

Anatomy of a Sample: The Legal Complexities Behind Hip-Hop's Creative Backbone

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From left: AIMP New York Executive Director Alisa Coleman of ABKCO Music & Records Inc., Mark Robinson of 300 Entertainment, Deborah Mannis-Gardner of DMG Clearances Inc., Matt Cutler of Rothenberg Mohr & Binder LLP, musicologist Judith Finell and producer Tony DoFat after their panel "Anatomy of a Sample" on Sep. 12, 2018 in New York City.

One of hip-hop's greatest musical legacies is its use of sampling as a creative technique. For labels, publishers and other rights holders, however, the rise of sampling also potentially poses a legal nightmare: What is the threshold between rewording a lyric or rehashing a melody and

infringing on valuable copyright? How do we leverage hip-hop's imitative foundations and fast-paced release culture without getting broiled in [multimillion-dollar lawsuits](#)? Has technology made the legal aspects of sampling -- from tracking down copyright holders to signing paperwork and paying stakeholders properly -- easier or harder?

Music-industry veterans debated these questions at the panel event "Anatomy of a Sample," hosted in New York City on Sep. 12 by the Association of Independent Music Publishers (AIMP). Speakers included **Judith Finell** (president of [Judith Finell MusicServices Inc.](#) and lead musicologist for the [Marvin Gaye](#) family in their "Blurred Lines" dispute against [Robin Thicke](#) and [Pharrell Williams](#)), **Deborah Mannis-Gardner** (president/owner of DMG Clearances), **Matt Cutler** (partner at Rothenberg, Mohr & Binder LLP), **Mark Robinson** (head of business and legal affairs at 300 Entertainment), **Tony DoFat** (producer who has worked with the likes of [Diddy](#), [Mary J. Blige](#), [Queen Latifah](#) and [Will Smith](#)) and moderator **Alisa Coleman** (COO of ABKCO Music & Records and executive director of AIMP's New York chapter), who were joined by several dozen AIMP members in the audience.

One point of near-unanimous agreement among the panelists: in a music landscape dominated by hip-hop, avoiding samples altogether as a legal cop-out is both difficult and futile. "Trying to make hip-hop without sampling is like trying to make fried chicken without chicken," said Dofat. "You have to be really creative to pull that off."

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Dofat kicked off the conversation by walking the audience through some of the first tracks he produced with Diddy -- including Mary J. Blige's 1992 single "What's the 411?," which samples a bass line from funk/soul band [Ohio Players](#)' "Pride and Vanity."

"Diddy and I used to go to clubs and study how people reacted to the DJ," said Dofat. "One time a breakbeat from an Ohio Players song came on and the crowd went crazy, and Puff said, 'Hey, write that down.' Then we went into the studio and mixed Mary J. Blige with an Ohio Players sample. It became an instant hit when we put it out, but we had no idea we were shaping black music at that time."

Dofat then showed the audience his sprawling Dropbox collection of samples from obscure records around the world. Some of the folders' titles referred to specific instruments and sounds (e.g. snares, hi-hats), while others were more vague and humorous -- such as "Indian dude on a rug," which referred simply to the image on the original album cover. "Unfortunately, I don't have any publishing information for a lot of these files yet," said the producer, eliciting chuckles from the audience.

Far beyond Dropbox alone, several other technological developments over the past decade have transformed sampling culture. Audio recognition technology has improved drastically since the '90s, such that many professionals now use apps like Shazam to help identify samples and their rights holders. In addition, contrary to producers' historically secretive practices around collecting samples, streaming and P2P file-sharing platforms are the new "crate-digging" sites, radically democratizing source material and allowing anyone from around the world to upload and discover deep catalog.

Legal specifics in sample clearance agreements have also shifted with the industry's growing confidence in hip-hop's cultural and financial sustainability. "When we first started, we were told that hip-hop and rap were 'just a phase,'" said Mannis-Gardner. "We were getting \$500 media buyouts that included all the rights." For instance, Mannis-Gardner cleared rapper [Me Phi Me](#)'s song "Keep It Goin'," which samples the "hey hey" from [James Brown](#)'s "The Payback" and was selected as the theme song of Fox TV show *TriBeCa*. In that deal, Fox bought out all the synchronization rights to the new song, instead of sharing it with the original artists and publishers.

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Nowadays, flat-rate buyouts are rare; instead, the publishers behind a sample normally ask for a percentage of the new copyright in addition to one-off, non-recoupable licensing fees of \$3,000 or more, industry sources say. Which parties are involved in sample negotiations depends on what type of sampling is being done in the new work. Lifting directly from the original master (e.g. sampling James Brown's "hey hey" vocal) requires clearing both the publishing and master rights of the original source, while interpolation (e.g. reciting the lyrics or re-recording any other musical aspect of the original composition) requires negotiating only with the publishing side.

Unlike with publishing, the master rights owner of the sampled material usually doesn't get to own a piece of the new copyright, but still takes a percentage of revenue from streaming and third-party licensing. Moreover, the non-recoupable fee normally comes directly out of the new artist's own budget: "the artist is on the hook to give up whatever royalty they're set to receive in their recording deal to the owners of the original work that's being sampled," said Cutler. "Other than paying upfront advances, the record company doesn't always take a hit."

That said, labels still exert significant power as a content gatekeeper. "We sometimes have hard conversations with the artist and say, 'Listen, we can't clear this sample so you have to take it off this record, or else it's not coming out,'" said Robinson.

As hip-hop continues its reign as the [most-consumed](#) genre in the U.S., sample clearance has become a necessary ordeal for a growing number of rights holders. Industry sources say that major labels and publishers now need to obtain third-party consent for an average of 50 percent of the songs they release. What's more, the denial rate for samples is hitting historic lows, hovering at only around 1 to 2 percent overall.

"I think people are more open to clearing samples today, because it means money. It's lucrative business," said Mannis-Gardner. "There are so many artists like [Hamilton Bohannon](#) and [Syl Johnson](#) whose catalogs or careers were essentially dead before sampling."

Yet publishers rarely talk with their songwriters about in-house sampling opportunities despite the financial potential. "Publishers should be saying to their writers, 'We have this whole catalog of songs that we'd love for you to work with, instead of having you look outside for material,'" said Coleman. "'Let's figure out how we can grow our bottom-line revenue with samples, on top of everything else.' Artists and producers should also be pitching the publishing side more often, because there are many songs that can easily be re-recorded without using the master."

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Perhaps one of the biggest challenges in sampling are the stubborn administrative challenges: while the technique has matured far beyond its beginnings, the paperwork around it arguably has not.

"98 percent of copyright holders don't go to contract," claimed Mannis-Gardner. "Universal [Music Group] sends us an informal quote letter, but usually it says something like, 'if we were to do a contract, this is how it would look,' and it just has blanks in it. It's boilerplate. Warner/Chappell hasn't gone to contract once since we started working with them around 2009. This is mostly due to the difficulty of getting signatures from the sheer number of publishers, attorneys and other parties for a single agreement."

The absence of paper trails arguably [hurts](#) emerging artists and producers the most. “It diminishes the value of your copyright in the long run if you don’t have the proper paperwork and co-publishing agreements signed by everyone, if you can’t prove your rights and your position of what you can and can’t do in the future,” said Coleman. “Clearly the majors feel differently, but I think the writers here in the room should be conscious of what that behavior’s going to look like for their catalog down the line.”

Such loose legal practices have given academically-trained musicologists like Finell unprecedented influence in the music business. While Finell is usually hired to evaluate cases that are brought to court after a record is released (such as the “Blurred Lines” case), industry professionals are increasingly hiring musicologists before a release as well, to ensure that a song’s content does not count as infringement.

“The ‘Blurred Lines’ case has created a tremendous amount of fear in the music industry,” said Finell. “As an artist, if you are using someone else’s material in any way -- whether lifting, imitating or even transforming it -- to some extent that material was your source, and you have to take the risk as well as the reward in releasing that to the public. And even if you’re Pharrell Williams, you don’t always win.”

Finell was also hired as a musical expert in the lawsuit that [Jimmy Castor](#) filed against the [Beastie Boys](#) in 1987, for sampling the former’s trademark phrase “Yo Leroy!” in the latter’s single “Hold It Now, Hit It” without permission. The musicologist walked the panel audience through how she and her team use [spectrogram analyses](#) to determine whether one excerpt of music sampled directly from another.

“It’s important to realize that you can’t just buy [spectrogram analyses] directly online and know what you’re doing,” said Finell, whose entire team holds doctorate degrees in musicology. “It takes quite a bit of knowledge and a lot of interpretive work around the musical significance around a given sample.”

One widespread misconception about sampling is that there are hard-coded rules about what does and does not constitute a sample. Cutler shared a recent horror story in which one of his artist clients was not aware that samples less than five seconds long still had to be cleared. The party being sampled wanted to deny this particular use -- except the record was already out.

Trying to clear samples post-release remains a surprisingly common, if not dangerous, practice. “[Teyana Taylor](#)’s label [Def Jam] gave me 24 hours to clear around 20 samples. That’s not going to happen,” said Mannis-Gardner. “We’re still cleaning that album up. I know as publishers, that freaks you out: if it hasn’t been registered properly, how are you going to collect your streaming royalties? How are you going to get that money?”

Technology may play a role in fixing these bottlenecks, with startups like [Tracklib](#) working not just to revive otherwise dormant back catalog, but also to streamline and automate the sample clearance process for producers and labels of all sizes. Through Tracklib’s system, labels whose catalog is sampled would also receive a percentage of a wider variety of master revenue across

the board -- including SoundExchange revenue and neighboring rights -- that are normally not included in haphazard sample agreements.

There will always be certain legacy artists such as [Anita Baker](#), [Rod Temperton](#) and even the red-handed Beastie Boys who are notoriously resistant to opening up their own catalogs to sampling -- and artists have the right to impose such restrictions on their creative output. But “even if something’s on that list of no’s, I still try to go for it,” says Mannis-Gardner. Amidst hip-hop’s enduring cultural power, “you never know when someone might say yes.”