

SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS

BETWEEN:

WANDA RER

Appellant

– and –

BESTMONT HOTELS

Respondent

FACTUM OF THE RESPONDENT

| | |
|--|-----------|
| <i>PART I – OVERVIEW</i> | 3 |
| <i>PART II – STATEMENT OF FACTS</i> | 5 |
| <i>PART III – POINTS IN ISSUE</i> | 6 |
| <i>PART IV – ARGUMENTS IN BRIEF</i> | 7 |
| ISSUE 1: Copyright does not subsist in the Appellant’s photos | 7 |
| 1.1 The Unfiltered Photos are Not Original | 7 |
| 1.2 The Filtered Photos are Not Original | 9 |
| ISSUE 2: Bestmont did not infringe the Appellant’s photos | 12 |
| 2.1 S. 32.2(1)(b) does not apply | 12 |
| 2.3 Bestmont’s use of the Unfiltered Photos is fair dealing | 17 |
| ISSUE 3: Subsection 38.1(3) is the appropriate quantum of statutory damages | 18 |
| 3.1 The Appellant’s Package is a single medium | 19 |
| 3.2 Awarding the highest range is grossly out of proportion to the infringement | 19 |
| 3.4 Punitive damages may not be ordered | 21 |
| <i>PART V – ORDER REQUESTED</i> | 21 |
| <i>PART VI – TABLE OF AUTHORITIES</i> | 22 |
| <i>PART VII – APPENDICES</i> | 24 |
| Appendix A – Statutory Provisions | 24 |
| Appendix B – Damage Awards | 27 |

PART I – OVERVIEW

[1] This case is about the Appellant’s improper attempt to attract exclusive copyright in a manner that is directly adverse to s. 3(1) rights: the backbone of the *Copyright Act* (the “Act”).¹ The Act rewards those who exercise skill and judgment in expressing their original works by granting copyright. Likewise, it definitively does not allow for copyright to subsist in works that are unoriginal because they are the product of copying or trivial, mechanical processes that have minimal human input. Though narrow user exceptions exist, Parliament’s intention in the Act is clear: to protect and reward original works and their author(s). The Appellant is attempting to manipulate the Act to protect her unoriginal works through an inappropriate interpretation of the Act’s most important provision and a narrow exception. The Court has an opportunity to clarify the law simply through applying it and dismissing this appeal.

[2] The Appellant, Wanda Rer, is a self-described social media influencer. The Appellant took photos of Bestmont’s artistic works (iconic, unique building designs and marquee) and attempted to sell reproductions of those works back to Bestmont. The Appellant sent Bestmont reproductions in an electronic package containing “**Unfiltered Photos**” and “**Filtered Photos**”.

[3] The Respondent, Bestmont Hotels, is a national hotel chain known for its carefully crafted, well-known red marquee and designs. In response to the Appellant’s attempt to simply reproduce Bestmont’s artistic works for commercial gain, Bestmont quickly asserted its underlying copyright and correctly informed the Appellant of her misconception. As the owner of the underlying copyright in these mere copies, Bestmont then displayed those pictures on the walls of its hotels’ halls. Its actions are appropriate and harmonious with s. 3(1) of the Act. The Appellant now seeks to assert copyright in her unoriginal reproductions. This must fail for two reasons.

¹ *Copyright Act*, RSC 1985, c C-42, s 3(1).

[4] First, copyright does not subsist in the Unfiltered Photos or Filtered Photos because they do not meet the threshold for originality. Section 5 of the Act states originality is a necessary condition for subsistence of copyright. The Unfiltered Photos are not the product of the Appellant's original work; the only expression in them is that of Bestmont's original artistic works. The Appellant did not exercise skill and judgment when she reproduced a mere copy of Bestmont's three-dimensional artwork in two-dimensional form. Likewise, the Filtered Photos germinate from this same seed, and the expression in them beyond the Unfiltered Photos is the result of trivial, mechanical efforts far below the necessary exercise of skill and judgment for copyright protection. The software routine used to apply the filters to the Filtered Photos is not the Appellant's amanuensis either; there is nothing in evidence to suggest her input went beyond the tap of a button. As such, the necessary originality is absent and copyright does not subsist.

[5] Second, even if copyright did subsist in the Unfiltered Photos or Filtered Photos, Bestmont is protected from copyright infringement. Though the sections can co-exist, s. 3(1) as the backbone of the Act should be interpreted expansively and the exception of s. 32.2(1) should be interpreted narrowly. The purpose of copyright outlined previously is paramount and should be taken into account here. This narrow exception incorrectly relied upon by the Appellant should not deprive Bestmont from asserting its underlying ownership of the copyright pursuant to s. 3(1) of the Act.

[6] This Court should affirm the Court of Appeal's decision, which held that copyright does not subsist in the Unfiltered Photos or Filtered Photos individually. In the event this Court holds it does subsist, Bestmont would not be liable because they did not infringe that copyright. If infringement is found, this Court has the discretion to reduce damages to a reasonable award under the circumstances given the good faith conduct of Bestmont.

PART II – STATEMENT OF FACTS

a. Factual Background

[7] **The Appellant:** in 10 years, Ms. Rer—a Canadian self-described artist, photographer, and social media influencer with a substantial following—has traveled the world with her camera.²

[8] **The Respondent:** in the last century, Bestmont Hotels—a Canadian hotel chain—has built a strong reputation for its 10 high-end hotels located across Canada. Bestmont curated and designed each hotel to give its guests an authentic experience. Each hotel has Bestmont’s well-known and instantly recognizable feature: the red marquee adorning each hotel entrance.³

[9] **The 10 “Unfiltered Photos”:** The Appellant stayed at Bestmont Hotels and took photos (the “Unfiltered Photos”) of the entrance of each of the Bestmont Hotels and their famous marquees—the Appellant used the same technique and camera set-up.⁴

[10] **The 40 “Filtered Photos”:** the Appellant applied four software-generated filters to each of the 10 Unfiltered Photos: ‘sepia’, ‘oil painting’, ‘pixilation’, and ‘pencil drawing’. The result is 40 filtered photos (the “Filtered Photos”).⁵

[11] **The “Package”:** the Appellant gave Bestmont a licensing proposal which included 10 Unfiltered Photos and 40 Filtered Photos (the “Package”) at a rate of \$3,000/photo to use in Bestmont’s marketing material. Bestmont rejected the Appellant’s proposal and informed the Appellant that she infringed Bestmont’s copyright in the marquee and hotel designs. On that basis, Bestmont asked the Appellant to destroy all copies of her infringing photographs.⁶

[12] **Bestmont’s 120 “Prints”:** Bestmont did not use any of the Appellant’s photos in its marketing material. Bestmont took the electronic version of the Unfiltered Photos and applied

² *Wanda Rer v Bestmont Hotels*, 21 TCCIP 1222 at para 1 [*Trial Decision*].

³ *Ibid* at para 2.

⁴ *Ibid* at paras 3-4.

⁵ *Ibid* at para 5.

⁶ *Ibid* at paras 6-7.

eleven different filters through a different photo editing software, which included famous filters such as: ‘sepia,’ ‘oil painting,’ ‘pixilation,’ and ‘pencil drawing.’ Bestmont printed, framed and hung the 12 new versions from each of the Unfiltered Photos, totaling 120 prints (“**Prints**”) and used them to decorate the guest floors’ hallways.⁷ Before trial, Bestmont removed all Prints from its walls pending the outcome of these proceedings.⁸

b. Procedural History

[13] **Trial Decision:** The Trial Court found Bestmont infringed the Appellant’s copyright.⁹ The Trial Court granted \$1,000,000 in statutory damages (\$20,000 per each of the 50 photos in the Package), and \$500,000 in punitive damages against Bestmont, even though punitive damages were not plead by the Appellant.¹⁰

[14] **Appeal Decision:** The Court of Appeal held that Bestmont cannot be found to infringe by reproducing its copyright in any medium and that s. 32.2(1) does not permit the Appellant the right to assert copyright infringement against Bestmont—the owner of the copyright. The Court of Appeal reversed the award of damages due to the absence of infringement.¹¹

PART III – POINTS IN ISSUE

[15] There are three issues before this Court:

1. Does copyright subsist in the Appellant’s photos?

1.1 Are the Unfiltered Photos original?

1.2 Are the Filtered Photos original?

2. Did Bestmont infringe the Appellant’s photos?

2.1 Does the Appellant’s liberal reliance on 32.2(1)(b) apply?

⁷ *Ibid* at para 8.

⁸ *Ibid* at para 10.

⁹ *Ibid* at paras 13-19.

¹⁰ *Ibid* at para 20.

¹¹ *Bestmont Hotels v Wanda Rer*, 2021 CAIP 333 at paras 2-4, 7-10 [*Appeal Decision*].

2.2 Is Bestmont’s use of the Unfiltered Photos fair dealing?

3. Is s. 38.1(3) the right quantum of statutory damages?

3.1 Is the Appellant’s Package a “single medium”?

3.2 Is the highest award grossly out of proportion to the infringement?

3.3 Were punitive damages appropriate in this case?

PART IV – ARGUMENTS IN BRIEF

ISSUE 1: Copyright does not subsist in the Appellant’s photos

1.1 The Unfiltered Photos are Not Original

[16] The Court of Appeal correctly held that the originality of the Unfiltered Photos largely stem from Bestmont’s artistic efforts. As set out below, the Unfiltered Photos are substantial reproductions of Bestmont’s underlying copyright and the Appellant did not contribute any new originality. Her Unfiltered Photos are derivative works that lack the degree of skill and judgment necessary to make them new original works that attract the protection of s. 3 rights.

[17] Originality is a necessary condition for subsistence of copyright. In *CCH Canadian Ltd. v. Law Society of Upper Canada*, the Supreme Court of Canada (“SCC”) outlines the threshold test for originality.¹² For a work to be original, it must (1) originate from the author; (2) be the product of material intellectual effort from an exercise of the author’s own skill and judgment; and (3) not be copied from another work.¹³ For further clarity on criterion point (2), the Court also confirmed in *CCH* that in order for a work to be original, it must be more than a mere copy. In the case at hand, the Court of Appeal’s test of originality was employed incorrectly but the proper outcome resulted and should be upheld for reasons set out below.

¹² *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 16 [*CCH*].

¹³ *Ibid* at paras 16, 24-28.

a. Scope of the Expression in the Unfiltered Photos

[18] In the case at hand, copyright does not subsist in the Unfiltered Photos because they are not original. The photos are substantial reproductions of the artistic Bestmont marquee and its copyrighted design; they are copies of Bestmont's copyright. There is no new expression in the photos. Rather, the Unfiltered Photos merely copy, through a mechanical exercise, Bestmont's iconic designs and marquees, taking Bestmont's works from three dimensions to two dimensions. As mere copies of Bestmont's marquees and buildings, the Unfiltered Photos fail to meet the originality threshold set out in *CCH*.

[19] The intellectual effort, skill and judgment in the Unfiltered Photos are those of Bestmont and not the Appellant. Producing the Unfiltered Photos was a purely mechanical exercise: all of which were composed at a distance of 100 feet and merely reproduce the copyrighted, famous work behind Bestmont's marquee and building design.¹⁴ According to the evidence, the only unique element within each of the Unfiltered Photos was the design created by Bestmont's artistic efforts.¹⁵ Additionally, the only unique expression differentiating the Unfiltered Photos from one another is the difference in atmosphere evoked by Bestmont's own underlying copyright.¹⁶

b. Skill and Judgment Analysis in the Unfiltered Photos

[20] The Unfiltered Photos are mere copies of Bestmont's copyrighted works and are devoid of originality. They are not the product of the Appellant exercising skill and judgment.

[21] The copying in the Unfiltered Photos, alongside the lack of additional novel expression by the Appellant, demonstrates that there is no originality in them because they copy Bestmont's

¹⁴ *Trial Decision, supra* note 2 at para 4.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

copyrighted “work”. In turn, this lack of originality means the Unfiltered Photos are unworthy of copyright protection as established in *CCH*.¹⁷

c. The Unfiltered Photos are Unoriginal 2D Models of Bestmont’s 3D Artistic Work

[22] Additionally, case law has clarified that changing an artistic work from three dimensions to two dimensions (or vice versa) does not necessarily create originality on its own.

[23] Taking Bestmont’s three-dimensional copyrighted work and recasting it in two dimensions should not afford a new copyright in the Unfiltered Photos. In the current scenario, the Appellant took Bestmont’s three-dimensional copyrighted artwork and mechanically reproduced a two-dimensional representation of Bestmont’s copyright to claim as her own original work despite expending trivial effort in recasting Bestmont’s art. But for the shielding exception in s. 32.2(1)(b), the Unfiltered Photos’ comprehensive reproduction of Bestmont’s marquee and building is infringement due to copying—a fatal blow for works purported to be original.

[24] Lastly, as held in *Delrina Corp (c.o.b. Carolian Systems) v. Triolet Systems Inc.*, “there is no copyright in what the author has copied from...a work in which another holds the copyright.”¹⁸ After filtering out the elements that are not copyrightable, there is no original work left to which copyright can subsist.

1.2 The Filtered Photos are Not Original

[25] Given that the Appellant used a mechanical process that did not engage anything more than trivial skill and judgment, there is no effort to be rewarded here.

a. The Expression of the Design in the Filtered Photos (Software is Not an Amanuensis)

[26] The 40 Filtered Photos are the result of an automatic software process, and not the Appellant’s skill and judgment. The coloured filters were automatically applied to the Unfiltered

¹⁷ *CCH*, *supra* note 12 at paras 14-16, 25-28, 35.

¹⁸ *Delrina Corp (cob Carolian Systems) v Triolet Systems Inc*, 2002 CanLII 11389 at para 39, 58 OR (3d) 339.

Photos by software in a non-proprietary manner. The Appellant had no input on the Filtered Photos beyond pressing a button; instead, the software was the primary actor. There is no evidence to suggest the Appellant did anything other than tap a pre-programmed button using a software.

[27] The Appellant had extremely trivial input in the production of the Filtered Photos. Authorship that is the product of an automatic process should be rewarded only when the author exercises a sufficient exercise of skill and judgment. However, in the case at hand, the Appellant’s software did the filtering—the Appellant simply provided a tap to begin an instant, automatic process. Image filtering is described as a “software routine that changes the appearance of an image or part of an image by altering the shades and colors of the pixels in some manner,” a definition that emphasizes the lack of input by the Appellant.¹⁹

[28] There is also no foundation to assert that the software was the scribe of the Appellant. A scribe’s role is merely to give effect to the author’s desired expression of the work through the author’s detailed instructions. It was held in *New Brunswick Telephone Co. v. John Maryon International Ltd.* that the creative mind—i.e., the one doing the process or informing the how of the process—is the author.²⁰ The Appellant filled neither role.

[29] The triviality of this input is further demonstrated by the Appellant’s willingness to apply different filters to the Filtered Photos based on how Bestmont ‘felt’ and the organization’s whims.²¹ That communication not only reinforces that there is no significant exercise of skill and judgment within the Filtered Photos, but also that it was and is trivial to change the filters.

[30] The Appellant’s contribution to produce the Filtered Photos was nominal. The English Court of Chancery previously held that where a person communicates an idea to an artist who then

¹⁹ “Definition of image filter” (2022), online: *PCMag* <www.pcmag.com> [perma.cc/5A57-MU72].

²⁰ *New Brunswick Telephone Co v John Maryon International Ltd.*, [1982] NBJ No 387 at paras 139-154, 24 CCLT 146.

²¹ *Trial Decision*, *supra* note 2 at para 6.

produces a work based on the idea, the artist gains copyright because they are the individual who actually expressed the idea in a form, whereas the owner of the idea has no rights in the work.²² This is because the expression of the idea arose from the skill and judgment of the artist. It cannot and should not be recognized as an expression of the idea provider who did not exercise skill and judgment towards—or contribute anything meaningful to—the resulting work’s form.²³ Similarly, despite the Appellant’s idea to apply filters, there is nothing in evidence suggesting that she could express the Filtered Photos without using a virtually-autonomous software routine.

[31] Lastly, the theme of “photos with filters” in and of itself is not sufficient to garner copyright protection inherently as clearly set out in the authorities, including *Cummings*; they emphasize that expression, skill and judgment are necessary ingredients for copyright protection.²⁴ The Filtered Photos nor the theme exhibit these.

b. Skill and Judgment Analysis

[32] The Court of Appeal correctly held that there was no skill and judgment exercised in the Filtered Photos.²⁵ The Federal Court in *Tele-Direct (Publications) Inc. v. American Business Information, Inc.* held that something that is not the product of inventive labour is unworthy of copyright protection.²⁶ The SCC in *CCH* also outlines a directly analogous example, holding that “changing the font of a work to produce ‘another’ work would be too trivial to merit copyright protection as an ‘original’ work.”²⁷ In common use, changing fonts employs a software routine,

²² *Donoghue v Allied Newspapers Ltd*, [1937] 3 All ER 503 at 508, [1938] Ch 106 (Eng Ch Div).

²³ *Kantel v Grant*, [1933] ExCR 84 at para 10.

²⁴ *Cummings v Global Television Network Quebec, Limited Partnership*, [2005] QJ No 6707 at paras 27-38, 2005 CanLII 17671 [*Cummings*]; tells us that suggested themes concepts are not protected by copyright when they are works of effort/skill below a certain threshold.

²⁵ *Appeal Decision*, *supra* note 11 at para 5.

²⁶ *Tele-Direct (Publications) Inc v American Business Information, Inc (CA)*, [1998] 2 FC 22 at para 32, [1997] FCJ No 1430.

²⁷ *CCH*, *supra* note 12 at para 16.

just like the application of filters to images. It follows that the Appellant's use of software to apply filters on 10 images to create 40 new ones expressed trivial skill and judgement at most.

[33] This Court should uphold both the SCC's standard for originality and the finding of the Court of Appeal: the mechanical use of a software routine that is substantially devoid of skill and judgment should not attract copyright protection.²⁸

[34] Further and in the alternative, if there was an "original" work created by the filter, it would be a single work in the compilation/collection as a whole as stated by the Court of Appeal.

ISSUE 2: Bestmont did not infringe the Appellant's photos

2.1 S. 32.2(1)(b) does not apply

a. A liberal interpretation of s. 32.2(1)(b) cannot be reconciled with the spirit of the Act

[35] Section 3(1) is the backbone that represents the purpose and spirit of the Act. Provisions in the Act should be "interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent."²⁹ Subsection 32.2(1)(b) does not apply to the present case, s. 3(1) does.³⁰ Bestmont disagrees with the Appellant's liberal interpretation of s. 32.2(1)(b) because it narrows the intent, purpose, and spirit of the Act encapsulated in s. 3(1). In light of the differing interpretations of ss. 3(1) and 32.2(1)(b), this Court must provide direction as to how those sections are to interact and be applied to the specific facts at hand by "referring to the ordinary meaning of the words and the purpose and spirit of the Act."³¹

[36] Bestmont, in asserting s. 3(1), is entitled to exercise its sole right to reproduce its copyrighted works and authorize such acts. The Appellant broadly interprets s. 32.2(1)(b) as a sword to allege infringement against Bestmont. The Appellant's liberal reliance on s. 32.2(1)(b)

²⁸ *Ibid.*

²⁹ *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] SCJ No 2 at para 8, [1998] 1 SCR 27; *Interpretation Act*, RC, c I-23, s 12.

³⁰ *Copyright Act*, *supra* note 1, ss 3(1), 32.2(1)(b).

³¹ *Rizzo & Rizzo Shoes Ltd (Re)*, *supra* note 29 at para 21.

would declare a statutory right to allege infringement over what Bestmont, the owner of its hotel design and marquee, could otherwise do with its tangible copyright. Section 32.2(1)(b) should therefore be interpreted as a non-infringing permitted act or interest which should foster the dissemination and production of creativity, without cutting across existing s. 3(1) rights. This approach is consistent with the notion that “only those works that are the product of creativity will be rewarded with copyright protection.”³²

b. The Appellant’s reliance on s. 32.2(1)(b) does not foster originality

[37] In balancing the purpose of copyright, s. 32.2(1)(b) should be interpreted in such a way as to promote the dissemination of originality without extinguishing Bestmont’s s. 3(1) rights. The focal point of the Appellant’s images is Bestmont’s copyright: the hotel design and marquee. Hence why, for each image, the Appellant used the same camera technique and camera set-up at 100-feet: to focus on Bestmont’s copyright.³³ The Appellant’s technical considerations serve to prominently depict Bestmont’s copyright in the centre of each image, as the main focus was to sell them to Bestmont for its marketing materials. The Appellant’s images do not foster originality capable of inspiring the creation of new original works. To accept the Appellant’s images as derivative works in which copyright subsists is to deny Bestmont’s right under s. 3(1) to reproduce its copyright in any material form. If the Appellant’s images are works in which copyright subsists, an absurd situation would arise: any photos Bestmont took of its copyright using a specific distance and camera technique/set up, would be infringing the Appellant’s derivative work.

[38] If s. 32.2(1)(b) applies to Bestmont’s marquee, then the Trial Court’s expansive interpretation of the provision was incorrect.³⁴ A liberal interpretation of s. 32.2(1)(b) does not

³² *CCH*, *supra* note 12 at para 15.

³³ *Trial Decision*, *supra* note 2 at para 4.

³⁴ *Trial Decision*, *supra* note 2 at paras 17-18.

consider whether a marquee is an “architectural work” under the Act. The Appellant relies on s. 32.2(b)(i) to claim her photographs of Bestmont’s architectural works, including the marquee.³⁵ The Act defines “architectural work” to mean “any building or structure or any model of a building or structure.”³⁶ Bestmont’s marquee is not a building. The marquee does not show “a certain functional or utilitarian character to be an architectural work.”³⁷ Unlike in *Corocord*, one cannot climb onto the marquee the same way one could on a playground structure technically designed to be climbed on.³⁸ The marquee is designed to adorn each entrance of Bestmont Hotels: its purpose is ornamental, serving no utilitarian function.

c. Bestmont did not assign its rights

[39] If the Appellant could use s. 32.2(1) as a sword, an additional absurd result would arise— it would prevent Bestmont from being able to licence or assign the right to another photographer to take a similarly framed photo. Bestmont’s copyright is a “patrimonial right that may be assigned, as provided in s. 13(4).”³⁹ The Appellant cites international law which entitles a copyright owner to “authorize or prohibit any creation of a new derivative work”.⁴⁰ Such right is consistent with Canadian law.⁴¹ Under ss. 13(4) and 14(1), Bestmont, as the owner of the copyright, has the right to “wholly or partially” assign or licence its copyright and to limit the scope of the assignment by restricting technical considerations such as medium or market sector.⁴² In this case, the Appellant took images for the purpose of licencing them to Bestmont for marketing materials only, to which

³⁵ *Wanda Rer v Bestmont Hotels*, 2022 SMCIP 1 (Factum of the Appellant at para 26 [FOA]).

³⁶ *Copyright Act*, *supra* note 1, s 2.

³⁷ *Lainco Inc c Commission scolaire des Bois-Francis*, 2017 FC 825 at para 125 [*Lainco*].

³⁸ *Corocord Raumnetz GmbH v Dynamo Industries Inc*, 2016 FC 1369 at paras 60-61 [*Corocord*].

³⁹ *Théberge v Galerie d’Art du Petit Champlain Inc*, 2002 SCC 34 at para 118 [*Théberge*]; *Copyright Act*, *supra* note 1, s 13(4).

⁴⁰ *FOA*, *supra* note 35 at para 23; 17 USC § 106(2); *Berne Convention for the Protection of Literary and Artistic Works*, September 1886, (entered into force 5 December 1887) art 12.

⁴¹ *Cinar Corporation v Robinson*, 2013 SCC 73 at para 1.

⁴² *Copyright Act*, *supra* note 1, ss 13(4). 14(1).

Bestmont refused, exercising its right to refuse the assignment of its copyright. Such rights flow from s. 3(1) which do not deny the applicability of s. 32.2(1), under the right circumstances.

[40] For instance, the Appellant could rely on s. 32.2(1)(f) as an “individual” who took photos “for private or non-commercial purposes”, “unless the individual and the owner of the copyright in the photograph [...] agreed otherwise”⁴³. In other words, the Appellant can create original works of photography depicting Bestmont’s copyright if Bestmont has agreed to this. Section 32.2(1)(f) reflects the balance between s. 32.2(1) interests and s. 3(1) rights.⁴⁴ This balance is deficient in the words of s. 32.2(1)(b) alone, thus s. 3(1) should implicitly apply to maintain proper balance.

[41] Moreover, if an exclusive licensee may not sue the copyright owner-licensor for infringement under the Act, the same principle should equally apply to s. 32.2(1). The SCC confirmed that an exclusive-licensee may sue third parties for infringing its exclusive license—but it may not sue the licensor (copyright owner) for infringement.⁴⁵ In *Euro-Excellence Inc. v. Kraft Canada Inc.*, the exclusive-licensee’s only action against the copyright owner-licensor is to sue for breach of contract, not copyright infringement.⁴⁶ Section 32.2(1) is ambiguous to “non-exclusive statutory licence” interests in a copyright. While the Appellant is not an exclusive-licensee, she is asserting the exclusive right to prepare derivative works based upon Bestmont’s copyrighted work. Accordingly, the Appellant relying on s. 32.2(1) should not be able to sue Bestmont, the copyright owner, for infringement.

d. s. 32.2(1) should be restrictively interpreted and s. 3(1) expansively interpreted

[42] This Court should uphold Bestmont’s extensive reliance on s. 3(1), a fundamental principle of copyright law. Bestmont, in asserting its s. 3(1) rights, is “not defending a privilege, but the

⁴³ *Copyright Act*, *supra* note 1, s 32.2(1)(f).

⁴⁴ *Théberge*, *supra* note 39 at para 73.

⁴⁵ *Euro-Excellence Inc v Kraft Canada Inc*, 2007 SCC 37 at paras 25, 28.

⁴⁶ *Ibid* at paras 15, 27-28, 33-34, 40.

sacred right of all rights to retain ownership of their works”.⁴⁷ Bestmont asserts its rights to reproduce the work or any substantial part thereof in any material form whatever. Bestmont reproduced its copyright in the material form of framed prints. The Prints were printed and framed, satisfying an ordinary meaning of “material form” that is palpable, tangible, and perceptible from the hotel guests’ eyes and touch.⁴⁸

[43] A broad interpretation of s. 32.2(1)(b) that overrides Bestmont’s s. 3 rights should be reserved for the Legislative branch which “should assume the major responsibility for law reform”.⁴⁹ Parliament’s intent in using broad words in s. 3 is to “allow the [Act] to evolve and adapt to new social and technological circumstances.”⁵⁰ A plain-face reading of s. 3(1) supports a copyright owner’s sole right to reproduce their copyright and to authorize such acts, which is not contrary to a non-owner’s interests under s. 32.2(1). Sections 13(4) and 14(1) flow from the s. 3(1) right for an owner to authorize reproductions of their copyright to non-owners by way of licence and assignment. The Appellant’s liberal reliance on 32.2(1)(b) would declare a statutory right to allege infringement over what a copyright owner can otherwise authorize with their copyright.

[44] A broad interpretation of s. 32.2(1)(b) denies Bestmont’s sacred s. 3(1) right which should be applied first before any “permitted acts” are considered under the Act. Courts have held that if other sections under the Act already apply, courts do not consider a s. 32.2(1)(b) analysis.⁵¹ For example, in *Corocord*, the Court found that since s. 64(2) applied, they did not deem it necessary to consider the applicability of s. 32.2(1)(b).⁵² In the case at bar, the application of the fundamental copyright principle under s. 3(1) supersedes the Appellant’s use of s. 32.2(1)(b) as a sword alleging

⁴⁷ *Théberge*, *supra* note 39 at para 112.

⁴⁸ *Eros-Équipe de Recherche Opérationnelle en Santé Inc v Conseillers en Gestion et Informatique CGI Inc*, 2004 FC 178 at para 113.

⁴⁹ *Watkins v Olafson*, [1989] 2 SCR 750 at para 14, [1989] SCJ No 94.

⁵⁰ *Théberge*, *supra* note 39 at para 141.

⁵¹ *Corocord*, *supra* note 38 at para 84; *Lainco*, *supra* note 37 at para 125.

⁵² *Corocord*, *supra* note 38 at para 84.

infringement over the images she took predominantly depicting Bestmont's copyright. Accordingly, this Court should restrict a broad interpretation of s. 32.2(1) in favour of extensively interpreting s. 3(1), the backbone of the Act.

2.3 Bestmont's use of the Unfiltered Photos is fair dealing for the purpose of research

[45] Bestmont relies on s. 29 of the Act which states: "Fair dealing for the purpose of research, private study [...] does not infringe copyright."⁵³ There are two-steps to establish a fair dealing defence: first, determine whether the dealing is for the purpose of either "research" or "private study"; second, assess whether the dealing is "fair" considering six factors: the purpose, character and amount of the dealing, the existence of any alternatives to the dealing, the nature of the work, and the effect of the dealing on the work.⁵⁴

[46] Whether something is "research" is to be considered from the perspective of the user or consumer's purpose, given a broad and liberal interpretation.⁵⁵ In *Trader Corp v. CarGurus*, the Court found that from the perspective of the user, looking at the dealer listings and photos on a vehicle website can be considered "research" by a user into the purchase of a new or used vehicle.⁵⁶ Here, from the hotel guests' perspective, looking at the Prints around Bestmont Hotels can be considered "research" by a user wanting to book and stay at one of the Bestmont Hotels. Bestmont's dealing in the prints is consistent with research undertaken for no purpose except personal interest in the instantly recognizable Bestmont Hotels copyrighted design and marquee.

[47] Bestmont's purpose was to enrich hotel guests' knowledge about its hotel designs, at no added cost. Unlike in *Trader*, the purpose of Bestmont's dealing is not a commercial one.⁵⁷

⁵³ *Copyright Act*, *supra* note 1, s 29.

⁵⁴ *CCH*, *supra* note 12 at para 53.

⁵⁵ *CCH*, *supra* note 12 at paras 12, 51; *Society of Composers v Bell Canada*, 2012 SCC 36 at paras 20-22.

⁵⁶ *Trader Corp v CarGurus Inc*, 2017 ONSC 1841 at para 37 [*Trader*].

⁵⁷ *Ibid* at para 38.

Bestmont did not disseminate the Appellant’s photos in electronic medium on its website or on the internet for the whole world to see. Instead, the character of the dissemination was fair, in that Bestmont used the photos of its copyright to create prints within the boundaries of its hotels.

[48] Bestmont had alternatives to using the Appellant’s photos—Bestmont could have taken its own photographs depicting its copyrighted design and marquee. However, Bestmont may have not considered alternatives to the dealing because they are the legitimate owner of the copyright of its hotel designs under the Act.⁵⁸ There is no indication that Bestmont acted maliciously in using the Unfiltered Photos; to the contrary, Bestmont removed all Prints from its walls before proceedings commenced.⁵⁹ The nature of the Appellant’s photos is social media photography, which Bestmont did not use to further its commercial interests. The effect of the dealing in the photos was not to compete squarely with the Appellant in the Canadian digital art marketplace, but to affix prints of its copyright within the walls of Bestmont Hotels. Considering all these factors, Bestmont meets the onus of establishing that its dealing in the Unfiltered Photos was fair.

ISSUE 3: Subsection 38.1(3) is the appropriate quantum of statutory damages

[49] Bestmont relies on its s. 3(1) rights to assert no damages should be owed because the Appellant’s photos are not original, and s. 32.2(1) does not apply to the marquee as a sword against Bestmont. In the event this Court decides statutory damages are owed to the Appellant, they are minimal.⁶⁰ This case does not involve aggravating factors to support an award of neither mid-range nor high-range statutory damages.⁶¹ Accordingly, this Court should exercise its discretion to reduce the s. 38.1(1)(a) maximum range, because “there is more than one work in a single

⁵⁸ *Copyright Act*, *supra* note 1, s 3(1).

⁵⁹ *Trial Decision*, *supra* note 2 at para 10.

⁶⁰ *Copyright Act*, *supra* note 1, s 38.1(3).

⁶¹ *Young v Thakur*, 2019 FC 835 at paras 41, 50, 65.

medium **and** awarding [even] the minimum per work would yield a total award that is grossly out of proportion to the infringement” [**emphasis added**].⁶²

3.1 The Appellant’s Package is a single medium

[50] The Appellant submits that the Prints are not a single medium because each photo had its own frame, rather than a collection of Prints.⁶³ However, the Appellant’s interpretation of “single medium” is incorrect. In *Patterned Concrete v. Mississauga Inc. v. Bomanite Toronto Ltd.*, the Federal Court found that the works should be in a single medium, not the copies of the work.⁶⁴ In this case, the works in the Appellant’s Package given to Bestmont, are in a single medium: digitally. It is in the works in the Package, not the 120 copies, that a single medium is found for s. 38.1(3) to apply.

3.2 Awarding the highest range is grossly out of proportion to the infringement

[51] The Appellant’s claim to an award of \$1,000,000 is “grossly out of proportion to the infringement.”⁶⁵ This Court should reduce the award under s. 38.1(3). In assessing statutory damages, s. 38.1(5) sets out the following factors: Bestmont’s good/bad faith; the conduct of the parties before and during the proceedings; and the need to deter other infringements of the copyright in question.⁶⁶ Statutory damages are assessed on a case-by-case basis, as evidenced in Appendix B of this factum.

[52] First, there is no evidence Bestmont acted in bad faith. Bestmont genuinely believed it had the right to reproduce its copyright in prints.⁶⁷ Bestmont acted in good faith when it printed,

⁶² *Rallysport Direct LLC v 2424508 Ontario Ltd*, 2020 FC 794, at paras 6-13 [*Rallysport*]; *Copyright Act*, *supra* note 1, s 38.1(1).

⁶³ *FOA*, *supra* note 35 at para 50.

⁶⁴ *Patterned Concrete Mississauga Inc v Bomanite Toronto Ltd*, 2021 FC 314 at para 65 [*Patterned Concrete*].

⁶⁵ *Copyright Act*, *supra* note 1 s 38.1(3).

⁶⁶ *1422986 Ontario Limited v 1833326 Ontario Limited*, 2020 ONSC 1041 at para 99 [*1422986*]; *Copyright Act*, *supra* note 1, s 38.1(5).

⁶⁷ *Appeal Decision*, *supra* note 11 at para 8.

framed, and hung photos of its hotels within its premises. The Prints are ornamental—printed and framed to fit within the ambiance of the hotel premises for guests to enjoy, at no added cost.

[53] Second, Bestmont’s conduct to print and frame the Prints aligns with its sole right as owner to reproduce its copyright.⁶⁸ Accordingly, Bestmont informed the Appellant that she was infringing its copyright in the marquee.⁶⁹ Bestmont did not appropriate the images in the Package. Unlike in *Bjørnsen v. Sharpe*, Bestmont did not strip the Appellant’s watermark, logo, or any copyright information on the photos it received, because the Appellant never included one.⁷⁰ Nonetheless, Bestmont took down its Prints pending the outcome of these proceedings.⁷¹

[54] Third, this case does not align with a deterrence situation. The issues in this case arose due to the confusion of s. 3(1) rights and s. 32.2(1) and how they interplay. Accordingly, the law needs clarification. Unlike other federal acts, this Act makes no reference to general deterrence.⁷² However, there should be deterrence on non-owners to assert rights over Bestmont’s copyright. The Appellant tried to profit off Bestmont; the photos were produced as part of a targeted offer which contemplated repeated use of Bestmont’s copyright, reconfigured in digital photos to “extend the media life” of the copyright.⁷³ Bestmont did not accept the Appellant’s offer. There is no suggestion the Appellant suffered any loss or that Bestmont obtained a material benefit by reason of the infringement, especially since Bestmont took down the prints. Unless the Appellant intended to use her photos in her portfolio for her own advertising purposes, which seems unlikely and of which there is no evidence, any use by Bestmont does not devalue the copyright in any way,

⁶⁸ *Copyright Act*, *supra* note 1, s 3(1).

⁶⁹ *Trial Decision*, *supra* note 2 at para 7.

⁷⁰ *Bjørnsen v Sharpe*, 2020 BCCRT 1425 at para 36 [*Bjørnsen*].

⁷¹ *Trial Decision*, *supra* note 2 at para 10.

⁷² *Piechnik v McFarlen*, 2016 BCPC 245 at para 27.

⁷³ *Don Hammond Photography Ltd v Consignment Studio Inc*, 2008 ABPC 9 at para 13.

since Bestmont owns the copyright.⁷⁴ If copyright is found to subsist in the Appellant’s images, however, Bestmont will suffer the most egregious loss of all: the rights to its copyright.

[55] In light of what is at stake for Bestmont, this Court can exercise discretion to award \$5,000 (\$100 x 50 photos), a fair and appropriate quantum that is not grossly disproportionate.

3.4 Punitive damages may not be ordered

[56] Punitive damages cannot be awarded when not pled.⁷⁵ The Appellant did not plead punitive damages in this case, thus this Court cannot award them under s. 38.1(1).⁷⁶ Further, and in the alternative, punitive damages are exceptional and generally awarded for malicious, oppressive, and high-handed conduct.⁷⁷ Punitive damages are only awarded where all other damage awards were deemed inadequate to accomplish the objectives of retribution, deterrence and denunciation.⁷⁸ Therefore, in absence of any “conscious wrongdoing in contumelious disregard of [the Appellant’s] rights”, on the part of Bestmont, punitive damages are not to be awarded.⁷⁹

PART V – ORDER REQUESTED

[57] The Respondent respectfully requests that the Supreme Moot Court for Intellectual Property Appeals dismisses this case.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Friday, January 28, 2022

Team No. 13R

Counsel for the Respondent

⁷⁴ *Ibid* at para 14.

⁷⁵ *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 86 [*Whiten*].

⁷⁶ *Ibid*; Copyright Act, *supra* note 1, ss 38.1(1), 38.1(7).

⁷⁷ 1422986, *supra* note 66 at para 104.

⁷⁸ *Collett v Northland Art Company Canada Inc*, 2018 FC 269 at para 71, citing *Whiten*, *supra* note 75 at para 123.

⁷⁹ *Whiten*, *supra* note 75 at para 53.

PART VI – TABLE OF AUTHORITIES

| LEGISLATION | SECTIONS |
|--|--|
| <i>Copyright Act</i> , RSC 1985, c C-42. | 2, 3(1), 13(1), 13(4), 14(1), 29, 32.2(1)(b), 32.2(1)(f), 38.1(1), 38.1(3), 38.1(5), 38.1(7) |
| <i>Interpretation Act</i> , RC, c I-23. | 12 |

| JURISPRUDENCE | PARAGRAPHS |
|--|------------------------------|
| <i>1422986 Ontario Limited v 1833326 Ontario Limited</i> , 2020 ONSC 1041. | 99, 104 |
| <i>Bjørnsen v Sharpe</i> , 2020 BCCRT 1425. | 36 |
| <i>CCH Canadian Ltd v Law Society of Upper Canada</i> , 2004 SCC 13. | 12, 14-16, 24-28, 35, 51, 53 |
| <i>Cinar Corporation v Robinson</i> , 2013 SCC 73. | 1 |
| <i>Collett v Northland Art Company Canada Inc</i> , 2018 FC 269. | 71 |
| <i>Corocord Raumnetz GmbH v Dynamo Industries Inc</i> , 2016 FC 1369. | 60-61, 84 |
| <i>Cummings v Global Television Network Quebec, Limited Partnership</i> , [2005] QJ No 6707, 2002 CanLII 11389 at para 39, 58 OR (3d) 339. | 27-38 |
| <i>Delrina Corp v Triolet Systems Inc</i> , 2002 CanLII 11389, 58 OR (3d) 339. | 39 |
| <i>Don Hammond Photography Ltd v Consignment Studio Inc</i> , 2008 ABPC 9. | 13-14 |
| <i>Donoghue v Allied Newspapers Ltd</i> , [1937] 3 All ER 503, [1938] Ch 106 (Eng Ch Div). | (Page) 508 |
| <i>Eros-Équipe de Recherche Opérationnelle en Santé Inc v Conseillers en Gestion et Informatique CGI Inc</i> , 2004 FC 178. | 113 |
| <i>Euro-Excellence Inc v Kraft Canada Inc</i> , 2007 SCC 37. | 15, 25, 27-28, 33-34, 40 |
| <i>Kantel v Grant</i> , [1933] ExCR 84. | 10 |
| <i>Lainco Inc c Commission scolaire des Bois-Francs</i> , 2017 FC 825. | 125 |
| <i>New Brunswick Telephone Co v John Maryon International Ltd</i> , [1982] NBJ No 387, 24 CCLT 146. | 139-154 |
| <i>Patterned Concrete Mississauga Inc v Bomanite Toronto Ltd</i> , 2021 FC 314. | 65 |
| <i>Piechnik v McFarlen</i> , 2016 BCPC 245. | 27 |

| | |
|--|-------------------|
| <i>Rallysport Direct LLC v 2424508 Ontario Ltd</i> , 2020 FC 794. | 6-13 |
| <i>Rizzo & Rizzo Shoes Ltd (Re)</i> , [1998] 1 SCR 27, [1998] 1 SCR 27. | 8, 21 |
| <i>Society of Composers, Authors and Music Publishers of Canada v Bell Canada</i> , 2012 SCC 36. | 20-22 |
| <i>Tele-Direct (Publications) Inc v American Business Information, Inc (CA)</i> , [1998] 2 FC 22 [1997] FCJ No 1430. | 32 |
| <i>Théberge v Galerie d'Art du Petit Champlain Inc</i> , 2002 SCC 34. | 73, 112, 118, 141 |
| <i>Trader Corp v CarGurus Inc</i> , 2017 ONSC 1841. | 37-38 |
| <i>Young v Thakur</i> , 2019 FC 835. | 41, 50, 65 |
| <i>Watkins v Olafson</i> , [1989] 2 SCR 750, [1989] SCJ No 94. | 14 |
| <i>Whiten v Pilot Insurance Co</i> , 2002 SCC 18. | 53, 86, 123 |

| OFFICIAL MOOT SOURCES | PARAGRAPH |
|--|------------------|
| <i>Wanda Rer v Bestmont Hotels</i> , 21 TCCIP 1222. | 1-8, 10, 13-20 |
| <i>Bestmont Hotels v Wanda Rer</i> , 2021 CAIP 333. | 2-5, 7-10 |
| <i>Wanda Rer v Bestmont Hotels</i> , 2022 SMCIP 1 (Factum of the Appellant). | 23, 26 |

| INTERNATIONAL SOURCES | PINPOINT |
|---|-----------------|
| <i>Copyrights</i> , 17 USC. | § 106(2) |
| <i>Berne Convention for the Protection of Literary and Artistic Works</i> , September 1886, (entered into force 5 December 1887). | art 12 |

| SECONDARY MATERIALS |
|--|
| “Definition of image filter” (2022), online: <i>PCMag</i> < www.pcmag.com > [perma.cc/5A57-MU72]. |

PART VII – APPENDICES

Appendix A – Statutory Provisions

- *Interpretation Act*, RC, c I-23.

Enactments deemed remedial

12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

- *Copyright Act*, RSC 1985, c C-42.

Definitions

2 In this Act,

architectural work means any building or structure or any model of a building or structure; (*oeuvre architecturale*)

commercially available means, in relation to a work or other subject-matter,

(a) available on the Canadian market within a reasonable time and for a reasonable price and may be located with reasonable effort, or

(b) for which a licence to reproduce, perform in public or communicate to the public by telecommunication is available from a collective society within a reasonable time and for a reasonable price and may be located with reasonable effort; (*accessible sur le marché*)

compilation means

(a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or

(b) a work resulting from the selection or arrangement of data; (*compilation*)

Copyright in works

3 (1) For the purposes of this Act, *copyright*, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(a) to produce, reproduce, perform or publish any translation of the work,
[...]

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,
[...]

and to authorize any such acts.

Ownership of copyright

13 (1) Subject to this Act, the author of a work shall be the first owner of the copyright therein.

Assignments and licences

(4) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent.

Limitation where author is first owner of copyright

14 (1) Where the author of a work is the first owner of the copyright therein, no assignment of the copyright and no grant of any interest therein, made by him, otherwise than by will, after June 4, 1921, is operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal representatives as part of the estate of the author, and any agreement entered into by the author as to the disposition of such reversionary interest is void.

Research, private study, etc.

29 Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

Permitted acts

32.2 (1) It is not an infringement of copyright

[...]

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

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

(ii) a sculpture or work of artistic craftsmanship or a cast or model of a sculpture or work of artistic craftsmanship, that is permanently situated in a public place or building;

[...]

(f) for an individual to use for private or non-commercial purposes, or permit the use of for those purposes, a photograph or portrait that was commissioned by the individual for personal purposes and made for valuable consideration, unless the individual and the owner of the copyright in the photograph or portrait have agreed otherwise.

Statutory damages

38.1 (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally,

(a) in a sum of not less than \$500 and not more than \$20,000 that the court considers just, with respect to all infringements involved in the proceedings for each work or other subject-matter, if the infringements are for commercial purposes; and

(b) in a sum of not less than \$100 and not more than \$5,000 that the court considers just, with respect to all infringements involved in the proceedings for all works or other subject-matter, if the infringements are for non-commercial purposes.

Special case

(3) In awarding statutory damages under paragraph (1)(a) or subsection (2), the court may award, with respect to each work or other subject-matter, a lower amount than \$500 or \$200, as the case may be, that the court considers just, if

(a) either

(i) there is more than one work or other subject-matter in a single medium, or

(ii) the award relates only to one or more infringements under subsection 27(2.3); and

(b) the awarding of even the minimum amount referred to in that paragraph or that subsection would result in a total award that, in the court's opinion, is grossly out of proportion to the infringement.

Factors to consider

(5) In exercising its discretion under subsections (1) to (4), 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;

(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.

Exemplary or punitive damages not affected

(7) An election under subsection (1) does not affect any right that the copyright owner may have to exemplary or punitive damages.

Appendix B – Damage Awards

| JURISPRUDENCE | # & TYPES OF WORK | Award per Work | TOT. Statutory Damages Awarded | Punitive Damages | Commercial Purpose? | Bad Faith? | Statutory Damages Mitigated per s. 38.1(3)? |
|--|---|----------------|--------------------------------|------------------|---------------------|------------|---|
| <i>Abi-Saad v Ramchandrar</i> , 2020 QCCQ 2947. | 2 Photographs | \$500 | \$1,000 | Dismissed | Yes | No | – |
| <i>Bjørnsen v Sharpe</i> , 2020 BCCRT 1425. | 2 artworks on Facebook | – | Dismissed | – | – | – | – |
| <i>Capitale en fête inc c Ouellet</i> , 2019 QCCQ 2607. | 36 photos on CD-ROM | \$300 | \$10,800 | N/A | Yes | – | Yes |
| <i>Century 21 Canada Limited Partnership v Rogers Communications Inc</i> , 2011 BCSC 1196. | 99 Photographs, 29 Real Property Descriptions | \$250 | \$32,000 | Dismissed | Yes | No | Yes |
| <i>Don Hammond Photography Ltd v Consignment Studio Inc</i> , 2008 ABPC 9. | 5 Photographs | \$100 | \$500 | – | Yes | No | Yes |
| <i>Piechnik v McFarlen</i> , 2016 BCPC 245. | 4 Photographs | Dismissed | \$500 | – | No | No | Yes |
| <i>Rallysport Direct LLC v 2424508 Ontario Ltd</i> , 2020 FC 794. | 1430 Photos | \$250 | \$357,500 | \$50,0000 | Yes | No | Yes |
| <i>Telewizja Polsat SA v Radiopol Inc</i> , 2006 FC 584. | 2009 TV Shows | \$150 | \$301,350 | Denied | Yes | Yes | Yes |
| <i>Thomson v Afterlife Network Inc</i> , 2019 FC 545. | 1,141,790 Obituaries | \$8.76 | \$10,000,000 | Dismissed | Yes | Yes | Yes |
| <i>Trader Corp v CarGurus Inc</i> , 2017 ONSC 1841. | 152,532 Car Photos | \$2 | \$305,064 | Dismissed | Yes | No | Yes |