

IN THE SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS

B E T W E E N:

WANDA RER

Appellant

- and -

BESTMONT HOTELS

Respondent

FACTUM FOR APPELLANT

PART I: OVERVIEW

[1] This case is about the rapidly growing content creation industry, and the need for copyright law to protect these new entrepreneurs in their negotiations with large corporations. Copyright law needs to evolve with technological and societal changes to meet the needs of this emerging group of copyright holders. Bestmont's interpretation of copyright law, if upheld, will have a stifling effect on photographers' ability to create and protect original works involving buildings located in a public place.

[2] The Appellant, Ms. Rer, is a talented and influential photographer who applied her skills, time, effort and judgement to produce a collection of photographs which she shared and offered to licence to Bestmont. Bestmont refused her offer but proceeded to misappropriate Ms. Rer's high quality photographs for its own commercial benefit.

[3] The Appellant respectfully requests that this Honourable Court overturn the decision of the Court of Appeal Intellectual Property Division which held that the respondent, Bestmont, did not infringe Ms. Rer's copyright in her photographs of Bestmont's hotels.

[4] Ms. Rer submits that the Court of Appeal Intellectual Property Division erred in:

- a. Its interpretation of s. 32.2(1)(b) and assessing originality when determining whether copyright subsists in both the Original and Filtered Photos;
- b. Concluding that Bestmont's use of Ms. Rer's photographs were not of a commercial nature;
- c. Determining the appropriate range of statutory damages; and,
- d. Determining the applicability of punitive damages.

[5] Ms. Rer has copyright in her photographs, as sufficient skill and judgement was involved in the creation of these original artistic works. Bestmont commercially infringed Ms. Rer's

copyright by hanging her Original Photos, as well as re-coloured versions of these photographs, in the guest hallways of their hotels. Bestmont attempted to raise a defence to this infringement under s. 3 of the Copyright Act. However, s. 3 cannot be interpreted in this way as this would prevent photographers, and other artists in this emerging market, from being able to enforce copyright in their own original works.

[6] The highest range of statutory damages should be awarded due to Bestmont’s bad faith, conduct before the proceedings, and the need to deter Bestmont and other large corporations from infringing the copyright of content creators in the future. If this Court determines that the statutory damages are insufficient to deter Bestmont and other large corporations from taking advantage of content creators, punitive damages should be awarded. The appellant submits that to conclude otherwise would be to stifle the creativity of a new class of rights holders.

PART II: STATEMENT OF FACTS

[7] Wanda Rer is an artist, photographer, and social media influencer who, using her camera, captured the uniqueness of Bestmont’s hotels and their famous red marquee in a photo project entitled “Façades.” Ms. Rer has nearly a decade of experience as a photographer and her understanding of millennial style and culture has led her to develop a substantial social media following.

Wanda Rer v Bestmont Hotels, 21 TCCIP 1222 at paras 1-3 [*Trial*].

[8] Ms. Rer created 10 original works by photographing each of Bestmont’s hotel marquees (the “Original Photos”). Using her decade of accumulated knowledge, Ms. Rer carefully chose a distance of 100 feet from each hotel, in order to allow the viewers of the Façades photo series to compare and contrast the design and atmosphere of each. Ms. Rer made the artistic decision to maintain a consistent technique and camera set-up for each of the 10 Bestmont hotels.

Trial, *supra* para 7 at para 4.

[9] Using her developed aptitude as a social media influencer, Ms. Rer discerningly chose four filters (sepia, oil painting, pixilation, and pencil drawing) which best showcased the uniqueness of the Bestmont hotels. She created 40 additional photographs by applying these filters to each of the Original Photos (the “Filtered Photos”). These filters can substantially change various components of the photograph including colour, contrast, brightness, saturation, vibrance, warmth, tint, and sharpness.

Trial, supra para 7 at para 5.

[10] After completing the Façades project, Ms. Rer provided Bestmont with high resolution electronic copies of all 50 photographs and offered to licence her photos to them. Bestmont refused her proposal, but kept all 50 photographs and wrongly accused her of infringing its copyright in the marquee and hotels. Bestmont demanded that she destroy all copies of the work, refused to return her electronic copies, and ignored her requests to remove the photos from its hallways.

Trial, supra para 7 at paras 6-7.

[11] Bestmont misappropriated her photographs by using them to decorate the guest hallways of their hotels without Ms. Rer’s permission or any attribution. Bestmont applied 11 filters to the electronic copies of the Original Photos, including the four filters chosen by Ms. Rer, and hung the 12 copies of each Façade photograph in all the Bestmont hotels.

Trial, supra para 7 at paras 8-9.

[12] Ms. Rer alleges that Bestmont infringed her copyright by reproducing her Original and Filtered Photos and using them to decorate the guest hallways of each of their hotels. She is seeking the highest statutory damages pursuant to s. 38.1 of the *Copyright Act* and punitive damages in the amount of \$500,000 as per the Decision of the Trial Judge, below. The original claim also included a permanent injunction; however, Bestmont removed the allegedly infringing photographs from their hotels prior to the trial.

Trial, supra para 7 at paras 9-10, 25.

PART III: POINTS IN ISSUE

[13] The appellant will argue the following issues on this appeal:

- a. Does Ms. Rer own copyright in the Façade photographs and if so, to what extent has Bestmont infringed that copyright?
- b. Upon a finding of infringement, what is the appropriate quantum of statutory damages, and if punitive damages are appropriate, in what amount?

PART IV: ARGUMENTS IN BRIEF

(I) Copyright in the Photos

[14] Subsection 5(1) of the *Canadian Copyright Act* states that “copyright shall subsist in Canada, for the term hereinafter mentioned, in every *original* literary, dramatic, musical and artistic work.” An original work is defined as “every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression.”

Copyright Act, RSC 1985, c C-42, ss 5(1), 2 [*Act*] [emphasis added].

[15] According to the Supreme Court of Canada in *CCH Canadian Ltd v Law Society of Upper Canada*, there must be an exercise of skill and judgement to establish originality. Skill is defined as “the use of one's knowledge, developed aptitude or practiced ability in producing the work” and judgement is defined as “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.” There must be an intellectual effort and the exercise of the skill and judgement must not be so trivial as to be purely mechanical.

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

(A) The Original Photos

[16] Ms. Rer exercised skill and judgement in the creation of each Original Photo. Canadian courts are not tasked with evaluating the artistic or aesthetic nature of the photograph, but rather the presence of skill and judgement. In an Ontario decision, the Court found that “original photographs inherently fall under the scope of copyright.” “Photographers necessarily exercise judgement when selecting subject matter, angles, staging, framing and ultimately what products to use.” Ms. Rer’s careful selection of photographic subject, aperture, ISO and shutter speed, distance, and framing of the photo demonstrates her intellectual effort far exceeded a mere mechanical exercise.

Trader Corp v CarGurus, Inc, 2017 ONSC 1841 at paras 23-26 [*Trader Corp*].
Rallysport Direct LLC v 2424508 Ontario Ltd, 2019 FC 1524 at para 47 [*Rallysport 2019*].

[17] Ms. Rer's credentials as a photographer are significant. She has spent almost a decade as an artist, photographer and social media influencer. During that time, she has honed her craft, and her skill and practiced ability has led her to amass a substantial social media following. Using her knowledge of millennial culture and her artistic eye, she knew that Bestmont would make the perfect photo subject that would resonate with people. Her recognition of the appeal of Bestmont’s marquee to the public speaks to her judgement used during this project.

Trial, supra para 7 at para 1.

[18] In creating an image, photographers primarily rely on the elements of photography: aperture, ISO, and shutter speed. These artists study for years to learn the best techniques to incorporate these three elements together, learning the skill and judgement necessary to become an influential photographer. Using her decade of accumulated skill and knowledge, she carefully chose the distance at which she captured the marquee to optimally feature its architectural appeal. She made an artistic decision to use this same technique and set-up at each Bestmont hotel so her

viewers would be able to compare the similarities and differences in the atmosphere and design of each hotel.

Trial, supra para 7 at para 4.

(B) The Filtered Photos

[19] In addition, Ms. Rer’s Filtered Photos are original works; this is seen in the exercise of skill and judgement used in their creation. Ms. Rer used her developed aptitude as a social media influencer and technical competency to apply the four filters, out of the many available, which would best complement Bestmont’s uniqueness.

Trial, supra para 7 at para 5.

[20] A substantial portion of a work has been discussed as being a substantial part of the originality of a work.¹ Looking to other jurisdictions’ interpretations of substantial portion can assist in determining the originality of the Filtered Photos. If a substantial part is changed, then it speaks to the originality needed to produce the Filtered Photos, and thus their skill and judgement.

Cinar Corporation v Robinson, 2013 SCC 73 at para 26 [*Cinar*].

[21] In an English Court of Appeal decision, the Court held that a “substantial part [of an artistic work] lies in the ‘feeling and artistic character’.” Ms. Rer’s application of the filters substantially changed a large portion of the Original Photos, the feeling and artistic character, thus creating new works.

Bauman v Fussell (1953), [1978] RPC 485, [1953] 5 WL UK 72 (EWCA Civ) at 485 [*Bauman*].

[22] An image filter can change the secondary elements of photography, including colour, exposure, contrast, brightness, saturation, vibrance, warmth, tint, and sharpness of the photograph, all of which are essential components to the photograph. Ms. Rer relied on her experience as a

¹ Originality consists of the exercise skill and judgement in a work, surpassing a mere mechanical exercise, per *CCH*.

social media influencer to know which filters would be most complimentary to her photos. Artists across the globe use techniques equivalent to those involved in the application of a filter to change the feeling and artistic character of their works, and are lauded for their efforts in creating a distinct style. These techniques involve no less skill and judgement. The originality and artistic merit of the works of Andy Warhol speaks for themselves; his “Prince Series” is a set of 12 portraits of the musician, Prince, each composed of the same subject, composition, and framing. However, each work differs in its colouration – in essence, they are ‘filtered’ to create new works.

[23] The amount of skill and judgment must be beyond a mere mechanical exercise. Ms. Rer’s filtering of the Original Photos creates her distinct style; her decision making, and accumulated experience, informed the careful selection and application of filters, which speaks to the skill and judgement necessary for their creation.

[24] In addition, the Original and Filtered Photos form a compilation titled “Façades.” A compilation is defined in s. 2 of the *Act* as “a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof.” Ms. Rer used skill and judgement in choosing Bestmont hotels to be the focus of her photos, and maintained a consistent technique and camera set-up for each photo to allow for the audience to compare and contrast the differences in each images’ design and atmosphere.

Trial, supra para 7 at para 3.
Act, supra para 14 at s 2.

[25] This compilation forms an additional work on top of the 50 Original and Filtered Photos; per s. 2.1(2) of the *Copyright Act*: “The mere fact that a work is included in a compilation does not increase, decrease or otherwise affect the protection conferred by this Act in respect of the copyright in the work or the moral rights in respect of the work.” “Copyright may subsist separately in a compilation of elements which may themselves individually be the subject of copyright.”

Act, supra para 14 at s 2(2).
Allen v Toronto Star Newspapers Ltd (1997), 36 OR (3d) 201 at para 13, 152 DLR (4th) 518 [*Allen*].

(II) Infringement

[26] Bestmont has infringed Ms. Rer’s copyright in at least one of the following ways. First, they have infringed by making copies of her Original Photos, and by hanging and exhibiting those works in public. Second, they created colourable imitations of her filtered works, and subsequently displayed them.

Trial, supra para 7 at para 8.

[27] Section 27(1) of the *Copyright Act* defines infringement as doing, “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.” Infringement requires proof of three elements: 1. The defendant has access to the works in question; 2. The defendant’s work was created *after* the plaintiff’s; and 3. The plaintiff’s work, or a substantial part thereof was copied.

Act, supra para 14 at ss 27(1), 3(1).
U & R Tax Services Ltd v H & R Block Canada Inc, [1995] FCJ No 962, 56 ACWS (3d) 396 [*U & R*].
Wolanski v Rhombus Media Inc, [2000] FCJ No 1582, ACF No 1582 [*Wolanski*].

[28] Section 27(2) of the *Copyright Act* requires that the alleged infringer knows, or should have known, that their copy of the work infringes or would infringe the copyright of another person. Bestmont is a sophisticated party. As a national hotel chain, they certainly have the means to retain legal counsel. Furthermore, Bestmont was provided the works by Ms. Rer prior to making copies of and displaying them without her consent, speaking to the access and subsequent creation of the infringing photos.

Act, supra para 14 at s 27(2).
Trial, supra para 7 at para 6.

[29] The Supreme Court of Canada discussed at length the *substantial part* section of this test in *Cinar Corporation v Robinson*. “A substantial part of a work is a flexible notion. It is a matter of fact and degree . . . a substantial part of a work is a part of the work that represents a substantial

portion of the author’s skill and judgement expressed therein.” In creating an image, photographers predominantly rely on the primary and secondary elements of photography, and study for years to learn the best techniques to incorporate these elements together using the skill and judgement necessary to become influential and renowned. Together, these create, in its most basic form, an image.

Cinar, *supra* para 20 at para 26.

[30] In recreating the photos, irrespective of any colouration, Bestmont necessarily copied the aperture, ISO, shutter speed, framing, subject matter, and composition of all 50 of Ms. Rer’s photographs, and in doing so infringed her copyright. Only Mr. Rer had the exclusive right to modify and display her photos, and create new, filtered works from the Original Photos.

[31] Bestmont copied the Original Photos, and created colourable imitations of both the Original and Filtered Photos. In a recent ONCA case, *Rains v Molea*, the most popular definition of ‘colourable imitation’ was provided as follows:

In perpetuating a colourable imitation, the infringer attempts to pass off as novel a work which is only a reproduction of . . . another work, by making alterations to the form of the original . . . The term ‘colourable’ ordinarily denotes an element of deception or camouflage; a person may therefore be said to infringe a work by modifying it in such a way as to conceal such infringement.

Rains v Molea, 2013 ONSC 5016 at para 45 [*Rains*].

[32] Bestmont’s attempt to camouflage both the Original and Filtered Photos behind their own editing software was in itself the creation of a colourable imitation, therefore infringing Ms. Rer’s copyright.

Trial, *supra* para 7 at para 8.

(III) Section 3 is Not a Defence to Infringement

[33] The Court of Appeal erred in finding that Bestmont reproduced *its own* copyright in the marquee by reproducing, filtering, and exhibiting in public Ms. Rer’s Original and Filtered Photos.

Copyright does not protect ideas themselves, but rather the expression of ideas. Ms. Rer’s photos bear no similarity in expression, and little resemblance in idea, to the original architectural works. Bestmont’s idea was a unique façade and marquee, expressed through the construction and placement of said architectural elements on the front of a chain of hotels. Ms. Rer’s expression of the marquee in the Façades project is a completely different expression of Bestmont’s idea, a compilation of original photographs, artistically taken and compiled in a photo project. It cannot be said that that expression through architectural works is the same as Ms. Rer’s photos. Indeed, even the idea is different; Bestmont attempted to create a unique architectural element, whereas Ms. Rer created original photographs to contrast forms of a landmark.

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

[34] Bestmont did not reproduce their own copyrighted work (i.e., construct a new hotel and marquee), but rather Ms. Rer’s copyright protected Original and Filtered Photos. Section 3 of the *Act*, interpreted purposively and in line with the language and context of the *Act*, speaks to the importance of distinguishing between expression and ideas. Section 32.2(1)(b)(i) reads as follows: “It is not an infringement of copyright for any person to reproduce, in a painting, drawing, engraving, photograph or cinematographic work, an architectural work, *provided the copy is not in the nature of an architectural drawing or plan.*” This distinction, which does not allow for architectural drawings or plans, creates an *exception* to this exception. Architectural drawings or plans are the same or overly similar to the expression of a building, whereas the other types of works, including photographs, are a different expression entirely.

Act, *supra* para 14 at ss 3(1), 32.2(1)(b)(i) [emphasis added].

[35] Original photographs inherently attract copyright protection per *Trader Corp.* Therefore this separate expression, the Original and Filtered Photos, should be granted the same s. 3 rights as any original work, regardless of Bestmont’s copyright. To not allow enforcement of copyright

in these other categories would undermine the rights of creators and stifle this growing content creation industry.

Trader Corp, supra para 16 at paras 23-26.
Rallysport 2019, supra para 16 at para 47.

[36] The Court of Appeal erred in interpreting the *Act* to allow photographs of Bestmont's buildings pursuant to s. 32.2(1)(b)(i) but not allowing these photos to be considered original works protected under s. 3. This is an interpretation incompatible with current case law and legislation. Canadian law allows the creation of photographs of copyrighted buildings in public. Original photographs inherently attract copyright protection per *Trader Corp* and affirmed in *Rally Sport*. Therefore, Ms. Rer has the right to enforce copyright in her Original and Filtered Photos against Bestmont, regardless of their ownership of copyright in the building.

Trader Corp, supra para 16 at paras 23-26.
Rallysport 2019, supra para 16 at para 47.
Act, supra para 14 at ss 32.2(1)(b)(i), 3(1).
Appeal, supra para 33 at para 3.

[37] The primary principle in statutory interpretation is that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense *harmoniously* with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament.” Reading s. 32.2(1)(b)(i) in its ordinary sense and harmoniously within the *Act* should allow for a photographer to copyright and protect their photos of buildings, even if the subject matter is itself copyrighted. To not allow for such a work would be to allow the copyright of ideas, not the expression of those ideas.

Act, supra para 14 at s 32.2(1)(b)(i).
Rizzo & Rizzo Shoes Ltd, Re, [1998] SCR 27 at para 21, [1998] SCJ No 2 [*Rizzo*] [emphasis added].

[38] Bestmont cannot use their copyright in the building and marquee as a defence to their infringement of Ms. Rer's copyright in the Original and Filtered Photos. In attempting to raise a defence under s. 3 of the Copyright *Act*, Bestmont is making an argument which is more familiar to trademark law. While s. 3 of the *Copyright Act* provides a description of the sole rights of the

author of a work, s. 19 of the *Trademark Act* grants the owner of the registered trademark “...the exclusive right to the *use* throughout Canada of the trademark.” Section 19 of the *Trademark Act* has been used as a complete defence in passing off and infringement cases. However, the Federal Court of Appeal in *Group III International v Travelway Group International* stated that “[t]he equivalent protection of section 19 is not available in other statutes governing intellectual property law in Canada. In that regard, trademark law is distinct from patent law and copyright law.” This suggests that the complete defence available through s. 19 of the *Trademark Act* is unique and not available under s. 3 of the *Copyright Act*.

Trial, supra para 7 at para 17.

Act, supra para 14 at s 3.

Trademarks Act, RSC 1985, c 7-13 s 19 [*TA*] [emphasis added].

Molson Canada v Oland Breweries Ltd/Brasseries Oland Ltée (2002), 214 DLR (4th) 473 at para 16, [2002] OJ No 2029 [*Molson*].

Boulangerie Vachon Inc v Racioppo, 2021 FC 308 at para 40 [*Boulangerie*].

Group III International v Travelway Group International, 2020 FCA 210 at paras 32-34 [*Group III*].

(IV) Damages

(A) Bestmont used the photographs for a commercial purpose

[39] Under s. 38.1(1) of the *Act*, a copyright owner may elect to recover an award of statutory damages for an infringement to their copyright. This section distinguishes between infringement for a non-commercial and commercial purpose, however there is no definition for a commercial or non-commercial purpose in the *Act*. In addition, a non-commercial purpose has rarely been found in the Canadian case law, and when it has, it has focused on individuals.

Parent c Gagnon, 2016 QCCQ 3744 at para 10 [*Parent*].

[40] In 2012, s. 38.1(1) of the *Act* was amended to create the distinction for commercial and non-commercial infringements. The debates in the Senate surrounding these amendments stated that it is unfair for an individual who violates copyright without any commercial advantage or private gain, to be charged on the same scale as a commercial entity. The debates in the House of

Commons emphasized the concept of proportionality and stated that commercial infringement requires a larger penalty, due to the damage it can cause to the marketplace.

“An Act to amend the Copyright Act”, 2nd reading, *Senate Debates*, 41-1, No 94 (20 June 2012) at 1640 (Hon Stephen Greene) [Senate Debates].

“An Act to amend the Copyright Act”, 2nd reading, *House of Commons Debates*, 41-1, No 31 (18 Oct 2011) at 1330 (Scott Simms) [House of Commons Debates].

[41] Bestmont is a large corporation which took advantage of a self-employed artist by misappropriating Ms. Rer’s works and hanging it in its hotels. It is clear from the debates in the House of Commons and the Senate that this is not what Parliament had in mind when it created the non-commercial range for statutory damages. Bestmont actions have an inherently commercial purpose due to the fact that it is a corporation. Corporations are incorporated under the *Canada Business Corporations Act*, and similar provincial legislation, for the purpose of carrying on business in Canada.

Canada Business Corporations Act, RSC 1985, c C-44, s 4 [CBCA].

[42] In addition, the Courts have emphasized that infringing activities do not need to generate a profit in order to have a commercial purpose. While displaying the photographs in the guest hallways does not directly generate profits for Bestmont, it enhances the ambience of the hotel. This is similar to JW Marriott using scents as a marketing tool in their hotels. Having an aesthetically appealing interior to the hotel is essential to Bestmont’s business. With their unique designs and famous red marquee, customers come to Bestmont partly for their unique aesthetic.

Young v Thakur, 2019 FC 835 at para 45 [Young].

Mejia v LaSalle College International Vancouver Inc, 2014 BCSC 1559 at para 214 [Mejia].

1395804 Ontario Ltd (cob Blacklock's Reporter) v Canadian Vintners Assn, [2015] OJ No 5369 (Sm Cl Ct) at para 2 [Canadian Vintners Assn].

Girard, Cassandra. “Meet the scent marketing firm winning the Battle For Your Nose”, (24 July 2017), online: *NBCNews.com* <<https://www.nbcnews.com/business/your-business/meet-scent-marketing-firm-winning-battle-your-nose-n783761>> [Girard].

[43] Analogously, people go to restaurants not only for the food but for the atmosphere. Background music in restaurants can significantly affect the ambience of the establishment. A

Copyright Board tariff decision discussed the use of background music in businesses and stated that it can be used as a marketing tool to create the right mood or image for the business. Similarly, in a hotel like Bestmont, the aesthetically pleasing photographs in their guest hallways are used to create the mood or image for their hotel. Customers are not only paying for a place to sleep, they are paying for the service, the décor, and overall ambience of the hotel.

Re Public Performance of Sound Recordings, 52 CPR (4th) 189, [2006] CBD No 6 (Copyright Board Canada) at para 121 [*Public Performance*].

[44] Lastly, the photographs of the Bestmont hotels in the guest hallways act as a type of advertisement. The photographs promote the beauty and uniqueness of the Bestmont hotels and are seen by all of Bestmont’s customers. The Courts have classified advertisements as a type of commercial purpose. For example, the British Columbia Supreme Court in *Meja v LaSalle College International Vancouver Inc.* classified the use of a copyrighted photograph in an advertising campaign as having a commercial purpose.

Meja, *supra* para 42 at paras 177, 215.
Young, *supra* para 42 at para 45.

(B) *Ms. Rer should be awarded the highest range of statutory damages*

[45] Ms. Rer has elected for statutory damages under s. 38(1) of the *Act*. Statutory damages are distinct from damages claimed under s. 35 of the *Act* which provides for the recovery of damages of the copyright holder and profits of the infringer. Statutory damages are available to compensate losses which are difficult to quantify. While actual damages may be considered when determining the quantum of statutory damages, “...any estimation of probable damages is not determinative and the use of such estimates in determining statutory damages is likely intended as one means of ensuring that any damages award is fair and proportionate.”

Act, *supra* para 14 at s 3.
Royal Conservatory of Music v MacIntosh, 2016 FC 929 at para 120 citing Ronald E. Dimock, in *Intellectual Property Disputes: Resolutions & Remedies* (Toronto, ON: Thomson Reuters Canada, 2016) (loose-leaf revision 5), ch 3 at 3-38 [*Royal Conservatory*].

[46] The following factors for assessing the quantum of statutory damages for commercial infringements are set out in s. 38.1(5) of the *Act*: (a) the good 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

Act, supra para 14 at s 38.1(5).

(i) Bad Faith and Conduct of Bestmont

[47] The first two factors in s. 38.1(5), the good or bad faith and the reprehensible, evasive, and unreasonable conduct of the parties, are often considered together. This analysis is highly contextual and fact specific.

Louis Vuitton Malletier S.A. v. Lin, 2007 FC 1179 at para 23 [*Louis Vuitton* 2007].
Microsoft Corp v 1276916 Ontario Ltd, 2009 FC 849 at para 40 [*Microsoft Corp* 2009].
Rallysport Direct LLC v 2424508 Ontario Ltd, 2020 FC 794 at paras 10–11 [*Rallysport* 2020].

[48] Bestmont, a large business, acted in bad faith in their dealings with the self-employed social media influencer, Ms. Rer. Not only did Bestmont refuse to pay for the photographs, but it used the samples, provided in good faith, to decorate its hotels. Bestmont was well aware of the power imbalance that existed, and abused its position of power by using Ms. Rer's high quality photographs for its own commercial benefit. This occurred after Bestmont rejected Ms. Rer's proposal and refused to provide Ms. Rer with any compensation for the use of her works.

Trial, supra para 7 at paras 7-8.

[49] If Bestmont had wished to use Ms. Rer's photographs they ought to have negotiated an acceptable rate with Ms. Rer. While Bestmont argues that Ms. Rer infringed its copyright in the hotel designs and marquee, this was not justification for Bestmont to infringe Ms. Rer's copyright in the photographs.

[50] In addition, the Federal Court has repeatedly considered parties ignoring cease and desist letters as a factor when assessing the bad faith and conduct of the parties. Prior to commencing

this action, Ms. Rer reached out to Bestmont to demand that it remove her photographs from its guest hallways. Bestmont acted in bad faith by ignoring Ms. Rer’s demands prior to this action. By removing the infringing photographs from the hotels once Ms. Rer sought legal remedies, Bestmont demonstrated that it knew that it was infringing Ms. Rer’s copyright.

Trial, supra para 7 at para 9.

Microsoft Corp v PC Village Co, 2009 FC 401 at para 34 [*PC Village*].

Rallysport 2020, supra para 47 at paras 10, 37.

Century 21 Canada Ltd Partnership v Rogers Communications Inc, 2011 BCSC 1196 at para 416 [*Century 21*].

Telewizja Polsat SA v Radiopol Inc, 2006 FC 584 at para 50 [*Telewizja*].

(ii) The Need to Deter Other Infringements of the Copyright

[51] In cases where the plaintiff’s area of business is particularly vulnerable to infringements and significantly affected by the infringement, deterrence has been held to be a significant factor in assessing statutory damages. For example, this was the case in *Video Box Enterprises Inc v Lam* where the Federal Court considered infringements involving the video rental business. The content creation industry is similarly afflicted due to the ease with which their products can be copied without any attribution or compensation.

LS Entertainment Group Inc v Formosa Video (Canada) Ltd, 2005 FC 1347 at para 65 [*LS Entertainment*].

Louis Vuitton 2007, supra para 47 at para 25.

Video Box Enterprises Inc v Lam, 2006 FC 546 at para 25 [*Video Box*].

[52] In the present circumstances, there is a need to deter other large corporations from taking advantage of self-employed social media influencers due to the large power imbalance in negotiations between these corporations and content creators. While self-employed content creators need the revenue from large corporations, large corporations have a wide choice of content creators available to choose from. The content creation economy is growing – it received over \$1.7 billion in investments in 2021 alone, and content creators rely on brand deals for up to 77% of their revenue. Copyright law needs to evolve with societal and technological changes and therefore

should be interpreted and applied in a forward looking manner in order to meet the needs of this emerging group of copyright holders.

CB Insights. “The creator economy explained: How companies are transforming the self- monetization boom”, (23 June 2021), online: CB Insights Research <<https://www.cbinsights.com/research/report/what-is-the-creator-economy/>> [CB Insights].

[53] Lastly, the Federal Court has stated that “the amount for statutory copyright damages must be sufficiently high to serve a salutary message and deter future infringements on the part of the named Defendants and other parties.” Therefore the appellant submits that this Court should award the highest statutory damages, due to Bestmont’s egregious conduct and in order to deter Bestmont and other large corporations from taking advantage of content creators.

PC Village, supra para 50 at para 39.

(C) The Court should award punitive damages

(i) The Trial Court had the Authority to Award Punitive Damages

[54] The trial judge had the authority to award punitive damages even if Ms. Rer did not explicitly claim punitive damages. The Supreme Court of Canada in *Whiten v Pilot Insurance* suggests that punitive damages need to be specifically pleaded separately from a claim for general damages in order to ensure sufficient notice of the charge to the infringer and to provide them with an opportunity to respond. The Supreme Court of Canada in *Whiten* then states that “whether or not a defendant has in fact been taken by surprise by a weak or defective pleading will have to be decided in the circumstances of a particular case.”

Trial, supra para 7 at para 25.

Whiten v Pilot Insurance, 2002 SCC 18 at paras 86–88 [*Whiten*].

[55] Cases involving general damages, such as personal injury cases, often do not have any details in their pleadings which would give the defendants notice of expected punitive damages. That is dissimilar from the present case where sufficient facts regarding Bestmont’s egregious bad faith behaviour and the need for general and specific deterrence were available to Bestmont, as

those facts flow from the pleadings concerning statutory damages. The trial judge recognized this in finding that Bestmont’s behaviour met the basis for punitive damages. As a result, Bestmont was aware or ought to have been aware of the facts necessary to show punitive damage. Therefore, in the circumstances of this particular case, the fairness issue contemplated by *Whiten* does not arise and the Court had the authority to award punitive damages.

Trial, supra para 7 at para 25.
Whiten, supra para 54 at paras 86–88.

(ii) The Court Should Reinstate the Trial Judges Award of Punitive Damages

[56] Section 38.1(7) of the *Act* provides that recovering statutory damages does not preclude a copyright owner from seeking punitive damages. Punitive damages are awarded for “malicious, oppressive and high-handed, [conduct which] offends the court’s sense of decency, and represents a marked departure from ordinary standards of decent behaviour.”

Act, supra para 14 at s 38.1(7).
Microsoft Corp v Liu, 2016 FC 950 at para 25 [*Microsoft Corp* 2016].

[57] When determining punitive damages the court should consider: “whether the conduct was planned and deliberate; the intent and motive of the defendant; whether the defendant has persisted in the outrageous conduct over a lengthy period of time; whether the defendant has concealed or attempted to cover up its misconduct; whether the defendant was aware of what he or she was doing was wrong; and finally whether the defendant profited from its misconduct.”

Louis Vuitton Malletier SA v 486353 BC Ltd (cob Wynnie Lee Fashion), 2008 BCSC 799 at para 85 [*Louis Vuitton* 2008].

[58] Bestmont demonstrated a blatant disregard for Ms. Rer’s copyright as Bestmont deliberately used her photographs without permission or payment. Despite receiving notice from Ms. Rer that they were infringing her copyright, they continued to use and benefit from the photographs to enhance the ambience of their hotels. Further, Bestmont removed the photographs

from the hallways before the trial, indicating that they knew that using Ms. Rer's photographs was wrong.

Trial, supra para 7 at paras 8–10.

[59] Bestmont's choice to remove the infringing photographs so close to trial was a transparent, tactical decision, taken in an attempt to mitigate its damages. This self-serving action by Bestmont should not be used as a basis for mitigating an award of punitive damages. The Federal Court has previously stated that admissions of wrong doing, likely done for the purpose of limiting liability, are of little value to the defendant.

Trial, supra para 7 at para 10.

Nintendo of America Inc v King, 2017 FC 246 at para 172 [*Nintendo*].

[60] Punitive damages should be applied when other damages, such as statutory damages, have been found to be inadequate to deter and denounce the behaviour. If this Court finds that the deterrent effect of the statutory damages is insufficient to deter Bestmont and other large corporations, it should consider punitive damages.

Microsoft Corp 2016, supra para 56 at para 26 citing *Whiten, supra* para 54 at para 123.

[61] In addition, the Supreme Court of Canada has said that the financial power of the defendant may be considered where "it is directly relevant to the defendant's misconduct" or in "other circumstances where it may rationally be concluded that a lesser award against a moneyed defendant would fail to achieve deterrence." As stated by the trial judge, many of the content creators in Ms. Rer's position would not have the means to bring an action to enforce their rights. This financial imbalance encourages large corporations to take advantage of content creators. In order to properly deter Bestmont and other large corporations, the damages awarded by the Court need to be proportionate to their size. An award limited to statutory damages in this case would not be felt by Bestmont and would be inadequate to accomplish the objectives of retribution, deterrence, and denunciation.

Whiten, supra para 54 at paras 119, 123.
Trial, supra para 7 at para 24.

[62] Ms. Rer submits that the trial judge's award of \$500,000 in punitive damages was appropriate in light of: (i) Bestmont's deliberate attempt to steal Ms. Rer's photographs, (ii) it's disregard of Ms. Rer's rights as copyright holder of the photographs and (iii) the need to deter large corporations from persisting in this behaviour when interacting with the content creator industry.

[63] Bestmont's blatant disregard of Ms. Rer's copyright should be denounced to prevent a stifling effect on content creators' ability to protect their original works. With the growth of the content creator industry, the network of connections between large corporations and social media influencers is growing, with the latter having little bargaining power. In order to facilitate the growth of this new industry, the law needs to strongly condemn and deter large corporations from using their size, financial resources, and market position to take advantage of these smaller entities.

PART V: ORDER REQUESTED

[64] The Appellant respectfully requests that the Court grant the appeal, and exercise its discretion to substitute its decision for that of the trial judge, and award Ms. Rer statutory and punitive damages in the amount of \$1,520,000.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Signed this 14th day of January, 2022

Team No. 12

Counsel for the Appellant

PART VI: TABLE OF AUTHORITIES

LEGISLATION
<i>Canada Business Corporations Act</i> , RSC 1985, c C-44, s 4.
<i>Copyright Act</i> , RSC 1985, c C-42, ss 2, 2(2), 3, 3(1), 5(1), 27(1), 27(2), 32.2(1)(b)(i), 38.1(5)
<i>Trademarks Act</i> , RSC 1985, c 7-13, s 19.

JURISPRUDENCE
<i>Allen v Toronto Star Newspapers Ltd</i> (1997), 36 OR (3d) 201, 152 DLR (4th) 518.
<i>Bauman v Fussell</i> (1953), [1978] RPC 485, [1953] 5 WL UK 72 (EWCA Civ).
<i>Bestmont v Wanda Rer</i> , 2021 CAIP 333.
<i>Boulangerie Vachon Inc v Racioppo</i> , 2021 FC 308.
<i>CCH Canadian Ltd v Law Society of Upper Canada</i> , 2004 SCC 13.
<i>Century 21 Canada Ltd Partnership v Rogers Communications Inc</i> , 2011 BCSC 1196.
<i>Cinar Corporation v Robinson</i> , 2013 SCC 73.
<i>Group III International v Travelway Group International</i> , 2020 FCA 210.
<i>LS Entertainment Group Inc v Formosa Video (Canada) Ltd</i> , 2005 FC 1347.
<i>Louis Vuitton Malletier SA v Lin</i> , 2007 FC 1179.
<i>Louis Vuitton Malletier SA v 486353 BC Ltd (cob Wynnies Lee Fashion)</i> , 2008 BCSC 799.
<i>Mejia v LaSalle College International Vancouver Inc</i> , 2014 BCSC 1559.
<i>Microsoft Corp v 1276916 Ontario Ltd</i> , 2009 FC 849.
<i>Microsoft Corp v Liu</i> , 2016 FC 950.

<i>Microsoft Corp v PC Village Co</i> , 2009 FC 401.
<i>Molson Canada v Oland Breweries Ltd/Brasseries Oland Ltée</i> (2002), 214 DLR (4th) 473, [2002] OJ No 2029.
<i>Nintendo of America Inc. v King</i> , 2017 FC 246
<i>Parent c Gagnon</i> , 2016 QCCQ 3744.
<i>Rains v Molea</i> , 2013 ONSC 5016.
<i>Rallysport Direct LLC v 2424508 Ontario Ltd</i> , 2019 FC 1524.
<i>Rallysport Direct LLC v 2424508 Ontario Ltd</i> , 2020 FC 794.
<i>Re Public Performance of Sound Recordings</i> , 52 CPR (4th) 189, [2006] CBD No 6 (Copyright Board Canada).
<i>Rizzo & Rizzo Shoes Ltd, Re</i> , [1998] SCR 27, [1998] SCJ No 2.
<i>Royal Conservatory of Music v MacIntosh</i> , 2016 FC 929
<i>Telewizja Polsat SA v Radiopol Inc</i> , 2006 FC 584.
<i>Trader Corp v CarGurus, Inc</i> , 2017 ONSC 1841.
<i>U & R Tax Services Ltd v H & R Block Canada Inc</i> , [1995] FCJ No 962, 56 ACWS (3d) 396.
<i>Video Box Enterprises Inc v Lam</i> , 2006 FC 546.
<i>Wanda Rer v Bestmont Hotels</i> , 21 TCCIP 1222.
<i>Whiten v Pilot Insurance</i> , 2002 SCC 18.
<i>Wolanski v Rhombus Media Inc</i> , [2000] FCJ No 1582, [2000] ACF No 1582.
<i>Young v Thakur</i> , 2019 FC 835.
<i>1395804 Ontario Ltd (cob Blacklock's Reporter) v Canadian Vintners Assn</i> , [2015] OJ No 5369 (Sm Cl Ct).

SECONDARY SOURCES

“An Act to amend the Copyright Act”, 2nd reading, *House of Commons Debates*, 41-1, No 31 (18 Oct 2011) at 1330 (Scott Simms) [House of Commons Debates].

“An Act to amend the Copyright Act”, 2nd reading, *Senate Debates*, 41-1, No 94 (20 June 2012) at 1640 (Hon Stephen Greene) [Senate Debates].

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