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

WRITTEN REPRESENTATIONS OF SONY/ATV MUSIC PUBLISHING CANADA CO. and SONY MUSIC ENTERTAINMENT CANADA INC.

November 20, 2015

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A. Overview

1. These are the joint written representations of the Respondents, Sony/ATV Music Publishing Canada Co. ("Sony/ATV") and Sony Music Entertainment Canada Inc. ("Sony Music Canada") opposing the application under s. 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act") of the Applicant, Stargrove Entertainment Inc. ("Stargrove"), for leave to commence a private application under ss. 75, 76, and 77 of the Act.

2. The Applicant seeks leave to bring a private application for an order to supply the Applicant with licences for the intellectual property of some of the Respondents.[1] The Applicant seeks to invoke ss. 75, 76 and 77 to require the Respondents to issue the Applicant "mechanical licenses" in respect of copyrighted musical works in which copyright is held by the Respondents.[2]

3. Section 103.1(7) of the Act provides that the Tribunal "may" grant leave in respect of an application involving ss. 75 or 77 of the Act "if it has reason to believe that the applicant is directly and substantially affected in the applicant's business by any practice referred to in one or more of those sections that could be subject to an order under that section." Section 103.1(7.1) of the Act similarly provides that the Tribunal "may" grant leave in respect of an application involving s. 76 of the Act "if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section."

4. Sony/ATV and Sony Music Canada respectfully submit that the Competition Tribunal lacks jurisdiction to make any of the orders sought by Stargrove under ss. 75, 76 or 77 of the Act. As a result, none of the relief sought by Stargrove "could be subject to an order" under any of ss. 75, 76, or 77. Sony/ATV and Sony Music Canada further submit that, in any event, Stargrove has not met the test of providing the Tribunal with any "reason to believe" that it is either "directly and substantially affected in the applicant's business" in respect of any conduct involving an alleged breach of s. 75 or 77, or that Stargrove is "directly affected" by any conduct alleged to breach s. 76. Stargrove's application should therefore be dismissed.

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1 Notice of Application for Leave at para. 1.

2 Proposed Notice of Application at paras. 10(1), 33-38.

5. Sony/ATV and Sony Music Canada adopt the submissions of the other Respondents on this application.

B. The Competition Tribunal Has No Jurisdiction to Make an Order under s. 75 of the Act

6. Section 75(1) provides as follows:

> 75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that
>
> > (*a*) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
> >
> > (*b*) the person referred to in paragraph (*a*) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
> >
> > (*c*) the person referred to in paragraph (*a*) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,
> >
> > (*d*) the product is in ample supply, and
> >
> > (*e*) the refusal to deal is having or is likely to have an adverse effect on competition in a market,
>
> the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

7. In *Canada (Director of Investigation and Research) v. Warner Music Canada Ltd.* ("*Warner Music*"), the Competition Tribunal definitively held that the Tribunal lacks jurisdiction under s. 75(1) to issue a compulsory license for intellectual property. In *Warner Music*, the Director of Investigation and Research sought an order under s. 75 of the Act requiring Warner to licence a competitor to manufacture and sell recordings made from Warner master recordings. In rejecting the Director's application, the Tribunal held that licences for the use of intellectual property are not a "product" as that term is used in s. 75:

> The requirements in section 75 that there be an "ample supply" of a "product" and usual trade terms for a product show that the exclusive legal rights over intellectual property cannot be a "product" -- there cannot be an "ample supply" of legal rights over intellectual property which are exclusive by their very nature and there cannot be usual trade terms when licences may be withheld.[3]

8. The Tribunal explicitly held s. 75 cannot be used to compel the supply of intellectual property rights:

> The right granted by Parliament to exclude others is fundamental to intellectual property rights and cannot be considered to be anti-competitive, and there is nothing in the legislative history of section 75 of the Act which would reveal an intention to have section 75 operate as a compulsory licensing provision for intellectual property.[4]

9. Here, the copyright licences being sought by the Applicant are similarly not a "product" for purposes of s. 75. The Tribunal therefore lacks jurisdiction under s. 75(1) to issue the order sought.

10. Moreover, the *Competition Act* clearly states that only the Federal Court of Canada – not the Competition Tribunal – has jurisdiction to order compulsory licences. Section 32 of the *Competition Act* provides for a range of orders available from the Federal Court where, for example, the use of exclusive rights and privileges conferred by a copyright prevents or lessens unduly competition in the manufacture or sale of an article. Section 32 of the Act gives the Federal Court jurisdiction to, among other things, grant a licence where an application for such an order is made by the Attorney General of Canada. The order may be made only where the Federal Court has considered the competitive effects as well as whether any defences based on international treaties are available.

11. *Warner Music* is entirely consistent with prior jurisprudence on the role of competition law in the context of enforcing intellectual property rights. In *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* ("*Tele-Direct*"), the Tribunal provided clear guidance on the interface between the *Competition Act* and the exclusionary rights that arise through

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3 *Canada (Director of Investigation and Research) v. Warner Music Canada Ltd.* (1997), 78 C.P.R. (3d) 321 (Comp. Trib.) at 333.

4 *Ibid.*

ownership of intellectual property. One of the key issues in *Tele-Direct* was whether the refusal to license a trade-mark to certain persons or groups of persons was an anti-competitive act for purposes of the Act's abuse of dominance provisions. The Competition Tribunal held that:

> ***The respondents' refusal to license their trade-marks falls squarely within their prerogative. Inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to grant a licence; selectivity in licensing is fundamental to the rationale behind protecting trade-marks.*** The respondents' trade-marks are valuable assets and represent considerable goodwill in the marketplace. The decision to license a trade-mark -- essentially, to share the goodwill vesting in the asset -- is a right which rests entirely with the owner of the mark. The refusal to license a trade-mark is distinguishable from a situation where anti-competitive provisions are attached to a trade-mark licence ....The respondents' motivation for their decision to refuse to license a competitor becomes irrelevant as the Trade-marks Act does not prescribe any limit to the exercise of that right.[5] (emphasis added)

While *Tele-Direct* dealt with a trade-mark licence, in *Warner Music* the Tribunal confirmed that the same approach applies to a licence for copyright.[6]

12. It is therefore clear that the Tribunal lacks jurisdiction under s. 75 of the Act to order the compulsory licensing of intellectual property.

C. The Competition Tribunal Similarly Has No Jurisdiction to Make an Order under ss. 76 or 77 of the Act

13. The reasoning and analysis of *Warner Music* apply equally to ss. 76 and 77 of the Act to deprive the Tribunal of jurisdiction to issue a compulsory license in respect of copyrighted musical works under those provisions. If, as *Warner Music* holds, a copyright license is not a "product" within the meaning of s. 75 of the Act, and cannot be in "amply supply" given the inherent exclusivity of copyright, by parity of reasoning such a copyright license equally cannot be a "product" within the meaning of ss. 76 or 77 of the Act.

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5 *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.) at 32.

6 *Canada (Director of Investigation and Research) v. Warner Music Canada Ltd.* (1997), 78 C.P.R. (3d) 321 (Comp. Trib.) at 333.

14. As this Tribunal held in *Warner Music*, the right granted by Parliament to exclude others is fundamental to intellectual property rights and cannot be considered to be anti-competitive. Nothing in the legislative history of ss. 76 and 77 of the Act reveals an intention to have these provisions operate as compulsory licensing provisions for intellectual property. To the contrary, as shown in the written representations of the other Respondents, in 1988 Parliament abolished compulsory licensing of mechanical rights in musical works. The Applicant cannot undo this legislative choice by seeking to re-litigate the settled law established in *Warner Music*.

15. As such, there is simply no basis on which the Tribunal could make any order under ss. 75, 76, or 77 of the Act. As the Tribunal lacks jurisdiction over the Applicant's complaint, this application should be dismissed with costs.

D. The Respondent Sony Music Canada Is Not a Proper Respondent As It Does Not Any Copyright Rights in Musical Works

16. In respect of the Respondent, Sony Music Canada, apart from the arguments set out above and the arguments set out by the other Respondents, the application against Sony Music Canada must be dismissed because no order could be made under any of ss. 75, 76, or 77 of the Act to require Sony Music Canada to grant compulsory licenses in respect of any musical works to Stargrove.

17. As set out in the affidavit of Ms Judy Naiberg, affirmed on October 6, 2015, filed herewith, Sony Music Canada "is not a music publisher. ***It does not own or control any copyright rights in musical works. As a result, even if the Tribunal were to grant the orders sought by the Application – namely, to require the Respondents to issue mechanical licenses in respect of copyrighted musical works – Sony Music Canada would simply be unable to comply with any such order as it does not own any copyright in any musical works.***"[7]

18. As such, Sony Music Canada is not a proper respondent on this application.

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[7] Affidavit of Judy G. Naiberg affirmed on October 6, 2015, para. 3 (emphasis added). As set out in Ms Naiberg's affidavit, para. 4, Sony Music Canada "does not otherwise accept the allegations stated in Stargrove's application and reserves the right to dispute those allegations if and when the Tribunal grants leave to commence a private application."

E. Order Sought

19. For the reasons stated above, and for the reasons stated in the written representations of the other Respondents, Sony/ATV and Sony Music Canada respectfully ask that this application be dismissed, with costs.

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

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Peter Franklyn

OSLER, HOSKIN & HARCOURT LLP
Counsel for the Respondents,
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and Sony Music Entertainment Canada Inc.

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