

THE SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS

BETWEEN:

WANDA RER

Appellant

– and –

BESTMONT HOTELS

Respondent

FACTUM OF THE APPELLANT

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PART I: OVERVIEW

[1] The core issue of this Appeal is whether the intent of Parliament is to balance owner and user rights in the *Copyright Act (CA)* through the co-existence of s. 3 and the exemption from infringement in s. 32.2(1) or whether the legislative intent is to prioritize s. 3 rights in such a way as to limit the rights afforded to works that rely on s. 32.2(1). More broadly, this Appeal is about clarifying the scope of originality in photographs.

[2] The Appellant, Ms. Wanda Rer (“Ms. Rer”), respectfully asks this Honourable Court to reverse the decision of the Court of Appeal and reinstate the decision of the Trial Judge which correctly held that the Respondent, Bestmont Hotels (“Bestmont”) infringed Ms. Rer’s copyright in the original and filtered photographs she created of Bestmont’s hotel designs and marquees.

[3] Copyright subsists in each one of Ms. Rer’s 50 original works, made up of the 10 “Original Photographs” and the 40 “Filtered Photographs” hereinafter defined at Paragraph 7.

[4] Ms. Rer’s photographs are derivative works, which does not preclude them from full protection under the *CA*. Derivative works are entitled to equal protection under the *CA* so long as they satisfy the conditions for the subsistence of copyright. S. 32.2(1) of the *CA* does nothing to alter the protections available to derivative works.

[5] As such, Ms. Rer is entitled to statutory damages as defined in s. 38.1 and should be awarded punitive damages due to Bestmont’s deliberate and deceptive manner in dealing with Ms. Rer.

PART II: STATEMENT OF FACTS

1. The Parties

[6] Ms. Rer is a Canadian photographer and social media influencer. Bestmont is a Canadian luxury hotel chain with 10 destinations across Canada.

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

2. Chronology of Events

[7] The uniqueness of each Bestmont Hotel inspired Ms. Rer to embark on a yearlong photo project. The project, which Ms. Rer titled “Façades”, involved creating a photograph of each of the 10 Bestmont Hotels’ entrances and marquees (the “Original Photographs”); as well as 40 filtered photographs created through Ms. Rer applying 4 filters to each of the Original Photographs (the “Filtered Photographs”). Ms. Rer developed an artistic process and technique that she used to create each Original Photograph. Each Original Photograph was taken at a distance of 100 feet, to maintain focus on the marquee while still allowing each hotel design to be featured. Ms. Rer ensured that the same techniques and camera set-up were used for each photograph so the result would yield photographs that showcased the similarities and differences between each hotel. After creating the 10 Original Photographs, Ms. Rer selected and applied filters to them by drawing on her experience as a social media influencer and on her knowledge of millennial style and culture. Her expertise led her to choose filters that she indicated would enhance the effect of each hotel design: ‘sepia’, ‘oil painting’, ‘pixilation’, and ‘pencil drawing’. Through this process Ms. Rer created an additional 40 new Filtered Photographs. In total, Ms. Rer created 50 photographs.

Trial, supra para 6 at paras 1-5.

[8] Ms. Rer offered Bestmont a licensing deal at a rate of \$3,000 per photograph for Bestmont to use in marketing their hotels. Ms. Rer went as far as to provide Bestmont with electronic copies of the 50 photographs and offered to continue in consultation with Bestmont. In response, Bestmont directed unfounded and threatening accusations against Ms. Rer that she infringed Bestmont’s marquee and hotel design copyrights and demanded that she destroy the photographs. Bestmont also refused to return the electronic photographs despite Ms. Rer’s multiple requests.

Trial, supra para 6 at paras 6-7.

[9] Without Ms. Rer's authorization, Bestmont applied 11 filters to each of the electronic Original Photographs. Bestmont then printed and framed 12 versions of each hotel's façade photograph (11 filtered photographs and 1 original) and used these photographs to market their hotels by placing them in the hallways of their guest floors. Bestmont did this without Ms. Rer's authorization, without attributing Ms. Rer as the author and without any notice to her whatsoever. In total Bestmont reproduced 120 of Ms. Rer's photographic works: 10 reproductions of the Original Photographs, 40 Filtered Photographs which were a direct copy of Ms. Rer's Filtered Photographs, and 70 reproductions of the Original Photographs modified using other filters.

Trial, supra para 6 at para 8.

[10] Once Ms. Rer became aware of Bestmont's actions, she requested that Bestmont remove the photographs from the hallways. After Bestmont ignored her request, Ms. Rer commenced an action for infringement of the copyright in her façade photographs. It was only after this that Bestmont finally agreed to remove the photographs.

Trial, supra para 6 at para 9.

3. Procedural History

[11] At Trial, Bestmont did not dispute that they reproduced the 10 Original Photographs. The Trial Judge found in favour of Ms. Rer by holding that copyright subsisted in each of Ms. Rer's 10 Original Photographs and 40 Filtered Photographs and that Bestmont infringed her copyright through the 120 reproductions. The Trial Judge also held that Ms. Rer's photographic works were permitted as non-infringing derivative works under s. 32.2(1)(b) of the *CA*. The Trial Judge concluded that Bestmont reproduced Ms. Rer's Filtered Photographs by copying the same filters she used, and thus infringed both the copyright in the Original Photographs and Filtered Photographs. The Trial Judge awarded Ms. Rer with both statutory (\$1,000,000) and punitive damages (\$500,000) totaling \$1,500,000.

Trial, supra para 6 at paras 13-25.

[12] The Court of Appeal reversed the decision, basing its rationale on an expansive interpretation of s. 3 of the *CA*. The Court held that Bestmont did not infringe Ms. Rer's copyright, because as the copyright owner in its hotel designs and marquee, it was immune from infringement. The Court went on to hold that Ms. Rer only exercised skill and judgment once in developing the concept and technique for the photographs, and even if copyright did subsist, it would be in the collection rather than in the individual photographs. The Court also held that filters do not warrant copyright protection.

Rer v Bestmont Hotels, 2021 CAIP 333 at paras 1-5 [*Appeal*].

PART III: POINTS IN ISSUE

[13] The issues in this appeal are:

- 1) a) Whether copyright subsists in Ms. Rer's photographs, and more specifically whether copyright subsists in the 10 Original Photographs and 40 Filtered Photographs, either individually or as a collection? b) Does s. 32.2(1) provide an exemption from infringement of s. 3, that allows derivative works to attract the full protection of the *Copyright Act (CA)* thereby balancing owner and user rights?
- 2) What is the appropriate quantum of damages? What are the factors to consider in statutory and punitive damages?

PART IV: ARGUMENTS IN BRIEF

1. Copyright Subsists in the Original Photographs

[14] In concluding that the façade photographs were not original, the Court of Appeal misconstrued the test of originality by holding Ms. Rer to a higher threshold of originality than has been articulated in the leading authorities. As established below, the Original Photographs and

Filtered Photographs are artistic works and have the requisite element of originality such that copyright subsists in each individual photograph.

A. The Court of Appeal Erred in Finding that the Original Façade Photographs were not Original

[15] Photographs are artistic works as defined in s. 2 of the *CA (CA)*. S. 5(1) of the *CA* states that copyright subsists “in every original literary, dramatic, musical and artistic work” (*CA*). In *CCH Canadian Ltd v Law Society of Upper Canada*, the Supreme Court outlined the following originality test (*CCH*): the work must originate from an author; not be copied from another work; and must be the product of an author’s exercise of skill and judgment.

Copyright Act, RSC 1985, c C-42, s 2, 5(1) [*CA*].
CCH Canadian Ltd v Law Society of Upper Canada, 2004 SCC 13 at para 28 [*CCH*].

(i) Ms. Rer is the Author of the Original Photographs and the Photographs have not been Copied from another Source

[16] An author is the individual that has “clothed the idea with form” (*McKeown*). Since the 2012 amendments to the *CA*, the author of a photograph is the individual who created it (*Hughes*). Ms. Rer created the photographs herself and clothed the hotels’ façades with form through these photographs, and as such she is the author. Additionally, Ms. Rer came up with the idea for the photographs through her own inspiration, and there was no evidence presented at Trial that rebuts the fact that the photographs were not copied.

John McKeown & Harold G. Fox, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed (Scarborough: Thomson/Carswell, 2003), ch 17:2 [*McKeown*].
Hon Roger T. Hughes, Susan J. Peacock & Neal Armstrong, *Hughes on Copyright and Industrial Design*, 2nd ed (LexisNexis Canada Inc, 2021) at part 3, s 11 [*Hughes*].

(ii) The Court of Appeal Erred in their Application of the Originality Test

[17] In *CCH*, the Supreme Court set the precedent for the workable standard of originality – for a work to be original, the author must have exercised skill and judgment in creating it in a way that

is not so trivial as to be regarded as a “purely mechanical exercise” (*CCH*). Skill is defined as the use of one’s “knowledge, developed aptitude or practised ability in producing the work” (*CCH*). Judgment is the use of one’s “capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work” (*CCH*). Together these imply that intellectual effort was used in creating the work (*CCH*).

CCH, supra para 15 at para 25, 16.

[18] The Court of Appeal incorrectly held that the Trial Judge’s test for originality was too low (*Appeal*), when in fact the threshold to meet the requirement of originality in photographs is a low one (*Ateliers, Century 21, Trader, Rallysport, Global Upholstery*). Originality has been found in photographs of office furniture in brochures (*Global Upholstery*), vehicles and automotive parts (*Trader, Rallysport*), and real estate properties (*Century 21*). The exercise of skill and judgment in the creation of photographs is rooted in the author’s choice of subject matter, arrangement, posing, choice of angle, view, lighting, as well as through the artistic work and personal effort of the photographer (*Ateliers, Century*). In *Ateliers* it was noted that a mere photo taken randomly, without prior research and particular framing, would not meet the standard of originality (*Ateliers*). This indicates that research undertaken in pursuit of the creation of the photographs is another factor weighing in favour of a finding of skill and judgment.

Appeal, supra para 12 at para 5.

Ateliers Tango Argentin Inc c Festival d’Espagne & d’Amérique Latine, [1997] RJQ 3030, 1997 CarswellQue 1225 [*Ateliers*] at para 37-39.

Century 21 Canada Ltd Partnership v Rogers Communications Inc, 2011 BCSC 1196 at para 187 [*Century*].

Trader Corp v CarGurus Inc, 2017 ONSC 1841 [*Trader*].

Rallysport Direct LLC v 2424508 Ontario Ltd, 2019 FC 1524 [*Rallysport*].

Global Upholstery Co v Galaxy Office Furniture Ltd (1976), 29 CPR (2d) 145, 1976 CarswellNat 493 [*Global Upholstery*].

[19] These authorities make it clear that Ms. Rer exercised skill and judgment in creating the façade photographs in a way that is more than a mere mechanical exercise. Ms. Rer used her skill and judgment by first undergoing rigorous research in the creation of these photographs, by

spending a year travelling and staying in each Bestmont destination and studying the differences and similarities between each hotel design (*Trial*). She further exercised skill and judgment when she chose the entrance of each hotel and their marquee as the subject matter of the photograph and the arrangement and angle for the photographs. When Ms. Rer chose to photograph each entrance at a distance of 100 feet with the marquee centred in the frame, she was using her skill and judgment as a photographer to create a work that would best depict the hotels (*Trial*). All these elements clearly show that the threshold for originality has been met in the Original Photographs.

Trial, supra para 6 at para 4.

(iii) The Photographs are Original even if each Image includes Bestmont’s Designs

[20] The Court of Appeal erred in holding that the bulk of the originality displayed in each image was due to Bestmont’s designs of their hotel entrances and marquees (*Appeal*). As outlined above, originality in photographs is rooted in more than just the choice of subject matter. It is well established that originality can exist in artistic works, even if those works feature a previously copyrighted work. The intention to protect such works is clear from the inclusion of compilations in several sections of the *CA*. A compilation is defined as a “work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof” (*CA*). The Supreme Court elaborated on this in *CCH*, stating that compilations take existing material and cast it in different form, and since copyright protects originality of form or expression, compilations are thus subject to copyright (*CCH*).

Appeal, supra para 12 at para 5.

CA, supra para 15, s 2.

CCH, supra para 15 at para 33.

[21] The basis of originality in compilations is set out in *Allen v Toronto Star Newspapers Ltd*, a case dealing with the originality of a magazine cover. In that decision, the Ontario Divisional Court reiterated that originality does not imply inventiveness, and therefore it is “enough that the

work is the production of something in a new form as a result of the skill, labour and judgment of the author” (*Allen*). The elements of skill and judgment were more thoroughly outlined in *Slumber-Magic Adjustable Bed Co v Sleep-King Adjustable Bed Co*, whereby the British Columbia Supreme Court held that originality in compilations is found through the degree of the creator’s use of thought, selection, work and industry (*Slumber-Magic*).

Allen v Toronto Star Newspapers Ltd (1997), 152 DLR (4th) 518, 36 OR (3d) 201 at para 16 [*Allen*].
Slumber-Magic Adjustable Bed Co v Sleep-King Adjustable Bed Co, [1985] 1 WWR 112, 1984 CarswellBC 765 at 4-5 [*Slumber-Magic*].

[22] Although the authorities have not interpreted the concept of compilations in photography, its application to other forms of artistic works provides clear guidance on the way the law should be applied to photographs. The issue of copyright subsisting in compilations which feature copyrightable subject matter has arisen in several architectural designs/plans cases.

[23] In *1422986 Ontario Ltd v 1833326 Ontario Ltd*, the Court dealt with a townhome project design that contained some features that were not unique or original (*1422986 Ontario*). The Ontario Superior Court found that despite this, the design was original as a compilation by virtue of the architect’s skill and judgment evident through the choices he made in including features his employer wanted (*1422986 Ontario*). On this point, the Court held that originality in architectural designs is based on whether the plan is the product of the personal effort of the designer; which involves taking into consideration whether the “designer assessed and weighed different components to meld them into his own expression of skill and judgment?” (*1422986 Ontario*). The case from which this test originates, *Construction Denis Desjardins inc c Jeanson*, provides a great example to illustrate its application. In *Construction*, an architectural design and building featured elements from another architect’s plan. The Québec Court of Appeal found that the plan and built versions were original compilations through the marrying of various architectural components (layout, angles, shapes, etc.) that were carefully curated through the designer’s

exercise of skill and judgment (*Construction*). Most importantly the Court set out the key principle that exercising judgment “does not preclude the designer from finding inspiration in pre-existing ideas, which, let us not forget, are not protected as such” (*Construction*).

1422986 Ontario Ltd v 1833326 Ontario Ltd, 2020 ONSC 1041 at paras 43, 36 [*1422986 Ontario*].
Construction Denis Desjardins inc c Jeanson, 2010 QCCA 1287 at para 16 [*Construction*].

[24] Following from these authorities, it is evident that works which feature other copyrighted work are still afforded copyright protection, and this is especially clear through the architectural design cases. This Honourable Court should afford this same protection to photographs that feature copyrighted subject matter. It is important to recognize that photography is different than other artistic works in that a photograph is – in essence – a work that frames something that already exists. When the *Copyright Modernization Act* came into force, one of the main objectives was to protect photographers by giving them equal rights to other creators (*CMA*). It would be absurd to say that when the legislation chose to protect photographers, they did not take into consideration the unique nature of photography, which through the photographer’s skill and judgment, captures something existing but casts it in a new form. Parliament’s intention in protecting photographers must have included the intention to protect photographs that are compilations.

Copyright Modernization Act, SC 2012, c 20 [*CMA*].

[25] Applying the architectural design authorities to Ms. Rer’s photographs, although Bestmont’s designs are the subject matter of the photographs, it is Ms. Rer’s expression in the photographs that makes them original artistic works subject to copyright protection. Ms. Rer used her skill and judgment as a photographer to make the Bestmont façades her subject matter, and by selecting the other elements that made up the photographs, including the distance from the hotel, lighting, framing, and background (*Trial*). Ms. Rer used her personal effort and skill as a photographer to weigh and assess the different components of each of the Bestmont hotel designs

and marquees and arrange them into a new work through the added elements of lighting, framing, and background. In turn, Ms. Rer melded Bestmont's designs into her own expression, resulting in the final façade photographs. This was clearly an exercise of skill and judgment beyond a mere mechanical exercise that makes each individual Original Photograph an original compilation.

Trial, supra para 6 at para 4.

B. Copyright Subsists in the 40 Filtered Photographs

[26] The Court of Appeal erred in holding that applying a social media filter does not warrant copyright protection (*Appeal*). The Trial Judge correctly applied the originality test by concluding that Ms. Rer used skill and judgment in selecting and applying the filters to the photographs and thus creating new works (*Trial*). It was established above that the threshold of originality in photographs is low and can be found through various elements such as the author's choice of subject matter, arrangement, artistic work of the photographer and more (*Ateliers*). It follows naturally that the choice of filters should be an element recognized as contributing to the originality of a photograph. Skill and judgment were evident when Ms. Rer relied on her experience and knowledge as a social media influencer and photographer to select filters that would enhance the effect of the photographs (*Trial*). Therefore, the 40 Filtered Photographs meet the standard of originality and thus warrant copyright protection.

Appeal, supra para 12 at para 5.

Trial, supra para 6 at para 16, 5.

C. The Photographs are Original Individually

[27] The Court of Appeal erred in concluding that if there was copyright subsisting in the photographs, it would be as a collection and not individually because Ms. Rer exercised skill and judgment once in developing the concept for the photographs (*Appeal*). The leading photography copyright authorities have afforded each photograph copyright protection, even when similar

techniques have been used to create them. In *Trader*, the Ontario Superior Court held that all 152,532 vehicle photographs were original works warranting copyright protection (*Trader*). Specifically, the Court noted that although the photographers were trained in photographing vehicles and followed a standardized procedure, this was still an exercise of skill and judgment that could not be reduced to a mechanical exercise (*Trader*). Similarly, the British Columbia Supreme Court in *Century 21* held that 99 photographs of real estate properties individually met the standard of originality (*Century 21*). Presumably professional photographers hired to take photographs of properties would follow a standardized procedure and use similar techniques in creating the photographs. As established in *Trader*, this fact would not reduce any subsequent photographs taken with similar set-ups or techniques to a mechanical exercise.

Appeal, supra para 12 at para 5.
Trader, supra para 18 at para 26, 24.
Century 21, supra para 18 at para 187.

[28] Holding that skill and judgment can only be exercised once if the concept of the photographs is the same would clearly be against the scheme and intention of the *CA*. Copyright protects the expression of the ideas and not the ideas themselves. The Court of Appeal thus erred in its interpretation of the *CA* when they reduced Ms. Rer's skill and judgment to the idea behind the photographs and not the expression of the ideas through the photographs. By holding that skill and judgment was only exercised in the development of the concept, the Court ignored the rest of the elements of skill and judgment that photographers use in turning each individual photograph from an idea to an expression. Although the concept and technique may have been the same, each hotel had to be turned into an artistic expression through the separate photographs Ms. Rer created using the techniques she chose by exercising skill and judgment. As previously stated, the *CMA* was enacted to afford equivalent protection to photographers as other artists (*CMA*). Holding that a single concept and technique turns every subsequent photograph with those features into a

mechanical exercise would be akin to holding that a painter who uses the same painting concept and technique would not be entitled to copyright protection in their subsequent paintings except for as a collection. This clearly goes against what the *CA* was intended to protect and against the *CMA* amendments designed to protect photographers' artistic works.

CMA, supra para 24.

D. Derivative Works are not Excluded from Protection as Original Works

[29] S. 32.2(1) protects what is more generally known as the freedom of panorama (FOP). The concept emerged in the 1840s to navigate the legal implications of new technologies such as photography (*Dulong de Rosnay*). FOP attempts to balance the rights of the public space with artists' ability to control their work. The exception in the FOP allows for a legal right to publish pictures of protected works which are in the public sphere (*Dulong de Rosnay*). The law on derivative works is an area of law that also considers the balancing of competing rights. Derivative works created pursuant to s. 32.2(1) are an exception to infringement of the monopoly authors are given under the *CA* just as public domain or fair dealing are also an exception.

Melanie Dulong de Rosnay & Pierre-Carl Langlais, "Public artworks and the freedom of panorama controversy: a case of Wikimedia influence" (16 Feb 2017) *Internet Policy Review* 6:1 [*Dulong de Rosnay*].

(i) Derivative Works are a part of Canadian Law and can be Protected as Original Works

[30] The Court of Appeal erred in law by not recognizing derivative works as an aspect of Canadian Copyright law. The Court of Appeal stated, "the doctrine of derivative works is a foreign principle that has but a toehold in Canada and should not be applied here" (*Appeal*). The Canadian *CA* does not explicitly define derivative work, but the Supreme Court of Canada in *Théberge* were clearly of the view that derivative works are central to s. 3(1) of the *CA*, which gives creators the exclusive right to control the preparation of derivative works (*Théberge*). The law of derivative works is firmly entrenched within the Canadian copyright regime.

Appeal, supra para 12 at para 3.
Théberge v Galerie d'Art du Petit Champlain inc, 2002 SCC 34 [*Théberge*].

[31] The lack of explicit treatment of derivative works under the *CA* combined with a lack of caselaw on the matter has left the law of derivative works in need of the guidance of this Honourable Court. S. 3(1) gives a wide right to the author, yet the legislative intent behind the *CA* is to balance and encourage creativity while protecting the rights of an author. S. 3(1) must not be expansively interpreted to render s. 32.2(1) meaningless.

[32] The Berne Convention is an international agreement on copyright law to which Canada is bound to adherence, per s. 91 of the *CA*. Article 2(3) of the Paris Revision of the Berne Convention of 1971 discusses derivative works and allows them to be protected as original works if there is not prejudice to the copyright in the underlying work (*Berne*). Justice D.M. Brown in *Beach v Toronto Real Estate Board*, states, “Canadian copyright law generally protects derivative works in their own right as long as the originality required [...] is present” (*Beach*) This means that if sufficient labour and skill have been used to create a derivative work it will attract the protection of copyright.

CA, supra para 15, s 91.
Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, 1161 UNTS 3 art 2(3) (revised at Paris 24 July 1971) [*Berne*].
Beach v Toronto Real Estate Board, [2009] OJ No 5227, 88 RPR (4th) 243 at para 101 [*Beach*].

[33] The caveat to allowing derivative works independent protection under the *CA* is requiring consent from the underlying work. *Fox on Canadian Law of Copyright* posits,

Since the exclusive rights, which include the rights to make derivative works, are vested in the author, another individual who wishes to make a “derivative” work will require the consent of the author, unless the work is in the public domain. In the absence of consent, the derivative work may infringe the author’s rights (*McKeown*).

The question of whether unauthorized derivative works can attract protection under the *CA* is still up to debate and is central to the case at hand.

McKeown, supra para 16, ch 4:5.

[34] The Trial Judge correctly identified Ms. Rer's photographs as expressly permitted derivative works under s. 32.2(1) of the *CA*. Ms. Rer does not need Bestmont's consent because s. 32.2(1) explicitly defines a limit to the infringement of architectural works: "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" (*CA*). Ms. Rer's photographs are not an architectural work as defined by the *CA* nor are they an architectural plan. Ms. Rer's photographs are derivative works entitled to protection under the *CA* because they meet the threshold of originality and are explicitly permitted in accordance with s. 32.2(1).

CA, supra para 15, s 32.2(1).

[35] The Court of Appeal erred in stating that s. 32.2(1)(b) "does not confer any right to assert copyright against others" and finding that Ms. Rer cannot assert copyright against Bestmont (*Appeal*). However, s. 32.2(1)(b) clearly grants Ms. Rer the right to feature Bestmont's copyright in her creative work without such use constituting infringement. The explicit permission given in s. 32.2(1)(b) allows copyright to subsist in Ms. Rer's work which enables Ms. Rer to protect her economic interest by suing Bestmont even though Ms. Rer features Bestmont's protected work.

Appeal, supra para 12 at para 3.

[36] The Court of Appeal, concerned that Ms. Rer's work prejudiced Bestmont's copyright, stated, "significant policy concerns arise if the creator of a derivative work is permitted to control how a copyright owner chooses to reproduce its underlying work" (*Appeal*). However, the finding that copyright subsists in Ms. Rer's work does not prejudice Bestmont. Bestmont's rights are only limited in that s. 32.2(1) does not allow them to claim infringement against Ms. Rer. The entirety of the rights afforded to them in s. 3 remain open to them.

Appeal, supra para 12 at para 3.

[37] The intent of Legislature is to balance the public's interest in artistic creativity with the protection of a creator's right to receive their just reward. The Court of Appeal's refusal to find originality in Ms. Rer's work is contrary to the legislative intent behind the *CA*, which if overturned, will limit creativity, and rewrite the law. In *Théberge* the Court stated that, "excessive control by holders of copyrights [...] may unduly limit the ability [...] to incorporate and embellish creative innovation [...] or create physical obstacles to proper utilization" (*Théberge*). People will be less willing to create if they cannot maintain an economic interest in their work. Allowing copyright protection in derivative works can facilitate the goal of further creativity and expression while maintaining the balance between copyright holders.

Théberge, supra para 30 at para 32.

[38] The Court of Appeal expansively interpreted Bestmont's s. 3 rights, in such a way as to limit the exception to infringement granted in s. 32.2(1). This Honourable Court must clarify how the exception to infringement in s. 32.2(1) operates with the rights granted in s. 3. Should the Court of Appeal's overly broad interpretation of s. 3 be allowed to stand, it would enlarge the protection of s. 3(1) and upset the balance within the *CA*. Although the law evolves through the interpretation of existing principles, "the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them" (*Watkins*). Justice Binnie in *Théberge* clearly agrees, noting it is the purview of Parliament to change the law, not the courts. The Court of Appeal's failure to recognize Ms. Rer's derivative works as original under the *CA* allows Bestmont an economic benefit that is not their own. "The idea that [someone] should be entitled to reap the benefit of another's original work, [...] offends against justice and common sense" (*Braithwaite*). The case between Ms. Rer and Bestmont provides an opportunity for this

Honourable Court to clarify if derivative works created in accordance with s. 32.2(1) attract the same copyright protection provided to underlying works in the *CA*.

Watkins v Olafson, [1989] 2 SCR 750, 61 DLR (4th) 577 at para 17 [*Watkins*].

Théberge, *supra* para 30 at para 73.

William J. Braithwaite, “Derivative Works in Canadian Copyright law” (1982) 20:2 Osgoode Hall LJ 191 at 209 [*Braithwaite*].

(ii) Ms. Rer is the Exclusive Owner of Copyright

[39] Under s. 13(1) of the *CA*, the author of a work is the first owner of the copyright therein (*CA*). Having established that Ms. Rer is the author and that both the Original Photographs and Filtered Photographs warrant copyright protection individually, Ms. Rer is thereby their owner.

CA, *supra* para 15, s 13(1).

[40] The Trial Judge correctly dismissed Bestmont’s assertion that it was entitled to reproduce Ms. Rer’s work under s. 3 of the *CA* (*Trial*). Bestmont does have a statutory right to reproduce their copyrighted work in whatever manner they desire under s. 3. However, they do not have that right when it pertains to original works that is not their own. The Trial Judge 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*). The Trial Judge, correctly applied s. 5(1) of the *CA* in finding that copyright subsists Ms. Rer’s original work (*Trial*). As shown above, Ms. Rer’s created original works that attract the protection of the *CA*. Bestmont has no right to copy Ms. Rer’s created expression.

Trial, *supra* para 6 at para 17-18, 14.

E. Bestmont Infringed Ms. Rer’s Moral Rights

[41] Bestmont infringed the moral rights of Ms. Rer under s. 28.1 of the *CA*. Moral rights protect the essence of the artist in the work as opposed to the economic aspects because moral rights adopt a more noble and less commercial view of the relationship between artist and their work (*Théberge*). Moral rights project the artist’s personality into the work and recognize the importance of protecting the artist’s dignity through the work by acting as a continuing restraint on what

someone can do with a work once it passes from the author (*Théberge*). Bestmont did not attribute credit to Ms. Rer for the image she created and Bestmont subsequently illegally reproduced. The integrity of a work is infringed under the *CA* only if the work is modified to the prejudice of the honour or reputation of the artist (*Théberge*). Ms. Rer's right of integrity was infringed per s. 28.2(1) because Bestmont modified the photographs. As per s. 28.2(2) of the *CA*, prejudice is deemed when a painting, sculpture or engraving is modified. It would follow, that photographs, which are a similar medium of artistic work, should be treated the same. Further, Bestmont did not attribute the work to Ms. Rer. Bestmont gave Ms. Rer no credit, eliminated the opportunity for her talent to be recognized, or have her reputation grow (*Collett, Théberge*).

Théberge, supra para 30.

Collett v Northland Art Company Canada Inc, 2018 FC 269 [*Collett*].

2. The Damages Awarded by the Trial Judge should be Restored

[42] The Trial Judge correctly found Bestmont infringed 50 original works created by Ms Rer. Bestmont admitted to reproducing the 10 Original Photographs and all but directly copied the 40 Filtered Photographs. Each one of the 10 Original Photographs and 40 Filtered Photographs have the requisite requirement for originality and attract individual protection under the *CA*. The Trial Judge awarded each one of the infringed 50 original works an amount of \$20,000, the maximum statutory award for infringement for a commercial purpose pursuant to s. 38.1 of the *CA*.

A. Factors Considered for Statutory Damages

[43] The court must consider factors set out in s. 38.1(5) of the *CA* to determine the extent of the statutory damages that should be applied. These factors are:

- a. the good faith or bad faith of the defendant;
- b. the conduct of the parties before and during proceedings;
- c. the need to deter other infringements of the copyright in question; and
- d. in the case of infringements for non-commercial purposes, the need for an award to be proportionate to the infringements, in consideration of the hardship the award may cause

to the defendant, whether the infringement was for private purposes or not, and the impact of the infringements on the plaintiff (*CA*).

The last factor applies only to non-commercial purposes, which are not relevant in this case.

CA, supra para 15, s 38.1(5).

[44] Bestmont acted in bad faith throughout its dealings with Ms. Rer. Ms. Rer proposed a licencing agreement for the façade photographs to Bestmont. Despite Bestmont's interest in Ms. Rer's work, Bestmont alleged infringement against Ms. Rer and proceeded to then infringe Ms. Rer's copyright by printing and exhibiting Ms. Rer's original work without her knowledge or consent and without attributing any credit to Ms. Rer. Bestmont repeatedly ignored Ms. Rer's demands to remove and return her original work.

[45] Bestmont's conduct before the trial was not just deceptive but also aggressive. Bestmont only took down the photographs once it was sued by Ms. Rer, despite a request from Ms. Rer prior to suit. However, prior to this, they refused to engage in discussion with Ms. Rer and ignored her attempt at communication. Bestmont attempted to intimidate Ms. Rer into destroying her photographs by claiming she infringed their copyright. Bestmont's actions forced Ms. Rer to assert her rights in court.

[46] There is a significant need to deter this kind of behaviour from happening in the future. Bestmont is a powerful and sophisticated actor. The Court must consider the power imbalance between Bestmont and Ms. Rer to send a message that large corporations cannot bully their way out of trouble. Bestmont exhibited blatant disregard for Ms. Rer's protection in copyright, flagrantly trampled her moral rights, and deliberately endeavoured to use intimidation to escape liability for their action.

[47] The Court of Appeal erred when it suggested that the quantum of damages granted by the Trial Judge was too large. Determining a quantum of damages is not a precise science, but a case-

by-case assessment of all relevant circumstances to achieve a just result (*Telewizja, Century 21*). The relevant factors in determining statutory damages do not consider lost earnings. Statutory damages, available to Ms. Rer under s. 35(1), provide a remedy in lieu of proving damages and profits because proving actual damages is difficult. Statutory damages incentivize a copyright owner to enforce their copyright and to deter infringers through the threat of a statutory award (*Telewizja*). The factors that determine the extent of liability under statutory damages are concerned with the nature of the infringement and assess the conduct of the infringing party, not what the financial state of the infringed party would have been.

Century 21, supra para 18.
Telewizja Polsat SA v Radiopol Inc, 2006 FC 584 [*Telewizja*].

[48] Bestmont infringed Ms. Rer's copyright for a commercial purpose. Ms. Rer's reproduced and modified photographs were featured in the hallways of each of Bestmont's 10 Canadian hotels. The photographs were a distinctive addition to Bestmont's ambiance, which displayed the beauty and uniqueness of their many destination hotels. Their use of the photographs provides the perfect form of self-advertising while reducing the need to purchase art to fills the halls. Bestmont's acts are undoubtedly commercially motivated.

B. Factors Considered for Punitive Damages

[49] Punitive damages go beyond the normal scope of general damages to punish conduct of a party and to deter similar conduct in the future. Punitive damages may be awarded against a defendant where the impugned conduct represents a "marked departure from ordinary standards of decent behaviour" (*Whiten*). Punitive damages are an exceptional remedy warranted only "where the [party's] conduct has been malicious, oppressive, and highhanded and offends the court's sense of decency" (*Hill*). They should be applied where other remedies are not sufficient to

accomplish the objectives of retribution, deterrence, and denunciation (*Whiten*). The relevant factors to consider when determining whether punitive damages should be assessed are (*Collett*):

- 1) Whether the conduct was planned and deliberate;
- 2) The intent and motive of the defendant;
- 3) Whether the defendant persisted in the outrageous 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 they were doing was wrong; and
- 6) Whether the defendant profited from its misconduct.

Bestmont deliberately stole Ms. Rer's original work and reproduced it many times as a planned effort to decorate and advertise each of their 10 Canadian hotels. They deliberately intimidated Ms. Rer by alleging copyright infringement against her. Bestmont repeatedly refused to respond to Ms. Rer's requests to return her work. Bestmont used their power and sophistication to take advantage of an individual artist. Bestmont's behaviour should be punished and turned into an example through a levy of punitive damages.

Whiten v Pilot Insurance Co, 2002 SCC 18 at para 36 [*Whiten*].
Hill v Church of Scientology of Toronto, [1995] 2 S.C.R. 1130 at para 196 [*Hill*].
Collett, supra para 41 at para 72.

PART V: ORDER REQUESTED

[50] For the foregoing reasons, the Appellant respectfully requests that this Honourable Court allow the appeal and requests that the Trial Judge's decision be reinstated with damages for infringement of Ms. Rer's moral rights and costs throughout.

Dated this 14th day of January 2022

Team 13A, Counsel for the Appellant

PART VI: TABLE OF AUTHORITIES

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Copyright Act, RSC 1985, c C-42.

Copyright Modernization Act, SC 2012, c 20.

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INTERNATIONAL MATERIALS

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