

Artists bristle over copyright racket



Performance artists Tibi Tibi Neuspiel, left, and Geoffrey Pugen claim their idea to re-enact a Björn Borg and John McEnroe match for their upcoming Nuit Blanche show is what inspired The New York Times Magazine's recent cover with Saturday Night Live actor Andy Samberg dressed as the tennis stars.

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By Tristin Hopper

For Toronto's Nuit Blanche, performance artists Tibi Tibi Neuspiel and **Geoffrey Pugen** will attempt to resurrect a piece of tennis history.

In a downtown courtyard fringed by skyscrapers, the pair will re-enact, serve for serve, the iconic tie-breaking fourth set of the 1980 Wimbledon match between Swede Björn Borg and American John McEnroe. For years, the calm, collected Borg and the spastic, tantrum-prone McEnroe maintained a famous rivalry dubbed "fire and ice" by commentators. The 1980 match, in particular, has been declared the "most riveting event in the sport's history."

The Oct. 1 performance will “allegorically explore the relationship between conservatism and risk in the economic square,” according to a description on the Nuit Blanche website alongside a photo of the pair clad as McEnroe and Borg. Although perfect synchronization would be impossible, “the heart of the work lays in their sincere attempt.”

But with only a few weeks left until the performance, Neuspiel and **Pugen** gazed with horror upon the Aug. 28 cover of *The New York Times Magazine*. There, a photo illustration showed *Saturday Night Live* star Andy Samberg depicting both McEnroe and Borg at the 1980 match. “Now that this work is out there, there’s a presumption on the part of the public that they stole the idea from *The New York Times Magazine*,” said Andrew Faith, Neuspiel and **Pugen’s** lawyer.

In a letter sent to the magazine, Faith called on the editors to withdraw the Samberg piece and “provide a full attribution and apology.”

Neuspiel and **Pugen** say they have more to back up their claim than simply a pair of similar photographs. In March, the pair say they went to a New York art show that they allege was attended by several members of *The New York Times Magazine’s* art department, and told two of them of their plans for a Borg/McEnroe reboot for Nuit Blanche.

“Of all the trillions of photographs that have been taken in this world since 1980, they pick this photo, and they pick it within months of our guys doing it,” Faith says. “The probabilities are so extreme that it seems highly unlikely that this is some kind of coincidence.”

The magazine denies the charges. “The idea for [the Aug. 28] *Times Magazine* cover and featured photo essay originated with our editor,” wrote Eileen Murphy, vice-president of communications for *The New York Times*. “No one involved in planning the feature or executing the idea had any knowledge of this particular performance piece and there is absolutely no connection between the two.

“Also, I should point out that our photo essay, unlike the planned performance piece, was not about the McEnroe/Borg match,” Murphy continued. “It was a look at the iconic players of tennis as parodied by a well-known comedian.” (Additional photos inside the magazine also feature Samberg clad as Andre Agassi, Pete Sampras and Jimmy Connors.)

This is not the first time impersonators have faced off against impersonators. In July 2010, the Fab Four, a Las Vegas Beatles tribute band, filed a federal lawsuit against fellow Beatles tribute band the Fab 4. The rival Beatles impersonators were “essentially identical in sound and appearance” to the Fab Four, read court documents.

The concept of dressing up in the laughably outdated styles of 1980-era Borg and McEnroe has even happened before. In 2008, a pair of New York advertising consultants released a parody of a Marc Jacobs fashion catalogue featuring Borg and McEnroe look-alikes in risqué poses with handbags and designer wear. McEnroe even parodied the look himself in 2005 when he arrived at a Halloween party clad in Converse sneakers and an orange wig.

Plagiarism charges are unlikely in the current case, according to one copyright expert. “It seems to me is that what they’re complaining about is a third party going to the same source material in a similar way — but I don’t think they can control the source material,” says Paul Whitney, a copyright consultant and former chief librarian for the city of Vancouver.

If a publication had stolen a script or a logo, it may be a different story, but “you can’t copyright an idea,” Whitney says.

In the past, celebrities have had some success in suing imitators found to be trafficking their image. In 1986, Woody Allen won US\$460,000 from a video rental store that used an Allen look-alike in one of their magazine ads. “We wanted to strike fear into the hearts of people who do that,” Allen said at the time. (The fear would not last; in 2009 Allen received a US\$5-million settlement from American Apparel after the clothing company used an unauthorized image of the comedian in a New York billboard.) In 1990, Tom Waits won US\$2.5-million from Frito Lay for using a Waits sound-alike in a commercial.

If McEnroe and Borg ever decided to come after either the Canadian artists or *The New York Times Magazine*, however, their chances of success would be slim. In the United States, thanks in part to a legal precedent pioneered by pornography entrepreneur Larry Flynt, the right to satire is protected under the U.S. Constitution.

Thus, *The Onion* can publish a headline reading, “Walmart Cuts Over 13,000 of What it Calls Jobs,” *Saturday Night Live* can enlist Tina Fey to portray a dim-witted Sarah Palin and comedians and performance artists alike can dress up as a pair of goofy-looking tennis players from the early ’80s — regardless of who may have thought of it first.

“The first Elvis impersonator can’t block all the other Elvis impersonators from coming along,” Whitney says.