File No. CT-2015-009

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, RSC 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;

B E T W E E N:

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

RESPONSE

of ABKCO Music & Records Inc. and Casablanca Media Publishing

CIPPIC MOTION FOR LEAVE TO INTERVENE

March 29, 2016

COMPETITION TRIBUNAL
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Jos LaRose for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT	# 30

AFFLECK GREENE McMURTRY LLP
Barristers & Solicitors
365 Bay Street, 2nd floor
Toronto, Ontario M5H 2V1

W. Michael G. Osborne
Tel. 416-360-5919
Fax 416-360-5960
Email mosborne@agmlawyers.com

Wendy Sun
Tel. 416-360-1485
Fax 416-360-5960
Email wsun@agmlawyers.com

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

TO: **The Registrar of the 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: **Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC)**
University of Ottawa, Faculty of Law
Common Law Section
57 Louis Pasteur St.
Ottawa, ON K1N 6N5

David Fewer
Tel: (613) 562-5800 ext. 2558
Fax: (613) 562-5417

Lawyer for the Moving Party
Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC)

AND TO: **WEIRFOULDS LLP**
Barristers and 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

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

Lawyers for the Applicant,
Stargrove Entertainment Inc.

AND TO: **OSLER, HOSKIN & HARCOURT LLP**
Barristers & Solicitors
Box 50, 1 First Canadian Place
Toronto ON M5X 1B8

Mahmud Jamal (LSUC# 38632A)
Tel: (416) 862-6764

Peter Franklyn (LSUC# 24049V)
Tel: (416) 862-6494
Fax: (416) 862-6666

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

AND TO: **CASSELS BROCK & BLACKWELL LLP**
Suite 2100, Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Casey Chisick
Chris Hersh
Tel: (416) 869-5387
Fax: (416) 360-8877

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

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CIPPIC MOTION FOR LEAVE TO INTERVENE

I OVERVIEW

1. The motion for leave to intervene by the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic ("CIPPIC") should be denied.

2. CIPPIC is not "directly affected" by the matters at issue in this proceeding, by its own admission. Accordingly, it fails to meet the statutory test for intervention.

3. It is not open to the Tribunal to change the "directly affected" test to a "genuinely interested" test, as CIPPIC requests, because the "directly affected" test comes from the Tribunal's consistentinterpretation of subsection 9(3) of the *Competition Tribunal Act*.

4. In any event, CIPPIC fails to meet even the "genuinely interested" test, because its interest is no more than a mere jurisprudential interest.

5. Further, the issues that CIPPIC proposes to address are not specifically raised by the applicant. They would expand the scope of the proceeding.

6. As well, CIPPIC has failed to identify a unique and distinct perspective that would assist the Tribunal, other than that is has a different status from that of the parties.

7. CIPPIC has also failed to submit a concise statement of competitive consequences, as required by the *Competition Tribunal Rules*.

8. There is no place in the scheme of the *Competition Act* and the *Competition Tribunal Act* for an intervention in the public interest by a legal clinic that is not affected by this proceeding. The *Competition Act* assigns this role to the Commissioner of Competition and gives him the right to intervene in this proceeding in the public interest.

II CIPPIC SHOULD NOT BE GRANTED LEAVE TO INTERVENE

A. CIPPIC is ineligible to intervene because it is not directly affected – as it admits

9. Subsection 9(3) of the *Competition Tribunal Act* expressly limits interventions to matters that "affect" the intervenor:[1]

> *Interventions by persons affected*
>
> (3) Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the Competition Act, to make representations relevant to those proceedings in respect of any matter that affects that person. [Emphasis added]

10. The Tribunal has clarified that the term "affects" must be read as meaning "directly affects", in *Air Canada*. In that case, the Tribunal rejected a proposed intervention by a public interest intervenor because it was not adequately affected – that is, it was not directly affected:

> I am rejecting the request of the Council of Canadians for leave to intervene because in my view it has not shown that it is adequately "affected" by these proceedings or that the representations it might have to offer would significantly assist the Tribunal in dealing with the issues within its mandate under the Competition Act.2 I believe that the term "affects" in subsection 9(3) of the Competition Tribunal Act must be read as meaning "directly affects".[2]

11. This interpretation of subsection 9(3) was incorporated into the four part test for intervention by the Tribunal in *Canadian Waste Services*.[3] The test laid down in that case, including the "directly affected" requirement, has been repeatedly applied by the Tribunal.

12. By its own admission, CIPPIC does not meet the "directly affected" test laid down in *Air Canada*. There is no "matter that affects" it within the meaning of subsection 9(3) of the *Competition Tribunal Act*.

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[1] *Competition Tribunal Act*, RSC 1985 c 19 (2nd Supp), s 9(3).
[2] *Director of Investigation and Research v Air Canada* (1992), 46 CPR (3d) 184 at 187. ("*Air Canada*")
[3] *Canada (Commissioner of Competition) v Canadian Waste Services Holding*, 2000 Comp Trib 9. ("*Canadian Waste Services*")

13. CIPPIC relies on the *D&B* case to support its contention that it has a "direct interest" (but not that it is "directly affected"). In *D&B*, an industry association was allowed to intervene because its members were directly affected: they had contracts with the respondent for the supply of scanner data. Those very contracts were at issue in the proceeding, as they had been challenged by the Director (Commissioner).[4]

14. In *Air Canada*, the Tribunal applied the "directly affected" test to deny an intervention application by an organization that wanted to advance its view of the public interest, much like CIPPIC. In that case, the Council of Canadians claimed to represent 25,000 Canadians who were concerned about the impact of the case on Canadian sovereignty. In *Visa Canada Corp.*,[5] Tribunal chair Simpson J. commented that under *Air Canada*, "leave to intervene would be denied to a person who might have strong views about the outcome of a case, but would not be affected differently from members of the general public".

15. In this case, CIPPIC's interest is even less than Council of Canadians. CIPPIC is a group of lawyers in a legal clinic at a law school who offer a pure legal opinion; it does not even claim to represent members or clients that could be affected by this case. However strong CIPPIC's views about this case may be, it has not shown that it would be affected differently from members of the general public.

16. The statutory language of the *Competition Tribunal Act* and jurisprudence of this Tribunal make clear that CIPPIC is not eligible to intervene.

B. The Tribunal should not change the test for intervention

17. CIPPIC instead asks the Tribunal to change the test for intervention to favour public interest intervenors, by adopting the "genuine interest" standard applied by the Federal Court of Appeal in *Globalive Wireless Management Corp v Public Mobile Inc.*[6]

18. *Globalive* has no application to an intervention application in this Tribunal. *Globalive* involved an application to review a decision of the Governor in Council in a *Telecommunications Act* matter. The rule governing interventions, Rule 109(1) of the *Federal Court Rules*, does not contain a requirement that the intervenor be "affected".

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[4] *Canada (Director of Investigation and Research) v The D & B Companies of Canada Ltd.*, [1994] CCTD No 19 at p 3 (QL).("*D&B*")
[5] *Canada (Commissioner of Competition) v Visa Canada Corp.*,[2011] CCTD No 2 at ¶12.("*Visa Canada Corp*")
[6] 2011 FCA 119 ("*Globalive"*).

19. It is not open to the Tribunal to substitute the "genuine interest" test for the "directly affected" test: subsection 9(3) of the *Competition Tribunal Act* expressly limits interventions to intervenors that can show that the case involves a "matter that affects" them. There is no way to give effect to CIPPIC's proposed "genuine interest" test that would not do violence to the express statutory requirement in subsection 9(3).

20. Even if it were possible for the Tribunal to apply the "genuine interest" test in place of the statutory "directly affected" test, the Tribunal should not do so here.

21. First, CIPPIC fails to meet even the *Globalive* test. In *Globalive*, the court noted that an intervenor's interest must be "beyond a mere 'jurisprudential' interest, such as a concern that this Court's decision will have repercussions for other areas of law".[7]

22. CIPPIC's basis for intervention is that "the Tribunal's decision will have repercussions for copyright law".[8] This fits squarely within the definition of a "mere jurisprudential interest", which disqualifies CIPPIC from being eligible to intervene, even under its proposed test.

23. Second, there is no need for public interest intervenors in private applications in the Tribunal because the *Competition Act* assigns that responsibility to the Commissioner of Competition. The Commissioner is the public official charged with the enforcement of the Act[9] and has the right to intervene in private applications.[10] The Commissioner has stated that in determining whether to intervene, "the overriding factors are whether there are significant competition issues raised and whether it is in the public interest for the Commissioner to intervene".[11] The Competition Bureau has a demonstrated interest and ability to address issues involving the interface between competition law and intellectual property, as numerous publications, including guidelines on competition law and IP,[12] cases before this Tribunal,[13] and speeches[14] indicate.

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[7] *Ibid* at ¶5.
[8] CIPPIC Application for Leave to Intervene, Written Representations, ¶11, 17
[9] *Competition Act*, s 7
[10] *Competition Act*, RSC 1985 c 34, s 103.2
[11] Canada, Commissioner of Competition, *Information Bulletin on Private Access to the Competition Tribunal*, p. 3.
[12] Canada, Commissioner of Competition, *Intellectual Property Enforcement Guidelines*, 2014.
[13] See for example, *Canada (Competition Act, Director of Investigation and Research) v Warner Music Canada Ltd.*, [1997] CCTD No 53; *Canada (Director of Investigation and Research, Competition Act) v NutraSweet Co*, [1990] CCTD No 17;
[14]See for example, John Pecman, "Remarks by John Pecman, Commissioner of Competition" (Speech delivered at the George Mason University Pharma Conference, 23 September 2014), [unpublished, archived at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03817.html]; John Pecman, "The Competition Bureau: A Year of Internal Reform and Accomplishments" (Speech delivered at the 2015

24. The overall scheme of the *Competition Act* and the *Competition Tribunal Act* is that the Commissioner's role is to advance the public interest; interventions are limited to private interests that are affected by the case before the Tribunal.

25. Since CIPPIC is not affected by this case, there is no place for it under the legislative scheme as a public interest intervenor, because there is an officer, appointed under the *Competition Act*, whose job it is to advance the public interest in competition, and who has the legal tools and expertise to do so. If a public interest intervention is appropriate, the appropriate intervenor is the Commissioner, not CIPPIC.

C. CIPPIC's proposed representations are not relevant to an issue specifically raised by the applicant

26. CIPPIC proposes to expand the scope of this proceeding to address policy issues relating to the place of the public domain in the *Copyright Act*.

27. The central issue in this case is whether section 76 can be used to force an owner of a musical work to license that work, notwithstanding exclusive rights granted to them by the *Copyright Act*. This case, in short, is about musical works that are not in the public domain.

D. CIPPIC has no unique or distinct perspective that would assist the Tribunal

28. CIPPIC would not bring a unique or distinct perspective that would assist the Tribunal in this case.[15]

29. CIPPIC claims that it can assist the Tribunal in understanding how its determination will affect copyright law and the public domain, as well as the general public's ability to access markets for public domain sound recordings.[16]

30. The parties to this proceeding are represented by counsel who can address all of the legal issues that it raises, including Parliament's scheme for the *Copyright Act*, and its interaction with the *Competition Act*, and, if the issue arises, the role of the public domain. CIPPIC is clinic composed of lawyers who propose to provide a pure legal opinion. It does not have any greater ability to address legal issues raised by the parties than the parties themselves.

Competition Law Spring Forum, 9 June 2015), [unpublished, archived at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03956.html].

[15] *Washington v Director of Investigation and Research*, [1998] CCTD No 4 (QL) (Comp Trib).

[16] CIPPIC Written Representations, ¶16.

31. CIPPIC has failed to offer any examples of topics on which its position might differ from those of the parties. The distinct perspective that CIPPIC claims to have does not arise from its demonstrating that it holds any positions that are different from those of the parties; it arises merely from the fact that CIPPIC has a different status from the parties, as a group of lawyers in a legal clinic based at a law school that advances its view of the public interest.

32. In *CREA*,[17] the Tribunal rejected a motion to intervene that was based upon having a different status from that of the parties. The proposed intervenor, Mr. Dale, claimed that he advanced a private interest distinct from the Commissioner's public interest focus. But he failed to provide examples of the topics on which his positions would differ from those of the Commissioner. In that case, as here, a bald statement is not sufficient to meet the "unique or distinct perspective" requirement.

E. CIPPIC has not provided a concise statement of the competitive consequences arising from the matters in issue

33. CIPPIC has failed to include a concise statement of the competitive consequences arising from the matters in issue which affects it as required by Rule 43(2) of the *Competition Tribunal Rules*.

34. Without this statement, the Tribunal lacks the legal and factual framework to grant intervenor status to CIPPIC.[18]

[17] *Canada (Commissioner of Competition) v The Canadian Real Estate Association* 2010 Comp Trib 11 at ¶13.
[18] *Canada (Commissioner of Competition) v Air Canada*, 2001 Comp Trib 4 at ¶14.

III SCOPE OF INTERVENTION, IF PERMITTED

A. CIPPIC should not have access to discovery evidence

35. For the reasons outlined above, the Tribunal should not grant CIPPIC leave to intervene.

36. If, however, the Tribunal were to grant leave to CIPPIC to intervene, CIPPIC's intervention should be confined to submitting arguments at the hearing. It should not be permitted access to any discovery evidence or documentary productions.

37. The reason is that CIPPIC would not need access to discovery in order to submit arguments. CIPPIC has not asked for the right to examine witnesses or submit evidence of its own. In submitting arguments, CIPPIC would therefore be limited to the record as it develops through the proceeding, from evidence tendered by the parties and admitted by the Tribunal. It would be highly improper for CIPPIC to refer to discovery evidence that was not properly before the Tribunal in making arguments. There is thus no basis upon which to grant CIPPIC access to this evidence.

B. CIPPIC's liability for costs should be left to the Tribunal at the hearing

38. If CIPPIC were granted leave to intervene, then its potential liability for costs should be left to the panel hearing the application. The Tribunal should not now fetter the discretion of the panel to make an adverse award of costs against CIPPIC in the event that it does not behave responsibly.[19]

[19] *Canada (Commissioner of Competition) v Toronto Real Estate Board*, 2011 Comp Trib 22 at ¶43; *Canada (Commissioner of Competition) v Direct Energy Marketing Ltd.*, 2013 Comp Trib 16 at ¶47.

IV ORDER REQUESTED

39. ABKCO and Casablanca request that CIPPIC's motion for leave to intervene be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 29, 2016

W. Michael G. Osborne

Wendy Sun

Counsel to the respondents
ABKCO Music & Records, Inc., and
Casablanca Media Publishing

SCHEDULE A - AUTHORITIES

A. Statutes and Regulations

1. *Competition Act*, RSC 1985 c C-34, ss 7, 103.1, 103.2, 104.
2. *Competition Tribunal Act*, RSC 1985 c 19 (2nd Supp), ss 9(3).
3. *Competition Tribunal Rules*, SOR/2008-141, ss 43(2).
4. *Federal Court Rules*, SOR/98-106, ss 109(1).

B. Cases

5. *Canada (Commissioner of Competition) v Air Canada*, 2001 Comp Trib 4.
6. *Canada (Commissioner of Competition) v Canadian Waste Services Holding*, 2000 Comp Trib 9.
7. *Canada (Commissioner of Competition) v Direct Energy Marketing Ltd.*, 2013 Comp Trib 16.
8. *Canada (Commissioner of Competition) v The Canadian Real Estate Association* 2010 Comp Trib 11.
9. *Canada (Commissioner of Competition) v Toronto Real Estate Board*, 2011 Comp Trib 22.
10. *Canada (Commissioner of Competition) v Visa Canada Corp*., 2011 Comp Trib 2.
11. *Canada (Director of Investigation and Research) v The D & B Companies of Canada Ltd.*, [1994] CCTD No 19.
12. *Canada (Director of Investigation and Research) v Warner Music Canada Ltd.*, [1997] CCTD No 53 (headnote only)
13. *Canada (Director of Investigation and Research, Competition Act) v NutraSweet Co*, [1990] CCTD No 17 (headnote only)
14. *Canada (Director of Investigation and Research) v Air Canada* (1992), 46 CPR (3d) 184.
15. *Globalive Wireless Management Corp v Public Mobile Inc*., 2011 FCA 119.
16. *Washington v Director of Investigation and Research*, [1998] CCTD No 4 (QL) (Comp Trib).

C. Secondary Sources

17. Canada, Commissioner of Competition, *Information Bulletin on Private Access to the Competition Tribunal*, p. 3.

18. Canada, Commissioner of Competition, *Intellectual Property Enforcement Guidelines*, 2014.

19. John Pecman, "The Competition Bureau: A Year of Internal Reform and Accomplishments" (Speech delivered at the 2015 Competition Law Spring Forum, 9 June 2015), [unpublished, archived at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03956.html] (Extract).

20. John Pecman, "Remarks by John Pecman, Commissioner of Competition" (Speech delivered at the George Mason University Pharma Conference, 23 September 2014), [unpublished, archived at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03817.html].

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AFFLECK GREENE McMURTRY LLP
Barristers & Solicitors
365 Bay Street, 2nd floor
Toronto, Ontario M5H 2V1

W. Michael G. Osborne
Tel. 416-360-5919
Fax 416-360-5960
Email mosborne@agmlawyers.com

Wendy Sun
Tel. 416-360-1485
Fax 416-360-5960
Email wsun@agmlawyers.com

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