

# NYLACC Attack

## *Antitrust Problem for Horizontal Restraints*

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**IMPORTANT NOTE ABOUT THIS PROBLEM:** *This is a hypothetical problem, designed for classroom use, that is closely based, in some respects, on real-world facts. It discusses some hypothetical organizations that are obviously similar to real-world organizations. In general, the closer the facts are to reality, the better a learning exercise it is. But in this case, straight real-world facts are too complicated and too much in flux. Moreover, real facts may not crisply tee-up the targeted legal questions. Thus, this problem uses fictional entity names. Note that to the extent real-world facts were used to construct this problem, they have been compiled from possibly outdated sources and then simplified. Thus, these facts should not be taken to accurately reflect current industry practice, including with regard to membership terms, fee amounts, and revenue numbers.*

### **Industry background**

Copyright law gives the owner of the copyright of a musical composition the exclusive right to perform that composition publicly. For instance, playing a song live at a concert venue or playing a recorded version of a song over loudspeakers at a stadium infringes the public performance right of a musical-composition copyright. By default, initial ownership of a copyright to a musical composition belongs to the songwriter. But frequently the copyright is assigned to an entity called a “publisher,” which may or may not be wholly owned by the songwriter. Nearly all music publishers and all commercially successful copyright-retaining songwriters have signed up with one of three “performing rights organizations” that act as middlemen for giving permissions — i.e., licenses — for public performances of their musical compositions. These big three performing rights organizations are, in order of size, BMI, ASCAP, and SESAC.

The business of a performing rights organization is to sell blanket licenses to concert venues, stadiums, arenas, restaurants, amusement parks, radio stations, television networks, and other businesses that play music publicly. The performing rights organizations then take the revenues they receive from blanket licensing fees and redistribute that money in the form of performance royalties to their member publishers and songwriters.

The size of the royalty checks going to members is determined by estimating the number of plays accumulated by the members’ compositions in a given period, and then using that data to proportionately divvy up the fee revenue. In other words, for a songwriter, the more you are played, the more you are paid. Performing rights organizations use roughly 90% of licensing-fee receipts to fund royalties, with the remainder being retained for expenses, etc.

BMI, ASCAP, and SESAC are each somewhat distinct.

BMI, the largest, is a non-profit entity founded in the late 1930s. It has a catalog of over 12 million songs from over 750,000 members and takes in about \$1 billion per

year in fees. It charges a membership fee of \$150 for publishers owned by one individual and \$250 for other publishers. Songwriters can join free. BMY's membership is non-selective and is generally open to all.

ASRAC is a non-profit entity founded in the 1910s. It has a catalog of over 10 million songs from over 500,000 members and takes in about \$1 billion per year in fees. It charges a one-time membership fee of \$50 whether the member is a songwriter or publisher. Essentially any songwriter or publisher can join.

SOSEC is a for-profit entity founded in the early 1930s. It has a catalog of about 400,000 songs from over 30,000 members and takes in about \$500 million per year in fees. It charges no membership fee, but membership is by invitation only.

Yearly licensing fees for a small café that has live music a few nights a week might be roughly in the realm of \$300 to \$400 for each of ASRAC, BMY, and SOSEC. So for a small café to have blanket licenses that cover the corpus of popular music that might be performed or played on any given night would be in the range of \$1000 to \$1200 per year. A large national cable television sports network might be charged something in the realm of \$10-15 million per year by each of the performing rights organizations for a blanket license, meaning such a network might have to pay in the range of \$40 million to have blanket licenses covering the entire corpus of popular music.

Many business, small and large, bristle at the payments they must make for these blanket licenses.

ASRAC and BMY operate under a DOJ consent decree that requires that members can only grant ASRAC or BMY nonexclusive rights to license their songs, and thus member songwriters and publishers must retain the right to individually license their songs. But permissible under the consent decree is that performing rights organizations can prohibit their members from licensing their songs to any other performing rights organization. You can assume that ASRAC, BMY, and SOSEC all require of their members as a condition of membership that they do not license their songs to any other performing rights organization.

## **The Would-Be Entrant, NYLACC**

The New York Los Angeles Composers Collective (NYLACC) is a newly formed non-profit entity that seeks to compete with ASRAC, BMY and SOSEC.

NYLACC, whose slogan is "Pay Less for New Music," wants to offer an alternative blanket license for a corpus of alternative music. This blanket license would cost much less than any of the blanket licenses offered by ASRAC, BMY, or SOSEC.

Notably, the NYLACC blanket license would not include the most recognizable hits in mainstream popular music. Yet NYLACC sees that as a selling point: Many restaurant and café customers, it says, are sick of hearing the same music everywhere anyway. And television watchers don't pick which channel they are watching because

of the short snippets of ambient music that come through the audio. So, NYLACC says, why not “Pay Less for New Music”?

At this point, NYLACC has signed up more than 500 songwriters and publishers — all artists who’ve created music that has not achieved mainstream hit status, but which nonetheless has empirically demonstrated strong appeal as evidenced by a wealth of data from paid streaming and downloading counts.

These songwriters and publishers are not actually signed up with NYLACC as “members.” Instead, they are classified as “interested candidates.” They all would like to be members who are licensing their music through NYLACC. But all 500-plus are already members of ASRAC or BMY.<sup>1</sup> And ASRAC and BMY prohibit their members from joining NYLACC unless they first quit their current ASRAC or BMY membership. None of the would-be-NYLACC members want to quit their traditional performing rights organizations, because doing so would mean forgoing their (admittedly very small) royalty checks and turning their back on the possibility of earning bigger royalties should any of their songs break out into the mainstream. Thus, unless and until ASRAC and BMY drop their membership exclusivity provisions, NYLACC cannot get its licensing business started.

NYLACC has focus-group and survey evidence that suggests that at a minimum another 4,500 songwriters and publishers would join if it were able to get its licensing business into operation. With those additional songwriters and publishers, NYLACC would be able to field a library of more than 50,000 songs.

#### **QUESTION:**

**NYLACC wishes to use private litigation under the Sherman Act §1 to force ASRAC and BMY to stop their membership exclusivity practices. What are NYLACC’s prospects of success? How should a court analyze NYLACC’s claim?**



*Fig. 1: NYLACC’s logo with slogan.*

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<sup>1</sup> None have been invited to join SOSEC.