

THE SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS

BETWEEN:

WANDA RER

Appellant

– and –

BESTMONT HOTELS

Respondent

FACTUM OF THE APPELLANT

PART 1: OVERVIEW

[1] This case is about refining the scope of copyright protection under the *Copyright Act*, specifically in regards to protecting creative innovation in artistic works that use settings in the public environment as their inspiration. In refining the scope of protection, the *Copyright Act* must be given an interpretation that balances the public's interest in the encouragement and dissemination of works of artistic embellishment and obtaining a just reward for creators.

[2] The Appellant, Wanda Rer ("**Rer**"), respectfully requests that this Honourable Court overturn the decision of the Court of Appeal and restore the judgment of the Trial Court. The Court of Appeal found that the Respondent, Bestmont Hotels ("**Bestmont**"), was immune from Rer's copyright infringement claim because it is the copyright owner of its hotel building designs and marquee, which Rer depicted in her artistic work.

[3] This appeal should be allowed and the Trial Court's decision should be reinstated. The Court of Appeal's interpretation of the *Copyright Act* improperly stifles artistic embellishment and innovation on works in the public environment, contrary to the statute's scheme and intent. The Court of Appeal erred in finding that the photographs were not used for a commercial purpose, that Bestmont did not act in bad faith, and that any copyright for the photos would vest in the collection as a whole.

[4] The facts and weight of the authority clearly supports the Trial Court's interpretation. Although Bestmont holds copyright for its hotels' architectural designs, section 32.2(1)(b) of the *Copyright Act* permits Rer to photograph the buildings as an architectural work. Each photograph Rer created was an exercise of her artistic skill and judgment. Therefore, each photograph attracts copyright protection under section 5(1) of the *Copyright Act*.

[5] Regarding damages, section 38.1(1)(a) of the *Copyright Act* is engaged. Bestmont, a commercial enterprise, reproduced Rer's images without her authorization for a commercial purpose to decorate its interiors and display its other locations to existing guests.

PART 2 – STATEMENT OF FACTS

The Parties

[6] The Appellant, Rer, is a social media influencer, photographer and artist by profession. Her attentiveness to contemporary style and culture, as captured in her photographs and postings on social media platforms, has amassed her a substantial following.

Rer v Bestmont Hotels, 21 TCCIP 1222 at para 1 [*Trial*].

[7] The Respondent, Bestmont Hotels, is a Canadian luxury hotel chain that operates ten hotels located in prime destinations across the country. The Respondent's hotel buildings have uniquely designed architecture, including a red marquee that adorns each building's entrance.

Trial, supra para 6 at para 2.

The Appellant's photographs

[8] For a recent photography project of Rer's titled "Façades," the Appellant travelled across Canada for a year to each of Bestmont's ten destinations. The Appellant was particularly inspired by the uniqueness of each hotel and how it fits within each destination's atmosphere. At each destination, Rer decided to take a photograph of the hotel's entrance. When taking each photograph, the Appellant used a specific photography technique and camera set-up, measuring a distance of 100 feet from the entrance and centering the marquee in the frame. The Appellant made this decision with the intention to allow the similarities and differences of the design and atmosphere of the hotels to be compared by juxtaposing the photographs together. In total, ten images were captured (the "**Original Photos**")

Trial, supra para 6 at paras 3-4.

[9] Rer then made the decision to apply four image filters to each of the Original Photographs known as 'sepia', 'oil painting', 'pixilation', and 'pencil drawing' using a social media platform. Rer used her judgment and her professional expertise in photography and social media in selecting these filters based on their popularity and ability to best enhance the

effect the images would have on depicting each hotel’s design and marquee. In total, forty filtered images were created for the “Façades” project (the “**Filtered Photos**”).

Trial, supra para 6 at para 5.

The Appellant’s business proposal to the Respondent

[10] Rer, as the owner of the Original and Filtered Photos, then attempted to use her photography project and the individual images within it in a business proposal. She approached the Respondent and offered to license her Original and/or Filtered Photos for Bestmont’s use in its own marketing materials at a rate of \$3,000 per image. As part of the Appellant’s business proposal, Rer provided Bestmont with high-resolution electronic versions of each of her photographs for the purposes of allowing the Respondent to consider her offer (the “**Promotional Package**”). Bestmont ultimately rejected Rer’s offer.

Trial, supra para 6 at paras 6-7.

The Appellant’s unauthorized reproduction of the Appellant’s Photographs

[11] Following Rer’s unsuccessful business proposal to the Respondent, the Respondent refused to return the Promotional Package, despite multiple requests by Rer. Instead, Bestmont accused Rer of copyright infringement and reproduced each of her Original Photos into twelve different versions, applying different image filters to the electronic versions included in the Promotional Package. The filters used by Bestmont included filters called ‘sepia’, ‘oil painting’, ‘pixilation’, and ‘pencil drawing’, though Bestmont used different photo editing software. Bestmont proceeded to use the twelve versions of the reproduced Original Photos to decorate the interior of its hotels. No attribution was given to Rer.

Trial, supra para 6 at para 8.

Trial Decision:

[12] The Trial Court found copyright subsisted in each of Rer’s Original and Filtered Photos under section 5(1) of the *Copyright Act*. Next, the Trial Court held that Bestmont’s reproductions of the Original Photos constituted copyright infringement of each of the

Original Photos and the Filtered Photos. Finding copyright infringement on the part of Bestmont, the Trial Court consequently awarded Rer both statutory and punitive damages in the amount of \$1,500,000 per sections 38.1(1)(a) and 38.1(7) of the *Copyright Act*.

Trial, supra para 6 at paras 16, 19-25.

[13] In the Trial Court’s decision, it was held that Rer exercised a sufficient amount of skill and judgment in taking and editing her photographs to warrant copyright protection for each of the Original and Filtered Photos. The Trial Court at para 15 held that only “[a] scintilla of artistic expression will suffice” to attract originality and copyright protection under s. 5(1) of the *Copyright Act*. Hence, the camera set-up and selection and application of filters were sufficient to find copyright subsisted in each of the Original and Filtered Photos. This copyright in each Original and Filtered Photos was infringed upon by Bestmont in its reproduction of Rer’s work included in her Promotional Package.

Trial, supra para 6 at paras 14-19.

[14] In calculating the quantum of damages, the Trial Court held that Bestmont’s infringing reproductions were for a commercial purpose in decorating its interiors. In justifying awarding the maximum allowable statutory damages of \$20,000 for each of Rer’s work infringed upon by Bestmont, the Trial Court held that the scope of Bestmont’s infringement was substantial and noted the importance of using statutory damages in deterring similar unscrupulous conduct as Bestmont’s in the future.

Trial, supra note 6 at paras 20-26.

Appeal Decision:

[15] The Court of Appeal overturned the decision of the Trial Court and dismissed Rer’s action. Since Bestmont is the underlying copyright holder of the hotel designs and marquee, the Court of Appeal held that it is “immune” from infringement allegations per section 3 of the *Copyright Act*.

Bestmont v Rer, 2021 CAIP 333 at para 2 [*Appeal*].

[16] The Court of Appeal made additional comments regarding the Trial Court’s decision. First, in the Court of Appeals opinion, if copyright was to subsist in Rer’s work, it would only exist in the “Façades” project as a collection as a whole (*Appeal*). The Court of Appeal also characterized Bestmont’s use of the Façade photograph as non-commercial in nature, stated that it was not within the discretion of the Trial Judge to award punitive damages, and did not characterize Bestmont’s conduct as acting in bad faith.

Appeal, supra para 15 at paras 5-8.

PART 3 – POINTS IN ISSUE

[17] The issues in this appeal are:

1. Whether copyright subsists in Rer’s Original and/or Filtered Photos;
2. Whether Bestmont’s unauthorized reproduction and use of Rer’s Original Photos to decorate its hotels amounted to an infringement of Rer’s copyright in the Original Photos and/or Filtered Photos; and
3. If copyright infringement is found, the quantum of statutory and/or punitive damages provided by s. 38.1 of the *Copyright Act*.

PART 4 – ARGUMENTS IN BRIEF

ISSUE 1: Copyright subsists each of the Original Photos and Filtered Photos

[18] It is respectfully submitted that the Court of Appeal erred in stating that copyright would only subsist in the “Façades” project as a compilation and not extend copyright protection to each Original and Filtered Photo. Section 5(1) of the *Copyright Act* provides that copyright shall subsist “in every original literary, dramatic, musical and artistic work” (emphasis added). “Artistic works” are defined in s. 2 of the *Copyright Act* to include photographs. As will be expanded upon below, each Original Photo and Filtered Photo is an original artistic work of Rer’s that should attract copyright protection.

Appeal, supra note 15 at para 5.

A. The Court of Appeal erred in finding that copyright does not subsist in the Original Photos and Filtered Photos

[19] The *Copyright Act* does not define what it means to be an “original” work under section 5(1). Instead, the Supreme Court of Canada in *CCH Canadian Ltd v Law Society of Upper Canada* (“*CCH*”) articulated a three-element test for determining what constitutes an “original” work (the “**Originality Test**”):

- (1) The work originates from the author;
- (2) The work is more than a mere copy of another work; and
- (3) The work is a product of the author’s exercise of skill and judgment.

CCH Canadian Ltd v Law Society of Upper Canada, 2004 SCC 13 at paras 16, 25 [*CCH*].

[20] Furthermore, the exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a “purely mechanical exercise” (*CCH*).

CCH, *supra* para 19 at para 25.

[21] The Appellant submits that each of her Original Photos and Filtered Photos satisfies the three elements of the Originality Test set out in *CCH*. First, Rer is the originating author of the Original Photos and Filtered Photos. Second, Rer’s photographs are more than “mere copies” of Bestmont’s architectural work. Third, and crucially, Rer’s exercised her skill and judgment in creating her Original Photographs. The arguments for the satisfaction of these elements are expanded upon below.

[22] In the alternative, the Appellant submits the compilation of photographs in the “Façades” project to attract copyright protection, as would have been found by the Court of Appeal. Work resulting from the simple arrangement of components can be copyrighted work, regardless of whether the owner author of the compilation holds copyright over the components in question. However, the fact that the compilation “Façades” also attracts copyright protection does not affect the protection to the individual works (i.e. the Original

Photos and Filtered Photos) that make up the compilation, which should also be conferred copyright protection.

Appeal, supra para 15 at para 5.
1422986 Ontario Limited v 1833326 Ontario Limited, 2020 ONSC 1041 at para 35.
Copyright Act, RSC 1985, c C-42, s. 2.1(2) [*Copyright Act*].

(i) ***Element 1: Rer is the author of the Original Photos and Filtered Photos***

[23] Rer took each Original Photo. Rer used her Original Photos in creating the Filtered Photos. Each of these works (i.e. each Original and Filtered Photo) originated from Rer. This component of the Originality Test is clearly satisfied.

Trial, supra para 6 at paras 4-5.

(ii) ***Element 2: The Original Photos and Filtered Photos are not ‘mere copies’ of Bestmont’s architectural works***

[24] Rer’s photographs of Bestmont’s hotel buildings are more than “mere copies” of the buildings’ architectural design. As will be elaborated upon below, determining that copyright may uniquely and independently subsist in a photograph of an architectural work apart from the architectural work itself is consistent with the scheme and purpose of the *Copyright Act*, as well analogous with existing jurisprudence on the issue.

[25] Section 32.2(1)(b) of the *Copyright Act* provides:

Permitted acts

32.2 (1) It is not an infringement of copyright...

(b) for any person to reproduce, in a painting, drawing, engraving, photograph or cinematographic work

(i) an architectural work, provided the copy is not in the nature of an architectural drawing or plan, ...

[26] Though the Court of Appeal may be correct in stating that section 32.2(1)(b) of the *Copyright Act* alone does not confer a right to assert copyright against others, the section cannot be divorced from the *Copyright Act* as a whole when establishing whether copyright subsists in a creator’s work. Whether copyright subsists is established by section 5 of the *Copyright Act*. Applying principles of modern Canadian statutory interpretation, section 5

must be read harmoniously with its entire scheme, the object of the act, and the intention of Parliament.

Appeal, supra para 17 at para 3.

Rizzo & Rizzo Shoes Ltd (Re), [1998] 1 SCR 27 at para 21, 1998 CanLII 837.

[27] The scheme of the *Copyright Act* expressly permits taking photographs of architectural works as a non-infringing activity. Respectfully, the Court of Appeal's overreliance on its conclusion that copyright does not independently stem from section 32.2(1)(b) misguided its full application of section 5(1) of the *Copyright Act* to find that copyright subsists in Rer's photographs. The extent to which section 32.2(1)(b) assists Rer in establishing copyright in each of her photographs is the credence it gives to the argument that copyright may uniquely and independently subsist in both an architectural work itself and a photograph of that architectural work as part of the public environment.

[28] Rer's photographs satisfy the conditions necessary to be non-infringing works of Bestmont's copyrighted hotel building design under section 32.2(1)(b) of the *Copyright Act*. Though satisfying s. 32.2(1)(b) alone does not give rise to an enforceable copyright claim (all three elements of the Originality Test must still be met), it strongly asserts that Rer's photographs are more than "mere copies" of Bestmont's architectural work.

[29] Bestmont's hotel buildings' designs and marquees fall under the definition of "architectural work". An "architectural work" is defined in s. 2 of the *Copyright Act* to mean "any building or structure or any model of a building or structure." The *Oxford English Dictionary* defines 'marquee' as "[a] canopy projecting over the main entrance to a building". Implicit in the definition and function of a marquee is its fixation on a building's structure. Hence, Bestmont's hotel building designs and marquees are subject to section 32.2(1)(b).

Oxford English Dictionary, online edition, *sub verbo* "marquee".

[30] Rer's Original Photos and Filtered Photos are not in the nature of an architectural drawing or plan and therefore satisfy s. 32.2(1)(b) of the *Copyright Act* as a non-infringing

activity. The Original Photos and Filtered Photos are artistic works to be appreciated for their aesthetic value. One would not use the photographs as a schematic architectural plan.

[31] Second, concluding that the Original and Filtered Photos are more than “mere copies” of Bestmont’s architectural works is also consistent with the purpose of the *Copyright Act*.

The Supreme Court of Canada in *Théberge v Galerie d’Art du Petit Champlain inc* stated the following about the purposes behind the *Copyright Act*:

“The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator. ...

Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in exceptions to copyright infringement enumerated in ss. 29 to 32.2...”

Théberge v Galerie d’Art du Petit Champlain inc, 2002 SCC 34 at paras 30-32 [*Théberge*] [emphasis added].

[32] The object of section 32.2(1)(b) is practical. Here, legislators have expressly recognized that the works of artists to capture and depict the public environment is both a legitimate and practical activity.

Normand Tamaro, *The 2021 Annotated Copyright Act* (Toronto: Thomson Reuters Canada, 2020) at 901.

[33] Rer’s photographs are works that incorporate and innovatively embellish upon Bestmont’s architectural designs. Holding that photographs of the hotel buildings constitute a “mere copy” of the hotel buildings would grant excessive control over depictions of the public environment to Bestmont, which the *Copyright Act* intended to avoid.

[34] Finally, finding that copyright independently subsists in a photograph of a building is distinct from different copyrighted aspects of that building is consistent with Canadian jurisprudence. For example, *Century 21 Canada Ltd Partnership v Rogers Communications Inc* (“*Century 21 Canada*”) held that copyright independently subsisted in 99 photographs of

properties listed for sale in addition to the copyright which also independently subsisted in the properties' description.

Century 21 Canada Ltd Partnership v Rogers Communications Inc, 2011 BCSC 1196 at para 190, 2011 CarswellBC 2348 [*Century 21 Canada*].

[35] It is not disputed that Bestmont owns copyright in the design of its hotels and marquee. However, as contended above, both the scheme and purpose of the *Copyright Act* as well as Canadian jurisprudence contemplate the potential for copyright to independently subsist photographs of an architectural work in the public environment.

[36] Hence, Rer's photographs are not merely copies of Bestmont's architectural designs. The second element of the Originality Test is satisfied. Finding that copyright subsists in Rer's Original and Filtered Photos therefore will turn on the third component of the test: whether sufficient skill and judgment were exercised when creating these photographs.

(iii) *Element 3: Rer exercised her skill and judgment in creating the Original and Filtered Photos*

[37] The Court of Appeal opined that the Trial Judge's test for originality was too low. The Court of Appeal stated that "mechanically repeating the same concept over and over at different hotels ought not to justify copyright in each resulting photograph as a separate work." Respectfully, this statement by the Court of Appeal amounted to an error of law in what it means for "purely mechanical exercise" to justify not finding that copyright subsists in a work per the *CCH* Originality Test. Consequently, the Court of Appeal also erred by imposing too high of a standard of what it means for a person to exercise their skill and judgment to establish originality.

Appeal, *supra* note 15 at para 5.
CCH, *supra* para 19 at para 25.

[38] Exercise of the requisite skill and judgment to establish originality for photographs may arise from the personal choice of subject matter, the creation of the scene to be

photographed, the angle of the photograph, lighting or other matters. Furthermore, the requirement for originality is low.

John S McKeown, *Fox on Canadian Law of Copyright and Industrial Designs, 4th Edition* (Toronto: Thomson Reuters Canada, 2003) (loose-leaf updated 2021, release 7), ch 10:23 [*Fox on Copyright Law*].
Century 21 Canada, supra para 34 at para 187.

[39] Rer's Original Photos clearly satisfy the criteria for originality. Rer exercised her specialized skills as a photographer in the process of taking her photographs. She chose the subject matter of the photographs which were Bestmont's hotels, which is an architectural work that is expressly permitted to be photographed without infringing on Bestmont's copyright in the hotel building designs and marquee. She chose her subject matter assiduously, requiring her to travel across the country to capture each of her scenes. She carefully set the scene by measuring a camera distance from 100 feet away from the hotel. She meticulously angled the camera to center the marquee and capture the subject matter. The resulting Original Photos taken by Rer are consequently each "original works" under s. 5 of the *Copyright Act* and attract copyright protection.

Trial, supra para 6 at para 4.

[40] The fact that Rer used the same camera set-up technique for each photo does not diminish the exercise of her skill and judgment to a "purely mechanical exercise". Rather, it was through this technique that Rer, an accomplished photographer, skillfully exercised her judgment in creating the scenes of her photographs. Furthermore, as held in *Trader Corp v CarGurus, Inc* at para 24 ("**Trader Corp**"), the fact that "photographers receive training and follow standardized procedures does not eliminate the use of their skill and judgment in taking photos, nor does it reduce the exercise of taking the photos to a simple mechanical exercise." It should also be noted that the court in *Trader Corp* found that copyright subsisted in each of the 152,532 the plaintiff could establish ownership of.

Trader Corp v CarGurus, Inc, 2017 ONSC 1841 at paras 24, 26-29 [footnotes omitted].

[41] Similarly, Rer also exercised her skill and judgment in creating her Filtered Photos. Although the Respondent may wish to analogize Rer’s selection and application of different image filters to the “purely mechanical exercise” of changing the font of a work, Rer actually exercised a great deal of skill and judgment when selecting and applying the filters.

[42] The Supreme Court of Canada in *CCH* defines what it means for one to exercise their skill and judgment in creating an original work:

“By skill, I mean the use of one’s knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one’s capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work.”

CCH, *supra* para 19 at para 16.

[43] Rer’s Filtered Photos also demonstrates an exercise of her skill and judgment such that each photo is an original work following the quote from *CCH* above. Rer is a professional photographer and social media influencer. She has developed an aptitude to create effective social media posts on her platforms. Using this developed aptitude, she selected filters based on her knowledge of their popularity in order to best present an impactful social media post. Rer also used her capacity for discernment and ability to form an opinion when selecting the filters to produce her work. She attentively chose the filters which, in her opinion and evaluation, best “enhanced the effect they would have on the depiction of the hotel design and marquee” (*Trial* at para 5). In doing so, Rer used her judgment on what would create the most aesthetically pleasing images, which goes to the essence of the artistic expression captured by her photographs. Thus, each Filtered Photo is also an original work under s. 5(1) of the *Copyright Act* and attracts copyright protection.

Trial, *supra* para 6 at para 5.

ISSUE 2: Bestmont’s Unauthorized Reproduction of the Original Photos Constitutes Copyright Infringement

[44] Respectfully, the Court of Appeal was incorrect in law to hold that since Bestmont owns the copyright in the hotel buildings’ design and marquee, it is “immune” from Rer’s

infringement allegations under s. 3 of the *Copyright Act (Appeal)*. To hold that a blanket immunity exists for copyright holders that it may flagrantly reproduce the copyrighted work of another is directly inconsistent with the scheme and purpose of the *Copyright Act*. As stated in *Théberge*, the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and to prevent someone other than the creator from appropriating whatever benefits may be generated. Rer, as the creator and owner of the copyright in the Original and Filtered Photos, should not have her work appropriated by the Respondent for its own benefit.

Théberge, supra para 31 at para 30.

[45] To hold that such an expansive immunity against infringement claims exists would also lead to absurd results. It would mean that Rer, who owns the copyright in her Original and Filtered Photos, would also now have the right to reproduce Bestmont’s architectural designs as a physical building material form—a right Rer concededly does not possess.

[46] Instead, once copyright is determined to subsist in a work, the law provides that it is an infringement of that copyright for any person to make a “substantial copy” of that work without the consent of the owner of the copyright.

Copyright Act, s. 27.

Philip Morris Products SA v Marlboro Canada Ltd, 2010 FC 1099, 2010 CarswellNat 4228 at para 313 [*Philip Morris Products*], rev’d in part 2012 FCA 201, leave to appeal to SCC refused, 35001 (20 March 2013).

[47] To constitute copyright infringement, two elements must be present (the

“Infringement Test”):

- (a) There must be sufficient objective similarity between the infringing work and the copyright work, or substantial part thereof, for the former to be properly described, not necessarily as identical with, but as a reproduction or adaptation of the latter; and

(b) The copyright work must be the source from which the infringing work is derived.

Fox on Copyright Law, supra para 38 at ch. 21:8.
Philip Morris Products, supra para 46 at para 315.

[48] In addition to Bestmont’s unauthorized reproduction of Rer’s Original and Filtered Photos, Bestmont’s activities also infringe upon Rer’s rights as an artist under s. 3(1)(g) of the *Copyright Act*. This section grants the author or artist of a work the first right to present the work at a public exhibition. By showcasing Rer’s photographs as an artistic installment in their very open and public guest hallways, Bestmont violated Rer’s section 3(1)(g) rights.

A. Bestmont infringed upon the copyright of the Original Photos

[49] Bestmont’s conduct in displaying each of Rer’s Original Photos in its hotel interiors satisfies both elements of the infringement test.

[50] For the first element, Bestmont took the exact electronic version of each of the ten Original Photos, printed the photos, and displayed the photos in its hotel interiors without Rer’s authorization (*Trial*). This is reproduction in its most literal sense. The works—Rer’s electronic versions of the Original Photos and Bestmont’s printed version of the Original Photos—are objectively identical.

[51] For the second element, Bestmont admits to using Rer’s electronic versions of the Original Photos. Rer’s copyright work is quite literally the source of Bestmont’s reproductions.

B. Bestmont infringed upon the copyright of the Filtered Photos

[52] In addition to infringing upon the copyright of the Original Photos, Bestmont’s application of similar image filters in its reproduction of the Original Photos also constitutes infringement upon the copyright of the Filtered Photos. As noted in the Trial Judgment, Bestmont also employed filters called “sepia”, “oil painting”, “pixilation” and “pencil drawing” in creating its reproductions.

[53] The Supreme Court of Canada in *Robertson v Thomson Corp* further refined the first element of the Infringement Test for determining whether a work, or any substantial part thereof, has been reproduced: “what will be determinative is the extent to which the item said to be a reproduction contains within it, in qualitative rather than quantitative terms, a substantial part of the skill and judgment exercised by the creator of the work.”

Robertson v Thomson Corp, 2006 SCC 43 at para 81.

[54] We can look to a fellow treaty country’s interpretation of expression and idea in regards to copyright in the American case of *Rogers v Koons* (“**Rogers**”) to examine how Bestmont’s application of filters to Rer’s photographs is not sufficient to create a separate work. In *Rogers*, a sculpture was made that directly copied a scene from a photograph. The United States Court of Appeals found that when an expression is copied instead of just the idea when there are multiple ways to express something, copyright is infringed. This is mirrored in the case at hand. Ultimately, the visual expression depicted in Rer’s copyrighted Filtered Photos was copied by Bestmont in its application of comparable filter effects.

Rogers v Koons, 1992 F.2d 301 at 28.

[55] While Bestmont could have taken its own photographs of its hotels, it did not. Instead, after seeing Rer’s Filtered Photos, the Respondent chose to take the exact photographs that Rer reproduced the aesthetic expression captured by the Filtered Photos. Bestmont did not exercise any of its original skill and judgment when applying filters to the photographs Rer took. It does not matter if Bestmont used different photo editing software. Therefore, instead of solely copying Ms. Rer’s idea and expressing it a different way, Bestmont copied her expression of overall aesthetic expression displayed by the Filtered Photos and infringed on her copyright for each of these as well.

ISSUE 3: Quantum of Statutory and Punitive Damages for Bestmont’s Copyright Infringement

[56] If the court is satisfied that Rer did indeed have copyright for the original and filtered photos and that Bestmont infringed on this copyright, then the appropriate quantum of damages is as follows: Rer is entitled to an injunction to prevent Bestmont from further infringing her images, \$20,000 per each of the fifty infringed photographs, and a penalty fine to deter Bestmont from engaging in such behaviour in the future.

A. Injunction

[57] The case of *Bell Canada v. L3D Distributing Inc. (INL3D)* (“**Bell Canada**”), affirming *Trimble Solutions Corporation v Quantum Dynamics Inc*, confirms that the court can permanently enjoin and restrain an infringing party from directly or indirectly manufacturing, distributing, leasing, installing, modifying infringing materials unless they have authorization from the respective plaintiff. While Bestmont agreed to take down the photos from its hotels prior to trial and the trial court then viewed the injunction as moot, Rer has requested the injunction be granted to prevent Bestmont from using her photographs again in any way in the future.

Bell Canada v L3D Distributing Inc. (INL3D), 2021 FC 832 at para 91 [*Bell Canada*].
Trial, supra para 6 at para 10.

B. Statutory damages per each infringed photograph per s. 38.1

[58] Bestmont infringed on a total of fifty separate pieces of copyrighted work owned by Rer. Each filtered and unfiltered photograph should be viewed as a separate work, as opposed to viewing the collections as a single work. This was the case in *Bell Canada*. In *Bell Canada*, when copyrighted TV shows were infringed upon by selling illegal access, each show was not viewed as a single work. Instead, each episode of each show was treated as a separate work. This precedent can be applied to the case at hand, and we can draw an analogy

between each episode of a TV series and each carefully filtered, artistic photo Rer produced. Therefore, Bestmont should be fined for infringing on fifty of Rer's pieces of work.

Bell Canada, supra para 57 at Annex "B".

[59] Bestmont, a luxury hotel enterprise, used Rer's photographs for a commercial purpose. Bestmont's hotels are known for their unique designs and they attract guests by carefully designing and curating their luxury hotels to provide guests with an authentic experience of their location. Therefore, by using Rer's photographs to improve their businesses' guest hallways and therefore attract guests and enhance the guests' experience of the hotels, the photos were used for a commercial purpose. The use of Rer's photographs goes to the heart of Bestmont's business model.

[60] In *Mejia v LaSalle College International Vancouver Inc*, the British Columbia Supreme Court found that a photo had been used for a commercial purpose after it was publicly posted on a company's Facebook page without the photographer's consent. Analogously, displaying the photographs of their various hotel locations so publicly in the guest hallways served to advertise its other hotel locations to their existing guests at each hotel. Under section 38.1(1)(a) of the *Copyright Act* the copyright owner is entitled to an amount ranging from \$500 to \$20,000 for each infringed work if the infringements are for a commercial purpose. While the court has discretion over what amount to award within the \$500 to \$20,000 range, Ms. Rer should be awarded the maximum value as a punitive measure against Bestmont, who acted in bad faith by using her photographs without consent or attribution to her, and who took advantage of a self-employed artist.

Mejia v. LaSalle College International Vancouver Inc, 2014 BCSC 1559 at para 215.
Trial, supra para 6 at paras 2, 8, 22.

[61] In calculating the appropriate award of statutory damages, *Bell Canada* cites subsections 38.1(5) of the *Copyright Act* which states that the relevant factors the court shall consider include: (i) the good or bad faith of the defendant; (ii) the conduct of the parties

prior to or during the proceedings; and (iii) the need to deter other infringements of the copyright in questions.

Bell Canada, supra para 57 at para 99.

(i) *The bad faith of the defendant*

[62] This was also present in *Collett v. Northland Art Company Canada Inc.* (“*Collett*”). In *Collett*, the court deemed the defendants’ conduct to be in bad faith because it involved the unauthorized production of the work, the intention attribution of the work to another artist, and the sale of 50 copies of the unauthorized work where the plaintiff conducted business. The plaintiff was awarded the maximum statutory damages of \$20,000 for the work. Similarly, Bestmont acted in bad faith by using Rer’s photographs without crediting her and without obtaining her consent to use them commercially or to display the photos publicly. They took advantage of the package that Rer provided solely for the purpose of demonstrating the quality of her work, which she repeatedly requested that they return to her.

Collett v. Northland Art Company Canada Inc., 2018 FC 269 at paras 61, 65 [*Collett*].

(i) *Bestmont’s conduct prior to the proceeding*

[63] *Bell Canada* and *Collett* further state that in a case where the Defendants have not participated in the proceeding, pursuing statutory damages is appropriate. Bestmont has failed to participate in the proceedings or respond to Rer prior to the trial. They ignored her requests to return her promotional package of images that she shared to demonstrate the quality of her work. They also failed to respond to her when she demanded that her photographs be removed from their displays, and refused to respond until Rer commenced a copyright infringement claim.

Bell Canada, supra para 57 at para 92.
Collett, supra para 62 at para 62.

(iii) *The need to deter other infringements of the copyright in question*

[64] This factor is discussed under the following section, titled “Punitive damages.”

C. Punitive damages

[65] Bestmont's penalty needs to be substantial enough to deter them from behaving in such a way in the future, and to serve as a reminder to other corporations that infringe on copyrighted materials that such actions will not be tolerated. As a matter of policy consideration, Bestmont has used its power as a national corporation to take advantage of Rer, a freelance photographer and social media personality. A small fine would do nothing to deter affluent corporations like Bestmont from infringing on an artist's work, as it would simply be viewed as a risk they were willing to take should the infringed party have the means to move forward to take legal action.

[66] Furthermore, election for statutory damages per section 38.1(1) of the *Copyright Act* does not affect any right Rer has to punitive damages.

Copyright Act, s. 38.1(7).

[67] The relevant factors to be considered whether an award of punitive damages should be made were noted in *Collett*. The factors are:

- Whether the conduct was planned and deliberate;
- The intent and motive of the defendant;
- Whether the defendant persisted in the outrageous conduct over a lengthy period of time;
- Whether the defendant concealed or attempted to cover up its misconduct;
- The defendant's awareness that what he or she was doing was wrong; and
- Whether the defendant profited from its misconduct.

Collett, *supra* para 62 at para 72.

[68] Bestmont's infringement was deliberate. They used the photos knowing that they had been taken by Rer, and displayed them in their hotel despite Rer repeatedly asking for her package to be returned. Bestmont ignored Rer's demands to remove her photographs from

their hallway display, and instead kept the photos up for several months until Rer commenced a claim alleging copyright infringement. Because they waited until she took legal action, it is likely that Bestmont would have continued to use her photos indefinitely had Rer not filed her claim. Bestmont also chose not to provide Rer with any credit or attribution. Although there is no way to calculate how much Bestmont profited from taking advantage of Rer and using her images without her consent, Bestmont benefited by using the photos to improve the interior of their hotels and showcase their other locations to their guests. Based on these factors, Rer requests that the trial judge's award of \$500,000 of punitive damages be restored.

PART 5 – ORDER REQUESTED

[69] The Appellant respectfully requests an order allowing the appeal, setting aside the Court of Appeal's decision and ordering the following: \$1,000,000 for the fifty works infringed, based on the maximum damages of \$20,000 provided by subsection 38.1(1)(a), an additional \$500,000 in punitive damages, and an injunction preventing Bestmont from using the photos for any purpose in the future.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Signed this 11th day of January, 2022

Team 10

Counsel for the Appellant

PART 6 – TABLE OF AUTHORITIES

| AUTHORITY | PINPOINT |
|--|--------------------------------------|
| LEGISLATION | |
| <i>Copyright Act</i> , RSC 1985, c C-42. | ss. 2, 3, 5(1), 27, 32.2(1)(b), 38.1 |
| JURISPRUDENCE | |
| <i>1422986 Ontario Limited v 1833326 Ontario Limited</i> , 2020 ONSC 1041. | 13 |
| <i>Bell Canada v L3D Distributing Inc. (INL3D)</i> , 2021 FC 832, [2021] CarswellNat 3001. | 35 |
| <i>Bestmont v Rer</i> , 2021 CAIP 333. | 2-3, 5-8 |
| <i>Century 21 Canada Ltd Partnership v Rogers Communications Inc.</i> , 2011 BCSC 1196 at para 190, 2011 CarswellBC 2348. | 187, 190 |
| <i>CCH Canadian Ltd v Law Society of Upper Canada</i> , 2004 SCC 13. | 16, 25 |
| <i>Collett v Northland Art Company Canada Inc.</i> , 2018 FC 269, [2018] CarswellNat 1294. | 61-62, 65 |
| <i>Mejia v LaSalle College International Vancouver Inc.</i> , 2014 BCSC 1559, [2014] CarswellBC 2454. | 2, 8, 22. |
| <i>Philip Morris Products SA v Marlboro Canada Ltd</i> , 2010 FC 1099, 2010 CarswellNat 4228 at para 313, rev'd in part 2012 FCA 201, leave to appeal to SCC refused, 35001 (20 March 2013). | 313, 315 |
| <i>Rer v Bestmont Hotels</i> , 21 TCCIP 1222. | 1-8, 14-26 |
| <i>Rizzo & Rizzo Shoes Ltd (Re)</i> , [1998] 1 SCR 27 at para 21, 1998 CanLII 837. | 21 |
| <i>Rogers v Koons</i> , 1992 2d Cir. 91-7396, [1992] 960 F.2d 301. | 28 |
| <i>Théberge v Galerie d'Art du Petit Champlain inc.</i> , 2002 SCC 34. | 30-32 |
| <i>Trader Corp v CarGurus, Inc.</i> , 2017 ONSC 1841. | 24, 26-29 |

| SECONDARY MATERIALS | |
|---|----------------------------|
| John S McKeown, <i>Fox on Canadian Law of Copyright and Industrial Designs, 4th Edition</i> (Toronto: Thomson Reuters Canada, 2003) (loose-leaf updated 2021, release 7). | Ch 10:23, 21:8 |
| Normand Tamaro, <i>The 2021 Annotated Copyright Act</i> (Toronto: Thomson Reuters Canada, 2020). | 901 |
| <i>Oxford English Dictionary</i> , online edition. | <i>Sub verbo</i> “marquee” |