

## HEAVY ARTILLERY ISN'T ALWAYS THE SOLUTION PUBLICITY RIGHT AND COPYRIGHT ACTION BEFORE THE QUEBEC SUPERIOR COURT

by  
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The Superior Court of the province of Quebec<sup>1</sup> has recently reminded the Plaintiffs in an action for breach of copyright and personality right, that heavy artillery is not always the best solution. Restrain and out-of-court settlement may be better alternatives.

Yvon Éthier is a well-known artist in the province of Quebec, he uses the name Patrick Norman as pseudonym. He and his manager were seeking a permanent injunction enjoining Boutique à Coiffer Tonic Inc. (TONIC) and Communications Voir Inc. (VOIR) from using his photography in association with promotion of TONIC's services and products. They were also asking for the issuance of an order against the Defendants enjoining them to publish at their own cost a copy of the judgment to intervene within ten (10) of its issue. The Plaintiffs were also requesting the following monetary reliefs:

1. \$50,000.00 as liquidated damages and interests for commercial use of Patrick Norman's image in association with TONIC's products;
2. \$250,000.00 as liquidated damages and interests for prejudice to the honour and reputation of the Plaintiffs and,
3. \$50,000.00 for exemplary punitive damages for intentional breach of the fundamental rights of the Plaintiffs in the commercial exploitation of Patrick Norman's image.

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<sup>1</sup> *Yvon Éthier (also known as Patrick Norman) and Di Cesare Management Inc. v. Boutique à Coiffer Tonic Inc. and Communications Voir Inc.*, Court Case No. 500-05-005529-944, dated December 21, 1998, not yet reported but can be obtained at: <http://rejb.cedrom-sni.qc.ca>, REJB 98-10030.

All of this turmoil was caused by the fact that a hairdresser salon called TONIC published in a newspaper entitled VOIR a one third page ad showing Patrick Norman's photography with the words: "Problem with your look! Here's the solution". This photography was taken from a LP album of Patrick Norman dating back to the 1970's.

The Plaintiffs argued that the Defendants have appropriated for themselves without authorization a reputation built through hard work and investment in order to promote their products and business. This appropriation of Patrick Norman's image, they alleged, prejudiced his honour and reputation, and the use, mutilation and publication of Patrick Norman's photography infringed his copyright in the photography.

The Court held that Patrick Norman had no copyright in his photography. The photography was the work of a photographer called Benoît Levac who was employed by Projet-Spec Inc., a company controlled by Patrick Norman. But the company went bankrupt and there was no evidence of any written assignment between the trustee in bankruptcy and Patrick Norman. Therefore, he could not claim any interest in the said copyright.

The Court then went on to analyze whether the newspaper VOIR had committed any fault by publishing the impugned advertisement. The evidence showed that the ad respected the general rules recognized in the publicity industry. It was not sexist, racist nor violent, it did not breach any of the fundamental rights recognized by the Canadian and Quebec Charters of Rights. According to the publisher, it is impossible for a newspaper such as VOIR to verify if every person whose photography appears on an advertisement has given his or her authorization. The Court found that the newspaper had no obligation to verify if Patrick Norman had authorized the use of his photography. Therefore, the Defendant's newspaper committed no fault.

TONIC, on the other hand, acknowledged that it did commit a fault. This was recognized early on. TONIC even published an ad expressing its excuses to Patrick Norman on the same page of the same newspaper with the same size ad.

With respect to exemplary punitive damages, the Court found that if any were owing, it would have to be under the Quebec Charter of Rights since the *Copyright Act* had no application. However, the Court found that TONIC did not intentionally breach the Plaintiffs' rights. The intention was to make a joke, not to harm anyone. The Court rejected the claim for exemplary punitive damages.

With respect to the prejudice to the Plaintiffs' honour and reputation, \$250,000.00 was claimed. The Court found that no proof of such prejudice was made at trial. The Court found that the Plaintiffs' honour and reputation did not suffer any harm from this publication. However, the Court found that the press conference organized by the Plaintiffs and the publicity surrounding the Court proceedings have increased the "visibility" of this advertisement which would have been rather discreet had it been limited to the publication in the VOIR newspaper. The Court found that public personalities can be the object of satire and jokes as long as there are no lies or factual errors and no intrusion in their private lives. The Court found that the ad could be assimilated to a mockery or a caricature which did not tarnish the Plaintiffs' honour or reputation.

The Court however found that having used the image of Patrick Norman for commercial purposes without his authorization did cause the Plaintiff some damages which the Court evaluated at \$5,000.00. In coming to this conclusion, the Court pointed out that if the Defendants got any benefit from the commercial use of Patrick Norman's image, this benefit was greatly outweighed by the legal costs which the Defendants had to bear to defend themselves against monetary claims which were greatly exaggerated. The Court refused to issue the permanent injunction since it had become useless considering the undertaking of the Defendants given only a few days after the publication of the ad.

Reading between the lines, it seems clear that the judge felt that this case should not have proceeded to trial and that the Plaintiffs should have been more reasonable in their monetary claims. Had they been more reasonable, the case would probably have been settled rapidly out of Court and the parties would have saved legal fees and a lot of stress.

