

**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

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT April 4, 2016 CT-2015-014 Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 36

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**RESPONSE**  
**of**  
**Casablanca Media Publishing**

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## **I RESPONSE TO STARGROVE'S STATEMENT OF GROUNDS AND MATERIAL FACTS**

1. Except as expressly admitted herein, the respondent 2204253 Ontario Inc., which carries on business as Casablanca Media Publishing ("Casablanca"), denies each and every ground asserted by Stargrove and each and every allegation in Stargrove's Statement of Grounds and Material Facts.

## **II MATERIAL FACTS RELIED ON BY CASABLANCA**

### **A. Casablanca**

2. Casablanca is an independent music publisher located in Toronto, Ontario.
3. Casablanca provides both domestic and foreign music publishing administration services to copyright owners around the globe.
4. Casablanca is not a record label, nor does it own a record label or have any affiliation with any record label, except as described below:
  - a) Casablanca has produced promotional CDs for original songs created at songwriter retreats held by Casablanca. These CDs were used to promote the songs for licensing to film, TV, advertising, and similar uses.
  - b) Casablanca Kids Inc. is an affiliate of Casablanca. Casablanca Kids operates as a children's record label, releasing CDs by Fred Penner, Sharon Lois & Bram, Al Simmons, Norman Foote, Jack Grunsky, and others.

### **B. The Three Songs**

5. Casablanca does not and did not ever own, administer, have, or grant any rights or licences whatsoever to any of the musical works referred to in the Amended Notice of Application and Statement of Grounds and Material Facts, or the Affidavit of Terry Perusini, sworn August 26, 2015, ("Application Materials") submitted by the applicant Stargrove Entertainment Inc. ("Stargrove") (the "Subject Musical Works").
6. Stargrove fails to plead which of Subject Musical Works are owned, controlled, or administered by Casablanca.

7. It is apparent from Mr. Perusini's affidavit that he believes that Casablanca administers the rights to three of the Subject Musical Works (the "Three Songs"), namely:

- a) "I Saw Her Standing There"
- b) "From Me To You"
- c) "I Wanna Be Your Man"

8. The Three Songs were all written by John Lennon and Paul McCartney.

9. The copyrights to the Three Songs are administered by Round Hill Music ("Round Hill"), a full service music publisher and creative rights management company located in New York, NY.

10. In 2012, Round Hill retained 1652181 Ontario Inc., which carries on business as Red Brick Songs ("Red Brick"), as its music publishing administrator and agent in Canada for the purpose of, among other things, granting licences to certain copyrighted musical works that it owned, including the Three Songs.

11. Red Brick is owned by Jennifer Mitchell. Ms. Mitchell is also the President and a minority shareholder in Casablanca. Red Brick and Casablanca share staff and facilities, including a website. However, Red Brick and Casablanca are not affiliates within the meaning of subsection 2(2) of the *Competition Act*, nor are they agents for each other.

12. On September 14, 2015, Round Hill gave notice to Red Brick that it wished to manage its Canadian business from the US, and thus was terminating Red Brick's ability to grant mechanical licences as of the end of September 2015, and performing rights licences, as of the end of December 2015.

13. Casablanca advised Stargrove of the above facts promptly upon receiving Stargrove's application for leave to bring this application, by way of letter dated September 18, 2015. Stargrove already knew, or should have known, that it was Red Brick, not Casablanca, that was refusing to grant mechanical licences, as Red Brick wrote to Stargrove's solicitors concerning this refusal on March 24, 2015.

14. Casablanca never had the ability to grant mechanical licences to the Three Songs or any of the Subject Musical Works. Red Brick did have that ability, but lost it as of the end of September 2015. The only way for Stargrove to obtain mechanical licences for the Three Songs is to request them from Round Hill.

**C. Casablanca and CMRRA**

15. Casablanca has retained the Canadian Musical Reproduction Rights Agency (“CMRRA”) as its agent for granting licences for reproduction of musical works (commonly referred to as “mechanical licences”) in Canada to musical works that it owns or administers.

16. Casablanca retains the right to instruct CMRRA to refuse to grant a mechanical licence to any particular musical work or to any particular person.

**D. Copyright in musical works and mechanical licences**

17. Any given music CD will embody a number of works that are subject to copyrights:

- a) Musical work: the author (or authors) of the musical work itself, that is, the words and music that together comprise the song (or other musical work) have a copyright in the musical work. This copyright lasts for the life of the last living author plus fifty years.
- b) Performer’s performance: each performer has a copyright in their performance which is fixed on the CD. This copyright lasts for fifty years after the end of the calendar year in which the first fixation of the performance in a sound recording occurs.
- c) Sound recordings: the maker of the sound recording has a copyright in the sound recording. In most cases, this copyright lasts for seventy years after the end of the calendar year in which the first publication of the sound recording occurs. The term of this copyright was extended in 2015 from fifty years to seventy years. The 2015 amendments did not restore copyright protection to recordings that had already fallen into the public domain, however.
- d) Compilation: the compilation of musical works on the CD, that is, the choice and order of musical works on the CD, is subject to copyright.
- e) Artwork and liner notes: any artwork on the liner or the CD itself is subject to copyright, as are the liner notes.

18. Any music label wishing to produce copies of a CD must obtain licences for each of the copyrights associated with the works that it wishes to reproduce.

19. In particular, the label must obtain a licence from the author of the musical work (or the person who administers or owns the author's copyright) to make copies of the musical work on the CD. This is the case whether the label intends to make copies of an existing recording of the musical work, or to make copies of a new recording by a band that is "covering" the work. This licence is referred to as a "mechanical licence".

#### **E. Stargrove's business model**

20. Stargrove's business model appears to involve producing CDs containing recordings that meet the following characteristics:

- a) The copyright over the sound recording has fallen into the public domain
- b) The copyright over the performers' performances have fallen into the public domain
- c) The author's copyright over the musical work is still in force.

21. In order to avoid the need to license the compilation, artwork, and liner notes, Stargrove must use a different compilation, different artwork, and different and liner notes from the original album.

22. Stargrove cannot avoid the need to license the author's copyright through a mechanical licence, as this copyright is still in force, and there is no way to produce a CD with the musical work without either obtaining a licence, or infringing the copyright.

#### **F. No compulsory mechanical licences**

23. The *Copyright Act* does not contain provisions for the compulsory licensing of mechanical licences. In fact, in 1988, Parliament expressly repealed compulsory mechanical licensing provisions.

24. CMRRA does not operate a compulsory mechanical licensing scheme, either *de facto* or *de jure*.

25. The CMRRA is a collective society as defined in section 2 of the *Copyright Act*.

26. The *Copyright Act* contains provisions (starting at section 70.1) that permit, but do not require, copyright holders to join collective societies in order to administer their rights under the *Copyright Act* more efficiently.

27. CMRRA can only grant mechanical licences to musical works owned or administered by music publishers that are affiliated with CMRRA and have authorized CMRRA to issue mechanical licences on their behalf.

28. No owner of copyrights in a musical work is required by law to join CMRRA.

29. No publisher client of CMRRA is compelled to license at CMRRA's standard rates.

30. CMRRA's publisher clients register titles in their catalogues with CMRRA to make them available for licensing. As a practical matter, a CMRRA member could withhold a title from CMRRA simply by not registering it. If a publisher chooses not to register a given title, CMRRA will not consider it to be part of that publisher's catalogue for licensing purposes.

31. Publishers are entitled to instruct CMRRA to exclude particular titles from the regular licensing process, and CMRRA will respect those instructions. For example, CMRRA's mechanical licence agreements ("MLA") exclude "White Christmas" from licensing under CMRRA's regular terms, as the owner of copyright in this title has chosen to license it directly.

32. Publisher clients of CMRRA are entitled to refuse to license particular musical works at particular times or to particular persons.

33. Casablanca regards the right to refuse to license particular musical works as important.

#### **G. No refusal to supply within the meaning of s. 76(a)(ii)**

##### **1. No refusal to supply**

34. Casablanca did not refuse to supply mechanical licences to any of the Subject Musical Works to Stargrove. It was impossible for Casablanca to have supplied mechanical licences to the Subject Musical Works, because Casablanca did not have the right to grant mechanical licences to the Subject Musical Works.

35. Casablanca pleads and relies on the maxim "*nemo dat quod non habet*".

##### **2. No refusal "because of low pricing policy" of Stargrove**

36. Paragraph 76(a)(ii) of the *Competition Act* constitutes a limited exception to the general freedom of a business to do business, or not to do business, with whomever it

wishes, and for any reason whatsoever. Paragraph 76(a)(ii) does not require a business to have a valid business reason for refusing to supply a product. Accordingly, Stargrove bears the burden of proving that Casablanca refused to grant mechanical licences to Stargrove because of its low pricing policy, and Casablanca puts Stargrove to the strict proof thereof.

37. If Casablanca's inability to grant mechanical licences is characterized as a refusal to grant mechanical licences, then this refusal was not "because of the low pricing policy" of Stargrove. Rather, it was because Casablanca did not have the right to grant mechanical licences to the Three Songs or any of the Subject Musical Works.

### **3. Casablanca is not a person subject to an order under s. 76(3)**

38. Contrary to Stargrove's assertion, Casablanca is not a person subject to an order under either paragraph 76(3)(a) or (c) of the *Competition Act*.

39. Since Casablanca is not and never was in the business of "producing or supplying" mechanical licences to any of the Subject Musical Works, Casablanca cannot be a person subject to an order as defined in paragraph 76(3)(a).

40. Since Casablanca does not and did not ever have any "exclusive rights and privileges conferred by a ... copyright" in the Subject Musical Works, Casablanca cannot be a person subject to an order as defined in paragraph 76(3)(c).

### **4. Casablanca would have valid business reasons to refuse to license to Stargrove**

41. In the alternative, if Casablanca refused to supply mechanical licences to the Three Songs or any of the Subject Musical Works (which is not admitted but is denied), then Casablanca had valid business reasons for so doing.

#### **a) Stargrove's CDs are of poor quality**

42. Stargrove's CDs are necessarily of poor quality.

43. This is because Stargrove does not have access to the original master tapes of the recordings of the Subject Musical Works, unless Stargrove is able to make separate arrangements with the owners of those master tapes. In any event, the master tapes for any given recording made in 1965 or earlier will likely have since been remastered to enhance the audio quality.

44. Because Stargrove does not have access to either the original or remastered master tapes, it is forced to make recordings from vinyl records or other sound recordings dating from 1965 or earlier to produce its CDs. This is referred to as a “needle drop”. The quality of the resulting CD cannot match that of a CD produced from remastered tapes.

45. Stargrove’s overall product, including packaging, artwork, and liner notes, is of poor quality.

46. The presence of inferior quality CDs on the market tends to reduce the perceived value of the musical works embodied on those CDs.

**b) *Synchronization licences***

47. Publishers such as Casablanca market and grant synchronization licences to musical works.

48. A synchronization licence is a licence to use a musical work in synchronization with a visual image (for example, for use in TV, film, advertising, etc.)

49. The value of a synchronization licence is bound up with the perceived value of the musical work to the public, or segment of the public, that will watch the film, TV show, or commercial.

50. Copyright owners have the right to extract the maximum possible value from the copyright, including from synchronization licences. To do this, they must be able to control, and occasionally, restrict, the relative availability of the musical work.

**5. No coordinated refusal to grant mechanical licences**

51. As set out above, Casablanca did not refuse to grant mechanical licences over the Three Songs or any of the Subject Musical Works to Stargrove.

52. In the alternative, Casablanca did not participate in any coordinated refusal to grant mechanical licences.

53. The decision of other publishers to license, or not to license, musical works to Stargrove has no impact upon Casablanca’s decision to license, or not to license, musical works. The converse is true: Casablanca’s decision to license, or not to license, musical works has no impact on the decision of other publishers.



54. This is because the songs are unique. Only the publisher who administers the rights to a particular song can license that song to a label such as Stargrove. Other publishers cannot license that song at all. It does not make it any easier for a publisher to refuse to license a song to Stargrove if other publishers refuse to license their songs; nor does it make it any harder for a publisher to refuse, if other publishers agree to license.

55. In any event, it is irrelevant to section 76 whether the refusal to supply was coordinated or not. Coordination or lack thereof is not an element of section 76.

#### **6. No resale of mechanical licences**

56. Mechanical licences are merely a licence to *produce* CDs. The licence is fundamentally a contract between the owner of the copyright in the musical work (the publisher) and the producer of the CDs (the label). This contract permits the label to produce CDs containing recordings of the musical work.

57. The purchaser of the CD does not acquire a mechanical licence. The purchaser of the CD does not become a party to the contract between the publisher and the label; nor does the label enter into a contract with the purchaser to permit the purchaser to make more copies of the CD for commercial sale.

58. The distributor merely acquires the physical CD and the right to resell it to retailers within a certain geographic market.

59. The consumer who buys the CD merely acquires the physical CD.

60. There is thus no resale of mechanical licences by Stargrove to either the distributor or the consumer.

61. The purpose of section 76 is to control *resale* price maintenance. As there is no resale in this case, section 76 cannot apply.

#### **7. Mechanical licences are not “products” within the meaning of s. 76**

62. Mechanical licences are not “products” within the meaning of section 76 of the *Competition Act*.

63. This is because mechanical licences come into being when they are granted. They are not pre-existing rights over property that are sold. The pre-existing property is the copyright itself. While a copyright might be a “product”, ownership over a copyright is not

transferred when a mechanical licence is granted. Rather, a mechanical licence is a contract between two parties granting one party certain non-exclusive rights to use property owned by the other party.

64. Even if a mechanical licence were a “product” within the meaning of section 2 of the *Competition Act*, this product is created whenever a mechanical licence is granted to someone. Consequently, Stargrove’s application asks the Tribunal to order Casablanca to *produce* a product for it. Nothing in section 76 is intended to grant the Tribunal jurisdiction to order a firm to *produce* products for another firm.

#### **H. Casablanca has not induced a supplier to refuse to supply (s. 76(8))**

65. Casablanca did not instruct CMRRA not to grant mechanical licences to the Three Songs or any of the Subject Musical Works to Stargrove. Ms. Mitchell instructed CMRRA on behalf of Red Brick not to grant mechanical licences to the Three Songs.

66. In any event, CMRRA is not a supplier for purposes of subsection 76(8). CMRRA acts as agent to music publishers in licensing musical works. A publisher that instructs CMRRA not to license is a principal instructing an agent, and not one supplier inducing another not to supply. Consequently subsection 76(8) does not apply.

67. Casablanca has not instructed or induced CMRRA not to grant an MLA to Stargrove. Casablanca takes no position on the form of contact between CMRRA and Stargrove.

#### **I. Copyright owners have the right to maintain the value of their copyrights**

68. The *Copyright Act* grants owners of copyright in musical works (and other creative works) the “sole right to produce or reproduce” a work (“le droit exclusive de produire ou reproduire”).

69. The purpose of these exclusive rights is to ensure that creators of musical works (and other works) can be compensated for their creative endeavours. The *Copyright Act* does this by giving the owner of the copyright a monopoly over the copyrighted work, which enables the owner to extract the full value of that work. The *Copyright Act* deliberately restricts competition with respect to the copyrighted work itself. That is, it prevents another person from copying the copyrighted work and selling it in competition with the owner of the copyrighted work.

70. Granting Stargrove's application would fundamentally negative the rights created by the *Copyright Act*. At bottom, Stargrove's case is that owners of copyrights in musical works should be forced to license those works to other parties who wish to sell copies of the work in competition with the owner of the copyright. This is the very thing that the *Copyright Act* is designed to prevent.

71. Stargrove asserts that by refusing to grant licences, the owners of the authors' copyright over the musical work are "artificially extending copyright over public domain recordings". Stargrove's position is thus that once the copyright in the sound recording has ended, the author should lose the right to refuse to grant licences to use the musical work, becoming instead subject to compulsory licensing.

72. There is nothing artificial about an author (or the owner of the author's copyright) asserting their copyright over the musical work. Parliament made an express policy choice in providing for a different term for the author's copyright than for copyright over the recording.

73. Parliament also made an express policy choice by repealing compulsory licensing provisions in 1988.

74. Stargrove is asking this Tribunal to do something that it does not have jurisdiction to do, that is, to reverse policy choices made by Parliament.

75. Section 76 of the *Competition Act* was not intended by Parliament to negative rights granted by the *Copyright Act* in the manner sought by Stargrove.

#### **J. No adverse effect on competition**

76. If Casablanca refused to supply Stargrove because of its low pricing policy (which is not admitted but is denied), then this refusal has had no adverse impact on competition.

#### **K. Breach of the *Copyright Act***

77. Even if Stargrove were to establish all of the elements of its application under section 76, the Tribunal should exercise its residual discretion and deny Stargrove any relief, because Stargrove has violated the *Copyright Act*.

78. Stargrove pressed and distributed CDs *before* obtaining mechanical licences. In the case of the Subject Musical Works, those licences were not ultimately granted.

79. Consequently Stargrove infringed copyright owned by the various publishers (but not Casablanca) contrary to section 3(1) and 27 of the *Copyright Act*, making Stargrove potentially liable for damages under sections 35 or statutory damages under section 38.1 of the *Copyright Act*.

80. Stargrove knew or ought to have known that making an application for mechanical licences did not mean it could start pressing CDs. The FAQ section on CMRRA's website warns that the licence must be issued before CDs can be pressed:

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

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

### III CONCISE STATEMENT OF ECONOMIC THEORY

#### A. Mere exercise of intellectual property rights

81. The conduct of the responding music publishers is a mere exercise of intellectual property rights granted by the *Copyright Act* to the creator of musical works to compensate for the initial costs of producing the musical work and reward the creation of valuable musical works.

82. The mere exercise of market power granted through intellectual property rights, including the right not to make mechanical licences available through a collective licensing agency such as CMRRA, the right to charge a royalty rate for mechanical licences higher than the standard rate included in voluntary industry agreements, and the right to refuse to issue mechanical licences to limit distribution and ensure the highest quality product does not constitute anti-competitive conduct under section 76 of the *Competition Act*.

#### B. The economics of copyrights

83. Copyright law is a means to promote innovation and the efficient allocation of scarce resources. The costs of producing a musical work or sound recording are often high, while the reproduction costs are minimal as it is relatively inexpensive to produce additional copies of CDs. Without the ability to earn revenue in excess of reproduction

costs, creators and performing artists have little incentive to produce musical works and sound recordings in the first place.

84. A large fraction of musical works enjoy limited commercial success, while a few “hit songs” by successful artists earn substantial economic rents. To induce the original creation of musical works, *expected* earnings for artists must not only exceed the cost of producing musical works, but also allow artists to earn normal profits to compensate them for their artistic effort.

85. Copyright, a form of intellectual property, confers on the copyright owner an exclusive right to reproduce a musical work. The *Copyright Act* grants right-holders certain exclusive rights regarding the use of the musical work. Specifically, the copyright granted enables the right’s owner to prevent others from making any reproductions or copies of the work or perform it in public, or authorize others to do the same. The exclusive right to reproduction allows the copyright holder to generate economic rents that compensate the creator for the initial costs of producing musical work and reward the creation of valuable musical works.

86. While users in the short-term might be better off in the absence of copyrights with musical works being freely available, without the prospect of being rewarded creators lack the economic incentive to continue to innovate, create, and share musical works in the future. If creators cannot appropriate the value of the musical work and earn a reward for successful innovation, the work will likely not be produced in the first place. In consequence, fewer valuable musical works will be created. The drop in innovation and shortage of valuable creative work will leave users significantly worse off in the long-term. Copyrights seek to achieve dynamic efficiency by balancing the interests of users of copyrighted musical works with the interests of artists who create original works, require creative control, and must be able to appropriate the value of the original creation to be induced to innovate, create, and share musical works. (Although the maximization of the use of copyrighted material with zero marginal cost of reproduction satisfies static efficiency, too little (future) innovation occurs and the outcome is characterized by a sub-optimal level of production of musical works. Dynamic efficiency refers to the optimal production of creative musical works over time.)

87. As discussed in more detail below, copyrights not only result in the existence of creative works that would not be commercialized otherwise, and therefore increases consumer surplus and social welfare, the ability to withhold the use of copyrights under

certain circumstances is economically justified and does not constitute an anti-competitive act from an economic standpoint.

### **C. The relevant antitrust markets**

88. The purpose of defining the relevant market is to identify close substitute products to which buyers would switch in significant volume if a firm were to increase the price of the focal product. Defining the relevant product and geographic markets is typically a first step in assessing whether market participants have the ability to exercise market power. If the conduct is unlikely to create, maintain, or enhance market power, it is unlikely to have an adverse effect on competition.

89. Canada is the relevant geographic market given the geographic scope of copyrights and the lack of geographic differentiation in the pricing of copyright licenses.

90. Stargrove defines the relevant product market as comprising the wholesale market for compact discs containing popular music titles recorded before 1964, where the songs have the following characteristics:

- a) the sound recording is in the public domain,
- b) the musical work fixed on the sound recording remains protected by copyright, and
- c) the sound recording and artist(s) are popular.

91. This product market definition has no basis in economics. It bears no relationship to the fundamental economic question of the substitutability of musical works within the market and their non-substitutability with works outside of the defined market. In that sense, it does not constitute a proper market for antitrust purposes. It lacks an economic basis since neither wholesale buyers nor retail consumers purchase compact discs based on the year of the sound recording, or copyright protection of the sound recording or the musical work. Furthermore, the notion of popularity of the sound recording and artist(s) remains undefined and it is not possible to delineate the relevant sound recording and artists that form this market, and those that are not part of this market.

92. More generally, substitutes from both the wholesale and retail perspective may include any items from the "\$5 bargain bin" which is Stargrove's niche market. These products may include copyrighted CDs, other types of non-musical recordings, and even

items that are priced around the same price point but have nothing to do with music or entertainment and are designed to be purchased on impulse.

**D. The copyright holder may choose to opt-out of collective pricing and licensing**

93. Both users and holders of copyrights seek ways to reduce transactions costs. Copyright holders can find it beneficial to join into collective management societies since collective administration reduces transaction cost.

94. The CMRRA is a collective music licensing agency issuing licenses to the reproduction right in musical works on behalf of the music publishers (copyright owners) it represents. The typical agreement between copyright holders and CMRRA sets the rate for a mechanical licence to reproduce a musical work on a sound carrier at 8.3 cents per song, with no distinction among musical works. Compared to individualized transactions, such collective pricing of copyrights embodies the lower transaction costs resulting from the collective management of the copyright and, as a result, provides benefits for both owners and users.

95. However, the *Copyright Act* grants the owner of copyright in a musical work the exclusive right to mechanical reproduction. Hence, a copyright owner may decide not to license musical works under collective pricing, instead choosing to negotiate transactions individually, or not to offer reproduction licenses at all. This is manifested in the express distinction between non-licensable and licensable songs, authorized and non-authorized compositions under a mechanical licensing agreement (MLA). Furthermore, music publishers represented by the collective may not participate in the industry agreement and can charge higher than the standard royalty rate. ABKCO, for example, charges a higher rate than CMRRA's standard rate.

96. From an economic perspective, this means that copyright owners are free to choose the most cost-effective licensing mechanism and optimize their strategy to bring their musical works to market.

97. If participating in a collective society like CMRRA entails as a corollary that a publisher loses the right to refuse to license particular songs to particular firms or at particular times, then publishers will be forced to choose between remaining in the collective society to gain the reduced transaction costs, but losing control over licensing, and leaving the collective society and suffering higher transaction costs, which would be passed on to licensees.

**E. Copyright holders have valid economic reasons not to issue mechanical licences**

98. Copyright holders of musical works have valid economic reasons to decline to issue mechanical licences. The owner of the copyright to musical work has an economic interest to build or maintain a brand and ensure the product sold is of high quality. Concerns about the value and quality of the product can relate to the quality of sound, production, format, booklet, or packaging, among others. Low-quality releases may taint the brand of the artist or creator of the musical work who may find it in his best economic interest not to license reproduction rights for low-quality releases.

99. Stargrove did not have access to the original master tapes of the sound recordings it included on the CD releases at issue. Rather, the songs have been transferred from a vinyl record to digital audio, a method referred to as a ‘needle drop’. The sound quality of a release produced by needle drop is inferior to a digital audio release created from the original master tapes of the sound recording. The copyright owner has an economic interest to ensure the reproduction of his musical work is of high quality, and may decide to refuse to issue mechanical licences for releases of lower quality.

100. Releases of musical work on compact discs represent only one avenue of copyright commercialization. Copyrights for musical works are also required for cover versions, music synchronization (images and movies), movie soundtracks, “best-of” compilations, and other activities that could be much more lucrative for copyright owners. Since different avenues of commercialization are competing to some extent with each other, a copyright holder might have a valid economic reason to withhold reproduction licenses for musical work in one channel in order not to cannibalize licenses, revenue, and the brand value of the musical work and artists in another commercialization channels. For example, a concurrent release of a best-of music album might cut into copyright revenue from the artist’s musical works prominently featured in a movie playing in theaters. In such instances, it is economically reasonable to withhold reproduction licences for the best-of album in order not to cannibalize the copyright revenues stream from the movie release (synchronization, soundtrack).

101. The timing of a release might also conflict with activities of the performing artists (e.g. touring), releases of other musical works, or other promotional activities around the copyrighted musical work. The copyright owner might find it in his best economic interest to withhold mechanical licences for certain releases of musical works at certain times due to its interference with other marketing activities of the artist.



**F. Refusal to issue mechanical licences to stargrove does not have an adverse effect on competition or result in harm to consumers**

102. While the refusal to issue mechanical licence might have a direct and substantial impact on Stargrove and its business activities, there is no evidence that the conduct has had, is having, or is likely to have an adverse effect on competition. The refusal to issue mechanical licence to Stargrove does not result in any measurable harm to consumers. The sound recordings at issue continue to be available in various formats and various quality levels, including on CDs and digital audio releases made from remastered tapes (high quality), on vinyl disks, on radio (broadcast, satellite, and streaming).

103. Furthermore, a multitude of substitute products exist, even if not perfect substitutes, that allow consumers to enjoy a wealth of creative work by other artists, or in formats other than low quality CD distribution through Walmart.

104. The ready availability of substitute products and lack of consumer harm is apparent with a properly delineated product market. Products which are erroneously excluded from the plaintiff's narrow product market definition such as other copyrighted CDs and other types of non-musical recordings prevent the exercise of market power by copyright holders and therefore preclude any adverse effects on competition.

**G. A mechanical licence is an input of production and is not resold**

105. A mechanical licence, granted by the owner of the copyrighted musical work (music publisher) directly or by the licensing collective CMRRA, is an input of production required to manufacture compact discs that include the specific copyrighted musical work. A mechanical licence is not a physical product nor a service, but rather a permission to reproduce a musical work on a sound carrier. No transfer of ownership is associated with this transaction.

106. A permission to reproduce a musical work cannot be resold. A compact disc containing the sound recording of a copyrighted musical work is neither identical nor substantially similar to the mechanical licence permitting reproduction. The compact disc is not a repackaged, reapportioned, processed, or transformed version of the mechanical licence granted by the owner of the copyright to the musical work. Hence, no resale of the mechanical licence occurs when a record label offers a compact disc for sale to retailers or directly to consumers.

**IV RELIEF SOUGHT**

107. Casablanca requests that Stargrove's application be dismissed with costs on a lump-sum, solicitor-client basis.

**V PROCEDURAL MATTERS**

108. Casablanca requests that this application be heard in English.

109. Casablanca requests that documents for this application be exchanged and filed electronically.

110. Casablanca requests an electronic hearing.

April 4, 2016



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**AFFLECK GREENE McMURTRY LLP**  
Barristers & Solicitors  
365 Bay Street, 2<sup>nd</sup> floor  
Toronto, Ontario M5H 2V1

**W. Michael G. Osborne**

*Tel.* 416-360-5919

*Fax* 416-360-5960

*Email* [mosborne@agmlawyers.com](mailto:mosborne@agmlawyers.com)

**Wendy Sun**

*Tel.* 416-360-1485

*Fax* 416-360-5960

*Email* [wsun@agmlawyers.com](mailto:wsun@agmlawyers.com)

Lawyers for Casablanca Media 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: 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, 32<sup>nd</sup> Floor  
Toronto, ON M5H 3R3

**Sangeetha Punniyamoorthy**  
**Thomas Kurys**  
Tel: (416) 971-7202  
Fax: (416) 971-6638

Lawyers for the Applicant,  
Stargrove Entertainment Inc.

**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

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**RESPONSE**  
**of Casablanca Media Publishing**

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April 4, 2016

**AFFLECK GREENE McMURTRY LLP**  
Barristers & Solicitors  
365 Bay Street, 2<sup>nd</sup> floor  
Toronto, Ontario M5H 2V1

**W. Michael G. Osborne**

*Tel.* 416-360-5919

*Fax* 416-360-5960

*Email* [mosborne@agmlawyers.com](mailto:mosborne@agmlawyers.com)

**Wendy Sun**

*Tel.* 416-360-1485

*Fax* 416-360-5960

*Email* [wsun@agmlawyers.com](mailto:wsun@agmlawyers.com)

Lawyers for the respondent Casablanca  
Music Publishing