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from the rights holders. 3. What happens if I sample music without permission/Using unlicensed samples can result in lawsuits, financial penalties, and removal of your music from platforms like Spotify and YouTube. 4. Unauthorized sampling risks your reputation and distribution opportunities.5. Are there legal alternatives to traditional sampling?Yes, you can use royalty-free sample libraries or Creative Commons-licensed content. These options provide pre-cleared samples that are easier and safer to use in your projects. Why is documentation important for sampling?Keeping detailed records of permissions, agreements, and licenses ensures you are legally protected and simplifies future music distribution or licensing opportunities. Documentation is critical for maintaining transparency and compliance. By Richard Stim, Attorney University of San Francisco School of Law Updated by Brian Farkas, Attorney Benjamin N. Cardozo School of Law Like all artists, musicians will sometimes borrow material from one another, referencing or using pieces of another’s music in their own. The complication, however, is that copyright law gives musicians exclusive rights over their work. If you use “samples” of other people’s music in your own music, you should first obtain written permission, so as to avoid allegations of copyright infringement. This is particularly true if you intend to release your music commercially and profit from the sales. The process of obtaining permission from the owners of the sampled music is referred to as “sample clearance.” Failure to obtain the proper permission could lead to serious consequences, including lawsuits for money damages or the inability to distribute your music to the public. As a musician, you obviously will want to avoid both outcomes. Fortunately, the sample clearance process can be fairly straightforward, depending on the music and artists involved. Sample clearance is typically required only if you plan to make copies of your music and distribute the copies to the public. If you are just playing for your friends in a small group, you likely do not need to worry about copyright litigation from a large music studio. Sample clearance is ordinarily not required if: You are just using the sampled music at home. You are using the sample in live shows. This is because you are probably not making copies, and the owner of the venue pays the blanket license fees to performing rights organizations such as Broadcast Music Incorporated (BMI) or the American Society of Composers, Authors, and Publishers (ASCAP). You plan to distribute copies to the public but meet one of the following: (1) an average listener would not notice the similarities between your end product and the sample, or (2) your use of the sample falls under the “fair use” doctrine. For more information on these, see “Defending a Lack of Sample Clearance,” below. Many artists releasing their own recordings cannot obtain clearances, either because they cannot get the music publisher to respond to their calls and requests or because they cannot afford the fees. What is the risk of going without a clearance? Using a music sample without clearance is always risky. However, as a practical matter, if you sell recordings only at shows and do not make more than 1,000 copies, your risk is reduced. The owner of the source recording will be unlikely to learn of your samples. However, if your recording becomes popular at clubs or on the radio, or if a major label wants to pick it up, you will have to deal with sample clearance, and might face consequences for your initial failure to do so. Reducing the risks. If you do use an uncleared sample, you can reduce your risks by: making it unrecognizable by changing the music and/or lyrics not using the sample as the primary groove or hook burying it in the mix, and not using the title of the source music in the title of your song. Defending a Lack of Sample Clearance If you decide to use samples without clearance, you might be in the clear in certain situations. Under U.S. copyright law, you do not have to obtain sample clearance if your sample is so altered that it does not infringe on the original, or your use is a fair one. Ensuring Your Sample Use Does Not Infringe on Copyright If you alter a sample so that an average listener cannot hear any substantial similarities between your work and the sample, there is no violation of the law. Often, musicians can be inspired by a tune, but make it so radically different from the original that the original artists (and the public) would not see the tunes as the same. What Is Fair Use? Fair use is the right to copy a portion of a copyrighted work without permission because your use is for a limited purpose, such as for educational use in a classroom or to comment upon, criticize, or parody the work being sampled. Factors in determining fair use. When reviewing fair use questions, courts primarily look for three factors: You did not take a substantial amount of the original work (say, ten seconds of a song versus 60 seconds). You transformed the material in some way (for instance, you added new base sounds to a melody). You did not cause significant financial harm to the copyright owner (perhaps you are using a bit of classical music in your heavy metal rock song, which appeals to a different market). Do not believe the widespread myth that “less than two seconds is fair use.” There is no “magic number” like this. Also, some courts apply a fair use rule only to the musical composition copyright, not the sound recording copyright. For example, one judge ruled that any musical sampling violated the sound recording copyright. You can use the above arguments to defend yourself against a lawsuit for sampling without permission. The problem: You will not know for sure which way the judge will rule. And, most likely you will have to hire an attorney to represent you in court. When Possible, Seek Permission to Use Music Samples You are always on safer legal ground if you obtain permission, especially if you have a record contract that puts the burden of sample clearance on your shoulders. Such contracts usually contain an indemnity clause—which means that if you and the record company are sued, you must pay the record company’s legal costs. Ouch! Note that when you sample music from a pre recording, you need two clearances: one from the copyright owner of the song, which is usually a music publisher, and one from the copyright owner of the master tapes, which is usually a record company. To learn how to get the proper sample clearance, see How to Obtain Sample Clearance for Use in One’s Music. Getting Publicity Releases Unfortunately, there is an extra wrinkle if you use a sample for purposes of selling or endorsing a product (for example in a Volkswagen ad), and the sampled artist is identifiable. In cases like this, you also need to get the source artist’s consent. That’s because the ad may create the impression of an endorsement. Without the consent, the source artist could sue for what is known as the violation of the “right of publicity.” (The same would be true if you imitated the source artist’s voice without sampling it.) So when you use a sample for an advertising agency or other commercial client, be aware that a third type of clearance or “release” may be necessary. Roadblocks for Small Recording Labels Nowadays, there are significant roadblocks for small independent labels who want to acquire sample clearance. For example: Some owners of source music will not want to deal with independent or unsigned artists. Often, the copyright owners will want to hear a recording that shows how much of the source you intend to use and how you intend to use it. That means you have to do your research first, without permission. If you then cannot obtain permission, much hard work will have gone to waste. Many small labels cannot afford the steep sample clearance rates. While there are no standard fees, the music publisher usually requires: an upfront “advance” payment (which could be anywhere between \$250 and \$5,000), and a percentage of the song income (usually between 15% and 50%). The owner of the master recording will want: an upfront payment (usually at least \$1,000), and a “rollover” payment, which is made when a certain number of copies have been sold. Sometimes, instead of a rollover, the owner of the master will ask for a portion of future record royalties (although sampling consultants advise against this practice). Sample CDs or digital albums, recordings that contain sounds and riffs specifically sold to be used in samplers, can be a helpful alternative for small labels that lack significant financial resources. Most sample discs are “pre-cleared,” which means that by buying the disc, you are automatically granted permission to use the music without paying any further fees. However, the permitted use of pre-cleared samples may vary from one disc to another. Do not assume you can use the sample in whatever way you like. Review the documentation that comes with the CD for any license information. Most sample disc makers grant the user a “nonexclusive license” to use the samples, which means you, and everyone else, have permission to use the music. However, with a sample CD you do not buy the right to redistribute the samples, only the right to use them in musical works. If it appears that your purchase of the disc does not grant the rights you need, contact the soundware manufacturer. You might be eligible for a refund. Or, the manufacturer should at least be able to clarify the rights to which you are entitled, if there’s any ambiguity. In short, the sample clearance process can be a hurdle for many newer musicians. But there are many resources to help you ensure that you are not violating any copyright laws. For more information, see Rich Stim’s Music Law: How to Run Your Band’s Business (Nolo), a comprehensive guide to all the legal issues your band may face. Like many forms of creative expression, music is protected by copyright law. That means a license is usually necessary if you create a new work using pre-existing music created by someone else (otherwise known as a “derivative work”). What rights do you need to license for music sampling? MUSIC COPYRIGHT BASICS There are two separate copyrights involved in a recording of music: a copyright in the song (which includes the musical composition and lyrics) and a copyright in the particular sound recording of that underlying composition. The song “New York, New York” by songwriter team John Kander and Fred Ebb provides a good example to illustrate the two copyrights. The copyright in a composition is typically controlled by one or more music publishers. “New York, New York” is published by Sony Music Publishing. However, the composition has been recorded by multiple artists, and typically the record label owns the copyright for their particular sound recording. ARE COVER RECORDINGS CONSIDERED SAMPLES? If someone simply wanted to record a “cover” version of “New York, New York,” he or she would need to obtain a mechanical license to the musical composition from the music publisher. A mechanical license is compulsory and automatic for those who pay the associated fee. In other words, the copyright holder to the musical composition cannot refuse to give someone a license to record their own audio-only version, but the copyright holder is entitled to be compensated for the license. However, the mechanical license is available for audio-only recordings, not for videos. If you want to include a recording of a pre-existing music into a television show, film, videogame or other audio-visual work, you will need to obtain “synchronization” licenses from both the music publisher(s) and the record label for the recording of the song in question. For example, if someone wants to “sample” Frank Sinatra’s version of “New York, New York,” he or she must obtain the rights to the sound recording and the rights to the composition, as discussed below. WHAT ARE MUSIC SAMPLING RIGHTS? Sampling refers to the act of taking a portion of a sound recording and reusing it by incorporating it into an audio-only recording of a new song. This is common in genres in which artists will typically use pre-recorded music and sounds to create new work. Sampling is especially common in Electronic Dance Music (EDM). If someone wants to sample a sound recording, he or she must obtain the permission from both the copyright owner of the song (the music publisher(s)) and the copyright owner of the particular recording of that song (the record label) to avoid copyright infringement. Unlike a mechanical license, licensing the right to use a sound recording is not compulsory. The artist can refuse to license the work or negotiate any price for those rights. If you want to use the recording, including the sample in an audiovisual work, you’ll also need to obtain synchronization licenses for that usage. WHAT IF I DON’T GET PERMISSION FOR MY SAMPLES? Licenses can get complicated depending on the length and nature of the music sample. A sample so brief that the underlying composition is unrecognizable may only require a license to use the sound recording. Conversely, a long sample would need a license for the sound recording plus permission for the musical composition. If you were to sample a song without a license, you could be liable for copyright infringement. However, if the sample was so brief or was not detectable to the ordinary listener, you may be able to argue the use of the sound recording was de minimis, and therefore no permission was required. This defense may not always be available. In some instances, even if the sample is short in length, a license may be required if the excerpt encompasses “the heart of the song” (for example, it only takes seconds to recognize the opening bars of Queen’s “Under Pressure”). In either case, it is much less costly to obtain a license to sample a work than it is to defend a copyright infringement action. CONTACT OUR TEAM If you are considering using a music sample or have been approached by a potential licensee, an experienced copyright attorney can assist you in determining what rights must be licensed and handle negotiating and drafting the licensing agreement. Contact a member of our team for next steps. [This blog post has been updated from a previous version, published September 25, 2021] Photo by Duncan Kidd on Unsplash In the music industry, the process of sampling is regularly used by music producers. However, contrary to popular belief, sampling of a copyrighted song without permission from the owner is still illegal. Further contrary to popular belief (and this one might be the biggest shocker), sampling a copyrighted song without permission for use on a non-commercial item (such as a mixtape) is still illegal. If you use samples in your music, it is necessary for you to obtain legal permission to use it. This process is known as sample clearance. If you fail to get the proper permission, you could end up suffering serious consequences. Music Copyrights. Composition and RecordingIn the music law world, music is actually protected by copyright laws on two levels, composition and recording. When you sample someone’s song without their permission, you are violating the copyright on the musical composition and the recording governing the actual song you are sampling from. Music CompositionMusical Composition refers to the structure of a musical piece. It is the combination of music notes and how they are pieced together to create a new and unique piece which is what the protection governs. Music RecordingA musical recording is the actual recording of the composition. This is what you actually hear when you listen to a CD or MP3 – the actual music that is able to be heard. High Cost to Clear SampleIt can often be difficult to obtain sample clearance because of expensive fees associated with music sampling. However, while difficult as it may be, it is necessary to obtain sample clearance if you want to make copies of your music and distribute it to the public. This sampling fee is determined by how much of the sample you want to use and the intended use of the sample in your song. It can also be challenging to reach a music publisher.Further, because when clearing a sample, because you need to get permission for the copyright on the musical composition and musical recording, a greater difficulty is involved because often times, this is owned by separate owners. What Happens if I Don’t Get Permission or Clear the Samples?Choosing to publish music without a sample clearance can ultimately have some severe consequences. If your recording gains significant popularity and is played at clubs or on the radio, you will most likely have to deal with sample clearance from a copyright infringement standpoint. This charge can generally run from \$500 to \$20,000 per instance of copyright infringement. If it is determined that willful infringement (meaning you intended to use someone else’s copyright and infringe on their rights) has occurred, the penalty can be as much as \$100,000 per instance of infringement. Aside from this penalty, you may also be asked to recall your albums, destroy them, or pay the infringing party some or all of the profits generated by your song.Sampling Music – What’s the Bottom Line? Despite popular belief and practice, sampling someone else’s songs without their permission is illegal. This is an act that can have serious consequences for those who do not obey the law. By sampling music illegally, you ultimately risk being charged a significant fine.For more information about how you can legally sample music and avoid being charged with copyright infringement, contact us.—Julian Cordero is an Attorney, Music Producer, and Entrepreneur. Oh and he blogs too! Julian is licensed to practice law in New York and is the Managing Member of Cordero Law LLC, a New York City based law firm focusing on Business Law, Entertainment Law, and Intellectual Property. So, you just heard a killer beat you want to use in a song. There are plenty of hit songs based on samples. Just think of Beyonce’s “Crazy In Love”, Rihanna’s “Work”, Eminem’s “My Name Is”, or Kanye West’s “New Slaves”. Ultimately, we’re all influenced and inspired by the music we’ve heard, and since there are only seven notes you can use in each key, there are bound to be similarities between songs. If you’re using notes and chords, you’re making music. That’s all there is to it. There’s no way you can be 100% unique. Regardless, sampling isn’t exactly new. In the 80s, it seemed as though every Hip Hop song featured a sample from another recognizable song. But to be fair, the 80s were still the “wild west” when it comes to sampling. The legalities of sampling have tightened up quite a bit since then. So, is sampling legal? How can you legally sample music? Read on. But first, if it’s your aim to do music professionally, you’ll want to check out our free ebook while it’s still available: Is Sampling Legal? Yes, but only if you go about it the right way. Generally, you need to get permission from both the owner of the sound recording and the copyright owner of the musical work. Assuming you have the permission to use the music, you can leverage it in your own sound recording. Do not use samples if you don’t have proper permission, unless you want to go to court. Why Sample? As a producer, you’re probably capable of producing your own beats. So, why would you sample a section of music? For one, it can cut down on production time. Time is of the essence in most recording situations these days, as more time in the studio generally means the need to spend more money. Plus, if you need to make a new beat, you must start from scratch. With a sample, you’ve got a good starting point. If not an entire song mapped out. Two, a sample can evoke nostalgic feelings in listeners. This is beside the point if the sample is too old or not widely recognized. And, in some cases, producers still use samples from songs that are lesser known because it nevertheless evokes the right mood or feelings for the song. But if you’re trying to get your audience to remember the “good old days”, you need to use a section music your target audience is familiar with. Three, duplicating the feel of a specific segment of music can be tricky. And, let’s say you don’t have immediate access to a 12-piece band. No problem – if the segment of music you’re looking to sample already has that layered sound you’re looking for, you don’t have to build it from the ground up. How To Sample A Song The Right Way Generally, samples contain two copyrighted works – the underlying composition and the recording. The underlying composition refers to the song itself, which is owned by the songwriter or publisher. The recording is owned by the artist or record label. As already noted, you need permission from both the owner of the composition and the recording. Once approved, you will need to enter into a sampling agreement with the copyright owners. How To Obtain Permission To Use The Composition Since you’re looking to record a song that doesn’t belong to you, what you need is a mechanical license. Fortunately, this is not hard to get, as you can obtain the license through Harry Fox Agency. Things get a little more complicated if you’re planning to combine two or more songs into one. In an instance like that, you need permission from each song’s owner. And, from a legal perspective, you’re creating what’s called a “derivative work” at that point. A mechanical license simply isn’t enough, so you’ll need to deal directly with the song owner and/or publisher. As far as figuring out who the publishers are, do a few searches on PRO websites (like ASCAP, BMI, SESAC, etc.). Publishers want as much information you can provide them with, so don’t be shy. Tell them how you’re planning to use the material for best results. Provide them with how many seconds the sample will last, which section of the song will be sampled, timing of the recording, the number of units you’re planning to create and distribute, and what type of media you will be using, whether it’s CD, vinyl, stream, or otherwise. How To Obtain Permission To Use The Recording Again, when you’re using a part of someone else’s song, you’re creating what’s called a derivative work. Sampling requests aren’t always looked upon with favor, because of how your use of the sample could devalue the original recording. To get permission, you’ll need to determine who owns the master recording. Generally, you’ll want to begin by contacting the record label and ask for a license to sample. Again, offer as much information as you possibly can, as this will increase your chances of success. You may be asked to present a demo, so be prepared. How Much Does Sampling Cost? This is going to depend on two factors: The owners of the composition. The recording you’re planning to sample. So, the cost of the sample is going to be determined by how much value the owners of the composition and recording place on it. There is no standard rate across the board. Mechanical licenses are standardized in the sense that they always cost 9.1 cents per copy for songs that are five minutes or less. But sampling can vary a lot in cost. So, when it comes to sampling, it’s mostly going to come down to negotiation. Some sources suggest royalty rates will vary from a fraction of a cent all the way up to five cents per unit. This does not include the advance, which could be several thousand dollars. The rate is also going to depend on many of the factors already noted, including how you intend to use the song, the overall success of the song you’re looking to sample, how successful you are as an artist, and so on. Here are a few proposals composition and recording owners are likely to make, especially if they value their works highly: Mechanical license for a royalty and share of performance royalties. Co-ownership in the new composition and/or recording. Complete ownership of the new composition and/or recording. Don’t be too hasty in entering any agreement before you’ve had the chance to run it by a qualified entertainment lawyer. You could easily miss out on important details that could affect your new song and career for a long time to come. Also keep in mind that rejection is always a possibility. The owners of the song may not give you the license. So, again, negotiation plays an important role in the process. What Are The Consequences Of Sampling Illegally? There are only so many ways I can say don’t. So, instead of just telling you that you shouldn’t sample a song illegally, I’m going to tell you about the consequences of doing such a thing. Sampling illegally could lead to your song being pulled off the market (this is called an injunction), a massive fine, and can even result in criminal prosecution under the seventh commandment, “Thou shalt not steal.” This is exactly what happened to rapper Biz Markie in 1991, for his song “I Need a Haircut”, which included a sample of Gilbert O’Sullivan’s “Alone Again (Naturally)”. So, to me, it just isn’t worth it to sample illegally. There are artists who are showing some defiance in this regard, but I hold that it may only be a matter of time before they’re brought to court as well. Are There Alternatives To Sampling? Of course, there are. After all, while it may be illegal to sample someone else’s recording without permission, it certainly isn’t illegal to sound like someone else. I think it depends at least somewhat on what your intentions are. If you’re just feeling lazy, and you don’t feel like making another beat, then maybe you should take some time and find some new inspiration. If the sample is critical to the song’s structure, then maybe it’s worth fighting for. If you think the sample is crucial to the song’s success, that can be a bit of a contentious issue. On the one hand, success is obviously important, but on the other, the powers that be may not care that much about your success. And, be honest with yourself – if your song can’t be a success without the sample, how good is the song? Making your own beat is always an option, even if it is the “long way around”. Is Sampling Legal? How To Legally Sample Music For Producers Final Thoughts In a way, everything in music has already been done. So, you might be asking yourself, “why reinvent the wheel?” If you can sample a song and get exactly the sound you want, why would you go to the trouble of starting from scratch? The answer is simple. Many times, sampling ends up being the costlier and lengthier way of going about things. For instance, The Beastie Boys opening song on Check Your Head was “Jimmy James.” Originally, the song was intended as a tribute to the late, great Jimi Hendrix. On their anthology, The Sounds of Science, the band mentioned that they used a bunch of Jimi’s guitar sounds on the recording. But because clearing the samples took too long, they had to re-record their own sounds for the original release of “Jimmy James”. Sounds kind of painful, doesn’t it? So, if you feel the sample is essential to your new release, then go ahead and get the license. Otherwise, it might be worth considering alternatives.P.S. Remember though, none of what you’ve learned will matter if you don’t know how to get your music out there and earn from it. Want to learn how to do that? Then get our free ‘5 Steps To Profitable Youtube Music Career’ ebook emailed directly to you!

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