File No. CT.2015.009

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act,* R.S.C. 1985, c. C.34 (the "**Act**");

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

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

BETWEEN:

STARGROVE ENTERTAINMENT INC.

Applicant

. and .

UNIVERSAL MUSIC PUBLISHING GROUP CANADA,
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

RESPONDING FACTUM OF CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.

(Application for Leave Pursuant to Section 103.1 of the *Competition Act* and Application for Interim Order Pursuant to Section 104 of the *Competition Act*)

November 20, 2015

Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Casey M. Chisick LSUC #: 46572R
Tel: 416.869.5403
Fax: 416.644.9326
cchisick@casselsbrock.com

Chris Hersh LSUC #: 43080N
Tel: 416.869.5387
Fax: 416.640.3017
chersh@casselsbrock.com

Lawyers for the respondent,
Canadian Musical Reproduction Rights Agency Ltd.

TO: **The Registrar**
Competition Tribunal
90 Sparks Street, Suite 600
Ottawa, ON K1P 5B4

Tel: 613.957.7851
Fax: 613.952.1123

AND TO: **John Pecman**
Commissioner of Competition
Competition Bureau
50 Victoria Street
Gatineau, QC K1A 0C9

Tel: 819.997.4282
Fax: 819.997.0324

AND TO: **WEIRFOULDS LLP**
Barristers & Solicitors
4100 -66 Wellington Street West
P.O. Box 35, Toronto Dominion Centre
Toronto, ON M5K 1B7

Nikiforos Iatrou
Scott McGrath
Bronwyn Roe

Tel: 416.365.1110
Fax: 416.365.1876

niatrou@weirfoulds.com
smcgrath@weirfoulds.com
broe@weirfoulds.com

Lawyers for the Applicant

AND TO: **DIMOCK STRATTON LLP**
20 Queen Street West, 32nd Floor
Toronto, ON
M5H 3R3

Sangeetha Punniyamoorthy
Thomas Kurys

Tel: 416.971.7202
Fax: 416.971.6638

spunniyamoorthy@dimock.com
tkurys@dimock.com

Lawyers for the Applicant

AND TO: **MCCARTHY TÉTRAULT LLP**
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Donald B. Houston

Tel: 416.601.7506
Fax: 416.868.0673

dhouston@mccarthy.ca

Lawyers for Universal Music Publishing Group Canada
and Universal Music Canada Inc.

AND TO: **OSLER, HOSKIN & HARCOURT LLP**
100 King Street West
1 First Canadian Place
Suite 6200
P.O. Box 50
Toronto ON M5X 1B8

Mahmud Jamal
Peter Franklyn

Tel: 416.862.6764
Fax: 416.862.6666

mjamal@osler.com
pfranklyn@osler.com

Lawyers for Sony/ATV Music Publishing Canada Co. and Sony Music Entertainment Canada Inc.

AND TO: **AFFLECK GREENE MCMURTRY LLP**
365 Bay Street, Suite 200
Toronto, Ontario, Canada M5H 2V1

W. Michael G. Osborne

Tel: 416.360.5919
Fax: 416.360.5960

mosborne@agmlawyers.com

Lawyers for ABKCO Music & Records, Inc. and Casablanca Media Publishing

INDEX

I. OVERVIEW

1. Mechanical licences are not subject to a compulsory licensing system in Canada.

2. As a non-exclusive agent for music publishers doing business in Canada, CMRRA has a duty to obey their instructions. CMRRA can only issue licences to the extent it is authorized to do so by its principals from time to time.

3. As the owners of copyright in the musical works in the CMRRA repertoire, CMRRA's music publisher principals have the right to authorize, or refuse to authorize, Stargrove from making mechanical reproductions of those songs. They also have the right to unilaterally revoke, limit, or narrow the mechanical licensing authority granted to CMRRA at any time.

4. Sections 75, 76 and 77 do not apply to CMRRA for the following reasons:

   (a) CMRRA does not control a "product" for the purposes of sections 75 (refusal to deal), 76 (price maintenance), and 77 (exclusive dealing) of the Competition Act (the "Act"). CMRRA controls only the mechanism through which it issues mechanical licences, where authorized to do so by its principals; and

   (b) CMRRA has not refused to deal with Stargrove. Contrary to Stargrove's allegations, CMRRA is prepared to issue licences for the CMRRA Licensable Songs (defined below) under the Pay-As-You-Press model, and has offered to discuss the development of a customized arrangement that better suits Stargrove's needs.

Accordingly, there are no grounds upon which the conduct of CMRRA could be the subject of an order under the relevant provisions of the *Act*.

5. In the alternative, if the Tribunal does not accept the view that the relevant provisions of the *Act* do not apply to CMRRA, Stargrove has failed to satisfy the test for leave to commence an application under section 103.1 of the *Act* for the following reasons:

(a) It has failed to file any credible evidence of a substantial effect on its business in particular, given that its entire business model is predicated solely on accessing intellectual property that it does not own; and

(b) CMRRA's conduct cannot be the subject of an order under sections 75, 76, 77 for the reasons set out above.

6. Finally, even if the Tribunal determines that Stargrove has met the test for leave set out under section 103.1 of the *Act*, it ought to exercise its discretion not to issue leave in this case given the significant policy issues relating to the use of the *Act* to override the express decision of Parliament regarding the mechanical licensing regime in Canada,.

II. FACTS

A. Background

7. CMRRA is a music licensing agency that represents certain music publishers doing business in Canada. CMRRA does not own any copyrights; its sole role is to act as a licensing agent on behalf of its music publisher clients for the purpose of issuing licences to users of the reproduction right in musical works.[1]

8. Among other things, CMRRA issues licences ("**mechanical licences**") on behalf of its publisher clients to record labels authorizing the reproduction of musical works on compact discs

[1] Affidavit of David Basskin sworn January 14, 2009 ("**Basskin Affidavit**"), Appendix 2 to the Affidavit of Mario Bouchard sworn August 17, 2015 ("**Bouchard Affidavit**"), Application Record, Vol. 2, Tab F, App. 2, p. 372 at paras. 15-17.

and other physical contrivances ("**mechanical reproduction**").[2] CMRRA's agency in this respect is non-exclusive; its clients also retain the right to issue mechanical licences directly.

9. The respondents Universal Music Publishing Group Canada, Sony/ATV Music Publishing Canada Co. ("**Sony/ATV**"), ABKCO Music & Records, Inc. ("**ABKCO**"), and Casablanca Media Publishing ("**Casablanca**") (collectively, the "**Publisher Respondents**") are music publishers who have engaged CMRRA as their non-exclusive agent for the issuance of mechanical licences. As an agent, CMRRA must follow the instructions of the Publisher Respondents, its principals.

10. The applicant, Stargrove Entertainment Inc. ("**Stargrove**"), and the respondents Universal Music Canada Inc. and Sony Music Entertainment Canada Inc., are record labels. The term "record label" generally refers to an entity that is in the business of manufacturing sound recordings that contain musical works.[3] A record label is responsible for obtaining the necessary mechanical licences for the reproduction of the musical works embodied in its recordings.[4]

B. CMRRA's Mechanisms for Mechanical Licensing: Pay-As-You-Press and MLA

11. Where a music publisher authorizes CMRRA to issue mechanical licences on its behalf, CMRRA does so pursuant to one of two mechanisms: (a) the pay-as-you-press/ import plan ("**Pay-As-You-Press**"), which is the default mechanism; or (b) a mechanical licensing agreement ("**MLA**"),[5] which CMRRA may choose to enter into with a qualifying record label.

12. Both the Pay-As-You-Press model and the MLA result in the issuance of mechanical licences to record labels provided that CMRRA is authorized to license the musical works in

---

[2] Basskin Affidavit, Appendix 2 to the Bouchard Affidavit, Application Record, Vol. 2, Tab F, App. 2, p. 372 at paras. 15-17.

[3] Basskin Affidavit, Appendix 2 to the Bouchard Affidavit, Application Record, Vol. 2, Tab F, App. 2, p. 374 at para. 26.

[4] Basskin Affidavit, Appendix 2 to the Bouchard Affidavit, Application Record, Vol. 2, Tab F, App. 2, p. 375 at para. 30.

[5] Excerpts from CMRRA Website, Affidavit of Terry Perusini sworn August 26, 2015 ("**Perusini Affidavit**"), Exhibit 2, Application Record, Vol.1, Tab E-2, p. 116.

question. The differences between the two models relate to the application process, the manner in which licences are issued, and the mechanisms for reporting and payment by the label.

13. Under the Pay-As-You-Press model, a record label applies for mechanical licences for each of the songs that it wishes to use, specifying the precise number of CDs or other physical sound recordings that it plans to manufacture or import. Under this model, the record label must calculate the royalties owing under the licences sought and submit them to CMRRA prior to manufacturing the recordings in question.[6]

14. An MLA is not itself a mechanical licence, nor is it an application for a mechanical licence. Rather, it is a framework agreement that sets out certain terms governing the licence application process and the issuance of mechanical licences to a particular record label.[7] There are three different forms of MLA[8] which differ from one another in a number of respects, particularly in relation to the record label's reporting and payment obligations.[9]

15. The Pay-As-You-Press model is CMRRA's default licensing mechanism. This is clearly indicated on its website, which states that CMRRA "may require" a record label to enter into an MLA, even where the record label is manufacturing sound recordings on an ongoing basis:

> The Mechanical Licensing Agreement: If you are manufacturing or importing sound recording products on a continuing basis, we **<u>may</u>**

---

[6] Excerpts from CMRRA Website, Perusini Affidavit, Exhibit 2, Application Record, Vol. 1, Tab E-2, pp.119-122, 130-131.

[7] For example, see Indie Model 1 MLA at s.2(d): "This agreement does not constitute a licence." Appended to the Perusini Affidavit, Exhibit 34, Application Record, Vol. 1,Tab E-34, p. 252.

[8] They are as follows: (i) the Music Canada MLA, an outdated version of which is referred to at the Basskin Affidavit, Appendix 2 to the Bouchard Affidavit, Application Record, Vol. 2, Tab F, App. 2, pp. 378-379 at paras. 42-46; (ii) the Indie Model 1 MLA, appended to the Perusini Affidavit, Exhibit 34, Application Record, Vol. 1,Tab E-34, pp. 247-287; and (iii) the Indie Model 2 MLA, appended to the Perusini Affidavit, Exhibit 35, Application Record, Vol. 1,Tab E-35, pp. 289-322.

[9] For example, there are significant differences in the royalty reporting and payment obligations under Indie Model 1 MLA and Model 2 MLA. See the email from CMRRA to Stargrove dated April 2, 2015, Perusini Affidavit, Exhibit 30, Application Record, Vol. 1, Tab E-30, pp. 231-232; and see section 4 of each of the Indie Model 1 MLA and Model 2 MLA, Perusini Affidavit, Exhibits 34 and 35, Application Record, Vol. 1, Tabs E-34 and E-35, pp. 257-260 and 298-301.

> **require** that you enter into CMRRA's standard Mechanical Licensing Agreement (MLA).[10] [Emphasis added]

16. CMRRA will enter into an MLA with a record label only where it considers that mechanism appropriate. A critical factor in this determination is the adequacy of a record label's royalty reporting system. The label must be able to provide error-free quarterly reporting, in the format required by the MLA,[11] and submit timely licence applications with all necessary supporting documents.[12]

17. Other factors considered by CMRRA for this purpose include:

(a) the number of individual products that the record label intends to manufacture,[13] the frequency with which it intends to do so,[14] and the number of songs that CMRRA represents on a given sound recording.[15] The CMRRA website explains this as follows:

> **Labels who are licensed under the Mechanical Licensing Agreement** can report royalties to CMRRA on a quarterly basis as products are sold. However, they **are also required to keep track of, and process, any change in the ownership of the musical works they have used in order to produce accurate royalty statements each quarter. This task in itself can be quite time consuming for them, and if not done properly, will lead to additional administrative costs and efforts to make the appropriate corrections**. For most small licensees, this

[10] Excerpts from CMRRA Website, Perusini Affidavit, Exhibit 2, Application Record, Vol. 1, Tab E-2, p. 116.

[11] Email from CMRRA to Stargrove dated April 2, 2015, Perusini Affidavit, Exhibit 29, Application Record, Vol. 1, Tab E-29, pp. 228-229.

[12] Email from CMRRA to Stargrove dated April 2, 2015, Perusini Affidavit, Exhibit 29, Application Record, Vol. 1, Tab E-29, pp. 228-229.

[13] Excerpts from CMRRA Website, Perusini Affidavit, Exhibit 2, Application Record, Vol. 1, Tab E-2, pp. 130-131.

[14] Email from CMRRA to Stargrove dated April 2, 2015, Perusini Affidavit, Exhibit 29, Application Record, Vol. 1, Tab E-29, pp. 228-229; Excerpts from CMRRA Website, Perusini Affidavit, Exhibit 2, Application Record, Vol. 1, Tab E-2, p. 116.

[15] Email from CMRRA to Stargrove dated April 2, 2015, Perusini Affidavit, Exhibit 29, Application Record, Vol. 1, Tab E-29, pp. 228-229; Email from CMRRA to Stargrove dated April 16, 2015, Perusini Affidavit, Exhibit 33, Application Record, Vol. 1, Tab E-33 p. 243; Excerpts from CMRRA Website, Perusini Affidavit, Exhibit 2, Application Record, Vol. 1, Tab E-2, p. 116.

> administrative burden is just not worth it, and the "pay-as-you-press" plan is the best option to meet their licensing obligations.[16]

(b) the willingness and ability of the record label to pay a security deposit, which is "about the equivalent of [one] quarter's worth of royalties"; [17]

(c) in some cases, the willingness and ability of the record label to pay a recoupable advance against royalties owed;[18] and

(d) where applicable, the ability of the record label to maintain and submit a list of unlicensed recordings (i.e., a "pending list").[19]

18. The agency agreement between CMRRA and its music publisher clients (the "**Publisher Affiliation Agreement**") further illustrates that the MLA is not automatically available to all record labels. It expressly instructs CMRRA to issue mechanical licences based on industry standards that *include* – but *are not limited to* – the MLA:

> Publisher hereby instructs CMRRA ... for the purposes set out herein, to grant Mechanical Licenses to persons ... on terms which are current for the music industry in Canada ... **including but not limited** to the terms of the MLA. [20] (Emphasis added)

[16] Excerpts from CMRRA Website, Perusini Affidavit, Exhibit 2, Application Record, Vol. 1, Tab E-2, pp. 130-131.

[17] Email from CMRRA to Stargrove dated April 2, 2015, Perusini Affidavit, Exhibit 29, Application Record, Vol. 1, Tab E-29, pp. 228-229.

[18] Email from CMRRA to Stargrove dated April 2, 2015, Perusini Affidavit, Exhibit 29, Application Record, Vol. 1, Tab E-29, pp. 228-229.

[19] Email from CMRRA to Stargrove dated April 2, 2015, Perusini Affidavit, Exhibit 29, Application Record, Vol. 1, Tab E-29, pp. 228-229.

[20] Publisher Affiliation Agreement, Appendix 4 to the Bouchard Affidavit, Application Record, Vol. 2, Tab F, App. 4, p. 472 at Schedule A, s.3.

C. Publishers May Refuse to Issue Mechanical Licences Under Both the Pay-As-You-Press Plan and the MLA

19. As the agent for the Respondent Publishers, CMRRA must obey their express instructions, and the Respondent Publishers may unilaterally revoke, limit, or narrow the authority of CMRRA at any time.[21]

20. This is reflected in both the Pay-As-You-Press system and the MLA, both of which permit the Respondent Publishers to refuse to issue or instruct CMRRA to refuse to issue mechanical licences.

21. The application process under the Pay-As-You-Press plan requires a record label licensee to pay the royalties owing under the proposed licence. However, the acceptance of that payment by CMRRA does not constitute the issuance of a licence.[22] The licensing process is not complete until a mechanical licence is delivered to the record label and the record label signs and returns one copy to CMRRA.[23]

22. Importantly, the CMRRA website expressly notifies prospective licensees that music publishers may separately review and refuse their applications, even after payment is remitted, and that, if an application is refused, CMRRA will refund any payment received in relation to that musical work:

> Please note that a few publishers represented by CMRRA reserve the right to separately approve each application, and that their royalty rate may be higher than the current standard rate, in which case we will advise you of the additional amount to be paid. **If a publisher refuses to**

[21] See the detailed discussion at paragraphs 58 to 60 below.

[22] Excerpts from CMRRA Website, Perusini Affidavit, Exhibit 2, Application Record, Vol. 1, Tab E-2, p. 120, 122.

[23] Excerpts from CMRRA Website, Perusini Affidavit, Exhibit 2, Application Record, Vol. 1, Tab E-2, p. 122.

> **authorize a licence, we will advise you and refund the amount in question**.[24] (Emphasis added)

23. Similarly, the MLA distinguishes between an "Authorized Composition," for which CMRRA is authorized to issue mechanical licences, and a "Non-Authorized Composition", for which it is not. "Non-Authorized Compositions" are expressly excluded from the scope of an MLA at the instruction of the publisher who administers or controls the copyright in that composition.[25]

24. Thus, even if CMRRA believed it was appropriate to enter into an MLA with Stargrove, which it did not, the Respondent Publishers would have retained the ability to exclude certain songs in their repertoires from that MLA as "Non-Authorized Compositions."

D. CMRRA'S DEALINGS WITH STARGROVE

1. Stargrove Manufactured CDs Without First Obtaining Mechanical Licences

25. In early January 2015, Stargrove applied to CMRRA for Pay-As-You-Press plan mechanical licences for compilation CDs featuring sound recordings under the following titles (collectively, the "**Stargrove CDs**"): *Love Me Do* and *Can't Buy Me Love* (The Beatles) (the "**Beatles CDs**"), *Little Red Rooster* (The Rolling Stones), *It Ain't Me Babe* (Bob Dylan) and *Fun, Fun, Fun* (The Beach Boys).

26. The Stargrove CDs went on sale on the Walmart website on January 20, 2015 and in Walmart stores on February 3, 2015.[26] There is no dispute that Stargrove did not have the necessary mechanical licences for the Stargrove CDs at that time and therefore infringed copyright in Canada in and to each of the musical works that those CDs contained.

---

[24] Excerpts from CMRRA Website, Perusini Affidavit, Exhibit 2, Application Record, Vol. 1, Tab E-2, p. 119. Although Mr. Bouchard purports to have reviewed the CMRRA website for the purposes of preparing his report, he incorrectly states that under the Pay-As-You-Press plan, a "refund is only for works that are not in CMRRA's repertoire."

[25] Indie Model 1 MLA, Perusini Affidavit, Exhibit 34, Application Record, Vol. 1, Tab E-34, pp. 249-250, 252 at ss.1 & 2(c); Indie Model 2 MLA, Perusini Affidavit, Exhibit 35, Application Record, Vol. 1, Tab E-35, pp.290-292 at s. 1.

[26] Perusini Affidavit, Application Record, Vol. 1, Tab E, p. 93 at para. 34.

2. The Respondent Publishers Instructed CMRRA to Not Issue Mechanical Licences to Stargrove

27. In or around January and February 2015, each of ABKCO,[27] Red Brick Songs Inc. ("**Red Brick**"),[28] and Sony/ATV,[29] who owned or controlled the copyrights in certain musical works on the Stargrove CDs, instructed CMRRA not to issue mechanical licences to Stargrove for those works.

28. CMRRA confirmed to Stargrove that it was required to obey such instructions in its capacity as agent.[30] However, CMRRA offered to continue processing Stargrove's mechanical licence applications for all of the songs on the Stargrove CDs that were not in the repertoires of ABKCO or Red Brick.[31] For example, in relation to ABKCO, CMRRA stated as follows:

> ABKCO has instructed CMRRA not to issue any licenses for the reproduction of these works by Star Grove [*sic*]. **As ABKCO's licensing agent, CMRRA must act pursuant to their instructions.** As such, CMRRA will not be issuing any licenses to Star Grove for the reproduction of these works on "Little Red Rooster".
>
> I understand that your licence application process is already underway through our "Pay-As-You-Press" department, and that a cheque has been sent to us. **This application has not yet been processed by us. CMRRA will continue to process your license applications for the other musical works for which licenses are being sought,** and apply your cheque to those licenses only. Any excess funds will be returned to you. **Please advise as to whether you would still like us to issue licenses for the remaining songs** on "Little Red Rooster," with the

[27] Email from CMRRA to Stargrove dated January 22, 2015, Perusini Affidavit, Exhibit 8, Application Record, Vol. 1, Tab E-8, p. 158.

[28] Although CMRRA initially believed that certain instructions were given by Casablanca, it notes and acknowledges that, according to an affidavit filed in this proceeding by Jennifer Mitchell, president of both Casablanca and Red Brick, the instructions were in fact given by Red Brick, which administered the songs in question at the relevant time.

[29] See the summary of facts set out in the letter from Dimock Stratton LLP to CMRRA dated March 9, 2015 (third bullet point on the second page), and the responding letter from CMRRA dated March 12, 2015, confirming that the summary of facts is accurate. Perusini Affidavit, Exhibits 17 and 18, Application Record, Vol. 1, Tabs E-17 and E-18, pp. 194 and 197.

[30] Emails from CMRRA to Stargrove dated January 22, 2015 and February 4, 2015, Perusini Affidavit, Exhibits 8 and 10, Application Record, Vol. 1, Tabs E-8 and E-10, pp. 158 and 164.

[31] Emails from CMRRA to Stargrove dated January 22, 2015 and February 4, 2015, Perusini Affidavit, Exhibits 8 and 10, Application Record, Vol. 1, Tabs E-8 and E-10, pp. 158 and 164.

> understanding that you would have to remove the above-noted ABKCO owned songs from that album. (Emphasis added.) [32]

29. Stargrove accepted CMRRA's offer to continue processing its applications for the remainder of the songs on the Beatles CDs.[33]

3. CMRRA Agreed to Issue Mechanical Licences for CMRRA Licensable Compositions

30. Save for a brief period of time – based on *bona fide* concerns of litigation arising out of Stargrove's own statements – CMRRA has at all times remained willing to process applications from Stargrove for mechanical licences for any songs other than those which the Respondent Publishers have expressly instructed CMRRA not to license (the "**CMRRA Non-Licensable Songs**"). (Songs for which CMRRA remains authorized to issue mechanical licences to Stargrove are referred to below as "**CMRRA Licensable Songs**").

31. On February 9, 2015, Jennifer Holt, an employee of Stargrove, sent an email to CMRRA stating that the situation "raise[d] many questions about unfair trading and competition laws."[34] That email effectively put CMRRA on notice of potential legal proceedings.

32. Prior to that notice, CMRRA had offered to process mechanical licence applications from Stargrove for all CMRRA Licensable Songs (see paragraph 28 above). However, given the threat of litigation, CMRRA indicated on February 11, 2015 that it would not process any further mechanical licence applications from Stargrove; instead, it suggested that Stargrove seek licences directly from the publishers in question. CMRRA also indicated that it would be willing to

---

[32] Email from CMRRA to Stargrove dated January 22, 2015, Perusini Affidavit, Exhibit 8, Application Record, Vol. 1, Tab E-8, p. 158.

[33] Email from CMRRA to Stargrove dated February 4, 2015, 2015, Perusini Affidavit, Exhibit 10, Application Record, Vol. 1, Tab E-10, p. 164.

[34] Email from Jennifer Holt to CMRRA dated February 10, 2015, Perusini Affidavit, Exhibit 11, Application Record, Vol. 1, Tab E-11, p. 168.

facilitate the issuance of licences for which Stargrove first obtained authorization from publishers.[35]

33. Subsequently, on March 25, 2015, CMRRA confirmed by email that it was willing to process mechanical licence applications from Stargrove for any and all CMRRA Licensable Songs. In that email, CMRRA reminded Stargrove of the inherent limitations of its status as agent for its music publisher principals, while also providing a detailed list of all of the CMRRA Licensable Songs and the CMRRA Non-Licensable Songs on the Stargrove CDs:

> … [CMRRA] is a licensing agency that acts pursuant to the instructions of its music publisher principals. **As an agent, CMRRA cannot act contrary to the instructions of its principals**. It is for this reason that **CMRRA cannot issue licenses for works where the owners of such works have instructed CMRRA not to do so**.
>
> Notwithstanding the fact that we had suggested to Stargrove that CMRRA would facilitate the licensing of the songs if Stargrove could obtain the necessary authorizations from the publishers allowing us to do so, **in an effort to resolve this matter as between us, we have proceeded to seek those authorizations directly** and can now advise as follows:
>
> *[The list of CMRRA Licensable Songs and CMRRA Non-Licensable Songs is omitted from this excerpt]*
>
> **Please confirm that your client would like CMRRA to facilitate licenses for the CMRRA Licensable Songs**. Once we have that confirmation from you, if Stargrove would still like to apply for licenses for the CMRRA Licensable songs, we will kindly request that Stargrove re-submit its license applications for those songs pursuant to CMRRA's Pay-As-You-Press licensing process.[36] (Emphasis added)

34. Thus, Stargrove has known at all material times that CMRRA is prepared to process mechanical licence applications from Stargrove for all CMRRA Licensable Songs.

---

[35] Email from CMRRA to Stargrove dated February 11, 2015, Perusini Affidavit, Exhibit 11, Application Record, Vol. 1, Tab E-11, p. 167.

[36] Letter from CMRRA to Dimock Stratton dated March 25, 2015, Perusini Affidavit, Exhibit 25, Application Record, Vol. 1, Tab E-25, p. 217.

4. Stargrove Does Not Qualify for an MLA

35. CMRRA has determined for valid business reasons, discussed in the paragraphs that follow, that entering into an MLA with Stargrove would not be appropriate. However, as an accommodation to Stargrove, CMRRA has offered to discuss a customized licensing process that meets Stargrove's particular needs and administrative capabilities.

(i) Inadequacy of Stargrove's Royalty Reporting System

36. As explained at paragraph 16 above, CMRRA must be satisfied that a record label has an acceptable royalty reporting system in place before it will enter into an MLA with that record label. Stargrove insisted that CMRRA permit it to enter into Indie MLA Model 1 A, which is the model that requires a record label to conduct all its own royalty reporting and accounting.[37]

37. In this case, CMRRA advised Stargrove that, before it could offer an MLA, it was necessary to ensure that Stargrove "is in a position to report in the format required under the MLA."[38] In response, Stargrove informed CMRRA that Ms. Holt and Mr. Perusini, the sole director and officer of Stargrove,[39] had previously been involved with another record label, Legacy Entertainment ("**Legacy**"), and that Stargrove intended to use a royalty reporting system that was the same as, or similar to, the system that Legacy had used.[40]

38. CMRRA advised Stargrove that it had experienced significant issues regarding the Legacy royalty reporting system including the following:

---

[37] Email from Jennifer Holt to CMRRA dated Apr 8, 2015, Perusini Affidavit, Exhibit 32, Application Record, Vol. 1, Tab E-32 p 237.

[38] Email from CMRRA to Stargrove dated April 7, 2015, Perusini Affidavit, Exhibit 31, Application Record, Vol. 1, Tab E-31, pp. 234-235.

[39] Perusini Affidavit, Application Record, Vol. 1, Tab E, p. 88 at para. 1.

[40] Email from Stargrove to CMRRA dated April 8, 2015, Perusini Affidavit, Exhibit 32, Application Record, Vol. 1, Tab E-32, pp. 237-238.

(a) In 2009, CMRRA had to meet with Legacy to address a number of issues with Legacy's royalty reporting system, including issues with "the data, formatting, unsigned licences, lack of a pending list, deleted products, price structure list for budget products, etc."[41]

(b) CMRRA also understood that, after that meeting, "a number of products were released/distributed in Canada [by Legacy] but never licensed;"[42] and

(c) Legacy did not provide CMRRA with a full reconciliation of accounts in respect of its products at the time it ceased operations.[43]

39. While Stargrove has asserted that any issues with the Legacy royalty reporting system had been resolved,[44] CMRRA disagrees. CMRRA remains of the view that the reporting system Stargrove proposes to use to comply with its obligations under an MLA is inadequate. CMRRA confirmed this to Stargrove in an email dated April 21, 2015, as follows:

> As I mentioned in my last e-mail to you, there were a number of problems with Legacy's reporting under their MLA and some of these concerns were also highlighted in our correspondence. It did not work, as you're saying, so we are concerned that you are using their system as an example.[45]

40. Stargrove has not offered any evidence in this proceeding that its royalty reporting system addresses, or will address the significant problems experienced with the system used by Legacy.

---

[41] Email from CMRRA to Stargrove dated April 16, 2015, Perusini Affidavit, Exhibit 33, Application Record, Vol. 1, Tab E-32, p. 243.

[42] Email from CMRRA to Stargrove dated April 16, 2015, Perusini Affidavit, Exhibit 33, Application Record, Vol. 1, Tab E-32, p. 243.

[43] Email from CMRRA to Stargrove dated April 16, 2015, Perusini Affidavit, Exhibit 33, Application Record, Vol. 1, Tab E-32, p. 243.

[44] For example, see the email from Jennifer Holt to CMRRA dated April 16, 2015, Perusini Affidavit, Exhibit 33, Application Record, Vol. 1, Tab E-33, p. 244; Email from Jennifer Holt to CMRRA dated April 20, 2015, Perusini Affidavit, Exhibit 33, Application Record, Vol. 1, Tab E-33 p. 242; Email from Terry Perusini to CMRRA dated April 28, 2015, Perusini Affidavit, Exhibit 36, Application Record, Vol. 1, Tab E-36, p. 324.

[45] Email from CMRRA to Stargrove dated April 21, 2015, Perusini Affidavit, Exhibit 33, Application Record, Vol. 1, Tab E-32, p. 241. As explained at paragraph 17(a), an MLA is not appropriate where the prospective licensee does not expect to manufacture a large quantity of products on a regular basis.

(ii) The Projection of Sales by Stargrove

41. In various correspondence, Stargrove has taken the position that its projected sales warranted an MLA.[46] However, in other correspondence, Stargrove confirmed that its projections were in fact highly speculative,[47] and it has not produced any documentation in this proceeding that suggests otherwise.[48] In any event, the low, or uncertain, sales projected by Stargrove were also a factor considered by CMRRA in determining that Stargrove's proposed business model did not justify the administrative burden associated with an MLA.[49]

(iii) Threshold of CMRRA Licensable Songs

42. As explained at paragraph 17(a) above, the number of CMRRA Licensable Songs on the sound recordings for which a record label seeks a mechanical licence is a relevant factor in CMRRA's determination of whether an MLA is warranted.

43. CMRRA considered this factor in determining that an MLA with Stargrove was not warranted. CMRRA explained this to Stargrove in an email dated April 21, 2015:

> As you know, CMRRA has been instructed by several of our publisher principals not to act on their behalf with respect to issuing licences to Stargrove. Therefore, **the remaining volume of licences that you**

[46] For example, see the email from Jennifer Holt to CMRRA dated April 2, 2015, Perusini Affidavit, Exhibit 29, Application Record, Vol. 1, Tab E-29, p. 229: "[sales] really depends on when we finally release. But approximately 15,000 units per quarter. We will definitely be more than the $1500 in royalties payable to CMRRA quarterly..."; See the email from Jennifer Holt to CMRRA dated April 20, 2015, Perusini Affidavit, Exhibit 33, Application Record, Vol. 1, Tab E-33, p. 242: "There will be some titles that will sell a few 1000 units and some that sell 10,000 to 50,000. It really depends on the strength of each individual title and ... that cannot be determined until the product is in the market."

[47] Email from Jennifer Holt to CMRRA dated April 20, 2015, Perusini Affidavit, Exhibit 33, Application Record, Vol. 1, Tab E-33, p. 242; Email from Jennifer Holt to CMRRA dated April 8, 2015, Perusini Affidavit, Exhibit 32, Application Record, Vol. 1, Tab E-32, p 238; Email thread between CMRRA and Jennifer Holt dated April 16-20, 2015; Perusini Affidavit, Exhibit 33, Application Record, Vol. 1, Tab E-33, pp. 242-243.

[48] Stargrove relies instead on the unsubstantiated statements of Mr. Perusini, and a few self-serving email exchanges with its distributors, to support its rather generous estimates of projected sales and revenue.

[49] Email from CMRRA to Stargrove dated April 16, 2015, Perusini affidavit, Exhibit 33, Application Record, Vol. 1, Tab E-33, p. 243.

> **would be seeking from CMRRA do not justify the work required under an MLA.**[50] (Emphasis added)

44. For all these reasons, but particularly due to concerns that Stargrove is unable to meet the administrative burden required to comply with an MLA, CMRRA has determined in good faith, that it is inappropriate to enter into an MLA with Stargrove.

E. CMRRA Has Offered to Consider a Customized Pay-As-You-Press Plan for Stargrove

45. Notwithstanding the concerns discussed above, CMRRA has offered, as an accommodation, to consider a customized approach to the Pay-As-You-Press system that would better suit Stargrove's particular needs.

46. Specifically, in response to Stargrove's concerns that Pay-As-You-Press licensing was not appropriate because it intended to ship orders weekly and possibly daily, [51] CMRRA wrote:

> With the understanding that you might be shipping daily or on a regular basis, perhaps we can find a way to work around it by allowing you to submit your Pay-As-You-Press applications on a quarterly basis (still based on pressing).However, this is probably something that we should discuss one on one so we can see what your distributor report looks like and established deadlines.[52]

47. Although Stargrove purported at first to be interested in exploring this suggestion,[53] it declined to schedule a meeting with CMRRA to discuss it.[54] Mr. Perusini subsequently accused

---

[50] Email from CMRRA to Stargrove dated April 21, 2015, Perusini Affidavit, Exhibit 33, Application Record, Vol. 1, Tab E-33, p. 241.

[51] Email from Stargrove to CMRRA dated April 2, 2015, Perusini Affidavit, Exhibit 29, Application Record, Vol. 1, Tab E-29, p.228-229.

[52] Email from CMRRA to Stargrove dated April 16, 2015, Perusini Affidavit, Exhibit 33, Application Record, Vol. 1, Tab E-33, p. 243.

[53] Email from Stargrove to CMRRA dated April 20, 2015, Perusini Affidavit, Exhibit 33, Application Record, Vol. 1, Tab E-33, p. 242.

[54] Email from Stargrove to CMRRA dated April 20, 2015, Perusini Affidavit, Exhibit 33, Application Record, Vol. 1, Tab E-33, p. 242.

CMRRA of making "excuse[s] to avoid" entering into an MLA with Stargrove and threatened legal proceedings.[55]

48. Accordingly, it is now Stargrove's unwillingness to engage that has precluded the development of a customized licensing arrangement that might facilitate its business.

III. ISSUES

49. CMRRA takes the following positions in respect of the issues raised in this proceeding:

A. Preliminary Issues

a. The Respondent Publishers have the right under copyright law to refuse to issue mechanical licences;

b. CMRRA as the agent of the Respondent Publishers has no discretion to issue mechanical licences where it has been expressly instructed not to;

c. CMRRA does not control a "product"; and

d. CMRRA is willing to deal with Stargrove.

B. Issues Regarding the Test for this Leave Application

Stargrove fails to meet the first part of the test for leave under section 103.1 of the *Act* because:

a. it has not filed credible evidence of a direct or substantial effect on its business;

b. it is disingenuous for Stargrove to develop a business model predicated on accessing intellectual property owned by third parties and then claim to be substantially or directly affected when it cannot access the intellectual property it wants; and

[55] Email from Terry Perusini to CMRRA dated April 28, 2015, Perusini Affidavit, Exhibit 36, Application Record, Vol. 1, Tab E-36, p. 325.

c. As CMRRA does not control a "product" and is willing to deal with Stargrove, its conduct cannot be subject to an order under sections 75, 76, or 77 of the *Act*.

IV. LAW AND ARGUMENT

A. Music Publishers May Instruct CMRRA Not To Issue Mechanical Licences to Stargrove Pursuant to Copyright Law and Agency Law

50. As a preliminary matter, it is important to clarify that the Publisher Respondents are entitled to refuse to issue mechanical licences to Stargrove, and to instruct CMRRA to do the same, pursuant to fundamental principles of copyright law and agency law.

1. A Copyright Owner May Refuse to Authorize a Third Party to Engage in a Protected Use of a Work

51. The *Copyright Act* grants the owner of copyright in a musical work, such as a music publisher, the sole right to make a mechanical reproduction of that work or authorize a third party to do so.[56] It is an infringement of copyright for any person to make a mechanical reproduction of a musical work without the authorization of the copyright owner.[57] Accordingly, a record label requires mechanical licences to manufacture sound recordings that contain protected musical works.

52. Intellectual property laws confer on the owner of intellectual property the right to unilaterally exclude others from using that property.[58] It is fundamental to copyright law that a copyright owner, by definition, has the right either to authorize or to refuse to authorize a third

---

[56] *Copyright Act*, RSC 1985, c C-42 at s.3(1)(d). Copyright in a musical work is distinct from copyright in a sound recording that *embodies* the same musical work, which is very often owned by a different person or entity (i.e., a producer or record label rather than a songwriter or music publisher.).

[57] *Copyright Act*, *supra* note 56 at s.27(1)(d).

[58] Competition Bureau, Intellectual Property Enforcement Guidelines, September 2014, online: Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03808.html> at Section 3.2 [*IPEGs*].

party to engage in a protected use of his or her work.[59] Copyright is "in essence a negative right to prevent the appropriation of the labours of an author by another."[60]

53. Important policy goals underscore this negative right. As the Supreme Court of Canada has held, "Parliament has decided it is worth fostering expression in exchange for a statutory monopoly (i.e., preventing anyone else from ... exploiting the copyrighted expression without permission)."[61] In addition, the objectives of the *Copyright Act* are "furthered by a carefully balanced scheme that creates exclusive economic rights for ... copyright owners ... typically in the nature of a statutory monopoly to prevent anyone from exploiting the work in specified ways without the copyright owner's consent."[62]

2. Mechanical Licences Are Not Compulsory

54. In 1988, Parliament expressly abolished a statutory licensing regime for the issuance of mechanical licences. In doing so, Parliament confirmed its intention that the owner of copyright in a musical work would have the unrestricted right to authorize or to refuse to authorize a third party to make mechanical reproductions of that work. CMRRA adopts and relies on the submissions of the respondents Universal Music Publishing Group Canada and Universal Music Canada Inc. regarding the 1988 amendments to the *Copyright Act*.

55. Moreover, Stargrove's claim that the market for the issuance of mechanical licences operates as though it were a compulsory system deliberately ignores the relevant facts. For example, in support of its position, both Stargrove and Mario Bouchard cite an affidavit sworn by David A. Basskin, the former President and Chief Executive Officer of CMRRA. Stargrove's

---

[59] *Canada (Director of Investigation & Research) v. Warner Music Canada Ltd.* (1997), 78 C.P.R. (3d) 321, 43 B.L.R. (2d) 93 (Comp. Trib) at para. 32 [*Warner*].

[60] John S. McKeown, *Fox on the Canadian law of copyright and industrial designs*, 4th ed (Toronto, Canada: Carswell, 2012) (loose-leaf updated 2013), ch 5 at s 1:3(a) [*Fox on Copyright*].

[61] *Mattel U.S.A. Inc. v 3894207 Canada Inc*., 2006 SCC 22 at para. 21.

[62] *Reference re Broadcasting*, [2012] 3 SCR 489 at para. 36. See also *Fox on Copyright, supra* note 60.

reliance on Mr. Basskin's affidavit in support of its request for a compulsory licensing system in place is misplaced. The affidavit is clear that, despite any then-current practice, "it would be desirable if mechanical licences were to be sought and obtained in advance,"[63] and that "the absence of a compulsory licence means that a given copyright owner is entitled to refuse a licence request and might well do so."[64]

56. This Tribunal should also give no weight to the report of Mr. Bouchard (the "**Bouchard Report**") and in particular his conclusion that the market operates as though compulsory licensing were still in place. He expressly bases that conclusion upon his own interpretation of: (i) certain decisions of the Copyright Board of Canada, (ii) the settlement order issued in the pending list class action; and (iii) the MLA and Publisher Affiliation Agreement.[65] Mr. Bouchard therefore advances legal argument and engages in contractual interpretation, which encroaches on the role of the parties to this proceeding and the decision-making function Tribunal, and ought to be ignored.[66]

57. Mr. Bouchard fails to address important aspects of CMRRA's mechanical licensing process, all of which contradict his conclusions. He does not address the fact that the Pay-As-You-Press plan, not the MLA, is the default mechanism by which CMRRA issues mechanical licences,[67] and that the MLA is only warranted where a prospective licensee is able to satisfy certain requirements.[68] He also fails to consider the significance of the agency relationship between CMRRA and its music publisher principals, including the publishers' right to unilaterally revoke authority from CMRRA and CMRRA's duty to obey, which is discussed below. Mr.

---

[63] Basskin Affidavit, Appendix 2 to the Bouchard Affidavit, Application Record, Vol. 2, Tab F, p. 380 at para. 50.
[64] Basskin Affidavit, Appendix 2 to the Bouchard Affidavit, Application Record, Vol. 2, Tab F, p. 381 at para. 51.
[65] Bouchard Affidavit, Application Record, Vol. 2, Tab F, p. 359 at paras. 30.
[66] Decision of the Tribunal dated November 18, 2015 regarding the motion to exclude the Bouchard Report, 2015 Comp. Trib. 17, para. 17.
[67] See paragraphs 11 to 18.
[68] See paragraphs 35 to 48.

Bouchard's failure to account for these factors in forming his opinions confirm that his report should be given no weight.

3. Publishers May Limit the Authority of CMRRA, Which Has a Duty to Obey

58. CMRRA is in a unique position in this proceeding, in that it is an agent for the Respondent Publishers. As Stargrove itself has acknowledged, CMRRA is "caught somewhat in the middle."[69] The following principles of agency law are therefore relevant to the matters at issue:

(a) As agent, CMRRA owes a duty of obedience to its music publisher principals, and may only perform an undertaking in accordance with the agent's express authority;[70]

(b) The music publisher principals may unilaterally revoke the authority granted to CMRRA at any time before CMRRA exercises that authority,[71] even if doing so would be wrongful or give rise to a cause of action of CMRRA:

> **The general rule, which is perhaps not widely understood, is that the *authority* of an agent** whether given by power of attorney, or informally, even if for consideration, and whether or not expressed to be irrevocable, **is revocable, without prejudice to the fact that such revocation may be wrongful as between principal and agent.** The revocation may be oral whether or not the authority was conferred in writing. […][72] (Italics in original, other emphasis added.)

It follows that the music publisher principals may revoke specific aspects of their grant of authority to CMRRA, thereby limiting or narrowing that authority;

---

[69] Email from Stargrove to CMRRA dated February 13, 2015, Perusini Affidavit, Exhibit 12, Application Record, Vol. 1, Tab E-12, p. 170.

[70] Gerald Fridman, *Canadian Agency Law*, 2nd ed (Markham, Canada: LexisNexis, 2012) at 102 [*Fridman*]; Cameron Harvey & Darcy MacPherson, *Agency Law Primer*, 4th ed (Toronto, Canada: Carswell, 2009) at 163-164 [*Harvey and MacPherson*].

[71] *Fridman, supra* note 70 at 132-133; *Harvey and MacPherson*, *supra* note 70 at 198; and Peter Watts, *Bowstead and Reynolds on Agency*, 19th ed (London, UK: Sweet & Maxwell, 2010) at 664-665 [*Bowstead*]. The sole exception to this general rule is where the agency is "irrevocable." An agency is not irrevocable merely because the parties refer to it as such, or because the agency is provided pursuant to a contract. Rather, an agency is irrevocable only where the authority of the agent is provided for the purpose of protecting or securing an interest of the agent. *Bowstead* at 651; *Harvey and MacPherson, supra* note 70 at 195-196; *Fridman*, *supra* note 70 at 133.

[72] *Bowstead*, *supra* note 71 at pp. 664-665 (10-023-10-024); See also *Harvey and MacPherson, supra* note 70 at 202.

(c) Stargrove could not rely on any ostensible authority on the part of CMRRA to issue mechanical licences for the songs in question, having received notice of the instructions from the Respondent Publishers that CMRRA not do so;[73] and

(d) If CMRRA had purported to issue mechanical licences to Stargrove for those songs in contravention of the Respondent Publishers' instructions, it would expose itself to potential liability for breach its duty to obey those instructions,[74] and breach of an implied warranty of authority to Stargrove.[75]

59. Thus, there is no merit to Stargrove's position that, under the Publisher Affiliation Agreement, a music publisher may only instruct CMRRA to deny a mechanical licence where it intends to grant that licence directly. In any event, Stargrove mischaracterizes the language of the Publisher Affiliation Agreement, writing as follows in its factum:

> CMRRA's contracts with the publishers it represents (called "Affiliation Agreements") contemplate that CMRRA "shall" issue the mechanical licences on standard terms... [76]

60. The Affiliation Agreement does not contain the word "shall", or any other mandatory language, in respect of the issuance of mechanical licences. Rather, it "engages" and "instructs" CMRRA to act as the non-exclusive agent for a music publisher for the purpose of issuing mechanical licences, and "such other services as Publisher may specifically instruct CMRRA to undertake..."[77] It uses *permissive* language to confirm that a publisher "may" refrain from issuing mechanical licences where it wishes to do so directly, but contains no express prohibition against the publishers instructing CMRRA to refuse an application in other situations, as it is entitled to do pursuant to the law of agency.

---

[73] *Fridman*, *supra* note 70 at 83 and 136-137; *Harvey and MacPherson, supra* note 70 at 198, 67.

[74] *Fridman*, *supra* note 70 at 102. See also *Harvey and MacPherson, supra* note 70 at 166.

[75] *Fridman*, *supra* note 70 at 159; See also *Harvey and MacPherson, supra* note 70 at 131-136.

[76] Applicant's Memorandum of Fact and Law, Application Record, Vol. 1, Tab D, p. 58, para. 18.

[77] Publisher Affiliation Agreement, Appendix 4 to the Bouchard Affidavit, Application Record, Vol. 2, Tab F, App. 4, pp. 470, 472 at s. 2 and Schedule A, s. 3.

B. CMRRA's Conduct Cannot Be the Subject to an Order Under Sections 75, 76 or 77

61. Sections 75, 76 and 77 are all contingent on the respondent controlling a "product". As stated above, all that CMRRA controls is the mechanism through which it issues mechanical licences, where it is authorized to do so. Even if the copyright in a musical work could be a "product", it is CMRRA's music publisher clients who control CMRRA's ability to issue mechanical licenses on their behalf.

62. The contractual mechanism used by CMRRA to issue mechanical licences (where it is authorized to do so) cannot possibly be a "product" as that term is defined under the *Act*.[78] For this reason, CMRRA submits that sections 75, 76 and 77 of the *Act* simply cannot apply to it and its conduct cannot therefore be subject to an order of this Tribunal.

63. Even if the Tribunal were to accept that the mechanism by which mechanical licences are issued (i.e., MLA or Pay-As-You-Press), as opposed to the licences themselves, could constitute a "product", Stargrove's evidence clearly confirms the fact that CMRRA is willing to issue licences to Stargrove where it is authorized to do so by its principals. Further, as stated a paragraphs 45 to 48, Stargrove has offered to discuss the development of a customized version of the Pay-As-You-Press mechanism that betters suits Stargrove's needs and it is Stargrove who has failed to pursue those discussions. Accordingly, Stargrove's application must fail since there has been no refusal to deal on the part of CMRRA.

64. In short, Stargrove's position is not that CMRRA has refused to deal with it (to the extent the relevant provisions of the *Act* apply at all given that CMRRA does not control a "product"), but rather that CMRRA is not willing to use the licensing mechanism that Stargrove prefers.

---

[78] The *Competition Act*, R.S.C. 1985, c. C-34, as amended [*Competition Act*] at s. 2(1) provides a definition of a "product" to includes an article or a service.

65. The relevant provisions of the *Act* were not intended to allow applicants to force third parties to enter into a particular form of commercial arrangement, especially where there are legitimate business reasons as to why that form of commercial arrangement is inappropriate and where a viable alternative is available.

66. For the reasons set out above, CMRRA submits that Stargrove's application as against CMRRA must fail, as the relevant provisions of the *Act* simply do not apply to CMRRA and the Tribunal has no grounds upon which to issue an order against CMRRA. Accordingly, Stargrove's application must be dismissed as against CMRRA.

C. Stargrove Fails to Meet the Test for Leave

67. In the event that the Tribunal disagrees with CMRRA's position that sections 75, 76 and 77 of the *Act* do not apply to CMRRA, the only issue before the Tribunal is whether Stargrove has satisfied the test for leave under subsection 103.1 of the *Act*. The Federal Court of Appeal has held that, to grant leave under section 103.1 of the *Act*, the Tribunal must be satisfied that:

(a) the leave application is supported by sufficient credible evidence to give rise to a bona fide belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice; and

(b) the practice in question could be subject to an order.[79]

1. Stargrove's Evidence is Insufficient to Establish a Direct and Substantial Effect on its Business

68. The Tribunal has determined that "substantial" in the context of an application for leave under subsection 103.1(7) of the *Act* carries the meaning "important" and "significant". To meet

[79] *Competition Act*, *supra* note 78 at s. 103.1; *Barcode Systems Inc. v Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1, [2004] C.C.T.D. No. 1; affd 2004 FCA 339, [2004] F.C.J. No. 1657, at para. 5 (C.A.) [*Barcode*]; *National Capital News Canada v. Canada (Speaker of the House of Commons)*, 2002 Comp. Trib. 41, [2002] C.C.T.D. No. 38 at para. 14.

this threshold, the applicant must show sufficient credible evidence of substantial effect and the evidence of loss cannot be speculative or undocumented.[80] In this regard, the evidence filed by Stargrove is clearly inadequate.

69. Rather than producing business documents, financial statements, purchase orders, or similar materials, Stargrove has instead limited its evidence on this important issue to Mr. Perusini's own unsubstantiated statements and a few self-serving email exchanges with its distributor, Anderson Merchandisers Canada Inc., which clearly stands to profit from future dealings with Stargrove.

70. Stargrove's evidence regarding the impact of the conduct at issue, which is limited to unsubstantiated statements by Mr. Perusini and Anderson Merchandisers Canada Inc., cannot be credible as it is both highly speculative and is effectively undocumented.

2. Stargrove's "Business" is Predicated on Accessing Intellectual Property it Does Not Own

71. In assessing whether Stargrove has been directly or substantially affected by the conduct at issue, it is important to consider the validity of its business model. In this case, Stargrove's business model is predicated on its ability to obtain rights to mechanical licences held by third parties.

72. According to Mr. Perusini's affidavit, Stargrove's business model consists of selling CDs that contain three different categories of sound recordings: (i) recordings in which Stargrove owns the sound recording copyright; (ii) recordings licensed to Stargrove from various independent labels; and (iii) recordings that have fallen into the public domain and for which master recording licences are therefore not required. However, the line of "business" at issue in Stargrove's

[80] *Sears Canada v Parfums Christian Dior Canada Inc.*, 2007 Comp. Trib. 6, [2007] C.C.T.D. No. 3, paras. 28-31, 40; *Canada (Director of Investigation and Research) v Chrysler Canada*, (1989), 27 C.P.R. (3d) 1,[1989] C.C.T.D. No. 49 at paras. 63-64 (Comp. Trib.).

application consists of selling CDs that contain only recordings that fall within the third category – and which contain songs that nevertheless require mechanical licences from the Publisher Respondents.

73. Given that the line of business at issue is entirely dependent upon the willingness of third parties to grant a licence, Stargrove's attempt to argue that it has been directly and substantially affected due to the Respondent Publishers' exercise of their copyright is clearly an attempt to use the *Act* as a compulsory licensing mechanism. The Tribunal has stated that this is not the intent of the *Act*.[81] Accordingly, CMRRA submits that the inability to obtain access to intellectual property, to which the applicant has no right, cannot support a valid claim of harm to which the *Act* is intended to apply.

74. As discussed at paragraphs 51 to 53 of this submission, the issuance of these mechanical licences is governed by copyright law. Under copyright law, a rightsholder is entirely within its rights to refuse to issue a mechanical licence to any third party under any circumstances.

75. Further, while the Respondent Publishers may not be willing to issue mechanical licences to Stargrove, there are other publishers who remain willing to do so – hence, the availability of the CMRRA Licensable Works. The fact that Stargrove does not have unfettered access to all of the musical works it would like does not, on its own, substantiate a finding that the conduct at issue has had a direct or substantial impact on it. In this regard, it is necessary to note that Stargrove has not provided any evidence of its inability to operate based on the access it does have to musical works owned by other rightsholders, including but not limited to the CMRRA Licensable Works.

76. In short, Stargrove has created a precarious business model based on having to obtain licences for intellectual property owned by others without first ensuring that it could do so.

---

[81] *Warner, supra* note 59 at para. 30.

Moreover, in the case of the Stargrove CDs actually released, Stargrove took the further liberty of manufacturing and distributing its products prior to ensuring that it had obtained all of the required mechanical licences. In the circumstances, it is disingenuous for Stargrove to claim that it has sustained direct and substantial harm as a result of the fact that it has not been able to secure the use of the intellectual property it wants, but has no rights to.

77. In light of the above, CMRRA submits that Stargrove has failed to establish that it has been directly and substantially affected by CMRRA's conduct and, as a result, has not met the first criterion of the test for leave.

78. Further, if the Tribunal accepts that a party can be directly and substantially affected where its business model is predicated on the unfettered access to third party intellectual property, the necessary implication is that the Tribunal process will be used as a compulsory licensing mechanism, in circumvention of the existing legal framework governing intellectual property rights in Canada. This is consistent both with *Warner Music*[82] and with the Competition Bureau's *Intellectual Property Enforcement Guidelines*, which state that "the mere exercise of an IP right is not a cause for concern under the general provisions of the Act", and that "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."[83]

D. Stargrove Does Not Meet the Tests Under Sections 75, 76 and 77

79. Should the Tribunal disagree with CMRRA's position on the first branch of the test for leave, CMRRA submits that Stargrove has also failed to demonstrate that CMRRA has engaged in a practice that could be subject to an order under the *Act*.

[82] *Warner, supra* note 59 at para. 32.
[83] *IPEGs, supra* note 58 at section 4.2.

80. Stargrove alleges that CMRRA's conduct violates sections 75 (refusal to deal), 76 (price maintenance), and 77 (exclusive dealings) of the *Act*. As explained below, Stargrove has failed to meet the applicable statutory requirements for each of these sections.

1. Section 75 – Refusal to Deal

81. CMRRA reiterates its position that it has not refused to deal with Stargrove given that Pay-As-You-Press licensing – and, indeed, the offer to explore a customized Pay-As-You-Press arrangement – has been available to Stargrove at all material times..

82. For Stargrove to succeed, the Tribunal must be satisfied that there is sufficient credible evidence with respect to each of the conjunctive statutory conditions under section 75 of the *Act*. Absent a single element, the application must fail.[84]

(i) Substantially Affected

83. CMRRA submits that Stargrove's claim under section 75 cannot succeed given that, as discussed above at paragraphs 68 to 70, Stargrove has failed, as it relates to CMRRA, to meet the first element of the section, namely to provide credible evidence that it will be substantially affected in its business or is precluded from carrying on business.

(ii) Adequate Supply/Ample Supply

84. CMRRA relies on its statement at paragraphs 61 to 63 above that the mechanism by which it issues mechanical licences is not a "product" within meaning of section 75 of the *Act*. Accordingly, CMRRA makes no representations regarding the second and fourth elements of section 75, namely the suggestions by Stargrove that (i) it is unable to obtain adequate supply of

[84] *Barcode, supra* note 79 at para. 18; *B-Filer Inc. v Bank of Nova Scotia,* 2005 Comp. Trib. 38, [2006] F.C.J. No. 983 at para. 52; *Sono Pro Inc. v Sonotechnique P.J.L. Inc.,* 2007 Comp. Trib. 18, 2007 CACT 18 at para. 12.

a “product” due to insufficient competition among suppliers of that product in the market, and (ii) there is ample supply of that “product”.

(iii) Usual Trade Terms

85. Stargrove alleges that it is “is willing to meet the usual trade terms of the Respondents through CMRRA for issuing mechanical licences. It has tried to enter into CMRRA’s standard MLA, but CMRRA refuses to deal with it on its standard terms.”[85]

86. Stargrove’s attempt to characterize the MLA as the “usual trade terms” deliberately ignores crucial facts.

87. First, the Pay-As-You-Press plan, not the MLA, is the default mechanism by which CMRRA issues mechanical licences (paras. 11 to 18).

88. Second, an MLA is only warranted where a prospective licensee is able to satisfy the requirements that are necessary to ensure the proper functioning of an MLA, including volume, credit, and administrative requirements. Stargrove was unable to meet these qualifications and, as a result, CMRRA determined in good faith that it was not able to enter into an MLA. Nevertheless, as an accommodation, CMRRA offered to work with Stargrove to develop a customized Pay-As-You-Press plan that would meet Stargrove’s business needs. Stargrove rejected that offer (paras. 35 to 48).

89. Third, contrary to Stargrove’s reference to a “standard MLA”, the MLA is a document that takes various forms, which differ from one another in a number of respects (para. 14). Moreover, CMRRA retains the right to modify an MLA that it enters into with a particular licensee. For these reasons, the terms of different MLAs can differ in practice.

---

[85] Proposed Notice of Application dated August 28, 2015, Schedule “A”, Application Record, Vol. 1, Tab B, p. 20 at para. 33.

90. In any event, the refusal to deal provisions are not intended to allow Stargrove to force CMRRA to enter into an MLA where an alternate licensing mechanism exists. As discussed above, CMRRA issues mechanical licences by way of the mechanism that it considers appropriate in the case of the particular licensee, with Pay-As-You-Press being the default plan, and subject in every case to CMRRA's having the necessary authority to issue the requested licences.

91. The fact that Stargrove initially applied for licences under the Pay-As-You-Press plan clearly indicates that it viewed that licensing mechanism as acceptable. Further, CMRRA has indicated a willingness to develop a customized licensing system that meets Stargrove's needs. There is simply no basis for the assertion that CMRRA has "refused to deal" with Stargrove.

(iv) Adverse Effect on Competition

92. Stargrove has failed to establish that CMRRA's alleged refusal to enter into an MLA is having, or is likely to have, an adverse effect on competition in the market.

93. As noted above, CMRRA acts as an agent of its music publisher principals; it can only issue licences where those rightsholders authorize it to do so.

94. Even assuming that the mechanism for issuing mechanical licences (i.e., MLA or Pay-As-You-Press) is a "product", which CMRRA denies, the fact remains that CMRRA has been willing to enter into a customized Pay-As-You-Press arrangement with Stargrove to facilitate the issuance of licences for the CMRRA Licensable Works. In the circumstances, it is simply not possible to conclude that CMRRA's actions could have *any* effect on competition, adverse or otherwise.

95. Accordingly, Stargrove has failed to demonstrate that CMRRA's conduct either (i) constitutes a refusal to deal, or (ii) has resulted in an adverse effect on competition.

96. Based on the above, Stargrove has failed to meet its burden to show that CMRRA has engaged in conduct that could be subject to an order under section 75 of the *Act*.

2. Section 76 – Price Maintenance

97. CMRRA denies Stargrove's allegation that it has engaged in price maintenance in contravention of section 76 of the *Act* on the following grounds.

98. Under section 76, Stargrove must demonstrate that CMRRA has influenced upward, or has discouraged the reduction of, the prices charged by another business that is either a customer or a competitor of CMRRA as a "supplier". It must also show that CMRRA, as a "supplier", has refused to supply a product to, or has discriminated against, another person because of that other person's low pricing policy, and that the conduct in question has had, is having, or is likely to have an adverse effect on competition in a market.

99. For the reasons set out in detail in CMRRA's discussion regarding the inapplicability of section 75 to its conduct, it submits that section 76 is equally inapplicable and that Stargrove's claim under this section must similarly fail.

3. Section 77 – Exclusive Dealing

100. CMRRA opposes Stargrove's allegation that it has engaged in exclusive dealings in contravention of section 77 of the *Act*.

101. First, it is unclear from Stargrove's submission how CMRRA has engaged in any conduct falling within the scope of section 77 of the *Act*. Stargrove has not provided any evidence to support its allegations against CMRRA. Further, for the reasons set out above, CMRRA submits that section 77 simply cannot apply to its conduct.

102. Accordingly, Stargrove has failed to satisfy the requirements for obtaining leave to commence an application under section 77 of the *Act*.

4. Stargrove Has Failed the Test for Leave

103. For all of the reasons outlined above, CMRRA submits that Stargrove has failed to establish that: (i) its application for leave to proceed is supported by sufficient credible evidence to give rise to a bona fide belief that Stargrove may have been directly and substantially affected in its business by a reviewable practice; or (ii) the practice in question could be subject to an order of the Tribunal. [86]

104. Even if the Tribunal were to decide that Stargrove has met the test for leave, CMRRA submits that it would not be proper for the Tribunal to exercise its discretion and grant leave.[87] As outlined above, there are significant policy issues relating to the interplay between the *Competition Act* and the *Copyright Act* (especially where the applicant is attempting to use the *Competition Act* to override the rights afforded to the respondents under the *Copyright Act*), CMRRA submits that it would be more appropriate for this matter to be considered by way of regulatory reform, if warranted.

V. ORDER SOUGHT

105. CMRRA requests that the Tribunal dismiss this leave application as against it, with costs on a solicitor-client basis or, in the alternative, costs to be fixed at the highest end of Column V of Tariff B of the *Federal Courts Rules*, S.O.R./98-106.

---

[86] Given that CMRRA does not control any "product" within the meaning of sections 75, 76 and 77 of the Act, the conduct alleged by Stargrove cannot be subject to an order of this Tribunal. Further, Stargrove has provided insufficient evidence to demonstrate that it is "substantially" affected by the alleged conduct. The Tribunal should infer that Stargrove has (i) put his best foot forward in its pleadings, (ii) has failed to demonstrate how CMRRA controls a "product" within the meaning of sections 75, 76 and 77 of the Act and (iii) has failed to provide evidence to substantiate the claim that it has been "substantially" affected by the alleged conduct. See *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141,2003 SCC 14, at para. 32.

[87] *Commissioner of Competition v Visa Canada Corporation, MasterCard International Incorporated, The Toronto-Dominion Bank, The Canadian Bankers Association*, 2013 Comp. Trib. 10, 2013 CACT 10 at paras. 393-394.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of November, 2015.

Christopher Hersh

Casey Chisick

SCHEDULE "A" – Authorities

Jurisprudence

1. *Canada (Director of Investigation & Research) v. Warner Music Canada Ltd.* (1997), 78 C.P.R. (3d) 321, 43 B.L.R. (2d) 93 (Comp. Trib)

2. *Mattel U.S.A. Inc. v 3894207 Canada Inc.,* 2006 SCC 22

3. *Reference re Broadcasting*, [2012] 3 SCR 489

4. *Barcode Systems Inc. v Symbol Technologies Canada ULC,* 2004 Comp. Trib. 1, [2004] CCTD No. 1; affd 2004 FCA 339, [2004] FCJ No. 1657

5. *National Capital News Canada v Canada (Speaker of the House of Commons)*, 2002 Comp. Trib. 41, [2002] CCTD No. 38

6. *Sears Canada v Parfums Christian Dior Canada Inc,* 2007 Comp. Trib. 6, [2007] CCTD No. 3

7. *Canada (Director of Investigation and Research) v Chrysler Canada*, (1989), 27 CPR (3d) 1, [1989] CCTD No. 49

8. *Goudie v Ottawa (City),* [2003] 1 SCR 141, 2003 SCC 14

9. *B-Filer Inc v Bank of Nova Scotia,* 2005 Comp. Trib. 38, [2006] FJ No. 983

10. *Sono Pro Inc. v Sonotechnique PJL Inc.*, 2007 Comp. Trib. 18, 2007 CACT 18

11. *Commissioner of Competition v Visa Canada Corporation, MasterCard International Incorporated, The Toronto-Dominion Bank, The Canadian Bankers Association*, 2013 Comp. Trib. 10, 2013 CACT 10

Secondary Sources

1. Competition Bureau, Intellectual Property Enforcement Guidelines, September 2014, online: Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03808.html>

2. Cameron Harvey & Darcy MacPherson, *Agency Law Primer*, 4th ed (Toronto, Canada: Carswell, 2009)

3. Gerald Fridman, *Canadian Agency Law*, 2nd ed (Markham, Canada: LexisNexis, 2012)

4. John S. McKeown, *Fox on the Canadian law of copyright and industrial designs*, 4th ed (Toronto, Canada: Carswell, 2012) (loose-leaf)

5. Peter Watts, *Bowstead and Reynolds on Agency*, 19th ed (London, UK: Sweet & Maxwell, 2010)

SCHEDULE "B" – Statutes and Regulations

1. *Competition Act*, RSC 1985, c C-34, ss. 2, 75, 76, 77, 103.1
2. *Copyright Act*, RSC 1985, c C-42, ss. 3, 27(1)

File No. CT.2015.009

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act,* R.S.C. 1985, c. C.34 (the "**Act**");

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

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to sections 75, 76, and 77 of the Act;

AND IN THE MATTER OF an application by Stargrove Entertainment Inc. for an order pursuant to section 104 of the Act;

BETWEEN:

STARGROVE ENTERTAINMENT INC.

Applicant

. and .

UNIVERSAL MUSIC PUBLISHING GROUP CANADA,
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

RESPONDING FACTUM OF
CANADIAN MUSICAL REPRODUCTION RIGHTS AGENCY LTD.
(Application for Leave Pursuant to Section 103.1 of the *Competition Act* and Application for Interim Order Pursuant to Section 104 of the *Competition Act*)

Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Casey M. Chisick LSUC #: 46572R
Tel: 416.869.5403
Fax: 416.644.9326
cchisick@casselsbrock.com

Chris Hersh LSUC #: 43080N
Tel: 416.869.5387
Fax: 416.640.3017
chersh@casselsbrock.com

Lawyers for the respondent,
Canadian Musical Reproduction Rights Agency Ltd