



Busch photographed March 17 at King & Ballow in Los Angeles.

FROM THE DESK OF

RICHARD BUSCH

Partner, King & Ballow

BY CLAUDIA ROSENBAUM PHOTOGRAPHED BY DAMON CASAREZ

I COME FROM A FIRM THAT doesn't have connections at the record labels," says King & Ballow partner Richard Busch, whose law firm specializes in entertainment business litigation. "When people come to me, they know they have 100% of my loyalty because I have no loyalty to anyone but my client."

That attitude often pits Busch, 53, against what he sees as the industry establishment, in the form of major labels, publishers and household-name performers. He's best known for representing two of Marvin Gaye's children in securing a ruling that Pharrell Williams and Robin Thicke's song "Blurred Lines" infringed the copyright of Gaye's 1977 hit "Got To Give It Up" and jury-awarded damages of \$74 million. (That amount was reduced to about \$5 million by a judge, then the ruling was essentially upheld by the Ninth Circuit Court of Appeals.) The decision sent shock waves through the music business, and some creators be-

lieve the precedent-setting appellate court decision could hinder creativity.

In March, when Megan Thee Stallion's label tried to stop her from releasing *Suga*, Busch made the unusual decision to file an emergency temporary restraining order against the label — which ultimately allowed the project to come out as scheduled. In another case — which could potentially shake up the music business by challenging the constitutionality of the Music Modernization Act — he's representing one of Eminem's publishers in a lawsuit against Spotify for willfully infringing the mechanical rights to 250 of the rapper's songs. The stakes: potentially over \$1 billion in damages, as well as the stability of the new legal structure for publishing in the streaming era.

Busch didn't set out to become a disruptive force in the music business — or even a copyright lawyer at all. On one of his first assignments as a King & Ballow associate, he went to New York to handle a civil racketeering case involving New York's

Daily News. When the case ended, he caught a taxi to Midtown in a snowstorm and wound up trading business cards with a man with whom he shared a ride. Months later, his phone rang with a call from the man, whose wife was the copyright administrator for Bridgeport Music. The Detroit-based music publishing company — which owns the rights to George Clinton compositions including "Atomic Dog" and "One Nation Under a Groove" — had just discovered that hundreds of its songs had been used in hip-hop recordings without licenses.

"I told her I didn't really know music law or copyright, but she said, 'You can learn,'" remembers Busch. "Eight months later, I filed what is now world-famous litigation against the entire rap music industry for copyright infringement — 478 cases." One case, which held that even the two-second sample of Funkadelic's "Get Off Your Ass and Jam" used in N.W.A.'s "100 Miles and Runnin'" constituted infringement, set an important copyright precedent that changed hip-hop.

While Busch's office isn't officially closed due to the coronavirus pandemic, he's now advocating for his clients from his Los Angeles home. In June, he filed a lawsuit against Travis Scott on behalf of three songwriters who allege that the rapper used their distinctive guitar melody in his hit "Highest in the Room." He also added the Harry Fox Agency to his lawsuit against Spotify, alleging that the two companies conspired to conceal copyright infringement by backdating paperwork to obtain compulsory mechanical licenses.

"I COME FROM A FIRM THAT DOESN'T HAVE CONNECTIONS AT THE RECORD LABELS. WHEN PEOPLE COME TO ME, THEY KNOW THEY HAVE 100% OF MY LOYALTY."

What is it like being a litigator in the midst of the coronavirus pandemic?

It's a challenge. Hearings are either being ruled on based on the submitted papers or after a telephonic hearing. I like to think my papers are pretty persuasive, but clients want you in the room, in person. When you go to a courtroom, you can read the room and take signals from the judge's questions.

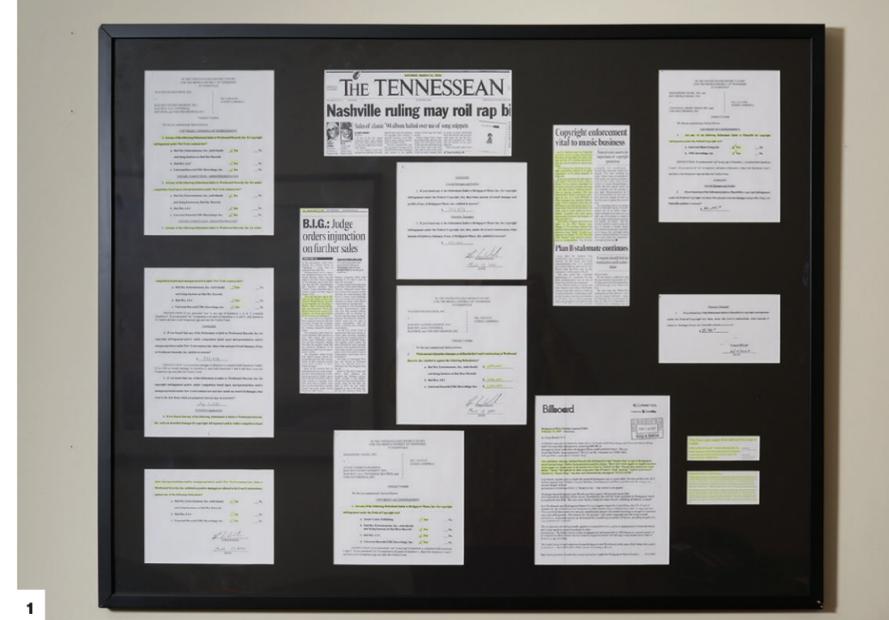
Depositions over Zoom create their own obstacles. Part of the purpose of a deposition is to be right there with the witness. Now you don't know what's going on behind the scenes, what's going on during the breaks. It's just not an effective process. Unfortunately, I think this is going to continue for most of 2020, and when we get back into the courtrooms there is going to be a bottleneck of cases.

The pandemic has hit the music industry hard, especially the live business. Are you expecting to see a flood of cases related to that?

I don't want to mention any names, but I have someone who's an actor and had a movie in Mexico set to begin production. He didn't feel comfortable going, and the studio threatened him. I don't know if that will result in any kind of claim, but that's the kind of thing you're going to see. I think most people will be reasonable: That's why there are force majeure provisions in contracts. I can't imagine that courts will be very sympathetic to claims that someone didn't risk their life to appear at an event and that this constitutes a breach of contract. But I'm advising my clients to protect themselves and to document everything — any unreasonable requests — and take whatever action they believe is appropriate to secure their own safety.

You won the "Blurred Lines" copyright infringement case without the judge allowing you to play Marvin Gaye's "Got To Give It Up" in its entirety. Instead, the decision was based on the sheet music that was filed with the U.S. Copyright Office. You won, but you've said you don't like that ruling. Why?

The purpose of submitting a deposit copy with a copyright registration is archival — to identify the work, not to define the scope of it. Now the Ninth Circuit, in the "Stairway to Heaven" case, has ruled essentially that the copyright registration defines the scope of the work — which is in conflict with the law of many other circuits. In my view, that ruling is ridiculous because Marvin Gaye and the plaintiff in the Led Zeppelin case [Spirit guitarist Randy Wolfe, whose estate filed the case] created their music in the studio. They didn't sit there and write out sheet music. The publishing company would hire somebody to do a sketch of the composition, called a



1

lead sheet, to get it on file with the Copyright Office. What they are saying by that decision is that Marvin Gaye is no longer the composer of "Got To Give It Up" — that rather some unknown person hired to do a lead sheet to get a copyright registration is the author. It's absurd! I believe the Supreme Court, if it looked at the issue, would conclude that the Ninth Circuit was absolutely wrong.

In your lawsuit against Spotify brought by Eminem's publisher Eight Mile Style, you have called the Music Modernization Act "unconstitutional." Why do you think so — and why are you so determined to have it overturned?

The law is very clear and well established that copyright infringement is a property right that vests at the moment of infringement. The Music Modernization Act, which became law in October 2018, contains a provision that retroactively holds that a plaintiff bringing a case for copyright infringement against DSPs [digital service providers] like Spotify cannot get statutory damages or attorney's fees if the lawsuit wasn't filed by Jan. 1, 2018. This gives retroactive immunity to DSPs. So publishers and songwriters whose work had been infringing lose the majority, if not all, of the remedies that have any teeth to them if they haven't filed a lawsuit by Jan. 1, 2018 — before the act had even passed. You're stripping them of their rights and giving the DSPs a "get out of jail free" card for years of copyright infringement. That's not fair. No less authority than Laurence Tribe, a scholar at Harvard Law School, remarked that our constitutional claims are "substantial."

One of your clients, the pop-punk band Yellowcard, took some heat when it said it would proceed with its infringement case involving Juice WRLD's "Lucid Dreams" after his death of a drug overdose. How do you navigate the sensitivities surrounding a lawsuit in a case like that?

It's important to remember that, No. 1, the lawsuit was filed before Juice WRLD passed away and, No. 2, that there are other co-writers, production companies, music publishers, record labels and distributors who are all profiting off of what we believe is an infringing work. While my clients certainly are sensitive and aware of these issues, the question is whether it is fair for all of these parties to continue to financially benefit. ☐



2



3

1. "When we filed the Bridgeport litigation in 2001, I was young and going up against basically every top entertainment law firm in the country," says Busch. "The Bad Boy case involved a sample in Notorious B.I.G.'s 'Ready To Die'; it was the first case to go to trial, and we won big. These are the articles that were written following that victory." 2. A copy of Donald Trump's tweet saying that "Blurred Lines" sounds nothing like "Got To Give It Up" and that Williams and Thicke should "get new lawyers fast." 3. "Anytime you are on the front page of *The New York Times*, so long as it's for a good reason, is incredible," says Busch. "I also really appreciated the fact that other lawyers are quoted in the article who say I'm a tough adversary."