

(Intro music)

Nina Pullano: Welcome to Sidebar – a podcast from Courthouse News. I’m Nina Pullano coming to you from Brooklyn, New York. As the summer comes into full swing – this is our last episode before we’re on hiatus for a couple of months – here in New York City the live music scene is lighting up. Outdoor festivals and shows are popping up left and right. Even our theme song has a little remix going on – if you have a really good ear, you might have picked up a hint that we’re going to get into an explosively popular style of music right now – reggaeton – and a copyright lawsuit in Manhattan that seeks to give all the credit for the genre to the duo that pioneered its ridiculously catchy syncopated beat. I went out to a reggaeton dance party in Manhattan – it’s a weekly kinda get-down in the basement of a venue called The Delancey – and I asked some folks what makes this music so special and unique. Here’s some of what they had to say.

Clips: ...Good vibes. And we’re Hispanic, so it’s where like we come from, right! ...I’m not even Hispanic but I love it cuz, I don’t know, it makes you wanna drink. ...As a salsa dancer reggaeton is something different and I love it ... It represents our culture, it also represents a side where we like to party, like no matter what’s going on in your life, there’s always time for like party and enjoying yourself. The beat makes me feel happy, makes me feel friendly. I just want to dance, like dance by myself, I don’t need anybody else, I can enjoy myself.

NP: Throughout its rise to mainstream popularity the music has carried with it such a rich history and cultural significance that the idea of chalking up all that success to two artists is kind of striking. But before we get into all that, some major music copyright cases have laid the groundwork for courts to deal with copycat accusations in popular music and I’m very excited to be joined by my fabulous colleague Josh Russell to break them down. Josh, it’s truly so great to have you here.

Josh Russell: Absolutely Nina, it’s blessed to be here on the pod.

NP: So, tell us a little bit about yourself.

JR: I’m a Manhattan courts reporter for Courthouse News for the last eight years, covering federal and state courts. I live in Clinton Hill, Brooklyn, and once a month I do a radio show on The Lot Radio in Greenpoint, Brooklyn.

NP: You have this very cool duality as a legal journalist and radio DJ – I feel like these worlds collide sometimes on Twitter where you’ll post underground shows you’re going to along with updates from the courthouse, it’s all in the feed. But recently they came together in a trial you covered – a civil case against singer-songwriter Ed Sheeran.

JR: I’m always happy when my love for collecting records and obsessing over music finally intersects with these courts that I’m following every day for Courthouse News. In my experience, most of the times when there’s an interesting copyright case coming through the court, they almost nearly always settle out of court. So, in the Ed Sheeran case, the estate of “Let’s Get It On” co-writer Ed Townsend sued Sheeran for copyright infringement of the legendary Marvin Gaye song, “Let’s Get It On,” which Townsend and Gaye had written together in 1973. The case did go to trial, which is rare. After like three hours of deliberation, the jury ruled that Sheeran hadn’t, you know, stolen the song from Marvin Gaye.

NP: What was it like, what was the kinda courthouse vibe like with Sheeran coming every day?

JR: So, you have this this little redhead English millionaire coming in every day, you know, occasionally to crowds of paparazzi, photographers and tourists, and just the press in general and a couple fans, probably.

NP: Ed Sheeran also took the stand at trial. What did he have to say for himself?

JR: He was certainly a bit snarky on cross-examination when he had to deal with the plaintiff's attorneys questioning him, but also on his own defense, he came off very competent as the veteran pop musician that he is, even several times pulling out an acoustic guitar to make his case and sing in court.

NP: So, the jury got a little free concert there?

JR: Yeah, he played his hits, and then a bunch of other songs, too. He's a real pro, turns out.

NP: And how did that play into the case?

JR: Well, one of his defenses is that he often mashes up his songs that are in the same key as other like, familiar pop songs, seamlessly in and out in what he calls mashups. Including songs like "No Woman, No Cry," and then the trial was super heavy on Van Morrison songs. Like it must have been five or six Van Morrison songs that he played, seamlessly weaving out of, you know, from Ed Sheeran's originals into a very similar sounding Van Morrison type, acoustic ballad, then back into the Ed Sheeran songs.

NP: That's a lot of Van Morrison.

JR: That was almost one of Sheeran's defenses, is that he wasn't ripping off Marvin Gaye, he was just trying to make Van Morrison music. His record label even called his song "Thinking Out Loud" the Van Morrison song.

NP: Has Van Morrison had anything to say about any of that?

JR: Yeah, Van Morrison has apparently blessed Sheeran to go ahead and do this, he even took him out to breakfast at a hotel one morning and let Ed Sheeran know that he was alright with it, according to Sheeran's testimony. His defense is that they were similar because they share the same musical building blocks, and he says, those can't be copyrighted. Those chord progressions of those songs are protected from infringement. He says they're the bare bones of songwriting.

NP: Has anything happened since trial ended?

JR: Kathryn Griffin-Townsend has appealed the verdict in that case at the Second Circuit Court of Appeals.

NP: So, we'll look out for that. But this wasn't Sheeran's first rodeo, right, being a defendant in a copyright case.

JR: Yeah, in 2016, Sheeran quite bitterly settled outside of court a \$20 million copyright lawsuit brought against him by two songwriters, Martin Harrington and Thomas Leonard, over his song "Photograph." The two songwriters alleged in the 2016 lawsuit that "Photograph" had ripped off their 2009 song

“Amazing.” In that case, the plaintiffs were represented by attorney Richard Bush, who had prevailed in the landmark trial on behalf of the Marvin Gaye family in the copyright lawsuit over the song “Blurred Lines.” Sheeran’s “Let’s Get It On” case always sort of drew some comparisons to this landmark case over “Blurred Lines.” In that case, the suit was brought by Marvin Gaye’s family against Pharrell and Robin Thicke over their 2013 hit. A jury found that there was enough evidence to give the verdict of Marvin Gaye’s estate, the family ultimately got over \$5 million.

NP: What kind of a reaction did people in the music industry have to the verdict?

JR: I think the Blurred Lines case had a lot of producers shaking in their boots about where the line was sort of between homage and infringement. And where was that was getting moved.

NP: Where the line is getting a little blurry, perhaps?

JR: Exactly, couldn’t have said it better.

NP: So, then the “Blurred Lines” case was appealed to the Ninth Circuit, where the decision was upheld in November 2018. Judge Jacqueline Nguyen wrote a dissenting opinion and it really doesn’t mince words about the impact she’s afraid of the ruling having. Here’s what she writes:

*The majority allows the Gayes to accomplish what no one has before: copyright a musical style. “Blurred Lines” and “Got to Give It Up” are not objectively similar. They differ in melody, harmony and rhythm. Yet by refusing to compare the two works, the majority establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere.*

The judge goes on to criticize the expert musicologist for the Gaye family – saying she cherry-picked snippets that allowed her to build a constellation of elements found in both pieces, but that those individual elements are not individually copyrightable. The judge writes:

*That might be reasonable if the two constellations bore any resemblance. But Big and Little Dipper they are not. The only similarity between these “constellations” is that they’re both compositions of stars.*

The majority opinion said that the circuit court decided Blurred Lines/Got to Give It Up based on narrow grounds – on the procedural posture of the case – and that the decision does not grant license to copyright a music style or a groove.

Brian McBrearty: It’s a misconception that the musical case that was made for “Got to Give It Up” was based on a style or a vibe or even a groove – a little bit less a groove. The musicology was actually fairly traditional.

NP: That’s Brian McBrearty, a forensic musicologist who was not involved in the case. As he points out – despite Judge Nguyen’s concerns in the dissent – the plaintiffs didn’t set out to protect an entire genre.

BM: They discussed similarity of melodies and harmonies, and they didn’t say we want to protect a vibe or a groove or a style.

NP: Still, Brian wouldn’t have decided the same way if he had been a juror on the case.

BM: I absolutely think it was the wrong verdict. Juries are famously unpredictable. And I think the most important part of my job is being able to help them understand the musical principles that are in play. It's not my job to decide what's right and wrong, it's really theirs. That's the system that we have, and so if you can make them understand their decision, even if they return the verdict that isn't the one that you wanted, if you've given them the information they needed to render it, then you've done your job.

NP: Like Josh said, most music copyright cases don't go to court – and Brian said even those that do don't necessarily fall into a specific subset.

BM: Most copyright cases come down to two elements. The copying element, which means that you actually need to have heard and intentionally or not intentionally or even subconsciously, have included elements of a one preexisting piece of music in a new piece of music. And then the elements that are similar need to be substantial enough and original to let's call it song A, such that song A should be able to enjoy protectability over those musical elements.

NP: So, for example in the two cases that we talked about earlier...

BM: Musically the two cases were really pretty different, as I said. "Thinking Out Loud" really does sound a little bit like "Let's Get It On," but in a way that I don't think "Let's Get It On" is entitled to enjoy predictability by copyright. "Blurred Lines" sounded like "Got to Get It Up" in ways that are not especially rooted in its composition. They were more presentational. And those kinds of elements typically do not enjoy copyright protection either.

NP: The courts have spoken: You can't copyright a groove. But what about a rhythm? Let's get back to Josh to fill us in on the lawsuit seeking to do just that.

JR: One case that I'd come across recently in the Southern District of New York's docket was filed by a pair of famed Jamaican reggae producers, Steely & Clevie, who claimed that their instrumental song "Fish Market" has essentially been used as the backbone for the entire genre of reggaeton.

NP: It's a beat that we and our listeners have almost certainly felt, even if just in passing.

JR: Yeah, as New Yorkers we hear reggaeton all the time. It's just out there in the city. You hear it from cars and those freaky three-wheeled slingshot motorcycles.

NP: Literally blasting from a car rolling by my window this morning. That was my wake-up call.

JR: Yeah, we all know that beat. That vibrant, uplifting reggaeton sound that moves you.

NP: Not only do we hear it all the time now, but New York City has been a big part of the history of reggaeton. The whole story goes back to Panama around the 70s or 80s and artists, largely workers from the West Indies, started to adapt Jamaican dancehall songs using the Spanish language in the rhythmic mixing pot of the Caribbean and created this new genre of music. As the scene moved to New York City, there was even more artist collaboration and the sound was then really popularized in Puerto Rico. It revolved around a legendary club, The Noise, and the scene was called El Underground. Beats were kind of too fire for the Puerto Rican government and along with the party culture and sexy perreo dancing, officials kind of tried to crack down but the party continued and it rose to the mainstream fame that we see today in the mainland United States.

JR: While it started on underground mixtapes and in Caribbean dance clubs and parades, in the last 20 years, it's gotten super global and hugely mainstream. You think of hits like Daddy Yankee's "Gasolina" in 2004 or "Papi Chulo" by Panamanian rapper Lorna.

NP: Reggaeton has only gotten more explosive in recent years. In 2017 the song "Despacito" by Luis Fonsi featuring Daddy Yankee topped the charts in 47 countries. In the United States it was the first song primarily in Spanish to hit number one since "The Macarena." And then there's the phenomenon of Bad Bunny – the Puerto Rican singer-rapper who has been the most-streamed artist globally on Spotify for three years in a row.

JR: Yeah, Bad Bunny, enormous, huge. I remember three years ago, when New York was in the thick of the coronavirus pandemic. He was the one artist to throw a concert in New York City.

News clip: Bad Bunny gives a whole new meaning to traffic jam. The Puerto Rican singer and rapper rolled through parts of the Bronx and Washington Heights performing from atop a semi-truck. Fans were spotted running alongside the truck trying to catch a glimpse. The surprise concert was Bad Bunny's first of 2020 because of the pandemic. The special Hispanic Heritage Month concert...

JR: Is there anyone bigger than Bad Bunny right now? Hugely popular.

NP: So, by total coincidence I was just in the Dominican Republic, and I actually met a young reggaeton artist – he's a rapper and singer – he introduced himself to me as Franklin, but as an artist he's known as Fichero Frecuency. Franklin knew a lot about the music's history, back to its roots in Panama, and he had heard about the Steely & Cleve lawsuit. He said it's difficult to even wrap his head around the lawsuit because the sound of reggaeton, colloquially known as dembow, is so important across Latin America and the Caribbean. He described what's so special to him about dembow, and of course breaks into a Bad Bunny song.

Fichero Frecuency: (Speaks Spanish) When you listen to dembow, you're not gonna be sad, no. You feel good. You feel funny, because (sings in Spanish). Me entiende?

NP: Sí, entiendo.

FF: Entonces, el dembow es música de buena vibra.

NP: Buena vibra – good vibes. And when you're in the club and the right song drops – it's like this force comes over the crowd – everyone singing along and just letting loose in a real sense of community. You're actually engaging with the people around you and not just the group you came with. It sounds kind of like this:

(Sounds of partying)

NP: Back to the case at hand. There's so much energy and enthusiasm. Is it really fair to say that the birth of all of that belongs to anyone in particular?

JR: Across three lawsuits, the Jamaican reggae production duo Steely & Cleve named at least 50 reggaeton songs that they say are built on a looped sample of one of their drum rhythms, essentially

making up the backbone of the entire reggaeton sound, and they say that sample is substantially similar, if not virtually identical to significant portions of their instrumental "Fish Market." The "Fish Market" suit names a slew of reggaeton musicians and producers as defendants, including the genre pioneers like Daddy Yankee, and his El Cartel Records label, bonafide 90s reggaeton duo Wisin & Yandel, alongside current star producers like Scott Summers, Chris Jeday and Gaby Music. Steely & Clevie's lawyers say that "Fish Market" is made up of a protectable combination of instrumentation including programmed electronic drums, kick, snare and hi hat, playing a one bar pattern with analog percussion instruments, namely a tambourine playing throughout the entire bar and a synthesized tom drum playing beats one and three. Here's a clip of Steely & Clevie a couple years before "Fish Market" in the studio in 1988 for the Jamaican Broadcasting Corporation magazine program "Scene."

NP: OK, so what's the story behind this alleged backbone of all of reggaeton music?

JR: So, in 1990 Steely & Clevie took an alternate mix of "Fish Market" from the same multitrack recording and turned it into a hit song for Jamaican dancehall superstar Shabba Ranks called "Dembow," which became a massive international hit. Then in 1990, in the wake of Dembow's success, another producer named Dennis the Menace replayed Dembow's instrumental to create another instrumental to be used on a couple Spanish language recordings by Panamanian reggae artist Nando Boom and another song by a duo, Bobo General and Sleepy Wonder. This is where Steely & Clevie say their song was taken, that became the beat of all reggaeton to come from the pounder.

NP: So, in this Steely & Clevie lawsuit, what kind of defenses have the artists on the other side of the case raised?

JR: One argument is artists can say they created that beat independently. So, a theory of independent creation, they could say, I didn't copy these guys I actually created it. Another argument is that the elements that Steely & Clevie are claiming infringement over are not copyrightable. Those are just musical building blocks, which is what Ed Sheeran had successfully argued before a New York jury.

NP: Speaking of those musical building blocks, here's musicologist Brian McBrearty again.

BM: I don't know of any famous cases that are as simply about a rhythm as this. This seems to me to be a function primarily of just that reggaeton's taking over the world. I think that's why we are where we are. It's why we're having this discussion. It's probably also why there's 40 defendants.

NP: He also explained what Steely & Clevie would have to prove in order to win their case.

BM: Copyright infringement requires copying first. And then the material that is common to both songs has to be substantial enough and original enough to song A, such that it deserves copyright protection from song B. In this case, we're only talking about a rhythm. And that rhythm is very, very short. It's just going *buh buh buh buh buh*, and then it's done, it's going to repeat that. And that's a couple of seconds long. Copyright law refers to a modicum of originality, so it doesn't take very much originality to be original. But to be substantial, is much more a function of different axes: a length axis and a depth axis and a novelty axis. And so, if you have some material that's extremely simple, and extremely brief, then it's just the math is going to work out such that the plausibility of it being original is diminished. So, in this case, it's borderline ridiculous.

NP: Brian also said something I thought was really interesting about the nature of how we listen to music and how placing such strict limits could burden creativity.

BM: Rhythms are notoriously difficult to claim originality over because they are about as building block as a building block gets. And every music copyright case now we talked about building blocks and building blocks are the essential language of music that we all use. And one of the reasons we want to protect that idea is that society wants music. And we don't want music that sounds completely different from every piece of music we've ever heard. Which is to have a foundation of familiarity, something that sounds like something else. And then we want it to have originality built on top that, sort of the way we don't want every house in the neighborhood to be a completely different geometric shape. Copyright wants to promote the creation of more music so that society can enjoy it. And that would be terribly hindered if everybody that wants to write a reggaeton song in the future had to license this basic element, this defining element almost, from one piece of music.

NP: I chatted up a copyright and entertainment attorney at the firm Romano Law named Marc Ostrow. He's also an adjunct professor at Cardozo Law School in New York City. He said that the case is probably going to be a long shot for Steely & Clevie.

Marc Ostrow: The beat itself, if you would, to write it out in notation form, only lasts for maybe a couple of measures before it repeats. And it's a fairly simple beat and even as described in the complaint, it's been used by a plethora of artists over the last 30 years. So, there's a concept in copyright law called *scènes à faire* which is easier to demonstrate in the visual arts than it is in music. So, basically *scènes à faire* is something that's endemic to a particular idiom or genre, so the example that I always give is, in a Western, if you end your film with the hero riding off into the sunset on his horse in his 10 gallon hat, you can't copyright that to the effect that somebody else can't film that scene. That is just endemic to the genre. Of course, you can have a copyright in the particular expression of that idea. The particular actor, the particular horse, the particular lighting, etc. But you can't prevent somebody else from making a Western that ends with the hero riding off on his horse into the sunset. So, similarly, if this beat is considered, you know, a fundamental building block of the genre, notwithstanding the fact that you can allegedly trace it back to the "Fish Market" recording and then the "Dembow" recording, it's a fairly strong argument that this is hey, this is just part of the genre, it's part of the field, or the groove of this genre. And just like the court said in "Blurred Lines," even though the decision didn't work out that way, the law technically is you can't copyright a feel or a groove.

NP: Josh we're doing some speculating here – what's the actual status of the case?

JR: Since its initial filing in New York, the "Fish Market" copyright case has been consolidated with two other lawsuits and transferred to the Central District of California where it's currently pending.

NP: And Steely & Clevie may or may not prevail in their mission to get recognition for creating reggaeton music – they might settle out of court or cut a deal for songwriting credits. If it goes to trial, there's no knowing what a jury might decide. Either way the beat goes on – the spirit of reggaeton is alive and well. And this is an especially big summer for music in New York City. What's the celebration this year, Mr. Russell?

JR: Yeah, Nina. So, this summer of 2023 has been celebrated as the 50th anniversary of the birth of hip-hop in New York, using the starting point being Jamaican immigrant DJ Kool Herc in the Bronx like DJing and scratching records for the first time for just playing soul and funk records for a party in a New York

basement serving as the birthplace of hip hop. There's going to be a ton of live shows and parties in parks and outdoor all summer in New York. I'm really excited. I'm definitely trying to get tickets to the LL Cool J "Rock the Bells" show in Forest Hills, Queens. There's also another enormously unreasonably stacked lineup in Yankee Stadium that same week, too many acts to name. Literally an abundance of boogie in the Bronx.

NP: So much going on. And before we let you go – how can listeners hear you do your thing on The Lot Radio?

JR: Yeah, once a month, I do a DJ show called Part Time Punk on The Lot Radio, which is streaming online at [thelotrдио.com](http://thelotrдио.com), which includes a video feed from the storage container that it's broadcast out of. It's like every fourth Wednesday on The Lot Radio. But thanks for having me, Nina, this has been a lot of fun.

NP: Thank you so much, Josh. And to our listeners, if you're heading out to see live music this summer, maybe keep in mind what's pulling you in: the familiar, the new and obscure — and what deep and intricate and potentially heavy litigated history might be behind those sounds. Thanks again to Josh Russell for joining us. You can find him on Twitter @jruss\_jruss. Also, a big thank you to our experts, Brian McBrearty and Marc Ostrow, for enlightening us, and to all creators of reggaeton, old and new, for keeping us in the groove. And a special shout out to mi hermano, James, for laying down the Sidebar remix that you heard at the top of the episode. Sidebar is out on summer break until August, so you have plenty of time to catch up on older episodes wherever you get your podcasts and maybe even drop us a review. That really helps us out. Find us online at [courthousenews.com](http://courthousenews.com) and on Twitter @CourthouseNews and @SidebarCNS. When we're back online – we'll be talking about those pesky phone calls we all love to hate – robocalls coming in at what feels like all hours of the day – and what a team of dozens of attorneys general are doing to conquer the problem. We'll see you then. Thanks for listening and have a great summer!

(Outro music)