Apotex Inc. v. Eli Lilly and Company*, 2005 FCA 361 at paras. 28 and 34.

Attorney General bring an application for a special remedy to the Federal Court.²⁶

31. Stargrove's allegation that the Respondents refused to grant licences does not constitute reviewable conduct under the sections in issue in this case. It constitutes *nothing more* than the mere exercise of an intellectual property right.

32. Accordingly, it is clear that only section 32 of the *Competition Act*, which requires an application from the Attorney General of Canada, could possibly be used to obtain orders that compel copyright holders to grant licences to their musical works and orders under section 75, 76 or 77 are not available.

(c) ***The Tribunal Has Upheld Intellectual Property Holders' Right to Exclude***

33. In *Warner Music*, the Tribunal held that no provision in the *Copyright Act* limits the copyright holder's sole and exclusive right to license and, thus, that copyright holders have the right to refuse to license.²⁷

34. In *Tele-Direct*, the Tribunal made the same finding with respect to trade-mark licensing, which it has found to be similar to copyright,²⁸ holding that discriminatory licensing of the respondent's trade-mark by a publisher was not anticompetitive and was specifically provided for under the *Trade-marks Act*:

The respondents' refusal to licence their trade-marks falls squarely within their prerogative. Inherent in the very nature of the right to licence a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to grant a licence; selectivity in licensing is fundamental to the rationale behind protecting trade-marks.²⁹

35. Moreover, in exercising its exclusive rights, a copyright owner may refuse to license a particular individual or organization for any reason. Even when presented with evidence to suggest an intellectual property owner's refusal to license is motivated by a competition rationale, the Tribunal has held the owner is entitled to refuse to grant a licence:

²⁶ *Intellectual Property Enforcement Guidelines*, at 4.2.2 Matters Outside the General Provisions — Section 32.

²⁷ *Director of Investigation and Research v. Warner Music Canada Ltd.* [1997] 78 C.P.R. (3d) 321 (Comp. Trib.) at para. 20.

²⁸ *Director of Investigation and Research v. Warner Music Canada Ltd.* [1997] 78 C.P.R. (3d) 321 (Comp. Trib.) at para. 32.

²⁹ *Director of Investigation and Research v. Tele-Direct Inc.*, [1997] 73 C.P.R. (3d) 1 (Comp. Trib.) at para. 66.

While the evidence suggests that Tele-Direct is motivated, at least in part, by competition in its decision to refuse to licence its trade-marks, the fact is that the *Trade-marks Act* allows trade-mark owners to decide to whom they will licence their trade-marks. The respondents' motivation for their decision to refuse to licence a competitor becomes irrelevant as the *Trade-marks Act* does not prescribe any limit to the exercise of that right.³⁰

36. Even accepting as true all of the allegations of Stargrove (which are not admitted) in refusing to license Stargrove, the Publishers are simply exercising their right to exclude, which cannot be considered anti-competitive under sections 75, 76, or 77.³¹ Competition law does not treat a refusal to deal or license as anti-competitive in itself,³² and the Tribunal has confirmed this view. As such, there is no basis for an order under sections 75, 76 or 77.

(d) ***Warner Music Is Dispositive of This Case***

37. *Warner Music* is a straightforward application of the principles articulated in Paragraphs 18 to 36 above. Its facts are very similar to this case. It also involved a refusal to grant copyright licences to make sound recordings. The Tribunal held that copyright confers an exclusive intellectual property right that includes the right to grant or not grant a licence. Without “something more”, the exercise of such a right can only be subject to section 32 of the *Competition Act*, which requires intervention by the Attorney General of Canada.

38. In *Warner Music*, the Tribunal also held that “exclusive legal rights over intellectual property cannot be a ‘product’” under section 75.³³ Since a copyright is not a “product”, it is not possible to make an order for “suppliers of the product in the market to accept the person as a customer”. Further, interpreting copyright licences as a “product” in this context would create a compulsory licence, which was expressly rejected by the Tribunal.

39. According to the Tribunal:

Having considered the submissions discussed here and the additional points in the parties' memoranda, the Tribunal has concluded that on the facts of this case the licences are not a

³⁰ *Director of Investigation and Research v. Tele-Direct Inc.*, [1997] 73 C.P.R. (3d) 1 (Comp. Trib.) at para. 68.

³¹ *Harris v. Glaxosmithkline Inc.*, 2010 ONCA 872 at para. 19, citing *Director of Investigation and Research v. Warner Music of Canada Ltd.* (1997), 78 C.P.R. (3d) 321 (Comp. Trib.), at p. 9.

³² David Vaver, *Intellectual Property Law*, 2d ed (Toronto: Irwin Law, 2011) at 588.

³³ *Director of Investigation and Research v. Warner Music Canada Ltd.* [1997] 78 C.P.R. (3d) 321 (Comp. Trib.) at para. 30.

product as that term is used in section 75 of the Act, because on a sensible reading section 75 does not apply to the facts of this case. Although a copyright licence can be a product under the Act, it is clear that the word "product" is not used in isolation in section 75, but must be read in context. The requirements in section 75 that there be an "ample supply" of a "product" and usual trade terms for a product show that the exclusive legal rights over intellectual property cannot be a "product" -- there cannot be an "ample supply" of legal rights over intellectual property which are exclusive by their very nature and there cannot be usual trade terms when licences may be withheld. The right granted by Parliament to exclude others is fundamental to intellectual property rights and cannot be considered to be anti-competitive, and there is nothing in the legislative history of section 75 of the Act which would reveal an intention to have section 75 operate as a compulsory licensing provision for intellectual property.³⁴

40. The Tribunal also expressly accepted the respondents' submissions in that case that, when considered in the context of sections 32 and 79(5) of the *Competition Act*, the term "product" in section 75 cannot be read to include these copyright licences.³⁵

41. Sections 76 and 77 were not expressly considered in *Warner Music*, but the same principles apply. Where parties are simply exercising their intellectual property rights, those rights should not be considered a "product" for the purpose of making a remedial order.

³⁴ *Ibid* para 30.

³⁵ *Ibid* paras. 25-28 "The submissions approved by the Tribunal included the following:

On the other hand, the respondents say that the language of section 75 has been "tortured" by the Director to force it to apply to this case. They submit that the Director's interpretation of the section ignores the respondents' copyright rights. For example, licences are only in ample supply if one assumes that the respondents do not have the right to refuse to grant them. Similarly, to find that usual trade terms may exist ignores the reality that Columbia House (Canada) is the only licensee in Canada, and that Canada is the market as defined by the Director. Furthermore, even if granted, any future licences must be negotiated. In these circumstances, the respondents submit that one could not find that there are usual trade terms.

The respondents also counter the Director's position by saying that nowhere in the Act is the Tribunal given the power to override the simple exercise of intellectual property rights and that, for this reason, any grant of such a power must be based on clear and unequivocal language. This is particularly true in their submission in view of the provisions of section 32 of the Act. Section 32 deals, inter alia, with situations in which the use of exclusive copyright rights prevents, or lessens, unduly competition in the manufacture or sale of an article. In such situations, jurisdiction is given to the Federal Court of Canada to make a wide range of orders including directing the grant of a licence.

Section 32 differs from section 75 in that: (i) it is specifically directed to the use of copyright rights; (ii) a competition impact test must be met before an order will be made; (iii) the Attorney General of Canada and not the Director is the applicant and; (iv) there is a defence based on treaty provisions....

The respondents also rely on subsection 79(5) of the Act, which deals with abuse of dominant position and which provides, inter alia, that acts engaged in only pursuant to the exercise of rights under the Copyright Act are not anti-competitive acts. In the respondents' submission, because Parliament expressly excluded the simple exercise of copyright rights from the definition of anti-competitive acts in section 79, one cannot reasonably find jurisdiction over such matters in section 75 without a clear statement to that effect.

42. Moreover, the Tribunal accepted the following submissions of the respondents in *Warner Music*, which apply equally to sections 76 and 77:

The respondents argue that, in the absence of clear language, it would be wrong to conclude that the Tribunal, as an inferior tribunal, has been given the power to ignore intellectual property rights and order the respondents to grant what are, in effect, compulsory licences in favour of BMG (Canada) when the Federal Court can make such an order only after the applicant meets a competition impact test and only after any defences based on international treaty rights are considered.³⁶

43. Universal has merely exercised its intellectual property rights, without “something more”. As such, Tribunal precedent dictates that section 75 does not apply, and that sections 76 and 77 do not apply either.

44. Under the *Competition Act*, there is only one provision that provides for the granting of a copyright licence. Pursuant to section 32, only the Federal Court, upon application from the Attorney General, may grant a copyright licence under limited circumstances. Section 32 is not at issue in this case. The explicit right conferred by section 32 further establishes that Parliament did not intend to create any such rights under sections 75, 76 or 77 of the *Competition Act*.

45. Even though *Warner Music* is fatal to Stargrove’s Application, it is only referenced in a footnote to Stargrove’s Factum. Stargrove apparently attempts to distinguish *Warner Music* on two bases, neither of which is valid:

- a. “Unlike other forms of intellectual property which may not ordinarily meet these criteria, the right to reproduce songs (through mechanical licences) is subject to standard rates and usual supply terms...”³⁷ In fact, in *Warner Music*, as in this case, there had been licences granted to others, the terms of which were known; and
- b. “Stargrove is being uniquely targeted and discriminated against by CMRRA and the Title Holders...with the various Respondents banding together with CMRRA to shut Stargrove out...”³⁸ While Stargrove has not provided evidence of these allegations, they are

³⁶ *Ibid* para. 28.

³⁷ Stargrove’s Factum at para. 54.

³⁸ Stargrove’s Factum at paras. 54 and 68.

irrelevant in this context: none go to any of the elements of sections 75, 76 or 77 of the *Competition Act*.

46. The correctness of the reasoning in the *Warner Music* case that section 75 cannot be used to grant compulsory licences to the mechanical rights in musical works is bolstered by the requirement that the *Competition Act* and the *Copyright Act* are required to be read together. Parliament is presumed to intend harmony, coherence, and consistency between these two statutes and where multiple interpretations of sections 75, 76, or 77 of the *Competition Act* are possible, the presumption of coherence requires that these provisions be read together with the scheme of rights set out in the *Copyright Act* so as to avoid conflict.³⁹

47. In the *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168* case, the Supreme Court struck down a “value for signal” regime, a licensing scheme created by the Canadian Radio-television and Telecommunications Commission (“CRTC”). Central to the decision was the Court’s requirement that the *Broadcasting Act* and the *Copyright Acts* be read together. The *Copyright Act*, as a matter of Parliament’s policy, did not create any right that prevented the retransmission of local television signals. The CRTC under the *Broadcasting Act* had a wide authority to issue licences and to attach conditions thereto. However, the Supreme Court ruled that the presumption of coherence between related Acts of Parliament required avoiding an interpretation that would introduce conflict into the statutory scheme. In that case, the presumption of coherence required that if the CRTC’s proposed regulatory regime would create conflict with the specific expressions of Parliament’s intent under the *Copyright Act*, it must be *ultra vires*.

In my view, s. 21(1) represents the expression by Parliament of the appropriate balance to be struck between broadcasters’ rights in their communication signals and the rights of the users, including BDUs, to those signals. It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in the *Copyright Act*, specifically excluding BDUs from the scope of the broadcasters’ exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime. The value for signal regime would upset the aim of the *Copyright Act* to effect an appropriate “balance between promoting the public

³⁹ *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489 at paras. 60-62. See also, *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at paras. 44-52.

interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator” (Théberge, at para. 30).⁴⁰

48. It is clear that Parliament’s policy was to abolish Canada’s compulsory licensing regime. The provisions of the *Competition Act* including sections 75, 76, and 77 must be read in light of Parliament’s clear intent. They cannot be used to indirectly restore precisely what Parliament abolished.⁴¹ Yet, that would be exactly the effect of a decision by the Tribunal that a music publisher’s decision not to grant mechanical licences to a given record label is a violation of the *Competition Act*.

49. Further, in the *Broadcasting Regulatory* case, the Supreme Court also invalidated the CRTC’s proposed licensing scheme because it conflicted with section 89 of the *Copyright Act* which states: “No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament”. The Court found that the “deliberate use of the words “this Act or any other Act of Parliament” rather than “this Act or any other enactment” means that the right to copyright must be found in an Act of Parliament and not in subordinate legislation promulgated by a regulatory body” such as the CRTC.⁴² An order under sections 75, 76 or 77 of the type requested by Stargrove would similarly create a form of implicit compulsory licence that Parliament expressly abolished.

(e) The Elements of Sections 75, 76 and 77 Are Not Made Out

(i) Refusal To Deal (Section 75)

⁴⁰ *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168* [2012] 3 S.C.R. 489 at paras. 34-79, see especially para. 67.

⁴¹ This was also the holding of the Tribunal in the *Warner Music* case which accepted the submissions of the respondent that “it would be wrong to conclude that the Tribunal, as an inferior tribunal, has been given the power to ignore intellectual property rights and order the respondents to grant what are, in effect, compulsory licences in favour of BMG (Canada), quoted above in para. 42.

⁴² *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168* [2012] 3 S.C.R. 489 at paras. 80-81: “Contrary to s. 89, the value for signal regime would create a new type of copyright by regulation or licensing condition. Sections 2 and 21 of the Copyright Act define copyright in a communication signal to include the sole right to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast. Authorizing simultaneous retransmission is then an aspect of copyright, although the right under the Copyright Act is limited to authorizing only specific defined entities, other broadcasters. In light of the legislative history discussed above, this limitation on copyright appears to be the result of a specific Parliamentary choice not to change the balance struck in the Copyright Act between broadcasters and BDUs. The value for signal regime would create a new right to authorize retransmission (and correspondingly prevent retransmission if agreement as to compensation is not achieved), in effect, amending the copyright conferred by s. 21. Thus the value for signal regime would create a new type of copyright and would do so without the required Act of Parliament, contrary to s. 89.”

50. Stargrove has not established that the actions of Universal could be the subject of an order under section 75 of the *Competition Act*.

51. Section 75(1) of the *Competition Act* provides that:

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,

(d) the product is in ample supply, and

(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

52. In *Warner Music*, the Tribunal explicitly and definitively concluded that a copyright licence cannot be the subject of an order under section 75.⁴³ Therefore, Stargrove's application for an order under section 75 must fail. Nonetheless, additional information follows on why Stargrove does not meet the elements of being directly and substantially affected in its business, or a likely adverse effect on competition.

(a) ***Stargrove's "Business" Is Not Substantially Affected***

⁴³ *Director of Investigation and Research v. Warner Music Canada Ltd.*, [1997] 78 C.P.R. (3d) 321 at para. 39.

53. Stargrove never had any business in making and selling CDs in the relevant market. At the time Stargrove manufactured and distributed the CDs in issue, it was unlicensed to do so. It effectively now seeks an order from the Tribunal to enable it to get into a new business it had never lawfully engaged in before. Further reasons why Stargrove does not meet this element are explained below in Paragraphs 90-106.

(b) *No Adverse Effect on Competition in a Market*

54. Stargrove has not led any evidence of an actual or likely adverse effect on competition in a market. Additionally, Stargrove has not provided any justification for its assertion that the relevant market is limited to CDs for which: “(i) the sound recording being marketed is in the public domain; (ii) the musical work fixed on the sound recording remains protected by copyright; and (iii) the recordings are of performances by artists who continue to be popular.”⁴⁴

55. Even if Stargrove’s market definition was correct (which it is not), Stargrove has not provided any information as to the size of the market or indication of its sales in comparison to the market as whole. Without leading this crucial information as evidence, there is no basis to draw a conclusion of an adverse effect on competition. The Application under this section must fail on this ground alone.

56. Stargrove led evidence that there are other sources of competition. Stargrove’s own employee, Jennifer Holt, states that there are other low-priced record labels, naming Madacy and St. Clair as examples.⁴⁵

57. Furthermore, there are other subcategories of CDs that should be included in the relevant market: (i) CDs of popular artists for which the musical work licence has fallen into the public domain as well, and (ii) other low-priced CDs with popular recent and current artists. Such CDs possess similar appeal and pricing to consumers as the Stargrove CDs in question.

58. As noted below, Stargrove essentially alleges a refusal by four music publishers, out of tens of thousands, to license 44 songs, out of, presumably, millions, to Stargrove. Stargrove cannot establish a substantial effect on its business, and certainly cannot establish an adverse effect on competition.

⁴⁴ Stargrove’s Concise Statement of the Economic Theory of the Case, paragraph 4.

⁴⁵ Perusini Affidavit, paragraph 44 (Application Record, p. 95) and Exhibit 12 (Application Record, p. 170).

(ii) Price Maintenance (Section 76)

59. Stargrove has not established that the actions of Universal could be the subject of an order under section 76 of the *Competition Act*.

60. Section 76 (i) of the *Competition Act* provides as follows:

76. (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that

(a) a person referred to in subsection (3) directly or indirectly

(i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or

(ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and

(b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.

61. As set out above, the exercise by the Publishers of their intellectual property rights can only be challenged by the Attorney General of Canada pursuant to section 32 of the *Competition Act*, not under section 76 or any other section of the *Competition Act*.

62. Additionally, while *Warner Music* did not expressly consider section 76, and predates the decriminalization of price maintenance in Canada, its principles directly apply. If “[t]he right granted by Parliament to exclude others is fundamental to intellectual property rights and cannot be considered to be anti-competitive”,⁴⁶ then it would be a perversion of Parliament’s intent to force the licensing of a copyright under section 76.

63. Section 76 also does not apply in this case because a copyright licence is not a product within the meaning of section 76. Subparagraph 76(1)(a)(ii), upon which Stargrove relies upon, refers to refusal to supply a “product”. The Bureau’s *Price Maintenance Enforcement*

⁴⁶ *Director of Investigation and Research* v. *Warner Music Canada Ltd.* [1997] 78 C.P.R.(3d) 321 at para. 30.

Guidelines make it clear that the “discrimination” references in subparagraph 76(1)(a)(ii) mean discrimination in respect of a “product”.⁴⁷

64. The Tribunal’s finding in *Warner Music* that copyright licences are not a “product” within the meaning of section 75 of the *Competition Act* in these circumstances, equally applies to section 76. Otherwise the very mischief that the Tribunal sought to avoid in section 75 could be achieved under section 76.

(a) ***Subsection 76(3) Does Not Assist Stargrove***

65. Paragraph 76(3)(c) can have no application on the facts asserted by Stargrove. Stargrove admits that CMRRA only has a right to facilitate the issuance non-exclusive licences on behalf of music publishers.⁴⁸ As CMRRA does not supply any products, and has no exclusive rights (or any rights) in any copyrights in issue, no order can be made against CMRRA or to require Universal to compel CMRRA to issue any licence on its behalf. The Application for leave to make a claim for relief under section 76 should be dismissed on this ground alone.

66. Moreover, it is clear from the wording of subsection 76(3) that while an order may be made against a person that has an exclusive right in a copyright, the nature of the order is limited to the supply of a “product” and not the granting of a licence. Subsection 76(3) must be read in the context of subparagraph 76(1)(a)(ii) and subsection 76(8), which require a “product”. Given this, and the inapplicability of the general provisions of the *Competition Act* to the mere exercise of intellectual property rights, subsection 76(3) can only apply where price maintenance conduct relating to a “product” is linked to intellectual property rights. For example, where a company selling computer chips that contains software owns the copyright in the software, but engages in price maintenance with respect to the sale of the chips (i.e., the “product”); in such an example, the copyright owner could be the subject of an order to prohibit the continued conduct with respect to the supply of the computer chips, but not an order to separately grant a licence to use (or distribute) the software in the computer chips. In this case, Stargrove makes no allegations that raise any issue as to whether the Publishers have engaged in price maintenance with respect to the sale of CDs embodying their musical works.

⁴⁷ Canada, Competition Bureau, *Price Maintenance Enforcement Guidelines (Section 76 of the Competition Act)*, (Ottawa: Communications and Marketing Branch, Industry Canada, September 2014). at 3.1.1.

⁴⁸ CMRRA, as an agent, is not even an exclusive rights holder.

67. Further, had section 76 been intended to provide a basis for the Tribunal to make an order granting licences to copyrights to an applicant, the language of section 76 would have to have been written to expressly permit it, as is the case with section 32. The differences in the wording with respect to the nature of the orders that can be made under sections 76 and 32, demonstrate, as the Tribunal found with respect to section 75, that Parliament did not intend that the Tribunal could make any such order.

(b) ***Stargrove Fails to Meet the Section 76 Resale Requirement***

68. The Tribunal in the *Visa/MasterCard* case found that “a resale is required under section 76 of the *Competition Act*.”⁴⁹ Although that case focused on subparagraph 76(1)(a)(i) of the *Competition Act*, the Tribunal considered the history of section 76 (*resale* price maintenance) and repeated its conclusion without carving out any portion of section 76 from the requirement:

The Tribunal therefore finds that section 76 requires a resale of a product. The resale of a product does not require that the product be identical. However, in many instances, the product should be identical or substantially similar on the important characteristics of the product.⁵⁰ [emphasis added]

69. The Publishers sublicense mechanical licences (with CMRRA often acting as agent) and Stargrove sells physical CDs. It is clear that licences and CDs are not similar at all. Therefore, it is evident that Stargrove is not reselling what it seeks to acquire from the Respondents. As such, there can be no basis for a finding of price maintenance.

(c) ***Subparagraph 76(1)(a)(ii) Is Not Met***

70. Subparagraph 76(1)(a)(ii) is not met because the Publishers have not “refused to supply a product ... or otherwise discriminated against [Stargrove]...” because of [its] low pricing policy.” Reliance on the exclusive rights bestowed by copyright renders the pricing policy of Stargrove irrelevant in this context.

(d) ***Subsection 76(8) Is Not Met***

⁴⁹ *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 10 at para. 115.

⁵⁰ *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 10 at para. 134.

71. Even assuming that mechanical licences could be a “product” (which they could not), subsection 76(8) is not met because the Publishers have not “by agreement, threat, promise or any like means... induced” CMRRA or anyone else not to provide licences to Stargrove because of its low pricing policy.

72. Further, Stargrove’s interpretation of “supplier” must be incorrect as it would render the long recognized principal-agent relationship meaningless and override Parliament’s specific intent. As an artists’ association that enters into licences on behalf of copyright owners, CMRRA is simply an agent acting on behalf of its principals; it does not have an interest in any publishers’ copyrights which it could “supply”.⁵¹

(e) ***No Adverse Effect on Competition in a Market***

73. The requirement for an order under subsections 76(2) and 76(8) that there be an adverse effect on competition in a market is identical to the requirement under paragraph 75(1)(e) with respect to refusal to deal. Stargrove has not demonstrated an adverse effect on competition in any market as particularized in Paragraphs 54-57 above, therefore, the threshold for a price maintenance order is not satisfied.

74. For all the foregoing reasons, a section 76 order could not be made based on the conduct alleged by Stargrove. Therefore, there is no basis to grant an order for leave.

(iii) **Exclusive Dealing (Section 77)**

75. Stargrove has not established that the actions of Universal could be the subject of an order under section 77 of the *Competition Act*.

76. Subsection 77(1) of the *Competition Act* provides that:

77. (1) For the purposes of this section,

“exclusive dealing” means

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier’s nominee, or

⁵¹ *Canadian Artists’ Representation v. National Gallery of Canada*, [2014] 2 S.C.R. 197 at paras. 22-23.

(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;

77. Subsection 77(2) provides that:

77. (2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in a market,

(b) impede introduction of a product into or expansion of sales of a product in a market, or

(c) have any other exclusionary effect in a market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

(a) *Definition of Exclusive Dealing Is Not Met*

78. The facts alleged by Stargrove do not meet the definition of exclusive dealing under subsection 77(1) of the *Competition Act*. For this reason, Stargrove's request for leave to make an application under section 77 should be denied.

79. Exclusive dealing is, in its essence, a restraint (exclusivity) imposed by a supplier on its customer as a condition of supplying a product, or by way of inducement.

80. There is no evidence that any Respondent imposed an exclusivity restraint as a condition of supplying a product. The highest that Stargrove alleged was that the Respondents “pressured”

Anderson Merchandise Canada Inc. (“**Anderson**”), Stargrove’s distributor, not to distribute Stargrove CDs.⁵²

81. In any event, any pressure allegedly applied was of no effect. Mr Perusini himself observes that “Luckily for Stargrove, Anderson did not bow to the pressure from Universal and the other Respondents. Anderson is still willing to distribute Stargrove's CDs today.”⁵³ Clearly, the Respondents did not impose conditions on Anderson, and any alleged inducements were ineffectual.

82. Stargrove alleges a number of irrelevant facts in connection with section 77. First, it claims that Universal placed negative reviews of Stargrove's CDs on Walmart's website. This is not conduct that is captured by section 77.

83. Next, it claims that “Universal appears to have been complicit in ABKCO and CMRRA's activities with respect to the Rolling Stones title in issue.”⁵⁴

84. Again, without evidence, Stargrove accuses the respondents of "banding together with CMRRA to shut Stargrove out".⁵⁵ Even if it was true (which it is not), this allegation does not establish exclusive dealing, or for that matter any of the other reviewable practices that Stargrove has alleged.

(b) The Requirements of Subsection 77(2) Are Not Met

85. In order for the Tribunal to make an order against exclusive dealing under subsection 77(2), the Tribunal must make three key findings:

- (c) Exclusive dealing is engaged in by a major supplier of a product in a market, or is widespread in a market;
- (d) The exclusive dealing is likely to have one of the enumerated effects (paragraphs 77(2)(a) through (c)); and
- (e) Competition is likely to be lessened substantially.

86. Stargrove has not led evidence that would permit the Tribunal to make any of these required findings.

⁵² Perusini Affidavit at para. 30 (Application Record, p. 92).

⁵³ Perusini Affidavit at para. 55 (Application Record, p. 98).

⁵⁴ Stargrove’s Factum at para. 65 (Application Record, p. 74).

⁵⁵ Stargrove’s Factum at para. 68 (Application Record, p. 74).

87. First, it is not clear what the product at issue for purposes of exclusive dealing is. It appears to be CDs. Stargrove has not led evidence as to major suppliers of CDs and whether the respondents are major suppliers. Nor has Stargrove led evidence that exclusive dealing is widespread in the market for CDs.

88. Second, none of the enumerated effects is likely, because there is no causal link between the alleged exclusive dealing and Stargrove's inability to enter the market. Anderson was not affected by Universal's alleged inducements. Rather, Stargrove's inability to sell the four CDs it pressed is caused by the refusal of the Publishers to grant mechanical licences.

89. Third, competition is not likely to be lessened substantially. As noted above, Stargrove cannot make out an “adverse effect” on competition, let alone a substantial lessening.

C. Stargrove Has Not Demonstrated Reason to Believe that It Is Directly or Substantially Affected in Its Business

90. The following submissions apply to the test under section 103.1, as well as the requirements of section 75(1)(a).

91. **Firstly**, Stargrove’s alleged business is not really a business at all in that it sold CDs without first obtaining the relevant mechanical licences that are required to do so.

92. Stargrove applied for licences and remitted payment under CMRRA’s pay-as-you-press system, but began manufacturing CDs before it received any licences. In fact, Stargrove’s own evidence, which quotes from the CMRRA website, explains that Stargrove’s operations were illegitimate:

Can the manufacturer start pressing my product as soon as I send my royalty payment to CMRRA?

No. A licence must be issued to you before your product can be manufactured. The fact that you have sent CMRRA a licence application and a royalty payment does not mean that we will be able to issue the licence you need for your project.⁵⁶

93. It would be contrary to public policy for the Tribunal to protect the interests of parties that operate in contravention of the law. Stargrove sought to operate a business without the

⁵⁶ Perusini Affidavit, Exhibit 2 (Application Record, p. 131).

mechanical licences required under the *Copyright Act*. For Stargrove to then turn around and seek protection under the *Competition Act* for its conduct is inappropriate. An illegitimate business does not merit consideration under this prong of the test.

94. **Secondly**, Stargrove has not led sufficient evidence to suggest that its business is substantially affected by the alleged conduct.

95. Stargrove's evidence suggests that it is unable to include a limited subset of songs on its CDs, namely certain songs that were recorded before December 31, 1964,⁵⁷ where the songwriter's copyright in the song is owned or controlled by one of the Publishers.

96. Stargrove's evidence does not address two groups of songs that it may be able to publish:

- (b) Sound recordings that feature songs that are entirely in the public domain; and
- (c) Sound recordings that feature songs owned by publishers other than the Publishers.

97. Stargrove can deal freely with songs that are entirely in the public domain without the need to obtain a mechanical licence. This includes any song, the author(s) of which died on or before December 31, 1964, provided that the sound recording that Stargrove wishes to use was recorded and published on or before that date.

98. Stargrove may also be able to include on its CDs songs whose copyright is owned or controlled by other publishers. There are "tens of thousands of music publishers, ranging from multi-national organizations to individual songwriters with very small catalogues".⁵⁸ Not all publishers are represented by CMRRA.⁵⁹ The CMRRA invited Stargrove to contact other publishers and offered to facilitate licences for publishers that agreed to grant mechanical licences to Stargrove on three occasions.⁶⁰

99. It was incumbent on Stargrove to lead evidence to show that it could not obtain suitable replacement songs to use on CDs in order to raise a *bona fide* belief that its business was

⁵⁷ This is because the new 70 year term in s. 23(1)(b) of the *Copyright Act*.

⁵⁸ "Mechanical Licensing FAQ", CMRRA website, Perusini Affidavit, Exhibit 2, (Application Record, p. 127)

⁵⁹ *Ibid.*

⁶⁰ Perusini Affidavit, Exhibit 11 (Application Record, pp. 167-168); Perusini Affidavit, Exhibit 18 (Application Record, pp. 197-198); Perusini Affidavit, Exhibit 25 (Application Record, pp. 217-219).

substantially affected by the Publishers refusal to licence. In *Allan Morgan*, for example, Mr. Morgan filed an affidavit detailing his efforts to obtain replacement brands following La-Z-Boy's termination of his distributorship.⁶¹

100. Stargrove has failed to lead any such evidence. Stargrove has not led any evidence about any efforts to use other songs, whether songs that are entirely on the public record, or songs that other publishers are willing to license, much less, evidence about the likely commercial success, or lack thereof, of these songs. Stargrove has led no evidence that it asked any other publishers to grant mechanical licences, nor any evidence about why it did not do this. There is not even any evidence that the Tribunal could use to derive useful information, as Stargrove has failed to provide any market share information for the market for mechanical licences.

101. What little evidence there is suggests that there are other songs that Stargrove could use. There are "tens of thousands of music publishers".⁶² From the chart prepared by Mr. Perusini, it appears that Stargrove sought mechanical licences for only 55 songs. It would seem Stargrove was granted licences for seven of them (the songs listed in green type).⁶³ Four of the songs for which Stargrove did not receive a licence are from publishers that are not parties to this application (two from Peermusic Canada, one from Drop Top Music, and one with no publisher shown). There is no evidence about Stargrove's dealings with these other publishers.

102. Stargrove is thus asking the Tribunal to speculate that a refusal by four music publishers, out of tens of thousands, to licence 44 songs, out of, presumably, millions, will substantially affect its business. This does not meet the test under section 103.1(7).

103. **Thirdly**, Stargrove has not provided any evidence that its sale of CDs for which the sound recordings have fallen into the public domain represents a substantial portion of its business.

104. Stargrove incorrectly paraphrased the Tribunal stating that "[a] 'substantial' effect on business means something just beyond *de minimis*."⁶⁴ In fact, the Tribunal stated that "substantial" "means more than something just beyond *de minimis*... terms such as 'important'

⁶¹ *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4 at para. 15.

⁶² "Mechanical Licensing FAQ", CMRRA website, Perusini Affidavit, Exhibit 2, (Application Record, p. 127).

⁶³ Chart, Perusini Affidavit, Exhibit 26 (Application Record, p. 221). See also letter from CMRRA to Dimock Stratton, 25 March 2015, Perusini Affidavit Exhibit 25 (Application Record, pp. 217-219).

⁶⁴ Stargrove's Memorandum of Fact and Law, paragraph 48.

are acceptable synonyms”.⁶⁵ Further, “the Tribunal has consistently taken the position that a substantial effect on a business is measured in the context of the entire business.”⁶⁶

105. Stargrove’s evidence states that its business actually consists of two other product lines in addition to selling CDs for which the sound recordings have fallen into the public domain: (i) CDs for which Stargrove owns the sound recording copyright, and (ii) CDs for which Stargrove licenced the sound recordings from independent record labels.⁶⁷ Moreover, Stargrove has not alleged that the sales of these other two product lines have been affected by the conduct of the Respondents. Stargrove has provided a purchase order for the five CDs in question⁶⁸ and estimated (without providing any methodology) its lost sales,⁶⁹ but has not led any evidence whatsoever about its other sales.⁷⁰

106. Without having any evidence of what portion of Stargrove’s overall sales are made up of CDs for which the sound recording is in the public domain but that require mechanical licences from the Publishers, there is no basis to conclude that Stargrove is “substantially affected”. This view is in accordance with Tribunal precedent:

since... no total sales figure has been provided, the Tribunal cannot know what this means for the whole enterprise. There is therefore no reasonable basis for the Tribunal to believe that [the applicant] has been substantially affected as required by subsection 103.1(7).⁷¹

107. For all the above reasons, there is no basis to find that Stargrove’s business has been directly and substantially affected by the alleged conduct of the Respondents and its application for leave should fail.

⁶⁵ *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.*, CT-1988-004, [1989] C.C.T.D. No. 49 [emphasis added] at p. 23 (cited to QuickLaw).

⁶⁶ *Sears Canada Inc. v. Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.*, 2007 Comp. Trib. 6 at para 21.

⁶⁷ Perusini Affidavit, paragraph 20 (Application Record, p. 91).

⁶⁸ Perusini Affidavit, Exhibit 4 (Application Record, p. 150).

⁶⁹ Perusini Affidavit, paragraph 77 (Application Record, p. 104).

⁷⁰ Applicants who have obtained leave have typically filed extensive financial evidence. See for example *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4 at paras. 15-19. Also, in *B-Filer Inc. v. The Bank of Nova Scotia*, 2005 Comp. Trib. 38 at paras. 54-55, the applicant B-Filer led evidence that 50% of its revenue depended on banking services provided by the respondent Scotiabank.

⁷¹ *Construx Engineering Corporation v. General Motors of Canada*, 2005 Comp. Trib. 21 at para 8.

D. The Tribunal's Discretion

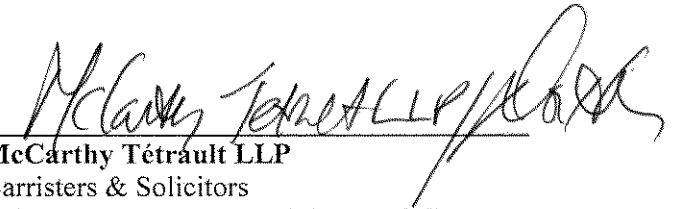
108. Subsections 103.1(7) and 103.1(7.1) provide that the Tribunal “may” grant leave if the requirements of those subsections are met. Thus, the Tribunal has the discretion not to grant leave in the appropriate circumstances.⁷² Here, the orders sought by Stargrove would in substance impose a compulsory licensing regime on the Publishers, notwithstanding the abolition of such a regime by the Parliament of Canada in 1988. Universal respectfully submits that the Tribunal should decline to make such an order.

V. ORDER SOUGHT

109. Universal respectfully requests that this leave application be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 9, 2015


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⁷² *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp. Trib. 10 at paras. 393-401.

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COMPETITION TRIBUNAL

IN THE MATTER OF the Competition Act, R.S.C.
1985, c. C-34, as amended;

AND IN THE MATTER OF an Application by
Stargrove Entertainment Inc. for an Order pursuant to
section 103.1 granting leave to make application
under sections 75, 76 and 77 of the *Competition Act*;

AND IN THE MATTER OF an Application by
Stargrove Entertainment Inc. for an Interim Order
pursuant to section 104 of the *Competition Act*;

BETWEEN:

STARGROVE ENTERTAINMENT INC.

Applicant

- and -

**UNIVERSAL MUSIC CANADA INC.,
SONY/ATV MUSIC PUBLISHING CANADA CO.,
SONY MUSIC ENTERTAINMENT CANADA INC.,
ABKCO MUSIC & RECORDS, INC.,
CASABLANCA MEDIA PUBLISHING, and
CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY
LTD.**

Respondents

**WRITTEN REPRESENTATIONS OF
THE RESPONDENT UNIVERSAL MUSIC CANADA INC.**

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