



## There's no such thing as a free sample

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Just because something is commonplace doesn't always mean it's legal. That's especially true in the murky rights world of YouTube.

It's fairly common to see videos – from individuals and businesses – posted there that feature a small amount of a popular song. It's called sampling – and most people assume it's not an infringement, so they're not at risk for a suit that could cost them large amounts of money. But that impression is a mistaken one.

Here are a few things to keep in mind as you add a soundtrack to a marketing presentation – whether it's posted online or in a more narrow capacity:

**Sampling is almost always illegal** - Using and/or distributing a copyrighted work without permission is the definition of copyright infringement. Thus, if you are sampling, you are infringing the original copyright.

**It's not fair use** - The fair use doctrine is a privilege allowing others than the owner of the copyrighted work to use the material without the owner's consent notwithstanding the monopoly of the use granted to the copyright

owner. It's the exception to the copyright infringement rules – and most violators cite it.

The problem is: Sampling fails to meet each and every one of the four prongs of the definition of Fair Use. Specifically, the doctrine notes:

- The use must be for non-commercial purposes – An infringer may get a pass if the use is for educational or non-commercial uses. But the idea of commercial use is interpreted broadly. If you are seeing any money from the sampling at all, it will be seen as commercial use. The majority of sampling fails based on this point.
- The nature of the copyrighted must be in the public interest – The second factor of the test goes to the need for public access. There would be an emphasis on allowing more public access to a treatise on physics than on a sampling from a song. Therefore sampling fails based on this point.
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole must be small – That mouthful is the basis for the 30 second rule, which a lot of people point to regarding the fact that if you only use a small section of the song it will constitute it fair use. This idea is a fallacy. The reason is that the amount of the work may matter if you are going to use an unidentifiable part of the song (but it probably won't even matter then). For the most part though, no one would do that. So instead, what you have are people sampling the most identifiable part of a song, like the hook, and then try to claim fair use based on the fact that only 30 seconds have been used. Sampling fails on this point too.
- The effect of the use upon the market for the value of the copyrighted work must be negligible – Sampling of the music will undeniably have a negative impact on the value of the copyrighted work because the new song may be purchased for as much as the original. Sampling would fail this as well.

**Obtain a license to clear the rights** – Getting a license generally puts you in the clear. There are many online services that will help you obtain a license for the music you want to use.

The first thing you need to do is search for the copyright holder's name. One of the best places to start is the [Music Publisher's Association of the United States](#). The MPA gives links to organizations that handle the copyright holder's rights, such as the [American Society of Composers, Authors and Publishers \(ASCAP\)](#); and [Broadcast Music, Inc. \(BMI\)](#).

The use of music on websites has become common place and some organizations have created a standard procedure to license music for this platform.. BMI, for example, has created an online process where you can license the entire BMI catalog for a price. The agreement is complex and takes into account the estimated number of page and/or music impressions. Note that the agreement is very onerous so it is important that it is reviewed by an experienced attorney.

**Even if you secure a license, you may still have problems** – That said, it may not matter if you obtain a license or not. One of the most famous sampling debacles is the case of the British band “The Verve” that looped a section from the Rolling Stone song “The Last Time” in its song “Bittersweet Symphony.”

The Verve actually had a license to use some of the orchestration from a derivative work of “The Last Time,” but the Stones (who owned the copyright on the underlying work) sued The Verve for copyright infringement saying that the band sampled too much of the song and exceeded the license. The Verve ended up giving 100% of the royalties of the song to the Rolling Stones and the song is now credited to Jagger, Richards, and the Verve's Ashcroft.

**Consider creating your own music** – The safest solution is to write your own music. This can be a time intensive process but may save you a lot of headaches and money in the end.

**Startup owners: Got a legal question about your business? Submit it in the comments below or email Curtis directly. It could end up in an upcoming “Ask the Attorney” column.**

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