

SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS

BETWEEN:

WANDA RER

Appellant

-and-

BESTMONT HOTELS

Respondent

FACTUM OF THE APPELLANT

PART I: OVERVIEW

[1] This case is about establishing how robust an exercise of skill and judgment must be to satisfy the originality threshold. An equal concern of this case is the Respondent's infringement of copyright accompanied by a reprehensible abuse of power, and bad faith conduct. An extension of these concerns is the availability of statutory damages and punitive damages in circumstances of copyright infringement. Furthermore, which sections of the *Act* are engaged, and the amount of damages which can be awarded.

[2] The Respondent is a renowned Canadian luxury hotel chain with prime destinations across Canada. Yet, the Respondent appropriated the photographs of the Appellant, a self-employed freelance photographer, looking to maintain her livelihood through her services as a photographer and social media influencer. The Respondent capitalized on the power imbalance between them and the Appellant, and deliberately copied and reproduced the Appellant's photographs. The Respondent then subsequently displayed them throughout all of their hotels without permission or providing credit.

[3] This appeal raises three issues. The first is that the Respondent infringed the copyright in the Appellant's photographs. The second issue is that despite the Appellant meeting the threshold of originality, the Court of Appeal found insufficient originality in the Appellant's photographs. The third issue is concerned with the remedies available when copyright infringement is accompanied by an abuse of power and bad faith conduct.

[4] The Court of Appeal decision should be set aside, and the decision of the Trial Court should be reinstated. As artistic works, copyright subsists in the photographs the Appellant used her skill, judgment and expertise to create. The Appellant's photographs should be properly protected under the *Copyright Act*.

PART II: STATEMENT OF FACTS

The Creation of the Photographs in Issue

[5] Ms. Rer is a self-described artist, photographer, and social media influencer who spent a year travelling and staying at each of Bestmont's ten destinations. Inspired by Bestmont's hotels, Ms. Rer sought to create a project called "Façades", which involved photographing the entrance and famous red marquee of each Bestmont hotel.

[6] Ms. Rer photographed each Bestmont hotel centered in the frame from 100 feet out to prominently feature each marquee and capture their unique design features. Photography techniques and camera set-ups were kept constant so similarities and differences in the design and atmosphere of the resulting hotel images could be observed. These ten images are referred to as the "Original Photos".

[7] Using her judgment and experience as a social media influencer and photographer Ms. Rer selected and applied specific social media platform filters to the Original Photos. For each Original Photo, Ms. Rer applied filters known as 'sepia', 'oil painting', 'pixilation', and 'pencil drawing'. The filters enhanced the depiction of the hotel design and marquee. These forty filtered images are referred to as the "Filtered Photos".

The Respondent's Unauthorized Use of Ms. Rer's Copyrighted Photographs

[8] Ms. Rer contacted Bestmont offering to license her Original and/or Filtered Photos as marketing materials at \$3,000 per photograph. She provided fifty electronic copies comprising the Original and four Filtered Photos of each hotel. Bestmont declined Ms. Rer, refused to return her photographs, accused her of copyright infringement, demanded the Façade photographs be destroyed, and proceeded to decorate their hotels with her photographs without Ms. Rer's consent or providing credit.

[9] Once aware of Bestmont actions, Ms. Rer demanded Bestmont remove her photographs from its hotels. Bestmont did not respond. Ms. Rer then commenced a claim alleging copyright infringement, seeking a permanent injunction and the maximum statutory damages allowed pursuant to s. 38.1 of the *Act*. Bestmont removed the Façades photographs before trial, but first denied Ms. Rer's copyright in the Façade photographs because of her lack of copyright registration and Bestmont's registration in its hotel designs and marquees.

The Trial Court Proceedings

[10] The Trial Judge Lodge J found there was subsistence of copyright in the Original and Filtered photographs (*Trial*). Subsection 5(1) states copyright shall subsist in original works (*Trial*). Ms. Rer's exercise of skill and judgment in the creation of her technique and camera set-up, as well as the selection and application of filters, constitutes originality (*Trial*).

Wandra Rer v Bestmont Hotels, [2021] TCIP 1222 at paras 14, 16 [*Trial*].

[11] Lodge J found that Bestmont could not reproduce Ms. Rer's originality, despite owning copyright in their hotels and marquee (*Trial*). Lodge J held that Bestmont infringed Ms. Rer's copyright because they admitted to reproducing the Original Photos (*Trial*). Bestmont also chose similar filters to those Ms. Rer suggested (*Trial*). Inspiration from Ms. Rer's photographs led Bestmont to apply their own filters (*Trial*). Therefore, Bestmont infringed Ms. Rer's copyright in the ten Original Photos and forty Filtered Photos (*Trial*).

Trial, supra para 10 at paras 10, 18, 19.

[12] Per subsection 38.1 of the *Act*, Lodge J found that \$1,500,000 of statutory damages should be awarded, with \$20,000 for each of the fifty works infringed and punishment of \$500,000 for Bestmont's deplorable conduct (*Trial*). The need for deterrence justifies the \$20,000 awarded for each work (*Trial*). Bestmont's substantial scope and breadth of infringement mitigates in favour of the higher end of statutory damages (*Trial*).

Trial, supra para 10 at paras 20, 22-24.

[13] Lodge J found Bestmont's bad faith conduct – Bestmont rejecting Ms. Rer's proposal, and levelling allegations of infringement against her while also infringing Ms. Rer's copyright and ignoring her demands – justified the increase of the award beyond subsection 38.1(1)(a)'s range (*Trial*). Lodge J also awarded punitive damages, subject to subsection 38.1(7)'s discretion (*Trial*).

Trial, supra para 10 at para 25.

The Court of Appeal Proceedings

[14] The Appeal Judge Lobi JA found that Bestmont was free from Ms. Rer's infringement allegations (*Appeal*). Lobi JA found that because Bestmont is the copyright owner in the design of each of its hotels and its marquee, Bestmont can reproduce its copyright in any medium including in the reproduction of Ms. Rer's Façade photographs. (*Appeal*).

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

[15] Addressing aspects that needed correcting, Lobi JA first found that Lodge J's test for originality was too low (*Appeal*). Therefore, Lobi JA concluded that if any copyright exists in the Façade photographs, it would vest in the collection as a whole (*Appeal*). Lobi JA admitted that Ms. Rer exercised her skill and judgment once in developing a single concept and technique for the Façade photographs (*Appeal*). Lobi JA expressed that Ms. Rer repeating the same concept at different hotels does not warrant copyright protection in each photograph (*Appeal*).

Appeal, supra para 14 at para 5.

[16] Lobi JA also stated that filters do not warrant copyright protection because of the lack of originality and the filters being readily available (*Appeal*). Lobi JA suggested that even if there was copyright in the individual Filtered Photos, the small amount of originality does not justify copyright protection (*Appeal*). Further, Lobi JA determined that Bestmont's use of a different filter than Ms. Rer was not a substantial reproduction of that originality (*Appeal*).

Appeal, supra para 14 at para 5.

[17] Lobi JA found that Lodge J erred in terms of statutory damages (*Appeal*). The public display of the photographs was of a non-commercial nature, because there was no evidence of the generation of revenue based on Bestmont's use of the photographs (*Appeal*). Without such

evidence, Lobi JA determined that Bestmont's unauthorized public display of Ms. Rer's photographs was insufficient to find infringement of a commercial purpose (*Appeal*).

Appeal, supra para 14 at paras 6-7.

[18] Lobi JA found that Lodge J's award of statutory damages was grossly out of proportion to the infringement and therefore, had no discretion to award a high amount, especially since Ms. Rer did not plead punitive damages separately from statutory damages (*Appeal*). Lobi JA believed that Lodge JA focused extensively on bad faith and deterrence and that this led to the disproportionate amount of damages awarded (*Appeal*). Further, Lobi JA found that Bestmont's conduct did not constitute bad faith because of Bestmont's belief of their right to reproduce the photographs (*Appeal*).

Appeal, supra para 14 at para 8.

[19] Lobi JA concluded that Bestmont had immunity from infringement and therefore, no statutory damages could be awarded (*Appeal*). Lobi JA determined however, that if infringement had been found, the maximum statutory damages that could be awarded to Ms. Rer could not exceed \$30,000 (*Appeal*). Otherwise, Lobi JA stated that she would be in a better position than she reasonably could have been in (*Appeal*). Ultimately, Lobi JA concluded that had infringement been found, Ms. Rer would have been awarded \$15,000, since infringement of multiple works reproduced in the same medium warrants a reduction in the award, per subsection 38.1(3) (*Appeal*).

Appeal, supra para 14 at para 9.

PART III: POINTS IN ISSUE

[20] The issues in this appeal are:

1. Whether copyright subsists in the individual Original and Filtered Photos.
2. Whether there was infringement of Ms. Rer's copyright by Bestmont.
3. Whether the statutory damages awarded by the Court of Appeal is sufficient.

PART IV: ARGUMENTS IN BRIEF

Issue 1: The Court of Appeal Erred in Concluding Copyright Does Not Subsist in Ms.

Rer's Individual Original and Filtered Photos

[21] Section 5(1) of the *Copyright Act*, herein referred to as the *Act (CA)*, provides that copyright subsists in “every original literary, dramatic, musical and artistic work”. Artistic works consist of photographs, as shown in the *CA*. The Courts may also consider artistic intent as a factor of artistic works (*DRG*).

Copyright Act, RSC 1985, c C-42, s 5(1) [*CA*].
DRG Inc v Datafile Ltd, (1988) 2 FC 243 at para 12 [*DRG*].

[22] There is no disputing that Ms. Rer took photographs of the Bestmont hotels for which Bestmont owns copyright in the marquee and design. However, Ms. Rer did not infringe Bestmont's copyright. Ms. Rer's actions were permitted by s. 32.2(1)(b)(i) of the *Act*, which establishes that it is not infringement of copyright to reproduce in photographs an architectural work.

CA, *supra* para 21 at s 32.2(1)(b)(i).

(i) *Copyright Subsists Where There is Skill and Judgment.*

[23] The term “original” is not defined within the *Act*. The Supreme Court of Canada (“SCC”) in *CCH Canadian Ltd. v Law Society of Upper Canada* stated that an original work is one that

originates from the author and is not copied from another source. Further, there is no requirement for an original work to be creative with respect to novelty or uniqueness. The SCC establishes that copyright protection will subsist where there is an exercise of skill and judgement and will necessarily involve intellectual effort. The exercise of skill and judgement cannot be trivial. Mechanical exercises, such as, changing a font to create a new work is not sufficient (*CCH*).

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

(ii) *Ms. Rer Exercised Skill and Judgment in The Creation of Her Photographs*.

[24] Ms. Rer exerted intellectual effort far beyond a mere mechanical exercise. Ms. Rer personally and intentionally chose the subject matter of the photographs, their orientation, and their organization to capture the most salient features of each hotel. Further, Ms. Rer utilized the exact same photographic techniques and camera set-up for each hotel to contrast the design and atmosphere of each hotel (*Trial*). Informed by her skill and experience, she carefully applied filters to her photographs. In short, Ms. Rer used her skill and judgment to produce these photographs.

Trial, *supra* para 10 at paras 15-16.

[25] The Courts' decisions in *Rallysport Direct LLC v. 2424508 Ontario Ltd. (Rallysport)* and *Century 21 Canada Ltd Partnership v. Rogers Communications Inc (Century 21)* can guide this Court in recognizing the skill and judgment exercised by Ms. Rer to create fifty original photographs consisting of the Original and Filtered Photos.

Rallysport Direct LLC v 2424508 Ontario Ltd., 2019 FC 1524 [*Rallysport*].
Century 21 Canada Ltd Partnership v Rogers Communications Inc, 2011 BCSC 1196 [*Century 21*].

[26] In *Rallysport*, Justice Fuhrer explained that there was a requirement by *Rallysport Direct* employees to “acquire, situate, and photograph individual automotive parts and accessories...and to select the most appealing photos.” The pictures of automotive aftermarket components displayed for sale on its website were determined to be products of skill and judgment by Fuhrer J, and therefore attracted copyright protection.

Rallysport, supra para 25 at para 48.

[27] A similar determination was reached in *Century 21*, where pictures of homes were displayed for sale on its website. Regarding the matter Justice Punnnett cited *Fox*, which states:

“With respect to the photographs in question, the requirement for originality is low and can arise from the choice of subject matter, the creation of the scene, the angle of the photograph or other factors.”

Punnnett J also stated, “[T]he preparation of...the photographs, as I have noted, required some level of skill.”

Rallysport, supra para 25 at para 48.

Century 21, supra para 25 at para 278.

Fox on Canadian Law of Copyright and Industrial Designs, 4th edition at s. 10:11(c) [*Fox*].

[28] The Courts in *Century 21* and *Rallysport* determined the impugned photographs in their respective cases were not a mechanical exercise and were created with the necessary intellectual effort.

Century 21, supra para 25 at para 187.

Rallysport, supra para 25 at para 48.

[29] In view of *Century 21* and *Rallysport*, simplistic photographs can be properly characterized to have been formed with skill and judgment to the level required by the SCC in *CCH*. Ms. Rer’s exercise of skill and judgment in producing her Original and Filtered Photos from the Façades Project equals or exceeds the skill and judgment in *Century 21* and *Rallysport*.

Century 21, supra para 25 at para 187.
Rallysport, supra para 25 at para 48.
CCH, supra para 23 at para 16.

(iii) *Ms. Rer's Exercise of Skill and Judgement Satisfies the Originality Threshold.*

[30] The SCC in *CCH* addressed the issue of thresholds for determining originality and concluded that the current standard requiring an exercise of skill and judgement “is a workable yet fair standard.” The higher threshold creativity standard of originality was deemed by the SCC to be “too high.” The Court expanded further by stating:

“[a] creativity standard implies that something must be novel or non-obvious concepts more properly associated with patent law than copyright law.”

Although creative works by definition are original and protected by copyright, creativity is not required to make a work original (*CCH*).

CCH, supra para 23 at para 24.

[31] In *Century 21*, the Court acknowledged that the threshold for originality is low; yet found no reason to adopt a higher threshold. In fact, the Court proceeded to find for originality in simplistic real estate listing photographs. As considered in both *Century 21* and *Rallysport*, photographs were entitled to copyright protection as they satisfied the originality requirements of s. 13(1) of the *Act*. Further to this point, determinations in both *Century 21* and *Rallysport* relied on *CCH* where Justice McLachlin stated:

“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. For example, any skill and judgment that might be involved in simply changing the font of work to produce "another" work would be too trivial to merit copyright protection as an "original" work.”

In view of *Century 21* and *Rallysport*, simplistic photographs can be properly characterized as original works produced with skill and judgment to the level required by the SCC in *CCH*. Like the photographs in *Century 21* and *Rallysport*, Ms. Rer's photographs are original. In this case, as it was in *CCH*, *Century 21* and *Rallysport*, the same threshold for originality should be applied.

Century 21, *supra* para 25 at para 187, 28.

Rallysport, *supra* para 25 at para 48.

CA, *supra* para 21 at s.13(1).

CCH, *supra* para 23 at para 16.

(iv) *Ms. Rer's Adherence to A Single Concept and Technique Does Not Reduce Photography to a Mechanical Exercise.*

[32] At appeal, Lobi J was concerned about Ms. Rer's use of a single concept and technique and stated that her copyright:

“...vests in the collection as a whole not the individual photographs. The bulk of the originality displayed in each image is a result of Bestmont's artistic efforts...Ms. Rer only exercised her skill and judgment once in developing a single concept and technique...”

This is insufficient grounds for challenging originality. Pursuant to s. 5(1) of the *Act* the Courts do not evaluate the artistic or aesthetic nature of a photograph but look to whether "skill and judgment" was required in its creation (*Trader*).

Appeal, *supra* para 14 at para 5.

Trader Corp. v. CarGurus Inc., 2017 ONSC 1841 at para 22, 24 [*Trader*].

[33] In *Rallysport*, employees were directed to take photos of automotive aftermarket components staged in positions enabling customers to examine key product details. This was a single concept and technique created by Rallysport Direct, which the employees utilized to take

photographs. Yet, Fuhrer J determined there was originality in Rallysport Direct's photographs relying on *Trader*. Justice Conway in *Trader* states:

“...the fact that the photographers receive training and follow standardized procedures does not eliminate the use of their skill and judgment in taking the photos, nor does it reduce the exercise of taking the photos to a simple mechanical exercise.”

Similarly, Ms. Rer used a single concept and technique to produce multiple photographs. Therefore, the originality of Ms. Rer's photographs should not be challenged based on her employing a single concept and technique. Copyright should subsist in Ms. Rer's individual photographs.

Rallysport, supra para 25 at para 13.
Trader, supra para 32 at para 24.

Issue 2: Whether There Has Been an Infringement of Ms. Rer's Original and Filtered

Photos by Bestmont

(i) *Infringement of Copyright Arises Where a Substantial Copy is Created Based on an Existing Work Without Consent.*

[34] Bestmont's conduct is contrary to s. 27(1) of the *Act*, which provides, “[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this *Act* only the owner of the copyright has the right to do.” Bestmont infringed upon Ms. Rer's Original and Filtered photos through the copy, use and display of her photographs in their hotels.

CA, supra para 21 at s. 27(1).

[35] Copyright infringement occurs when the defendant has created a “substantial similarity” to an original work, and there was access to the protected work (*Philip Morris Products S.A. v. Marlboro Canada Ltd.*). The SCC in *Robinson* characterizes substantial similarity as a question of fact and degree. Assessment of an infringed copy by the similarities between the original and the infringed is the determinative factor for identifying a substantial part of a work as borrowed (*Rains*). In view of *Rains*, the photographs Bestmont created should be properly construed as a substantial copy of Ms. Rer’s Original and Filtered Photos.

Philip Morris Products SA v Marlboro Canada Ltd, 2010 FC 1099 at para 315 [*Philip Morris*].
Robinson v Films Cinar Inc, 2013 SCC 73 at para 26 [*Robinson*].
Rains v Molea, 2013 ONSC 5016 at para 29 [*Rains*].

[36] Bestmont is permitted to reproduce its own hotel designs and marquee. However, as Lodge J correctly stated, “Bestmont’s right to reproduce its own designs does not extend so far as to allow it to reproduce Ms. Rer’s originality” (*Trial*). If desired, Bestmont could take their own photographs of their hotel designs and marquee, with distances, focal points and lighting selected at their discretion.

Trial, supra para 10 at para 17-18.

[37] The *Act* defines a photograph as a “photo-lithograph and any work expressed by any process analogous to photography”. Photography is defined as “the art or process of producing images by the action of radiant energy and especially light on a sensitive surface such as film or an optical sensor” [Emphasis added] (*Webster*). Bestmont did not produce any photographs. Instead, they appropriated, used and copied through reproduction Ms. Rer’s photographs contravening s. 27(1) of the *Act*, thereby infringing Ms. Rer’s copyright in the Original and Filtered Photos.

CA, *supra* para 21 at s. 2, s.27(1).
Merriam-Webster, online edition, *sub verbo* “photography” [*Webster*].

[38] Bestmont sought to capitalize on its access to Ms. Rer's photographs and deliberately reproduced Ms. Rer's Filtered Photos using filters identical to those used by Ms. Rer. Bestmont's use of any alternative filters has an infinitesimal effect here because Bestmont's photographs are still substantial reproductions of Ms. Rer's Original photographs and constitute infringement.

Appeal, supra para 14 at para 2.

(ii) *Bestmont Deliberately Created a Substantial Reproduction of Ms. Rer's Façades Photographs.*

[39] The Court in *Ateliers Tango Argentin Inc. v. Festival d'Espagne & d'Amerique Latine Inc.*, considers infringement in photographs, in which a photographer took a photograph which became the commercial image of a dance school. A festival organizer was presented with this photograph but was advised it could not be used to promote the festival. The organizer then asked a different photographer to create a photograph identical to the commercial image. Infringement was found based on identical choice in subject, location, layout, choreographic positioning of models, camera angle and props; indicating to the Court the photograph was intentionally copied.

Ateliers Tango Argentin Inc. v. Festival d'Espagne & d'Amerique Latine Inc., [1997] CarswellQue 1225 at para 68, 74 [*Ateliers Tango*].

[40] Similar to the circumstance in *Ateliers Tango*, Bestmont copied Ms. Rer's photographs and deliberately created a substantial reproduction. Ms. Rer provided Bestmont with her Original and Filtered Photos offering to license them to Bestmont (*Trial*). After rejecting Ms. Rer's proposal, Bestmont selected filters identical to each Filtered Photo that Ms. Rer provided,

applied them to the Original Photos and displayed them in their hotels (*Trial*). The selection of different filters of the same type is indicative of Bestmont’s intent to deliberately copy Ms. Rer’s Filtered Photos through reproduction.

Trial, supra para 10 at para 19, 25, 8-9.

Issue 3: The Court of Appeal Erred with Respect to Statutory Damages and Punitive

Damages

[41] The *Act* details the amount of statutory damages that can be awarded for infringement of copyright. Section 38.1(1)(a) of the *Act* establishes a range of \$500 to \$20,000 for commercial purposes. Section 38.1(b) of the *Act* establishes a range of \$100 to \$5,000 for non-commercial purposes. The Court of Appeal found that the Trial Judge’s award of statutory damages was grossly out of proportion to the infringement. The Court of Appeal based this decision on the finding that the Trial Judge had no discretion to exceed the statutory limit and on the determination that public display of the photographs was for a non-commercial purpose.

CA, supra para 21 at s 38.1(1)(a)(b).

(i) Bestmont’s Infringement Has a Commercial Purpose Despite the Lack of Profits.

[42] By displaying Ms. Rer’s photographs in their hotels, Bestmont “...improv[ed] the atmosphere for its paying guests,” (*Trial*). Bestmont’s infringement has a commercial purpose (*Trial*), despite the lack of evidence of profits made by Bestmont after displaying Ms. Rer’s photographs. In *Young v. Thakur*, music video footage was used to advertise services. However, no profit was made from these services. Justice Kane found that even if the defendants made no profit the infringement had a commercial purpose. In view of *Young v. Thakur*, the assessment of

statutory damages in this case should be within the range of \$500 and \$20,000, and further justifies the maximum award of \$20,000 for each infringed work.

Trial, supra para 10 at para 21.
Young v Thakur, 2019 FC 835 at para 45 [*Young*].

(ii) Bestmont’s Bad Faith Conduct, Conduct Before the Proceedings, and Deterrence Justifies the Highest Amount of Statutory Damages.

[43] Subsection 38.1(5) of the *Act* establishes that “the court shall consider all relevant factors including (a) the good faith or bad faith of the defendant; (b) the conduct of the parties before and during the proceedings; and (c) the need to deter other infringements of the copyright in question...”

CA, supra para 21 at s. 38.1(5)(a)-(c).

[44] Bestmont’s demonstration of bad faith conduct satisfies the good faith element justifying in part, reason to increase the amount of statutory damages awarded to Ms. Rer. *Pinto v Bronfman Jewish Education Centre* defines bad faith as “conduct that is contrary to community standards of honesty, reasonableness or fairness”. Ms. Rer approached Bestmont in good faith proposing to license the Façade photographs (*Trial*). Bestmont in turn refused to return Ms. Rer’s property and without authorization used her photographs (*Trial*). This is bad faith treatment contrary to community standards of honesty, reasonableness and fairness (*Pinto*).

Pinto v Bronfman Jewish Education Centre, 2013 FC 945 at para 197 [*Pinto*].
Trial, supra para 10 at para 25.

[45] Regarding bad faith Harrington J in *Microsoft Corp. v 9038-3746 Quebec Inc* was deciding whether to award the maximum amount of \$20,000 for each of the 25 copyright

infringements. Harrington J found that the defendants acted in bad faith, and that this was one of three elements considered in justifying the maximum award. Furthermore, Bestmont's conduct satisfies the conduct of the parties' element which justifies in part reason to award the maximum amount of statutory damages to Ms. Rer.

Microsoft Corp v 9038-3746 Quebec Inc, 2006 FC 1509 at para 113, 108 [*Microsoft Corp*].
Trial, supra para 10 at para 20, 24-25.

[46] In consideration of Bestmont's conduct, Lodge J correctly concluded that there is a significant power imbalance between Bestmont and Ms. Rer (*Trial*). Further, Bestmont and other corporations need to respect the rights of individual content creators (*Trial*). Importantly, Lodge J recognized a significant need to deter conduct similar to that of Bestmont's conduct, satisfying the final element required to justify awarding the maximum amount of statutory damages (*Trial*).

Trial, supra para 10 at para 24.

[47] Supporting Lodge J's finding in *Rallysport the Court* in *Microsoft Corp v PC Village Co*, determined that it is necessary to:

... deter the Defendants from continuing their course of action and...the amount statutory damages must be sufficiently high to serve a salutary message and deter future infringements on the part of the named Defendants and other parties.

Bestmont failed to return Ms. Rer's package and remove her photographs from their hallways (*Trial*). Ms. Rer had to commence a claim against Bestmont for them to comply (*Trial*).

Bestmont's conduct warrants a need to deter future infringements (*Trial*). Further, hotels, and other large corporations need to be deterred from taking advantage of photographers and social media influencers (*Trial*). Therefore, on this basis awarding the maximum of \$20,000 for each of the fifty works infringed is fair.

Microsoft Corp v PC Village Co, 2009 FC 401 at para 39 [*PC Village Co*].
Trial, supra para 10 at para 10, 24.

[48] In seeking \$20,000 for each of the fifty infringed images, Ms. Rer's award would not be grossly disproportionate to the infringement. Relying on *Rallysport*, in addition to s. 38.1(5) several factors are considered to determine appropriate statutory damages which include: "(a) copyright economic loss considers the market value of the image actually created; (b) market value is not limited to lost licensing fees and can encompass production costs; (c) production costs can include labour costs; and (d) evidentiary gaps are not necessarily fatal."

Rallysport Direct LLC v 2424508 Ontario Ltd, 2020 FC 794 at para 24 [*Rallysport*].
CA, supra para 21 at s. 38.1(5)(a)-(c).

[49] Regarding statutory damages Fuhrer J in *Rallysport* stated: "[they] are not intended to be 1:1 proportional with provable "but-for" losses; rather, they can encompass both provable economic losses and additional factors such as deterrence." In consideration of the aforementioned factors (a-d), the production and labour costs Ms. Rer incurred travelling to Bestmont hotels for over a year to complete the Façades project, and an added deterrence factor for Bestmont's bad faith conduct. The maximum of \$20,000 for each work should be awarded pursuant to s. 38.1(1)(a) of the *Act*.

Rallysport, supra para 48 at para 9.
CA, supra para 21 at s. 38.1(1)(a).

[50] Further, Fuhrer J determined that "defendants have the burden of establishing that a total award...would be grossly out of proportion to the infringement." Expanding further, Fuhrer J considers gross proportionality to be an individualized analysis dependent on the facts of the case. In considering Bestmont's bad faith, conduct before the proceedings and the significance of deterrence as well as the four factors (a-d) enumerated by *Rallysport*, the maximum award of \$20,000 per work, for Ms. Rer's fifty works infringed is fair and proportionate pursuant to s. 38.1(5).

Rallysport, supra para 48 at paras 13, 12.
CA, supra para 21 at s. 38.1(5).

(v) *Awarding Punitive Damages Despite Ms. Rer Not Explicitly Claiming Them.*

[51] Although Ms. Rer did not explicitly claim punitive damages pursuant to s. 38.1(7) of the *Act*, she still retains the right to punitive damages. Considering this issue, the Court in *Entral Group International Inc v MCUE Enterprises Corp* states:

“[T]here is no statutory impediment to assessing and awarding exemplary or punitive damages in addition to statutory damages and, as the case law already referred to makes clear, this Court has been willing to award such damages where the facts warrant such an award.”

Therefore, even though Ms. Rer did not explicitly claim punitive damages they should be awarded in this circumstance.

Entral Group International Inc v MCUE Enterprises Corp, 2010 FC 606 at para 49 [*Entral*].

[52] *Entral* considers this issue and relies on *Whiten*, which states, “punitive damages will be awarded against a defendant...in exceptional cases for malicious, oppressive and high-handed misconduct that offends the court's sense of decency.”

Entral, supra para 51 at para 50.

[53] *Entral* outlines the different aspects that could influence the level of blameworthiness in determining punitive damages, which include: (a) whether the conduct was planned and deliberate; (b) the intent and motive of the defendant, whether the defendant persisted in the outrageous conduct over a lengthy period of time; (c) whether the defendant concealed or attempted to cover up his misconduct; (d) the defendant’s awareness that what he or she was doing was wrong; (e) whether the defendant profited from his misconduct.

Entral, supra para 51 at para 50.

[54] The purpose of punitive damages is to punish the defendant, assessing the plaintiff's compensation separately. Punitive damages address serious misconduct and should sting, therefore an award of \$500,000 is appropriate to the circumstances of this case. The sum of statutory damages and punitive damages sought for Ms. Rer in the amount of \$1,000,000 and \$500,000 respectively is appropriate. Courts have not previously hesitated to award maximum statutory damages where it was warranted.

PART V: ORDER REQUESTED

[55] The Appellant respectfully requests for the Court of Appeal's decision to be reversed and the Trial Court's decision to be reinstated.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed this 14th day of January 2022

Team 11

Counsel for the Appellant

PART VI: TABLE OF AUTHORITIES

LEGISLATION

Copyright Act, RSC 1985, c C-42.

JURISPRUDENCE

Ateliers Tango Argentin Inc. v. Festival d'Espagne & d'Amérique Latine Inc., [1997] RJQ 3030, 77 ACWS (3d) 400.

CCH Canadian Ltd v Law Society of Upper Canada, 2004 SCC 13, [2004] 1 SCR 339.

Century 21 Canada Ltd Partnership v Rogers Communications Inc, [2011] BCJ No 1679, 2011 BCSC 1196.

DRG Inc v Datafile Ltd, [1988] 2 FC 243, [1987] FCJ No 1056.

Entral Group International Inc v MCUE Enterprises Corp, 2010 FC 606, 188 ACWS (3d) 1138.

Microsoft Corp v PC Village Co, 2009 FC 401, 176 ACWS (3d) 1128.

Microsoft Corp v 9038-3746 Quebec Inc, 2006 FC 1509, 155 ACWS (3d) 170.

Philip Morris Products SA v Marlboro Canada Ltd, 2010 FC 1099, rev'g in part 2012 FCA 201, aff'g 2015 FCA 9.

Pinto v Bronfman Jewish Education Centre, 2013 FC 945, 233 ACWS (3d) 454.

Rains v Molea, 2013 ONSC 5016, 231 ACWS (3d) 787.

Rallysport Direct LLC v 2424508 Ontario Ltd., 2019 FC 1524, 315 ACWS (3d) 756.

Rallysport Direct LLC v 2424508 Ontario Ltd. 2020 FC 794, 322 ACWS (3d) 302.

Robertson v. Thomson Corp. (2004), 243 DLR (4th) 257, 34 CPR (4th), rev'g in part 2006 SCC 43.

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