



## Sampling

*I know a recent high court ruling said that every sample needs to be cleared whereas it used to depend on the length of the sample, how easily recognizable it is and other things. What's the story on that issue?*

There has been a change in the way courts approach copyright infringement through digital sampling. To understand this change, it is important to recognize the two types of copyrights involved in most music recordings – the copyright in the composition and the copyright in the sound recording.

The copyright for the composition refers to the song itself. Conceptually, think of this as the music the songwriter wrote on a sheet of staff paper or computer screen. The copyright for the sound recording refers to an artist's recorded performance of the song. Think of this as your CD or MP3 recording of the band performing the song. Why is this important?

In early cases where samples were being used without permission, the courts dealt with the infringement of the *copyright in the composition*.

Over time and through past cases, courts create tests to help them consistently address a particular recurring issue. To have copyright infringement of the composition, the court must be shown that there is a valid copyright in the original work, the original work was copied, and there is a substantial similarity between the original work and the new work.

When the court looks at whether there is a substantial similarity between the two works, it looks at both the quantity and the quality of music that was used. Quantity is how much was taken – a whole chorus or a single word. However, in this context, the meaning of quality is in reference to how recognizable or how important the part of the music that was used is to the overall song. This is sometimes referred to as the "heart" of the song. Some indicators of quality could include distinctive riffs, a single word or phrase taken from the chorus, or a distinctive vocal styling.

Under that analysis, if an artist used a short sample of a riff that is not easily recognizable, and that isn't the "heart" of the original song, a court might not find that copyright infringement of the composition has occurred.

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This analysis changed when the Sixth Circuit Court of Appeals, looking at a digital sampling case, took a new approach when it examined the *copyright in the sound recording* instead of the copyright in the composition. No other court had addressed this issue this way so the court created a clear new rule that prohibits any sampling of sound recordings without permission. That is where the law stands now.

For all of you artists with recording contracts, get them out and read over the section that talks about warranties, representations, an indemnity. It's usually toward the end. By signing the recording contract, the artist guarantees that they own copyright in all of the music that they are recording – and that if they do not, the record label will not be held liable in any copyright infringement actions – the artist will.

So if you want to use a digital sample of a sound recording that is protected by copyright, and you don't want to be sued for copyright infringement, get a license.

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