

IN THE SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY

BETWEEN:

WANDA RER

Appellant

-and-

BESTMONT HOTELS

Respondent

FACTUM OF THE RESPONDENT

PART I - OVERVIEW

[1] Copyright law is about the protection of innovative works of those who use their unique skill and judgement to protect their work from individuals who want to steal and capitalize off stolen works. The *Copyright Act* (hereinafter “**the Act**”) is the armour that protects the creatives of their work. This case is about the protection of two different individual works and where the line of infringement is with a narrower scope to determine where creativity is captured in individual works and what is to be protected under the Act.

[2] Both parties in the case are facing in dispute of copyright. The Appellant Wanda Rer (hereinafter “**Rer**”) is in question for infringing the Respondent Bestmont Hotels’ (hereinafter “**Bestmont**”) copyright of the famous red marquee, while Bestmont is in question for infringing the copyright of Rer’s photographs which depicted the said red marquee. Although the determination of infringement is an issue for both parties, copyright damages still need to be established. There is an issue, whether Bestmont used Rer’s photographs for a commercial purpose and if the use of the photos establishes a proportionate value of the photographs or use of the red marquee.

[3] This Supreme Moot Court should dismiss the appeal. Whereas Bestmont is immune from infringement allegations, and a re-evaluation of the skill and judgement test for Rer’s photographs is in question. Since Bestmont did not use Rer’s photographs in a commercial nature then and Lodge, J.’s award was grossly disproportionate to the infringement alleged.

PART II – STATEMENT OF FACTS

The Parties

[4] Bestmont, the respondent, is a high-end luxury hotel chain with locations in prime destinations across Canada. Bestmont owns ten beautiful hotels, and each hotel is carefully

designed and provides guests with an authentic experience inspired by its destinations. In addition to its locations, Bestmont’s hotels are widely known for their grandeur design and the famous red marquee is defined as a Bestmont symbol and instantly recognizable¹.

[5] Rer, the appellant, is a self-described artist, photographer, and social media influencer, and she has a substantial number of followers on social media².

The “Façades” Project

[6] Upon being inspired by the uniqueness of Bestmont luxury hotels, Rer’s focused photography was of the well-known red marquee entrances. Rer referred to her photographs as a project named “Façades,” where she set up her camera at the distance of 100 feet in front of each Bestmont hotel and centered the red marquee. She chose this setup to ensure that the entire entrance of each hotel is captured with its red marquee and unique features. Rer used the same exact set-up in taking the photograph of each entrance resulting in a total ten images, referred to as the original photos³.

[7] To further develop her project, Rer solely picked out four image filters known as ‘sepia’, ‘oil painting’, ‘pixilation’, and ‘pencil drawing’, which are very popular on a popular social media platform to apply to each of the original photos. As a result, she produced forty more images which are referred to as filtered images⁴.

Rer’s Infringement of Bestmont’s Copyright

[8] Rer tried to profit from the pictures she took of the red marquee of the Bestmont hotels. She reached out to Bestmont with an offer of licensing the photos at a rate of \$3,000 per image to be used in Bestmont’s marketing materials. She included in her proposal electronic versions of

¹ *Wanda Rer v Bestmont Hotels*, 21 TTCCIP 1222 at para 1 [Trial]

² *Trial*, supra, para. 1

³ *Trial*, supra, paras 3-4

⁴ *Trial*, supra, para. 6

fifty images featuring predominantly the red marquee and unique designs of the hotels. Bestmont rejected Rer's proposal because they believed that her project infringed their copyright of the protected identifiable red marquee. Furthermore, Bestmont as a rightful copyright holder, requested that Rer destroy copies of all the images in her possession because of copyright infringement and thus did not return the package to Rer⁵.

Bestmont's Private Use of Photographs

[9] As the copyright owner of the famous red marquee and hotel designs depicted in the photos taken by Rer, Bestmont rightfully reproduced the photographs to decorate the hallways of guest floors. Bestmont applied eleven different filters – using a different photo editing software instead of the social media platform Rer previously used.

The Trial Decision

[10] The Trial Judge ruled Rer owns the copyright in each of the original and filtered photos under s.5(1) of the Act. Then, the Trial Court held that Bestmont's use of the photos constituted the reproduction of copyrighted material thereby resulting in infringement of each of the original and the filtered photos. Furthermore, as Bestmont infringed the copyright of Rer's photos, the Trial Judge awarded both statutory damages and punitive damages in total \$1,500,000 under sections 38.1(1)(a) and 38.1(7) of the Act⁶.

[11] In deciding whether copyright subsists in the original and filtered photos, the Trial Judge at para 15 held that "scintilla of artistic expression" is sufficient, thereby setting out the bar for originality required for copyright protection is a relatively low test. The Court concluded that setting up the camera at the distance of 100 feet from the hotel entrances, picking out and applying

⁵ *Trial*, supra, paras 6 - 7

⁶ *Trial*, supra, paras 13-20

popular filters on social media to the original photos required the use of judgement and skills, which resulted in subsisting copyright in the original and filtered photos.

[12] With respect to damages, the Trial Judge held that Bestmont infringed on the copyright for commercial purposes, due to hanging the photos in the hallways at each hotel. According to the Trial Judge, commercial use justified the maximum allowable statutory damages of \$20,000 per work done by Rer, though the Act ranges from \$500 to \$20,000 for statutory damages. On the face of it, the Trial Court attempted to use this case as deterrence for similar conducts in the future and awarded punitive damages in the amount of \$500,000, which is an unprecedentedly high amount of award that is inconsistent with the established copyright jurisdiction on punitive damages⁷⁸

The Appeal Court Decision

[13] The Appeal Court unanimously overturned the decision of the Trial Court and allowed the appeal in its entirety⁹.

[14] In dismissing the action, the Appeal Court found that because Bestmont is the owner of underlying copyright in its hotel designs and the famous red marquee, Bestmont is *immune* from the copyright infringement allegations brought forward by Rer. Thus, Bestmont did not infringe upon any copyrighted work in reproducing the Façade photos. Moreover, applying popular social media filters to the original photos did not consist of any originality to merit copyright protection¹⁰.

[15] The Appeal Court found the test employed by the Trial for originality was ‘too low’, and even if copyright subsisted in the photos, it was not subsisted in the individual images, but only in the entirety of the Façade collection. Rer used her judgement and skills to set up the concept and then repeated the same approach for each location, which resulted in different images. Then, the

⁷ *Trial*, supra, paras 20-25

⁸ *Canada (Attorney General) v. Rundle*, 2014 ONSC 2136, paras 11-15

⁹ *Wanda Rer v. Bestmont Hotels*, 2021 CAIP 333, para. 1 [Appeal]

¹⁰ *Appeal*, supra, paras 2 - 5

Appeal Court held that the use of the photos by Bestmont were for non-commercial purposes, and it was simply public display¹¹.

[16] The awards granted by the Trial Court and the Appeal Court held that the requisite bad faith and misconduct for punitive damages did not exist on the part of Bestmont. Statutory damages must be proportionate with the loss incurred by the claimant as a result of copyright infringement. Rer's business proposal was \$3,000 per image with the total of \$30,000 for her service and the use of the photograph. Hence, the award of the Trial Court would have put her in a much better position than she could not even have contemplated, let alone causing any loss. Lastly, the Appeal Court determined that the Trial Court should have reduced the award amount under s.38.1(3) provided that the Trial Court had not erred in finding infringement in the reproduction of the images in the same collection¹².

PART III – POINTS IN ISSUE

The issues in this appeal are:

1. Bestmont's primary copyright and right to produce non-commercially.
2. Rer did not have copyright of all the photos.
3. Where infringement is found, identifying the appropriate damages.

PART IV – ARGUMENTS IN BRIEF

Issue I: Bestmont's Primary Copyright Protection

¹¹ *Appeal*, supra paras 5-7

¹² *Appeal*, supra paras 8-9

[17] The red marquee is the attraction of Bestmont’s luxury hotel chain, and the red marquee and hotel designs are protected through registered Canadian copyright under the Act¹³¹⁴. The distinct red marquee of Bestmont hotels is defined as an “artistic work”, which is further described in the Act as an “architectural work” and has copyright protection under section 3(1)(e)¹⁵. The Bestmont red marquee has an unmistakable individuality because it is often described as “well-known and instantly recognizable by most Canadians”¹⁶. The Act, s.13(6) discusses the ownership of copyright and the assignment of copyright by licence by right of action for greater certainty with infringement issues, therefore Bestmont controls how the red marquee and Bestmont designs will be replicated, which includes derivative works¹⁷. While there is no need to register for copyright in a treaty country because of the protection available through the creation, if registered, the infringement section 53 of the Act is applicable; this protects Bestmont because the certificate of registration is evidence their copyright subsists¹⁸.

[18] The copyright protection under s.3(1)(a) includes the sole right to produce and reproduce the work or any substantial part thereof in any material form, and this includes the reproduction of Rer’s photographs - where she has infringed copyrighted red marquee that is the focus of all of the photographs¹⁹. In lieu of the skill and judgement requirement to establish originality described in *Cinar*, which looks for the protection of expression for the basis of the claim for economic rights of copyright.²⁰ Bestmont’s red marquee is registered under the Act.

¹³ *Trial*, supra, para 11

¹⁴ *Copyright Act*, s.3(1)

¹⁵ *Ibid*, s.3(1)(e)

¹⁶ *Trial*, supra, para 2

¹⁷ *Copyright Act* s.13(6)

¹⁸ *Ibid* s.53

¹⁹ *Ibid*, s.3(1)(a)

²⁰ *Cinar Corporation v. Robinson*, 2013 SCC 73, para. 24

[19] Although, Rer believes the photographs she took of Bestmont’s red marquee are to be deemed “original works” themselves even though they would be defined as a “derivative work”. Now, Rer faces infringement risks herself, with s. 27(1) where she reproduced Bestmont’s copyright work without their consent which demonstrates primary infringement²¹. Rer has ten original photos and forty filtered photos which she believes she has copyright protection over all fifty of the photographs through the skill and judgement test of originality of the works. Bestmont has the right to reproduce work that is protected under their copyright, which includes Rer’s work as it is a reproduction of the capturing of the red marquee in front of Bestmont hotels, following s. 3(1) of the Act²².

A. Bestmont’s Copyright Creates Reproduction Immunity

[20] Bestmont is immune from Rer’s infringement allegations. Bestmont was entitled to reproduce Rer’s project under the protected red marquee copyright in s. 3(1) of the Act²³. The issue of infringement of Rer’s original photos and filtered photos was the determination if there was a not agreed upon reproduction with Bestmont, however, Rer also stated that Bestmont infringed her claimed copyright of all of her photographs. Bestmont is not disputing that Rer’s a talented social media influencer, but creating the shot that was replicated nine times after the initial idea does not suffice for copyright protection of all those images²⁴. As the Appellant judge states in the most liberal interpretation of the law, under the Act, that Rer only exercised the proper intellectual skill and judgement at most only once, there is no reproduction by Rer, that would not be characterized as infringement because of the lack of consent of Bestmont²⁵.

²¹ *Copyright Act*, s.27(1)

²² *Ibid*, s.3(1)

²³ *Ibid*, s.3(1)

²⁴ *Goldi Productions Ltd. v. Bunch*, 2018 CarswellOnt 15127, paras 15-16

²⁵ Appeal, *supra*, para. 5

[21] In her creation of the initial image, there was sufficient skill and judgement, although since this repetitive action occurred nine more times, there is a lack of originality and insufficient protection under the Act. Although none of these photos were authorized by Bestmont, her skill and judgement of creating the idea subsides, therefore, the consultation beforehand would have let Rer be in the best position for a joint partnership with Bestmont.

[22] However, discussing the inspiration of the photos' in which Bestmont applied filters to Rer's original photos. The filters, "sepia", "oil painting", "pixilation", and "pencil drawing" are extremely common within the photo editing and social media realm. Bestmont chose to apply eleven different filters, including the four of the filters Rer had previously applied, this does not constitute a proper substantial portion of the author's skill and judgement, especially if the filtered photos by Rer are not copyright protected because of the lack of originality²⁶. The mere choice of filters was at Bestmont's disposal, and there is not clear evidence in the intentional copying of the filters, perhaps they were the ones that looked best with each unique location and were suitable for different locations in lieu of their atmosphere. These filters were not only on the social media platform – which is meant to be used by the abundance of the population, where these filters are easily accessible and have an accustomed "popularity" – and also available on the sequent program that Bestmont used. The action of putting on filters does not require the sufficient amount of skill and judgement of the intellectual nature to deem any of the filtered photos to be considered an entirely different original work that is worthy of copyright protection.

Bestmont Reproduced the Photos Privately

²⁶ *Cinar Inc. v Robinson*, 2013 SCC 73, para. 24

[23] The Trial Judge ruled that the photographs were used for commercial purposes by Bestmont. As Appeal Court found that even if copyright is found in the photographs, Bestmont's use did not constitute commercial use²⁷²⁸

[24] The meaning of commercial use in the context of copyright law is not settled yet. However, case law indicates commercial use is more related to profit and selling/purchasing activities. And within the Act, the closest definition is “commercially available” which defines public spaces that is available to collective society within a reasonable time and a reasonable price, which Bestmont did not have Rer's photos available for any price or profit.

[25] Black's Law Dictionary defines ‘commercial’ among many meanings as “1. *of, relating to, or involving the buying and selling of goods*; 4. *Manufactured for the markets; put up for trade*; 5. *Of, relating to, or involving the ability of a product or business to make a profit*”²⁹. And, the meaning of the “commercial” in the Oxford Learner's Dictionaries³⁰, is defined as “*connected with the buying and selling of goods and services*”. While dictionary meanings are not binding or authoritative in determining what exactly a word is meant in a specific situation, they are helpful in understanding ordinary meaning of a word, and it could be concluded that the word “commercial” in an ordinary sense is related to profit and trade. The evidence is clear that Bestmont did not make any profit or attempt to sell the photographs at no time while the photographs were displayed in hallways.

[26] The leading case with respect to the use of nature of copyrighted work is *Royal Conservatory*³¹ in which the court ruled that infringement was commercial in nature because the

²⁷ *Trial*, supra, para. 21

²⁸ *Appeal*, supra, para. 7

²⁹Black's Law Dictionary (11th ed. 2019), “commercial”

³⁰ Oxford Advanced Learner's Dictionary, online edition, “commercial”

³¹ *Royal Conservatory of Music v MacIntosh*, 2016 FC 929

defendant used the copyrighted work without permission as content in books which were sold, which is clearly making a profit.

[27] In *Century 21 Canada Ltd. Partnership v Rogers Communication Inc. (Century 21)*³², the court found that the motive and activity was commercial in nature noted that “while apparently not yet profitable, it is endeavouring to generate income by selling advertising space on the web”³³ and “the primary purpose is to sell real property”³⁴.

[28] Lastly, the court in *Collett v. Northland Art Company Canada Inc. (Collet)*³⁵ found that “copyrighted work was sold for the purpose of profit”.

[29] In conclusion, the cases laid out above state that in determining the use of infringed copyrighted work was commercial or non-commercial, the Supreme Moot Court should look into whether there is any “selling/purchasing” or clear intent of making profit out of an infringed work. Hence, the Appellant Judge was correct in the application of damages pursuant to s. 38.1 of the Act, it is evident that there is no commercial use of the photos, which did not create any extra revenue for the Bestmont luxury hotel chain.

Issue II: Copyright does not subsist in the Façade project because it is not an *original* work

i. Bestmont’s underlying copyright repudiates Ms. Rer’s infringement claims

A – The Trial Court incorrectly construed s.3 of the Copyright Act

[30] The Trial Court did not sufficiently consider that Bestmont has the right to reproduce its copyrighted work. Pursuant to provisions of the s.3 of the Act, copyright owners have *the sole right to produce or reproduce the work or any substantial part thereof in any material form*³⁶.

³² *Century 21 Canada Ltd. Partnership v Rogers Communications Inc.* 2011 BCSC 1196

³³ *Century 21*, supra, para. 218

³⁴ *Century 21*, supra, para. 219

³⁵ *Collet v Northland Art Company Canada Inc.* 2018 FC 269 at para 61.

³⁶ *Copyright Act*, s.3(1)

Therefore, the Court of Appeal correctly determined that Bestmont was immune from the infringement claims because the photos taken by Ms. Rer was predominantly depicting Bestmont's copyrighted red marquee and hotel designs.

[31] Under the Act, copyright in a work subsists in “*every literary, dramatic, musical and artistic work*³⁷” in situations where *the work originates from an author and must not be copied from another work*³⁸. The Act protects only original works. The author is the first owner of the copyrighted work³⁹ and by analogy, Bestmont is the first *author* of the predominantly depicted red marquee and façade in Ms. Rer's photos.

[32] The protections provided by the Act do not only extend to the original ‘artistic work’ but also to subsequent copies which embody the work⁴⁰. Hence, the Appeal Court's justification of absolving Bestmont of infringing Ms. Rer's photos on the basis that Bestmont was the first owner of the Façade project and the marquee is aligned with the established jurisprudence.

B – The Trial Judge erroneously applied s.32.2(1)(b) to the facts

[33] The trial judge erred in finding that copyright subsists in the original and filtered Photos, the Trial Judge ruled that Ms. Rer's images are derivative works explicitly permitted by s.32.2(1)(b) of the Act⁴¹. As the creator of the derivative work, Rer is bestowed upon by the Trial Court to control how the owner of the original work should use its copyrighted work. However, the right of the derivative work does not outweigh the actual owner of the original work under s.13(6).

³⁷ *Copyright Act*, s.5(1)

³⁸ *University of London Press v University Tutorial Press Ltd.*, [1916] 2 Ch. 601, at 608 – 9

³⁹ *Copyright Act*, s.13(1)

⁴⁰ *Galerie dart du Petit Champlain inc. v Théberge*, 2002 SCC 34, para 8

⁴¹ *Trial*, *supra*, para. 18

[34] The Supreme Court of Canada (SCC) ruled that a statutory interpretation should not be conducted in isolation, and the modern approach to interpretation was adopted⁴². This approach required the Trial Judge to consider the entire context, the scheme of the Act, and the intention of the Legislature in applying s.32.2(1)(b).

[35] Firstly, if the Legislature had wanted to grant an underlying copyright via this section, it would have done so.

[36] Secondly, in looking into the scheme of the Act, this section is not placed under the heading of “Ownership of Copyright”, but under Part III, which sets out the infringement related matters.

[37] Finally, in interpreting this section, the Trial Court had to consider the broader context and take into account s.30.7 of the Act⁴³ which provides that it is not an infringement of copyright to incidentally and not deliberately include a copyrighted work. The term “incidentally” is defined in the Cambridge Dictionary⁴⁴ as “in an incidental manner: not intentionally”. According to the testimony tendered by Ms. Rer, Rer was inspired by the uniqueness of Bestmont hotels, and she depicted predominantly in her images Bestmont’s famous red marquee and its unique design features of each hotel’s façade. Ms. Rer deliberately featured Bestmont’s copyrighted works in her photography in a very predominant manner in which she has violated Bestmont’s copyright. Therefore, neither s.30.7 nor s.32.2(1)(b) of the Act does not confer any copyright, and the Trial Judge’s interpretation of s.32.2(1) in isolation was erroneous.

ii. **Copyright does not subsist in the Façade Project**

A. **The originality test employed by the Trial Court was incorrect**

⁴² *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] S.C.J. No. 2, para 21

⁴³ *Copyright Act*, s.30.7

⁴⁴ Cambridge Dictionary, online edition, “incidentally”

[38] The Appeal Court found that the test for originality applied to Ms. Rer’s works was too low. The Court clarified that any originality that may exist in the photos was the result of Bestmont’s artistic efforts in designing its hotel entrances and marquee. Further, the Court concluded that employing the same technique does not provide copyright protection to each photo taken and applying social media filters to the Original Photos does not merit copyright protection⁴⁵.

[39] The Act does not provide a definition for term “original”. However, in *CCH Canadian Ltd. v. Law Society of Upper Canada*⁴⁶, the SCC held that an “original work must be the product of an author’s exercise of skill and judgement⁴⁷ and creativity is not required for originality. Furthermore, the SCC clarified that the use of skill and judgement must not be too trivial that it could be characterized as a *purely mechanical exercise*⁴⁸. In its review of the jurisprudence and replacing the ‘sweat of brow’ approach with skill and judgement, the SCC held that the skill and judgment test for originality is between creativity which requires a very high standard and ‘sweat of the brow’, which sets a too low standard⁴⁹.

[40] The Appeal Court correctly reversed the trial judgement on the basis that the Trial Court used a very low standard for originality which was akin to ‘sweat of brow’ as Ms. Rer mechanically repeated the technique that resulted in differing outcomes.

B. Rer mechanically repeated the technique in producing the Façade project

i. The original photos

⁴⁵ *Bestmont v Wanda Rer*, 2021 CAIP 333, p. 5

⁴⁶ *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 [CCH]

⁴⁷ *Ibid*, paras 22-25

⁴⁸ *Ibid*, para. 16

⁴⁹ *Ibid*, para. 24

[41] Rer took the photos at a distance of 100 feet centering red marquee in the frame to make it “predominantly featured as the focus of the photograph, while still depicting the unique design features of each hotel’s façade”⁵⁰.

[42] The trial evidence shows that Ms. Rer used exactly the same technique and camera set-up and then took pictures of the entrance of each Bestmont hotel by centering the red marquee. The Appeal Court correctly observed that applying the same concept repeatedly does not warrant copyright protection.

[43] An elementary principle of copyright law is that an author has no copyright in ideas but only in their expression of them⁵¹. The skill and judgement must be used in the expression of an idea in order to attract copyright protection⁵². What Rer did was to employ the same technique repeatedly to create different results without demonstrating any intellectual effort. The Court of Appeal did not err in finding that mechanically repeating the same technique does not warrant copyright protection in the resulting images.

[44] In *Rains v. Molea*⁵³, the court held that every image in the “Classical Series” attracted copyright protection because Rains by using his skills and judgment considered “appropriate vantage point” for every image he created, not a standardized technique resulted in different works.

[45] Predominantly reflecting copyrighted work without the use of judgement and skill in relation to the content will not result in a new work. Addy J. in *Motel 6 Inc. No.6 Motel Ltd.*⁵⁴ determined that copying a mark, although not an exact replica still constitutes an infringement. By following this ruling, The Federal Court of Canada – Trial Division concluded that a copyrighted

⁵⁰ *Bestmont*, supra, para 4

⁵¹ *Moreau v St. Vincent*, 1950 CarswellNat4, para. 15

⁵² *CHH*, supra, para 16

⁵³ *Rains v Molea*, 2013 ONSC 5016, para. 12

⁵⁴ *Motel 6 Inc. v No. 6 Motel Ltd.*, [1982] 1 F.C. 638, para 28

design used on the union campaign leaflets and posters was an infringement⁵⁵. By analogy, Rer violated the Act by substantially reproducing Bestmont’s copyrighted work in photography form, which naturally repudiates any copyright claim.

[46] In conclusion, the Court of Appeal held correctly that the individual original photos do not attract copyright protection. Perhaps, Rer used her judgement and skills only in developing the concept and technique. However, in the end, she ended up substantially reproducing Bestmont’s copyrighted work in photography form in a mechanically repeated manner.

ii. The filtered photos

[47] Ms. Rer asserts that she chose the filters on a popular social media platform by using her judgement and skills as a social media influencer and photographer due to the popularity and effects of the filters, “sepia”, “oil painting”, “pixilation”, “pencil drawing”. In doing so, the Trial Court ruled that Rer used her skills and judgement through the selection and application of filters.

[48] On the other hand, Bestmont applied eleven different filters to the original photographs by using different software, proving that what Bestmont did not reproduce alleged copyrighted work. Even if so, by the approach of the Trial Court, Bestmont should have copyright in images it produced as a result of applying eleven filters.

[49] In fact, the ruling of the Court of Appeal is more aligned with the established jurisprudence in this regard. Honorable Bryan Holub D.J. ruled in *Goldi Productions Ltd. v. Bunch*⁵⁶ [Goldi] that putting the photo in a computer programme to enhance the photo was a “purely mechanical process”, and the resulting enhanced photos, therefore, are not original. Using computer programs to enhance photos are analogous, and this court should apply *Goldi* and the rule that copyright does not subsist in the filtered photos produced by Rer.

⁵⁵ *Cie Générale des établissements Michelin – Michelin & Cie v CAW – Canada*, 1996 CarswellNat 2297, para. 77

⁵⁶ *Goldi Productions Ltd. v Bunch*, 2018 CarswellOnt 15127, paras 15-16

[50] In *the Bridgemen Art Library Ltd. vs Corel Corporation*⁵⁷, an American case, it was held that “elements of originality ... may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved but “slavish copying” despite requiring technical skills and effort, does not qualify” as quoted by the judge in *Goldi Productions*.

[51] In the case at bar, Ms. Rer probably used her developed technical skills in applying the social media filters. However, in reality, her work was nothing more than “slavish copying” through mechanical repetition, which required technical skills.

[52] In conclusion, the Trial Court erred in finding that selection and application of readily available social media filters gave rise to copyright protection. Hence, the Appeal Court’s ruling of setting aside the trial judgment is more aligned with the jurisprudence that the Supreme Moot Court should uphold.

Issue III: Damages

A. The Trial Judge wrongly determined the amount of damages

i. *The Trial Judge erred in deciding the amount of statutory damages*

[53] The award to Rer by the Trial Court is grossly out of proportion to the infringement. The awarded amount of 1,000,000 for infringement as statutory damages is extremely disproportionate due to the factors in 38.1(5) of the Act. The court considered whether the defendant was acting in good or bad faith, whether the conduct of the parties and the need to deter infringements.

[54] Even though section 38.1 does not speak of actual damages, there should be some correlation between actual damages and statutory damages⁵⁸.

⁵⁷ *The Bridgemen Art Library Ltd. vs Corel Corporation* No. 97 CIV.6232 (LAK), para 197

⁵⁸ McKeown, John. *Fox Canadian Law of Copyright and Industrial Designs*, 4th ed. (Scarborough: Thomson Carswell, 2003 at 24.77

[55] Further, a correlation between probable and statutory damages helps ensure fairness and proportionality⁵⁹.

[56] The Honorable F. Lemieux J. held in *Telewizja*⁶⁰ “When examining section 38.1 of the *Act* as a whole, it is evident to me the overarching mandate of a judge assessing statutory damages in lieu of damages and loss of profit is to arrive at a reasonable assessment in all of the circumstances in order to yield a just result.”. It was the Trial Judge duty to yield a just result by considering all the circumstances surrounding the case.

[57] Furthermore, Canadian copyright law jurisdiction demonstrates that the courts in granting the higher end of statutory damages per infringement are carefully exercising the discretion provided under the *Act*. In the *Trout Point Lodge*⁶¹, the court granted the maximum amount for each of the four infringing photographs because the context of the photos were used to damage, harass and embarrass the Applications in breach of a court order.

[58] The Federal Court also concluded in the *Microsoft Corp.*⁶² that the amount of statutory damages must reflect not only bad faith of the Defendants and their disregard for the rights of Plaintiff. It must also deter the Defendants from continuing their course of action. In the court’s view in the *Microsoft Corp.*, supra, the amount for statutory copyright damages must be sufficiently high to serve a salutary message and deter future infringement on the part of the named Defendants and other parties.

[59] In conclusion, the Trial Judge failed to take into account s.38.1(3), misjudged the factors under s.38.1(5), and did not follow the established copyright jurisdiction in granting the statutory

⁵⁹ Dimock, Ronald E. *Intellectual Property Disputes: Resolution & Remedies* (Toronto, ON: Thomson Reuters Canada, 2016) (loose-leaf-revision 5), ch 3 at 3-38

⁶⁰ *Telewizja Polsat S.A. v Radiopol Inc.*, 2006 FC 584, para. 37

⁶¹ *Trout Point Lodge Ltd. Handshoe*, 2014 NSSC 62, para.28

⁶² *Microsoft Corp. PC Village Co.*, 2009 CF 401, para. 39

damages, which in turn *did not yield a just result*. In particular, the Trial Judge high-handedly failed to address the following factors:

1. Bestmont never acted in bad faith, and it was always Bestmont's position that it has the underlying copyright in the photos, and it was using its copyrighted work. This is evident from the fact that Best from the very beginning clearly communicated with Rer that she should delete the photos because she was infringing Bestmont's work in which copyright subsists. In other words, Bestmont was acting within their right – at least it is what Bestmont believed and there is no existing contrary evidence adduced.
2. Bestmont did not use the photos in commercial sense and did not make any profit out of them⁶³ they were simply used as décor. At best, the use of photos by Bestmont was incidental.
3. Bestmont did not hold any malicious intent towards Rer, did not try to intimate, harass or defame her, and never was in breach of court order in contrast to the *Trout Point Lodge*.
4. Bestmont merely hung up the photos in the hallways, which did not result in any loss on the part of Rer.
5. Rer demanded *only \$30,000* for photos. The Trial Court overlooked correlation between probable (\$30,000) and statutory damages (\$1,000,000) in its analysis.
6. There is no actual loss on the part of Rer because Bestmont was not obliged to enter into a business deal with Rer and in fact Bestmont rejected her offer.

⁶³ *Robinson v Cinar Inc.*, 2013 SCC 73, para. 80

7. The Canadian copyright law jurisprudence patently established that courts should be meticulous in exercising the powers granted under s. 38.1(1) and be cautious in employing the higher end of statutory damages.
8. Before the trial, Bestmont agreed not to display photos in its hotels. This is a commendable behaviour given that Bestmont was not found to be infringing Rer's copyrighted work at that stage. This also proves that there is no need for deterrence in the future as the infringement, if any, ceased to exist.

ii. *The Trial Judge insinuated in granting punitive damages*

[60] While both the Trial Judge and the Appellant Judge both noted that Ms. Rer did not plead punitive damages, they both acted as if she did, in lieu of section 38.1(7) which provided the award to do so.

[61] The leading case on punitive damages is *Whiten*⁶⁴, and the court can deem punitive damages are appropriate when a party's conduct has been malicious, oppressive and high-handed, offends the court's sense of decency and represents a market departure from ordinary standards of decent behaviour.

[62] Also, if a defendant's conduct can be characterized as "outrageous", "highly unreasonable" or showing a callous disregard for the right of the plaintiff, punitive damages will be warranted⁶⁵. In another case⁶⁶, the need for punitive damages set out slightly different as follows: "the possibility of such an award becomes engaged where there are advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own".

⁶⁴ *Whiten v Pilot Insurance Co.*, 2002 SCC 18, para 36.

⁶⁵ *Louis Vuitton Malletier S.A. v Singga Enterprises (Canada) Inc.*, 2011 FC 776, para. 168

⁶⁶ *Keays v Honda Canada Inc.*, [2008] 2 S.C.R 362 (S.C.R.), para. 62

[63] Furthermore, the Court in *Parks*⁶⁷renumerated a list of relevant factors by reference to *Whiten*, supra, to be considered in assessing punitive damages. These factors are as follow;

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

[64] It is also crucial to note that assessing punitive damages, there needs to be determined whether the amount granted by the courts is outstripping the amounts awarded in other cases⁶⁸. The Trial Judge's award of \$500,000 far outstripped the award made the majority of the other Canadian cases with respect to copyright infringements.

[65] A few examples of cases where the punitive damages were granted will help assess the amount of punitive damages. Punitive damages of \$50,000 are awarded where the infringement activity continued after the action was commenced.⁶⁹ In another case⁷⁰, punitive damages of \$10,000 was granted in circumstances where the defendant used the photos to damage, harass, and embarrass the Applicants in breach of a court order. The last example⁷¹ is where punitive damages of \$100,000 was awarded because an estimated annual profit of between \$90,000 to \$135,000 over eighteen months was anticipated to be made

[66] The Trial Judge failed to provide justifiable reasons for the penalty of \$500,000 even though the award vastly outstripped the awards made in other cases. In this case, the scale and duration of the infringing activities were low because the photos were only put up in the hotels for

⁶⁷ 2703203 *Manitoba Inc. v Parks*, 47 C.P.R. (4th) 276, para. 38

⁶⁸ *Lam v Chanel S. de R.L.*, 2016 FCA 111 (F.C.A.), para. 23

⁶⁹ *Microsoft Corp. v. 1276916 Ontario Ltd.*, 2009 FC 849 (F.C.), para. 55

⁷⁰ *Trout Point Lodge*, supra, para 28

⁷¹ *Louis Vuitton Malletier S.A. v Yang*, 2007 FC 1179, para 53

decorations, and these photos were likely up for several months until Rer brought her action. Bestmont removed the alleged infringing photos before the trial and did not attempt to conceal or cover up the alleged wrongdoings, on the contrary, it displayed the photos in the hotel with no concealment. Bestmont eventually took the photos down and is no longer displaying them.

[67] In summation, the Appeal Court was correct in its assessment of punitive damages, and its judgment is consistent with the case law summarized above.

PART V – ORDER REQUESTED

Based on the foregoing, the Respondent respectfully requests the dismissal of this Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed this 28th day of January, 2022

Team 10

Counsel for the Respondent

TABLE OF AUTHORITIES

AUTHORITY	PINPOINT	IN FACTUM
-----------	----------	-----------

LEGISLATION	PINPOINT	IN FACTUM
Copyright Act, RSC 1985, c C-42.	s.3(1), s.3(1)(a), s.3(1)(e), s.5(1), s.13(1), s.13(6), s.53, s.27(1), s.30.7, s.32.2(1)(b), s.38.1(1)(a), s.38.1(3), s.38.1(5) s.38.1(7),	

JURISPRUDENCE: CANADA	PINPOINT	IN FACTUM
<i>Bestmont Hotels v Wanda Rer</i> , 2021 CAIP 333	Para 1, paras 2-5, paras 6-7, paras 8-9, para 5	13, 14, 15, 16, 41
<i>Canada (Attorney General) v Rundle</i> , 2014 ONSC 2136	Paras 11 - 15	12
<i>CCH Canadian Ltd. v Law Society of Upper Canada</i> , 2004 SCC 13	Paras 22- 25, para 16, para 24	42, 52
<i>Cie Générale des établissements Michelin – Michelin & Cie v. CAW-Canada</i> , 1996 CarswellNat 2297	Para 77	48
<i>Century 21 Canada Ltd. Partnership v Rogers Communications Inc.</i> 2011 BCSC 1196	Para 218 - 219	29
<i>Cinar Corporation v Robinson</i> , 2013 SCC 73	Para 24, para 80	18, 24, 63
<i>Collet v Northland Art Company Canada Inc.</i> 2018 FC 269	Para 61	30
<i>Galerie dart du Petit Champlain inc. v Théberge</i> , 2002 SCC 34	Para 8	35
<i>Goldi Productions Ltd. v Bunch</i> , 2018 CarswellOnt 15127	Paras 15 - 16	20, 52
<i>Keays v. Honda Canada Inc.</i> , [2008] 2 S.C.R. 362 (S.C.R.)	Para 62	66
<i>Microsoft Corp. v PC Village Co.</i> , 2009 CF 401	Para 39	61
<i>Microsoft Corp. v 1276916 Ontario Ltd.</i> , 2009 FC 849 (F.C.)	Para 55	69
<i>Moreau v St. Vincent</i> , 1950 CarswellNat4	Para 15	46
<i>Motel 6 Inc. v No. 6 Motel Ltd.</i> , [1982] 1 F.C. 638	Para 28	48
<i>Lam v Chanel s. de R.L.</i> , 2016 FCA 111 (F.C.A.)	Para 23	68

<i>Louis Vuitton Malletier S.A. v Singga Enterprises (Canada) Inc.</i> , 2011 FC 776	Para 168	66
<i>Louis Vuitton Malletier S.A. v Yang</i> , 2007 FC 1179	Para 53	69
<i>Rains v Molea</i> , 2013 ONSC 5016	Para 12	47
<i>Rizzo & Rizzo Shoes Ltd. (Re)</i> , [1998] S.C.J. No. 2	Para 21	37
<i>Royal Conservatory of Music v MacIntosh</i> , 2016 FC 929		31
<i>Telewizja Polsat S.A. v Radiopol Inc.</i> , 2006 FC 584	Para 37	59
<i>Trout Point Lodge Ltd. v Handshoe</i> , 2014 NSSC 62	Para 28	60, 69
<i>Wanda Rer v Bestmont Hotels</i> , 21 TCCIP 1222	Para 1, paras 3-4, para 6, paras 6-7, paras 13-20, paras 20-25, para 11, para 2, para 18,	4, 5, 6, 7, 8, 10, 12, 17, 36
<i>Whiten v Pilot Insurance Co.</i> , 2002 SCC 18	Para 36	65
<i>2703203 Manitoba Inc. Parks</i> , 47 C.P.R. (4th) 276	Para 38	67

JURISPRUDENCE: FOREIGN		
<i>The Bridgemen Art Library Ltd. v Corel Corporation</i> No. 97 CIV. 6232 (LAK)	Para 197	53
<i>University of London Press v University Tutorial Press Ltd.</i> , [1916] 2 Ch. 601		38

SECONDARY MATERIALS		
Black's Law Dictionary (11th ed. 2019)	<i>sup verbo</i> "commercial"	26
Oxford Advanced Learner's Dictionary, online edition	<i>Sup verbo</i> "commercial"	27
Cambridge Dictionary, online edition	<i>Sup verbo</i> "incidentally"	40
Dimock, Ronald E. <i>Intellectual Property Disputes: Resolution & Remedies</i> (Toronto, ON: Thomson Reuters Canada, 2016) (loose-leaf-revision 5), ch 3 at 3-38		58
McKeown, John. <i>Fox Canadian Law of Copyright and Industrial Designs</i> , 4th ed. (Scarborough: Thomson Carswell, 2003 at 24.77		57